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Charles H. Whitebread
University of Southern California Law School

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Recent Criminal Decisions of the United States Supreme Court:

The 2006-2007 Term

Charles H. Whitebread

The past Term of the Court was one in which it swung to the right. A single justice, Justice Anthony Kennedy, made all the difference—being in the majority in every five-to-four decision that split along ideological lines. Cases of particular interest to state-court judges held that a passenger in a routine traffic stop is seized for Fourth Amendment purposes, that California's determinative sentencing law was unconstitutional, and that the Court's decision on *Crawford v. Washington* would not be applied retroactively on collateral review.

FOURTH AMENDMENT

Justice Scalia delivered the opinion of the Court in *Scott v. Harris*,[1] which held that a police officer did not violate a passenger's Fourth Amendment rights by bumping his car off the road during a high-speed chase. The petitioner, a Georgia police officer, joined a high-speed pursuit in progress and received permission to "take … out" the pursued vehicle. The petitioner "applied his push bumper to the rear of respondent's vehicle," and the respondent was paralyzed in the resulting crash. The respondent alleged "a violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment." After examining a "videotape capturing the events in question," the Court finds that the respondent "plac[ed] police officers and innocent bystanders alike at great risk of serious injury." To determine the reasonableness of petitioner's action, the Court balances "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" After weighing the risks caused by the petitioner's actions and the danger that the police officer was trying to eliminate, the Court concludes that his decision to bump the respondent's car was reasonable and that he is entitled to summary judgment.

In *Los Angeles County, California v. Rettele*,[2] the Court held that a search of the respondents' house was reasonable despite the fact that the respondents were of a different race than the original suspects. Los Angeles County deputies "obtained a valid warrant to search a house, … unaware that the suspects being sought had moved out three months earlier." Upon entering the house at 7:00 a.m., deputies found the respondents Max Rettele and Judy Sadler naked in bed and held them at gunpoint for one to two minutes before allowing them to dress and instructing them to wait in the living room. Within five minutes, the deputies realized their mistake, apologized, and left the house. The respondents claimed that their Fourth Amendment rights had been violated, but the District Court held "that the warrant was obtained by proper procedures and the search was reasonable." The Ninth Circuit reversed. The Court rejects the Ninth Circuit's holding because "it is not uncommon for people of different races to live together," so "[w]hen the deputies ordered respondents from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house." The Court also notes that "officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search." Because an armed suspect might easily hide a firearm in bedding, the Court finds the officers' orders to be reasonable under the circumstances and concludes that the respondents' constitutional rights were not violated.

In *Brendlin v. California*,[3] a unanimous Court held that a routine traffic stop subjects a passenger to a Fourth Amendment seizure in an opinion delivered by Justice Souter. The petitioner Bruce Brendlin was riding as a passenger in a car when it was stopped by Deputy Sheriff Robert Brokenbough. Deputy Brokenbough recognized the petitioner and arrested him after verifying that he "was a parole violator with an outstanding no-bail warrant for his arrest." A search revealed several items in the car that are used to manufacture methamphetamines. The petitioner moved at trial to suppress the evidence against him as "fruits of an unconstitutional seizure," arguing that the traffic stop unlawfully seized his person. The Supreme Court of California denied the motion and held that "a passenger 'is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the … officer's investigation or show of authority.'" The Court begins by stating that a Fourth Amendment seizure occurs when an officer, "'by means of physical force or show of authority,' terminates or restrains [a person's] freedom of movement." The Court next cites the test established in *Unites States v. Mendenhall*,[4] which states that a seizure occurs if "'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" The Court also notes that prior cases have repeatedly stated in dicta "that during a traffic stop an officer seizes everyone in the vehicle, not just the driver" and that the Court has never made

Footnotes

1. 127 S. Ct. 1769 (2007).
2. 127 S. Ct. 1989 (2007).
3. 127 S. Ct. 2400 (2007).
4. 446 U.S. 544 (1980).

"any distinction between driver and passenger that would affect the Fourth Amendment." The Court next asks "whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself." In response, the Court reasons that a passenger "will expect to be subject to some scrutiny" and will not feel that he or she can simply leave during the traffic stop. Therefore, the Court concludes that a passenger is seized during a routine traffic stop.

SIXTH AMENDMENT

In the decision on *Carey v. Musladin* by Justice Thomas,[5] the Court held that a state court reasonably applied federal precedent in allowing family members of a murder victim to wear buttons with the victim's picture on them during the murder trial. The respondent Mathew Musladin was convicted by a jury of first-degree murder. Members of the victim's family attended some of the trial while wearing buttons with a photo of the victim on them, and the trial court denied a motion by the respondent's counsel to order the family members not to wear the buttons. The respondent appealed his conviction and argued that the court's decision to allow the buttons deprived him of his right to a fair trial under the Sixth Amendment. The Court of Appeal concluded that under the standard established in *Holbrook v. Flynn*,[6] the buttons had not "branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." The respondent filed a federal writ of habeas corpus, and the District Court granted a certificate of appealability on the buttons question. The Ninth Circuit found that the state court's decision failed to correctly apply *Flynn* and *Estelle v. Williams*[7] and reversed. The Court begins by noting that under the Antiterrorism and Effective Death Penalty Act (AEDPA), habeas relief can be granted "if the California Court of Appeal's decision was contrary to or involved an unreasonable application of" the Court's previous holdings. *Williams* involved a defendant who was forced to wear identifiable prison clothing during his trial. The Court concluded that this action violated his Fourteenth Amendment rights. *Flynn* addressed the issue of seating "'four uniformed state troopers'" immediately behind the defendant at trial. The Court held that this presence did not violate the defendant's right to a fair trial. The Court distinguishes *Williams* and *Flynn* from the present case because they involved government-sponsored actions in contrast to the private spectators' actions of wearing the buttons. The Court holds that due to a lack of Supreme Court decisions regarding private spectator's conduct, the Ninth Circuit erred in holding that the California Court of Appeal's ruling was an unreasonable application of "clearly established Federal law."

In an opinion delivered by Justice Ginsburg, a 6-3 Court in *Cunningham v. California*[8] held that California's determinative sentencing law (DSL) violated petitioner John Cunningham's Sixth and Fourteenth Amendment rights. The petitioner was convicted of continuous sexual abuse of a child under the age of 14. Under the DSL, this crime requires "a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years." The DSL mandates that a trial judge sentence the defendant to the middle term unless he finds additional aggravating or mitigating factors by a preponderance of the evidence at a sentencing hearing. In the petitioner's case, the judge found six aggravating factors and one mitigating factor and sentenced petitioner to the upper term sentence of 16 years. The Court begins its review by examining the history of the DSL, which was enacted to "promote uniform and proportionate punishment." The Court finds that the DSL frequently uses the term "fact" and requires a preponderance of the evidence, "a clear factfinding directive." The Court states that it has consistently held that "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt." In *Apprendi v. New Jersey*,[9] the Court held that an extended prison term was not valid when imposed because of a judge's finding that the crime was committed "'with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.'" The Court finds that although it should be clear that California's DSL violates *Apprendi*'s rule, it must address the California Supreme Court's decision in *People v. Black*[10] to the contrary. The *Black* decision held that the DSL only allows "'the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence.'" The Court rejects this decision because the *Apprendi* rule leaves "no room for such an examination" by a judge. The Court concludes that the DSL violates the Sixth Amendment and notes that it is up to California to adjust its sentencing system in light of this decision.

[A] 6-3 Court . . . held that California's determinative sentencing law violated . . . Sixth and Fourteenth Amendment rights.

In Justice Breyer's decision on *Rita v. U.S.*,[11] an 8-1 Court held that the Circuit Courts of Appeals may presume a sentence imposed within a properly determined U.S. Sentencing Guidelines range is reasonable. The petitioner Victor Rita was convicted of perjury, making false statements, and obstructing justice. During sentencing, the Guidelines were applied and a sentencing range of 33-to-41 months was recommended. The petitioner raised two arguments for a sentence outside of the recommended range: (1) that within the Guideline's framework his case was "atypical" and "falls outside the 'heartland' to which the United States Sentencing Commission intends each individual Guideline to apply;" and (2) that "independent

5. 127 S. Ct. 649 (2006).
6. 475 U.S. 560 (1986).
7. 425 U.S. 501 (1976).
8. 127 S. Ct. 856 (2007).
9. 530 U.S. 466 (2000).
10. 35 Cal. 4th 1238 (2005).
11. 127 S. Ct. 2456 (2007).

[A] 5-4 Court . . . upheld California's catchall factor (k) instruction against an Eighth Amendment challenge.

of the Guidelines, application of the sentencing factors set forth in 18 U.S.C. §3553(a) … warrants a lower sentence." The sentencing judge entered a sentence of 33 months, the Guidelines minimum. The Fourth Circuit affirmed and stated that "'a sentence imposed within the properly calculated Guidelines range … is presumptively reasonable.'" The Court begins by noting that a presumption of reasonableness "is not binding" and merely reflects the "double determination" made by the sentencing judge and the Sentencing Commission that the sentence is reasonable. In reviewing the legislative history of the Guidelines, the Court finds that "[t]he Commission has made a serious, sometimes controversial, effort to carry out [Congress's] mandate," reflecting the dual goals of uniformity and proportionality, despite the fact that they sometimes conflict. The Court concludes that "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve §3553(a)'s objectives." The Court also relies upon *U.S. v. Booker*,[12] which held that a provision of the Guidelines that made them binding on district courts was unconstitutional. The Court finds that the *Booker* opinion "made clear that today's holding does not violate the Sixth Amendment" in stating that "'the constitutional issues presented … would have been avoided entirely if Congress had omitted … the provisions that make the Guidelines binding on district judges.'" The Court concludes that the petitioner's circumstances do not "require a sentence lower than the sentence the Guidelines provide."

In *Whorton v. Bockting*,[13] a unanimous Court held that its decision in *Crawford v. Washington*[14] does not apply retroactively to the respondent's case. The respondent Marvin Bockting resided with his wife, Laura, and Laura's daughter from a previous relationship, Autumn. One night Autumn told her mother that the respondent had sexually abused her. Laura took Autumn to a hospital where an examination of her "revealed strong physical evidence of sexual assaults." Detective Charles Zinovitch interviewed Autumn while her mother was present, and she described in detail what the respondent had allegedly done to her. The respondent was arrested and indicted on four counts of sexually assaulting a minor under 14 years of age. At trial, Autumn was too unnerved to testify, and the state moved to allow Laura and "Detective Zinovitch to recount Autumn's statements regarding the sexual assaults." The trial court admitted the testimony over the defense counsel's objection, and the respondent was subsequently convicted of three counts of sexual assault. The Nevada Supreme Court affirmed the decision of the trial court, relying on *Ohio v. Roberts*.[15] While the respondent's appeal to the Ninth Circuit was pending, the Court decided *Crawford*, which overruled *Roberts*, and held that "'[t]estimonial statements of witnesses absent from trial' are admissible 'only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness].'" The respondent contended on appeal that under *Crawford*, Autumn's out-of-court testimony would not have been admitted. The Court begins by examining *Teague v. Lane*,[16] which states that "an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." The Court decides that *Crawford* announces a new rule because its decision was not dictated by precedent and was, in fact, contrary to *Roberts*. Because *Crawford* is a new rule, it cannot apply retroactively unless "it is a '"watershed rul[e] of criminal procedure"' implicating the fundamental fairness and accuracy of the criminal proceeding." This requires showing: (1) that the rule is needed to prevent "'an "'impermissibly large risk'"' of an inaccurate conviction" and (2) that the rule "'alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" The Court holds that the first requirement is not satisfied because *Crawford*'s impact is uncertain and not significant. The Court also finds that *Crawford* does not meet the second requirement because it does not effect "a profound and 'sweeping'" change. Therefore, *Crawford* does not apply retroactively, and the judgment of the Ninth Circuit is reversed.

CAPITAL SENTENCING

A 5-4 Court in *Ayers v. Belmontes*,[17] upheld California's catchall factor (k) instruction against an Eighth Amendment challenge. The respondent Fernando Belmontes was convicted of first-degree murder. During sentencing he introduced mitigating evidence to demonstrate his ability to positively contribute to society as a prison inmate. The trial judge's sentencing instructions to the jury included California's catchall factor (k) instruction that allows the jury to consider "'[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.'" Based on these instructions, the respondent was sentenced to death. The Court begins its review by considering the previous challenges to factor (k) in *Boyde v. California*[18] and *Brown v. Payton*.[19] *Boyde* involved a challenge to factor (k)'s ability to allow jury consideration of mitigating evidence related to a defendant's background or character. In *Payton*, the defendant made a similar argument with respect to postcrime mitigating evidence. The Court rejected both challenges. The Court distinguishes the present case from *Payton* in that the federal habeas petition at issue was filed before the AEDPA deadline, resulting in a less deferential standard of review. Therefore, the relevant

12. 543 U.S. 220 (2005).
13. 127 S. Ct. 1173 (2007).
14. 541 U.S. 36 (2004).
15. 448 U.S. 56 (1980).
16. 489 U.S. 288 (1989).
17. 127 S. Ct. 469 (2006).
18. 494 U.S. 370 (1990).
19. 544 U.S. 133 (2005).

inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." The Court analogizes the respondent's mitigating evidence to the precrime evidence in *Boyde*, concluding that it is well within the range of consideration that factor (k) allows. Furthermore, both the respondent and the prosecution discussed the evidence extensively, and it is "improbable the jurors believed that the parties were engaging in an exercise in futility." The Court concludes that it is highly unlikely that the jury felt that it could not consider the mitigating evidence presented by the respondent regarding his future value as an inmate.

In *Abdul-Kabir v. Quarterman*[20] and its companion case *Brewer v. Quarterman*,[21] a 5-4 Court held that Texas's sentencing instructions in capital cases did not give the jury enough opportunity to weigh the mitigating evidence presented in each case. The petitioner Jalil Abdul-Kabir was convicted of capital murder. At his sentencing hearing, he presented "testimony from his mother and his aunt, who described his unhappy childhood" and testimony from a psychologist that "sought to provide an explanation for [petitioner's] behavior that might reduce his moral culpability." The trial court denied the petitioner's request for special instructions and instead asked the jury: (1) "Was the conduct of the defendant … committed deliberately and with the reasonable expectation that the death of the deceased … would result?"; and (2) "Is there a probability that the defendant … would commit criminal acts of violence that would constitute a continuing threat to society?" Under the Texas criminal code, if the jury answers both questions affirmatively, the judge must impose a death sentence. The jury answered in the affirmative, and Abdul-Kabir was sentenced to death. In the companion case, the petitioner Brent Ray Brewer was convicted of murder. He presented mitigating evidence including a recent "bout with depression," manipulation and domination by his female co-defendant, and abuse of drugs. As in Abdul-Kabir's case, a sentencing jury answered the sentencing questions affirmatively, and Brewer was sentenced to death. The Court begins the *Abdul-Kabir* opinion by noting that because the AEDPA applies, it must determine "whether the Texas Court of Criminal Appeals' (CCA) adjudication of [Abdul-Kabir's] claim on the merits 'resulted in a decision that was contrary to … clearly established Federal law.'" The Court finds that its precedent clearly establishes that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty…." Turning to the trial court's decision, the Court states that the "trial judge did not analyze [*Penry v. Lynaugh* (*Penry I*)[22]]," but instead "relied on three later Texas cases and on [the Court's] opinion in *Graham v. Collins*."[23] The Court finds that *Graham* is less relevant to Abdul-Kabir's case than *Penry I*, and the trial court's use of this formulation of the issue "resulted in a decision that was both 'contrary to' and 'involved an unreasonable application of'" the Court's previous decisions. The Court next finds that the CCA erred in its application of *Penry I* because it "ignored the fact that even though [Abdul-Kabir's] mitigating evidence may not have been as persuasive as Penry's, it was relevant … for precisely the same reason." The Court concludes that it is conceivable that a juror could find "himself without a means for giving *meaningful* effect to the mitigating qualities" of the presented evidence as mandated by *Penry I*. Accordingly, the judgment of the Fifth Circuit denying Abdul-Kabir's application for a writ of habeas corpus is reversed, and the case remanded. In the *Brewer* opinion, the Court states that the Fifth Circuit erred in its decision, and the decision is reversed for the reasons enumerated in the *Abdul-Kabir* opinion.

[A] 5-4 Court held that Texas's sentencing instructions in capital cases did not give the jury enough opportunity to weigh the mitigating evidence . . . .

In *Smith v. Texas*,[24] a 5-4 Court held that the Texas Court of Criminal Appeals' (CCA) requirement that the petitioner show egregious harm was an error based "on a misunderstanding of the federal right" that the petitioner asserted. The petitioner LaRoyce Lathair Smith was convicted of first-degree murder. The sentencing phase of his trial took place between *Penry v. Lynaugh* (*Penry I*),[25] and *Penry v. Johnson* (*Penry II*).[26] During this interim period, the Texas trial court in Smith's case attempted to correct the special jury instructions invalidated in *Penry I* by instructing the jury to "nullify the special issues if the mitigating evidence, taken as a whole, convinced the jury Smith did not deserve the death penalty." Nevertheless, the jury answered affirmatively to the special instructions, and the petitioner was sentenced to death. Following this sentencing phase, the Court held in *Penry II* that a similar nullification charge was "insufficient to cure the flawed special issues." The petitioner sought relief, but the CCA affirmed the denial of relief. The Court granted certiorari and reversed in *Smith v. Texas* (*Smith I*).[27] On remand, the CCA again denied relief, holding that petitioner's "pretrial objections did not preserve the claim of constitutional error he asserts" and that under Texas law, "this procedural default required Smith to show egregious harm—a burden … he did not meet." The Court begins by discussing the CCA's decision. The Court disagrees with the CCA's egregious-harm requirement because the basis for reversal in *Smith I* was that the nullification charge did not "[cure] the underlying *Penry* error" and not some separate error based on the nullification charge itself. The Court finds

20. 127 S. Ct. 1654 (2007).
21. 127 S. Ct. 1706 (2007).
22. 492 U.S. 302 (1989).
23. 506 U.S. 461 (1993).
24. 127 S. Ct. 1686 (2007).
25. 492 U.S. 302 (1989).
26. 532 U.S. 782 (2001).
27. 543 U.S. 37 (2004).

In *Panetti v. Quarterman*, a 5-4 Court overturned the death sentence of a mentally ill prisoner.

that the petitioner's "central objection at each stage has been to the special issues" and that this is sufficient to preserve his claim of *Penry* error as vindicated in *Smith I*. Therefore, under the Texas framework, he is only required to show "'*some* harm'" from the CCA's error. The Court concludes that this harm exists because the petitioner "has shown there was a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of his mitigating evidence."

In *Panetti v. Quarterman*,[28] a 5-4 Court overturned the death sentence of a mentally ill prisoner. The petitioner Scott Louis Panetti killed his wife's parents in front of his wife and daughter. A court-ordered psychiatric evaluation "indicated that petitioner suffered from a fragmented personality, delusions, and hallucinations." At trial, the petitioner represented himself, "claimed he was not guilty by reason of insanity," and displayed very strange behavior. Afterwards, a jury found him guilty of murder and sentenced him to death. After his execution date was set, the petitioner's counsel filed a motion claiming "for the first time, that due to mental illness he was incompetent to be executed." In state court, two court-appointed mental-health experts evaluated the petitioner and concluded that he "'knows that he is to be executed, and that his execution will result in his death,' and, moreover, that he 'has the ability to understand the reason he is to be executed.'" Despite his objections to the evaluation and proceedings, the court held that the petitioner had not shown he was incompetent to be executed. The petitioner "returned to federal court," and the District Court denied his habeas petition on the grounds that he "had not shown incompetency as defined by Circuit precedent." In the Supreme Court, the petitioner argues that under the AEDPA, no deference is due to the state court's judgment. The Court agrees with the petitioner because the state court's "failure to provide the procedures mandated by *Ford v. Wainwright*,[29] constituted an unreasonable application of clearly established law." The Court states that the trial court did not give the petitioner "an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court" and that this is an unconstitutional error. After finding that "[t]here is … much in the record to support the conclusion that petitioner suffers from severe delusions," the Court turns to an examination of the District Court's holding that the petitioner is competent enough to be executed because he knows that he committed the murders, that he will be executed, and that the justification for his execution is his commission of the murders. The Court concludes that the District Court was mistaken because "[i]t is error to derive from *Ford* … a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted."

CRIMINAL STATUTORY INTERPRETATION

A unanimous Court in *Jones v. Bock*[30] rejected the Sixth Circuit's interpretation of the Prisoner Litigation Reform Act of 1995 (PLRA). The petitioners are three inmates who filed grievances against prison officials and officers of the Michigan Department of Corrections. The PLRA mandates that prisoners "exhaust prison grievance procedures before filling suit." In interpreting the PLRA, the Sixth Circuit required that proof of exhaustion be attached to prisoner complaints and also that the defendants "have been named from the beginning of the grievance process." If both exhausted and unexhausted claims were pleaded in a single complaint, the Sixth Circuit applied a "total exhaustion" rule and dismissed the entire suit. The Court begins by addressing whether the PLRA requires exhaustion to be pleaded in the complaint or whether it is an affirmative defense for the defendant. The Court finds that under the Federal Rules of Civil Procedure, exhaustion is usually treated as an affirmative defense and that there is nothing explicit or implicit in the PLRA to the contrary. The respondent, however, contends that the PLRA was meant to deviate from this traditional framework to effectively reduce the volume of frivolous prisoner lawsuits. The Court feels that this argument proves too much and that "the same could be said with respect to any affirmative defense." The Court holds that under the PLRA, exhaustion need not be pleaded by an inmate in his or her complaint, and failure to exhaust is an affirmative defense. The Court next turns to the issue of whether inmates must name all future defendants in their initial grievances. Finding that "nothing in the statute imposes a 'name all defendants' requirement," the Court holds that "exhaustion is not *per se* inadequate simply because an individual later sued is not named in the grievances." Finally, the Court addresses the Sixth Circuit's total-exhaustion rule. The respondents argue that the PLRA language stating that "'no action shall be brought' unless administrative procedures are exhausted" bars an entire suit because Congress would have used the term "claim" instead of "action" if it intended otherwise. The Court rejects this argument as reading too much into boilerplate language and concludes that the Sixth Circuit's interpretation of the PLRA is erroneous.

In *James v. U. S.*,[31] a 5-4 Court held that attempted burglary is a felony for purposes of the Armed Career Criminal Act's (ACCA) mandatory minimum sentencing requirement. The ACCA provides that any "'person who violates section 922(g) … and has three prior convictions … for a violent felony or a serious drug offense'" is subject to a mandatory minimum sentence of 15 years. Section 922(g) is violated when a felon is convicted of possession of a firearm. A violent felony is defined under the ACCA as "any crime punishable by imprisonment for a term exceeding one year … that … (ii) is burglary, arson, or extortion, … or otherwise involves conduct

28. 127 S. Ct. 2842 (2007).
29. 477 U.S. 399 (1986).
30. 127 S. Ct. 910 (2007).
31. 127 S. Ct. 1586 (2007).

that presents a serious potential risk of physical injury to another." The petitioner Alphonso James, a previously convicted felon, pleaded guilty to violating section 922(g) and had been convicted of three previous felonies: two serious drug convictions and one attempted burglary conviction. At the petitioner's trial, the District Court concluded "that attempted burglary is a violent felony" and applied the ACCA's minimum mandatory sentence. The Court begins by noting that the only possible way the petitioner's attempted burglary conviction qualifies as a violent felony is if it "'otherwise involves conduct that presents a serious potential risk of physical injury to another.'" The Court turns to the question of "whether attempted burglary, as defined by Florida law, is an offense that 'involves conduct that presents a serious potential risk of physical injury to another.'" The Court finds that the risk of burglary "arises not from completion of the burglary, but from the possibility that an innocent person might appear while the crime is in progress" and that attempted burglary "poses the same kind of risk." The Court also notes that every Court of Appeals that has dealt with an attempted-burglary statute similar to Florida's "has held that the offense qualifies as a 'violent felony.'" The Court concludes that attempted burglary under the Florida law is a violent felony under ACCA's residual provision.

In *Wilkie v. Robbins*,[32] the Court declined to create a new constitutional cause of action to govern the respondent's case and also denied his Racketeer Influenced and Corrupt Organizations Act's (RICO) claim. The respondent Frank Robbins purchased the title to a ranch in Wyoming from George Nelson. Nelson had previously granted the United States an easement to use and maintain a road on the ranch, but the Bureau of Land Management had failed to record it. After Bureau employees realized their mistake, they phoned the respondent and "demanded an easement to replace Nelson's." The respondent refused, and over the next several years, he alleges that Bureau employees "carried on a campaign of harassment and intimidation aimed at forcing him to regrant the lost easement." The respondent filed the instant suit in 1998, alleging that the petitioners violated his Fourth and Fifth Amendment rights under *Bivens v. Six Unknown Fed. Narcotics Agents*,[33] which "held that the victim of a Fourth Amendment violation by federal officers had a claim for damages." The respondent also asserts a RICO claim. The Court begins with a brief examination of *Bivens*, noting that "in most instances we have found a *Bivens* remedy unjustified." The Court finds that the respondent "has an administrative … process for vindicating virtually all of his complaints," but the Court notes that this does not expressly preclude the creation of a new constitutional cause of action. The respondent alleges that while he may have had some remedy for most of the individual incidents, the Bureau's conduct amounted to "'death by a thousand cuts'" and should be treated as a whole. The Court agrees that "[t]he whole here is greater than the sum of its parts" but feels that respondent's claim is essentially that the government "went too far" and notes the inherent difficulty of line-drawing in such cases. Therefore, the Court rejects the respondent's proposed *Bivens* cause of action, finding that it might "be worse than the disease." RICO makes it illegal for certain organizations to engage in a "'pattern of racketeering activity,'" including violations of the Hobbs Act. The Court finds that at the time the Hobbs Act was passed, the crime of extortion dealt mostly with public corruption and not "the harm caused by overzealous efforts to obtain property on behalf of the Government." For this reason, the Court also dismisses the respondent's RICO claim.

A 5-4 Court . . . held that the AEDPA's tolling period for state post-conviction procedures does not continue to toll during . . . certiorari petitions.

FEDERAL HABEAS CORPUS

A 5-4 Court in *Lawrence v. Florida*,[34] held that the AEDPA's tolling period for state post-conviction procedures does not continue to toll during U.S. Supreme Court certiorari petitions. The petitioner Gary Lawrence was convicted of murder and sentenced to death. The Florida Supreme Court affirmed the sentence, and the Court denied certiorari on January 20, 1998. 364 days later, the petitioner filed a petition for post-conviction relief and was denied. He again petitioned the Court for certiorari, and while this was pending, he also filed a federal habeas application. The Court denied certiorari on March 24, 2003. The petitioner's habeas claim was dismissed in the District Court as untimely under AEDPA section 2244(d), which contains a one-year statute of limitations for habeas relief from the judgment of a state court. Section 2244(d)(2) states that this "limitations period is tolled while an 'application for State post-conviction or other collateral review … is pending.'" The District Court concluded that this period does not toll during a petition for certiorari. The District Court held that the limitations period had run because the petitioner waited 364 days before filing his petition for postconviction relief and then an additional 113 before filing his habeas petition. The Court begins its analysis by stating that the real issue "is whether the limitations period was also tolled during the pendency of Lawrence's petition for certiorari to this Court." The Court feels that a natural reading of the statute's language only includes the state-court review process and that the Court is clearly not part of this process. The Court further reasons that under the petitioner's reading of the AEDPA, no "state prisoner could exhaust state postconviction remedies without filing a petition for certiorari." However, the Court has previously held that state procedures are exhausted "at the end of state-court review." The Court concludes by noting that the petitioner's position would "provide incentives for state prisoners to file certiorari petitions as a delay tactic."

32. 127 S. Ct. 2588 (2007).
33. 403 U.S. 388 (1971).
34. 127 S. Ct. 1079 (2007).

[R]espondent's repeated requests that his counsel not present mitigating evidence at his sentencing hearing provided sufficient reason . . . to deny his habeas petition.

In *Schriro v. Landrigan*,[35] a 5-4 Court held that the respondent's repeated requests that his counsel not present mitigating evidence at his sentencing hearing provided sufficient reason for the District Court to deny his habeas petition. The respondent Jeffrey Landrigan was convicted of theft, second-degree burglary, and felony murder. At sentencing, his counsel attempted to submit mitigating evidence in the form of testimony from the respondent's ex-wife and his mother, but at the respondent's request, "both women refused to testify." The respondent also interrupted when other mitigating evidence was brought in by his counsel and told the judge to "'bring on'" the death penalty. The respondent was sentenced to death. Citing the ineffective-assistance-of-counsel standard set forth in *Strickland v. Washington*,[36] a District Court refused the respondent an evidentiary hearing, finding that he could not make a "colorable claim" because he "could not demonstrate that he was prejudiced by any error his counsel may have made." The Ninth Circuit reversed. The Court begins by addressing the Ninth Circuit's application of the AEDPA. The Ninth Circuit concluded that the state court's finding that the respondent "instructed his counsel not to introduce any mitigating evidence," was an "'unreasonable determination of the facts.'" Reviewing the record, the Court cites several instances of the respondent informing his counsel not to present mitigating evidence and concludes that "the Arizona postconviciton court's determination of the facts was reasonable." The Court finds that "[i]f Landrigan issued such an instruction, his counsel's failure to investigate further could not have been prejudicial under *Strickland*" and "the District Court was well within its discretion to determine that … [he] could not develop a factual record that would entitle him to habeas relief." The Court concludes that the Ninth Circuit "erred in holding that the District Court abused its discretion in declining to grant Landrigan an evidentiary hearing."

In *Uttecht v. Brown*,[37] a 5-4 Court, in a decision delivered by Justice Kennedy, held that the Ninth Circuit failed to give proper deference to state-court determinations that a particular juror would be substantially impaired in performing his or her juror duties. The respondent Cal Coburn Brown was sentenced to death in the State of Washington, and the Washington Supreme Court affirmed his sentence. He petitioned a District Court for a writ of habeas corpus and was denied. The Ninth Circuit reversed, holding that "the state trial court had violated Brown's Sixth and Fourteenth Amendment rights by excusing" Juror Z on the grounds that he "could not be impartial in deciding whether to impose a death sentence." The Court begins with an examination of *Witherspoon v. Illinois*,[38] which held that "'a sentence of death cannot be carried out if the jury that imposed … it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty.'" However, the Court points out that *Wainwright v. Witt*[39] adopted a looser standard for excluding veniremen: "'[W]hether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" The Court next analyzes the *voir dire* in respondent's case, finding that Juror Z "had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case." The Court also notes that with regard to the State's challenge to Juror Z and "[b]efore the trial court could ask [the respondent] for a response, the defense volunteered, 'We have no objection,'" and Juror Z was subsequently excused. The Court rejects the Ninth Circuit's holding that Juror Z was not substantially impaired and concludes that "the trial court acted well within its discretion in granting State's motion to excuse Juror Z." In conclusion, the Court holds that "[c]ourts reviewing claims of *Witherspoon-Witt* error, … especially federal courts considering habeas petitions, owe deference to the trial court."

In *Fry v. Pliler*,[40] the Court upheld the Ninth Circuit's determination that the petitioner was required to demonstrate substantial and injurious effect from the trial court's decision to exclude testimony. The petitioner John Francis Fry was convicted by a jury of two murders. At trial he attempted to link Anthony Hurtz to the homicide. The trial court excluded the testimony of his witness Pamela Maples, "who was prepared to testify that she had heard Hurtz discussing homicides bearing some resemblance to the murder of the Bells." On appeal, the petitioner contended that the exclusion of Maples's testimony "deprived [him] of a fair opportunity to defend himself, in violation of *Chambers v. Mississippi*…."[41] A federal magistrate judge recommended denying habeas relief because "'there ha[d] been an insufficient showing that the improper exclusion of the testimony … had a substantial and injurious effect on the jury's verdict' under the standard set forth in" *Brecht v. Abrahamson*.[42] The District Court agreed with the magistrate judge, and the Ninth Circuit affirmed. The Court begins its opinion with a discussion of the relevant standards of review under *Chapman v. California*[43] and *Brecht*. *Chapman* "held that a federal constitutional error can be considered harmless only if a court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *Brecht* rejected the *Chapman* standard for cases reaching the Court on collateral review and adopted the more "forgiving" standard from *Kotteakos v. U.S.*[44] that an error "is harmless unless it '"had substantial and injurious effect or

35. 127 S. Ct. 1933 (2007).
36. 466 U.S. 668 (1984).
37. 127 S. Ct. 2218 (2007).
38. 391 U.S. 510 (1968).
39. 469 U.S. 412 (1985).
40. 127 S. Ct. 2321 (2007).
41. 410 U.S. 284 (1973).
42. 507 U.S. 619 (1993).
43. 386 U.S. 18 (1967).
44. 328 U.S. 750 (1946).

influence in determining the jury's verdict."'" Therefore, the question at hand is whether a federal court must apply the *Brecht* standard "even if the state appellate court has not found, as the state appellate court in *Brecht* had found, that the error was harmless beyond a reasonable doubt under *Chapman*." The Court finds that the *Brecht* decision "clearly assumed that the *Kotteakos* standard would apply in virtually all §2254 cases" and concludes that the Ninth Circuit was correct to apply *Brecht*.

In *Bowles v. Russell*,[45] a 5-4 Court held that the Sixth Circuit lacks jurisdiction over the petitioner's habeas appeal because it was filed after the 14-day period allowed by statute, despite a judge's extension of that period to 17 days. The petitioner Keith Bowles was convicted of murder and sentenced to 15 years to life imprisonment. He filed a federal petition for habeas corpus on September 5, 2002. The District Court denied relief on September 9, 2003, and the petitioner did not file a timely notice of appeal. However, on December 12, 2003, the petitioner moved to "reopen the period during which he could file his notice of appeal," relying on Rule 4(a)(6), "which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen…." The District Court granted the petitioner's motion but extended the time period by 17 days instead of the 14 days allowed by Rule 4(a)(6). The petitioner filed his notice 16 days later, within the period granted by the court, but after the 14-day period had elapsed. Beginning its review, the Court finds that the issue at hand is whether the Sixth Circuit "lacked jurisdiction to entertain an appeal filed outside the 14-day window … but within the longer period granted by the District Court." The Court states that it "has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional'" and that "courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction." Unlike more flexible court-promulgated rules, the Court finds that under Rule 4(a)(6), "Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period…." The Court concludes that the petitioner's failure to meet this statutory deadline deprived the Sixth Circuit of jurisdiction and states that if a rigid rule is unfair, "Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits."

Charles H. Whitebread (A.B., Princeton University, 1965; L.L.B., Yale Law School 1968) is the George T. and Harriet E. Pfleger Professor of Law at the University of Southern California Law School, where he has taught since 1981. Before that, he taught at the University of Virginia School of Law from 1968 to 1981. *Professor Whitebread gratefully acknowledges the help of his research assistant, Cris Briscoe.*

45. 127 S. Ct. 2360 (2007).