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## **Off Broadway: The Supreme Court's Criminal Law Decisions in the 1996 Term Take Second Stage in an Historic Term**

**Professor William E. Hellerstein**

*Hon. Leon D. Lazer:*

Our next speaker is going to deal with the subject of criminal law, Fourth Amendment and related areas. William Hellerstein has been with us from the beginning of these programs, nine years ago. I have known William Hellerstein for a much longer than that. I first came to know him when I was in the Appellate Division and he was the Chief of the Appeals Bureau of the Legal Aid Society. All of us on the bench at that time were of the belief that the Legal Aid Society lawyers, at least the ones arguing in the Appellate Division, were superior generally to the Appeals Bureaus of the various District Attorneys offices in the Second Department. Of course, occasionally, we would have the privilege of hearing Professor Hellerstein himself. He is, of course, a professor at Brooklyn Law School and widely regarded as one of leading authorities on constitutional law and criminal law, so it's my pleasure now to present him to you.

*Professor William E. Hellerstein:*

The Supreme Court's criminal law decisions of the 1996-97 Term fade into the background of a term, labeled "historic" by some,<sup>1</sup> in which the Court handed down rulings that placed limits on Congressional power to legislate under Section 5 of the Fourteenth Amendment,<sup>2</sup> conscript state and local officials to implement federal gun control laws,<sup>3</sup> and regulate the content of material on the Internet,<sup>4</sup> upheld state statutes proscribing physician-assisted

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<sup>1</sup> Marcia Coyle, *Was This Term Historic*, NAT'L L.J., Aug. 11, 1997, at B5.

<sup>2</sup> *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

<sup>3</sup> *Printz v. United States*, 117 S. Ct. 2365 (1997).

<sup>4</sup> *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997).

suicide,<sup>5</sup> allowed a civil lawsuit against the president to go forward,<sup>6</sup> left in tact the line-item veto given the president,<sup>7</sup> overturned its prior decision prohibiting local governments from sending public school teachers into parochial school to provide remedial education to disadvantaged children,<sup>8</sup> and made the settlement of class actions in mass tort cases more difficult.<sup>9</sup> Nonetheless, a number of criminal decisions were both interesting and important, with the government once again prevailing more often than not as the Court maintains its conservative course in this realm.<sup>10</sup>

The Court decided four Fourth Amendment<sup>11</sup> cases; the government prevailed in three, the individual in one. In *Maryland v. Wilson*<sup>12</sup> the Court, by a 7-2 vote held that the police may order passengers, as well as drivers, to get out of vehicles stopped for routine traffic violations.<sup>13</sup> This extended to passengers the "bright-line" rule that, twenty years ago, *Pennsylvania v. Mimms*<sup>14</sup> established with respect to drivers.<sup>15</sup>

The defendant was riding in a rental car that was stopped for speeding and not having a regular license plate.<sup>16</sup> After the car was stopped, the officer thought the defendant acted suspiciously and ordered him out of the car.<sup>17</sup> Although the denial of suppression

<sup>5</sup> *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). See also *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

<sup>6</sup> *Clinton v. Jones*, 117 S. Ct. 1636 (1997).

<sup>7</sup> *Raines v. Byrd*, 117 S. Ct. 2312 (1997).

<sup>8</sup> *Agostini v. Felton*, 117 S. Ct. 1997 (1997), *rev'g* *Aguilar v. Felton*, 473 U.S. 402 (1985).

<sup>9</sup> *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

<sup>10</sup> See William E. Hellerstein, *It Was a Very Good Year -- For the Government*, 13 TOURO L. REV. 395 (1997).

<sup>11</sup> U.S. CONST. amend. IV. The Fourth Amendment states in pertinent part: "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . ." *Id.*

<sup>12</sup> 117 S. Ct. 882 (1997).

<sup>13</sup> *Id.* at 890.

<sup>14</sup> 434 U.S. 106 (1977) (holding a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 107.

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

could have been justified on the basis of such conduct, it did not figure in the Court's decision.<sup>18</sup> Instead, the Court chose the occasion to extend the *Mimms* rule to passengers and to resolve some of the confusion that had accumulated in lower courts on the rights of passengers in lawfully stopped vehicles.<sup>19</sup>

Chief Justice Rehnquist, writing for the majority, took issue with the state court's refusal to apply *Mimms*.<sup>20</sup> *Mimms* had weighed the state's interest in protecting officers' safety against the liberty intrusion to an already stopped driver by requiring the driver to get out of the vehicle.<sup>21</sup> Against the state's interest, the liberty interest was deemed "*de minimis*" and it succumbed.<sup>22</sup> Citing statistics about assaults and killings of police officers during traffic chases and stops, the Chief Justice concluded that "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger."<sup>23</sup> He noted also that "the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer."<sup>24</sup>

Although the Chief Justice conceded that because there is no probable cause to believe that a passenger has committed any traffic offense a passenger has a stronger liberty interest than a driver, he concluded that such an interest was inconsequential, stating that "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle," — an order to exit merely changes their location.<sup>25</sup> Also, he pointed out that a passenger has the same motivation as a driver to use a weapon concealed in the car to prevent the officer from discovering evidence of a more serious crime.<sup>26</sup>

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<sup>18</sup> The state did not argue that Wilson's own conduct gave rise to reasonable suspicion and thus the issue was deemed waived. *Wilson*, 117 S. Ct. at 887 n.1 (Stevens, J., dissenting).

<sup>19</sup> *Id.* at 884.

<sup>20</sup> *Id.* at 885.

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

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.* at 886.

<sup>26</sup> *Id.*

Justice Stevens dissented in *Mimms*,<sup>27</sup> and did so here.<sup>28</sup> He argued that the majority's statistics did not differentiate between passengers and drivers, between attacks on police launched from inside vehicles and those launched from outside, or between jurisdictions that applied *Mimms* to passengers and those that did not.<sup>29</sup> Thus, he argued, they did not support the argument that applying *Mimms* to passengers will minimize the risk to police officers.<sup>30</sup> It is noteworthy that the Chief Justice did not attempt to refute Stevens' statistical analysis. He merely side-stepped it, stating that it is "regrettable that the empirical data on a subject such as this are sparse," but that the Court "need not ignore the data which do exist simply because further refinement would be even more helpful."<sup>31</sup>

Stevens also disputed the majority's claim that orders to a passenger to exit a vehicle are only *de minimis* intrusions.<sup>32</sup> He estimated that the Court's ruling, while affording the police at most an extremely marginal advantage, as in one instance in 20,000<sup>33</sup> stops, would impose a burden on "thousands of innocent citizens."<sup>34</sup> Because the Court was taking "the unprecedented step of authorizing seizures that are unsupported by any individual suspicion whatsoever," he cautioned that the decision "may pose a more serious threat to individual liberty than the Court realizes."<sup>35</sup>

Somewhat surprisingly, Justice Kennedy joined Stevens' dissent and wrote a brief one of his own.<sup>36</sup> He pointed out that when this case is combined with last year's "pretext stop" decision in *Whren v. United States*,<sup>37</sup> which held that as long as the police have stopped a car lawfully for a traffic infraction, their subjective intent

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<sup>27</sup> *Mimms*, 434 U.S. at 115 (Stevens, J., dissenting).

<sup>28</sup> *Wilson*, 117 S. Ct. at 886 (Stevens, J., dissenting).

<sup>29</sup> *Id.* at 887 (Stevens, J., dissenting).

<sup>30</sup> *Id.* at 888.

<sup>31</sup> *Id.* at 885 n.2.

<sup>32</sup> *Id.* at 888 (Stevens, J., dissenting).

<sup>33</sup> *Id.* (Stevens, J., dissenting).

<sup>34</sup> *Id.* (Stevens, J., dissenting).

<sup>35</sup> *Id.* at 890 (Stevens, J., dissenting).

<sup>36</sup> *Id.* (Stevens, J., dissenting).

<sup>37</sup> 116 S. Ct. 1769 (1996).

is irrelevant, it “puts tens of millions of passengers at risk of arbitrary control by the police.”<sup>38</sup> He stated that assertions that the police would exercise their new power with discretion and restraint and that if orders to exit became routine in a particular jurisdiction, citizens would call for an end to the practice, miss the point.<sup>39</sup> Uttering what I consider one of the best individual rights aphorisms in recent memory, Justice Kennedy concluded his dissent with the reminder that “liberty comes not from officials by grace but from the Constitution by right.”<sup>40</sup>

There was little reason to expect that a Court which last term, in *Whren*, was untroubled about declaring irrelevant the subjective motive of police officers when stopping motorists for minor traffic infractions,<sup>41</sup> should concern itself with the increased power exit orders to passengers gives the police. However, mere commission by a driver of a minor traffic violation expands considerably police search opportunities.<sup>42</sup> As one commentator has pointed out, “when officers order the occupants out of a car, they frequently see—or claim to see—that some contraband has come into plain view, either inside the car or on the persons of the occupants.”<sup>43</sup> This decision permits them to conduct searches of the car, the driver, and the passengers far beyond what they are permitted to do based solely on a traffic stop.”<sup>44</sup>

In *Ohio v. Robinette*,<sup>45</sup> a seven-member majority also increased police authority to search automobiles stopped for traffic offenses.<sup>46</sup> The Court, in an opinion also written by the Chief Justice, rejected the defendant’s argument that there is a bright-line rule that requires a “you are free to go” warning before a lawfully detained motorist’s consent to a search of his or her vehicle will be found

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<sup>38</sup> *Wilson*, 117 S. Ct. at 890 (Kennedy, J., dissenting).

<sup>39</sup> *Id.* at 891 (Kennedy, J. dissenting).

<sup>40</sup> *Id.* (Kennedy, J. dissenting).

<sup>41</sup> *Whren*, 116 S. Ct. at 1774.

<sup>42</sup> *Wilson*, 117 S. Ct. at 884.

<sup>43</sup> Ira Mickenberg, *Criminal Rulings Primarily Benefit the Prosecution*, NAT’L L.J., Aug. 11, 1997, at B14, 15.

<sup>44</sup> *Id.*

<sup>45</sup> 117 S. Ct. 417 (1996).

<sup>46</sup> *Id.* at 421.

voluntary.<sup>47</sup> Instead, it held that consent depends on the totality of circumstances and that the Ohio Supreme Court erred in establishing a *per se* rule to the contrary.<sup>48</sup>

After Robinette had been stopped for speeding, the officer checked his license and found no outstanding violations.<sup>49</sup> He then asked Robinette to get out of his car, issued him a verbal warning and returned his license.<sup>50</sup> Prefacing his inquiry with the statement “[o]ne question before you get gone,” the officer asked Robinette if he had weapons or drugs in the car.<sup>51</sup> When Robinette said no, the officer asked for permission to search the car. Robinette agreed, and the search turned up drugs.<sup>52</sup>

In declaring the search invalid, the Ohio Supreme Court held that “citizens stopped for traffic offenses [must] be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation.”<sup>53</sup>

Chief Justice Rehnquist first disposed of the threshold issue of the Court’s jurisdiction to hear the case in light of the fact that the state court’s decision arguably relied on the state constitution as well as the federal.<sup>54</sup> He stated that the opinion below mentioned the state constitution only in passing, and that the syllabus -- the only part of the opinion through which the Ohio Supreme Court speaks as a court -- spoke only in very general terms about the basis for the decision.<sup>55</sup> Therefore, concluded Rehnquist, under *Michigan v. Long*,<sup>56</sup> the Ohio Supreme Court did not make a sufficiently clear statement of the state law basis of its decision to preclude review.<sup>57</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 419.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *State v. Robinette*, 653 N.E.2d 695, 699 (Ohio 1995).

<sup>54</sup> *Robinette*, 117 S. Ct. at 420.

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

<sup>56</sup> 463 U.S. 1032 (1983) (holding that when it is not clear that the state court decision rests on the state constitution, the court will assume it rests on federal law).

<sup>57</sup> *Robinette*, 117 S. Ct. at 420.

Turning to the merits, the Chief Justice stated that the Ohio Supreme Court's "bright-line" approach was inconsistent with the emphasis, in cases such as *Florida v. Royer*,<sup>58</sup> on the "fact-specific nature of the reasonableness inquiry" that is the "touchstone" of the Fourth Amendment.<sup>59</sup> He also pointed out that the Ohio court's rule was "very similar" to the argument that the Court rejected in *Schneckloth v. Bustamonte*,<sup>60</sup> that no consent could be voluntary unless the person had been informed of his right to refuse consent.<sup>61</sup> It would be "unrealistic," he concluded, "to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." Of course, one could ask why it would be "unrealistic" to do so.<sup>62</sup> I thought that if the Supreme Court says you have to do it, you do it.

Rehnquist also criticized the Ohio court for saying in its syllabus that a continued detention is invalid if the officer's "motivation" for it is not related to the purpose of the original stop.<sup>63</sup> He pointed out that after last term's decision in *Whren*, a police officer's subjective motivations are of no relevance to the validity of the officer's conduct under the Fourth Amendment.<sup>64</sup> Under *Pennsylvania v. Mimms*,<sup>65</sup> Rehnquist said, the officer's request that Robinette get out of his car was objectively justifiable.<sup>66</sup>

Justice Ginsburg concurred in the judgment but she focused her attention on the ambiguity of the Ohio Supreme Court's decision which, because of *Michigan v. Long*,<sup>67</sup> contributed to an outcome

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<sup>58</sup> 460 U.S. 491 (1983) (providing that the single sentence or paragraph rule is disavowed in recognition of the endless variation in facts and circumstances implicating the Fourth Amendment).

<sup>59</sup> *Robinette*, 117 S. Ct. at 421 (citing *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

<sup>60</sup> 412 U.S. 218 (1973) (stating that knowledge of the right to refuse consent is not the *sine qua non* of an effective consent).

<sup>61</sup> *Robinette*, 117 S. Ct. at 421.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 424 U.S. 106 (1977).

<sup>66</sup> *Robinette*, 117 S. Ct. at 421.

<sup>67</sup> 463 U.S. 1032, 1040-42 (1983).



that she believed the Ohio court did not contemplate.<sup>68</sup> In short, she thought it improbable that the Ohio Supreme Court “understood its ‘first tell-then-ask rule’ to be the Federal Constitution’s mandate for the Nation as a whole.”<sup>69</sup> She suggested that the Ohio court meant its rule to be a “prophylactic measure,” and she urged state courts to be explicit about the basis for their decisions.<sup>70</sup>

Justice Stevens agreed with the majority that the Fourth Amendment does not require a bright-line rule on voluntariness.<sup>71</sup> However, he dissented on the ground that at the time Robinette’s consent was obtained, Robinette was being detained without justification and that his consent was the product of that illegal detention.<sup>72</sup> Stevens pointed out that a reasonable person in Robinette’s position would not have felt free to leave.<sup>73</sup> In fact, the officer’s testimony that he had secured consent in hundreds of similar cases, Stevens argued, is explainable only on the assumption that motorists generally assume that they are legally obliged to consent to a request to search.<sup>74</sup>

The issue of whether the police should be allowed to capitalize on people’s ignorance of their Fourth Amendment rights was resolved years ago in *Schneckloth*,<sup>75</sup> which held that a police warning that consent to a search was not obligatory, was not required.<sup>76</sup> Critics of that decision rejected distinctions between the Fifth Amendment’s<sup>77</sup> self-incrimination privilege, protected by the admonitions mandated by *Miranda*,<sup>78</sup> and Fourth Amendment

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<sup>68</sup> *Robinette*, 117 S. Ct. at 422 (Ginsburg, J., concurring).

<sup>69</sup> *Id.* at 423. (Ginsburg, J., concurring).

<sup>70</sup> *Id.* (Ginsburg, J., concurring).

<sup>71</sup> *Id.* at 424 (Stevens, J., dissenting).

<sup>72</sup> *Id.* (Stevens, J., dissenting)

<sup>73</sup> *Id.* (Stevens, J., dissenting)

<sup>74</sup> *Id.* at 425 (Stevens, J., dissenting)

<sup>75</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (disdaining a “waiver” analysis, applicable to Fifth and Sixth Amendment rights, for Fourth Amendment rights preferring instead, a “totality of the circumstances” test).

<sup>76</sup> *Id.*

<sup>77</sup> U.S. CONST. amend. V. This Amendment provides in pertinent part: “No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprive of life, liberty, or property, without due process.” *Id.*

<sup>78</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

rights, which secure privacy rights. That battle having long been over, Robinette had no serious chance to muster five votes for a *per se* rule imposing a “you are free to go” predicate upon the police.

Although not discussed in the decision, there is an issue that the authors of the casebook that I use in my Criminal Procedure course call attention to: the relationship between the definition of “consent” and the definition of “seizure.” In essence, they ask, should a court treat consent by a detained person differently from consent by a suspect who has not been seized?<sup>79</sup> They point out that in *Schneekloth*, the Court determined that a consensual search is one that is voluntary under all the circumstances, and that in *United States v. Mendenhall*,<sup>80</sup> and the line of cases that follow it,<sup>81</sup> the Court has said that a suspect is “seized” if a reasonable person in his circumstances would not feel free to leave.<sup>82</sup> One obvious possibility, they suggest, is that these definitions might merge — that the same facts that would lead a reasonable person to feel detained (hence “seized” under the *Mendenhall* standard) would also lead the defendant to feel he had to give permission to search (thereby making consent “involuntary” under *Schneekloth*).<sup>83</sup> Consequently, they conclude, this line of argument suggests a rule similar to the one adopted by the Ohio Supreme Court —that coercion rather than consent is presumed where the suspect is seized, and so the officer must do something affirmative to dispel

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<sup>79</sup> RONALD J. ALLEN, RICHARD B. KUHN & WILLIAM J. STUNTZ, CONSTITUTIONAL CRIMINAL PROCEDURE, PROFESSOR'S UPDATE 24 (1997).

<sup>80</sup> 446 U.S. 544, 554 (1980) (opinion of Justice Stewart).

<sup>81</sup> *See, e.g.*, *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion). (stating that had not the police prolonged the defendant's detention, his consent to an immediate search would have been lawful); *Florida v. Rodriguez*, 469 U.S. 1 (1984) (holding that “the initial contact between the officers and the respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest”); *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 (1984) (holding that where employees were questioned regarding their citizenship by Immigration and Naturalization Service agents, such “encounters were classic consensual encounters rather than Fourth Amendment seizures.”).

<sup>82</sup> *Mendenhall*, 446 U.S. at 553.

<sup>83</sup> RONALD J. ALLEN, CONSTITUTIONAL CRIMINAL PROCEDURE, PROFESSOR'S UPDATE 24 (1997).

the coercion.<sup>84</sup> Hence the requirement of a warning.<sup>85</sup> Somehow, despite the ostensible logic of this argument, I doubt that the current Court would be receptive to it.

In light of the concerns which Justice Kennedy expressed in *Maryland v. Wilson*<sup>86</sup> about the enormous power conferred upon the police by that case in conjunction with *Whren*,<sup>87</sup> I would have thought he would have expressed similar concerns here. In *Robinette*, the seizure was justified by a traffic offense but the search was for drugs.<sup>88</sup> The use of traffic stops to secure consent is certainly possible, especially after *Whren*. But did the police really wait for the decision in *Whren* or were they not using traffic stops for other purposes for quite some time? Consider that Officer Newsome, who pulled Robinette over, testified in another case that he sought consent to search in 786 traffic stops in 1992, the year Robinette was stopped.<sup>89</sup>

The case also bears significant consequence in terms of process. Justice Ginsburg, and Justice Stevens before her, have been vehement critics of the Court's decision in *Michigan v. Long*,<sup>90</sup> which changed the landscape as to the Supreme Court's adequate, independent ground jurisprudence. Prior to *Long*, if there was ambiguity in a state court's decision as to whether it rested on a violation of a provision of the state constitution or the federal, the Supreme Court would decline jurisdiction.<sup>91</sup> *Long* changed all that

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 117 S. Ct. 882, 890-91 (1997) (Kennedy, J., dissenting).

<sup>87</sup> 116 S. Ct. 1769 (1996).

<sup>88</sup> 117 S. Ct. 417 (1996).

<sup>89</sup> RONALD J. ALLEN, PROFESSOR'S UPDATE 25(1997).

<sup>90</sup> 463 U.S. 1032 (1983). The Court held that:

[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, and when the adequacy and independence of any possible state law is not clear from the face of the opinion, we will accept as the most reasonable explanation that that the state court decided the case that way it did because it believed that federal law required it to do so.

*Id.* at 1040-41.

<sup>91</sup> *Id.* at 1038. See also *Lynch v. New York*, 293 U.S. 52 (1934). The Court holding that:

by inverting the rule so that ambiguity guaranteed reviewability, assuming of course the Supreme Court's interest in the case; only a clear statement from the state court that its ruling is based on the state constitution can now avert review by the Supreme Court.<sup>92</sup>

Two aspects of *Long* have always puzzled me, although one is easier to understand than the other. The Court's pre-*Long* practice of declining review in the face of ambiguity had always been consistent with the Court's institutional constraints against deciding federal constitutional questions unnecessarily.<sup>93</sup> Adherence to such a policy was long considered a "conservative" approach and one that was sensitive to federalism concerns. But it was the Burger Court, considered much more conservative than the Warren Court, that adopted a policy that swept into the Court's purview ambiguous state court rulings in which state courts afforded their citizens greater protections than those mandated by the federal constitution. As Justice Stevens argued in his dissent in *Long*, the Supreme Court has little legitimate interest in telling state courts that they had gone too far in protecting individual rights where that protection may have rested on state constitutional principles.<sup>94</sup> The reason I am not overly puzzled by this aspect of *Long* is that it has long been clear that the Burger Court and now the Rehnquist Court believes firmly that it should decide as many cases as possible where a defendant was successful below and thereby allow the Court to shape its criminal law jurisprudence more harmoniously with a crime-control model than a due process model. *Long's* departure from previous practice was essential to a more rapid fulfillment of that agenda.

It is the second aspect of the *Long* universe that continues to perplex me and which involves, not the Supreme Court, but the

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[W]here the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction.

*Id.* at 55.

<sup>92</sup> *Id.* at 1031-32 (Stevens, J., dissenting)

<sup>93</sup> *Lynch*, 293 U.S. at 55

<sup>94</sup> *Id.* at 1068-69 (Stevens, J., dissenting).

state courts. If, under *Long*, as Justice Ginsburg reminds us, a state court decision can be insulated from Supreme Court review by a plain statement that the decision rests exclusively on state constitutional grounds, why is it that state courts continue to produce opinions that are ambiguous and thereby enable the Supreme Court to stretch the concept of ambiguity to suit its crime control agenda? I don't know that there is a single explanation for this phenomenon. In my own discussions with many judges, I have been given various explanations. One is what I call the "float theory," -- that to get agreement, one or more judges may insist that the opportunity for review by the Supreme Court should be left open so that the Court's intelligence (not insubstantial) can at least be gleaned. The second is what I call the "I forgot theory." This theory needs no further explanation. The third is the "I thought we did it theory." And you may have (as the Ohio court in *Robinette* may have believed). But you didn't do it well enough!

In *Richards v. Wisconsin*,<sup>95</sup> the Court at least was consistent in rejecting a second "bright-line" rule request, this time one sought by the state. Two years ago, in *Wilson v. Arkansas*,<sup>96</sup> the Court held that compliance with the common law knock-and-announce rule is mandated by the Fourth Amendment's reasonableness requirement.<sup>97</sup> However, the Court also stated that exigent circumstances can render some unannounced entries constitutional.<sup>98</sup> Before *Wilson* was decided, the Wisconsin Supreme Court had established a blanket rule that permitted no-knock entries in all cases involving search warrants in felony drug investigations.<sup>99</sup> In *Richards*, the Wisconsin court held that nothing in *Wilson* undermined the validity of its blanket rule, which was based on the destructibility of evidence and on the connection between drug dealing and violence.<sup>100</sup>

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<sup>95</sup> 117 S. Ct. 1416 (1997).

<sup>96</sup> 514 U.S. 927 (1995).

<sup>97</sup> *Id.* at 934.

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

<sup>99</sup> *Id.* at 935-36.

<sup>100</sup> *State v. Richards*, 549 N.W.2d 218, 220 (Wis. 1996).

In a unanimous decision written by Justice Stevens, the Court reversed, holding that the Fourth Amendment requires an examination of the facts on a case-by-case basis before the knock-and-announce requirement can be dispensed with, and that the police must have a reasonable suspicion that knocking and announcing would, under the particular circumstances, be either dangerous, futile or damaging to the investigation.<sup>101</sup> Stevens pointed out that there will be situations in which “the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry.”<sup>102</sup> One example that he gave was the execution by the police of a warrant at a time when no one connected with the drug crime is present.<sup>103</sup> He stated that “Wisconsin’s blanket rule impermissibly insulates these cases from judicial review.”<sup>104</sup> Refuting the state’s argument that the Fourth Amendment’s chief concern is the police entry itself, Stevens noted that occupants of premises to be searched retain constitutionally cognizable interests in avoiding the destruction of property attendant to some forced entries and in being given an opportunity to dress themselves.<sup>105</sup>

Justice Stevens also pointed out that a blanket exception for drug cases would threaten to swallow the rule, stating that “[i]f a *per se* exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment’s reasonableness requirement would be meaningless.”<sup>106</sup>

For Richards himself, fending off the state’s quest for a *per se* rule was a pyrrhic victory. His conviction remained intact because on the facts of the case, the Court determined that police failure to knock and announce was reasonable.<sup>107</sup> A police officer disguised

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<sup>101</sup> *Richards*, 117 S. Ct. at 1421.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

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

<sup>105</sup> *Id.* at 1421 n.5.

<sup>106</sup> *Id.* at 1421.

<sup>107</sup> *Id.* at 1422.

as a maintenance worker knocked on the door of a hotel room for which the police had a warrant.<sup>108</sup> When Richards opened the still-chained door to peek outside, he saw one of the uniformed officers and slammed the door.<sup>109</sup> Justice Stevens concluded that it was reasonable for the officers to believe that Richards would try to destroy evidence, so they were justified in bursting in immediately.<sup>110</sup> This was so even though the magistrate who issued the warrant had specifically rejected the police request for permission for a no-knock entry.<sup>111</sup> Stevens explained that the reasonableness of a no-knock entry must be evaluated in light of the facts known to the officers at the time of the entry, and “the magistrate could not have anticipated in every particular the circumstances that would confront the officers when they arrived at Richards’ hotel room.”<sup>112</sup>

The importance of this case depends very much on how seriously lower courts implement the clear message that the Fourth Amendment does not tolerate categorical exemptions from its ambit based on the type of crime that is under investigation. There have been a goodly number of courts that, prior to *Richards*, have taken to upholding police searches based on exigent circumstances that are often so broad as to incorporate an entire category of crime. In a notable warrantless drug search case in a Second Circuit case several years ago, the court’s rather expansive view of exigent circumstances led Judge Kearse, in dissent, to remark that “[a]fter this decision there appears to be little left of the warrant requirement in narcotics cases.”<sup>113</sup> I mentioned this case two years

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<sup>108</sup> *Id.* at 1419.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1422.

<sup>111</sup> *Id.* at 1418-19.

<sup>112</sup> *Id.* at 1422. Given the outcome of the case, the Court did not have to reach the state’s argument that even when a no-knock entry is deemed unreasonable, the inevitable discovery doctrine would render the evidence uncovered during the search admissible. *Id.* In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the Court also did not reach the issue because it had not been raised in the lower courts. *Id.* at 937 n.4. I adhere to my belief that “inevitably” the Court will.

<sup>113</sup> *United States v. MacDonald*, 916 F.2d 766, 777 (2d Cir. 1990) (Kearse, J., dissenting), *cert. denied*, 498 U.S. 1119 (1991).

ago in my discussion of *Wilson*, pointing out that the fact specific nature of the exigency inquiry allowed by the Court as to the no-knock requirement made Supreme Court supervision of abuses extremely difficult.<sup>114</sup> I don't know if Judge Kearse feels any better now that *Richards* rejects categorization, but I do just a tad. I think a unanimous admonition from the Court that categorical carve-outs of crime categories are unacceptable sends a positive message to some judges who might otherwise tilt against Fourth Amendment protections in a discrete crime category such as drugs.

In *Chandler v. Miller*,<sup>115</sup> the Court finally found a suspicionless search that did not meet the requirements of its relatively new "special needs" exception to the Fourth Amendment when it struck down a Georgia statute that required candidates for specified state offices to certify that they tested negative for certain drugs within 30 days of qualifying for nomination or election.<sup>116</sup> By an 8-1 vote, the Court held that the state failed to identify a "special need" that would justify subjecting candidates for public office to a suspicionless search.<sup>117</sup>

Writing for the Court, Justice Ginsburg rejected the Eleventh Circuit's conclusion that the state had a legitimate interest to ensure that office holders are "appreciative of the perils of drug use" and possessed of "the highest levels of honesty, clear-sightedness, and clear-thinking."<sup>118</sup> Instead, she applied the principles that have emerged from the Court's three prior "special needs" cases which upheld suspicionless searches, *Treasury Employees v. Von Raab*<sup>119</sup> (Customs Service employees), *Skinner v. Railway Labor Executives' Assn.*<sup>120</sup> (railway employees in the aftermath of an accident) and *Vernonia School Dist. 47J v. Acton*<sup>121</sup> (student

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<sup>114</sup> See William E. Hellerstein, *Tiptoeing Through the Tulips: The Supreme Court's Major But Modest By Comparison, Criminal Law Rulings During the 1994-95 Term*, 12 *TOURO L. REV.* 267, 290 (1996).

<sup>115</sup> 117 S. Ct. 1295 (1997).

<sup>116</sup> *Id.* at 1305.

<sup>117</sup> *Id.* at 1303.

<sup>118</sup> *Id.* at 1300.

<sup>119</sup> 489 U.S. 656 (1989).

<sup>120</sup> 489 U.S. 602 (1989).

<sup>121</sup> 515 U.S. 646 (1995).



athletes), and distinguished them on their facts. She pointed out that these cases establish the principle that, to survive a Fourth Amendment challenge, a suspicionless search must be based on “special needs” beyond the normal need for law enforcement and that courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.<sup>122</sup>

Applying these principles to the state’s argument that unlawful drug use jeopardizes the discharge of public functions and undermines public confidence, Justice Ginsburg concluded that nothing in the record even hinted that the state’s concerns were real rather than hypothetical and that nothing compared to the showings made in *Skinner* and *Vernonia*, respectively, of substance abuse by railway employees engaged in safety-sensitive tasks and the sharp rise in students’ use of unlawful drugs.<sup>123</sup> That the Court, in *Von Raab*, upheld the drug-testing program without any evidence of drug abuse by Customs Service employees was of no consequence either, Justice Ginsburg concluded; she emphasized that their work directly involved drug interdiction or the carrying of firearms.<sup>124</sup> By contrast, the Georgia officials at issue “typically do not perform high-risk, safety sensitive tasks, and the required certification immediately aids no interdiction effort.”<sup>125</sup> She also distinguished *Von Raab* on the ground that candidates for public office “are subject to relentless scrutiny” whereas the employees in *Von Raab* received less scrutiny than most.<sup>126</sup> She further pointed out that operationally, the Georgia statutory scheme neither effectively identified candidates who violate anti-drug laws nor meaningfully deterred illicit drug users from seeking election to state office: there is no element of surprise about the test, and most drug-using candidates could abstain long enough to avoid detection.<sup>127</sup> For Justice Ginsburg, the bottom line was that the need revealed by the

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<sup>122</sup> *Chandler*, 117 S. Ct. at 1301.

<sup>123</sup> *Id.* at 1302-04.

<sup>124</sup> *Id.* at 1304.

<sup>125</sup> *Id.* at 1304-05.

<sup>126</sup> *Id.* at 1304.

<sup>127</sup> *Id.* at 1303-04.

Georgia statute is “symbolic, ‘not special’ as that term draws meaning from our case law,” and that “[h]owever well meant, [the statute] diminishes personal privacy for a symbol’s sake.”<sup>128</sup>

In his lone dissent, Chief Justice Rehnquist found the Georgia statute well within the principles of the three “special needs” precedents.<sup>129</sup> He read them as holding that “if there was a proper governmental purpose other than law enforcement, there was a ‘special need’ and the Fourth Amendment then required the familiar balancing between that interest and the individual’s privacy interest.”<sup>130</sup> On the individual’s privacy interest, he was quick to point out that “[u]nder normal Fourth Amendment analysis, the individual’s expectation of privacy is an important factor in the equation.”<sup>131</sup> But here, the Court perversely relies on the fact that a candidate for office *gives up* so much privacy \* \* \* as a reason for *sustaining* a Fourth Amendment claim.”<sup>132</sup> Relying on the Court’s previous concession that “privacy concerns ordinarily implicated by urinalysis drug-testing are ‘negligible,’” Rehnquist struck the balance in favor of Georgia’s legitimate purpose of identifying drug users who were candidates for office.<sup>133</sup>

In past appearances at this symposium, I was critical of all of the Court’s “special needs” decisions, especially *Von Raab*<sup>134</sup> and *Vernonia*,<sup>135</sup> I was more “balanced” as to *Skinner*.<sup>136</sup> My overriding concern has been that since *Terry v. Ohio*,<sup>137</sup> the Court has departed so extensively from the probable cause and warrant requirements that Fourth Amendment rights are held hostage to constant assault from the day to day exigencies of the battle against

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<sup>128</sup> *Id.* at 1305.

<sup>129</sup> *Id.* at 1306 (Rehnquist, J., dissenting).

<sup>130</sup> *Id.* (Rehnquist, J., dissenting).

<sup>131</sup> *Id.* (Rehnquist, J., dissenting).

<sup>132</sup> *Id.* (Rehnquist, J., dissenting).

<sup>133</sup> *Id.* at 1307 (Rehnquist, J., dissenting).

<sup>134</sup> William E. Hellerstein, *Fourth Amendment*, 6 *TOURO L. REV.* 31, 32-45 (1989).

<sup>135</sup> Hellerstein, *supra* note 115, at 292-300.

<sup>136</sup> Hellerstein, *supra* note 135, at 37-38.

<sup>137</sup> 392 U.S. 1 (1967) (upholding stops and frisks based on reasonable suspicion).

crime and the perceived need of government to make whatever adjustments are deemed necessary. Thus, I am pleased with the Court's ruling in *Chandler*. But I do not think it calls for celebration with the opening of a fine vintage Pomerol; indeed, anything other than a vin ordinaire would be inappropriate.

For the reasons set forth by Justice Ginsburg (and as an 8-1 vote signifies) this was a relatively easy case. In my estimation, it was made easy by the fact that only Georgia had enacted such a statute and that the record, legislative and litigated, was empty. But if a significant number of states had enacted similar statutes, and the record was fuller, the result might have been different. That the Court saw fit to embark on a "special needs" doctrine and extend it to the point reached in *Vernonia*, leaves it there for potential future erosion of privacy interests. However, until *Chandler*, the direction of the "special needs" doctrine had been all one way--adverse to individual privacy interests. In a way it has been like playing baseball on a field with no foul lines. It is at least of some comfort to have some indication from the Court as to what it considers a foul ball. But the perimeter of the entire field remains to be defined and there may yet be plenty of room for the government's "special needs" hits on the Fourth Amendment to drop in safely.

Although I do not wish to minimize the importance of the Court's Fourth Amendment work last term, none of the four cases were "blockbusters." On the other hand, the decision in *Kansas v. Hendricks*,<sup>138</sup> upholding the validity of Kansas's Sexually Violent Predator Act comes close to deserving that appellation.

The Kansas statute provides for the involuntary civil commitment of "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in . . . predatory acts of sexual violence."<sup>139</sup> The statute does not use the term "mental illness" and defines "mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually

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<sup>138</sup> 117 S. Ct. 2072 (1997).

<sup>139</sup> KAN. STAT. ANN. § 59-29a02(a) (1996).

violent offenses in a degree constituting such person a menace to the health and safety of others.”<sup>140</sup> The statute’s preamble states specifically that the statute is aimed at “a small but extremely dangerous group of sexually violent predators . . . who do not have a mental disease or defect that renders them appropriate for treatment” under Kansas’ general civil commitment law.<sup>141</sup> The preamble further states that the law is directed against those who “generally have anti-social personality features which are unamenable to existing mental illness treatment modalities,” that they need long-term treatment, and that the prognosis for treating them in prison is poor.<sup>142</sup> People found to be sexually violent predators under the act are committed indefinitely.<sup>143</sup> Although their cases must be reviewed annually, they may be confined for life if the reviewing panel does not find them to be cured of the disorder that renders them predators.<sup>144</sup>

Although I believe the Court would have upheld the statute in any case, the peculiar facts of Hendricks’ own situation certainly made it easy. In 1984 Hendricks, who had a history of child sexual molestation dating to 1955, was convicted of taking “indecent liberties” with two 13-year-old boys.<sup>145</sup> After serving nearly 10 years of his sentence, he was scheduled to enter a halfway house.<sup>146</sup> However, before his release date, the State filed a petition to commit him civilly as a sexually violent predator.<sup>147</sup> Hendricks challenged the statute on substantive due process, *ex post facto*, and double jeopardy grounds but the trial court reserved decision on the constitutional challenges, found there was probable cause to support a finding that Hendricks was a sexually violent predator, and ordered that he be evaluated in a state hospital.<sup>148</sup>

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<sup>140</sup> *Hendricks*, 117 S. Ct. at 2077.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 2078.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

At the jury trial to determine whether he was a sexually violent predator, Hendricks not only testified to his long history of sexually deviant behavior, but also that despite receiving professional help, he continued to harbor sexual desires for children and that whenever he was not confined, he had repeatedly abused children and, that the only sure way he could keep from sexually abusing children in the future was to die.<sup>149</sup> It also didn't help that his own stepdaughter and stepson testified that they had been subjected to repeated sexual abuse by Hendricks.<sup>150</sup> That the jury unanimously found that Hendricks was a sexually violent predator is about as shocking as Captain Reynaud's "discovery" of gambling at Rick's in Casablanca.<sup>151</sup> Nonetheless, the Kansas Supreme Court held that the act violated substantive due process by not requiring a finding of "mental illness."<sup>152</sup>

By a 5-4 vote, in an opinion by Justice Thomas, the Supreme Court reversed the Kansas Supreme Court's due process ruling and also rejected Hendricks's double jeopardy and *ex post facto* claims.<sup>153</sup> Justice Thomas held that the act's definition of "mental abnormality" satisfied substantive due process requirements because when it was combined with the statute's requirement of proof that a person is actually dangerous to himself or others, it overcame the Court's prior decisions that future dangerousness alone is ordinarily not enough to justify indefinite voluntary confinement.<sup>154</sup> Justice Thomas further stated that there was nothing talismanic about the term "mental illness," emphasizing that legal definitions of mental conditions do not have to be coterminous with those of the medical profession.<sup>155</sup> Instead, he pointed out that the Kansas statute was similar to statutes that provide for civil commitment of people who suffer from a "volitional impairment rendering them dangerous beyond their

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 2079 n.2.

<sup>151</sup> CASABLANCA (Metro-Goldwyn-Mayer) 1942.

<sup>152</sup> *In re Hendricks*, 919 P.2d 129, 138 (Kan. 1996).

<sup>153</sup> *Hendricks*, 117 S. Ct. at 2081.

<sup>154</sup> *Id.* at 2080-81.

<sup>155</sup> *Id.*

control.”<sup>156</sup> He noted also that Hendricks conceded that he was a pedophile and that pedophilia is classified as a serious mental disorder.<sup>157</sup>

In rejecting Hendricks’ claim that the act was punitive, Justice Thomas dealt a knockout blow to Hendricks’ double jeopardy and *ex post facto* claims. He stated that commitment under the act does not implicate retribution or deterrence and, although it requires a prior conviction or charge, it “does not affix culpability for prior criminal conduct;” prior crimes are used solely as evidence of mental abnormality or future dangerousness.<sup>158</sup> Further indicia of the statute’s non-punitive purpose, Thomas stated, were its lack of a scienter requirement, its focus on persons who are unlikely to be deterred by the threat of confinement, its provision for immediate release if the person is adjudged to be safe to be at large, and that the confinement conditions for persons covered by the act are essentially those of other civilly committed individuals.<sup>159</sup>

For me, the most interesting aspect of case is the way the treatment (or non-treatment issue, if you will) was approached. The Kansas Supreme Court had concluded that the lack of treatment for sexually violent predators made the statute punitive.<sup>160</sup> It stated that “[i]t is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent.”<sup>161</sup> Moreover, the Court pointed out, by not utilizing existing civil commitment statutes, the Kansas Legislature had conceded that sexually violent predators are not treatable; since no treatment is possible the court reasoned, then there is no mental illness and, therefore, “the provisions of the Act for treatment appear somewhat disingenuous.”<sup>162</sup>

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<sup>156</sup> *Id.* at 2080.

<sup>157</sup> *Id.* at 2081.

<sup>158</sup> *Id.* at 2082.

<sup>159</sup> *Id.* at 2082-83.

<sup>160</sup> *Id.* at 2079.

<sup>161</sup> *In re Hendricks*, 912 P.2d at 136.

<sup>162</sup> *Id.*

Justice Thomas acknowledged that one could read this language to mean that the Kansas Supreme Court determined that Hendricks' condition was untreatable and that the act's sole purpose was incapacitation.<sup>163</sup> Even if that were so, Justice Thomas pointed out, it was constitutionally inconsequential because the Court had "never held that the Constitution prevents a State from civilly detaining those for whom no treatment is possible, but who nevertheless pose a danger to others."<sup>164</sup> Nor was it of any help to Hendricks' claim to read the Kansas Supreme Court's decision as having concluded that Hendricks' condition was treatable but that no treatment was being provided him. Justice Thomas pointed to both the lower court's concession that while not its overriding purpose, an ancillary purpose of the act was to provide treatment and that language in the statute itself mandates treatment to individuals like Hendricks.<sup>165</sup> He further pointed out that "[a]lthough the treatment program initially offered Hendricks may have seemed somewhat meager, . . . he was the first person committed under the Act."<sup>166</sup>

Justice Kennedy concurred but said that the result would be different if commitment were used for retribution or deterrence, or if "mental abnormality" turns out to be "too imprecise a category to offer a solid basis for concluding that civil detention is justified . . ."<sup>167</sup> Such hesitancy appears to be characteristic of Justice Kennedy's generally cautious approach to outer-limit constitutional issues -- a sort of wanting to keep options open. I'm not sure I know the extent of it here but it could be important (since his was the fifth vote in *Hendricks*) in future attempts to use civil commitment procedures for confinement of persons with disorders that have received little or no recognition as mental "illnesses."

In this case, Justice Kennedy's vote was based on his willingness to insist on less than unanimity in the psychiatric profession as to the nature of pedophilia. "The Constitution," he stated, "permits a

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<sup>163</sup> *Hendricks*, 117 S. Ct. at 2084.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 2085.

<sup>167</sup> *Id.* at 2087 (Kennedy, J., concurring).

State to follow one reasonable professional view, while rejecting another.”<sup>168</sup>

Justice Breyer dissented, joined by Justices Stevens and Souter and partially by Justice Ginsburg.<sup>169</sup> He agreed with the majority that the statute’s definition of “mental abnormality” satisfies substantive due process.<sup>170</sup> But, in concluding that the act was punitive, and thus a violation of the Ex Post Facto Clause,<sup>171</sup> he seized on the State’s concession that Hendricks’ condition is treatable, that the act failed to provide Hendricks and others like him with any treatment until after his release date and only inadequate treatment thereafter, and that the committing authority was not required to consider less restrictive alternatives.<sup>172</sup>

The immediate impact of *Hendricks* is twofold: (1) it strengthens similar statutes in other states (Arizona, California, New Jersey, Minnesota, Washington, Wisconsin) and will encourage others such as New York to enact one in the near future; (2) it has figured prominently in recent decisions upholding Megan’s Law statutes as not violative of either double jeopardy or *ex post facto* prohibitions.<sup>173</sup> In the Second Circuit’s decisions upholding New York’s Megan’s Law, Judge Newman stated that *Hendricks* “implicitly approves” the analysis that, short of a display by a plaintiff that a civil law is punitive in nature, the legislature’s stated intent to create a nonpunitive statute will generally be dispositive.<sup>174</sup>

Thus, when combined with Megan’s Law statutes, which many states have adopted in one form or another, sexual predator statutes such as that upheld in *Hendricks* now provide a potent one-two

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<sup>168</sup> *Id.* (Kennedy, J., concurring).

<sup>169</sup> *Id.* at 2087 (Breyer, J., dissenting).

<sup>170</sup> *Id.* at 2087-88 (Breyer, J., dissenting).

<sup>171</sup> U.S. CONST. art. I, § 9 (3). The Ex Post Facto Clause states that “No Bill of Attainder or ex post facto law shall be passed.” *Id.* See also U.S. CONST. art. I, § 10 (1). This section states in relevant part that: “No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.” *Id.*

<sup>172</sup> *Id.* at 2087 (Breyer, J., dissenting).

<sup>173</sup> *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

<sup>174</sup> *Doe v Pataki*, 120 F.3d 1263, 1275 (2d Cir.1997).



punch as to sex offenders, the clamor for which politicians may find irresistible.

However, there may be some serious side-effects to the enactment of sexual predator statutes. As Ira Mickenberg of the D.C. Public Defender's Office asks, "once a state adopts a predator law, will any person accused of a violent sex crime ever be willing to accept a plea bargain?," and points out that "[i]t doesn't make much sense for an accused person to plead guilty in return for a shorter sentence if the state is going to civilly commit him for life once his criminal term is over."<sup>175</sup> If that is the case, he adds, then some victims will be required to testify at trial and will not be spared the agony of reliving their trauma.<sup>176</sup>

It is important to appreciate that *Hendricks* does not rest on the principle that mere dangerousness is enough to confine; there must also be a "mental abnormality." Nonetheless, the Court has taken a giant step away from our traditional approach to crime--conviction, sentence, punishment; *Hendricks* purports to tell us that incarceration in this context is not punishment. Do you believe it?

Although not of constitutional dimension, the Court's 5-4 ruling in *Old Chief v. United States*<sup>177</sup> is worth some discussion. The issue in the case is one that arises whenever the federal government prosecutes a defendant under 18 U.S.C. 922 (g) (1)<sup>178</sup> for being a felon in possession of a firearm and the defendant offers to stipulate to the existence of the prior felony and thus keep from the jury the details of his prior crime; the decision also purports to resolve conflicts among the federal courts of appeal.

*Old Chief* was indicted not only for assault with a dangerous weapon and using a firearm in relation to a crime of violence, but

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<sup>175</sup> Ira Mickenberg, *Criminal Rulings Primarily Benefit the Prosecution*, NAT'L L.J., Aug. 11, 1997, at B14.

<sup>176</sup> *Id.* Mickenberg also asks whether a prosecutor even can promise never to seek civil commitment and whether, if made, it is enforceable. *Id.*

<sup>177</sup> 117 S. Ct. 644 (1997).

<sup>178</sup> 18 U.S.C. § 922 (g)(1)(1996). The statute makes it unlawful for anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm . . . ." *Id.*

also under Section 922(g)(1) as a felon in possession of a firearm.<sup>179</sup> The predicate crime with which he was charged in the 922(g) count of the indictment was for assault causing serious bodily injury.<sup>180</sup> He tried to keep the name and nature of that crime from the jury by offering to stipulate to the fact that, in the words of the statute, he had been convicted of “a crime punishable by imprisonment exceeding one year.”<sup>181</sup> The prosecutor refused to so stipulate, and the district court allowed documents identifying the offense and naming the victim into evidence.<sup>182</sup> The Ninth Circuit affirmed, reasoning that since a stipulation is not proof, regardless of the defendant’s offer to stipulate, the government is entitled to prove a prior felony offense through probative evidence.<sup>183</sup>

Writing for the majority, Justice Souter initially rejected Old Chief’s argument that the name and nature of his prior conviction were irrelevant and thus inadmissible under Rule 402 of the Federal Rules of Evidence.<sup>184</sup> However, Old Chief fared much better under Souter’s analysis of Rule 403, pursuant to which a trial judge may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Souter defined “unfair prejudice” as “the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”<sup>185</sup> He then stated that, as a general matter, an item of evidence is not to be considered in isolation when the Rule 403 balancing test is performed.<sup>186</sup> Instead, “what counts as the Rule 403 probative value of an item of evidence, as distinct from its Rule 401

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<sup>179</sup> *Old Chief*, 117 S. Ct. at 647.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 647-48.

<sup>182</sup> *Id.* at 648.

<sup>183</sup> *Id.* at 649 (citing *United States v. Breitkreutz*, 8 F.3d 688, 690 (9th Cir. 1993)) (further citations omitted).

<sup>184</sup> *Id.* at 649 n.3. Rule 402 states that: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.” FED. R. EVID. 402.

<sup>185</sup> *Id.* at 650.

<sup>186</sup> *Id.*

relevance, may be calculated by comparing evidentiary alternatives.”<sup>187</sup> In other words, “the discretionary judgment may be informed not only by assessing an evidentiary item’s twin tendencies” to prove a relevant fact and to create unfair prejudice, but also “by placing the result of that assessment alongside similar assessments of evidentiary alternatives.”<sup>188</sup>

Justice Souter pointed out that the unfair prejudice that Old Chief was concerned with was the likelihood that the jury would use his prior assault as evidence of criminal propensity which is a risk that is generally present in a section 922(g)(1) prosecution.<sup>189</sup> The risk is especially high, Souter stated, when the prior conviction is for a gun crime or a crime similar to others charged in the case.<sup>190</sup> Thus, “Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, could take on added weight from the related assault charge against him.”<sup>191</sup> On the other hand, noted Souter, Old Chief’s proffered stipulation would have covered the prior-conviction element without posing this risk -- indeed, it encompassed alternative, relevant, admissible evidence of the prior conviction that was not merely relevant but ostensibly conclusive evidence of the prior felony.<sup>192</sup>

Justice Souter observed further that the language of section 922 (g)(1) shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies.<sup>193</sup> Moreover, he noted, Old Chief clearly meant to admit that his felony did qualify, by stipulating “that the Government has proven one of the essential elements of the offense.”<sup>194</sup> As a consequence, “although the name of the prior offense may have been technically relevant, it

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<sup>187</sup> *Id.* at 652.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 653.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

addressed no detail in the definition of the prior conviction element that would not have been covered by the stipulation.”<sup>195</sup>

Justice Souter conceded that, as a general rule, a defendant may not “stipulate his way out of the full evidentiary force of the case as the government chooses to present it.”<sup>196</sup> He emphasized, however, that the government’s need for “evidentiary depth to tell a continuous story has . . . virtually no application when the point at issue is the defendant’s legal status resulting from a prior, independent adjudication.”<sup>197</sup> He noted that “proof of the defendant’s status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense.”<sup>198</sup> Therefore, he said:

[P]roving status without telling exactly why the status was imposed leaves no gap in the story of a defendant’s subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.<sup>199</sup>

In short, according to Souter’s reasoning, in a case in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion is that the risk of unfair prejudice substantially outweighs the discounted probative value of the record of conviction, and it is an abuse of discretion to admit the record when an admission is available.<sup>200</sup> On the other hand, Souter took pains to note that apart from proof of convict status cases, a “prosecutor’s choice will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.”<sup>201</sup>

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 654.

<sup>198</sup> *Id.* at 655.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 656.

Justice O'Connor dissented, joined by the Chief Justice, and Justices Scalia and Thomas. She took issue with the majority's conclusion that the "prejudice" resulting from evidentiary use of the name and nature of the prior conviction is "unfair."<sup>202</sup> She argued that the structure of section 922 (g)(1) evinces Congress' understanding that jurors would learn the name and basic nature of the defendant's prior offense.<sup>203</sup> Because certain felonies are exempt from serving as predicates, a defendant's prior felony conviction connotes that he has engaged in specific criminal conduct.<sup>204</sup> Even more fundamentally, she said, a person is not simply convicted of "a crime" or "a felony."<sup>205</sup> He is convicted of a specific offense and therefore, "[t]he name and basic nature of petitioner's crime are inseparable from the fact of his earlier conviction and were therefore admissible to prove guilt."<sup>206</sup>

I believe the majority has the better of this argument. Justice Souter's analysis is pragmatically grounded and, without any burden upon the prosecution, it ensures fairness to a defendant. On the other hand, Justice O'Connor's argument values formalism over fairness and is unconcerned with the problems confronting a defendant charged with possession of a firearm as a felon.<sup>207</sup> Our system goes to considerable length to exclude a defendant's prior record from the jury. While prior criminal conduct is admissible to prove motive, opportunity, intent, plan, identity and the like,<sup>208</sup> it is

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<sup>202</sup> *Id.* (O'Connor, J., dissenting).

<sup>203</sup> *Id.* (O'Connor, J., dissenting).

<sup>204</sup> *Id.* at 657 (O'Connor, J., dissenting).

<sup>205</sup> *Id.* (O'Connor, J., dissenting).

<sup>206</sup> *Id.* (O'Connor, J., dissenting).

<sup>207</sup> *Id.* (O'Connor, J., dissenting).

<sup>208</sup> *See* FED. R. EVID. 404 (b). Rule 404 (b) Provides in relevant part: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial

not admissible to show the defendant's criminal propensity. While such a rule works well in the normal case, it has nothing to say in a case in which the defendant's prior conviction is an element of the offense. The *Old Chief* decision makes the crucial point that in most cases, the prejudice to the defendant from introduction of the specifics of the prior conviction is inherent. Therefore, it seems only consistent with our abhorrence of propensity evidence, to conclude that evidence which carries that danger should be precluded, especially where the prosecution's purposes are equally well served by a stipulation to an element of the offense charged -- the defendant's prior conviction.

However, there are some very interesting practical items that should be considered, especially by defense counsel, as a result of *Old Chief*. The underlying assumption of the case is that it is to the defendant's advantage always to offer to stipulate to his prior conviction. But in a recent article, Professor James Duane of Regent University suggests this might not be the case.<sup>209</sup> He argues that there are better ways of trying to shield the jury from the prejudicial details of one's criminal record and that offering to stipulate is not the best. For example, he points out that status as a convicted felon is a matter of public record and that defendants have nothing to lose by admitting it without reservation, preferably in writing.<sup>210</sup> Even if the trial judge denies the motion to preclude the government from proving the details of the prior crime, says Duane, the defendant will have lost nothing if the jury learns that he admitted it unconditionally in open court prior to trial.<sup>211</sup> Also, he recommends that counsel should ask the trial judge to take judicial notice of the defendant's criminal record; if, under Federal Rule of Evidence 201, a fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot

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notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

*Id.*

<sup>209</sup> James Joseph Duane, *Litigating Felon-with-a-Firearm Cases After Old Chief*, 12 CRIM. JUST. 18 (1997).

<sup>210</sup> *Id.* at 19.

<sup>211</sup> *Id.* at 20.

reasonably be questioned” the judge, he argues, has no discretion to refuse.<sup>212</sup>

Professor Duane is also critical of the Court’s decision for a number of reasons. For example, he maintains that because the decision rests on Rule 403’s balancing processes, it actually leaves defendants with less protection than most of the courts of appeal had given them by deeming irrelevant under Rule 402, evidence of the underlying facts of a prior conviction.<sup>213</sup> On the other hand, the Supreme Court’s emphasis on Rule 403’s balancing process, he contends, will make the law less uniform because the balancing exercise will vary greatly among judges and consequently, at times, fall more restrictively on a particular defendant.<sup>214</sup> Professor Duane’s article is must reading if you represent a defendant charged with a 922(g) violation.

Despite its extremely limited application, the decision in *Bracy v. Gramley*<sup>215</sup> deserves mention. However, because time is short and it is my understanding that Professor Kaufman intends to cover the case in her presentation later today, I will skip my own discussion of it.

The Court also rendered several decisions that concern the Federal Sentencing Guidelines. At this symposium in prior years, it has not been customary for me to discuss the Court’s decisions interpreting the sentencing guidelines, and I have no intention to do so now. Nonetheless, I feel obliged to mention one such case that was decided by the Court after summary, rather than plenary, review. That is because the principle for which its stands draws negative reaction, indeed anger, in many of the precincts in which I travel -- precincts that are not as exclusively defense-oriented as was the case in my prior life with the Legal Aid Society.

The case of which I speak is *United States v. Watts*,<sup>216</sup> in which, by a 7-2 vote, the Court held that conduct for which a defendant has been acquitted by a jury nonetheless may be used to enhance his

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 22-23.

<sup>214</sup> *Id.*

<sup>215</sup> 117 S. Ct. 1793 (1997).

<sup>216</sup> 117 S. Ct. 633 (1997).

sentence for a charge for which he has been convicted. Actually, there were two cases before the Court: *Watts*, in which the defendant was convicted of possessing crack cocaine with intent to distribute but acquitted of using a firearm in relation to a drug offense,<sup>217</sup> and *Putra*, in which the defendant was convicted of aiding and abetting the possession of one ounce of cocaine base with intent to distribute but acquitted of a similar charge involving five ounces of the drug.<sup>218</sup>

At sentencing, the district courts found, under the preponderance of evidence standard allowed by the sentencing guidelines, that the conduct underlying the acquitted counts had in fact taken place.<sup>219</sup> Consequently, in *Watts*, the defendant received a two-level increase in his base offense level; in *Putra*, the acquitted transaction was deemed "relevant conduct" under section 1B1.3 of the guidelines and the defendant's sentence was based on the six ounces of crack rather than one ounce.<sup>220</sup> In each case, the Ninth Circuit held that the acquitted conduct could not be used in sentencing under the guidelines.<sup>221</sup>

The Supreme Court reversed both cases, stating that the Ninth Circuit's decisions conflicted with the clear implications of 18 U.S.C. 3661,<sup>222</sup> the Federal Sentencing Guidelines, and the Court's own decisions, especially *Witte v. United States*.<sup>223</sup>

The Court began its analysis by viewing section 3661 as stating broadly that no limitation may be placed on the kind of information about a defendant's "background, character, and conduct" that a federal court may consider in sentencing, and that this principle was

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<sup>217</sup> *Id.* at 634.

<sup>218</sup> *Id.* at 634-35.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 635.

<sup>222</sup> 18 U.S.C. § 3661 (1985). Section 3661 states: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

*Id.*

<sup>223</sup> 515 U.S. 389 (1995).



also established in *Williams v. New York*.<sup>224</sup> Neither the statute nor *Williams*, said the Court, “suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.”<sup>225</sup> The Court emphasized that although the guidelines had made serious inroads on the sentencing discretion of federal courts, they did not change the aspect of that discretion embodied in section 3661 and *Williams*.<sup>226</sup> The Court referred to USSG 1B1.4,<sup>227</sup> whose language is similar to section 3661’s and USSG 1B1.3,<sup>228</sup> which the Court read to provide a “sweeping” definition of “relevant conduct.”<sup>229</sup> The Court also rejected the argument that acquitted conduct may only be considered in choosing a sentence within the guideline range, and not in setting that range.<sup>230</sup>

The Court placed substantial reliance on *Witte*, which held that conduct relied on in sentencing for another offense may subsequently be prosecuted in its own right without violating the Double Jeopardy Clause.<sup>231</sup> Thus, the Ninth Circuit’s conclusion that the use of acquitted conduct in sentencing amounts to “punishment” for the acquitted offense is, in the Court’s view, inconsistent with the principle in *Witte*, that “sentencing enhancements do not punish defendants for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction.”<sup>232</sup> The Court emphasized that the preponderance of evidence standard,

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<sup>224</sup> 337 U.S. 241 (1949).

<sup>225</sup> *Watts*, 117 S. Ct. at 635.

<sup>226</sup> *Id.*

<sup>227</sup> USSG § 1B1.4. This section provides in pertinent part that “[i]n determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.” *Id.*

<sup>228</sup> USSG § 1B1.3. This section provides in relevant part that “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant” may be considered.” *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 636.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

which may be utilized at sentencing, is less demanding than the reasonable doubt standard that governs trials.<sup>233</sup> Therefore, the fact of acquittal on a specific charge may mean only that the jury was not satisfied that the government had met its burden of proof, not that the defendant did not engage in the act.<sup>234</sup>

Justices Scalia and Breyer wrote concurring opinions in which they took opposite positions on the issue of whether the Sentencing Commission could change the rule of this case. Justice Scalia argued that under Section 3661 and another statutory provision requiring the guidelines to be consistent with pertinent provisions of the federal criminal code,<sup>235</sup> the commission lacks authority to forbid courts to consider acquitted conduct otherwise usable at sentencing, or to compel the use of a higher standard of proof.<sup>236</sup> Justice Breyer argued that nothing in the Court's decision prevents the commission from crafting such a directive.<sup>237</sup>

Justice Stevens dissented, expressing the view that "[t]he notion that a charge cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant" to "longstanding procedural requirements enshrined in our constitutional jurisprudence."<sup>238</sup> He argued that under the sentencing guidelines, section 3661 has a "narrower scope" than the majority gave it: the guidelines "incorporate the broadly inclusive language of 3661 only into those portions of the sentencing decision in which the judge retains discretion," and determining what conduct is relevant is not one of those areas.<sup>239</sup> He distinguished *Williams* on the ground that it dealt with the exercise of the sentencing judge's discretion within the range authorized by law, rather than with rules defining the range within

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<sup>233</sup> *Id.* at 637.

<sup>234</sup> *Id.*

<sup>235</sup> 28 U.S.C. § 994(b)(1) (1997). This section provides that the "Guidelines [should] be consistent with all pertinent provisions of title 18, United States Code." *Id.*

<sup>236</sup> *Watts*, 117 S. Ct. at 638 (Scalia, J., concurring).

<sup>237</sup> *Id.* at 638-39 (Breyer, J., concurring).

<sup>238</sup> *Id.* at 644 (Stevens, J., dissenting).

<sup>239</sup> *Id.* at 640 (Stevens, J., dissenting).

which such discretion may be exercised.<sup>240</sup> He also pointed out that the issue of the burden of proof applicable to sentencing facts was not present in *Williams*, because the defendant's attorney did not contest the facts and that *Williams* was decided in the context of a sentencing system that focused on subjective assessments of rehabilitation, a regime replaced by the sentencing guidelines with a rigid system with a different rationale.<sup>241</sup> He distinguished *Witte* on the ground that it was limited to the definition of "punishment" in the context of double jeopardy. Here, he insisted, the issue "is not whether a defendant is being twice punished or prosecuted for the same conduct, but whether her initial punishment has been imposed pursuant to rules that are authorized by the statute and consistent with the Constitution."<sup>242</sup>

Justice Kennedy dissented because he believed that "the case raised a question of recurrent importance," one which should not be decided by the Court in summary fashion.<sup>243</sup>

The case is troubling for several reasons. Regardless of the legal niceties of burdens of proof differentials, the idea that conduct for which one has been acquitted nonetheless can serve as the basis for enhanced punishment draws considerable negative reaction from ordinary citizens. In this sense, I believe that Justice Stevens more accurately assesses what people feel about our trial and sentencing processes. If I am correct in this observation, then the Court's conclusion, because it is counterintuitive, should have been arrived at, if at all, after full briefing and oral argument, not summarily. In this regard it is difficult to quarrel with Justice Kennedy. More troubling, however, is the reality that only one member of the Court dissented on the merits; indeed, Justice Kennedy seems to lean towards the majority view. Consequently, all that remains is the issue disputed by Justices Scalia and Breyer, whether the Sentencing Commission can alter the decision. Whether and how that issue will arise is uncertain.

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<sup>240</sup> *Id.* at 641 (Stevens, J., dissenting).

<sup>241</sup> *Id.* at 642 (Stevens, J., dissenting).

<sup>242</sup> *Id.* at 642-43 (Stevens, J., dissenting).

<sup>243</sup> *Id.* at 644 (Kennedy, J., dissenting).

Well, that pretty much does it. This was not the most exciting run of cases, but although the Court's criminal law decisions were "Off-Broadway," they still were a pretty good show. Thank you.

