Touro Law Review

Volume 17
Number 1 *Supreme Court and Local Government Law: 1999-2000 Term & New York State Constitutional Decisions: 2001 Compilation*

Article 23

March 2016

Shakin' and Bakin': The Supreme Court's Remarkable Criminal Law Rulings of the 1999 Term

William E. Hellerstein

Follow this and additional works at: https://digitalcommons.tourolaw.edu/lawreview

 Part of the Constitutional Law Commons, Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation

Hellerstein, William E. (2016) "Shakin' and Bakin': The Supreme Court's Remarkable Criminal Law Rulings of the 1999 Term," *Touro Law Review*: Vol. 17: No. 1, Article 23.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol17/iss1/23

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

"SHAKIN' AND BAKIN':" THE SUPREME COURT'S REMARKABLE CRIMINAL LAW RULINGS OF THE 1999 TERM

PROFESSOR WILLIAM E. HELLERSTEIN[1]

INTRODUCTION

The 1999 Term of the Supreme Court was fascinating in numerous subject matter areas, none more so than in the field of criminal law and procedure. Although the Court decided fewer cases, seventy-three, than it has since the 1950's, twenty-seven were criminal cases. Moreover, of the Court's twenty five-to-four decisions, nine were criminal cases. It was also a Term in which, generally speaking, the Court did not continue its erosion of the rights of criminal defendants. Whether this signifies a change in the Court's overall direction or whether it was a momentary blip remains to be seen.

I. *MIRANDA* LIVES

The "drawing card" for the 1999 Term, of course, was *Dickerson v. United States*,[2] in which the Court had granted certiorari to examine the continued viability of *Miranda v. Arizona*.[3] Although many of us held our breath, the Court's decision reaffirming the constitutional foundation of *Miranda* had the feel of anticlimax. Much of that feeling was attributable to the one-sidedness of the seven-to-two vote and to the mundane texture of Chief Justice Rehnquist's opinion.

But there's the rub. For it was Rehnquist himself who, as Associate Justice in 1974, began the assault on *Miranda*. In

---

[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 has argued numerous appeals before the U.S. Supreme Court, the Second Circuit, and the New York Court of Appeals.

[2] 120 S. Ct. 2326 (2000). (Chief Justice Rehnquist delivered the opinion of the Court, in which Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer joined. Justice Scalia filed a dissenting opinion in which Justice Thomas joined).

[3] 384 U.S. 436 (1966).

Published by Digital Commons @ Touro Law Center, 2000

Michigan v. Tucker,[4] Rehnquist argued for the first time that the *Miranda* warnings themselves were not constitutionally required but were merely prophylactic admonitions meant to protect the privilege against self-incrimination. Yet, in *Dickerson* he writes the Court's opinion that saves *Miranda* from the dustbin of history.

At issue in *Dickerson* was the relationship to *Miranda* of § 3501 of the Omnibus Crime Control Act of 1968,[5] enacted by Congress in the midst of strong political reaction.[6] Essentially, § 3501 reinstated the "voluntariness" or "totality of the circumstances" test for determining the admissibility of statements obtained by custodial interrogation from a suspect, the standard which the *Miranda* Court considered unsatisfactory for the protection of the individual's privilege against self-incrimination.

Despite the presence since 1968 of § 3501, the Government had persistently declined to rely on it to avoid suppression of a defendant's confession obtained in the absence of *Miranda* warnings, even though the Court continued to reiterate that the warnings were not themselves mandated by the Constitution.[7] And, in *Davis v. United States*,[8] Justice Scalia at oral argument[9] and in a concurring opinion,[10] expressed both anger and dismay about the Government's refusal to rely on § 3501.

---

[4] 417 U.S. 433 (1974).

[5] 18 U.S.C. § 3501 (2000).

[6] *See* S. REP. NO. 1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 21112, 21124-32 (stating purpose of section 3501 was to prevent the "rigid, mechanical" exclusion from evidence of voluntary confessions based solely on police failure to comply with the "inflexible requirements of the majority opinion in the Miranda case").

[7] *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (overriding considerations of public safety justified arresting officer's failure to provide *Miranda* warning to accused prior to inquiring as to whereabouts of abandoned weapon where accused was apprehended after a chase wearing an empty shoulder holster); Oregon v. Elstad, 470 U.S. 298 (1985) (failure to advise burglary suspect of *Miranda* rights initially did not preclude subsequent waiver of rights when suspect made second incriminating statement after being properly warned).

[8] 512 U.S. 452 (1994).

[9] Transcript of oral argument in *Davis v. United States*, 1994 U.S. Trans. LEXIS 116, at *40-45.

[10] Davis v. United States, 512 U.S. 452, 462-65 (Scalia, J. concurring).

Justice Scalia's *Davis* viewpoint received a friendly reception in the United States Court of Appeals for the Fourth Circuit, a court fairly well populated by Federalist Society types and viewed by many as the most conservative federal appellate court in the nation. When the Government appealed the trial court's suppression of Dickerson's confession but again did not rely on § 3501, the court of appeals felt obliged to raise the issue *sua sponte*. It concluded that all of the "prophylaxis" talk in *Tucker* and the cases which repeated it, meant a great deal and it held that since *Tucker* and its progeny said that the *Miranda* warnings were not constitutionally required, Congress could supersede *Miranda* and that § 3501 was constitutional.[11]

So what happened in the Supreme Court? And to the Chief Justice in particular? As Justice Scalia points out in his *Dickerson* dissent,[12] Rehnquist's opinion cannot be squared with Rehnquist's own writings in *Michigan v.Tucker*[13]and with what was said subsequently in *New York v. Quarles*[14] and *Oregon v. Elstad.*[15] And Justice Scalia is right. It can't. In fact, the *Tucker-Quarles-Elstad* view of *Miranda* provided opponents of *Miranda* their best argument for upholding § 3501.

On the other hand, supporters of *Miranda,* of which I am one, argued that *Tucker* and its progeny were themselves intellectually dishonest in concluding that the Miranda warnings were not constitutionally required.[16] We argued that the *Miranda* warnings were constitutional mandates for several reasons. First,

---

[11] United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (holding that § 3501 legislatively overruled *Miranda* and restored the voluntariness test for admissibility of criminal confessions in federal court), *rev'd,* 120 S. Ct. 2326 (2000).

[12] Dickerson, 120 S. Ct. at 2337-43 (Scalia, J., dissenting).

[13] 417 U.S. 433 (1974).

[14] 467 U.S. 649 (1984) (overriding considerations of public safety justified arresting officer's failure to provide *Miranda* warning to accused prior to inquiring as to whereabouts of abandoned weapon where accused was apprehended after a chase wearing an empty shoulder holster).

[15] 470 U.S. 298 (1985) (failure to advise burglary suspect of *Miranda* rights did not preclude subsequent waiver of rights when suspect responded to unwarned yet uncoercive questioning by police).

[16] William E. Hellerstein, *The Miranda Wars Reopen: Border Skirmish or Major Conflagration?* 4 BLS LAW NOTES 7 (1999); Charles S. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998).

Chief Justice Warren's opinion in *Miranda* said as much.[17] Second, if the warnings were not constitutionally grounded, the States could not be required to comply with *Miranda*. Not only had no state court ever taken that position, the Rehnquist Court, in *Withrow v. Williams*,[18] had sustained a state defendant's federal habeas corpus petition because his conviction had been based on a confession obtained without *Miranda* warnings, a remedy that is only available when the federal constitution has been violated and state law must recede because of the Supremacy Clause.[19]

Justice Douglas' dissent in *Michigan v. Tucker*[20] made many of these arguments. And, Chief Justice Rehnquist's *Dickerson* opinion reads much like that dissent. So how explain the Chief Justice's turn of mind? Here's where the fun begins. Several views have been offered:

Professor Stephen Saltzburg of George Washington University Law School has opined that *Associate* Justice Rehnquist would have voted to uphold § 3501 but *Chief Justice* Rehnquist has increasingly assumed a leadership role and that he did not want to see three decades of *Miranda* jurisprudence going up in smoke. Also, the Chief Justice is comfortable with *Miranda* and believes that the police can live with it. Linda Greenhouse, the New York Times Supreme Court Reporter, focused on Rehnquist's reliance in part on *City of Boerne v. Flores*,[21] the 1997 decision that

---

[17] In *Michigan v. Tucker*, 417 U.S.433 (1974), Justice Rehnquist had focused on Chief Justice Warren's statement in *Miranda* that the Constitution did not mandate "adherence to any particular solution." *Id.* at 444 (quoting *Miranda*, 384 U.S. at 467). However, Justice Rehnquist omitted the remainder of the quoted passage from *Miranda* which authorized a departure from the required warnings only if they were replaced by alternatives that were equally effective. As Justice Brennan urged in a memorandum to Chief Justice Warren, the Court should allow the states a degree of flexibility so as to cushion the impact of the decision. That memorandum, whose message Warren embraced, made it clear that the warnings specified in *Miranda* were minimum constitutional requirements. *See* Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. at 123-25.

[18] 507 U.S. 680 (1993).

[19] U.S. CONST. art. VI, cl. 2, provides in pertinent part that, "[t]his Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . ." *Id.*

[20] 417 U.S. at 461-66.

[21] 521 U.S. 507 (1997).

overturned the Religious Freedom Restoration Act[22] which, to her, meant that Rehnquist was solidifying the Court's institutional position by letting Congress know who's in charge when it comes to having the final say as to the meaning of the Constitution.[23]

There is much to be said for both of these speculations. I offer a third which, meaning no disrespect, is a tad more cynical. And that is, even as Chief Justice, had Rehnquist had the votes, he would have dumped *Miranda* and followed his *Tucker* theme, which was no fly-by-night affair. But having only two votes to dump *Miranda*, Scalia and Thomas, he chose the high road and wrote the truth about *Miranda* that most of us who were around when it was decided understood it to hold. Thus, he turned the defeat of his own crabbed view of *Miranda* into a *carpe diem*-statesmanlike reaffirmance of a constitutional landmark while, at the same time, adding, as frosting on the cake, the institutional strengthening of the Supreme Court's role in our constitutional framework, in the tradition of the great Chief Justice, John Marshall. The only one who need not speculate on the Chief Justice's turnabout is the Chief Justice himself. But, I do not think we'll be hearing from him on this subject in the near future.

II. SEARCHES AND SEIZURES

From the defense side of the aisle, this was a remarkably pleasant Fourth Amendment year. Of the four decisions rendered,[24] law enforcement won only one.

In *Bond v. United States,*[25] the Court held that a border patrol agent's manipulation of the defendant's luggage in an overhead rack on the bus in which he was a passenger violated the Fourth Amendment.[26]

---

[22] 42 U.S.C. § 2000bb (1994).

[23] Linda Greenhouse, *A Turf Battle's Unlikely Victim,* N.Y. TIMES, June 28, 2000 at A1.

[24] Bond v. United States, 120 S.Ct. 1462 (2000); Florida v. J.L., 120 S. Ct. 1375 (2000); Illinois v. Wardlow, 120 S. Ct. 673 (2000); Flippo v. West Virginia, 528 U.S. 11, 120 S. Ct. 7 (1999).

[25] 120 S. Ct. 1462 (2000).

[26] *Id.* at 1463.

Bond was a passenger on a Greyhound bus, traveling from California to Little Rock, Arkansas. At a permanent checkpoint in Texas, a border patrol agent checked the immigration status of the passengers. As the agent walked down the aisle towards the exit door, he "squeezed" Bond's luggage. He felt a "brick-like" object, and Bond later consented to the agent's opening the luggage. The agent found a "brick" of methamphetamine wrapped in duct tape. Bond was convicted of conspiracy to possess and possession with intent to distribute.[27] The district court denied his motion to suppress. The Fifth Circuit affirmed his conviction, finding that the manipulation of the bag was not a search within the meaning of the Fourth Amendment.[28]

The Supreme Court reversed, with only two dissenters, Justices Breyer and Scalia. Chief Justice Rehnquist, writing for the Court, first stated that the luggage is an "effect" protected by the Fourth Amendment.[29] He then turned to the question of whether Bond's exposing his luggage to the public negated his claim that the "squeezing" was a Fourth Amendment "search." He stated that under the Court's Fourth Amendment jurisprudence, whether a governmental official conducted a search depends on two issues: (1) "'whether the individual, by his conduct, has exhibited an actual expectation of privacy" and (2) if so, "whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable.'"[30]

As to the first issue, Rehnquist noted that Bond had used an opaque bag and that he had placed it just above his seat; thus Bond had exhibited an actual expectation of privacy.[31] As to the second, whether this expectation was reasonable, the Chief Justice discussed the Court's "public exposure" decisions, and found a difference between "visual" observation and tactile manipulation.[32] He noted that in prior cases, when officials gathered information by flying over a person's property, this type of public exposure

---

[27] *Id.*
[28] United States v. Bond, 167 F.3d 225 (5th Cir. 1999), *rev'd,* 120 S. Ct. 1462 (2000).
[29] *Bond*, 120 S. Ct. at 1464.
[30] *Id.* at 1465.
[31] *Id.*
[32] *Id.*

signified that a person did not have a "reasonable" expectation of privacy.[33] In *California v. Ciraolo,*[34] the Court had held that an airplane flying above property at 1,000 feet did not violate the Fourth Amendment and in *Florida v. Riley,*[35] the Court held that a police helicopter flying above property at 400 feet did not violate the Fourth Amendment.

Rehnquist pointed out, however, that the agent's tactile manipulation of Bond's luggage differed from mere visual observation; it was more intrusive than the touching a bus passenger would expect from "other passengers or bus employees."[36] Also, what distinguished the agent's touching from the touching by others was its "exploratory" manner. This type of touching was more intrusive than that expected from other passengers.[37]

At a previous forum in this hall, I bemoaned the manner and frequency with which the Court had used the "expectation of privacy" doctrine, given to us in the landmark Fourth Amendment friendly case of *Katz v. United States,*[38] to shrink rather than expand a person's privacy zone.[39] It is refreshing that the Court has foregone another opportunity to again shrink Fourth Amendment protections.

In two cases, the Court focused on two frequent street scenarios that raise "reasonable suspicion" conundra in the application of the stop and frisk doctrine of *Terry v. Ohio.*[40] *Illinois v. Wardlow* [41] required the Court to assess what weight a person's mere flight at the sight of the police can be given, and *Florida v. J.L.*[42] required the Court to assess what quantum of suspicion an anonymous tip about an individual's possession of a weapon should be given.

---

[33] *Id.*
[34] 476 U.S. 207 (1986).
[35] 488 U.S. 445 (1989).
[36] *Bond*, 120 S. Ct. at 1464.
[37] *Id.* at 1465.
[38] 389 U.S. 347 (1967).
[39] William E. Hellerstein, *Fourth Amendment*, 6 TOURO L. REV. 31. 48 (1989).
[40] 392 U.S. 1 (1968).
[41] 528 U.S. 119, 120 S. Ct. 673 (2000).
[42] 529 U.S. 266, 120 S. Ct. 1375 (2000).

In *Wardlow*, the defendant had been walking in a "high crime" neighborhood in Chicago. The neighborhood was known for drug trafficking and police officers expected to find drug dealers, lookouts, and buyers. Police officers formed a caravan of four cars, looking for drug trafficking in the area. The trial record established that the officers in the fourth car were in uniform, but it did not specify whether any of the officers drove marked cars.[43]

When the fourth car in the caravan passed the corner where Wardlow stood holding an opaque bag, Wardlow looked in the direction of the officers and fled.[44] The officers followed in their car, as Wardlow ran through a gangway and alley. Cornered by the police, Wardlow stopped. One of the officers immediately frisked him for weapons. He squeezed the bag and felt a heavy, hard object similar to the shape of a gun.[45] Opening the bag, he found a gun and ammunition, and arrested Wardlow.[46] Wardlow was convicted of unlawful use of a weapon by a felon after a bench trial and received a two-year sentence. The Illinois appellate courts reversed, holding that the officers lacked reasonable suspicion for a *Terry* stop. The Supreme Court reversed, holding that the officers had reasonable suspicion for the stop.[47]

In *Florida v. J.L.*,[48] the Miami-Dade Police received an anonymous call stating that a young black male, wearing a plaid shirt, was standing at a bus stop and had a gun.[49] The tip also referred to the presence of "several young black males" at the stop.[50] Two officers responded and went to the bus stop and saw three black males, one of whom was wearing a plaid shirt.[51] One officer told J.L, who was wearing a plaid shirt, to put his hands on the bus stop. He then frisked him and found a gun. The other officer frisked the others and found nothing.[52] The state charged J.L. with carrying a concealed weapon without a license and

---

[43] *Wardlow*, 120 S. Ct. at 674-75.
[44] *Id.* at 675.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 676.
[48] 529 U.S. 266, 120 S. Ct. 1375.
[49] *J.L.*, 120 S. Ct. at 1377.
[50] *Id.*
[51] *Id.*
[52] *Id.*

possessing a firearm without a license while under eighteen. The trial court granted J.L.'s motion to suppress the gun, an intermediate court reversed, and the Florida Supreme Court reversed, holding that the stop was invalid under *Terry* because there was no reasonable suspicion and that there was no "firearms exception" to stop and frisk jurisprudence.[53] The Supreme Court affirmed on both grounds: no reasonable suspicion[54] and no "firearms exception to *Terry*.[55]

In *Wardlow,* the Court split along traditional conservative and liberal lines in deciding the issue whether the police officers had reasonable suspicion for the stop. Chief Justice Rehnquist's opinion was subscribed to by Justices O'Connor, Scalia, Kennedy, and Thomas; Justice Stevens' concurring and dissenting opinion was joined by Justices Souter, Ginsberg, and Breyer. In *Florida v. J.L.*, the Court unanimously agreed that the officer lacked reasonable suspicion; only Justice Kennedy joined by the Chief Justice stated in a concurrence that the Court's holding was fact-specific, and would have little effect on the ability of the police to use anonymous tips to establish reasonable suspicion.[56]

When applying *Terry's* "reasonable suspicion" standard, one should never fail to appreciate the extremely fact-driven nature of stop and frisk cases. In *Wardlow,* the Court did not hold that flight alone gives rise to reasonable suspicion for a stop. Nor did it hold that presence by itself in a high crime area creates reasonable suspicion. But, when you put two such factors together, things may change, especially if a person exhibits "nervous, evasive behavior" which the Court characterized as not "going about one's business."[57] The Court distinguished between a person's ignoring a police officer and walking away, and a person's running "headlong" after spotting a police officer.[58] Thus, presence in a high crime area and running headlong can combine to satisfy the reasonable suspicion required quantum – as was the case with Wardlow himself.

---

[53] *Id.* at 1377-78.
[54] *Id.* at 1378-79.
[55] *Id.* at 1379-80.
[56] *J.L.*, 120 S. Ct. at 1381 (Kennedy, J., concurring).
[57] *Wardlow*, 120 S. Ct. at 676.
[58] *Id.*

Dissenting, Justice Stevens believed there were too many questions left open: (1) whether the other police cars were marked or unmarked; (2) whether the other officers were in uniform; (3) whether Wardlow was near anyone when he ran; (4)whether the address of the stop was the intended destination of the police caravan; (5) whether the officers drove quickly; and (6) whether Wardlow saw the other cars in the police caravan.[59] But the most important point made by Justice Stevens, especially in this season of racial profiling and very troubled minority community-police relationships is his cogent reminder that:

> [a]mong some citizens, particularly minorities and those residing in high crime areas, there is the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" or "abnormal." Moreover, these concerns and fears are known to the police officers themselves and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.[60]

In *Florida v. J.L.*, [61] the Court was surprisingly of one voice in concluding that reasonable suspicion was lacking. In *Alabama v. White,*[62] the Court had found an anonymous tip sufficient to meet the reasonable suspicion standard. Characterizing *White* as a "close case," the Court stated that unlike in *White*, the tipster in *J.L.* did not provide any predictive information that the officers could corroborate.[63] All that the tipster had was information about

---

[59] *Id.* at 678-79 (Stevens, J., concurring in part and dissenting in part).
[60] *Id.* at 680-81.
[61] *J.L.*, 120 S. Ct. 1375.
[62] 496 U.S. 325 (1990).
[63] *J.L.*, 120 S. Ct. at 1378-79.

what was currently happening.[64] The Court also rejected the prosecution's request for a "firearm exception" to *Terry,* which would have allowed officers to stop and frisk citizens based on an anonymous tip that the person had an illegal gun. It stated that such an exception would allow citizens to easily harass each other. It also added that it could not narrowly define such an exception, pointing out that several courts have assumed that if a person has drugs, then the person also has guns.[65] Thus, bare-boned anonymous tips about guns or drugs and guns as a predicate for a forcible stop are constitutionally unacceptable. However, the Court hinted that it might not be as demanding with respect to tips relating to a bomb and searches where individuals have a diminished expectation of privacy, such as at airports and schools.[66] Although dicta, I would take this statement seriously.

Somewhat concerned about the impact of the Court's decision on police practices in regard to anonymous tips Justice Kennedy, in a concurring opinion, provided some helpful hints as to how to handle anonymous callers such as (1) using caller identification; (2) recording the calls and comparing the voice to the voice of reliable tipsters; and (3) tracing the call and sending squad cars immediately to the location of the call.[67]

The last of the Fourth Amendment decisions, *Flippo v. West Virginia,*[68] was decided *per curiam,* and was a reaffirmation of the holding of *Mincey v. Arizona,*[69] which rejected the creation of a "crime scene exception" to the warrant requirement.

In *Flippo,* the police responded to a 911 call that had reported an attack at a cabin. When police officers arrived, they found the defendant outside the cabin. His head and legs were injured. The officers questioned him, and one went inside the cabin, finding the defendant's wife dead. The officers then closed off the scene, examined the surrounding area for footprints, and took the defendant to the hospital.[70] Police officers reentered the

---

[64] *Id.* at 1379.
[65] *Id.* at 1379-80.
[66] *Id.* at 1380.
[67] *Id.* at 1381 (Kennedy, J., concurring).
[68] 528 U.S. 11, 120 S. Ct. 7 (1999).
[69] 437 U.S. 385 (1978).
[70] *Flippo,* 120 S. Ct. at 7.

cabin at 5:30 a.m. to "process the crime scene" by taking pictures and searching the cabin. The trial court denied the motion to suppress on the ground that the Fourth Amendment authorized a "homicide crime scene" search. The appellate court denied review.[71] Obviously both courts had either not heard or cared about *Mincey*.

Flippo and *Mincey* permit the police to make warrantless entries into homes when they reasonably believe that a person within is in need of immediate aid. They also allow officers to search the area to find other victims or to find a killer on the premises. But contrary to common understanding, perhaps derived from watching too many episodes of Law and Order[72] or NYPD Blue,[73] police still need a warrant to reenter a crime scene to conduct a subsequent investigation. However, in *Flippo,* the Court left open whether the defendant's call for help gave "implied consent to search."[74]

III. SENTENCING AND DUE PROCESS

Compared to *Dickerson* and three of the four search and seizure decisions just discussed, *Apprendi v. New Jersey*[75] was little noticed as it lay on the Court's docket. And even after the decision was handed down, it took a while for it to be appreciated for the bombshell that it is.

In *Apprendi,* a five-to-four decision, the Court held that the constitutional guarantees of trial by jury and due process requires that except for prior convictions, any fact that increases a defendant's sentence beyond that provided by statute as the maximum for the crime of conviction must be proved to the jury beyond a reasonable doubt.

Apprendi was convicted for possession of a firearm for an unlawful purpose, classified under New Jersey law as a "second degree offense."[76] New Jersey's "hate crime" law authorized the

---

[71] *Id.* at 7-8.
[72] *Law & Order* (NBC television broadcast).
[73] *NYPD Blue* (ABC television broadcast).
[74] *Flippo,* 120 S. Ct. at 8-9.
[75] 120 S. Ct. 2348 (2000).
[76] N.J. STAT. ANN. § 2C:39–4(a) (West 1995).

trial court to determine by a preponderance of evidence that the crime was a "hate crime" and to impose a greater sentence than would have been allowable for the firearms charge alone.[77] The ordinary firearm offense carried a sentence range of five-to-ten years.[78] Under the hate crime statute, a judge finding by a preponderance of the evidence that a crime was committed "with a purpose to intimidate an individual or group of individuals because of race" could impose a sentence between ten-to-twenty years.[79] After a hearing, the sentencing judge found by a preponderance of the evidence that Apprendi had fired his weapon with a motivation of racial bias and sentenced Apprendi to twelve years in prison.[80]

The majority opinion, written by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, immediately had to deal with the fact that two relatively recent decisions had upheld statutes involving enhanced sentences based upon judicial findings of fact under a preponderance standard. In *McMillan v. Pennsylvania,*[81] the Court had sustained a statute that specified that a person convicted of certain felonies receive a mandatory minimum five-year sentence if the trial judge concluded by a preponderance of the evidence that the defendant visibly possessed a firearm in the course of committing the crime. And, in *Almendarez-Torres v. United States,*[82] the Court had upheld a sentence that had been enhanced beyond the term provided for by the statute of conviction upon the trial judge's finding that the defendant, who was charged with being in the United States after being deported, had previously been convicted of a felony. However, in a more recent case, *Jones v. United States,*[83] the Court said in a footnote that its prior cases suggested that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must

---

[77] N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000).
[78] N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995).
[79] N.J. STAT. ANN. § 2C:43-7(a)(3) (West Supp. 2000).
[80] *Apprendi,* 120 S. Ct. at 2351.
[81] 477 U.S. 79 (1986).
[82] 523 U.S. 224 (1998).
[83] 526 U.S. 227 (1999).

be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[84]

The significance of *Apprendi,* is appreciable in a number of ways. First, Justice Stevens suggested in a footnote that *McMillan* may be due for reconsideration, and limited it to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict."[85] Second, Stevens questioned seriously the correctness of the Court's decision in *Almendarez-Torres,* stating that at best, it represents an exceptional departure from historic practice and is a "narrow" recidivism exception to the general rule.[86] There was no need to reconsider *Almendarez-Torres* because the defendant had admitted his prior convictions and no additional fact had to be proven.[87]

Apprendi's significance grows even more when the views expressed by other Justices are examined. Justice Thomas would have gone much further than the majority. He would have overruled both *McMillan* and *Almendarez-Torres.*[88] He proposed a rule that any fact that "is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecutor's entitlement" to a particular kind, degree, or range of punishment "is an element" This would cover both recidivism and situations in which a fact triggers the application of a mandatory minimum sentence.[89]

Justice O'Connor, joined in dissent by the Chief Justice and Justices Kennedy and Breyer, called the decision a "watershed change in constitutional law"[90] and warned that it would undo "significant sentencing reform accomplished at the federal and state levels over the past three decades."[91] Justice O'Connor also made several suggestions as to how to avoid the Court's decision. She stated that a state could widen the sentencing range for crimes and make the upper end of the range available only upon the trial

---

[84] *Jones*, 526 U.S. at 243, n.6.
[85] *Apprendi,* 120 S. Ct. at 2361, n.13.
[86] *Id.* at 2361-62.
[87] *Id.*
[88] *Apprendi,* 120 S. Ct. at 2378-79 (Thomas, J., concurring).
[89] *Id.* at 2368-69 (Thomas, J., concurring).
[90] *Id.* at 2380 (O'Connor, J., dissenting).
[91] *Id.* at 2394 (O'Connor, J., dissenting).

court's finding, under the preponderance standard, of a purpose to intimidate. If that did not work, then the Court's decision would have "severe" consequences for sentencing in many jurisdictions. If it did work, then the Court's decision would do no more than require "meaningless formalism."[92]

Clearly something very important has happened here. But what that is remains to be seen. Are the Federal Sentencing Guidelines, and similar sentencing schemes, imperiled, as suggested by the dissenters? There is certainly a possibility that *Apprendi* could be extended and that *Almendarez-Torres* and even *McMillan* could be overturned. Not only would such a turn have a dramatic impact prospectively, it would raise very serious questions under retroactivity principles. Enhanced sentences that are predicated on constitutionally inadequate fact-findings would seem entitled to correction retroactively just as is a conviction violative of the reasonable doubt standard of *In Re Winship,*[93] as the Court held in *Ivan V. v. The City of New York.*[94]

On the other hand, it is important to appreciate the limits of *Apprendi*, as to what the decision by its own terms does not do. First, it does not address the ability of judges to exercise discretion in choosing a sentence within statutorily defined limits. Nor does it address a state's ability to define crimes, to set punishments, or to allow for significant ranges of permissible sentences for a given crime. For example, at least for now, New Jersey could redraft its hate crime statute and make the range of a second-degree felony whose purpose was to intimidate on account of race zero-to-twenty years or ten-to-twenty years, thus allowing the trial judge to impose a sentence of twelve years, as he did in *Apprendi*. New Jersey could also create separate crimes for those involving proof of acting with a purpose to discriminate and set a higher range than for those not requiring such proof. Only as to the former would a jury have to decide the additional "hate" element.

In *Castillo v. United States*,[95] the Court also had to confront the "elements" or "sentencing factor" conundrum and to again

---

[92] *Id.* at 2390-92 (O'Connor, J., dissenting).
[93] 397 U.S. 358 (1970).
[94] 407 U.S. 203 (1972)
[95] 120 S. Ct. 2090 (2000).

"feel the breath" upon its *Jones*[96] and *Almendarez-Torres*[97] decisions, which, I believe, pushed it to place the statute in question in the "elements of crime," column, rather than treat the statute as a sentencing statute. At issue was whether the specified types of firearms listed in the statute are elements of an offense that must be determined by a jury. The statute read that "Whoever, during and in relation to any crime of violence. . ., uses or carries a firearm, shall, in addition to the punishment provided for such crime. . . , be sentenced to imprisonment for five years. . ., and if the firearm is [*e.g.*,] a machinegun, . . .to imprisonment for thirty years."[98]

Writing for the Court, Justice Breyer held that the statute uses the word "machinegun" (and similar words) to state an element of a separate, aggravated crime.[99] He reasoned that (1) the statute's overall structure strongly favors the "new crime" interpretation;[100] (2) courts have not traditionally used firearm types (such as "machinegun)" as sentencing factors where the use or carrying of the firearm is itself the substantive crime;[101] (3) to ask a jury, rather than a judge, to decide whether a defendant used a machinegun would not complicate a trial or risk unfairness;[102] (4) the legislative history of the statute favors interpreting the statute as setting forth elements,[103] and (5) the length and severity of an added mandatory sentence that turns on the presence or absence of a machine gun weighs in favor of treating such offense-related words as referring to an element.[104]

Although Justice Breyer stated that the "elements" issue was easier to resolve than in *Almendarez-Torres*,[105] in which the Court was split 5-4,[106] I believe the Court was happy to avoid the constitutional issue that it had to face squarely in *Apprendi* and

---

[96] Jones v. United States, 526 U.S. 227.
[97] Almendarez-Torrez v. United States, 523 U.S. 224.
[98] 18 U.S.C. § 924(c)(1).
[99] *Castillo,* 120 S. Ct. at 2091.
[100] *Id.* at 2093.
[101] *Id.* at 2093-94.
[102] *Id.* at 2094-95.
[103] *Id.* at 2095-96.
[104] *Id.* at 2096.
[105] 523 U.S. 224.
[106] *Castillo,* 120 S. Ct. at 2096.

which it had not yet decided. And by applying the traditional rule that an ambiguous penal statute[107] would be construed in favor of the defendant, the Court was able to do that.[108]

IV. THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE ACT OF PRODUCTION DOCTRINE

The "act of production" doctrine, first announced by the Supreme Court in *Fisher v United States*,[109] has been viewed by some as inadequate to protect the true purposes of the privilege against self-incrimination.[110] The essence of the doctrine is that if the custodian of documents subpoenaed by the Government was not compelled to create them, the documents themselves fall outside the privilege; the act of production, assuming its relevance to a particular criminal charge, is all that is barred.

In *United States v. Hubbell*,[111] even though the prosecution disclaimed reliance on the act of production, the Court stated that there still remained the question of whether the government had already made use derivatively of the testimonial aspect of that act in obtaining the indictment against Hubbell.[112] In an eight-to-one decision with Chief Justice Rehnquist the sole dissenter, the Court held that a grand jury witness who, having been served with a

---

[107] *See, e.g.*, Staples v. United States, 511 U.S. 600, 619, n.17 (1994) (rule of lenity requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused"); United States v. Bass, 404 U.S. 336, 347 (1971).

[108] *Castillo*, 120 S. Ct. at 2096.

[109] 425 U.S. 391, 400-02 (1975).

[110] *See* Fisher v. United States, 425 U.S. 391, 420 (1975) (Brennan J. concurring) ("An individual's books and papers are generally little more than an extension of his person. They reveal no less than he could reveal upon being questioned directly. Many of the matters within an individual's knowledge may as easily be retained within his head as set down on a scrap of paper. I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production." * * * "For it is not enough that the production of a writing, or books and papers, is compelled. Unless those materials are such as to come within the zone of privacy recognized by the [Fifth] Amendment, the privilege against compulsory self-incrimination does not protect against their production"). *Id.* at 423.

[111] 120 S. Ct. 2037 (2000).

[112] *Hubbell*, 120 S. Ct. at 2046.

subpoena duces tecum and granted immunity, produces documents that the government is unable to identify with precision in the subpoena is protected by the immunity grant from being prosecuted on criminal charges that were prepared with the help of the documents.[113]

The Hubbell of the case, of course, was Webster Hubbell, former Associate Attorney General of the United States and close friend of President Clinton and Mrs. Clinton. As you may recall, the Independent Counsel, Kenneth Starr, investigating the Whitewater scandal,[114] obtained an indictment against Hubbell for mail fraud and tax evasion arising out of his billing practices at the Rose Law Firm in Little Rock, Arkansas. Hubbell pled guilty and agreed to cooperate fully with the Independent Counsel in regard to Whitewater.[115]

Starr's second prosecution of Hubbell, for additional tax evasion, resulted from Starr's attempt to determine whether Hubbell had fulfilled his agreement to cooperate. Accordingly, he subpoenaed from Hubbell, eleven categories of documents, totaling more than 13,000 pages, for production before a Little Rock Grand Jury.[116] Hubbell refused to state whether he had those documents and Starr obtained a court order directing him to respond and granting him immunity "to the extent allowed by law."[117] Hubbell then produced the documents, which provided the basis for a second indictment, in the District of Columbia. Of 10 counts of tax related crimes, and mail and wire fraud.[118]

The district court dismissed the indictment as violative of the immunity grant.[119] The court of appeals vacated that decision

---

[113] *Id.* at 2046-47.

[114] Whitewater refers to the investigation in which Independent Counsel Kenneth Starr sought to determine "whether any individuals or entities ha[d] committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." United States v. Hubbell, 167 F.3d 552, 554-55 (D.C. Cir. 1999).

[115] *Hubbell*, 120 S. Ct. at 2040.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 2041.

[119] United States v. Hubbell, 11 F. Supp. 2d 25, 33-37 (D.D.C. 1998).

and remanded the case so that the Mr. Starr could prove at a hearing that his office came upon the evidence leading to the indictment from a source independent of the testimonial value of Hubbell's compelled act of production in response to the subpoena.[120] Starr acknowledged that he could not make such a showing but argued that he was not required to do so.

In the Supreme Court, Justice Stevens, writing for the Court, held that Starr's concession that he could not prove independent source required dismissal of the indictment.[121]

Because I have found that the "act of production" doctrine confounds not only law students, but active practitioners, it is worth a moment's time to relate Justice Stevens' review of its governing principles: First, *Fisher* established that a person may be required to produce specific documents even though they contain incriminating evidence because the creation of those documents was not "compelled" within the meaning of the privilege.[122] But the act of producing documents in response to a subpoena may have a compelled testimonial aspect in that the witness could be admitting that the papers existed, were in his possession or control, and were authentic.[123] Second, compelled testimony that communicates information that may lead to incriminating evidence is privileged even if the information itself is not inculpatory.[124] Applying these principles to the subpoenaed documents, Stevens concluded that the compelled testimony was not in the contents of the records but in the testimony inherent in the act of producing the documents.[125]

Starr argued that he did not need to introduce the documents into evidence in order to prove the charges against Hubbell and thus he was not making improper use of Hubbell's compelled testimony. Stevens responded that this is a separate question from whether Starr had already made derivative use of the testimonial aspect of the act of production in obtaining the

---

[120] *Hubbell*, 167 F.3d at 581.
[121] *Hubbell*, 120 S. Ct. at 2048.
[122] *Id.* at 2043.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 2043-44.

indictment and preparing for trial–which Starr clearly had.[126] Stevens pointed out that the text of the subpoena itself showed that Starr needed Hubbell's assistance both (a) to identify potential sources of information and (b) produce those sources. Stevens likened it to requiring Hubbell to answer a set of interrogatories or give oral testimony as to the location of particular documents fitting a broad description– in contrast to asking for a specific document: "[t]he assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strong box."[127] Stevens also noted that Hubbell's act of producing the documents was the first step in a chain that led to the prosecution: the documents arrived not as "'manna from heaven,'" but only after Hubbell "took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena."[128]

The importance of the Hubbell decision lies in the fact that it counterbalances or offsets the Court's "act of production" doctrine, which defines very narrowly the meaning of "compelled," by increasing the scope of derivative use immunity and thereby making it more difficult for the government to meet the independent source standard.

Justice Thomas' concurring opinion which Justice Scalia joined, is especially interesting. Justice Thomas believes the Court should reconsider entirely the "act of production" doctrine which the Court created in *Fisher*.[129] In his view, the doctrine is based on a misreading of the text of the Fifth Amendment itself. Although the amendment states that a person shall not be compelled to be a witness against himself, the history leading up to James Madison's writing of the amendment meant that a person could not be compelled to *give evidence against himself* because that's what witnesses do. Madison's phrasing, Thomas argues, was not meant to change this usage and there was no indication in the debates that it was so intended.[130] Put another way, there was no difference to

---

[126] *Id.* at 2044.
[127] *Hubbell*, 120 S. Ct. at 2047.
[128] *Id.* at 2046-47.
[129] *Id.* at 2050 (Thomas, J., concurring).
[130] *Id.* at 2051-53 (Thomas, J., concurring).

Madison between a subpoena ad testificandum (which the Fifth Amendment clearly prohibits) and a subpoena duces tecum (which calls for previously created documents) and is allowed under *Fisher.*

Thomas acknowledged (and advocated) that his analysis could lead the Court to reexamine its departure from the doctrine of *Boyd v. United States,*[131] which had rested to a substantial degree on the idea that a subpoena of a person's personal papers violated the privilege.[132] Whether a majority of the Court would ever agree to return to *Boyd* and abandon the "act of production" doctrine is highly questionable–especially since the impact on law enforcement would be enormous.

V. AFFECTING LITIGATION STRATEGIES

The Supreme Court decided two cases that will have a direct impact on defense strategies. I believe both decisions are misguided and unfortunate. In *Portuondo v. Agard,*[133] the Court held that a prosecutor's comment during summation that the defendant, who testified, had an opportunity to tailor his testimony to that of other witnesses, did not violate either the defendant's Sixth Amendment right to testify on his own behalf, and be present at his trial, or his Fourteenth Amendment right to due process.[134]

In a surprisingly one-sided, seven-to-two decision the Court, in an opinion written by Justice Scalia, reversed the Second Circuit's decision, written by Chief Judge Ralph Winter. Justice Scalia framed the issue as one requiring an "extension" of *Griffin v. California,*[135] which, in 1965, held that a prosecutor could not comment on a defendant's refusal to testify and that to allow such comment unconstitutionally cuts down on the privilege against self-incrimination by making its assertion costly.[136]

Scalia observed first that no evidence historically supported the defendant's argument and that the defendant had not cited one

---

[131] 116 U.S. 616 (1886).
[132] *Boyd,* 116 U.S. at 634-35.
[133] 529 U.S. 61, 120 S. Ct. 1119 (2000).
[134] *Portuondo,* 120 S. Ct. at 1122-28.
[135] 380 U.S. 609 (1965).
[136] *Portuondo,* 120 S. Ct. at 1123.

case in which the practice was even challenged before *Griffin*.[137] *Griffin*, he said, prohibited the prosecution from urging the jury to do what it was not permitted to do, something that was not natural. By contrast, it is natural and irresistible for a jury, in evaluating a defendant's credibility, to weigh in the balance that he heard the testimony of all those who preceded him.[138] Scalia further distinguished *Griffin* as prohibiting comments that suggest a defendant's silence is evidence of guilt; here, he argued, it is merely a comment on the defendant's credibility as a witness – which is always in issue when he testifies.[139]

Scalia relied on *Brooks v. Tennessee*,[140] which struck down Tennessee's requirement that the defendant testify first or not at all. In that case, the Court adverted to the danger of "tailoring" and said that there was a less heavy-handed way to deal with that – the adversary system which reposes judgments of the credibility of all witnesses in the jury.[141] That New York law requires a defendant to be present at his trial,[142] Scalia concluded, did not lend support to the argument that there is a due process violation. What apparently escaped Scalia's notice or concern is that, ironically, the consequence of the Court's decision can be to force a defendant to do what the unconstitutional Tennessee statute required him to do – testify first.

Agard's counsel relied heavily on *Doyle v. Ohio*,[143] which held that a defendant cannot be cross-examined as to why he remained silent after receiving Miranda warnings. Scalia said there might be reason to reconsider *Doyle* but that it was not necessary to do so in this case: a statute requiring a defendant to be present at trial does not contain a promise of no penalty similar to the one the Court found in *Doyle*.[144]

Justice Stevens' concurrence, joined by Justice Breyer, is more than a little puzzling. He didn't like the prosecutor's

---

[137] *Id.* at 1124.
[138] *Id.*
[139] *Id.* at 1125.
[140] 406 U.S. 605 (1972)
[141] *Brooks*, 406 U.S. at 610.
[142] N.Y. CRIM. PROC. LAW § 60.45 (McKinney 2000).
[143] 426 U.S. 610 (1976).
[144] *Portuondo*, 120 S. Ct. at 1128.

summation but didn't think it rose to a constitutional violation.[145] Nonetheless, he denounced it by stating that "it demeaned due process," "violated respect for the petitioner's dignity," and "ignored" the presumption of innocence. Stevens also said that he agreed with much of the dissent, but he thought that trial judges can protect a defendant with adequate instructions to the jury.[146] One might ask Justice Stevens how much more he needs to take it to the level of a constitutional violation.

In dissent Justice Ginsburg, joined by Justice Souter, stated that the decision does not advance the truth because every defendant who testifies is now subject to a generic accusation about his opportunity for tailoring.[147] She pointed out that the prosecution is always free, on cross-examination, to raise the tailoring issue, that all the Second Circuit had prohibited is the prosecution from doing it when there is no particular reason to believe tailoring has occurred, and that a generic accusation on summation removes the benefit of doubt given in ambiguous situations by *Griffin* and *Doyle*, to the inference of innocence.[148] The consequence of the majority's position, she emphasized, is that it can prevent a defendant from answering the charge.[149] Justice Ginsburg responded to Justice Scalia's historical argument by pointing out that the common law customary practice of taking pretrial statements, upon which Scalia relied, actually explained why prosecutors at trial had no need to make generic tailoring arguments – and that is why defense counsel couldn't cite any cases.[150]

Now that prosecutors have been given constitutional license to make generic tailoring arguments, what will happen in New York? Agard's petition for leave to appeal to the New York Court of Appeals was denied and, for a while, he was the rare recipient of a favorable federal habeas corpus ruling by the Second Circuit. Therefore, it is unlikely that the New York Court of Appeals will find that the practice violates the New York

---

[145] *Id.* at 1128-29 (Stevens, J., concurring).
[146] *Id.* at 1129 (Stevens, J., concurring).
[147] *Id.* at 1129 (Ginsburg, J., dissenting).
[148] *Id.* at 1130-32 (Ginsburg, J., dissenting).
[149] *Id.* at 1133 (Ginsburg, J., dissenting),
[150] *Portuondo,* 120 S. Ct. at 1132-33 (Ginsburg, J., dissenting).

Constitution. I say unlikely only because individual judges of the Court of Appeals, who must each rule on hundreds of leave applications each year, occasionally overlook the significance of a particular issue when considering a leave application. That had to be the case in *Portuondo v. Agard.* In my view, any case that is decided by the Supreme Court perforce must contain an issue worthy of review by the New York Court of Appeals.

Nonetheless, I don't think this should be the end of the discussion. There is nothing that compels a trial judge to allow a "tailoring" accusation in a prosecutor's summation simply because the Supreme Court has not condemned it as a constitutional matter. As Justice Stevens maintained, the practice stinks for the reasons he and Justice Ginsburg detailed. Moreover, we have never subscribed exclusively to Holmes' "bad man" theory of the law.[151] Quite the contrary, I believe many adhere to the principle that our jurisprudential frame of reference imports norms that have far greater moral gravitas. And, since we have always viewed our trial judges as having broad discretion to insure the fairness of a trial, there is nothing that requires a judge to mechanically approve a prosecutor's attempt in summation to accuse a defendant of tailoring when there is no basis for it other than the defendant's presence at his own trial.

What then should defense counsel do given the possibility that the prosecution may indulge itself with the fruits of *Portuondo v. Agard?* First, counsel should ascertain from the judge if he or she will allow it. If the answer is yes, then counsel must assess the risks and advise the defendant accordingly on whether he or she should testify. If the decision is that the defendant should testify, then defense counsel should, during summation, attempt to preempt the prosecutor by telling the jury that they may expect such a statement from the prosecutor, and that the jury should

[151] Oliver Wendell Holmes, Jr. *The Path of the Law,* 10 HARV. L. REV. at 42-43, *reprinted in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES at 393. (Sheldon M. Novick ed., Univ. of Chicago Press, 1995). "If we take the view of our friend the bad man we shall find that he does not care two straws for . . . axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law". *Id.*

appreciate that the prosecutor, when he or she had the chance do so on cross-examination of the defendant, made no effort to attack the defendant's testimony as tailored.

The second case that has a direct impact on trial strategy is *Ohler v. United States*,[152] in which the Court, in a five-to-four decision held that in federal trials, a defendant who preemptively introduces evidence of a prior conviction on direct may not then challenge on appeal, the trial judge's decision on a motion *in limine* to allow the prosecution to use the prior conviction, pursuant to Rule 609 (a)(1) of the Federal Rules of Evidence[153] to impeach the defendant's credibility.

Ms. Ohler was charged with marijuana offenses. The trial judge granted the Government's motion to admit her prior felony conviction to impeach her credibility. In the face of that ruling, defense counsel introduced it himself as part of the defedant's direct case. The Ninth Circuit held that by introducing it, the defendant had waived the right to contest the ruling on appeal.[154]

Writing for the majority, Chief Justice Rehnquist stated that the case was governed by the "well-established common sense principle" that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted."[155] Ohler argued that a defendant who is forced to allow the prosecutor on cross-examination to bring out prior convictions would appear to be hiding the truth. The Government disputed that was the case. Rehnquist made no attempt to resolve that issue; instead he pointed out that both sides "must make choices as the trial progresses," and acceptance of the defendant's position would deny the prosecution

---

[152] 120 S. Ct. 1851 (2000).

[153] FED. R. EVID. 609(a)(1) states in pertinent part:

> For the purposes of attacking the credibility of a witness . . . evidence that an accused has been convicted of such a crime [punishable by death or imprisonment in excess of one year] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial affect to the accused.

Id.

[154] United States v. Ohler, 169 F.3d 1200, 1204 (9th Cir. 1999), *aff'd by Ohler*, 120 S. Ct. 1851.

[155] *Ohler*, 120 S. Ct. at 1853.

the right to make one of those choices.[156] Rehnquist explained that even after prior convictions have been held admissible for impeachment, the prosecution might decide not to risk using them if the case appears to be going well.[157] He maintained that the rule sought by the defendant would "short-circuit" the prosecution's decisional process.[158] Also, it would be inconsistent with *Luce v. United States*,[159] which held that a defendant who decides not to testify after an unfavorable ruling on the admissibility of priors may not appeal the ruling after conviction.[160]

Justice Souter, joined in dissent by Justices Stevens, Ginsburg, and Breyer, argued that the majority's conclusion was unprecedented and in disregard of the rules of evidence and the reasonable objectives of a trial.[161] First, he pointed out that in *Luce*, the defendant did not take the stand and therefore the Court's decision turned on the practical realities of appellate review; without the defendant's testimony, the Court would have had to speculate on whether the trial judges ruling was harmless error.[162] Secondly, *Luce* was not a waiver case; it merely articulated the incapacity of an appellate court to assess the significance of a ruling to a defendant who did not testify.[163] Third, the Court's reliance on the "common sense" rule that a party who introduces evidence cannot complain on appeal is not based on common sense when the party has opposed its admission and only seeks to mitigate its effect; basic procedure assumes the right to mitigate in the face of erroneous rulings.[164]

Finally, allowing the defendant to preemptively admit the evidence promotes fairness without depriving the Government of anything to which it is entitled; on the other hand, if the defendant says nothing, the jury may infer that the defendant intended to

---

[156] *Id.* at 1853-54.
[157] *Id.* at 1854.
[158] *Id.*
[159] 469 U.S. 38 (1984).
[160] *Ohler*, 120 S. Ct. at 1854.
[161] *Id.* at 1855 (Souter, J., dissenting).
[162] *Id.* at 1855 (Souter, J., dissenting).
[163] *Id.* at 1855-56 (Souter, J., dissenting).
[164] *Id.* at 1856 (Souter, J., dissenting).

mislead. But if she does advert to the prior conviction, the erroneous ruling is insulated from review.[165]

Defense attorneys in federal trials now face a very difficult choice, perhaps even more difficult than that resulting from *Portuondo v. Agard*.[166] Many factors will influence the decision as to whether a defendant should take the stand. That the prosecutor may avail herself of the generic tailoring argument in summation may not, under a totality of circumstances, keep the defendant off the stand. However, given the prevalence of motions *in limine* as to the admissibility on cross examination of prior convictions, defense counsel will have to face quite regularly the painfully difficult choice of whether to take the sting out of the defendant's prior convictions or waiving a viable attack on the court's decision to allow them to be used in the first place.

Both cases clearly display the Supreme Court's willingness to allow the prosecution to place extra fingers on the scale of justice. A result in favor of the defendant in both *Portuondo* and *Ohler* would cost the Government nothing. In the *Portuondo* context, the Government's "tailoring" concerns can be raised easily on cross-examination. In the *Ohler* context, the government always can place before the jury all of the defendant's prior convictions which it is *legitimately* entitled to use. All that it would have lost had the Court reversed Ohler's conviction would have been the right to use the *illicit* windfall afforded it by a trial judge's erroneous *in limine* ruling on the admissibility of some or all of a defendant's prior convictions to impeach his or her credibility.

VI. THE *EX POST FACTO* CLAUSE[167]

The Court decided three *Ex Post Facto* Clause cases.[168] One, *Carmell v. Texas*,[169] is of particular significance in New York

---

[165] *Id.* at 1857-58 (Souter, J., dissenting).
[166] 529 U.S. 61, 120 S. Ct. 1119 (2000).
[167] U.S. CONST., art. I, § 10, states in pertinent part: "No state shall . . . pass any . . . ex post facto law . . . ." *Id.*
[168] Johnson v. United States, 120 S. Ct. 1795 (2000); Carmell v. Texas, 120 S. Ct. 1620 (2000); Garner v. Jones, 120 S. Ct. 1362 (2000).
[169] 120 S. Ct. 1620.

because it effectively overrules the New York Court of Appeals' decision in *People v. Hudy*.[170] Both *Hudy* and *Carmell* involved sex crimes against minors, and both involved a change in the rules with respect to corroboration evidence necessary to convict.[171] In *Carmell,* the defendant was convicted of various offenses, including sexually assaulting his stepdaughter when she was between the ages of fourteen and eighteen.[172] At the time of the crimes, Texas law allowed a conviction that was based on the uncorroborated testimony of the victim of the sexual offense if the victim made "fresh outcry," *i.e.* by informing any person, other than the defendant, within six months of the date of the offense. However, where the victim was under fourteen, the "fresh outcry" was not required.[173] Subsequent to the dates of the defendant's alleged offenses, the Texas statute was amended to eliminate the "outcry" requirement for victims under the age of eighteen.[174] The Supreme Court held that the State's reliance on the post-offense amendment to obtain the defendant's conviction violated the *Ex Post Facto* Clause.[175] The Court split five-to-four, with Justice Stevens writing for the majority; he was joined by Justices Scalia, Thomas, Souter, and Breyer. Justice Ginsburg wrote the dissent– one of those rare events in which she was in the unusual company of the Chief Justice and Justices O'Connor and Kennedy.

The majority held that the Texas statute, as amended, violated the *Ex Post Facto* Clause because it altered the legal rules of evidence and allowed the receipt of less or different testimony than the law required at the time of the commission of the offense

---

[170] 73 N.Y.2d 40, 535 N.E.2d 250, 538 N.Y.S.2d 197 (1988). The Court of Appeals held that "The *Ex Post Facto* Facto Clause of the United States Constitution does not require that a defendant be tried under the corroboration rules that existed at the time his alleged crimes were committed. 73 N.Y.2d at 44-45.

[171] *See Carmell*, 120 S. Ct. at 1624-26; *Hudy,* 73 N.Y.2d at 44-45.

[172] *Carmell*, 120 S. Ct. at 1624.

[173] TEX. CODE CRIM. PROC. ANN., art. 38.07 (Vernon 1983).

[174] TEX. CODE CRIM. PROC. ANN., art. 38.07, as amended by Act of May 29, 1993, 73d LEG., REG. SESS., ch. 900 § 12.01, 1993 TEX. GEN. LAWS 3765, 3766, and Act of May 10, 1993, 73d LEG., REG. SESS., ch. 200, § 1, 1993 TEX. GEN. LAWS 387, 388.

[175] *Carmell*, 120 S. Ct. at 1632-34.

in order to convict the defendant.[176] The issue before the Court turned on whether the Texas statute as amended was a sufficiency of evidence rule or a witness competency rule. The state courts and Justice Ginsburg in her dissent, relied on *Hopt v. Territory of Utah*,[177] an 1884 decision which upheld the retrospective application of a witness competency statute that allowed the prosecution to present the testimony of witnesses who had been convicted of felonies.

Justice Stevens stated that the Texas statute could not be read as a witness competency statute. First, it began with the words "a conviction . . . is supportable," and a different Texas statute dealt with the competency of witnesses. Secondly, rules reducing the quantum of evidence "will *always*" run in the prosecution's favor," and directly implicate "elements of unfairness and injustice in subverting the presumption of innocence."[178] On the other hand, rules relaxing prior restrictions on witness competency do not always favor the prosecution.[179]

Carmell is an important *Ex Post Facto* Clause decision. In the seminal case of *Calder v. Bull*,[180] Justice Chase stated that the proscription against *ex post facto* laws applied to four categories of *ex post facto* criminal laws: (1) a law that criminalizes conduct that was legal before enactment of the law; (2) a law that aggravates a crime, or makes it greater than when committed; (3) a law that increases the punishment for a crime after the date of its commission, and (4) a law that alters the legal rules of evidence, and receives less or different testimony that facilitates conviction of the offender.[181] The U.S. Government, appearing as *amicus curiae* in *Carmell*, argued that the fourth category was not viable and should be abandoned. It maintained that neither Blackstone nor *ex post facto* clauses in Ratification-era state constitutions mention the fourth category and thus Justice Chase got it wrong.

---

[176] *Id.* at 1631. "The [Texas law] is unquestionably a law 'that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.'" *Id.* (quoting Calder v. Bull, 3 U.S. 386, 390 (1798).

[177] 110 U.S. 574 (1884).

[178] *Carmell*, 120 S. Ct. at 1640.

[179] *Id.*

[180] 3 U.S. 386 (1798).

[181] *Calder*, 3 U.S. at 390.

Justice Stevens pointed out that to accept the Government's argument would require the Court to also abandon the third category because it too was not mentioned in those sources.[182]

In the second *Ex Post Facto* Clause case, *Garner v. Jones*,[183] the Court held that a Georgia law adopted in 1985 permitting an extension of the intervals between parole considerations did not constitute an *ex post facto* law if applied retrospectively.[184] By a six-to-three vote, in a majority opinion written by Justice Kennedy and joined by Chief Justice Rehnquist, Justices O'Connor, Thomas, and Breyer, the Court based its ruling on the fact that there was no record evidence that suggested that there is a significant risk of prolonging the incarceration of inmates."[185] The Court felt secure in its conclusion because "the statutory structure, its implementing regulations, and the Parole Board's unrefuted representations regarding its operations do not lead to the conclusion" that there will be an increase in the length of incarceration.[186]

Justice Souter dissented and was joined by Justices Stevens and Ginsburg. He disagreed with the majority's assessment of the risk to which inmates were exposed, arguing that Georgia officials not only had given the courts insufficient information as to the actual working of the new parole regime, they had affirmatively resisted discovery.[187] He also detailed ways in which the system could operate to prolong incarceration.[188]

The third *Ex Post Facto* Clause case, *Johnson v. United States*,[189] raised the question of whether a federal district court is authorized to impose an additional term of supervised release under 18 U.S.C. § 3583 (h) after an individual was reimprisoned for violating the terms of the initial supervised release.[190] The Court, with Justice Souter writing for an eight member majority, held that Congress so intended and that as thus construed there was

---

[182] *Carmell*, 120 S. Ct. at 1634-36.
[183] 120 S. Ct. 1362 (2000).
[184] *Garner*, 120 S. Ct. at 1367-70.
[185] *Id.* at 1369-71.
[186] *Id.* at 1369.
[187] *Id.* at 1373-75 (Souter, J., dissenting).
[188] *Id.* at 1374, n.3 (Souter, J., dissenting).
[189] 120 S. Ct. 1795.
[190] *Johnson*, 120 S. Ct. at 1800-02.

no *Ex Post Facto* Clause issue because the penalties imposed upon revocation of supervised release qualify as punishment for the original offense.[191]

VII. HABEAS CORPUS

The Court decided several important habeas corpus cases but time constraints limit my discussion considerably. Two cases meriting discussion were each entitled *Williams v. Taylor* but involved different petitioners. Both were capital cases and both habeas petitioners prevailed – a remarkable event in its own right.

In *Williams (Terry) v. Taylor*[192] the Court, for the first time, had to interpret Section 2254 (d)(1) of the 1994 Antiterrorism and Effective Death Penalty Act (AEDPA).[193] Under section 2254 (d)(1), a federal court may not grant habeas corpus relief on the basis of a claim adjudicated on the merits in state court unless the state court adjudication "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."[194]

The alignment of the Justices requires a scorecard. The segment of the decision that sets forth the critically important statutory interpretation discussion was authored by Justice O'Connor and joined by the Chief Justice and Justices Kennedy, Scalia, and Thomas. The segment that describes the background of the case and the application of the statute to the facts was written by Justice Stevens and joined by Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer.

The O'Connor majority held that a state court decision that applies a correctly identified federal constitutional standard in a reasonable way must be upheld even if it conflicts with a federal court's interpretation of the same standard.[195] This majority made

---

[191] *Id.* at 1802-07.

[192] 120 S. Ct. 1495 (2000).

[193] 28 U.S.C. § 2254(d)(1) (1994 ed., Supp.III), gives the court authority to grant a habeas corpus petition if the prior state court decision was either "contrary to, or . . . an unreasonable application of, clearly established federal law." *See Williams*, 120 S. Ct. at 1503-04.

[194] *Id.*

[195] *Id.* at 1518-21.

it clear that Congress did more to limit the availability of federal habeas review than merely codify the standards of *Teague v. Lane*.[196] They concluded that the phrases "contrary to" and "unreasonable application of" were intended by Congress to establish two distinct exceptions to Section 2254 (d)'s general prohibition on granting relief.[197] Thus, a state court decision that is "contrary to" clearly established Supreme Court precedent is one in which the state court either (1) arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or (2) "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours."[198]

Justice O'Connor noted that prior to AEDPA, federal habeas courts reviewed constitutional claims under a "plenary" or "de novo" standard of review.[199] But she took issue with Justice Stevens' view that Congress' enactment of AEDPA did not effect prior habeas corpus law in this regard.[200] She argued that Stevens had failed "to give independent meaning to both the 'contrary to' and "unreasonable application" clauses of the statute."[201] In her view, under § 2254(d)(1)'s 'unreasonable application' clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.[202] The complexity of this issue merits quoting Justice O'Connor's summarization in full:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is

---

[196] 489 U.S. 288 (1989).
[197] *Williams*, 120 S. Ct. at 1519-20.
[198] *Id.* at 1519.
[199] *Id.* at 1516-17.
[200] *Id.* at 1518.
[201] *Id.* at 1519.
[202] *Id.* at 1520-21.

> satisfied–the state court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . .clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing principle from this Court's decisons but unreasonably applies that principle to the facts of the prisoner's case.[203]

One very important aspect of the O'Connor majority's delineation of the "unreasonable application" standard is that it disapproved a formulation that would have required a habeas petitioner to show that all reasonable jurists would agree that the state court acted unreasonably. Justice O'Connor observed that such a standard, for which some support in prior decisions could be found, "would tend to mislead federal judges because it focused attention on a subjective, rather than an objective inquiry."[204] With regard to the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," the majority stated that it refers to the holdings, as opposed to the dicta of the Court's decisions as of the time of the relevant state court decision.[205]

As to Williams' own habeas claim, a majority coalesced around those segments of Justice Stevens' opinion that held the state court's decision was both "contrary to" and "involved and unreasonable application of" the Court's *Strickland*[206] standard

---

[203] *Williams*, 120 S. Ct. at 1523.
[204] *Id.* at 1521-22.
[205] *Id.* at 1523.
[206] Strickland v. Washington, 466 U.S. 668 (1984).

governing the Sixth Amendment's effectiveness of counsel requirement.[207]

Williams had been sentenced to death. On state post-conviction review, the trial judge decided that defense counsel had been ineffective by failing to investigate and present mitigating evidence during the sentencing phase. The Virginia Supreme Court reversed on the ground that even if counsel's performance was subpar, the level of prejudice required to be shown under *Strickland* had been raised by the Supreme Court's 1993 decision in *Lockhart v. Fretwell.*[208] The Fourth Circuit upheld that determination.[209] The Stevens' majority rejected the idea that *Lockhart* required, in addition to a *Strickland*-type prejudice showing, a further inquiry into the fundamental fairness of petitioner's trial.[210] Stevens pointed out that *Lockhart* involved an unusual situation in which a defendant-favorable decision that counsel failed to invoke had been overruled by the time the habeas claim reached the Supreme Court.[211]

Williams (Michael Wayne) v. Taylor[212] required the Court to construe Section 2254(e)(2) of AEDPA,[213] which sharply limits a habeas petitioner's ability to obtain a hearing on a claim the

---

[207] *Williams,* 120 S. Ct. at 1512-13.
[208] 506 U.S. 364 (1993).
[209] *Williams,* 120 S. Ct. at 1499-1503.
[210] *Id.* at 1512-15.
[211] *Id.* at 1512-13.
[212] 120 S. Ct. 1479.
[213] 28 U.S.C.§ 2254(e)(2) (1994 ed., Supp. III):

> If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–
> (A) the claim relies on–
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Id.

factual basis for which was not developed in state court. In a unanimous decision, written by Justice Kennedy, the Court held that this provision does not apply unless there has been some fault, amounting at least to a lack of diligence, on the part of the petitioner or his attorney.[214]

Section 2254(e)(2) provides that if the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless certain conditions obtain.[215] The state argued that the section applies regardless of whether the petitioner is at fault in some way for the failure of the factual basis for the claim to be developed.[216]

The Court rejected this "no-fault" reading of the statute, stating that in its customary and preferred sense, 'fail' connotes some omission, fault, or negligence on the part of the person who has failed to do something,-- a no-fault rule would more logically use the formulation "did not" than "has failed to."[217] Of considerable importance is the Court's ultimate conclusion that the purposes of AEDPA do not demand adoption of the state's no-fault reading and that furtherance of comity, equity, and federalism does not require that petitioners who exercise diligence in pursuing their claims be treated the same as petitioners who do not.[218] The Court then determined that Williams could not be blamed for the underdevelopment of the factual bases of two of his three claims, those relating to juror bias and to prosecutorial misconduct.[219]

The interesting aspect of these two cases is the possibility that the Court may be approaching habeas corpus a little more progressively than its dismal record in recent years would lead one to expect. However, I think it too early to tell if these two cases warrant a feeling of greater comfort on the part of state defendants. Nonetheless, it is refreshing to note that even this Supreme Court finds some of the Fourth Circuit's habeas corpus jurisprudence unpalatable.

---

[214] *Williams*, 120 S. Ct. at 1488-90.
[215] *See supra* note 213 and accompanying text.
[216] *Williams*, 120 S. Ct. at 1489.
[217] *Id.* at 1488.
[218] *Id.* at 1490-91.
[219] *Id.* at 1491-94.

VIII. JURY REQUESTS

Well, here's a Fourth Circuit ruling that five Justices did not find unpalatable, although it should have. In *Weeks v. Angelone*,[220] the Court held that the Constitution is not violated when a trial judge simply redirects a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to a question regarding the proper consideration of mitigating circumstances.[221]

In this capital case, the jury was given a pattern instruction setting out the sentencing options and the two aggravating factors alleged by the prosecution. The instruction said that at least one aggravating factor had to be found beyond a reasonable doubt in order for the death penalty to be imposed. After deliberating for a time, the jury sent out a written question asking whether if it believed that the defendant was guilty of at least one aggravating factor, its duty was "to *issue* the death penalty" or to "*decide* (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences?"[222] Defense counsel asked the court to tell the jurors that even if they found one or both aggravators, they could still impose one of the life sentences. The court refused, saying that it could not improve on its previous instruction; it then referred the jurors to the relevant paragraph in its original instruction.[223]

Chief Justice Rehnquist, writing for the majority, stated that a jury is presumed to follow its instructions and is presumed to understand a judge's answer to a question.[224] He emphasized that Weeks' jury did not inform the court that after reading the relevant paragraph of the instruction, it still did not understand its role. "To presume otherwise," he said, "would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer."[225]

---

[220] 120 S. Ct. 727 (2000).
[221] *Weeks*, 120 S. Ct. at 729.
[222] *Id.* at 730-31.
[223] *Id.*
[224] *Id.* at 733.
[225] *Id.*

In dissent, Justice Stevens, joined by Justices Souter, Ginsberg, and Breyer, stated that the jury instructions on mitigating evidence were ambiguous and could be read to mean that a life term could be imposed only if the prosecution proved neither aggravator.[226] He emphasized that the language to which the trial court referred the jury had to have been the source of the confusion the jury wished to have dispelled. By failing to respond with a "simple, clear-cut statement" that the jury had no obligation to impose death after finding at least one aggravator, the trial judge created a reasonable likelihood that the jurors believed that obligation to be real.[227] To Rehnquist's emphasis on the fact that after receiving the judge's response, the jury asked no further questions, Stevens pointed out that their failure to do so probably reflected a belief that to do so would be disrespectful.[228]

Perhaps I am dense. Have we reached such depths about the death penalty that it is asking too much to be relatively sure that the decision to impose it has been properly arrived at by a jury? As a general matter, even in a non-capital run of the mill criminal case, is it the better practice to send a confused jury back to their deliberations with nothing more than a repeat of the instruction that caused them to inquire in the first place? I think the Court here is wrong on the merits. But I think its willingness to subscribe to the broad proposition that a trial judge need do no more than was done here is an unwise, unnecessary, and far more costlier proposition than would be a requirement that in such circumstance, some further explication by the court of its instructions be provided.

---

[226] *Weeks*, 120 S. Ct. at 735 (Stevens, J., dissenting).
[227] *Id.* at 737 (Stevens, J., dissenting).
[228] *Id.* at 737 (Stevens, J., dissenting).

IX. INTERSTATE DETAINERS

Brief mention is warranted of *New York v. Hill*,[229] primarily because the case is from New York and the New York Court of Appeals' decision[230] was reversed unanimously by the Supreme Court. In other words, the Court of Appeals apparently missed this one by a wide margin.

The issue was whether defense counsel's agreement to a trial date beyond the time period required by Article III of the Interstate Agreement on Detainers (IAD) bars the defendant from seeking dismissal because his trial did not occur within the specified time period.[231] The Court of Appeals held that it did not. Justice Scalia, writing for the Court, held that the defendant was precluded.

Under Article III (a) of the IAD, a prisoner who is the subject of a detainer filed by another jurisdiction may request that the charges underlying the detainer be disposed of within 180 days.[232] The statute contains a proviso that "for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."[233] If a prisoner is not brought to trial within the 180-day time period, Article V(c) requires dismissal of the charging document with prejudice.[234]

Hill was an Ohio prisoner who was the subject of a detainer filed by New York and he invoked his speedy trial rights under the IAD. However, when the Rochester prosecutor proposed a trial date that was beyond the 180 days, his attorney agreed. Later, Hill moved for a dismissal of the indictment on the ground that the 180-day period had run.[235] The Court of Appeals held that something

---

[229] 528 U.S. 110, 120 S. Ct. 659 (2000).
[230] People v. Hill, 92 N.Y.2d 406, 704 N.E.2d 542, 681 N.Y.S.2d 775 (1998).
[231] The Interstate Agreement on Detainers 18 U.S.C. App. § 2 is codified in New York in N.Y. CRIM. PROC. LAW § 580.20. It is a contract that 48 states and the District of Columbia have entered into for the purpose of resolving one state's outstanding charges against a prisoner in another state's custody. *Hill*, 120 S. Ct. at 662.
[232] N.Y. CRIM. PROC. LAW § 580.20 (McKinney 2000).
[233] *Hill*, 120 S. Ct. at 662-63.
[234] *Id.* at 663.
[235] *Id.*

more affirmative than counsel's acquiescence was required before a prisoner could be deemed to have waived his IAD speedy trial rights.[236]

Justice Scalia observed that there are some fundamental rights for which the defendant "must personally make an informed waiver,"[237] and others that "may be effected by actions of counsel."[238] This case did not involve a purported prospective waiver of all protection of the IAD's time limits but merely agreement to a specified delay in trial.[239] He stated that "[w]hen that subject is under consideration, only counsel is in a position to assess the benefit or detriment of the delay to the defendant's case. . . . Requiring express assent from the defendant himself for such routine and often repetitive scheduling determinations would consume time to no apparent purpose."[240] He also pointed out that "by allowing the court to grant 'good cause continuances' when either 'prisoner or *his counsel'* is present, the IAD contemplates that scheduling questions may be left to counsel."[241]

It appears that I have run out of time. It is not my fault; it is the fault of the Supreme Court. This Term, the Court simply gave us so much to discuss. It was a dynamic year for the Court and it wasn't a bad year for the defense. In closing, I can state only that this coming Term may be another big one insofar as constitutional criminal procedure is concerned. Already, the Court has agreed to hear four major Fourth Amendment cases,[242] including urine testing for drugs of pregnant women in Charleston, South Carolina's hospitals,[243] not allowing a person enter his home

---

[236] People v. Hill, 92 N.Y. 2d 406, 704 N.E.2d 542, 681 N.Y.S.2d 775.
[237] *Hill,* 120 S.Ct. at 664.
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.* (emphasis in original).
[242] *See* Ferguson v. City of Charleston, 186 F.3d 469 (4th Cir. 1999), *cert. granted,* 120 S. Ct. 1239 (Feb. 28, 2000)(no. 99-936); Atwater v. City of Lago Vista, 195 F.3d 242 (5th Cir. 1999), *cert. granted,* 120 S. Ct. 2715 (June 26, 2000)(no. 99-1408); Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999), *cert. granted,* City of Indianapolis v. Edmond, 120 S. Ct. 1156 (Feb. 22, 2000) (no. 99-1030); Illinois v. McArthur, 304 Ill. App. 3d 395, 713 N.E.2d 93 (1999), *cert. granted,* 120 S. Ct. 1830 (May 1, 2000) (no. 99-1132).
[243] *Ferguson,* 186 F.3d at 473.

while the police are awaiting the issuance of a search warrant.[244] I look forward to returning next year and discussing these and many more cases that the Court will have decided. Hopefully, I will have ample time to do justice to them.

[244] *McArthur*, 304 Ill. App. 3d at 396-97.