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## CRIMINAL PROCEDURE DECISIONS FROM THE OCTOBER 2006 TERM

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As other commentators have observed, the Supreme Court has been deciding an increasingly small number of cases in recent years—sixty-eight or seventy, as opposed to the 140 or 150 in earlier decades.<sup>1</sup> One remarkable thing about the October 2006 Term, even more so than the present Term, is that close to half of the cases the Supreme Court decided in that small pool were about criminal law and procedure. This Article discusses cases from the October 2006 Term in three areas: Fourth Amendment,<sup>2</sup> Sixth Amendment,<sup>3</sup> and

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<sup>1</sup> See Erwin Chemerinsky, *An Overview of the October 2005 Supreme Court Term*, 22 *TOURO L. REV.* 873, 874 (2007).

<sup>2</sup> U.S. CONST. amend. IV states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>3</sup> U.S. CONST. amend. VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

death penalty cases.

Criminal procedure issues can arise either in direct criminal appeals, habeas corpus proceedings, or Section 1983 actions—all of which involve more procedural limitations and exclusions than many areas in the rest of the Term’s docket. It is also fair to say, paradoxically, that the Supreme Court is not anxious to hear cases in the criminal law and procedure areas. Much of the Court’s energy seems devoted to staunching the flow of such cases.

#### I. FOURTH AMENDMENT

Since September 11, 2001, the Supreme Court has decided about two-dozen search and seizure cases and in all but three, the Court has held in law enforcement’s favor.<sup>4</sup> The Court seems to be sweeping the Fourth Amendment out of the way of law enforcement.

Of the three cases where the Supreme Court did in fact rule in favor of a Fourth Amendment claim, two involved searches of a home.<sup>5</sup> This year, the Court finally had a case involving a car where it unanimously held that a Fourth Amendment right existed: *Brendlin v. California*.<sup>6</sup> While this result seems remarkable enough on its surface, *Brendlin* is a good window into many of the Supreme Court’s

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<sup>4</sup> See *Brendlin v. California*, 127 S. Ct. 2400, 2403 (2007) (holding the passenger of a car during a traffic stop “is seized within the meaning of the Fourth Amendment”); *Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (holding that a warrantless search over the objection of one co-owner of home who was actually present was not a valid consensual search); *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (finding a search warrant invalid because it did not specifically state the person or things to be seized). *But cf.* *Kirk v. Louisiana*, 536 U.S. 635, 635-36 (2002) (remanding a case for determination of the existence of exigent circumstances regarding a warrantless entry, arrest, and search).

<sup>5</sup> *Groh*, 540 U.S. at 553; *Randolph*, 547 U.S. at 107, 123 (implicating the search of a home in both cases).

<sup>6</sup> *Brendlin*, 127 S. Ct. at 2403 (holding that both a driver and passenger of a car stopped during a traffic stop are “seized within the meaning of the Fourth Amendment”).

attitudes regarding the Fourth Amendment and what is at stake in this area.

**A. *Brendlin v. California***

In *Brendlin v. California*, a deputy sheriff and his partner were looking carefully at a parked Buick, and discovered the car's registration sticker had expired.<sup>7</sup> At that point, they became interested enough to investigate further and discovered that there was a renewal application with respect to that registration pending.<sup>8</sup> The same deputy sheriff and his partner later spotted the same car on the road and noticed that there was a temporary operating permit displayed. They had no reason to believe the permit was invalid; it was clearly labeled a temporary registration.<sup>9</sup> Nevertheless, the deputy sheriff testified that they decided to stop the car in order to verify whether the permit matched the vehicle. When they stopped the car, they spotted the front seat passenger, Bruce Brendlin, whom the deputy sheriff recognized, and subsequently "verified that Brendlin was a parole violator."<sup>10</sup> Having begun the way many car stops begin, with a pretext stop, the story continued the way most Fourth Amendment stories concerning cars continue. The deputy sheriff performed a search of the car, incident to arrest, and found drugs.<sup>11</sup> Brendlin was charged with a drug crime and, as typically happens in these criminal cases, made a motion to suppress the drugs discovered in the car on

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2404.

<sup>9</sup> *Id.* The deputy sheriff "admitted later, there was nothing unusual about the permit or the way it was affixed." *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Brendlin*, 127 S. Ct. at 2404.

the ground that they were found illegally.<sup>12</sup>

If there is one thing everyone knows about the Fourth Amendment, it is that there is a special standing doctrine from *Rakas v. Illinois*.<sup>13</sup> The doctrine says that if the police illegally search a car, without probable cause, a passenger in that car might not be permitted to challenge the legality of the search.<sup>14</sup> This standing doctrine encourages police to just search a car, regardless of what is required by the Fourth Amendment, because the passengers are not likely to have standing to challenge the search—they had no reasonable expectation of privacy in the area of the car searched.<sup>15</sup> Therefore, evidence obtained in even the most blatantly illegal search might be admitted against a passenger, creating a perverse incentive for the police to disregard the Fourth Amendment. *Rakas* left open the possibility that a passenger might nevertheless have a claim to suppress evidence obtained in a car that had been illegally stopped. If law enforcement officials illegally stop a car in which the passenger is riding (but in which he has no property interest), then the passenger is detained, so he may have standing to claim that the evidence obtained during the search was the fruit of an illegal stop.<sup>16</sup>

The trial court, in *Brendlin*, ruled that the traffic stop at issue

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<sup>12</sup> *Id.* (“*Brendlin* . . . moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop.”).

<sup>13</sup> 439 U.S. 128 (1978).

<sup>14</sup> *Id.* at 129-30.

<sup>15</sup> *Id.* at 148 (“[P]etitioners’ claim is one which would fail . . . since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers.”).

<sup>16</sup> *Id.* at 150 (“The Illinois courts were therefore correct in concluding that it was unnecessary to decide whether the search of the car might have violated the rights secured to someone else by the Fourth and Fourteenth Amendments to the United States Constitution.”).

was perfectly fine, despite the absence of legitimate grounds for the police to stop the car.<sup>17</sup> On appeal, the State of California concluded that the trial court was wrong and conceded that the stop was in fact unconstitutional because the deputy sheriff lacked reasonable suspicion, as required under the Fourth Amendment.<sup>18</sup> Because of the temporary renewal sticker, there was no reason to stop the car. The Supreme Court has always held that the police cannot arbitrarily stop cars, because to afford so much discretion would give rise to the possibility of arbitrary and discriminatory enforcement.<sup>19</sup> Law enforcement must either have a particularized suspicion or some other sufficient ground, such as a reasonable roadblock, to justify a stop.<sup>20</sup>

Even with this concession, the California Supreme Court held that the drugs found in the car were admissible against Brendlin on the ground that a passenger does not have standing to challenge the legality of the stop of the car because the passenger is not “seized” within the meaning of the Fourth Amendment.<sup>21</sup> The court theorized that if you are a passenger in a car and the police stop the car because the driver is doing something wrong, that has nothing to do with the passenger, who is free to walk away. The California Supreme Court reasoned that such a passenger, therefore, lacks standing because he is detained only for that one moment while the car is stopped.

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<sup>17</sup> *Id.* at 2404.

<sup>18</sup> *Brendlin*, 127 S. Ct. at 2404.

<sup>19</sup> *Id.* at 2410 (“Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.”). *See also* Delaware v. Prouse, 440 U.S. 648 (1979).

<sup>20</sup> *Brendlin*, 127 S. Ct. at 2410 (noting that the Fourth Amendment prohibits police officers from spot-checking drivers licenses without either a warrant or probable cause).

<sup>21</sup> *Id.* at 2404.

The Supreme Court disagreed. In a unanimous opinion authored by Justice Souter, the Court concluded that a reasonable passenger would not think he could walk away when the police stop the car he is riding in.<sup>22</sup> In fact, Justice Souter pointed out that if you are in a car which is stopped, you may not know why the police are stopping the car; they might be stopping the car for you.<sup>23</sup> The Supreme Court has ruled that as long as the police have probable cause to believe a passenger in a car has done something wrong, they can stop the car even though someone else is driving it.<sup>24</sup> In this case, Justice Souter applied a test the Court articulated in *United States v. Mendenhall*,<sup>25</sup> stating that a person is seized within the meaning of the Fourth Amendment if a reasonable person would not feel free to walk away under the circumstances. Under this test, Souter concluded that Brendlin had been seized and therefore had standing to challenge whether or not that seizure—the stop of the car—was legal.<sup>26</sup> This appears to be an objective test. What would a reasonable person under similar circumstances think? California argued that it should not really matter what the reasonable person would think because the officers were only targeting the driver; they had no intentions as to the passenger and therefore the passenger's rights could not be violated.<sup>27</sup> Justice Souter pointed out that the Supreme Court

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<sup>22</sup> *Id.* at 2406-07 (“[I]n these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.”).

<sup>23</sup> *Id.* at 2407 (“[A] passenger cannot assume, merely from the fact of a traffic stop, that the driver’s conduct is the cause of the stop.”).

<sup>24</sup> *Id.*

<sup>25</sup> 446 U.S. 544 (1980).

<sup>26</sup> *Brendlin*, 127 S. Ct. at 2405 (quoting *Mendenhall*, 446 U.S. at 554).

<sup>27</sup> *Id.* at 2409 n.6 (noting the state’s argument that police did not act purposefully to detain

has consistently rejected such subjective tests under the Fourth Amendment.<sup>28</sup>

*Whren v. United States*,<sup>29</sup> a relevant example of the Court rejecting a subjective test, highlights what is important about *Brendlin*. In *Whren*, a car containing Mr. Whren was stopped for making a turn without signaling. The police objectively had probable cause to believe the car was doing something illegal; there was a turn without a signal.<sup>30</sup> I suspect that what happened in this case is similar to my suspicions regarding *Brendlin*, where the deputy sheriff kept “running into” and examining the car. Whren’s car may have been stopped because vice squad officers were actually interested in this car for reasons that had nothing to do with traffic control. In fact, the vice squad lacked the authority to stop people for traffic offenses, but they did so anyway in Mr. Whren’s case.<sup>31</sup> Whren argued this was a drug investigation and racial profiling was the real reason his car was picked out over every other car that also made illegal turns without signaling.<sup>32</sup> The Supreme Court, in *Whren*, did not want to consider the limitation on the vice squad officers’ traffic enforcement powers, or the motivation for the stop. If there was probable cause to believe that there was a violation of a traffic law being committed, said the

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Brendlin).

<sup>28</sup> See *id.* (“[C]riterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized.”).

<sup>29</sup> 517 U.S. 806, 819 (1996) (holding that petitioners’ Fourth Amendment rights were not violated because police officers had probable cause to make the traffic stop).

<sup>30</sup> *Id.* at 808, 819.

<sup>31</sup> *Id.* at 815 (quoting laws which permit plainclothes officers in unmarked vehicles to enforce traffic laws “only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others”).

<sup>32</sup> *Id.* at 810 (noting that “[a]s a general matter, the decision to stop an automobile is reasonable” if probable cause exists for officials to conclude there has been a traffic violation).

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Court, that was per se reasonable and sufficient.<sup>33</sup>

I worked on an amicus brief in the *Brendlin* case for the ACLU.<sup>34</sup> The chief argument we made to the Supreme Court was that if they accepted the California Supreme Court's argument—that the police could stop any car and the driver was the only person who would have standing to challenge the illegal stop of the car—it would create an open season for racial profiling. The police might decide to stop any car, at any time, with no legitimate reason at all, to fish for evidence of drug offenses. If the police know only the driver can challenge the legality of their conduct, then there is no disincentive when the police are actually interested in the possibility of obtaining evidence against the passengers.

The Supreme Court essentially agreed with that theory. Justice Souter noted that the police need a reason to stop a vehicle.<sup>35</sup> In discussing whether the objective test for passengers is too objective, one issue the ACLU was concerned about in writing the brief was whether or not you could say to the Supreme Court: “Every mother who has a son who is a person of color tells her son not to run away from the police. Whatever the statistics show, people have very different views about how reasonable or safe it is to run away from the police, depending on the color of their skin.” While the brief did not

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<sup>33</sup> *Id.* at 819. The Court upheld the convictions, concluding “the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment . . .” *Id.*

<sup>34</sup> See Brief of Am. Civil Liberties Union et. al as Amici Curiae Supporting Petitioner, *Brendlin*, 127 S. Ct. 2400 (No. 06-8120).

<sup>35</sup> *Brendlin*, 127 S. Ct. at 2410 (noting, before citing sundry cases requiring sufficient reason for a stop, that to admit evidence against passengers obtained pursuant to arbitrary stops, “would be a powerful incentive to run the kind of ‘roving patrols’ that would still violate the driver’s Fourth Amendment right”).



actually say that, it did focus on the issue of racial profiling.

Fortunately, the *Brendlin* Court held that passengers could challenge the illegal stop of the car.<sup>36</sup> What this means is that in a situation similar to *Brendlin*, before stopping a car, the deputy sheriff would now have to follow the car until it went two miles over the speed limit or changed lanes without signaling. That would give rise to sufficient cause, under *Whren*, to stop the car legally. It is not much, but at least police officers are required to do that much in the future.

The Supreme Court sometimes draws fine lines in its Fourth Amendment jurisprudence, and this is one such time. In these criminal cases, the Court, in motions to suppress evidence, is often hostile to the Fourth Amendment because it does not particularly favor the exclusionary rule.<sup>37</sup> While the rule has not been wholly discarded, it is not well liked by the Court.<sup>38</sup> The Court wants to have its cake and eat it too by professing belief in the strictures of the Fourth Amendment, but also allowing use of evidence seized in violation of those strictures against each particular criminal defendant.

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<sup>36</sup> *Id.* at 2403 (“[A] passenger is seized as well and so may challenge the constitutionality of the stop.”).

<sup>37</sup> See *Hudson v. Michigan*, 547 U.S. 586 (2006).

<sup>38</sup> See L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 672-73 (1998). The authors point out that “[d]espite the Court’s apparent dislike for the [exclusionary] rule . . . [and despite] carving out exception after exception, the Court has left the rule battered and bloodied.” *Id.* at 672 & n.11 (citing *United States v. Leon*, 468 U.S. 897, 907 (1984) (the good faith exception); *Nix v. Williams*, 467 U.S. 431, 440-41 (1984) (inevitable or ultimate discovery); *Brown v. Illinois*, 422 U.S. 590, 602 (1975) (the doctrine of attenuation); *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (independent source); *Walder v. United States*, 347 U.S. 62, 65 (1954) (the impeachment exception); *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

**B. *Los Angeles County v. Rettele***

It would seem that the Fourth Amendment should fare better in Section 1983<sup>39</sup> actions, because generally, the people involved have not been charged with a crime. These plaintiffs believe their Fourth Amendment rights were violated and want to bring a charge of police misconduct or the equivalent. Yet these cases do not fare well in the Supreme Court either. For example, in *Scott v. Harris*,<sup>40</sup> the notorious high-speed car chase case from the past Term, the Court found no constitutional violation on fairly dramatic facts.<sup>41</sup> It appears that the Court continues to be concerned about opening the floodgates to a multitude of Section 1983 actions.

In *Los Angeles County v. Rettele*,<sup>42</sup> police officers obtained a search warrant based on a suspicion that several people were engaged in fraud and identity theft.<sup>43</sup> The suspects were three African-American men. The officers located an address for these suspects, which they subsequently used in obtaining a search warrant, by looking at a Department of Motor Vehicles record for one of the suspects. When the police went to the house to execute the warrant, they found Max Rettele and Judy Sadler lying naked in bed and Sadler's son in another room.<sup>44</sup>

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<sup>39</sup> 42 U.S.C.A. § 1983 (West 2003) (providing redress for individuals subjected to "deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

<sup>40</sup> 127 S. Ct. 1769 (2007).

<sup>41</sup> *Id.* at 1778 (concluding that it had "little difficulty in concluding it was reasonable for [Officer] Scott to take the action that he did").

<sup>42</sup> 127 S. Ct. 1989 (2007).

<sup>43</sup> *Id.* at 1990.

<sup>44</sup> *Id.* at 1991 ("The deputies entered their bedroom with guns drawn and ordered them to get out of their bed and to show their hands. They protested that they were not wearing clothes.").

As it turned out, the previous occupants sold the house to Rettele, and Rettele and Sadler had lived there for three months.<sup>45</sup> The Ninth Circuit thought the police should have realized that the Retteles were the wrong people because both of them were Caucasian, and therefore did not match the description of any of the suspects. The search warrant authorized the officers to enter and search the house and to search the three African-American men for evidence of identity theft.<sup>46</sup> When the police entered the house without realizing that it belonged to new owners, they woke up the Retteles, made them get out of bed naked and at gun-point, and made them stand around for some period of time before allowing them to get dressed. Eventually, the police realized their mistake but not until after the Retteles had undergone a frightening and humiliating ordeal.<sup>47</sup>

The Ninth Circuit, reversing the district court's decision, ruled the officers had forfeited qualified immunity by acting unreasonably. In essence, the court thought the officers' mistake was not reasonable.<sup>48</sup>

The Supreme Court, in examining this case, decided not to address the qualified immunity issue but, instead, ruled on the merits of the Fourth Amendment claim. The Court decided there was nothing unconstitutional about this situation. The police had probable

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1990-91 (noting that the deputy was investigating "a fraud and identity-theft crime ring," there were three suspects, and the "warrant authorized [them] to search the homes and three of the suspects for documents and computer files").

<sup>47</sup> *Rettele*, 127 S. Ct. at 1991.

<sup>48</sup> *Id.* at 1992 ("[T]he Court of Appeals held that 'after taking one look at [Plaintiffs], the deputies should have realized that [Plaintiffs] were not the subjects of the search warrant and did not pose a threat to the deputies' safety.'").

cause and a search warrant.<sup>49</sup> How were they to know? Maybe the suspects were somewhere else in the house.

In a separate opinion, concurring in judgment, Justice Stevens and Justice Ginsburg wondered why the Court did not just say the officers had qualified immunity.<sup>50</sup> If the officers did not know their actions were unconstitutional, then why was it necessary for the Court to go so far as to say that nothing unconstitutional happened instead of issuing the narrower ruling? This is another example of the general hostility toward Section 1983 cases. Looking directly to the constitutional questions instead of starting with qualified immunity empowers lower courts to simply dismiss similar future cases on their merits.

## II. SIXTH AMENDMENT

The current Supreme Court prefers the Sixth Amendment to the Fourth. Justice Antonin Scalia is particularly fond of several sections of the Sixth Amendment. As a result, since 2000, there have been radical renovations of three different Sixth Amendment rights, mostly due to Justice Scalia's vote.

### A. Right to Confrontation

First is the *Crawford* area—right to confrontation.<sup>51</sup> In 2004, the Supreme Court radically changed its law about the Confrontation

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<sup>49</sup> *Id.* at 1993-94 (concluding that the Fourth Amendment is not violated when “[w]hen officers execute a valid warrant and act in a reasonable manner . . .”).

<sup>50</sup> *Id.* at 1994 (Stevens, J., concurring) (“[T]he defendants were entitled to qualified immunity [despite the constitutional question.]”).

<sup>51</sup> U.S. CONST. amend. VI states, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”

Clause by holding the Sixth Amendment bars admission of testimonial statements of witnesses who do not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness.<sup>52</sup> Since 2004, the Supreme Court has granted certiorari on several cases dealing with the application and scope of *Crawford*. Last Term, we discussed cases in which the Supreme Court tried to define what it meant by “testimonial.”<sup>53</sup> This Term, the Court came up with some new answers to questions about the scope and impact of *Crawford*. In *Whorton v. Bockting*,<sup>54</sup> the Court announced that *Crawford* was not to be applied retroactively.<sup>55</sup> Parties bringing habeas corpus petitions cannot raise *Crawford* claims because *Crawford* is deemed to have created a new rule. The doctrine from the 1989 case of *Teague v. Lane*<sup>56</sup> states that a “new” rule cannot be raised in a habeas corpus petition; it can only be raised on direct appeal.<sup>57</sup>

A key question that arises when the Supreme Court creates a new rule like the one in *Crawford* is whether a mistake may ever be considered to be harmless error. In *Fry v. Pliler*,<sup>58</sup> the Supreme Court decided that instead of applying the demanding harmless error stan-

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<sup>52</sup> *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

<sup>53</sup> See Susan N. Herman, *Criminal Procedure Decisions in the October 2005 Term*, 22 *TOURO L. REV.* 969, 991-92 (2007). See also *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006) (holding that statements are testimonial “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”).

<sup>54</sup> 127 S. Ct. 1173, 1184 (2007) (“*Crawford* announced a ‘new rule’ of criminal procedure and . . . this rule does not fall within the *Teague* exception for watershed rules.”).

<sup>55</sup> *Id.* at 1181.

<sup>56</sup> 489 U.S. 288 (1989).

<sup>57</sup> *Id.* at 310.

<sup>58</sup> 127 S. Ct. 2321 (2007).

dard that comes from *Chapman v. California*,<sup>59</sup> the Court would use the more forgiving harmless error standard from a habeus corpus case—*Brecht v. Abrahamson*.<sup>60</sup> Under the *Brecht* standard, it is easier to find a Confrontation Clause violation to be harmless error.

Next Term, the Supreme Court will be hearing *Danforth v. Minnesota*,<sup>61</sup> which raises extremely interesting issues about federalism. In *Danforth*, the prosecutor played a videotape of an alleged child abuse victim at trial rather than having the child testify in person, thus violating the *Crawford* rule.<sup>62</sup> The Minnesota Supreme Court decided this case before *Whorton v. Bockting*, where the Supreme Court ruled that *Crawford* should not be applied retroactively, so the Minnesota court had to confront that issue as one of first impression.<sup>63</sup> Minnesota, anticipating the Supreme Court's reasoning, did not apply *Crawford* retroactively.

The Minnesota Supreme Court also considered the novel

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<sup>59</sup> 386 U.S. 18 (1967). The *Chapman* standard required a belief by the court that the conduct was "harmless beyond a reasonable doubt." *See id.* at 22-24.

<sup>60</sup> 507 U.S. 619 (1993). *Brecht*, by contrast, defines "harmless" as not having "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 638.

<sup>61</sup> *See Danforth v. State*, 718 N.W.2d 451 (Minn. 2006), *cert. granted*, 127 S. Ct. 2427 (2007) (No. 06-8273). Petition for a Writ of Certiorari, *Danforth v. State*, 2006 WL 4541279 (Dec. 6, 2006) (No. 06-8273). The first question presented was stated as follows:

Are state supreme courts required to use the standard announced in *Teague v. Lane*, to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?

*Id.* (internal citations omitted).

<sup>62</sup> *Danforth*, 718 N.W.2d at 454.

<sup>63</sup> *Bockting*, 127 S. Ct. at 1182-83. The *Court* found that while *Crawford* improved the accuracy of fact-finding in criminal trials, it did not eliminate an "impermissibly large risk" of inaccurate convictions nor did *Crawford* constitute a previously unrecognized "'bedrock procedural element[] essential to the fairness of a proceeding.'" *Id.* (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).

question of whether a state court would be required to apply the *Teague* standard, rather than its own state approach to retroactivity, in deciding whether to allow Danforth to raise his Sixth Amendment claim.<sup>64</sup> The Minnesota Supreme Court decided to apply the standard established in *Teague* on the theory that the retroactivity standard is part of what the Supreme Court attaches to its analysis of a new right.<sup>65</sup> Thus, where any court, state or federal, attempts to determine whether or not a new right applies retroactivity, the court must look to *Teague*. After considering the *Teague* factors, the Minnesota court decided that the “new” right should not apply retroactively.<sup>66</sup>

There has been a marked split in the lower courts on this issue. Some courts reason that a state court considering a new constitutional claim and trying to decide whether to give a defendant the benefit of that new claim should not have to follow the *Teague* standard because it is founded in federalism concerns.<sup>67</sup> *Teague* is a limiting doctrine created by the Supreme Court for federal habeas corpus cases because the Court did not want federal courts telling states what to do and undermining convictions the state courts wish to treat as fi-

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<sup>64</sup> *Teague*, 489 U.S. at 310.

<sup>65</sup> *Id.* at 457.

<sup>66</sup> *Id.* at 460-61. The court considered whether the *Crawford* rule was anticipated, whether it was a watershed right, and whether it was about innocence. *Id.*

<sup>67</sup> See *State v. Whitfield*, 107 S.W.3d 253, 266-67 (Mo. 2003) (declining to adopt the *Teague* test because it narrowed the situations in which a court could retroactively apply a new rule); *Meadows v. State*, 849 S.W.2d 748, 755 (Tenn. 1993) (declining to follow *Teague*); *Cowell v. Leapley*, 458 N.W.2d 514, 518 (S.D. 1990) (rejecting *Teague* as “unduly narrow” as to what issues can be considered on collateral review). *But see State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1297 (La. 1992) (applying *Teague* in the interest of finality of state judgments); *State v. Slemmer*, 823 P.2d 41, 49 (Ariz. 1991) (adopting *Teague* based on the “supremacy of the United States Supreme Court” and its “explication of the law”); *Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990) (electing to follow *Teague* because the state and federal interests in post-conviction relief were substantially similar).

nal. According to this point of view, the state court may hear more claims and expand the constitutional right more than a federal court could because in the context of state court decision making, it is possible to “bleed out” the federalism concerns. The state court would follow its own state retroactivity rules instead of federal procedural law. Under the Minnesota court’s point of view, the state courts remain in parity with the federal courts by following the same procedural restrictions. The Supreme Court may be hard pressed to choose between these two very different visions of federalism. My own prediction is that the Court will agree with Minnesota in limiting the federal claim.

### B. Right to Jury Trial

A second area where the Sixth Amendment has undergone a tremendous revolution due to Justice Scalia’s vote has been in the area of sentencing, beginning with the decision in *Apprendi v. New Jersey*.<sup>68</sup> The case turned, in part, on the Sixth Amendment right to a jury trial.<sup>69</sup>

In 2000, the Supreme Court adopted the revolutionary notion that a person is entitled to be sentenced only for the crime of which that person is convicted.<sup>70</sup> That may not sound revolutionary or surprising, but prior to *Apprendi* there were several kinds of sentencing

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<sup>68</sup> 530 U.S. 466, 498 (2000).

<sup>69</sup> *Id.* at 498, 500-01 (5-4 decision) (Thomas, J., concurring, joined by Scalia, J.,) (finding that New Jersey’s sentence-enhancement legislation violated the Sixth Amendment because it removed from the jury questions of fact that increased criminal penalties beyond the statutory maximum).

<sup>70</sup> *See id.* at 494, 497. The state sentencing scheme had the impermissible effect of exposing a criminal defendant to an increased penalty which aggravated a “second-degree offense into a first degree offense.” *Id.*



schemes, including the Federal Sentencing Guidelines,<sup>71</sup> where the jury finding a person guilty of possessing drugs, or some other criminal conduct, was only the first step in deciding the level of sentence applicable. The sentence the convicted person actually received would depend on how the sentencing judge viewed some additional facts. For example, a person possessing a certain quantity of drugs, even more than the jury actually considered, or having a gun in connection with the use of drugs, could be sentenced for an enhanced offense if the judge found those additional facts. The Supreme Court, in *Apprendi*, said this was unconstitutional.<sup>72</sup> If a court wants to sentence a person for a greater offense, bouncing the person into a different sentencing range, the sentence must be based on facts found by a jury using the proof beyond a reasonable doubt standard. The enhanced sentence cannot constitutionally be based on facts that the judge found in a more casual manner or under a lower standard of proof. *Apprendi*, like *Crawford*, raised many questions, and the Su-

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<sup>71</sup> See Sentencing Reform Act, 28 U.S.C.A. § 994(a) (West 2006) (authorizing the Sentencing Commission to promulgate and distribute the Sentencing Guidelines to the courts of the United States); 18 U.S.C.A. § 3553(a)(4)(A), (B) (West 2000 & Supp. 2007) (governing the federal courts' imposition of sentences as promulgated by the United States Sentencing Commission). See also U.S. SENTENCING GUIDELINES MANUAL (2006), <http://www.ussc.gov/2006guid/gl2006.pdf>.

<sup>72</sup> *Apprendi*, 530 U.S. at 491-92.

The New Jersey statutory scheme that *Apprendi* asks us to invalidate allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree, based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" for unlawfully possessing the weapon was "to intimidate" his victim on the basis of a particular characteristic the victim possessed. . . . [T]his practice cannot stand.

*Id.*

preme Court has heard a number of cases since 2000 dealing with the application and scope of its holding.

One subsequent case, *Blakely v. Washington*,<sup>73</sup> held the same principle applies regardless of whether a person is bumped from one statutory range to another, or if he or she is bumped from a guidelines range within a statute to a different guidelines range.<sup>74</sup> A defendant has the right to have a jury find, beyond a reasonable doubt, all the facts on which a sentence is based.<sup>75</sup>

Especially after the *Blakely* decision in 2004, observers wondered what would happen to the Federal Sentencing Guidelines.<sup>76</sup> In 2005, the Supreme Court decided a bizarre case, *United States v. Booker*,<sup>77</sup> involving the Federal Sentencing Guidelines. In *Booker*, the idealism of Justice Scalia—who is very principled about the idea that a defendant has a right to have the jury decide the facts on which sentence will be imposed—was pitted against the pragmatism of Justice Breyer—who arguably should have recused himself in all cases involving the Federal Sentencing Guidelines since he had worked on the Guidelines as a member of the Sentencing Commission.<sup>78</sup> Justice Breyer is deeply committed to the Guidelines. He once wrote an arti-

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<sup>73</sup> 542 U.S. 296, 313 (2004).

<sup>74</sup> *Id.* at 303 (defining the “statutory maximum” under *Apprendi* as “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*,” not the maximum that a judge could impose under state law).

<sup>75</sup> *Id.* at 313 (holding that criminal defendants have the right to insist that “all facts legally essential to the punishment” are presented to a jury).

<sup>76</sup> See Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615 (2002).

<sup>77</sup> 543 U.S. 220 (2005).

<sup>78</sup> See *id.* at 303-14 (Scalia, J., dissenting); *id.* at 326-34 (Breyer, J., dissenting in part). Justices Stevens and Breyer wrote two distinct parts of the majority opinion, with Justice Scalia dissenting from the part authored by Justice Breyer.

cle entitled *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*.<sup>79</sup> To him, the Guidelines are a desirable, practical way to attain uniformity in sentencing and to guide judges' discretion and necessarily entail some compromise to reach those goals.<sup>80</sup>

The *Booker* Court's five Justice majority, which did not include Justice Breyer, concluded that the Federal Sentencing Guidelines were unconstitutional and violated the Sixth Amendment in the same manner as the sentencing schemes considered in the *Blakely* and *Apprendi* cases.<sup>81</sup> Another five Justices, with only Justice Ginsburg overlapping, joined the "remedial" part of the opinion, written by Justice Breyer.

Justice Stevens, who wrote the majority opinion, thought once the Guidelines had been found unconstitutional, the only appropriate remedy was to require a jury to find the facts on which a person is sentenced.<sup>82</sup> Justice Breyer disagreed, and forged a new compromise in the second part of the opinion, declaring what remedy would apply in light of the majority's finding of unconstitutionality. His compromise was based on the idea that the real problem with the Guidelines

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<sup>79</sup> Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988). Congress had two primary purposes when it authorized the commission to create sentencing guidelines: (1) achieve "honesty in sentencing" whereby a defendant will serve the sentence imposed without parole, and (2) reduce the "unjustifiably wide" disparity in sentencing. *Id.* at 4.

<sup>80</sup> *Id.* at 32.

<sup>81</sup> *Booker*, 543 U.S. at 243 (holding, in light of *Apprendi* and *Blakely*, the Sixth Amendment requires facts essential to support a sentence exceeding the statutory maximum to be found by juries, not judges).

<sup>82</sup> *Id.* at 273 (Stevens, J., dissenting). Justice Stevens reasoned that the drug quantity and obstruction questions should have been put to a jury in *Booker*'s case, called for the implementation of the Federal Sentencing Guidelines requirement that certain issues must be decided by a jury beyond a reasonable doubt. *Id.*

was that they were mandatory rather than merely advisory.<sup>83</sup> While the Guidelines were mandatory, appellate courts were asked to conduct de novo appellate review of a sentence to ensure that district court judges did not freelance and that they followed the Guidelines. Under Justice Breyer's opinion, the Guidelines are declared advisory, and review on appeal is limited to the more deferential standard of whether or not the sentence imposed by the sentencing court was "reasonable."<sup>84</sup>

Where did Justice Breyer get this from? He made it up in order to save the Guidelines. The *Booker* decision made no sense because the two majority opinions did not fit together. If the Federal Sentencing Guidelines are unconstitutional, then the jury must be allowed to find the facts on which a person will be sentenced. But that is not what the Court said here.

What does the *Booker* case mean? Most federal judges concluded that the way to play it safe and not have Congress swoop in and completely change federal sentencing was to follow the Guidelines anyway, on a "voluntary" basis. Clearly, that is what Justice Breyer had in mind. Therefore, most judges still sentence according to the Guidelines, and profess they know the Guidelines are "only advisory," if asked. Then, most federal appellate courts reviewing those sentences would find the sentences appropriate because they were within the Guidelines. But that is not what the appellate courts

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<sup>83</sup> *Id.* at 245 (majority opinion) (finding the provision of the Sentencing Reform Act that made the Guidelines mandatory was incompatible with the Sixth Amendment right to a jury trial).

<sup>84</sup> *Id.* at 260 (severing the Guidelines' mandatory sentencing provision, leading to the excision of the provision that governed standards of review on appeal.)

were supposed to say. They were supposed to say the sentences were “reasonable.”

The problem the appellate courts had, of course, was in defining what “reasonable” means. This Term, the Supreme Court granted certiorari on two cases to decide what “reasonable” means under *Booker*—obviously a very big question.<sup>85</sup> One case was *Rita v. United States*, where a district court judge sentenced Rita within the Guidelines.<sup>86</sup> Rita thought it was an unreasonable sentence because he thought he had a strong argument for a downward departure.<sup>87</sup>

The Supreme Court, in an opinion not surprisingly authored by Justice Breyer, held the sentence was reasonable for two reasons: (1) the courts should be somewhat deferential to the Guidelines, not because they are mandatory, but because, after all, the Sentencing Commission was very careful in writing them so they are probably inherently reasonable;<sup>88</sup> and (2) the appellate courts should also be somewhat deferential to the sentencing judge because sentencing

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<sup>85</sup> See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (holding that only on appellate review of district court sentences may courts apply a presumption of reasonableness to determine whether the trial court abused its discretion); *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (2006), *vacated as moot*, 127 S. Ct. 2245 (2007).

<sup>86</sup> *Rita*, 127 S. Ct. at 2462.

<sup>87</sup> *Id.* Specifically, Rita argued his sentence was “unreasonable” because (1) it did not fully consider his “history and characteristics,” and (2) it was “greater than necessary to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).” *Id.*

<sup>88</sup> *Id.*

The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill this statutory mandate. They also reflect the fact that different judges (and others) can differ as to how best to reconcile the disparate ends of punishment.

judges, after *Booker*, have some discretion.<sup>89</sup> Deferring to both the sentencing commission and the sentencing judge in this case did not create any tension because the sentence was within the Guidelines range, and the district judge did explain his reasoning, even if he might have been even clearer about his rationale for declining a downward departure.

The more difficult case would have been *United States v. Claiborne*, where Mr. Claiborne was sentenced *below* the Guidelines range.<sup>90</sup> The question the Supreme Court agreed to hear was whether this was a “reasonable” sentence.<sup>91</sup> The *Rita* case permits the appellate court to presume a sentence is reasonable if it is within the Guidelines.<sup>92</sup> But might an appellate court treat a sentence outside the Guidelines as presumptively unreasonable? Mr. Claiborne died while the case was pending, so we did not have to answer that question.<sup>93</sup>

The Supreme Court was apparently eager to decide that question, however, so after Claiborne died, it promptly granted certiorari in another case, *United States v. Gall*.<sup>94</sup> This case raises the issue of what happens if a person is not sentenced within the Guidelines range

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<sup>89</sup> *Id.* at 2463.

<sup>90</sup> *Claiborne*, 439 F.3d at 480 (reviewing a district court sentence of fifteen months to determine whether it was an “unreasonable downward variance from the [G]uidelines range” that advised a minimum of thirty-seven months).

<sup>91</sup> *Claiborne*, 127 S. Ct. 551. The Court granted certiorari but limited review to whether “the district court’s choice of below-Guidelines sentence [was] reasonable” and whether it was “consistent with *United States v. Booker*, to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances.” *Id.* (internal citation omitted).

<sup>92</sup> *Rita*, 127 S. Ct. at 2463-64.

<sup>93</sup> *Claiborne*, 127 S. Ct. 2245 (2007) (mem.).

<sup>94</sup> 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (2007) (No. 06-7949). *See also* Transcript of Oral Argument, *Gall*, 127 S. Ct. 2933 (No. 06-7949), 2007 WL 2847118.

and what “reasonable” means in that context.

Another interesting aspect of last Term’s Federal Sentencing Guidelines cases has been Justice-watching. *Apprendi* and its progeny were five-four decisions, where the four in the minority included Chief Justice Rehnquist and Justice O’Connor.<sup>95</sup> Those Justices, of course, are no longer on the Court, having been replaced by Chief Justice John Roberts and Justice Samuel Alito. Given the numerical breakdown, what Justices Roberts and Alito felt about *Apprendi* was not likely to start a counterrevolution. Their votes could amplify the majority, but could not alter the outcome, regardless of whether they disagreed with Chief Justice Rehnquist and Justice O’Connor on this issue.

Although their votes are not dispositive, Justices Roberts and Alito seem to be pulling in opposite directions in this area. *Cunningham v. California*<sup>96</sup> concerned a California sentencing scheme that provided different alternatives.<sup>97</sup> The question posed was whether the statutory scheme allowed too much flexibility in determining sentencing ranges without a jury’s input. This decision came out six-three,<sup>98</sup> with Chief Justice Roberts joining the majority in ruling there was a violation of the *Apprendi* and *Blakeley* principles.<sup>99</sup> Justice Alito’s dissent accused the majority of being both incorrect and inconsistent. Alito expressed the view that *Apprendi* went in the wrong

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<sup>95</sup> See *Apprendi*, 530 U.S. at 523 (O’Connor, J., dissenting).

<sup>96</sup> 127 S. Ct. 856 (2007).

<sup>97</sup> *Id.* at 870. The California sentencing system was not advisory because it required judges to select from “three fixed sentences with no ranges between them.” *Id.*

<sup>98</sup> *Id.* at 859.

<sup>99</sup> *Id.* at 860.

direction, and the California law was indistinguishable from the advisory Federal Sentencing Guidelines endorsed by *Booker*.<sup>100</sup> The big question in this area remains whether Congress will step in, as these cases have truly muddled federal sentencing.

### III. DEATH PENALTY CASES

All of the death penalty cases this Term were decided five-four, which means they went whichever way Justice Anthony Kennedy wanted them to go.<sup>101</sup> In all of these five-four cases, Justice Kennedy was the fifth Justice in the majority.<sup>102</sup>

*Schriro v. Landrigan*, regarding the effective assistance of counsel, involved the sentencing phase of a capital case.<sup>103</sup> In capital cases, after the jury convicts a person of a capital offense, the jury must then decide whether or not capital punishment should be imposed, so there is a bifurcated proceeding with a separate sentencing phase. At the sentencing phase, evidence is presented, including evidence about aggravating and mitigating circumstances. The Supreme Court required this so jury discretion, in making the life or death decision, would be guided and not arbitrary, cruel, or unusual.

One important rule is the jury must have a sufficient opportunity to consider mitigating evidence. Mitigating evidence can include the defendant's terrible childhood, a prediction that this defendant

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<sup>100</sup> *Id.* at 873 (Alito, J., dissenting) (“Both sentencing schemes grant trial judges considerable discretion in sentencing . . .”).

<sup>101</sup> See Chemerinsky, *supra* note 1, at 877-79.

<sup>102</sup> See e.g., Panetti v. Quarterman, 127 S. Ct. 2842 (2007); *Uttecht v. Brown*, 127 S. Ct. 2218 (2007); *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007); *Smith v. Texas*, 127 S. Ct. 1686 (2007); *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007).

<sup>103</sup> *Schriro*, 127 S. Ct. 1938.



will never again pose a danger for some reason, or really almost anything else the defendant wants to tell the jury.

At the sentencing phase of the capital proceeding in *Schriro*, defense counsel wanted to put the defendant's ex-wife, as well as his birth mother, on the stand to testify to some mitigating circumstances regarding the defendant's past and childhood. The defendant, however, asked his lawyer not to do that.<sup>104</sup> The defendant stated, "I think if you want to give me the death penalty, just bring it on. I'm ready for it."<sup>105</sup> Not much occurred at the sentencing phase except that the defendant acted up. There was no mitigating evidence presented to the jury at all.

The jury sentenced the defendant to death. Then there was a state post-conviction proceeding brought where the defendant was represented by a new lawyer. The new lawyer discovered there was far more impressive mitigating evidence available in this case than the trial defense attorney had found. In addition to what the defendant's birth-mother and ex-wife would have said, doctors would have testified that the defendant had suffered organic brain damage, and that there were serious reasons why he was a very troubled individual.<sup>106</sup> Therefore, at the state post-conviction proceeding, the new de-

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<sup>104</sup> *Id.* at 1937.

<sup>105</sup> *Id.* at 1938.

<sup>106</sup> *Id.* at 1945 (Stevens, J., dissenting) (discussing the failures of defendant's counsel).

[C]ounsel did not complete a psychological evaluation of respondent, which we now know would have uncovered a serious organic brain disorder. He failed to consult an expert to explore the effects of respondent's birth mother's drinking and drug use during pregnancy. And he never developed a history of respondent's troubled childhood with his adoptive family—a childhood marked by physical and emotional abuse, neglect by his adoptive parents, his own serious substance abuse problems (including an overdose in his eighth or ninth grade classroom), a

fense attorney claimed the original attorney at the trial had been ineffective.

In the five-four decision, Justice Kennedy voted with the four conservative Justices, and Justice Clarence Thomas wrote the majority opinion.<sup>107</sup> Currently, I am working on a piece about Justice Thomas, and it is interesting that most of Justice Thomas' significant opinions for over his first decade on the Court were dissents. The October 2006 Term was the first time when Thomas wrote a number of significant majority opinions, signaling yet another change in the Court.

In the *Schriro v. Landrigan* habeas corpus case, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")<sup>108</sup> becomes relevant. According to AEDPA, a state prisoner bringing a federal habeas corpus claim cannot prevail unless the claim being raised was clearly established by Supreme Court precedent at the time of the trial, and the state court unreasonably applied that law in his case.<sup>109</sup> This is an arm's length kind of review, even more cir-

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stunted education, and recurrent placement in substance abuse rehabilitation facilities, a psychiatric ward, and police custody.

*Id.*

<sup>107</sup> *Id.* at 1936. Justices Roberts, Scalia, Kennedy, and Alito joined the majority opinion of the court; Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined. *Id.*

<sup>108</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.A.).

<sup>109</sup> *Schriro*, 127 S. Ct. at 1939.

Under AEDPA, Congress prohibited federal courts from granting habeas relief unless a state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or the relevant state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

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cumscribed than usual forms of appellate review.

The question then becomes whether the state court acted unreasonably in finding the defendant did not suffer ineffective assistance of counsel. Justice Thomas noted that the defendant was acting up, and so concluded that the defense counsel's conduct did not matter because the defendant would not have let his counsel offer any mitigating evidence. Thomas also suggests that the defendant may have waived his right, that any error may have been harmless error, and that, in any event, the defendant should not have won his habeas corpus proceeding. Thomas ruled the defendant was not even entitled to a hearing because he failed to make out a sufficient claim under the AEDPA to qualify for raising a claim regarding the effectiveness of his first defense attorney.<sup>110</sup>

In writing the dissent for four members of the Court, Justice Stevens inquired as to how the defendant could have waived his right to put on mitigating evidence when he did not know what mitigating evidence existed.<sup>111</sup> His original attorney did not investigate sufficiently to determine what was really important in the case.

This case probably would have come out differently if Justice O'Connor had still been on the Court. It was in such cases that Justice O'Connor was proud of the standard she developed in *Strickland v. Washington*<sup>112</sup> for measuring ineffective assistance of counsel, a claim she took very seriously.<sup>113</sup> With the current composition of the

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*Id.* (quoting 28 U.S.C.A § 2254).

<sup>110</sup> *Id.* at 1941-42.

<sup>111</sup> *Id.* at 1944 (Stevens, J., dissenting).

<sup>112</sup> 466 U.S. 668 (1984).

<sup>113</sup> *Id.* at 687. Under *Strickland*, a convicted defendant must make prescribed showings to

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Court, Landrigan did not receive a habeas corpus hearing because the Supreme Court was enthusiastically reading many layers of procedural obstacles into the AEDPA rather than asking any direct questions about whether the defense attorney failed the *Strickland* standard of minimum competence. The Court is willing to allow procedural bars to preclude consideration of constitutional claims even in capital cases. Death is not as different as it used to be.

One big exception to the Supreme Court's increasingly arm's length attitude to death penalty cases is last Term's decision in *Smith v. Texas*.<sup>114</sup> The Supreme Court evidently does not like, or trust, the Texas Court of Criminal Appeals. The feeling seems to be mutual. Under clear Supreme Court precedent, capital sentencing juries must be told to consider a defendant's mitigating evidence.<sup>115</sup> For years, Texas had a standard jury instruction for capital cases. The jurors were told that if they find the killing was deliberate, and the defendant was a continuing menace, then the death penalty must be imposed—period. This instruction did not seem to leave any room at all for considering mitigating circumstances.

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earn relief in the form of a new trial:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.*

<sup>114</sup> *Smith*, 127 S. Ct. 1686.

<sup>115</sup> *Id.* at 1690 ("Under Texas law the jury verdict form provides special-issue questions to guide the jury in determining whether the death penalty should be imposed.").

Many years ago, the Court specifically held the Texas instruction unconstitutional.<sup>116</sup> However, the judge in *Smith* dealt with this issue in the way a number of judges in Texas had. The judge would instruct the jury that if they found the killing was deliberate and the defendant was a continuing menace, then the death penalty would be automatic, but would also tell the jurors that if the jury were to accept the defendant's mitigating evidence, then it should just answer no to one of those questions. A jury believing that sufficient mitigating circumstances existed, therefore, would have to say either the killing was not deliberate or the defendant was not a continuing menace to impose a life sentence instead of death.<sup>117</sup>

This was called the nullification instruction. The Supreme Court also held this instruction was unconstitutional, finding that it did more harm than good because it made no sense and completely confused the jury.<sup>118</sup>

The Court had decided *Smith* on direct appeal, ruling that the instruction was unconstitutional and remanded the case to the Texas Court of Criminal Appeals.<sup>119</sup> However, the Texas Court of Criminal Appeals refused to follow the logic of the Supreme Court's earlier decisions, ruling instead that the defendant had not challenged the right thing at the right time. Therefore, the Supreme Court got the case back for a second time and reiterated its ruling, requiring the Texas Court of Criminal Appeals to follow its pronouncements. Jus-

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<sup>116</sup> *Id.* at 1690-91. See *Penry v. Lynaugh (Penry I)*, 492 U.S. 302 (1989).

<sup>117</sup> *Smith*, 127 S. Ct. at 1690.

<sup>118</sup> *Id.* at 1691. See *Penry v. Johnson (Penry II)*, 532 U.S. 782 (2001).

<sup>119</sup> *Smith*, 127 S. Ct. at 1689-90, 1698-99.

tice Kennedy was the fifth vote finding the instruction to be unconstitutional and the procedural default ruling ill-founded.<sup>120</sup>

The next case, *Abdul-Kabir v. Quarterman*, raised exactly the same claim concerning another Texas defendant, although this time in a habeas corpus proceeding. The majority held the Texas courts had unreasonably applied clearly settled Supreme Court law regarding the jury nullification rule.<sup>121</sup> In this case, the Court got past even the AEDPA standards and found that Texas was wrong.

Finally, the Court decided the latest in a series of cases about jury selection in capital cases. In 1968, the Supreme Court decided *Witherspoon v. Illinois*.<sup>122</sup> In *Witherspoon*, the Court held a prospective juror with qualms about the death penalty could not be automatically excluded because winnowing the jury in such a one-sided manner would result in a biased jury.<sup>123</sup> Since *Witherspoon*, in a few cases in the 1980s, the Court has chipped away at that law, allowing jurors who express qualms about imposition of the death penalty to be removed and thus tilting capital juries toward death.

*Uttecht v. Brown* considered a juror who said, in response to questioning, that he believed he could follow the instructions and was a supporter of the death penalty, but expressed confusion about what would happen if the defendant were to be sentenced to prison without the possibility of parole.<sup>124</sup> As a result of this confusion, that juror

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<sup>120</sup> *Id.* at 1690.

<sup>121</sup> *Abdul-Kabir*, 127 S. Ct. at 1675 (holding that the jury must be able to give meaningful effect to mitigating evidence on behalf of the defendant and any statute which hinders this process is unconstitutional).

<sup>122</sup> 391 U.S. 510 (1968).

<sup>123</sup> *Id.* at 519-20.

<sup>124</sup> *Uttecht*, 127 S. Ct. at 2226-27.

was excused. In a five-four decision for which Justice Kennedy wrote for the majority, the Court held that the decision to exclude the juror was acceptable.<sup>125</sup> In contrast, the dissenters, including Justice Stevens, stated that too much deference had been given to the trial judge.<sup>126</sup> Justice Kennedy, for the majority, said there was not enough reason to be concerned about whether the court was tipping the jury in a way that would be radically pro-death.

And those are the most significant criminal procedure decisions from the October 2006 Term. It certainly isn't the Warren Court any more.

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<sup>125</sup> *Id.* at 2228 (finding the trial court did not abuse its discretion by allowing a juror to be excused on the prosecutor's motion).

<sup>126</sup> *Id.* at 2239 (Stevens, J., dissenting) ("Today the Court ignores . . . well-established principles, choosing instead to defer blindly to a state court's erroneous characterization of a juror's *voir dire* testimony.").