| DISTRICT V | Judge Andy Buster  
Miami, Florida  
Judge Jerry L. Fielding  
Tallahassee, Alabama  
Judge Steven Leifman  
Miami, Florida |
| DISTRICT VI | Judge John E. Conery  
Franklin, Louisiana  
Judge David Gorbaty  
Chalmette, Louisiana  
Judge Toni Higginbotham  
Baton Rouge, Louisiana |
| DISTRICT VII | Judge James Heupel  
Fredericksburg, Texas  
Judge Sherry Jackson  
Texarkana, Texas  
Judge Nathan E. White, Jr.  
McKinney, Texas |
| DISTRICT VIII | Judge Lorenzo Arredondo  
Crown Point, Indiana  
Judge Leon Ruben  
Nashville, Tennessee  
Judge Karen Thomas  
Newport, Kentucky |
| DISTRICT IX | Judge Larry Allen  
Willoughby, Ohio  
Judge Howard H. Harcha  
Portsmouth, Ohio  
Judge W. Milton Nuzum III  
Marietta, Ohio |
| DISTRICT X | Judge Leo Bowman  
Pontiac, Michigan  
Judge Gus Cifelli  
Bloomfield Hills, Michigan  
Judge Stephen Cooper  
Southfield, Michigan |
| DISTRICT XI | Judge Kevin S. Burke  
Minneapolis, Minnesota  
Judge W. M. McMonigal  
Berlin, Wisconsin  
Judge John Williams  
Kansas City, Missouri |
| DISTRICT XII | Judge Lynda Howell  
Phoenix, Arizona  
Judge Denise M. Lightford  
Phoenix, Arizona  
Judge David Orr  
Moose Jaw, Saskatchewan |
| DISTRICT XIII | Judge Pedro Hernandez  
Billings, Montana  
Judge Richard Kayne  
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EDITOR’S NOTE

One of the challenges faced by a journal serving a specialized audience, like judges, is to balance general-interest articles with ones on a single topic. Some topics are of sufficient significance, though, that we will devote most or all of an issue of Court Review to that topic. When we do this, we work hard to find authors who are in the forefront of work in that area. For this issue on jury reform, we think you’ll be pleased with the result. The authors who have contributed to this issue are unquestionably among the top experts in the field.

In the first article, Greg Mize and Chris Connelly provide an overview of jury reform in the United States today. They include information on a national program now underway to increase use of effective jury reform methods. Mize cochaired the District of Columbia Jury Project from 1996-1998 and remains active today in the jury reform movement.

Our second article, by Mike Dann and Valerie Hans, reviews the most recent empirical evaluations of several jury trial innovations, including note taking, questions from jurors, preliminary substantive instructions, and juror discussions of evidence during trial. Dann cochaired the Arizona Jury Trial Reform Committee in 1993; Hans has written two books and numerous articles on juries and jury reform.

Our third article, by Shari Seidman Diamond, Mary Rose, and Beth Murphy, reviews the practice of letting jurors ask questions during trial. They focus on an in-depth look at a single question: what are the effects when jurors are allowed to ask questions, but the judge doesn’t ask one of the questions submitted? These researchers were able to observe unanswered questions in 39 jury trials. They provide an excellent overall review of the value of letting jurors ask questions and whether any negative effects arise when that is done. Seidman Diamond is one of the leading experts on juries, with dozens of published articles. Rose has conducted empirical research on juries for many years. And Murphy has been previously published in Court Review on ways to improve jury deliberations.

We appreciate the effort of each of these authors in making this a special and valuable issue. We also acknowledge the help of Paula Hannaford-Agor at the National Center for State Courts in helping to recruit some of the authors; and of Greg Mize and Shari Seidman Diamond in making suggestions for the Resource Page: Focus on Jury Reform on page 42.

As always, we hope you’ll take a moment while reading the issue to look at the Resource Page section, which starts on page 44. And, as you come across information that you believe might be appropriately listed on the Resource Page or otherwise of interest to other judges, please let us know.—SL
President’s Column

Michael R. McAdam

My travels this year have given me the opportunity to spread the word about the benefits of AJA membership. My message has been simple: Every judge needs to belong to a national judges’ organization that represents all judges, not just a narrow section or division of judges and not just a bar association with a small minority of judge members. Those kinds of organizations have a role to play, but they can’t speak beyond their narrow focus or with one voice. The AJA can do both.

The reception I’ve received to this message has been positive but we, as an organization, need to do more. Toward that end, last spring our Executive Committee voted to suspend indefinitely the first-year-free membership that we had offered for many years and replace it with a new “Member-Get-a-Member” campaign. The details of this program have been sent to you in the mail and in Benchmark.

The point I want to make here is simply that all of us can spread the word about the benefits of AJA membership as we attend our local and state judicial conferences and as we communicate with our judicial colleagues on a daily basis. You, as an AJA member, are the best ambassador we have.

The AJA has a critical role to play in the coming national battles over judicial independence, selection and retention of judges, and salaries and benefits for judges. These issues are critical to the future independence of our courts. But that role is diminished if our numbers are declining. Membership in a state association is vital, but I’ve learned in my year as your AJA president that judges have key national allies with which state judicial organizations may not have open lines of communication. I’ve also discovered that attacks on the courts take familiar forms, whether in different states or even in Canada. Therefore, a national judicial organization is needed to educate the public and media about the necessity for an independent judiciary. Toward this end, the AJA sought and obtained a grant from the Joyce Foundation of Chicago to put on the National Forum on Judicial Independence at our annual conference in San Francisco.

AJA involvement in substantive national issues must continue. In the past year, I appointed Judge Leo Bowman of Michigan to serve on the joint committee of CCJ/COSCA dealing with problem-solving courts. He also served as the AJA representative on “A National Survey of the Court’s Capacity to Provide Protection Orders” established by the National Institute of Justice. Judge Lynda Howell of Arizona and I participated in an expert panel on “The Judge’s Role in the Reduction of Impaired Driving,” an ongoing educational project funded by the National Highway Traffic Safety Administration and administered by the National Center for State Courts. Your next AJA president, Judge Gayle Nachtigal of Oregon, has developed a program of education for presiding judges and those who aspire to such administrative judicial positions, which is scheduled for our next annual conference.

These initiatives put the AJA “brand” name on important educational efforts to train judges and court personnel.

When I became AJA president last year, I expressed as a goal the need to continue the AJA’s tradition of providing solid educational programs at our annual and midyear conferences, along with strong social events at each to facilitate the meeting and making of friends and colleagues from across the nation. I also wanted to strengthen our ties with other judicial organizations. Our joint midyear meeting in Savannah with the National Association for Court Management (NACM) was a success in all three respects. NACM put on an excellent educational program that had relevance to judges, court administrators, and clerks. The joint nature of the meeting made it possible for AJA members to share concerns of common interest with the members of NACM. And, of course, the social program was top notch, particularly the fabulous Super Bowl party. This is just an example of the kind of partnership the AJA can benefit from with other national judicial organizations.

This past year has been exciting and exhausting. I wouldn’t have missed it for anything. I thank all AJA members for your good wishes and your wise counsel. I thank the scores of judges who volunteered their time and energy to make this year a successful one. Your involvement and support of the AJA and its many important activities is the indispensable ingredient for its continued success.
Recently the United States Supreme Court has instructed us that any contested fact, other than a prior conviction, that increases the penalty for a crime must be determined by a jury. In addition, the highest court for the Commonwealth of Virginia has determined that, in capital cases, a claimed defense of mental retardation raises a jury question. Whether it is a case prompted by these high court rulings, one of the many accounting fraud prosecutions in New York, or scientific evidence presented in a products liability action in the Midwest, the American jury is repeatedly being called upon to make findings in new and complex matters. Unfortunately it is common for jurors to perform these weighty tasks in unfit conditions and without the learning tools that we take for granted in school. While computers and interactive technology are becoming commonplace in our classrooms, juror note-taking and questioning of expert witnesses have customarily been discouraged in courtrooms.

Moreover, despite the wellspring of pride in our democratic ideals after September 11, 2001, corrosive myths and misgivings about the jury trial still abound. In this regard we need only reflect upon several notorious jury verdicts in the 1990s. Laymen and litigators, who fix upon those cases, think juries too often get it wrong. In addition, there is the recently recurring diminishment of governmental funding for trial courts and widespread citizen reluctance to respond to summonses for jury duty. For example, in many large, urban court systems, the response rate to jury summoning is about 20%. Is it any wonder that citizens are dodging jury service in record numbers?

There is good news, though. A growing number of courts are taking steps to perform at a higher level with respect to jury trials. As shown below, a movement started in Arizona has taken hold in a growing number of states. Creative court administrators, courageous judges, and inspired bar leaders are joining together to bring our cherished institution of trial by jury into the 21st century. Articles included in this issue of Court Review show how members of the legal academy are testing and demonstrating the dynamics of jury trial innovations that are founded on principles long recognized by the social sciences and business communities. Indeed, as described in this article, there now exists a National Program to Increase Citizen Participation in Jury Service Through Jury Innovations. Before long, there will be an encyclopedic collection of uniform data called the “State of the States” that will tell us how every state operates each aspect of its jury trial systems. Importantly, the State of the States will provide court leaders with information about how to contact persons in other parts of the country who have undertaken and implemented successful jury trial innovations.

THE RECENT HISTORY OF JURY TRIAL INNOVATION EFFORTS

On September 6, 1999, the Columbus Dispatch reported on an alarming occurrence in Ohio. The column asked the pointed question, “What is being done to get a prospective juror to respond affirmatively to a summons?” While most people may believe this to be a non-issue, the article went on to detail the story of Lucinda Whiting, whose arson case could not begin for one simple reason: only 11 jurors could be found to sit for her case after the conclusion of voir dire. The quoted words of the judge to the jurors who arrived in the courtroom were: “This is important, and maybe it’s because some of your fellow citizens did not recognize how important this was that you and I spent the day here and accomplished nothing.”1

The reported example raises the issue: how do we ensure that jurors report for service? For many states, a solution has been to look toward innovations in their jury systems to make the process work more effectively, efficiently, and conveniently for citizens and legal professionals alike. These efforts have been multifaceted, ranging from reforms that seek to increase juror comprehension of evidence and testimony to those that provide greater compensation for service.

Serious discussions about jury trial innovation got underway in the early 1990s with the 1992 publication of Charting a Future for the Civil Jury System by the Brookings Institution. This paper reported the results of a symposium held in Charlottesville, Virginia, in the same year. The three-day conference, organized by Brookings and the Section of Litigation of the American Bar Association, “developed recommendations to improve civil jury procedures based both on their unique perspectives and on the findings of commissioned papers that were presented at the conference.”2 The gathering marked what some have considered the birth of organized jury trial innovations. Because such endeavors in innovation ultimately reside in the hands of affected jurisdictions, we must look at the innovative practices within the states. To this end, eyes must first turn to Arizona.

The Arizona Supreme Court Committee on More Effective Use of Juries began working on its system in 1993. The committee, chaired by Judge B. Michael Dann, advocated changing procedures to make the trial an educational process for jurors.
and to give jurors a more active voice in the proceedings. The Arizona Supreme Court eventually approved numerous reforms, including granting jurors in civil trials the opportunity to discuss evidence among themselves before final deliberations. This was an effort to improve comprehension, especially in complex proceedings. Arizona was the first state in the country to adopt this and many other juror-empowering policies.

Arizona continued to demonstrate leadership on jury trial issues throughout the 1990s. Many of those efforts have been studied and reported in professional publications. The banner issues raised in Arizona include improvements in judicial communications with jurors during trial, jury note taking, juror questions to witnesses, and increasing responsiveness to the needs of deliberating juries. What followed was a multitude of similar efforts across the country.

To date, research indicates that 30 states have undertaken formal steps to analyze their jury trial systems and establish some innovations. These efforts have included state-organized commissions, jury innovation conferences, and written reports and studies. In general, most states’ efforts follow a “top-down” format. In these instances, the judiciary creates a statewide initiative dedicated to jury innovation efforts. The initiative often produces recommendations leading to varying degrees of implementation, as state rules and procedures are altered accordingly. However, there have also been “bottom-up” jury innovation efforts. “Bottom-up” innovation can be considered more of a grassroots movement, in which some trial judges introduce innovative procedures in their own courtrooms, without instruction or recommendation from a central hub. Although rarer, “bottom-up” innovation efforts put new programs into practice more immediately. Not surprisingly, they can have narrower impact and be more difficult to study.

One noteworthy way some states have generated improvements is the use of pilot programs. Under this methodology, a statewide commission commonly enlists the support of volunteer judges to test certain practices in their courtrooms. The volunteers report back to the commission about the effectiveness of the innovations before they are instituted on a statewide basis. In other words, this is a combination of the “top-down” and “bottom-up” approaches. The states that have followed this procedure have been able to obtain very useful information about the effect of jury innovations. For a taste of some of these benefits, we look to Massachusetts, Colorado, New Jersey, Hawaii, and the Columbus Dispatch’s home state of Ohio.

In November 1997, Massachusetts hosted a conference on jury trial innovations, during which judges from the trial courts met to hear presentations on jury innovations. The two-day conference led to 16 judges’ participation in a two-year demonstration study, during which they introduced the reforms discussed at the conference into their own courtrooms. It is important to note that this effort was not organized by the state administration—it was a grass-roots reform effort that brought together likeminded individuals concerned with reforming the jury system. Sixteen innovations were tested, including juror note-taking, juror questions to witnesses, “plain English” jury instructions, pre-instructing the jury on the law, post-verdict meetings between jurors and the judge, and others. Judges and jurors were both asked to give their opinions of these reforms. Questionnaires were collected from judges and jurors in 150 cases, 66% of which came from criminal trials. Responses were received from 1,264 jurors.

These innovations were tested with varying frequency. For example, juror note-taking was tested in 95% of the trials in which surveys were returned, whereas permitting jurors to submit questions to witnesses was tested in 41% of the cases. Judges overwhelmingly recommended certain innovations, including note-taking, pre-instruction on the law, and post-verdict meetings between judges and jurors. With respect to imposing time limits on parties’ time at trial and providing written copies of instructions to the jury, there was little negative feedback about the effectiveness of these methods in improving the jury process. Some judges recommended every innovation that they tested. One commented that “[a]ll of the practices used in the project seem to involve the jury more actively in the learning process necessary to a rational decision. Juries in my experience have reacted very favorably to the practices. I have found virtually no drawbacks in or contraindications to using these practices.”

7. Id.
8. Id.
innovative procedures have been fine-tuned by way of bar CLE programs and judicial conferences.

While programs in Massachusetts may have gone largely unnoticed by the national media, it has been hard to miss the attention given to Colorado’s jury reform efforts due to the trial of a certain basketball superstar. The Kobe Bryant sexual assault case drew attention to the new criminal trial procedure in Colorado that enables jurors to ask witnesses written questions. “When Kobe Bryant goes on trial later this year,” according to an Associated Press story, “jurors will be allowed to submit questions for witnesses in the sexual assault case in what is believed to be the first rule of its kind.” Though the national media has focused on juror questions to witnesses, it is simply one reform that has resulted from Colorado’s innovation efforts.

The reform effort resulting in juror questions at criminal trials was the result of a long history of jury reform recommendations in Colorado, beginning with the adoption of reforms suggested in the February 1997 report, “With Respect to the Jury: A Proposal for Jury Reform.” After the Colorado Supreme Court “adopted in principle the recommendations” contained in this report, the chief justice “appointed a Jury Reform Implementation Committee . . . and charged that committee with developing specific proposals to implement the various recommendations in this Report, and reporting back to the Court.”

In 1998, the Committee reported back, subdividing their recommendations into seven areas relevant to different areas of possible improvements, including reworking Colorado’s jury instructions, statutory revisions to clarify rules and procedures, and administrative changes such as public education, revision of the master juror list, addressing the need for juror debriefing, and standards for excusing jurors. Additionally, they recommended commencement of pilot programs to test the success of various innovations, specifically relating to pre-deliberation discussion among jurors in civil cases, and the new famous reform regarding juror questions in criminal cases.

The juror questions pilot program was the first to be completed, resulting in the 61-page “Dodge Report” in Fall 2002. The report conveyed results and recommendations relating to “the presence or absence of allowing jurors to submit questions . . . randomly assigned to 239 District and County Court criminal trials.” The study began in September 2000 when Chief Justice Mary Mullarkey “authorized a statewide pilot study to evaluate the effects of permitting jurors to submit written questions during criminal trials.” The study obtained feedback from judges, attorneys, and jurors by means of post-trial questionnaires. Juror questions were permitted in 118 trials, while not permitted in 121. Surveys were collected from both samplings. The resulting data included the reasons jurors asked questions and assessments by judges and attorneys about the quality of the juror questions. Findings were overwhelmingly in favor of the innovation, with 93% of the jurors surveyed reporting that it should be allowed in future trials. Ultimately, the report supported questioning with judicial supervision, stating that it “will have positive effects with few detrimental results.”

Similarly, New Jersey has focused its efforts on juror inquiries to witnesses. But unlike Colorado, their emphasis has been on juror questions in civil trials. In 1998, a pilot program to investigate this innovation in civil trials was approved by the New Jersey Supreme Court, though it did not begin until nearly two years later. From January 2000 through June 2000, 11 judges were commissioned to allow jurors to pose written questions to witnesses. The effort was chaired by Judge Barbara Byrd Wecker. It covered 147 civil trials, from which surveys were obtained from attorneys, judges, and jurors. New Jersey based parts of their effort on the Massachusetts program, using it to build their own testing ground for the use of juror questions in civil cases. As with the Massachusetts study, the results showed that “it was apparent that jurors and judges were reacting very favorably, whereas attorney reaction was mixed . . . . [T]he jurors virtually all loved it . . . . [T]he judges . . . were very pleased . . . and the attorneys’ responses were measured.” The pilot recommended that the state adopt their rules to allow juror questions accordingly.

Following the completion of this pilot, the New Jersey Supreme Court approved the pilot’s recommended changes, and the revisions went into effect on September 3, 2002. In addition to adopting these rules, the Conference of Civil Presiding Judges initiated a follow-up project to focus on the specific procedures that judges may use when allowing jurors to ask questions. Chaired by Judge Maurice Gallipoli, the goal of this ongoing project is to perfect the process of question asking. The areas of inquiry include whether judges modify questions, whether attorneys ask follow-up questions of witnesses, and how much additional trial time is required for the allowance of questions. The inquiry period lasted six months and involved surveys of both judges and juries. “The jury is still out” regarding the results of this study. The findings of the project are expected to be completed in the fall of 2004.

Though Colorado and New Jersey have focused largely on the field of juror questions, Hawaii has taken the idea of pilot programs further. On June 22, 1993, the Hawaii Supreme Court established their Committee on Jury Innovations for

11. Id. at 1-4.
12. MARY DODGE, SHOULD JURORS ASK QUESTIONS IN CRIMINAL CASES? A
13. Id. at 1.
14. Id. at 580.

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the 21st Century with the mission to “study and obtain information about jury trial innovations considered or adopted by other states.”  

At its first meeting, the group decided that a pilot program, to involve five circuit court judges (the number was later increased to six), would be beneficial in testing the effectiveness of innovations in the civil and criminal courts. The Hawaii Supreme Court authorized this pilot program upon request of the committee and set the window of its activity to be July 1, 1998 through October 15, 1999. In the course of this 15-month period, “judges participating in the pilot project . . . conducted seventy-seven criminal trials and ten civil trials.” A key clause in the Hawaii Supreme Court order gave the six judges involved discretionary power over the innovations that they tested in the courtroom, thus leaving the ultimate responsibility for the test in the hands of six individuals.

These six judges ended up testing ten different innovations, including allowing jurors to take notes, juror questions to witnesses in civil and criminal trials, jury instructions prior to closing arguments, and others. Courts that took part in the study responded to surveys regarding their experiences, resulting in 1,063 responses in criminal cases and 136 in civil cases. The responses largely supported innovative procedures. For example, 88% of attorneys in civil trials and 90% of attorneys in criminal trials stated that none of the innovations negatively impacted the trial. In addition, they found “statistically significant evidence supporting the proposed advantages of both juror note-taking and question asking . . . both innovations were found to be supported by jurors, whether they used the opportunities afforded them or not.”  

In the end, all but one of these innovations was recommended by the committee. The singular exception concerned pre-deliberation juror discussion of evidence in civil trials. As a result of this report, the Hawaii Supreme Court issued an order, effective July 1, 2000, that altered the court rules related to jury innovations, making virtually all of the changes recommended by the committee’s report.

It would be mere speculation to state the Hawaii changes may have impacted the previously mentioned case of Lucinda Whiting had it occurred in the Aloha State. Rather, the question becomes, what did Ohio do to correct the problems illustrated by the *Columbus Dispatch*? In July 2002, Chief Justice Thomas Moyer appointed a jury task force to study the jury system in Ohio and to recommend relevant innovations. The group was independent from the Supreme Court. The task force split itself into two subcommittees, with one focusing on

20. Ohio Supreme Court Task Force on Jury Service, Report and

21. Id., App. B.
A national project to increase use of effective jury reform methods and to improve the conditions of jury service has begun. It is a joint project of the National Center for State Courts’ Center for Jury Studies, the Council for Court Excellence (Washington, D.C.), and the Trial Court Leadership Center of Maricopa County (Phoenix, Ariz.).

The project—officially the “National Program to Increase Citizen Participation in Jury Service Through Jury Innovations”—seeks to increase citizen awareness of positive aspects of jury service and to improve conditions of jury service. The project will deliver tools and technical assistance needed by judges, attorneys, and court administrators to meet these objectives.

Major projects planned are (1) providing technical assistance to state and local courts to implement innovative jury practices, (2) compiling a “State of the States” database of jury practices throughout the United States, and (3) providing a series of “prescriptive packages” to improve response to jury summonses, comprehension of jury instructions, and effective jury management in urban courts.

A descriptive brochure summarizing the plans of the National Program to Increase Citizen Participation in Jury Service Through Jury Innovations can be found at http://www.ncsconline.org/juries/04-050046%20Jury%20Trends-Flyer.pdf. For more information about the program, contact Tom Munsterman, Director of the National Center’s Center for Jury Studies, by phone (703-841-5620) or by e-mail (tmunsterman@ncsc.dni.us).

profit corporation, the Council for Court Excellence gained foundation grants to fund the D.C. Jury Project, a top-to-bottom study of the jury trial systems in the District of Columbia. The final recommendations for improvements took the form of a 1997 report, “Juries for the Year 2000 and Beyond.” The D.C. Jury Project was unique in that it was totally funded by private-sector contributions and its recommendations were received—and acted upon—by both the federal and state-type trial courts in our nation’s capitol.

It is evident the 30 states that have done some type of work on jury innovation have each gone about it in ways uniquely their own. Many states have performed studies. Many others have carefully organized steps to implement jury trial innovations. And as depicted above, many have utilized pilot programs. However, the data on what actually is being done is often difficult to come by. In those states that have not performed exhaustive studies or formulated reports, it can be a daunting task to fathom the landscape. This lack of knowledge begs for answers to several questions. What is the state of the jury trial system in every state? How can trial judges and lawyers communicate with each other about jury trial issues and improvements? How can court leaders in states that have not undertaken a study of their jury trial systems come to learn valuable lessons from their colleagues in the other state courts?

The purpose of the Jury Summit was to bring together representatives from across the nation to examine the state of America’s jury system, share innovative practices, and plan for continued improvement. Over 400 persons from 45 states attended, including state and federal judges from the trial and appellate benches, court administrators, clerks, attorneys, representatives from community-based organizations, and even jurors. The legacy of the Jury Summit was to encourage states to expand efforts to improve the jury system nationwide. The results have been encouraging.

Following the basic themes of the National Jury Summit, the Program centers on citizen outreach and improving the conditions of jury service. Citizen outreach about the glory of the jury system and civic responsibility are hollow, however, if citizens who report are treated poorly—in terms of the facilities, or lack of respect for their time (and that of their employers), or compelled hardship to themselves or their families. To these people, Thomas Jefferson’s statement that “serving on a jury is more important than voting” is entirely lost. Consequently the Program is designed to provide courts with methods to improve citizen attitudes toward jury service. It will provide a service package that explains how several jurisdictions have developed outreach programs to promote community appreciation of trial by jury. The Program will also make technical assistance available to help jurisdictions that are interested in making the jury trial itself a more information-centered endeavor.

The National Center for State Courts leads these efforts through its Center for Jury Studies. It is joined by two other court assistance organizations, the Council for Court Excellence (Washington, D.C.) and the Maricopa County Trial Court Leadership Center (Phoenix, Ariz.).

Employing well-established business management practices, the Center is undertaking a sequence of tasks. First, it is systematically gathering a compendium of current state jury management practices known as the “State of the States.” Upon completion, it will establish the first-ever, baseline measure of the statutes, rules, customs, and practices that define jury systems across the country. The State of the States documentation will span an operational spectrum ranging from initial summoning to final dismissal after verdict. Contemporaneously, prescriptive packages are being developed to describe practices that have proven to be highly effective in states that have already undertaken jury trial renovations. The “best practices” packages will cover four priority areas: (1) improving citizen response to jury summonses, (2) comprehensibility of jury instructions, (3) model legislation and rules to anchor jury reforms, and (4) jury management workshops for urban courts. The prescriptive packages will be used as technical assistance tools and made widely available.
through the National Center, the National Judicial College, and state judicial education programs.

To begin implementation, a “to-be-determined” number of courts will be selected. The chief justice and state court administrator will be approached and involved to the fullest extent in each case. When the court selections are made, program staff will work directly with the courts to establish an individualized plan of action from a full menu of jury innovations. Depending on what stage a selected jurisdiction is at in the process of jury system renovation, the technical assistance will follow one of several established paths described below.

For a jurisdiction just getting started, the Program would suggest that the state supreme court appoint a broad based committee to examine many aspects of the state jury system. This committee or task force would report back to the court with recommendations. The National Center staff would guide and assist all along the way.

If a state has already begun a renewal effort that has stalled, the Program staff will help the state re-ignite its innovation actions. In states where reform implementation is discretionary with individual trial judges, the Program will offer a replication of the successful approach undertaken in Massachusetts.

Clearly, the National Program will create crucial benefits for state courts. Measurable results include: the increased use of innovative practices by judges, reduced burden upon jurors and employers, reduced citizen non-response to summonses, a greater proportion of our population actually serving on juries, less juror waiting time in court, fewer questions asked by deliberating juries, and a more well-trained judiciary. There will also be more instances of juries being representative of the community in terms of age, education, occupation, and profession. Across our land we should see more efficient and cost-effective jury systems. Trial jurors will be better informed. In other words, juror decision-making and satisfaction will be enhanced. Importantly, there should be greater public trust and confidence in jury verdicts and the courts.

Gregory A. Mize currently serves as a consultant to the National Center for State Courts’ Center for Jury Studies. Before that, he served as a judge on the Superior Court of the District of Columbia from 1990 to 2002. While there, Mize presided over hundreds of jury trials, both civil and criminal, and also conducted more than 800 settlement conferences. In 1997 and 1998, he co-chaired the D.C. Jury Project, which issued its nationally recognized recommendations in 1998. From 1983 to 1990, he served as general counsel to the District of Columbia City Council. He received his A.B. in philosophy from Loyola University in Chicago and his J.D. from Georgetown University Law Center; he has served as an adjunct professor at the Georgetown University Law Center and the University of Virginia School of Law.

Christopher J. Connelly is a court research analyst for the National Center for State Courts Center for Jury Studies in Arlington, Virginia. Before joining the Center for Jury Studies, Connelly worked as an intern in the National Center’s Knowledge and Information Services Division in Williamsburg, Virginia. He received a B.A. in history and government from the College of William and Mary in 2004.

Recent Evaluative Research on Jury Trial Innovations

B. Michael Dann and Valerie P. Hans

During the past decade, state jury reform commissions, many individual federal and state judges, and jury scholars have advocated the adoption of a variety of innovative trial procedures to assist jurors in trials. These include reforms as prosaic as allowing juror note taking and furnishing jurors with copies of written instructions, through more controversial changes, such as allowing jurors to ask questions of witnesses or permitting them to discuss the case together during breaks in the trial. Accounts of the nature and purpose of the innovations and the pace of change are found in this issue of Court Review and elsewhere. These innovations are now catalogued in convenient form, accompanied by practical guidance for judges.

Many jury trial reforms reflect growing awareness of best practices in education and communication as well as research documenting that jurors take an active rather than a passive approach to their decision-making task. Traditional adversary jury trial procedures often appear to assume that jurors are blank slates, who will passively wait until the end of the trial and the start of jury deliberations to form opinions about the evidence. However, we now know that jurors quite actively engage in evidence evaluation, developing their opinions as the trial progresses. It makes sense to revise trial procedures so they take advantage of jurors’ decision-making tendencies and strengths.

Although reform groups have endorsed many of these innovations, until recently there was only modest evidence about their impact in the courtroom. Now, substantial research on the effects of most of the reforms on juror comprehension and juror satisfaction with the trial has been completed and reported. Data are now available to judges and others seeking reliable empirical support for the changes to the traditional jury trial.

This article will describe the methods used to study juries and jury trials and present recent data now available for each of the major proposed innovations. We also draw on new findings from our own recent research testing the comparative advantages of jury innovations for understanding complex scientific evidence.

METHODS USED TO STUDY JURY INNOVATIONS

Researchers have taken a variety of approaches in studying the effects of jury innovations. Some involve using the scientific method of experimentation.

Mock Jury Experiments: Many jury researchers, particularly psychologists, use mock jury experiments to test the impact of an innovation. The experimental approach has been used in many scientific studies. Participants are asked to assume the role of jurors, hear trial evidence, and reach a verdict in a mock trial. To examine the effects of a specific trial reform such as jury note taking, some participants are randomly assigned to take notes and others are not. The performance and decisions of the people taking notes are compared to the participants in the control group to assess the impact of note taking. Most mock jury experiments take place in university research laboratories.

Field Experiments: Field experiments take advantage of the scientific power of random assignment. But instead of using people from the community or even college students and asking them to assume a hypothetical role, the field experiment takes place in the courtroom.

Footnotes

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6. Robert MacCoun, Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Litan, ed., Brookings Institution/American Bar Association 1993) at 137, 140-47. MacCoun also discusses archival analyses, in which researchers analyze jury cases and their outcomes for patterns, but that has not been employed much in studies of the impact of jury innovations.
real world. To test a jury innovation, actual jury trials are randomly assigned to be conducted with a particular innovation or not. Just as with mock jury experiments, jurors in the experimental and control conditions are compared to determine the impact of the jury innovation.

Non-Experimental Studies. Many states have tested the effects of jury reforms in systematic ways, although these studies do not include random assignment and experimentation. Our article describes state pilot programs and other efforts to assess trial participants’ views and reactions to new jury trial procedures. One common approach is to survey or interview trial participants, including jurors, following a trial, collecting their perceptions about jury innovations used during the trial. So, for example, in a trial in which a judge permitted jurors to ask questions, the judge, the lawyers, and the jurors might all be surveyed about what they thought about the reform and how it affected the jury’s work.

Each of these methods has characteristic strengths and limitations. Interviews and surveys rely on trial participants being able to report accurately how an innovation affected them. Mock jury experiments can present a more controlled environment, but participants are not really deciding someone’s fate. Field experiments appear to be an ideal marriage of scientific power and the reality of jury decision making, but they are rare. Some judges are reluctant to use random assignment with actual jury trials. Pilot programs could reflect the unique situation of particular jurisdictions. Thus, it is necessary to employ all of these divergent approaches to studying the effects of jury reforms, looking for a convergence of findings. Below we describe how research using these methods has discovered valuable information about the operation and impact of jury trial innovations.

RECENT EMPIRICAL EVALUATIONS OF JURY TRIAL INNOVATIONS

Eight innovations have attracted the most attention of jury researchers and state reform groups: juror note taking, questions from jurors intended for witnesses, discussions of the evidence by jurors during civil trials, pre-instructing jurors on the applicable law, providing jurors with juror notebooks, instructing the jury before closing arguments, providing each juror with a copy of the instructions, and offering suggestions regarding jury deliberations.

NOTE TAKING

In some states, judges are required to inform jurors that they may take notes if they desire and to furnish jurors with the necessary materials. Trial judges in most other state and federal courtrooms may permit juror note taking, or not, at the judge’s discretion. More are doing so, but many still do not.

Research on juror note taking has been undertaken both with mock juries in controlled settings and actual juries in field experiments. Both lines of research find no evidence of any risk to juror note taking. The field studies show widespread support among trial participants for permitting jurors to take notes. Jurors themselves routinely report that note taking is helpful. Some studies show significant improvement in juror comprehension and memory.

Researchers Lynne ForsterLee and Irwin Horowitz conducted a series of mock trials of complex tort cases using jury-eligible adults. They report that experience with note taking improved jurors’ performances at several levels, including memory and understanding of the evidence and overall satisfaction with the trial process.

We found that note-taking juries were able to better organize and construct the evidence and, importantly, this in turn led to improved and more efficient (focused on the evidence) deliberations. . . . Note-taking jurors believed they were more efficient, and they expressed greater satisfaction with the trial process as compared to their non-note-taking jury counterparts. Lastly, note-taking juries were more likely to recognize case-related facts and reject “lures” (statements that were not actually in the trial) than were non-note-taking juries.

In another mock jury experiment involving 128 college students, Rosenhan and his colleagues also found statistically significant evidence that note taking increased recall of trial information and enriched note takers’ subjective experiences. Note takers had better recall of the trial evidence than non-note takers. Compared to non-note takers, note takers rated themselves as more attentive, more involved in the trial, and more able to keep up with the proceedings.

Most recently, in a research project funded by the National Institute of Justice, the authors of this article conducted a series of 60 mock jury trials to test the effects of four jury trial reforms on juror understanding of contested DNA presentations. Of the 400 jurors instructed they could take notes during trials of an armed robbery case, fully 89% responded that notes helped them remember or understand the evidence. As expected, there was an “education effect”; those jurors with

8. Id., at 188-89.
The practice of permitting juror questions of witnesses . . . is growing and is increasingly authorized by court rule or case law.

The recent research on juror note taking demonstrates that jurors believe the innovation enhances memory and understanding of the evidence, that judges and jurors strongly support the procedure, and that scant evidence exists of significant downsides to the innovation. There is some modest objective evidence that jury note taking significantly improves recall or comprehension.

ALLOWING JURORS TO ASK QUESTIONS AT TRIAL

The practice of permitting juror questions of witnesses (submitted to the judge in writing for screening) is growing and is increasingly authorized by court rule or case law. A 2004 decision of the Supreme Court of Vermont observed that the vast majority of states and all ten federal circuits that have considered the issue permit juror questions of witnesses in criminal cases at the discretion of the trial judge.15 Still, jurors are not permitted to submit their questions in a high percentage of today's courtrooms.

Like note taking, permitting jurors to put questions to the witnesses has received substantial attention from researchers. In their 1997 article reporting on their field study of actual trials in which note taking and juror questions were tested, Heuer and Penrod concluded that juror questions enhanced juror satisfaction with the trial process and jurors' confidence that they had enough information to decide the case, and that the process created some useful feedback for the attorneys.16 Nevertheless, there was insufficient evidence to support the claims that the process will uncover important evidence or lead to greater overall juror satisfaction with the trial. Conversely, the data did not bear out the concerns that permitting juror questions would be unduly disruptive, would prolong the trial, would unfairly surprise the lawyers, would burden the judge or staff, or that jurors' questions would be inappropriate.

In an extensive study involving juror questions in 239 criminal trials in Colorado, researchers administered questionnaires to the judges, attorneys, and jurors who participated. They concluded: “Overall, the results reveal that juror questioning has little negative impact on trial proceedings and may, in fact, improve courtroom dynamics.”17 Regarding the oft-heard complaint that juror questions will help the prosecution meet its burden of proof, only 16% of judges and 23% of attorneys felt that jurors' questions assisted in meeting the burden.
of proof. Almost three-fourths of both groups answered “No” or “No Opinion” to the question. Almost 80% of judges favored jury questioning in criminal cases. Prosecutors and defense counsel were divided: 90% of prosecutors favored allowing jury questions; only 30% of defenders did so. Note, however, that opposition to the procedure decreased by 50% among defense counsel after their experience in the pilot program.

A 1999 pilot project in Los Angeles County Superior Court in which judges experimented with a number of jury innovations reported that 92% of the jurors told they could ask questions had very positive opinions about the procedure. The overwhelming majority of jurors felt that being allowed to put their questions to witnesses improved their role as decision makers and made them feel more involved in the trial. Ninety-three percent of the judges said the process did not unduly prolong trials.

Following the Massachusetts pilot of juror questions, 96% of the judges who received juror questions thought the procedure was helpful and worthwhile.

Over 88% of the Ohio judges who participated in its pilot program testing the procedure approved of allowing jurors to ask questions. None of the purported risks of allowing jurors to put questions materialized. Over three-fourths of surveyed jurors reported that question asking helped them remain attentive, and 63% said that the answers to their questions aided their decision making.

After a six-month pilot program of allowing juror questions in New Jersey civil trials, the committee recommended that the New Jersey Supreme Court approve the procedure by rule, concluding:

No study of actual trials can measure the results against the theory in any scientifically reliable way. However, the questionnaires completed by the jurors, judges, and attorneys gave us significant information—including the fact that out of 127 trials conducted by 11 judges in as many counties, no one suggested that the process had an unfair effect on the outcome of the trial. . . . It is our perception that there need be no tension between the goal of a trial as a search for justice, and the method of the adversarial process.

The participating New Jersey judges, who received a median number of nine questions per trial (77% of which were put to a witness), unanimously favored the procedure, as did the overwhelming number of jurors. Trials were lengthened by 30 minutes, but jurors reported that answers to their questions shortened the time required for deliberations. Almost 60% of the pilot project attorneys also supported adoption of the eventual rule.

The Tennessee pilot program of allowing juror questions in trials reported similar juror support for the procedure—89%. In our mock jury experiment, 160 of the 480 mock jurors were instructed they could submit written questions to the expert DNA witnesses. A total of 49 relevant questions (average of 2.45 per trial) were received and answered. Most questions sought further explanations or elaborations of technical DNA evidence presented by the expert witnesses. Jurors who had taken more science and mathematics courses were more likely to ask questions. There was only a weak correlation between education and science or math job experience and the likelihood of asking questions. Support for the innovation among those in the question-asking conditions was very high—97%. When asked how the question procedure helped, almost 75% of jurors answered that the procedure helped them better understand the evidence. No objective differences in comprehension were found, however.

At least one other researcher has completed a study of a large number of juror questions to discover what jurors are asking. Nicole Mott conducted a content analysis of 2,271 juror questions from 164 actual trials, both criminal and civil. A median number of seven questions were asked per trial. She concluded that jurors used their questions to clarify previous testimony of both lay and expert witnesses and to inquire about common practices of unfamiliar professions. Mott found that jurors exercised the privilege of asking questions in responsible ways to enhance the quality of decision making. She concluded that the process was not detrimental to the adversarial trial. These latter conclusions coincide with the earlier findings from a national study by the American Judicature Society.

Finally, this issue of Court Review features an article analyzing jurors’ attitudes and reactions when their questions go unanswered.

### PRELIMINARY JURY INSTRUCTIONS ON THE APPLICABLE LAW

In most jurisdictions, the trial judge has the discretion to include in the court’s preliminary jury instructions at least some of the law that will govern the case. Some states now require it by court rule; many individual judges in other jurisdictions are doing so on their own. The available research focuses on the advantages to jurors who hear and read a legal “road map” they

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19. Frank & Madensen, supra note 12.
22. Dann et al., supra, note 10.
will be expected to follow at the outset of the case instead of having to wait until the conclusion of trial, when legal instructions are traditionally given.

In their work involving mock jury trials of complex tort cases, ForsterLee and Horowitz demonstrated that pre-instructed jurors scored significantly better on recall and comprehension measures. They concluded: “[S]ubstantive pre-instruction provided jurors with a framework, or schema, that enabled them to organize the trial facts according to legal guidelines as they were being presented. The advantage of substantive pre-instruction was apparent.” The authors added, “[J]urors made better decisions when they had a coherent framework to organize the initial processing and subsequent recall of the trial evidence.” Combining note taking and pre-instruction on at least some of the law the jury will be expected to enhance juror cognition still further.

In the Tennessee pilot project testing various reform proposals, some of the juries in the 45 trials received substantive preliminary instructions. Almost all the juror participants (98%) found the early instructions helpful; 81% reported they were “very helpful.” Attorneys in the same cases were “virtually unanimous” that they considered the preliminary instructions on the law helpful.

The pilot study in Los Angeles County Superior Court also tested substantive preliminary instructions. Ninety-eight percent of the 200 reporting jurors gave a “very positive” rating to the procedure, adding that the law provided in advance of evidence enabled them to focus better during the trial and enhanced their comprehension of the evidence.

In Ohio, where preliminary instructions on the law were given to some of the juries in that state’s study, 75% of the judges agreed that they helped jurors follow the evidence; only 7% disagreed.

Finally, in the Massachusetts jury project, 94% of the jurors who participated in the trials where substantive preliminary instructions were given said they were somewhat to very helpful. The vast majority of attorneys agreed that the preliminary instructions provided jurors with a better understanding of the legal issues and facilitated better juror focus during trial. Three-fourths of the trial judges reported that substantive preliminary instructions helped jurors to follow the evidence.

29. Frank & Madensen, supra note 12.
30. Hannaford & Munsterman, supra note 11.
33. Dann et al., supra note 10.
34. Connor, supra note 18.
ful.” Thirty-seven percent of the judges thought the notebooks helped the parties’ presentations; 72% said the notebooks assisted jurors in understanding exhibits.

Tennessee: When 418 jurors were asked about multipurpose notebooks, 90% responded that they were useful in performing their tasks. All attorneys in the same cases, with just one exception, gave the notebook experience a positive rating.

Massachusetts: All of the judges who oversaw preparation of notebooks and furnished notebooks to jurors reported that they were helpful and worthwhile.

Thus, recent research and judicial experience with jury notebooks, particularly in complicated cases, provide support for their use.

STRUCTURED JUROR DISCUSSIONS OF EVIDENCE DURING CIVIL TRIALS

The innovation considered the most radical and controversial is the one that turns on its head the traditional rule swearing civil jurors to silence during the entire trial, no matter how long, complex, or stressful. Jurors are instructed prior to civil trials that they may discuss the evidence during the trial, but only among other jurors; only in the privacy of the jury room; only when all jurors are present to participate; and only on condition that they reserve judgments about the ultimate issues until they have heard all of the evidence, the court’s final instructions on the law, and the arguments of counsel. The reform, adopted by rule in Arizona and subjected to evaluation by independent jury experts, is being watched closely by other jurisdictions and judges who favor reform generally. The research reveals strong support by judges and jurors. Only modest evidence was found supporting the assertions of proponents that discussions will enhance juror memory and comprehension. Little evidence was cited that validates the critics’ fears that such discussions would lead to premature judgments regarding the outcomes of cases.

The first study of this innovation was by a team of researchers that included one of this article’s authors, Valerie Hans. Together with Paula Hannaford and G. Thomas Munsterman of the National Center for State Courts, Hans conducted a field experiment in Arizona to study the effects of civil jury trials in four counties, the researchers used random assignment of the cases to “Discuss” and “No Discuss” conditions. Trial participants were quite supportive of the reform.

Support for the change ran very high among judges and jurors particularly: three-fourths or more of each group responded positively to the new procedure. Attorneys favored the new practice, but at the lower rate of 51%. Attorney support increased as they gained more experience with jurors being able to discuss the evidence during their trials.

Hannaford, Hans, and Munsterman analyzed the data collected regarding the effects of the change permitting juror discussions in civil cases. Jurors who discussed the evidence during the trial reported that the discussions were very helpful in resolving confusion about the evidence. However, the jurors’ self-reports about how well they understood the evidence overall, and the degree that judges agreed with the jury verdicts, were not affected by the opportunity to discuss the evidence.

The researchers also found that jurors in the two conditions did not differ in the timing of opinion formation about outcome issues. The data belied a principal fear voiced by skeptics of the new rule, that permitting such discussions among jurors would lead to premature judgments on the merits of the case. No such pattern was detected.

The most recent field study of structured discussions of evidence by Arizona jurors, conducted by Shari Seidman Diamond and Neil Vidmar, closely examined 50 civil trials after videotaping the trials, all juror discussions during breaks in the trial, and all juror deliberations. The investigators described what jurors discuss when instructed in accordance with the new rule:

During discussions jurors sought information about the testimony from one another to assist them in recalling testimony, obtain needed clarification, or provide meaning to facts. They also discussed questions that they had submitted to the court or that they planned to submit, and they talked about evidence that had not yet been presented that they would like to have. Case studies in the complex cases examining the correspondence between the trial evidence and the answers that jurors gave when their fellow jurors sought information during discussions revealed that discussion did result in more accurate understandings of trial evidence.

35. Frank & Madensen, supra note 12.
37. Hannaford & Munsterman, supra note 11.
41. Id., at iv.
allowed to discuss the evidence during trial pre-decide the merits... at any earlier stage than their counterparts...

The authors found only modest evidence that the innovation positively affected juror comprehension or recall of the trial evidence or law. With some recommendations for procedural changes in the Arizona practice, they concluded that structured juror discussions before formal deliberations can assist juries hearing complex cases. Like the researchers who had gone to Arizona before to study the same practice, Diamond and Vidmar did not find evidence that jurors

After a test of the procedure in several Tennessee trials, the participating judges unanimously endorsed instructing on the law prior to closing arguments. Almost all of the attorneys (93%) approved, and 85% of jurors said it was helpful in understanding the arguments of counsel.

In a similar project in Ohio, most judges (80%) and attorneys (68%) agreed that instructing on the law before closing arguments was more helpful to juries than the traditional order.

In any event, the recommended practice calls for the judge addressing the jury after counsel finish, since there are important procedural matters remaining.

SUGGESTIONS FROM THE JUDGE REGARDING DELIBERATIONS

This commonsense idea springs from the simple facts that so few members of a given jury have likely served before through to verdict and most are strangers to the deliberation process. Studies on the matter demonstrate that jurors welcome and benefit from some helpful suggestions (as opposed to directions) from the judge regarding the important tasks of choosing a presiding juror and conducting of deliberations, voting, etc.

Again, the most recent research has been done at the behest of state jury reform committees:

In Massachusetts, 88% of jurors who received such instructions from their trial judges found them helpful.

Jurors in Ohio who received suggestions from the court regarding their choosing a foreperson, conducting deliberations, conducting votes, and resolving disagreements were similarly enthusiastic about receiving help. They agreed, at rates of 81% to 92%, that the suggestions were helpful.

Readily adaptable resources are available for judges wishing to offer such help to juries about to embark on deliberations.

WRITTEN COPIES OF INSTRUCTIONS FOR ALL JURORS

Finally, furnishing each juror with a copy of court’s instructions before the instructions, so jurors can follow along as they are read by the judge and have access to them during closing arguments and deliberations, is another simple, thoughtful

42. Hannaford & Munsterman, supra note 11.
43. Munsterman et al., JURY TRIAL INNOVATIONS, supra note 3, at 161; Cohen, supra note 26, at 694-95; Dann, supra note 4, at 1258-59.
45. Frank & Madensen, supra note 12.
46. ForsterLee & Horowitz, supra note 7.
47. Munsterman et al., JURY TRIAL INNOVATIONS, supra note 3, at 171; Christopher N. May, “What Do We Do Now,” 28 LOYOLA L.A. L.
48. Dann et al., supra note 10.
49. Frank and Madensen, supra note 12.
innovation. The proponents of furnishing copies to each juror contend that individual copies accommodate jurors’ different learning styles, enhance comprehension, and reduce the number of questions about the instructions from deliberating jurors.51

According to recent polling of judges, attorneys, and jurors, support for individual written copies of instructions runs high.

Massachusetts: 98% of judges using the innovation found it helpful. Jurors who did not have individual copies of the instructions asked 78% more questions concerning the legal charge than jurors who were given individual copies.52

California: jurors in the pilot program furnished with individual copies of the instructions sent out no questions about them during deliberations and 94% favored the practice (80% were "strongly positive").53

Tennessee: Deliberating jurors made an average number of 4.78 references to their copies, and 99% found the instructions “clear,” and 87% “very clear.” Judges report no significant problems in preparing and furnishing each juror a copy.54

CONCLUSION

Many years ago, United States Supreme Court Justice Louis Brandeis praised the value of experimentation: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”55 This survey of work on innovations to the traditional jury trial underscores Justice Brandeis’s point. The combined insights from pilot programs, field experiments, and laboratory research on jury trial innovations show the benefits that can derive from systematic evaluation of proposed trial reforms.

The willingness, if not the insistence, that changes in the traditional jury trial format intended to benefit the decision makers be subjected to evaluations demonstrates wisdom and confidence. Jury reforms have the best chance to succeed and become part of a new tradition if subjected to the kind of systematic studies summarized here. Today’s jurors deserve no less if they are to have the tools they need to better understand and decide today’s cases.

51. Munsterman et al., Jury Trial Innovations, supra note 3, at 174; Dann, supra note 4, at 1259; ABA Report: Jury Comprehension in Complex Cases (Lit. Sec. 1989) (jurors unanimously found copies helpful during deliberations).
52. Hannaford & Munsterman, supra note 11.
53. Connor, supra note 18.
Jurors’ Unanswered Questions

Shari Seidman Diamond, Mary R. Rose, and Beth Murphy

American courts have rediscovered what was familiar at common law.¹ A majority of modern courts now sanction the practice of permitting jurors to submit questions during trial.² A procedure that permits jurors to submit questions is consistent with the view that juror questions can promote juror understanding of the evidence³ and fits with other jury innovations, like note taking and written jury instructions, that aim at optimizing juror comprehension and recall. Nonetheless, the practice of permitting juror questions has not received unanimous endorsement and adoption.⁴ Even in jurisdictions that authorize juror questions during trial, the ultimate decision as to whether or not to permit them is generally left to the discretion of the trial court,⁵ and it is unclear how pervasive the practice actually is across jurisdictions in which juror questions are authorized.

Some judges have been reluctant to permit juror questions because of concerns that jurors will frequently submit inadmissible questions that the judge cannot answer or allow⁶ a witness to address, that the jurors may be offended when their questions are not answered,⁷ and that jurors may come up with their own answers that will unfairly prejudice one party or the other. A unique opportunity allowed us to examine the frequency and nature of jurors’ unanswered questions and to assess how jurors responded. We collected all of the questions that jurors submitted during 50 civil trials in Arizona, where jurors are regularly permitted to submit questions during trial.⁸ A distinctive feature of the research is that we were able not only to identify the questions that the judge declined to allow, but also to observe juror reactions during trial and deliberations as the jurors learned that their question would not be allowed.⁹ This examination both addresses the concerns raised about unanswered juror questions and gives judges who have not yet permitted juror questions a preview of the kind of questions jurors are likely to submit that judges may not be able to answer, but also to observe juror reactions during trial and deliberations as the jurors learned that their question would not be allowed.⁹ This examination both addresses the concerns raised about unanswered juror questions and gives judges who have not yet permitted juror questions a preview of the kind of questions jurors are likely to submit that judges may not be allowed to answer, but also to observe juror reactions during trial and deliberations as the jurors learned that their question would not be allowed.⁹

Footnotes

1. 1 M. Hale, THE HISTORY OF THE COMMON LAW OF ENGLAND 164 (C. Gray ed. 1971)(1st ed. 1713) (“[b]y this Course of personal and open examination, there is Opportunity for all Persons concerned, viz. The Judge, or any of the Jury . . . to propound occasional questions, which beats and boults out the Truth”).
6. We use the word “permit” to refer to the practice of letting jurors submit questions during trial; we use the word “allow” to refer to the decision to answer a juror’s question or let a witness to answer it.
7. See, e.g., Smith, supra note 4, at 564 (“When questions are not asked after being formulated by a juror, he/she may become upset with one of the parties, especially the one objecting to his/her questions [even though] the objections to the questions are made outside of the jury’s presence”).
8. The Arizona rule authorizing the practice of juror questioning in civil cases specifies that “Jurors shall be permitted to submit to the court written questions directed to witnesses or the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.” Ariz. R. Civ. P. 39(b)(10). Consistent with this language, the standard practice in Arizona is to permit juror questions and jurors were so instructed in all 50 of the cases we studied.
9. The Arizona Supreme Court authorized the taping of jury discussions and deliberations in these 50 trials as part of an evaluation of another jury innovation: permitting jurors to discuss the case in the course of the trial. The results of that evaluation are reported in Shari S. Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, Jury Discussions During Civil Trials: Studying an Arizona Innovation, 45 U. of Arizona Law Rev 1 (2003).
able to allow witnesses to answer.

Before turning to this analysis of the unanswered questions, we briefly review the claimed advantages and disadvantages of permitting juror questions in light of the available evidence.

**ADVANTAGES AND DISADVANTAGES OF JUROR QUESTIONS**

The primary claim made in favor of permitting juror questions is that it promotes juror understanding of the evidence. To the extent that jurors are like students in their attempts to understand the material being presented to them at trial, answers to juror questions, like those given to students in a classroom, offer the opportunity to correct sources of confusion, clarify misunderstandings, and improve comprehension and recall. Some support for this proposition comes from a national field experiment in which 160 cases in 33 states were randomly assigned to permit or not permit juror questions. Jurors who were permitted to submit questions rated themselves as better informed than those who were not permitted to submit questions. Similarly, in a Colorado field experiment involving 239 criminal trials, jurors who were permitted to submit questions were more likely to agree that they had sufficient information to reach a correct decision.

Another potential advantage of juror questions is that they can signal counsel, as they do an instructor in a classroom, that some issues need to be addressed further. It is unclear how often this occurs, but judges who have permitted juror questions and attorneys who have tried cases in which questions were permitted report instances in which the juror questions assisted attorneys in presenting their cases clearly. Similarly, judges report that jurors appear more attentive and involved when questions are permitted.

Judges who have experimented with juror questions have generally become more enthusiastic about permitting juror questions after trying out the procedure. Judges too report satisfaction with the opportunity to submit questions.

Critics of juror questioning have suggested that permitting juror questions might upset court decorum and consume unnecessary court time. Judges who have experimented with juror questions generally address those concerns by instructing jurors at the beginning of the trial that they can write down a question and submit it to the judge through the bailiff. The judge then consults with the attorneys out of the presence of the jury, usually at a sidebar, and determines whether to ask the witness the juror's question. If proper, the judge puts the question to the witness. Attorneys are permitted to ask any necessary follow-up questions. This procedure handles juror questions efficiently, minimizing the additional time that juror questions may require.

A separate set of concerns, and our focus in this article, is on juror reactions to the questions they submit that are not answered. Do jurors react unfavorably if their questions are not answered, taking offense or experiencing unnecessary embarrassment? Are questions rejected because jurors become argumentative, losing their objectivity and becoming advocates? Do jurors draw inappropriate inferences when the court does not allow a juror question? Juror surveys find no evidence to support these concerns, but these self-reports about socially undesirable reactions may not fully capture what occurs in the jury room. The Arizona Filming Project made it possible for us to examine the questions that jurors submitted during trial that the judge was unable to allow and to assess how jurors actually handled the lack of a response. We begin by briefly describing the Arizona Filming Project and then turn to the unanswered juror questions.

**THE ARIZONA FILMING PROJECT**

The Pima County Superior Court, with the endorsement and support of the Arizona Supreme Court, approved a novel experiment in Tucson to evaluate the Arizona innovation that permits jurors to discuss the evidence among themselves during the trial. The study involved videotaping discussions and deliberations. The project required an elaborate set of permissions and security procedures. In each case in the study, we obtained permission from the judge, jurors, litigants, and attorneys. For each case, the entire trial was videotaped from opening statements to closing arguments and jury instructions. In the jury rooms two unobtrusive cameras and microphones were mounted at ceiling level. An on-site technician taped the conversations in the jury room whenever at least two jurors were present. We drew on the trial videotapes to develop a detailed "road map" for each trial. Transcripts were created for all juror discussion periods and transcripts were prepared for all deliberation periods. They allowed detailed

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11. Id. at 142-143, Table 13.


15. See, e.g., Mark Frankel, Jurors Questioning Witnesses, 60 WISC. BAR BULL. 23 (Feb. 1987).


18. See supra note 7.

19. See, e.g., Heuer & Penrod, supra note 17.

20. For a detailed description of these procedures, see Diamond et al., supra note 9, at 17.
analyses of the content of juror discussions and deliberations. We also obtained copies of all questions submitted during the trial or during deliberations, including those that the judge did not answer or allow a witness to answer.

The sample of 50 cases consisted of 26 (52%) motor vehicle cases, 17 (34%) non-motor vehicle tort cases, 4 (8%) medical malpractice cases, and 3 (6%) contract cases, a distribution that is nearly identical to the breakdown for civil jury trials for the Pima County Superior Court for the 1996-97 fiscal year and the 2001 calendar year. The tort cases varied from the common rear-end collision with a claim of soft-tissue injury to cases involving severe and permanent injury or death. Plaintiffs received an award in 65% of the cases. Awards ranged from $1,000 to $2.8 million dollars, with a median award of $25,500.21

The Questions that Jurors Submit

Judges in other jurisdictions who permit juror questions report that the questions jurors submit are generally appropriate.22 Nonetheless, the rules of evidence bar a variety of questions on grounds of relevance and form as well as more technical bases. It would be astounding indeed if laypersons limited their inquiries to legally acceptable grounds and always expressed their inquiries in legally acceptable terms. Several surveys and experiments with juror questions indicate that judges typically allow witnesses to answer between 72% and 86% of jurors’ questions, leaving 14% to 28% unanswered.23

In the Arizona Filming Project, jurors submitted questions during 48 of the 50 trials. In half of the trials, they submitted 10 or fewer questions, with an average of 17.5 per trial. Across all cases, jurors submitted an average of less than 1 question (.76) per hour of trial.24 The number of questions submitted by the jurors during a trial increased with the length of the trial (r = .54).25 One jury submitted 110 questions, almost twice the number submitted in any other trial. Significantly, the trial in which this occurred was 77.5 hours in length, amounting to an average of 1.4 questions per hour.

Judges allowed answers to 76% of the jurors’ 820 questions. The questions that the judges allowed were consistent with the observations from previous reports that jurors generally submit appropriate and relevant questions. For example, the jurors directed nearly half of their questions to expert witnesses, typically attempting to clarify their testimony or to understand the bases for their opinions.26 The jurors who laud questions that judges allowed ranged from simple questions about definitions, such as “What is a tear of the meniscus?” (for a physician) and “What does the ‘reasonable psychological probability’ mean?” (for a psychologist who testified using the phrase), to more complex attempts by jurors to understand the inferences made by the witness, such as “Is his post-traumatic stress a result of the confrontation, or a result from his childhood? Specifically, could his breakdown be from another accident?” and “Not knowing how he was sitting, or his weight, how can you be sure he hit his knee?” (for an engineer testifying about an accident reconstruction). But what about the questions that the judge did not answer or permit the witness to answer? We turn now to an analysis of those unanswered questions and to jurors’ reactions when no response was forthcoming.

Disallowed Juror Questions

In 39 of the 50 trials, judges were presented with at least one question that they did not allow a witness to answer. In half the cases, judges rejected 2 or fewer juror questions during trial. Both allowed and disallowed questions occurred more frequently in longer trials.27 The opportunity to discuss the evidence during trial did not significantly influence the rate of submitting either allowed or disallowed questions.28

After examining all of the questions that jurors submitted,
we identified 15 types of questions. The breakdown for the 12 categories that produced instances of disallowed questions appears in Table 1.

Many of the questions that the judges disallowed reflect commonsense ways of reasoning based on information that is excluded under the rules of evidence. Thus, a number of these questions centered on a search for a comparison that could assist the juror in evaluating the plausibility of the plaintiff’s claims. The first and most frequent category consisted of what we termed “Standards”—questions that sought information on how others might view the present circumstances, essentially inviting witnesses to give jurors a standard by which to judge the case (n = 43 questions). We subdivided this category into requests for legal and other standards. Examples of requests for legal standards were inquiries such as, “Who was cited in this accident?” or “Is the defendant required to have his vision and hearing tested in order to renew his driver’s license, and has he done so?” In all such questions, jurors sought to know whether one of the parties had done something legally improper that bore a relationship to the conflict being decided. Examples of other standards asked witnesses about how the same or similar circumstances affected people other than the plaintiff who were, or could have been, involved in the incident that led to trial. Thus, several juror questions asked about whether other passengers in a plaintiff’s vehicle were also injured (or whether the defendant was injured). Likewise, in a case involving an alleged infliction of emotional distress, jurors asked a non-party witness how the defendant treated other people with whom he came in contact. These two types of standards questions accounted for about one-fifth of all disallowed questions.

A second frequent type of excluded question concerned jurors’ attempts to obtain information on the character and/or credibility of the witness. Although jurors are charged with evaluating the credibility of witnesses and jurors asked many questions bearing on credibility that the judge allowed witnesses to answer, the jurors also asked disallowed questions that could produce potentially prejudicial information, e.g., “Has [the plaintiff] been in any other lawsuit considering the number of accidents he has been involved in?” (directed to the plaintiff) or called for hearsay, e.g., “Does the [Plaintiff] have any idea why his employer had an Independent Medical Examination conducted [on him]?” Some disallowed questions asked witnesses to offer opinions or to answer questions when no foundation had been laid that the witness had firsthand knowledge or asked the witness to draw conclusions that the jury was charged with making: e.g., “There are differences between your testimony and that of the plaintiff. Which one is telling the truth?”

Charged with compensating the plaintiff in a civil case, jurors sometimes interpreted their mandate more broadly than the law envisions and posed questions that attempted to explore legally irrelevant financial considerations. Consistent with prior analyses of this data set, jurors in civil cases were interested in the insurance status of both the plaintiff and the defendant. For example, jurors may express concern about overcompensating plaintiffs who have already received payments from insurance companies or they may wonder whether the defendant will be paying any award out of pocket. Insurance questions alone constituted 12% of all disallowed questions, with jurors posing 23 questions in 12 trials; in 4 of categories that are not represented in Table 1. The questions in these categories were generally directed toward the experts and involved 1) extent of injury or damage, 2) basis for diagnosis or treatment, and 3) credentials or experience of the expert.

Many of the questions that the judges disallowed reflect commonsense ways of reasoning based on information that is excluded under the rules of evidence.

<table>
<thead>
<tr>
<th>Question Type</th>
<th>N</th>
<th>Percent (of total not allowed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standards</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal standards</td>
<td>27</td>
<td>14</td>
</tr>
<tr>
<td>Other standards</td>
<td>16</td>
<td>8</td>
</tr>
<tr>
<td>Character or credibility of witness</td>
<td>24</td>
<td>12</td>
</tr>
<tr>
<td>Legally irrelevant financial issues</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance coverage</td>
<td>23</td>
<td>12</td>
</tr>
<tr>
<td>Attorneys fees</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Litigation management</td>
<td>13</td>
<td>7</td>
</tr>
<tr>
<td>Definitions and miscellaneous facts</td>
<td>27</td>
<td>14</td>
</tr>
<tr>
<td>Cause of the injury</td>
<td>24</td>
<td>12</td>
</tr>
<tr>
<td>Parties’ mental state</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>Predictions about future injury</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Other topics or unclear</td>
<td>17</td>
<td>9</td>
</tr>
</tbody>
</table>

29. Two coders independently categorized the questions, making use of 15 total categories. Overall reliability for these categorizations was modest, weighted kappa = .67 (1.0 indicates perfect reliability, zero indicates pure chance agreement). This value increased as the two coders gained experience and after they discussed disagreements part-way through coding (weighted kappa on a subset of 56 questions coded post-discussion = .74). For the categories listed in Table 1, the coders typically agreed more often than they disagreed: just two had percent agreement rates below 50% (Definitions/Miscellaneous facts, Parties’ mental state).

30. Judges allowed witnesses to answer all juror questions in three
A fourth source of disallowed questions consisted of inquiries about how the lawsuit itself had been or was being managed (n = 13 questions, 7% of all disallowed)—for example, “When did you initiate this lawsuit?” and “How did you come up with your damage figure?” (directed at plaintiffs in different cases).

We also identified instances of questions close to the central controversies in the cases (i.e., establishing what happened, negligence, liability, damages, etc.), but which, for a variety of possible reasons, the judge did not allow. Fourteen percent of questions asked a witness for definitions or to explain some fact about what happened (e.g., “Was the impact in a forward or rearward direction?”; “How many people were in each car?”), but were not allowed, presumably because no foundation had been laid that the witness had firsthand knowledge and, thus, was competent to answer the question. In 24 cases (12%), jurors asked for information that might illuminate the cause of the plaintiff’s injuries (e.g., “Can we see a picture of what the plaintiff looked like before the accident?” or “What percent of your current problems are a result of this accident?”); and in 18 cases, their questions touched on the mental state of the parties, including questions about potential negligence, recklessness, or intent (e.g., “How long did the plaintiff wait at the intersection before entering?” or whether a wrong witness. When a later witness testified who could address the issue, one of the attorneys generally followed up. Other disallowed questions called for speculation; were expressed in a form that made them objectionable, e.g., “Are you being paid to testify here today?” (asked of an expert); or were simply unclear about what the juror was asking, e.g., a juror wanted to know “What does ‘bodiar’ the witness entitle the lawyer to do?” (The juror probably meant “voir dire” but was unable to accurately repeat the phrase he had just heard and wanted to understand.) In other instances, the question would have been appropriate for one witness, but not for another, and it was not clear when the question was submitted and which witness was the target of the question. Finally, on a few occasions, the question was directed to an appropriate witness and submitted at the appropriate time and the question appeared to be admissible, but the witness was not allowed to answer it. For example, in one case a juror wanted to ask the plaintiff how long he was stopped at the stop sign before the collision occurred. The plaintiff had already testified that he had come to a stop and an issue in the case was how fast he had been going when the collision took place.

When No Immediate Answer Was Given

We turn now to the aftermath of these questions: how the judge and the jury responded to the questions that the judge did not allow the witness to answer. Judicial Responses: The judge formally acknowledged less than a third (32%) of the 197 juror questions that were disallowed (see Figure 1). The tendency to acknowledge or not acknowledge questions was typically, but not always, consistent within the same trial. In 14 trials, the judge acknowledged no juror question (range: 1 to 16 questions); in 11 cases, the judged acknowledged all of the questions in some way (range: 1 to 6 questions); and in 14 trials the judge acknowledged some but not others (e.g., in one case, the judge explained that insurance was not relevant to the jurors’ decision but said nothing when jurors wanted to know if anyone else in the plaintiff’s vehicle had been injured).

Acknowledgment of the jurors’ questions took many forms. Judges sometimes said only, “Some questions were objected to for one reason or another,” or “Some questions cannot be answered.” In several instances, the judge informed the jury that one of the submitted questions would be more appropriate for a later witness or would be addressed in later testimony. In another instance when jurors asked a witness to solve a conflict between his testimony and that of another witness, the judge explained that it was the jury’s job to make decisions about such conflicts. Finally, judges also explicitly cited the law in explaining why a question would not be permitted, saying, for instance, that a given issue was not “relevant” or, in one case, that the “Federal Rules of Evidence” did not allow the question. Explanations about legal constraints on questions could be short (e.g., “The jury cannot consider insurance in its decision”), but occasionally involved lengthy recaps about the specific issues the jury was to solve (e.g., who was “legally obligated to make payment for [the plaintiff’s] medical bills and . . . repair of the vehicle”), including reminders that who paid the bills was “outside your relevant area of inquiry as
35. We coded as follows: 1 = no discussion; 2 = explicit acknowledgment that the information is unnecessary or irrelevant; 3 = wistful or begrudging acceptance of the lack of information (e.g., acknowledging they were unlikely to get an answer but still wanting to know—we combined this category with no. 2 to describe the jurors as accepting the non-answer); 4 = explicitly negative reactions (e.g., explicit annoyance, complaint, or statements insisting the information is relevant); 5 = attempts to give or suggest an answer to the question (including by not countering an answer developed during a previous discussion period—to count, the answer or its relevance to the case had to be undisputed by other jurors). Two coders demonstrated high reliability in assigning text to these categories, weighted kappa = .79.

36. F (1, 157) = 2.77, p<.10. This test statistic reflects controls for the fact that cases differed in the extent to which judges acknowledged juror questions (“non-independence of observations” in statistical parlance).

37. The case is discussed in more detail in the text at note 39.
Although jurors appreciate the opportunity to submit questions, they rarely express disappointment or even surprise when the judge does not supply them with an answer.

lack of response or expressed no complaint and swiftly turned to other topics for discussion. In some of these reactions, jurors reminded others that the judge said the information was not relevant or pointed out, as one juror did, that “it doesn’t do any good to guess.” In others, they explained to their fellow jurors why they had submitted a question but then expressed neither satisfaction nor dissatisfaction or commented in some other neutral way. In short, all such jurors appeared to “move on,” irrespective of whether they might have preferred to have an answer.

Overt annoyance or displeasure with the judge’s failure to pose the question was exceedingly rare (see Figure 1): we identified just seven responses (4%) from three cases as explicitly negative; four of these seven complaints came from a single jury and involved a single issue; two others came from a different jury; and the remaining one from a third jury. The jury expressing four complaints was deciding a case involving the potential negligence of a business. The jurors wanted to know if the law required the business to post a sign in the establishment and whether a sign had been posted, believing that the answers might signal negligent behavior. The judge did not acknowledge the jurors’ two related questions, either the first time or the second time they were submitted. Although persistent, the “complaints” were phrased in mild terms (e.g., one juror said that she was “shocked” that the judge would not answer the questions). In both of the other cases involving juror complaints, a single juror simply expressed the belief that the information that had been requested was relevant, even if the judge had ruled otherwise. For example, a juror asked if either of the two motorists involved in a collision had received citations, and the judge said that the question was not relevant. A juror expressed the opinion that it would be pertinent to find who’s at fault. The disagreement here may be with the terminology. Arguably, a citation in the accident is relevant, but is excluded because it is both hearsay and potentially prejudicial.

Finally, we identified a number of instances in which jurors attempted to answer a question the judge had not allowed. We found 31 such occurrences (involving 16% of all disallowed questions). In 12 instances, jurors suggested answers by drawing reasonable inferences directly from the evidence. For example, one case involved someone seated in the rear of a vehicle who claimed he was injured in an accident after hitting the car’s front seat. A juror submitted a question about whether it was likely that the other passenger riding in the back would also have hit the front seat. When this juror mentioned the unanswered inquiry to her fellow jurors during discussion, another juror informed her that the laws of physics (to which experts had testified) applied equally to all passengers. Jurors drew on their own experience or beliefs to address 10 additional unanswered questions about insurance or attorney’s fees. For example, a juror who submitted an unanswered question about insurance speculated that the plaintiff probably did not pay much for the accident because he probably had disability insurance.

The remaining answers to inquiries came from jurors’ personal experiences or expertise or from a combination of personal expertise and reasoning based on what they had heard in court. For example, the judge in one case did not allow a witness to answer a question about the muscular side effects of a steroidal medication a plaintiff had been taking. Later in deliberations, when the juror who submitted the question reintroduced it, mentioning that it had been left unanswered, another juror explained that the steroid in question was an anti-inflammatory, not an agent that affected muscle tone. In a few instances, jurors’ guesses about answers reflected conclusions one of the parties likely wished to avoid. For example, a juror in one case asked why a plaintiff was no longer working in the area in which she had been trained; the juror later wondered if the reason was because the plaintiff had done “something bad” in her prior job. Nearly all (30 of 31) of the unanswered questions that jurors discussed involved the kinds of issues and responses that naturally occur during deliberations even if a juror has not submitted a question on the topic. In only one instance did a juror draw a conclusion from the fact that the judge did not answer the juror’s question. In an automobile accident involving claims for both personal and property damage, a juror asked whether the plaintiff’s vehicle had a particular design feature and the judge did not acknowledge the question. The juror said, “I got no answer, so evidently it’s not [part of the design].” No acknowledged juror question, whether the acknowledgment was perfunctory or more complete, produced this kind of inference.

Juror attempts to address the unanswered questions varied substantially across the types of questions posed. When jurors discussed unanswered questions they had submitted about standards, jurors attempted to answer only 15% of them. In contrast, when they discussed unanswered insurance questions, jurors attempted to answer 79% of them (11 of the 14 they discussed at all). Jurors also suggested answers to both of the inquiries about attorney fees (concluding in one case that attorneys “usually” got half the award, and in the other that it could be anywhere between 25% and 45%). These responses to questions on legally irrelevant financial topics account for almost half of the answers (42%) that jurors offered one another when a question was disallowed. As we have previously observed, talk and speculation in the jury room about the insurance of the parties are common even when jurors do

38. Twenty-five (25) of these occasions occurred during discussion periods and 11 during deliberations.
39. The legal issue was not dealt with in the jury instructions at the end of the trial, and the jurors discussed it during deliberations as well as during the trial.
40. Jurors were able to answer three additional unanswered insurance questions by examining bills that were included among the case exhibits.
not submit questions about insurance,\footnote{See Diamond & Vidmar, supra at note 32.} reinforcing the notion that jurors should be specifically instructed on the irrelevance of insurance in tort cases.\footnote{Id. at 1910 for a description of potential jury instructions on the topic of insurance.}

**Summary of Findings**

As our survey of juror questions during trial indicates, more than three-quarters (76%) of the questions that the jurors submit are legally appropriate. Jurors not only appreciate the opportunity to submit questions, but also formulate relevant questions to assist them in evaluating the evidence. Our analysis of the questions jurors submit that judges do not allow under current evidentiary rules reveals that those questions are likely to concern topics like legal standards and insurance, topics that reflect commonsense ways of reasoning and common knowledge but that evidentiary rules preclude jurors from obtaining information about in reaching their verdicts.

Although jurors appreciate the opportunity to submit questions, they rarely express disappointment or even surprise when the judge does not supply them with an answer. The preliminary instruction that judges in Arizona use informs jurors that they will not always be able to receive answers to the questions they submit, and popular lay understanding of how trials work probably prepared the jurors to accept that outcome for most of their unanswered questions. Thus, the concern with juror reactions to unanswered questions did not materialize. We did observe a few occasions when jurors expressed annoyance with the failure to respond to a juror question. Significantly, only one instance of expressed annoyance occurred when the judge gave even a perfunctory nonspecific acknowledgment that the question could not be allowed. Although jurors were somewhat more likely to discuss an unanswered question when the judge acknowledged it, that discussion was generally brief, except when the topic was insurance or attorneys' fees.

Finally, when the judge did not allow the jurors to obtain an answer directly, a minority of the jurors did attempt to answer their own questions. In doing this, the jurors technically violated the pre-instruction admonition not to attempt to answer questions that the judge declined to allow.\footnote{Jurors are told: “If a particular question is not asked, do not guess why or what the answer might have been.”} Importantly, many of the same questions and answers that jurors supplied may have emerged even in the absence of a juror question formally submitted by a juror during the trial (i.e., during the normal course of deliberations in which jurors regularly use one another to resolve sources of ambiguity).\footnote{Again, it is significant that almost half of the answers jurors offered concerned the topic of insurance or attorneys' fees. See generally Diamond & Vidmar, supra at note 32.}

**Implications for Procedures Used When Juror Questions Are Permitted**

The procedures used when jurors are permitted to submit questions generally give counsel the opportunity to object to a juror question outside the hearing of the jury and permit attorneys to ask appropriate follow-up questions when a juror question is answered. There is also agreement that the jurors should be told in advance that it will not be possible to allow some of their questions to be asked. As the results here show, jurors generally understand and accept the legitimacy of these procedures.

**Cautionary Instructions:** Less agreement exists on the standards for the instructions that jurors should receive about how and when they should submit their questions, other than the question should be submitted in writing. A current Standard of the American Bar Association\footnote{Civil Trial Practice Standard Part One: The Jury, Standard 4 (1998).} supports juror questions for witnesses, but suggests that a series of cautionary instructions be given, including a warning that “Questions should be reserved for important points only”; that “The sole purpose of juror questions is to clarify the testimony, not to comment on it or express any opinion about it”; and that “Jurors are not to argue with the witness.”\footnote{Id. at 4b. (i), (ii), and (iii).} The instructions received by the jurors we studied did not include any of these warnings. The 820 questions we reviewed in these 50 cases, including the 197 that the judge did not allow, provided no instances of jurors submitting frivolous questions and only a few that could be characterized as argumentative. (E.g., a juror submitted a question for the plaintiff asking how he would work full-time after the trial. The plaintiff was claiming that the accident had temporarily impaired his ability to work and the jurors were skeptical about that claim.) Indeed, almost all of the questions appeared to reflect serious attempts to understand the evidence and to help the jurors assess how it could assist them to evaluate the competing claims of the parties.

Even without such cautionary admonitions, jurors censored their own potential questions. On average, the jurors discussed almost 2 potential questions per case (1.7) that they then decided not to submit. Their restrained behavior suggests that jurors need not be cautioned that they should limit their instructions to important ones. The danger of including such cautionary instructions is that they will have a chilling effect on jurors’ questions, discouraging jurors from attempting to resolve the areas of confusion that the opportunity to submit questions was designed to help them deal with. A similar issue also arises with the recommendation from the Civil Trial Practice Standards that juror questions be signed.\footnote{Id. at 4b x.} In Arizona, jurors are instructed not to sign their name when they submit a question on the assumption that jurors should not have to worry about appearing ignorant when they are experiencing some confusion.
Acknowledging Juror Questions: One decision that judges who permit juror questions must make is what if anything to say to a jury in response to a question that cannot be answered. As we have seen, judges often rely primarily on their pretrial instruction informing jurors that “the rules of evidence or other rules of law may prevent some questions from being asked” and say nothing further to the jurors. That approach avoids exposing the other members of the jury to a question that is irrelevant or otherwise improper. Although jurors generally do not complain about this implicit rejection of a question, jurors do seem to appreciate it when judges offer even a perfunctory acknowledgment that a submitted question cannot be addressed without describing the question itself. Moreover, that response prevents a juror from drawing an inference about the answer to the question from the judge’s silence. In a few other instances, a series of questions submitted on the same topic stimulated the judge to be more direct and specific. For example, jurors in one case submitted several questions asking who owned the property where the injury occurred. After the third question was submitted, the judge told the jurors, “A couple of you, Ladies and Gentlemen, asked questions concerning [the location]. Although these are things you may wonder about, for the purpose of what you have to decide today, it doesn’t make any difference.” The jurors never referred to these questions in their discussions during trial or during their deliberations. The approach that this judge adopted recognizes that the jurors can be given assistance in identifying relevant information. In other situations, jurors may need further assistance in understanding why a question cannot be addressed.

An Ancillary Value

Are unanswered jury questions merely an incidental cost of permitting jurors to submit questions? Some additional observations suggest that even the disallowed questions have some ancillary value. In one case, the jurors’ early questions suggested that they were trying to assess the negligence of the defendant when the defendant had already conceded negligence. The jurors’ questions provided an occasion for the judge to correct that misimpression in the course of denying the jurors’ request for the irrelevant information. Thus, even the unanswered questions, which the judge shares with the attorneys in deciding whether the question will be allowed, can signal potential sources of juror confusion that the judge or the attorneys may be able to address.

Similarly, the natural interest of jurors in insurance arises whether or not jurors pose a question about it. A juror question about insurance, however, provides a natural occasion for a collaborative instruction from the judge that recognizes the reasonableness of the jurors’ interest and helps jurors understand why they should not be focusing on insurance. A full collaborative instruction would accurately explain why insurance is


49. Diamond & Vidmar, supra note 32, at 1884.

50. Id. at Section V for a full description of collaborative jury instructions.
irrelevant (e.g., it tells nothing about negligence or how much damage was caused) and would let jurors know that any speculation about how much insurance the parties have, or even whether or not they have any insurance, would be inaccurate.31

CONCLUSION

Most of the recent innovations in jury trials recognize that jurors are active decision makers and adjust trial procedures to reflect that reality. Whether or not jurors are permitted to submit questions during trial, we know that questions are occurring to them as they try to understand the evidence in anticipation of being charged with reaching a verdict. Permitting jurors to submit their questions during trial provides the opportunity to learn what those juror questions are and to address them when possible. As this research indicates, even when judges tell the jury that they cannot allow a witness to address them when possible. The need to leave some juror questions unanswered offers no justification for missing the opportunity to assist jurors in reaching well-grounded decisions.

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Resource Page: Focus on Jury Reform continued from page 42.

Peter M. Tiersma, Jury Instructions in the New Millenium, Summer 1999 Court Review at 28.

Linguist and law professor Peter Tiersma provides practical guidance on making jury instructions understandable. The article includes a helpful list of legal words often used and words that could be more appropriately used with a jury.


Boatright and Murphy explain, based on research in 12 jury trials, how jurors can benefit from additional background information about how to go about the work they are to expected to do.

A FEW, FINAL ARTICLES

http://lawreview.kentlaw.edu/articles/78-3/CONTENTS%2078-3.html

This symposium issue contains 10 articles discussing the role of the jury—past, present, and future. Topics covered include social science research on race and juries, ways to improve the voir dire process, and the jury’s historic and present role in statutory interpretation.

http://www.law.duke.edu/fac/vidmar/AzLR.pdf

This article provides an in-depth evaluation of the Arizona innovation permitting juries to discuss the evidence during the trial. The evaluation was based on an experiment that involved the videotaping of actual jury discussions and deliberations.
The United States Supreme Court this term reasserted the rule of law in the context of the detainees in the war on terrorism. At the same time, this was a term of unanswered questions. The Court handed down several decisions that had far-reaching implications that were not addressed by the Court's opinions. Two cases with the greatest practical input on the day-to-day administration of justice were criminal cases: *Crawford v. Washington,* concerning the admissibility of hearsay at criminal trials, and *Blakely v. Washington,* regarding the proper role of judges and juries in determining aggravating factors that justify harsher sentences. Each opinion left many unresolved issues that will require further court interpretation in future cases.

In this article, we review the Court's decisions in criminal cases and in habeas corpus actions challenging criminal convictions. In the next issue of *Court Review,* we will review the past term's cases involving civil rights, the First Amendment, federalism, presidential power, and civil statutory interpretation.

**FOURTH AMENDMENT**

In *United States v. Banks,* Justice Souter, writing for a unanimous Court, determined that a 15- to 20-second wait between the time the officers knocked on the door and announced their presence to execute a drug-trafficking search warrant and their forced entry was not unreasonable under the Fourth Amendment. Several officers arrived at respondent's apartment to execute a drug-trafficking warrant. The officers at the front of the building knocked and announced themselves loudly enough to be heard by the officers at the back. Unbeknownst to the officers, respondent was at home, but was in the shower and did not hear the officers. After waiting between 15 to 20 seconds, the officers forced entry into the apartment. The officers found drugs and weapons during their search and respondent sought to have them excluded from evidence on the ground that the officers had waited an unreasonably short time before forcing entry. The Court concluded that between the time the officers knocked on the door and the time they forced entry, exigent circumstances arose because "15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine."

The Court applied a "totality analysis," specifically rejecting the Ninth Circuit's attempts to create a set of "sub-rules" to govern what constitutes a reasonable amount of time. To reach its conclusion, the Court relied on *Wilson v. Arkansas* and *United States v. Ramirez.* In *Wilson,* the Court held "the common law knock-and-announce principle is one focus of the reasonableness inquiry; and we subsequently decided that although the standard generally requires the police to announce their intent to search before entering closed premises, the obligation gives way when officers have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile or . . . would inhibit the effective investigation of the crime by, for example, allowing destruction of evidence." *Ramirez* stated that in exigent circumstances, officers may damage the premises as is necessary for a forced entry.

In *Maryland v. Pringle,* Justice Rehnquist delivered the opinion for a unanimous court, which upheld the arrest of all three occupants of a car in which cocaine was found after each had denied ownership of the drugs. Respondent was one of three occupants in a car, which was stopped by an officer for a traffic violation. The officer noticed a large amount of cash in the glove compartment and a subsequent search of the vehicle "yielded $763 from the glove compartment and five glassine baggies containing cocaine from behind the back-seat armrest." All three occupants of the car denied ownership of the cocaine and money and were arrested. After being given *Miranda* warnings, respondent stated that the money and cocaine were his and that the other occupants knew nothing about it. At trial, respondent moved to suppress the evidence on the grounds that the officer had no probable cause to arrest him.

The Court first noted that "[i]t is uncontested . . . that the officer, upon recovering the five plastic glassine baggies containing suspected cocaine, had probable cause to believe a felony had been committed." Thus, the only question remaining is "whether the officer had probable cause to believe that Pringle committed that crime." The Court said that "[t]o determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to'..."
probable cause.” The Court then analyzed the facts of the case before it: (1) Pringle was one of the three men riding in the car during the early hours of the morning; (2) there was $763 of rolled-up cash in the glove compartment directly in front of Pringle; (3) five plastic glassine baggies of cocaine were found in a place accessible to all three men; and (4) all three men failed to offer any information with respect to the ownership of the cocaine or money. Given these facts, the Court concluded that it was “an entirely reasonable inference . . . that any or all three of the occupants had knowledge of, and exercise dominion and control over, the cocaine.” Therefore, a reasonable officer could conclude “that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.”

Justice Breyer, writing for a six-person majority in Illinois v. Lidster,7 concluded that a checkpoint stop to obtain information from motorists about a hit-and-run accident, not likely committed by any of the motorists who were stopped, did not violate the Fourth Amendment. An unknown motorist struck and killed a 70-year-old bicyclist; about one week later, police implemented a highway checkpoint “to obtain more information about the accident from the motoring public.” Respondent was stopped at the checkpoint, arrested, and eventually convicted for driving under the influence of alcohol. He challenged his conviction, arguing that the government had obtained much of the relevant evidence through use of a checkpoint stop that violated the Fourth Amendment.

The Court disagreed. It concluded that the checkpoint here differed from the one the Court found unconstitutional in Indianapolis v. Edmund,8 because, unlike in Edmund, the “purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others.” The Court states, Edmund aside, the Fourth Amendment would not “have us apply an Edmund-type rule of automatic unconstitutionality to brief, information-seeking highway stops of the kind now before us.” First, “[t]he Fourth Amendment does not treat a motorist's car as his castle.” Therefore, “special law enforcement concerns will sometimes justify highway stops without individualized suspicion.” Like certain other forms of police activity, i.e., crowd control or public safety, “an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.” Further, the Court noted, “information-seeking stops are less likely to provoke anxiety or to prove intrusive.” Although “the importance of soliciting the public's assistance is offset to some degree by the need to stop a motorist to obtain that help . . . [t]he difference . . . is not important enough to justify an Edmund-type rule here.” The Court's analysis did not end there; it also concluded that the checkpoint stop was reasonable: (1) the Court found that “[t]he relevant public concern was grave;” (2) it concluded that “[t]he stop advances this grave public concern to a significant degree;” and (3) “most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect.”

Justice Stevens delivered the opinion of a 5-4 Court in Groh v. Ramirez.9 It held that a warrant that fails to describe with particularity the things or persons to be seized is facially invalid, even if the application for the warrant, which was not incorporated by reference, did not describe these things in detail. It also concluded that the officer in charge of the search was not entitled to qualified immunity because he drafted the warrant and no reasonable officer could believe that the warrant was valid. Petitioner Jeff Groh, an agent with the Bureau of Alcohol, Tobacco, and Firearms (ATF), was informed that Ramirez had “a large stock of weaponry” at his ranch. The application for the warrant described with particularity the items to be seized, but the warrant form submitted with the application, and signed by the magistrate judge, did not. Nor did the warrant incorporate by reference the application. Petitioner and other officers executed the warrant and did not find any illegal weapons. Ramirez filed suit under Bivens v. Six Unknown Fed. Narcotics Agents10 for violation of his Fourth Amendment rights.

The Fourth Amendment requires that a warrant must particularly describe the persons or things to be seized. In this case, the actual warrant completely lacked any description of the items to be seized. Furthermore, the Court concluded that the more specific application did not save the warrant: “The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.” The Court did not decide, however, whether a detailed application that is incorporated by reference into the warrant would save the warrant because that was not done in this case. Finally, the Court determined that in light of these facts, the petitioner did not have qualified immunity: “The answer depends on whether the right that was transgressed was ‘clearly established’—that is, whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” The Court concluded that there was no way petitioner could have believed the warrant was sufficient.

The Court, in a unanimous opinion delivered by Justice Rehnquist, held in United States v. Flores-Montano11 that the government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble an automobile's gas tank. Respondent was stopped at the United States-Mexico border and delayed while customs inspectors requested that a mechanic under contract with the government come to the border station to remove respondent's gas tank. Respondent moved to suppress the evi-
The Court determined that an officer may search the passenger compartment... even if he first makes contact with the occupant after he... has... recently exited the vehicle.

balancing tests to determine what is a ‘routine’ search of a vehicle, as opposed to a more ‘intrusive’ search of a person, have no place in border searches of vehicles.” In support of its determination, the Court said that the “Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.” The Court has continuously determined that the “longstanding right of the sovereign to protect itself” renders searches of persons and things reasonable “simply by virtue of the fact they occur at the border.” This interest is illustrated by the seizure of the drugs in this case.

In Thornton v. United States, the Court determined that an officer may search the passenger compartment of an automobile, pursuant to New York v. Belton, even if he first makes contact with the occupant after he or she has recently exited the vehicle. In this case, the officer, who noticed that petitioner’s license tags did not match the vehicle petitioner was driving, was not able to stop petitioner until the latter had exited his vehicle. Petitioner, who was acting nervously, consented to a pat-down search and the officer discovered two individual plastic bags containing marijuana and crack cocaine. Petitioner was arrested, handcuffed, and placed in the squad car. The officer then performed a search of petitioner’s automobile and found a gun beneath the driver’s seat. Petitioner moved to suppress the firearm as fruit of an unconstitutional search.

Chief Justice Rehnquist, writing for the five-person majority, began the opinion with a synopsis of the Court’s decision in Belton. The Court, in Belton, had determined that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” In Belton, the Court relied on two justifications as set forth in Chimel v. California: (1) the need to remove any weapon the arrestee might possess or seek to use to avoid arrest; and (2) “the need to prevent the concealment or destruction of evidence.” The Court concluded that when it articulated the rule in Belton, it placed no reliance “on the fact that the officer in Belton ordered the occupants out of the vehicle, or initiated contact with them while they remained within it.” Furthermore, it did not find these factors relevant: Belton’s rationale provides no basis “to conclude that the span of the area generally within the arrestee’s immediate control is determined by whether the arrestee exited the vehicle at the officer’s direction, or whether the officer initiated contact with him while he remained in the car.” According to the Court, for all practical purposes, “the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.”

Justice Scalia concurred in the judgment but believed that the reasoning in Chimel and Belton was inappropriate here: petitioner was handcuffed and in the police car when the search occurred and, therefore, the possibility that he would grab a weapon to escape or destroy evidence was “remote in the extreme.” Instead, he would find the search lawful under a more general interest: that “the car might contain evidence relevant to the crime for which he was arrested.” Justice Stevens, dissenting, believed Belton veered away from the principles stated in Chimel, solely for the purpose of establishing a bright-line rule, and that it should be narrowly applied. For anyone who is not an actual occupant of a car, “Chimel itself provides all the guidance that is necessary.”

In Hiibel v. Sixth Judicial District Court, Justice Kennedy, writing for a 5-4 Court, held that Nevada’s “stop and identify” statute did not violate the Fourth or Fifth Amendments. An officer responded to a call regarding a possible assault and encountered petitioner, who was standing next to a parked truck with a woman still inside the truck. It was apparent that the truck had been stopped quickly and that petitioner was drunk. Petitioner refused to give the police officer his name and was arrested and prosecuted under Nevada’s “stop and identify” statute, which makes it a misdemeanor for a person to refuse to identify himself if stopped by an officer under “suspicious circumstances surrounding his presence abroad.” The Court granted certiorari on direct appeal to address petitioner’s contention that his conviction under Nevada’s statute violates the Fourth and Fifth Amendments.

The Court began with the statement that “interrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.” In Terry v. Ohio, the Court “recognized that law enforcement officers’ reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further.” The Court’s subsequent decisions make clear that “questions concerning a suspect’s identity are a routine and accepted part of many Terry stops” and, furthermore, serve important governmental interests, i.e., whether the suspect is wanted for another crime or has a history of mental disorder. The Fourth Amendment “does not impose obligations on the citizen but instead provides rights against the government.” Therefore,
while “the Fourth Amendment cannot require a suspect to answer,” it does not necessarily prevent a state from compelling a person to identify himself during a Terry stop. According to the Court, “[t]he principles in Terry permit a State to require a suspect to disclose his name in the course of a Terry stop.” As for petitioner's Fifth Amendment claim, the Court concludes that it need not address whether the Nevada statute's requirement that a person identify himself compels a “testimonial” communication. It concludes that petitioner's argument must fail because “in this case disclosure of his name presented no reasonable danger of incrimination.”

Justice Stevens dissented. He concluded that the statute was directed only at a specific class of persons, essentially, those that are “targets of a criminal investigation.” These people can be prosecuted for crime if they do not identify themselves. Under his view, the Fifth Amendment has no exception, including this narrow one, to its “right to remain silent.” Justice Breyer, also dissenting, wrote because he believed a limit to a Terry stop, which “invalidates laws that compel responses to police questioning,” obviously invalidates Nevada's law. In Terry, the Court set forth conditions to a Terry stop, what has become known as the “reasonable suspicion” standard. It is well established that a Terry detainee need not answer any questions posed to him by a police officer and Justice Breyer saw no compelling reason to “reject this generation-old statement of the law.”

**FIFTH AMENDMENT**

In a 5-4 decision, the Court, in Yarborough v. Alvarado, decided that consideration of age and inexperience when determining whether an individual is in custody for the purposes of Miranda is inappropriate because the test is objective and these factors introduce a subjective element. Respondent, a 17-year-old, agreed to help his friend steal a car in a parking mall. His friend pulled a gun and shot and killed Francisco Castaneda, who refused to relinquish possession of his vehicle. Respondent was taken to the police station by his parents for an “interview” and questioned for two hours outside their presence. He was not given warnings pursuant to Miranda v. Arizona and eventually told the entire story to the officer, including his role in the botched car-jacking. Several months later, respondent was charged with first-degree murder and moved to suppress his statements made during the interview, claiming he was in custody for the purposes of Miranda and, therefore, entitled to warnings.

The case was before the Court on a petition for a writ of habeas corpus pursuant to 28 U.S.C. section 2254; therefore, the Court first recognized that it could reverse only if the lower court applied “clearly established law” in an objectively unreasonable manner. The Court concluded that the lower court's determination under clearly established law that respondent was not in custody for Miranda purposes was not objectively unreasonable. In Thompson v. Keohane, the Court had articulated a two-step analysis to determine whether an individual was in custody for the purposes of Miranda: “first, what were the circumstances surrounding the interrogation; and, second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” The Court concluded that in the circumstances of the present case, respondent was not in custody: respondent was not put under arrest; respondent's parents, rather than the police, had brought him to the station; the parents remained at the station; and respondent was asked at least twice if he wanted to take a break. The Court also concluded, in the first instance, that respondent's age and inexperience were not factors that should be considered in its analysis. It said, “There is an important conceptual difference between the Miranda custody test and the line of cases from other contexts considering age and experience”: “the Miranda custody inquiry is an objective test,” the others are not. The Court did not wish to change the nature of this test because the objective standard is “designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry.”

Justice Breyer, dissenting, believed it was clear that respondent was in custody: a reasonable person in respondent's circumstances would not believe he was free to leave. Furthermore, Justice Breyer argued that respondent's youth did add to his interpretation of the situation and should be considered: “[A] 17-year-old is more likely than, say, a 35-year-old, to take a police officer's assertion of authority to keep parents outside the room and as an assertion of authority to keep their child inside as well.” Justice Breyer viewed the respondent's age and inexperience as objective circumstances, which were known to the police.

In Missouri v. Seibert, the Court determined that warned statements obtained directly after an interrogation in which Miranda warnings were not given were not admissible. Respondent's son, Jonathon, who had cerebral palsy, died in his sleep and respondent was afraid she would be charged with neglect because he had bed sores. In the presence of respondent, respondent's other sons devised a plan to incinerate Jonathon's body by burning down their mobile home, thus destroying any evidence that might have been used to prove neglect. They decided to leave Donald Rector, a mentally ill teenager living with the family, in the home when they started the fire so it would not appear that Jonathon had been left unattended. Donald died in the fire. Police officers questioned respondent for about 30 to 40 minutes without issuing her Miranda warnings. After the police elicited inculpatory statements, they gave respondent her Miranda warnings and questioned her again, receiving the same inculpatory responses. This interrogation technique is taught at numerous police academies nationwide and is referred to as “question-first.”

Under this technique, officers interrogate a person in successive unwarned and warned phases, only providing Miranda warnings after the officers have elicited inculpatory statements.

Justice Souter, writing for a plurality that included Justices Stevens, Ginsburg, and Breyer, determined that exclusion of both the warned and unwarned statements was necessary under the Fifth Amendment. The plurality recognized that “[j]ust as ‘no talismanic incantation [is] required to satisfy Miranda’s structures,’ . . . it would be absurd to think that mere recitation of the litany suffices to satisfy Miranda in every conceivable circumstance.” It concluded that “unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliant with Miranda, or for treating the second stage of the interrogation as distinct from the first, unwarned and inadmissible segment.”

Justice Breyer concurred, but believed the Court should apply the “simple rule” and “exclude ‘fruits’ of the initial unwarned questions unless the failure to warn was in good faith.” Justice Kennedy also concurred, concluding “[t]he interrogation technique used in this case is designed to circumvent Miranda.” However, he concluded that when the failure to warn is not “deliberate” and when “curative measures” are taken, the second statements should be admissible. Justice O’Connor dissented on grounds that the Court specifically rejected the subjective-based tests it applied in this case in Oregon v. Elstad. In her view, since respondent’s statements were voluntary, they were admissible.

The Court decided in United States v. Patane that Miranda v. Arizona did not require the suppression of physical evidence obtained in connection with unwarned but voluntary statements. In this case, two officers went to respondent’s home to arrest respondent for violation of a restraining order. One officer began to give respondent Miranda warnings but was stopped by respondent before he finished. Without completing the warnings, the officer, who had been tipped that respondent illegally possessed a firearm, then questioned the respondent about the firearm. Respondent eventually confessed to having the firearm and permitted the officer to retrieve it from the apartment. Respondent sought to exclude the firearm from evidence.

A three-justice plurality, in an opinion written by Justice Thomas, determined that the fruit of the poisonous tree doctrine did not apply in these circumstances. Fifth Amendment prophylactic rules, like Miranda, sweep beyond the Self-Incarnation Clause and, therefore, “any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination.” According to the plurality, “the Miranda rule ‘does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted.’” The plurality made clear that “a mere failure to give Miranda warnings does not, by itself, violate a suspect’s constitutional rights or even the Miranda rule.” Instead, the “nature of the right protected” is a “fundamental trial right.” This right only relates to the exclusion of testimonial evidence. Therefore, the plurality concluded that it follows then that “police do not violate a suspect’s constitutional rights (or the Miranda rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warning prescribed by Miranda.” The violation occurs “only upon the admission of unwarned statements into evidence at trial.”

Justice Kennedy, joined by Justice O’Connor, concurred. He found it “unnecessary to decide whether the detective’s failure to give respondent the full Miranda warning should be characterized as a violation of the Miranda rule itself, or whether there is ‘anything to deter’ so long as the unwarned statements are not later introduced at trial.” Instead, he relied on Oregon v. Elstad, in which the Court held that evidence obtained following an unwarned interrogation was admissible. Justice Souter dissented, stating that the Court’s conclusion that “the Fifth Amendment does not address the admissibility of nontestimonial evidence [is an] overstatement that is beside the point.” The issue was whether the application of the fruit of the poisonous tree doctrine should be applied “lest we create an incentive for the police to omit Miranda warnings . . . before custodial interrogation.”

**SIXTH AMENDMENT**

In Crawford v. Washington, the Court held the only indicator of reliability that satisfies the Sixth Amendment’s Confrontation Clause is confrontation, meaning an out-of-court statement by a witness is only admissible if (1) the witness is unavailable and (2) the accused had a prior opportunity to cross-examine the witness. Justice Scalia wrote for a seven-person majority; Chief Justice Rehnquist, joined by Justice O’Connor, filed a concurring opinion. Petitioner was arrested for assault and attempted murder and the State sought to introduce at trial his wife’s tape-recorded statements previously made to police during an interrogation. The state could not otherwise have her testify because of the state marital privilege, “which generally bars a spouse from testifying without the other spouse’s consent.” The privilege does not apply, however, to a spouse’s out-of-court statements admissible under a hearsay exception. To argue the tape-recorded statements were admissible, Washington relied on Ohio v. Roberts, which held that the constitutional right to confront witnesses “does not bar admission of an unavailable witness’s statements against a criminal defendant if the statement bears ‘adequate indicia of reliability.’” To meet this requirement, the evidence must either

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that this “bedrock procedural guarantee” was safeguarded even if it allowed into evidence a witness's out-of-court statements “so long as it has adequate indicia of reliability—i.e., falls within a ‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness.’” In this case, however, the Court determined that Roberts was wrongly decided. To reach its conclusion, the Court turned to the history of the Sixth Amendment and concluded that it “supports two inferences about the meaning of the Sixth Amendment:” (1) “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused;” and (2) “that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” The Court identified a “core class of ‘testimonial statements,’” and concluded “interrogations by law enforcement officers fall squarely within that class” of testimonial hearsay with which the Sixth Amendment is concerned. The Court also concluded that the “text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.” The only exceptions to the accused's right to confront those witnesses against him are those that existed at the “time of the founding.” As history illustrates, the admission of prior “examinations” is conditioned on “unavailability and a prior opportunity to cross-examine.”

Chief Justice Rehnquist wrote a concurring opinion, in which he “dissent[ed] from the Court's decision to overrule [Roberts].” He believed the Court's distinction between testimonial and nontestimonial statements “is no better rooted in history than our current doctrine.” His own analysis of the history of the Sixth Amendment revealed that there existed a less concrete common-law rule regarding confrontation. He argued that “[e]xceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made.” He would, however, reverse the judgment based on existing law.

In Blakely v. Washington, a 5-4 Court determined that a court cannot impose an “exceptional” sentence that exceeds the “ordinary” maximum sentence, but not the statutory maximum, based upon a judicial determination of aggravating factors. Petitioner reached a plea agreement with respect to charges for second-degree kidnapping, involving domestic violence and use of a firearm. During sentencing, the judge, pursuant to Washington law, imposed a sentence of 90 months, which was above the “standard range” of 59 to 53 months, upon finding “substantial and compelling reasons justifying an exceptional sentence.” The sentence, however, still fell within the statutory maximum of ten years. The findings upon which the judge relied to support the “exceptional sentence” were not those used to support the underlying sentence.

Justice Scalia, writing for the Court, determined that the imposition of the enhanced sentence violated petitioner's Sixth Amendment right to a trial by jury as set forth in Apprendi v. New Jersey. Apprendi states that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” In Ring v. Arizona, the Court extended Apprendi to capital sentencing. As in Apprendi, the Court concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. In Blakely, the Court extended Apprendi to circumstances where a judge has found aggravating factors and imposed a sentence above the “standard range,” even though it still falls within statutory maximum. In response to the dissents, the Court said why it followed Apprendi: “Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial.” Under the constitution, “a jury trial is meant to ensure [the people's] control of the judiciary.” The Court's rule in Apprendi “carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict.”

Justice O'Connor dissented, focusing most of her opinion on the perceived ill-effects of the decision. She concluded: “What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.” Justice Kennedy agreed, but wrote to add one more criticism: “The Court . . . disregards the fundamental principle under our constitutional system that different branches of government ‘converse with each other on matters of vital common interest.’” Sentence guidelines are one example where case-by-case judicial determinations have been “refined by legislature and codified into statutes or rules as general standards.” Because of the Court's decision, “[n]umerous States that have enacted sentencing guidelines similar to the one in Washington State are now commanded to scrap everything and start over.” Justice Breyer, also dissenting, categorized Apprendi as an “impulse,” easily understood as the Court's attempt to control widely disparate sentences. He wrote that the purpose of the Sixth Amendment's right to a jury trial is for “fairness and effectiveness of a sentencing system.”

In his view, however, the Court’s *Blakely* decision “prevents the legislature from seeking sentencing systems that are consistent with, and indeed may help to advance, the Constitution’s greater fairness goals.”

In *Fellers v. United States*, Justice O’Connor, writing for a unanimous Court, held that statements “deliberately elicited” by police officers after an individual has been indicted by a grand jury violate his Sixth Amendment right to counsel; therefore, any fruits analysis must be conducted under the Sixth Amendment as opposed to the Fifth Amendment. Fellers was indicted by a grand jury. When police officers went to Fellers’s home to arrest him, they questioned him prior to advising him of his rights under *Miranda v. Arizona* and *Patterson v. Illinois*, the latter having extended *Miranda* to the Sixth Amendment right to counsel. Petitioner made inculpatory statements, which were repeated later at the jailhouse after he received the proper warnings. He sought to exclude all the statements from evidence.

The Court began its opinion by stating that Fellers’s Sixth Amendment right to counsel was triggered when the grand jury issued the indictment. Under the Sixth Amendment, to determine whether the right to counsel has been violated, the Court “consistently applie[s] the deliberate-elicitation standard.” In this case, it concluded that the statements taken from Fellers at his home were “deliberately elicited” and, therefore, obtained in violation of his Sixth Amendment rights. Furthermore, as to the jailhouse statements, the Court concluded that a fruits analysis should not be conducted under the Fifth Amendment. In *Oregon v. Elstad*, the Court determined that “though *Miranda* requires that the unwarmed admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.” However, the Court has not yet determined “whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards.” Therefore, it remanded the case to allow the lower courts “to address this issue in the first instance.”

Justice Ginsburg delivered the opinion for a unanimous Court in *Iowa v. Tovar*, which held that the Sixth Amendment does not require a trial court to admonish the defendant, before accepting a guilty plea, that by waiving counsel (1) defendant will not obtain an independent opinion whether it is wise to plead guilty and (2) defendant risks overlooking a viable defense; the Sixth Amendment only requires that waiver of counsel be knowing and intelligent and during pretrial proceedings the warnings required to meet that standard are less rigorous than if an accused is waiving his right to trial counsel. Tovar was arrested numerous times for operating a motor vehicle while under the influence of alcohol. Under Iowa law, his last and third offense was a “class ‘D’ felon[yl].” Tovar argued his first OWI “could not be used to enhance the December 2000 OWI charge from the second-offense aggravated misdemeanor to a third-offense felony” because “his 1996 waiver of counsel was invalid—not ‘full knowing, intelligent, and voluntary’—because he was ‘never made aware by the court . . . of the dangers and disadvantages of self-representation.’” The trial court conducted a “guilty plea colloquy” as required by Iowa criminal procedure. The Iowa Supreme Court, however, determined that the following elements were also necessary to satisfy the Sixth Amendment: (1) “that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked;” (2) that the defendant “will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty;” and (3) “the defendant understands the nature of the charges against him and the range of allowable punishments.” While the trial court covered the last point, it did not warn Tovar about the first two.

The Court determined that the specific warnings set forth by the Iowa Supreme Court were not necessary. While a plea hearing qualifies as a “critical stage” in the criminal process, triggering the Sixth Amendment, the Court has not previously “prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel.” Instead, it only requires that waiver of counsel be intelligent, i.e., the “choice is made with eyes open.” Therefore, while a trial court’s warning for waiver of trial counsel “must be ‘rigorous[ly]’ conveyed,” “at the earlier stages of the criminal process, a less searching or formal colloquy may suffice.” The Court concluded that in this case, Iowa’s plea colloquy suffices both to advise a defendant of his right to counsel, and to assure that his guilty plea is informed and voluntary. The Court also determined that in order to decide this case, it need not “endorse the State’s position that nothing more than the plea colloquy was needed to safeguard Tovar’s right to counsel.” The question is narrower: “Does the Sixth Amendment require a court to give a rigid and detailed admonishment to a pro se defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risks overlooking a defense?” The Court answered the question in the negative and concluded that these two specific admonishments were not required by the Sixth Amendment.

**CRIMINAL STATUTORY INTERPRETATION**

Justice Souter delivered the eight-justice majority opinion in *United States v. Dominguez Benitez*, which held that “a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under

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34. 124 S.Ct. 1379 (2004).
Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea.” After lengthy negotiations, respondent entered into a plea agreement regarding charges of possession and conspiracy to possess methamphetamine. As part of the plea, it was also agreed that the government would stipulate that respondent “would receive what is known as a safety-valve reduction of two levels.” When accepting the plea, the District Court gave most of the warnings under Rule 11, but “failed to mention that [respondent] could not withdraw his plea if the court did not accept the Government’s recommendations.” However, this admonition was set forth in the written plea agreement. It was later discovered that respondent was not eligible for the safety valve and was sentenced to the mandatory minimum. Respondent appealed, claiming “that the District Court’s failure to warn him, as Rule 11(c)(3)(B) instructs, that he could not withdraw his guilty plea if the court did not accept the Government’s recommendations, required reversal.” The Court disagreed. Although Rule 11 requires a court to instruct a defendant that he may not withdraw his guilty plea if the court does not except the government’s recommendation, it also instructs that “not every violation of its terms call for reversal of conviction by entitling the defendant to withdraw his guilty plea.” The Court, in United States v. Vonn, 36 “considered the standard that applies when a defendant is dilatory in raising Rule 11 error, and held that reversal is not in order unless the error is plain.” The Court did not, however, “formulate the standard for determining whether a defendant has shown, as the plain-error standard requires . . . an effect on his substantial rights.” In this case, the Court concluded that a prejudicial standard applies, relying on three reasons: (1) “the standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error;” (2) the standard “should respect the particular importance of the finality of guilty pleas;” and (3) at least in this case, “the reasons are contemplated by the fact, worth repeating, that the violation claimed was of Rule 11, not due process.”

Justice Scalia concurred in the judgment, but wrote separately because he disagrees that “respondent need not show prejudice by a preponderance of the evidence.” He writes, “this Court has adopted no fewer than four assertedly different standards of probability relating to the assessment of whether the outcome of trial would have been different if error had not occurred, or if omitted evidence had been included.” Justice Scalia believed the only “serviceable standards are the traditional ‘beyond a reasonable doubt’ and ‘more likely than not.’”

In Sabri v. United States, 37 Justice Souter delivered the opinion of the Court, which held that Congress had the power to enact a federal bribery law, which provides criminal penalties for anyone who attempts to bribe or bribes a state or local official of an entity receiving federal funding, under the Necessary and Proper Clause of Article I of the Constitution. Justice Souter was joined in full by six justices, with Justice Kennedy concurring in the judgment and in part. Justice Thomas concurred in the judgment. 18 U.S.C. section 666(a)(2) imposes federal criminal penalties for anyone who bribes an individual if that individual is part of an organization, government, or agency that receives, in any one-year period, benefits in excess of $10,000 from the federal government. Petitioner was convicted for offering three separate bribes to a city councilman, Brian Herron, who also served as a member on the Board of Commissioners for the Minneapolis Community Development Agency, in connection with a real estate development project. Petitioner challenged his indictment on the grounds “that [section] 666(a)(2) is unconstitutional on its face for failure to require proof of a connection between the federal funds and the alleged bribe, as an element of liability.” The Court concluded that Article I power does not require proof of a connection between federal money as an element of the offense. Under Article I, Congress has the power under the Spending Clause to “appropriate federal monies to promote the general welfare.” Under its corresponding authority in the Necessary and Proper Clause, Congress has the power “to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officials are derelict about demanding value for dollars.” According to the Court, section 666(a)(2) “addresses these problems at the sources of bribes, by rational means, to safeguard the integrity of the state, local, and tribal recipients of federal dollars.” The Court recognized that not every bribe covered by section 666(a)(2) will be traceable from federal funds or constitute a quid pro quo for some dereliction in spending of a federal grant. However, “this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest.”

FEDERAL HABEAS CORPUS

Justice Breyer, joined by seven other justices, delivered the opinion of the Court in Castro v. United States, 38 resolving a split among the circuits. It held that a court cannot recharacterize a pro se litigant’s motion as the litigant’s first motion under 28 U.S.C. section 2255 unless the court: (1) informs the litigant of its intent to recharacterize the motion; (2) warns the litigant that the recharacterization will subject subsequent section 2255 motions to the law’s “second or successive” restrictions; and (3) provides a litigant with the opportunity to withdraw or amend the filing. In 1994, petitioner filed a motion with the district court, which he classified as a Rule 33 motion. In its decision, the district court referred to the motion as both a Rule 33 and a section 2255 motion. The Eleventh Circuit

affirmed the district court's dismissal of the motion. In 1997, petitioner filed a section 2255 motion and the government sought to have it dismissed on the ground that petitioner had failed to comply with section 2255's restrictive "second or successive" conditions. The Court determined that the 1997 motion was not a "second or successive" motion because the 1994 was not properly reclassified as a second 2255 motion. The Court recognized that courts may sometimes recharacterize pro se motions, but when a court decides to recharacterize a motion as a section 2255 motion, because of section 2255's restrictions, it must give the warnings set forth above. The Court noted that even the government suggested that the Court has the power to create such a rule based on the following grounds: (1) under the Federal Rules of Appellate Procedure 47, (2) under its authority to "regulate the practice through 'the exercise' of our 'supervisory powers' over the federal judiciary," and (3) because it "is likely to reduce and simplify litigation over questions of characterization, which are often quite difficult."

Justice Scalia wrote separately, concurring in the judgment and in only the first two parts of the majority's opinion. He disagreed with "the Court's laissez-faire attitude toward recharacterization." He believed the Court had erred by promulgating a new rule without placing limitations on when recharacterization can occur, including the fact that the Court has failed to provide a pro se litigant the opportunity "to insist that only requires that the district court dismiss the motion." He argued that when, as here, there is nothing to be gained by recharacterization, a district court should not be allowed to recharacterize a motion. In this case, Castro's Rule 33 motion was "valid as a procedural manner, and the claim it raised was no weaker on the merits when presented under Rule 33 than when presented under [section] 2255." Therefore, the recharacterization was improper.

In Plier v. Ford, Justice Thomas delivered the opinion of the Court, which held that a district court is not required to issue the following warnings to a pro se habeas petitioner: (1) the court can stay the petitioner's motion only if he chooses to dismiss the unexhausted claims from a mixed petition and (2) that the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA) will bar refiling of the petition if he dismissed the action to exhaust the nonexhausted claims. Respondent filed two pro se federal petitions for habeas corpus five days before the statute of limitations ran under the AEDPA. Some of the claims in each of the petitions had not been exhausted in state court. The district court gave petitioner three options: (1) the petitions could be dismissed without prejudice and respondent could refile after exhausting the unexhausted claims; (2) the unexhausted claims could be dismissed and respondent could proceed with only the exhausted claims; or (3) respondent could contest the magistrate judge's finding that some of the claims had not been exhausted. Respondent chose to exhaust his nonexhausted claims. When he sought to refile after exhausting his nonexhausted claims, his petitions were dismissed because the one-year statute of limitations had run.

Under Rose v. Lundy, "federal district courts must dismiss mixed habeas petitions." To avoid statute of limitations problems, the Ninth Circuit had adopted the "stay-and-abeyance" procedure, which involves three steps: (1) "the dismissal of any unexhausted claims from the original mixed petition," (2) "a stay of the remaining claims, pending exhaustion of the dismissed unexhausted claims in state court," and (3) "amendment of the original petition to add the newly exhausted claims that then relate back to the original petition." In this case, the Ninth Circuit concluded that the district court was required to advise respondent that it could only consider petitioner's stay motions if petitioner dismissed the nonexhausted claims and then "renewed the prematurely filed stay motions." It also concluded that the district court committed prejudicial error by failing to inform respondent that the one-year statute of limitations had run. The Court, without addressing the Ninth Circuit's stay-and-abeyance procedures, determined that a district court is not required to give the warnings set forth by the Ninth Circuit. Rose only requires that the district court dismiss mixed petitions, which results, of course, in the prisoner being obligated to follow one of the two paths. However, nothing in Rose obligates that these "options be equally attractive, much less suggests that district court give specific advisements as to the availability and wisdom of these options."

Justice Ginsburg delivered the opinion of the Court in Banks v. Dretke, which held that discovery and an evidentiary hearing is authorized in a federal habeas corpus proceeding when the state has concealed exculpatory or impeaching evidence and the petitioner has met the requirement of Brady v. Maryland. Furthermore, the Court concluded, in a pre-AEDPA habeas proceeding, Rule 15 of the Federal Rules of Civil Procedure applies and the state may waive by its actions procedural default and exhaustion remedies. Petitioner was convicted of first-degree murder. The prosecution used the testimony of a paid police informant, Robert Farr, in both its case-in-chief and in the penalty phase of the trial, without disclosing the fact that Farr was a paid police informant, although that information was requested and the state indicated that it would disclose all necessary information. The prosecution also used the testimony of another witness, Charles Cook, in its case-in-chief, who stated many times on cross-examination that he had not "talked to anyone about his testimony." This was a misrepresentation that was not corrected by the prosecution. In 1996, Banks filed a petition for a writ of habeas corpus, asserting: (1) "that the State had withheld material exculpatory evidence 'revealing Robert Farr as a police informant and Mr. Banks' arrest as a set-up' ("Farr Brady claim"); and (2) "that the State had concealed 'Cook's enormous incentive to

40. 455 U.S. 509 (1982).
42. 373 U.S. 83 (1967).
testify in a manner favorable to the [prosecution]” (“Cook Brady claim”).} In June 1998, “Banks moved for discovery and an evidentiary hearing to gain information from the State on the roles played and trial testimony provided by Farr and Cook.” The magistrate judge allowed limited discovery for Cook, but denied it as to Farr, stating Banks had not provided sufficient justification. In 1999, Banks renewed his request for discovery and an evidentiary hearing, “[h]is time, . . . [proffering] affidavits from both Farr and Cook to back up his claims that, as to each of these two key witnesses, the prosecution had wrongfully withheld crucial exculpatory and impeaching evidence.” The magistrate judge then ordered discovery and, for the first time, two things were disclosed: (1) Cook had been extensively coached prior to his testimony at Bank's trial and (2) “that Farr was an informant and that he had been paid $200 for his involvement in the case.”

In the first part of its opinion, the Court addressed Banks's Farr Brady claim. The Court determined that Banks had exhausted his state remedies because his state-court application alleged “‘the prosecution knowingly failed to turn over exculpatory evidence involving Farr in violation of Banks's due process rights.” However, because Banks failed to produce any evidence to support his claim, he must “show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure.” In Strickler v. Greene, the Court set forth the three essential elements to establish a Brady prosecutorial misconduct claim: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or is impeaching, (2) the evidence must have been suppressed by the State, either willfully or inadvertently, and (3) “‘prejudice must have ensued.'” The Court said that “[c]ause and prejudice’ in this case ‘parallels two of the three components of the alleged Brady violation itself.’” It also concluded that Banks satisfies the three requirements. First, the suppressed evidence “qualifies as evidence advantageous to Banks.” As to “cause,” the Court determined that “Banks’s failure to develop the facts in state-court proceedings is informed by Strickler.” In Strickler, as in this case, the prosecutor told the defense it would open the state files and there was no need for a formal Brady motion. However, the file was missing several important documents. In Strickler, the Court determined that the “petitioner has shown cause for his failure to raise a Brady claim in state court,” relying on three factors: (1) “the prosecution withheld exculpatory evidence;” (2) petitioner reasonably relied on the prosecution’s “open-file” policy; and (3) “[t]he [State] confirmed petitioner’s reliance on the open-file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government.” The Court concluded that this case was “congruent with Strickler in all three respects.”

In the second part of the opinion, the Court addressed Banks's Cook Brady claim. The Fifth Circuit determined that Banks had failed to develop the facts underpinning the claim in his 1992 state petition, making the evidentiary hearing ordered by the magistrate judge unwarranted. It denied the certificate of appealability “apparently” because it regarded Rule 15(b) as inapplicable in a federal habeas proceeding. Rule 15 states in part that “when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” The Court states that “[w]e have twice before referenced Rule 15(b)’s application in federal habeas proceedings,” and have concluded that it applies. In this case, there is no “reason why an evidentiary hearing should not qualify [for Rule 15(b) purposes] so long as the respondent gave ‘any sort of consent’ and has a full and fair opportunity to present evidence bearing on the claim’s resolution.” The Court did not believe, as the Fifth Circuit cautioned, that such a rule would “undermine the State's exhaustion and procedural default defenses.” Pre-AEDPA, “there was no inconsistency between Rule 15(b) and those defenses” because “exhaustion and procedural default defenses could be waived based on the State's litigation conduct.” Because Banks could have “demonstrate[d] that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further,” the Court concluded a certificate of appealability should have issued.

In an 8-1 decision, the Court, in Baldwin v. Reese, held that a state prisoner does not satisfy the “fair presentation” requirement of 28 U.S.C. section 2254 when a state court must read beyond the petition, brief, or other papers to be alerted to the federal nature of the claims. Respondent's petition for review in the Oregon Supreme Court did not allege “his separate appellate ‘ineffective assistance’ claim violated federal law.” After review was denied, respondent brought a petition for a writ of habeas corpus in federal court, raising the claim. The district court dismissed the claim because respondent had failed to “fairly present” it in highest state court. A divided panel of the Ninth Circuit reversed and found that Reese had fairly presented the claim because the Oregon Supreme Court “had ‘the opportunity to read . . . the lower court decision claimed to be in error before deciding whether to grant discretionary review.” Justice Breyer, writing for the majority, reversed. The Court held that “to say that a petitioner ‘fairly presents’ a federal claim only by reading lower court opinions in the case is to say that those judges must read the lower court opinions—for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance.” Federal habeas law does not impose such a requirement. The Court also concluded that the federal claim was “fairly presented” because the state and federal claims were virtually identical.

Justice Stevens, dissenting, said “[i]t is appropriate to disregard this Court’s Rule 15.2 and permit respondents to defend a
Judgment on grounds not raised in the brief in opposition when the omitted issue is ‘predicate to an intelligent resolution of the question presented.’ In this instance, he would consider Reese’s last argument and, since there is ‘no significant difference between’ the state and federal claims, find that ‘the state courts did have a fair opportunity to assess [Reese’s] federal claim.’

In Dretke v. Haley, a 6-3 Court determined that when faced with a claim of actual innocence, whether of a sentence or a crime charged, a court must first address all non-defaulted claims for comparable relief and other grounds for cause to excuse the procedural default. Respondent was convicted of theft and under a habitual offender statute, even though he did not meet the elements necessary for the habitual offender statute. Respondent did not, however, challenge his conviction based on actual innocence until his petition for habeas relief in state court. The state court denied his claim because it was not raised on direct appeal, but on federal habeas review, the Fifth Circuit reversed, ‘holding narrowly that the actual innocence exception ‘applies to noncapital sentencing procedures involving a career offender or habitual felony offender.’”

The Court has recognized “an equitable exception to the bar when a habeas applicant can demonstrate cause and prejudice for the procedural default.” Because the “cause and prejudice” standard is not a “perfect safeguard,” the Court, in Murray v. Carrier, recognized “a narrow exception to the cause requirement where a constitutional violation has ‘probably resulted’ in the conviction of one who is ‘actually innocent’ of the substantive offense.” Sawyer v. White extended this exception to capital sentencing errors. In the case before it, the Court declined to extend this “narrow exception” to noncapital sentencing, stating that “a federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse procedural default.” The Court finds that this avoidance principal was “implicit” in Carrier. In this case, Petitioner “has conceded . . . that respondent has a viable and ‘significant’ ineffective assistance of counsel claim.” Therefore, this claim should be addressed first.

Justice Stevens dissented, finding that “[t]he unending search for symmetry in the law can cause judges to forget about justice.” In his view, this was a simple case: “because the constitutional error clearly and concededly resulted in the imposition of an unauthorized sentence, it also follows that respondent is a ‘victim of a miscarriage of justice.’” Justice Kennedy, in his own dissenting opinion, added that “[t]he case also merits this further comment concerning the larger obligation of state or federal officials when they know an individual has been sentenced for a crime he did not commit.” He believed the state should have taken steps to “vindicate” these interests in the first place and not attempt to keep Haley incarcerated for a crime he did not commit.

In a 6-3 decision, written by Justice O’Connor, the Court, in Tennard v. Dretke, held that the only question to be answered in determining whether to issue a certificate of appealability is whether a reasonable juror could find the determination of the district court debatable or wrong; a petitioner need not make a threshold showing that he suffered from a “uniquely severe permanent handicap” or show a nexus between his impaired intellectual functioning and the crime committed to satisfy Penry I and obtain a certificate of appealability. Petitioner was convicted by a jury of capital murder in 1986. During the penalty phase of the trial, defense introduced evidence of Tennard’s low IQ, which the prosecution argued was irrelevant. Tennard sought post-conviction relief, arguing that in light of the instructions given to the jury, his death sentence “had been obtained in violation of the Eighth Amendment as interpreted by this Court in Penry I.” In Penry v. Lynaugh, the Court held, in invalidating the very same instructions that were given to Tennard’s jury, that it was not enough to give mitigating evidence to the sentencer, “[t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence.” The Court of Appeals for the Fifth Circuit concluded Tennard was not entitled to a certificate of appealability for two reasons: (1) “evidence of low IQ alone does not constitute a uniquely severe condition,” and (2) “even if Tennard’s evidence was mental retardation evidence, his claim must fail because he did not show that the crime he committed was attributable to his low IQ.” In reversing and remanding, the Court determined the Fifth Circuit “invoked its own restrictive gloss on Penry I”: “Neither Penry I nor its progeny screened mitigating evidence for ‘constitutional relevance’ before considering whether the jury instructions comport with the Eighth Amendment.” The proper analysis of Tennard’s claim asks whether “Tennard [has] ‘demonstrate[d] that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong?’” The Court concluded that reasonable jurists could conclude that low IQ was relevant mitigating evidence and that “the Texas Court of Criminal Appeals’ application of Penry to the facts of Tennard’s case was unreasonable.” The Court concluded that “[i]mpaired intellectual functioning has mitigating dimensions beyond the impact it has on the individual’s ability to act deliberately.”

HABEAS CORPUS – NEW RULES

Justice Thomas delivered the opinion of a 5-4 Court in Beard v. Banks. It held the Court’s decision in Mills v. Maryland, which forbids a state from imposing a requirement of unanimity before a mitigating factor can be considered in a

sentencing decision, does not apply retroactively. Respondent was convicted of murder and sentenced to death prior to the Court's decision in Mills. Under Teague v. Lane,\textsuperscript{52} to determine whether a constitutional rule of criminal procedure applies to a case on collateral review, a court must: (1) “determine when the defendant's conviction became final;” (2) “ascertain the ‘legal landscape’ as it then existed,” and (3) “ask whether the Constitution, as interpreted by the precedent then existing, compels the rule.” As to the last step, the court essentially must determine whether the rule is “new.” If it is “new,” the court must consider “whether it falls within either of the two exceptions to nonretroactivity.” \textit{Teague}’s bar on retroactivity does not apply if: (1) it is a rule “forbidding punishment ‘of certain primary conduct [or . . . ] . . . prohibiting a certain category of punishment for a class of defendants because of their status or offense,” or (2) it is a “watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings.” The Court concluded that it was clear that respondent’s conviction became final prior to its decision in \textit{Mills}. It also concluded that the rule announced in \textit{Mills} was new, finding that existing precedent, i.e., \textit{Lockett v. Ohio},\textsuperscript{53} and its progeny, did not mandate the rule in \textit{Mills}. Because the Court summarily concluded that the first nonretroactive exception in \textit{Teague} did not apply, it only discusses the second, stating that it has “repeatedly emphasized the limited scope of the second Teague exception, explaining that it is clearly meant to apply only to a small core of rules requiring some observance of those procedures that . . . are implicit in the concept of orderly liberty.” The Court has yet to find a rule that falls within this exception and found that the \textit{Mills} rule not to be the first one. While recognizing that \textit{Mills} helps avoid the “potentially arbitrary impositions of the death sentence,” “the fact that a new rule removes some remote possibility of arbitrary infliction of the death sentence does not suffice to bring it within \textit{Teague}’s second exception.” However laudable, “it has none of the primary and centrality’ necessary for it to fall under the exception.

In \textit{Schriro v. Summerlin},\textsuperscript{54} a 5-4 Court, in an opinion written by Justice Scalia, determined that its decision in \textit{Ring v. Arizona},\textsuperscript{55} which requires a jury determine the existence of aggravating factors used to impose a death sentence, was a procedural rule, but not a “watershed rule of criminal procedure” that requires retroactive application. While respondent’s case was pending on federal habeas review, the Court decided \textit{Apprendi v. New Jersey},\textsuperscript{56} which “interpreted the constitutional due-process and jury-trial guarantees to require that, [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,” and \textit{Ring}, which applied \textit{Apprendi}’s rule to a death sentence. Respondent challenged his death sentence by arguing that the judge, not the jury, found the existence of aggravating factors. The Court determined that the rule announced in \textit{Ring} was procedural and, therefore, the rules regarding retroactive application as expressed in \textit{Teague} v. \textit{Lane} apply.\textsuperscript{57} It does not, however, believe \textit{Ring} announced a “watershed rule of criminal procedure,” thereby falling into one of the exceptions for retroactive application. The purpose behind \textit{Ring} was the Court’s determination that it is the jury’s, and not the judge’s, role to decide whether aggravating factors exist. However, there is no unequivocal evidence to suggest that a judge is a less accurate factfinder than a jury, meaning that a determination by a judge carries an “impermissibly large risk” of punishing conduct the law does not reach. The Court turned to its decision in \textit{DeStefano v. Woods}\textsuperscript{58} for support. In \textit{DeStefano}, the Court “refused to give retroactive effect to \textit{Duncan v. Louisiana},\textsuperscript{59} which applied the Sixth Amendment’s jury-trial guarantee to the States.” The Court here said that in deciding \textit{DeStefano}, it had determined “that, although ‘the right to jury trial generally tends to prevent arbitrariness and repression[,] . . . [w]e would not assert . . . that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would a jury.”

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55. 536 U.S. 584 (2002).
56. 530 U.S. 466 (2000).
58. 392 U.S. 631 (1968) (per curiam).
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