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CRIMINAL JUSTICE IN THE SUPREME COURT: AN ANALYSIS OF UNITED STATES SUPREME COURT CRIMINAL AND HABEAS CORPUS DECISIONS (OCTOBER 2, 2000 - SEPTEMBER 30, 2001)

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I. INTRODUCTION

During the United States Supreme Court's October Term, 2000,[1] the Court issued opinions in 87 cases, of which approximately forty percent involved criminal procedure, federal habeas, immigration and other criminal justice related matters. Without question the most intriguing decision, however, was *Bush v. Gore*,[2] which ended the dispute over election returns in the state of Florida and decided the 2000 presidential election. What relevance does an equal protection case involving voting rights in a presidential election have for criminal procedure? Perhaps a great deal.

1. The Court's 2000 Term extended from October 2, 2000 to September 30, 2001.
2. 531 U.S. 98 (2000).

A. Equal Protection and Fundamental Rights

The essential equal protection principle underlying *Bush v. Gore* is easily grasped: Where a fundamental right is at stake, official discretion must be controlled to prevent unequal treatment in the enjoyment of that right.[3] Stated broadly, *Bush v. Gore* thus teaches that the failure to create standards to control official discretion *alone* can violate the Equal Protection Clause of the Fourteenth Amendment when abridgment of a fundamental right is involved. Thus, to establish an equal protection violation, *in this context*, it is not necessary to prove "the existence of purposeful discrimination."[4]

While the Court has been subject to harsh criticism[5] for intervening in presidential politics, and for the manner in which it intervened, that criticism has not been directed at the equal protection principle itself. Indeed, as Professor Cass Sunstein has observed, the underlying principle "behind the equal protection ruling has considerable appeal" and broadly understood "should bring a range of questionable practices under fresh constitutional scrutiny."[6] While Professor Sunstein's remarks were made in the context of discussing the equal treatment of voters, why should the equal protection principle suddenly lose its appeal when applied in the criminal justice context to require equal treatment of criminal defendants, especially those accused of capital offenses?[7]

Indeed, the argument for requiring controls on discretion to ensure equal treatment would seem even more compelling in the latter context than in the former. As the Court in *Bush v. Gore* acknowledged, an "individual citizen has no federal constitutional right to vote for electors for President of the United States."[8] The Court found that where the state has created such an entitlement, however, the right to vote is "fundamental."[9] The Court noted that

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3. *Id.* at 104-05.

4. McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (citing Whitos v. Georgia, 385 U.S. 545, 550 (1967)). In *McCleskey* the Court held that defendant's reliance upon empirical studies, showing a statistically significant risk that race influenced jury decisions imposing the death penalty in the state of Georgia, was insufficient to establish an equal protection violation because statistical studies could not "prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* (emphasis in original). *McKleskey*, however, raised a traditional, category-type equal protection claim based upon suspect class status. Such a claim requires proof of intentional or purposeful discrimination against the suspect class. *See* Washington v. Davis, 426 U.S. 229 (1976). In contrast, the claim raised in *Bush v. Gore* does not depend upon this categorical approach, but argues simply that official discretion must be controlled to prevent disparate treatment of similarly situated individuals, regardless of their status.

5. Symposium, Bush v. Gore, 68 U. CHI. L. REV. 613 (2001).

6. Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 737, 773 (2001).

7. Indeed Professor Sunstein expressly recognizes this implication of *Bush v. Gore*. *Id.* at 772.

8. Bush v. Gore, 531 U.S. at 104. Indeed, the states have total discretion in deciding how the members of the electoral college representing their state will be selected. Article II provides for election of the President by "Electors" who are to be appointed "in such Manner as the Legislature [of each state] may direct." U.S. CONST. art. II § 2.

9. Bush v. Gore, 531 U.S. at 104. Fundamental rights are given heightened judicial pro-

"one source of its fundamental nature lies in the equal weight to be accorded each vote and the equal dignity owed to each voter."[10]

Applying the equal protection principle safeguarding fundamental rights to Florida's manual recount procedures, the Court ruled that "in the absence of specific standards *to ensure* its equal application"[11] the broad "intent of the voter"[12] standard permitted "disparate treatment" between voters in different counties.[13] This failure to have adequate standards for controlling official discretion thus violated the Equal Protection guarantee because it allowed the state to "value one person's vote over that of another."[14]

Certainly the *Bush v. Gore* equal protection principle ought to be no less applicable when a state permits "disparate treatment" of death-eligible defendants. This occurs when prosecutors in a state use differing standards to elect those particular death-eligible defendants in their county they will seek to execute. In contrast to the implied right at issue in *Bush v. Gore*, the "right to life" is a fundamental right that is found in the Constitutional text, expressly protected by both the Fifth[15] and Fourteenth Amendments.[16] Indeed as the Framers proclaimed in the Declaration of Independence, it is to secure such "inalienable" rights that governments are instituted.[17]

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tection in the form of strict judicial scrutiny. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

10. Bush v. Gore, 531 U.S. at 104.

11. *Id.* at 106 (emphasis added).

12. The Florida Supreme Court had ordered that ballots not counted by machine should be manually examined and counted as a legal vote if "the intent of the voter" could be ascertained. No standards, however, had been promulgated for determining how such intent was to be determined. The Court stated, "Florida's basic command . . . is to consider the 'intent of the voter.' . . . This is unobjectionable as an abstract proposition and as a starting principle. The problem inheres in the absence of specific standards to ensure its equal application." *Id.* at 105-06 (quoting Gore v. Harris, 773 So.2d 524, 526 (Fla. 2000)).

13. For example, there appeared to be a difference in treatment among several counties with respect to whether an indentation, or dimple, which did not penetrate through the paper ballot sufficiently to cause light to shine through, was counted or not. Bush v. Gore, 531 U.S. at 105.

14. *Id.* at 104-05.

15. The Fifth Amendment provides: "No person shall be . . . deprived of life, liberty or property without due process of law." U.S. CONST. amend. V.

16. The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Because the right to life explicitly protected by these Amendments is "fundamental" and therefore entitled to heightened judicial protection, would seem self-evident. This has been recognized in *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) and *Furman v. Georgia*, 408 U.S. 238 (1972), where Justice Marshall observed:

> The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (i.e., the right to life) . . . the State needs a compelling interest to justify it.

Furman, 408 U.S. at 359 n.141 (per curiam) (Marshall, J., concurring).

17. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

As is true of voting rights, the fundamental nature of the right to life lies in the equal weight to be accorded each life and the equal dignity owed to each defendant. The absence of specific state-wide standards to ensure that prosecutorial decisions do not result in "disparate treatment" between similarly situated death-eligible defendants in different counties, permits the state to "value one person's [life] over that of another" and violates the Equal Protection guarantee.[18]

It has been said, however, that because *Bush v. Gore* dealt with a unique situation of immediate national importance, the decision is "*sui generis*;" that it will not "have legs" to carry its equal protection principle beyond the bounds of voting rights cases.[19] But to stamp the Court's decision with a label warning that the principle it announces is good "for this case only," is to admit that the Court is simply a "naked power organ" which has perverted the prime directive to decide cases according to principle rather than politics.[20]

All students of the Constitution, including Judge Robert Bork, agree that a "principled decision is one that rests on reasons . . . that in their generality and their neutrality transcend any immediate result that is involved."[21] As Judge Bork explains:

> The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. This model we may . . . call "Madisonian." . . . [I]t follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution. . . . If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power.[22]

Lower courts, therefore, cannot assume that *Bush v. Gore's* equal protection principle should not be taken seriously. These courts will have to explain why the equal protection principle established in that decision does not also apply to the right to life, which unlike the implied right to vote for electors, is explicitly recognized in the text of our nation's founding documents. Moreover this justification will have to satisfy the most rigorous standard of

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18. Bush v. Gore, 531 U.S. at 104-05.

19. Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. 1279, 1280 (2001).

20. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971).

21. *Id.* at 2 (quoting H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, *in* PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 27 (1961)).

22. Bork, *supra* note 20, at 2-3.

judicial review—strict scrutiny.[23] Thus, prosecutors will have the burden of proving that it is *necessary* to promote a *compelling* governmental interest that they be given absolute discretion, unrestrained by statewide standards, to select from among those defendants eligible for death, those who will be executed.[24] This would seem a most difficult burden to meet. To suggest that there does not have to be "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied"[25] when the fundamental right to life hangs in the balance, is to repudiate *Bush v. Gore* as a legitimate exercise of judicial power.

What compelling interest could the government assert for not having statewide standards, for example, that would reduce the likelihood of convicting and executing an innocent person? Cases that depend upon eyewitness identification testimony provide a classic example where statewide standards could be employed. Just as certain types of vote tabulating machines have a known error rate, we now know that cases depending upon eyewitness identification also result in erroneous convictions.[26] In death-eligible cases where the identification of the assailant is at issue and the state's case will be based on eyewitness identification testimony, a statewide standard could provide uniformity by restraining prosecutorial discretion to seek death unless DNA or other evidence substantially corroborates the eyewitness testimony.

Other examples where unequal treatment due to the lack of uniform statewide standards might be shown include the impact of race on the capital decision-making process[27] and the likelihood of perjury contributing to the

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23. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942), Shapiro v. Thompson, 394 U.S. 618 (1969), Harper v. Virginia Bd. of Elections, 383 US.663 (1966) *and* Reynolds v. Sims, 377 U.S.533 (1964).

24. This is thus quite different from the Eighth Amendment claim raised in *Gregg v. Georgia,* 428 U.S. 153 (1976). The question raised under a *Bush v. Gore* analysis is whether a state's "procedures . . . are consistent with its obligation to avoid arbitrary and disparate treatment" with respect to a fundamental right. Bush v. Gore, 531 U.S. 98, 105 (2000). Governmental practices which are inconsistent with equal treatment of a fundamental right are "carefully and meticulously scrutinized." Reynolds v. Sims 377 U.S. at 561. Therefore, the burden is on the state to show that the practice is necessary to promote a "compelling state interest." Shapiro v. Thompson, 394 U.S. at 638.

25. Bush v. Gore, 531 U.S. at 109.

26. *See* EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (finding that the majority of defendants exonerated by DNA evidence had been victims of mistaken eye-witness identification). *See also* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases,* 40 STAN. L. REV. 21, 57 (Table 6) (1987).

27. *See* David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia,* 83 CORNELL L. REV. 1638 (1998); Michael B. Blankenship & Kristie R. Blevins, *Inequalities in Capital Punishment in Tennessee Based on Race: An Analytical Study of Aggravating and Mitigating Factors in Death Penalty Cases,* 31 U. MEM. L. REV. 823, 858 (finding racial disparity where the aggravating factor was a homicide found to be "heinous, atrocious, and cruel"). Standards could require that a panel of experienced prosecutors screen cases according to objective criteria without knowledge as to the race of either the defendant or the victim.

conviction of the innocent.[28] Our purpose here is not to draw a detailed blueprint, but rather to sketch the broad outlines of a strategy for eliminating these and other causes of unequal treatment of death eligible defendants. Under this strategy the courts would not have to be involved in determining the content of such standards. That could be left appropriately to legislative bodies. But if injunctive relief were sought in pending death penalty cases to enforce *Bush v. Gore's* equal protection principle, and a stay was granted pending the formulation and adoption of state-wide standards, the resulting moratorium and renewed debate over capital punishment might well advance our criminal justice system toward a more rational, just and civilized structure of punishment where the death penalty is severely restricted if not eliminated altogether.

B. Judicial Alignments

Approximately one third of the 2000 Term decisions relating to criminal justice were announced by unanimous opinions. The non-unanimous decisions appeared to divide the court almost in half. The Chief Justice, joined by Justices Scalia, Thomas and Kennedy typically squared off in support of law enforcement against Justices Stevens, Souter, Ginsburg and Breyer who were more inclined to support individual rights. Justice O'Connor, who wrote the largest number of majority opinions in criminal cases, swung from one camp to the other, often providing the crucial fifth vote for a decision.[29] There were notable exceptions to this pattern, however. Justice Scalia and Souter appeared to switch sides on Fourth Amendment issues[30] and in *Rogers v. Tennessee*,[31] which dealt with retroactivity of judicial decision making, there were defections from both camps.[32] Justice Stevens found himself most often in the minority, dissenting in ten cases.

C. Fourth Amendment

The Court attempted to resolve several thorny Fourth Amendment issues concerning law enforcement's use of surveillance technology and the

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For cases in rural localities and in highly publicized cases in urban areas this might require that the Office of the State Attorney General organize the panel at the state level.

28. The risk of convicting an innocent person because of perjury could be reduced by setting standards which would constrain the use of the death penalty in cases in which the testimony of self-interested witnesses, such as jail house informants (who are offered substantial sentence reductions in return for their testimony) contribute to the state's case against the accused.

29. Justice O'Connor authored seven majority opinions, Justices Stevens wrote five.

30. *See* Kyllo v. United States, 121 S. Ct. 2038 (2001) *and* Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

31. 121 S. Ct. 1693 (2001).

32. In *Rogers*, the Chief Justice and Justices Kennedy and Souter joined Justice O'Connor, to form a majority opposed by Justice Stevens, Scalia, Thomas and Breyer.

increasing reliance upon suspicionless searches and seizures under the "special needs" exception to the normal warrant and probable cause requirements. In *Kyllo v. United States*,[33] the Court held that the use of a thermal imager to detect infrared radiation constituted a "search" when used to reveal crude images of heat escaping from the exterior walls and roof of a home. The five-to-four decision, authored by Justice Scalia, should give one pause, however, in light of Justice Stevens' dissent, which sees the Court's rationale as a departure from the test announced in *Katz v. United States*.[34] The opinion's cryptic attempt to limit its rationale to technology that is "not in general public use" is also a troubling indication of the narrowness of this decision.

In *City of Indianapolis v. Edmond*[35] and *Ferguson v. City of Charleston*[36] the Court was confronted with the logical consequences of its own prior decisions that had departed from the individualized suspicion standard embedded in the text of the Fourth Amendment. The Court had created an exception to the basic probable cause requirement in cases where there was a special need for flexibility necessitated by an important governmental interest unrelated to law enforcement purposes.[37] The police, however, quickly took advantage of opportunities to extend these exceptions to their logical conclusion. Recognizing that virtually any suspicionless search or seizure could be immunized by the "special needs" doctrine, the Court attempted to halt the hemorrhaging, first striking down the police use of a checkpoint for the purpose of detecting drugs in *Edmond*, and then holding in *Ferguson* that the suspicionless drug tests performed on pregnant women without their consent at a state hospital were unconstitutional. In both cases the Court employed a "primary purpose" test to determine whether the government practice was law enforcement related and thus disqualified under the "special needs" exception. This new purpose inquiry promises to add a new layer of confusion to Fourth Amendment jurisprudence and increase litigation in this murky area.

The Court did achieve clarity regarding the ability of police to make a full custodial arrest for a minor offense, although this was accomplished at the citizen's expense. In *Atwater v. City of Lago Vista*,[38] the Court held by a five-to-four margin that "it is not a constitutional violation for a police officer to be a jerk."[39] Thus, the Court upheld the full custodial arrest of a soccer mom who was taken to jail and forced to post bail because she failed to wear her seat belt, a non-jailable infraction punishable only by a $50.00 fine. This

33. 121 S. Ct. 2038 (2001).
34. 389 U.S. 347 (1967).
35. 531 U.S. 32 (2000).
36. 121 S. Ct. 1281 (2001).
37. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) *and* Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1988), discussed *infra*.
38. 121 S. Ct. 1536 (2001).
39. Comment by Justice Kennedy during oral argument in *Atwater*. Tr. Oral Arg. 19.

decision, which gives the policeman on the street unbridled discretion to take a person into custody for any traffic offense, allows law enforcement to inflict a substantial loss of liberty upon a wide segment of the population, without needing to give any justification. Moreover, it also permits a significant intrusion upon privacy as full searches of both the traffic offender and her vehicle may be made as an incident of a custodial arrest. The Court's failure to recognize *Atwater's* implications in areas where racial profiling occurs is highlighted by the fact that a majority of the Court saw the admitted abuse in this case as a rare occurrence that was not deserving of Constitutional protection.

D. Habeas Corpus and Post Conviction Relief

In *Artuz v. Bennet*,[40] a unanimous Court gave an important procedural victory to habeas petitioners, holding that a pending state post-conviction petition was "properly filed" for the purpose of tolling the one-year time limit for filing federal petitions for writ of habeas corpus, even if the state petition contained claims that were procedurally barred by state law. This controversy arose because the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[41] requires federal habeas corpus petitions to be filed within a year of the close of state proceedings.[42] However, a properly filed state post-conviction petition will toll the statute until it is resolved in the state court. The state argued that a post-conviction petition that contained unexhausted or procedurally defaulted claims was not "properly filed." Justice Scalia, who authored the Court's opinion, however, found that the question of whether a petition contained meritious claims was separate from the question whether the petition had been properly filed. Justice Scalia therefore held that a petition was properly filed when it was delivered to a court having appropriate jurisdiction and accepted as being in compliance with the applicable rules governing the filing of such petitions.

Having given a literal interpretation to Section 2244(d)(2) of the AEDPA in *Artuz*, the Court then did an about face in *Duncan v. Walker*,[43] refusing to interpret the words "other collateral review" in the same section to encompass a federal habeas petition. The statute states that in calculating the one-year filing limitation on federal habeas corpus after the close of state proceedings, "the time during which a properly filed application for State post-conviction *or other collateral review*... is pending" shall not be counted.[44] In a split decision, Justice O'Connor held that the term "other collateral review" only referred to state court proceedings. Thus defendant's first federal habeas petition, dismissed without prejudice because of the ap-

40. 531 U.S. 4 (2000).
41. Pub. L. 104-132, 110 Stat. 1214 (codified in 28 U.S.C. §§ 2244-2266) (1996)).
42. *See* 28 U.S.C. § 2244(d)(2) (2001).
43. 121 S. Ct. 2120 (2001).
44. 28 U.S.C. § 2244(d)(2) (2001) (emphasis added).

parent failure to exhaust state remedies, did not toll the statutory period. As a result, the defendant's second habeas petition filed outside of the one-year limitation period was dismissed as untimely filed.

Habeas petitioners lost again in *Tyler v. Cain*,[45] where Justice O'Connor provided the key fifth vote for denying relief. The issue in this case was whether Tyler's second habeas petition properly relied upon a "new rule of constitutional law, *made retroactive* to cases on collateral review by the Supreme Court" as required by the AEDPA.[46] The defendant argued that it was sufficient for a federal appellate court to declare that a new rule of constitutional law was retroactive to cases on collateral review based principles established by Supreme Court precedent. The Court held, however, that only where the Supreme Court itself specifically holds that a new rule is retroactive, or where the holdings of prior Supreme Court decisions "necessarily dictate retroactivity," can it be said that the new rule was "made retroactive" by the Supreme Court.[47]

In *Lackawanna County District Attorney v. Coss*,[48] the Court also restricted the right of defendants to obtain federal habeas relief with respect to prior state convictions used to enhance their sentence in a current state case. Again, the Court was split. Justice O'Connor wrote the majority opinion and Justices Souter, Stevens, Ginsburg, and Breyer dissented. Similarly, in *Daniels v. United States*, [49] the Court, per Justice O'Connor, refused to allow a federal defendant to collaterally attack a prior state conviction via federal post-conviction relief.[50] In both *Coss* and *Daniels* it should be noted the Court recognized there is an exception if the prior state convictions were obtained without counsel.

In *Seling v. Young*,[51] the Court, in another opinion by Justice O'Connor, used labels to restrict the availability of the writ. The Court held that a sex offender, committed in a civil proceeding as a sexually violent predator, cannot obtain habeas relief by raising an "as applied" challenge to the conditions of his confinement, alleging that they are punitive and therefore violate double jeopardy and ex post facto guarantees.

While federal habeas relief was thus restricted in *Walker, Tyler, Coss, Daniels*, and *Young*, the right to use the writ was strengthened in three immigration cases. In *INS v. St. Cyr*,[52] the defendant pled guilty to a deportable offense in 1996 at a time when the Attorney General had discretion to review the proceedings and waive deportation. Thereafter, Congress enacted

45. 121 S. Ct. 2478 (2001).
46. 28 U.S.C. § 2244 (b)(2)(A) (2001) (emphasis added).
47. Tyler v. Cain, 121 S. Ct. 2478, 2484 (2001).
48. 121 S. Ct. 1567 (2001).
49. 121 S. Ct. 1578 (2001).
50. *See* 28 U.S.C. § 2255 (2001).
51. 531 U.S. 250 (2001).
52. 121 S. Ct. 2271 (2001).

legislation which removed the Attorney General's discretion.[53] Defendant maintained that this legislation could not be applied retroactively to him. The Immigration and Naturalization Service (INS) argued that the Court was without jurisdiction to hear his claim, because the Congressional legislation had also stripped federal courts of habeas jurisdiction to review deportation proceedings. In a five-to-four decision by Justice Stevens, however, the Court held that the legislation could not be interpreted to remove habeas jurisdiction and upheld St. Cyr's retroactivity claim. Justice Stevens observed that in light of the prohibition against suspending the Writ of Habeas Corpus found in Article I, § 9 of the Constitution, the interpretation claimed by the INS (precluding review of deportation proceedings by any court) would "give rise to substantial constitutional questions."[54]

In *Calcano-Martinez v. INS*,[55] where the permanent resident aliens were deportable based upon their past criminal convictions, a federal appellate court dismissed their petition for direct review for want of jurisdiction, based upon the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[56] The Supreme Court agreed that the IIRIRA stripped the Courts of Appeal of jurisdiction to hear petitioners' claims on direct review. However, the Court held that such deportees could still seek relief from a deportation order by filing a Writ of Habeas Corpus.

In the third case of this trilogy, *Zadvydas v. Davis*,[57] the Court also upheld habeas jurisdiction for deportees who sought to challenge their indefinite confinement by the INS, which arose when no country was willing to accept them. Justice Breyer, joined by Justices O'Connor, Stevens, Souter, and Ginsburg construed the relevant statute to limit the period of detention to only what was "reasonably necessary" for the purpose of removal because indefinite detention of an alien who had been lawfully permitted to enter would raise "serious constitutional concerns."[58]

E. Capital Punishment

The Court reversed two death penalty cases during the term because of erroneous jury instructions. In *Penry v. Johnson*[59] Justice O'Connor overturned the second death sentence imposed upon Johnny Paul Penry. The Court had previously reversed defendant's first death sentence because his jury had not been properly instructed regarding mitigating factors including

53. Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 (1996); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

54. INS v. St. Cyr, 121 S. Ct. 2271, 2279 (2001).

55. 121 S. Ct. 2268 (2001).

56. 110 Stat. 3009-546 (1996).

57. 121 S. Ct. 2491 (2001).

58. *Id.* at 2495.

59. 121 S. Ct. 1910 (2001).

organic brain damage and mental retardation.[60] On retrial, Penry was again convicted and sentenced to death under virtually the same jury instructions. The only change was a supplemental instruction that simply told the jury it could consider mitigating evidence.[61] The verdict form, however, was tied to the original three "special issue" questions[62] that the Court had previously held precluded any meaningful consideration of the mitigating evidence in Penry's case. The Supreme Court, therefore, again reversed Penry's death sentence for failure to give proper instructions to the jury concerning his mental retardation.

In *Shafer v. South Carolina*,[63] the Court also vacated a death sentence because the trial court refused to inform the jury, as required by *Simmons v. South Carolina*,[64] that because of defendant's prior record, the default sentence would automatically be life imprisonment without possibility of parole if the jury did not vote for death.[65] The trial court refused to give such an instruction to the jury on the theory that the prosecutor never argued the defendant should be given death because of his dangerousness.[66] The Supreme Court found, however, that the failure to inform the jury of the mandatory default sentence was a clear violation of *Simmons*.[67]

F. Ex Post Facto

In *Rogers v. Tennessee*,[68] the Court again grappled with the application of the Ex Post Facto Clause of the Constitution. The defendant had stabbed a victim who died more than a year and a day after the act. The Tennessee Supreme Court affirmed his murder conviction, however, abolishing the common law "year and a day" rule as obsolete.[69] In affirming the Tennessee court, Justice O'Connor found that *ex post facto* limitations incorporated into due process give courts greater flexibility than legislatures.[70] In dissent, Jus-

60. Penry v. Lynaugh, 492 U.S. 302 (1989).
61. Penry v. State, 903 S.W.2d 715, 759-60 (Tex. Crim. App. 1995).
62. The three questions were:

> (1) Whether the conduct of the defendant . . . was committed deliberately . . .; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) . . . whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation. . . .

Penry v. Johnson, 121 S. Ct. 1910, 1915 (2001) (quoting Penry v. Lynaugh, 492 U.S. at 310 (quoting Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Supp. 1989))).
63. 121 S. Ct. 1263 (2001).
64. 512 U.S. 154 (1994).
65. *Shafer*, 121 S. Ct. at 1266.
66. *Id.* at 1268.
67. *Id.* at 1271 (citing Simmons v. South Carolina, 512 U.S. 154 (1994)).
68. 121 S. Ct. 1693 (2001).
69. State v. Rogers, 992 S.W.2d 393, 394 (Tenn. 1999).
70. Rogers v. Tennessee, 121 S. Ct. at 1699-1700.

tice Scalia argued that it was just as unfair to allow courts to change the law *ex post facto* as it was for legislatures to do so.[71]

G. Sixth Amendment Right to Counsel

Texas v. Cobb[72] restricts the scope of protection afforded by the Sixth Amendment right to counsel by narrowing the class of offenses to which the right is available. Cobb was indicted for a residential burglary and counsel was appointed. Thereafter, without notifying his appointed counsel, Cobb was questioned by the police about two missing occupants of the home that he had broken into, and he confessed to their murders.[73] The Texas Court of Criminal Appeals reversed, holding that because counsel had been appointed for him on the burglary charge, that lawyer should have been notified by the police prior to interrogating Cobb on the related murders that had occurred during the course of the burglary.[74] In a groundbreaking opinion, authored by the Chief Justice, the Court held that because the Sixth Amendment had not attached to the uncharged murders, no right to counsel under the Sixth Amendment existed.[75] Using the "Blockburger test"[76] as a standard, the Court asserted that the right to counsel would apply to an uncharged offense only if it were considered the "same offense" as the formally charged crime.[77] Because murder and burglary each have different elements and were thus separate crimes under that test, Cobb did not have a Sixth Amendment right to have his lawyer, appointed on the burglary charge, present at his interrogation on the murders.[78] In reaching this conclusion the Court narrowly construed *Brewer v. Williams*,[79] *Maine v. Moulton*[80] and *McNeil v. Wisconsin*;[81] weakened *Michigan v. Jackson*;[82] and departed from the bright line approach adopted in Fifth Amendment cases by *Edwards v. Arizona*[83] and *Arizona v. Roberson*.[84]

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71. *Id.* at 1704 (Scalia, J., dissenting).
72. 121 S. Ct. 1335 (2001).
73. *Id.* at 1339.
74. Cobb v. State, 2000 WL 275644, at *3 (Tex. Crim. App. 2000).
75. *Cobb*, 121 S. Ct. at 1340.
76. "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932).
77. *Cobb*, 121 S. Ct. at 1343.
78. *Id.* at 1344.
79. 430 U.S. 387 (1977).
80. 474 U.S. 159 (1985).
81. 501 U.S. 171 (1991).
82. 475 U.S. 625 (1986).
83. 451 U.S. 477 (1981).
84. 486 U.S. 675 (1988).

In *Glover v. United States*,[85] an ineffective assistance case, counsel's failure to object to the government's arguably incorrect classification of defendant's offenses resulted in the defendant receiving a sentence increased by an additional six months.[86] Rejecting the government's argument that this failure, if error, was *de minimus*, the Court, in a unanimous opinion by Justice Kennedy, held that any increase in jail time caused by counsel's deficient performance, constituted prejudice under the test for ineffective assistance established in *Strickland v. Washington*.[87]

H. Self-Incrimination

In *Ohio v. Reiner*[88] the Court held that a witness who denies guilt may still properly invoke her Fifth Amendment privilege against self-incrimination. A babysitter had been called as a witness against the defendant Reiner, who was charged with murder and child abuse in the death of his infant. The babysitter had invoked her privilege and was granted immunity before she testified against the defendant.[89] The Court held unanimously that the babysitter, who had denied any involvement in the abuse and death of the child, properly invoked the privilege, finding that she had reasonable cause to apprehend danger from answering questions where the defense maintained that she was the cause of the abuse.[90]

I. Detainers

In *Alabama v. Bozeman*,[91] state authorities lodged a detainer against an inmate incarcerated on a federal sentence. The inmate was transferred to the lodging state for a single day for the purpose of arraignment on the state charge and then returned to federal prison.[92] The Court adhered to a literal interpretation of the Interstate Agreement on Detainers which provides that where an inmate is transferred pursuant to a detainer, the charge to which the detainer relates must be dismissed if an inmate is returned to the place of his original imprisonment prior to the completion of the trial on that charge.[93]

85. 121 S. Ct. 696 (2001).
86. *Id.* at 699.
87. *Id.* at 701 (citing Strickland v. Washington, 466 U.S. 668 (1984)).
88. 121 S. Ct. 1252, 1255 (2001).
89. *Id.* at 1253.
90. Id. at 1254-55.
91. 121 S. Ct. 2079 (2001).
92. *Id.* at 2083-84.
93. *Id.* at 2082-83.

II. FOURTH AMENDMENT

A. Kyllo v. United States[94]

In an unusual alignment of justices, the Court held, five-to-four, that law enforcement use of thermal imaging technology to measure otherwise undetectable heat emissions from the walls and roof of a home constituted a "search" for Fourth Amendment purposes.

Federal agents suspected that Danny Lee Kyllo was growing marijuana inside his home in Florence, Oregon.[95] An Agema Thermovision 210 thermal imager operated by a Sergeant in the Oregon National Guard[96] was employed to scan the triplex in which Kyllo lived.[97] The thermal imager detects infrared radiation not otherwise visible to the naked eye, and transforms this information into heat images that show relative differences in temperature.[98] The scan of the triplex at 3:20 a.m. revealed that the roof and one wall of Kyllo's residence were significantly warmer than the rest of his home or the adjacent homes of his neighbors.[99] Believing this heat pattern was consistent with the use of high intensity lamps used by indoor marijuana growing operations, the agents sought a search warrant. Based in part upon the thermal imaging information, a federal magistrate authorized the search of Kyllo's home, which revealed over one hundred marijuana plants.[100]

Although the agents ultimately obtained a warrant to physically enter Kyllo's home, they did not possess a warrant at the time they conducted the high-tech scan of the exterior of Kyllo's home. Because the Fourth Amendment normally requires a warrant to safeguard the home from unreasonable searches, the issue in *Kyllo* was whether the use of the thermal imager constituted a "search."

The Framers of the Fourth Amendment would have no doubt understood the word "search" to include any examination, inspection or observation made for the purpose of discovering information.[101] Following the Court's decision in *Katz v. United States,*[102] however, a "search" occurs for Fourth Amendment purposes only when the government invades an objectively reasonable expectation of privacy. Thus it was thought that the outcome of this case would hinge largely on how the Supreme Court justices chose to characterize the heat emissions radiating from Kyllo's home. Most

94. 121 S. Ct. 2038 (2001).
95. *Id.* at 2041.
96. United States v. Kyllo, 37 F.3d. 526, 528 (9th Cir. 1994).
97. *Kyllo,* 121 S. Ct. at 2041.
98. *Id.*
99. *Id.*
100. *Id.*
101. *See* WEBSTER'S AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (6th ed. 1989).
102. 389 U.S. 347 (1967).

courts addressing the issue had treated the escaping radiation as abandoned "waste heat" exposed to the public, and ruled that a homeowner can have no reasonable expectation of privacy with respect to this information any more than she could with respect to smoke escaping from a chimney.[103] On the other hand, where the heat emissions were viewed as "signatures" of activities occurring inside the home, the homeowner's expectation of privacy was deemed reasonable and the use of the thermal imager was ruled a "search."[104]

In *Kyllo* itself, the Ninth Circuit Court of Appeals, complaining that it lacked a factual basis from which to assess the "intrusiveness" of the technology employed, had remanded the case back to the District Court for an evidentiary hearing to determine "the quality and the degree of detail of information" that the thermal imager could reveal.[105] The Court of Appeals raised the concern that the device might be capable of detecting "sexual activity in the bedroom."[106] The District Court, however, found that the thermal imager revealed only a crude visual image of the heat patterns emanating from the outside walls of Kyllo's house and did not show any human forms or activities within the home.[107] In a bizarre turn of events, divided panels of the Ninth Circuit initially reversed Kyllo's conviction, but then affirmed it. The first panel, in an opinion by Judge Noonan, ruled two-to-one that the use of the thermal imager constituted a search.[108] But after a change in composition, that panel withdrew the initial opinion and then ruled two-to-one, with Judge Noonan dissenting, that the thermal scan was not a search.[109] The reconfigured panel held that Kyllo had no subjective expectation of privacy in heat that he allowed to escape from his home. The panel held further that Kyllo had no objectively reasonable expectation of privacy in the "hot spots" revealed by the thermal imager because they "did not expose any intimate details of Kyllo's life."[110]

In a rarely seen alignment, Justice Scalia, joined by Justices Souter, Thomas, Ginsberg and Breyer, rejected both prongs of the Court of Appeals analysis. Justice Scalia began by observing that the *Katz* "reasonable expectation of privacy" test for determining when law enforcement conduct constitutes a "search" has been criticized as "circular . . . subjective and unpredictable."[111] The truth of this observation is plainly illustrated by the unusual twists and turns that this case took in the lower courts.

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103. *See* United States v. Myers, 46 F.3d 1325 (11th Cir. 1995); United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995); *and* United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994).

104. *See* United States v. Cusumano, 67 F.3d 1497 (10th Cir. 1995) (holding that warrantless use of thermal imager constituted a search), *vacated and decided on other grounds by* 83 F.3d 1247 (10th Cir. 1996) (en banc).

105. *Kyllo*, 37 F.3d 526, 530 (9th Cir. 1994).

106. *Id.*

107. Kyllo v. United States, 121 S. Ct. 2038, 2041 (2001).

108. United States v. Kyllo, 140 F.3d 1249 (1998).

109. United States v. Kyllo, 190 F.3d. 1041 (1999).

110. *Id.* at 1047.

111. *Kyllo*, 121 S. Ct. at 2043.

Setting these difficulties aside, however, Justice Scalia found that privacy expectations in the interior of the home have roots deep in the common law and have always been acknowledged as reasonable. Thus, historically, "the Fourth Amendment draws a firm line at the entrance to the house."[112] Finding that this "ready criterion . . . assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted,"[113] Justice Scalia rendered irrelevant the debate about degrees of intrusiveness by deeming all details about the interior of the home intimate details. Writing for a majority, he therefore held that,

> obtaining by sense-enhancing technology *any information* regarding the *interior* of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," . . . constitutes a search—at least where (as here) the technology in question is not in general public use.[114]

Thus, while the thermal imager disclosed only crude images of hot spots on the roof and walls of Kyllo's home, it nevertheless revealed information about "the relative heat of various rooms in[side] the home."[115] To withdraw Fourth Amendment protection for information concerning the interior of the home, Justice Scalia said would "erode the privacy guaranteed by the Fourth Amendment . . . [and] leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home."[116]

Justice Scalia's apparently newfound concern for the Fourth Amendment should not be seen, however, as a signal that he has defected to the liberal wing of the Court. Neither should one too readily assume that the battle to place limits upon the power of technology "to shrink the realm of guaranteed privacy" has been won.[117] Such an interpretation is belied by the narrowness of the rule adopted in *Kyllo* and the gateway left open for the very erosion of rights Justice Scalia so ardently claims to protect.

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112. *Id.* at 2046 (quoting Payton v. New York, 445 U.S. 573, 590 (1980)).

113. *Kyllo*, 121 S. Ct. at 2043.

114. *Id.* (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)). The curious use of *Silverman*—a case decided prior to *Katz*—as precedent in the sentence announcing *Kyllo's* essential holding is consistent with Justice Scalia's antipathy for *Katz* and the broader scope of Fourth Amendment protection that the *Katz* decision gave to areas beyond the protected zones expressly mentioned in the Amendment's text—i.e., "persons, houses, papers and effects." U.S. CONST. amend. IV.

115. *Kyllo*, 121 S. Ct. at 2043 n.2.

116. *Id.* at 2043-44.

117. Justice Scalia would have us believe, however, that *Kyllo* resolves this issue, noting, "The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy." *Id.* at 2043.

It should not be forgotten that just recently Justice Scalia, concurring in *Minnesota v. Carter*,[118] belittled the *Katz* test as "fuzzy," "self-indulgent" and "notoriously unhelpful."[119] In *Kyllo*, Justice Scalia did not abandon the position he took in *Carter*, that the Fourth Amendment should be applied only as literally written and historically understood.[120] Indeed, as implied by Justice Stevens' dissent, the "new" rule adopted in *Kyllo* can actually be seen as a departure from *Katz*.[121] Narrowly read, *Kyllo* only grants protection from sensory-enhancing technology for information obtained from the interior of the home because text and tradition establish that this was the "minimal . . . degree of privacy against government that existed when the Fourth Amendment was adopted."[122] The office, the telephone booth, the car and other areas not traditionally covered by the literal text of the Amendment or having "roots deep in the common law" are thus left unprotected by *Kyllo's* rule.[123]

More importantly, as the dissent points out, Justice Scalia's apparent limitation of *Kyllo* to technology not in "general public use" actually makes the rule uncertain and "somewhat perverse" because "its protection apparently dissipates as soon as the relevant technology is 'in general public use.'"[124] Justice Scalia's footnote response to the dissent[125] claims that the Court's prior precedent in *California v. Ciraolo* requires this qualification.[126] However, *Ciraolo* involved a naked eye observation of defendant's backyard from a fixed wing aircraft lawfully flying in navigatable airspace at 1000 feet. Technology (i.e. the use of an airplane) was thus employed in *Ciraolo* to enhance the officer's *vantage point*—not his senses. The issue there was whether the homeowner had a reasonable expectation of privacy from observations made from that aerial vantage point. Thus *Ciraolo* is clearly distinguishable from *Kyllo*, which involved the technological enhancement of human senses rather than vantage point.[127]

Certainly the use of technology to enhance human sensory capabilities presents different and more serious issues than the use of technology to sim-

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118. 525 U.S. 83 (1998). *See also* 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:1998-1999*, 36 CAL. W. L. REV. 437, 442-50 (2000) (discussing Minnesota v. Carter).

119. *Carter*, 525 U.S. at 91, 97 (Scalia, J., concurring).

120. *Id.* at 96. (Scalia, J., concurring) (commenting that the Court's decision in *Minnesota v. Olsen*, 495 U.S. 91, 98 (1990) (holding that an overnight guest had a reasonable expectation of privacy in her host's home) represented the "absolute limit of what text and tradition permit").

121. Kyllo v. United States, 121 S. Ct. 2038, 2051 (2001) (Stevens, J., dissenting).

122. *Id.* at 2043.

123. *Id.*

124. *Id.* at 2050 (Stevens, J., dissenting) (quoting *id.* at 2043).

125. *Id.* at 2046 n.6.

126. 476 U.S. 207 (1986).

127. For further discussion of this distinction, see generally Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825 (1989).

ply provide a platform from which to make naked eye observations. Justice Scalia's failure to distinguish between these two separate issues is made all the more troubling by his failure to define "general" public use. Indeed this vague standard presents a mirror image of the issue that the Court left unresolved with respect to vantage point in *Florida v. Riley*.[128]

In *Riley*, decided after *Ciraolo*, police used a helicopter to view the interior of a greenhouse secluded in the defendant's backyard. The Court fragmented on the issue of when a naked eye observation made from a lawful public vantage point constituted a search. A plurality, comprised of Justices White, Scalia, Kennedy and the Chief Justice, believed that a homeowner had no reasonable expectation of privacy regarding police observations made from a helicopter that lawfully hovered over a back yard at 400 feet. Five justices in that case, however, disagreed with the plurality's view that an otherwise reasonable expectation of privacy in the curtilage of the home could be lost simply because police viewed defendant's greenhouse from a position that could have been lawfully used by the public. Justice O'Connor, who wrote a separate opinion concurring in the judgment, actually agreed with the four dissenters that the mere fact a member of the public could lawfully travel at 400 feet over backyards was not enough to destroy one's otherwise reasonable expectation of privacy. Rather, the question to be answered, in the view of five justices, was whether the public used this airspace with such regularity that a defendant could not have reasonably expected privacy with respect to observations made from that vantage point.[129]

A similar issue appeared last term in *Bond v. United States*[130] where the Court held that squeezing a bus passenger's carry-on luggage was a search. Significantly, the Court rejected the government's reliance upon the plurality opinion in *Riley*, concluding that while a passenger may have exposed her bag to manipulation by other passengers, "[s]he does not expect that other passengers or bus employees will, *as a matter of course*, feel the bag in an exploratory manner."[131] Even more significant, however, is the fact that Justice Scalia dissented in *Bond,* agreeing with Justice Breyer that the type of manipulation engaged in by the officer there was not a search because it was "entirely foreseeable" and "substantially similar" to the manipulation engaged in by the general public.[132]

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128. 488 U.S. 445 (1989).

129. *Id.* at 454. Because Justice O'Connor believed the defendant had the burden of proof on this issue and had failed to meet it, she agreed with the plurality that the defendant had not shown a Fourth Amendment violation. However, she did not agree with the plurality's reasoning. *See* Benner, *supra* note 127, at 861-73.

130. 529 U.S. 334 (2000).

131. *Id.* at 338-39 (emphasis added). For a discussion of *Bond* see Laurence A. Benner, et al., *Criminal Justice in the Supreme Court: A Review of United States Supreme Court Criminal and Habeas Corpus Decisions (October 4,1999-October 1, 2000)* 37 CAL. W. L. REV. 239, 248-50 (2001).

132. *Bond*, 529 U.S. at 340.

Justice Scalia's cryptic reliance upon *Ciraolo* (that a homeowner has no reasonable expectation of privacy from aerial observation because overhead flights by fixed wing aircraft are "routine"[133]), coupled with the omission of any discussion of either *Riley* or *Bond* in his response to Justice Stevens' dissent in *Kyllo* is ominous. In *Ciraolo* there was no evidence that aircraft flew over the defendant's backyard "as a matter of course"[134] or that members of the public observed his or anyone's back yard from aircraft at 1000 feet with "sufficient regularity"[135] that an expectation of privacy from such fleeting glimpses was unreasonable.[136] Thus, *Ciraolo* can be read to stand for the proposition that if public use of a particular vantage point is merely foreseeable, then an expectation of privacy from that vantage point is not reasonable. But that is not the standard adopted by the *de facto* majority in *Riley* or the majority in *Bond*. And surely that should not be the standard for addressing the entirely different issue, presented in *Kyllo*, of using technology to enhance the human senses.

If a citizen's privacy in her conversations or other activities conducted entirely indoors is lost whenever it is reasonably foreseeable that members of the public could use a new form of technology to invade that privacy, then it will simply be a matter of time before what is available at your local Radio Shack will determine the scope of protection afforded by the Fourth Amendment against government snooping. Precisely because such an eventuality would be intolerable, the use of technology to enhance the senses should be subjected to the Fourth Amendment's warrant and probable cause requirements anytime its use reveals information about the interior of a home that could not have otherwise have been obtained by the naked senses without invading a reasonable expectation of privacy. *Kyllo* should not stand in the way of a future ruling to that effect despite Justice Scalia's cryptic reference to *Ciraolo* in a footnote.[137]

A further question remains as to what impact *Kyllo* will have on the use of technology outside the home. New passive imaging technology that can see through clothing to reveal weapons or other hidden items has already been developed for law enforcement use.[138] In a manner similar to the thermal imager, this technology detects the radiation of electro-magnetic energy.

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133. The full passage reads: "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet." California v. Ciraolo, 476 U.S. 207, 215 (1986).

134. *Bond*, 529 U.S. at 339.

135. Florida v. Riley, 488 U.S. 445, 454 (1989).

136. *Ciraolo*, 476 U.S. at 223 (Powell, J. dissenting) (taking issue with the majority opinion on the ground that it would require a homeowner to protect against such a "fleeting . . . glimpse" in order to maintain Fourth Amendment protection).

137. *Kyllo*, 121 S. Ct. at 2046 n.6.

138. Michael Allen, *Are These X-Rays Too Revealing?* WALL ST. J., Mar. 2, 2000, at B1. *See also Kyllo*, 121 S. Ct. at 2044 n.3. (describing other forms of new surveillance technology).

If the Court were to rule that we do not have a reasonable expectation of privacy in the radiation our bodies naturally emit, then the Fourth Amendment would not apply to the use of such devices. But the "person" is expressly protected by the literal text of the Fourth Amendment and certainly tradition and history support the argument that privacy of the person was just as important to the framers of the Amendment as the interior of the home. While such technology may show only crude images and reveal no "intimate details," reliance upon that argument to reduce one's expectation of privacy about information emanating from the body would seem foreclosed by *Kyllo*. Thus, after *Kyllo,* not only the thermal imager, but also other similar devices that measure radiation may now be subject to the protection of the Fourth Amendment's warrant and probable cause requirements.

B. Atwater v. City of Lago Vista[139]

Although the Fourth Amendment was intended by the Framers to protect against arbitrary, unreasonable seizures, in this case the Supreme Court, by the margin of a single vote, appears to have abdicated its role as the guardian of that Constitutional protection. The Court let stand what all admit was arbitrary and unreasonable—the warrantless, custodial arrest,[140] booking, and jailing of a young mother of two small children, for a traffic infraction for which her state legislature had determined she could not be incarcerated, even for an hour.

Gail Atwater, a sixteen year resident of Lago Vista, Texas (population 2,486) is a full-time mother who, prior to this incident, had received only a single traffic citation, ten years earlier, for failing to signal a lane change.[141] She was coming home from soccer practice with her two children when they realized that a toy, which had been affixed to the window of their pickup truck, had fallen off.[142] Ms. Atwater back-tracked to look for the toy and the children, aged three and five, took off their seat belts so they could look out the window.[143] There was no traffic and Ms. Atwater was driving slowly about 15 miles per hour on a residential street near her home when she was pulled over by a Lago Vista police officer.[144]

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139. 121 S. Ct. 1536 (2001).

140. The term "arrest" is synonymous with seizure. California v. Hodari, 499 U.S. 621, 627 (1991). Thus, an officer effects an arrest when he make a traffic stop, detains the driver and issues a citation. A "custodial arrest" occurs when the arrestee is taken into custody, transported to a police station, booked and required to post bond or otherwise obtain release by court order. *See generally* United States v. Robinson, 414 U.S. 218 (1973); New York v. Belton, 453 U.S. 454 (1981). *Cf.* Knowles v. Iowa, 525 U.S. 113 (1998).

141. Atwater v. City of Lago Vista, 121 U.S. at 1565 (O'Connor, J., dissenting).

142. Petitioner's Brief at 2-4. Record at 380.

143. *Id.*

144. *Id.*

From the outset the officer was verbally abusive to Ms. Atwater.[145] Jabbing his finger in her face and screaming, he castigated her for failing to have her children buckled up.[146] The children became frightened and started crying. When Ms. Atwater asked him to lower his voice he yelled at her "You're going to jail."[147] When Ms. Atwater asked if she could drop her children at a neighbor's house just down the street, he refused and said he would take them into custody as well.[148] Only through the intervention of neighbors who had gathered at the scene were the children released to a friend of the family.[149]

Ms. Atwater was handcuffed with her hands behind her back, placed in a squad car and transported (without a seatbelt) to the police station. There, she was stripped of her shoes, her possessions and her eyeglasses. After her mug shot was taken, she was placed in a holding cell for about an hour and then was taken before a judge who released her on $310 bond.[150] When she returned to retrieve her car she found it had been towed.[151]

Ms. Atwater was charged with failing to wear a seat belt, failing to have her children properly belted, and failing to have her driver's license and proof of insurance on her person.[152] She pled no contest to her own seat belt violation and paid a $50 fine, the maximum possible punishment. All other charges were dismissed.[153] Under Texas law, the failure to wear a seat belt is a non-jailable offense. However, law enforcement is given unbridled discretion to give either a citation or to make a full custodial arrest for such an infraction.[154]

There was no evidence that Ms. Atwater presented a flight risk or was a threat to either the officer or the pubic. Nor was there any evidence that she had provoked her arrest by being belligerent or in any way challenging the officer's authority. Indeed Ms. Atwater had apologized for letting the children take off their seat belts.[155] The record does not reveal that the officer ever gave or was required to give any reason for making a custodial arrest instead of issuing a citation. It does appear, however, that this officer was on a crusade to zealously enforce the seat belt statute. Just three months earlier

145. *Id.* The allegations contained in the complaint filed by Atwater against the officer were assumed by the Court to be true for the purposes of this decision. *Atwater*, 121 S. Ct. at 1541.

146. *Id.* at 1565 (O'Connor, J., dissenting).

147. *Id.* at 1541.

148. *Id.* at 1565 (O'Connor, J., dissenting).

149. *Id.*

150. *Id.* at 1542.

151. *Id.* at 1565 (O'Connor, J., dissenting).

152. *Id.* at 1542.

153. *Id.*

154. *Id.* at 1541.

155. *Id.* at 1566 (O'Connor, J., dissenting).

he had stopped Ms. Atwater because he mistakenly suspected that one of her children was not wearing a seat belt.[156]

Believing that her custodial arrest without a warrant was arbitrary and unreasonable, she filed suit against the officer under 42 U.S.C. § 1983. Sitting *en banc*, the Court of Appeals for the Fifth Circuit, over three dissents, affirmed the trial court's order granting summary judgment for the officer.[157] Justice Souter, writing for the Chief Justice, and Justices Scalia, Kennedy and Thomas affirmed the Fifth Circuit. Justice O'Connor, Stevens, Ginsburg and Breyer dissented.[158]

Justice Souter's opinion first struggled with the historical record regarding warrantless arrests for misdemeanors. Justice Souter began by acknowledging that Atwater's historical argument was "by no means insubstantial."[159] Atwater maintained that the common law only permitted warrantless arrests for misdemeanors if they involved a breach of the peace committed in the officer's presence. Eminent authorities such as Lord Halsbury, Sir William Blackstone, James Fitzjames Stephen and Glanville Williams supported her position.[160] However, citing among others a treatise published posthumously in 1736 more than half a century after the author's death, Justice Souter found that there was not unanimous agreement on this point.[161]

Justice Souter then called attention to the "nightwalker statutes" (which permitted arrest of strangers walking abroad at night) and pointed out other statutes passed by the British Parliament close to the time of the American Revolution that permitted warrantless arrests for certain misdemeanors not technically constituting a breach of the peace. It is not at all clear why enactments of a British regime from which Americans revolted, a regime whose repression of rights gave impetus to the Fourth Amendment, should serve to restrict the interpretation of that Amendment today. Nevertheless, Justice Souter found that the historical record at the time the Fourth Amendment was ratified, failed to provide "a clear answer" to the question of when warrantless misdemeanor arrests were prohibited by the common law.[162]

If absolute clarity and unanimity in the historical record is a prerequisite, then virtually all of our constitutional rights may be in danger. History teaches us that these protections have almost always been forged as a result of controversy and conflict. The fact they were enshrined in constitutional text and a separate bill of rights is testament to the fact the Framers thought these rights were vulnerable to abuse from the power of unconstrained discretion. Justice Souter's tedious excursion into history, moreover, misses the

156. *Id.*
157. Atwater v. City of Lago Vista, 165 F.3d 380 (1999).
158. *Atwater*, 121 S. Ct. at 1536.
159. *Id.* at 1543.
160. *Id.* at 1544-45.
161. *Id.* at 1546.
162. *Id.* at 1552-53.

forest by focusing upon only a few of the trees. What *is* clear from the historical record is that there was no universal, unlimited power to arrest at common law for offenses that were less than felonies. Rather than seeing the existence of a limited number of statutory exceptions as proof of this general rule, Justice Souter uses them to defeat a particular version of the rule, which is propped up to serve as a straw man.

Justice Souter found that there was also no uniform rule banning warrantless misdemeanor arrests other than for breaches of the peace in early American cases, citing as an example decisions that upheld statutes authorizing warrantless arrests for "Sabbath-breaking."[163] He also extensively demonstrates, supported by an appendix containing statutory references, that current state laws authorize warrantless arrests for many minor offenses not involving breaches of the peace.[164]

Finding no support for either an English common law or an existing American law rule limiting warrantless misdemeanor arrests to breaches of the peace, Justice Souter then refused to "mint" a new constitutional rule to limit an officer's discretion in cases involving minor offenses. Atwater had argued that absent circumstances where public safety required detention, a custodial arrest was unreasonable if the offense for which the arrest was being made did not carry any jail time. This seemingly straightforward bright line rule, based on legislatively authorized punishment, was rejected, however, on the ground that "an officer on the street might not be able to tell" because state penal laws frequently have "complex penalty schemes."[165] But surely an officer could check with a superior? Justice Souter claimed, however, that such a rule would "place the police in an almost impossible spot."[166] The amount of drugs involved, for example, might not turn out to be enough to have warranted a jail sentence. Yet again, this example is baffling because all the rule proposed by Atwater requires is probable cause to believe that a jailable offense has been committed.

This over-solicitous concern regarding the administrability of the rule from the officer's perspective highlights the Court's true concern. It fears that a constitutional rule controlling the discretion to make a custodial arrest

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163. *Id.* at 1548.

164. *Id.* at 1552, 1558-60. The Appendix appears to ignore, however, the distinction between infractions and misdemeanors. For example, the Appendix gives the impression that California permits warrantless arrests for any type of "public offense" so long as it is committed in the officer's presence. *Id.* at 1558. However, California law in fact provides that except for certain specified offenses (e.g., driving while impaired) an officer may not take an arrestee into custody for an infraction (defined as an offense not punishable by jail, CAL. PENAL CODE § 19.6) unless the arrestee "refuses to sign a written promise to appear, has no satisfactory identification, or refuses to provide a thumbprint or fingerprint." CAL. PENAL CODE § 853.5. Elsewhere in the opinion the Court does recognize that California is one of the "[m]any jurisdictions [that] have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses," Atwater v. City of Lago Vista, 121 S. Ct. at 1540, but cites only to a section of the California Vehicle Code dealing with the offense of speeding. *Id.*

165. *Id.* at 1554.

166. *Id.* at 1555.

would result in "increased litigation" that would result in evidence being excluded and provide a basis for making police officers personally liable under 42 U.S.C. § 1983 for making wrongful arrests.[167] But surely the cost of lost evidence discovered in connection with an arrest for a non-jailable infraction cannot be significant.[168] Neither can it be said that our system of administering criminal justice will be greatly damaged if an officer is indeed deterred, despite the benefit of qualified immunity[169] from making a custodial arrest for an offense because he has doubts about whether it is punishable by a jail sentence. One is compelled to conclude, therefore, that it is ultimately only the Court's desire to shield police officers from lawsuits, seeking to hold them personally accountable for patently unreasonable conduct, that trumps the right of citizens not to be subjected to such unreasonable exercises of discretion.

In fairness, it should be noted that during oral argument, Justice Souter appeared to sincerely believe that the type of "horrible case" Atwater presented was "very rare" and therefore should not be the basis for "constitutionalizing a general rule."[170] In response to Justice O'Connor's dissent, he replied that her claim that minor traffic stops would become a gateway for harassment of minorities, was "speculative" and noted that "absent from the parade of horribles is any indication that the 'potential for abuse' has ever ripened into a reality."[171] Justice Souter and the majority are therefore content to rely upon the "good sense (and failing that, the political accountability) of most local lawmakers and law enforcement officials" to prevent an "epidemic of unnecessary minor traffic arrests" from occurring.[172]

This idealistic trust in democracy as a cure-all, however, is unfaithful to the Framer's understanding of the role of the Constitution. The Fourth Amendment was intended to prevent abuses from occurring by constraining unlimited discretion precisely because arbitrary power is destructive of liberty. Justice Souter's idealism also sadly betrays a mindset far removed from the reality of racial stereotyping and the plight of the powerless in America. By placing the burden upon the citizenry to prove there is an "epidemic" of abuse before it will act to control unbridled discretion, the Court both overvalues the corrective influences, which are assumed in theory to exist, and dramatically undervalues the costs to human liberty and privacy at stake.

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167. *Id.*

168. This is so even without considering the many exceptions to the exclusionary rule. *See, e.g.*, Arizona v. Evans, 514 U.S. 1 (1995).

169. *See* Anderson v. Creighton, 483 U.S. 635, 646 (1987) (holding that if a police officer makes a good faith reasonable mistake about the lawfulness of a search or seizure, she cannot be held personally liable).

170. Transcript of Oral Argument at 18.

171. Atwater v. City of Lago Vista, 121 S. Ct. at 1557.

172. *Id.*

Contrary to the Court's assessment that Atwater's arrest was merely "inconvenient and embarrassing"[173] there is much more at stake than the humiliation of being handcuffed and the stigma of being arrested. A custodial arrest is a severe intrusion, which can involve a substantial loss of physical liberty[174] and regardless of duration constitute a serious disruption to the life of the person arrested. This disruption can also have attendant social costs extending to the arrestee's employer and dependents. Indeed, in Atwater's case the traumatic scars inflicted upon her innocent children were well documented.[175]

A custodial arrest also results in a substantial invasion of one's privacy. The arresting officer is now authorized to conduct a full search of the arrestee's person[176] and any immediately adjacent property as an incident of that arrest.[177] The arrestee's car can also be searched[178] and subjected to impoundment where a full inventory of the contents may be made.[179] The arrestee is also subjected to the degrading process of being "booked" and the not unfrightening experience of being locked in a holding cell with strangers until bail is posted or a magistrate orders release. The Court's cavalier dismissal of the consequences of a full custodial arrest displays an appalling indifference to the values of individual dignity, liberty and privacy protected by the reasonableness requirement embodied in the text of the Fourth Amendment.

The risk that a police officer's unconstrained discretion will be abused must also be evaluated by the degree to which opportunities for abuse exist. It is estimated that nationwide, there are 19.3 million traffic stops annually, representing about ten percent of licensed drivers.[180] Exposing such a considerable portion of the population to the unfettered discretion to impose such severe intrusions upon liberty and privacy should alone tip the balance in favor of providing constitutional protection. But there is an additional reason why uncontrolled discretion should not be sanctioned. This is because, as recent studies have now established, the risk of exposure to such discretion does not fall evenly. National statistics compiled by the United States Department of Justice, Bureau of Justice Statistics, reveal that "in 1999, Blacks had higher chances than Whites of being stopped at least once and higher chances than Whites of being stopped more than once."[181] Blacks and

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173. *Id.* at 1558.

174. *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (holding that 48-hour detention before being taken before a magistrate was not unreasonable).

175. *Kyllo*, 121 S. Ct. at 1566 (O'Connor, J., dissenting).

176. United States v. Robinson, 414 U.S. 218, 224-25 (1973).

177. *See* Chimel v. California, 395 U.S. 752, 763 (1969).

178. New York v. Belton, 453 U.S. 454, 460 (1981).

179. Colorado v. Bertine, 479 U.S. 367, 368-69 (1987).

180. Patrick A. Langan, et al., Contacts Between Police and the Public, Findings from the 1999 National Survey, Bureau of Criminal Justice Statistics, February, 2001, at 1.

181. *Id.* at 13.

Hispanics were also significantly more likely to experience the threat of force or use of force as a result of contact with police.[182]

Similar disparities were reported in a recent study conducted by an urban police department whose leadership has actively addressed public concern about racial profiling.[183] That study, which was based upon special incident reports filled out by police officers for every vehicle stop, found that Black and Hispanic drivers were over-represented in vehicle stops in comparison to their portion of the driving age population.[184] This was especially true with respect to equipment violations. Overall, Blacks and Hispanics had about a twenty-five percent chance of being stopped as opposed to Whites who had only a fifteen percent chance of being stopped.[185] Black and Hispanic drivers were also substantially more likely to have their cars searched than Whites.[186] Almost 10,000 cars and 5,000 drivers were searched in connection with vehicle stops.[187] Contrary to prevailing racial stereotypes about drug use, the success rate of the discretionary searches in finding contraband, while extremely low overall, was highest for White drivers.[188]

Finally and most importantly, the study showed that Blacks and Hispanics had substantially higher chances than Whites of being arrested (two to three times higher) as a result of a vehicle stop. In a petition for rehearing, Atwater presented the Court with new evidence suggesting that over 250,000 people are arrested annually for minor traffic offenses.[189] Reiterating the concerns expressed by the dissenters, Atwater's petition reminded the Court that because its decision in *Whren v. United States*[190] has foreclosed any inquiry into the subjective motivations of the police officer for making the stop, law enforcement officers who harbor racial stereotypes about drug use by minorities may now effect a full custodial arrest as a pretext in order to do a full blown search of both driver and car.[191] Ironically, where such searches do not reveal any contraband (which will be the case for the vast, overwhelming

182. *Id.* at 2.

183. Vehicle Stop Study, Year End Report: 2000, San Diego Police Department, May 8, 2001. The San Diego Police Department is nationally recognized as a leader in community policing that seeks to involve the community and employ proactive approaches to solving the problem of crime. Under the leadership of Police Chief David Bejarano the Department has also made a concerted effort to combat racial profiling.

184. *Id.* at 3.

185. *Id.*

186. *Id.*

187. *Id.*

188. The success rate in finding contraband as a result of discretionary (non-inventory) searches was 17.4% for Whites, 15.9% for Blacks, 12.7% for Asian/Pacific Islander and 12.6% for Hispanics. *Id.* Tbl. 18.

189. Petition for Rehearing, at 4.

190. 517 U.S. 806 (1996).

191. Petition for Rehearing, at 6. Shortly after the *Atwater* decision was handed down, however, the Court in a per curiam opinion reaffirmed *Whren* in the context of a custodial arrest made after an allegedly pretextual traffic stop. Arkansas v. Sullivan, 121 S. Ct. 1876 (2001).

majority of those Black and Hispanic drivers searched[192]) the officer can change his mind and issue only a citation. Thus the members of the Court will never learn about such abuses and the myth about a "dearth of horribles" will continue.

In *Knowles v. Iowa*[193] the Court unanimously held that in the absence of probable cause to search for evidence of crime or reasonable fear for the officer's safety, a search of a vehicle incident to the issuance of a traffic citation was unreasonable, because there was no justification for it.[194] Ironically, *Knowles* will now have the perverse effect of giving curious officers the incentive to make custodial arrests for minor infractions in order to take advantage of the officer's broader power to search incident to arrest.[195] One cannot fault the natural desire of law enforcement to use every opportunity to fight the war on drugs. One can question, however, why the Court remains blind to the fact that the war on drugs is disproportionately leveled against Black and Hispanic citizens.[196]

Finally there is even a more fundamental reason for limiting police discretion to make custodial arrests for fine-only offenses. Our criminal justice system is premised upon the principle that only the elected representatives of the people may determine what may be punished as a crime. When an officer, without being required to give any justification whatsoever, is given the unrestrained discretion to make a custodial arrest for a non-jailable traffic offense, he is in effect being granted the arbitrary power to punish the offender with incarceration. This is precisely what the officer's purpose was in *Atwater*, as seen by his exclamation "You're going to jail" at the outset of the encounter with Ms. Atwater. Although the law did not allow it, he decided to punish her with incarceration because in his opinion she was being a negligent mother. *Atwater* thus gives new meaning to the term "police state." One can only hope that state legislators, mindful of the abuses made possible by this extraordinary decision, will curb the arbitrary power to engage in such extra-legislative punishment by enacting state laws which place controls on law enforcement discretion to make custodial arrests.[197]

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192. Over 87% of the Black and Hispanic drivers searched by the San Diego Police Department during 2000 were innocent of carrying any contraband. Vehicle Stop Study, *supra* note 183, table 18.

193. 525 U.S. 113 (1998).

194. *Id.* at 114.

195. *See* New York v. Belton, 453 U.S. 454 (1981).

196. *See* Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants, Sixth Annual Symposium: Politics of the Drug War*, J. OF GENDER, RACE & JUSTICE (forthcoming, 2002).

197. *See, e.g.*, CAL. PENAL CODE § 853.5 (West 2001)

> In all cases, except [those involving impaired driving offenses], in which a person is arrested for an infraction, a peace officer shall only require the arrestee to present his driver's license or other satisfactory evidence of his identity for examination and to sign a written promise to appear. If the arrestee does not have a driver's license or other satisfactory evidence of identity in his or her possession, the offi-

C. City of Indianapolis v. Edmond[198]

In the first of two "special needs" doctrine cases decided during the term, the Court held that roadblocks "designed primarily to serve the general interest in crime control" violate the Fourth Amendment.[199] In *Edmond*, the Indianapolis police conceded that the primary purpose of their "narcotics" checkpoint program was to discover illegal drugs.[200] Although police asserted that a secondary purpose was to detect impaired drivers who were intoxicated and check driver's licenses and registration, this did not save the roadblocks.[201]

A supervisor authorized the roadblocks, and site selection was based upon crime statistics for the area and traffic flow.[202] The roadblocks were manned by approximately thirty officers and conducted under written guidelines that required a predetermined number of vehicles be stopped in a particular sequence.[203] Officers had no discretion to stop cars out of sequence.[204] A narcotics detector dog circled around each car stopped at the checkpoint.[205]

> cer may require the arrestee to place a right thumbprint . . . or fingerprint . . . on the promise to appear. This thumbprint or fingerprint shall not be used to create a database. Only if the arrestee refuses to sign a written promise, has no satisfactory identification, or refuses to provide a thumbprint or fingerprint may the arrestee be taken into custody.

Id.

198. 531 U.S. 32 (2001).

199. *Id.* at 42. The other decision is *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). Under the "special needs" doctrine, the Court has used a balancing test to determine when the normal Fourth Amendment safeguards embodied in the warrant and probable cause requirement may be relaxed. If the government's special need for flexibility outweighs the citizen's privacy and liberty interests, then the police practice is deemed to be "reasonable" under the Fourth Amendment. The origins of the "special needs" doctrine are found in *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the special need to protect an officer's safety when investigating suspected violent criminal activity (armed robbery) was held to outweigh the minimal intrusion occasioned by a brief seizure and pat down search for weapons. *Id.* at 30. *See also* New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding searches of school children by school officials on reasonable suspicion); Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1988) (upholding warrantless and suspicionless drug testing of railroad employees); Treasury Employees v. Von Raab, 489 U.S. 656 (1989) (upholding drug testing of federal workers); Vernonia School District v. Acton, 515 U.S. 646 (1995) (upholding drug testing of junior high school athletes). *But see* Chandler v. Miller, 520 U.S. 305 (1997) (refusing to uphold warrantless and suspicionless drug testing of candidates for political office).

200. *Edmond*, 531 U.S. at 35-36.

201. *Id.* at 43-44.

202. *Id.* at 35.

203. *Id.*

204. *Id.* at 35. Random stops of motorists for safety inspection and driver's license checks were held unlawful in *Delaware v. Prouse*, 440 U.S. 648 (1979).

205. *Edmond*, 531 U.S. at 35. Although the legality of the checkpoint did not turn on the point, the Court observed that a dog sniff did not constitute a search because there was no entry into the car and the only information obtained concerned the presence or absence of illegal narcotics. *Id.* at 40. *See also* United States v. Place, 462 U.S. 696 (1983).

It was stipulated that the duration of each stop did not exceed five minutes.[206] A search did not take place unless there was consent or the requisite individualized suspicion required by the Fourth Amendment.[207]

The roadblocks were operated in daylight and motorists were given warnings that they would encounter the narcotics checkpoint as they approached.[208] During a two-month period, the roadblocks, resulting in 104 arrests, 55 of which were for drug-related crimes, stopped 1,161 vehicles.[209] Edmond brought a class action in federal court seeking to enjoin the roadblocks.[210] The district court denied Edmond's motion for preliminary injunction, but the Court of Appeals for the Seventh Circuit reversed.[211]

Writing for the majority, Justice O'Connor, joined by Justices Stevens, Kennedy, Souter, Ginsburg and Breyer, affirmed the Seventh Circuit.[212] The Chief Justice, joined by Justices Scalia and Thomas dissented.[213]

Justice O'Connor began by observing that in previous checkpoint cases the Court had found a "special need" for dispensing with the normal requirement of individualized suspicion.[214] In *United States v. Martinez-Fuerte*,[215] a fixed immigration checkpoint, located within 100 miles of the U.S.-Mexico border, was designed to stop the tide of illegal immigrants flowing into the country.[216] This checkpoint was upheld, said Justice O'Connor, because of the special need to police the Nation's border and the "formidable . . . difficulty of effectively containing illegal immigration at the border itself."[217] In *Michigan Dept. of State Police v. Sitz*,[218] the Court also upheld sobriety checkpoints because of the "the immediate hazard posed by the presence of drunk drivers on the highways, and the . . . gravity of the drunk driving problem."[219] In both of these cases, said Justice O'Connor, there was a special need to detect wrongdoers "beyond the normal need for law enforcement"[220] that justified relaxing traditional Fourth Amendment requirements.

The primary purpose of a "narcotics checkpoint," however, was in the majority's view "indistinguishable from the general interest in crime con-

206. *Edmond*, 531 U.S. at 35.
207. *Id.*
208. *Id.* at 35-36.
209. *Id.* at 34-35.
210. *Id.* at 36.
211. *Id.*
212. *Id.*
213. *Id.* at 48.
214. *Id.* at 33, 37.
215. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).
216. *Edmond*, 531 U.S. at 38 (citing *Martinez-Fuerte*, 428 U.S. at 551-54).
217. 531 U.S. at 37 (citing *Martinez-Fuerte*, 428 U.S. at 561-64).
218. 496 U.S. 444 (1990).
219. 531 U.S. at 39 (citing *Martinez-Fuerte*, 428 U.S. at 451).
220. 531 U.S. at 37-38.

trol."[221] Acknowledging that in both *Martinez-Fuerte* and *Sitz* the roadblocks had the same "ultimate purpose" of arresting law violators as the *Edmond* roadblock, Justice O'Connor nevertheless declared:

> If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.[222]

Justice O'Connor recognized that the social harm created by illegal drugs was "of the first magnitude," but noted that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[223]

Neither did the secondary purpose of the roadblock, (i.e. removing impaired and unlicensed drivers from the highways) save the roadblocks. It is the primary purpose of the roadblock by which its lawfulness is judged.[224] Otherwise, Justice O'Connor observed, police would be able to use roadblocks for "virtually any purpose so long as they also included a license or sobriety check."[225] The Chief Justice, joined by Justices Scalia and Thomas, strongly dissented from this ruling. In their view, because the secondary purpose provided a valid reason for the roadblock, it was therefore lawful whatever the other objectives were that police may have had in mind.[226] Relying on *Whren v. United States*,[227] the Chief Justice argued that the subjective intentions of the police are irrelevant to a Fourth Amendment analysis.[228]

The majority distinguished *Whren* noting that there, the seizure was in fact in compliance with the Fourth Amendment's normal requirement of individualized justification.[229] In *Whren,* the officer allegedly used a traffic stop as a pretext to look for drugs. However, the officer did have probable cause to stop the vehicle in question because of an observed traffic violation.[230] By contrast, in roadblock situations, Justice O'Connor pointed out, there is no individualized suspicion that independently justifies the stop of a particular car.[231] She also likened the *Edmond* purpose inquiry to the subjective inquiry made in inventory searches. In those cases, *Whren* is also inap-

221. *Id.* at 44.
222. *Id.* at 42.
223. *Id.*
224. *See id.* at 48.
225. *Id.* at 46.
226. *Id.* at 51-52 (Rehnquist, J., dissenting).
227. 517 U.S. 806 (1996).
228. 531 U.S. at 52 (Rehnquist, J., dissenting).
229. *Id.* at 45.
230. *Id.*
231. *Id.* at 46.

plicable because "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."[232]

If inventory searches are to become the paradigm for how the *Edmond* purpose inquiry is to be conducted, however, the *Edmond* primary purpose test may itself turn out to be a ruse. Inventory searches are exempt from the normal requirements of a warrant and probable cause because they are undertaken for "administrative care taking functions."[233] In *Colorado v. Bertine*,[234] the Court noted that an inventory search might be invalidated if there was a showing that the search was conducted for the "*sole* purpose" of investigating suspected criminal activity rather than an administrative purpose.[235]

Far from being a model for a "primary" purpose inquiry, *Bertine* has led lower courts to validate inventory searches whenever twin purposes exist. For example in *United States v. Judge*,[236] the defendant's car was seized following his drug arrest and DEA agents without probable cause searched a bag in the trunk of his car.[237] The court upheld the search as an inventory search, but candidly admitted:

> It would be disingenuous of us to pretend that when the agents opened Judge's bag, they weren't hoping to find some more evidence to use against him. But they could have also reasonably had an administrative motive, which is all that is required under *Bertine*. While there are undoubtedly mixed motives in the vast majority of inventory searches, the constitution does not require and our human limitations do not allow us to peer into a police officer's "heart of hearts."[238]

Arguably, such twin purpose inventory searches are now invalid after *Edmond* without a showing that the administrative purpose was the "primary" purpose. Even if that is correct, however, the difficulty of making such a determination remains. Indeed it will be even more difficult to peer into the "heart of hearts" of policy-making police personnel who establish (and are apparently required by *Martinez-Fuerte* and *Sitz* to establish) the special purpose roadblocks.[239] Will police chiefs or high level deputies now

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232. *Id.* at 45 (quoting Florida v. Wells, 495 U.S. 14 (1990)). *See also* Colorado v. Bertine, 479 U.S. 367, 372 (1987) (noting the relevance of bad faith).

233. *Bertine*, 479 U.S. at 371.

234. 479 U.S. 367 (1987).

235. *Id.* at 372 (emphasis added).

236. 864 F.2d 1144 (5th Cir. 1989).

237. *Id.* at 1145.

238. *Id.* at 1147 n.5.

239. One of the central premises underlying both *Martinez-Fuerte* and *Sitz* was the fact that the discretion of the officer in the field was controlled to prevent arbitrary and discriminatory intrusions. Unless supervisory personnel control the placement of roadblocks that premise is undermined. *See* State v. Hicks, No. E1999-00957-SC-R11-CD, 2001 WL 1035172, at *15 (Tenn. Sept. 11, 2001). This understanding was echoed in *Edmond* by the Court's declaration that the purpose inquiry was to be conducted "only at the programmatic level." City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2001).

be routinely called to the stand to testify at suppression hearings regarding the "primary" purpose of roadblocks?

Justice O'Connor recognized the difficulty this new primary purpose inquiry would create for courts, and acknowledged that the same police practice might be either permitted or invalidated solely upon a determination that it was "driven by an impermissible purpose."[240] Nevertheless, she noted that courts routinely undertake such inquiries in other areas of constitutional jurisprudence in order to uncover abusive governmental conduct.[241]

It is clear that the majority has struck a compromise in *Edmond* between the need to give law enforcement flexibility and the need, at the same time, to keep overzealous law enforcement in check. Insight into the nature of that compromise is perhaps best seen in the remarks of the Chief Judge of the Seventh Circuit, who wrote the opinion in the court below.[242] In an attempt to deflect criticism that a purpose inquiry was too difficult and too uncertain to provide a suitable constitutional yardstick for evaluating such roadblocks, Chief Judge Posner stated:

> But law like politics is the art of the possible and often requires imperfect compromises. Inquiry into purpose is one method of identifying and banning the most flagrantly abusive governmental conduct without handcuffing government altogether. The alternative would be to rule that either all roadblocks are illegal or none are. . . ."[243]

The "primary purpose" test thus functions like a kind of judicial toggle switch that can be manipulated by the courts to either uphold or invalidate a particular roadblock. But in this resulting compromise, the principle that ordinary searches for evidence of crime must be based upon individualized suspicion would seem to have been given short shrift. It appears to be conceded from the start that the "primary purpose" test will not provide a workable rule for enforcing this principle, but rather will be capable of weeding out only the "most fragrantly abusive" roadblocks.

It also seems clear that *Edmond* will generate a great deal of litigation. Far from creating a bright line rule where it can be established that all roadblocks for a certain purpose will be valid, courts will now have to examine each roadblock to determine its "primary" purpose. That purpose, furthermore, will have to be justified under a special needs analysis. As Justice O'Connor explained: "The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program."[244] Thus, the burden still remains upon the government to establish three things: first, that there is a substantial special need to dispense with individualized suspicion in order to accomplish the state inter-

240. *Edmond*, 531 U.S. at 47.
241. *Id.*
242. Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999).
243. *Id.* at 665.
244. *Edmond*, 531 U.S. at 47.

est served by the checkpoint;[245] second, that this primary interest is in fact promoted by the roadblock;[246] and third, that the gravity of the state interest served by the roadblock is important enough to outweigh the intrusion imposed upon citizens using the public highways.[247] Satisfying these three elements may be a relatively easy burden to meet near the border in immigration checkpoint cases, in areas where drunk driving is a significant problem, and in emergency situations where a roadblock is setup to "thwart an imminent terrorist attack" or apprehend a dangerous fleeing criminal.[248]

There remains, however, the suggestion in dicta in *Delaware v. Prouse*, repeated again as dicta in *Edmond*,[249] that a roadblock for the purpose of checking drivers' licenses and registration is permissible, so long as there are adequate controls on the officers' discretion to eliminate arbitrariness in selecting which cars to stop.[250] However, it is difficult to understand how such a checkpoint would survive the foregoing analysis, especially if a "substantial" need to dispense with Fourth Amendment protections must be shown as required by *Chandler v. Miller*.[251] Indeed, the Supreme Court of Tennessee in *State v. Hicks*[252] has provided a good example of how such an analysis dooms driver's license checkpoints.[253]

In *State v. Hicks* members of the Highway Patrol and two city police departments set up a roadblock for the asserted purpose of ensuring "highway safety" by "detecting and deterring unlicensed drivers."[254] Six officers manned the checkpoint, including one K-9 officer with a drug-detecting dog.[255] At the roadblock, an officer examined defendant's license, while the dog circled around the car and alerted to the presence of drugs. Marijuana was discovered inside the passenger compartment of Hicks' car.[256]

Assuming *arguendo* that the primary purpose of the roadblock in *Hicks* was to check for drivers' licenses, the Court held that the state failed to show any special need to abandon normal Fourth Amendment requirements.[257] Be-

245. *See* Chandler v. Miller, 520 U.S. 305, 318 (1997) (invalidating a program for drug testing political candidates, holding that it must be shown that the need to dispense with ordinary Fourth Amendment protections is "substantial").

246. This "effectiveness" requirement stems initially from *Delaware v. Prouse*, 440 U.S. 648, 659 (1979).

247. *See Chandler*, 520 U.S. at 318.

248. 531 U.S. at 44, 47.

249. *Id.* at 47.

250. Delaware v. Prouse, 440 U.S. 648, 663 (1979).

251. 520 U.S. 305 (1997). *Chandler* requires that there be a "substantial" need to dispense with individualized suspicion. *Id.* at 318.

252. State v. Hicks, No. E1999-00957-SC-R11-CD, 2001 WL 1035172 (Tenn. Sept. 11, 2001).

253. Although the Tennessee Court relied upon its own state constitution, the analysis is similar.

254. *Hicks*, 2001 WL 1035172 at *7.

255. *Id.* at *1.

256. *Id.* at *7.

257. *Id.* at *8.

cause a warrantless seizure is presumptively unreasonable absent narrowly defined exceptions, the Court reasoned that it could not presume that the state's asserted interest was sufficient without evidence.[258] Here the prosecution had failed to present any evidence that unlicensed drivers were unable to drive safely, that they presented an imminent danger of death or serious bodily harm, or that the threat from unlicensed drivers was of such a magnitude that the danger to highway safety posed by this problem justified relaxing the normal Fourth Amendment requirements.[259] Furthermore, because the roadblock did not discover a single unlicensed driver during the period it operated, the *Hicks* Court found that there was no proof that the roadblock was effective in detecting unlicensed drivers.[260] The Court rejected the state's argument that this lack of effectiveness was due to the fact that the roadblock deterred unlicensed drivers, because there had been no advanced publicity concerning the roadblock given to the public.[261]

Having determined that the asserted primary purpose was insufficient to justify the roadblock, the *Hicks* Court then briefly addressed the issue of whether the checkpoint had been used as a pretext.[262] The Court observed that the preponderance of the evidence suggested this was the case, but sidestepped the *Edmond* issue, apparently troubled by the warning in *Edmond* that courts were to conduct the purpose inquiry only at the "programmatic level" and not delve into the minds of the officers at the scene.[263] The difficulty the state court confronted here was that a Lieutenant who was at the scene apparently set up the roadblock. The Tennessee Court therefore avoided actually ruling on the *Edmond* issue and instead, in an interesting twist, found that the use of the drug detector dog, being unrelated to a check for drivers' licenses, showed that there had been an inadequate level of supervisory authority over the officers at the scene.[264] The conduct of the officers was therefore relevant to establish whether there had been a failure to control their discretion in order to minimize the risk of arbitrary intrusions.[265] *State v. Hicks* thus demonstrates some of the difficulties of an *Edmond* inquiry and suggests an alternate approach that focuses on evaluating whether the roadblock is unreasonable in terms of its asserted primary purpose.

It should be noted that in his dissent in *Edmond*, the Chief Justice, joined only by Justice Thomas, argued that the majority should not have

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258. *Id.* at *10.
259. *Id.* at *9.
260. *Id.* at *12.
261. *Id.*
262. *Id.* at *16.
263. "[W]e caution that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." Indianapolis v. Edmond, 531 U.S. 32, 48 (2001) (citing Whren v. United States, 517 U.S. 806 (1996)).
264. State v. Hicks, 2001 WL 1035172 at *17.
265. *Id.* at *16-18.

evaluated the checkpoint under a "special needs" analysis.[266] In the Chief Justice's view, the previous checkpoint cases, *Martinez-Fuerte* and *Stiz*, had not been decided on that basis because the special needs doctrine had arisen only in cases involving searches.[267] Therefore, the Chief Justice would assess the reasonableness of any checkpoint, regardless of purpose, on whether it "effectively serve[s] a significant state interest with minimal intrusion on motorists."[268] Justice Scalia did not join this part of the Chief Justice's dissent.[269]

Ironically, in a separate dissent, Justice Thomas declared that he was not convinced that *Sitz and Martinez-Fuerte* were correctly decided because the Framers would not have considered "indiscriminate stops of individuals not suspected of wrongdoing" to be "reasonable."[270] Nevertheless, because no one advocated overruling these precedents, which he found to be controlling for the reasons given by the Chief Justice, he joined the Chief Justice's dissenting opinion in full.[271]

D. Ferguson v. City of Charleston[272]

In this case, the Court, by a six-to-three margin, refused to sanction warrantless drug testing of pregnant mothers who sought prenatal care at a state hospital. The "ultimate goal" of the drug-testing program was to protect the health of both mother and baby by using the threat of criminal prosecution to force cocaine-addicted mothers into a treatment program.[273] Despite this benign purpose, the Court found that the diagnostic drug tests were unreasonable searches, absent consent or a warrant based upon probable cause, because the "immediate objective" and "direct and primary purpose" of the testing program was "to generate evidence *for law enforcement purposes*. . . ."[274]

After the South Carolina Supreme Court held that a person who took cocaine during the third trimester of their pregnancy could be charged with criminal child neglect,[275] hospital staff at the Medical University of South Carolina,[276] working together with police and prosecutors, formed a task force to establish a policy for sharing results of drug tests conducted on

266. *Edmond*, 531 U.S. at 54 (Rehnquist, J., dissenting).
267. *Id.* at 54 (Rehnquist, J., dissenting).
268. *Id.* at 51 (Rehnquist, J., dissenting).
269. *Id.* at 48.
270. *Id.* at 56 (Thomas, J., dissenting).
271. *Id.*
272. 532 U.S. 67 (2001).
273. *Ferguson*, 121 S. Ct. at 1291.
274. *Id.* (emphasis in original).
275. *See* Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997).
276. Because the hospital in question is a public hospital operated by the state, the medical staff who conducted the testing are state actors subject to the Fourth Amendment. *Ferguson*, 121 S. Ct. at 1287.

pregnant patients who received prenatal care at the hospital.[277] The policy, known as M-7, created a protocol for who would be tested, established procedures for ensuring a proper chain of custody was maintained so the results of the test could be used as evidence in a criminal prosecution, and laid out the precise offenses with which a patient would be charged depending on the stage of her pregnancy.[278]

The program was challenged by ten women who went to the public hospital for medical care during their pregnancy, tested positive for cocaine and then were arrested for cocaine related offenses.[279] Four of the women had been arrested without being given any chance to obtain treatment.[280] The remaining women were arrested after the program was modified to authorize arrest only after the patient had been referred to treatment, but tested positive a second time or otherwise failed to comply with the terms of the drug treatment program.[281]

The state argued that because the ultimate purpose of the drug testing program was to protect the health of both mother and child and prevent the birth of babies addicted to cocaine, the special needs doctrine justified the searches despite the absence of a warrant, individualized suspicion or consent.[282] In previous cases, the Court had used the "special needs" doctrine to diminish Fourth Amendment protection for various groups of citizens in an attempt to give law enforcement greater power to win the war on drugs. The Court approved suspicionless drug testing of railroad employees on a train involved in a serious accident,[283] sanctioned testing of U.S. Customs Service employees applying for promotions,[284] and upheld drug testing of high school athletes.[285] The Court declined, however, to extend the "special needs" exception to candidates running for political office.[286] In none of these cases, however, was the result of the drug test automatically shared with law enforcement as a matter of routine.[287]

Writing for the majority, Justice Stevens, joined by Justices O'Connor, Souter, Ginsburg, and Breyer, rejected the state's attempt to invoke the "spe-

277. *Id.* at 1284-85.

278. *Id.* If the pregnancy was 27 weeks or less the patient was charged with possession. *Id. But see* State v. Lewis, 394 N.W.2d. 212 (Minn. App. 1986) (holding that mere presence of a controlled substance in a person's urine specimen did not constitute "possession" for the purposes of a criminal statute proscribing unlawful possession of a controlled substance). If the pregnancy was 28 weeks or more, the patient was also charged with child neglect. *Ferguson*, 121 S. Ct. at 1285.

279. *Ferguson,* at 1286.

280. *Id.*

281. *Id.*

282. *Id.* at 1290.

283. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1988).

284. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

285. Vernonia School District, v. Acton, 515 U.S. 646 (1995).

286. Chandler v. Miller, 520 U.S. 305 (1997).

287. *Ferguson*, 121 S.Ct. at 1288.

cial needs" doctrine.[288] Justice Kennedy concurred separately.[289] Justices Scalia, Thomas, and the Chief Justice dissented.[290]

Acknowledging that the asserted purpose of the drug testing policy was beneficent rather than punitive, Justice Stevens nevertheless observed that the Court would not simply accept the state's proffered purpose. Instead, the Court would carry out a "close review" considering "all the available evidence in order to determine the relevant primary purpose."[291] After undertaking that review, Justice Stevens concluded that the purpose "actually served" by the drug testing policy is ultimately indistinguishable from the general interest in law enforcement because "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."[292] Support for the conclusion that the primary and immediate objective of the diagnostic testing was actually to collect evidence for criminal prosecution was seen in the initial involvement of law enforcement agencies in developing the policy and their continued involvement in the daily operation of the program.[293] The police were notified immediately of positive test results and hospital staff were trained in procedures for handling positive test samples to assure a proper chain of custody that would satisfy evidentiary rules for admissibility of the test results in a criminal trial.[294]

The majority thus found that there was a "critical difference" between this case and the previous drug testing cases upheld under the "special needs" doctrine because here the immediate and primary purpose for testing was not "divorced from the State's general interest in law enforcement."[295] Indeed, the use of law enforcement and the threat of criminal prosecution were at the "core" of the program and were "essential" to its success.[296]

The majority distinguished the situation where a doctor, in the course of ordinary medical procedures, inadvertently came across information that law or medical ethics might require be reported to the police, such as evidence of child abuse.[297] The majority also distinguished *New York v. Burger*,[298] which upheld a warrantless administrative search of an auto junkyard conducted by policemen, because there "plain administrative purposes" negated the claim that the statute authorizing the search had been enacted for the purpose of enabling the police to gather evidence of crime.[299] Noting that in such admin-

288. *Id.* at 1284.
289. *Id.* at 1293-96 (Kennedy, J. concurring).
290. *Id.* at 1296 (Scalia, J., dissenting).
291. *Id.* at 1290.
292. *Id.*
293. *Id.* at 1290-91.
294. *Id.*
295. *Id.* at 1289.
296. *Id.* at 1292 n.20.
297. *Id.* at 1290.
298. 482 U.S. 691 (1987).
299. *Ferguson*, 121 S.Ct. at 1292 n.21.

istrative searches the discovery of evidence of crime would have been "merely incidental," the majority contrasted the present case, observing that here "the policy was specifically designed to gather evidence of violations of penal laws."[300]

Justice Kennedy, concurring in the judgment, disagreed with that portion of the majority opinion that held that the "special needs" test must hinge entirely upon the immediate purpose of the drug test rather than the program's ultimate goal.[301] In Justice Kennedy's view, if the ultimate goal of the process was the improvement of the health of the mother and child, that would satisfy the "special needs" exception, although the immediate result of the procedure was to gather evidence for a criminal prosecution.[302]

The majority had drawn the distinction between "ultimate" and "immediate" purpose, however, because otherwise they feared the Fourth Amendment would be reduced to a meaningless nullity by the "special needs" doctrine.[303] This is because it could be said that the enforcement of any criminal law ultimately serves some broader social purpose.[304] Thus, the majority noted, virtually any suspicionless search could be "immunized" under the "special needs" doctrine if the government was permitted to justify the search in terms of its ultimate, rather than immediate purpose.[305]

Justice Scalia, joined by the Chief Justice and Justice Thomas, dissented.[306] Unlike Justice Kennedy, they concluded that the ultimate goal was the treatment of the mother and child, and, unlike the majority, they would permit the ultimate goal to validate the testing under the special needs doctrine, despite the involvement of the police in the process.[307]

Ferguson adds yet another layer of complexity to the primary purpose test established in *Indianapolis v. Edmond*.[308] If the immediate purpose of a police practice is to secure evidence for general law enforcement purposes, then ordinary Fourth Amendment safeguards apply.[309] Only when the immediate primary purpose is to serve a special need, unrelated to ordinary law enforcement, will the "special needs" analysis be undertaken to determine whether, after a balancing of the interests, relaxation of normal Fourth Amendment requirements is justified.[310]

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300. *Id.*

301. *See id.* at 1293 (Kennedy, J., concurring).

302. Justice Kennedy nevertheless agreed with the majority that the "special needs" exception was not applicable because of the pervasive involvement of the police in the entire process and his apparent doubt that the health of mother and child was the ultimate goal. *Id.*

303. *Id.* at 1291-92.

304. *Id.*

305. *Id.*

306. *Id.* at 1296 (Scalia, J., dissenting).

307. *Id.* at 1302 (Scalia, J., dissenting).

308. 531 U.S. 32 (2001).

309. *See Ferguson*, 121 S. Ct. at 1292.

310. *Id.* at 1290 n.17.

Yet, the line between what is an immediate, as opposed to an ultimate, purpose may prove to be exceedingly fragile protection. Suppose, for example, that evidence of illegal drug use arises from routine diagnostic medical testing conducted without police involvement. Would the Fourth Amendment bar the evidentiary use of such drug test results in a criminal trial? Arguably, the immediate purpose of the initial testing was to protect the health of the fetus by screening for all known threats. But it would not be necessary, to serve that purpose, to maintain the test samples and test results under a chain of custody appropriate for use as criminal evidence. What would be the purpose of maintaining such physical evidence and turning the test results over to police, if not for the purpose of criminal prosecution? What if medical personnel, suspecting drug use, asked the patient and the patient confirmed her drug use? What would be the immediate primary purpose of testing for drugs under that circumstance?

This suggests another issue left unresolved by *Ferguson*. May state health care professionals turn the evidence over to police for criminal prosecution of the mother?[311] Could they reveal her admissions relating to drug use? If not, why should disclosure of test results be treated differently? What if a law required medical personnel to report drug use by patients who are pregnant? In his dissent, Justice Scalia complains that the Court has left police "in the dark" about whether they can use incriminating evidence obtained under such reporting statutes as "trusted sources," thus highlighting a new avenue for defense attorneys to consider in attacking search warrants that may be based upon information provided by medical informants.[312]

It may be argued, as a policy matter, that without the threat of criminal prosecution, a prenatal drug treatment program may in many instances be unsuccessful and, thus, fail to prevent harm to the unborn fetus. This view, however, is subject to the counterargument that if the prenatal care facility becomes known for working hand-in-glove with the police, addicted women will steer clear of the facility, resulting in even greater potential harm to the fetus, because the opportunity to receive prenatal care, as well as the chance of successful treatment, will be lost.

Also undecided in *Ferguson* was the issue of consent.[313] When an expectant mother goes for treatment of her pregnancy, the testing of bodily fluids is a normal part of a doctor's examination. A variety of health problems may be disclosed as a result of such testing, other than illicit drug use. Is the evidence of drug use so acquired consensual? Furthermore, may the woman consent to testing only for a limited purpose? In other words, may a patient limit her consent by restricting the purposes for which the test results are used? Is informed consent then required not only as to testing for drug use but also as to the purposes for which the results of such tests may be used?

311. There was no physician-patient privilege under the law in South Carolina. *Id.* at 1298 (Scalia, J., dissenting).

312. *Id.* at 1298 n.3. For Justice Stevens' response to this charge, see *id.* at 1292 n.24.

313. *Id.* at 1288 n.11.

The Court in Ferguson did not address the issue of consent.[314] However, Justice Stevens noted that while state hospital employees may be obligated to furnish to police evidence inadvertently acquired, "when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients,* they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require."[315]

The reference to *Miranda* did not go unnoticed by Justice Scalia, who complained, in a solo portion of his dissent, that any requirement of informed consent was "flatly contradicted by our jurisprudence."[316] As Justice Scalia recognized, however, there was a "conceivable basis" for arguing that any consent obtained was "coerced by the patient's need for medical treatment."[317] The issue of informed consent, remanded to the Court of Appeals for resolution, may thus prove to be even more complicated than the purpose inquiry mandated by *Edmond* and *Ferguson.*

E. Illinois v. McArthur[318]

The Court held in this case that where police have probable cause to believe that there are illegal drugs in a home, the homeowner may be prevented from entering the home for a reasonable time while a search warrant is obtained.[319]

Defendant's wife went to the police and asked them to accompany her to their trailer home to protect her while she removed her belongings. Two officers accompanied the wife to the trailer home, remaining outside while she entered.[320] When the wife exited, she told the officers that she observed her husband slide some dope under the couch.[321] An officer knocked on the door. When defendant answered, the policeman told him what his wife had said and asked permission to search the premises. Defendant refused permission.[322] One officer, accompanied by the wife, left to obtain a search warrant for the premises. The other officer remained on the front porch where defendant was now also standing. The officer told defendant he could not re-enter

314. *Id.* Only Justice Scalia raised this issue. None of the other dissenters joined that part of his opinion. *Id.* at 1296.

315. *Id.* at 1292 (citing Miranda v. Arizona, 384 U.S. 436 (1966)) (emphasis in original).

316. *Id.* at 1297 (Scalia, J., dissenting) (citing Hoffa v. United States, 385 U.S. 293 (1966)) (holding that a person assumes the risk that what he voluntarily discloses to a government informant will be turned over to the police)).

317. *Id.* at 1296. Indeed, at least with respect to a woman confined in labor, *Miranda* would seem to be an appropriate analogy.

318. 121 S. Ct. 946 (2001).

319. *Id.* at 948.

320. *Id.*

321. *Id.* at 948-49.

322. *Id.* at 949.

his home unaccompanied.[323] While awaiting the warrant, defendant was allowed to reenter the premises to obtain cigarettes and to make a telephone call, but the officer stood inside the doorway observing defendant at all times.[324] Two hours later the officer returned with a search warrant.[325] Less than 2.5 grams of marijuana was found.[326] Defendant was charged with a misdemeanor for which the maximum sentence was thirty days in jail.[327]

In his motion to suppress evidence defendant argued that the impoundment of his home was unlawful and that as a result the marijuana should be suppressed.[328] The trial court suppressed the evidence, the appellate court affirmed, and the Illinois Supreme Court declined to review the decision.[329] The United States Supreme Court reversed, holding the seizure lawful.[330] Justice Stevens was the only dissenter.[331]

Justice Breyer writing for the majority held that the warrantless seizure of the home was reasonable under the Fourth Amendment because: (1) it was based upon probable cause; (2) there were exigent circumstances because it was reasonable for the officers to assume that defendant would have destroyed the drugs had he been allowed an unrestricted right to reenter the premises; (3) the restriction was narrowly tailored to the exigency, as McArthur was prevented only from reentering the home unaccompanied; and (4) the restraint was temporary, lasting only two hours, which was a reasonable time period for obtaining a search warrant.[332]

Defendant relied upon *Welsh v. Wisconsin*,[333] which held that the exigent circumstances exception to the warrant requirement did not apply to minor offenses because the state's interest in prosecution did not outweigh the serious intrusion occasioned by the search of a home.[334] The Court distinguished *Welsh*, however, on the ground that in *Welsh*, the offense was a "'nonjailable traffic offense.'"[335] Here, the possession of marijuana, albeit a minor misdemeanor, was a jailable offense.[336] Thus, as Justice Souter made explicit in a concurring opinion, because the officer could have searched the home with-

323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.* at 952.
328. *Id.* at 949.
329. *Id.*
330. *Id.* at 953.
331. *Id.* at 954.
332. *Id.* at 953.
333. 466 U.S. 740 (1984).
334. *See McArthur*, 121 S. Ct. at 953 (citing Welsh v. Wisconsin, 466 U.S. 740, 742, 754 (1984)).
335. *McArthur*, 121 S. Ct. at 953 (quoting *Welsh*, 466 U.S. at 742).
336. *McArthur*, 121 S. Ct. at 953.

out a warrant under the exigent circumstances exception, it was a lesser intrusion to seize the home while a search warrant was being obtained.[337]

Justice Stevens, the lone dissenter, argued that because Illinois classified the offense as a minor misdemeanor, the homeowner's possessory interest in his home should be given a higher priority than the law enforcement interest in prosecuting this petty offense.[338]

III. HABEAS CORPUS AND POST CONVICTION RELIEF

A. Tyler v. Cain[339]

The Anti-Terrorism and Effective Death Penalty Act of 1996[340] (AEDPA) places severe restrictions on filing successive federal habeas corpus applications. Ordinarily if a state prisoner files a second petition raising a claim that he has previously asserted in a habeas petition, the claim will be denied.[341] There is an exception, however, for a claim that relies upon "a new rule of Constitutional law, made retroactive to cases on collateral review by the Supreme Court. . . ."[342] The issue in this case is whether the words "made retroactive" mean that the United States Supreme Court itself must make such a holding in a given case, or whether that determination may be made by lower courts from principles for determining retroactivity found in decisions by the High Court.[343] The Court concludes that only where it specifically holds that a new rule is retroactive, or where the holdings of several cases "necessarily dictate" retroactivity, can it be said a new rule has been "made retroactive" by the Supreme Court.

Melvin Tyler's decades old conviction in Louisiana for second-degree murder arose out of a fight with his girlfriend in March 1975. During the melee, their 20-day-old daughter was killed.[344] The jury instruction on reasonable doubt used in his trial was "substantively identical"[345] to the instruction later held to violate Due Process in *Cage v. Louisiana.*[346] Although Tyler's case had been affirmed on direct appeal and five successive post-conviction petitions had been turned down, he filed a sixth state post-

337. *See id.* at 953-54 (Souter, J., concurring).
338. *Id.* at 954 (Stevens, J., dissenting).
339. 121 S. Ct. 2478 (2001).
340. Pub. L. 104-132,110 Stat. 1214 (1996) (codified in 28 U.S.C.§§ 2244-2266).
341. 28 U.S.C. § 2244(b)(1) (2001).
342. 28 U.S.C. § 2244(b)(2)(A) (2001).
343. *Tyler,* 121 S. Ct. at 2480.
344. *Id.*
345. *Id.*
346. 498 U.S. 39, 41 (1990). Under the rule established in *Cage,* a defendant is denied Due Process if there is a reasonable likelihood that a jury instruction was interpreted by the jury to permit a finding of guilt on a quantum of proof which was less than proof beyond a reasonable doubt. *See also* Estelle v. McGuire, 502 U.S. 62 (1991) *and* Victor v. Nebraska, 511 U.S. 1 (1994).

conviction petition raising a claim under *Cage*.[347] Again, he was denied relief by Louisiana.[348]

Tyler had also filed an unsuccessful petition for federal habeas corpus prior to his sixth state post-conviction petition.[349] Therefore, he now had to request leave to file a successor petition in the Fifth Circuit Court of Appeals.[350] The Court of Appeals granted the motion, allowing him to file in District Court. The District Court then denied relief and the Court of Appeals affirmed, ruling that that Tyler could not show that any United States Supreme Court decision rendered *Cage* retroactive to cases on collateral review.[351]

Writing for the Court, Justice Thomas acknowledged that the word "made" was ambiguous and could be interpreted as meaning "to cause to happen."[352] Nevertheless, looking at the plain meaning of the statute taken as a whole, he concluded that Congress intended the word "made" to mean "held."[353] Justice Thomas reaches this result by reasoning that the Supreme Court does not "make" a rule retroactive "when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts."[354] Only if the Supreme Court itself specifically declares the new rule of law to be retroactive, or, if a series of Supreme Court holdings "necessarily dictate" retroactivity, can it be said that the rule has been "made retroactive" by the Supreme Court.[355] Since the Court never said in the *Cage* opinion itself that the rule it announced in that case was retroactive, and did not in another case say that errors like the error in *Cage* were retroactive, the statutory exception was not available to Tyler and dismissal of his second habeas petition was affirmed.[356]

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. The dissent argued that the Supreme Court's decisions in *Teague v. Lane*[357] and *Sullivan v. Louisiana*[358] make it clear that the Court has made

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347. *Tyler*, 121 S. Ct. 2480-81 (2001).

348. State *ex rel.* Tyler v. Cain, 684 So. 2d 950 (1996).

349. Tyler v. Butler, No. 88cv4929 (ED La.), *aff'd*, Tyler v. Whitley, 920 F2d. 929 (5th Cir. 1990).

350. *See* AEDPA, 110 Stat. 1214, 28 U.S.C. § 2244(b)(3)(A) (1996).

351. Tyler v. Cain, 218 F.3d. 744 (5th Cir. 2000). The Courts of Appeal were divided on this issue. The First and Eleventh Circuits had held that *Cage* had not been made retroactive to cases on collateral review. Rodriguez v. Superintendent, 139 F.3d 270 (1st Cir. 1998); *In re* Hill, 113 F.3d 181 (11th Cir. 1997). However the Third Circuit had held that *Cage* was made retroactive to cases on collateral review. West v. Vaughn, 204 F.3d 53 (3rd Cir. 2000).

352. *Tyler*, 121 S. Ct. at 2482.

353. *Id.*

354. *Id.*

355. *Id.* at 2484.

356. *Id.* at 2485.

357. 489 U.S. 288 (1989).

358. 508 U.S. 275 (1993).

the *Cage* rule retroactive to cases on collateral review.[359] Although *Teague* establishes that new constitutional rules promulgated by the Supreme Court will generally not be applied retroactively to cases on habeas review, there is an exception for "watershed rules of criminal procedure" which go to the accuracy of the process for determining guilt or innocence.[360] In order for this exception to apply, the following two conditions must be met: (1) infringement of the new rule must "seriously diminish the likelihood of obtaining an accurate conviction;"[361] and (2) the new rule must "alter our understanding of the "*bedrock procedural elements*" essential to the fairness of the proceeding.[362]

A "*Cage* error," the dissent noted, involves a defect in the most fundamental of criminal jury instructions—the instruction on reasonable doubt.[363] Indeed, *Sullivan* held that an instruction that violated *Cage* could not be harmless error because it "'vitiates all the jury's findings,' and deprives a criminal defendant of a 'basic protection . . . without which a criminal trial cannot reliably serve its function.'"[364] Such an error "renders the situation as if 'there has been no jury verdict within the meaning of the Sixth Amendment.'"[365]

Justice Breyer thus concluded that any instruction which makes all the jury's findings untrustworthy must of necessity also seriously "diminish the likelihood of obtaining an accurate conviction"[366] thus satisfying the first *Teague* condition. Secondly, a "deprivation of a 'basic protection' needed for a trial to 'serve its function'"[367] is of necessity "a deprivation of a 'bedrock procedural element,'"[368] thus satisfying the second *Teague* condition. Finally, there is no debate on the question of whether or not *Cage* enunciated a new rule which altered pre-existing law.[369] Therefore, reading *Teague* together with *Sullivan*, Justice Breyer maintained, it is clear as a matter of simple logic that these Supreme Court precedents "made" *Cage* retroactive.

Justice Thomas dismissed this argument, however, stating that since it was based upon a deduction from the holdings of *Teague* and *Sullivan* all that it established was that the Supreme Court *should* make *Cage* retroac-

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359. *Tyler*, 121 S. Ct. at 2487 (Breyer, J., dissenting).

360. *Teague*, 489 U.S. at 311.

361. *Id.* at 315.

362. *Id.* at 311 (emphasis in original).

363. *See Tyler*, 121 S. Ct. at 2486-87 (Breyer, J., dissenting) (citing Cage v. Louisiana, 498 U.S. 39, 41 (1990)).

364. *Tyler*, 121 S. Ct. at 2487 (Breyer, J., dissenting) (quoting Sullivan v. Louisiana, 508 U.S. 275, 281 (1993)) (emphasis in original).

365. *Tyler*, 121 S. Ct. at 2487 (Breyer, J., dissenting) (quoting *Sullivan*, 508 U.S. at 280).

366. *Tyler*, 121 S. Ct. at 2487 (Breyer, J., dissenting) (quoting Teague v. Lane, 489 U.S. 288, 315 (1989)).

367. *Tyler*, 121 S. Ct. at 2487 (Breyer, J., dissenting) (quoting *Sullivan*, 508 U.S. at 281).

368. *Tyler*, 121 S. Ct. at 2487 (Breyer, J., dissenting) (quoting *Teague*, 489 U.S. at 311).

369. *See Tyler*, 121 S. Ct. at 2488 (Breyer, J., dissenting).

tive.[370] However, even if the deduction were correct, that would be insufficient because the Supreme Court itself has never squarely held that the new rule laid down in *Cage* was retroactive to cases on collateral review.

Justice O'Connor joined Justice Thomas' opinion but wrote separately to clarify that when the Court decriminalizes an offense by holding that "a particular species of primary, private individual conduct is beyond the power of the criminal lawmaking authority to proscribe, it necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review."[371]

Justice O'Connor also acknowledged that it is not necessary for the Supreme Court to hold explicitly in a case that a new procedural rule is retroactive.[372] However, she agreed with Justice Thomas that where a claim of retroactivity was based upon a reading of several cases, the test was one of "strict logical necessity."[373] In her view, the Court "can be said to have 'made' a rule retroactive within the meaning of Section 2244(b)(2)(A) only where the Court's holdings logically permit no other conclusion than that the rule is retroactive."[374] Justice O'Connor believed that under that standard, the Court's holdings do not require the *Cage* rule to be held retroactive.[375]

B. Artuz v. Bennett[376]

In an important procedural victory for habeas petitioners, a unanimous Court held that a pending state post-conviction petition tolled the one-year time limit for filing habeas corpus petitions, even if the application for state post-conviction relief contained claims that were procedurally barred.

The question presented in this case was whether an application for post-conviction relief that presents claims, which are procedurally barred, is "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2).[377]

Section 2244(d)(2) provides "that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection."[378]

Bennett was convicted of attempted murder and other crimes in Queens County, New York in 1984. After unsuccessfully pursuing both a direct appeal and post-conviction relief, Bennett filed a *pro se* post-conviction petition in 1995. The State trial court denied this motion orally, on the record,

370. *Id.* at 2484.
371. *Id.* at 2486 (O'Connor, J., concurring).
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. 531 U.S. 4 (2000).
377. 28 U.S.C. § 2244(d)(2) (1994 ed. Supp. IV).
378. *Id.*

but never sent the defendant a written order from which he could appeal, despite several requests to do so.[379]

The defendant filed a petition for writ of habeas corpus in 1998, which the District Court dismissed as untimely because it was filed almost two years after the passage of the AEDPA.[380] The Court of Appeals for the Second Circuit reversed, however, holding that because the defendant was unable to appeal the denial of his 1995 *pro se* state post-conviction petition, it was still pending for purposes of Section 2244(d)(2) and thus tolled the time period for filing the habeas petition.[381] The Second Circuit found that the *pro se* state petition was "properly filed," even though the claims it contained may have been subject to two procedural bars under New York state law. The state contended that defendant's *pro se* claims were precluded by a bar against raising an issue that had been previously determined on the merits on direct appeal,[382] and a bar against raising a claim that was available on direct appeal but was not raised due to the defendant's unjustifiable failure.[383] The United States Supreme Court held that even if the claims were barred, the application was nevertheless still pending and affirmed the Second Circuit.

Justice Scalia, speaking for a unanimous Court, distinguished between claims in an application and the application itself.[384] Thus the question of whether an application is properly filed is "quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar."[385] What if some claims were procedurally barred and some were not, would the State argue that the application is partially filed? Rejecting the state's contention, Justice Scalia ruled that an application is "properly filed" for purposes of Section 2244(d)(2) when, "its delivery and acceptance are in compliance with the applicable laws and rules governing filings."[186] Thus while an application erroneously accepted by a court without jurisdiction or payment of the requisite filing fee would not be "properly" filed, the acceptance of an otherwise properly filed petition does not become improper simply because it contains claims which are procedurally barred or lack merit.

This is a very important case because often the question arises as to whether a post-conviction application properly tolls the one-year time period for filing a petition for writ of habeas corpus after the close of state court proceedings. If a state court later determines that the claims in an application

379. *Bennett*, 531 U.S. at 5-6.

380. *Id.* at 6 (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (S 735), 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244-2266) [hereinafter AEDPA]). Since this was a pre-AEDPA conviction the relevant time period ran from the effective date of the act, April 24, 1996. *See* Ross v. Artuz, 150 F.3d 97, 98 (2d Cir 1998)

381. Bennett v. Artuz, 199 F.3d 116, 118 (2d Cir. 1999).

382. N.Y. CRIM. PROC. LAW § 440.10(2)(a) (2001).

383. *Id.* at § 440.10(2)(c).

384. *Bennett*, 531 U.S. at 7.

385. *Id.* at 9.

386. *Id.* at 8.

were procedurally barred by state law, *Artuz* makes clear that the defendant cannot lose his right to federal habeas relief because he attempted to have the state court first hear his federal claims.

C. Duncan v. Walker[387]

Having decided in *Artuz v. Bennett*[388] that a properly filed state post-conviction petition tolls the limitation period for filing for federal habeas relief, even if the claims in the state petition are procedurally defaulted,[389] the Court in this case turns to the question of whether a previously filed habeas petition can also have this effect. The precise question in *Walker* was whether the phrase "other collateral review" in Section 2244(d)(2) includes a prior federal habeas corpus petition, or whether it only refers to other state collateral attacks.[390]

Justice O'Connor, in an opinion joined by five members of the court, held that "other collateral review" was limited to state proceedings and did not include a federal habeas petition. Justices Stevens and Souter concurred. Justices Breyer and Ginsburg dissented.

In June, 1992, Walker plead guilty to robbery in a New York state court and received a sentence of seven to fourteen years. Walker filed a petition for writ of habeas corpus on April 10, 1996, which was dismissed by the District Court without prejudice, because it was not clear to the Court whether or not Walker had exhausted his state remedies with respect to his claims.[391] On May 20, 1997 Walker filed another petition for writ of habeas corpus in the District Court, which was dismissed as time barred.[392] The Court of Appeals for the Second Circuit reversed, holding that Walker's first federal habeas petition was an application for "other collateral review" which tolled the statute of limitations under Section 2244(d)(2).[393] The Court of Appeals reasoned that the word "state" modified only "post conviction," and not "other collateral relief" in Section 2244(d)(2). The Supreme Court granted certiorari,[394] to resolve the conflict between the Second and Tenth Circuits[395] and the Fifth, Ninth, and Third Circuit courts of appeal,[396] and reversed the Second Circuit.[397]

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387. 121 S. Ct. 2120 (2001).

388. 531 U.S. 4 (2000).

389. *See id.* at 9.

390. *Walker*, 121 S. Ct. at 2123. 28 U.S.C. § 2244(d)(2) provides that, "the time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2) (1994 ed. Supp. V).

391. *Walker*, 121 S. Ct. at 2123.

392. *Id.*

393. Walker v. Artuz, 208 F.3d 357, 359 (2nd Cir. 2000).

394. Artuz v. Bennett, 531 U.S. 991 (2000).

395. *See* Petrick v. Martin, 236 F.3d 624 (10th Cir. 2001).

396. *See* Grooms v. Johnson, 208 F.3d 488 (5th Cir. 1999); Jiminez v. Rice, 222 F.3d

Justice O'Connor argued for the majority that if Congress had intended the phrase "other collateral relief" to include federal habeas corpus petitions, it would have said so expressly.[398] She based that argument on a comparison of Section 2244 with other sections of the AEDPA, which do mention both of the words "state" and "federal" expressly.[399]

Observing that it was a cardinal rule of statutory construction to give meaning to every clause and word of a statute, Justice O'Connor also argued that under the defendant's view of the statute, the word, "state" would have no significant operative effect.[400] She noted that there could be other forms of state collateral relief other than post-conviction. For example, in addition to state post-conviction, some states allow for state habeas corpus relief or other forms of collateral attack on state convictions. Many additional examples of other state collateral relief, which are not post-conviction actions, abound. Justice O'Connor points to challenges to state court commitments to mental hospitals after a verdict of not guilty by reason of insanity, and to challenges to civil contempt orders or civil commitment orders.[401] Therefore, the most reasonable interpretation in her view was to construe the phrase to mean "other State collateral review."[402]

Finally, O'Connor turned to the policy considerations that result from the different interpretations of the statute.[403] Because restricting the term "other collateral review" to state actions would better further the aims of the AEDPA to "further the principles of comity, finality, and federalism," Justice O'Connor opts for the restrictive view.[404] That view "promotes the exhaustion of state remedies" and better serves the purposes of the AEDPA.[405] Therefore, she holds that the defendant's first federal habeas corpus petition did not toll the limitation period of Section 2244(d)(2).[406]

Justice Souter, joined by Justice Stevens, concurred in the result, noting that the District Courts have the power to "toll the limitations period apart from Section 2244(d)(2)."[407] Justice Souter pointed out that uniformly federal courts have allowed a grace period of one year after the effective date of the AEDPA for the filing of federal habeas corpus petitions for defendants whose convictions became final prior to April 24, 1996.[408] He also stated that "equitable considerations may make it appropriate for federal courts . . . [to

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1210 (9th Cir. 2000); Jones v. Morton, 195 F.3d 153 (3rd Cir. 1999).

397. *Walker*, 121 S. Ct. at 2124.

398. *Id.*

399. *Id.* at 2124-25 (citing 28 U.S.C. §§ 2254(i), 2261(c), 2264(a)(3) (West 2001)).

400. *Id.* at 2125 (citing Williams v. Taylor, 529 U.S. 362, 404 (2000)).

401. *Walker*, 121 S. Ct. at 2126.

402. *Id.*

403. *Id.* at 2127.

404. *Id.* (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)).

405. *Walker*, 121 S. Ct. at 2127.

406. *Id.* at 2129.

407. *Id.* at 2130.

408. *Id.*

toll] AEDPA's statute of limitations for unexhausted federal habeas petitions."[409] Given those two safeguards, Stevens and Souter concurred.

Justices Breyer and Ginsburg dissented.[410] Justice Breyer explains the problem with the majority's interpretation is that if the defendant files a timely habeas corpus petition with unexhausted claims, that petition may be dismissed.[411] Then the defendant must go back to state court to exhaust those claims. If he loses in the state court, the defendant would then want to return to Federal Court to pursue those claims. However, if the previously filed habeas corpus petition does not toll the one-year statute of limitations, his subsequent petition might well be time barred.[412]

To back up his fears, Breyer cites some alarming statistics: sixty-three percent of all habeas petitions are dismissed, and of that number, fifty-seven percent were dismissed for failure to exhaust state remedies.[413] Moreover, nearly half of the habeas petitions were pending in the District Court for six months or longer, and ten percent were pending for more than two years.[414] Thus, unless "other collateral review" is construed to include prior habeas petitions, a substantial number of prisoners will be deprived of the ability of carrying their case back to federal court after state court rejection of their claims.[415]

Of course, the figures which Justice Breyer uses to back up his apprehension are based on statistics from 1992, which is prior to the 1996 enactment of the AEDPA, and prior to the case of *McFarland v. Scott*.[416] In that case the Court held that a condemned prisoner could request the Federal District Court to appoint counsel for him to prepare a petition for federal habeas corpus.[417] Justice Breyer admits that ninety-three percent of the cases involving unexhausted claims were prepared *pro se* by the inmates themselves.[418] It would be reasonable to postulate that since the advent of *McFarland v. Scott*, the number of unrepresented condemned inmates on Federal Habeas has decreased because the condemned inmates can now request counsel to prepare their habeas petitions. However, although the figures for cases dismissed because of unexhausted claims by death row inmates may have decreased since

409. *Id.*

410. *Id.* at 2131 (Breyer, J., dissenting).

411. *See* Rose v. Lundy, 455 U.S. 509, 510 (1982).

412. *Walker*, 121 S. Ct. at 2131 (Breyer, J., dissenting).

413. *Id.* (citing U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 17 (1995) [hereinafter Federal Habeas Corpus Review]).

414. *Walker*, 121 S. Ct. at 1231 (Breyer, J., dissenting) (citing Federal Habeas Corpus Review at 19).

415. *Walker*, 121 S. Ct. at 1231 (Breyer, J., dissenting).

416. 512 U.S. 849 (1994).

417. *Id.* at 856-57.

418. *Walker*, 121 S. Ct. at 2134 (Breyer, J., dissenting) (citing Federal Habeas Corpus Review at 14).

1992, unexhausted claims may still appear in federal habeas petitions prepared by both lawyers and non-lawyers for a variety of reasons.[419]

Moreover, Breyer disputes the majority's argument that if "other collateral review" was interpreted to include federal habeas petitions, more of them would be filed with unexhausted claims.[420] He points out that if a petitioner files a mixed petition, the District Court has the power to dismiss all unexhausted claims,[421] and District Courts have the power to require that on refiling, the habeas petition contain only exhausted claims.[422]

The decision in this case was much closer than is apparent from the vote. If experience shows that Justices Stevens and Souter are not correct in their view that federal judges will consider "equitable tolling" for prior habeas corpus petitions with unexhausted claims, then they well might be persuaded by Justices Breyer's argument and agree to visit this issue again.

D. Seling v. Young[423]

In *Seling v. Young*, the Court held that an individual, claiming punitive treatment after being involuntarily committed in a civil proceeding as a sexually violent predator, cannot raise double jeopardy and ex post facto claims in a habeas petition by making an "as applied" challenge to his particular conditions of confinement.[424]

The state of Washington authorizes the civil commitment of sex offenders as "sexually violent predators" upon a showing of mental abnormality or personality disorder that makes them "likely to engage in predatory acts of sexual violence if not confined."[425] The commitment proceedings are commenced when a violent sex offender is about to be released from prison. The individual is entitled to counsel and funds for expert witnesses, and the State bears the burden of proof beyond a reasonable doubt that the person is a sexually violent predator.[426]

The state filed a petition to commit Young as a sexually violent predator one day prior to his scheduled release from prison.[427] Young had been previously convicted of six rapes over a period of three decades.[428] The District

419. *Id.*

420. *Walker*, 121 S. Ct. at 2134 (Breyer, J., dissenting) (citing Rose v. Lundy, 455 U.S. 509, 520 (1982)).

421. *Walker*, 121 S. Ct. at 2134 (Breyer, J., dissenting) (citing 28 U.S.C. § 2254 (b)(2) (1994 ed. Supp. V)).

422. *Walker*, 121 S. Ct. at 2134 (Breyer, J., dissenting) (citing Slack v. McDaniel, 529 U.S. 473, 489 (2000)).

423. 121 S. Ct. 727 (2001).

424. *Id.* at 735.

425. *Id.* at 730 (citing Community Protection Act of 1990, WASH. REV. CODE § 71.09.010 et seq. (1992 and Supp. 2000)).

426. *Young*, 121 S. Ct. at 730.

427. *Id.* at 731.

428. *Id.*

Court granted Young's petition for writ of habeas corpus on grounds that his commitment violated the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.[429] The Ninth Circuit remanded the case for reconsideration,[430] however, following the United States Supreme Court's decision in *Kansas v. Hendricks*,[431] which held that a similar commitment statute was civil.

The District Court denied Young relief, holding that because the Washington Act is civil, Young's claims of double jeopardy and violation of the *Ex Post Facto* Clause failed.[432] The Ninth Circuit reversed holding that the linchpin of the claim was whether or not the act was punitive "as applied" to Young.[433]

The United States Supreme Court reversed the Ninth Circuit holding that an "as applied" analysis was not proper for an individual claimant, noting that there remains a civil remedy for any problems associated with the conditions of confinement and treatment regime at the place of commitment.[434] Justice O'Connor, who wrote the majority opinion, acknowledged that some of Young's claims were serious. Young maintained that the conditions of his confinement were more restrictive than those of "true" civil commitment detainees; that residents were abused and denied access to services; and that excessive restrictions and policies such as videotaping therapy sessions, were not reasonably related to treatment.[435] Indeed the facility at which Young was held did not even have any certified sex offender treatment specialists and even a court-appointed psychologist conceded that the facility appeared to be "designed and managed to punish and confine individuals for life without any hope of release."[436]

Nevertheless Justice O'Connor agreed with the state that using an "as applied" approach to determine whether the state's sex offender commitment scheme was civil or punitive would be unworkable because confinement was a continuing rather than a fixed event.[437] Thus, Justice O'Connor held that Young could not obtain release by proving that his particular conditions of

429. *Id.* at 732.

430. *Id.*

431. 521 U.S. 346 (1997). In *Hendricks* the Court held that the determination of whether a law is civil or punitive in nature is initially an issue of "statutory construction," which must be determined by looking at text and legislative history. Did the legislature intend the statute to establish civil proceedings? If so, the Supreme Court reasoned, a court can only reject that legislature's manifest intent where a party challenging the statute provides "the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention." *Id.* at 361 (citing United States v. Ward, 448 U.S. 242, 248-49 (1980)).

432. *Young*, 121 S. Ct. at 733.

433. *Id.*

434. *Id.* at 736.

435. *Id.* at 733.

436. *Id.* at 735.

437. *Id.*

confinement were in fact punitive and thus violated the Double Jeopardy and Ex Post Facto Clauses because:

> Such an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and Ex Post Facto Clauses. . . . Unlike a fine, confinement is not a fixed event. As petitioner notes, it extends over time under conditions that are subject to change. The particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive, but it remains no less true that the query must be answered definitively. The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute.[438]

However, Justice O'Connor did leave open the possibility that generally applicable conditions of confinement could be relevant to a determination, in the first instance, as to whether a commitment scheme was punitive.[439] Thus the holding of *Young* would seem to be quite narrow. Where a commitment scheme has been found to be civil, it "cannot be deemed punitive "as applied" to a single individual."[440] The majority's concession that an as applied challenge might still be appropriate in certain circumstances prompted Justice Scalia, joined by Justice Souter, to file a concurring opinion to expressly dissociate themselves from that suggestion, asserting that the determination of civil or punitive statutes must be made by looking at the text of the legislation on its face.[441] Justice Thomas also filed an opinion concurring in the judgment which expressed a similar view, observing that "a statute which is civil on its face cannot be divested of its civil nature simply because of the manner in which it is implemented."[442]

Only Justice Stevens dissented. In his view it was perfectly proper for a court to look to the effect of a statute to determine whether its true nature is civil or punitive.[443] Stevens accused the majority of incorrectly assuming the answer to the question it was asked to decide by starting from the assumed premise that the commitment scheme was civil. Young's petition, Justice Stevens pointed out, sought to introduce evidence of the conditions of his confinement to show the punitive purpose and effect of the Washington commitment scheme, noting that Young had now served a longer term of confinement after completion of his sentence than he did on the sentence for the crime he committed.[444]

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438. *Id.*
439. *Id.* at 737.
440. *Id.*
441. *Id.* (Scalia, J., concurring) (citing Hudson v. United States, 522 U.S. 93 (1997)).
442. *Young*, 121 S. Ct. at 727.
443. *Id.* at 743 (Stevens, J., dissenting).
444. *Id.* at 742, 745 n.4 (Stevens, J., dissenting).

This case is important not so much because of its result, which was entirely predictable in light of *Kansas v. Hendricks*.[445] What is significant is the court's apparent willingness to allow a "civil" label, based upon a facial reading of the text of a commitment statute, to take precedence over its actual effect.

E. Daniels v. United States[446]

Under a federal post conviction statute (28 U.S.C. § 2255), a federal defendant can file a motion to vacate, set aside or correct his sentence on the ground that it was imposed in violation of the Constitution or laws of the United States.[447] At issue in this case is whether a defendant can use this federal post-conviction remedy to challenge a prior state conviction that was used to enhance his federal sentence under the Armed Career Criminal Act (ACCA).[448]

The defendant, Daniels, was convicted of being a felon in possession of a firearm in 1994.[449] Thereafter, the government sought to have Daniels declared to be an armed career criminal under the ACCA, based upon four prior state convictions—two for robbery in 1978 and 1981, and two for burglary in 1977 and 1979.[450] The Federal District Court found the defendant to be an armed career criminal within the meaning of the ACCA[451] and sentenced him to 176 months in prison.[452] Had the defendant not been subject to this enhancement, his maximum sentence would have been only 120 months.[453]

Daniels unsuccessfully attacked his sentence on direct appeal,[454] and subsequently filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence.[455] Daniels argued that his state convictions were unconstitutional because they were based on guilty pleas that were not knowing and voluntary, and that one was also the product of ineffective assistance of counsel.[456] The District Court denied relief, and the Court of Appeals affirmed.[457]

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445. 521 U.S. 346 (1997).
446. 532 U.S. 374 (2001).
447. 28 U.S.C § 2255 (Supp. v. 1994). The Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996 amended § 2255, but those amendments are not relevant here.
448. 18 U.S.C.S. § 924(e) (1984).
449. 18 U.S.C § 922 (g)(1).
450. *Daniels*, 121 S. Ct. at 1580.
451. 18 U.S.C.S. § 924 (e) (1984).
452. *Daniels*, 121 S. Ct. at 1580.
453. 18 U.S.C. § 924 (a)(2).
454. 86 F.3d 1164 (9th Cir. 1996).
455. *Daniels*, 121 S. Ct. at 1580.
456. *Id.* at 1581.
457. *Id.*

The reasoning of the lower courts was based upon the prior decision of the United States Supreme Court in *Custis v. United States*.[458] In that case, the Supreme Court held, with the exception of convictions obtained without the assistance of counsel, a defendant could not attack the validity of his federal sentence under the ACCA in his federal sentencing hearing by collaterally attacking prior state convictions that were used to enhance that sentence. In *Daniels* the issue was whether, after sentencing was over, the defendant could challenge those enhancing prior convictions under 28 U.S.C. § 2255, which was designed to provide relief to federal prisoners "whose sentence was imposed in violation of the Constitution or laws of the United States."[459] The lower courts found *Custis* dispositive of that issue as well.

The Supreme Court agreed that the policy considerations extant in *Custis* applied equally to the federal habeas context.[460] Justice O'Connor, writing for a majority, which included the Chief Justice, Justices Kennedy, Thomas and Justice Scalia, who concurred in a separate opinion, cited two reasons for affirming the lower courts. The first was "ease of administration."[461] Justice O'Connor pointed out that in order to challenge prior state sentences, transcripts of those hearings and other state court records could be required, which might no longer be available.[462] For example, Daniels had challenged a 1978 conviction on the theory that he did not fully understand the elements of the crimes with which he was charged when he entered his guilty plea.[463] However, the transcript of that proceeding was missing[464] and unavailable for federal review of the guilty plea under Section 2255.

The other consideration concerned the finality of state court judgments.[465] In some states, convictions affect the right to vote, hold public office, professional licensing, possession of firearms, etc.[466] If that conviction were open to later collateral attack in a federal proceeding, all of these restrictions might have to be reevaluated, and there would be no finality to the state conviction.

Justice O'Connor agreed with Daniels that defendants have the right to challenge their convictions if they were unconstitutionally obtained, but the question was in what proceedings and for how long.[467] The defendant may challenge his conviction on direct appeal, post-conviction, and in a writ of habeas corpus under 28 U.S.C. § 2254.[468] But, once the defendant is to be

458. 511 U.S. 485 (1994).
459. 28 U.S.C § 2255 (Supp. V. 1994).
460. *Daniels*, 121 S. Ct. at 1583-84.
461. *Id.* at 1581.
462. *See id.*
463. *Id.* at 1582.
464. *Id.*
465. *Id.* at 1581.
466. *See id.* at 1582.
467. *See id.* at 1582-83.
468. 28 U.S.C § 2254 (Supp. V. 1994).

sentenced under the ACCA, and the prior conviction has not been set aside, it is presumptively valid and can be used to enhance a federal sentence.[469]

Finally, Justice O'Connor argued that if a defendant has failed to challenge his state conviction in a timely fashion on direct appeal, post-conviction, or federal habeas, he should not be able to get another "bite at the apple" because that conviction is later used to enhance a federal sentence.[470]

Justice Scalia, in a separate concurring opinion, agreed with Justice O'Connor that the defendant should not be allowed to collaterally attack his prior state convictions under 28 U.S.C. § 2255.[471] However, he wrote separately to indicate his disagreement with the suggestion by Justice O'Connor and the plurality that in certain circumstances, where "no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own," the defendant might be able to file a motion under 28 U.S.C. § 2255 challenging a federal sentence based on such a conviction.[472]

Justice Scalia does not believe that 28 U.S.C. § 2255 is broad enough to encompass review of a claim "that an enhanced federal sentence violates due process" if the enhancement is based on prior convictions.[473]

Justice Souter, dissented together with Justices Ginsburg and Stevens, arguing that the language of 28 U.S.C. § 2255 is broad enough to encompass such a claim.[474] Justice Souter points out, moreover, that *Custis* dealt with the question of "where, not whether, the defendant could attack a prior conviction for constitutional infirmity."[475] Custis was in custody at the time of his decision and could still have attacked his prior state convictions in state court or through federal habeas review.[476] However, Daniels has no other forum in which to attack his prior state convictions. Justice Souter asked:

> [w]hy should a prisoner like Daniels suddenly be barred from returning to challenge . . . a conviction, when the Government is free to reach back to it to impose extended imprisonment under a sentence enhancement law unheard of at the time of the original convictions? Daniels could not have been expected in 1978 to anticipate the federal enhancement statute enacted in 1984. . . .[477]

Justice Souter also notes the anomaly in the plurality's acceptance of the fact that the defendant could attack these prior state convictions if any were

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469. *Daniels*, 121 S. Ct. at 1583.
470. *Id.* at 1584.
471. *Id.* at 1585 (Scalia, J., concurring).
472. *Id.*
473. *Id.*
474. *Id.* at 1586-87 (Souter, J., dissenting).
475. *Id.* at 1586 (quoting Nichols v. United States, 511 U.S. 738, 765 (1994) (Ginsburg, J., dissenting) (emphasis omitted)).
476. Custis v. United States, 511 U.S. 485, 497 (1994).
477. *Daniels*, 121 S. Ct. at 1587-88.

obtained in violation of *Gideon v. Wainwright*.[478] Although agreeing that the exception for *Gideon* violations was valid, so were other violations of federal constitutional law such as *Miranda* violations, *Brady* violations, and/or *Strickland* violations, etc., which are equally as important and should be similarly subject to correction if a conviction obtained in violation of the federal constitution has been used to enhance a federal sentence.[479]

Justice Breyer dissented separately to argue that *Custis* itself should be overruled since it was the root of the problems noted by the dissent.[480] Prior to *Custis,* the practice of the lower courts was to allow a challenge to a prior state conviction at the time of the sentencing in federal court.[481] Justice Breyer predicted that unless *Custis* was reconsidered there would be "ever-increasing complexity" in this area.[482]

F. Lackawanna County D.A. v. Coss[483]

This case deals with the question of whether federal habeas relief is available to a state prisoner who challenges a current sentence on the ground that it was enhanced due to an unconstitutional prior conviction for which the defendant is no longer in custody. In *Daniels v. United States*,[484] the Court held that such relief was generally unavailable to a federal prisoner through 28 U.S.C. § 2255.[485] In *Coss,* the Court holds that relief is likewise generally not available to a to state prisoner through a petition for a writ of habeas corpus under 28 U.S.C. § 2254.[486] *Coss*, however, arguably presented circumstances constituting two exceptions to this general rule. The first exception concerns prior convictions with respect to which there was a failure to appoint counsel. A majority of the Court agreed that under this circumstance the general rule against attacking prior convictions did not apply and a defendant could seek habeas relief.[487] A majority of the members of the Court would also appear to recognize a second exception. That exception would arise if it can be shown that the prisoner, through no fault of his own, has been deprived of a forum in which to raise the claim he now seeks to

478. *Id.* at 1588 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

479. *Daniels*, 121 S. Ct. at 1588 (citing Miranda v. Arizona, 384 U.S. 436 (1964) (requiring police to warn the defendant of the consequences of his confession and right to counsel or to remain silent); Brady v. Maryland, 373 U.S. 83 (1963) (requiring the prosecution to disclose exculpatory evidence in their possession to the defense); *and* Strickland v. Washington, 466 U.S. 668 (1984) (requiring not only that the defendant have counsel, but that his counsel be effective)).

480. *Daniels,* 121 S. Ct. at 1589.

481. *Id.* at 1588.

482. *Id.* at 1589.

483. 121 S. Ct. 1567 (2001).

484. 532 U.S. 374 (2001).

485. 28 U.S.C. § 2255 (Supp. V. 1994).

486. 28 U.S.C. § 2254 (Supp. V. 1994).

487. *Coss*, 121 S. Ct. at 1574.

vindicate.[488] In that circumstance, Justice O'Connor, The Chief Justice, Justice Kennedy and presumably the four dissenters in this case would permit habeas relief. Justice O'Connor, writing for a plurality, avoided defining the parameters of that exception, however, finding that it did not apply here because defendant's sentence had not actually been adversely affected by the allegedly unconstitutional prior conviction.[489]

Coss was no stranger to the criminal justice system. By the time he was sixteen he had been found delinquent at least five times.[490] By the time he was twenty-three, he had been convicted of assault, vandalism, criminal mischief, disorderly conduct, and possession of narcotics.[491] In 1986, Coss was convicted of several misdemeanors involving simple assault, criminal mischief and vandalism.[492] For these crimes he was sentenced to two consecutive terms of six months to one year.[493] Although Coss did not file a direct appeal, he filed a post-conviction petition alleging that his counsel was ineffective.[494] The Lackawanna County Court appointed counsel, and the State filed an answer to the petition.[495] Thereafter, no further action was taken on this petition and it was still technically pending at the time the instant proceedings were undertaken almost fourteen years later.[496]

In 1990 Coss was convicted of felony aggravated assault.[497] At first, he received a sentence of six to twelve years. However, he successfully challenged that sentence on appeal. On remand for re-sentencing, however, one of the issues concerned whether Coss's prior 1986 misdemeanor convictions should be considered as separate offenses, thereby increasing his "prior record score" and his possible sentence.[498] The trial court ruled that the 1986 misdemeanor convictions should count only as one offense, because they arose out of the same incident. Under the Pennsylvania sentencing code a single misdemeanor does not count toward the prior record score.[499] Therefore the 1986 convictions did not affect the *range* of sentences to which Coss was eligible.[500] However, during the re-sentencing hearing, the trial court also had to choose a sentence *within the range* of sentences available to him. In choosing that range, the trial judge considered a number of factors, including

488. *Id.* at 1575.
489. *Id.* at 1576.
490. *Id.* at 1570.
491. *Id.*
492. *Id.*
493. *Id.* at 1571.
494. *Id.*
495. *Id.*
496. *Id.* at 1570-71.
497. *Id.* at 1571.
498. *Id.*
499. *Id.*
500. *Id.*

> the seriousness and nature of the crime involved . . ., the well being and protection of the people who live in your community, your criminal disposition, *your prior criminal record*, the possibility of your rehabilitation, and the testimony that I've heard . . . it's indicative that from your actions you will continue to break the law unless given a period of incarceration.[501]

The trial court then re-sentenced Coss to a term of six to twelve years.[502]

In 1994, the defendant filed a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, alleging that his 1986 convictions were the result of his counsel's ineffectiveness, and that his 1990 re-sentencing was adversely and unconstitutionally impacted by their consideration.[503] Based on the sentencing Judge's comments, the District Court found that he had taken the 1986 convictions into account in his resentencing for the 1990 conviction. Therefore, the District Court found that it had jurisdiction to hear the case under Section 2254, and concluded that Coss's counsel had been deficient, but failed to find prejudice.[504] Therefore, the petition was denied.[505] Sitting en banc, the Court of Appeals for the Third Circuit agreed that the sentencing court considered Coss's 1986 convictions when it determined Coss's sentence for the 1990 felony.[506] Reversing the District Court, the Court of Appeals found that Coss's counsel was ineffective as to one of the 1986 convictions and remanded the case back to the District Court with instructions that either Coss be retried as to that offense or that he be re-sentenced without consideration of the assault conviction.[507]

On appeal to the Supreme Court, the threshold issue was whether the defendant could properly bring an action for habeas relief. Justice O'Connor agreed that Coss was "in custody" as required by Section 2254,[508] since he was still in custody on the 1990 conviction.[509] The more difficult question was to what extent Coss' prior state convictions could be attacked collaterally. Justice O'Connor held that the policy reasons explained in *Daniels v. United States*[510] dictated that a state prisoner likewise could not ordinarily attack a prior state conviction via a petition for federal habeas corpus under 28 U.S.C. § 2254.[511]

Justice O'Connor observed that the policy reasons of finality of judgment and ease of administration operate the same in the federal habeas con-

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501. *Id.* (quoting Record Doc. No. 101)(emphasis added).
502. *Coss*, 121 S. Ct. at 1571.
503. *Id.* at 1571-72.
504. *Id.* at 1572.
505. *Id.*
506. *Id.*
507. *Id.*
508. 28 U.S.C. § 2254(a) requires that a habeas petitioner establish that he is "in custody pursuant to the judgment of a state court."
509. *Coss*, 121 S. Ct. at 1571.
510. 532 U.S. 374 (2001).
511. *Coss*, 121 S. Ct. at 1574.

text as in the federal post-conviction context. Once a state conviction has been secured, and the defendant has failed to take advantage of his direct and/or collateral appeal options, the state has a strong interest in preserving the integrity of the conviction. Moreover, the same problems exist in trying to discover old transcripts and records in order to revisit these prior convictions.[512]

Justice O'Connor, writing for a majority, held, however, that where the petitioner could demonstrate that his prior expired conviction was obtained in the absence of counsel an exception would be made to allow relief under Section 2254.[513]

Up to this point in her opinion, Justice O'Connor was joined by the Chief Justice and by Justices Scalia, Kennedy, and Thomas. However, Justices Scalia and Thomas refused to join that portion of her opinion addressing a second exception to the general rule barring habeas attack on prior state convictions used to enhance a present sentence. This exception arose, Justice O'Connor asserted, when it appeared that the defendant was not at fault in failing to perfect a direct or collateral attack on his prior expired conviction in the first instance.[514] Justice O'Connor believed that where a defendant, who was without fault, no longer had any forum in which to bring his claim, he should be allowed to collaterally attack a prior conviction used to enhance his present sentence. While only the Chief Justice and Justice Kennedy joined this part of her opinion, it is clear that with the additional votes of the four dissenters a clear majority would adhere to this position.[515]

Justice O'Connor avoided ruling on the issue, however, by finding the error harmless. She acknowledged that it is "technically correct" to say that the trial court did consider the tainted 1986 misdemeanor convictions in resentencing Coss.[516] However, she concluded that in light of Coss' extensive criminal record, the 1986 misdemeanors were "'such a minor component of [Coss'] record'" that the trial judge would have given the same sentence even without their consideration.[517] Therefore, Justice O'Connor reversed the Court of Appeals decision below, finding that Coss did not qualify for relief under Section 2254 "because the 1990 sentence he is challenging was not actually affected by the 1986 convictions."[518] This harmless error analysis, however, was only adopted by a plurality, as Justice Scalia did not join this portion of the opinion.[519]

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512. *Id.* at 1573-74.

513. *Id.* at 1570.

514. *Id.* at 1575.

515. *See id.* at 1575-77 (Souter, J. dissenting). *See also id.* at 1577 (Breyer, J., dissenting).

516. *Id.* at 1576.

517. *Id.* (citing Coss v. Lackawanna County District Attorney, 204 F.3d 453, 468 (3d Cir. 2000) (Nygaard, J., dissenting).

518. *Coss*, 121 S. Ct. at 1576 (2001).

519. *Id.* at 1570.

Justice Souter, joined by Justices Stevens and Ginsburg, dissented.[520] He noted that here Coss had filed a timely state post conviction petition, but for some unknown reason it had become lost in the state system for fourteen years.[521] Indeed it is because of this fact that Justice O'Connor allowed for the possibility of an exception to the prohibition against attacking prior state convictions under Section 2254.[522] Justice Souter pointedly disagreed with Justice O'Connor's harmless error analysis, however, noting that the District Court expressly found that the sentencing judge made reference to the 1986 convictions when it imposed a sentence at "the top of the standard range" for Coss' 1990 offense.[523] This finding was not challenged in the Court of Appeals. Therefore, Justice Souter argued that by ruling in the first instance that the consideration of the 1986 convictions had no adverse effect, the Supreme Court was exceeding its authority as a court of review, and abrogating the role of the lower courts.[524]

Justice Breyer dissented separately to note that since the State had never argued that the trial court's consideration of the 1986 convictions was harmless error, he would not overturn the ruling of the Court of Appeals on that basis.[525] However, he would have remanded the case back to the Court of Appeals to determine whether federal habeas was (as the exception required) the only forum available for review of the prior convictions.[526]

G. INS v. St. Cyr[527]

In this five-to-four decision, the Supreme Court took a bold, proactive stand to protect the rights of resident aliens subject to deportation by the INS. The *St. Cyr* case addressed two issues: 1) whether habeas corpus remains available as a remedy following enactment of two restrictive statutes in 1996; and 2) whether statutes enacted after resident aliens plead guilty to criminal charges may be retroactively applied to deportation proceedings taking place at a later time.[528]

St. Cyr is one of three cases in this Supreme Court term that supports the continued viability of the Writ of Habeas Corpus, weakens the authority of the INS, and staunchly maintains the primacy of the judiciary's role in safeguarding the Writ as a remedy against detention by the executive branch of government. In this case, the INS argued that certain provisions of the

520. *Id.* at 1576 (Souter, J., dissenting).
521. *Id.* at 1576-77 (Souter, J., dissenting).
522. *Id.*
523. *Id.* at 1577 (Souter, J., dissenting).
524. *Id.*
525. *Id.*
526. *Id.*
527. 121 S. Ct. 2271 (2001).
528. *Id.* at 2275.

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[529] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[530] stripped the courts of jurisdiction under the habeas corpus statute, 28 U.S.C. § 2241.[531] Justice Stevens, writing for the majority, disagreed with the INS, citing the strong presumption in favor of judicial review and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.[532] Justice Stevens also pointed to the clear requirement in Article I of the Constitution that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasions, the public Safety may require it," observing that any statutory construction precluding judicial review would raise "substantial constitutional questions."[533] Thus, he concluded, some form of judicial oversight in deportation cases is "unquestionably" required by the Constitution.[534]

Despite the High Court's view that it must remain proactively involved against incursions upon its authority by administrative agencies of the executive branch such as the INS, this decision does not alter the deference the Court has shown to the decisions of state courts in criminal proceedings.[535] Justice Stevens is quick to distinguish *St. Cyr* from *Felker v. Turpin*,[536] where the Supreme Court refused to grant a death penalty inmate leave to file a successor habeas corpus petition to challenge his state court conviction after passage of the AEDPA.[537] In Stevens' view, historically, the Great Writ was largely a remedy against executive detention.[538]

In explaining why the language of the AEDPA and IIRIRA do not prohibit habeas corpus jurisdiction, Justice Stevens observed that those statutes employ specific words like, "judicial review," or "jurisdiction to review," but fail to include language relating to the Writ of Habeas Corpus or its ena-

529. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-32, § 735, 110 Stat. 1214 (1996).

530. Illegal Immigration and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (amended 1997).

531. *St. Cyr*, 121 S. Ct. at 2277-78.

532. *Id.* at 2278.

533. *Id.* at 2279 (quoting U.S. CONST. art. I, § 9, cl. 2).

534. *St. Cyr*, 121 S. Ct. at 2279 (citing Heikkila v. Barber, 345 U S. 229 (1953)).

535. *See, e.g.*, Nancy Albert-Goldberg & Marshall J. Hartman, *What Remains of Habeas Corpus for Death Row Inmates?*, 2 PUB. INT. L. REP. 11, 31 (1997). The authors note that the AEDPA generally requires federal courts to defer to state court decisions. It is also a retreat from case law that allowed federal circuit courts of appeal to rely on their own interpretation of federal law instead of only Supreme Court precedent. As a result, some federal circuit court judges believe that the AEDPA tramples on the judicial power embodied in Article III of the Constitution.

536. 518 U.S. 651 (1996). *See also* Marshall Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Antiterrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 378 (1997).

537. *Felker v. Turpin*, 518 U.S. 651, 654 (1996).

538. *St. Cyr*, 121 S. Ct. at 2280. We will leave it to future scholars to examine whether, historically, executive and judicial functions were as clearly separate and distinct as they are in the United States today.

bling statute, 28 U.S.C. § 2241.[539] Citing the Supreme Court's decision in *Heikkila v. Barber*[540] and two other early Supreme Court decisions, Justice Stevens noted that the terms "judicial review" and "habeas corpus" have historically distinct meanings in the context of immigration.[541] Therefore, a statute precluding judicial review of a deportation order does not preclude a court from hearing a habeas corpus petition related to that order. Accordingly, *St. Cyr* holds that habeas jurisdiction under Section 2241 was not repealed by either the AEDPA or IIRIRA.[542]

The second issue in this decision relates to the retroactive application of the statutes in question.[543] Enrico St. Cyr, a Haitian citizen, was admitted as a lawful permanent U.S. resident in 1986.[544] In March 1996, he pled guilty in state court to selling a controlled substance.[545] The plea took place prior to passage of the AEDPA in April 1996.[546] Deportation proceedings against St. Cyr were not commenced until April 1997, after passage of both AEDPA and IIRIRA.[547] The effect of those statutes was to repeal previously existing laws that gave the Attorney General discretion to waive deportation for aliens convicted of certain crimes.[548]

Both the federal District Court and the Second Circuit Court of Appeals agreed that the 1996 statutes should not apply to removal proceedings brought against an alien who pled guilty to a deportable crime before their enactment.[549] The High Court affirmed the ruling of the Court of Appeals, stating that it would be unfair to apply the statutes upon an individual who entered into a plea agreement in reliance on the laws then in effect, without a clear indication from Congress that it intended to make the statutes retroactive.[550]

In a prophetic passage in light of the subsequent terrorist attacks on September 11, 2001, Justice Stevens took issue with the INS's assumption that immigrants were not an "unpopular group"[551] and expressed the Court's concern that "'[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use

539. 28 U.S.C. § 2241 provides in part that, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

540. 345 U.S. 229 (1953).

541. *St. Cyr*, 121 S. Ct. at 2285.

542. *Id.* at 2287.

543. *See id.* at 2275.

544. *Id.*

545. *Id.*

546. *See id.*

547. *Id.*

548. *See id.*

549. St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000).

550. *St. Cyr*, 121 S. Ct. at 2291-93.

551. *Id.* at 2288 n.39.

retroactive legislation as a means of retribution against unpopular groups or individuals.'"[552]

Justice Scalia filed a lengthy dissent, joined by the Chief Justice, Justice Thomas, and, in part, by Justice O'Connor. Justice Scalia argued that the AEDPA and the IIRIRA, which latter statute revised the Immigration and Nationality Act of 1952 (as amended in 1961), unambiguously repealed the application of 28 U.S.C. § 2241, the general habeas corpus provision, to deportation challenges brought by aliens convicted of certain crimes.[553] The dissent objected to the majority opinion's imposing a "magic words requirement" upon Congress by insisting that clear language be included in the statutes in order to repeal habeas jurisdiction.[554] Even if habeas relief of some form were required by virtue of the Suspension Clause in Article I of the Constitution, Justice Scalia argued that it would not embrace the "rarified right asserted here: the right to judicial compulsion of the exercise of Executive *discretion.*"[555]

Justice Scalia further charged that the majority's decision routes all challenges to removal orders by "criminal aliens" to the district courts rather than to appellate courts, thereby avoiding time limits required in appellate courts and according "criminal aliens" with greater access to judicial review than other aliens subject to removal.[556] Justice Stevens' opinion responded to that charge by pointing out that *St. Cyr* raises only a question of an alien's eligibility for discretionary relief, and that Congress could choose to provide an avenue of relief though appellate courts if it wished.[557]

Justice O'Connor, in a separate dissenting opinion, agreed with Justice Scalia that the claimed right to executive discretion falls outside the scope of habeas corpus review, and therefore did not find it necessary to address the issue of what quantum of habeas review, if any, was required by the Suspension Clause.[558]

H. Calcano-Martinez et al. v. INS[559]

This is a companion case to *INS v. St. Cyr*. Unlike St. Cyr, who filed a habeas corpus petition but did not appeal, the petitioners in this case filed both a petition for review in the Second Circuit Court of Appeals[560] and a habeas corpus petition in the District Court.[561] Like St. Cyr, petitioners were

552. *Id.* at 2288 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 266 (1994)).
553. *Id.* at 2294 (Scalia, J., dissenting).
554. *Id.*
555. *Id.* at 2301 (Scalia, J., dissenting) (emphasis in original).
556. *Id.*
557. *Id.* at 2287 n.38.
558. *Id.* at 2293 (O'Connor, J., dissenting).
559. 121 S. Ct. 2268 (2001).
560. These petitions were filed pursuant to 8 U.S.C. § 1252(a)(1) (1994 ed., Supp. V).
561. The habeas corpus petitions were filed pursuant to 28 U.S.C. § 2241

lawful permanent residents of the United States, who conceded that they were deportable based upon their past criminal convictions.

The petitions for review were consolidated in the Court of Appeals, which subsequently dismissed them on the ground that the new Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[562] expressly precluded courts of appeals from exercising jurisdiction to review any final order of removal against any alien who has been convicted of certain offenses, including any aggravated felony.[563] The Supreme Court in *Calcano-Martinez* affirmed the Court of Appeals' decision, holding that the IIRIRA strips the courts of appeals of jurisdiction to hear the petitioners' claims on petitions for direct review.

With respect to petitioners' habeas corpus petitions, however, the Court of Appeals ruled that they could pursue those claims in a Section 2241 action filed in district court.[564] Consistent with *St. Cyr*, the Supreme Court in *Calcano-Martinez* affirmed the ruling by the Second Circuit.

This case makes the Supreme Court's position with regard to AEDPA and IIRIRA abundantly clear. In cases where resident aliens convicted of aggravated felonies are ordered deported, appellate courts are without jurisdiction to entertain direct appeals, but deportees may petition for relief under the habeas corpus statute in the district court.

I. Zadvydas v. Davis[565]

Like *St. Cyr* and *Calcano-Martinez*, this case limits the extent of recent legislative restrictions upon the writ of habeas corpus for resident aliens after entry of a final removal order. In *Zadvydas* the issue was whether the United States Attorney General was authorized to detain a removable alien indefinitely beyond the removal period, or only for a period reasonably necessary to secure the alien's removal.[566] Writing for the majority in another 5 to 4 immigration decision, Justice Breyer held that the Immigration and Nationality Act's (INA) post-removal detention provision[567] contains "an implicit reasonableness limitation" that limits the discretion of the Attorney General. To construe the INA provision otherwise, the Court stressed, would cause the statute to run afoul of the Fifth Amendment's Due Process Clause.[568]

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562. 110 Stat. 3009-546.

563. 232 F.3d 328 (1999).

564. *Id.*

565. 121 S. Ct. 2491 (2001).

566. *Id.* at 2495.

567. 8 U.S.C. § 1231(a)(6)(1994 ed., Supp. V) states that "an alien ordered removed . . may be detained beyond the removal period, and, if released, shall be subject to [certain] terms of supervision. . . ." The Court stressed the importance of the word "may" as an indication that Congress wished to limit the Attorney General's discretion. *Zadvydas*, 121 S. Ct. at 2502.

568. *Id.* at 2498.

This decision arose out of two cases that were consolidated due to a conflict between the Fifth and Ninth Circuit Courts of Appeals. The Fifth Circuit case involved Kestutis Zadvydas, born of Lithuanian parents in a German displaced persons camp and brought to the United States at age eight.[569] The Ninth Circuit case involved Kim Ho Ma, whose parents fled Cambodia, taking him to refugee camps in Thailand and the Philippines before bringing him to the United States at the age of seven.[570] Both of these individuals had been convicted of aggravated felonies and served their time in prison before being released into INS custody. The INS ruled that they should be deported due to their criminal records.[571]

However, the INS was unable to deport both Zadvydas and Ma.[572] In the case of Zadvydas, neither Germany nor Lithuania would accept him. As for Ma, the INS could not send him back to Cambodia because that nation has no repatriation treaty with the United States.[573] Both men filed habeas petitions after being held beyond expiration of the ninety-day removal period, and in both cases, the United States District Courts granted their petitions on the grounds that the government and the Constitution forbids post-removal-period detention, unless there is a realistic chance that an alien will be removed.[574] The Fifth Circuit reversed on the ground that eventual deportation of Zadvydas was "not impossible."[575] The Ninth Circuit, on the other hand, affirmed the granting of Ma's petition, concluding that detention was not authorized for more than a reasonable time beyond the ninety-day period.[576]

Following a review of provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which limited judicial review of deportation decisions, the *Zadvydas* Court concluded that 28 U.S.C. § 2241 habeas proceedings are available as a forum for statutory and constitutional challenges to post-removal-period detention of resident aliens.[577] Although, on the surface, this conclusion appears to mesh with that in *St. Cyr* and *Calcano-Martinez*, there is one significant difference between these decisions.[578] As Justice Breyer points out in *Zadvydas*, the IIRIRA

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569. *Id.* at 2495-96. *See* Zadvydas v. Caplinger, 986 F. Supp. 279 (E.D. La. 1999) *and* Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999).

570. *Zadvydas*, 121 S. Ct. at 2496. *See* Binh Phan v. Reno, 56 F. Supp. 2d 1149, 1156 (W.D. Wash. 1999) (this case was consolidated with approximately 100 similar cases); Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000).

571. *Zadvydas*, 121 S. Ct. at 2496.

572. *Id.*

573. *Id.* at 2496-97.

574. *Id.*

575. *Id.* at 2496.

576. *Id.* at 2497.

577. *Id.* at 2498.

578. This difference may help to account for the fact that Justice O'Connor sided with the majority in *Zadvydas*, but not in *St. Cyr*, and Justice Kennedy sided with the majority in *St. Cyr*, but not in *Zadvydas*.

states that, "'no court shall have jurisdiction to review' decisions 'specified to be in the *discretion* of the Attorney General.'"[579] In *St. Cyr* and *Calcano-Martinez*, petitioners were seeking to allow the Attorney General the authority to grant a discretionary waiver of a deportation order, and therefore it was necessary for the Supreme Court to reach the issue of whether the word "review" was a bar to habeas corpus relief.[580] The remedy sought in *Zadvydas*, on the other hand, was to remove the Attorney General's discretion to keep the aliens in custody indefinitely.[581] Justice Breyer reasoned that, since the aliens in *Zadvydas* were not seeking review of the Attorney General's exercise of discretion, the restrictive provision of the IIRIRA did not apply.[582] The plain language restriction in the IIRIRA was not a potential bar to relief, as it had been in *St. Cyr* and *Calcano-Martinez*, as Zadvydas wanted to eliminate the Attorney General's discretion rather than to authorize it.

This case shines a light on the nature of INS proceedings and the need for executive branch compliance with constitutional mandates. Justice Breyer observed that government detention violates the Due Process Clause unless (1) it is ordered in a criminal proceeding with adequate procedural safeguards, citing *United States v. Salerno*,[583] or (2) it is ordered in a civil non-punitive proceeding where there is a special justification, such as "harm-threatening mental illness,"[584] citing *Kansas v. Hendricks*.[585] INS proceedings are civil and therefore assumed to be non-punitive.[586] Because the basic purpose of detention in the removal law is to assure the alien's presence at the time of removal, there is thus no special justification for requiring imprisonment rather than supervised release on specified conditions.[587] If preventive detention is sought because of dangerousness, then the procedural protections required under *Salerno* and *Hendricks* ought to apply.[588]

Justice Breyer expressly noted that this case did not involve preventive detention in connection with terrorism or other special circumstances where an argument might be made for "heightened deference to the judgments of the political branches with respect to matters of national security."[589] He also made a distinction between the constitutional rights afforded resident aliens who have been given permission to enter and aliens who have not yet entered the United States. Thus, Justice Breyer distinguished *Shaughnessy v.*

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579. *Zadvydas*, 121 S. Ct. at 2497 (quoting 8 U.S.C. §1252(a)(2)(B)(ii) (1994 ed., Supp V)).

580. Calcano-Martinez v. INS, 121 S. Ct. 2268, 2269 (2001); St. Cyr v. INS, 229 F.3d 406, 410 (2d Cir. 2000).

581. *Zadvydas*, 121 S. Ct. at 2497.

582. *Id.*

583. 481 U.S. 739 (1987).

584. *Zadvydas*, 121 S. Ct. at 2498-99.

585. 521 U.S. 346 (1997).

586. *Zadvydas*, 121 S. Ct. at 2499.

587. *Id.* at 2499, 2502.

588. *Id.* at 2499.

589. *Id.* at 2502.

United States ex rel. Mezei,[590] where an alien was indefinitely detained when he tried to reenter the country at Ellis Island.[591] Mezei's presence at Ellis Island was not considered a "landing" by the Court, and therefore, he was treated as if he had not entered the country.[592] In contrast, Justice Breyer pointed out, the Due Process Clause applies to all persons *within* the United States, including aliens, regardless of whether their presence is "lawful, unlawful, temporary or permanent."[593]

Noting that preventive detention of even dangerous persons had been upheld only where there were "strong procedural protections," Justice Breyer concluded that a "serious constitutional problem" would arise if the provisions of the ADEPA and the IIRIRA were construed to permit indefinite and perhaps even permanent detention based upon executive discretion without such protections.[594] Justice Breyer then concluded that there was nothing in the history of these statutes clearly demonstrating a congressional intent to authorize indefinite or permanent detention.[595] Therefore, the Court held, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.[596]

Justice O'Connor, who dissented in *St. Cyr* and *Calcano-Martinez*, joined Justices Breyer, Stevens, Souter, and Ginsburg to form the majority in *Zadvydas*. Justice Kennedy, who joined the majority in *St. Cyr* and *Calcano-Martinez*, authored the dissent in *Zadvydas*, in which he was joined by the Chief Justice and, in part, by Justices Scalia and Thomas. Justices Scalia and Thomas also filed a separate dissent.

All four dissenting justices joined in the view that the Attorney General possessed clear statutory authority to detain aliens subject to deportation indefinitely despite the refusal of any other country to accept them, and decried the intrusion of the judicial branch upon the authority of "high officers of the Executive" branch.[597] Justice Kennedy's dissent indicated an acceptance of an alien's right to seek habeas review after a removal order to determine whether the detained alien poses a risk of dangerousness or flight.[598] Justices Scalia and Thomas, on the other hand, refused to concede that there are any situations in which the courts can order release.[599]

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590. 345 U.S. 206 (1953).

591. *Zadvydas*, 121 S. Ct. at 2500 (citing *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 215-16 (1953)).

592. *Zadvydas*, 121 S. Ct. at 2500.

593. *Id.* at 2500-01 (citing Plyler v. Doe, 457 U.S. 202 (1982) *and* Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

594. *Zadvydas*, 121 S. Ct. at 2500.

595. *Id.* at 2502.

596. *Id.* at 2504.

597. *Id.* at 2507-09.

598. *Id.* at 2517 (Kennedy, J., dissenting).

599. *Id.* at 2506-07 (Scalia, J., dissenting).

IV. SIXTH AMENDMENT RIGHT TO COUNSEL

A. Texas v. Cobb[600]

This case resolves a longstanding question regarding the scope of protection afforded by the Sixth Amendment right to counsel to shield an accused from police interrogation.[601] While appearing to be similar to the right to counsel announced in *Miranda v. Arizona*,[602] the Sixth Amendment right to counsel is both broader and narrower than the counsel right under the Fifth Amendment. In order to ensure that the Fifth Amendment right to be free from compelled self-incrimination was honored in the police station, *Miranda* ruled that before police can interrogate a suspect in custody they must first advise the suspect that he has a right to consult an attorney and to have the attorney present during any interrogation. Any custodial interrogation conducted without a proper waiver of this right to counsel renders the suspect's statements inadmissible in the prosecution's case in chief.[603] Thus, the right to counsel under the Fifth Amendment arises only in relation to a *custodial* interrogation by police.[604]

The Sixth Amendment right to counsel, however, is not so limited in scope. It applies to all critical stages of a prosecution including attempts to deliberately elicit incriminating statements from an accused even if he is not in custody.[605] The Sixth Amendment right to counsel attaches, however, only when there is a criminal prosecution. Therefore, this right does not exist until "adversary proceedings, triggered by the government's formal accusation of a crime, begin."[606] Accordingly, the Sixth Amendment right attaches only to specific offenses, which have been formally charged,[607] usually by the filing of an indictment or a complaint.[608] Once the right to Sixth Amendment counsel attaches, and is invoked, either by retaining, requesting or accepting the appointment of counsel, it acts like a shield, which protects the accused from further deliberate attempts by police or their agents to elicit incriminating statements from him without counsel present.[609]

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600. 121 S. Ct. 1335 (2001).
601. U.S. CONST. amend. VI.
602. 384 U.S. 436, 444 (1966).
603. *Id.*
604. *Id.*
605. Massiah v. United States, 377 U.S. 201, 205 (1964).
606. Texas v. Cobb, 121 S. Ct. 1335, 1345 (2001) (Breyer, J., dissenting).
607. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).
608. *But see* Brewer v. Williams, 430 U.S. 387 (1977) (finding that the right to counsel was triggered by judicial arraignment, which used an arrest warrant as the charging instrument).
609. *See generally* Michigan v. Jackson, 475 U.S. 625 (1986); Massiah v. United States, 377 U.S. 201 (1969); Brewer v. Williams, 430 U.S. 387 (1977); United States v. Henry, 447 U.S. 264 (1980); *and* Kuhlmann v. Wilson, 477 U.S. 436 (1986).

In *Cobb*, the Court holds that this protective cloak provided by the Sixth Amendment right to counsel can extend to uncharged offenses beyond those formally prosecuted, but only if the uncharged offense would be considered the "same offense" as a charged offense.[610] To determine whether an uncharged offense is the "same offense" as a charged offense, the Court adopted the elements test established in the double jeopardy context by *Blockburger v. United States*.[611] The Court rejected the more generous factually based approach used in most lower courts, which extended the right to counsel to other uncharged offenses if they were "closely related to" or "inextricably intertwined with" a charged offense.[612]

The facts in *Cobb* show how the choice of tests can make a dramatic difference in the scope of protection the Sixth Amendment provides regarding interrogation on related but uncharged offenses. In December 1993, a homeowner in Walker County, Texas reported that his house had been burglarized and that his wife and infant daughter were missing.[613] Raymond Cobb, a neighbor, was questioned, but denied involvement. In July 1994, Cobb was questioned again and this time confessed to the Sheriff that he had committed the burglary, but denied any knowledge of the missing wife and daughter. Cobb was indicted for the burglary and Attorney Ridley was appointed as his counsel.[614]

Thereafter, Sheriff's investigators requested counsel's permission to question Cobb about the missing persons, which was granted on two different occasions, but Cobb continued to deny involvement. However, while Cobb was free on bond and living with his father in Odessa, Texas, he confessed to his father that he had killed the wife during the burglary. Cobb's father informed the Walker County Sheriff.[615]

A warrant was faxed to Odessa authorities, who arrested Cobb, gave him Miranda warnings, and secured a confession to the murders of both mother and infant. Cobb stated that he had stabbed the mother in the stomach when she saw him taking her stereo, and later buried the baby with its mother.[616] He was convicted of capital murder and received the death penalty.[617]

On appeal, the Texas Court of Criminal Appeals reversed, holding that his confession was taken in the absence of counsel, and that his right to counsel had attached when Ridley had been appointed for the burglary. The court reasoned that once the right to counsel attaches to a charged offense, it also attaches to any other offense that is "very closely related factually to the offense

610. *Cobb*, 121 S. Ct. at 1343.
611. 284 U.S. 299 (1932).
612. *Cobb*, 121 S. Ct. at 1340-41.
613. *Id.* at 1339.
614. *Id.*
615. *Id.*
616. *Id.*
617. *Id.* at 1340.

charged."[618] Finding the murder charges very closely related to the burglary charge, the Texas Court held that the Odessa police should have notified Ridley and sought Ridley's permission to question Cobb about the murders. Absent that permission, the confession should have been suppressed.[619] The Texas Court relied upon *Michigan v. Jackson*.[620] In that case, the defendant had requested the appointment of counsel at arraignment. The next morning, the police took a statement from the defendant in the absence of counsel, and without any notification to counsel.[621] The confession was suppressed as a violation of Jackson's Sixth Amendment right to counsel.[622]

Chief Justice Rehnquist, writing for a majority, which included Justices O'Connor, Scalia, Kennedy, and Thomas, reversed the Texas Court of Criminal Appeals. A concurring opinion by Justice Kennedy, joined by Justices Scalia and Thomas, cast considerable doubt on the continuing validity of the presumption in *Michigan v. Jackson* that a request for counsel at arraignment constitutes an invocation of counsel for all purposes, including interrogation.[623] Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented.[624]

The Chief Justice premised his decision on a literal reading *of McNeil v. Wisconsin*.[625] In *McNeil*, he argued, the Court held that that the Sixth Amendment right to counsel attached only to the specific offense charged.[626] In other words it was an "offense specific" right. In *McNeil*, the confession at issue related to a crime far different in terms of time, place and subject matter from the crime charged against McNeil at the time of the contested interrogations. McNeil had been initially arrested and formally charged with a robbery that occurred in West Allis, Wisconsin.[627] The disputed questioning of McNeil by police related to a murder committed in the town of Caledonia, Wisconsin.[628] The two crimes were totally without connection except for the fact that McNeil was a suspect in each crime. The Court therefore held that although McNeil's Sixth Amendment right to counsel had attached and shielded him from police initiated interrogation with respect to the West Allis robbery, he did not have a similar Sixth Amendment shield with respect to the uncharged Caldonia murder.[629] *McNeil*, however, did not address the situation present in *Cobb* where the subsequent interrogation involves closely related offenses arising out of the same course of conduct.

618. *Id.*
619. *Id.*
620. 475 U.S. 625 (1986).
621. *Id.* at 627.
622. *Id.* at 626.
623. *Cobb*, 121 S. Ct. at 1344.
624. *Id.* at 1338.
625. 501 U.S. 171 (1991).
626. *Cobb*, 121 S. Ct. at 1341.
627. *McNeil*, 501 U.S. at 173.
628. *Id.* at 173-74.
629. *Id.* at 173.

A previous decision that is more closely related factually to *Cobb* than *McNeil* is *Brewer v. Williams*.[630] Williams had been arrested in Davenport, Iowa and arraigned on an arrest warrant charging him with abduction in Des Moines, Iowa. A lawyer for Williams had been present at his arraignment in Davenport. Williams also had a lawyer in Des Moines. Despite assurances given to the lawyers that they would not interrogate Williams during the trip, Williams was ultimately induced by police, while being transported back to Des Moines, to lead them to a shallow grave where he had buried the body of the ten-year-old girl he had abducted and murdered.[631] Thereafter, Williams was convicted of murder.[632] On appeal, however, the Supreme Court held that Williams had been denied his Sixth Amendment right to counsel during the interrogation on the ride from Davenport to Des Moines.[633]

Cobb argued that *Brewer* implicitly held that the right to counsel under the Sixth Amendment attached to the murder charge because it was factually related to the abduction charge.[634] Chief Justice Rehnquist, however, rejected this argument, declaring that "Constitutional rights are not defined by inferences from opinions which did not address the question at issue."[635] He therefore distinguished *Williams* because in *Williams*, no one apparently raised the issue that the defendant was charged only with abduction when the disputed police interrogation occurred.[636]

The Chief Justice also distinguished *Maine v. Moulton*[637] on the same ground.[638] In that case, Moulton and Colson were charged with three offenses involving auto theft and the theft of auto parts. Both men retained counsel. Colson, however, agreed to cooperate with police. He admitted that he and Moulton had broken into a Ford dealership to steal the auto parts that were the subject of the third theft charge.[639] Colson also indicated that Moulton

630. 430 U.S. 387, 430 (1977).
631. *Id.* at 392-93.
632. *Id.* at 394.
633. *Id.* at 405-06.
634. Texas v. Cobb, 121 S. Ct. 1335, 1341 (2001).
635. *Id.*
636. The Chief Justice, then an Associate Justice, had joined in the dissent in *Brewer*. Yet none of the Justices had suggested that because abduction was the only pending charge at the time of the interrogation, that interrogation concerning the separate crime of murder meant that Williams was without a Sixth Amendment right to counsel when he confessed to the murder by leading police to the grave site. That this argument was not made at that time is noteworthy because the Court was apparently so concerned about public reaction to its decision in *Brewer* (which appeared to result in freeing an obviously guilty child murderer) that it suggested in dicta that the discovery of the body might still be admitted since a search was already underway and searchers would have inevitably found the shallow grave without using the tainted confession. Williams was retried using this theory and the Supreme Court subsequently upheld the conviction establishing what has come to be referred to as the inevitable discovery doctrine. Nix v. Williams, 467 U.S. 431 (1984).
637. 474 U.S. 159 (1985).
638. *Cobb*, 121 S. Ct. at 1341.
639. *Moulton*, 474 U.S. at 163.

had discussed the idea of killing one of the witnesses to be called by the state. Colson agreed to help obtain and secretly record admissions from Moulton regarding the pending charges and any plan to kill the state's witness. At a meeting between the two, which was initiated by Moulton, Colson prodded his former partner in crime into making admissions regarding the pending theft offenses. During this meeting, Moulton also incriminated himself with respect to the burglary of the Ford dealership from which the stolen auto parts had been taken. In a superseding indictment, Moulton was charged and convicted of both the originally charged theft offenses and the closely related burglary of the Ford dealership.[640]

On appeal, the Supreme Court reversed Moulton's conviction for both the theft offenses *and* the burglary, holding that the Sixth Amendment is violated "when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."[641] Justice Brennan, author of the Court's opinion, in a broad statement of principal, explained further:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. . . . The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation.[642]

Moulton would therefore appear to recognize that the Sixth Amendment attached to the burglary charge because it was closely related to and indeed inextricably intertwined with counsel's representation of the defendant on the originally charged theft offense involving the stolen auto parts.

In *Cobb*, however, Chief Justice Rehnquist distinguished *Moulton* on the ground that the issue of separate offenses was not before the Court.[643] The Chief Justice argued, moreover, that the following language from Justice Brennan's opinion in *Moulton*, indicates that Justice Brennan agreed that Sixth Amendment's protection did not apply to uncharged offenses:

> On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.[644]

But it is clear from this passage that other offenses were at issue. Indeed, it is with respect to these *future* offenses that the above quoted language refers. In *Moulton*, the state argued that because police were investi-

640. *Id.* at 167.
641. *Id.* at 176.
642. *Id.*
643. *Cobb,* 121 S. Ct. at 1342.
644. *Id.* at 1342 (quoting Maine v. Moulton, 474 U.S. 159, 180 (1985)).

gating the possible threat to the safety of a witness, there should be an exception created to the *Massiah* rule protecting defendants from interrogation by secret informants. In responding to this argument, Justice Brennan took pains to note, as had the Court in *Massiah*, that "it was entirely proper to continue to investigate the suspected criminal activities of the defendant."[645] However, Justice Brennan continued, again quoting *Massiah*,

> "All that we hold is that the defendant's own incriminating statements . . . [cannot] constitutionally be used by the prosecution as evidence against him at his trial." . . . To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigation and risks the evisceration of the Sixth Amendment right recognized in *Massiah*.[646]

It is thus clear, as the use of the word "surveillance" suggests, that Justice Brennan was referring to the possibility of future charges arising out of the alleged plan to kill a state's witness. This reference to admissions obtained by secret interrogation to discover plans for a *future* crime is a far cry from interrogation to obtain incriminating admissions about a past offense. In *Moulton*, Justice Brennan was explicitly attempting to reconcile the conflict between the law enforcement's need to be able to investigate future criminal activities of those already charged, and the need to protect an accused who had invoked his right to counsel from being unfairly dealt with. Deception with respect to future crimes was permissible.[647] Deception with respect to interrogation concerning past offenses, which related to the current representation guaranteed by the Sixth Amendment, was not. Yet the majority in *Cobb* ignore this important aspect of *Moulton* and take its language out of context.

Having dismissed these prior precedents, and the "common sense" interpretation of "virtually every lower court in the United States to consider the issue,"[648] the Chief Justice was thus able to reject the Texas appellate court's "closely related" test and coin his own rule. He announced that the Sixth Amendment right to counsel would extend to uncharged offenses only if they constitute the "same offense."[649] Using the test established in *Blockburger v. United States*,[650] a 1932 double jeopardy case, the Chief Justice then defined "same offense" as follows:

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645. *Moulton*, 474 U.S. at 179 (quoting *Massiah*, 377 U.S. at 207).

646. *Id.* at 179, 180.

647. *See* Hoffa v. United States, 385 U.S. 293, 308 (1966) (holding that post-indictment statements made to a government informer were admissible because they related to "a quite separate offense" of jury tampering).

648. *Cobb*, 121 S. Ct. at 1350-51 (Breyer, J., dissenting).

649. *Id.* at 1343.

650. 284 U.S. 299 (1932).

> "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is *whether each provision requires proof of a fact which the other does not.*"[651]

An examination of *Blockburger* will be helpful to appreciate how restrictive the decision in *Cobb* will prove to be. Blockburger was convicted of three counts. The gist of each count was his sale and delivery of contraband narcotics to the same person, on two consecutive days. The first count alleged that defendant sold narcotics upon which the tax stamp had not been displayed on the first day. The second count alleged the sale of narcotics to the same person on the second day. The third count alleged that the sale on the second day was made without a prescription. The second transaction had been arranged by the purchaser with the defendant at the time of the sale on the first day.[652]

Blockburger, convicted on all three counts, was sentenced to five years in prison on each of the three counts, with each sentence to run consecutively.[653] He argued that only one crime had occurred because it was one continuous transaction.[654] The one act, one crime argument is in fact compelling as to the second and third counts, because the same narcotics, the same date and the same act of delivery were involved. But the *Blockburger* Court rejected the continuous transaction argument, holding that each of the three counts required proof of a fact that was not a necessary element in the other two counts.[655] The first two counts required proof of a delivery of narcotics, but on two separate days. Because the date of delivery for each count was a necessary fact, both counts therefore required proof of a fact that the other did not. Although the second and third counts related to the same delivery, an essential element of the second count was the fact that the narcotics came from a package without a tax stamp. But that fact was not a necessary element for the third count. The fact that the purchaser did not present the seller with a proper prescription was a necessary fact to the third count, but this fact was irrelevant to the first two counts. Therefore each of the three counts properly alleged three different crimes.

Applying this test to the facts in *Cobb*, the Chief Justice observed that the lawyer represented Cobb only on the burglary charge.[656] Murder, the subject crime of the Odessa police questioning of Cobb, and burglary, the only charged crime at the time of the Odessa interrogation, each have different elements. Therefore, although the murder arose in the course of, and for the

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651. *Cobb*, 121 S. Ct. at 1343 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)) (emphasis added).

652. *Blockburger*, 284 U.S. at 300-01.

653. *Id.* at 301

654. *Id.*

655. *Id.* at 302.

656. *See Cobb*, 121 S. Ct. at 1344.

purpose of, completing the burglary, Cobb had no Sixth Amendment right to counsel regarding his interrogation on the uncharged murders.[657]

Justice Kennedy, while joining the Chief Justice's opinion also wrote a concurring opinion joined by Justices Scalia and Thomas.[658] These three justices would abolish the Sixth Amendment shield against police-initiated interrogation, which *Michigan v. Jackson*[659] held was automatically perfected once counsel has been appointed at arraignment. In their view, if the police comply with *Miranda v. Arizona,*[660] the confession should be admissible as evidence without regard to the stage of proceeding, unless a defendant has clearly and unambiguously asserted that he does not want to speak except through the medium of counsel.[661]

Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, dissented.[662] Justice Breyer observed that it has been extraordinarily difficult for lawyers and judges to apply the very technical *Blockburger* formula in double jeopardy cases and predicted it will be even more difficult to use this test to define Sixth Amendment rights.[663] Indeed, it is almost ludicrous to imagine the police considering the *Blockburger* test before interrogating a suspect at the police station.

Justice Breyer also defended *Michigan v. Jackson* against the attack launched by Justice Kennedy, noting that "the police may not force a suspect who has asked for legal counsel to make a critical legal choice without the legal assistance that he has requested and that the Constitution guarantees."[664]

However, by allowing the police to initiate interrogation of a defendant who has invoked his Sixth Amendment right to counsel, on the basis that a different charge in involved, *Cobb* has moved the Court a significant step toward Justice Kennedy's position.

Cobb also drives a wedge between the Sixth and Fifth Amendments by creating another distinction between the Sixth Amendment right and the right to counsel under *Miranda*. In *Arizona v. Roberson*,[665] the Court refused to follow the path taken in *Cobb*, holding, in the Fifth Amendment context, that once an accused in custody had requested counsel, he could not be ap-

657. *Id.*

658. *See id.*

659. 475 U.S. 625 (1986).

660. 384 U.S. 436 (1966).

661. *Cobb*, 121 S. Ct. at 1344-45 (2001) (Kennedy, J., concurring). It would seem, however, that such formalism could easily be defeated by a similar formality. At arraignment the defendant could simply make the clear and unambiguous assertion that Justice Kennedy requires by stating on the record that he or she wishes to communicate only through the medium of counsel and does not wish to submit to any questioning in counsel's absence

662. *Id.* at 1345.

663. *Id.* at 1350 (Breyer, J., dissenting).

664. *Id.* at 1347 (Breyer, J., dissenting).

665. 486 U.S. 675 (1988).

proached by police to initiate custodial interrogation on any other offense, whether related or not.[666]

In *Roberson*, police had arrested a burglary suspect. When he was questioned about the burglary at the station house, he requested a lawyer and questioning was discontinued.[667] Three days later an officer not involved in the arrest or initial questioning, came to the station house and interrogated Roberson about a different, unrelated burglary. Roberson was fully advised of his *Miranda* rights, but this time did not request a lawyer and waived his right to silence.[668] He answered questions and made incriminating admissions. However, these admissions were suppressed by the state trial court at Roberson's trial on the second burglary charge.[669] The Supreme Court agreed with the state court that once Roberson requested a lawyer with respect to interrogation about the offense for which he was arrested, the failure to provide counsel barred the questioning of Roberson about any other offenses, even if they were unrelated.[670] The Court's reasoning was that once a suspect invokes his right to counsel after being read the *Miranda* warnings, any "resumption of questioning . . . without the requested attorney being provided, strongly suggests to the accused that he has no choice but to answer."[671] The Court distinguished *Michigan v. Mosely*[672] noting that a request for counsel by a suspect raises the presumption "that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance" and this pressure does not dissipate simply because the police seek at a later time to interrogate him about a different offense.[673]

A request for counsel at custodial interrogation, made in response to a *Miranda* warning, even before a suspect is formally charged with an offense, therefore triggers a bright-line rule barring any further police-initiated interrogation of the suspect on any charge, whether it be the offense with respect to which interrogation was initially sought or a totally unrelated offense that police may wish to question him about in the future. In *Cobb*, by contrast, the Court does not treat a request for counsel at arraignment as having the same effect as a request for counsel made during a *Miranda* advisement.

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666. *Roberson*, 486 U.S. at 677-78.

667. *Id.* at 678.

668. *Id.*

669. *Id.*

670. *Id.* at 678-79.

671. *Id.* at 678 n.2 (quoting the state trial court's explanation given for his ruling to suppress the statements).

672. 423 U.S. 96 (1975) *Mosley* holds that where a suspect only expresses a desire not to be questioned, but does not request counsel, the police can, after a reasonable period of time, approach the suspect again and seek to question him. So long as a proper *Miranda* waiver is obtained and there is no evidence of repeated badgering, incriminating statements made during this subsequent encounter will be admissible. *Id.* at 106-07. The invocation of one's right to silence is thus given significantly less protection than the invocation of one's right to have the assistance of counsel. *See* Edwards v. Arizona, 451 U.S. 477, 485 (1981).

673. *Roberson*, 486 U.S. at 683.

Thus, even though the suspect has now been formally charged and has the forces of organized society arrayed against him, he is only protected from renewed attempts by police to interrogate him, if the subject matter of the interrogation relates to the "same offense" as the formally charged offense (as defined by the *Blockburger* test). This is because a request for Sixth Amendment counsel at arraignment, while viewed as a general all-purpose request for legal assistance,[674] is treated as a request for counsel's assistance at interrogations only with respect to offenses formally charged. Such formalism defies common sense. Certainly a defendant does not know and does not calculate whether he is invoking his right to counsel under the Sixth Amendment or the Fifth Amendment.[675] *Cobb* also substitutes for the bright line rule in *Roberson* a muddy test that, despite its obvious purpose to encourage police to interrogate formally charged defendants, will nevertheless be a trap for the unwary officer who has not mastered complexities of a double jeopardy test that has proven difficult for judges and lawyers. Most importantly, however, *Cobb* undercuts the fundamental premise underlying *Michigan v. Jackson* that a request for Sixth Amendment counsel constitutes a request for counsel's assistance in all dealings with the state, because the state is now an adversary that has determined to prosecute him.

Cobb and Justice Kennedy's concurring opinion cast an ominous cloud over the future of the right to counsel at interrogation. The Court's lack of respect for the right to counsel was also seen during the term in its denial of certiorari in *Bridgers v. Texas*.[676] In that case the *Miranda* warning, which was read from a printed card, failed to advise a suspect that he had the right to have an attorney present with him during any interrogation.[677] The warning only suggested that an attorney could be consulted "prior to any questioning."[678] In a "statement" (not a dissent) respecting the denial of certiorari, Justice Breyer, joined by Justices Stevens and Souter, wrote explicitly to reiterate that the denial of certiorari "expresses no view about the merits of petitioner's claim" and noted that the warning omitted "an essential *Miranda* element."[679] Justice Breyer's statement concluded that if this problem "proves to be a recurring one, I believe that it may well warrant this Court's attention."[680]

674. *See* Michigan v. Jackson, 475 U.S. 625, 629 (1986).

675. Indeed it is ironic that the *Roberson* rule is grounded in a "right" to counsel that is not found in the text of any Amendment, but is granted judicially by the *Miranda* decision.

676. 121 S. Ct. 1995 (2001).

677. *Id.* at 1996.

678. *Id.* at 1995-96.

679. *Id.* at 1996.

680. *Id.*

B. Glover v. United States[681]

Upholding the right to effective counsel at trial and sentencing, a unanimous Court held that any increase in jail time attributable to ineffectiveness of counsel would constitute prejudice under *Strickland v. Washington*,[682] and *Williams v. Taylor*.[683]

In *Glover*, the defendant, who was Vice President and General Counsel of the Chicago Truck Drivers, Helpers, and Warehouse Workers Union, was charged with taking kickbacks on investments made with the Union's money.[684] He was convicted of money laundering, labor racketeering, and tax evasion. Viewing these offenses as involving the same harm, the probation pre-sentence report recommended that all convictions be grouped together for the purpose of determining the sentencing range under the United States Sentencing Guidelines.[685] This would have produced a sentence range of 63 to 78 months.[686] However, the government argued that the crime of money laundering should be separated out from the other crimes, yielding a higher range of 78 to 97 months in prison.[687] The defendant received a sentence of 84 months.[688]

At trial, Glover's lawyers did not aggressively contest the government's position on this "grouping" issue, nor did they raise the issue on appeal to the Seventh Circuit Court of Appeals, despite the fact that prior to the decision in Glover's case, a different panel of that circuit held that under certain circumstances it was appropriate to group money laundering with other similar offenses for the purpose of determining the sentencing range.[689]

After Glover's convictions were affirmed on direct appeal involving other grounds, Glover filed a *pro se* petition under 28 U.S.C. § 2255 challenging his sentence. He argued that his lawyer's failure to vigorously argue that all offenses should have been grouped together constituted ineffective assistance of counsel under the *Strickland* test.[690]

The District Court denied his petition on the theory that even if the alleged failure was error, the difference such an error would have made in Glover's sentence (a 6-21 month differential) would not constitute prejudice within the meaning of *Strickland*. The Seventh Circuit affirmed relying on

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681. 531 U.S. 198 (2001).

682. 466 U.S. 668 (1984). *Strickland* created a two prong test, requiring a defendant claiming ineffectiveness of counsel to demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that the defendant was prejudiced by counsel's deficient performance. *Id.* at 669.

683. 529 U.S. 362 (2000).

684. *Glover*, 531 U.S. at 200.

685. *Id.*

686. *See id.* at 202.

687. *Id.* at 200, 201.

688. *Id.* at 201.

689. *Id. See also* United States v. Wilson, 98 F.3d 281 (1996).

690. *Glover*, 531 U.S. at 201-02.

acting as an agent of the state.[697] The Texas court also found that Penry's jury instructions regarding mitigation were in compliance with *Penry I*.[698]

Because Penry filed his federal habeas petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the provisions of that law governed the Court's review. Under the restrictions imposed on federal habeas review by AEDPA, the Supreme Court did not reach the actual merits of Penry's Fifth Amendment claim because it could not be said that the Texas court's ruling on that issue was "objectively unreasonable."[699] However, six justices found that the State court's determination that the trial court followed the mandate set out in *Penry I* was objectively unreasonable.[700]

Justice O'Connor, who authored the Court's opinion, explained that the AEDPA prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court, unless that adjudication "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."[701]

Justice O'Connor observed that the "contrary to" and "unreasonable application" clauses of AEDPA have independent meaning under *Williams v. Taylor*[702] and a state court decision will be contrary to clearly established Supreme Court precedent if the state court either "applies a rule that contradicts the governing law set forth in our cases,"[703] or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."[704] A state court decision will be an "unreasonable application of" clearly established precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case."[705]

In arguing that the admission of the conclusions from his previous psychiatric evaluation violated the Fifth Amendment, Penry had relied upon *Estelle v. Smith*.[706] In *Estelle*, the Court held that the Fifth Amendment prohibited use of statements made at an uncounseled psychiatric interview. Unlike *Penry*, however, the defendant in *Estelle* had not placed his mental condition at issue.[707] Moreover, in *Estelle*, it was the trial court that had called for the competency evaluation and the State had chosen the examining

697. *Id.* at 1917. The report concluded that Penry would be dangerous to others if released. *Id.*

698. *Id.*

699. *Id.* at 1919.

700. *Id.* at 1924.

701. 28 U.S.C. § 2254(d)(1).

702. 529 U.S. 362 (2000).

703. *Id.* at 406.

704. *Id.*

705. *Id.* at 407-08.

706. 451 U.S. 454 (1981).

707. *Id.*

Lockhart v. Fretwell.[691] Assuming without deciding that counsel was ineffective, it was the Seventh Circuit's view that *Lockhart* precluded relief since the increase in sentence was not so significant that the outcome was fundamentally unfair. Justice Kennedy, writing for the entire Court, reiterated that *Williams v. Taylor*[692] had established that *Lockhart* did not change the *Strickland* analysis. Justice Kennedy thus rejected the Seventh Circuit's attempt to add an additional "significance" requirement, holding that "any amount of actual jail time has Sixth Amendment significance."[693] The Court then remanded the case for a determination of whether there was in fact error in failing to group the offenses and if so whether Glover's counsel had been ineffective.

V. CAPITAL PUNISHMENT

A. Penry v. Johnson[694]

In 1989 the United States Supreme Court held that Johnny Paul Penry's sentence to death for the brutal rape and murder of Pamela Carpenter was in violation of the Eighth Amendment, because his jury had not been adequately instructed with respect to mitigating evidence regarding his mental retardation.[695] Penry was retried in 1990, and again a Texas jury found him guilty of capital murder and sentenced him to death.

In this case, the Court considered two issues: (1) whether the jury instructions at Penry's resentencing complied with the Court's original mandate, and (2) whether the admission into evidence, during cross-examination of a defense expert witness, of conclusions from a psychiatric report based on an uncounseled interview with Penry, which occurred two years before the murder of Carpenter, violated the Fifth Amendment.

The Texas Court of Criminal Appeals held that no Fifth Amendment violation had occurred because the interview had been conducted by a psychiatric specialist requested by Penry's defense counsel to determine Penry's competency to stand trial in an unrelated case.[696] Therefore, the use of conclusions from his psychiatric evaluation, even though based upon unwarned and uncounseled statements made by Penry, were not elicited by someone

691. 506 U.S. 364 (1993).

692. 529 U.S. 362 (2000). For a discussion of *Taylor* see Benner et al., *Criminal Justice in the Supreme Court: A Review of United States Supreme Court Criminal and Habeas Corpus Decisions (October 4, 1999-October 1,2000)*, 37 CAL. W. L. REV. 239, 285-95 (2001).

693. *Glover*, 531 U.S. at 203.

694. 121 S. Ct. 1910 (2001)

695. Penry v. Lynaugh, 492 U.S. 302 (1989) [hereinafter *Penry I*].

696. Penry v. Johnson, 121 S. Ct. 1910, 1916 (2001).

psychiatrist.[708] Here Penry's counsel in the unrelated 1977 case requested the psychiatric exam. In *Estelle*, the State had called the psychiatrist to testify as a part of its affirmative case,[709] but it was during the cross-examination of Penry's own psychological witness that the prosecutor elicited the quotation from the report. Also, in *Estelle*, the defendant was charged with a capital crime at the time of his competency exam, and it was thus clear that his future dangerousness would be a specific issue at sentencing; but Penry had not yet committed murder at the time he was interviewed regarding his competency to stand trial on the unrelated case. Finding it unnecessary to actually determine Penry's Fifth Amendment claim, the Court concluded, in light of these differences between Penry's situation and Estelle's, it was not objectively unreasonable for the Texas court to rule that *Estelle* did not require exclusion of the conclusions from the defense originated report on cross examination by the state.

The instructions to the jury, however, were a different matter. The Texas death penalty statute requires that at the close of the penalty hearing, the jury be instructed to answer three statutorily mandated "special issues":

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[710]

The first time the case was tried (in 1980) the jury answered "yes" to each issue and, as required by statute, the trial court sentenced Penry to death.[711] Although Penry had offered extensive evidence that he was mentally retarded and had been severely abused as a child, the jury was never instructed that it could give mitigating effect to that evidence in imposing sentence.[712] For that reason, the Supreme Court had reversed and remanded Penry's case for retrial, mandating that the jury receive instructions that would permit it to "consider and give effect to" the mitigation evidence presented by Penry.[713]

Justice O'Connor, in *Penry II*, holds that the instructions given in Penry's retrial did not accomplish this constitutionally mandated goal. Although the trial court did instruct the jury about mitigation, and told them

708. *Id.* at 456-57.
709. *Id.* at 459.
710. TEX. CODE CRIM. PROC. ANN., art. 37.071(b) (Vernon 1981 and Supp.1989)).
711. Penry v. Lynaugh, 492 U.S. 302, 310-11 (1989).
712. *Id.* at 320.
713. *Id.* at 319.

they could consider it and give it the weight they felt it deserved, it still instructed the jury that it must answer the three questions, and that three "yes" answers would mandate a death sentence.[714] Although the defense told the jury that if they wished, they could simply answer "no" to one of the questions if they felt the mitigation was such that death was not appropriate. The Court held that this did not cure the defect identified in *Penry I*. Characterizing the supplemental instruction as confusing, the Court acknowledged that it informed the jurors they could take Penry's mitigating evidence regarding his retardation into account in answering the three special issue questions. However, the instructions were still found wanting because the three special questions themselves did not provide an opportunity for the jury to consider Penry's mitigating evidence. As Justice O'Connor explained:

> [T]he supplemental instruction placed the jury in no better position than was the jury in *Penry I*. As we made clear in *Penry I*, none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and childhood abuse. . . . Thus, because the supplemental instruction had no practical effect, the jury instructions at Penry's second sentencing were not meaning-

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714. The court instructed the jury:

> [B]efore any issue may be answered 'Yes,' all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be 'Yes.' . . . [I]f any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered 'Yes,' then such juror should vote 'No' to that Special Issue. . . . [I]f you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

The trial court also gave a "supplemental instruction" on mitigation:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

Penry v. Johnson, 121 S. Ct. 1910, 1916-17 (2001) (citing App. 672-75).

> fully different from the ones we found constitutionally inadequate in *Penry I*.[715]

Justice O'Connor also rejected the State's alternative argument that the supplemental instruction acted as a "nullification instruction" permitting the jury to disregard the three special issue questions, if it believed death was not appropriate because of Penry's retardation. This argument, however, ran counter to the presumption that jurors follow their instructions. Under this view of the instructions, Justice O'Connor said, the jurors would be forced to violate their oath to answer the three special questions truthfully. Thus the jury instructions, taken as a whole, were "internally contradictory and placed law-abiding jurors in an impossible situation."[716]

Justice O'Connor concluded that the Texas Court of Criminal Appeal's determination that the jury instructions given at Penry's second trial met the mandate of *Penry I* was therefore "objectively unreasonable."[717]

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia dissented, arguing that the Texas trial court had given the jury sufficient opportunity to consider Penry's mitigating evidence.[718]

B. Shafer v. South Carolina[719]

In this case, the Court tells the state of South Carolina, rather emphatically, that it *meant* what it said in *Simmons v. South Carolina.*[720] *Simmons* held that where a capital defendant's future dangerousness is placed in issue, and the only sentencing alternative other than death is life imprisonment without possibility of parole, due process requires that the jury be informed of the defendant's parole ineligibility.[721]

After *Simmons,* South Carolina modified its capital statute so that the jury was charged with making two decisions. First the jury decided if eligibility for the death penalty had been proven beyond a reasonable doubt by considering evidence regarding the aggravating factors which made the defendant death-eligible. If death-eligibility were found, then the jury would make the decision only between life without parole and death.[722] If the jury found that defendant was not death-eligible, sentencing would then go to the judge, who could sentence the defendant either to a term of thirty years to life, or to life without parole.

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715. *Id.* at 1921.
716. *Id.*
717. *Id.* at 1924.
718. *Id.*
719. 121 S. Ct. 1263 (2001).
720. Simmons v. South Carolina, 512 U.S. 154 (1994).
721. Ramdass v. Angelone, 530 U.S. 156, 165 (2000).
722. Sections 16-3-20(A), (B), (C).

In April of 1997, Wesley Aaron Shafer, Jr., shot and killed a convenience store cashier during an attempted robbery. Before trial, the prosecutor notified the defense they would seek the death penalty, and that the State would present evidence of Shafer's "prior bad acts," as well as his "propensity for [future] violence and unlawful conduct."[723]

Near the end of Shafer's sentencing hearing, the trial judge conducted an in camera hearing on jury instructions. Shafer's counsel maintained that due process, and the holding in *Simmons v. South Carolina,*[724] required the judge to instruct that under South Carolina law a life sentence carries no possibility of parole. The prosecutor opposed the request stating that "'the State has not argued at any point . . . that he would be a danger to anybody in the future, nor will we argue [that] in our closing argument. . . .'"[725] Defense counsel replied that the state had introduced evidence, which tended to show future dangerousness and the instruction was therefore required.[726] The judge denied the requested *Simmons* instruction.

Shafer's counsel then sought permission to read in his closing argument lines from the controlling statute, Section 16-3-20(A), which stated plainly that a life sentence in South Carolina carries no possibility of parole. That motion was also denied.[727]

During the jury's deliberations (after a finding of eligibility), the jury sent out a note asking about the possibility of parole.[728] Shafer's lawyer *again* asked that the relevant statute be read, but the judge refused, instead responding to the jury's inquiry by telling them not to concern themselves with parole. The jury sentenced Shafer to death within eighty minutes after receiving the judge's response.[729]

After noting that South Carolina has consistently refused to inform the jury of a capital defendant's parole eligibility status, Justice Ginsburg rejected the South Carolina Supreme Court's view that *Simmons* was inapplicable under the new sentencing scheme, because at the *start* of jury deliberations the defendant was technically eligible for parole if the jury found he

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723. *Shafer*, 121 S. Ct. at 1267.

724. 512 U.S. 154 (1994).

725. *Shafer*, 121 S. Ct. at 1267-68 (quoting App. at 161) (alteration appearing in text of the opinion).

726. The defense attorney argued,

> The State cannot introduce evidence of future dangerousness, and then say we are not going to argue it and [thereby avoid] a charge on the law. . . . They have introduced [evidence of a] post arrest assault, [and] post arrest violations of the rules of the jail. . . . If you put a jailer on to say that [Shafer] is charged with assault . . on [the jailer], that is future dangerousness.

Id. (citation to record omitted).

727. *Id.*

728. "'1) Is there any remote chance for someone convicted of murder to become elig[i]ble for parole? 2) Under what conditions would someone convicted for murder be elig[i]ble.'" *Id.* at 1269 (citation to record omitted).

729. *Id.* at 1270.

was not death-eligible and he could be given a thirty years to life sentence.[730] Dismissing this argument, Justice Ginsburg observed that once the jury has determined a defendant *is* death eligible, *Simmons* does come into play. She pointed out that at this stage:

> South Carolina law provides no third choice, no 30-year mandatory minimum, just death or life without parole. . . . We therefore hold that whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that a life sentence carries no possibility of parole.[731]

The Court also rejected South Carolina's claim that the jury was sufficiently apprised of defendant's parole ineligibility by defense counsel closing argument, which urged that defendant would "die in prison" if given a life sentence.[732] The Court was similarly unpersuaded by the State's argument that no parole ineligibility instruction was required under *Simmons* because the State never argued Shafer would pose a future danger to society.[733]

Although Justice Scalia and Thomas dissented, they both acknowledged that *Shafter* is a "logical extension of *Simmons*."[734]

VI. PROSECUTORIAL IMMUNITY

A. Michaels v. McGrath[735]

In a surprising opinion, Justice Thomas dissents from the denial of certiorari in this case.[736] Margaret Michaels, who worked as a teacher's aid in a nursery school was tried and convicted of the sexual abuse of her charges. She served five years in prison before a New Jersey appellate court reversed citing egregious behavior by the police and prosecution.[737] The appellate court noted that even the respondents apparently realized that their interrogation techniques "'caused certain children to use their imagination and stray from reality.'"[738] The New Jersey Supreme Court affirmed the reversal, holding "'the interviews of the children were highly improper and employed coercive and unduly suggestive methods,'"[739] and that "'[t]he interrogations undertaken in the course of this case utilized most, if not all, of the practices

730. *Id.* at 1270-71.
731. *Id.* at 1273.
732. *Id.*
733. *See id.* at 1274.
734. *Id.* at 1275 (citations omitted).
735. 222 F.3d 118 (3d Cir. 2000), *cert denied*, 531 U.S. 1118 (2001).
736. Michaels v. McGrath, 531 U.S. 1118 (2001).
737. *Id.* (citing State v. Michaels, 625 A.2d 489, 510-19 (N.J. Super. Ct. App. Div. 1993)).
738. *Id.* (citing State v. Michaels, 625 A.2d 489, 511 (N.J. Super. Ct. App. Div. 1993)).
739. *Id.* (citing State v. Michaels, 642 A.2d 1372, 1380 (N.J. 1994)).

that are disfavored or condemned by experts, law enforcement authorities and government agencies.'"[740]

Michaels then sued for a violation of her civil rights under Rev. Stat. Section 1979, 42 U.S.C. § 1983, but the District Court granted summary judgment,[741] and the Court of Appeals for the Third Circuit affirmed,[742] holding

> [r]ecovery was barred because the coercion of child witnesses was a violation only of the *witnesses*' rights, and not of any right held by petitioner. And although petitioner's due process rights were violated when the testimony was used at trial, the court held that the presentation of testimony fell squarely within the doctrine of absolute prosecutorial immunity."[743]

Justice Thomas noted that the Seventh Circuit[744] agreed with the Third, but the Second and Tenth Circuits did not.[745] Justice Thomas would grant certiorari.

In *Zahrey v. Coffey*,[746] the Second Circuit took the position that a plaintiff does state a claim under Section 1983 when he shows that prosecutorial misconduct in gathering evidence has led to a deprivation of his liberty. The intervention of a subsequent immunized act by the same officer does not break the chain of causation necessary for liability. Justice Thomas stated: "I believe that the Second Circuit's approach is very likely correct, and that the decision below leaves victims of egregious prosecutorial misconduct without a remedy."[747] In light of Justice Thomas' general antipathy to criminal defendants, this dissent from a denial of certiorari is therefore of particular interest.

VII. DUE PROCESS

A. Rogers v. Tennessee[748]

Rogers was convicted of second-degree murder for the stabbing death of James Bowdre. Bowdre, stabbed with a butcher knife, did not die right away, but lapsed into a coma after surgery. After fifteen months he developed a kidney infection and died from "cerebral hypoxia, secondary to a stab wound to the heart."[749] Rogers appealed his conviction, arguing that under Tennes-

740. *Id.* (citing State v. Michaels, 642 A.2d 1372, 1379 (N.J. 1994)).
741. Michaels v. New Jersey, 50 F. Supp. 2d 353, 356 (D.N.J.1999).
742. Michaels v. New Jersey, 222 F.3d 118, 123 (3d Cir. 2000).
743. Michaels v. McGrath, 531 U.S. 1118 (2001) (citation omitted).
744. *See* Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994).
745. *See* Clanton v. Cooper, 129 F.3d 1147 (10th Cir. 1997) *and* Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000).
746. 221 F.3d 342 (2d Cir. 2000).
747. Michaels v. McGrath, 531 U.S. 1118 (2001).
748. 121 S. Ct. 1693 (2001).
749. State v. Rogers, 992 S.W. 2d 393, 395 (Tenn. 1999).

see common law, if the victim does not die within a year and a day the defendant cannot be convicted of murder.[750] The Tennessee Supreme Court, however, abolished the "year and a day" rule and affirmed Roger's conviction.[751]

Although the Tennessee Court observed that the rule was part of Tennessee law,[752] it noted that the rule had recently been abolished in the vast majority of jurisdictions that had considered it.[753] It then found that the original reasons for recognizing the rule no longer existed, and abolished the rule.[754] The defendant argued that abolishing the rule in his case would violate due process and the Ex Post Facto Clauses of both the state and federal constitutions. The Tennessee Supreme Court, however, rejected the due process argument and held that the Ex Post Facto Clause applied only to legislative acts and did not apply to the Judiciary.[755]

In an opinion by Justice O'Connor, the Supreme Court affirmed the Tennessee Supreme Court in a five-to-four decision.[756] Justice O'Connor was joined by Chief Justice Rehnquist, and Justices Kennedy, Ginsburg, and Souter. Justice Stevens wrote the dissenting opinion, joined by Justices Scalia, Thomas, and in part by Justice Breyer.

It is interesting to note that the lineup is very similar to the lineup last term in *Carmell v. Texas*,[757] which also dealt with the issue of the Ex Post Facto Clause of the federal constitution. In *Carmell* the defendant was accused of sexually abusing his teenage stepdaughter in 1991.[758] At the time he committed these offenses, Texas law allowed the uncorroborated testimony of anyone under fourteen to be sufficient for conviction, but if the victim was over fourteen years of age, the victim's testimony would require other corroboration for conviction. However, in 1993 the Texas legislature amended the legislation to allow the uncorroborated testimony of any victim under eighteen to be sufficient for conviction.[759] Under that act, Carmell was convicted on the testimony of the victim only, and sentenced to life impris-

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750. *See, e.g.*, 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 197198 (1769).

751. State v. Rogers, 992 S.W. 2d 393 (Tenn. 1999).

752. *See, e.g.*, Percer v. State, 118 Tenn. 765 (1907).

753. State v. Rogers, 992 S.W. 2d at 397.

754. *Id.* at 399-401. The rule is generally believed to date back to the 13th century when medical science was not capable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury and the death. Advances in modern medical science have rendered the reason for the rule obsolete. *See* Donald E. Walther, Comment, *Taming a Phoenix: The Year-and-a-Day Rule in Federal Prosecutions for Murder*, 59 U. CHI. L. REV. 1337 (1992) (tracing the history of the rule).

755. State v. Rogers, 992 S.W.2d. at 402.

756. 529 U.S. 1129 (2000).

757. Carmell v. Texas, 529 U.S. 513 (2000).

758. *Id.* at 516.

759. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07.

onment and thirteen concurrent sentences of twenty years each. He appealed, and the United States Supreme Court reversed.[760]

Using both historical arguments and the four pronged test set forth in *Calder v. Bull*,[761] Justice Stevens found that the action of the Texas legislature violated the Ex Post Facto clause of the United States Constitution, because Carmell was convicted on less evidence than was required at the time he allegedly committed the offense.[762]

However, *Rogers* involved a change in a common law rule promulgated by the judiciary. Justice O'Connor observed that the literal text of the Ex Post Facto Clause, which reads "no state shall pass any ex post facto law,"[763] makes clear that the Clause is "'a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government.'"[764]

However, that is not the end of the analysis, because as the Court recognized in *Bouie v. City of Columbia*,[765] there are "limitations on *ex post facto* judicial decisionmaking . . . inherent" in the Due Process Clause of the Fourteenth Amendment.[766] *Bouie* involved the judicial enlargement of South Carolina's criminal trespass statute, which required notice from the owner or tenant prohibiting entry in order to apply.[767] The South Carolina Supreme Court construed the state's criminal trespass statute to apply to patrons who had entered a store with permission, but refused to leave when asked.[768] The United States Supreme Court reversed, holding that the South Carolina Court's decision constituted a retroactive construction of the statute and thus violated due process.

In *Rogers*, Justice O'Connor points out that it is a basic principle of due process that a criminal statute must give fair warning of the conduct it makes a crime.[769] Therefore, for Justice O'Connor and the majority, *Bouie* stood for the proposition that "if a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed

760. *Carmell*, 529 U.S. at 552-53.

761. 3 Dall. 386, 390 (1798), The four categories were (1) every law that makes an act done before the passing of the law, and which was not criminal when done, criminal; (2) every law that makes a crime greater, i.e., aggravated, than it was when committed; (3) every law that provides a greater punishment for a crime that when it was committed; and (4) 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 offense in order to convict the offender.

762. *See Carmell*, 529 U.S. at 530.

763. U.S. CONST. art. I, § 10, cl. 1.

764. Rogers v. Tennessee, 121 S. Ct. 1693, 1697 (2001) (quoting Marks v. United States, 430 U.S. 188, 191 (1977)).

765. Bouie v. City of Columbia, 378 U.S. 347 (1964).

766. *Rogers*, 121 S. Ct. at 1697.

767. *Bouie*, 378 U.S. at 349 n.1.

768. *Id.* at 357.

769. *Id.* at 350.

prior to the conduct in issue, then that construction must not be given retroactive effect."[770]

However, Rogers read *Bouie,* to hold that if a state legislature is barred by the Ex Post Facto Clause from retroactively applying a law, "'it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.'"[771] Justice O'Connor rejected the idea that *Bouie* held the Due Process Clause "incorporates the specific prohibitions of the Ex Post Facto Clause as identified in *Calder.*" [772] She declared that language in *Bouie* to this effect was mere dicta, because *Bouie* was decided on "core due process concepts of notice, forseeability, and in particular the right to fair warning."[773]

Noting the differences between the work of the legislature and the work of the courts, and observing that the *Calder* categories would "place an unworkable and unacceptable restraint on judicial decisionmaking,"[774] Justice O'Connor formulates the test for retroactive judicial decisionmaking under the Due Process Clause as follows:

> [W]e conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."[775]

Having set up that test, Justice O'Connor finds that the Tennessee Court's abolition of the year and a day rule was not unexpected and indefensible. The rule was based upon outmoded models of medical science, and had been abolished in the vast number of jurisdictions that had considered it.[776] In addition, although it was recognized in Tennessee law, it was not part of the criminal code and had been only mentioned several times in dicta by the Tennessee courts.[777] Finally, it had never been enforced in the state.[778] For those reasons, Justice O'Connor believed that the action taken by the Tennessee Supreme Court was defensible and not unexpected.

Justice Scalia wrote the chief dissenting opinion, joined by Justices Stevens and Thomas, with Justice Breyer joining in part. In a fierce opening salvo, Justice Scalia begins:

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770. *Id.* at 354.
771. *Rogers,* 121 S. Ct. at 1698 (quoting *Bouie,* 378 U.S. at 353-54).
772. *Rogers,* 121 S. Ct. at 1698.
773. *Id.*
774. *Id.* at 1700.
775. *Id.* (quoting *Bouie,* 378 U.S. at 354).
776. *Rogers,* 121 S. Ct. at 1701.
777. Percer v. State, 118 Tenn. 1765 (1907); Cole v. State, 512 S.W.2d 598 (Tenn. Crim. App. 1974); State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995).
778. *Rogers,* 121 S. Ct. at 1702.

> The Court today approves the conviction of a man for murder that was not murder (but only manslaughter) when the offense was committed. It thus violates a principle . . . which "dates from the ancient Greeks" and has been described as one of the most 'widely held value-judgments in the entire history of human thought.[779]

The thrust of Justice Scalia's first argument is that it makes no sense to give judges the power to do that which elected representatives cannot do, i.e. "retroactively make murder what was not murder when the act was committed."[780] Justice Scalia then compares *Rogers* to *Carmell v. Texas*,[781] which was decided the previous term. He argues that just as the law could not be applied retroactively in *Carmell* to allow the uncorroborated testimony of a rape victim to convict, when it could not do so at the time of the crime, so too, the law cannot be changed after the fact to allow a manslaughter to become a murder.[782] Indeed, Justice Scalia points out:

> if the present condition differs at all from the one involved in *Carmell* it is in the fact that it does not merely pertain to the "quantum of evidence" necessary to corroborate a charge, . . . but is an actual *element* of the crime—a "substantive principle of law,". . . the failure of which "entirely precludes a murder prosecution."[783]

Justice Scalia then disagrees with the majority that the statements contained in *Bouie v. City of Columbia*,[784] to the effect that "'if a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction,'"[785] are "mere dicta."[786] Instead, according to Justice Scalia, "the ratio decidendi of *Bouie* was that the principle applied to the legislature through the Ex Post Facto clause was contained in the Due Process Clause insofar as judicial action is concerned."[787] Justice Scalia thus saw *Rogers* as falling within *Calder's* second category of ex post facto laws (i.e. "one that aggravates a crime, or makes it greater than it was, when committed").[788]

Justice Scalia also rejects the majority's interpretation that *Bouie* only forbade retroactive judicial changes, which were made without fair warning, noting that the "fair warning" Bouie referred to was "not 'fair warning that

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779. *Id.* at 1703 (Scalia, J., dissenting) (quoting in part, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d ed. 1960)).

780. *Rogers*, 121 S. Ct. at 1703.

781. 529 U.S. 513 (2000).

782. *Rogers*, 121 S. Ct. at 1703-04.

783. *Id.* at 1704 (Scalia, J., dissenting) (internal citations omitted).

784. 378 U.S. 347 (1964).

785. *Id.* at 353-54, *quoted in* Rogers, 121 S. Ct. at 1704 (Scalia, J., dissenting).

786. Rogers, 121 S. Ct. at 1704 (Scalia, J., dissenting).

787. *Id.*

788. *Id.*

the law might be changed,' but fair warning of what constituted the crime at the time of the offense."[789] Justice Scalia observed that if a bill, pending before a legislature and assured passage, were upon enactment to be retroactively applied, the fact there was fair warning would not save it from invalidation.[790] Thus, he argued the same result should follow for the courts as well.[791]

Continuing in his point-by-point refutation of the majority opinion, he concludes by attacking Justice O'Connor's philosophizing about the need for judicial flexibility because the common law needs to grow and change with the times. Justice Scalia acknowledges this, but points out the difference between applying the law to a new set of circumstances and changing the law by abolishing a long established common law rule.[792] He then argues that "retroactive revision" of judicial rules in criminal cases was unheard at the time of the adoption of the Due Process Clause.[793] Quoting from an admiralty case in 1886, well after the adoption of the Fourteenth Amendment of 1868, Scalia observed that the Supreme Court had disclaimed such power:

> [t]he rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule.[794]

Justice Scalia maintained that English Judges could not change a law even if they felt the reason for the law was no longer valid. Rather, it was for Parliament to change the law, and these views carried over into the colonies. Justice Scalia then closes his lengthy historical analysis into English common law, with a quote from James Madison in the Federalist Papers, that "ex post facto laws . . . are contrary to the first principle of the social compact, and to every principle of social legislation."[795]

Justice Scalia then responds to the majority's notion that due process is violated only when there is lack of a fair warning of the impending retroactive change. Justice Breyer joins him in this portion of the dissent as well. Justice Scalia does not agree that the defendant in this case received any kind of fair warning to prepare him for the retroactive abolition of the year and a day rule. First, he deals with the majority's assertion that the year and a day rule had been abolished in the vast number of jurisdictions that had recently considered the issue. How had this given him fair warning? Is a per-

789. *Id.*
790. *Id.* at 1705.
791. *Id.*
792. *Id.*
793. *Id.*
794. The Harrisburg, 119 U.S. 199, 213-14 (1886), *overruled* by Morgane v. States Marine Lines Inc., 398 U.S. 375 (1970).
795. *Rogers*, 121 S. Ct. at 1709 (Scalia, J., dissenting) (quoting *THE FEDERALIST* No. 44, at 282 (C. Rossiter ed. 1961)).

son expected to keep abreast of the laws of the fifty states? Moreover, why not consider the number of jurisdictions that had not recently considered the issue, or those that had considered the issue and dealt with the problem legislatively instead of by judicial fiat? What about the jurisdictions that had abolished the rule prospectively, and not retroactively? Justice Scalia therefore finds that the defendant did not have fair warning that the year and a day rule would be retroactively abolished by the judiciary.[796]

Justice Breyer agreed with the majority of the Court that in applying the Due Process Clause, the relevant question to ask is whether the judicial ruling was unexpected and indefensible. But he felt that Rogers did not have fair warning that this rule would be abolished, or if it were, that it would be abolished retroactively, and not prospectively or by the legislature. Therefore, he agreed with the dissenters on this issue.[797]

VIII. FIFTH AMENDMENT

A. Ohio v. Reiner[798]

In this per curiam opinion, the Court held that a claim of innocence does not preclude a witness from asserting the Fifth Amendment privilege against compelled self-incrimination, where the witness has reasonable cause to believe that her answers could be used to incriminate her.[799]

This case arose out of a grant of transactional immunity to a state's witness. Defendant Reiner was convicted of involuntary manslaughter after his two-month-old son died from "shaken baby syndrome."[800] The evidence showed that the infant had a broken leg and a broken rib at the time he died. Defendant claimed that the family's babysitter, who had cared for the infant on the day he died and for two weeks preceding his death was responsible.[801] The State called the babysitter at trial and she asserted her Fifth Amendment privilege. The trial court then granted her transactional immunity from prosecution as provided for by state law and the jury was informed of this fact. The babysitter then testified that she had never shaken the deceased infant and was unaware of any injuries.[802]

The Ohio Supreme Court reversed Reiner's conviction on the ground that the babysitter did not have a valid claim of privilege, because she denied any involvement in the crime and that defendant was prejudiced by the

796. *Rogers*, 121 S. Ct. at 1710.
797. *Id.* at 1711 (Breyer, J. dissenting).
798. 121 S. Ct. 1252 (2001).
799. *Id.* at 1253.
800. *Id.*
801. *Id.*
802. *Id.*

wrongful grant of immunity because it communicated to the jury that the babysitter did not cause the infant's injuries.[803]

Noting that the privilege against compelled self-incrimination protects the innocent as well as the guilty, the Supreme Court's per curiam opinion noted that the innocent witness as well as the wrongdoer "might be ensnared by ambiguous circumstances . . . [and] may provide the government with incriminating evidence from the speaker's own mouth."[804]

Given the fact that the defense theory was that the babysitter was responsible for the abuse, she therefore had "reasonable cause to apprehend danger"[805] that her answers to questions might "furnish a link in the chain of evidence" that could be used to prosecute her for the abuse to the infant under her care.[806] Because the witness therefore had a valid claim of privilege, the Supreme Court reversed the state court's judgment and remanded the case leaving open the question as to whether the grant of immunity under had been appropriate.

IX. STATUTORY INTERPRETATION

A. Cleveland v. United States[807]

This case holds that a state license to operate a gambling machine does not constitute "property" for the purposes of the federal mail fraud statute until the license is actually issued.[808]

The state of Louisiana authorizes gambling through use of video poker machines. Owners of the machines must obtain a license from the state before operating the machine for gambling and the license must be renewed yearly.[809] Applicants paid a $10,000 fee to the state for processing their initial application and a $1000 fee with each license renewal application. The state also taxed the machine $2000 yearly and received 32.5 percent of the net revenue from the machine.[810]

Cleveland served as the attorney for a successful applicant for the license, as well as several renewals of that license.[811] He was convicted of mail fraud and racketeering under the Federal mail fraud statute.[812] The gist of the alleged mail fraud was Cleveland's failure to disclose in the initial application and subsequent renewal applications that he was a part owner-operator

803. *Id.*
804. *Id.* at 1254.
805. *Id.* at 1255.
806. *Id.* at 1254.
807. 531 U.S. 12 (2000).
808. *Id.* at 15.
809. *Id.*
810. *Id.* at 22.
811. *Id.* at 15-16.
812. Id. at 17.

of the video machines covered by the license.[813] Cleveland's motion to dismiss the indictment on grounds that the license was neither money nor property, as defined in the statute, was denied and the Fifth Circuit Court of Appeals affirmed the conviction.[814] The United States Supreme Court, however, in a unanimous decision, authored by Justice Ginsburg, reversed.[815]

The government argued that the license granting the right to operate the gambling machine constituted intangible property.[816] In support of this position, the government pointed out that other intangibles such as confidential business information and services had been held to constitute property for the purposes of the mail fraud statute.[817] However, the Court concluded that before the state issues a license, the license is not property.[818] The primary purpose of the license requirement is regulatory.[819] The license processing fees are for expenses incurred by the state in connection with the licensing process. Subsequent taxes are only received after the license is issued.[820] Once issued, the license may become property, but until the license was issued, it was not property.[821] The renewal of the license also did not deal with property, because once the license expired, and until it was actually renewed, it did not represent any interest.[822] Also, to the extent that there may be some ambiguity to the term "property" in the mail fraud statute, the Court held that ambiguity should be resolved in favor of the defendant as a matter of leniency.[823] Accordingly, the false statement in the applications did not violate the Federal Mail Fraud statute.[824]

X. PRISONER RIGHTS

A. Shaw v. Murphy[825]

In *Shaw*, a unanimous Court held that an inmate of a state penitentiary had no special right under the First Amendment to provide legal advice to another inmate, although he served in the penitentiary as an inmate law clerk.[826] The Court held that a penitentiary may regulate who is to receive the

813. Id. at 16-17.
814. *Id.* at 17-18.
815. *Id.* at 27.
816. *Id.* at 21-22.
817. *Id.* at 23-24.
818. *Id.* at 15.
819. *Id.* at 23.
820. *Id.* at 22.
821. *Id.* at 15, 25.
822. *See id.* at 15.
823. *Id.* at 25 (citing Rewis v. United States, 401 U.S. 808, 812 (1971)).
824. *Cleveland,* 531 U.S. at 27.
825. 121 S. Ct. 1475 (2001).
826. *Id.* at 1477.

law clerk's legal advice, so long as the regulation is reasonably connected to a legitimate objective of the penitentiary.[827]

Murphy, a maximum-security inmate in a Montana penitentiary was a law clerk allowed to provide legal information to other inmates.[828] However, penitentiary policy would not permit him to provide legal assistance to another maximum-security inmate because, in the prison's view, such communications could threaten prison security.[829] Pat Tracy, a fellow maximum-security prisoner, was criminally charged with assaulting a correction officer employed at the penitentiary.[830] Tracy was represented by an attorney in the case, but Tracy also asked for Murphy to assist him in his defense.[831]

Prison officials barred Murphy from giving advice to Tracy because they were both maximum-security inmates.[832] The prison offered Tracy the help of another prison law clerk.[833] Nevertheless, Murphy sent Tracy a letter containing information and legal advice about the case.[834] The letter was intercepted by prison officials and Murphy was disciplined for violating prison rules.[835]

Murphy brought this action for an injunction, claiming, among other things, infringement on his First Amendment rights.[836] The district court dismissed the suit.[837] The Ninth Circuit Court of Appeals reversed the district court, holding that prison "'inmates have a . . . right to assist other inmates with their legal claims.'"[838] A unanimous Supreme Court in an opinion by Justice Thomas, reversed the Ninth Circuit.[839]

Justice Thomas' opinion first noted that in *Turner v. Safley*,[840] the Court held that prison regulations may lawfully infringe upon constitutional rights of prisoners if the regulation is "'reasonably related to legitimate penological interests.'"[841] Indeed, *Turner* was a First Amendment case. Murphy argued here, however, that a First Amendment right required greater protection when the exercise of that right involved giving legal advice to another prisoner facing a criminal charge. The Court declined to elevate legal advice

827. *Id.* at 1481.
828. *Id.* at 1477.
829. *Id.* at 1478.
830. *Id.* at 1477.
831. *Id.* at 1477, 1477 n.1.
832. *Id.* at 1477 n.1.
833. *Id.*
834. *Id.* at 1477.
835. *Id.* at 1477-78.
836. *Id.* at 1478.
837. *Id.*
838. *Id.* (quoting Murphy v. Shaw, 195 F.3d 1121, 1124 (9th Cir. 1999)).
839. *Murphy*, 121 S. Ct. at 1477.
840. Turner v. Safely, 482 U.S. 78 (1987).
841. *Murphy*, 121 S. Ct. at 1479 (quoting *Turner*, 482 U.S. at 89).

from one prisoner to another prisoner in this situation to a higher status than other communications between prisoners.[842]

Justice Ginsburg concurred in a separate opinion noting that Murphy also claimed that the prison rules under which he was disciplined (which prohibited insolence and interference with due process hearings) were vague and overbroad as applied to him.[843] She observed that since the court below did not resolve those issues, this decision does not prevent Murphy from pursuing those claims on remand.[844]

XI. CONCLUSION

The criminal justice decisions of the Supreme Court's 2000 Term reflect the cautious, tentative approach of a deeply divided Court. In many of the most significant cases the defendant's fate was decided by a single vote. A majority of these five to four decisions rejected the defendant's claims. Nevertheless, in several of these close cases, the Court upheld important constitutional protections, although this was accomplished either by a narrow interpretation of the right or through statutory construction that avoided treading upon the constitutional right at issue. Thus, in *Kyllo v. United States* the Court struck down high-tech surveillance of a home, but based its decision upon reasoning that arguably may have little application outside the home itself. Similarly in *INS v. St. Cyr* and *Zadvydas v. Davis*, the Court preserved access to the Writ of Habeas Corpus guaranteed in Article I of the Constitution, but did so by avoiding the constitutional issue, finding no clear Congressional intent to restrict this method of judicial review in immigration cases.

Despite their narrow scope, the opinions in these cases resonate with a healthy respect for the importance of the Constitutional rights at stake. *St. Cyr* and *Zadvydas*, moreover, have presciently laid the groundwork for firmly establishing the right to use the Writ of Habeas Corpus to challenge the exercise of executive power. *Zadvydas* also illuminates the fact that due process protections do not disappear just because the government orders detentions in contexts outside the normal criminal or mental health spheres. It is fortunate that these decisions occurred before the terrorist attacks on September 11, 2001. They provide a base line for rational discourse unaffected by the emotional trauma that has anguished us all in the aftermath of those tragic events. Challenges to the detention provisions of the USA Patriot Act[845] and President Bush's Military Order[846] authorizing trials of suspected

842. *Murphy*, 121 S. Ct. at 1479-80.

843. *Id.* at 1481 (Ginsburg, J., concurring).

844. *Id.*

845. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, PL 107-56 (HR 3162) (Oct 26, 2001) (amending, *inter alia*, the Immigration and Nationality Act (8 U.S.C. § 1101 et seq.) to provide detention of suspected terrorists for periods of up to six months.

non-citizen terrorists by military tribunals, for example, may soon reach the Court via the very avenue of habeas corpus relief it secured in *St. Cyr* and *Zadvydas*.

To be sure, as the Court in *Zadvydas* expressly noted, in the context of national security, an argument might be made for judicial deference to the judgments of the political branches. Under what circumstances the Court's deference will extend to sacrificing the strong procedural protections it recognized in *Zadvydas*, however, remains to be seen. The lessons of history teach that blind deference in the past has proven unwise and has tarnished the Court's integrity.[847] The Court might well find courage from the example set in *Kennedy v. Mendoza-Martinez*,[848] a war related case, which refused to permit the government to dispense with the right to a jury trial and other basic due process protections, declaring that even Congress' power to conduct war and foreign relations was still subject to the Constitution:

> The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental actions. 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all

846. Military Order, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, 2001 WL 1435652 (Pres.). Section 7(b) of the Military Order declares that:

> (b) with respect to any person subject to this order—
> (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
> (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in
> (i) any court of the United States, or any State thereof,
> (ii) any court of any foreign nation, or
> (iii) any international tribunal.

Such a blanket attempt, by executive order, to deprive individuals of all judicial review concerning even whether they are in fact properly considered a "person subject to this order," would appear to be subject to challenge under *Zadvydas*.

847. *See* Korematsu v. United States, 23 U.S. 214 (1944) (upholding internment of citizens of Japanese ancestry during World War II).

848. 372 U.S. 144 (1963). Mendoza-Martinez was a person of dual nationality who fled to Mexico in 1942 to evade U.S. military service. He later voluntarily re-entered, was convicted of draft evasion in 1947 and served his sentence of a year and a day. Five years later deportation proceedings were brought against him. Following a hearing before a special inquiry officer appointed by Attorney General Robert F. Kennedy, the government determined Mendoza-Martinez had forfeited his U.S. citizenship and was thus now a deportable alien. *Id.* at 147-48. The Supreme Court held that the forfeiture of citizenship by executive decision, even though Congressionally authorized, was nevertheless unconstitutional because it denied Mendoza-Martinez the due process safeguards guaranteed by the Fifth and Sixth Amendments. *Id.* at 166.

> classes of men, at all times, and under all circumstances.' . . . In no other way can we transmit to posterity unimpaired the blessings of liberty....[849]

It may be feared that because *Zadvydas* was decided on non-constitutional grounds and by the slimmest of margins, it may easily be distinguished and ignored. That may be prove to be true, but it does not necessarily follow. In many ways *Zadvydas* is thus emblematic of the 2000 Term. It reveals a Court cautiously keeping its options open, while not readily tossing away constitutional protections that have historically been deemed fundamental to American justice.

Whatever the outcome of future litigation in this area, it is likely that Justice O'Connor will play a critical role in its determination. She cast the decisive vote to form the majority which upheld the constitutional protections at issue in *Zadvydas*. Indeed the 2000 Term perhaps bears the stamp of Justice O'Connor's signature more clearly than that of any other justice; she wrote seven majority opinions during the term and cast the decisive vote in over half of the closely decided cases.

In two other split decisions, *Penry v. Johnson (Penry II)* and *Shafer v. South Carolina*, which were decided by larger margins, the Court struck down death sentences because of faulty jury instructions. In the wake of revelations by DNA technology that our criminal justice system has repeatedly convicted the innocent and on numerous occasions even sentenced them to death,[850] a majority of the Justices have shown an increased sensitivity to capital punishment issues. Only the Chief Justice, Justice Scalia and Justice Thomas dissented in *Penry II*, which held, following remand by the Court in *Penry I*, that the state had again failed to give adequate jury instructions regarding the mitigating effect of Penry's mental retardation. The failure of either the state legislature or the courts in Texas to adequately address the Supreme Court's mandate in *Penry I* may have prompted its decision to hear a direct challenge to the constitutionality of executing the mentally retarded during the 2001 Term.[851]

The Court, by a six to three margin, also attempted to hold the line and prevent further erosion of the right to be free from unreasonable searches and seizures, refusing to dispense with the traditional Fourth Amendment requirement of individualized justification in both *Ferguson v. City of*

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849. *Id.* at 164-65 (quoting Ex parte Milligan 4 Wall 2, 120-21 (1866)). *But cf.* Ex parte Quirin, 317 U.S. 1 (1942). *Quirin* involved the trial of Nazi saboteurs, during a declared war, before a military tribunal authorized by Congressional legislation, for war crimes which "by the law of war may be triable by such military commissions." *Id.* at 29. *Quirin* expressly noted that it did not address whether the executive branch had constitutional power to create military tribunals in the absence of Congressional legislation. *Id.*

850. *See* EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (finding that the majority of defendants exonerated by DNA evidence had been victims of mistaken eye-witness identification). *See also* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 (Table 6) (1987).

851. Atkins v. Virginia, No. 00-8452 (Sup. Ct. argued Feb. 20, 2001).

Charleston and *City of Indianapolis v. Edmond.* However, the elusive "principal purpose" test employed there to strike down drug checkpoints and law-enforcement-initiated drug testing of pregnant mothers, is hardly a bright line rule. We may find that *Ferguson* and *Edmond* were just lines drawn in the sand, easily washed away by the waves of fear and frustration enveloping us in this new era of terrorism. The traditional structure of Fourth Amendment protection could then conveniently be replaced by the simple concept of "reasonableness," which has become the touchstone of the Court's "special needs" doctrine. Yet, the malleable concept of "reasonableness" once unleashed from its textual moorings, found in the Amendment's probable cause and warrant requirements, can all too quickly and unnecessarily diminish the compass of liberty and privacy. What is "reasonable," after all, is subject to the fears and prejudices of the day.[852] The Fourth Amendment, however, was intended to shelter liberty and privacy against the storm of such passions, not become their barometer. The Court's failure to establish a solid foundation for Fourth Amendment protections during the 2000 Term will make it difficult to resist the pressures that lay ahead.

The 2000 Term was also filled with some curious contrasts. In *Bush v. Gore*, for example, the Court required standards to control the discretion of vote counters in determining the intent of the voter with respect to punch card ballots which were not machine readable. In *Atwater v. City of Lago Vista*, however, the Court upheld the wholly unbridled discretion of police officers to make full custodial arrests, subjecting traffic offenders to the indignity of being taken to jail for minor, non-jailable infractions. The Court's indifference to the additional intrusions this decision will impose upon minorities (who, recent racial profiling studies indicate, will bear the brunt of such arrests and accompanying searches) remains another of the major disappointments of the Court's Fourth Amendment jurisprudence.

Another disappointing contrast is seen in the fact that while the Court recognized in *Ohio v. Reiner* that the Fifth Amendment exists to protect the innocent as well as the guilty, it did not seem to recognize in *Texas v. Cobb* that this same principle also applies in the context of the Sixth Amendment's right to counsel. In *Cobb*, which delivered a severe blow to the Sixth Amendment right to counsel at interrogation, the Court seems to see counsel as an obstacle to gaining incriminating admissions from guilty defendants. But in assuming the defendant's guilt, the Court is trampling upon the presumption of innocence that must exist if our system of criminal justice is to provide fundamental fairness and actually do justice. While the Court recognized in *Reiner* that an innocent person could unwittingly make an incriminating admission in the courtroom, its confession jurisprudence does not seem to recognize the even greater danger that this could happen in the con-

852. It should not be forgotten that the Court once upheld restricting an individual's use of certain transportation facilities because of their race on the ground this was a "reasonable regulation." Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

fines of the police station interrogation room. The right to counsel at interrogation serves not as a roadblock to the conviction of the guilty, but as a safeguard against the conviction of the innocent. The Court once recognized that a system of criminal justice that comes "to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[853] Sadly, the Court seems willing to ignore that lesson of history.

A final contrast appears in the Court's treatment of retroactivity. This theme was present in *Tyler v. Cain* and *Rogers v. Tennessee* as well as *INS v. St. Cyr* and *Zadvydas v. Davis*. The Court's pronouncement in *Rogers* that a court can retroactively apply changes in judicial rulemaking to the *detriment* of defendants, so long as such changes are not unexpected or indefensible in light of prior law, of course, contrasts sharply with the much different *ex post facto* prohibition imposed on legislatures. The *Rogers* rule, however, stands in even starker contrast to the AEDPA rules, which, after *Tyler v. Cain*, severely restrict the ability of defendants, via habeas review, to gain the retroactive *benefit* of new judicial interpretations regarding constitutional protections. One can only hope that *Rogers* is not the harbinger of an ill wind portending future restrictions, through judicial interpretation, of basic constitutional rights.

853. Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964).