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The Line Holds, But Death May Matter: The Supreme Court's Criminal Procedure Decisions of the 2001 Term

William Hellerstein

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Cover Page Footnote

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THE LINE HOLDS, BUT DEATH MAY MATTER: THE SUPREME COURT'S CRIMINAL PROCEDURE DECISIONS OF THE 2001 TERM

*William Hellerstein*¹

As I have said now for fourteen years, it is always a pleasure to come to Touro Law School to talk about the work of the Supreme Court in the criminal procedure field. This was a significant year in general and a highly successful year for law enforcement. With the exception of the capital punishment cases, it was almost a clean sweep for law enforcement, and that may tell you something about the drift of the country and the Court. Accordingly, in a number of search and seizure cases, the Court mentioned terrorism, even though there was no element of terrorism in the particular case. The subject also comes up in oral argument and it is clearly something that the Court is concerned with.² I believe that the Fourth Amendment cases reflect that concern and I will begin with them.

Search and Seizure Decisions

The first case is *United States v. Drayton*.³ This was a six to three decision with Justice Kennedy writing for the majority. It concerned what I call the “working the buses” practice that federal and state officials use in Florida on major drug routes. Essentially, “working the buses” involves law enforcement’s well-founded belief that a large amount of drug traffic passes through the Greyhound Bus Line’s system of transportation, and similar bus lines.⁴ In this particular instance, passengers on a Greyhound Bus

¹ Professor of Law, Brooklyn Law School; B.A., Brooklyn College; J.D., Harvard Law School. Professor Hellerstein teaches Constitutional Law, Civil Rights Law, and Criminal Procedure. He is an expert in criminal law and constitutional litigation; and he has argued numerous appeals before the U.S. Supreme Court, the Second Circuit, and the New York Court of Appeals.

² See, e.g., Charles Lane, *High Court to Hear Case on Public Searches; Ruling Could Affect Domestic War on Terrorism, Bush Administration Says*, WASH. POST, Jan. 5, 2002, at A10.

³ 536 U.S. 194 (2002).

⁴ See generally John R. Nussbaumer, *Working the Buses: Close Encounters of the Third Kind?*, 7 PREVIEW 224 (March 19, 1991).

were traveling from Fort Lauderdale to Detroit.⁵ At one point during the trip, the bus driver made a scheduled stop at a rest area where passengers had to get off while the bus was being cleaned and refueled.⁶ While the bus driver left the bus to complete paperwork, three Drug Enforcement Agency agents boarded the bus.⁷ One agent knelt on the driver's seat and faced the rear of the bus; one agent went to the rear of the bus and the other agent walked up the aisle asking passengers about their travel plans, and if they would mind if their luggage was searched.⁸

The two unfortunate defendants in this case consented to the search of their luggage, which turned up no evidence or contraband.⁹ However, the agents' suspicions were aroused and the agent working the aisle asked the defendants if they would mind being patted down, and they consented.¹⁰ It was warm and the defendants were wearing baggy, warm clothes, although they were going to Detroit.¹¹ Of course, the searches of both men uncovered narcotics.¹² The issue was whether this procedure constituted a seizure for purposes of the Fourth Amendment.¹³ If it did, it would mean there had to be reasonable suspicion in order for the seizure to be constitutional.¹⁴

The Court held that the actions of the agents did not give rise to a seizure, and therefore, the agents were under no obligation to advise the passengers that they had a right to refuse the search.¹⁵ The Eleventh Circuit upheld suppression of the evidence found on the defendants based upon the fact that certain of its prior decisions had held that passengers did not feel free to leave in these

⁵ *Drayton*, 536 U.S. at 197.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Drayton*, 536 U.S. at 199.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 197.

¹⁴ *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that a police officer does not need probable cause to stop and frisk, he only needs reasonable suspicion based upon the circumstances).

¹⁵ *Drayton*, 536 U.S. at 203, 206.

situations.¹⁶ However, a majority of the Supreme Court disagreed. The Court said that the proper inquiry, after *Florida v. Bostick*,¹⁷ decided several years ago, is whether a reasonable person would feel free to decline an officer's request to conduct a search.¹⁸ Justice Kennedy stated that a reasonable person would feel free to decline giving an officer permission to conduct the search.¹⁹ He reasoned that the passengers on the bus would have felt free to decline the agent's request to search because the agents gave the passengers no reason to believe that they were required to comply.²⁰ In addition, Kennedy pointed out, the agents did not brandish their weapons, the aisle was free so people could exit, the passengers were spoken to in a quiet, polite voice, and the officer in the front seat did nothing to intimidate the passengers.²¹ Furthermore, of considerable importance to Justice Kennedy was the fact that the passengers answered the officer's questions and otherwise cooperated because the passengers knew that their participation enhanced their own safety and the safety of those around them.²² Moreover, he asserted, a search in a society based on law, the concepts of agreement and consent should be given a weight and dignity of their own.²³

Let me ask, if you were on a bus and in this situation, would your reaction be to state to the agent, "it is my pleasure to cooperate with your hunt for whatever you are looking for"? Would you be thinking, "sure you can search my bags, pat me

¹⁶ *United States v. Drayton*, 213 F.3d 787, 790 (11th Cir. 2000). See *United States v. Washington*, 151 F.3d 1354, 1355-57 (11th Cir. 1998). In *Washington*, federal agents searched passengers on a bus after it made a scheduled stop. *Id.* at 1355. The search revealed cocaine concealed in the pants of one of the passengers. *Id.* at 1356. The court stated that the facts and circumstances surrounding the search indicated that "a reasonable person in the defendant's position would not have felt free to disregard [the agent's] request without some positive indication that consent could have been refused." *Id.* at 1357. The court held that the search violated the Fourth Amendment's prohibition against unreasonable searches and seizures. *Id.*

¹⁷ 501 U.S. 429 (1991).

¹⁸ *Drayton*, 536 U.S. at 201.

¹⁹ *Id.* at 204.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Drayton*, 536 U.S. at 207.

down, whatever you like, because I live in a society where dignity goes with consent”? That is essentially the sociological assumption of the case, expounded by Justice Kennedy for the majority. However, that is not quite the response that my criminal procedure students have given me. I asked them to raise their hands if they would feel free to say to an officer, particularly in the confines of a bus, “I would like to terminate my encounter.” Most of my students replied that they would not even say so to an officer on the open street. Perhaps more may do so now since they know their rights, but I doubt it.

Justice Souter in dissent said essentially: “come on, wait a minute. This is not the airport; this is not even the street.”²⁴ There is an air of unreality about the majority’s social psychology.²⁵ He suggested that if an individual is in an alley and three officers come his or her way, would he or she feel free to terminate the encounter and say, “I will see you later”?²⁶ Souter did not think so and he argued that no reasonable passenger could have believed that he stood nothing to lose if he refused to cooperate with the police.²⁷ However, that is not what the majority believed.

What is the significance of this opinion? The significance is essentially that the Court has made a value judgment in the war on drugs and weapons in that Fourth Amendment protections should take a backseat. You can resolve for yourself whether Justice Kennedy’s psychological assumptions are an accurate portrayal of how any of us feel with respect to police behavior in this context. My own view is that Justice Kennedy’s opinion is either naïve about our normal proclivities and our own psychological state or, if not, it is disingenuous because he knows it is not the way we really are.

This case reminds me of those old movies from the 1940’s and 1950’s starring actors like Frederic March and Jimmy Stewart where the Gestapo stop people on the trains and buses and ask for their papers. I raise the question whether the war on drugs is worth the civil liberties tradeoff as we consistently go in this direction. I

²⁴ *Id.* at 208 (Souter, J., dissenting).

²⁵ *Id.* (quoting the majority opinion).

²⁶ *Id.* at 210.

²⁷ *Id.*

think the Court has made the commitment in that direction and I think it unfortunate.

Second in importance to *Drayton* is *Board of Education of Independent School District No. 92 v. Earls*.²⁸ This was a five to four decision written by Justice Thomas.²⁹ It extended the right of school officials to conduct random urine testing of all students who choose to participate in any extracurricular activities. The Court first gave a green light to school officials in *Vernonia School District 47J v. Acton*.³⁰ *Vernonia* involved the random drug testing of high school athletes, who were tested because they were considered role models for other students.³¹ Using *Vernonia*'s balancing test, Justice Thomas concluded that the school's policy is reasonable in light of the limited privacy expectation of students, the non-intrusive nature of the urine test, and the school's need to prevent and deter drug use.³²

Justice O'Connor wrote a scathing dissent in *Vernonia*,³³ and in this case she dissented as well.³⁴ But the controlling vote rested upon Justice Breyer's concurring opinion. I will talk about that in a moment. Justice Thomas upheld the urine testing procedure in this case even though the record did not indicate extensive drug use by students who were engaged in extracurricular activities at the school. That there was some, plus the fact that there is a nationwide problem with drug usage by teenagers, was deemed reason enough.³⁵ In addition, Thomas opined that it is too much to ask courts to articulate a threshold level of drug use that would suffice to justify a drug-testing program for school children.³⁶ Thus, he refused to fashion what

²⁸ 536 U.S. 822 (2002).

²⁹ *Id.* at 824.

³⁰ 515 U.S. 646 (1995).

³¹ *Id.* at 663 (stating "It seems to us self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use and of particular danger to athletes is effectively addressed by making sure that athletes do not use drugs.").

³² *Earls*, 536 U.S. at 831-35.

³³ *Vernonia*, 515 U.S. at 666 (O'Connor, J., dissenting).

³⁴ *Earls*, 536 U.S. at 842 (O'Connor, J., dissenting).

³⁵ *Id.* at 834-35.

³⁶ *Id.* at 836.

would in effect be a constitutional quantum of drug use necessary to demonstrate a “drug problem.”³⁷

Several years ago, when the U.S. Customs employees³⁸ and the railroad accident cases³⁹ were before the Court, the Court could have accepted the government’s argument that urine testing is not a search and urine testing by government officials would have been outside the Fourth Amendment; however, the Court said urine testing is a search.⁴⁰ Nonetheless, the Court has extended the government’s right to conduct random urine testing, with but one exception, and that was *Chandler v. Miller*,⁴¹ decided two terms ago. *Chandler* involved urine testing of candidates for political office in Georgia.⁴² The Court concluded that the connection between drug use and candidacy for office was too distended.⁴³

The significance of *Earls* is that it extends the *Vernonia* ruling to all intramural extracurricular activities.⁴⁴ Justice Ginsburg’s dissent points out that the Tecumseh urine-testing program is perverse and capricious.⁴⁵ She noted that the program targets a student population that is *least* likely to be at risk for illicit drugs and the damaging effects that drugs cause.⁴⁶ Accordingly, she wrote, “[n]otwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree.”⁴⁷ Some kids who are going to be tested, she noted, participate in the choir and the band.⁴⁸

Of course, the price one pays’ for not submitting to the testing program is not being permitted to participate in

³⁷ *Id.*

³⁸ *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989).

³⁹ *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989).

⁴⁰ *Id.* at 607, 607 n.1.

⁴¹ 520 U.S. 305 (1997).

⁴² *Id.* at 309.

⁴³ *Id.* at 323.

⁴⁴ *Earls*, 536 U.S. at 837-38.

⁴⁵ *Id.* at 843.

⁴⁶ *Id.*

⁴⁷ *Id.* at 852.

⁴⁸ *Id.*

extracurricular activities. Which is to say, “well, if you believe in the Fourth Amendment, stand tall and hold on.” Of course, when a student applies for admission to college and he or she is asked, “How come you didn’t participate in any extracurricular activities in high school,” a principled Fourth Amendment stand may prove very costly.

A key concern is Justice Breyer’s concurrence. I do not know what he was thinking when he stated, “I believe it is important that the school board provided an opportunity for the airing of these differences at public meetings, designed to give the entire community the opportunity to be able to participate in developing the drug policy.”⁴⁹ Justice Breyer was referring to a Tecumseh town meeting where the majority of parents raised their hands in support of urine testing. Well, do you submit the Constitution and the meaning of the Constitution to the “hands have it?” Justice Breyer seems to think that is a very important factor and it controls his vote.⁵⁰ He does admit that it is a high price to pay not to participate in extracurricular activities, but the fact that the Tecumseh folks wanted drug testing seems to him to make it all right.⁵¹

You may recall reading on the front page of Sunday’s New York Times last week that because of this case, school districts around the country are now considering whether they can test the entire student population.⁵² I do not believe that this case holds that a school district can test an entire school’s population. However, I believe that the broad language of Justice Thomas’ opinion, especially his allusion to the national teenage drug problem, as distinguished from the immediate problem in the Tecumseh School District, may yet carry the majority of the Court when it is presented with an overall school-testing program. I do not necessarily believe that Justice Breyer’s vote will be confined to the testing of students who participate in extracurricular activities. I suppose that if everybody has a town meeting, all that

⁴⁹ *Earls*, 536 U.S. at 841 (Breyer, J., concurring).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Tamar Lewin, *With Court Nod, Parents Debate School Drug Tests*, N.Y. TIMES, Sep. 29, 2002, at A1.

is necessary to obtain Justice Breyer's vote would be a raise of hands, with the majority prevailing.

The merits of such a broad-based urine-testing program, as a matter of policy are yours to determine. I can only think of Justice O'Connor's dissent in the *Vernonia* case when she quoted from the testimony of the father of the child who did not want to submit to drug testing and who subsequently challenged the practice.⁵³ In the district court, he asked whether a urine testing program that is founded on a suspicion that children are law violators is the kind of citizenship message that we want to give to our students.⁵⁴ That is a policy question, but it also implicates our constitutional judgment.

There are two other Fourth Amendment cases decided in the government's favor that merit discussion. The first is *United States v. Arvizu*.⁵⁵ On the border of Arizona in the southeastern part of the state, a border patrol agent seized a vehicle that had triggered a sensor on the highway.⁵⁶ There was concern about illegal immigrants and drug smugglers using these particular roads.⁵⁷ Once the sensor was triggered, the officer responded to investigate.⁵⁸ The officer saw a minivan, (not a four-wheel drive vehicle), with the father driving, the mother in the passenger seat, and three children in the back with their feet propped up on what looked like some kind of cargo.⁵⁹ As he observed them, the father tried to ignore the officer, and the children were waving in an abnormal pattern as if they were being instructed to wave.⁶⁰ The combination of these factors and the officer's experience triggered something in his mind: the family was on a road that was close to the border, the road was known for smuggling activity, and it did not seem that they were coming from, or going to, a picnic. The

⁵³ *Vernonia*, 515 U.S. at 682 (O'Connor, J., dissenting).

⁵⁴ *Id.*

⁵⁵ 534 U.S. 266 (2002).

⁵⁶ *Id.* at 269.

⁵⁷ *Id.* at 268-69.

⁵⁸ *Id.* at 269-70.

⁵⁹ *Id.* at 270.

⁶⁰ *Arvizu*, 534 U.S. at 271.

officer assumed there had to be drugs and, of course, the officer was correct.⁶¹

The Ninth Circuit, which has one of the worst track records in the Supreme Court of any circuit, decided in this case that everything the officer saw was innocent conduct: family driving, children waving, and legitimate use of the road.⁶² The court actually considered eight to ten factors and determined them all to be innocent.⁶³ The Supreme Court reversed and held that this method of analysis was unacceptable: one plus one in fact can equal three, or five plus five can equal eleven.⁶⁴ Why? Because accepting the Ninth Circuit's analysis does an injustice to the way stop and frisk seizures should be assessed.⁶⁵ Even though each fact observed may be innocent in itself, inferences that create reasonable suspicion can properly be drawn, and that is all the officer did here.⁶⁶

What is most important about this case is that in addition to the rejection of the Ninth Circuit's "innocent conduct divide and conquer" approach, as the Supreme Court called it, is that the Court puts a substantially favorable thumb on the surveilling police officer's experience.⁶⁷ Therefore, a combination of the officer's experience plus the totality of circumstances is the way that the existence of reasonable suspicion should be determined.⁶⁸ However, there is nothing terribly new here, and anyone who is involved with these types of cases knows they are very fact specific. However, I think what it does provide is further incentive to trial judges to afford a greater amount of leeway to a police officer's expertise.

I have always felt that reasonable suspicion or even probable cause determinations are very subjective. If you put ten

⁶¹ *Id.* at 272 (discovering approximately 129 pounds of marijuana in the defendant's vehicle).

⁶² *Id.*

⁶³ *Id.* at 272-73 (citing the decision below).

⁶⁴ *Id.* at 273, 274-75; see also *United States v. Sokolow*, 490 U.S. 1, 11 (1989) ("Factors which by themselves were 'quite consistent with innocent travel' collectively amounted to reasonable suspicion.").

⁶⁵ *Arvizu*, 534 U.S. at 274.

⁶⁶ *Id.* at 273, 277.

⁶⁷ *Id.* at 276-77.

⁶⁸ *Id.* at 277.

judges in a room, five will say no probable cause and five will say there was probable cause. In *Arvizu*, the Supreme Court has emphasized the importance of getting rid of the Ninth Circuit's procedure of simply adding up innocent conduct factors and coming up with less than reasonable suspicion.⁶⁹

The last Fourth Amendment case, *United States v. Knights*,⁷⁰ was a unanimous decision that held constitutional a search of a probationer's home based only on reasonable suspicion rather than on probable cause.⁷¹ In this case, the defendant committed a drug offense and received probation.⁷² He signed a document that said essentially, "you may search my home at any time without any cause."⁷³ Therefore, as a condition of probation, ostensibly he could be held to the agreement. The question presented was whether the Fourth Amendment would permit this agreement to be enforced.⁷⁴

However, the Court did not reach that question. The Court simply held that as regards a probationer, reasonable suspicion is enough to search his home; it is not necessary that there be probable cause.⁷⁵ The argument made by the probationer in the lower court was that the probation officer was not performing a task related to a probation problem, but to a police investigation.⁷⁶ The Supreme Court said it had never drawn a distinction between investigatory and probationary enforcement searches, and that it was not going to do so here.⁷⁷ Therefore, from the probation defendant's universe, the good news is that there is a reasonable

⁶⁹ *Id.* at 274.

⁷⁰ 534 U.S. 112 (2001).

⁷¹ *Id.* at 121.

⁷² *Id.* at 114.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Knights*, 534 U.S. at 121 ("Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.").

⁷⁶ *United States v. Knights*, 219 F.3d 1138, 1143 (9th Cir. 2000).

⁷⁷ *Knights*, 534 U.S. at 116 ("Certainly nothing in the condition of probation suggests that it was confined to searches bearing upon probationary status and nothing more. The search condition provides that *Knights* will submit to a search "by any probation officer or law enforcement officer" and does not mention anything about purpose.").

suspicion requirement, so that even the signing of a total consent document does not necessarily allow the search of one's home.⁷⁸ The bad news is that a probationer's home can be intruded upon with less than probable cause,⁷⁹ a largely debatable proposition, for the Court has always placed the home at the top of the scale of Fourth Amendment protections.⁸⁰

Although the government prevailed in the cases described above, it did lose one case, *Kirk v. Louisiana*.⁸¹ This case, decided *per curiam*, was a reaffirmation and reminder that the Supreme Court's decision in *Payton v. New York*⁸² is still good law.⁸³ In *Payton*, the Court held that law enforcement officers must obtain an arrest warrant before entering an arrestee's home in the absence of exigent circumstances.⁸⁴

Fifth Amendment - Privilege Against Self-Incrimination

One decision I find quite troubling is *McKune v. Lile*,⁸⁵ a privilege against self-incrimination case in which the Court applied a questionable due process analysis in order to avoid self-incrimination precedents that favored the prisoner. It was a five to four decision with a plurality opinion written by Justice Kennedy and a concurrence by Justice O'Connor. In *McKune*, the Court

⁷⁸ *Id.* at 121.

⁷⁹ *Id.*

⁸⁰ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 29 (stating "with few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."); *Payton v. New York*, 445 U.S. 573, 590 (1980) (stating "in terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.").

⁸¹ 536 U.S. 635 (2002).

⁸² 445 U.S. 573 (1980).

⁸³ *Kirk*, 536 U.S. at 638 ("As *Payton* makes plain police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home. The Court of Appeal's ruling to the contrary, and consequent failure to assess whether exigent circumstances were present in this case, violated *Payton*.").

⁸⁴ *Payton*, 445 U.S. at 590 ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

⁸⁵ 536 U.S. 24 (2002).

upheld a Kansas law that required a prisoner to admit responsibility for all sex offenses, even those that have not yet been prosecuted, as a condition for the enjoyment of numerous prison privileges.⁸⁶

Suppose an attorney represents someone who insists that he is innocent. However, the client has been convicted of a crime and the attorney is currently working on the client's case. Then suppose that the attorney receives a letter from the defendant stating, "I can get an early parole if I comply with the prison and enter a sex offender treatment program. However, if I enter this program, I will have to accept responsibility for a sex crime of which I am innocent." In a situation such as this, what should the attorney advise the defendant to tell the parole board? What does he tell the institution that says if you go to the sex offender program you get out early, but going to the sex offender program means you have to admit to all of your offenses?

In this particular case, under Kansas law, it is mandatory for a defendant to accept responsibility and disclose all of his sex offenses, even those that have not yet been prosecuted.⁸⁷

⁸⁶ *Id.* at 35. The Court held:

The [Kansas Sex Abuse Treatment Program] does not compel prisoners to incriminate themselves in violation of the Constitution The consequences in question here -- a transfer to another prison where television sets are not placed in each inmate's cell, where exercise facilities are not readily available, and where work and wage opportunities are more limited -- are not ones that compel a prisoner to speak about his past crimes despite a desire to remain silent.

Id.

⁸⁷ *Id.* at 30. The Court stated:

In 1994, a few years before respondent was scheduled to be released, prison officials ordered him to participate in a Sexual Abuse Treatment Program (SATP). As part of the program, participating inmates are required to complete and sign an "Admission of Responsibility" form, in which they discuss and accept responsibility for the crime for which they have been sentenced. Participating inmates also are required to complete a sexual history form, which details all prior sexual activities, regardless of whether such activities constitute uncharged criminal offenses.

Id.

However, such disclosure is not privileged under Kansas law.⁸⁸ In fact, if the defendant makes this disclosure, the Kansas prison authorities are obliged under the law to call the prosecutor and inform him/her that the defendant has admitted to some unsolved crimes.⁸⁹ It seems like a classic Fifth Amendment privilege against self-incrimination circumstance, does it not?

However, the Court said this is not a violation of the defendant's Fifth Amendment privilege against self-incrimination for a number of reasons.⁹⁰ First, what would refusal to participate do to a defendant? The defendant would only lose visitation rights, work opportunities, ability to send money to his family, access to personal television, and other privileges.⁹¹ The prisoner would go from lesser security to maximum security, and from a two-person cell to a four-person cell if he did not submit to the program.⁹² But the Supreme Court, in its wisdom, responded with regard to the self-incrimination issue that the prisoner is not being compelled to participate in the sex offender program because what he has to give up if he does not participate and comply with its requirements is really not very much.⁹³ In other words, the punishment for not complying is not "atypical"; they are the usual things that happen to prisoners in prison.⁹⁴ What the plurality then did was transfer a concept from *Sandin v. Connor*,⁹⁵ a due process case, which held that, "challenged prison conditions cannot give rise to a due process violation, unless those conditions constitute atypical and significant hardships on [inmates] in relation to the ordinary incidents of inmate life," into the self-incrimination context in order to conclude that a prisoner is not being deprived of his privilege against self-incrimination because not being subjected to "atypical" treatment, the prisoner is not truly being compelled.⁹⁶

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *McKune*, 536 U.S. at 32-37.

⁹¹ *Id.*

⁹² *Id.* at 31.

⁹³ *Id.* at 36.

⁹⁴ *Id.*

⁹⁵ 515 U.S. 472 (1995).

⁹⁶ *Id.* at 484.

Justice O'Connor did not accept the plurality's *Sandin* analysis.⁹⁷ However, even though she concluded that the Fifth Amendment's compulsion standard is broader than the "atypical and significant hardship" standard for evaluating due process claims, she too concluded that alterations in the defendant's prison conditions did not amount to compulsion.⁹⁸ I find it amazing when judges who have never been inside a correctional facility state that the aforementioned privileges that an uncooperative prisoner would have to relinquish are unimportant.

When looking at prior Fifth Amendment cases, it would be difficult to find a case that in any way suggests that the decision in *McKune* is a proper ruling. Prior decisions uphold the privilege even if a person faces loss of the ability to engage in a public contract or to work at a public employment job.⁹⁹ Many cases hold that a person cannot be required to give up his Fifth Amendment privilege because of a threat. However, here the Court says, because Lile is a prisoner, it was constitutional.¹⁰⁰ I find it a very troubling decision. Of course, I agree with the other side. Justice O'Connor's rejection of the plurality's self-incrimination analysis allows one to hope that the damage caused to the privilege against self-incrimination can be contained.

Sixth Amendment Right to Counsel

In *Alabama v. Shelton*,¹⁰¹ another five to four decision, the Court held that the Sixth Amendment's right to counsel in misdemeanor cases applies even to cases in which the defendant is given a suspended sentence.¹⁰² There was a gap between two cases

⁹⁷ *McKune*, 536 U.S. at 48 (O'Connor, J., concurring).

⁹⁸ *Id.* at 48-49.

⁹⁹ See, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973) (holding that the state could not compel testimony from public contractors by threatening to cancel their contract if they did not comply); *Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967) (holding that police officers could not be coerced into incriminating themselves under the threat of job loss).

¹⁰⁰ *McKune*, 536 U.S. at 49.

¹⁰¹ 535 U.S. 654 (2002).

¹⁰² *Id.* at 674 (holding "[a] defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel.").

decided in the 1970s. The first was *Argersinger v. Hamlin*,¹⁰³ decided in 1972, which held that a defendant has a right to counsel in a misdemeanor case if it may result in even the briefest imprisonment.¹⁰⁴ The second case was *Scott v. Illinois*,¹⁰⁵ decided in 1979, where the Court held that an indigent defendant who is not sentenced to imprisonment does not have a right to assigned counsel.¹⁰⁶ However, what had not been decided was a defendant's right to counsel who had received a suspended sentence that could be revoked if he violated the terms of probation.

In *Shelton*, the Court said that is different from *Scott*; it falls on the defendant's side because at a probation revocation hearing the defendant is precluded from testing the merits of his underlying conviction.¹⁰⁷ The only issue at a probation revocation hearing is whether the defendant violated the terms or conditions of probation.¹⁰⁸ Therefore, said the Court, "the defendant would be deprived of that 'crucible of meaningful adversarial testing' "¹⁰⁹ of his case, and the reliability of the defendant's conviction is "the key Sixth Amendment inquiry" that entitles a defendant to counsel.¹¹⁰

In dissent, Justice Scalia said essentially that this is a federalism issue.¹¹¹ He argued that the Court is imposing on the states' resources, since they will now have to provide counsel in all such cases.¹¹² Justice Scalia believed that only twenty-four states

¹⁰³ 407 U.S. 25 (1972).

¹⁰⁴ *Id.* at 37 (stating that "'the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation.'" (internal citations omitted).

¹⁰⁵ 440 U.S. 367 (1979).

¹⁰⁶ *Id.* at 373 (agreeing with *Argersinger*'s holding "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . . [and warrants adopting] actual imprisonment as the line defining the constitutional right to appointment of counsel").

¹⁰⁷ *Shelton*, 535 U.S. at 666.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 667 (citing *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 679 (Scalia, J., dissenting).

¹¹² *Shelton*, 535 U.S. at 679.

already do this, so twenty-six would be affected by this decision.¹¹³ The majority believed only sixteen states are affected.¹¹⁴ The case does not have an impact in New York, because there is no problem with the right to counsel in similar circumstances. New York has always been a leader in affording indigents the right to counsel, except, of course, with regard to the fees paid to assigned counsel.

The two remaining Sixth Amendment cases involved ineffective assistance of counsel. The first case is *Mickens v. Taylor*.¹¹⁵ Suppose an attorney is on her cell phone and says "Hi, Mom, remember the kid I told you about, who the judge assigned me to represent? He was killed. But not to worry; the judge just assigned me to represent the person who they say killed him. In addition, the prosecution is seeking the death penalty. I am going to take the case, but I don't think I should tell my client that I represented the guy who he is charged with killing." Does anybody not have a problem with this? The Supreme Court, with Justice Scalia writing for the majority, had no problem with this. Why? Because there was no proof that this conflict in any way affected the defendant's representation in this capital case.¹¹⁶

In *Mickens*, the deceased had been brought into juvenile court based on his mother's complaint.¹¹⁷ In addition, the defendant and the deceased were in a homosexual relationship.¹¹⁸ The majority stated that it was not interested in these facts because there was no showing that the trial attorney in any way limited his cross-examination or that this conflict affected his representation¹¹⁹ and the defense attorney did not learn anything confidential from the deceased that was relevant to the defense at trial or sentencing.¹²⁰ Thus, the majority held that there must be a reasonable probability that the conflict in question led to ineffective assistance of counsel in violation of the Sixth Amendment.¹²¹ And the Court found no such probability.¹²²

¹¹³ *Id.*

¹¹⁴ *Id.* at 669.

¹¹⁵ 535 U.S. 162 (2002).

¹¹⁶ *Id.* at 172-74.

¹¹⁷ *Id.* at 183 n.4 (Stevens, J., dissenting).

¹¹⁸ *Id.* at 181 (Stevens, J., dissenting).

¹¹⁹ *Id.* at 175.

¹²⁰ *Mickens*, 535 U.S. at 171.

¹²¹ *Id.* at 174.

Justice Stevens, in dissent, argued that the same judge had assigned the attorney to both defendants,¹²³ and that “justice must satisfy the appearance of justice.”¹²⁴ Justice Souter, in his dissent, stated that the Court’s prior holdings in the *Wheat* line of cases requires the judge to inquire into potential conflicts, especially in a case such as this.¹²⁵ However, the interesting issue in terms of prejudice at the capital sentencing phase of the case is that the prosecutor argued that all the deceased’s mother did in life was “live for that boy.”¹²⁶ Justice Souter pointed out that the defense attorney failed to inform the jury that the deceased’s mother, who, in the words of the prosecutor, “lived for that boy,” had in fact filed charges alleging that she was assaulted by her wonderful child.¹²⁷ Further, the jury that imposed the death penalty was not apprised of this information.¹²⁸ In opposition to the majority, the Breyer/Ginsburg dissent stated that the facts in this case embodied the type of representation that is egregious on its face, exacerbated by the fact that this was a capital case.¹²⁹ Furthermore, they emphasized that the Commonwealth itself created the conflict by allowing the same judge to assign the same lawyer to both defendants.¹³⁰

In another Sixth Amendment case, *Bell v. Cone*,¹³¹ the Court kept the bar very high for defendants who must prove ineffective assistance of counsel. In this case, the trial attorney remained silent at the capital phase.¹³² The case involved the killing of an elderly couple by the defendant, who was a Vietnam

¹²² *Id.*

¹²³ *Id.* at 180 (Stevens, J., dissenting).

¹²⁴ *Id.* at 189 (internal citations omitted).

¹²⁵ *Mickens*, 535 U.S. at 189 (Souter, J., dissenting) (citing *Wheat v. United States*, 486 U.S. 153 (1988) (holding “a judge who knows or should know that counsel for a criminal defendant facing, or engaged in, trial has a potential conflict of interests is obliged to enquire into the potential conflict and assess its threat to the fairness of the proceeding.”)).

¹²⁶ *Id.* at 185.

¹²⁷ *Id.* at 208 n.13 (Souter, J., dissenting).

¹²⁸ *Id.* at 165.

¹²⁹ *Id.* at 210 (Breyer, J., dissenting).

¹³⁰ *Mickens*, 535 U.S. at 210.

¹³¹ 535 U.S. 685 (2002).

¹³² *Id.* at 701.

veteran.¹³³ The defendant had gone to college; however, after his Vietnam experience, he was never the same.¹³⁴ At trial, the defendant raised the defense of insanity.¹³⁵ However, the defense attorney at the sentencing phase did nothing to establish mitigation.¹³⁶ To paraphrase him, he said, "I did nothing because I don't get to speak last and the assistant prosecutor who spoke before me was not really saying very much."¹³⁷ He continued, "If I got up to say anything, the primary prosecutor, the really heavy-hitter, would get up and really be able to lay into me."¹³⁸ Consequently, the jury never learned that the defendant was awarded the Bronze Star for his courage in Vietnam.¹³⁹ The Court determined that this was not a structural defect in the proceeding.¹⁴⁰ Accordingly, the Court held that application of the *Strickland* standard of reasonable competence to this case did not establish ineffective assistance of counsel.¹⁴¹

There are many other cases that raise concern that the Court is too lenient as to the standard of competence to which defense attorneys are held. I think that most courts are not very

¹³³ *Id.* at 689.

¹³⁴ *Id.* at 701-02.

¹³⁵ *Id.* at 702.

¹³⁶ *Bell*, 535 U.S. at 702.

¹³⁷ *Id.* at 721 (Stevens, J., dissenting).

¹³⁸ *Id.* at 713-14.

¹³⁹ *Id.* at 713.

¹⁴⁰ *Id.* at 702.

¹⁴¹ *Bell*, 535 U.S. at 702. See *Strickland v. Washington*, 466 U.S. 668, 690 (1984) indicating:

[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Id.

demanding. I have been running an innocence project at Brooklyn Law School for over a year now. A fact of life is that a predominant number of actual innocence cases are accompanied by ineffective assistance of counsel. A more demanding performance standard as a matter of Sixth Amendment jurisprudence from the Supreme Court could reduce the number of erroneous convictions.

Capital Cases

That takes me to what I believe is the most important work of the term: the capital cases. I think it has been a rather remarkable term in a number of ways, as the Court overruled two of its own recent decisions. There is no question in my mind that the Court, including Justice O'Connor, is beginning to realize that there is a serious problem in the country regarding wrongful conviction; it is a reality that is beginning to prey on more than one of the Justices' minds.

The Court decided three capital cases: *Ring v. Arizona*,¹⁴² which applied the *Apprendi v. New Jersey* rule to a capital case at the sentencing phase,¹⁴³ *Atkins v. Virginia*,¹⁴⁴ which concerned capital punishment of the mentally retarded,¹⁴⁵ and *Kelly v. South Carolina*,¹⁴⁶ which expanded the universe in which defendants are entitled to have the jury informed that they are not eligible for parole.¹⁴⁷

I think by far the most important case is *Ring v. Arizona*. As background to this case, recall that in *Apprendi v. New Jersey*, the Court held that any fact, except a prior conviction, that increases punishment beyond the maximum prescribed by the statute for the offense, must be found by the jury beyond a reasonable doubt.¹⁴⁸ The *Apprendi* Court stated, however, that

¹⁴² 536 U.S. 584 (2002).

¹⁴³ *Id.* at 608. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding "other 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.").

¹⁴⁴ 536 U.S. 304 (2002).

¹⁴⁵ *Id.* at 306.

¹⁴⁶ 534 U.S. 246 (2002).

¹⁴⁷ *Id.* at 257.

¹⁴⁸ *Apprendi*, 530 U.S. at 490.

there was no conflict between its ruling and decisions such as *Walton v. Arizona*,¹⁴⁹ which allowed judges to find aggravating circumstances in capital cases.¹⁵⁰ To paraphrase Justice O'Connor's dissent in *Apprendi*: "you guys have it all wrong; there is a conflict between what we are doing today and our decision in *Walton*."¹⁵¹ She believed that the majority misread Arizona law and that the two decisions were inconsistent.¹⁵²

In *Ring*, the Court found that Justice O'Connor had been correct and the Court now concluded that aggravating circumstances must be tried to the jury, and not to a judge, because aggravating circumstances are essentially elements of the capital crime.¹⁵³ In *Ring*, a jury convicted the defendant.¹⁵⁴ The case involved an armored car robbery, which is a first-degree felony murder, but the jury did not find Ring guilty of premeditated murder.¹⁵⁵ However, at the sentencing phase, an accomplice testified in front of the judge that the defendant was the ringleader and that the crime was Ring's idea from the beginning.¹⁵⁶ The judge, basing his decision on the testimony of Ring's accomplice, imposed the death penalty.¹⁵⁷ Justice Ginsburg, writing for the majority, relied on Justice O'Connor's dissent in *Apprendi* and held that *Walton v. Arizona* is overruled insofar as it allowed a judge sitting without a jury to find an aggravating circumstance necessary for imposition of the death penalty.¹⁵⁸ The implications of this decision have not yet fully been felt. At present, Colorado, Idaho, Montana and Nebraska all have statutes similar to Arizona's.¹⁵⁹ Alabama, Delaware, Florida, and Indiana have a different system where the jury makes a recommendation, but the judge imposes the sentence.¹⁶⁰ It is estimated that about 800 death

¹⁴⁹ 497 U.S. 639 (1990).

¹⁵⁰ *Apprendi*, 530 U.S. at 522 (citing *Walton v. Arizona*, 497 U.S. 639 (1990)).

¹⁵¹ *Id.* at 536 (O'Connor, J., dissenting).

¹⁵² *Id.* at 537-38.

¹⁵³ *Ring*, 536 U.S. at 609.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 593.

¹⁵⁷ *Id.*

¹⁵⁸ *Ring*, 536 U.S. at 609.

¹⁵⁹ *Id.* at 608 n.6.

¹⁶⁰ *Id.*

row inmates could be affected by the *Ring* decision.¹⁶¹ There are also unresolved questions about cases in the appellate and post-conviction pipelines, in terms of what will be the retroactive effect of this decision.

The second capital case, *Atkins v. Virginia*, again raised the issue whether a mentally retarded defendant can be executed.¹⁶² Thirteen years ago the Court held in *Penry v. Lynaugh*,¹⁶³ that capital punishment could not be prohibited under the Eighth Amendment solely because the defendant was mentally retarded.¹⁶⁴ In *Atkins*, the Court changed its view and in an opinion written by Justice Stevens overruled *Penry*. The Court used the following factors to support its reasoning:

First, the Court said that when *Penry* was decided in 1989, the consensus with respect to execution of the mentally retarded was just emerging.¹⁶⁵ Until 1989, only the federal government and the State of Maryland had statutes prohibiting the execution of the mentally retarded.¹⁶⁶ However, since 1989, sixteen more states have adopted similar statutes.¹⁶⁷ Thus, the consistent direction of this change constituted a national consensus. This was significant because usually “anti-crime legislation is far more popular” than legislation favoring defendants,¹⁶⁸ the votes in the abolishing states have been one-sided in favor of eliminating the death penalty for the mentally retarded, and for thirteen years, no state has enacted or reinstated the death penalty for the mentally retarded.

Justice Stevens also pointed out that societal consensus is not the only factor.¹⁶⁹ Cases such as *Coker v. Georgia*,¹⁷⁰ where the Court held that execution for rape constituted cruel and unusual punishment, meant that the Court had the right to make its own

¹⁶¹ Adam Liptak, *A Supreme Court Ruling Roils Death Penalty Cases*, NEW YORK TIMES, Sept. 16, 2002, at A14, col. 5.

¹⁶² 536 U.S. at 307.

¹⁶³ 492 U.S. 302 (1989), overruled by *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁶⁴ *Id.* at 340.

¹⁶⁵ *Atkins*, 536 U.S. at 314.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 314-15.

¹⁶⁸ *Id.* at 315.

¹⁶⁹ *Id.* at 318.

¹⁷⁰ 433 U.S. 584 (1977).

judgment.¹⁷¹ The third factor that the Court utilized was the value of the retribution and deterrence aspects of the death penalty, which Justice Stevens said speaks less forcibly to the mentally retarded because they cannot appreciate things in the same manner as those who are not mentally retarded.¹⁷²

Chief Justice Rehnquist, and Justices Scalia and Thomas had much to say in dissent. Scalia had one of his truly livid moments as he derisively labeled the majority opinion “the pinnacle of our Eighth Amendment death-is-different jurisprudence.”¹⁷³ He attacked the majority’s definition of a consensus. With respect to the assertion by Justice Stevens that the Court can bring its own judgment to the issue, Scalia said, “[t]he arrogance of this presumption of power takes one’s breath away.”¹⁷⁴ “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.”¹⁷⁵

The last of the capital cases is *Kelly v. South Carolina*.¹⁷⁶ For the third year in a row, the Court was faced with an issue stemming from its 1994 decision in *Simmons v. South Carolina*,¹⁷⁷ concerning a capital defendant’s right to a jury instruction on his ineligibility for parole.¹⁷⁸ In this case, during the penalty phase, the district attorney talked about defendant’s dangerousness and called him a “butcher.”¹⁷⁹ He also stated, “murderers will be murderers”; “you would not want to be 30 feet away from this guy”; and “while he was in prison he made a weapon and engaged in an attempt to escape.”¹⁸⁰ In response, the defense attorney sought a *Simmons* instruction.¹⁸¹ A *Simmons* instruction is an instruction that informs a jury that if the defendant receives a life sentence, he would be

¹⁷¹ *Id.* at 592.

¹⁷² *Atkins*, 536 U.S. at 319-20.

¹⁷³ *Id.* at 352 (Scalia, J., dissenting).

¹⁷⁴ *Id.* at 348.

¹⁷⁵ *Id.* at 338.

¹⁷⁶ 534 U.S. 246 (2002).

¹⁷⁷ 512 U.S. 154 (1994).

¹⁷⁸ See, e.g., *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Ramdass v. Angelone*, 530 U.S. 156 (2000).

¹⁷⁹ *Kelly*, 534 U.S. at 249.

¹⁸⁰ *Id.* at 248-50.

¹⁸¹ See *Simmons*, 512 U.S. at 154.

ineligible for parole.¹⁸² The *Simmons* line of cases holds that a defendant is entitled to this instruction if the prosecutor presents evidence of a defendant's future dangerousness.¹⁸³ The state appellate court in this case believed that this is not what the prosecution did because the prosecutor was just talking about how mean the defendant was.¹⁸⁴ Regarding the defendant's future dangerousness, nothing was said or presumed.¹⁸⁵ Disagreeing, the Supreme Court concluded that the prosecutor's statements were not so narrow as to prevent the jury from drawing inferences of future dangerousness, even though the prosecution did not directly state that the inference was that the defendant would always be in trouble.¹⁸⁶ The Court made the point that "evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms."¹⁸⁷

Post-Apprendi Cases

Finally, I wish to address the effects of the *Apprendi* decision further. When I talked about *Apprendi* when it was first decided, I said it was the "sleeper" case of the year. That was an understatement. But in the noncapital cases decided this term, the Court has somewhat calmed the concerns of those, like Justice O'Connor, who believed like "chicken little," that as a result of *Apprendi*, the sky was falling.

In *Harris v. United States*,¹⁸⁸ the Court decided the issue of whether imposition of mandatory minimum sentences could be made by a judge based on facts that were not presented to a jury.¹⁸⁹ The plurality opinion by Justice Kennedy, joined by Justices O'Connor, Scalia, and Chief Justice Rehnquist, distinguished between the Constitution's requirement for facts that increase a

¹⁸² *Kelly*, 534 U.S. at 248.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 251.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 253-54.

¹⁸⁷ *Kelly*, 534 U.S. at 254.

¹⁸⁸ 536 U.S. 545.

¹⁸⁹ *Id.* at 549-50.

minimum sentence and that for the determination of facts that increase the maximum sentence.¹⁹⁰ The plurality said that *Apprendi* was based on the historical practice of treating facts that increase the maximum punishment as offense elements.¹⁹¹ However, it concluded that there is not a clear record of how history treated facts that increase the maximum punishment.¹⁹²

Justice Breyer concurred, but he did not agree with the analysis of the plurality.¹⁹³ He did not think that the plurality had successfully distinguished facts that establish the top end of a statutory range from facts that establish the bottom end. He concurred in the judgment because of his belief that *Apprendi* was wrongfully decided.¹⁹⁴ Justice Breyer served on the U.S. Sentencing Commission and he had much to do with the drafting of the sentencing guidelines, which are imperiled because of *Apprendi*. His concurrence evinces his refusal to see his contribution to the guidelines diminished.¹⁹⁵

Justice Thomas, joined by Justices Stevens, Souter and Ginsburg, dissented. Justice Thomas argued that “looking to the principles that animated the decision in *Apprendi*, and the basis for the historical practice upon which *Apprendi* rested, there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximums, whether one raises the floor or raises the ceiling, it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.”¹⁹⁶

In *United States v. Cotton*,¹⁹⁷ the Court upheld convictions that predated *Apprendi*. The Court held essentially that if trial counsel did not have the clairvoyance to know that the Court would decide *Apprendi* and thus to preserve the *Apprendi* issue for appellate review, then the plain error rule controls.¹⁹⁸ The Court then held there was no plain error in this instance “because even

¹⁹⁰ *Id.* at 557-59.

¹⁹¹ *Id.* at 563.

¹⁹² *Id.*

¹⁹³ *Harris*, 536 U.S. at 569-70 (Breyer, J., concurring).

¹⁹⁴ *Id.* at 570.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 579.

¹⁹⁷ 535 U.S. 625 (2002).

¹⁹⁸ *Id.* at 631.

assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings."¹⁹⁹

The Court relied on its prior ruling in *United States v. Johnson*,²⁰⁰ which held that a failure to submit the question of materiality to the jury is not a structural error and thus is unlike an erroneous reasonable doubt charge that spoils the entire trial process.²⁰¹ Applying *Johnson*, the Court reasoned that "the same analysis applies to the omission of the drug quantity from the indictment."²⁰² After appraising the evidence of cocaine base seized by the police from Cotton and his co-defendants, the Court concluded that "surely the grand jury having found that the conspiracy existed, would also have found that the conspiracy involved at least 50 grams of cocaine base."²⁰³

There is still much uncharted turf out there in *Apprendi*-land. Lower courts are divided on a host of issues, and current understandings of New York's persistent felon statute may be questioned in the light of these decisions. Time does not permit exploration of them. But make no mistake, they are out there and lawyers and judges will continue to struggle with a host of knotty issues, some we may not even have thought of yet. Notwithstanding decisions such as *Harris* and *Cotton*, which rein in certain logical thrusts of *Apprendi*, the ingenuity of creative defense lawyers and the beauty of the common law system ensure that much more in this arena is yet to come.

¹⁹⁹ *Id.* at 632.

²⁰⁰ 520 U.S. 461 (1997).

²⁰¹ *Id.* at 469.

²⁰² *Cotton*, 535 U.S. at 633.

²⁰³ *Id.*

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