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# Criminal Justice in the Supreme Court: A Review of United States Supreme Court Criminal and Habeas Corpus Decisions (October 4, 1999 - October 1, 2000)

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## TABLE OF CASES

## I. INTRODUCTION

Criminal and habeas corpus cases constituted approximately one-third of the docket for the U.S. Supreme Court's October Term 1999, which began on October 4, 1999 and ended on October 1, 2000. Of the twenty-seven cases decided by full opinion, seventy percent were split decisions. In one third of these split decisions the outcome was decided by a single vote. Over three fourths of these close cases went against the defendant, with Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy and Thomas constituting the majority. There were, nevertheless, some significant victories for civil liberties, although these were more often victories which held the line, preventing further erosion of established rights, than decisions which expanded the scope of constitutional protections. The *Miranda* warnings were preserved in *Dickerson v. United States;*[1] stops based on uncorroborated anonymous tips were held to violate the Fourth Amendment in *Florida v. J.L.,*[2] and an attempt to overturn *Mincey v. Arizona*[3] and create a "crime scene" exception to the warrant requirement was summarily dismissed in *Flippo v. West Virginia.*[4] In an important case with potentially "huge"[5] ramifications, *Apprendi v. New Jersey*[6] held a sentencing enhancement, which causes a defendant's sentence to exceed the maximum which can be imposed for the underlying offense, violates due process unless the factual basis for the enhancement was found by a jury to be proven beyond a reasonable doubt. The Court also handed down a number of significant decisions in habeas cases. This included *Williams v. Taylor,*[7] where the court found that counsel in a death penalty case was ineffective for failing to investigate and present mitigating evidence to the sentencing jury. This marks the first time that the Supreme Court has found a right to counsel violation under the standard for ineffective assistance of counsel established in *Strickland v. Washington.*[8]

1. 530 U.S. 428 (2000).
2. 529 U.S. 266 (2000).
3. 437 U.S. 385 (1978).
4. 528 U.S. 11 (1999).
5. This characterization of *Apprendi's* significance was made by Justice Anthony Kennedy, Address at California Western School of Law Library Dedication (Sept. 12, 2000).
6. 530 U.S. 466 (2000).
7. 529 U.S. 420 (2000).
8. 466 U.S. 668 (1984).

## II. FOURTH AMENDMENT

### A. Illinois v. Wardlow[9]

In the first Fourth Amendment opinion of the new millennium, the Court addressed the long-standing debate[10] regarding whether flight from a police officer should constitute reasonable suspicion of criminal activity, justifying a *Terry* stop.[11] The sight of a police cruiser rounding the corner at night may be reassuring to most white, middle class citizens. However, in some communities the glare of a police cruiser's spotlight is more often perceived as a prelude to harassment based upon racial profiling.[12] A majority of jurisdictions addressing the issue have held that flight from police presence alone is insufficient to justify a *Terry* stop.[13] In *Wardlow,* the Supreme Court similarly refrained from announcing a "bright line" rule that flight from police, standing alone, equals reasonable suspicion. However, Chief Justice Rehnquist's five to four opinion can arguably be interpreted to create just such a rule when the flight occurs in a location labeled a "high crime area."

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9. 528 U.S. 119 (2000).

10. In prior cases, the Supreme Court had declined to hold that flight was sufficient to constitute reasonable suspicion. *See, e.g.,* Michigan v. Chesternut, 486 U.S. 567 (1988); California v. Hodari, 499 U.S. 621 (1991). In *Hodari* the defendant threw down drugs as he ran from police. Instead of finding that defendant's flight constituted reasonable suspicion justifying a seizure, the Court instead found defendant had not been seized at the time he discarded drugs because he had not submitted to the officer's show of authority. Nevertheless, Justice Scalia, who authored the Court's opinion, could not refrain from quoting the well-known Biblical passage: "The wicked flee when no man pursueth," Proverbs 28:1. *Id.* at 629.

11. Terry v. Ohio, 392 U.S. 1, 30 (1968). *Terry* held that police may stop a person based on reasonable suspicion that they are about to engage in violent criminal activity. The Court later expanded this narrow exception to uphold temporary seizures in order to investigate nonviolent criminal activity and past offenses. *See generally* Adams v. Williams, 407 U.S. 143 (1972) (narcotics possession); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (immigration); U.S. v. Hensley, 469 U.S. 221 (1985) (wanted flyer).

12. *See* National Congress for Puerto Rican Rights v. City of New York, 191 F.R.D. 52 (1999); Brown v. City of Oneonta, 195 F.3d 111 (2d Cir. 1999) for recent examples of class action suits alleging the existence of discriminatory police stop and frisk policies based upon race or national origin. *See also* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked,* 69 IND. L.J. 659 (1994); Tracy Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion,* 72 ST. JOHN'S L. REV. 1271 (1998); Randall Kennedy, *Suspect Policy,* THE NEW REPUBLIC, Sept., 13, 1999, at 30; Jeffery Goldberg, *The Color of Suspicion,* NEW YORK TIMES MAGAZINE, June 20, 1999, at 51; David Kocieniewski & Robert Hanley, *Racial Profiling was the Routine, New Jersey Finds,* NEW YORK TIMES, Nov. 28, 2000, at A1, col. 2; *San Diego Police Department Vehicle Stop Study, Year End Report: 2000,* May 8, 2001 (Hispanic and Black/African American drivers were more likely to be stopped and more likely to be searched in connection with a vehicle stop than white or Asian drivers).

13. *See generally* State v. Tucker, 642 A. 2d 401 (N.J. 1994); State v. Hicks, 488 N.W.2d 359 (Neb. 1992); People v. Shabaz, 378 N.W. 2d 451 (Mich. 1985); People v. Aldridge, 674 P.2d 240 (Cal. 1984); People v. Thomas, 660 P.2d 1272 (Colo. 1983); Watkins v. State, 420 A.2d 270 (Md. 1980).

Sam Wardlow was convicted in Chicago of unlawful use of a weapon by a felon. On appeal, his conviction was reversed by the Illinois Appellate Court and that reversal was affirmed by the Illinois Supreme Court on the grounds that the discovery of the weapon was the fruit of an illegal stop.[14] Officer Nolan, a member of the special operations section of the Chicago Police Department, was one of eight officers traveling in a four-car caravan, which was dispatched to investigate heavy narcotics trafficking. The officers expected to encounter a large number of people, including drug customers and lookouts.[15] Officer Nolan, dressed in uniform, was seated in the last car of the caravan. He testified that when the caravan passed 4035 West Van Buren, he saw defendant Wardlow standing next to a building holding an opaque bag. Wardlow looked in the direction of the officers and fled. Nolan pursued Wardlow and stopped him. During a pat down, Nolan squeezed the bag Wardlow was carrying and felt a heavy, hard object in the shape of a gun. The officer then opened the bag and discovered a .38 caliber handgun.[16]

Chief Justice Rehnquist, writing for a bare majority, reversed the Illinois Supreme Court's determination that the officer lacked reasonable suspicion to make the stop. The Chief Justice acknowledged that mere presence in an area of "expected criminal activity," standing alone, does not amount to "reasonable particularized suspicion." He declared, however, "officers are not required to ignore the relevant characteristics of a location" in determining whether to investigate, and noted that in *Adams v. Williams*[17] the fact the stop occurred in a "high crime area" was considered relevant.[18] Given the contextual backdrop of expected heavy narcotics trafficking, Wardlow's "unprovoked" and "headlong" flight upon noticing the police officers thus constituted reasonable suspicion that Wardlow was engaged in criminal activity.

Given the attention paid to the contextual background, the majority opinion does appear to reject a *per se* rule that flight under *all* circumstances creates reasonable suspicion for a stop. Justice Stevens, writing for Justices

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14. *Wardlow*, 528 U.S. at 122.

15. *Id.* at 124.

16. *Wardlow*, 528 U.S. at 121-22. Certiorari was granted solely on the question of whether the stop violated the Fourth Amendment. The validity of the frisk of the bag, therefore, was not before the Court. *Id.* at 124 n.2. *But see* Bond v. United States, 529 U.S. 334 (holding that squeezing a passenger's carry-on luggage constitutes a search).

17. 407 U.S. 143 (1972).

18. *Wardlow*, 528 U.S. at 119. This attempt to turn a passing reference to high crime area in *Adams* into precedent which gives elevated status to "high crime area" in determining reasonable suspicion seems a bit of a stretch. While it is true that reasonable suspicion is based upon the totality of the circumstances, and thus the likelihood of criminal activity in an area can be relevant, the issue in *Adams* was whether a tip (that a man sitting in a car had narcotics and a gun) made by an undisclosed informant, was sufficiently reliable to establish reasonable suspicion. The Court found that there was an indicia of reliability because the informant was personally known to the officer and could have been charged with giving false information to a police officer if the tip had been bogus. *Id.* at 147. It thus really made no difference in *Adams* whether the car was located in a high crime area or not.

Souter, Ginsburg and Breyer in dissent, takes special pains to make this clear by echoing Chief Justice Rehnquist's earlier pronouncement in *United States v. Sokolow*[19] that "[t]he concept of reasonable suspicion . . . is not readily, or even usefully, reduced to a neat set of legal rules," but must be determined by looking to "the totality of the circumstances—the whole picture."[20] Using this "totality of the circumstances" framework, one can argue that *Wardlow* narrowly holds only that flight from an area of expected imminent criminal drug activity, by someone carrying an object that could be a gun or narcotics, gives rise to reasonable suspicion that "criminal activity may be afoot."[21] Indeed, *Wardlow* can be sharply contrasted with the more typical case of flight from officers on routine patrol in a high crime area. In *Wardlow,* an entire caravan of officers went into an area of expected ongoing narcotics sales to make arrests and spotted a man holding an opaque bag (which could have held a gun) loitering next to a building (a position from which he could have served as a lookout). To hold that flight under these circumstances constitutes reasonable suspicion does not mean that flight from police under other circumstances, where no imminent criminal activity is expected, likewise justifies the forcible stop of a fleeing citizen.

It is unlikely, however, that such a narrow, fact bound reading of *Wardlow* will prevail. In *United States v. Montero-Camargo,*[22] the Ninth Circuit upheld a stop of a Hispanic defendant, driving a car with Mexicali license plates, who made a U-turn just after a sign indicating that a previously closed Border Patrol checkpoint had been reopened. This 'flight from a checkpoint' occurred on a highway in an isolated, uninhabited locale. The location was nevertheless designated as a "high crime area" because "historically" it had been used for illegal activities.[23] The Court of Appeals acknowledged the danger that unless it is "properly limited and factually based" the term "high crime area" can "easily serve as a proxy for race or ethnicity."[24] The Court further cautioned:

> We must be particularly careful to ensure that a "high crime area" factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity.[25]

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19. 490 U.S. 1 (1989).

20. *Wardlow*, 528 U.S. at 126-27 (citing United States v. Sokolow, 490 U.S. 1, 7-8 (1989)). While the majority opinion pays token reference to *Sokolow*, it curiously omits any mention of the "totality of the circumstances" test.

21. *Terry*, 392 U.S. at 30.

22. 208 F.3d 1122 (9th Cir. 2000) (en banc).

23. *See id.* at 1139.

24. *See id.* at 1138.

25. *See id.*

Nevertheless, the determination of "high crime area" was made in *Montero-Camargo* solely upon the basis of "vague and undocumented" testimony of the Border Patrol officers based upon their past personal experiences. As the concurring justices in *Montero-Camargo* complained: "To them [the majority] it's a high crime area because the officers say it's a high crime area."[26]

If the problematic definition of "high crime area" permits an ever-expanding universe in which *Wardlow* will be applied, language from the Chief Justice's opinion, lifted out of *Wardlow's* factual context, likewise threatens to transform flight into a talisman of reasonable suspicion. As the majority opinion notes, evasive behavior has always been recognized as a "pertinent factor" in determining reasonable suspicion. Finding that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion," the Chief Justice observed that such evasion, "while not necessarily indicative of wrongdoing is certainly suggestive of such."[27] Even if *Wardlow* is confined to high crime areas, this inference makes it possible to argue that *Wardlow* does in fact create a bright line rule: flight from police in a high crime area equals reasonable suspicion. But drawing such a blanket inference from flight alone ignores the quite different realities that exist between middle-class, white, suburban communities and low income, inner city, minority communities, where racial stereotyping and fear of police are part of the landscape.

This darker side of *Wardlow* is brought into clearer focus by the majority's disapproval of the Illinois Supreme Court's reliance on *Florida v. Royer*.[28] In *Royer*, Justice White emphasized that while an officer may approach someone and pose questions without offending the Fourth Amendment, an individual has the right to ignore the police and go about his business:

> The person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . . He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.[29]

Following *Royer*, the Illinois Supreme Court reasoned that flight at the approach of a police officer "may simply reflect the exercise– 'at top speed' of the person's constitutional right to 'move on'" and ruled that "the exercise

26. *See id.* at 1143.

27. *Wardlow*, 528 U.S. at 124. Some courts have found that merely walking away from a group when police approach is not "headlong flight" and therefore have distinguished *Wardlow*. *See* State v. Warfield, 101 Wash. App 1052, (2000) (unpublished opinion) *available at* 2000 WL 1009035. *But see generally Montero-Camargo*, 208 F.3d at 1122, where an apparently legal U-turn was treated as the equivalent of flight.

28. 460 U.S. 491 (1983).

29. *Id.* at 498.

of this constitutional right may not itself provide the basis for more intrusive police activity."[30] The state court therefore held that flight from police could justify a forcible stop "only when coupled with specific knowledge connecting the person to involvement in criminal conduct."[31] Rejecting this view, Chief Justice Rehnquist asserted: "But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite." [32]

The Chief Justice does not elaborate upon what would constitute "provoked" flight. It is clear, however, that the right to avoid interaction with police, so boldly asserted in *Royer*, has been substantially curtailed by *Wardlow* and must be exercised, if at all, with great restraint. Indeed, the scope of the damage done by *Wardlow* to the Fourth Amendment right to be let alone is seen clearly in recent lower court decisions such as United *States v. Stone*.[33]

In *Stone*, the defendant, a young black male, was observed by patrolling officers from the Street Crime Unit, walking with an "awkward gait" at 12:25 a.m. in the Bronx. The officers were in plain clothes, traveling in an unmarked car. After momentarily observing Stone walking on the sidewalk as they drove by, the police turned their car around and followed him into a parking lot because, in their experience, individuals carrying firearms often walked unnaturally like Stone did. When they drove up alongside Stone, one officer called out: " How are you doing? Police." Stone responded, "I am just going home" and then fled. The officers chased Stone and grabbed him as he tried to climb a fence. A gun was found in his right front pants pocket. The district court found that "it is very likely that the officers' actions were based initially on racial stereotyping." [34] Although "troubled" by the likeli-

30. People v. Wardlow, 701 N.E. 2d 484, 487 (Ill. 1998), *cert. granted*, 526 U.S. 1097 (1999), *rev'd*, 528 U.S. 119 (2000).

31. *See id.*

32. *Wardlow*, 528 U.S. at 125.

33. 225 F. 3d 647 (2d Cir. 2000) (unpublished opinion) *available at* 20000 WL 1341455.

34. The trial court concluded:

> [I]t seems likely that the initial effort to speak to the defendant, which resulted in his decision to flee, was probably based on the fact that he was a relatively young black male walking alone, late at night, in an area of the Bronx patrolled by the Street Crime Unit—by definition a high-crime area. This conclusion is bolstered by the officer's own testimony. Specifically, Detective Martin testified that when Officer Denver first prompted him to look at the defendant, he could see nothing at all that might arouse Officer Denver's suspicion that the defendant was engaged or about to be engaged in criminal activity of any kind.

United States v. Stone, 73, F. Supp. 2d 441, 447 (1999). The trial court then noted that since the record reflected that the defendant was illuminated only by street lighting, and Officer Denver directed his fellow officer's attention toward defendant while he was still more than fifty feet away from their moving car, race must have been the predominant reason the officer found "something noteworthy about the defendant." *Id.* The trial court noted that while the officer's actions did not violate the Fourth Amendment, "that does not mean that these actions are necessarily free from further review, perhaps in the context of a civil action." *Id.* at 448.

hood that race motivated the initial decision to approach the defendant, the court ruled that the officer's subjective intentions were irrelevant to Fourth Amendment analysis under *Whren v. United States*[35] and denied defendant's motion to suppress.

The Second Circuit Court of Appeals, applying *Wardlow*, endorsed the trial court's conclusion that since the area in which defendant was walking was patrolled by the Street Crime Unit, it was "by definition a high crime area." Observing that flight from such an area "alone might be sufficient, under *Wardlow*, to justify . . . the seizure of Stone," the court found that the added fact Stone walked with an awkward gait and, according to the officers, repeatedly touched his right front pocket, removed any doubt about the lawfulness of both the stop and the frisk for weapons.[36] Stone's argument that his flight was provoked because he did not know the plainclothes officers were police and feared a robbery attempt was rejected because the officers claimed they identified themselves as police. Assuming that was so, the fact that the officers confronted the defendant apparently was not considered provocation, nor was this difference from *Wardlow* even noticed.

It is ironic that the district court judge who decided *Stone* is also the trial judge in *National Congress for Puerto Rican Rights v. New York*,[37] which involves a class action, filed prior to *Stone*, alleging racial profiling by the same Bronx Street Crimes Unit which approached Stone. In areas where it is known or commonly believed that a person can become the subject of police attention simply because of his race, it might be argued that flight from such encounters may be the common response of even law abiding residents of the minority community, especially the young. This, in turn, reveals that relying on "high crime area" as the predominant factor in elevating flight to reasonable suspicion is seriously flawed. As Professor Margaret Raymond has suggested, the character of a neighborhood should be considered in evaluating reasonable suspicion only when the conduct observed is "behavior that is not common amongst law-abiding persons at the time and place observed."[38]

One is reminded of the knife-fighting scene in Leonard Bernstein's musical, Westside Story. After the fatal wound is inflicted, there is a dramatic moment of hushed silence, then police sirens are heard in the background and everyone who has gathered round to watch the fight flees into the darkness. Realistically, could a young Black or Hispanic resident feel safe in choosing any option other than flight, if he had just witnessed that scene re-

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The trial court then referred defendant to the complaint filed by Plaintiff Richie Perez in *National Congress for Puerto Rican Rights v. New York*, 191 F.R.D. 52 (1999), which alleges a conspiracy to violate defendant's civil rights.

35. 517 U.S. 806 (1996).

36. United States v. Stone, 225 F.3d 647 (2000) (unpublished opinion).

37. 191 F.R.D. 52 (1999).

38. Margaret Raymond, *Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 27 SEARCH & SEIZURE LAW REPORT, no. 2, at 12 (Feb. 2000).

played on the streets of urban America today? Of course, flight from the scene of a crime *is* suspicious and that is indeed all *Wardlow* really holds. Yet *Wardlow's* language and the nebulous term "high crime area" threaten to turn entire neighborhoods into crime scenes, where avoiding unwanted contact with police is no longer an option. It may be argued that there should be a duty on the part of law-abiding citizens to assist the police. But whatever the merits of that position, the debate on that issue should not take place in ignorance of the role race plays in structuring the context in which that duty arises.

### *B.* Bond v. United States[39]

In this deceptively simple, but important case, the Court held that a law enforcement officer's squeeze of a bus passenger's soft carry-on luggage was a "search" under the Fourth Amendment.[40]

The defendant was traveling on a Greyhound bus from California to Little Rock, Arkansas when a Border Patrol Agent in Texas boarded the bus. After he had determined that no illegal immigrant was on board, the Agent squeezed the passengers' bags in the overhead luggage rack as he was leaving the bus. When he examined defendant's canvas bag he felt a brick-like object, which turned out to be a brick of methamphetamine that had been wrapped in duct tape and rolled in a pair of pants.[41]

The Fifth Circuit Court of Appeals affirmed the trial court's denial of defendant's motion to suppress on the ground that the officer's physical manipulation of the bag was not a search. In a surprising seven to two opinion written by Chief Justice Rehnquist, the U.S. Supreme Court reversed.[42]

The importance of this case stems from its rejection of the Government's argument, based upon *California v. Ciraolo*[43] and *Florida v. Riley*.[44] In *Ciraolo*, the defendant grew marijuana in the privacy of his fenced back yard. Despite the fact that the backyard constituted curtilege and thus had Fourth Amendment protection from ground level observation, the Court held defendant had no reasonable expectation of privacy with respect to visual observation from an airplane traveling at 1000 feet, because "any member of the public *could have* lawfully observed the defendant's property by flying overhead."[45] Therefore, under the test established in *Katz v. United States*,[46] such an observation by police was not a search.

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39. 529 U.S. 334 (2000).
40. *Id.* at 334.
41. *Id.* at 334-37.
42. *Id.* at 339.
43. 476 U.S. 207 (1986).
44. 488 U.S. 445 (1989).
45. *Ciraolo*, 476 U.S. at 213 (emphasis added).
46. 389 U.S. 347 (1967)

In *Riley*, the court fragmented when attempting to apply *Ciraolo* to police observations of curtilege from a helicopter at 400 feet. Justice White, in a plurality opinion announcing the judgment, adopted the "bright line" position that the Fourth Amendment does not extend protection to an area the police can observe from a "lawful public vantage point." While the defendant lost in *Riley*, what is often forgotten is that Justice White could garner only three additional votes for his position. Justice O'Connor, who concurred in the judgment, and the four *Riley* dissenters all agreed that it was not the lawfulness of the vantage point that was determinative. Rather, in their view, a citizen's Fourth Amendment protection was lost only if the public used that vantage point with "sufficient regularity" that an expectation of privacy was unreasonable.[47] Thus, a *de facto* majority of justices distinguished *Ciraolo* on the ground that while airplanes routinely flew overhead as a matter of course, helicopter flights were another matter.[48] Because *Riley* established no precedent for adopting either the plurality's "any lawful public vantage point" test or Justice O'Connor's "routinely used" lawful public vantage point test, the lower courts have been left in a quandary.[49]

In *Bond*, the Government relied on the *Riley* plurality position and the quoted language from *Ciraolo* noted above. In a straightforward argument, the Government claimed that because the defendant exposed his bag to the public by placing it in the overhead luggage rack, members of the public *could have* lawfully made the same discovery the officer did by pushing or squeezing the bag to make room for their luggage. Because the defendant had no reasonable expectation that the bag would be exempt from such physical manipulation, he had no reasonable expectation of privacy regarding tactile information so acquired. The fact that a fellow passenger acquired this information inadvertently, while the officer's acquisition was purposeful, did not matter in *Ciraolo* and, the Government maintained, it should therefore make no difference here.

Rejecting this view, the Court stressed the heightened privacy interest travelers have in their carry-on luggage and held that while a passenger may expect her bag to be handled, "[s]he does not expect that other passengers or bus employees will, *as a matter of course*, feel the bag in an exploratory manner."[50] The italicized language is of crucial importance because it would appear to indicate that a majority of the Court has come around to Justice O'Connor's position. While the Chief Justice's opinion does not make this

47. *See Riley*, 488 U.S. at 454. For a full discussion of Justice O'Connor's position see Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825, 861-73 (1989).

48. Justice O'Connor concurred in the judgment reached by the plurality only because the defendant, in her view, had the burden of proof with respect to establishing a reasonable expectation of privacy and failed to show that helicopter flights over his home were infrequent. *Riley*, 488 U.S. at 455.

49. *See* Pew v. Scorpio, 904 F. Supp. 18 (1995) (complaining about the "unhappy state of Supreme Court precedent").

50. *Bond*, 529 U.S. at 338-39 (emphasis added).

explicit, it is nevertheless the clear import of the decision. The fact that it was theoretically possible that defendant's bag *could have* been physically manipulated by any member of the public was not found to be controlling. Rather it was the conclusion that such manipulation by the public was not sufficiently routine (i.e., "a matter of course") that determined the outcome of this application of the *Katz* test.

Forming an odd couple, Justice Breyer and Justice Scalia dissented. In their view, the traveling scene is a "dog-eat-dog" world where passengers cram, shove and push each others belongings in their attempts to stuff luggage into overhead bins. Thus they saw the type of manipulation engaged in by the officer as "entirely foreseeable" and "substantially similar" to manipulation engaged in by the general public. Predicting that the majority's decision would "lead to a constitutional jurisprudence of 'squeezes', which would do little to protect privacy," Justice Breyer admonished passengers who want protection from such public touching to get hard shell suitcases.[51]

The dissenting duo also took issue with the Chief Justice's weak attempt to distinguish *Ciraolo* and *Riley* on the ground that they involved visual observations, which were less intrusive than physically invasive manipulation. Here the dissent would seem to have a point. *Katz* abolished the distinction between physical trespass and auditory intrusions in order to apply the Fourth Amendment to wiretapping. Similarly, nothing should turn on a purely categorical distinction between physical and visual intrusions. Indeed, as the dissent points out, whether a physical intrusion (e.g. touching a bag) is more intrusive than a visual intrusion (e.g., looking through a bedroom window) "necessarily depends on the particular circumstances."[52]

If *Bond* indeed signals that a majority still adheres to Justice O'Connor's formulation of the *Katz* reasonable expectation of privacy test, it will prove to be an important opinion. If, however, it signals a return to artificial distinctions based upon physical intrusiveness, it raises ominous warning signs that a storm is coming that could turn *Katz* on its head.

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51. *Id.* at 342.

52. *Id.* The degree of intrusiveness is usually considered relevant to the quantum of justification needed to justify a search. Compare, for example, New York v. Class, 475 U.S. 106 (1986)(holding that entry into a car to push aside papers laying next to the windshield in order to expose the VIN was a search, but needed no individualized suspicion because it was a deminimus intrusion) with Terry v. Ohio, 392 U.S. 1 (1968) (permitting a more intrusive pat down search only on reasonable suspicion) and Payton v. United States, 445 U.S. 573 (1980) (requiring warrant based upon probable cause to enter home to make routine felony arrest). However, in *Bond*, the issue is whether there is a "search" in the first place. Under the majority's analysis, the degree of intrusiveness was properly considered relevant to whether or not the defendant's expectation of privacy was reasonable. Obviously the more invasive a governmental intrusion is on a citizen's subjective expectation of privacy, the more likely the citizen's expectation of privacy against that manner of intrusion will be considered reasonable. However, the dissent would appear to be correct in asserting that the degree of intrusiveness should not be determined by blind application of categories labeled "physical," "visual," or "auditory."

### C. Florida v. J.L.[53]

In another surprising victory for the Fourth Amendment, the Court held that an anonymous tip that a person was carrying a gun was insufficient to establish reasonable suspicion for a stop and frisk.[54]

Miami-Dade Police received an anonymous call that a young black male wearing a plaid shirt was standing at a bus stop with a gun. No record was made of the call and no further information was known about the unidentified caller. Two police officers went to the bus stop and observed three black males "hanging out" there. One was wearing a plaid shirt. Although the officers observed no conduct that suggested any criminal activity, they nevertheless frisked all three individuals and found a gun on J.L. who was fifteen years old. The Florida Supreme Court held the search was invalid and the Supreme Court affirmed in a unanimous opinion by Justice Ginsburg.[55]

Previously, in *Alabama v. White,*[56] the Court upheld a stop based upon an anonymous tip. The unknown informant in that case predicted that a woman carrying cocaine would travel from an apartment to a specific motel in a car of a certain description at a specified time.[57] Distinguishing J.L.'s case from *White*, Justice Ginsburg noted that here the tip did not contain similar predictive information, which could be verified to provide a basis for corroborating the informant's knowledge or credibility.[58]

In response to the State's argument that the tipster did correctly predict that a person in a plaid shirt would be standing at the bus stop, Justice Ginsburg explained that this was insufficient to show the informant had knowledge of criminal activity. Justice Ginsburg also declined the State's invitation to create a "firearms exception" to the Fourth Amendment, noting that it would be difficult to confine such an exception to just firearms. More importantly, she observed, such an exception would permit anyone seeking to harass another to initiate a police search against a target simply by placing an anonymous call.[59] Nevertheless, the opinion did not rule out that there might be some circumstances in which the danger was so great (e.g., a bomb threat) that an anonymous tip might be a permissible basis for intervention without a showing of reliability. Similarly, the Court noted that a lower standard of reliability would be acceptable in order to do protective searches in schools, airports, and other areas where expectations of privacy are diminished.[60]

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53. 529 U.S. 266 (2000).
54. *Id.* at 268.
55. *Id.* at 268-69.
56. 496 U.S. 325 (1990).
57. *Id.* at 329.
58. *J.L.*, 529 U.S. at 271.
59. *Id.* at 272.
60. *Id.* at 273-74.

### *D.* Flippo v. West Virginia[61]

In *Flippo,* a unanimous Court rejected an attempt to create a "homicide crime scene" exception to the Fourth Amendment's warrant requirement.[62]

The defendant and his wife were on vacation, spending the night in ill-fated Cabin 13, located in a state park. The defendant called 911 and reported that the couple had been attacked by an intruder. Police arrived to find defendant sitting outside with injuries to his head and legs. Inside they found the body of Mrs. Flippo who had died from wounds to the head. The defendant was taken to the hospital and the area surrounding the cabin secured and sealed off. Around 5:30 a.m. police reentered the cabin to "process the crime scene." On a table they found an unlocked briefcase, which they opened. Inside they discovered photographs that were later used in evidence against defendant to establish a motive for murdering his wife. No warrant was ever obtained to search either the cabin or the briefcase.[63]

The trial court denied defendant's motion to suppress the photographs, declaring that it was "clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area."[64]

In a brief *per curiam* opinion, the Court reiterated the general rule that a "warrantless search is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement."[65] Without elaboration, the Court then reaffirmed *Mincey v. Arizona,*[66] which had previously refused to create an exception for a murder crime scene.

While much could be said in favor of creating a "crime scene" exception to the warrant requirement when circumstances make it appear reasonable to do so, the Supreme Court has wisely avoided an open-ended reasonableness inquiry, based upon a balancing of interests. Because the exclusionary rule places powerful hydraulic pressures upon lower courts to expand any exception in order to admit evidence of wrongdoing, such an approach could lead to the rapid erosion of the warrant requirement for entry into a home. Given the infrequency with which the Supreme Court can address a particular rule governing police practices, and considering the importance of personal security and privacy in the home, it is thus better to have a rule which marks as clearly as possible the limits of an officer's unilateral discretion to search a person's home.[67]

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61. 528 U.S. 11 (1999).
62. *Id.* at 11.
63. *Id.*
64. *Id.* at 13.
65. *Id.*
66. 437 U.S. 385 (1978); *see also* Thompson v. Louisiana 469 U.S. 17 (1984) (per curiam).
67. The line is, of course, already muddy enough as a result of the consent doctrine, *Florida v. Jimeno,* 500 U.S. 248 (1991) and the exigent circumstances doctrine, *Warden v. Hayden,* 387 U.S. 294 (1967) both of which permit warrantless entry into a home. The war-

## III. FIFTH AMENDMENT

### A. Dickerson v. United States[68]

The ink was barely dry on Chief Justice Earl Warren's opinion in *Miranda v. Arizona*[69] when Congress passed 18 U.S.C. § 3501,[70] which purported to overrule the decision. The statute, which applied only to federal criminal prosecutions, declared "a confession shall be admissible in evidence if it is voluntarily given."[71] In determining voluntariness, a trial court was instructed to take into consideration all of the circumstances surrounding the giving of the statement including five specified factors, none of which was controlling.[72] The Supreme Court's required *Miranda* warnings were accordingly reduced to the status of mere factors to be considered in evaluating voluntariness under a totality of the circumstances analysis. At the time it was passed, and for more than thirty years thereafter, most commentators and federal prosecutors thought the statute was an unconstitutional attempt to legislatively override *Miranda's* interpretation of the Fifth Amendment and re-impose the old "voluntariness test" that *Miranda* had expressly found unworkable and inadequate to protect an accused's Fifth Amendment rights during custodial interrogation.

Over the years, however, the Court's exceptions to the *Miranda* warnings in *Michigan v. Tucker*,[73] *New York v. Quarles*,[74] and *Oregon v. Elstad*[75] whittled away at the constitutional basis for the warnings. Moreover, the right to counsel at custodial interrogations, which had been based on the Sixth Amendment in *Miranda*,[76] was subsequently undercut by *Kirby v. Illinois*.[77] *Kirby* held that the Sixth Amendment right to counsel did not attach until adversary judicial proceedings had been commenced by indictment or the filing of a formal charge. Because most interrogations take place *before* formal charges are filed, the Miranda "rights" thus came to be seen as

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rant requirement outside the home is of course riddled with exceptions. *See* Scalia, concurring in California v. Acevedo, 500 U.S. 565, 582 (1991).

68. 530 U.S. 428 (2000).

69. 384 U.S. 436 (1966).

70. 18 U.S.C.A. § 3501 (West 2000).

71. *Id.*

72. One of the factors was "whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him." *Id.*

73. 417 U.S. 433 (1974).

74. 467 U.S. 649 (1984).

75. 470 U.S. 298 (1985).

76. It is today often forgotten that Chief Justice Warren began his analysis in *Miranda* by expressly reaffirming *Escobedo* v. *Illinois* 378 U.S. 478 (1964) which held that the Sixth Amendment guaranteed the right to counsel at custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 442 (1966).

77. 406 U.S. 682 (1972).

merely judge-made "prophylactic" safeguards rather than true constitutional rights.

After Justice Scalia, in a concurring opinion in *Davis v. United States*,[78] scathingly attacked the Justice Department for failing to invoke section 3501 in federal criminal cases, a three-judge panel of the Fourth Circuit Court of Appeal took matters into its own hands. Contrary to the express wishes of the Justice Department and without briefing in opposition, the panel held two to one that admissions made by Charles Thomas Dickerson were admissible under section 3501, despite the trial court's finding that the FBI had violated the *Miranda* decision by failing to give timely warnings.[79] The U.S. Supreme Court, in an opinion written by the Chief Justice, reversed, holding that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress. . . ."[80] Only Justices Scalia and Thomas dissented.

The facts of the case show how little *Miranda* is honored in actual practice, even by the FBI. Dickerson drove the getaway car in a bank robbery in Arlington, Virginia. He used his own car, and his license plate was spotted as he drove away from the bank. When ten FBI agents came to his apartment, he "voluntarily" accompanied them to the FBI's field office. No *Miranda* warnings were given during Dickerson's initial interrogation, apparently on the assumption that Dickerson was not "in custody." While agents interrogated Dickerson without success, a search warrant was sought for his apartment where a large amount of cash had been seen on a bed. When the agents succeeded in getting a search warrant, they informed Dickerson they were about to search his apartment and it was at this point in time that he gave an incriminating statement, which also implicated the principal in the robbery. While an FBI agent testified that he had given Dickerson *Miranda* warnings shortly after obtaining the search warrant, the trial court found this testimony was impeached by documentary evidence, which showed that the *Miranda* rights form had not been signed until almost an hour after the search warrant had been issued. The trial court therefore believed Dickerson's testimony that he had not been given warnings until after he had given his statement and ruled that Dickerson's admissions were not admissible.[81]

In reversing the Fourth Circuit's ruling that defendant's admissions were rendered admissible by virtue of section 3501, the Chief Justice began with the premise that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[82] Turning then to the second premise—that *Miranda* announced a constitutional rule—the Chief Jus-

78. 512 U.S. 452 (1994).

79. United States v. Dickerson, 166 F.3d 667, 672 (4th Cir. 1999).

80. Dickerson v. United States, 530 U.S. 428, 432 (2000).

81. *Dickerson*, 166 F.3d at 673.

82. Dickerson v. United States, 530 U.S. 428, 437 (citing City of Boerne v. Flores, 521 U.S. 507 (1997)).

tice candidly acknowledged that there was language (much of it his own) in some of the Court's *Miranda* jurisprudence that suggested otherwise. However, he reasoned, if *Miranda* was not constitutionally based, how could *Miranda* apply to the states or form the basis for habeas relief? This *ipse dixit* is hardly persuasive. Clearly, the *Miranda* Court thought it was announcing a rule based upon the Constitution, but that argument begs the question as to whether *Miranda* itself is indeed legitimately based on the Constitution. In the final analysis, when one cuts through the sophistry, the Chief Justice's feeble defense of *Miranda*, which is contained in only five paragraphs, is no defense at all.

The real premise underlying *Miranda* is that custodial interrogation violates the Fifth Amendment's prohibition against compelled self-incrimination because the pressures inherent in the interrogation techniques used by police constitute compulsion when employed against a person who is powerless to escape from those pressures because he is held in custody. Therefore, unless a suspect waives his or her right to be free from the compulsion of custodial interrogation, any questioning in that context is prohibited by the Fifth Amendment. This premise is sound if one concludes, as the Court did a century earlier in *Bram v. United States*[83] that even mild questioning constitutes compulsion because a person who is arrested and accused of a crime necessarily fears that if he remains silent when questioned, it will be considered an admission of guilt and diminish his chances of being released.[84]

The *Miranda* Court relied upon *Bram*, expressly stating that it was implementing the standard for compulsion established by that decision.[85] *Bram*, of course, was decided in an era that showed great solicitude for the privilege against self-incrimination. The problem with Bram's premise today is that the definition of "compulsion" under the Fifth Amendment has become entwined with the concept of "voluntariness," which has changed in meaning over the course of a century. Today our conception of "voluntariness" (and thus also compulsion) has been colored by the Court's development between 1936 and 1966 of the due process voluntariness doctrine—a much rougher test than the refined concept of voluntariness employed by the Court in *Bram*. The voluntariness doctrine spawned by the Fourteenth Amendment's Due Process Clause was used by the Court to decide the admissibility of confessions in state cases at a time when the Fifth Amendment did not yet apply to state criminal proceedings. Always in tension with the strictures of federalism, this use of federal constitutional power to invalidate a state criminal conviction developed as a compromise between the desire to pre-

83. 168 U.S. 532 (1897).

84. *Id.* at 562-63.

85. The Court stated: "In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today. . . ." Miranda v. Arizona, 384 U.S. 436, 461 (1966).

vent abuses and yet still allow the states to retain control over their own procedures for administering criminal justice.

Using a "shocks the conscience" test as a rule of thumb, a due process voluntariness analysis thus requires significantly more pressure to constitute a violation than simply the fear generated by questioning after accusation and arrest. Because not all custodial interrogations result in the kind of pressure that renders a statement involuntary under due process standards, and because the Fifth Amendment, by its terms, requires actual compulsion (*i.e.*, involuntariness) before there is a constitutional violation, the linking of compulsion and due process voluntariness together causes *Miranda* to become unhinged from its major premise.

By failing to defend *Miranda's* core premise, as elaborated in *Bram*, the Court in *Dickerson* was thus forced to claim that it has the power to protect against actual unconstitutional pressure by prescribing rules that sweep broader than the Fifth Amendment right itself. While such rule making is defensible in order to protect suspects in custody against unconstitutional pressures, nowhere does the *Dickerson* majority set forth a justification for its exercise of such rule making power. It simply asserts that it has it. The dissent thus rightfully takes the majority to task, calling its opinion the "Cheops' Pyramid. . .of judicial arrogance."[86]

It remains to consider the actual holding of *Dickerson*. The issue, narrowly conceived, is whether section 3501 is unconstitutional. But *Miranda* itself stated that it did not intend to throw a constitutional straightjacket over the states and Congress. In a noteworthy passage the *Miranda* opinion emphasized that because it was "impossible to foresee all of the potential alternatives for protecting the privilege which might be devised by the Congress or the States" it would not say "that the Constitution necessarily requires adherence to any particular solution for the inherent compulsion of the interrogation process as it is presently conducted."[87]

So why was the "solution" adopted by Congress in section 3501 defective? The answer lies in the following passage from *Miranda*, which constitutes the core of both the *Miranda* and *Dickerson* holdings: "[U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right to silence and in assuring a continuous opportunity to exercise it, the following safeguards (i.e. Miranda warnings) must be observed."[88]

Thus, the *Dickerson* Court concluded that although the "Constitution does not require police to administer the particular *Miranda* warnings,"[89] it does require "procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right

86. *Dickerson*, 530 U.S. at 465.
87. *Miranda*, 384 U.S. at 467.
88. *Id.*
89. *Dickerson*, 530 U.S. at 440 n.6.

will be honored."[90] Because section 3501 does not require that an accused *must* be told that he can remain silent and that the police will respect that right, it is thus not "a procedure that is effective in securing Fifth Amendment rights."[91]

It will be immediately noted that this minimalistic view of *Miranda* leaves the right to counsel warning vulnerable to future "solutions." It is true that the Court found no justification for overruling *Miranda*, which it observed has become part of our national culture, but the Court left the door ajar to finding a substitute for the right to counsel as a means of assuring that the exercise of the right to be free from compulsion will be honored. For example, it might not be necessary to require that suspects be advised of the right to consult an attorney if they made their waiver before a judge or perhaps some other neutral court official such as a court clerk.

What clearly remains a permanent part of our constitutional jurisprudence is the requirement that suspects must be warned of the existence of their right not to have to talk to police. *Dickerson* itself put to rest the clamour over the alleged damage done to law enforcement by *Miranda,* noting that "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."[92] As Professor Yale Kamisar has observed: "[T]he various exceptions imposed on *Miranda* have made it a much less formidable rule than the Warren Court contemplated. But the significant numbers of 'exceptions' *Miranda* has had to bear may be a principal reason why it is still alive. . . ."[93]

### *B.* United States v. Hubbell[94]

Defendant Hubbell entered into a plea bargain resulting in a sentence of twenty-one months on charges of mail fraud and tax evasion in connection with his billing practices as an attorney in an Arkansas law firm. As part of his plea agreement, Hubbell agreed to provide the Independent Counsel Ken Starr with "full, complete, accurate, and truthful information" in connection with the investigation of President Clinton's investment in the Whitewater Development Corporation.[95]

In subsequent proceedings against Hubbell regarding his alleged breach of that plea agreement, Hubbell invoked his Fifth Amendment privilege against self-incrimination and was granted use and derivative use immunity as provided under 18 U.S.C. § 6002. In response to a subpoena demanding

90. *Id.* at 442.
91. *Id.* at 440 n.6.
92. *Id.* at 443-44.
93. Yale Kamisar, *Your Sort-of Right to Remain Silent*, NATIONAL L.J., July 17, 2000, at A18.
94. 530 U.S. 27 (2000).
95. *Id.* at 30.

"any and all documents reflecting, referring or relating to any direct or indirect source of money or other things of value received" Hubbell produced over 13,000 pages of documents and records.[96] These documents led to a new ten count indictment against Hubbell for additional mail and wire fraud charges and tax violations. The District Court dismissed the indictment on the ground that the Independent Counsel had violated the immunity statute. Because the prosecutor had discovered the unreported income and other crimes from studying the documents produced in response to a subpoena that the trial court characterized as "the quintessential fishing expedition,"[97] all evidence the prosecutor would offer at trial was deemed derived either directly or indirectly from the "testimonial aspects"[98] of Hubbell's act of producing those documents.[99]

On appeal, the Government relied upon *Fisher v. United States*,[100] maintaining "that the communicative aspect of [Hubbell's] act of producing ordinary business records [was] insufficiently 'testimonial' . . . because the existence and possession of such records by any businessman [was] a 'foregone conclusion.'"[101] In *Fisher*, the defendants had given records prepared by their accountants to their attorneys.[102] The Court found that compulsory acquisition of voluntarily prepared records having incriminating content did not amount to compulsion of testimony any more than did the similar acquisition of incriminating physical evidence.[103] The Court acknowledged, however, that the act of producing such documents could have "communicative aspects" that might be testimonial.[104] As Professor LaFave has explained: "[T]hree elements of production—acknowledgment of existence, acknowledgment of possession or control, and potential authentication by identification—are clearly compelled . . . but whether they are 'testimonial' and 'incriminating' . . . depend[s] upon the 'facts and circumstances of particular cases.'"[105]

In *Fisher*, the Court found no basis for finding that the defendants' implicit admissions that the records existed were testimonial. Because the accountants had prepared the work papers in question in the ordinary course of preparing the defendants' tax returns, the existence of such records was a

96. *Id.* at 31.
97. 11 F. Supp. 2d 25, 37 (D.D.C. 1998).
98. *See* Schmerber v. California, 384 U.S. 757 (1966). The Court held that the Fifth Amendment protected only against compelled communications or testimony and therefore did not apply to compelled production of physical evidence.
99. 11 F. Supp. 2d at 33-37.
100. 425 U.S. 391 (1976).
101. United States v. Hubbell, 530 U.S. 27, 44 (2000).
102. *Fisher*, 425 U.S. at 394.
103. *Id.* at 409-10.
104. *Id.* at 410.
105. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.13, at 467 (3rd ed. 2000).

"foregone conclusion" and defendants' act of production added "little or nothing to the sum total of the Government's information."[106]

In *Hubbell*, Justice Stevens, writing for all justices except the Chief Justice who dissented, distinguished *Fisher* on the ground that in *Fisher* the Government knew of the existence and location of the accounting records, while here the Government had no prior knowledge of either the existence or the whereabouts of the 13,000+ pages produced by Hubbell. Justice Stevens noted: "The Government cannot cure this deficiency through the overbroad argument that a businessman such as respondent will always possess general business and tax records that fall within the broad categories described in this subpoena."[107] Stevens concluded that it was "undeniable" that the production of these documents gave the Government a "lead to incriminating evidence," observing that "the documents did not magically appear in the prosecutor's office like 'manna from heaven.'"[108] This advantage was not the result of the mere non-testimonial act of production, because here it was necessary for Hubbell "to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena."[109] Thus, Justice Stevens likened Hubbell's act in assembling the documents to being forced to tell, "an inquisitor the combination to a wall safe, [rather than] being forced to surrender the key to a strongbox."[110] Because the testimonial aspect of Hubbell's act of producing the subpoenaed documents was the "first step in a chain of evidence that led to this prosecution," Hubbell was therefore entitled to derivative use immunity under the federal immunity statute.

## IV. HABEAS CORPUS

### A. Ramdass v. Angelone[111]

In an ironic triumph of form over substance, a bare majority held that a trial court could refuse to inform a capital sentencing jury that the defendant, if given life, would in all probability never be released from prison.[112] Technically at the time of the penalty phase of his trial, the defendant was eligible for parole.[113] He became ineligible for parole once judgment was entered on a prior conviction. That event did not occur, however, until two and a half weeks after his death penalty trial had been concluded.

106. *Fisher*, 425 U.S. at 411.
107. United States v. Hubbell, 530 U.S. 27, 45 (2000).
108. *Id.* at 42.
109. *Id.* at 43.
110. *Id.*
111. 530 U.S. 156 (2000).
112. *Id.* at 158.
113. *Id.* at 157.

Bobby Lee Ramdass was convicted of the murder of a convenience store clerk committed in the course of a robbery and was sentenced to death. At the sentencing phase the prosecutor relied upon future dangerousness as the aggravating circumstance justifying death, arguing that Ramdass would continue to "[c]ommit criminal acts of violence that would constitute a continuing serious threat to society."[114] *Simmons v. South Carolina*,[115] requires that when future dangerousness of the defendant is at issue and the defendant would be sentenced to life imprisonment without the possibility of parole if the jury gave a life sentence, the jury must be so instructed. Despite the fact that defendant's sentencing jury in *Ramdass* was confused about the possibility of parole and made an express request for clarification on this issue, no such instruction was given.[116] The trial court reasoned that Ramdass was technically still eligible for parole at that moment because judgment had not yet been entered on the jury verdict convicting him of the prior offense that would render him parole ineligible.

The events that led to this death sentence are as follows. During a Virginia crime spree throughout the month of August of 1992, the defendant participated with others in robbing a Pizza Hut, a hotel, and a cab driver. On August 30, defendant participated in an armed robbery of a Domino's Pizza restaurant. On September 2, defendant, together with five other men robbed a convenience store. During the robbery a clerk was killed. According to the testimony of two accomplices, the defendant was responsible for the killing.

Defendant was arrested on September 11 and charged with the two pizza restaurant robberies and the murder of the convenience store clerk.[117] Four months later he was brought to trial and convicted by a jury of armed robbery of the Pizza Hut on December 15, 1992. In quick succession he was then brought to trial in a different county on the armed robbery of the Domino's Pizza and also brought to trial on the murder charge. The jury verdict finding him guilty of the Domino's Pizza robbery was delivered on January 7, 1993. The penalty phase of the murder trial concluded on January 29 and the jury recommended death.

Virginia's "three strikes" law precludes the possibility of parole for a third felony offense if the three convictions involve murder, rape, or armed robbery.[118] At the time of Ramdass' conviction for the murder of the convenience store clerk, he had been convicted and a judgment was entered on the verdict for the Pizza Hut robbery. However, no judgment had been entered on the verdict in the Domino's Pizza case. Under Virginia law a conviction

114. *Id.* at 161 (referencing VA. CODE ANN. §§ 19.2-264.4(C) (1993)).
115. 512 U.S. 154 (1994).
116. 530 U.S. at 162.
117. *Id.* at 160; *see also* Ramdass v. Commonwealth of Virginia, 437 S.E.2d 566 (1993); Ramdass v. Angelone, 28 F. Supp. 2d 343 (1998).
118. VA. CODE ANN. §§ 53.1-151(B1) (1993).

could not be considered for three strikes purposes unless judgment had been entered on the verdict.[119]

During the penalty phase of the murder trial, the prosecutor called witnesses to the uncharged robberies of the hotel clerk and the cab driver.[120] The prosecutor also brought the Domino's Pizza robbery to the jury's attention through cross-examination of the defendant. Both the prosecution and defense thus relied upon this offense. The prosecution used it to show defendant's propensity for violence. Defense counsel used it to establish that defendant would never be released if given a life sentence. Defense counsel argued, without objection from the prosecution, that "Your sentence [of life imprisonment] will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison.... Ramdass will never be out of jail."[121]

During deliberations, however, the jury was apparently confused about whether defendant would ever be released from prison and sent a note to the judge asking, "If the Defendant is given life, is there a possibility of parole at some time before his natural death?."[122] The trial court responded, "You should impose such punishment as you feel is justified under the evidence.... You are not to concern yourself with what may happen afterwards."[123]

On appeal the Virginia Supreme Court agreed that the trial judge had applied settled Virginia law that parole ineligibility was irrelevant to a capital sentence.[124] Thereafter, the United States Supreme Court granted defendant's petition for certiorari and remanded the matter back to the state court to reconsider in the light of *Simmons v. South Carolina.*[125]

On remand, the Virginia Supreme Court held that *Simmons* did not apply because Ramdass was technically not ineligible for parole at the time the jury considered his sentence in the convenience store clerk killing.[126] This resulted from a technicality: No judgment had yet been entered on the verdict in the Domino's Pizza case. Ramdass' petition for certiorari in connection with his direct appeal was denied and he subsequently sought federal habeas relief which was granted by the district court only to be reversed by the Fourth Circuit Court of Appeals.

A plurality of the United States Supreme Court agreed that *Simmons* did not apply. Justice Kennedy writing for Justice Thomas, Justice Scalia, and

119. Ramdass v. Commonwealth, 450 S.E.2d 360 (1994).

120. Both of these crimes were committed with violence. The hotel clerk was pistol-whipped and the cab driver was shot in the head, but survived after a lengthy period of unconsciousness. *Ramdass*, 530 U.S. at 160.

121. *Id.*

122. *Id.* This is the same question which the jury asked in *Simmons*, 512 U.S. at 160.

123. *Ramdass*, 530 U.S. at 163.

124. *Id.*

125. 512 U.S. 154 (1994).

126. *Ramdass*, 530 U.S. at 164.

Chief Justice Rehnquist ruled that since judgment had not been entered on the conviction for the prior offense it was possible that defendant could have filed a post trial motion and overturned the conviction. Therefore, at the time the jury posed its question to the judge about parole eligibility, it was not conclusively established that defendant would become parole ineligible as a result of the prior Domino's Pizza robbery conviction. The plurality distinguished *Simmons* on the grounds that there, the defendant was legally ineligible for parole at the time of sentencing, subject to the possibility a future event (such as the overturning of a prior conviction by appeal or pardon) could change that circumstance.[127] Here, the defendant was legally eligible for parole at the time of sentencing, subject to a future event (entry of judgment) that would make him ineligible. By means of this formalistic appeal to logic the plurality thus sidestepped the fact that there is a vast difference between the two future events in terms of the probability of their occurrence. The likelihood in *Simmons* of a prior conviction being overturned was nil, while the likelihood that judgment would be entered on Ramdass' prior conviction was a virtual certainty. Even if a motion for new trial had been filed, such motions are rarely successful and their purpose is primarily to preserve issues for appeal. In any event, judgment was in fact entered in the Domino's Pizza robbery conviction only two and half weeks after the conclusion of the penalty phase in Ramdass' murder trial.[128]

It is difficult to understand the plurality's fixation on certainty. What is certain is that the jury was confused about the possibility of parole and it mattered enough for them to send a precise question to the judge seeking clarification. Equally clear under Virginia law at the time was that anyone convicted of murder was not eligible for parole until they had served twenty-five years.[129] Empirical research cited to the Court showed that over half (67%) of the jurors surveyed were more likely to give a life sentence if they knew this fact alone.[130] If the infliction of the death penalty is to be a reasoned moral choice among the competing alternatives of life and death, why should not the trial court, when expressly asked, have been required to inform the jury of at least the facts which were certain?

Justice O'Connor, concurring, noted that if a judgment entered on the verdict were a purely ministerial act, she would have agreed that Ramdass was for all practical purposes ineligible for parole at that point. However,

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127. *Id.* at 167.

128. *Id.* at 160.

129. *Id.* at 177.

130. Anthony Paduano & Clive A. Stafford Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211 (1987). The plurality went out of its way to reject this attempt to inform the court, stating: "The poll is not a proper consideration in this Court. Mere citation of a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so-called scientific conclusions contained within it." *Ramdass*, 530 U.S. at 172. This statement represents only the views of four justices, however. Justice O'Connor, who apparently agreed with the plurality's reasoning, did not join Justice Kennedy's opinion.

under Virginia law the entry of judgment was not merely a ministerial act because the defendant could file a motion for new trial prior to entry, which could result in setting aside the jury verdict. Therefore, she agreed with the plurality that this was not a case which was "contrary to or involved an unreasonable application of" *Simmons*, which is the standard required by the Anti-Terrorism and Effective Death Penalty Act of 1996 for reversal on habeas review.[131]

Justice Stevens, writing for Justices Breyer, Souter, and Ginsburg, dissented. Stevens accused the plurality of engaging in excessive formalism to defeat the clear purpose of the decision in *Simmons*, which was to ensure that a defendant could bring his parole ineligibility to the jury's attention when the State argued future dangerousness. Justice Stevens noted, "when the State seeks to show defendant's future dangerousness . . . the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case."[132] Stevens argued that there was "acute unfairness" in allowing the state to use a recent conviction to show future dangerousness, while denying the defendant the right to use the same conviction to establish he would not be a danger because he would be incarcerated for life.[133] Stevens also noted that in *Simmons* the defendant was in fact also technically eligible for parole at the time of sentencing because under the law of that state only the parole board could determine eligibility. Thus, at the time of sentencing, the defendant in *Simmons* was technically in the same position as Ramdass.[134]

Furthermore, Justice Stevens pointed out, Ramdass had not made a motion to set aside the verdict in the Domino's Pizza case and even if he had, there was no indication from the record that any ground existed that would have permitted the trial judge to set aside this conviction. Therefore, the plurality's attempt to distinguish *Simmons* on the ground that a verdict was more uncertain than an entry of judgment was, on the facts of this case, "just flat wrong."[135] The dissenters thus found that the decision of the Virginia Supreme Court was contrary to the decision in *Simmons*, or at the very least was an unreasonable application of *Simmons*, and that therefore habeas relief was appropriate.[136]

The fact that a motion to set aside the Domino's Pizza verdict, even after judgment was entered, is allowed under Virginia law[137] and the recogni-

131. *Ramdass*, 530 U.S. at 179. The federal habeas corpus statute forbids relief unless the state court's decision was "contrary to or involved an unreasonable application of, clearly established Federal law. . . ." (referring to 28 U.S.C. § 2254(d)(1) (1994 ed. Supp. III)).

132. *Id.* at 195. (quoting Justice O'Connor's concurring opinion in Simmons v. South Carolina, 512 U.S. at 177).

133. *Ramdass*, 530 U.S. at 182.

134. *Id.* at 186.

135. *Id.* at 190.

136. *Id.* at 208.

137. *Id.* at 188 (citing Virginia Supreme Court Rule 3A:15(b) (1999)).

tion that any of the qualifying prior convictions in this case could be overturned on direct appeal, or post conviction proceedings, demonstrates not only the flaw in the plurality's seeming obsession with certainty, but also a fundamental weakness in *Simmons* itself. This is perhaps why the plurality was so miserly about applying *Simmons* here. But considering the frequency with which death sentences have been erroneously imposed[138] the Court's passion for closing the door to any loophole which might result in the imposition of an erroneous life sentence seems misplaced. Especially egregious in this case is the fact that three jurors, in post trial interviews, indicated that if the jury had known that Ramdass would never have been released from prison, they would have given him life instead of death.[139]

In *Furman v. Georgia*[140] a death sentence was invalidated because it was "arbitrarily . . . wantonly . . . and freakishly imposed."[141] One has only to review the lower court appellate decisions in this case to recognize that nothing has changed in the intervening three decades. The formalistic handling of this case by the Supreme Court is made all the more troubling by the cursory treatment by the Virginia Supreme Court of Ramdass's direct appeal which in only eight pages summarily dismissed (often without discussion) numerous issues including denial of the appointment of expert assistance, denial of appointment of an investigator, denial of discovery regarding polygraph tests, including questions and answers, given to his accusing accomplices, and improper restriction on cross-examination of those same accomplices. In the end, however, Bobby Lee Ramdass was the victim of the speed and efficiency with which death cases are processed in America today. Had his penalty phase been continued just two and a half weeks, until after judgment was entered on the conviction that did in fact make him parole ineligible, he might have been given life.

### *B.* Portuondo v. Agard[142]

In this case, the Court held that a prosecutor may argue in summation that the defendant has a unique opportunity to fabricate and tailor his testimony because the defendant testifies last, after having the opportunity to hear all of the prosecution witnesses' testimony.

Agard and his alleged victim met in a bar. After a night of drinking, they engaged in a variety of sexual activities together, which were entirely

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138. *See* Ky Henderson, *How Many Innocent Inmates are Executed?* 24 HUM. RTS. 10, American Bar Association (Fall 1997) (reporting that 17 death row inmates across the nation had been found innocent during a four year period). *See also* Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?* 34 J. MARSHALL L. REV. 409 (2001).

139. *Ramdass*, 530 U.S. at 184.

140. 408 U.S. 238 (1972).

141. *Id.* at 249 (Douglas, J., concurring).

142. 529 U.S. 61 (2000).

consensual. Approximately a week later, they met again, consumed substantial amounts of intoxicants and drugs, and once again engaged in sexual activities, which defendant testified were consensual. The complainant testified it was not consensual. Agard was convicted on one count of first-degree sodomy and sentenced to a term of ten to twenty years.[143]

On federal habeas review the Second Circuit Court of Appeals reversed this conviction, holding that the prosecutor's argument that Agard had a unique opportunity to fabricate and tailor his testimony because he testified after hearing the other witnesses testify, violated a defendant's right to be present at his trial and confront his accusers.[144] The United States Supreme Court reversed, affirming Agard's conviction. Justice Scalia wrote the Court's opinion, joined by the Chief Justice and Justices O'Connor, Kennedy and Thomas. Justice Stevens concurred in the judgment, joined by Justice Breyer. Justice Ginsburg dissented, joined by Justice Souter.

The defendant relied primarily upon *Griffin v. California*[145] to support his position that the prosecutor's fabrication argument was improper. In *Griffin*, the Court held that neither the prosecutor's argument to the jury, nor the judge's jury instructions could suggest that defendant was guilty because she failed to take the stand and testify. Such argument and instruction unduly encumbered the privilege against self-incrimination because it imposes a penalty on the defendant for exercising the right.[146] Here, the defendant argued that he had a right to testify after the other witnesses testified. Indeed, he must wait for the prosecution to present its case before he is permitted to testify. Therefore, like the defendant in *Griffin*, he should not be, in effect, punished for exercising that right.

Rejecting this attempt to extend *Griffin*, Justice Scalia began by noting that defendants were historically disqualified from giving evidence themselves at trial. It was not until the latter part of the nineteenth century that the prohibition ended.[147] Hence, there was no historical support for Agard's proposition that he has a constitutional right to testify last.[148] The majority held that *Griffin* only stands for the proposition that a prosecutor cannot urge a jury to do something it is not permitted to do, namely, infer defendant's guilt from his silence.[149] This is because a defendant's silence at trial is a non-act that is too ambiguous for a fair inference of guilt to arise.[150]

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143. Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997). He was also convicted of several minor weapons offenses. *Id.*

144. *Id.*

145. 380 U.S. 609 (1965).

146. *Portuondo*, 529 U.S. at 69.

147. *Id.* at 66.

148. Would it not appear, then, that there is no historic support for the *Griffin* result?

149. *Portuondo*, 529 U.S. at 67.

150. *See id.*

Defendant also relied upon *Doyle v. Ohio*,[151] which held that a defendant's silence, after receiving *Miranda* warnings, could not be used against him. The *Doyle* rationale was based upon the fact that in light of the *Miranda* warnings it was unfair to draw any conclusion from a defendant's silence.[152] Distinguishing *Doyle*, the Court pointed out that here no similar assurances were made to the defendant. He was not told that no comment would be made if he testified last.

The Court also rejected defendant's argument that *Geders v. United States*[153] supported his position. In *Geders*, the Court reversed the defendant's conviction, holding that the trial judge may not place an order on the defendant restricting him from talking to his lawyer during an overnight recess. The judge's order was seen as imposing too heavy a burden on a defendant's right to assistance of counsel. However, Justice Scalia observed, *Geders* did not involve credibility. The prosecutor in *Geders* was free to cross-examine the defendant about any coaching he received during the overnight recess, and thus was permitted to infer that the defendant had fabricated his testimony.[154] Hence, *Geders* was not applicable to the *Agard* situation.[155] Having dismissed the defendant's precedents, the majority found support for its position in *Brooks v. Tennessee*.[156] In *Brooks*, the Court held unconstitutional a Tennessee statute that required a defendant to testify first in the defense case or not at all. In dicta, however, the Court stated that the prosecution was not overburdened by a defendant's testifying last in the defense's case because the prosecutor could present the fabrication argument to the jury.[157]

The majority also relied upon the Court's decision in *Reagan v. United States*.[158] In *Reagan*, the Court approved an instruction that the jury may consider the interest a criminal defendant has in the case when evaluating his testimony. Essentially, Justice Scalia asserted, the prosecutor's argument in *Agard* is the same as the *Reagan* argument.

Justice Stevens, concurring in the judgment, and joined by Justice Breyer, found that while that the prosecutor's argument impugned the defendant's right of confrontation, the error did not rise to the level of "fundamental unfairness" necessary to reverse the conviction.[159] Stevens, however,

151. 426 U.S. 610 (1976).

152. It may be noteworthy that Justice Scalia comments, "[t]here might be reason to reconsider *Doyle*." *Portuondo*, 529 U.S. at 74.

153. 425 U.S. 80 (1976).

154. *Id.* at 89-90.

155. *Portuondo*, 529 U.S. at 69.

156. 406 U.S. 605 (1972).

157. *Portuondo*, 529 U.S. at 70.

158. 157 U.S. 301 (1895).

159. *Portuondo*, 529 U.S. at 75.

rejected the majority's implicit endorsement of such summations noting that they demean the adversary process and the presumption of innocence.[160]

Justice Ginsburg, joined by Justice Souter, dissented.[161] She began her opinion by noting that, "[t]he Court today transforms a defendant's presence at trial from a Sixth Amendment right to an automatic burden on his credibility."[162] Justice Ginsburg was persuaded that *Griffin* and *Doyle* required a reversal of Agard's conviction. She did not see *Reagan*, relied on by Justice Scalia, as pertinent because that 1895 decision addressed a statute that gave the defendant the right to testify in his own defense and was not premised on the Constitution.[163]

The *Agard* decision allows the structure of the order of proof to burden the defendant who testifies at trial. However, in most jurisdictions the allegation of recent fabrication in the trial testimony of a witness may be rebutted by evidence of the witness' prior out-of-court statement that is consistent with the testimony of the witness. This suggests at least two approaches for a defense lawyer representing a client who has made a prior statement consistent with his testimony. First, although such statements are usually not admissible until the prosecutor attacks the defendant's credibility on cross-examination, in light of the prosecutor's potential *Agard* closing argument to the jury, defense counsel can argue that the defendant's prior consistent statements should be admissible during counsel's direct examination of the defendant. Although such a motion will likely be denied, it may discourage or otherwise lay the foundation for later objecting to the prosecutor's use of this tactic during closing argument. Second, if the prosecution does not cross-examine the defendant about his presence during trial, the defense counsel can move *in limini* to foreclose such an argument because the defendant was not confronted with his "opportunity to fabricate." In any event, if the prosecutor is permitted to embark on an *Agard* argument, objection can be made in light of Justice Stevens' comments in *Agard*. If overruled, and no opportunity has previously been given, the defense can urge the judge to reopen the evidence to allow the introduction of a defendant's prior consistent statement. Support for the trial judge's interrupting final argument to reopen evidence may be found in *Geders*.[164]

### *C.* United States v. Martinez-Salazar[165]

In *Martinez-Salazar*, the Court held that a defendant's right to peremptory challenges is not infringed simply because he used a peremptory chal-

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 82.
164. *See Geders*, 425 U.S. at 86-87.
165. 528 U.S. 304 (2000).

lenge to remove a juror who should have been removed for cause.[166] Defendant and a co-defendant were charged with narcotics and weapon offenses. During jury selection, one prospective juror steadfastly maintained that he would favor the prosecution and vote for the government's position if all things were equal. Not even the trial judge's questioning could undermine the juror's determination to favor a conviction. Defendant moved to exclude the juror candidate for cause. The trial judge denied the motion, perhaps because at one point the prospective juror had said he would follow the judge's instructions. Defendant used one of his peremptory challenges to exclude the prospective juror.[167] At the conclusion of jury selection, defendant and his co-defendant had exhausted their ten allowable peremptory challenges.[168] They had not asked for any additional peremptory challenges to make up for the one lost in removing the biased juror, nor did they ask that any other juror be excused for cause. The trial judge read the names of all the selected jurors aloud and asked if the defense or the prosecution had objections to any of the seated jurors. Defendant's attorney answered, "none from us."[169]

Defendant was convicted, and on appeal, argued that he was denied the full compliment of ten peremptory challenges authorized by law because he had to use one of his peremptory challenges on a person who should have been excluded for cause. The Ninth Circuit Court of Appeals agreed and reversed Defendant's conviction, remanding for a new trial.[170]

A unanimous Supreme Court reversed and affirmed defendant's conviction. The Court concluded that defendant had not been denied any constitutional right because the juror he objected to was excused in any event by defendant's use of his peremptory challenge. In addition, defendant had not been denied any right conferred by statute or rule because he had not asked for any additional challenges, had not attempted to excuse any other juror for cause, and had expressed no objections to any of the jurors who decided the case.[171]

Justice Ginsburg authored the Court's opinion.[172] She agreed that if defendant had not used his peremptory challenge, and the contested juror had actually sat for the trial, there may have been error.[173] The trial judge's failure to excuse the juror for cause would be of constitutional importance because the defendant's right to a fair and impartial jury would have been violated. However, she noted, if defendant had a peremptory challenge available for excusing the juror, it is hardly likely that a majority of the Court would

166. *Id.* at 317.
167. *Id.* at 304.
168. FED. R. CRIM. P. 24(b).
169. *Martinez-Salazar*, 528 U.S. at 309.
170. 146 F.3d 653 (9th Cir. 1999).
171. *See Martinez-Salazar*, 528 U.S. at 309.
172. *Id.* at 307.
173. *Id.* at 316.

reverse the conviction if defendant could have excused the juror but failed to do so.[174]

The Court observed that the right to have peremptory challenges, while an old and venerable rule, which is valuable in assuring a fair and impartial jury, is not a right imbedded in the Federal Constitution.[175] What is constitutionally protected, is the right of a defendant to a jury which is fair and impartial. Having peremptory challenges available is very helpful in achieving that end, but not essential. Defendant did not claim that an unfair jury had convicted him. The Court viewed as inconsequential the fact that the defendant might have exercised a peremptory challenge on one of the seated jurors if he had not used one to remove a candidate that should have been excused for cause.[176]

Defendant's failure to ask for additional challenges and his failure to seek to have any other juror excused after the ten peremptory challenges were exhausted contributed to his unsuccessful argument. Even so, it does not follow that had defendant requested an additional challenge or challenged a juror who was not excused after he had used ten challenges, that a reversal would follow. The Court would likely call the error harmless, so long as the defense could not point to a juror, actually empanelled, who should have been excused for cause but was not.[177]

Justice Souter's brief concurrence is worthy of note. He pointed out that because defendant did not request additional challenges, this case "does not present the issue whether it is reversible error to refuse to afford a defendant a peremptory challenge beyond the maximum otherwise allowed, when he has used a peremptory challenge to cure an erroneous denial of a challenge for cause. . ."[178]

### *D.* Weeks v. Angelone[179]

In this case, the Court held that the presumption that a jury has read and understood its instructions from the trial court overrides objective evidence demonstrating jury confusion regarding the applicable law.[180] The Court found that taken as a whole, the jury instructions were constitutionally adequate regarding the penalty phase of a death penalty case.[181] However, the

174. *Id.* at 313.
175. *Id.* at 311.
176. *Id.* at 314.
177. *See id.* at 313.
178. *Id.* at 783; *see* Gray v. Mississippi, 481 U.S. 648 (1987) (holding in a capital case where a judge erroneously excused a juror for cause at the request of the prosecution, the jury's sentence of death must be vacated); *see also* Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 469 U.S. 412 (1985); Adams v. Texas, 448 U.S. 38 (1980).
179. 528 U.S. 225 (2000).
180. *Id.* at 234-37.
181. *Id.* at 234.

jurors apparently focused on only one of the instructions, which even the majority conceded, was indeed ambiguous and confusing standing alone.[182]

Weeks was convicted of capital murder,[183] and the jury imposed the sentence of death.[184] The Virginia Supreme Court affirmed the conviction.[185] Weeks' petition for habeas corpus relief was dismissed and the Circuit Court of Appeals for the Fourth Circuit affirmed.[186] The Supreme Court also affirmed, upholding the death sentence.[187] The Chief Justice wrote the Court's opinion, joined by Justices O'Connor, Scalia, Kennedy, and Thomas.[188] Justice Stevens wrote a dissenting opinion, joined by Justices Ginsburg and Breyer. Justice Souter joined in all but Part I of Stevens' opinion.[189]

Weeks stole an automobile.[190] Several weeks after the theft, while Weeks was a passenger in the stolen car, the car was stopped by a police officer.[191] Weeks shot the officer six times with hollow point bullets.[192] Arrested the day after the killing, Weeks admitted to the crime and indicated that he was contemplating suicide because of it.[193] While in jail, Weeks also wrote a letter to a jail officer in which he expressed his sorrow for the killing.[194]

At the sentencing phase of Week's trial, the prosecution relied on two aggravating factors, each of which alone would support a death sentence: (1) defendant was a "continuing serious threat to society" because of his propensity to commit violent crime, and (2) defendant's conduct was "outrageously wanton, vile, horrible, or inhuman, in that it involved . . . aggravated battery"[195] "to the victim beyond the minimum necessary to accomplish the act of murder."[196] Jury instruction number two stated, in pertinent part, "If you find . . . that the Commonwealth has proved . . . either of the two alternatives, . . .then you may fix the punishment. . .of death, or if you believe from all the evidence that the death penalty is not justified, then you should fix the punishment . . . at imprisonment for life. . . ."[197]

Other instructions advised the jury that, although they accepted one or both of the aggravating factors as present, they were to consider all of the

182. *Id.* at 228-29.
183. *Id.* at 228.
184. *Id.* at 230-31.
185. *Id.* at 231.
186. *Id.*
187. *Id.*
188. *Id.* at 226.
189. *Id.* at 237.
190. *Id.* at 227.
191. *Id.*
192. *Id.*
193. *Id.* at 227-28.
194. *Id.* at 228.
195. *Id.*
196. *Id.* at 229 n.1.
197. *Id.*

evidence in deciding whether to impose death or the alternative life sentence.[198] The instruction, titled "Evidence In Mitigation," correctly explained the definition of mitigation and how such evidence may result in a sentence of life in prison despite the existence of one or both of the aggravating factors.[199]

After deliberating for approximately four and one half hours, the jury sent the following question to the judge: "If we believe [defendant] is guilty of at least 1 of the alternatives, then is it our duty. . .to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or . . . the life sentence? What is the rule?. . ."[200]

The trial judge answered the question by simply referring the jurors back to the ambiguous instruction number two, set out above, without further explanation.[201] He did not direct the jurors to other explanatory instructions that correctly defined the role of mitigation. The defense objected, asking that the judge advise the jurors that even upon finding one or both of the aggravating factors present, they still could impose a life sentence.[202] The trial judge refused the request.[203]

After the judge had responded to the jury, more than two hours passed before the jury returned a verdict of death.[204] The verdict specifically found that the second alternative aggravating factor (i.e., "outrageously or wantonly vile, horrible, or inhuman," conduct involving aggravated battery) was proven beyond a reasonable doubt.[205] According to the notes of the court reporter, as the jurors were polled on their sentencing decision, a majority of them were crying.[206]

Weeks argued that the jury misunderstood that the mitigating evidence could be used to justify a life sentence even though the jury found that the second aggravating factor was present.[207] The jury's confusion was evidenced by its questions to the judge, which asked exclusively about the ambiguous instruction.[208] The judge failed to give a clear answer to the jury's question.[209] Instead, he exacerbated their confusion by directing attention to a single instruction which did not explain that mitigation factors could nullify

198. *Id.*
199. *Id.* at 232 n.2.
200. *Id.* at 229.
201. *Id.*
202. *Id.* at 230.
203. *Id.*
204. *Id.*
205. *Id.* at 230-31.
206. *Id.* at 248 (Stevens, J., dissenting).
207. *Id.* 238 (Stevens, J., dissenting).
208. *Id.* at 228-29.
209. *Id.* at 238 (Stevens, J., dissenting).

the death penalty, even if the second aggravating factor was proven beyond a reasonable doubt.[210]

The defense argued that therefore the jurors were led to believe that the mitigation evidence addressed only the first aggravating ground, namely the defendant's continuing threat to society.[211] Prior to this incident defendant had been a well-behaved student and star athlete who stayed with his girlfriend when she became pregnant and helped raise their child.[212] These mitigating circumstances the defense argued played no further role in the sentencing decision, however, because of the juror's mistaken belief that mitigation did not apply once the jurors accepted the second aggravating factor.[213] Weeks argued that with respect to that aggravating circumstance, the sentence of death was mandatory in the minds of the jurors.[214] The judge's response should have specifically advised the jurors that mitigation must be considered if the jury found either of the aggravating factors present.[215]

In a five to four decision, the jury's verdict of death was affirmed.[216] The majority conceded that instruction number two, standing alone, was ambiguous and inadequate.[217] But in other instructions, the jurors were advised that mitigation may serve as a basis for a sentence less than death even when aggravation was present.[218] The majority held that it is presumed that jurors read and understood all of the instructions.[219] Furthermore, the arguments of counsel to the jury made it clear that the jurors were to consider mitigation although they also were convinced that one or more aggravating factors was present in deciding what sentence to impose.[220]

Dissenting, Justice Stevens argued that the question from the jurors clearly illustrated their confusion regarding the role of mitigation.[221] The judge's answer to their question only increased the likelihood that the jurors would incorrectly ignore mitigation once the second aggravating factor was accepted.[222] Thus, the jurors likely believed that a sentence of death was mandatory if they found the aggravating circumstance existed.[223] The fact that most of the jurors were in tears as they were polled after their verdict,

210. *Id.* at 228-29.
211. *Id.* at 241 (Stevens, J., dissenting).
212. *Id.* at 248 n.9 (Stevens, J., dissenting).
213. *Id.* at 248-49 (Stevens, J., dissenting).
214. *Id.* at 242 (Stevens, J., dissenting).
215. *Id.* at 241-42 (Stevens, J., dissenting).
216. *Id.* at 231.
217. *Id.* at 228-29.
218. *Id.* at 232 n.2.
219. *Id.* at 234.
220. *Id.* at 234-36.
221. *Id.* at 242 (Stevens, J., dissenting).
222. *Id.*
223. *Id.*

illustrated that the jurors, in all likelihood, would not have imposed death if they had understood that death was not mandatory.[224]

The dissent further argued that all the defendant need establish is the "reasonable likelihood" that the jury applied its instructions in a way that foreclosed consideration of the mitigating evidence, once aggravating circumstances were found, and that the record discloses such a "reasonable likelihood."[225]

### *E.* Slack v. McDaniel[226]

In this case, the Supreme Court answered three questions concerning the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[227] which transformed federal habeas review. First, the Court held that after the effective date of the AEDPA (April 24, 1996), an appeal taken from the dismissal of a habeas corpus petition should be governed by the certificate of appealability (COA) requirements of the AEDPA regardless of the date of the original petition.[228] Second, the Court held that a COA should issue following the dismissal of a habeas corpus petition on procedural grounds if the prisoner demonstrates: "[1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and, [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[229] Third, the Court held that a subsequent habeas petition, "filed after an initial petition was dismissed" for "failure to exhaust state remedies," without adjudication on the merits, is not a "second or successive" petition, which may be dismissed as an abuse of the writ.[230]

In 1990, Antonio Slack was prosecuted in a Nevada state court and convicted of second-degree murder."[231] After an unsuccessful direct appeal, Slack filed a petition for habeas corpus relief in federal district court in 1991.[232] Because he had failed to present all of his claims to Nevada state courts, however, Slack was unable to continue in federal court[233] for failure to comply with the exhaustion requirements of *Rose v. Lundy*.[234] Slack thus moved for a stay and abeyance, so he could return to state court to exhaust

224. *Id.* at 248-49 (Stevens, J., dissenting).
225. *Id.* at 238 (Stevens, J., dissenting).
226. 529 U.S. 473 (2000).
227. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) Pub. L. 104-132, 110 Stat. 1217 (1996) (codified at 28 U.S.C. §§ 2244-2266 (2001)).
228. *Slack*, 529 U.S. at 478.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. 455 U.S. 509 (1982) (holding that a federal district court must dismiss a habeas petition if it contains both exhausted and unexhausted claims).

his state remedies.[235] On February 19, 1992, the Federal District Court agreed and ordered that Slack's petition be dismissed "without prejudice" and that Slack be "granted leave to file an application to renew upon exhaustion of all State remedies."[236]

After exhausting his claims in state court, Slack filed a new habeas petition in federal court.[237] The District Court appointed counsel, who filed an amended petition on December 24, 1997, containing fourteen claims for relief.[238] In response, the government filed a motion to dismiss the petition on two grounds: (1) the petition was "mixed" because some of the claims contained therein had not been presented to the state courts; and (2) under Ninth Circuit precedent, adding claims to the current petition which were not raised in to the 1991 habeas petition constituted "an abuse of the writ."[239]

On March 30, 1998, the District Court granted the motion to dismiss Slack's petition.[240] The District Court found that Slack's 1995 petition constituted a "second or successive petition."[241] Therefore, invoking the abuse of the writ doctrine, the court dismissed "with prejudice the claims that Slack had not raised in [his] 1991 petition."[242] Finally, the court dismissed the remaining four claims on the grounds that one of the claims had not been raised in the state courts, thus rendering the petition "mixed" and subject to dismissal.[243]

On April 29, 1998, Slack filed a Notice of Appeal in the district court.[244] Following Circuit practice and the pre-AEDPA version of 28 U.S.C. § 2253, the district court treated the pleading "as an application for a certificate of probable cause (CPC)," which it denied on the grounds that "the appeal would raise no substantial issue."[245] The Court of Appeals also denied Slack a CPC.[246] Slack appealed to the U.S. Supreme Court, contending that his 1995 petition was not a "second or successive" petition and that he was "entitled to an appeal of the dismissal of his petition."[247]

Before concluding that Slack's 1995 petition was not a "second or successive" petition, Justice Kennedy, writing for a majority, resolved two preliminary issues.[248] First, Justice Kennedy found that the *post*-AEDPA version

235. *Slack*, 529 U.S. at 479.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at 479-80.
244. *Id.* at 480.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*

of section 2253 should have controlled Slack's right to appeal.[249] Second, Justice Kennedy articulated the showing Slack must make upon appeal from the dismissal of a petition on procedural rather than substantive grounds.[250]

According to the pre-AEDPA version of section 2253, a prisoner can only appeal from a final order in a habeas corpus proceeding if "the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause" (CPC).[251] As the Court explained in *Barefoot v. Estelle*,[252] a prisoner must make "a substantial showing of the denial of a federal right" in order to obtain a CPC.[253] After April 24, 1996, the effective date of the AEDPA, the nature of an appeal from a final habeas order changed. The post-AEDPA version of section 2253 permits a prisoner to appeal only after obtaining a COA from a circuit justice or judge.[254] The revised statute also provides that, in order to obtain a COA, a prisoner must make a "substantial showing of the denial of a constitutional right."[255]

Distinguishing the holding of *Lindh v. Murphy*,[256] Kennedy found that the latter version of section 2253 should have controlled Slack's appeal.[257] In *Lindh*, the Court held that the post-AEDPA version of section 2254 (the section governing entitlement to relief) only applies to petitions that are filed in the district court after the AEDPA's effective date.[258] Section 2254 is thus "directed to proceedings in the district court."[259] In contrast, Kennedy explained, "§ 2253 is directed to proceedings in the appellate courts."[260] As a result, the post-AEDPA version of section 2253 governs appellate court proceedings that were filed after the AEDPA's effective date, which includes Slack's 1998 "Notice of Appeal."[261] Slack, therefore, was required to seek a COA in order to obtain review of the dismissal of his habeas petition.[262]

Because Slack filed a "Notice of Appeal," the court of appeals should have treated it as an application for a COA. Noting that the showing required to obtain a COA under the post-AEDPA version of section 2253 is essentially the same as that required to obtain a CPC under the pre-AEDPA version of section 2253, Kennedy explained that the meaning of "substantial showing" is the same as that articulated in *Barefoot*: it "includes showing

249. *Id.* at 482.
250. *Id.* at 483-85.
251. 28 U.S.C. § 2253, Act of June 25, 1948, 62 Stat. 967.
252. 463 U.S. 880 (1983).
253. *Id.* at 893.
254. 28 U.S.C. § 2253(c)(1).
255. 28 U.S.C. § 2253(c)(2).
256. 521 U.S. 320 (1997).
257. *Slack*, 529 U.S. at 481-82.
258. *Lindh*, 521 U.S. at 336.
259. *Slack*, 529 U.S. at 481.
260. *Id.*
261. It is interesting to note, however, that on appeal, pre-AEDPA law would govern the rulings of the trial court. *Id.*
262. *Id.* at 482.

that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[263]

In a case in which the habeas petition was dismissed on the merits, then, the petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[264] In Slack's case, however, the habeas petition was dismissed on procedural grounds without the district court having reached the merits of his constitutional claims.[265] The Supreme Court therefore formulated the particular standard to be applied in cases like Slack's as follows: "a COA should issue when . . . jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[266] Justice Kennedy noted that this interpretation of the "substantial showing" requirement was consistent with both *Barefoot* and the AEDPA.[267]

Determining whether a COA with respect to a procedural ruling should be granted thus entails two inquiries.[268] One is directed at the substantive constitutional claim.[269] The other is directed at the procedural ruling.[270] As Slack only addressed the procedural prong of the standard in the court below, the Supreme Court remanded the case to allow the parties to brief the substantive prong, i.e. whether the requisite showing of a debatable constitutional error was met.[271]

The Court, however, squarely addressed the procedural prong of the standard.[272] First, Justice Kennedy explained that the District Court's characterization of Slack's 1995 petition as a "second or successive" habeas petition was incorrect.[273] Although Slack's 1995 petition followed an earlier petition, the initial 1991 petition was dismissed because of the exhaustion requirement rather than on its merits.[274] Moreover, the question of whether Slack's 1995 petition was second or successive should be assessed according to *pre*-AEDPA law because his right to relief in the trial court was implicated, and Slack initiated these proceedings in the district court before the

263. *Id.* at 483-84 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 & n.4).
264. *Id.* at 484.
265. *Id.* at 489.
266. *Id.* at 484.
267. *Id.*
268. *Id.*
269. *Id.* at 485.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 485-86.

enactment of the AEDPA.[275] Relying on its earlier decisions in *Rose*[276] and *Stewart v. Martinez-Villareal*,[277] the Court held that only if a petitioner, having presented a mixed petition, chose to proceed with just his exhausted claims and deliberately declined to return to state court to pursue his unexhausted claims, would a subsequent petition raising those claims risk being classified as "second or successive."[278] Where, however, a mixed petition is dismissed under *Rose* and petitioner chooses to return to state court to exhaust all of his claims, his subsequent habeas petition upon return the federal court is to be treated as "any other first petition."[279]

Reaffirming its "admonition that the complete exhaustion rule is not to 'trap the unwary *pro se* prisoner,'"[280] the Court also rejected the State's argument that the subsequent petition should be limited to the claims made in the initial petition, which Justice Kennedy acknowledged is often uncounseled and hand-written.[281] Instead, Justice Kennedy suggested that the courts treat the initial mixed petition "as though it had not been filed, subject to whatever conditions the court may have attached."[282]

Finally, the Court responded to the State's complaint that a "vexatious litigant" could return to federal court upon exhaustion in state court and again file a mixed petition, causing the whole "process to repeat itself" and thereby delay collateral review.[283] First, Justice Kennedy pointed out that the states may prevent litigants from repeatedly returning to state court by imposing their own procedural bars.[284] Second, where the AEDPA applies, it may also limit such a tactic.[285] Finally, Justice Kennedy observed that federal courts have the ability, pursuant to the Rules of Civil Procedure, to dismiss initial petitions with an instruction that the prisoner is only to bring exhausted claims in any subsequent petition to the court.[286] In view of these numerous mechanisms for avoiding vexatious litigation, the majority thus rejected the state's claim that a gateway to abuse would be opened as a result of the Court's interpretation of "second or successive."[287]

Because his 1995 petition should not have been characterized as a "second or successive" habeas petition, Slack satisfied the requisite showing that reasonable jurists could conclude that the district court's finding that there

275. *Id.* at 486.
276. Rose v. Lundy, 455 U.S. 509 (1982).
277. 523 U.S. 637 (1998).
278. *Slack*, 529 U.S. at 486-87.
279. *Id.* at 487.
280. *Id.*
281. *Id.*
282. *Id.* at 487-88.
283. *Id.* at 488.
284. *Id.* at 489.
285. *Id.*
286. *Id.*
287. *Id.*

was an abuse of the writ was wrong.[288] However, the Supreme Court remanded the case to determine whether Slack was otherwise entitled to a certificate of appealability on the substantive claims raised.[289]

Justices Scalia and Thomas dissented.[290] They believed that Slack's 1995 petition was rendered "second or successive" as a result of its inclusion of new, unexhausted claims.[291] Justice Scalia first dismissed, as irrelevant, the holding of *Martinez-Villareal* because that case did not involve exhaustion.[292] He then found the theory on which the majority apparently thought the decision in *Rose* was based, to be "counterfactual."[293] By treating a mixed petition as if "[it] never existed," the majority, Justice Scalia complained, effectively ruled that no subsequent petition would qualify as "second or successive."[294] It would be much better, Scalia suggested, to interpret *Rose* as holding that a later refiling was just a renewal of the claims in the first petition.[295]

Justice Scalia also discounted the Court's "mixed-petitions-don't-count theory" because the language of the two cited cases did not support it.[296] In *Rose*, the Court only provided that prisoners should be entitled to "exhaust the remainder of their claims" after dismissal from federal court.[297] It did not provide that prisoners may add new claims or return to federal court without having exhausted all claims.[298] Likewise, in *Martinez-Villareal*, the Court only referred to treating "these claims" (i.e., previously dismissed, unexhausted claims) as if they were part of any other first petition.[299] It did not require treating "any and all claims" as if they were part of a first petition.[300]

Finally, Justice Scalia decried the burden that the majority's construction of "second or successive" will produce for the system.[301] Not only will the State be required to expend time and resources to answer repeated petitions, Scalia argued, but the corrective measures suggested by the majority will also impose an unnecessary burden on the district courts.[302]

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288. *Id.*
289. *Id.* at 489-90.
290. *Id.* at 490.
291. *Id.* at 493.
292. *Id.* at 491.
293. *Id.*
294. *Id.*
295. *Id.* at 492.
296. *Id.* at 491.
297. *Id.*
298. *Id.*
299. *Id.* at 491-92
300. *Id.* at 492.
301. *Id.*
302. *Id.*

### *F.* Edwards v. Carpenter[303]

The intriguing constitutional question presented in this case is whether a federal district court, on habeas review, can consider an ineffective assistance of counsel claim as "cause" for the procedural default of another constitutional claim, when the ineffectiveness of assistance counsel claim itself has been procedurally defaulted.[304] Justice Scalia, writing for a majority of six members of the Court, held that it cannot, unless the habeas prisoner can also satisfy the "cause and prejudice" standard with respect to the procedurally defaulted ineffectiveness claim.[305]

Carpenter was indicted for aggravated murder and aggravated robbery in Ohio and pled guilty, while maintaining his innocence. A three-judge panel accepted his plea based on the prosecution's recitation of the evidence and after a mitigation hearing, sentenced him to life imprisonment with eligibility for parole after thirty years. On direct appeal, counsel for Carpenter raised only one issue: that the evidence in mitigation justified eligibility for parole after twenty years rather than thirty years. The Ohio Court of Appeals affirmed the sentence, and Carpenter's counsel did not appeal to the Ohio Supreme Court.[306]

After state post conviction relief was pursued without success, new counsel for Carpenter filed an application to the Ohio Court of Appeals to reopen his appeal on the grounds that his first appellate lawyer was constitu-

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303. 529 U.S. 446 (2000).

304. *Id.* at 1589.

305. Like the exhaustion of state remedies doctrine, which requires federal claims to be first presented to state courts, the procedural default doctrine and its accompanying "cause and prejudice" standard are based upon principles of comity and federalism. A federal judge cannot free a state prisoner held in custody in violation of the federal Constitution if, despite the federal violation, there is an adequate and independent state ground justifying the prisoner's detention. One such "adequate and independent" state ground is procedural default—the failure of the prisoner to bring his federal claim in state court in accordance with proper state procedures. As Justice Breyer points out in his concurring opinion in *Carpenter*, there are three circumstances, however, where the state's assertion of such an independent ground will not be deemed "adequate" to bar a federal claim: (1) where the refusal to consider the claim will result in a "fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991); (2) where the state procedural rule has not been "firmly established and regularly followed." Ford v. Georgia, 498 U.S. 411, 423-24 (1991); and (3) where the habeas petitioner has good "cause" for failing to comply with state procedural rules and has been "prejudiced" as a result. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). *See Carpenter*, 529 U.S. at 456 (Breyer, J. concurring). When the asserted "cause" of a procedural default is the alleged incompetence of counsel, the Court has further held that to constitute "cause" counsel's performance must be so defective that it amounts to a denial of petitioner's Sixth Amendment right to the effective assistance of counsel. Murray v. Carrier, 477 U.S. 478 (1986). Thus, like a set of interlinked Russian dolls, a case like Carpenter's presents a series of interconnected issues, each with its own analysis. For recent applications of the standard established by *Strickland v. Washington*, for determining a violation of the Sixth Amendment right to effective assistance of counsel, see *Roe v. Ortega*, 528 U.S. 470 (2000) and *Williams v. Taylor*, 529 U.S. 362 (2000).

306. *Id.* at 448-49.

tionally ineffective for failing to raise the claim that the evidence was insufficient to support the guilty plea as well as the sentence.[307] This application was made pursuant to a state rule of appellate procedure that permitted a defendant in a criminal case to apply to reopen a direct appeal on the ground of ineffective assistance of appellate counsel, provided the application was made within ninety days from the publication of the appellate judgment, unless good cause was shown for filing later.[308]

The effective date of Rule 26(b), however, was July 1, 1993, more than two years after Carpenter's direct appeal was completed.[309] The Ohio Court of Appeals decided that Carpenter's time for filing began on the effective date of Rule 26(b) and expired ninety days thereafter.[310] Since Carpenter's application was filed more than a year after the effective date of the rule, the state court dismissed the application, holding that he had failed to show good cause for filing after the ninety-day period.[311]

Carpenter then filed a petition for a writ of habeas corpus in the U.S. District Court, alleging that his first appellate counsel was ineffective for failing to raise the substantive claim that a factual basis was lacking for his plea.[312] The District Court agreed appellate counsel had been ineffective under *Strickland v. Washington*[313] and issued the writ, conditioned, however, on the Ohio Court of Appeals reopening of the direct appeal.[314]

On cross-appeals the Sixth Circuit Court of Appeals held that defendant's ineffective assistance of counsel claim served as "cause" to excuse the initial procedural default for failure to raise the substantive claim even if the ineffectiveness claim itself was time barred and thus procedurally defaulted.[315] The Sixth Circuit reasoned that Carpenter had exhausted the ineffectiveness claim in state court by presenting it in his application under rule 26(B) to reopen the direct appeal.[316]

Before the United States Supreme Court, the state argued that a procedurally defaulted ineffective assistance of counsel claim can only serve as cause to satisfy the cause and prejudice requirements of another defaulted claim, if it can also satisfy the cause and prejudice standard to excuse its own default. Writing for a majority of the Court, Justice Scalia agreed with the state. He pointed out, that in order to qualify as an excuse for the default of another claim, there were two requirements for the ineffective assistance of counsel claim. First, the claim had to be presented to the state court. Sec-

307. *Id.* at 449.
308. OHIO R. APP. P. 26(B).
309. 529 U.S. at 449 n.2.
310. *Id.*
311. *Id.* at 449.
312. *Id.*
313. 466 U.S. 668 (1984)
314. 529 U.S. at 449.
315. *Id.* at 450.
316. *Id.*

ondly, the state court must have had a fair opportunity to consider the claim. If that claim was procedurally defaulted, so that the state could not really consider the claim, it should not automatically qualify as cause for some other claim. Therefore, the ineffectiveness of counsel claim itself must satisfy the cause and prejudice test.[317]

The Supreme Court sent the matter back to the Court of Appeals to determine whether the defaulted ineffectiveness of counsel claim met the cause and prejudice standard, or whether the Ohio Appellate Rule of Procedure, which required such an application to be filed within ninety days, did not qualify as an adequate and independent state ground. Only if the default was excused for "cause and prejudice," or Ohio's procedure did not constitute an "adequate and independent state ground," could the ineffectiveness of counsel claim then be used to excuse the default regarding the substantive claim.[318]

### *G.* Roe v. Flores-Ortega[319]

In *Roe v. Flores-Ortega* the Court considered whether defense counsel's failure to file a notice of appeal following a guilty plea, without consultation or consent by the defendant, constitutes *per se* ineffective assistance of counsel.[320] Rejecting the Ninth Circuit's "bright line" rule approach, the Court held that ineffective assistance of counsel claims should be determined under a totality of the circumstances analysis—even where the claim is based upon a court appointed lawyer's failure to consult with an indigent client.

In October 1993, the defendant, represented by his public defender and assisted by a Spanish language interpreter, appeared in court and plead guilty to second-degree murder.[321] His plea comported with California law allowing a plea of guilty when a defendant denies guilt, but agrees that the State has enough evidence to convict.[322] In return, the prosecutor dismissed a use of a deadly weapon enhancement and assault charges.[323] After he was sentenced to a term of fifteen years to life, the trial court then advised the defendant that he "may file an appeal within sixty days from today's date with the court."[324] The notice of appeal, characterized as a "purely ministerial task," generally consists of a one-sentence document stating that the defendant wishes to appeal from the judgment.[325]

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317. *Id.*
318. *Id.* at 453-54.
319. 528 U.S. 470 (2000).
320. *Id.* at 473.
321. *Id.*
322. *Id.*; *see also* People v. West, 3 Cal. 3d 595 (1970).
323. 528 U.S. at 473.
324. *Id.* at 473-74.
325. *Id.* at 474.

For the next ninety days, the defendant was in lockup undergoing evaluation and was thereby prevented from communicating with his public defender.[326] Although his attorney had noted, "bring appeal papers" in her case file, she had no further contact with defendant and did not file a notice of appeal.[327] Four months later the defendant filed an untimely notice of appeal, which was rejected by the Superior Court clerk.[328] Defendant then filed a state habeas corpus petition, challenging both his plea and sentence, claiming that his public defender had promised to file the notice of appeal.[329]

After state post-conviction proceedings were unsuccessful, the defendant filed a federal habeas corpus petition, alleging that his counsel was ineffective for failing to file a notice of appeal.[330] After an evidentiary hearing before a magistrate-judge, the District Court denied relief.[331] The United States Court of Appeals for the Ninth Circuit, citing its prior "bright line" rule in *United States v. Stearns*,[332] which held that the defendant must consent to counsel's failure to file a notice of appeal, remanded the matter back to the District Court with instructions to grant the writ of habeas corpus and the state appealed.[333]

Justice O'Connor, writing for a majority, began by acknowledging that both California law[334] and national standards promulgated by the American Bar Association for the provision of indigent defense services[335] require, at a minimum, that counsel consult with the defendant respecting his right to appeal. However, Justice O'Connor observed, under the standard for determining ineffective assistance of counsel established by *Strickland v. Washington*,[336] the Sixth Amendment only requires that counsel's conduct be reasonable. [337]

Setting to one side cases in which counsel has received and ignored clear instructions from a client to appeal, Justice O'Connor rejected any bright line rule that would, in *all* cases, require counsel to consult with defendants concerning their right to appeal.[338] Instead, Justice O'Connor held,

326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* at 474-75.
332. 68 F.3d 328 (Ca. 1995).
333. 528 U.S. at 475-76.
334. *See* CAL. PENAL CODE § 1240.1(a) (West Supp. 2000) (imposing a duty on trial counsel to consult with the defendant about the possibility of an appeal).
335. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION § 4-8.2(a) (3d ed. 1993).
336. 466 U.S. 668 (1984).
337. 528 U.S. at 481. To establish a constitutional violation under the *Strickland* two pronged test, defendant must show (1) that counsel's performance "fell below an objective standard of reasonableness" and (2) that defendant was prejudiced by counsel's deficient performance. *Strickland,* 466 U.S. 688, 694 (1984).
338. 528 U.S. at 479-80.

"counsel has a constitutionally-imposed duty to consult with the defendant when there is reason to think either (1) that a rational defendant would want to appeal (for example because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing."[339]

The determination of whether a duty to consult existed, moreover, is to be made under a "totality of the circumstances" approach, taking into account all information counsel "knew or should have known."[340] Relevant factors under the totality of circumstances analysis include, for example, whether the defendant plead guilty, whether defendant received the sentence he bargained for as part of the plea agreement, and (as expressly emphasized in the above-quoted statement of the holding) whether there exists nonfrivolous grounds for an appeal.[341] Justice O'Connor noted that it was the Court's expectation that in the vast majority of cases this inquiry would result in finding that counsel had a duty to at least confer with his or her client regarding the right to appeal.[342] However, she refused to impose "detailed rules" for counsel's conduct, noting that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but rather] simply to ensure that criminal defendants receive a fair trial."[343]

Turning then to the second prong of the *Strickland* two-prong test, Justice O'Connor addressed the requirement that a defendant must show that he was prejudiced by counsel's defective performance. Recognizing that the Court has consistently held that a complete denial of counsel at a critical stage of a judicial proceeding has mandated a presumption of prejudice because the adversary system has been rendered "presumptively unreliable," Justice O'Connor acknowledged that here the denial was "even more serious" where counsel's deficient performance resulted in the forfeiture of the judicial proceeding itself.[344] However, while prejudice will be presumed from the forfeiture of a judicial proceeding, Justice O'Connor held that the defendant still has the burden of showing that counsel's ineffective assistance actually caused the forfeiture.[345] Thus, Justice O'Connor reformulated the test for prejudice in this context to require that "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed."[346]

How an illiterate defendant who speaks no English and who has no understanding of the legal system is supposed to satisfy this burden is left un-

339. *Id.* at 480.
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.* at 481 (quoting *Strickland*, 466 U.S. at 689).
344. *Id.* at 483.
345. *Id.* at 484.
346. *Id.*

addressed. Justice O'Connor did, however, specifically reject the notion that the defendant would have to specify in a habeas proceeding the specific meritorious points that he would have raised on appeal if one were granted.[347] It is sufficient that he demonstrates that but for counsel's failure to file the notice of appeal, he would have appealed.[348] She then remanded the case back to the District Court, because she was unable to determine from the record whether defense counsel had a duty to consult, whether she did in fact consult with defendant, and, if not, whether defendant was prejudiced by that failure.[349] Given the undisputed facts of this case, this broad remand is telling. Defense counsel's own file notes stated "bring appeal papers."[350] Clearly, this indigent defendant, who was handicapped by having to understand the proceedings through an interpreter, had expressed himself in perhaps the only way he could—by not admitting his guilt. Yet the fact this case involved an *Alford* plea was apparently not seen as significant by the Court.[351]

In a concurring opinion, Justice Breyer joined Justice O'Connor's opinion, which in his view "makes clear that counsel does 'almost always' have a constitutional duty to consult with a defendant about an appeal *after a trial*."[352] He emphasized that the issue in this case concerned only the duty to consult after a guilty plea.[353]

Justice Souter, joined by Justices Stevens, and Ginsburg, concurred with Justice O'Connor's analysis of the prejudice prong of the *Strickland* test, but dissented with respect to the performance prong analysis.[354] In the dissenting justices' view, it was unreasonable for a lawyer representing a client like the defendant here to "walk away . . . after sentencing without at the very least acting affirmatively to ensure that the client understands the right to appeal."[355] "To condition the duty" to consult upon a determination whether "a rational defendant would want to appeal" in effect, Justice Souter insightfully observed, "substitute[s] a harmless error rule for a showing of reasonable professional conduct."[356] There can be little doubt that this is what the majority intended. As Justice O'Connor recognized, and repeatedly emphasized in examples, the existence of a nonfrivolous ground for appeal will sat-

347. Roe v. Flores-Ortega, 528 U.S. 470, 486 (2000).
348. *Id.*
349. *Id.*
350. *Id.* at 474.
351. In *North Carolina v. Alford*, 400 U.S. 25 (1970) the Court upheld this type of plea, whereby a defendant who maintains his innocence can nevertheless be convicted upon a plea that waives his trial rights and admits that there is evidence sufficient to convict. *See also* People v. West, 3 Cal. 3d 595 (1970).
352. Roe v. Flores-Ortega, 528 U.S. at 488.
353. *Id.*
354. *Id.*
355. *Id.* at 488-89.
356. *Id* at 492.

isfy both the performance and prejudice prongs of the *Strickland* analysis.[357] While Justice O'Connor expressly noted that this was not a necessary requirement, in practice, it may prove difficult for a claim of ineffective assistance of counsel to prevail in the absence of such a showing.[358]

As Justice Souter warned, this decision "erodes the principle that a decision about appeal is validly made only by a defendant with a fair sense of what he is doing."[359] Observing that most defendants cannot rationally make a decision about an appeal without the advice of counsel, Justice Souter criticized the majority for countenancing convictions even when there has been "a breakdown of the adversary system."[360]

### *H.* Terry Williams v. Taylor[361]

This landmark case marks the first time that the United States Supreme Court, applying the two-pronged standard in *Strickland v. Washington,*[362] found that a defense lawyer rendered ineffective assistance of counsel in failing to investigate and present mitigation evidence at the sentencing hearing in a death penalty case. The categories of evidence outlined in the Court's analysis provide a useful blueprint for assessing claims of ineffectiveness at sentencing. The decision is also important because it interpreted a critical provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[363] which operates to insulate state interpretations of federal constitutional law from federal habeas corpus review.

Defendant, Terry Williams, was found guilty of the murder of Harris Stone. At the close of the sentencing hearing defense counsel told the jury:

> I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself. I doubt very seriously that he thought much about mercy when he was in Mr. Stone's bedroom that night with him .... I doubt very seriously that he had mercy on his mind when he took two cars that didn't belong to him. Admittedly, it is very difficult to get us (sic) and ask that you give this man mercy when he has shown so little of it himself. But I would ask that you would.[364]

Not surprisingly, the jury recommended death.

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357. *Id.* at 486.

358. *Id.*

359. *Id.* at 493.

360. *Id.*

361. 529 U.S. 362 (2000) There were two *Williams v. Taylor* decisions, involving different individuals, decided during the term. Therefore the first name is added to avoid confusion.

362. 466 U.S. 688 (1984). *Strickland* created a two pronged test, which requires a defendant to show: (1) that counsel's performance "fell below an objective standard of reasonableness," and (2) that defendant was prejudiced by counsel's deficient performance. *Id.* at 669.

363. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) Pub. L. 104-132, 110 Stat. 1214 (1996) (codified in 28 U.S.C. §§ 2244-2266).

364. 529 U.S. at 369 n.2.

The victim was found dead in his home on Henry Street in Danville, Virginia on November 3, 1985.[365] Finding no signs of struggle, officials initially attributed the death to blood alcohol poisoning. Six months later, however, the police received an unsigned letter from an inmate of the city jail who confessed to "killing that man down on Henry Street" and several other crimes.[366] The letter was traced to Williams, and he subsequently gave a statement to the police in which he admitted striking Stone in the chest and taking three dollars from his wallet after Stone had refused to loan it to him.[367]

Williams was convicted of robbery and capital murder. The State introduced two state-employed "expert" witnesses in aggravation who predicted that Williams would pose a serious continuing threat to society.[368] The State also produced evidence of ten other violent crimes that he had committed in the past, including an assault on an elderly woman who was left in a "vegetative state" and was not expected to recover.[369] In mitigation, trial counsel presented the defendant's mother, two neighbors (one of whom he spotted in the courtroom and put on the stand without knowing exactly what she would say), and a tape-recording of a statement by a psychiatrist saying that Williams had removed the bullets from a gun in an earlier robbery so as not to hurt anyone.[370] The judge followed the recommendation of the jury and imposed the death sentence.[371]

In 1988, the defendant filed a state post conviction petition, alleging that counsel was ineffective for failing to investigate in preparation for the sentencing phase. Due to this failure a wealth of mitigation evidence that had been readily available was never presented to the jury. For example, defense counsel could have called correctional officers who were willing to testify that Williams was not dangerous and had in fact received commendations for helping to uncover a drug ring in prison. A prominent member of the community, one who had met Williams in jail in connection with a prison ministry program, had also phoned defense counsel, offering to testify on Williams' behalf, but defense counsel never returned the phone call.

Most importantly, defense counsel failed to present any evidence relating to Williams' traumatic childhood. Documents prepared in connection with Williams' juvenile commitment when he was eleven years old, after his parents had been imprisoned for criminal neglect, revealed that he was "borderline mentally retarded" and had suffered repeated head injuries, which could have resulted in organic mental impairment.[372] These documents also

365. *Id.* at 367.
366. *Id.*
367. *Id.* at 367-68.
368. *Id.* at 368-69.
369. *Id.* at 368.
370. *Id.* at 369.
371. *Id.* at 370.
372. *Id.*

dramatically described a history of continued mistreatment, abuse, and neglect.[373] Based on this evidence, Judge Ingram, who had presided over the original trial and imposed the death sentence on Williams, concluded that defense counsel was ineffective and that Williams had been prejudiced by counsel's deficient performance because, in the trial judge's view, there was a reasonable probability that had this evidence been presented, the jury would have spared Williams' life.[374]

The Virginia Supreme Court, assuming without deciding that counsel was ineffective, nevertheless disagreed with the original trial judge that Williams had suffered sufficient prejudice under the second prong of the *Strickland* test.[375] Adding an additional requirement to the prejudice analysis, based upon its reading of *Lockhart v. Fretwell*,[376] the Virginia Supreme Court found Williams had not shown that his sentencing hearing was "fundamentally unfair" and denied relief.[377]

Having exhausted his state remedies, Williams then filed a writ of habeas corpus in federal district court.[378] The District Court first addressed the issue of counsel's ineffectiveness and catalogued five categories of mitigation not brought out by trial counsel: (1) evidence of Williams' background; (2) evidence of physical abuse by his father; (3) testimony by correctional officers that he adapted well to a structured environment and was not dangerous while in prison; (4) prominent character witnesses who would have testified on his behalf; and (5) evidence of petitioner's borderline mental retardation.[379]

The federal district judge, like the state trial judge, found that defense counsel's performance fell below the norm of reasonable performance in a capital case. The judge then ruled that the Virginia Supreme Court had failed to carefully read the record, leading it to an erroneous factual conclusion, and had applied the wrong legal standard in determining prejudice by grafting an additional fundamental unfairness requirement to *Strickland's* outcome determination test.[380] In order to vacate Williams' death sentence and order a new sentencing hearing, however, the federal court had to comply with the new requirements of the AEDPA,[381] which significantly cut back the power of federal courts on federal habeas review of state convictions.

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373. *Id.*
374. *Id.* at 371.
375. *Id.*
376. 506 U.S. 364 (1993).
377. Williams v. Warden, 487 S.E.2d 194, 199-200 (Va. 1997).
378. 529 U.S. at 362.
379. *Id.* at 373 n.4.
380. *Id.* at 373.
381. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996) (codified in 28 U.S.C. §§ 2244-2266).

### *1. Historical Background of the AEDPA*

The AEDPA, passed by the 104th Congress, was the result of long agitation and attempts to reform habeas corpus relief. In order to understand the implications of the new act, it is helpful to understand the unique role the writ of habeas corpus has played in American history. Initially the writ was viewed as a protection only against the abuse of power by the federal government. Accordingly, the Judiciary Act of 1789 made the writ available only to federal prisoners and prohibited any inquiry by the federal courts into the propriety of state custody.[382]

By 1867, tracking concern for the protection of black citizens from abuses by state governments in the aftermath of the Civil War, the reach of the writ was extended to state prisoners as well by providing that federal courts "shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States."[383]

Of course, since the Bill of Rights did not apply to the states at that time,[384] the impact of this extension of habeas corpus jurisdiction to state prisoners did not reach full flower until the Warren Court era during the decade of 1960s. During that decade, the Warren Court incorporated most of the provisions of the Bill of Rights and applied them to the states via the Fourteenth Amendment.[385] These decisions, which transformed state criminal procedure, responded to an increasing awareness that state courts were failing to protect racial minorities from abusive law enforcement practices at a time when these groups were attempting to exercise their political rights and participate in the democratic process.[386] Images on national television of police beating peaceful civil rights protestors, and the documentation of dragnet searches and coerced confessions obtained in back rooms of police stations, provided justification for federal intervention to protect basic constitutional rights.[387]

Many of these decisions, collectively known as the Criminal Law Revolution, were controversial.[388] Because the Supreme Court could review only a limited number of state criminal cases each term, the Court lacked an effec-

382. Act of Sept. 24, 1789, ch. 20, § 14 , 1 Stat 73, (1789).

383. Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385 (1867).

384. Barron v. Baltimore, 32 U.S. 243 (1833).

385. *See generally* BODENHAMER & ELY, THE BILL OF RIGHTS IN MODERN AMERICA (1993)

386. *Id.* at 138.

387. *Id.*

388. The controversy over *Mapp v. Ohio*, 367 U.S. 643 (1961) which ruled that evidence obtained in violation of the Fourth Amendment was inadmissible in state cases, was overshadowed only by *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966) which mandated similar restrictions on the admissibility of confessions. *See* Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L. Q. 59, 119 (1989).

tive means of implementing its decisions in state courts. The Warren Court thus turned to the writ of habeas corpus and made the writ (and thus each federal district court) its agent for the enforcement of its new criminal procedure decisions. In 1963, the United States Supreme Court decided three landmark cases, *Fay v. Noia*,[389] *Townsend v. Sain*,[390] and *Sanders v. United States*.[391] In the aggregate, these cases cut through the procedural thicket previously shielding state court decisions and facilitated access to federal courts to correct violations of the federal Constitution and the Bill of Rights. However, these Supreme Court decisions also affected the balance of power between state and federal government, with respect to control over the criminal justice system, resulting in the balance of power shifting dramatically to the federal judiciary.

Subsequently, both the Burger and Rehnquist Courts modified several of these habeas decisions, moving in the direction of more deference to state court decisions and making it harder for federal courts to effectively review state court convictions.[392] Spurred by rising crime rates, members of Congress were also concerned that the pendulum had swung too far in favor of defendants' rights and wished to return the control of the administration of criminal justice to the states.[393] Even so, few lawyers and judges expected the sweeping changes wrought by the AEDPA in 1996. The new Act reduced the time for filing habeas petitions to one year after the close of state court proceedings and created many other barriers to federal review.[394]

For example, prior to the AEDPA, although factual determinations by state court judges were presumed correct, determinations of federal law or mixed questions of fact and law were reviewed *de novo* by the federal court.[395] After the AEDPA, not only was the presumption of correctness for state factual determinations retained,[396] but the power of a federal court to conduct *de novo* review of questions of federal constitutional law or mixed questions of law and fact was restricted. The controlling section of the AEDPA at issue in the *Williams* case was 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect

389. 372 U.S. 391 (1963).

390. 372 U.S. 293 (1963).

391. 373 U.S. 1 (1963).

392. *See* BODENHAMER & ELY, *supra* note 384, at 101.

393. *Id.* at 102.

394. *See generally* Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After The Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997).

395. *See* Thompson v. Keohane, 516 U.S. 99 (1995) (holding that whether a suspect was "in custody" for *Miranda* purposes was a mixed question of fact and law and thus entitled to de novo review by the federal court).

396. 28 U.S.C. § 2254(e)(1) (1996).

> to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was *contrary to, or involved an unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[397]

The District Court, applying this provision, held that the Virginia Supreme Court had misapplied the *Strickland* test, a rule clearly established by Supreme Court precedent, and therefore that its decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" under section 2254(d)(1).[398]

The Fourth Circuit Court of Appeals reversed, ruling that the Virginia Supreme Court's application of *Strickland* was not "unreasonable" as required by the AEDPA because it could not be said that *all* reasonable jurists would disagree with it.[399] On appeal, the Supreme Court fragmented, requiring two separate opinions to resolve the case. Justice Stevens writing for Justices Souter, Ginsburg, Breyer, O'Connor, and Kennedy, delivered the opinion of the Court on the substantive issue, holding that counsel was ineffective under *Strickland*.[400] However, Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Kennedy, Thomas, and Scalia, delivered the opinion of the Court regarding the AEDPA issue, finding that section 2254(d)(1) required a state court's decision to be both incorrect and unreasonable, when dealing with the application of facts to a correctly stated rule of law.[401] This majority then split over the issue of reasonableness. Justices O'Connor and Kennedy believed the Virginia Supreme Court's decision was an unreasonable application of *Strickland* and thus joined Justice Stevens in reversing Williams' death sentence.[402] Chief Justice Rehnquist, believing the Virginia Supreme Court's decision was not unreasonable, filed an opinion concurring in part and dissenting in part, which was joined by Justices Scalia and Thomas.[403]

### *2. The Ineffective Assistance of Counsel Claim*

Justice Stevens, delivering the opinion of the Court on the issue of ineffective assistance of counsel, noted under *Strickland*, that defendant:

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397. 28 U.S.C. § 2254(d) (1996) (emphasis added).
398. 529 U.S. at 374.
399. 163 F.3d 860 (4th Cir. 1998).
400. 529 U.S. at 367.
401. *Id.* at 379.
402. *Id.* at 385-91.
403. *Id.* at 416.

> must show counsel's representation fell below an objective standard of reasonableness [and] that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[404]

Justice Stevens began his analysis of the performance prong of this test by pointing out that trial counsel did not begin to prepare for the sentencing phase until one week prior to trial.[405] Moreover, counsel failed to investigate or uncover extensive records documenting Williams' "nightmarish" childhood, not because of a strategic decision, but because trial counsel thought state law barred the use of such records. Had counsel investigated the matter, they would have found, *inter alia*, that Williams' parents were imprisoned for neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, and that Williams was borderline mentally retarded and did not advance past the sixth grade. An investigation would also have discovered that in the structured environment of prison, Williams had earned a carpentry degree and had received commendations from officials for helping to uncover a prison drug ring.[406]

With respect to the prejudice prong, Justice Stevens viewed as significant the fact that the judge on state collateral review was the original trial judge who had heard the case.[407] Justice Stevens concluded that there was a reasonable probability this mitigating evidence would have changed the jury's mind about sentencing Williams to death.[408] Justice Stevens concluded that the state trial judge had correctly analyzed the ineffectiveness claim under *Strickland* while the Virginia Supreme Court had not.[409]

For Justice Stevens, since the Virginia Supreme Court's decision was incorrect, it was therefore "contrary to or an unreasonable application of *Strickland* within the meaning of 28 U.S.C. § 2254(d)(1).[410] Justices O'Connor and Kennedy, while agreeing with Justice Stevens that Williams' counsel was ineffective, disagreed with this interpretation of the AEDPA provision.

### *3. The Scope of Habeas Relief Under Section 2254(d)(1)*

Justice O'Connor, writing for a majority, found that Justice Stevens failed to give independent meaning to both the "contrary to" and "unreasonable application of" phrases in section 2254(d)(1). Applying a cardinal principle of statutory construction to give effect, wherever possible, to every

404. *Id.* at 390-91 (quoting *Strickland*, 466 U.S. at 688, 694).
405. *Id.* at 395.
406. *Id.* at 396.
407. *Id.* at 396-97.
408. *Id*
409. *Id.* at 398.
410. *Id.* at 399.

clause and word of an enactment, she then bifurcated the statute into two separate categories where habeas relief was permitted. This was necessary, said Justice O'Connor, to effectuate the intent of Congress, which had passed the AEDPA to reduce delay and bring finality to state court convictions by deliberately restricting the power of federal courts to order retrials of state criminal cases via habeas review.[411]

Justice O'Connor then attempted to define the two categories in which habeas relief could be granted. First, a federal court could grant relief when the state court's decision was "contrary to" clearly established Supreme Court precedent. The phrase "contrary to" meant "mutually opposed" or "substantially different from the relevant precedent of this Court."[412] Thus if the state court applied the wrong legal rule, say, for example, a "preponderance of the evidence" test instead of *Strickland's* "reasonable probability" test, in analyzing an ineffectiveness claim, the state court's decision would be "contrary to" clearly established precedent, and a federal court could grant relief.

Justice O'Connor then postulated a second category of cases: the "run-of-the-mill" case where the correct legal rule has been identified, but the federal court, in its judgment, believed that the state court had applied the rule incorrectly to the facts of that particular case.[413] Here, Justice O'Connor declared that the "unreasonable application" clause of section 2254(d)(1) should control because: "Although the state-court decision may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case, the decision is not "mutually opposed" to *Strickland* itself."[414]

Thus, in a case where the correct rule of law has been incorrectly applied, the federal court, under the AEDPA, must also find that the state court's application was "unreasonable." Using legislative history to support this interpretation, Justice O'Connor cited the following remarks of Senator Specter: "[U]nder the [AEDPA] deference will be owed to State courts' decisions on the application of Federal law to the facts. Unless it is unreasonable, a State court's decision applying the law to the facts will be upheld."[415]

Justice O'Connor then muddied the waters considerably by postulating a second kind of misapplication. The Fourth Circuit had held that the "unreasonable application" clause should also govern an incorrect extension or refusal to extend a legal principle to a new context.[416] Suggesting only that this holding "may perhaps be correct," Justice O'Connor admitted that an at-

411. *Id.* at 404-05.
412. *Id.*
413. *Id.* at 406.
414. *Id.*
415. *Id.* at 408 (citing 142 Cong. Rec. 7799 (1996) (remarks of Sen. Specter)). Justice Scalia, while joining Justice O'Connor's opinion in all other respects, expressly disassociated himself from this use of legislative history. *Id.* at 399.
416. Green v. French, 143 F.3d 865, 869-70 (4th Cir. 1998).

tempt to apply the "unreasonable application" clause to this nebulous category of cases did have "some problems of precision." With refreshing candor, Justice O'Connor recognized:

> Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context. Indeed, on the one hand, in some cases it will be hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts. On the other hand, in many of the same cases it will also be difficult to distinguish a decision involving an unreasonable extension of a legal principle from a decision that "arrives at a conclusion opposite to that reached by this Court on a question of law."[417]

Retreating from this quagmire, Justice O'Connor saved this issue for another day, concluding that it would be unnecessary in *Williams* to decide how such "extension of legal principle" cases should be handled under section 2254(d)(1). With respect, it is submitted that such a retreat was neither candid nor possible. As implicitly recognized in the above quoted passage, extension of the "unreasonable application" clause to cases involving an extension of a legal principle, would swallow the very dichotomy Justice O'Connor sought to create. Indeed all members of the Court agreed that the Fourth Circuit had incorrectly extended a legal principle (fundamental unfairness), which it derived from *Lockhart v. Fretwell*[418] to create an additional hurdle for a defendant to overcome when raising an ineffectiveness claim.[419] When it came time to apply her analysis to the facts of *Williams*, Justice O'Connor treated that extension of the *Lockhart* principle as falling within the "contrary to" category, which does not require a showing of unreasonableness.[420]

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417. *Terry Williams*, 529 U.S. at 362, 408 (quoting her own earlier example of a case which would be classified as falling within the "contrary to" category). *Id.* at 405.

418. 506 U.S. 364 (1993).

419. Even Justice Rehnquist, dissenting, conceded that such an extension was "improper" but argued that the Virginia Supreme Court had not relied upon that principle, despite the citation of *Lockhart* and several express references to the principle in the state court's opinion. *Terry Williams*, 529 U.S. at 417.

420. In *Lockhart*, defendant's death sentence had been based upon an aggravating circumstance (murder for pecuniary gain) which, at the time of his trial had been ruled unconstitutional by the Eighth Circuit. If defense counsel had brought this precedent to the trial court's attention, the outcome would have obviously been different because presumably the aggravating circumstance would not have been used. However, the Supreme Court later held that the use of this aggravating circumstance was permissible. Therefore, while defense counsel had made an error which would have otherwise qualify for relief under both the performance and prejudice prongs as set forth in *Strickland*, the error didn't deprive defendant of any actual constitutional right. So when the case reached the Supreme Court on habeas review, the Court held, in the special circumstances of that case, that there had been no prejudice because the defendant had not been denied fundamental fairness. In *Williams*, Justice O'Connor held that the Fourth Circuit's expansive attempt to extend a "fundamental fairness" requirement to all

Justice O'Connor then turned to the definition of "unreasonable" for purposes of section 2254(d)(1). Acknowledging that this too was a difficult inquiry, she stressed that a federal court cannot issue a writ simply because it concludes the state court applied federal law incorrectly or erroneously. The erroneous application must be unreasonable. While declining to give any further guidance, Justice O'Connor did make a point of expressly rejecting the standard of reasonableness employed by the Court of Appeals for the Fourth Circuit. That court had held that habeas corpus relief was prohibited under section 2254(d)(1) unless the State Court "decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable."[421] That test, as Justice Stevens pointed out, would be so restrictive as to deny relief in all but the most outrageous cases. Indeed it would require federal courts (including the United States Supreme Court) to defer to state judges' interpretation of federal law in almost every case.[422] Agreeing, Justice O'Connor, speaking for the majority of the Court, held that the Fourth Circuit's standard, that *all* reasonable jurists would have to agree that the state court decision was unreasonable, was incorrect.[423] The proper inquiry by the federal court, Justice O'Connor said, should be whether the state court's application of clearly established federal law was "objectively unreasonable." The "all reasonable jurists" test, according to Justice O'Connor would transform the inquiry into a subjective test.[424]

Applying her analysis to the *Williams* case, Justice O'Connor (and Justice Kennedy) found the decision of the Virginia Supreme Court to be an unreasonable application of *Strickland.* In Justice O'Connor's view, there was a reasonable probability that the jury's sentence of death would have been different, observing that as a consequence of defense counsel's failure to adequately investigate and present mitigating evidence "his generic, unapologetic closing argument . . . provided the jury with no reasons to spare petitioner's life."[425]

The Virginia Supreme Court and the Fourth Circuit had believed that the evidence that Williams presented a future danger to society was overwhelming and thus outweighed the omitted mitigation evidence, especially since Williams had set fire to his cell while awaiting trial and had admitted to having visions of harming other inmates.[426] However, Justice O'Connor found that the Virginia Supreme Court failed to consider the "totality" of the mitigation evidence.[427] This disagreement over the weight to be given the

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ineffective assistance of counsel cases was "contrary to *Strickland.*" *Terry Williams,* 529 U.S. at 414.

421. Green v. French, 143 F.3d at 865.

422. *Terry Williams,* 529 U.S. at 362, 377 (Stevens, J.).

423. *Id.* at 410.

424. *Id.*

425. *Id.* at 416.

426. *Id.* at 418-19.

427. *Id.* at 416. Justice O'Connor was being tactful. The Virginia Supreme Court charac-

mitigation evidence was apparently enough to make the state-court decision "unreasonable" as well as incorrect. Thus Justices O'Connor and Kennedy joined with the Stevens' plurality in forming a majority for reversal of Williams' death sentence. However, had they found that the state court decision was merely incorrect, under the AEDPA, the federal courts would have been powerless to reverse this case, and Terry Williams would have been executed despite a determination by the original trial judge, a federal district judge, and a majority of the members of the U.S. Supreme Court, that he had been denied the effective representation to which he was entitled by the Sixth Amendment of the Constitution.

### *I.* Michael Williams v. Taylor[428]

This case modified the harshness of 28 U.S.C. § 2254(e)(2), a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[429] This statutory provision ordinarily bars an evidentiary hearing on a claim in federal court, if a habeas petitioner "failed" to develop a factual basis for the claim in state court proceedings.

On February 27, 1993, Michael Williams and Jeffrey Cruse were dropped off in front of a local store in rural Cumberland County, Virginia. They intended to rob the employees and customers in the store, but found the store had closed.[430] Undaunted, the pair proceeded to the home of the owners, Mr. and Mrs. Keller, whom Williams knew.[431] They ransacked the house and murdered the Kellers.[432] After loading the valuables from the house into the Kellers' Jeep, they drove to Fredericksburg, Virginia, where they sold some of the property and set fire to the Jeep.[433] Williams then fled to Florida.[434]

Acting on a lead, police questioned Cruse.[435] Cruse obtained counsel and entered into a plea bargain with the State.[436] The State agreed not to pursue the death penalty against Cruse in exchange for his disclosure of the details

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terized the mitigation evidence as follows: "At most, this evidence would have shown that numerous people, mostly relatives, thought that [Williams] was nonviolent and could cope very well in a structured environment." Williams v. Warden, 487 S.E.2d 194, 200 (1997). It is thus clear from the Virginia Supreme Court's own summary of the mitigation evidence that it had either not read the record carefully or had ignored entire aspects of it, especially regarding defendant's history of abuse and mental condition.

428. 529 U.S. 420 (2000). There were two *Williams v. Taylor* decisions rendered by the Supreme Court during the term. Therefore the first name is added to avoid confusion.

429. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) Pub. L. 104-132, 110 Stat. 1214 (1996) codified in 28 U.S.C. §§ 2244-2266.

430. 529 U.S. at 424.

431. *Id.*

432. *Id.* at 425.

433. *Id.* at 425-26.

434. *Id.* at 426.

435. *Id.*

436. *Id.*

of the crime.[437] Cruse then told police about the murders, placing most of the blame upon Williams. Cruse, however, neglected to tell the police that he raped Mrs. Keller.[438] When the State found out about the rape, it revoked the plea bargain and charged Cruse with capital murder as well.[439]

Nevertheless, at trial, Cruse was the State's main witness against Williams.[440] Cruse testified that Williams raped Mrs. Keller and shot both victims several times to make sure they were dead.[441] The jury also heard the circumstances of the proposed "plea agreement" between Cruse and the State, which was subsequently withdrawn.[442] Williams took the stand in his own defense and testified that he shot Mr. Keller only once.[443] He denied raping or shooting Mrs. Keller.[444] The jury convicted Williams and recommended death, which was imposed by the trial judge.[445] Thereafter, Cruse pled guilty to capital murder of Mrs. Keller and first-degree murder of Mr. Keller.[446] However, he received a life sentence after the prosecution asked the Court to spare his life because he testified against Williams.[447]

After an unsuccessful direct appeal and state habeas proceedings, Williams filed for federal habeas corpus relief in the Eastern District of Virginia on November 20, 1996, alleging juror bias and prosecutorial misconduct.[448] He made three claims: (1) that the State violated *Brady v. Maryland*[449] by failing to provide him with a confidential pre-trial psychiatric report on Cruse, which suggested that Cruse had only vague memories of the night of the murders because he was intoxicated with alcohol and marijuana at the time, (2) that Bonnie Stinett, the foreperson of the jury, had falsely denied during voir dire that she was related to any law enforcement agents who might testify at trial when in fact she had been formerly married to Deputy Sheriff Meinhard for seventeen years (Meinhard, who had interrogated Cruse and investigated the crime scene was the State's lead-off witness at trial), and (3) that Stinett also denied that any of the lawyers in the case had ever represented her or any member of her family privately, when in fact one of the prosecuting attorneys, Woodson, had represented her in the divorce proceedings against Meinhard.[450]

437. *Id.*
438. *Id.*
439. *Id.* at 426.
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.*
445. *Id.* at 426-27.
446. *Id.* at 427.
447. *Id.*
448. *Id.*
449. 373 U.S. 83 (1963).
450. *Williams*, 529 U.S. at 427.

Initially, the District Court granted an evidentiary hearing on claims two and three.[451] However, before the hearing could be held, the State applied for an emergency stay and a petition for writ of mandamus and prohibition in the Court of Appeals, arguing that the AEDPA barred such an evidentiary hearing.[452] The provision at issue, 28 U.S.C. § 2254(e)(2), provides, in pertinent part:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that (A) The claim relies on -i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[453]

The State argued that Williams had "failed to develop" his claims in state court as required by the AEDPA, and therefore, no evidentiary hearing could be held in federal court on these issues.[454] The Court of Appeals remanded the matter back to the District Court with instructions to apply the new statute to Williams' request for an evidentiary hearing.[455] The District Court, on remand, held that Williams had failed to satisfy the requirements of 28 U.S.C. § 2254(e)(2), and therefore vacated its earlier order granting an evidentiary hearing on claims two and three.[456] The Court of Appeals affirmed, and the United States Supreme Court reversed in part.[457]

Justice Kennedy, writing for a unanimous Court, acknowledged at the outset that Williams had not established a factual basis for his claims in state court.[458] In fact, he did not even raise these claims until he filed his federal habeas corpus petition in the District Court.[459] Moreover, Williams also conceded that he did not come within the narrow exception created for those who can establish their innocence by clear and convincing evidence as required by section 2254(e)(2)(B).[460] The State argued that once it is established that a habeas petitioner "failed to develop" his claims in state court, the statute does not permit a federal court to inquire further into the cause of

451. *Id.*
452. *Id.* at 427-28.
453. 28 U.S.C. § 2254(e)(2).
454. *Williams*, 529 U.S. at 428.
455. *Id.*
456. *Id.*
457. *Id.* at 428-29.
458. *Id.* at 429.
459. *Id.*
460. *Id.* at 430.

that failure.[461] However, Williams argued that the "failed to develop" clause must be read as meaning a lack of diligence in developing the claims in state court.[462] Justice Kennedy agreed with Williams stating:

> To say a person has failed in a duty implies he did not take the necessary steps to fulfill it. . . . In this sense, a person is not at fault when his diligent efforts to perform an act are thwarted . . . by the conduct of another or by happenstance. Fault lies, in those circumstances, either with the person who interfered with the accomplishment of the act or with no one at all.[463]

Justice Kennedy illustrated the point by observing:

> If the opening clause of § 2254(e)(2) covers a request for an evidentiary hearing on a claim which . . . remained undeveloped in state court, because . . . the prosecution concealed the facts, a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim. . . . The `failed to develop' clause does not bear this harsh reading, which would attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court.[464]

Justice Kennedy then found that with respect to claims two and three, Williams was not at fault for "failing to develop" the facts in state court.[465] Indeed, in state habeas proceedings, Williams' counsel had requested funds for an investigator to "examine all circumstances relating to the empanelment of the jury and the jury's consideration of the case."[466] The prosecution opposed this motion and the Virginia Supreme Court denied it, thus depriving the defendant of the opportunity to develop this claim in state court.[467] Similarly, there was no reason for defense counsel to suspect that the prosecutor had represented the juror on her divorce.[468] It is true such information was available in public records, but Justice Kennedy observed that, "we should be surprised, to say the least, if a district court . . . were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror."[469]

With respect to the first claim, however, which charged the prosecutor with a *Brady* violation for failing to provide him with the psychiatric report on the State's chief witness Cruse, the Supreme Court held that defense counsel was not diligent.[470] There were sufficient references to this psychiat-

461. *Id.*
462. *Id.*
463. *Id.* at 432.
464. *Id.* at 434-35.
465. *Id.* at 437.
466. *Id.* at 442.
467. *Id.*
468. *Id.* at 443.
469. *Id.*
470. *Id.* at 449-50.

ric report in the transcript of Cruse's sentencing hearing to inform defense counsel of the existence of the report.[471] Therefore, state habeas counsel could have made an effort to obtain this report so that the favorable information in could be raised in the state habeas proceeding. Williams' state habeas counsel did in fact write a letter to the prosecutor requesting "[a]ll reports of physical and mental examinations, scientific tests, or experiments conducted in connection with the investigation of the offense, including but not limited to . . . [a]ll psychological tests . . . performed upon any prosecution witness and all documents referring or relating to such tests."[472] Absent a court order, however, the prosecutor refused, and defense counsel apparently did not pursue the matter further.[473] Because he did not pursue the matter further, Williams' defense counsel was not diligent, and therefore "failed to develop" the basis for his claim in state court, triggering the application of section 2254(e)(2). Thus, an evidentiary hearing on that issue was barred by the AEDPA.

*Michael Williams v. Taylor* is of tremendous importance to both trial and appellate counsel. First, it is a unanimous opinion by the Court, which itself carries great weight. Second, it makes it more difficult for the state to deny defense discovery requests and then urge the application of the AEDPA to block any further inquiry in federal court by way of an evidentiary hearing.

But *Williams* also sends a warning signal to defense counsel, highlighting the necessity to make a *bona fide* documented attempt to raise and investigate every claimed constitutional violation before a federal habeas case is filed. The Court's conclusion that defense counsel's letter to the prosecutor requesting copies of psychological reports was insufficient to show diligence, mandates that formal discovery motions must be filed and a court record made regarding all discovery requests. Requesting the prosecutor to state on the record that the items sought do not exist would be one way to guard against the AEDPA coming back to haunt a defendant who belatedly uncovers a significant discovery violation.

## V. RIGHT TO SELF-REPRESENTATION

### *A.* Martinez v. California[474]

In an opinion skeptical of the value of the right to self-representation, the Court unanimously agreed that a state, which protects the right to make *pro se* filings, can force a defendant, against his will, to accept representation on direct appeal by a court-appointed counsel.[475] In contrast to the right

471. *Id.* at 438-39.
472. *Id.* at 439.
473. *Id.*
474. 528 U.S. 152 (2000).
475. *Id.*

to self-representation at trial, established in *Faretta v. California*,[476] the Court found that there is no constitutional right to represent oneself on appeal.[477]

Martinez, who worked as a paralegal in a law office, was accused of converting to his own account an amount of $6,000, which belonged to a client.[478] Representing himself at trial, he was convicted of embezzlement.[479] Because he had three prior convictions, he was sentenced to twenty-five years to life.[480] On appeal, he moved to represent himself based upon *Faretta*[481].

The California Court of Appeal denied his motion based on prior California precedent that had held that there was no constitutional right to represent oneself on appeal.[482] The Supreme Court granted certiorari to resolve a deep split among both the states and the lower federal courts on the issue.[483] Justice Stevens delivered the opinion of the Court, affirming the denial, with Kennedy and Breyer filing concurring opinions. Justice Scalia wrote a separate opinion, concurring in the result.[484]

Distinguishing *Faretta*, Justice Stevens pointed out that there were significant differences both historically and structurally between the right to self-representation at trial and on appeal.[485] With respect to historical antecedents, he noted first that there was little historical evidence supporting a right to self-representation on appeal.[486] Indeed, there was no right to appeal at all in a criminal case at common law.[487] Moreover, although all states had some kind of discretionary appellate review, the right to appellate review of a criminal case was not recognized as a matter of state constitutional law until 1899.[488] Therefore, Justice Stevens concluded, in the absence of historical precedent, and in view of fact that the right to appeal was itself of recent ori-

476. 422 U.S. 806 (1975).

477. *Martinez*, 528 U.S. 152.

478. *Id.* at 154-55.

479. *Id.* at 155.

480. *Id.*

481. *Id.*

482. *Id.* (citing People v. Scott, 64 Cal. App. 4th 550 (1998)).

483. *Id.* at 155. State court decisions in Arkansas, Indiana, Pennsylvania, and Texas recognized the right of self-representation on appeal, while California, Florida and Tennessee did not. The Circuit Courts of Appeal were similarly split. *Myers v. Collins*, 8 F.3d 249, 252 (5th Cir. 1993), *Chamberlain v. Ericksen*, 744 F.2d 628, 630 (8th Cir. 1984), and *Campbell v. Blodgett*, 940 F.2d 549 (9th Cir. 1991) recognized the right, while *United States v. Gillis*, 773 F.2d 549, 560 (4th Cir. 1985), and *Lumbert v. Finley*, 735 F.2d 239 (7th Cir. 1984) did not.

484. *Martinez*, 528 U.S. 152.

485. *Id.* at 156-62.

486. *Id.* at 156-59.

487. *Id.* at 159. J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 308-10 (1883).

488. *Martinez*, 528 U.S. at 159 n.7 (citing Lobsenz, *A Constitutional Right to an Appeal; Guarding against Unreasonable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375, 376 (1985)). Washington was the first state to "constitutionalize" the right of appeal. *Id.*

gin, it could not be said that there was any "long-respected right of self-representation on appeal."[489]

Noting that *Faretta* was also grounded in part upon a respect for individual autonomy and traditional distrust of lawyers, Justice Stevens observed that the historical reasons for the suspicion the populace had for lawyers in the early colonial days, when most lawyers were officers of the Crown "bent on the conviction of those who opposed the King's prerogatives"[490] were no longer present today.[491] Justice Stevens acknowledged that an indigent appellant might well be skeptical of a lawyer's undivided loyalty when the same government that is prosecuting him employs his lawyer.[492] He also noted that there are "without question" cases in which counsel's performance is ineffective.[493] Nevertheless Justice Stevens concluded that the risk of disloyalty and incompetence was not sufficient today to conclude that due process was denied by failing to give an appellant the right to self-representation.[494]

Perhaps recognizing that this negative assessment of the value of the right to self-representation could be seen as weakening the rationale for *Faretta*, Justice Kennedy wrote briefly to express his support for the right to self-representation at trial.[495] Justice Breyer, on the other hand, wrote separately to recognize that trial judges "closer to the firing line have sometimes expressed dismay about the practical consequences of [*Faretta*]."[496] In the absence of empirical research that could shed light on how the right of self-representation impacts fairness, however, Justice Breyer observed that the Court was "not in a position to reconsider the constitutional assumptions that underlie [*Faretta*]."[497]

In a chilling concurring opinion, Justice Scalia stated simply that there was no right to self-representation on appeal because there was no constitutional right to appeal.[498]

## VI. DUE PROCESS IN SENTENCING

### A. Apprendi v. New Jersey[499]

In the last decade, there has been a trend toward creating statutory sentencing enhancements based upon factors that historically have been consid-

489. *Martinez*, 528 U.S. at 159.
490. *Faretta*, 422 U.S. 806, 826 (1975).
491. *Martinez*, 528 U.S. at 156-58.
492. *Id.* at 160.
493. *Id.* at 161.
494. *Id.*
495. *Id.*
496. *Id.* at 164.
497. *Id.* at 164-65.
498. *Id.* at 165.
499. 530 U.S. 466 (2000).

ered by judges to justify a harsher sentence under the existing range of sentences for the offense. In many cases the codification of these aggravating factors has resulted in giving the trial judge the discretion to increase the sentence beyond that which could otherwise be imposed for the underlying substantive offense committed; yet, the determination as to whether the aggravating factor exists has often remained an issue for the trial judge to decide at the sentence hearing. *Apprendi* addresses the question of when a trial judge may make this determination and when due process requires a sentencing enhancement to be determined by a jury beyond a reasonable doubt. A little after 2:00 a.m. on December 22, 1994, Apprendi fired several shots into the home of an African American family that had recently moved into his all-white neighborhood in Vineland, New Jersey.[500] Arrested immediately, Apprendi admitted he did the shooting and stated that he did so because he did not want blacks in the neighborhood. [501]

Charged in a twenty-three-count indictment involving other shootings and various weapons offenses, Apprendi entered into a plea bargain in which he pled guilty to three counts involving unlawful possession of weapons.[502] One of these offenses (possession of a firearm for an unlawful purpose) was linked to the December 22nd shooting incident.[503] The maximum punishment authorized by the legislature for this second degree weapons offense was ten years.[504]

Under the terms of the plea agreement, the remaining twenty counts were dismissed.[505] However, with respect to the December 22nd weapons offense, the plea agreement allowed the state the right to proceed at the sentencing hearing under a hate crimes enhancement statute.[506] This statute provided that if Apprendi's purpose in committing a crime was to "intimidate an individual or group . . . because of [their] race" he would be subject to substantially increased punishment.[507] With respect to the December 22nd weapons offense, to which Apprendi pled guilty, the penalty could be enhanced upwards to a maximum of twenty years.[508]

At the sentencing hearing the state introduced evidence to support the hate crime enhancement.[509] Apprendi testified that he was not racially moti-

500. *Id.* at 466.
501. *Id.*
502. *Id.* at 469.
503. *Id.*
504. *Id.*
505. *Id.*
506. N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000).
507. *Apprendi*, 530 U.S. at 469.
508. Since one of the other offenses Apprendi pled guilty to was also a second degree offense punishable by 10 years imprisonment, his exposure under the plea agreement, in light of the possibility of consecutive sentences was also 20 years. However, this fact was deemed irrelevant by the Court because Apprendi's actual sentence was based upon the use of the enhancement to increase his punishment for the December 22nd offense. *Id.* at 474.
509. *Id.* at 469.

vated and fired into the residence because he was intoxicated.[510] The trial judge concluded "by a *preponderance* of the evidence" that "the crime was motivated by racial bias."[511] As a result of this finding, Apprendi was now, by virtue of the enhancement statute, subject to a prison sentence of not less than ten years nor more than twenty years.[512] The judge sentenced him to twelve years imprisonment on the December 22nd weapons offense.[513]

It was conceded that Apprendi had been adequately advised before he entered his guilty plea to the original charges. He was also aware that the state intended to proceed under the separate sentence enhancement statute and of the potentially heavier sentence that could follow.[514] Apprendi appealed only the sentence imposed.[515] Apprendi argued that the racial motive, which authorized the harsher sentence, could not be determined by a judge using the lower standard of proof which applied at a sentencing hearing.[516] Instead, he asserted, due process required that this element be formally charged and resolved at trial by a jury based upon proof beyond a reasonable doubt.[517]

The state reviewing courts upheld the enhancement statute reasoning that it merely addressed the offender's motive for perpetrating the crime, which was historically only a sentencing factor and not an element of the offense.[518] On appeal the U.S. Supreme Court held five to four that the enhancement statute was unconstitutional because racial motive was in effect an element of the offense for which Apprendi was sentenced.[519] Justice Stevens wrote the Court's opinion, which was joined by Justices Scalia, Souter, Thomas, and Ginsburg. Justice O'Connor wrote a dissenting opinion, joined by the Chief Justice and Justices Kennedy and Breyer.

*Apprendi* continues the examination of enhancement statutes begun by the Court in *Almendarez-Torres v. United States*[520] and *Jones v. United States.*[521] *Apprendi's* rule, stated in its simplest terms, is that "it is unconstitutional for a legislature to remove from the jury the assessment of facts which increases the prescribed range of penalties to which a criminal defendant is

510. *Id.*
511. *Id.* (emphasis added).
512. *Id.*
513. Apprendi received shorter concurrent sentences on the other two charges to which he pled guilty. *Id.*
514. *Id.*
515. *Id.*
516. *Id.*
517. *See Apprendi*, 530 U.S. at 475 n.3 (discussing *In re* Winship, 397 U.S. 358 (1970)).
518. *Apprendi*, 530 U.S. at 469.
519. *Id.*
520. Almendarez-Torres v. United States, 523 U.S. 224 (1998)
521. Jones v. United States, 526 U.S. 227 (1999). See Laurence A. Benner et al., *Criminal Justice in the Supreme Court: A Review of United States Supreme Court Decisions at the Close of the Millennium*, 36 CAL. W. L. REV. 437, 492-95 (2000) for a discussion of *Jones* and *Almendarez-Torres.*

exposed . . . [S]uch facts must [also] be established by proof beyond a reasonable doubt."[522] Hence, because the racial hate motive increased the punishment beyond the maximum for the underlying offense, this fact must be charged, determined by a jury, and proven beyond a reasonable doubt.

Justice Stevens justified this requirement on a review of history and precedent, relying upon *In re Winship* [523] and *Mullaney v. Wilbur.*[524] As Justice Stevens explained:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense re heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections which until that point, unquestionably attached."[525]

In Justice Stevens' view, by adding the new racial motive element (intent to intimidate on the basis of race) to enhance Apprendi's punishment, the State had created a new "crime." [526]The original underlying weapons offense became, in effect, a lesser-included offense to a hate crime, which had the added element of racial motive. It would have been an entirely different matter, Justice Stevens said, if the legislature had merely directed the judge to consider racial motive as a factor that justified giving a sentence toward the higher end of the sentencing range—for example a sentence closer to ten years of incarceration rather than the minimum sentence of five years.[527] Under this scenario, a new crime would not have been created.[528]

Justice O'Connor, in dissent, chided the majority for exalting form over substance since a legislature could decree that the maximum punishment was a range of between five and twenty years for an offense, and then leave it to judicial discretion to *decrease* punishment based upon the judge's determination that the defendant had not acted with a racial motive.[529] Justice Stevens responding to this criticism in a lengthy footnote, observed that such a possibility seemed "remote" since "structural democratic constraints" would discourage a legislature from exposing all citizens to severe punishment that would be out of all proportion to the culpability normally attaching to the offence.[530] He also observed that in addition to this "political check on potentially harsh legislative action" any revision of a criminal offense to avoid the

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522. *Apprendi,* 530 U.S. at 488 (citing Jones v. United States, 526 U.S. 227, 252-53 (1999)) (Stevens, J., concurring).

523. *In re* Winship, 397 U.S. 358 (1970).

524. Mullaney v. Wilbur, 421 U.S. 684 (1975).

525. *Apprendi,* 530 U.S. at 484.

526. *Id.* at 486.

527. *Id.*

528. *Id.* at 488.

529. *Id.* at 543.

530. *Id.* at 488 n.16.

requirements of due process would be questioned by the Court.[531] Noting that there was a difference between facts which aggravate punishment and facts which mitigate punishment, Justice Stevens emphasized that what counted was not form, but effect.[532]

The majority distinguished *McMillan v. Pennsylvania*,[533] in which the Court upheld a statute requiring a mandatory minimum sentence of five years if the defendant was found by a preponderance of the evidence to have visibly possessed a firearm, because the sentence range, which authorized a maximum sentence of ten-years' incarceration, with or without the aggravating factor, remained the same.[534] All that resulted from finding the additional factor in *McMillan* was an increase in the minimum sentence, which was already within the range of authorized punishment.

Justice Stevens claimed in a footnote that *Apprendi* did not overrule *McMillan* but only limited it "to cases which do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict."[535] However, as both the dissent and Justice Thomas, concurring, point out, the logic of *Apprendi* would arguably seem to require a different result since the *amount* of punishment depends upon a fact not found by a jury beyond a reasonable doubt. It might be possible to distinguish *Apprendi* from *McMillan* on the ground that *Apprendi* involved an intent, or *mens rea* element, which, as the majority noted, "is more often than not the *sine qua non* of a violation of a criminal law."[536] However, that attempt, as the dissent suggests, would also seem to run contrary to *Apprendi's* logic. Whether an element is based on intent, conduct or the existence of a circumstance or result, should make no difference. The logic of *Apprendi* dictates that if the element causes a defendant's punishment to be increased beyond what it otherwise would have been, then due process requires a determination of that element by a jury based upon proof beyond a reasonable doubt.[537]

Justice O'Connor's dissent noted that the majority opinion also ignored *Patterson v. New York*.[538] arguing that *Apprendi* is inconsistent with that decision.[539] In *Patterson*, the issue involved a New York statute which reduced second-degree murder to manslaughter if the defense proved that the defen-

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531. *Id.* at 494.
532. *Id.*
533. McMillan v. Pennsylvania, 477 U.S. 79 (1986).
534. *Id.*
535. Apprendi, 530 U.S. at 486 n.13.
536. *Id.* at 2364 n.18. By contrast, the enhancer in *McMillian* was arguably a circumstance (the visibility of the weapon). *But cf.* Jones v. United States, 526 U.S. at 340 (striking down an enhancement based upon a finding of serious bodily injury resulting from a car jacking).
537. *Apprendi*, 530 U.S. at 533.
538. Patterson v. New York, 432 U.S. 197 (1977).
539. *Apprendi*, 530 U.S. at 530-31.

dant killed while under the influence of extreme emotional disturbance.[540] The statute was an expansion of the common law provocation doctrine, which reduced murder to manslaughter and thus lessened the sentencing range.[541] The *Patterson* Court upheld shifting the burden of proof to the defendant on the provocation issue.[542]

As Justice Stevens pointed out, however, *Patterson* is not applicable to the facts of *Apprendi*, because it deals with a defense.[543] Provocation is an issue that arises only if the state has first proven all of the elements of the crime of murder. Provocation, moreover is an affirmative defense and historically it has been permissible to place the burden upon the defendant to prove the existence of affirmative defenses. Therefore *Patterson* would seem to have little to do with sentencing factors which aggravate punishment.

The dissent also argued that *Apprendi* was inconsistent with *Almendarez-Torres v. United States*[544] decided just the previous term. In that case, a federal statute extended the punishment possible for an offense beyond its statutory maximum because of the offender's prior criminal record.[545] The Supreme Court upheld the enhancement in a five to four decision, because recidivism had traditionally been a basis for judicial enhancement of a sentence.[546]

Justice Stevens acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were *contested*."[547] However, Justice Stevens pointed out, the defendant in *Almendarez-Torres* admitted to the earlier convictions.[548] Since the defendant had due process safeguards with respect to the facts underlying those convictions and admitted to their existence there was no contested fact requiring the safeguards at issue in *Apprendi*.[549]

In light of Justice Stevens' acknowledgement and Justice Thomas' concurring opinion, it would seem a safe bet that *Almendarez-Torres* will most likely be limited to its facts and become an extremely narrow exception to the *Apprendi* rule. While joining the Court's opinion, Justice Thomas wrote separately because he believed that "the Constitution requires a broader rule than the Court adopts."[550] Moreover, Justice Thomas confessed that he had erred in joining the majority in *Almendarez-Torres*: "[O]ne of the chief er-

540. N.Y. PENAL LAW § 125.20(2) (McKinney 1975).
541. *Patterson*, 432 U.S. at 202.
542. *See* Leland v. Oregon, 343 U.S. 790 (1952) (upholding Oregon's statute placing the burden of proof for the insanity defense upon the defendant).
543. *Apprendi*, 530 U.S. at 485 n.12.
544. Almendarez-Torres v. United States, 523 U.S. at 239.
545. 8 U.S.C. § 1326(b)(2) (1988).
546. *Almendarez-Torres*, 523 U.S. at 230.
547. *Apprendi*, 530 U.S. at 489-90 (emphasis added).
548. *Id.* at 488.
549. *Id.*
550. *Id.* at 499.

rors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discover whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence."[551]

*Almendarez-Torres* was a five to four decision, with Justice Thomas's vote making the margin of difference. Obviously, if the issue in *Almendarez-Torres* were to be revisited, the exception for prior convictions would likely not continue to stand.

For Justice Thomas, *Apprendi* "turns on the simple question of what constitutes a 'crime.'"[552] He argued that history convincingly demonstrates that a "crime" includes every fact that forms "the basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)."[553] On this view then, any fact used to establish punishment would be covered by *Apprendi's* rule requiring the due process safeguards (i.e. jury determination and standard of proof beyond a reasonable doubt).

If Justice Thomas is correct, this throws into doubt not only *Almendarez-Torres* but also *McMillan,* and typical (judicially determined) enhancements in drug offenses based upon the quantity of drugs sold or possessed [554] as well as similar enhancements under the federal Sentencing Guidelines.[555] Moreover death penalty statutes such as that previously upheld in *Walton v. Arizona*[556] which direct a judge (rather than a jury) to determine whether an aggravating circumstance exists, thus making the defendant eligible for death, would also be called into serious question.[557] Indeed, Justice O'Connor, in dissent, conceded that in *Walton* the judge's finding subjected a defendant to punishment which exceeded the maximum punishment which could otherwise be imposed on the basis of the jury's verdict. She argued:

> If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10 year increase in the maximum sentence to which a defendant is exposed.[558]

By the same logic, then, after *Apprendi*, if a State *cannot* remove from the jury a factual determination that results in only a ten year increase in the maximum sentence to which a defendant is exposed, as *Apprendi* holds it cannot, it is inconceivable that a State could do the same with respect to a factual determination that makes the difference between life and death.

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551. *Id.* at 520.
552. *Id.* at 499.
553. *Id.* at 501.
554. *See* Alan Elllis et al., *Apprehending and Appreciating* Apprendi, 15 WTR CRIM. JUST. 16 (2001) (discussing *Apprendi's* impact on drug cases).
555. *Id.* at 18.
556. Walton v. Arizona, 497 U.S. 639 (1990).
557. *Apprendi*, 530 U.S. at 522-23 (Thomas, J., concurring opinion).
558. *Id.* at 537 (O'Connor J., dissenting opinion).

All of this, of course, was foreshadowed in *Jones v. United States*[559] where the Court, in striking down an enhancement based upon a judicial determination of serious bodily injury, attempted an elaborate factors analysis to determine whether an enhancement was an element of the crime or merely a traditional sentencing factor.[560] Justice Thomas is correct. After *Apprendi* it is clear that this initial approach has failed. It has failed because of the power of *Apprendi's* logic, and that power comes from the clear command of the Constitution itself. Noting that the dissenters could provide no "coherent alternative" to counter the force of this logic, Justice Scalia astutely summed up the essence of *Apprendi* in his concurring opinion:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee—what it has assumed to guarantee throughout history—the right to have a jury determine those facts that determine the maximum sentence the law allows. . . . [T]he [jury trial] guarantee . . . has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.[561]

Another issue for the future, and one not addressed in the *Apprendi* decision, is retroactivity. In *Teague v. Lane*[562] the Court held that new rules of constitutional criminal procedure announced by the United States Supreme Court will not be applied to cases that became final prior to the announcement of the new rule.[563] In *Bousley v. United States*,[564] however, the Court specifically held that *Teague* did not apply to rules of substantive law.[565] Accordingly, the first question is whether the *Apprendi* rule is one of substantive or procedural law. It may be argued that *Apprendi* defines what is a crime and thus creates a rule of substantive law, not procedure. The procedural aspect arises only because of the substantive result.

If, on the other hand the decision is viewed as procedural, does *Apprendi* announce a new rule, or does the case solely reiterate what the Court previously held? Moreover, if it is a new rule of procedure, does it fit within an exception to *Teague* in that it is the new rule so fundamental to ordered liberty as to require retroactive application?[566] Justice Stevens' conclusion that the New Jersey statute constituted an "unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system"[567] would seem to lend weight to the argument that the Court has simply re-

559. Jones v. United States, 526 U.S. 227 (1999).
560. *See* Benner, *supra* note 520, at 494.
561. *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring).
562. Teague v. Lane, 489 U.S. 288 (1989).
563. *Id.* at 310.
564. Bousley v. U.S., 523 U.S. 614 (1998).
565. *Id.* at 615.
566. *Teague*, 489 U.S. at 314.
567. *Apprendi*, 530 U.S. at 497.

turned home to fundamental constitutional principles, which are both ancient and fundamental.

### *B*. Castillo et al. v. United States[568]

Castillo was a member of the Branch-Davidians who had been involved in the deadly confrontation with federal agents at Waco, Texas, in 1993. A jury convicted Castillo of carrying a firearm during the commission of a violent crime. The type of firearm Castillo possessed was not specified in the charge, nor presented as an issue for the jury to resolve. The punishment for this offense, however, depended upon the type of firearm carried. The minimum penalty was five years imprisonment, which increased to ten years if the weapon was a shotgun, and thirty years if the weapon was a machine gun.[569] At sentencing, the trial judge found the firearm to be a machine-gun and sentenced Castillo to thirty years' incarceration.[570]

Castillo argued that the machine-gun allegation was an element of the crime and had to be tried as a jury issue and proven beyond a reasonable doubt. The Supreme Court, in a unanimous opinion by Justice Breyer, agreed with the defendant and reversed and remanded the conviction.[571]

Instead of engaging in an *Apprendi*[572] analysis, however, the Court resolved the case through statutory construction, holding that Congress intended the type of firearm to be an element of the crime.[573] Justice Breyer arrived at this conclusion based upon several factors. First the overall structure of the statute suggested that Congress intended that the type of firearm should be an element of the crime because the word "machine gun" was in the same sentence as the operative element "uses or carries" and was not separated from the main body of the offense by dashes or subsections.[574] Second, firearm types were not a typical or traditional basis for enhancing a sentence.[575] Third, there was no unfairness to the government in having a jury determine this factual issue.[576] Finally, the severity of the penalty further persuaded the Court that Congress intended the issue to be one for the jury.[577]

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568. Castillo v. United States, 530 U.S. 120 (2000).

569. The statute creating the offense provided: "Whoever, during and in relation s to any crime of violence . . . uses or caries a firearm, shall . . . be sentenced to imprisonment for five years, and if the firearm is a. . .machine gun. . .to imprisonment for thirty years. 18 U.S.C. § 924(c) (1) (1988 & Supp. V).

570. *Castillo*, 530 U.S. at 122. .

571. *Id.* at 131.

572. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).

573. *Castillo*, 530 U.S. at 124.

574. *Id.* at 124-25.

575. *Id.* at 126.

576. *Id.* at 127-28.

577. *Id.* at 131.

Castillo thus carries on the factors approach initiated in *Jones v. United States*[578] to determine legislative intent. Where the legislature intends that a fact shall serve only as a sentencing factor and does not provide for jury determination based upon proof beyond a reasonable doubt, Apprendi will govern whether such a provision is constitutionally permissible.

## VII. IMPEACHMENT BY PRIOR CONVICTION

### A. Ohler v. United States[579]

Defendant Maria Ohler attempted to cross the border from Mexico into San Diego in a van carrying eighty-one pounds of marijuana. In a federal prosecution for importation and possession of marijuana, the prosecution filed a successful pre-trial motion, which secured the right to impeach the defendant with her prior conviction for possession of methamphetamine. When defendant testified at trial, she preempted the prosecutor's impeachment by admitting to the prior conviction on direct examination. With respect to the current offense, defendant claimed that she had gone to Mexico to retrieve her van and denied having any knowledge that there was marijuana hidden there.[580]

On appeal from her conviction, defendant maintained that the pre-trial motion permitting impeachment had been improperly granted. The Ninth Circuit held, however, that she had waived her objection by revealing the prior conviction during her direct testimony.[581]

In the Supreme Court defendant argued that it was unfair to require her to have to wait to disclose her prior convictions until she was under cross-examination. She pointed out that unless she was allowed to bring out the prior convictions during her direct examination, the jury would think that she was being deceitful in not revealing them and thus might discredit her testimony even more than would otherwise be the case.[582]

Chief Justice Rehnquist, writing for a five-member majority, affirmed the Ninth Circuit on the principle that a person "introducing evidence cannot complain on appeal that the evidence was erroneously admitted."[583] Observing that "both the Government and the defendant in a criminal trial must make choices as the trial progresses,"[584] the Chief Justice postulated a hypothetical situation in which the defendant's testimony might be so unbeliev-

578. *See* Jones v. United States, 526 U.S. 227 (1999).
579. 520 U.S. 753 (2000).
580. *Id.* at 754-55.
581. 169 F.3d 1200, 1204.
582. 520 U.S. at 757.
583. *Id.* at 756.
584. *Id.* at 757.

able that a prosecutor might elect not to impeach with a contested prior conviction in order to avoid making it an issue on appeal.[585]

In dissent, Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, found that neither precedent nor principle supported the majority's waiver rule.[586] Justice Souter argued that the majority had given prosecutors an unjustified tactical advantage by allowing a prosecutor on cross-examination to create "an impression of current deceit by concealment" which could affect the jury's assessment of a defendant's testimony, since they would blame the defendant for not being forthcoming.[587]

In light of Justice Souter's conclusion that this prosecution tactic is "antithetical to dispassionate fact finding"[588] and can improperly influence a jury's evaluation of a defendant's credibility,[589] it can be argued that in such cases defense counsel should be given broad latitude on *voir dire* to explore juror attitudes regarding prior convictions. It might be countered that this inquiry by defense counsel could itself be construed as a waiver under *Ohler*. Extending *Ohler* that far, however, would not be justified by the logic of the opinion, which is based upon the admission of evidence. Nor would it seem fair to prevent defense counsel from attempting to secure their client's right to an impartial jury when confronted with an admittedly misleading prosecutorial tactic.

## VIII. ATTORNEY WAIVER OF STATUTORY RIGHTS

### A. New York v. Hill[590]

In a unanimous opinion, the Supreme Court held that defense counsel's agreement to a trial date beyond the deadline required by the Interstate Agreement on Detainers[591] waived his client's speedy trial rights under that statute.[592]

The defendant had been in custody in Ohio when New York lodged a detainer against him under the Interstate Agreement on Detainers (IAD).[593] Under the provisions of the IAD, once the defendant signed a request for disposition (which he had in this case), the requesting state had 180 days to

585. *Id* at 757-58.
586. *Id* at 763.
587. *Id.* at 764.
588. *Id.*
589. *Id.*
590. 528 U.S. 110 (2000).
591. 18 U.S.C. app. § 2 (1970). "The Interstate Agreement on Detainers (IAD) is a compact entered into by 48 States, the United States, and the District of Columbia to establish procedures for the resolution of one State's outstanding charges against a prisoner of another state." 528 U.S. at 111.
592. 528 U.S. at 118.
593. *Id.* at 112.

bring him to trial.[594] Without the defendant being present, his lawyer agreed to a court date outside that time. Seven days after the time had run, the defendant moved to dismiss.[595] His motion was denied by the trial court, which concluded that defense counsel's agreement to the trial date constituted a waiver of the defendant's rights under the IAD.[596] The New York Court of Appeals reversed reasoning that defense counsel's mere acquiescence in accepting the date should not constitute waiver because it was not an affirmative act, like seeking a continuance.[597]

Justice Scalia, speaking for a unanimous court, reversed the New York Court of Appeals and reinstated defendant's second-degree murder conviction, holding that the defendant was bound by the lawyer's agreement to the trial date.[598] Justice Scalia noted that while "there were basic rights that [an] attorney cannot waive without the [client's] fully informed and publicly acknowledged consent . . ., the lawyer . . . must have—full authority to manage the conduct of the trial."[599] Justice Scalia disagreed with the New York high court's conclusion that waiver required an affirmative act, stating that under such a rule defendants could accept treatment inconsistent with IAD requirements and then recant.[600] Given this potential for abuse, and the harshness of the sanction for violating the IAD 180 day rule (dismissal with prejudice) Justice Scalia rejected the distinction between active and passive waiver as "hypertechnical."[601]

## IX. EX POST FACTO LAWS

### A. Carmell v. Texas[602]

In *Carmell* the Supreme Court dealt with the question of whether an amended Texas statute allowing conviction upon the uncorroborated testimony of a sexual assault victim alone, was an *ex post facto* law, when at the time of the commission of the offense, the law required corroboration. The Court held that such a conviction violated the Ex Post Facto Clause of the Constitution.[603]

Carmell was indicted on fifteen counts of sexual offenses against his stepdaughter, who was thirteen at the commencement of the abuse. The acts

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594. *Id.*
595. *Id.* at 113.
596. People v. Reid, 627 N.Y.S.2d 234, 237 (1995).
597. People v. Hill, 704 N.E.2d 542, 546 (1998).
598. 528 U.S. at 118.
599. *Id.* at 114-15 (quoting Taylor v. Illinois, 484 U.S. 400, 417-18 (1988)).
600. 528 U.S. at 118.
601. *Id.*
602. 529 U.S 513 (2000).
603. U.S. CONST. art. I, § 10. The Constitution provides that "No State shall . . . pass any . . . ex post facto Law. . . ." *Id.*

occurred between 1991 and 1995.[604] The victim did not report the abuse until 1995. Carmell was convicted on two counts of aggravated sexual assault, five counts of sexual assault, and eight counts of indecency with a minor. He was sentenced to life imprisonment on the two counts of aggravated sexual assault and given concurrent twenty year sentences on the other offenses.[605]

Prior to 1993, a Texas statute provided that a sexual assault victim's uncorroborated testimony was insufficient to support a criminal conviction as a matter of law. One form of corroboration, known as "outcry," permitted conviction on the victim's testimony alone if the victim had informed another person of the sexual assault within six months of its occurrence.[606] An exception was also made to the corroboration requirement if the victim was less than fourteen years of age at the time of the alleged offense.[607]

Because Carmell's stepdaughter was fourteen or older at the time most of the offenses were committed, this statutory rule of evidence thus precluded conviction in the absence of either "outcry" or some other form of corroboration. However, in 1993, the Texas statute was amended to expand the exception to the corroboration requirement. Under the amendment, convictions could now be based upon the uncorroborated testimony of victims who were under eighteen years of age at the time of the alleged offense. Carmell was tried under this amended rule of evidence.

On direct review, Carmell appealed four of his convictions (charging offenses committed between 1992 and 1993) on the ground that the application of the amended statute to these offenses violated the Ex Pose Facto Clause.[608] Carmell argued that as to those charges the pre-1993 version of the statute should have been applied. Under the pre-1993 version of the statute, the State would not have been able to present the required quantum of evidence, because the allegations were based on the uncorroborated testimony of the victim, and the victim neither made a timely outcry nor was under fourteen years old at the time of the offenses.

The Court of Appeals for the Second District of Texas rejected Carmell's *ex-post facto* argument, holding that the retroactive application of the amended statute to Carmell's case did not constitute a violation of the Ex Post Facto Clause.[609] The court reasoned that the amended law was a rule of procedure that "merely 'remove[d] existing restrictions upon the competency of certain classes of persons as witnesses.'"[610]

The United States Supreme Court reversed in a five to four decision. Justice Stevens, writing for the majority, began by giving a detailed historical account of the constitutional proscription against *ex post facto* laws, starting with

604. 529 U.S. at 554.
605. *Id.* at 517.
606. TEX. CODE CRIM. PROC. ANN. art. 38.07 (2000).
607. *Id.*
608. U.S. CONST. art. I, § 10.
609. 963 S.W. 2d 833, 836 (1998) (quoting Hopt v. Utah, 110 U.S. 574, 590 (1884)).
610. *Id.*

the opinion of Justice Chase in *Calder v. Bull*.[611] According to Justice Chase, *ex post facto* laws fell into four categories:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th *Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offence, in order to convict the offender.*[612]

As Stevens explained, Carmell's case fell into the fourth category discussed by Justice Chase. Observing that Chase relied heavily upon the work of the common law scholar Richard Wooddeson, Justice Stevens pointed out that both Wooddeson and Chase had cited the English case of Sir John Fenwick as an example of an *ex post facto* law falling into the fourth category.[613] Justice Stevens described Fenwick's case in detail because he found it to be very similar to Carmell's.[614]

In 1688, William III deposed James II and became King of England. In 1695, following the death of Queen Mary, Sir John Fenwick participated in a conspiracy to overthrow King William and restore James to the throne.[615] Included in the group were George Porter and Cardell Goodman. However, before the group could carry out their scheme, several members of the conspiracy told King William of the plot and everyone was arrested except Fenwick, who went into hiding. At the time, the law of England provided that the testimony of at least two witnesses was required to prove the crime of high treason.[616]

It soon became apparent during the trials of those conspirators apprehended that only Porter and Goodman could implicate Fenwick. Fenwick decided to try to bribe these witnesses to avoid conviction. He began by offering Porter a bribe through one of his agents, which Porter accepted. However, hoping to gain favor with King William, Porter turned in Fenwick's agent and testified against Fenwick before the Grand Jury. Undaunted, Fenwick asked his wife to try to bribe Goodman. She authorized her agent to offer Goodman money if he left the country or certain death if he did not accept. Faced with an offer he could not refuse, Goodman took the money and fled to France.[617] Upon discovering Fenwick's ruse, the House of Commons amidst much debate concerning its propriety, passed a Bill of Attainder against Fenwick notwithstand-

611. 3 U.S. 386, 390 (1798).

612. *Id.* (emphasis added).

613. 529 U.S. at 526.

614. *Id.* at 526-27.

615. *Id.* at 526 (citing 4 MACAULAY, HISTORY OF ENGLAND 406-07 (1899)).

616. *Id.* at 526-27 (citing An Act for Regulating of Trials in Cases of Treason and misprision of Treason, 7 & 8 Will. III, ch. 3 § 2 (1695-96), *in* 7 STATUTES OF THE REALM 6 (reprint 1963)).

617. *Id.* at 528 n.16 (citing 4 MACAULAY, HISTORY OF ENGLAND 495-512 (1899)).

ing the two-witness rule. The bill was subsequently passed by the House of Lords and assented to by the King.[618] Fenwick was finally beheaded on January 28, 1697.[619]

Because Fenwick's case was historically held to be the paradigm of an *ex post facto* law in the fourth category, Justice Stevens compared the conviction of Carmell to the attainder of Fenwick. He noted first that Fenwick was convicted by the House of Commons on less evidence than was required when the act of alleged treason was committed (i.e. he was convicted on the testimony of one witness, when two witnesses were required at the time of the commission of the treason). Similarly, Carmell was convicted on less evidence than would have been sufficient at the time his offenses were committed.[620] Justice Stevens therefore concluded that Carmell's conviction violated the Ex Post Facto Clause.

Justice Ginsburg, joined by Justices O'Connor, Kennedy, and Chief Justice Rehnquist, dissented. They agreed with the Texas state court that the amended Texas statute was a procedural rule defining witness competency rather than a substantive rule, which determined the sufficiency of the evidence for conviction.[621] Instead of focusing on English history, Justice Ginsburg focused on the history of Texas, beginning with the observation that a seduced female had historically been deemed an incompetent witness as a matter of Texas law.[622] While this disability was removed by statute in 1911, a corroboration requirement was nevertheless imposed.[623] Referring to the corroboration requirement as "outmoded" because sexual assault victims are no more likely to fabricate testimony than victims of other crimes for which no corroboration is required, Justice Ginsburg noted most states no longer require it. Nevertheless, she pointed out, the historical development of the Texas statute at issue "reveals a progressive alleviation of restrictions on the competency of victim testimony, not a legislative emphasis on the quantum of evidence needed to convict."[624]

Relying upon *Hopt v. Territory of Utah*,[625] Justice Ginsburg then pointed out that witness competency rules have been upheld when applied to offenses

618. *Id.* at 530 (citing An Act to Attaint Sir John Fenwick Baronet of High Treason, 8 Will. III, ch. 4 (1696)).

619. *Id.* at 530 (citing 4 MACAULAY, HISTORY OF ENGLAND 526-34 (1899)). This method of proceeding, whereby capital punishment is imposed by a special act of the legislature (called a Bill of Attainder) without recourse to proper judicial proceedings, is of course also prohibited by Article 1, Section 10 of the Constitution.

620. Carmell, like Fenwick, was convicted on the uncorroborated testimony of a single witness, the victim of his alleged sexual assaults. Yet, at the time the offenses at issue were committed, the law required corroboration because the victim was above the age of fourteen. Thus like Fenwick's case, a second witness (reporting the victim's "outcry") or some other form of corroboration, was necessary for a valid conviction at the time that Carmell's offenses were committed.

621. *Id.* at 553.

622. *Id.* at 520-21.

623. *Id* (citing Tex. Rev. Crim. Stat. tit. 8, ch.7, art. 789) (1911).

624. *Id.*

625. 110 U.S. 574 (1884)

committed before their enactment.[626] In *Hopt*, a statute in effect at the time the defendant committed his offense provided that felons were incompetent to testify.[627] Prior to defendant's trial, that statute was repealed, and the State introduced the testimony of a felon to convict Hopt of capital murder. The defendant argued that allowing the felon to testify at his trial was a violation of his rights under the Ex Post Facto Clause. The Supreme Court disagreed, holding that the repeal "simply enlarge[d] the class of persons who may be competent to testify in criminal cases."[628] Likewise, Justice Ginsburg argued, the amendment to the Texas statute was merely an enlargement of the class of persons competent to testify. In this case the class of victims deemed competent to testify without corroboration was expanded to include victims up to eighteen years of age.[629]

In response to the argument that the Texas statute was merely a "witness competency" rule, the majority countered that a teenage victim of sexual assault was always "competent" to testify both before and after the amendment to the Texas statute. Therefore the amendment neither enlarged the class of persons competent to testify nor removed any restriction on the competency of any witness to testify.[630] What changed as a result of the amendment was the sufficiency of the evidence needed to convict, and this the majority argued could not be applied retroactively without violating the Ex Post Facto Clause.

This counter-argument, Justice Ginsburg replied, valued form over substance. Although it was true that a child aged fourteen to eighteen was allowed to testify in a technical sense prior to 1993, this technical fact ignored the reality that the child's testimony could not be considered by the jury for the purposes of conviction in the absence of corroboration. Thus the child's testimony was not really "competent" because "[e]vidence to which the jury is not permitted to assign weight is, in reality, incompetent evidence."[631]

The dissent then argued that neither of the twin purposes underlying the Ex Post Facto Clause were served by applying it to Carmell's case. The first purpose of the clause, Justice Ginsburg argued, was "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[632] Clearly, Ginsburg said, Carmell knew his behavior was illegal, and nothing in the record suggested that it was impossible for his victim to report the sexual abuse to another person, so he could not have reasonably relied upon the "outcry" period.[633] Therefore neither notice nor reliance were implicated in this case.

626. 529 U.S at 553.
627. 110 U.S. at 577-78.
628. 529 U.S. at 571 (citing Hopt v. Territory of Utah, 110 U.S. 574, 589 (1884)).
629. *Id.* at 554-55.
630. *Id.* at 544-45.
631. *Id.* at 563.
632. *Id.* at 566 (quoting Weaver v. Graham, 450 U.S. 24, 28-29 (1981)).
633. *Id.* at 566-67.

The second purpose of the clause was to "restrict governmental power by restraining arbitrary and potentially vindictive legislation."[634] This purpose, Justice Ginsburg noted, had to do with the separation of powers and reflected the concern that legislatures should not "meddle with the judiciary's task of adjudicating guilt and innocence in individual cases." Here, there was no suggestion that Carmell was singled out by the Texas legislature for special treatment.

Therefore, the dissent argued, since neither purpose of the Ex Post Facto Clause was served by applying it to the case at bar, it should not be stretched to apply to a statute that was attempting to make progressive reforms with respect to the methods of proving a case.[635]

The majority's refusal in *Carmell* to permit an exception to the historical understanding of the Ex Post Facto Clause, even in the face of Justice Ginsburg's eloquent argument, demonstrates the Clause's continued vitality as a "bulwark in favour of the personal security of the subject"[636] against the dangers of governmental abuse.[637] As Justice Stevens noted, the burden imposed by the Ex Post Facto Clause is modest. Nothing in the Clause prohibits prospective application of an amended statute. If the law existing at the time of the offense did not punish the offender, then his escape from punishment "can never produce [as] much harm to the community, as may arise from the infraction of a rule, upon which the purity of public justice and the existence of civil liberty, essentially depend."[638]

As Justice Ginsburg warned, however, *Carmell* also places a shadow over any evidentiary rule change "that work[s] to the defendant's detriment."[639] Attempting to head off this criticism, Justice Stevens asserted:

> We do not mean to say that every rule change that has an effect on whether a defendant can be convicted implicates the Ex Post Facto Clause. Ordinary rules of evidence, for example, do not violate the Clause. . . . Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption.[640]

Even with this caveat, however, the door would seem to have been opened to permit a challenge to any change in an evidentiary rule that arguably makes a

634. *Id.* at 566 (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)).

635. *Id.* at 567.

636. Calder v. Bull, 3 U.S. at 386, 390 (1798).

637. 529 U.S. at 553-74. Justice Scalia, who perhaps was not immune to Justice Stevens' appeal to history, joined the majority opinion without comment.

638. *Id.* at 553 (quoting JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1338, at 211 n.2 (1833)).

639. *Id.* at 562. Justice Ginsburg, postulated, for example, the enactment of a new exception to the rule against hearsay, which now made evidence admissible that had previously been excluded at the time of the commission of the offense. *Id.*

640. *Id.* at 533 n.23.

defendant's conviction depend on less evidence that it did at the time of the commission of the alleged offense.

## X. CONCLUSION

In its first full term of the new millennium, the Supreme Court charted a moderate course as it attempted to mediate the tension between individual rights and the pressures generated by the criminal justice system's need for flexibility in law enforcement and finality regarding convictions. The Court reaffirmed basic constitutional protections under the Fourth Amendment in *Flippo v. West Virginia* (no crime scene exception to the warrant requirement), *Bond v. United States* (squeezing luggage constitutes a search), and *Florida v. J.L.* (rejecting anonymous tip as basis for reasonable suspicion). It also preserved Fifth Amendment protections in *Dickerson v. United States* (rejecting Congress' attempt to overrule *Miranda*) and *United States v. Hubbell* (allowing derivative use immunity). The Court also halted the recent erosion of fundamental due process rights in sentencing in *Apprendi v. New Jersey* (right to jury trial and proof beyond a reasonable doubt apply to sentencing enhancements which increase maximum punishment) and sustained the Ex Post Facto Clause in *Carmell v. Texas* (invalidating conviction obtained on less evidence than law required at time of offense).

At the same time the Court also gave an assist to the police in *Illinois v. Wardlow* (flight from police in a high crime area gives officer reasonable suspicion to stop) and permitted tactical advantages for prosecutors in *Portuondo v. Agard* (closing argument) and *Ohler v. United States* (impeachment with prior convictions).

One trend emerging from this term's decisions is seen in the Court's concern with ineffective assistance of counsel. Almost one quarter of its cases involved either claims of ineffective assistance or failures on the part of defense counsel that worked to the detriment of their client's rights. In *Terry Williams v. Taylor* the Court seemed to send a clear signal that the *Strickland* standard can no longer be used to whitewash such failures, finding that defense counsel was ineffective for failing to investigate and present mitigating evidence at a capital sentencing hearing.

On the other hand, in *Roe v. Flores-Ortega* the Court held that defense counsel's failure to file a notice of appeal after a guilty plea was not *per se* ineffectiveness of counsel, but must be assessed under a 'totality of the circumstances" analysis. In *Edwards v. Carpenter* the Court also held that an ineffective assistance of counsel claim could not serve as "cause" for the procedural default of a substantive claim unless the ineffectiveness claim itself had been properly preserved.

Perhaps the most discouraging aspect of the term was the Court's "hands off" approach to issues involving jury instructions in death penalty cases. In *Weeks v. Angelone* the Court continued to embrace the presumption that a jury reads and applies all jury instructions together, even where objec-

tive evidence indicated that the jury was confused and improperly focused on just one ambiguous instruction. The freakish imposition of the death penalty was also demonstrated in *Ramdass v. Angelone* where the Court refused to require that a jury be adequately informed about the likelihood of defendant's parole eligibility—a consideration that post-trial interviews indicated would have influenced at least three members of the jury to spare his life.

The Court also severely cut back on the autonomy of defendants, declaring in *Martinez v. California* that there is no right to self-representation on appeal and casting perhaps some doubt on the continuing viability of the right to self-representation at trial. At the same time the Court held in *New York v. Hill* that defense counsel must have full authority to manage the conduct of the trial stage and could therefore, without defendant's knowledge or consent, waive statutory speedy trial rights under the Interstate Agreement on Detainers.

Finally the Court clarified and modified the harshness of some of the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) that placed dramatic restrictions on federal habeas corpus review. In *Slack v. McDaniel*, the court held that a subsequent habeas petition, filed after an initial petition had been dismissed without adjudication on the merits because of the failure to exhaust state remedies, was not a "second or successive" petition subject to dismissal under the abuse of writ doctrine. The Court also modified AEDPA's bar on evidentiary hearings in federal court, holding in *Michael Williams v. Taylor* that where a habeas petitioner failed to develop a factual basis for a claim in state court, an evidentiary hearing would still be permitted if counsel was diligent, but had been precluded by circumstances or misconduct from timely development of a factual basis in state court proceedings. In *Terry Williams v. Taylor*, however, the Court restricted habeas relief by requiring that deference be given on habeas review to state court determinations of constitutional law. Interpreting 28 U.S.C. § 2254(d)(1), the Court held that federal habeas relief cannot be granted simply because a federal court thinks the state court decision was incorrect. Habeas relief is appropriate only if the state court decision is contrary to clearly established Supreme Court precedent or constitutes an unreasonable factual application of a correct rule of law.

For the practitioner or academic looking for answers to the persistent problems confronting our criminal justice system on a daily basis, this term offered only scant solace. Cases like *Apprendi*, *Terry Williams* and *Carmell* have spawned more questions than answers. The Court also still seems blind to the failure of its Fourth Amendment jurisprudence to address the problem of racial profiling, as demonstrated by its decision in *Illinois v. Wardlow,* which ignored the implications of that practice. Yet perhaps the most significant observation that can be made about this term is that the Rehnquist Court, known to prefer a balance that favors law and order, held the line, to a large extent, against repeated attempts to whittle away at basic constitutional liberties.