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Criminal Justice in the Supreme Court: A Review of United States Supreme Court Decisions at the Close of the Millennium 1998-1999

Laurence A. Benner
California Western School of Law, lab@cwsl.edu

Marshall J. Hartman

Hon. Shelvin Singer, Ret.

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1998-1999

LAURENCE A. BENNER*

MARSHALL J. HARTMAN**

HON. SHELVIN SINGER, RET.***

* Professor of Law, California Western School of Law, San Diego, California.
** Deputy Defender, Capital Litigation Division, Office of the Illinois State Appellate Defender, Chicago, Illinois.
*** Judge, Circuit Court of Cook County, Illinois, retired.
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I. INTRODUCTION

This review of criminal and federal habeas decisions of the United States Supreme Court covers highlights of the 1998-99 Term, including selected cases decided in early 1998. These decisions reveal that at the close of the twentieth century the Court was still fine-tuning its retreat from the Warren Court's "Criminal Law Revolution" of the 1960s. The Warren Court had attempted to create a uniform national code of criminal procedure by making most of the provisions of the Bill of Rights applicable to the states. By contrast, the Rehnquist Court, keeping in step with the law and order philosophy reflected in Congress' passage of the Anti-Terrorism and Effective Death Penalty Act of 1996, has continued to de- constitutionalize criminal procedure and return power to regulate criminal justice matters back to the states.

Notwithstanding this trend, several of the Court's decisions carve a hard line in the sand in support of individual rights and show that the Court is not yet willing to throw the baby out with the bath water. For example, while the Court cut back on standing to contest Fourth Amendment violations in *Minnesota v. Carter*,[1] and further reduced Fourth Amendment protection with respect to searches and seizures of automobiles in *Wyoming v. Houghton*[2] and *Florida v. White*[3], it nevertheless held firm in *Knowles v. Iowa*,[4] refusing to extend the "search incident to arrest" exception to traffic arrests that result only in the issuance of a citation. The Court also protected residential privacy in *Wilson v. Lane*[5] and *Hanlon v. Berger*,[6] holding that police may not bring the media along when they execute a search warrant.

Similarly, in the Fifth Amendment context, while the Court held in *United States v. Balsys*[7] that fear of foreign criminal prosecution did not provide grounds for exercising the privilege against self-incrimination in a deportation proceeding, it also held by a five-to-four margin in *Mitchell v. United States*[8] that a person who pleads guilty does not thereby waive their Fifth Amendment rights with respect to sentencing matters. Therefore, the Court ruled in *Mitchell*, the defendant's silence could not be used against her to increase her sentence. In *Gray v. Maryland*[9] and *Lilly v. Virginia*,[10] two Sixth Amendment right to confrontation cases, the Court also restricted the

1. 525 U.S. 83 (1998).
2. 526 U.S. 295 (1999).
3. 526 U.S. 559 (1999).
4. 525 U.S. 113 (1998).
5. 526 U.S. 603 (1999).
6. 526 U.S. 808 (1999).
7. 524 U.S. 666 (1998).
8. 526 U.S. 314 (1999).
9. 523 U.S. 185 (1998).
10. 527 U.S. 116 (1999).

prosecution's use of confessions by non-testifying co-defendants, and in *Swidler & Berlin v. United States*[11] held that the federal attorney client privilege continued after the death of the client with respect to disclosure of incriminating matters. Yet, in *Conn v. Gabbert*[12] the Court found that prosecutors did not violate due process when they detained an attorney in the courthouse in order to execute a search warrant for letters carried on his person, even though the timing of the warrant's execution was deliberately calculated to prevent the attorney from being available for consultation while his client was called to testify before a grand jury.

In a number of other decisions the Court made it more difficult for convicted defendants to obtain reversal of their convictions. In *O'Sullivan v. Boerckel*,[13] the Court held that a habeas petitioner had not properly exhausted his state remedies when he failed to seek discretionary review in the state's highest court. In *Strickler v. Greene*[14] the Court also affirmed defendant's death penalty conviction even though the prosecution failed to disclose documents to the defense which contained impeachment material discrediting a key witness.

While it seems at times that the Court is giving with one hand while taking away with the other, what these decisions appear to demonstrate is the Court's attempt to remove constitutional obstacles along the pathway toward conviction of the guilty, without at the same time discarding wholesale the constitutional restraints on state power that are designed to prevent abuses and harassment of the innocent. This is seen most clearly in *City of Chicago v. Morales*[15] where the majority, while refusing to countenance a constitutional right to loiter, nevertheless struck down Chicago's Gang Congregation Ordinance on the ground that its broad and subjective definition of loitering permitted arbitrary and discriminatory enforcement against non-gang members.

Finally, in what may turn out to be the most important case during the 1998-99 Term, the Court in *Saenz v. Roe*[16] resurrected the Privileges or Immunities Clause of the Fourteenth Amendment after it had lain dormant for 130 years. While *Saenz* is a non-criminal case involving the right to travel, the Court's willingness to utilize this separate provision of the Fourteenth Amendment could have important implications for criminal law and procedure in state cases. This is because any provision of the Bill of Rights guaranteed as a matter of due process could also arguably be considered a privilege or immunity of national citizenship protected against abridgement by the states.

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11. 524 U.S. 399 (1998).
12. 526 U.S. 286 (1999).
13. 526 U.S. 838 (1999).
14. 527 U.S. 263 (1999).
15. 119 S. Ct. 1849 (1999).
16. 526 U.S. 489 (1999).

II. ARREST, SEARCH, AND SEIZURE

A. Standing

Minnesota v. Carter[17]

In what was the 1998-99 term's most revealing harbinger of future Fourth Amendment issues, a fragmented court further reduced the scope of Fourth Amendment protection by denying temporary business invitees the right to challenge the warrantless search of their host's home.[18] The decision highlights deep divisions among the Justices with respect to constitutional protection for privacy and leaves in its wake an indeterminate multi-factor test for deciding when a visitor's Fourth Amendment rights are violated by government intrusions, which would violate the homeowner's rights.[19] The decision will result in increasing the admissibility of evidence obtained in violation of the Fourth Amendment, and as Justice Ginsburg points out in dissent, create incentives for police to make warrantless intrusions into homes.[20] Carter was arrested in a suburb of Minneapolis Minnesota and charged with conspiracy to distribute cocaine. The facts developed at a pre-trial hearing on defendant's motion to suppress evidence disclose that one evening a confidential informant told a police officer that he had looked into a ground level window of a basement apartment and observed people at a table putting white powder into bags.[21] The informant had not previously been known to the officer, nor was his reliability otherwise established. The officer went to the apartment complex. Standing in the dark, about a foot outside the apartment window, he peered into the apartment for fifteen minutes through a gap in the venetian blinds, which had been drawn shut.[22] A light was on in the apartment and the officer saw the female tenant and two visitors, Carter and Johns, seated at a dining table. They were observed placing what appeared to be cocaine in plastic baggies.[23] This observation was later used to justify Carter's arrest and to obtain a search warrant to seize evidence in the apartment.

Carter and Johns had come from Chicago. The record did not disclose their relationship with the tenant other than the fact she received one eighth of an ounce of cocaine in exchange for the use of her apartment as a workplace to package the cocaine. The two visitors stayed in the apartment for approximately two and one-half hours and were arrested immediately after

17. 525 U.S. 83 (1998).
18. *See id.* at 83.
19. *See generally id.*
20. *See id.* at 95 (Ginsburg, J., dissenting).
21. *See id.* at 88.
22. *See id.*
23. *See id.* at Joint Appendix F at 7-14.

they left it.[24] The Minnesota Supreme Court held that the officer's observation into the home constituted a warrantless search which Carter had "standing" to contest since he was an invited guest of the apartment's leaseholder.[25] In an opinion by Chief Justice Rehnquist, the Supreme Court reversed, finding that Carter's Fourth Amendment rights were not violated because he had "no legitimate expectation of privacy" in the apartment which he had used solely for a commercial purpose.[26]

Five justices joined the Chief Justice's opinion. Deciphering the ramifications of this decision, however, requires careful reading because two of the justices in the majority (Scalia and Kennedy) also wrote concurring opinions which are inconsistent with each other.[27] Justice Ginsburg, joined by Stevens and Souter, dissented.[28] Justice Breyer, while expressing agreement with the dissenters on the standing issue, nevertheless concurred in the judgment on the separate ground that the officer's observation through the window did not constitute a "search" triggering Fourth Amendment safeguards because the officer made the observation from a public place used by the general public. Breyer was the only justice to address this issue.[29]

The Chief Justice, assuming *arguendo* that the officer's observation was a search with respect to the homeowner, began his opinion for the Court by rebuking the Minnesota Supreme Court for employing the concept of "standing," noting that this form of analysis had been expressly rejected in *Rakas v. Illinois*.[30] In *Rakas*, the defendants were passengers in a car that was stopped and searched, revealing a weapon under the front passenger seat and shells in a locked glove compartment. The Court held that as mere passengers, defendants' had no reasonable expectation of privacy in the car and therefore had suffered no violation of their Fourth Amendment rights.[31] *Rakas* overturned the "legitimately on the premises" test established in *Jones v. United States*,[32] which gave anyone lawfully present in the place searched standing to challenge the search if evidence derived from it was targeted against them.[33] *Rakas* held that the Fourth Amendment, which guarantees the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures"[34] creates personal rights which cannot be vicariously asserted.[35] Therefore the issue in *Carter* is not whether

24. *See id.*
25. *See id.* at 89.
26. *See id.* at 91.
27. *See generally id.*
28. *See id.* at 105 (Ginsburg, J., dissenting).
29. *See id.* at 103 (Breyer, J., concurring).
30. 439 U.S. 128 (1978).
31. *See id.*
32. 362 U.S. 257 (1960).
33. *See id.*
34. U.S. Const. amend. IV.
35. *See Rakas*, 439 U.S. at 128.

Carter had "standing" to contest the violation of the homeowner's rights, but rather, whether Carter had *personally* been subjected to a "search."[36]

In *Katz v. United States*[37] Justice Harlan's concurring opinion formulated a two-pronged test that has now become the divining rod for determining when government conduct constitutes a search. A Fourth Amendment "search" occurs when the government intrudes upon a person's (1) subjective expectation of privacy, and (2) society accepts that expectation of privacy as reasonable.[38] *Katz* expanded the scope of constitutional protection for privacy beyond the Amendment's literal text in order to include electronic eavesdropping within its compass, holding that a telephone conversation in a public phone booth was safeguarded from warrantless governmental eavesdropping. In the hands of the Rehnquist Court, however, the test has been used to restrict protection for privacy.[39] In the context of the issue in *Carter*, Chief Justice Rehnquist viewed the *Katz* "reasonable expectation of privacy" test as a continuum.[40] At one end of the spectrum, he noted, is the overnight guest. The Court ruled in *Minnesota v. Olson*[41] that as a matter of social custom a guest who spends the night has a reasonable expectation of privacy in her host's home.[42] At the other end is a person who is simply legitimately on the premises. Without more, such a person has no reasonable expectation of privacy and therefore no Fourth Amendment protection. This is because no "search" occurs with respect to that person and the Fourth Amendment's warrant and probable cause requirements therefore do not apply.

Finding that the defendant in *Carter* lay "somewhere in between" these two extremes,[43] the Chief Justice gave three reasons for concluding that Carter's situation fell closer to the "no protection" end of the spectrum. First, the home was used solely to package cocaine – a purely commercial purpose. Thus Carter was merely a business invitee and the "home" was, with respect to Carter, merely commercial premises in which there are significantly diminished expectations of privacy.[44] Second, the duration of the stay was brief, only two and one-half hours. Finally, there was nothing in the re-

36. While the Chief Justice would therefore eschew the term "standing" altogether, his approach obscures the fact that a constitutional violation has occurred with respect to *someone*. Despite the Chief Justice's view, the term was employed during the oral argument of the case and by Justice Ginsburg in her dissent.

37. 389 U.S. 347 (1967).

38. *See id.*

39. *See, e.g.*, California v. Greenwood, 108 S. Ct. 1625 (1988) (finding no reasonable expectation of privacy in sealed trash bags left for the garbage collector); *see generally* Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825 (1989).

40. *See Carter*, 525 U.S. at 88.

41. 495 U.S. 91 (1990).

42. *See id.*

43. *See Carter*, 525 U.S. at 91.

44. *See id.* at 93 (citing O'Connor v. Ortega, 480 U.S. 709 (1987)).

cord to suggest a "previous connection" between Carter and the apartment's leaseholder.[45]

It is tempting to view the majority opinion in *Carter* as a categorical bright line rule, which would exclude all business invitees from Fourth Amendment protection. Indeed, Justice O'Connor proposed such a categorical approach during oral argument, suggesting that a line could be drawn between business visitors and social guests. However, as the hypotheticals bantered about during oral argument quickly suggested, such a line would easily become blurred and also produce unacceptable results. For example, is it clear that a paid babysitter should be treated the same as the washing machine repair man? On which side of the line should one place a home healthcare nurse, or a co-worker who visits to jointly work on a job-related task with the homeowner? Indeed, if the test simply focused on commercial purpose, would not Katz himself be considered a mere business invitee when he entered the phone booth and paid his dime to place the call regarding his bookmaking business? In light of the frayed edges, which would quickly appear with such a monochromatic test, the majority therefore adopted a multifactored approach rather than a bright line rule.[46] How the Court in the future will apply the nature of use, duration and relationship factors is clouded, however, by the concurring opinions of Scalia and Kennedy.

Justice Kennedy joined the Chief Justice's opinion stating that it was consistent with his view that as a general rule "almost all social guests" have a reasonable expectation of privacy in their host's home.[47] Justice Kennedy did not elaborate any criteria for distinguishing which social guests would have a reasonable expectation of privacy. Carter's "fleeting and insubstantial connection" with the home simply did not give rise to "guest" status.[48] Justice Kennedy did give an indication as to what he thought were relevant considerations, however, when he noted that there was no evidence Carter engaged in confidential communications with the homeowner or had any meaningful connection to her or the home.[49] This comment suggests that Justice Kennedy, like the Court in *Katz*, would give careful consideration to the nature of the activity intruded upon and not rely simply upon the status of the individual or the fact that the Activity was conducted for a business purpose.

Justice Scalia, writing for himself and Justice Thomas, also joined the Chief Justice's opinion because " it accurately applies our recent case law."[50] Although he apparently felt bound by that body of precedent, Justice Scalia, nevertheless, did not agree with the reasoning of those cases. He rejected outright the *Katzian* mode of analysis employed by both the dissent and the

45. *See id.*
46. *See id.*
47. *See id.* at 99 (Kennedy, J., concurring).
48. *See id.* at 102.
49. *See id.*
50. *Id.* at 91.

Chief Justice, calling it a "fuzzy," "self-indulgent" and "notoriously unhelpful" standard which "bears an uncanny resemblance to those expectations of privacy that this Court considers reasonable."[51] Contrary to both the Chief Justice and the rest of the Court, Justices Scalia and Thomas would thus abandon the *Katz* test and apply the Fourth Amendment only as literally written and historically understood. They would therefore refuse to allow even a social guest to claim Fourth Amendment protection unless they use the home as their residence. Presumably this requires sleeping overnight since *Olsen* represents for Scalia the "absolute limit of what text and tradition permit" in extending Fourth Amendment protection.[52]

Justice Ginsburg, joined by Justices Stevens and Souter, dissented.[53] In their view, any time a homeowner invites another to share the privacy of her home, the guest gains a reasonable expectation of privacy regardless of the duration of the stay or its purpose because such social interaction "serves functions recognized as valuable by society."[54] Justice Ginsburg also voiced concern that the majority's decision would tempt the police to make warrantless incursions into homes since they had everything to gain and little to lose if they knew that a least one potential defendant was a non-resident against whom any evidence obtained would be admissible.[55]

Justice Breyer's separate concurring opinion is by far the most disturbing, if not the most puzzling.[56] Agreeing with the dissent that Carter could claim Fourth Amendment protection with respect to a search of the apartment, he nevertheless believed that Carter's Fourth Amendment rights were not violated because there had been no "unreasonable search" of that home. The brief seven paragraph opinion consisting mostly of factual "assumptions," misperceives prior case law as "well-established" when it is not, and appears to conflate two separate prongs of analysis: (1) whether there was a search, and if so, (2) whether the search was "unreasonable" under the Fourth Amendment.[57]

Justice Breyer cites *Florida v. Riley*,[58] as authority for an apparently simple rule that it is permissible for an officer to see what may be seen from a lawful public vantage point. His pinpoint citation for this "well established" rule, however, was to Justice White's plurality opinion which announced only the judgment in *Riley* and represented the views of only four Justices: White, the Chief Justice, Kennedy and Scalia.[59] Five justices, in

51. *Id.* at 91, 97.
52. *Id.* at 96.
53. *See id.* at 105 (Ginsburg, J., dissenting).
54. *Id.* at 108.
55. *See id.*
56. *See id.* at 103 (Breyer, J., concurring).
57. *See id.* at 104.
58. 488 U.S. 445 (1989).
59. *See id.* at 447.

fact, rejected that simple test.[60] Four dissenting justices (Brennan, Marshall, Stevens and Blackmun) and Justice O'Connor, who concurred only in the judgment on a separate ground involving the burden of proof, all agreed that the fact the helicopter was in a lawful position was not determinative.[61] In her concurring opinion, Justice O'Connor agreed with the four dissenting justices that the test was not whether the officer made his observation from a vantage point the public could lawfully use. Rather, the proper test was whether the public used that vantage point with "sufficient regularity" so that the citizen's expectation of privacy was unreasonable.[62]

The Minnesota Supreme Court, in a thoughtful and well reasoned opinion by Justice Tomljanovich, found that the officer had taken "extraordinary measures" to enable him to view the inside of the apartment because he left the sidewalk, climbed over some bushes and crouched down, placing his face within twelve to eighteen inches from the window pane in order to see through a small gap in the blinds which had been shut.[63] The members of the Minnesota Supreme Court unanimously agreed that under these circumstances the homeowner had not knowingly exposed the inside of her apartment to observation by members of the general public. Therefore the officer's observation invaded a reasonable expectation of privacy and constituted a search.[64] Since the prosecution conceded that there was neither probable cause nor a warrant authorizing the intrusion, the state court held it was an "unreasonable" search, which violated the Fourth Amendment.

Justice Breyer took issue with the Minnesota Supreme Court's conclusion that the officer had engaged in contortions in order to view the inside of the apartment.[65] Admittedly, the officer never testified that he climbed over bushes or crouched. It also appears from photographic exhibits that the apartment windows were standard size. It would therefore appear possible to see into the apartment while simply standing and looking downward if the blinds were open. But the blinds were closed and it would seem a reasonable inference that during the officer's fifteen minute observation he must have positioned himself in ways members of the public passing by would not, in order to see through the gap in the blinds. Justice Breyer, however, asserted that the record denied such an inference.[66] Rejecting the judgment of a unanimous Minnesota Supreme Court, Justice Breyer chose to make the op-

60. *See generally id.* (involving surveillence of defendant's curtilage from a helicopter lawfully in public airspace).

61. For a detailed discussion of *Riley* and the two conflicting views expressed in that case, see Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825, 861-73. For a case making a valiant attempt to apply *Riley* see Pew v. Scorpio, 904 F. Supp. 18 (1995) (complaining about the "unhappy state of Supreme Court precedent").

62. *See Riley*, 488 U.S. at 454; *see also* Benner, *supra* note 61 at 863.

63. *See* State v. Carter, 569 N.W. 2d 169, 177-78 (1997).

64. *See id.*

65. *See Carter*, 525 U.S. at 103 (Breyer, J., concurring).

66. *See id.*

posite inference and assumed that any member of the public could have seen the same thing the officer saw.[67] This assumption was based upon limited testimony of a police officer that families in the apartment complex used the grassy common area for playing and walking and a prosecution photograph, which conveniently showed a bicycle leaning against the wall right next to the apartment window in question.[68] Drawing the inference against the defendant seems somewhat unfair, however, in light of the officer's convenient memory loss when asked to describe the location of the gap in the blinds through which he claimed to have viewed the inside of the apartment. During the officer's direct testimony at the suppression hearing the following testimony was elicited by leading questions from the prosecutor:

> Q. Finally officer, I'm showing you Exhibit 17, which I believe we can stipulate to is a picture of the same window . . . As far as the size, the width of the blind and everything else, does it appear to be the same?
>
> A. As far as I recall right now, yes.
>
> Q. The only difference is they were open, at least one or two of them were open . . . . Do you recall which ones were open at all?
>
> A. I—I know we got a lot of pictures. I don't recall right offhand which portion of the blind was open that I could see through.[69]

Obviously the location of the opening was an important fact. If the gap was in the lower portion of the window, the angle of observation from a standing position would not have permitted the officer to see into the interior of the apartment as he claimed, unless he crouched down. Although the burden of establishing a reasonable expectation of privacy is on the defendant,[70] we deal here with the question of when inferences of fact will be permitted to establish that burden. Because the officer failed to testify as to even the general location of the gap, it would seem fairness would require that any inference be drawn against the state regarding its location. If that is done, then it necessarily follows that the officer could not have seen into the window from a vantage point ordinarily used by members of the public who presumably pass by windows standing upright.

The most disturbing part of Justice Breyer's opinion, however, is not in his debatable factual assumptions, but rather his concluding observation that there was a "benefit" to permitting a police officer, from a "public vantage point" to confirm an untested informant's tip by peeping into a woman's apartment window through closed blinds at night. The asserted benefit was that the officer's tom-peeping would have saved an innocent apartment dweller from a more physically intrusive search if the observation had revealed no illegal activity. But surely that does not follow. If the officer does

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67. *See id.*
68. *See id.*
69. *Id.* at Joint Appendix F, 31-32.
70. *See* Florida v. Riley, 488 U.S. 445 (1989).

not have probable cause because the informant is not reliable, then he should not be able to get a search warrant to conduct the physically intrusive search. As Professor Amsterdam has observed:

> [U]nless the Fourth Amendment controls tom-peeping and subjects it to a requirement of [probable] cause. . .police may look through windows and observe a thousand innocent acts for every guilty act they spy out. Should we say that prospect is not alarming because the innocent homeowner need not fear that he will get caught doing anything wrong? The Fourth Amendment protects not only against incrimination, but against invasions of privacy –or rather, as *Katz* holds, of the right to maintain privacy without giving up too much freedom as the cost of privacy. The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.[71]

Under Justice Breyer's logic, a citizen must live under pain of surveillance even if they draw their blinds! Perhaps that is why the other members of the Court did not leap into this briar patch where the privacy of citizens without the financial means to live in single family residences behind gated walls can be so easily balanced away. The Minnesota Supreme Court, assuming that the untested informant's tip established at least reasonable suspicion, rejected the argument that "a little bit of information justifies a little bit of search."[72] It is not clear, however, that Justice Breyer would require even this minimal level of protection since he did not distinguish between a known and an anonymous informant. Surely, in light of the Court's recent unanimous decision in *Florida v. J.L.*,[73] Justice Breyer would agree that if police cannot conduct a minimally intrusive pat down search of a person for weapons based solely upon an anonymous informant's tip, they likewise cannot conduct a minimally intrusive search of a home.

What is most distressing about the *Carter* decision, however, is the realization that it appears possible that five members of the Court could adopt Justice White's simple "lawful public vantage point" test as the only control on police snooping.[74] Under this test, if the officer is standing in a public place where any member of the general public could in theory lawfully stand, then whatever the officer can see from that vantage point is fair game.

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71. Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 402-03 (1974).

72. State v Carter, 569 N.W.2d 169, 179 (Minn. 1997). Arguably the informant's tip in *Carter* created reasonable suspicion since the informant was known to the officer. *See* Adams v. Williams, 407 U.S. 143 (1972) (holding that where the informant is known to the officer there is an indicia of reliability sufficient to give rise to reasonable suspicion because the informant can be held accountable if his information turns out to be a fabrication).

73. 120 S. Ct. 1375 (2000).

74. Chief Justice Rehnquist, and Justices Kennedy and Scalia joined White's plurality opinion in *Riley*. Justice Breyer would make four. Justice Thomas, who generally follows Scalia in Fourth Amendment matters would be a likely fifth vote.

This simple test admittedly has the attraction of providing a bright line for police to follow. However, the "lawful public vantage point" test's simplicity is deceptive because it obscures the far reaching consequences it would have in diminishing the privacy all citizens may enjoy in their own homes. It would also signal the deathnell for *Katz* and the reasonable expectation of privacy test.[75]

B. Automobile Searches

Florida v. White[76]

Over dissents by Justices Stevens and Ginsburg, the Supreme Court reversed the Florida Supreme Court and upheld the warrantless seizure of an automobile parked in a public place.[77] The sole basis for the seizure was probable cause to believe the car was subject to forfeiture.[78]

Florida's Contraband Forfeiture Act provides that an automobile used in connection with an illegal drug transaction is subject to forfeiture. Defendant White was observed using his car to transport cocaine.[79] Several months later White was arrested at his place of work on an unrelated charge.[80] His car, which was parked in his employer's parking lot was seized at the time of his arrest on the sole ground it was "forfeitable contraband" because of the prior drug transportation. An inventory search of the car revealed two pieces of crack cocaine in the ashtray.[81]

The Florida Supreme Court ruled that no exigency justified the seizure of the vehicle without a warrant and suppressed the fruits of the inventory search.[82] Distinguishing *Carroll v. United States*,[83] the Florida high court concluded that there was a "vast difference" between a temporary seizure and search of a car under *Carroll* and the more intrusive seizure of a vehicle for the purpose of forfeiture.[84]

Justice Thomas, writing for seven members of the Court disagreed, finding that the "principles underlying the rule in *Carroll* . . . fully support the conclusion that the warrantless seizure of respondent's car did not violate the Fourth Amendment."[85] To bolster this conclusion, Thomas argued that fed-

75. For a discussion of alternative approaches to the "lawful public vantage point" test, see Benner, *supra* note 61 at 868-73.

76. 526 U.S. 559 (1999).

77. *See id.*

78. *See id.*

79. *See id.* at 561.

80. *See id.*

81. *See id.* at 562.

82. White v Florida, 710 So.2d 949 (Fla. 1998)

83. 267 U.S. 132 (1925) (the prohibition era case which created the automobile exception to the warrant requirement for searches of readily mobile vehicles).

84. *White*, 710 So.2d at 953.

85. *Id.*

eral law enforcement practice at the time the Fourth Amendment was adopted permitted such warrantless seizures, and cited ancient customs statutes dating back to 1789 to support this contention.[86] These statutes authorized warrantless searches and seizures of ships, which concealed goods subject to customs duties.[87] Thomas also emphasized that the car was parked in a public place and that therefore no privacy interest was involved which merited protection by a warrant.[88]

Justice Stevens, joined by Justice Ginsburg dissented.[89] They noted that while the majority had not disavowed the presumption that a warrantless seizure is unreasonable under the Fourth Amendment, the exceptions have all but swallowed this general rule.[90] Indeed there would no longer seem to be any presumption with respect to automobiles, for it is hard to see how the balancing test normally used to overcome the presumption in favor of warrants could have been fairly applied in this case. On the state's side of the scale there was no fear that anything dangerous or illegal was inside the car at the time it was seized. The only state concern was an economic interest in the forfeited vehicle which at most was threatened by the theoretical exigency that the movable vehicle, which the police had impounded, might somehow escape from police control before they could get a warrant, notwithstanding the fact that the police held both the keys and the owner in custody.[91] On the other side of the balance was the owner's significant property interest affected by a lengthy seizure, the privacy interest invaded by the inevitable inventory search of the vehicle, and the time, expense and hassle of having to litigate to reclaim wrongfully seized property in a post-deprivation hearing.[92] As the dissent pointed out, the protection which a warrant provides – a neutral determination of probable cause – was especially needed in this case to protect those interests because law enforcement agencies cannot be relied upon to be impartial decision makers, since they have a pecuniary interest in the property they seize for the purpose of forfeiture.[93]

A final observation concerns the telltale warning signaled by Justices Souter and Breyer.[94] Although they joined Thomas' opinion, they nevertheless cautioned in a separate concurring opinion by Justice Souter that the majority opinion should not be read "as a general endorsement of warrantless seizures of anything a State chooses to call 'contraband' whether or not the property happens to be in public when seized."[95] This warning highlights the

86. *See id.* at 562.
87. *See id.* (citing Carroll v. United States, 267 U.S. 132, 150-51 (1925)).
88. *See id.* at 561.
89. *See id.* at 564 (Stevens, J., dissenting).
90. *See id.* at 565.
91. *See id.* at 564.
92. *See generally id.*
93. *See id.* at 570. Under Florida law title to the forfeited property vests in the seizing law enforcement agency. Fla. Stat. § 932.704(8).
94. *See id.* at 564 (Souter, J., concurring).
95. *Id.*

curious fact that the state did not argue the warrantless seizure was justified under the plain view doctrine.[96] Instead of relying on this doctrine the state sought a decision on a far more sweeping question: "[W]hether, absent exigent circumstances, the warrantless seizure of an automobile under the [Contraband] Forfeiture Act violated the Fourth Amendment."[97] Thomas's opinion does not state the question to be answered in this broad way. Indeed, he pays lip service to the fact that the automobile in this case was in a public place, but it is not clear that the locus of the car is essential to the majority's holding. Especially in light of Thomas' assertion that *Carroll* and historical practice "fully support" the majority's conclusion that the warrantless seizure was valid,[98] we may well expect someday to see the argument, Souter and Breyer's disclaimer notwithstanding, that property which is not illegally possessed, and is not evidence of a crime, may nevertheless be seized without a warrant if there is probable cause to believe it may be forfeitable under some statutory definition of "contraband." In light of the weak protection afforded by the Fourth Amendment's balancing test, it may be that only post-deprivation remedies guaranteed under procedural due process will provide any meaningful protection against unwarranted seizures of property in the future.[99]

Wyoming v. Houghton[100]

In *Katz v. United States,*[101] the Supreme Court established the guiding principle that the Fourth Amendment protects people not places.[102] In *Houghton*, a divided Court tossed this principle aside, reduced the privacy of automobile passengers and expanded the scope of an automobile search, holding that where police have probable cause to search a car, they may search a passenger's belongings if they could contain the object of the search.[103] Specifically, the majority found that probable cause to search a driver's car for drugs based on the driver's conduct and admissions, justified the search of a female passenger's purse, even though there was no probable cause to suspect her of wrongdoing or to believe there was contraband in her purse.[104] In dissent, Justice Stevens, joined by Souter and Ginsburg accused the Court of going beyond existing precedent and overturning the "settled distinction" between drivers and passengers recognized over fifty years ago by Justice

96. The plain view doctrine permits police to make warrantless seizures if they are in a lawful position to view and seize the property and have probable cause to believe it is contraband or evidence of a crime. *See* Horton v. California, 496 U.S. 128 (1990).

97. *White*, 526 U.S. at 559.

98. *See id. at 564.*

99. *See generally* City of West Covina v. Perkins, 525 U.S. 234 (1999).

100. 526 U.S. 295 (1999).

101. 389 U.S. 347 (1967).

102. *See id.* at 353.

103. *See Houghton*, 526 U.S. at 296.

104. *See id.*

Jackson in *United States v. Di Re*.[105] The search in Houghton arose following a routine traffic stop for speeding. A Wyoming Highway Patrol officer noticed a hypodermic syringe in the driver's shirt pocket.[107] The driver admitted that he used the syringe to take drugs.[108] At this point the officer ordered two female passengers out of the car. One of those females was Sandra Houghton.[109] Searching the car he found a purse on the back seat, which Houghton admitted belonged to her.[110] Inside the purse the officer found several containers which he also opened, discovering drugs.[111]

In an apparent attempt to cut the Gordian Knot of confusion surrounding the scope of automobile searches based on probable cause, the Court in *Houghton* abandoned the individualized suspicion standard in order to fashion a bright line rule.[112] After *Houghton*, an officer who has probable cause to search an automobile can search any container capable of holding the object of the search. This will be true even though the container is identified as the property belonging to a mere passenger, and even though there is no probable cause to believe that specific container holds the object of the search.

In an extraordinarily cavalier opinion, Justice Scalia begins with his traditional two step analysis of Fourth Amendment issues.[113] First, Scalia looks at history to provide an answer to the question whether the search or seizure is reasonable.[114] If history is unavailing, he then turns to a balancing test where he measures "the degree to which the search intrudes upon an individual's privacy" and balances that against "the degree to which [the search] is needed for the promotion of legitimate government interests."[115]

Turning to history, Scalia finds that there is historical support for permitting the search of all containers in a vehicle. As precedent he dredges up from the obscurity of antiquity old customs cases involving searches of ships for imported goods.[116]

Recognizing that these cases don't quite deal with something as private as a woman's purse, he then moved on to conduct his balancing test. Here, he employed a bizarre "assumption of the slightest theoretical risk diminishes your privacy" argument, finding that a passenger's expectation of privacy in personal belongings carried in a car are diminished because the car

105. *See id.* at 303 (citing United States v. Di Re, 332 U.S. 581 (1948)).
106. *See id.* at 302.
107. *See id.* at 299.
108. *See id.*
109. *See id.*
110. *See id.*
111. *See id.*
112. *See id.* at 301.
113. *See id.* at 298.
114. *See id.*
115. *Id.*
116. *See id.*

might become involved in a traffic accident where the contents might be scattered about, and thus be open to public scrutiny.[117]

Placing his thumb on the scale for the government, Scalia then concluded that catching drug users would be "appreciably impaired" by a rule that required officers to refrain from searching passengers belongings unless they have probable cause, because the passengers might be involved with the driver in illegal drug use.[118] Acknowledging that it would not always be true that passengers would be partners in crime with drivers, Scalia nevertheless asserted: "but the balancing of interests must be conducted with an eye to the generality of cases."[119] To require individualized justification for the search of a passenger's belongings would result in a "bog of litigation" Scalia observed, which would muddy the bright line rule.[120] Therefore, the balance of interests militated in favor of the "needs of law enforcement" and against a personal privacy interest which Scalia viewed as "ordinarily weak."[121]

Justice Breyer in a concurring opinion agreed that creating a passenger's belongings exception would muddy the bright line rule that allowed the search of all containers which could hold the object of the search.[122] He noted, however, several limitations on the holding of *Houghton*. First, he observed that the bright line rule only applied to automobile searches.[123] Second, he noted that *Houghton* does not authorize personal searches without probable cause or reasonable fear for safety (pat downs).[124] Finally, Breyer took pains to point out, in *Houghton* the woman was not holding her purse. It "would matter" to Justice Breyer "if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of outer clothing."[125] So much for bright line rules.

By focusing on the places searched, (i.e. the automobile and the purse, the court has, in a futile quest for simplistic clarity, stood Katz[126]on its head and once again forsaken the principle of individualized justification, which once served as the cornerstone of fourth amendment protection.[127]

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117. *Id.* at 300.
118. *See id.*
119. *Id.* at 301.
120. *See id.*
121. *Id.*
122. *See id.* at 302 (stating that "the resulting uncertainty will destroy the workability of the bright line rule set forth in United States v. Ross, 456 U.S. 798 (1982)").
123. *See id.*
124. *See id.*
125. *Id.*
126. Katz v. United States, 389 U.S. 347 (1967).
127. *See generally,* Benner, *supra* note 61.

Knowles v. Iowa[128]

In an apparent victory for the Fourth Amendment, the Supreme Court held the line and refused to expand the search incident to arrest exception beyond circumstances involving an actual custodial arrest.[129]

Knowles was stopped for speeding forty-three m.p.h. in a twenty-five m.p.h. zone.[130] Under Iowa law, the officer had the discretion to make either a custodial arrest or issue a citation.[131] Regardless of which option he chose, the officer was authorized by statute to make a full search of the car during a traffic stop. The officer gave Knowles a citation and then searched his car without consent or probable cause, finding marijuana under the seat.[132]

The Supreme Court, in a unanimous opinion authored by Chief Justice Rehnquist, reversed the Iowa Supreme Court's decision, which had upheld the search incident to a citation.[133] As the Chief Justice noted, the rationale for the search incident to arrest exception to the warrant requirement is based upon "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence . . . ."[134] Limiting the search incident to arrest to its rationale, Rehnquist concluded that only when a person is arrested and taken into custody, do the concerns for officer safety justify the full search of the person and automobile.[135] The danger to the officer flows from the fact of arrest, which results in extended exposure to the suspect under circumstances of stress and uncertainty. On the other hand, a routine traffic arrest resulting in a citation was viewed by the Chief Justice as "more analogous to a so-called Terry stop."[136] Such a "brief encounter" was less likely to provoke hostility to police. In any event, noted the Chief Justice, officers have an independent basis to search for weapons and protect themselves from danger. They can order the driver and any passengers out of the car.[137] They can also conduct a Terry pat down of both driver and passenger if there is reasonable suspicion they may be "armed and dangerous."[138] Police may also conduct a search of the passenger compartment of the car if there is "reasonable suspicion an occupant is dangerous and may gain immediate control of a weapon."[139]

Rejecting Iowa's "bright line rule" that full searches of cars were per-

128 525 U.S. 113 (1998).
129. *See generally id.*
130. *See id.* at 117.
131. *See id.* at 118, n.1.
132. *See id.* at 117.
133. *See id.*
134. *Id.* (quoting United States v. Robinson, 414 U.S. 218, 234 (1973)).
135. *See id.* at 120.
136. *Id.*
137. *See id.* (citing Maryland v. Wilson, 519 U.S. 408, 414 (1997); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977)).
138. *Id.*
139. *Id.* (quoting Michigan v. Long, 463 U.S. 1032, 1049 (1983)).

mitted in any case in which there was probable cause to make a custodial arrest, the Chief Justice concluded that the concern for officer safety "is not present to the same extent (in a routine traffic stop) and the concern for destruction or loss of evidence is not present at all."[140]

C. Media Presence During Searches

Wilson v. Layne[141]

Pursuant to a U.S. Marshals' national fugitive apprehension program, three arrest warrants for probation violations were obtained for Dominic Wilson.[142] Each warrant bore the address of Dominic's parents' home, although the police were unaware of this fact. Around 6:45 a.m., a team of U.S. Marshals and Montgomery County police, accompanied by a reporter and a photographer from the Washington Post, entered the Wilson residence.[143] Dominic Wilson's parents, Charles and Geraldine, were still in bed when the officers entered. Charles, dressed only in briefs, ran into the living room to investigate.[144] He found at least five plain-clothes men with guns in his living room, so he angrily demanded that they state their business. The officers quickly subdued Charles while his wife, dressed only in a nightgown, watched.[145] Dominic was not in the house. The Post photographers took numerous pictures, which were never published.[146]

The petitioners sued the law enforcement officials in their personal capacities as they contended that the officers' actions in bringing members of the media into their home was a violation of the Fourth Amendment.[147] The District Court denied respondent's motion for summary judgment on the basis of qualified immunity.[148] A divided Court of Appeals panel reversed and held that the respondents were entitled to qualified immunity.[149]

The Supreme Court granted review to reconcile a split among the Circuits.[150] The Court began by noting that government officials performing discretionary functions generally were granted a qualified immunity and were "shielded from liability for civil damages insofar as their conduct did not violate clearly established statutory or constitutional rights, which a reasonable person would have known."[151]

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140. *Id.*
141. 526 U.S. 603 (1999).
142. *See id.* at 606.
143. *See id.*
144. *See id.*
145. *See id.* at 607.
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.*
151. *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

The officers, without question, had authority to enter the Wilson home to execute the arrest warrant for Dominic Wilson. However, police actions in execution of a warrant must be related to the objectives of the authorized intrusion of the home. The Court found that the presence of the media was clearly unrelated to the objective of effecting an arrest.[152]

In answering Respondent's First Amendment arguments, the Court also found that the interest of the police and U.S. Marshals in promoting good public relations was simply not enough, standing alone, to justify the media intrusion into a private home.[153]

The Court concluded, however, that it was not unreasonable for a police officer to have believed that bringing media observers along during the execution of an arrest warrant in a home was lawful. Therefore, qualified immunity applied in this case.[154] In his dissent Justice Stevens did not believe that qualified immunity applies when the sanctity of the home has been invaded.[155]

Hanlon v. Berger[156]

In this companion case to *Wilson v. Layne*[157], government officials in multiple vehicles went onto a ranch to execute a search warrant, for "the taking of wildlife in violation of federal laws."[158] The warrant excluded the residence on the 75,000-acre ranch. The officials brought a media crew from CNN with them and searched the ranch and its outbuildings.[159] In a *per curiam* opinion the Court again found a Fourth Amendment violation, but ruled that the police and U.S. Marshals had qualified immunity, because this was a case of first impression.[160] Justice Stevens reiterated his dissent in *Wilson*.[161]

D. Fourth Amendment Exclusionary Rule

Pennsylvania Board of Probation v. Scott[162]

In *Scott*, the Court held that the Fourth Amendment exclusionary rule does not extend to parole revocation hearings.[163] Scott was on parole for a

152. *See id.* at 609.
153. *See id.*
154. *See id.* at 611.
155. *See id.* at 615 (Stevens, J., concurring in part and dissenting in part).
156. 526 U.S. 808 (1999).
157. *See Wilson*, 526 U.S. 603.
158. *Hanlon*, 526 U.S. at 808.
159. *See id.*
160. *See id.*
161. *See id.* at 809 (Stevens, J., dissenting).
162. 524 U.S. 357 (1998).
163. *See id.* at 359. Evidence obtained in violation of the Fourth Amendment is generally

third degree murder conviction.[164] As a consideration for release on parole, he signed an agreement that gave permission for authorities to conduct warrantless searches of his residence.[165] When police officers received information that Scott possessed firearms, among other things, at his home, they obtained an arrest warrant for him and arrested Scott at a restaurant.[166] They also went to his home, however, and conducted a warrantless search, seizing evidence that was introduced against Scott at his parole revocation hearing.[167] Scott was held to be in violation of his parole and returned to the penitentiary to serve at least 36 months of "backtime."[168] No other criminal proceedings were brought against Scott. The Pennsylvania Supreme Court concluded that the evidence should have been suppressed as unlawfully seized since the arresting officers knew Scott was on parole when they arrested him.[169] The Pennsylvania court had analyzed the issue as one of balancing the cost to society of excluding probative evidence against the benefits to be derived from deterring Fourth Amendment violations.[170] The state court concluded that a failure to exclude the unlawfully seized evidence would encourage officers to violate the Fourth Amendment right of all parolees. Indeed, the violations would be rewarded by the return of the parolee to prison, perhaps for a considerably lengthier period of incarceration than if the parolee were prosecuted for the offense arising from the discovered evidence.

Justice Thomas, writing for a majority of the U.S. Supreme Court, reversed the Pennsylvania Supreme Court, holding the unlawfully seized evidence was admissible.[171] The majority in the U.S. Supreme Court saw the balance differently. Justice Thomas reasoned that burdening the administrative process of the penitentiary system with challenges to the method employed by the state in securing the evidence would have too deleterious an impact on prison administration.[174] On the other hand, the Justices reasoned, police do not make a conscious decision that evidence they secure should be used for parole violation hearings rather than on original criminal prosecutions. Original criminal prosecutions are the primary objectives of the police.[175] Therefore, to exclude illegally obtained evidence in parole violation proceedings exacted too great a price when compared to what Justice Tho-

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inadmissible at trial in a criminal case. Mapp v. Ohio, 367 U.S.643 (1961). There are numerous exceptions, however. *See*, e.g., United States v. Leon, 468 U.S. 897 (1984).

164. *See id.* at 360.
165. *See id.*
166. *See id.*
167. *See id.*
168. *See id.* at 361.
169. *See id.*
170. *See id.*
171. *See id.* at 369.
172. *See id.* at 361.
173. *See id.*
174. *See id.* at 364.
175. *See id.* at 367.

mas saw to be a relatively negligible benefit. Justice Souter, joined by Justices Ginsburg and Breyer, dissented.[176] Justice Souter agreed that the exclusionary rule is not required by the Fourth Amendment, but is a procedure to deter Fourth Amendment violations by police. However, Justice Souter found that a considerably greater benefit was achieved by utilizing the rule in situations such as that presented by *Scott*, because parole revocation often is the only forum in which the state will use the illegally seized evidence.[177] When a suspect is identified as a parolee, the police and parole officers usually cooperate. Hence, a parole revocation must be in the mind of the officer as the investigation progresses. The result is usually a return to the penitentiary for the parolee following an administrative hearing considerably less cumbersome than a criminal trial, without the burdensome safeguards of proof beyond a reasonable doubt, evidentiary rules, or trial by jury. Thus, when the subject of the police investigation is a known parolee, the incentive to circumvent the Constitution becomes compelling.

Justice Stevens also wrote a short dissent in which he agreed with Justice Souter that exclusion should be available to parolees.[178] He added, however, that the exclusionary rule was not merely a creature of policy considerations, since he believed exclusion of evidence seized in violation of the Fourth Amendment was constitutionally mandated.[179]

III. DUE PROCESS

A. *Vagueness Doctrine*

City of Chicago v. Morales[180]

A sharply divided Court struck down Chicago's Gang Congregation Ordinance, which prohibited citizens who associated with apparent gang members from loitering in a public place.[181] Designed to take back the streets from gangs who intimidated the neighborhood, the ordinance allowed a police officer to order any group of two or more persons gathered in a public place to disperse from the area if he reasonably believed one of them was a gang member and determined they were loitering.[182] Failure to obey the dispersal order gave the officer grounds to arrest all members of the group whether or not they were gang members.[183]

176. *See id.* at 370 (Souter, J., dissenting).
177. *See id.* at 377.
178. *See id.* at 369 (Stevens, J., dissenting).
179. *See id.* (It is noteworthy that no court, including the U.S. Supreme Court, relied on Scott's written agreement to allow warrantless searches of his home to justify the search).
180. 119 S. Ct. 1849 (1999).
181. *See id.* at 1849.
182. *See id.* at 1851.
183. *See id.*

Invoking the vagueness doctrine, a majority of six justices agreed the ordinance was invalid because it unnecessarily gave police too much discretion to determine what activities constituted "loitering" and therefore permitted arbitrary enforcement in violation of the Fourteenth Amendment's Due Process Clause.[184]

Under the two alternate prongs of the vagueness doctrine, a law violates the Due Process Clause if it either (1) fails to define the offense with sufficient clarity to give fair warning regarding what conduct is prohibited, or, (2) fails to provide sufficient guidelines to control official discretion in order to prevent arbitrary or discriminatory enforcement. The Supreme Court has in recent years found the second prong to be the more important.[185]

The fatal flaw in the Chicago ordinance was the operative word "loitering," which was defined as remaining in one place "with no apparent purpose."[186] Finding that this inherently subjective definition gave police "vast discretion" to determine when a group could be told to disperse, Justice Stevens, joined by Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer, noted that relatives, teachers and even total strangers might arbitrarily have their liberty abridged if they were seen talking to a gang member on a street corner outside their own home.[187] On the other hand, the ordinance ironically did not apply to situations where a group had an "apparent purpose" to threaten or intimidate others.[188] Thus, the ordinance excluded from its broad sweep the very conduct that supposedly motivated its enactment. Finding that the broad grant of discretion failed to provide minimal standards of definiteness and clarity to prevent abuses in enforcement, the majority therefore struck the ordinance down on its face without regard to the facts of the cases consolidated for review.[189]

Justice Scalia dissented separately[190] and Justice Thomas, joined by the Chief Justice and Scalia also filed a brief dissenting opinion.[191] Admitting that there might be "some ambiguity at the margin" Justice Scalia criticized the majority's use of facial review to strike down the ordinance.[192] Reciting the facts of the specific encounters at issue on appeal, Justice Scalia would have upheld the ordinance as applied to each of those cases. Justice Thomas, in a brief paragraph complained that the majority had created a new freedom to loiter, which was contrary to the Nation's history and tradition.[193] How-

184. *See id.* at 1852.

185. *See* Kolender v. Lawson, 461 U.S. 352 (1983) (striking down a California statute which permitted arrest if a person failed to carry "credible and reliable" identification").

186. *Morales,* 119 S. Ct. at 1852.

187. *See id.* at 1862.

188. *See id.*

189. *See id.* at 1863.

190. *See id.* at 1867 (Scalia, J., dissenting).

191. *See id.* at 1879 (Thomas, J., dissenting).

192. *See id.* at 1867 (Scalia, J., dissenting).

193. *See id.* at 1879 (Thomas, J., dissenting).

ever, only two justices, Souter and Ginsburg joined that portion of Stevens' opinion which referred to the freedom to loiter for innocent purposes as a liberty interest protected by the Fourteenth Amendment. Justices O'Connor, Kennedy and Breyer all filed separate concurring opinions, joining Steven's opinion only in its central holding, which focused on the control of police discretion.

It is clear from the six separate opinions in this case that a majority of the Court is still committed to using facial review to strike down broad sweeping laws which unnecessarily grant police such unbridled discretion that they permit arbitrary and discriminatory enforcement practices.[194] *Morales* therefore is an important case because it establishes the Vagueness Doctrine as an alternate approach to the Equal Protection Clause, when seeking to combat racial discrimination in law enforcement. Under this alternative, laws which permit such discrimination can be invalidated without having to prove racial bias.

B. Right to Practice Law

Conn v. Gabbert[195]

In a case involving the re-trial of the high profile "Menendez Brothers" case, prosecutors learned that Lyle Menendez may have written a letter to his former girlfriend instructing her to testify falsely at the first trial.[196] Attorney Gabbert represented the girlfriend, Tracy Baker, who had testified for the defense in the first trial, which ended in a hung jury. Prosecutors obtained a subpoena directing the girlfriend to testify before the Los Angeles County grand jury and to also produce any correspondence she may have received from Lyle Menendez.[197] Prosecutors subsequently learned that Ms. Baker had given all of her letters from Menendez to her attorney Mr. Gabbert. When Ms. Baker and Gabbert arrived at the courthouse on the day scheduled for her grand jury testimony, prosecutors served a search warrant for Gabbert's person, believing he would have the letter in his possession.[198] While Gabbert was taken to a private room to be searched by a Special Master, Ms. Baker was called by prosecutors into the grand jury room and questioned.[199]

Gabbert subsequently filed an action pursuant to 42 U.S.C. § 1983 alleging that his Fourteenth Amendment right to practice his profession had been unreasonably interfered with by the prosecutor's execution of a search warrant at the precise moment his client was called to testify before the

194. *See generally id.*
195. 526 U.S. 286 (1999).
196. *See id.* at 289.
197. *See id.*
198. *See id.* at 290.
199. *See id.*

grand jury.[200] Justice Rehnquist, writing for eight members of the Court rejected this argument, finding that precedent established a violation only when there was a complete prohibition of the right to engage in a calling.[201] The brief interruption caused by legal process in this case, the Court said, did not deprive Gabbert of any liberty interest in practicing law. Neither did Gabbert have standing to raise any claim by his client that her right to the assistance of counsel was violated, if indeed there was a right to have counsel's assistance outside the grand jury room.[202]

In conclusion, Rehnquist summarized the Court's holding by stating that the Fourteenth Amendment right to practice one's calling is not violated by the execution of a search warrant even if the timing of the search is "calculated to annoy or even to prevent consultation with a grand jury witness."[203]

Stevens, in a separate opinion concurred in the result because Gabbert had not shown any evidence that his reputation, income, clientele or professional qualifications were adversely affected by the search.[204] Therefore, Stevens could find no deprivation of any liberty or property interest. Stevens noted that the reasonableness of the search under the Fourth Amendment had not been squarely presented or argued by the parties.[205]

C. Procedural Due Process and Remedies for Wrongful Seizures

City of West Covina v. Perkins[206]

In an opinion joined by seven members of the Court, Justice Kennedy concluded that due process requires law enforcement agents to take "reasonable steps" to give notice to a homeowner that property has been seized pursuant to a search warrant.[207] The majority did not go the extra step, however, and require that police also give the homeowner notice of state law remedies for obtaining the return of his or her property.[208]

Perkins had the bad luck to have a boarder who, later, after he left Perkins' home, became a suspect in a murder investigation.[209] Police obtained a search warrant for Perkins home to look for evidence against the former boarder.[210] They seized a shotgun and other miscellaneous items belonging to Perkins and his family including over $2000 in cash.[211] The officer left on the

200. *See id.*
201. *See id.* at 294.
202. *See id.* at 293.
203. *Id.* at 294.
204. *See id.* (Stevens, J., concurring).
205. *See id.* at 295.
206. 525 U.S. 234 (1999).
207. *See id.* at 234.
208. *See generally id.*
209. *See id.* at 235.
210. *See id.*
211. *See id.*

premises an inventory of the items seized and the phone number of the detective in charge of the investigation.[212]

When Perkins called the detective seeking return of his property, he was told he needed to obtain a court order from the judge who issued the search warrant. When Perkins went to the courthouse he discovered that the issuing judge had gone on vacation.[213] Perkins tried to get another judge to release his property but was told that there was no record of any search warrant under Perkin's name. The number of the search warrant had not been given in the original notice and inventory because the search warrant had been sealed to allegedly avoid compromising the ongoing murder investigation.[214]

Understandably upset at this apparent Catch-22, Perkins brought suit in Federal District Court against the city alleging that the search had been conducted without probable cause, had exceeded the scope of the warrant, and that the city had a policy of permitting unlawful searches.[215] The District Court granted summary judgment for the city on these issues and it was subsequently not contested that although Perkins was entitled to the return of his property, a valid search warrant had been properly executed.[216]

The District Court also found that California's post deprivation remedies for the return of seized property satisfied due process.[217] On appeal, the Ninth Circuit held that while state law post deprivation remedies were adequate, the city should have given Perkins notice of the proper procedure for obtaining the return of his property and the information necessary to invoke those procedures (i.e. the search warrant number).[218]

Reversing the Ninth Circuit, the Supreme Court held that since adequate state law remedies were published in generally available state statutes and case law, a homeowner whose property had been seized could turn to "these public sources to learn about the remedial procedures available to him."[219] The city therefore did not have to "inform him of his options."[220] In an apparent attempt to assist such homeowners the Court attached an appendix to the opinion listing the "Federal and State Laws Governing Execution of Search Warrants and Procedures for Return of Seized Property."[221] Unfortunately, the Appendix gives the wrong statutory reference for California - the state which it presumably found had adequate procedures.[222]

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212. *See id.* at 235-36.
213. *See id.* at 236.
214. *See id.*
215. *See id.*
216. *See id.*
217. *See id.*
218. *See* Perkins v. City of West Covina, 113 F.3d 1004, 1011-14 (9th Cir. 1997).
219. *Id.* at 237.
220. *Id.*
221. *Id.* at 239.
222. The Court's appendix cites CAL PENAL CODE §1535 which simply requires that the officer executing a search warrant give a receipt for the property taken. The appropriate remedial sections, however, are §§ 1536 and 1540 which have been interpreted to empower a

There is perhaps a brighter side to this case, however. The majority opinion clearly and unequivocally asserts that when officers seize property pursuant to a warrant "due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return."[223] While the Court did not have occasion to define what "reasonable steps" might entail, it seems clear that at a minimum such notice must describe the property that has been seized and identify the agency responsible for the seizure. On this point there seems unanimous agreement. Even Justice Thomas, in a concurring opinion joined by Justice Scalia, grudgingly acknowledged that history supported such a minimal notice requirement.[224] Thomas refused, however, to accept the majority's position that such notice was required as a matter of procedural due process.[225] Arguing that procedural due process should not apply to the execution of search warrants, Thomas and Scalia would determine the scope of any notice requirement under the Fourth Amendment's flexible reasonableness standard.[226] The Fourth Amendment, of course, is made applicable to the states through the Fourteenth Amendment's Due Process Clause. Since Due Process is the engine that carries the Fourth Amendment to the states, Thomas and Scalia would seem to have put the cart before the horse.

IV. SELF-INCRIMINATION

Mitchell v. United States[227]

In a narrow victory for the Fifth Amendment, the Court held firm to established principles ruling 5-4 that a guilty plea does not constitute a waiver of the privilege against self-incrimination at sentencing.[228] Therefore, the sentencing judge cannot draw an adverse inference based upon defendant's silence regarding her participation in the crime.[229]

Amanda Mitchell was among twenty-two defendants indicted for conspiracy to distribute cocaine. She pled guilty to the sheet without any plea

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court to entertain summary proceedings and grant relief pursuant to a motion to return wrongfully seized property. *See* the lower court's opinion in *Perkins*, *supra* note 218, at 1011. However, neither § 1536 nor § 1540 describe the procedure for obtaining such a court order. In light of the fact that search warrants most frequently target minorities who are less likely to have adequate access to legal resources, one may question the Court's assumption that these "public resources" are very helpful. *See* Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego*, 36 CAL. W. L. REV. 221, 230 (2000).

223. *Id.* at 240.

224. *Id* at 247.

225. *See id.* at 246 (Thomas, J., concurring). In Thomas' view the majority's "suggestion" was dicta. *See id.*

226. *See id.*

227. 526 U.S. 314 (1999).

228. *See id.*

229. *See id.*

agreement, but reserved the right to contest the drug quantity attributed to her at sentencing. At the plea colloquy after a factual basis was laid the trial judge asked: "Did you do that?" Mitchell responded "Some of it."[230] After further discussion concerning her liability as an aider and abettor Mitchell persisted in her plea.

At the sentencing hearing a co-defendant testified regarding Mitchell's role as a drug courier on a number of specific occasions. From this testimony the sentencing judge inferred that Mitchell had been a drug courier on a regular basis for over a year and a half and had sold up to two ounces a week during this time.[231] This put her over the five-kilogram threshold and resulted in her receiving the mandatory ten-year minimum sentence. In handing down this sentence the trial judge stated on the record that "one of the things" that persuaded the court to rely upon the testimony of the co-defendant was Mitchell's "not testifying to the contrary."[232]

On appeal defendant argued that the judge had drawn an adverse inference from the defendant's silence in violation of her Fifth Amendment privilege. The government, on the other hand, drew an analogy to the general rule that a witness may not testify voluntarily about a subject and then invoke the privilege with respect to the details. According to the government, the defendant therefore waived any Fifth Amendment privilege with respect to the details of the crime when she pled guilty.[233]

Rejecting this argument Justice Kennedy, writing for Stevens, Souter, Ginsburg and Breyer, distinguished the rule for witnesses, noting that the policy concerns which justify cross-examination of a defendant who testifies about a subject are not applicable to the plea colloquy, which exists as a protection against defendants making unintelligent and involuntary pleas.[234] The government's rule, Kennedy said, would turn "this constitutional shield into a prosecutorial sword."[235]

The majority also refused to retreat from the rule against adverse inferences from a defendant's silence. Finding the rule to be of "proven utility" Justice Kennedy observed in language reminiscent of Escobedo and Miranda:

> [T]here can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition . . . .The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether

230. *Id.* at 318.
231. *See id.* at 319.
232. *Id.* at 320.
233. *See id.* at 321.
234. *See id.* at 322-23.
235. *Id.* at 322.

> the government has carried its burden to prove its allegations while respecting the defendant's individual rights.[236]

Justice Scalia, joined by the Chief Justice, and Justices O'Connor and Thomas dissented. The dissenters agreed that Mitchell had the right to invoke the Fifth Amendment at sentencing, but would permit the sentencing judge to draw adverse inferences from her "uncooperativeness" in failing to testify about her participation in the crime.[237] Justice Thomas, in a separate dissent, went even further, indicating that he would overrule *Griffin v. California*,[238] which established the ban on drawing adverse inferences from a defendant's silence at the guilt phase.[239]

United States v. Balsys[240]

In *Balsys*, the Court held that fear of criminal prosecution by a foreign government, without any danger of prosecution in the United States, will not justify the refusal of a person to testify pursuant to a subpoena.[241] The Fifth Amendment's prohibition against compelled self-incrimination therefore does not provide any protection for a witness who is in danger of only foreign prosecution.

Balsys, a resident alien in the United States, was the subject of a deportation proceeding.[242] The allegations in support of his deportation were that Balsys gave false information in his application for entry into the United States about his activities during World War II in Europe.[243] Apparently there was good reason to believe he had been a concentration camp guard who participated in many murders in the camp. Balsys was subpoenaed by the United States government to testify at a deposition in preparation for the deportation hearing. Balsys refused to testify, claiming his right to be free from compelled self-incrimination under the Fifth Amendment.[244] Balsys conceded that the privilege against self-incrimination could not be asserted in the deportation proceeding itself because of its civil character,[245] but raised instead his fear of criminal prosecution for war crimes. The government agreed that his fear of criminal prosecution for his wartime activities, by Lithuania, his native country, and also Israel were "real and substantial."[246]

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236. *Id.* at 330.
237. *See id.* at 331 (Scalia, J., dissenting).
238. 380 U.S. 609 (1965).
239. *See id.* at 342 (Thomas, J., dissenting).
240. 524 U.S. 666 (1998).
241. *See id.* at 669.
242. *See id.*
243. *See id.*
244. *See id.* at 670.
245. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984).
246. *Id* at n.2 (citing Zicarelli v. New Jersey Comm'n of Investigation, 406 U.S. 472 (1972)).

There was, however, no realistic fear of prosecution by the United States. A prosecution for perjury in his application for entry into the United States was barred by the statute of limitations, and none of his suspected war crimes were within the jurisdiction of the United States. The government moved to compel the testimony and the federal district court ordered Balsys to testify.[247] The Court of Appeals for the Second Circuit vacated the order, holding that Balsys could assert a Fifth Amendment privilege although his only reasonable fear of prosecution was by foreign governments.[248] The United States Supreme Court reversed the circuit court, holding that a witness had no right to assert the privilege where his fear of prosecution lay only in a foreign state.[249] The majority opinion was by Justice Souter. Justices Ginsburg and Breyer dissented.

Balsys' principal argument was that the Fifth Amendment's Self incrimination Clause, by its unequivocal terms, embraced any and all criminal prosecution.[250] The Fifth Amendment states that a person shall not be compelled "in any criminal case" to be a witness against himself.[251] The majority agreed that the phrase, "any," standing alone would appear to require protection with respect to potential foreign as well as domestic criminal prosecutions. The majority, however, held that the Self-incrimination Clause should be examined in the context of entire Fifth Amendment.[252] The Court noted that all of the other clauses in the Fifth Amendment, such as the grand jury guarantee, protection against double jeopardy, due process, and compensation for taking property, only bind the United States and not any other foreign government. Indeed, until the passage of the Fourteenth Amendment, none of the provisions of the Fifth Amendment even applied to the governments of the states of the United States. Placing the Self-incrimination Clause in that context, the majority held that the Clause is without import as to the threat of foreign prosecution. Accordingly, Balsys could not claim a right to remain silent despite his realistic fear of criminal prosecution in Lithuania or Israel.[253]

The Court did intimate a limitation on its otherwise broad holding. This exception dealt with the possibility of admissions being extracted and used in the prosecution of a crime which was common to both the United States and a foreign country.[254] If, the majority observed, it was shown that the United States granted immunity from domestic prosecution for a specific crime and compelled testimony for the purpose of delivering that testimony to prosecutors in another country so they could prosecute the same crime

247. *See id.*
248. *See id.*
249. *See id.* at 671.
250. *See id.* at 672.
251. U.S. CONST. amend V.
252. *See Balsys*, 524 U.S. at 673.
253. *See id.* at 674.
254. *See id.* at 698.

there, then the self-incrimination clause might be triggered, because the prosecution could not be "fairly characterized as distinctly 'foreign.'" [255] Despite a treaty between the United States and Lithuania which provided that the two governments "agree to cooperate in prosecution of person who are alleged to have committed war crimes" there was no showing, however, that "complementary substantive offenses" were involved in Balsys' case.[256] Thus the Court concluded that the "mere support of one nation for the prosecution efforts of another does not transform the prosecution of the one into the prosecution of the other." [257] This part of the majority opinion, while commanding a majority of the Court, was not joined by Justices Scalia or Thomas.

Justices Ginsburg and Breyer dissented. Justice Ginsburg, in her short opinion, argued that the Fifth Amendment, as an expression of "fundamental decency" and "civilized governmental conduct," should apply when there is a reasonable fear of foreign prosecution.[258] Justice Breyer, also joined by Ginsburg, argued that given the express terms of the self-incrimination prohibition (i.e. "any criminal case,") and prior precedent,[259] national boundaries should not erode the basic values underlying the Fifth Amendment.[260]

V. CONFRONTATION

Gray v. Maryland[261]

In *Gray*, Kevin Gray and Anthony Bell were charged with the beating murder of Stacy Williams in 1993.[262] Anthony Bell confessed to the police that he, Kevin Gray, and "Tank" Vanlandingham had committed the crime. Subsequently, Vanlandingham died. Gray and Bell were indicted for murder.[263] Gray moved for a separate trial, which was denied. At trial the prosecutor introduced the confession of Bell, in which he implicated Gray. To avoid the impact of *Bruton v. United States*,[264] the prosecution substituted a

255. *Id.*
256. *Id* at 700.
257. *Id* at 702.
258. *See id.* at 701-02.
259. Justice Breyer relied upon Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964) which held that witnesses granted immunity from state prosecution could nevertheless assert their fear of federal prosecution as a bar against compelling them to testify in a state proceeding. Justice Breyer read *Murphy* as abolishing the "same sovereign" rule of United States v. Murdock, 284 U.S. 141 (1931), which had held that the Fifth Amendment privilege could only be asserted against the jurisdiction seeking to compel the self-incriminating statements. The majority, however, disavowed this broad reading of *Murphy*, finding its historical premises flawed and its reasoning unsound. *See Balsys*, 524 U.S. at 688.
260. *See Balsys*, 524 U.S. at 703.
261. 523 U.S. 185 (1998).
262. *See id.* at 187.
263. *See id.*
264. 391 U.S. 123 (1968). *Bruton* held that the introduction of a non-testifying co-

blank for the defendant's name.[265] Then a police officer read the confession to the jury. When the policeman had finished reading the confession, the prosecutor asked him whether after Bell gave him this information, the policeman was able to arrest Gray. The policeman answered, "Yes."[266]

In a 5-4 decision authored by Justice Breyer, the Court held that substituting a blank or the word "deleted" for the defendant's name still constituted a violation of *Bruton* and the defendant's Sixth Amendment right to confront the non-testifying witnesses against him.[267] Breyer acknowledged that *Richardson v. Marsh*[268] held that if the confession did not facially implicate the defendant, a non-testifying co-defendant's confession could be introduced into evidence.[269] However, he pointed out that this case was more like *Bruton*, because the State did not delete all reference to the defendant in the confession, as had been done in *Richardson*.[270]

The dissent, authored by Justice Scalia, and joined by the Chief Justice and Justices Kennedy and Thomas, argued that the deletion fell within the exception to *Bruton* carved out by the Court's holding in *Richardson*.[271]

Lilly v. Virginia[272]

This capital case involved the admission into evidence of a co-defendant's confession "against penal interest," as an exception to the hearsay rule and defendant's constitutional right to confrontation.[273] The Court per Justice Stevens, however, reversed on the grounds that the non-testifying co-defendant's confession was not so much against the declarant's penal interest as it was against the penal interest of the defendant, and therefore was not reliable enough to be admitted into evidence without cross-examination.[274]

The facts of the case are as follows: Three men, Benjamin Lilly, his brother Mark, and Gary Wayne Barker broke into a home and stole nine bottles of liquor, three loaded guns, and a safe. They consumed the liquor, and

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defendant' s confession implicating another defendant on trial in the same proceeding violated the Confrontation Clause of the Sixth Amendment to the Constitution since the defendant was not able to cross-examine the confessing co-defendant. *See* SHELVIN SINGER AND MARSHALL J. HARTMAN, CONSTITUTIONAL CRIMINAL PROCEDURE HANDBOOK, § 22.3 (1986) for a discussion of *Bruton* and its progeny.

265. *See Gray*, 523 U.S. at 187.
266. *See id.*
267. *See id.* at 188.
268. 481 U.S. 200 (1987).
269. *See Gray*, 523 U.S. at 188 (citing Richardson v. March, 481 U.S. 200 (1987)).
270. *See id.* at 191.
271. *See id.* at 193 (Scalia, J., dissenting).
272. 527 U.S. 116 (1999).
273. *See generally id.*
274. *See id.* at 123.

later robbed a store.[275] Then they kidnapped Alex DeFilippis, stole his car, and killed him. They committed two additional robberies before being apprehended by the police.[276]

All three men were questioned separately, and Mark stated that he was pretty drunk from the liquor taken in the burglary and a twelve-pack of beer taken during one of the robberies. However, he "admitted" that his brother, Benjamin was behind the carjacking and had personally shot DeFilippis, while he (Mark) had nothing to do with the killing.[277]

At Benjamin's trial, the State introduced the tape recordings and transcripts of Mark's interrogation, including the section where he implicated Benjamin. The Judge allowed the tape-recording and transcripts, and Benjamin was found guilty and sentenced to death. The Virginia Supreme Court affirmed. The United States Supreme Court, however, granted certiorari and reversed.[278]

The leading case in the field, prior to *Lilly*, in which the State attempted to use the confession of a non-testifying accomplice to implicate the defendant, was *Bruton v. United States*.[279] In that case, Evans and Bruton were charged in a joint trial with armed postal robbery. An inspector testified that Evans had confessed to him that he (Evans) and Bruton had committed the crime.[280] The United States Supreme Court reversed the conviction, holding that Bruton's Right of Confrontation had been violated. Even though the confession was admissible against Evans, as a statement against his "penal interest," its use was not justified against Bruton.[281]

The importance of the "penal interest" exception for the defendant was highlighted in *Chambers v. Mississippi*.[282] In that case, Chambers was charged with the murder of a policeman. An individual named McDonald informed Chambers' lawyers that he had committed the crime, but he refused to testify to that at Chambers' trial. Mississippi evidentiary rules barred the use of McDonald's admissions as hearsay. The United States Supreme Court reversed, holding that the requirements of "due process" trumped Mississippi's Evidence Code and made admissible McDonald's admission that he had killed the police officer.[283]

However, when a confession made by a declarant implicates the defendant on trial, while minimizing the role of the declarant, the courts have traditionally viewed such "admissions against penal interest" with great cau-

275. *See id.* at 121.
276. *See id.*
277. *See id.*
278. *See id.* at 116.
279. 391 U.S. 123 (1968).
280. *See id.* at 126 (citing Bruton v. United States, 391 U.S. 123 (1998)).
281. *See id.* (citing *Bruton*, 391 U.S. 123).
282. 410 U.S. 284, 300 (1973).
283. *See id.*

tion. For example, in *Douglas v. Alabama*,[284] Justice Stevens points out that the Court held that the admission of a non-testifying accomplice's confession, shifting responsibility and implicating the defendant as the "trigger-man," "plainly denied [the defendant] the right of cross-examination secured by the Confrontation Clause."[285]

Having discussed the three above-mentioned cases, Justice Stevens then turned to the test promulgated by the United States Supreme Court for determining when such evidence would be admissible as an exception to the right of confrontation. Under that test the evidence must fall within a firmly rooted hearsay exception or otherwise possess particularized guarantees of trustworthiness.[286] Under that test, the "admission against penal interest" fails in a situation where the declarant is minimizing his role in the crime and essentially makes an admission against the "penal interest" of the defendant.

First, Stevens observed, "accomplice confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule"[287] Secondly, Justice Stevens found that such accomplice statements generally lack "particularized guarantees of reliability." Indeed, in the case at bar "Mark was in custody for his involvement in and knowledge of serious crimes and made his statements under the supervision of governmental authorities . . . . Thus, Mark had a natural motive to attempt to exculpate himself as much as possible."[288]

Therefore, Justice Stevens concluded that "these factors militate against finding that [the co-defendant's] statements were so inherently reliable that cross-examination would have been superfluous."[289]

VI. DOUBLE JEOPARDY

Monge v. California[290*]

In *Monge*, a non-capital case, the issue was whether *Bullington v. Missouri*[291] governed the sentencing enhancement proceeding so that an appellate reversal of the enhancement factor for lack of sufficient evidence beyond a reasonable doubt would trigger the double jeopardy bar to re-

284. 380 U.S. 415 (1965).
285. *Id.* at 419.
286. *See* Ohio v. Roberts, 448 U.S. 56 (1980).
287. *Lilly*, 527 U.S. at 133.
288. *Id.* at 136.
289. *Id.* The case was remanded to the Virginia Supreme Court to determine whether the Sixth Amendment violation was harmless beyond a reasonable doubt.
290. 524 U.S. 721 (1998).
* Contributed by Kim Fawcett, Assistant Defender, Supreme Court Unit, Office of the Illinois State Appellate Defender.
291. 451 U.S. 430 (1981).

sentencing on the enhancement factor, which would result in the defendant's receiving a significantly lower prison sentence.[292]

The Court held that *Bullington* does not govern in a non-capital case so Monge could be remanded for re-sentencing on the enhancement factor without violating double jeopardy.[293] Justice O'Connor wrote the majority opinion in a five-one-three split.

Monge was convicted of three drug-related offenses. Under California's "three-strikes" statute, he was vulnerable to possible sentence enhancement as he had a prior assault conviction, which constituted the first "strike."[294] If proved under the statute, it would result in a doubling of his prison sentence. Under the statute, the State had to prove two things: (1) that Monge personally committed the assault and (2) that he used a dangerous weapon.[295]

The sentencing judge found both factors were proved beyond a reasonable doubt, as the statute required.[296] The Court of Appeals reversed for lack of sufficient evidence to support the enhancement, holding that neither factor was proved by the document the State offered in support. The Court of Appeals relied on and applied *Burks v. United States*,[297] and *Bullington* to bar any further sentencing under the enhancement provisions of the statute.[298] The California Supreme Court reversed the double jeopardy ruling, holding *Bullington* did not extend to non-capital sentencing proceedings.[299] Thus, Monge faced re-sentencing under the enhancement provisions when he filed his certiorari petition.

Justice O'Connor held that sentencing does not place a defendant in jeopardy of an "offense" and so there can be no second jeopardy at a normal sentencing.[300] Also, sentencing determinations normally are not analogized to an acquittal. *Bullington* provided an exception.[301] *Bullington* involved a jury as the sentencer choosing between life and death, and it chose life. Then, upon reversal of his conviction, Bullington learned the State would again seek the death penalty.[302] In fact, this was the result of the re-sentencing upon reconviction. On appeal, the Supreme Court, in an opinion authored by Justice Blackmun, held that the second death penalty violated double jeopardy.[303] Although Justice Blackmun advanced a complicated analysis to explain why the *Bullington* fact-pattern created an exception to the general rule

292. *See Monge*, 524 U.S. at 724.
293. *See id.* at 734.
294. *See id.* at 725.
295. *See id.*
296. *See id.*
297. 437 U.S. 1 (1978).
298. *See Monge*, 524 U.S. at 725.
299. *See id.* at 726.
300. *See id.* at 728.
301. *See id.* at 730.
302. *See id.*
303. *See id.*

that double jeopardy does not apply to sentences, Justice Powell, in dissent, essentially characterized the *Bullington* result as a "death is different" analysis.

In *Monge*, the *Bullington* analysis was reviewed by Justice O'Connor. She noted first that *Bullington's* first jury operated in a trial-like proceeding during the sentencing phase; second that the jury had a choice between two well-defined alternatives under standards to guide its decision; third that the State was required to prove the facts that made Bullington eligible for death beyond a reasonable doubt in a separate proceeding; and fourth that the ordeal, anxiety, and expense of a capital sentencing hearing made it equal to a trial on guilt and innocence so that the State might fairly be limited to one fair opportunity to obtain a sentence of death or be forever barred from obtaining it.[304] Justice O'Connor then distinguished Monge's fact setting from Bullington's, stating that even if there were similarities in the procedural protections involved under the two statutes, i.e., proof beyond a reasonable doubt, a separate proceeding, etc., the important difference was that *Bullington* involved a capital sentencing.[305] A capital sentencing proceeding is practically a continuation of the trial on guilt or innocence, is unique in both its severity and finality, and calls for greater reliability, which parallels the double jeopardy clause's concern for preventing repeated attempts at convicting someone who, though innocent, may thereby be found guilty.[306] *Bullington* turned on both the nature of the proceedings and the consequences of the adverse result to the defendant. Therefore, even though the three strikes statute paralleled a capital sentencing hearing and had many trial-like protections, those were not enough to convert the non-capital sentencing into a candidate for inclusion in the *Bullington* exception.[307] Monge could be resentenced consistently with the constitution.

Justice Stevens dissented and stated that double jeopardy should bar the re-sentencing because there was a factual insufficiency in the evidence.[308] He also seemed concerned about sentence enhancement practices and double jeopardy because he stated in a footnote that the consequences of the majority opinion were accurately characterized by Justice Scalia as "sinister."[309] Justice Stevens also pointed out that the first steps down this road were taken by the Supreme Court in *McMillan v. Pennsylvania*.[310]

Justice Scalia, joined by Justices Souter and Ginsburg, agreed that *Bullington* should not be extended and that the double jeopardy clause does not

304. *See id.* at 730-31.
305. *See id.* at 731.
306. *See id.* at 732, n.8.
307. *See id.* at 734.
308. *See id.* (Stevens, J., dissenting) (citing Burks v. United States, 437 U.S. 1, 11 (1978)).
309. *Id.* at 737 n.8.
310. 477 U.S. 79 (1986) (holding that weapons sentencing enhancement provision does not violate double jeopardy).

apply to non-capital sentencing proceedings, but thought there was a larger problem and that Monge did not merely involve a sentencing proceeding.[311] Justice Scalia questioned whether a state could redefine a crime to have one element and call all of the other elements "sentencing enhancements," thereby excluding their determination from the protections of the Constitution.[312] For example, he asked whether a state could enact only one crime, "knowingly causing injury to another," punish it by 30 days in jail, and then add a series of sentencing enhancements authorizing increased punishment, up to life in prison without parole, but limit all present trial protections only to the 30-day offense.[313] Justice Scalia said this "gimmick" is the "El Dorado" of those who seek a "means of dispensing with inconvenient constitutional 'rights.'"[314]

Justice Scalia's useful and thought-provoking opinion is worthy of careful study because he addresses the need for a coherent fundamental analysis of the double jeopardy clause and the limits which should be placed on state legislatures when they define crimes and punishments in ways that evade the clause's protections. Justice O'Connor's opinion for the majority once again illustrates her common law judge approach. If Justice Scalia is right, then Justice O'Connor's opinion has to be wrong. If Justice O'Connor can factually distinguish Justice Scalia's hypothetical case and adhere to tradition and practice without being concerned about a cohesive and symmetrical body of law, then she is right. The outcome may depend on just which approach is taken at the outset. Justice Powell won this case, however, because Justice O'Connor essentially followed his dissent in *Bullington* while paying lip service to Justice Blackmun's analysis.

VII. CAPITAL PUNISHMENT

A. Mitigation

Buchanan v. Angelone[315]

A classic dichotomy in American death penalty jurisprudence is epitomized in theSupreme Court's opinion in *Buchanan v. Angelone*.[316] The dichotomy is clearly explained by Justice Scalia in his concurring opinion as "the incompatibility between the *Lockett-Eddings* requirement and the holding of *Furman v. Georgia*."[317]

311. *See Monge*, 524 U.S. at 737 (Scalia, J., dissenting).
312. *See id.* at 738.
313. *Id.* at 739-40.
314. *Id.*
315. 522 U.S. 269 (1998).
316. *Id.*
317. *Id.* at 275 (Scalia, J., concurring).

In *Lockett v. Ohio*,[318] the United States Supreme Court vacated the death sentence of a twenty-one-year-old woman because, under Ohio law, the jury was not permitted to learn about her background, low I.Q., or drug abuse problems.[319] In holding that the Ohio death penalty statute was too restrictive in not allowing the jury to consider her age, prior record, social background, and family history, the Court enunciated the doctrine that in a death penalty case, the sentencer must be able to consider all possible factors that might be mitigating. The Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering as a mitigating factor any aspect of a defendant's character or record."[320]

In *Eddings v. Oklahoma*,[321] the defendant, a sixteen-year-old male, shot and killed a highway patrol officer.[322] As in *Lockett*, the sentencing judge refused to consider evidence of the defendant's difficult childhood, mental and emotional age below the norm, having been raised by an alcoholic mother, and having suffered physical abuse at the hands of his father.[323] The trial judge also ignored testimony regarding the excellent chances for Eddings' rehabilitation, and a psychiatrist's testimony that after treatment, Eddings would not pose a threat to society. The judge took into account only Eddings' age as a mitigating factor before imposing the death penalty.[324] In reversing, the United States Supreme Court reiterated its doctrine in *Lockett* and held that "the state courts must consider all relevant mitigating evidence."[325]

According to Justice Scalia, however, in sharp contrast to this policy of bringing every possible mitigating factor before the sentencing court or jury lies the doctrine of *Furman v. Georgia*,[326] which seeks to constrain the sentencer's discretion in order "to avoid arbitrary or freakish imposition of the death penalty."[327]

In *Furman*, the Court was concerned with the unbridled discretion possessed by sentencing jurors to kill a defendant influenced by factors such as the race of the victim, race of the defendant, poverty, religion, gender, as well as the nature of the crime. These and other factors were seemingly Applied in a random fashion in deciding who should receive the death penalty. Outlawing such unbridled discretion, the Supreme Court held the death penalty unconstitutional as then administered in 1972.[328] Thereafter, thirty six

318. 438 U.S. 586 (1978).
319. *See id.* at 587.
320. *Id.* at 589.
321. 455 U.S. 104 (1982).
322. *See id.* at 107.
323. *See id.* at 110.
324. *See id.*
325. *Id.* at 113.
326. 408 U.S. 238 (1972).
327. Buchanan v. Angelone, 522 U.S. 269, 277 (1998) (Scalia, J., concurring).
328. *See Furman*, 408 U.S. at 238.

states revised their statutes to limit the imposition of the death penalty to narrowly delineated statutory categories, such as the killing of a police officer, firefighter, child, or prison guard, or murder during the commission of a felony.

For Justice Scalia, however, the dilemma is how to reconcile the fact that on the one hand, the Court attempts to shackle the sentencing jury and narrow the focus of its options, while on the other hand, it attempts to insure that the jury hears all relevant mitigating evidence before deciding the ultimate question of life or death.[329]

Chief Justice Rehnquist, in his majority opinion in *Buchanan*, attempted to resolve this issue by separating the sentencing function into two parts. First is the "eligibility" part, during which the sentencer determines whether the defendant fits into one of the narrowly delineated statutory categories of those persons eligible for death in a given state, fulfilling the narrowing function mandated by *Furman*.[330]

The second part of the sentencing function is the "selection" phase, during which the sentencer hears all aggravating and mitigating evidence and determines the life or death of the defendant, fulfilling the mandates of *Eddings*, and *Lockett*.[331]

For Justice Scalia, the dichotomy is irreconcilable, and he would resolve it by following *Furman* and narrowing the scope of eligibility, but he would not follow *Eddings* or *Lockett*. He would not "require that sentencing juries be given the discretion to consider mitigating evidence."[332]

This issue has been raised by Justice Scalia in other cases,[333] but never as sharply as in *Buchanan*. Justice Scalia concluded by saying that "[t]he Court's ongoing attempt to resolve that contradiction by drawing an arbitrary line in the sand between the 'eligibility and selection phases' of the sentencing decision is . . . incoherent and ultimately doomed to failure."[334]

Nevertheless, that is exactly what Justice Rehnquist did in his decision. He drew the arbitrary line, but in doing so affirmed the defendant's conviction and sentence of death.[335] The petitioner defendant, Douglas Buchanan, was charged with the murder of his father, stepmother, and two brothers.[336] The Virginia Code listed specific aggravating and mitigating factors. Among the aggravating factors that would allow the consideration of a death sentence was that the killing was vile, and the prosecutor based his request for death on that factor.[337]

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329. *See generally Buchanan*, 522 U.S. 269.
330. *See id.* at 275.
331. *See id.*
332. *Id.* at 277 (Scalia, J., concurring).
333. *See generally* Walton v. Arizona, 497 U.S. 639 (1990).
334. *Buchanan*, 522 U.S. at 277 (Scalia, J., concurring).
335. *See id.* at 269.
336. *See id.*
337. *See id.* at 274.

Defense counsel had presented seven mitigation witnesses, including a psychiatrist who testified that Buchanan was under extreme emotional distress at the time of the murders. Counsel then requested four instructions, which were based on mitigating factors listed in the Virginia Code.[338] These included instructions on the fact that Buchanan had no significant criminal history, he was under extreme emotional disturbance at the time of the killing, he was young, and he had impaired capacity to appreciate the criminality of his act.[339] Counsel also requested an additional instruction relative to the background of the defendant and any other mitigating facts.

The trial court refused to give those specific instructions and instead told the jury that "if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment."[340]

The jury voted for a sentence of death, and the trial judge imposed it. The conviction and sentence of death were upheld on state appeal, by the federal district court, and by the Fourth Circuit Court of Appeals. The United States Supreme Court granted certiorari and affirmed.[341]

After noting the two aspects of the capital sentencing process, the "eligibility" phase and the "selection" phase, Chief Justice Rehnquist conceded that although the sentencer could not be precluded from considering any constitutionally relevant mitigating evidence, the Supreme Court had never "gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence."[342]

Therefore, Justice Rehnquist held, since the jury instructions directed the jury to base its decision on "all the evidence," the instructions did not foreclose any mitigating evidence from the jury's consideration, and the Virginia practice of not specifying mitigating factors was constitutional.[343]

Justices Breyer, Stevens, and Ginsburg dissented.[344] They agreed with the majority that the proper standard to be applied to jury instructions was "whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[345] The dissenters, however, pointed out that the trial judge had instructed the jury that if the State proved beyond a reasonable doubt that Buchanan killed any one of the four victims in an outrageously vile manner, the jury should fix his punishment at death. Only if they found that the State had not proved that "vileness" beyond all reasonable doubt, or "if they believed from all the evidence" that the death penalty was not war-

338. *See id.*
339. *See id.*
340. *Id.* at 274.
341. *See id.* at 269.
342. *Id.* at 273.
343. *See id.* at 275.
344. *See id.* at 278 (Breyer, J., dissenting).
345. *Id.* at 272.

ranted, then and only then could the jury impose a sentence of life imprisonment.[346] The dissenters felt it was not clear to the jury that they were to consider the mitigating factors of the defendant's extreme emotional disturbance at the time of the killing, his youth, etc. Therefore, they would have required that the judge instruct the jurors specifically with respect to the mitigating factors.[347]

Although no other Justice seemed to agree with Justice Scalia, the practical effect of the majority opinion is to solidify his position because in fact the jury is now not required to be specifically instructed as to even relevant statutory mitigating factors. Therefore, in a given case, the jury might fail to specifically consider those factors as they vote for death.

B. Jury Instructions on Deadlock

Jones v. United States[348]

Louis Jones Jr., kidnapped Private Tracie Joy McBride at gunpoint from the Goodfellow Air Force Base in San Angelo, Texas.[349] He brought her to his house and sexually assaulted her. He then drove her to a bridge just outside of San Angelo, where he repeatedly struck her in the head with a tire iron.[350]

In a 5-4 opinion, the Supreme Court rejected Petitioner's claims that the instructions and Verdict Forms given to the jury confused jurors about the consequences of a deadlock, and held that failure to give a defense requested instruction on the consequences of "dead lock" did not violate the Eighth Amendment.[351] The defense instruction had sought to inform jurors that if they were unable to unanimously agree on the sentence to be imposed, the court would impose life imprisonment without possibility of release.[352]

C. Jury's Obligation to Consider Lesser-Offenses

Hopkins v. Reeves[353]

The Court in *Hopkins* held that when a defendant is charged with a capital offense (in this case felony murder) and the evidence would support a jury verdict of second degree murder or manslaughter (non-capital crimes),

346. *See id.* at 278.
347. *See id.*
348. 527 U.S. 373 (1999).
349. *See id.* at 389.
350. *See id.*
351. *See id.* at 373.
352. *See id.* at *379.*
353. 524 U.S. 88 (1998).

the state is not constitutionally required to give the jury a lesser included offenses instruction, where state law does not classify those crimes as lesser-included offenses of felony murder.[354]

This prosecution arose in Nebraska State court, where Reeves was charged with two felony murders in the course of a rape. Under Nebraska law, the intent to kill is conclusively presumed if the State proves defendant's intent to commit the underlying felony.[355] Felony murder is a capital offense in Nebraska, and sentencing in capital cases is the function of a three-judge sentencing panel when the jury returns a felony murder verdict.[356] Reeves was convicted of two felony murders by a jury and sentenced to death by a three-judge panel. The evidence at trial was that Reeves killed two women and raped at least one of the women. After his arrest, Reeves admitted to police the rape, but said he could not recall much about the killings because he was highly intoxicated.[357]

Essentially, Reeves argued that second degree murder and manslaughter instructions and verdicts should have been given to the jury for its consideration because some of the evidence supported such verdicts. Under Nebraska law, second degree murder requires the specific intent to kill but manslaughter, apparently, does not.[358] However, neither offense is a lesser-included offense of felony murder.[359] Nevertheless, Reeves argued that the failure of the trial judge to give the jury defense-tendered second degree and manslaughter verdict possibilities when such verdicts could have been justified by the evidence violated the rule of *Beck v. Alabama*.[360] In *Beck*,[361] an Alabama statute barred a jury from considering any lesser-included offense in a death penalty case.[362] Hence, the jury was required to find the capital murder defendant guilty as charged or entirely acquit. All other non-capital trials required that the jury consider lesser-included offenses when the evidence would support a lesser verdict. *Beck* held the statute unconstitutional. Reeves argued that his jury confronted the same predicament as the *Beck* jury. They had to decide whether to convict him of capital murder or entirely acquit him, even thought they believed him to be guilty of a lesser criminal homicide.[363]

The Eighth Circuit Court of Appeals granted Reeves' petition for a writ of habeas corpus, but Justice Thomas, writing for eight Justices, reversed the circuit court and affirmed the convictions and death sentence.[364] Justice Ste-

354. *See id.*
355. *See id.* at 90.
356. *See id.*
357. *See id.* at 94.
358. *See id.* at 98.
359. *See id.*
360. *See id.*
361. 477 U.S. 625 (1980).
362. *See Reeves*, 524 U.S. 90 (citing *Beck*, 447 U.S. 625).
363. *See id.* at 96.
364. *See id.* at 104.

vens dissented.[365]

Justice Thomas ruled that the significant difference between *Reeves* and *Beck* was that in *Beck* the state law accepted the lesser offenses as included offenses in all cases except capital cases.[366] Hence, the exclusive limitation unfairly discriminated against a capital case defendant. In Nebraska, on the other hand, capital cases are not treated differently from non-capital cases.

Justice Thomas' opinion also rejected the circuit court's reliance on *Tison v. Arizona*,[367] and *Enmund v. Florida*.[368] Justice Thomas stated that those cases merely held that persons convicted of felony murder could not be sentenced to death unless the defendant intended to kill or had a culpable state of mind regarding the killing, apart from the state of mind presumed from the underlying felony.[369] In Nebraska, the jury did not impose death sentences; only a three-judge panel had that power. Therefore, the same concerns were not present because the *Tison-Enmund* limitation could be adequately addressed by the three-judge sentencing panel.

Justice Stevens dissented because he felt that to be consistent with *Enmund*, *Tison*, and *Beck*, when the State asks for the death penalty on a felony murder charge, it must allow the jury to consider lesser offenses when supported by the evidence regardless of the State's otherwise limited definition of "lesser included offenses."[370]

VIII. HABEAS CORPUS CASES

A. Exhaustion of State Remedies

O'Sullivan v. Boerckel[371]

A state prison must first exhaust available state remedies before seeking federal habeas corpus relief.[372] In a 6-3 decision, which pushes the etiquette of federalism to new extremes, the Court held that petitioner procedurally defaulted constitutional claims raised on direct appeal in state court because he failed to include those issues in his petition for discretionary review in the state's court of last resort.[373]

Darren Boerckel, a mentally handicapped seventeen year old was convicted in 1977 of rape, burglary and aggravated battery of an eighty-seven

365. *See id.* (Stevens, J., dissenting).
366. *See id.* at 98.
367. 481 U.S. 137 (1987).
368. 458 U.S. 782 (1982).
369. *See Reeves*, 524 U.S. at 102.
370. *See id.* at 104 (Stevens., J., dissenting).
371. 526 U.S. 838 (1999).
372. 28 U.S.C. §§ 2254(b)(1), (c).
373. *See O'Sullivan*, 526 U.S. at 842.

year old woman, largely on the basis of his confession.[374] He appealed his conviction to the Appellate Court of Illinois on a number of grounds, including the claim that his confession was involuntary and was made without a knowing and intelligent *Miranda* waiver.[375] The intermediate appellate court, with one judge dissenting, considered and rejected all claims, affirming his conviction.[376] In his petition for leave to appeal to the Illinois Supreme Court, Boerckel did not raise the *Miranda* and voluntariness issues but focused instead on the issue which attracted the dissent: whether Boerckel had been illegally arrested at the time he confessed.[377] The Illinois Supreme Court, exercising its discretionary power to control its docket, denied the petition for leave to appeal.[378]

In 1994 Boerckel filed a *pro se* petition for a writ of habeas corpus.[379] The District Court appointed counsel and in an amended petition counsel raised the *Miranda* and voluntariness issues.[380] The District Court ruled that Boerckel had procedurally defaulted on these claims by failing to raise them in his petition for leave to appeal to the Illinois Supreme Court.[381] The Seventh Circuit Court of Appeals reversed concluding that a habeas petitioner was not required to present claims in a petition for discretionary review in order to satisfy the exhaustion requirement.[382]

In an opinion by Justice O'Connor, joined by the Chief Justice, Scalia, Kennedy, Souter and Thomas, the Supreme Court reversed the Seventh Circuit holding that a habeas petitioner must completely exhaust his state remedies by giving the state courts "one full opportunity to resolve any constitutional issues by invoking one *complete* round of the State's established appellate review process."[383] Justice O'Connor observed that the exhaustion requirement is a rule of comity which "reduces friction" between the state and federal court systems by avoiding the "unseemliness" of a federal district judge overturning a state court conviction on the basis of constitutional claims which have not been addressed by the state courts in the first instance.[384] Justice O'Connor noted, however, that this rule of gentility did not require a state prisoner to invoke " any possible avenue of state court review."[385] Observing that a petition for discretionary review in the Illinois Supreme Court is a "normal, simple and established part of the State's appel-

374. *See id.*
375. *See id.*
376. *See id.*
377. *See id.* at 843.
378. *See id.*
379. *See id.*
380. *See id.*
381. *See id.* at 844.
382. *See id.*
383. *Id.* at 845(emphasis added).
384. *See id.* at 846.
385. *Id.* at 844.

late review process,"[386] she distinguished extraordinary remedies such as a suit for injunction, a writ of prohibition or mandamus, or a suit for declaratory judgment "when those remedies are alternatives to the standard review process and where the state courts have not provided relief though those remedies in the past."[387] This latter qualification, of course, muddies the waters considerably. At what point will the successful use of an extraordinary remedy make it part of the "ordinary review process?"[388]

Justice Souter, while joining Justice O'Connor's opinion for the Court concurred to express his understanding that a state prisoner could "skip a procedure even when a state court has occasionally employed it to provide relief so long as the State has identified it as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion."[389] Justice Souter cited as an example of such a plain statement, the declaration of the Supreme Court of South Carolina: "[I]n all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies . . . ."[390]

Justice Stevens filed a dissenting opinion in which Justices Ginsburg and Breyer joined.[391] In Justice Stevens' view the majority conflated the exhaustion requirement and the doctrine of procedural default. Because Boerckel in fact had no available state remedy at the time he filed his federal habeas petition, Stevens found that the exhaustion requirement was met.[392] In his view a habeas petitioner is only required to exhaust state remedies which are *presently* available at the time the petition is filed. The procedural default doctrine, on the other hand, was designed to prevent state prisoners from deliberately letting time run on available and adequate state remedies in order to utilize the federal court system.[393] The issue was therefore a question of fairness: Did petitioner give the state a fair opportunity to rule on his constitutional claims before running to federal court? Clearly, asserted Stevens, counsel's limiting of the issues on a petition for discretionary review to those likely to prevail was "the hallmark of effective appellate advocacy."[394] Stevens noted that the majority's requirement that all issues must be raised on discretionary review will, given the imposition of page limits such as those imposed by the Supreme Court itself, lead to less effective advocacy with

386. *Id.* at 846.
387. *Id.*
388. *Id.* at 848.
389. *Id.* at 850 (Souter, J., concurring).
390. *Id.* (quoting In re Exhaustion of State Remedies in Criminal and Post Conviction Relief Cases, 471 S.E.2d 454 (1990)).
391. *See id.* at 851 (Stevens, J., dissenting).
392. *See id.*
393. *See id.* at 854.
394. *Id.* at 858 (quoting Jones v. Barns, 463 U.S. 745, 751-52 (1983)).

respect to those issues deserving full attention. Further, the requirement will impose additional burdens on the state appellate system as petitions for discretionary review will have to be filed in all cases if the federal habeas remedy is to be preserved. Thus, the rule not only promotes bad lawyering but, as Justice Stevens observed, turns federalism on its head by delaying the completion of litigation and increasing the workload of state supreme courts.

B. Successor Petitions and Incompetency to be Executed

Stewart v. Martinez-Villareal[395]

In *Stewart v. Martinez-Villareal*,[396] the Supreme Court dealt with the question of whether a petition raising the issue of incompetency can be barred by the strict successor provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA).[397]

In *Ford v. Wainwright*,[398] the Supreme Court held that a person who was incompetent could not be executed under the cruel and unusual clause of the Eighth Amendment.[399] Martinez-Villareal filed such a claim in his first habeas petition in 1993, but it was dismissed as premature because death was not imminent.

Later, Martinez-Villareal filed the same claim in a subsequent habeas petition in 1997 after the State of Arizona had issued a warrant for his execution and he had been found fit to be executed by a state court.[400] The State objected on the grounds that the 1997 claim constituted a successor habeas petition, which did not meet the requirements for successor petitions under

395. 523 U.S. 637 (1998).

396. *Id.*

397. AEDPA was passed by Congress on April 24, 1996. Under the new AEDPA provisions, federal courts still retain the power to oversee state criminal proceedings via the writ of habeas corpus, but the balance of power has shifted dramatically back to the states. AEDPA severely restricts the filing of successor petitions for federal habeas relief. In order to be accepted, the successor petition must meet new standards. For example, under Section 2244(2)(A) the new claim must be based upon a "new rule" of constitutional law made retroactive to cases on collateral review by the United States Supreme Court. This is virtually an impossible burden because the Supreme Court has held that a "new rule" of constitutional law will almost never be applied to cases on collateral review. *See* Teague v. Lane 489 U.S. 288 (1989). In addition, under Section 2244(3)(A), instead of filing in the district court, as under the former statute, a motion for leave to file a successor petition must first be presented to the Court of Appeals. Thereafter, under subsection 3(E), if the Court of Appeals denies the motion for leave to file the successor petition, there is no further appeal to the United States Supreme Court on this petition. These new restrictions make it exceedingly difficult to file "successor" petitions under AEDPA. *See e.g.* Roldan v. United States, 96 F.3d 1013 (1996). For a fuller explication and discussion of the AEDPA, see Marshall Hartman & Jeannette Nyden, *Habeas Corpus and the New Federalism After the AntiTerrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997).

398. 477 U.S. 399 (1986).

399. *See Martinez-Villareal*, 523 U.S. at 639 (citing *Wainright*, 477 U.S. 399).

400. *See id.* at 640.

the new AEDPA.[401]

Under the AEDPA, successive petitions could be filed only if the claim relied on a new rule of constitutional law held retroactive by the United States Supreme Court to cases on collateral review, or if the claim would clearly establish the innocence of the petitioner.[402]

Since the claim of incompetency to be executed could not satisfy either of those requirements, the district court dismissed the claim.[403] The court of appeals held that § 2244(b) did not apply to claims of incompetency to be executed and reversed the district court.[404]

Chief Justice Rehnquist, joined by Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer, reversed the Court of Appeals, but side stepped the issue, holding that this claim should not be treated as a successor petition.[405] The reason was that when it was raised the first time in 1993, it was denied because it was not ripe for decision.[406] The Supreme Court remanded the case to the district court for a hearing on the merits. Justices Scalia and Thomas dissented.[407]

C. Power to Stay Execution Based upon Claim of Actual Innocence

Calderon v. Thompson[408]

In *Calderon v. Thompson*, Thomas Thompson met twenty-year old Ginger at a pizza parlor. They went to several bars, and then to Thompson's apartment.[409] Three days later Ginger's body was found in a field ten miles from the apartment Thompson shared with his roommate, David Leitch. She had been stabbed five times in the head and was wearing unbuttoned jeans with no underwear.[410] Her shirt and bra had been cut and sperm consistent with Thompson's was found in her body.[411] A footprint near the body was found that matched that of one of David Leitch's shoes. Additionally, fibers from the blanket with which the body was wrapped were found to be similar to fibers found in the trunk of Leitch's car.[412] Thompson initially admitted that he had raped Ginger, but later stated that they had consensual sex.[413]

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401. *See id.* at 642.
402. *See* 28 U.S.C. § 2244(b).
403. *See Martinez-Villareal*, 523 U.S. at 640.
404. *See id.*
405. *See id.* at 644.
406. The defendant could not have been executed at that time, and therefore the claim was not "exhausted" in state court through no fault of the defendant.
407. *See Martinez-Villareal*, 523 U.S. at 645.
408. 523 U.S. 538 (1998).
409. *See id.* at 542.
410. *See id.* at 543.
411. *See id.*
412. *See id.*
413. *See id.* at 544.

Thompson was found guilty of rape and murder and sentenced to death.[414] Leitch was found guilty of second degree murder by a separate jury. The California Supreme Court affirmed, and three state habeas petitions were denied.[415] Thereafter, he filed a petition for a writ of habeas corpus in Federal District Court and the Court granted relief on the rape charges.[416] It held that his trial counsel was ineffective because of his failure to cross-examine vigorously the state's forensic experts and two jailhouse informants. The District Court then vacated the death penalty.[417]

Thereafter, a three-judge panel of the Ninth Circuit Court of Appeals vacated the judgment of the District Court.[418] The Supreme Court denied certiorari, and an execution date was set for August 5, 1997. Undaunted, Thompson filed a fourth state habeas petition alleging that David Leitch had stated in a parole hearing that he had witnessed Thompson and Ginger having consensual sex the night of the murder.[419] That petition was denied, but then Thompson moved the Court of Appeals to recall its mandate. He also moved the District Court for relief on the basis of Leitch's statement to the Parole Board.[420]

The District Court construed Thompson's motion as a successive federal habeas corpus petition, which must meet the standard of actual innocence under the provisions of the AEDPA.[421] The Court held that he could not meet that standard, given the other evidence in the case, and denied relief.[422] At first, the Court of Appeals agreed with the District Court and denied relief, but then it learned that, due to an administrative error, two justices had failed to vote on the original motion for rehearing en banc.[423] Therefore, four days before the scheduled execution, the Court of Appeals called for oral argument on the question of whether a fundamental miscarriage of justice might occur if Thompson were to be executed.[424]

In the meantime, the Governor denied clemency. However, on August 3, 1997, two days before the scheduled execution, a divided Court of Appeals recalled the mandate.[425] Relying only on the record in the first habeas petition, (thereby avoiding the AEDPA restrictions on successor petitions) it held that the District Court had been correct in finding that trial counsel had been ineffective with respect to the rape charge both in the guilt-innocence

414. *See id.*
415. *See id.* at 544-45.
416. *See id.* at 545.
417. *See id.*
418. *See id.* at 545-46.
419. *See id.* at 546.
420. *See id.*
421. *See id.* at 547.
422. *See id.*
423. *See id.* at 548.
424. *See id.* at 547.
425. *See id.* at 548.

phase, and during the sentencing hearing, and it vacated the death sentence.[426]

The State of California filed mandamus in the United States Supreme Court, which the Court construed as a petition for Certiorari, and granted it to determine whether the Court of Appeals had abused its discretion in recalling the mandate and granting relief.[427]

In a 5-4 decision, Justice Kennedy held that the Court of Appeals had abused its discretion.[428] Joining Kennedy were O'Connor, Scalia, Thomas, and Chief Justice Rehnquist. Souter dissented, joined by Stevens, Ginsburg, and Breyer.[429] The Court held that in the interests of finality of state criminal judgments, the Court of Appeals action, sixteen years after the murder, was an abuse of discretion, unless its action was required to avoid a miscarriage of justice.[430] That meant, consistent with Congressional intent expressed in the new AEDPA, that the merits of a criminal conviction "not be revisited in the absence of a strong showing of actual innocence."[431] It is interesting to note that even though the Court states that the AEDPA does not specifically govern this case, the discretion of the Court of Appeals must be consistent with the "objects of the statute."[432]

The majority opinion concludes that neither under the "actual innocence" test of *Schlup v. Delo*,[433] or the "innocence of the death penalty" standard enunciated in *Sawyer v. Whitley*,[434] could the defendant meet his burden and demonstrate his innocence.[435] In light of the other evidence on the charge of rape, he could not show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[436] Nor could he show "by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty in light of the new evidence."[437]

Therefore, the majority concluded because the execution of the defendant would not result in a miscarriage of justice, the Ninth Circuit Court of Appeals abused its discretion in recalling its mandate and granting relief as to the rape charge and the death sentence.[438]

Justice Souter, in dissent, begins by disagreeing with the standard of review employed by the majority. He states that the proper standard of review of the actions of the Court of Appeals should be one of "a high degree of

426. *See id.* at 549.
427. *See id.*
428. *See id.*
429. *See id.* at 566 (Souter, J., dissenting).
430. *See id.* at 566.
431. *Id.* at 558.
432. *Id.* at 554.
433. 513 U.S. 298 (1995).
434. 505 U.S. 333 (1992).
435. *See id.* at 560.
436. *Id.* at 559 (quoting *Schlup*, 513 U.S. at 327).
437. *Id.* at 560 (quoting *Sawyer*, 505 U.S. at 348).
438. *See id.* at 566.

deference."[439] The dissent also disagrees with the notion that the AEDPA has anything to do with this case.[440] Since the decision to recall the mandate was *sua sponte* by the Court of Appeals, based on its realization that through administrative error two justices of that court had failed to vote on the original motion for rehearing *en banc*, this was not a case involving successor petitions. Therefore, the AEDPA had absolutely no applicability.[441]

D. Harmless Error Under Habeas Review

Calderon v. Coleman,[442]

In a *per curiam* opinion issued with four dissents the Court reaffirmed, in a death penalty case, the special harmless error analysis established for habeas review in *Brecht v. Abrahamson.*[443] *Brecht* departed from the *Chapman v. California*[444] test for harmless error on direct review. Under that test the error required reversal unless it was harmless beyond a reasonable doubt.[445] *Brecht* adopted a much stricter test, however, holding that even where a "trial error" of constitutional dimension had occurred in a state criminal proceeding, federal habeas relief could not be granted unless the constitutional error had a "substantial and injurious effect" on the jury.[446]

In *Coleman* the issue concerned erroneous instructions given to the jury concerning the death penalty.[447] The California trial court gave what is called a "Briggs" instruction, which informed the jury of the Governor's power to commute or modify a sentence of life without possibility of parole to a lesser sentence which could include the possibility of parole.[448] The trial court then stated: "You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant."[449]

In *California v. Ramos*,[450] the U.S. Supreme Court had upheld a Briggs instruction against a federal constitutional challenge, but on remand the California Supreme Court had ruled that the instruction violated the California State Constitution because it was misleading and invited the jury to consider

439. *See id.* at 567.
440. *See id.* at 572.
441. On July 14, 1998, Thomas Thompson, age 43, was executed by lethal injection by the State of California.
442. 525 U.S. 141 (1998).
443. 507 U.S. 619 (1993).
444. 386 U.S. 18 (1967).
445. *See generally id.*
446. *See Brecht*, 507 U.S. at 619.
447. *See Coleman*, 525 U.S. at 144.
448. *See id.* at 142.
449. *Id.* at 142-43.
450. 463 U.S. 992 (1983).

irrelevant and speculative matters.[451] In Coleman's case the instruction thus violated California law, but the California Supreme Court held that the error was not prejudicial because the jury had been instructed not to consider the possibility of commutation.[452]

On federal habeas review the District Court granted the writ because it discovered that the Briggs instruction had incorrectly stated the Governor's power to commute as applied to Coleman.[453] Because Coleman was a twice-convicted felon, under California law had Coleman been sentenced to life without possibility of parole, the Governor would have had no power to commute his sentence without the approval of four justices of the California Supreme Court.[454] The Ninth Circuit Court of Appeals affirmed, declaring that a "commutation instruction is unconstitutional when it is inaccurate."[455] Without addressing the correctness of this "sweeping pronouncement," the *per curiam* opinion simply reversed and remanded because the Ninth Circuit failed to expressly undertake a *Brecht* harmless error analysis before allowing habeas relief.[456]

Justices Stevens, Souter, Ginsburg and Breyer dissented, finding that despite the Court of Appeals lack of clarity in addressing the issue of harmless error, the result was correct and the per curiam's remand therefore undermined the state's interest in bringing litigation in capital cases to a prompt conclusion by needlessly prolonging the proceedings.[457]

E. Teague Limited to New Procedural Rules

Bousley v. United States[458]

Bousley was arrested in 1990 for alleged drug-trafficking activity conducted in his garage. Firearms were also found, located in his bedroom. Bousley pleaded guilty to "using" a firearm in violation of 18 U.S.C. § 924(c)(1) and to possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), reserving the right to challenge the quantity of drugs used to determine the length of his sentence.[459] The District Court accepted both pleas and sentenced him to seventy-eight months imprisonment on the drug charges, sixty consecutive months on the firearms charge, and four years of supervised release.[460] Bousley subsequently ap-

451. *See Coleman*, 525 U.S. at 144 (citing California v. Ramos, 37 Cal. 3d 136 (1984)).
452. *See id.*
453. *See id.*
454. *See id.*
455. *Id.* at 145 (quoting Calderon v. Coleman, 150 F.3d 1105, 1118 (1998)).
456. *See id.* 148.
457. *See id.* at 149 (Stevens, J., dissenting).
458. 523 U.S. 614 (1998).
459. *See id.* at 620.
460. *See id.*

pealed his sentence, but did not appeal the validity of his plea. The Court of Appeals affirmed. In 1994, Bousley sought a writ of habeas corpus, challenging the factual basis for his plea in that neither the evidence nor the plea allocation showed a link between the firearms in the bedroom and the activity that occurred in the garage.[461] The District Court ordered that the appeal be dismissed, finding that the guns were in close proximity and readily accessible.[462] Bousley appealed, and while the appeal was pending, the Supreme Court's decision in *Bailey v. United States*[463] came down.[464] *Bailey* required that the government show "active employment of the firearm" to fulfill § 924(c)(1)'s "use" prong.[465] Bousley's counsel argued that *Bailey* should apply retroactively, but the Court of Appeals affirmed the District Court's order for dismissal.[466]

Chief Justice Rehnquist, delivering the opinion of the Court, stated that Bousley's initial guilty plea, to be valid, must have been "voluntary" and "intelligent." He stipulated that in order for the plea to be intelligent, Bousley must have been given "real notice of the true nature of the charges against him."[467] The Court rejected the claim that *Teague v. Lane*[468] barred Bousley's appeal, holding that *Teague's* restriction on retroactivity applied to new procedural rules of law, not to new substantive rules of law.[469] However, the majority also found that Bousley, in contesting his sentence, but not the validity of his plea on appeal, had procedurally defaulted on his claim.[470] Justice Rehnquist noted that collateral review in such cases was limited to those who could show "cause and prejudice," or actual innocence. While the Court rejected Bousley's arguments for "cause," they remanded the case for determination of actual innocence.[471] Upon remand, Bousley would have to show that no reasonable juror would have convicted him (in light of the new interpretation of the "use" prong) of the charge at issue or of any other charge foregone in exchange for the guilty plea. Because actual innocence, and not legal insufficiency, would be at issue, neither the government nor the defendant would be limited to the prior record, but could instead present any available admissible evidence.[472]

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461. *See id.*
462. *See id.* at 621.
463. 516 U.S. 137 (1995).
464. *See Bousley*, 523 U.S. at 620.
465. *See id.* at 621 (citing *Bailey*, 516 U.S. at 144).
466. *See id.*
467. *Id.* at 618 (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941).
468. 489 U.S. 288 (1989). *Teague* held that ordinarily "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310.
469. *See Bousley*, 523 U.S. at 623.
470. *See id.* at 625.
471. *See Bousley*, 523 U.S. at 628.
472. *See id.*

Justice Stevens, concurring in part and dissenting in part, agreed with the central holding of the majority.[473] He pointed out that Bousley had been given critically incorrect legal advice, rendering Bousley's guilty plea, based on such misinformation, constitutionally invalid.[474] Justice Stevens added that legal advice given in good faith reliance on judicial decisions was none the less critically incorrect. Justice Stevens, however, argued that a constitutionally invalid plea may be set aside on collateral review whether or not the issue was previously raised on appeal, and would therefore have remanded the case with instructions to vacate Bousley's initial plea and allow him to plead anew.[475]

Justice Scalia, joined by Justice Thomas, dissented.[476] Justice Scalia argued that collateral review of issues procedurally defaulted should be heard on a showing of "cause" and "prejudice," but that allowing a defendant to claim "actual innocence," should be reserved for only those defendants who were actually tried and convicted by a jury. Justice Scalia argued that allowing an "actual innocence" claim by those who were not convicted by a jury would create too great a burden on the criminal justice system. Further, that would then require the government to litigate charges potentially made years before, or even charges never made because they were foregone in exchange for a guilty plea, where evidence may no longer be available.[477]

F. International Law and the AEDPA

Breard v. Greene[478]

In *Breard,* the Court dealt with the impact of an international treaty on a state's right to execute foreign-born nationals.[479] Angel Breard came to Virginia from Paraguay in 1986 at the age of twenty. Seven years later he was arrested and charged with the attempted rape and murder of Ruth Dickie.[480] Under the Vienna Convention on Consular Relations, Breard was entitled to contact the Paraguayan Consulate. He was never notified of that right by the police.[481]

Breard rejected a plea bargain which offered a life sentence in return for a guilty plea. Against the advice of his lawyers, Breard testified at his trial that he murdered Dickie, but explained that he did so because of a Satanic curse placed on him by his father-in-law. A jury convicted him and sen-

473. *See id.* at 629 (Stevens, J., concurring in part and dissenting in part).
474. *See id.* at 630.
475. *See id.*
476. *See id.* at 634 (Scalia, J., dissenting).
477. *See id.* at 639.
478. 523 U.S. 371 (1998).
479. *See generally id.*
480. *See id.* at 372.
481. *See id.* at 373.

tenced him to death.[482] His conviction was affirmed, certiorari was denied, and state collateral relief was denied as well. Breard then filed a petition for habeas corpus relief in the federal district court, alleging a violation of international law because the police failed to notify him of his rights under the Vienna Convention.[483] He argued that had he been able to contact his consulate, he might have accepted the State's offer to drop the death penalty in return for a plea of guilty. The District Court denied relief, stating that his claim was procedurally defaulted because he had failed to raise it in the state court.[484] The Court of Appeals affirmed. Breard then filed a petition for certiorari, an original writ of habeas corpus in the Supreme Court and associated requests to stay his execution.

On April 3, 1998, the Republic of Paraguay filed proceedings in the International Court of Justice, alleging that the United States had violated the Vienna Convention.[485] The International Court issued an order on April 9, 1998, requesting that the United States delay execution until the matter could be resolved by the International Court.[486]

On April 14, the day of Breard's scheduled execution, a majority of the Court in a *per curium* opinion, and over the dissents of Justices Stevens, Breyer, and Ginsburg, denied both the petition for certiorari and the petition of a writ of habeas corpus and the related stays. The Governor of Virginia received a letter from the Secretary of State asking him to halt the execution but the Governor declined to intervene.

In its *per curiam* opinion denying certiorari and other relief, the majority agreed with the Court of Appeals that Breard had procedurally defaulted any claim his rights under the Vienna Conventions were violated, because he failed to first raise them in state court. The *per curiam* opinion explained that this procedural rule (under the AEDPA) trumped the treaty right, because treaty rights must be exercised in accordance with the procedural rules of the forum state.[487] The *per curiam* opinion observed that even though a treaty is the supreme law of the land, it could be rendered null and void by a subsequent act of Congress. When a treaty and a statute conflict, the most recent act of Congress governs. Since the AEDPA, which enacted the procedural default rule was passed in 1996, it therefore took precedence over the Vienna Convention which was ratified in 1969.[488]

The *per curiam* opinion went on to observe that even if there had been no procedural default it would have been extremely doubtful that Breard

482. *See id.* at 374.
483. *See id.*
484. *See id.* at 375.
485. *See id.* at 376.
486. *See id.*
487. *See id.* at 375.
488. *See id* at 376.

would have prevailed on the merits, since he made no showing that the treaty violation had any effect on his trial. [489]

Justice Souter, in a separate statement, agreed that there was no "reasonably arguable causal connection between the treaty violations and Breard's conviction and sentence."[490]

In dissent Justice Stevens chided the majority for refusing to stay the execution so that the Court would have the benefit of full briefing under its normal rules.[491] Justice Breyer also dissented from the hasty decision, arguing that the novelty of Breard's claim might constitute good cause for his default and the violation of the treaty might have constituted prejudice since Breard might have accepted the guilty plea and life sentence had he been able to talk to officials from his own country.[492]

Justice Ginsburg also dissented stating that she would have granted a stay of execution in order to consider " in the ordinary course" Breard's first federal petition for a writ of habeas corpus.[493]

Angel Breard was executed on April 14, 1998.

IX. CONSTITUTIONAL LIMITATIONS ON DEFINITIONS OF CRIME

In *Davis v. United States*,[494] and *In re Winship*,[495] the Court held that the Due Process Clause requires the state to prove guilt beyond a reasonable doubt in both federal and state criminal prosecutions.[496] The *Winship* rule, along with the closely related requirements of notice and right to trial by jury, undeniably impose a considerable burden upon state prosecutions and increase the uncertainty of criminal convictions. To reduce the difficulties for the prosecution, some legislatures have redefined what formerly had been elements of offenses into matters of affirmative defenses (to be proven by the defendant) or as sentencing issues , thus reducing the impact of the reasonable doubt standard.[497] In its last two terms of the millennium, the Supreme Court revisited the issue of how far a state may go in rearranging the elements of an offense to avoid the heavier burden of proof standard and reduce the issues that a jury must decide.

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489. *See id.* at 377.
490. *Id.* at 379.
491. *See id.* at 379-80 (Stevens, J., dissenting).
492. See id at 380 (Breyer, J., dissenting).
493. *Id.* at 381 (Ginsburg, J,. dissenting).
494. 160 U.S. 469 (1985).
495. 397 U.S. 358 (1970).
496. *See generally Davis*, 160 U.S. 469; *In re Winship*, 397 U.S. 358.
497. *See e.g.* Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977).

Almendarez-Torres v. United States[498]

In *Almendarez-Torres* the Court held that where the legislature, by the terms of the statute that defines the crime, specifies that a prior conviction may allow for a substantially heavier penalty, the matter is not ordinarily an element of the crime, and thus not an issue for trial, but merely a matter for sentencing.[499] On the other hand, if the matter is one that makes the offense more serious, in terms of penalty because of an additional element, other than a prior conviction, the nature of the crime may have been changed - i.e. a new offense created - and the matter will be treated as an element. of that offense to be charged and proven at trial. The difficulty is to distinguish elements of mere penalty from elements of the crime.

Defendant Almendarez-Torres [hereinafter Torres] was charged with and convicted of the criminal offense of being in the United States without permission of the Attorney General, after having been deported.[500] The sentence maximum for that crime is two years of incarceration. At sentencing the government introduced evidence that Torres' first deportation was because of his conviction in the United States of an aggravated felony.[501] Hence, according to the statute the possible sentence for his present violation of the immigration laws was up to twenty years of incarceration, instead of only two years.[502] Torres was sentenced to seven years, one month of incarceration. He challenged the sentence on the grounds that he was not charged under the enhanced penalty section of the statute. The prior aggravated felony conviction was simply introduced at his sentencing. The trial court rejected the argument that the prior felony conviction should have been charged. The Fifth Circuit Court of Appeals affirmed, and the Supreme Court also affirmed.[503]

In a 5-4 decision, the Court held that the matter addressed only a sentencing issue and thus need not have been alleged in the indictment. Justice Breyer wrote the majority opinion which was joined by the Chief Justice and Justices O'Connor, Kennedy and Thomas. Justice Scalia wrote a dissent, joined by Justices Stevens, Souter and Ginsburg.[504]

The majority, in assessing congressional intent, pointed out that recidivism is a proper and usual grounds for enhancement of sentence and is therefore usually only a sentencing matter. The majority concluded that the two-year sentence provision is part of one subsection of the statute. The twenty-year sentence provision was in a separate subsection and thus was not in-

498. 523 U.S. 224 (1998).
499. *See id.*
500. *See id.* at 230.
501. *See id.*
502. *See* 8 U.S.C. § 1326.
503. *See id.* at 231.
504. *See id.* at 242 (Scalia, J., dissenting).

tended to describe a greater offense, only a sentencing issue for the crime.[505] The Court also rejected the argument, that an enhanced sentence because of recidivism required that the prior convictions be charged in the indictment, although not creating a different crime.[506]

Justice Scalia in his dissent argued that the plain language of the statute changes the crime from simple re-entry after deportation for any reason, to re-entry after conviction of an aggravated felony, and was therefore not simply a matter addressing recidivism.[507] In the dissenters' view, the two-year sentence clause created a lesser-included offense, namely re-entry after deportation for whatever reason. Re-entry after deportation for conviction of an aggravated felony, which carried a possible twenty-year sentence, was a separate offense having an additional element.

Jones v. United States[508]

Nathaniel Jones was charged with a federal carjacking offense. The statute under which he was charged provides for imprisonment of not more than fifteen years, unless serious bodily injury resulted, in which case imprisonment of up to twenty-five years could be imposed.[509] The indictment did not allege serious bodily injury; the jury was not instructed on serious bodily injury as an element of the offense and the jury's guilty verdict did not include serious bodily injury.[510] At the sentencing hearing, however, evidence of serious bodily injury was introduced and the judge imposed a twenty-five-year sentence. The Circuit Court of Appeals agreed with the trial court that the sentence enhancer was not an element of the offense, and thus presented only a sentencing issue. The United States Supreme Court, in a 5-4 decision held that serious injury was an element of the offense.[511] Hence, it must be charged and proven beyond a reasonable doubt as a jury issue.

The majority opinion, written by Justice Souter, with Justices Scalia, Thomas, Ginsburg and Stevens joining, addressed the question of how to determine whether a sentence enhancing factor is an element of the offense rather than merely a sentencing issue where the statute itself does not specify and indicated the following factors would be considered: (1) Does the sentence enhancer appear to stand alone, away from the elements of the offense, (2) Does the sentence enhancer require further facts about the basic crime, (3) Does the sentence enhancer greatly increase the penalties, and (4) Does the sentence provision come after the word "shall" in the statute? Legislative history should also be examined. Recidivism and prior convictions are usu-

505. *See id.* at 236.
506. *See id.*
507. *See id.* at 242 (Scalia, J., dissenting).
508. 526 U.S. 227 (1999).
509. *See* 18 U.S.C. § 2119.
510. *See Jones*, 526 U.S. at 232.
511. *See id.* at 234.

ally treated as a sentencing factor. Here the enhancer was bodily injury, which in the past had been treated as an element in some statutes but a sentencing factor in other statutes. Robbery with bodily injury is most often an element of the offense in both state and federal systems.[512] Carjacking is closely akin to robbery. Hence, the Court concluded that great bodily injury was an element, which creates a new crime apart from carjacking without injury and is thus not merely a matter to be considered in sentencing.[513] Plain carjacking is the lesser-included offense.

Perhaps considerably more far reaching than the actual decision is the discussion in the majority opinion of the constitutional limitations upon a legislature when rearranging elements to avoid the Due Process Clause. However, the decision hinges upon statutory construction. In footnote 6, the Court explicitly stated that, a legislature may not avoid fundamental due process requirements of notice, right to jury trial, and proof beyond a reasonable doubt by "manipulating" elements of the offense with the designation of an element as a sentencing matter.[514] The majority opinion also argued that perhaps any matters other than prior convictions which the legislature includes in the statute and which would result in more severe penalties, are elements of the basic offense and may not be constitutionally relegated to issues for the sentence hearing. Hence the majority argues, "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt."[515] Whether this proposition will survive further examination by the Supreme Court remains to be seen.

The difference between *Almendarez-Torres* and *Jones* appears to be a difference of statutory interpretation, and the fact that a prior conviction was the sentence enhancer in *Almendarez-Torres* but not in *Jones*. But it should be kept in mind that *Jones* is a 5-4 decision. The dissent in *Jones* of Justice Kennedy was joined by the Chief Justice, and Justices O'Connor and Breyer.[516] The dissent would hold that the issue is one of statutory interpretation only and conclude that the proper interpretation is that great bodily injury is simply a subject for sentencing.

Brogan v. United States[517]

In *Brogan*, the Court held that when a person questioned by federal agents as part of a criminal investigation, is asked if he committed the crime

512. *See id.* at 238.
513. *See id.* at 252.
514. *See id.* at 245, n.6.
515. *See id.*
516. *See id.* at 255 (Kennedy, J., dissenting).
517. 522 U.S. 398.

under investigation, a false answer, "no" justifies conviction for knowingly making a false statement to a federal agent.[518]

Brogan, was a labor union officer. He was convicted of accepting unlawful cash payments from employers and making a false statement to government agents in violation of 18 U.S.C. § 1001.[519] The false statement was the answer, "no" when asked by the agents if he had taken payments from employers. At the time of the questioning, Brogan was not in custody and he had been advised of the subject of the investigation.[520] The only issue addressed by the Supreme Court was whether his one word answer "no" could support a conviction for providing false information to government agents.[521]

The majority opinion by Justice Scalia upheld Brogan's conviction for the false answer. Justices Stevens and Breyer dissented.[522]

The majority concluded that the false answer "no" to an incriminating question was proscribed within the plain language of the statute. The majority also concluded that the Fifth Amendment's self-incrimination clause was not violated by the questioning.[523] Brogan had not yet been charged, nor was he in custody at the time of the questioning.

The dissent argued that in light of the statute's legislative history, the exculpatory "no" answer, although false, was not intended by Congress to be within the parameter of the statute.[524] The majority held that when the plain language of the statute is clear, the Court may not explore legislative history.[525]

Muscarello v. United States and *Cleveland v. United States*[526]

Both petitioners were charged with "carrying" a firearm "during and in relation to" a "drug trafficking crime."[527] Muscarello carried marijuana in his truck to a place of sale and unlawfully sold the drug. Police officers found a handgun in the locked glove compartment of his truck, which Muscarello admitted he carried for protection in relation to the drug sales.[528] The petitioners in the second case, Cleveland and Gray-Santana, placed several guns in a bag in the trunk of their car and traveled to a designated spot where they intended to steal drugs from the sellers. Federal agents stopped them and

518. *See id.* at 398.
519. *See id.* at 405.
520. *See id.*
521. *See id.*
522. *See id.* at 415 (Stevens, J., dissenting).
523. *See id.* at 408.
524. *See id.* at 415 (Stevens, J., dissenting).
525. *See id.* at 404.
526. 524 U.S. 125 (1998).
527. *Id.* at 125.
528. *See id.* at 127.

their suppliers at the scene, searched both cars and found the guns and drugs. Cleveland and Gray-Santana were charged with attempted possession of cocaine.[529] In both cases, the Court of Appeals found that the petitioners had "carried" a firearm "during and in relation to" a "drug trafficking crime" within the meaning of 18 U.S.C. § 924(c)(1).[530]

Justice Breyer, joined by Justices Stevens, O'Connor, Kennedy, and Thomas, affirmed the Court of Appeals decisions and held that § 924(c)(1) is not limited to the carrying of a weapon on one's person, but that it also applies "to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies."[531] Looking at the language of the statute, the majority determined that Congress intended that the phrase "to carry" be construed under its primary meaning, which includes conveyance in a vehicle, rather than under its special, slang meaning, "to bear" or "to pack" which is consistent with modern usage of the term. The latter definition, the majority argued, is a more limited embodiment of the general meaning, and nothing in the legislative history or the broad purpose of the statute to combat the dangerous combination of weapons and drugs implies that Congress intended the more limited use of the term.[532] The majority argued that such an interpretation did not equate "to carry" with "to transport," used elsewhere in the statute, because transporting covered a broader category of actions than that which the majority defined as "carrying," including the shipping of weapons to another which one knows will be used in relation to drug trafficking activity.[533] The majority stated that the more narrow interpretation of "to use" in *Bailey v. United States*[534] was given to avoid swallowing the meaning of "to carry," whereas the broader interpretation of "to carry" presently adopted by the majority does not run the risk of enveloping "to use."[535] The majority pointed out that congressional limitation requiring that the firearms be used or carried, "during and in relation to" drug trafficking offenses, sufficiently prevented misuse of the statute.

In the dissenting opinion, Justice Ginsburg, joined by the Chief Justice and Justices Scalia and Souter, argued that "to carry" should be limited to those circumstances where firearms are borne, "in such a manner as to be ready for use as a weapon."[536] Justice Ginsburg disputed the majority's argument that usage of "to carry" necessarily included conveyance in a vehicle, pointing out that "to carry" has also often been used to mean carrying on one's person. An interpretation requiring the firearm to be on or about one's

529. *See id.*
530. *See id.*
531. *Id.* at 126-27.
532. *See id.* at 129.
533. *See id.* at 134.
534. 516 U.S. 137 (1995).
535. *See id.* at 136-37.
536. *Id.* at 139 (Ginsburg, J., dissenting).

person, she argued, is fully consistent with the provisions of the statute, and, given that the statute determines what method of sentencing will be used, does not create a danger of gaps in coverage.[537] Considering that the statutory provision is not decisively clear, the dissent argued that such ambiguity should be resolved in favor of the defendant. Justice Ginsburg concluded by arguing that had Congress intended the broad meaning advocated by the majority, Congress, "hardly lacks competence to select the words "possesses" or "conveys" when that is what the Legislature means."[538]

X. DISCRIMINATION IN JURY SELECTION

Campbell v. Louisiana[539]

Campbell holds that an indicted white defendant has standing to raise the issue of exclusion of blacks as forepersons of grand juries, where the trial judge personally selects the foreperson from among the grand jury venire.[540]

In Louisiana, the foreperson of the grand jury is selected by the trial judge from the grand jury venire of the parish (county). The remaining grand jurors are selected at random from the same venire. The foreperson presides over deliberations of the grand jury and votes on all bills of indictment presented to the grand jury. In Evangeline Parish, Louisiana, where Campbell was indicted and convicted of murder, during the period 1976 to 1993, no black person ever served as grand jury foreperson, although twenty percent of the parish population was comprised of black citizens who are registered voters.[541]

Campbell moved to dismiss the indictment on the basis of discrimination in the selection of the grand jury foreperson. The trial court denied the motion, holding that Campbell, a white person, charged with the murder of a white person was without standing. The Louisiana Supreme Court affirmed. The United States Supreme Court reversed the state court, holding Campbell did have standing.[542] The majority opinion by Justice Kennedy, was joined by the Chief Justice and Justices Stevens, O'Connor, Souter, Ginsburg and Breyer.

In *Hobby v. United States*,[543] the Court had held that discrimination in selection of the foreperson in federal grand juries did not confer standing upon a federally indicted defendant because the foreperson's duties were ministerial and he was selected by the other grand jurors from among those

537. *See id.* at 140.
538. *Id.* at 149.
539. 523 U.S. 392 (1998).
540. *See id.* at 396.
541. *See id.*
542. *See id.* at 397.
543. 468 U.S. 339 (1984).

already selected to serve as grand jurors.[544] The Court distinguished *Hobby* from the present case in that the foreperson here was specifically added to the grand jury by the trial judge. In *Hobby*, the foreperson had been selected for service on the grand jury, and then selected as foreperson by the grand jurors. A defendant in the Federal System had no particular interest in the selection of a foreperson apart from the selection of the grand jurors, since the foreperson was on the grand jury as a voting member before his election as foreperson. In Louisiana, the foreperson becomes a voting member of the grand jury because of his or her selection as foreperson by the trial judge.

The three elements that a defendant must satisfy to have standing to assert another's equal protection rights are: (1) The defendant in fact suffered an injury, (2) He had a close relationship to the excluded class, and (3) It was difficult for the persons in the excluded class to assert their own right.[545] The first element is satisfied because racial discrimination destroys the integrity of the charging process and raises doubt as to the fairness of the process. The second element is satisfied because a defendant has a vital interest in the fairness of the system; and will vigorously litigate the issue to overturn his conviction. The third element is satisfied because it is improbable that a person who is discriminated against by the grand jury process will attempt to vindicate his rights because of the extraordinary financial burden he would suffer, with little or no economic reward if he prevailed.[546] It is important to note that it is not Campbell seeking to assert his rights. He is merely asserting the rights of excluded black persons, but with the objective of reversing his criminal conviction, as well as assuring that the excluded class will have access to the position of grand jury foreperson.

Justice Thomas, joined by Justice Scalia dissented.[547] They argued that it served no one's interest to reverse the conviction of a murderer who had been found guilty by a petit-jury, selected under the *Batson v. Kentucky*[548] safeguards from a jury venire comprised of a representative cross section of the community, i.e., a venire that includes people from all significant classes of persons in the community.[549]

XI. VENUE

United States v. Cabrales[550]

Cabrales was indicted in the United States District Court for the Western District of Missouri for conspiracy to avoid a transaction-reporting re-

544. *See Campbell,* 523 U.S. at 397 (citing Hobby v. United States, 468 U.S. 339).
545. *See id.* at 400.
546. *See id.*
547. *See id.* at 404 (Thomas, J., concurring in part and dissenting in part).
548. 476 U.S. 79 (1986).
549. *See Campbell,* 523 U.S. at 404.
550. 524 U.S. 1 (1998).

quirement, conducting a financial transaction to avoid a transaction-reporting requirement, and engaging in a monetary transaction in criminally derived property of a value greater than $10,000.[551] The indictment alleged that Cabrales had deposited $40,000 in the AmSouth Bank of Florida and then made four withdrawals of $9500 each over the span of one week. The indictment also alleged that the money she had deposited and then withdrawn derived from illegal sales of cocaine in Missouri. Cabrales moved to dismiss the entire indictment for improper venue.[552] The District Court denied the motion for the first count, but dismissed both the second and third count. The Eighth Circuit affirmed the dismissal of both of the money-laundering charges.[553]

Writing for a unanimous court, Justice Ginsburg affirmed the Eighth Circuit's dismissal of the money-laundering charges for improper venue.[554] She pointed to Article III, § 2, clause 3, and the Sixth Amendment of the Constitution, as well as Rule 18 of the Federal Rules of Criminal Procedure, which all dictate that the accused is to be tried where the crime was committed.[555] In making such a determination, the majority held that the location was to be determined by considering the nature of the crime and the location of the acts constituting it. Though crimes that begin in one state and are continued or completed in another allow for venue in any of the states where the criminal activity took place, the Court stated that Cabrales' money-laundering activity had taken place solely within Florida, making Missouri an improper venue for trial.[556] As the majority pointed out, the government had no evidence that Cabrales had acquired the money in Missouri and taken it to Florida from there. Her involvement in money-laundering had both commenced and been completed within the state of Florida. The Court also pointed out that Cabrales was not charged with aiding or abetting, which could have made her first crime an essential element of the second and possibly render Missouri an eligible venue. The Court rejected the government's argument that convenience and the interests of the society victimized by drug dealers could render Missouri a proper venue.[557] The majority pointed out that Cabrales' conspiracy charge was still pending in Missouri, and that any acts of money-laundering in Florida could be used in evidence in Missouri as overt acts in furtherance of the conspiracy, essentially rendering the dismissal of the money-laundering charges of negligible impact.[558]

551. *See id.* at 4.
552. *See id.* at 5.
553. *See id.*
554. *See id.* at 6.
555. *See id.*
556. *See id.*
557. *See id.* at 9.
558. *See id.*

XII. PRISONERS' RIGHTS

Pennsylvania Department of Corrections v. Yeskey[559]

Ronald Yeskey was sentenced to serve eighteen to thirty-six months in a Pennsylvania correctional facility, but as a first-time offender, the sentencing court recommended he be placed in Pennsylvania's Motivational Boot Camp, where successful completion would have led to his release on parole in six months.[560] Due to a medical history of hypertension, Yeskey was refused admission to the program. Yeskey then filed suit against the Department of Corrections, claiming their refusal to admit him violated Title II of the Americans With Disabilities Act of 1990 (ADA).[561] The District Court dismissed the claim, holding that the ADA did not cover inmates in state prisons, but the Third Circuit subsequently reversed.[562]

Delivering the unanimous opinion of the Court, Justice Scalia held that both inmates and state prisons are covered by the ADA.[563] Justice Scalia found that state prisons fall squarely within the ADA's definition of a public entity as, "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[564] In addition, the Motivational Boot Camp was found to be a "program" which provided a "benefit" to prisoners.[565]

The Court also rejected the state's argument that "qualified individual with a disability" did not apply to individuals held against their will such as a prisoner, noting that language in the ADA referring to "institutionalization" indicated that Congress had intended to cover penal institutions.[566] The Court declined to address whether application of the ADA to state prisons, was a permissible exercise of congressional authority under the Commerce Clause or under § 5 of the Fourteenth Amendment because these arguments had not been considered by the courts below.

XIII. ATTORNEY-CLIENT PRIVILEGE

Swidler & Berlin v. United States[567]

In *Swidler*, Justice Rehnquist delivered the opinion of the court in a 6-3 decision which held that the federal attorney-client privilege protected attor-

559. 524 U.S. 206 (1998).
560. *See id.* at 208.
561. 42 U.S.C. § 12132.
562. See Yeskey, 524 U.S. at 208.
563. *See id.* at 210.
564. *Id.* (quoting 42 U.S.C. § 12131(1)(B)).
565. *See id.*
566. *Id.* at 211-12.
567. 524 U.S. 399 (1998).

ney-client communications from disclosure in criminal proceedings even after the death of the client.[568] Vincent W. Foster, Jr. consulted with James Hamilton, an attorney at Swidler & Berlin, in July, 1993, seeking legal representation in connection with possible congressional investigation concerning the 1993 dismissal of employees from the White House Travel Office. Foster had been Deputy White House Counsel when the firings occurred. During the two-hour meeting with Foster, Hamilton took three pages of handwritten notes. Foster committed suicide nine days later.[569]

In December, 1995, a federal grand jury issued subpoenas to Swidler & Berlin for Hamilton's handwritten notes taken during the meeting with Foster.[570] The subpoenas were issued at the request of the Office of the Independent Counsel while investigating possible crimes related to the firings. After reviewing the notes, the District Court concluded that the notes were protected by both the attorney-client privilege and the work-product privilege, and denied enforcement of the subpoenas.[571]

The Court of Appeals for the District of Columbia Circuit reversed.[572] The Court of Appeals believed that posthumous privilege protecting client communications was not absolute, noting the well-recognized exception of allowing disclosure in cases of disputes among the client's heirs.[573] Applying a balancing test (which was subsequently rejected by the Supreme Court) the Court of Appeals held that an exception to attorney-client privilege could be created where the relative importance of the communications to particular criminal litigation is substantial. The Court also held that the notes were not protected by the work-product privilege.[574]

Chief Justice Rehnquist reversed the decision of the Court of Appeals, holding that the attorney-client privilege extended posthumously to bar disclosure of confidential attorney-client communications in a criminal proceeding.[575] The Court pointed out that the attorney-client privilege is one of the oldest recognized privileges for client communications. Though few cases directly address the extension of the privilege posthumously, many judicial references occur through recognition of an exception to the privilege in cases of testamentary disputes among the deceased client's heirs.[576] Judicial recognition that such circumstances constitute an exception to or waiver of the privilege supports an implicit recognition that the privilege does extend posthumously.[577]

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568. *See id.* at 401.
569. *See id.* at 402.
570. *See id.*
571. *See id.*
572. *See id.*
573. *See id.*
574. *See id.* at 403.
575. *See id.*
576. *See id.*
577. *See id.*

In distinguishing the testamentary dispute cases, Chief Justice Rehnquist pointed out that the testamentary exception allowing disclosure in cases of disputes among the deceased client's heirs is rationalized as furthering the client's intent.[578] This rationale does not apply in cases involving posthumous disclosure for purposes of criminal litigation. One of the primary purposes for the privilege is to encourage full and frank communication between the client and the attorney. For this reason, the privilege serves a broader purpose than that associated with the Fifth Amendment protection against self-incrimination. The interests of a client therefore extend beyond the mere desire to avoid criminal liability. A client may need to discuss personal matters of a sensitive nature with their attorney, which remain sensitive, even after the death of the client.[579] Possible disclosure of the communications between attorney and client upon the client's death may impede such full and frank disclosure.[580] Balancing the importance of the information against the interests of the client in retrospect only creates substantial uncertainty as to when the privilege will apply. Therefore the impact of creating such an exception, even if only in criminal cases, will be far from marginal. Prior to death, a client may not know whether privileged communications will later be sought for criminal or civil matters, potentially creating a chilling effect in both areas. Given such considerations, the Court held that an exception to the common law privilege for posthumous disclosure in criminal litigation could thus not be supported "in light of reason and experience."[581]

In her dissenting opinion, Justice O'Connor argued that though attorney-client privilege ordinarily survives death of the client, it does not inevitably preclude disclosure of the deceased client's communications in criminal proceedings.[582] Pointing out that the majority had overvalued the posthumous interests of the client, Justice O'Connor argued that after the death of the client, the risk of harm to the client's interests are substantially reduced and the risk of the client being held criminally liable has been completely extinguished.[583] The chilling effect upon communications between attorney and client is also exaggerated. At present, several exceptions to the attorney client privilege exist, e.g., the crime-fraud exception and or exceptions for claims related to attorney competence or compensation, reflecting that under certain circumstances the privilege ceases to operate. In light of these already existing exceptions, Justice O'Connor concluded that the marginal potential for increased silence in allowing a posthumous exception for criminal proceedings is outweighed by the harm which would result from

578. *See id.*
579. *See id.*
580. *See id.*
581. *Id.* (quoting Funk v. United States, 290 U.S. 371 (1933)).
582. *See id.* at 411 (O'Connor, J., dissenting).
583. *See id.* at 412.

precluding critical evidence which could not be acquired through other means.[584]

XIV. EXCESSIVE FINES

United States v. Bajakajian[585]

In Bajakajian, a contentiously divided Court held that confiscation by the United States of defendant's $357,144 in cash, money lawfully earned and intended for a lawful purpose, violated the Excessive Fines Clause of the Eighth Amendment.[586] Bajakajian's crime was his failure to report that he was leaving the United States with more than $10,000 in cash pursuant to 31 U.S.C. § 5316.[587]

This federal statute requires that a person who takes more than $10,000 in cash out of the United States must report the cash to the government.[588] The penalty for a willful violation is a fine of not more than $250,000 or up to 5 years in prison, or both. The statute provides that one who violates the act "shall . . . forfeit to the United States any property . . . involved in such offense . . . ."[589] The issue here was the forfeiture of the entire $357,144 in cash that defendant attempted to transport out of the United States without making the required report. All of the money was earned lawfully and was being transported to satisfy a lawful debt to a foreign creditor. The act of transporting the money would have been entirely lawful if reported. The defendant used cash because of his distrust of banks and because of his cultural experiences.[590] Bajakajian pled guilty to the charge but contested the forfeiture in a bench trial, arguing that to forfeit the entire $357,144 would be grossly disproportionate to the offense.[591] Defendant was sentenced to three years probation and ordered to pay a $5000 fine. The trial judge allowed forfeiture of only $15,000 of the total of the $357,144. The government appealed, demanding all of the funds as the statute provided. Bajakajian did not appeal. The Circuit Court affirmed the trial court, and the U.S. Supreme Court affirmed.[592]

In the majority opinion by Justice Thomas, joined by Justices Stevens, Souter, Ginsburg and Breyer, the Court held that the forfeiture constitutes punishment and was excessive when compared to the seriousness of the of-

584. *See id.* at 414-15.
585. 524 U.S. 321 (1998).
586. *See id.* at 324.
587. *See id.*
588. *See* 31 U.S.C. § 5316.
589. 18 U.S.C. § 982 (a)(1).
590. *See Bajakajian*, 524 U.S. at 326.
591. *See id.*
592. *See id.* at 326-27.

fense.[593] The Court defined "excessive," as used in the Eighth Amendment, as ". . . surpassing the usual, the proper or normal measure of proportion,"[594] and held that forfeiture of the entire amount was disproportionate to the offense.

In the view of the majority, the forfeiture provision constituted punishment because it was part of the sentence to be imposed on one adjudicated guilty of the non-reporting offense.[595] In arriving at this conclusion, the majority observed there is a difference between the forfeiture here, where the person of the defendant is before the court, and *in rem* forfeitures that are proceedings against the property rather than against an offender, or the property owner directly.[596] *In rem* forfeitures may even divest an innocent owner of his property interest, *Bennis v. Michigan.*[597] because such forfeitures are not punishment, but are ordered because the property is the instrumentality of the crime, or is contraband. It is property sullied by the crime.[598] Here, transporting the money was not criminal and the money did not represent illgotten gains. Nor was the money to be used in a criminal conspiracy. Therefore the money was not an instrumentality of any crime.[599]

The dissent by Justice Kennedy, joined by the Chief Justice and Justices O'Connor and Scalia was harsh in its condemnation of the majority opinion.[600] It noted that the parameters of what constitutes punishment is largely a legislative matter. In that context, the dissent argued that the harm addressed by the money reporting statute is not merely for the purposes of identifying how much money leaves the United States. To the contrary, the reporting statute is a tool in the arsenal against international crime, drug smuggling conspiracies, money laundering and other activities by organized crime. Therefore the statute addresses a serious problem and a non-reporting conviction may justifiably be viewed as a major offense that requires a severe penalty.[601] The dissent also found a greater degree of culpability in the defendant than did the majority, for the cash was well hidden and Bajakajian repeatedly lied to the authorities, rather than simply fail to report the money.[602] In the dissent's view, the Excessive Fines prohibition was enacted primarily to keep the government from imposing exorbitant fines so that people who would not otherwise be imprisoned could be targeted and lose their liberty simply because of their poverty.[603] That presents no problem

593. *See id.* at 337.
594. *Id.* at 335.
595. *See id.* at 344.
596. *See id.* at 340.
597. 116 S. Ct. 994 (1996).
598. *See* United States v. Ursery, 518 U.S. 267 (1996).
599. *See Bajakajian,* 524 U.S. at 337.
600. *See generally id.* (Kennedy, J., dissenting).
601. *See id.* at 351.
602. *See id.* at 352.
603. *See id.* at 355.

here because the money was seized by the government at the onset. Therefore, the dissent argued, the Excessive Fines Clause was not intended to apply to this money reporting statute.[604]

XV. DISCOVERY

Strickler v. Greene[605]

This case found the Supreme Court at the crossroads of the procedural default doctrine which applies to federal habeas corpus petitions and the materiality requirement of the *Brady* doctrine which determines when a prosecutor's failure to disclose evidence favorable to the defense violates due process. Both doctrines require that the defendant prove that he suffered prejudice as the result of the state's violation of a constitutional standard.

Early in the evening of January 5, 1990, a young co-ed, Leanne Whitlock, was abducted from a shopping mall, robbed, and eventually murdered.[606] Tommy Strickler and Ronald Henderson were charged with capital murder. Although Strickler maintained that Henderson killed Whitlock, Strickler was subsequently convicted and sentenced to death.[607] A prosecution witness, Anne Stoltzfus, testified at the trial that on two separate occasions she had seen Strickler, co-defendant Henderson and an unidentified blonde female at the mall where the victim was abducted.[608] Furthermore, Ms. Stoltzfus stated that she witnessed the actual abduction by these three people. She identified Strickler and the others as the ones who had abducted the victim from the mall parking lot.[609] She stated: "I have an exceptionally good memory. I had very close contact with [Strickler] and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification."[610]

She also testified that, she saw a shiny dark blue car at the mall, with Ms. Whitlock driving, singing, well dressed, beautiful, and happy.[611] Then, "Mountain Man" [Strickler] came tearing out of the mall entrance, pounded on the passenger window, shook the car, yanked the door open and jumped in. He then "started hitting her . . . on the left shoulder, on the right shoulder, and then . . . he started hitting her on the head, and . . . the Blonde girl got in the back, and "Shy guy" [Henderson] followed and got behind him."[612]

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604. *See id.*
605. 527 U.S. 263 (1999).
606. *See id.* at 268.
607. *See id.*
608. *See id.* at 274-75.
609. *See id.* at 275.
610. *Id.* at 272-73.
611. *See id.* at 274.
612. *Id.* at 275.

Although the Prosecutor maintained that he had turned over his entire file in the case to the defense, absent from the file were notes taken by Detective Claytor of interviews with Ms. Stoltzfus, and letters from this witness to the detective about the case.[613] As Justice Stevens put it, writing for the majority, these notes and letters "cast serious doubt on Stoltzfus' confident assertion of her exceptionally good memory."[614]

One document was a letter, written by Stoltzfus three days after the first interview with the detective, "to clarify some of my confusion for you." In this letter Stoltzfus states that she had not remembered being at the mall, but that her daughter had helped jog her memory as to that event.[615] Another document was a note written by Detective Claytor after his initial interview with the witness. This note states that Stoltzfus could not identify the victim in this case.[616] Yet a subsequent note from Stoltzfus to Claytor states that after spending several hours with the victim's boyfriend looking at current photos she was able to identify the victim Leanne Whitlock as the woman she had seen in the car at the mall "beyond a shadow of a doubt." [617] Another document shows that she could not identify any of the white males involved.[618] Other documents describe her "muddled memories" and thank the detective for his patience with her.[619]

In his federal habeas petition Strickler asserted that the prosecution had violated its duty to disclose favorable evidence to the defense under *Brady v. Maryland*.[620] The District Court agreed, but the Court of Appeals for the Fourth Circuit reversed, finding that Strickler had procedurally defaulted this claim because counsel could have raised it in state court.

In the Supreme Court Justice Stevens reaffirmed the prosecutor's duty under *Brady* and *Kyles v. Whitley*,[621] to determine whether there may be evidence favorable to the defense which is held by the police. Steven also found that because defendant's trial and appellate counsel reasonably relied upon the prosecutor's open file policy, there was cause for Strickler's failure to raise the claim in state court. Indeed Strickler's habeas counsel did not uncover the impeaching documents until the federal district court granted a

613. *See id.* at 276.
614. *Id.*
615. *See id.*
616. *See id.*
617. *Id.* at 274.
618. *See id.* at 277.
619. *See id.* at 278.
620. 373 U.S. 83 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution). Subsequent cases have held that the duty to disclose exists even in the absence of a specific request by the defense. *See* United States v. Agurs, 427 U.S.97 (1976). Evidence which would constitute impeachment of a state's witness is also considered "favorable" evidence. United States v. Bagley, 473 U.S. 667 (1985).
621. 514 U.S. 419 (1995).

sweeping discovery order which it may well not have had the authority to order.[622] The Achilles heel for Stickler, however, was the requirement that he prove he was prejudiced by the prosecutor's failure to make the disclosure at trial. This requirement that prejudice be shown is an aspect of both the habeas procedural default doctrine and the *Brady* doctrine. As Justice Stevens, explained under *Brady's* tripartite test, the evidence must be favorable to the accused, it must have been suppressed by the state, and prejudice must have ensued. Justice Stevens acknowledged that Stoltzfus' testimony was "prejudicial" in the sense that it made his conviction more likely than it would have been without it. But that is not the test. Rather, Stevens said, the defendant must convince the court that "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.[623] Stressing that the adjective "reasonable" was important, Stevens cautioned that this did not mean that the defendant had to prove that a different verdict would have been more likely than not, had the suppressed evidence been admitted. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[624]

Despite the important of the eyewitness account so confidently relayed by Ms. Stoltzfus, Stevens nevertheless concluded, based upon the other evidence in the case, that there was no reasonable probability that Strickler's conviction or death sentence would have been different had the impeaching material been available to the defense.[625] Thus the defendant could not show materiality under the *Brady* doctrine, nor could he show prejudice under the procedural default doctrine.

Justices Souter and Kennedy concurred in part and dissented regarding the issue of prejudice.[626] The dissenters argued that the short hand formulation of the test and the use of the words "reasonable probability" created an unjustifiable risk of misleading courts into believing the standard was more demanding than it was. They therefore would use the words "significant possibility" to describe "the degree to which the undisclosed evidence would place the actual result in question. . . ."[627] In their view, Stoltzfus' testimony was critical because she told a gripping story which placed Strickler as the "madly energetic leader of two morally apathetic accomplices, who were passive but for his direction."[628] Citing jury research which "redoundingly proves that the story format is the key to juror decision making" the dissenters argued that one could not be 'reasonably confident" that Strickler's death

622. *See Strickler*, 527 U.S. at 287, n.28 and n.29.
623. *Id.* at 289-90.
624. *Id.*
625. *See id.* at 292.
626. *See id.* at 298 (Souter, J., concurring in part and dissenting in part).
627. *Id.*
628. *Id.* at 307.

sentence would have been the same had the defense been able to impeach the credibility of that story.[629]

XVI. EVIDENCE: THE CHANGING APPROACH TO EXPERT TESTIMONY

A. Historical Perspective

We all rely upon expertise of others in our daily lives, whether it be a salesperson in a home improvement center, a car mechanic or the pharmacist at the drug store. Trials are no different. Experts who have acquired knowledge through training, research or experience beyond the common range of knowledge are necessary to assist the jury in its role as the trier of fact. The problem often faced by courts, however is how to determine when something posing as "scientific" evidence is is fact valid and reliable.

By the mid-1970s the most dominant rule for the qualification expert testimony at trial required that the method or procedure used by the expert in arriving at an opinion had to have gained general acceptance in its own field in order to be admissible. Hence, if the theory upon which the opinion was based was untested or the device or technique used to arrive at the opinion, was still experimental, the opinion was not admissible. This rule for the qualification of expert testimony was identified most closely with the decision in *Frye* v. *United States*[630] and was referred to as the *Frye* test.

This rule never gained universal acceptance. Some courts had taken the position that general acceptance was not necessary, as long as the person rendering the opinion had sufficient credentials to warrant the court receiving the opinion. The opponent, of course, was free to introduce experts to contradict the opinion directly, or to attack the process by which the opinion was derived. Thus the jury was left to sort out the battle of the experts. In 1975, Federal Rule of Evidence 702 (FRE 702) was enacted which made no mention of the Frye general acceptance test.

B. FRE 702 Supersedes Frye

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[631] the Supreme Court interpreted FRE 702, holding that it displaced the *Frye* test. It should be noted that *Daubert* does not apply to expert testimony in state courts. Of course, one may find state courts adopting the United States Supreme Court's approach. *Daubert* also expanded the rights of litigants to use expert witnesses. But *Daubert* did not leave the door wide open. Instead it delegated to trial courts the discretion to include or exclude an expert's testimony, creating the so-called "gatekeeper" role for trial judges.

629. *See id.*
630. 293 F. 1013 (D.C. Cir. 1923).
631. 509 U.S. 579 (1993).

In *Daubert*, plaintiffs alleged that the Daubert brothers were born with serious birth defects because their mother had taken Bendectin, a prescription drug given to relieve nausea during her pregnancy.[632] The mother took the drug pursuant to her physician's direction. Merrell Dow, the defendant who marketed the drug, moved for summary judgment. In support, Merrel Dow filed depositions of its expert witnesses asserting that in more than 30 studies of the drug's impact upon pregnant mothers, none found that the drug caused damage to a fetus.[633] The Dauberts did not directly attack those studies. Instead, they presented the affidavits of eight experts who, based on studies with animals, and comparison of the ingredients of Bendectin with substances having similar ingredients which were known to cause birth defects, rendered opinions that the ingestion of Bendectin caused the birth defects at issue.[634] The trial court granted the defendant's motion for summary judgment, holding that the *Frye* standard was not satisfied by the plaintiff's proffer of evidence because the animal studies and chemical structure analyses relied upon by plaintiff's experts had not received general acceptance in the scientific community, when applied to humans. The Appellate Court, also relying upon the *Frye* rule, affirmed, concluding that the analysis of the plaintiff's experts had not been published, had not been subjected to peer review, and was without general acceptance.[635] The United States Supreme Court reversed and remanded for further proceedings, consistent with Fed. Rule of Evidence 702. The Supreme Court concluded that 702 established a different standard from the *Frye* test and thus superseded it.[636]

Justice Blackmun, writing for the Court, held that FRE 702 requires only that the evidence offered through an expert be relevant and reliable and beyond the ordinary experience of jurors.[637] FRE 702 thus differed from *Frye* in that it did not require general acceptance as a necessary precondition to admissibility, although the fact of general acceptance in the scientific community alone may be sufficient to justify admission of the testimony.[638] Noting that FRE 702 established a flexible inquiry, the Court explained that many factors, in addition to general acceptance, could be used by trial judges in exercising their discretion to exclude or admit expert evidence under FRE 702. Such factors would include such as whether the theory or technique relied upon has been tested, whether the error rate for the technique is known and whether it has been the subject of peer review and publication.[639]

632. *See id.* at 582.
633. *See id.*
634. *See id.* at 584.
635. *See id.*
636. *See id.* at 585.
637. *See id.* at 591.
638. *See id.* at 597.
639. *See id.* at 592-94

C. *Standard of Review*

General-Electric Co. v. Joiner[640]

In *General-Electric Co. v. Joiner,*[641] the Court resolved the issue of what standard an appellate court is to use when reviewing a trial judge's ruling on the admissibility of expert testimony.[642] The Court adopted the abuse of discretion standard. Under that standard, if the trial judges' ruling is supported by evidence, the reviewing court should defer to the trial court and affirm that ruling, although there is evidence that would also support a contrary ruling.[643]

Joiner had been employed as an electrician with a Georgia municipal utility department. His duties, he alleged, required him to sometimes work with liquids that occasionally contained polychlorinated biphenyls (PCB).[644] PCB production and sales had been banned by Congress because of the belief that human exposure to the substance was dangerous and may cause cancer. However, quantities of PCB remained in the public domain from distribution prior to the congressional ban.[645] Joiner eventually developed lung cancer, and in his lawsuit alleged that his exposure to PCB contributed to his lung cancer.[646] In fact Joiner was a smoker, and Joiner's family had a history of lung cancer, although no one had developed the disease at so young an age.[647] The District Court ruled that Joiner's proffered experts were excluded as witnesses at trial because their opinion that his exposure to PCB caused, or contributed to Joiner's type of cancer, was unsupported by the research involving the human species. Joiner's experts' opinions were based upon studies with animals where a large quantity of PCB was directly injected into the stomach of the animal, which then developed cancer.[648] Joiner's evidence, at best, showed his exposure to diluted minimal amounts of PCB, generally only external exposure, and over an extended period of time.

The Appellate Court reversed the ruling of the trial court; but the Supreme Court disagreed and affirmed the trial court.[649] The Supreme Court explained that a reviewing court is to examine the trial judge's ruling only within the limits of the abuse of discretion standard.[650] That means that the reviewing court is not to decide whether, based upon the supporting evi-

640. 522 U.S. 136 (1997).
641. *Id.*
642. *See id.* at 139.
643. *See id.*
644. *See id.*
645. *See id.* at 140.
646. *See id.*
647. *See id.*
648. *See id.* at 145.
649. *See id.* at 149.
650. *See id.* at 139.

dence, it would have admitted or excluded the proffered expert testimony. The only question to be addressed by the reviewing court was whether or not there was a reasonable basis for the trial judge's decision. If so, that decision is to be affirmed, whether the decision is to allow the expert testimony, or excludes the testimony. The abuse of discretion applies equally when the ruling of the trial judge on admissibility ends the litigation, or merely excludes some of the evidence, with the trial still to go forward.[651]

Here, the trial court did not abuse its discretion in excluding Joiner's experts. The animal tests relied upon presented dissimilar situations from that of Joiner's: first, because only animals were tested, second, there was a vast difference in quantity and kind of exposure between the test animals and Joiner's experience. The Court also concluded that the epidemiological studies also relied upon by Joiner's experts, while presenting similar situations to Joiner's, were not sufficient to serve as foundation for opinion evidence because the higher than expected cancer rates shown in those studies were not sown to be statistically significant.[652] Hence, the trial judge's ruling excluding the Joiner experts was upheld.

Kuhmo Tire Co., Ltd v. Carmichael[653]

In *Kuhmo*, the Supreme Court again addressed FRE 702 in light of *Daubert*.[654] This time, the Court extended *Daubert's* flexible inquiry to all expert testimony, not merely scientific experts such as those involved in *Daubert*.[655] The Court also provided further guidance for evaluating the admissibility of expert testimony.

In *Kuhmo*, plaintiff Carmichael purchased a used motor vehicle. While driving the vehicle, a tire blew out causing an accident and injuring the Carmichaels.[656] The errant tire was steel-belted, made in 1988 and installed in the vehicle some time before Carmichael purchased the used vehicle in March of 1993.[657] The accident occurred two months after purchase, and Carmichael had driven the vehicle some 7000 miles.[658] The Carmichaels' expert witness admitted that the tire in question was badly worn and had at least two punctures, which had been inadequately repaired.[659] Nevertheless, based upon his examination of the tire, the expert testified in his deposition that, in his opinion, the tire blew out because of a manufacturing or a design

651. *See id.* at 144.
652. *See id.* at 146-47.
653. 526 U.S. 137 (1999).
654. 509 U.S. 579 (1993).
655. *See Kuhmo*, 526 U.S. at 141.
656. *See id.* at 142.
657. *See id.*
658. *See id.* at 143.
659. *See id.*

defect.[660] Even with the tires' wear, he believed it should not have blown out. The expert conceded that if the tire was not operated at the correct inflation level, that could have caused a blowout.[661] However, he concluded that from his observation of the tire, it was operated at correct inflation. The witness explained the factors he relied upon in arriving at his conclusion regarding the inflation level of the tire during operation. These factors were four characteristics apparent in a tire operated at an incorrect inflation level.[662] Two of the four characteristics were present, according to the Carmichael expert, but he still maintained that in his opinion the tire had been used with the proper inflation.[663] Kuhmo moved for summary judgment. The motion was granted on the basis that the Carmichael expert's testimony was inadmissible at trial.[664]

The Circuit Court of Appeal reversed, but again the Supreme Court upheld the decision of the District Court excluding the expert testimony.[665] First, the Supreme Court agreed with the Carmichaels that one may qualify as an expert although not be a scientist, because the subject of expert testimony offered under FRE 702 is not limited to scientific opinion. Persons who have technical or other specialized knowledge may qualify as an expert witness and give opinion evidence.[666] Expertise may arise from observations and experiences as well as specialized education and training. To qualify as an expert, the witness must have education and/or experiences that are beyond that acquired by ordinary people.

Carmichaels' expert has an M.S. degree in mechanical engineering, had worked for 10 years for Michelin America, Inc. and had been qualified as an expert on tire blowouts in other court cases.[667] However, the trial judge did not exclude the expert's evidence because the witness was not a scientist nor because the witness was without specialized knowledge. The evidence was excluded primarily because of the trial judge's distrust of the procedure the expert used to arrive at his conclusions.[668] The Carmichaels' expert had agreed with the defendants that the tire should have been replaced because of its condition before the blowout. He also noted that two tire punctures had been inadequately repaired. He conceded that there was evidence of improper inflation of the tire and that improper inflation could cause the tire to blow out.[669] The expert could not, or did not, cite any experiments or tests which supported his theory that the tire had been properly inflated. In addi-

660. *See id.*
661. *See id.*
662. *See id.* at 143-44.
663. *See id.* at 144.
664. *See id.* at 145.
665. *See id.* at 160.
666. *See id.* at 148.
667. *See id.* at 154.
668. *See id.*
669. *See id.* at 154-55.

tion a critical factor that appeared to motivate the trial judge's decision was the fact that the witness arrived at his opinion after initially only examining photographs of the tire.[670] The witness did examine the tire on the day of his deposition, just before the deposition. By then, however, the expert was committed to testify for the plaintiffs. Given the poor condition of the tire before the blowout and the evidence of incorrect inflation, the trial court's decision to exclude the plaintiff's expert was therefore not an abuse of discretion.[671]

The Court also elaborated upon the factors to be considered when evaluating proffered expert testimony noting that the factors suggested in *Daubert* were intended to be "helpful, not definitive."[672] In sum, the Court noted that the trial judge was to be given "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[673]

D. Polygraph Evidence

United States v. Scheffer[674]

Edward Scheffer, an airman stationed at March Air Force Base in California, volunteered to work as an informant in drug investigations for the Air Force Office of Special Investigations (OSI) in March 1992.[675] His supervisors informed him that he would be required to submit to periodic drug testing and polygraph examinations. In early April, Scheffer submitted to a urine test. Shortly thereafter, he was given a polygraph examination, which was administered by an OSI examiner. The examiner found that the test indicated no deception on Scheffer's part in his denial of any drug use since joining the Air Force.[676] On April 30, Scheffer failed to appear for work and could not be found on the base. He was absent without leave until May 13, when he was pulled over by an Iowa state patrolman for a routine traffic stop, arrested, and returned to the base where he was tested for drug use.[677] The results of Scheffer's urinalysis, which indicated the presence of methamphetamine, were later revealed to OSI agents.[678]

Scheffer was tried by general court martial on several charges, including use of methamphetamine. At trial, he relied on an "innocent ingestion" theory. The prosecutor attempted to impeach Scheffer's testimony on cross-

670. *See id.* at 156.
671. *See id.* at 160.
672. *Id.* at 151.
673. *Id.* at 152.
674. 523 U.S. 303 (1998).
675. *See id.* at 305.
676. *See id.* at 306.
677. *See id.*
678. *See id.*

examination by pointing out inconsistencies between Scheffer's trial testimony and earlier statements Scheffer made to OSI officials. Scheffer then attempted to bring in the polygraph evidence to support his testimony that he did not knowingly ingest drugs while in the Air Force.[679] Military Rule of Evidence 707 prohibits admission into evidence of the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, or failure to take, a polygraph exam.[680] The military judge found Rule 707 to be constitutional and denied Scheffer's motion. Petitioner was convicted on all counts.[681] The Air Force Court of Criminal Appeals affirmed in all material respects. The United States Court of Appeals for the Armed Forces reversed, however, holding that a *per se* exclusion of the evidence violated Petitioner's Sixth Amendment right to present a defense.[682]

A sharply divided Supreme Court reversed the Court of Appeals, upheld the exclusion of polygraph evidence in this case, but failed to command a majority for a *per se* rule of blanket exclusion. Delivering the judgment of the Court, Justice Thomas wrote an opinion which studiously avoided defining the constitutional source of a defendant's right to present a defense. [683] In the portion of his opinion which was joined by eight members of the court, he concluded that Rule 707 had not precluded the defendant from introducing any factual evidence in his defense. He had simply been deprived of expert opinion which would have bolstered his credibility on the witness stand. [684] Therefore the defendant's right to present a defense with respect to all facts relevant to the charged offense had not been "significantly impaired" by the exclusion of the polygraph evidence.[685]

In reaching this conclusion Justice Thomas distinguished three precedents upon which the Court of Appeals had relied: *Rock v. Arkansas*,[686] *Washington v. Texas*,[687] and *Chambers v. Mississippi*.[688] In all three cases Thomas and the majority found, the exclusion of evidence was unconstitu-

679. *See id.*

680. *See id.* at 307 (citing Military Rule of Evidence 707).

681. *See id.*

682. *See id.*

683. Thomas noted that the Court of Appeals for the Armed Forces relied upon the Sixth Amendment without pointing to any particular language in the text of the Amendment, and in a footnote observed that the defendant claimed the source of the right lay in the Sixth Amendment's Compulsory Process Clause and the "combined effect" of the Fifth and Sixth Amendments. *Id.* at 307, n.3.

684. *See id.* at 317.

685. *Id.*

686. 483 U.S. 44 (1987). *Rock* held that a defendant whose memory had been hypnotically refreshed could not be barred by a statute banning such assisted testimony, from testifying that the killing had been accidental.

687. 388 U.S. 14 (1967). *Washington* held that the Sixth Amendment was violated by a rule that barred co-defendants from testifying to events they had personally observed.

688. 410 U.S. 284 (1973). *Chambers* held that due process was violated by a common law evidentiary rule which prevented a party from presenting testimony which impeached its own witness.

tional because a witness had been precluded from testifying to facts about the crime itself. Here, while admitting that the raw data from the polygraph concerning pulse rate, respiration and perspiration were factual, the expert's opinion testimony was not factual evidence about the accused's conduct concerning the crime with which he was charged.[689]

In the portion of his opinion which garnered only a plurality,[690] Thomas asserted that a defendant's right to present relevant evidence is subject to a reasonableness requirement, and therefore must bow to other legitimate interests in the criminal trial process, so long as the rules designed to promote these other interests are neither arbitrary nor disproportionate to promoting the desired ends.[691] According to Justice Thomas, Rule 707's prohibition on the use of polygraph evidence serves several legitimate purposes related to the criminal trial process. The first of these is the need to ensure that the trier of fact is presented with reliable evidence.[692] The reliability of polygraph evidence, however, is a matter of dispute within the scientific community and among state and federal courts. In light of such vast disagreement, Justice Thomas concluded that Rule 707's blanket prohibition of such evidence was both a rational and proportional means of furthering the legitimate interest of barring unreliable evidence. Second, the plurality found that Rule 707 preserves the jury's core function of making credibility determinations. Reliance on polygraph evidence at trial may diminish this particular role where the aura of infallibility associated with polygraph tests prompts jurors to disregard their duty to weigh the evidence and assess credibility themselves.[693] Finally, the plurality asserted, Rule 707 operates to ensure that litigation pertains to issues associated with guilt or innocence, rather than collateral issues pertaining to the reliability of the polygraph results or the qualifications of the examiner administering the test.[694]

Four Justices (Kennedy, O'Connor, Ginsburg and Breyer) concurred in part and concurred in the judgment.[695] Writing on their behalf, Justice Kennedy emphasized that various courts could come to different conclusions as to the reliability of polygraph evidence in light of the surrounding controversy and for that reason, the Court would be unwise to invalidate Rule 707.[696] Justice Kennedy warned against the use of a *per se* exclusion of such evidence, however, pointing out that future cases may present a stronger argument for including polygraph evidence at trial. In addition, the concurring

689. Scheffer, 523 U.S. at 317, n.13.

690. Justice Thomas was joined in this part by the Chief Justice, and Justices Scalia and Souter. *See id* at 305.

691. *See id.* at 308.

692. *See id.* at 309.

693. *See id.* at 313.

694. *See id.* at 314.

695. *See id.* at 318 (Kennedy, J., concurring) (O'Connor, Ginsburg, and Breyer join in Kennedy's concurrence).

696. *See id.*

opinion took issue with Justice Thomas' asserting that allowing expert opinion based upon polygraph evidence would diminish the jury's core function of assessing credibility.[697] Finding Justice Thomas' attempt to "revive this outmoded theory... especially inapt in the context of the military justice system," Justice Kennedy observed that under the Military Rules of Evidence, no restrictions are placed upon the presentation of opinions or conclusions as to the ultimate issue to be decided by the trier of fact.[698] Therefore, an argument to exclude polygraph evidence based on the need to keep a polygraph examiner's opinion on the ultimate truthfulness of the accused from the trier of fact was not persuasive.

Justice Stevens, the lone dissenter,[699] pointed out that *per se* exclusion of polygraph evidence, no matter how reliable, was inconsistent with the "flexible inquiry" dictated by *Daubert v. Merrell Dow Pharmaceuticals.*[700] In particular, the special role polygraph examinations play in the military, as opposed to that in the civilian sector of society, argues for greater admissibility because of the procedures and guidelines in place to ensure a reliable result. Justice Stevens argued that in light of the substantial reliability of military polygraph exams, as well the ability of a military juror to competently assess the reliability of the results and their relevance to the issues of the trial, the advancement of legitimate interests emphasized in Justice Thomas' opinion was minimal at best.[701]

Justice Stevens also emphasized the fundamental nature of the right of the accused to present a defense, which he believed was barely touched upon in the majority opinion.[702] Justice Stevens argued that blanket exclusion of evidence which may have proved potentially illuminating, without any further inquiry into the specific evidence sought to be admitted, impeded the ability of the accused to fully present a defense.[703]

He further argued that a legitimate interest in barring presentation of unreliable evidence to the trier of fact could not justify a *per se* exclusionary rule.[704] Exclusion of potentially reliable evidence is constitutionally required to be proportional to the purposes served by the exclusion.[705] Justice Stevens argued that the majority failed to consider interests on both sides of the balance, essentially ignoring the interests of the defendant in such cases. The defendant, for example, has a strong interest in providing corroborating evidence from a third party, which may be more readily believed by the jury than the words of the accused. Prohibiting the presentation of such evidence

697. *See id.*
698. *Id.* at 319-20.
699. *See id.* at 320 (Stevens, J., dissenting).
700. 509 U.S. 579 (1993).
701. *See id.* at 325.
702. *See id.* at 326.
703. *See id.* at 327.
704. *See id.* at 330.
705. *See id.* at 331.

therefore greatly impairs the ability of the defendant to make a meaningful defense.

In reviewing the legitimate interests advanced by Justice Thomas, Justice Stevens found that the interests of the defendant were substantially greater.[706] First, the reliability of polygraph evidence is often great, and admissible under *Daubert*, which requires no specific degree of accuracy.[707] Second, the jury's role in making credibility judgments includes making judgments on matters presented by third party witnesses, and the average jury is intelligent enough to do that with respect to polygraph evidence.[708] Third, the desire to eliminate collateral proceedings is an inadequate justification for eliminating the use of polygraph evidence because collateral proceedings arise concerning the presentation of testimony of any expert witness on any subject-matter.[709] Though Justice Thomas' rationale may find support in specific instances, Justices Stevens thus concluded that a blanket prohibition clearly cannot be supported, especially since it could substantially limit a defendant's ability to present a meaningful defense.[710] A *de facto* majority of the court (Justices Stevens, Kennedy, O'Connor, Ginsburg and Breyer) thus would not permit a *per se* blanket exclusion of all polygraph evidence when offered by the defense.

XVII. PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT

Saenz v. Roe[711]

In a case with a potential for far reaching ramifications, the Supreme Court breathed new life into the long dormant Privileges or Immunities Clause of the Fourteenth Amendment.[712] That clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[713] Not to be confused with a similarly worded clause in Article IV of the Constitution, which prohibits a State from unfairly discriminating against nonresident citizens of other States, this mysteriously undefined section of the Bill of Rights protects freedoms that all Americans share by virtue of their status as citizens of the United States.

One of the undisputed privileges of national citizenship is the right to travel to any State in the nation and establish residence there. The Supreme Court, by a 7-2 vote, held in *Saenz* that a State cannot abridge that privilege

706. *See id.* at 339.
707. *See id.* at 333.
708. *See id.* at 336.
709. *See id.* at 337.
710. *See id.*
711. 526 U.S. 489 (1999).
712. U.S. CONST. amend. XIV,§1.
713. *Id.*

of national citizenship by treating newcomers to a State differently from long-term residents.[714] At issue in the case was a prominent feature of former California Governor Pete Wilson's welfare reform effort which barred new residents for one year from receiving greater benefits than they would have received in the State of their prior residence.[715] This restriction on the state's Temporary Assistance to Needy Families (TANF) program was made operative through congressional authorization under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.[716]

Touted as a necessary measure to prevent California from becoming a "welfare magnet" the broad gauged provision nevertheless applied across the board to all newcomers even if they were not welfare recipients in their former State.[717] Thus a woman coming from Oklahoma to take a job in Long Beach would receive only about half of the normal monthly benefit if she became unemployed during her first year of residency. A mother and child coming from Colorado to escape from domestic abuse would likewise receive substantially less than the amount legislatively determined to be the minimum essential to meet the cost of living in California. Even a life long resident of California who left to take a job in Mississippi but returned unemployed after several months would receive only the Mississippi rate of $144 for a family of four, instead of California's $673.

The ACLU, supported by a broad coalition, including the American Bar Association, Professor Laurence H. Tribe of Harvard, religious organizations and groups serving domestic violence survivors, challenged this discriminatory treatment, arguing that it violated one of the core values of our Constitution: The right to choose to become a citizen of any State without hindrance or penalty.

In light of the obvious lack of equal treatment between similarly situated residents of the same state, court watchers naturally thought the Supreme Court would resolve this case under the Equal Protection Clause of the Fourteenth Amendment. Encrusted by years of precedents, which have resulted in a dizzying array of standards, the Court's multi-tiered analysis of claims under the Equal Protection Clause, however, has become a game of indecipherable semantics. Avoiding that thicket, the Court instead found that the discriminatory classification violated the "right to travel."[718]

Justice Stevens, joined by Justices O'Connor, Scalia, Kennedy, Souter, Ginsburg and Breyer, delivered the majority opinion striking down the California restriction. The Court delineated three general classes of cases that may implicate the constitutional right to travel.[719] This included (1) the right of a citizen of one state to freely enter and leave another state, (2) the right

714. *See Saenz*, 526 U.S. at 492.
715. *See id.*
716. *See id.* at 496.
717. *See id.* at 492.
718. *See id.* at 503.
719. *See id.* at 501.

of a citizen to be treated as a welcome visitor while temporarily present in another state, and (3) the right of a citizen to travel to another state and become a permanent resident there with equal status as other citizens of that state.[720]

Finding that the length of time an individual had spent in the state was unrelated to the need for welfare, the Court concluded that the discrimination against newcomers operated as a penalty on the right to travel which was unjustified by any substantial state interest.[721] The Court rejected the state's argument based on fiscal policy as unconvincing and reiterated its holding in *Shapiro v. Thompson*[722] that states may not discriminate in order to deter the migration of needy families to their state.[723] Citing Justice Cardozo, Stevens concluded "the peoples of the several states must sink or swim together [because] in the long run prosperity and salvation are in union and not division."[724]

The right to travel is one of the few rights universally acknowledged as falling within the protection of the Fourteenth Amendment's Privileges or Immunities Clause. Apart from that, however, there is little agreement as to what constitutes the Privileges or Immunities of national citizenship. The phrase "privileges and immunities" can be traced back to the beginnings of the American Revolution when the colonists protesting the Stamp Act repeatedly asserted that they were entitled to the same fundamental rights as those enjoyed by English citizens.

There is a growing consensus that at a minimum certain fundamental provisions of the Bill of Rights which have been incorporated into and made part of due process should also be considered privileges or immunities of national citizenship.[725] While it is beyond the scope of this brief survey to explore the ramifications of that idea fully, using the different text of the Privileges or Immunities Clause would allow courts to write on a clean slate and escape from the shackles of the due process based precedents, which currently apply selected provisions of the Bill of Rights to the states. Indeed, differences between the operative terms in the Privileges or Immunities Clause and the Due Process Clause could make a significant difference in how a particular right is applied. For example while the Due Process Clause protects against the "deprivation" of certain fundamental rights, the Privileges or Immunities Clause protects against "abridgement." That this difference is no small matter can be seen by comparing *Saenz* with *Conn v. Gab-*

720. *See id.* at 501-03.

721. *See id.* at 504.

722. 394 U.S. 618 (1969).

723. *See Saenz*, 526 U.S. at 507.

724. *Id.* at 511.

725. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AN THE BILL OF RIGHTS 2, (1986); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Laurence H. Tribe, *Saenz San Prophecy: Does the Privileges and Immunities Revival Portend the Future- Or Reveal the Structure of the Presence?*, 113 HARV. L. REV. 110 (1999).

bert.[726] The Court in *Gabbert*, employing a due process analysis, was unable to give relief against calculated interference with the attorney-client relationship because the conduct did not "deprive" the attorney of any liberty or property interest. The Court noted that the cases relied upon by *Gabbert* involved a "complete prohibition" of the right to engage in a calling. By contrast, in *Saenz*, there was no prohibition whatsoever on the right to travel to California.[727] At most, the restriction on the amount of the welfare benefit merely chilled that privilege and therefore constituted an abridgement. Had the attorney's right to engage in a lawful calling in *Gabbert* been viewed as a right protected under the Privileges or Immunities Clause, the issue likewise would have been whether the government's conduct "abridged" that privilege. It is not altogether obvious that the same result would have been arrived at under this different form of constitutional analysis.

It is of course well known that the Privileges or Immunities Clause was emasculated in the often criticized 1873 decision in the Slaughter-House Cases[728] and left a dead letter. Perhaps the most significant jurisprudentially neglect of the twentieth century was the failure to revitalize this Constitutional mandate and develop a coherent theory of substantive rights which are the birthright of all Americans. Today in light of the increasing control by government over so many aspects of our lives, the need for well-defined substantive privileges and immunities in areas such as privacy and decisional autonomy is clear. It is therefore fitting that in its last full Term of the century that the Court resurrected this noble Clause from its entombment. While some will agree with the dissenters, Chief Justice Rehnquist and Justice Thomas, that *Saenz* raises the specter that the Privileges or Immunities Clause will simply become a tool for inventing new rights, the decision also presents an opportunity for re-examination, which may allow the Court in the new millennium to re-commit our nation to the fundamental values which launched this great experiment in democratic self-government.

XVIII. CONCLUSION

While the 1998-99 Term witnessed the continued deconstitutionalization of criminal procedure and showed that the trend toward returning power to the states to regulate criminal prosecutions has not diminished, unanimity on the Court was rare. Indeed, in approximately one third of the criminal cases decided during the term, the Court was sharply divided and in some cases badly splintered. Justice Stevens, who filed the most dissents of any justice during the term, was frequently joined by Justice Ginsburg, Justice Souter and (except for the notable departure in *Minnesota v. Carter*) Justice Breyer. This block of four Justices generally was seen in opposition to the

726. 526 U.S. 296 (1999).
727. *See Saenz*, 526 U.S. at 493, note 1.
728. 83 U.S. 36 (1873).

Chief Justice, who was usually joined by Justices Scalia and Thomas. Justices Kennedy and O'Connor, who are regarded as centrists on the Court, most frequently sided with the Chief Justice against the rights of criminal defendants. Yet in *Mitchell v. United States* Justice Kennedy not only provided the crucial fifth vote, but wrote the opinion upholding the Fifth Amendment privilege against self incrimination at sentencing. Similarly, in *City of Chicago v. Morales* and *Saenz v. Roe,* both Kennedy and O'Connor joined with the Steven's quartet to form a majority that struck down laws which adversely impacted personal liberty, demonstrating that this Supreme Court is still capable on occasion of rising to fulfill its traditional role as the guardian of individual freedom. It would be too much to read into these cases the glimmerings of a return to the principles which motivated the Warren Court. With the potential retirement of the Chief Justice in the near future, however, the prospects for continuing the deconstitutionalization of criminal procedure into the new millennium may well be determined by the Presidential and Congressional elections in the fall of 2000.[729] Would it not be ironic if future historians record that the seeds for a "new generation of constitutional ideas,"[730] incompatible with the current retrenchment of individual rights, were planted at the close of the twentieth century in the twilight of the Rehnquist Court's waning moments.

729. It is of course also possible that both Justices O'Connor and Stevens could retire.
730. Tribe, *supra* note 725, at 125.