May 2004

Court Review: Volume 41, Issue 1 - Recent Criminal Decisions of the United States Supreme Court: The 2003-2004 Term

Charles H. Whitebread
Yale Law School

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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*,[1] concerning the admissibility of hearsay at criminal trials, and *Blakely v. Washington*,[2] 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*,[3] 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*[4] and *United States v. Ramirez*.[5] 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*,[6] 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'

Footnotes

1. 124 S.Ct. 1354 (2004).
2. 124 S.Ct. 2531 (2004).
3. 124 S.Ct. 521 (2003).
4. 514 U.S. 927 (1995).
5. 523 U.S. 65 (1998).
6. 124 S.Ct. 795 (2003).

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) "[m]ost importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect."

The Court concluded that there was no way petitioner could have believed the warrant was sufficient.

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 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 Agents*[10] 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-Montano*[11] 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. The mechanic then disassembled the gas tank, and the inspector found 37 kilograms of marijuana bricks concealed in the gas tank. Respondent moved to suppress the evi-

7. 124 S.Ct. 885 (2004).
8. 531 U.S. 32 (2000).
9. 124 S.Ct. 1284 (2004).
10. 403 U.S. 388 (1971).
11. 124 S.Ct. 1582 (2004).

[T]he 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.

dence, arguing that it was obtained in violation of his Fourth Amendment rights because the inspectors did not have sufficient probable cause to conduct a search of his gas tank. However, according to the Court, "the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles." Thus "[c]omplex 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*,[12] the Court determined that an officer may search the passenger compartment of an automobile, pursuant to *New York v. Belton*,[13] 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 baggies 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*:[14] (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*,[15] 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*,[16] 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,

12. 124 S.Ct. 2127 (2004).
13. 453 U.S. 454 (1981).
14. 395 U.S. 752 (1969).
15. 124 S.Ct. 2451 (2004).
16. 392 U.S. 1 (1984).

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*,[17] 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*[18] 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*,[19] 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."

The Court also concluded . . . that respondent's age and inexperience . . . should not be considered in its analysis.

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 argueds 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*,[20] 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."

17. 124 S.Ct. 2140 (2004).
18. 384 U.S. 436 (1966).
19. 516 U.S. 99 (1995).
20. 124 S.Ct. 2601 (2004).

In *Crawford v. Washington*, the Court held the only indicator of reliability that satisfies the . . . Confrontation Clause is confrontation . . . .

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] strictures,' . . . 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*.[21] In her view, since respondent's statements were voluntary, they were admissible.

The Court decided in *United States v. Patane*[22] that *Miranda v. Arizona*[23] 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 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-Incrimination 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*,[24] 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*,[25] 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*,[26] 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

21. 470 U.S. 298 (1985).
22. 124 S.Ct. 2620 (2004).
23. 384 U.S. 436 (1966).
24. 470 U.S. 298 (1985).
25. 124 S.Ct. 1354 (2004).
26. 448 U.S. 56 (1980).

"[1] fall within a 'firmly rooted hearsay exception' or [2] bear 'particularized guarantees of trustworthiness.'"

The Sixth Amendment requires that "'in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him.'" The Court previously determined in *Roberts* 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*,[27] 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.

In *Blakely v. Washington*, a 5-4 Court determined that a court cannot impose an "exceptional sentence" . . . based upon a judicial determination of aggravating factors.

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.[28] *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*,[29] 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.'" Sentencing 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."

27. 124 S.Ct. 2531 (2004).
28. 530 U.S. 466 (2000).
29. 536 U.S. 584 (2002).

The Court determined that the specific warnings set forth by the Iowa Supreme Court were not necessary.

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*,[30] 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*[31] and *Patterson v. Illinois*,[32] 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*,[33] the Court determined that "'[t]hough *Miranda* requires that the unwarned 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*,[34] 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[y]." 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*,[35] 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

30. 124 S.Ct. 1019 (2004).
31. 384 U.S. 436 (1966).
32. 487 U.S. 285 (1988).
33. 470 U.S. 298 (1985).
34. 124 S.Ct. 1379 (2004).
35. 124 S.Ct. 2333 (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 Justices Scalia and 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 recognized that not every bribe . . . will be traceable from federal funds . . . .

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 officers 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

36. 535 U.S. 55 (2002).
37. 124 S.Ct. 1941 (2004).
38. 124 S.Ct. 786 (2003).

The prosecution used the testimony of a paid police informant . . . without disclosing the fact that [he] was a paid police informant . . . .

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 the district court rule on his motion as filed." 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 *Pliler v. Ford*,[39] 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*,[40] "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*,[41] 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*.[42] 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

39. 124 S.Ct. 2441 (2004).
40. 455 U.S. 509 (1982).
41. 124 S.Ct. 1256 (2004).
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, "[t]his 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 wrongly 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 Banks'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*,[43] 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) "'the [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.

[T]he prosecutor told the defense it would open the state files . . . . However, the file was missing several important documents.

In an 8-1 decision, the Court, in *Baldwin v. Reese*,[44] 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 not "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

43. 527 U.S. 263 (1999).

44. 124 S.Ct. 1347 (2004).

Justice Stevens dissented, finding that "[t]he unending search for symmetry in the law can cause judges to forget about justice."

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*,[45] 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*,[46] 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. Whitley*[47] 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*,[48] 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 *Penre 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*,[49] 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 comported 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*.[50] It held the Court's decision in *Mills v. Maryland*,[51] which forbids a state from imposing a requirement of unanimity before a mitigating factor can be considered in a

45. 124 S.Ct. 1847 (2004).
46. 477 U.S. 478 (1986).
47. 505 U.S. 333 (1992).
48. 124 S.Ct. 2562 (2004).
49. 492 U.S. 302 (1989) (*Penry I*).
50. 124 S.Ct. 2504 (2004).
51. 486 U.S. 367 (1988).

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*,[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." *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 *Mills*. It also concluded that the rule announced in *Mills* was new, finding that existing precedent, *i.e., Lockett v. Ohio*,[53] and its progeny, did not mandate the rule in *Mills*. Because the Court summarily concluded that the first nonretroactive exception in *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 *Mills* rule not to be the first one. While recognizing that *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 *Teague*'s second exception." However laudable, "'it has none of the primacy and centrality" necessary for it to fall under the exception.

In *Schriro v. Summerlin*,[54] a 5-4 Court, in an opinion written by Justice Scalia, determined that its decision in *Ring v. Arizona*,[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 *Apprendi v. New Jersey*,[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 *Ring*, which applied *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 *Ring* was procedural and, therefore, the rules regarding retroactive application as expressed in *Teague v. Lane* apply.[57] It does not, however, believe *Ring* announced a "watershed rule of criminal procedure," thereby falling into one of the exceptions for retroactive application. The purpose behind *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 *DeStefano v. Woods*[58] for support. In *DeStefano*, the Court "refused to give retroactive effect to *Duncan v. Louisiana*,[59] which applied the Sixth Amendment's jury-trial guarantee to the States." The Court here said that in deciding *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.'"

Charles H. Whitebread (A.B., Princeton University, 1965; LL.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. He is found on the web at http://www.rcf.usc.edu/~cwhitebr/. *Professor Whitebread gratefully acknowledges the help of his research assistant, Heather Manolakas.*

52. 489 U.S. 288 (1989).
53. 438 U.S. 586 (1978).
54. 124 S.Ct. 2519 (2004).
55. 536 U.S. 584 (2002).
56. 530 U.S. 466 (2000).
57. 489 U.S. 288 (1989).
58. 392 U.S. 631 (1968) (*per curiam*).
59. 391 U.S. 145 (1968).