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## **A Year to Remember: The Supreme Court's Fourth, Fifth, and Sixth Amendment Jurisprudence for the 2003 Term**

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## A Year to Remember: The Supreme Court's Fourth, Fifth, and Sixth Amendment Jurisprudence for the 2003 Term

Cover Page Footnote

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Hellerstein: 4th, 5th, & 6th Amendments  
**A YEAR TO REMEMBER:  
THE SUPREME COURT'S FOURTH, FIFTH,  
AND SIXTH AMENDMENT JURISPRUDENCE  
FOR THE 2003 TERM**

*Professor William E. Hellerstein<sup>1</sup>*

In the context of constitutional criminal law, this was a very full and rich term for the Supreme Court. The Court decided six Fourth Amendment cases and I will discuss five of them. The government prevailed in all six. The Court also decided three cases involving the fruits of the poisonous tree doctrine, the tree being statements obtained from the defendant pursuant to improper police interrogation methods. The government won one, the defendant won one, and the third was a partial victory for the defendant. By far, the most important decisions of the term were two Sixth Amendment cases: *Blakely v. Washington*<sup>2</sup> and *Crawford v. Washington*.<sup>3</sup> Each opened an enormous Pandora's box and raised as many issues as they resolved.

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<sup>2</sup> *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (holding that Washington State's sentencing enhancement scheme deprived criminal defendants of their right to a jury trial).

<sup>3</sup> *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that out-of-court testimonial statements are subject to the Confrontation Clause).

### *The Fourth Amendment Cases*

Let me begin with *Hiibel v. Sixth Judicial District Court of Nevada*.<sup>4</sup> Picture this scenario: a police officer comes up to you and says, “Let me see some identification.” You say, “I do not feel like providing that, Officer.” “Well,” says the officer, “you are under arrest and you have the right to remain silent, anything you say can be held against you.” That scenario is the ironic, perhaps weird, result of the Supreme Court’s holding in the *Hiibel* case.<sup>5</sup> In *Hiibel*, the Court upheld a Nevada statute making it a crime for a person to refuse to provide identification to a police officer who has reasonable suspicion that the person is engaged in criminal conduct.

As you may recall, the Supreme Court’s landmark ruling in *Terry v. Ohio*<sup>6</sup> permits a police officer to detain a person whom he or she believes is acting suspiciously, even though the officer lacks probable cause for what was concededly a seizure of the person, and to make inquiry of that person as to what he is about. However, the *Terry* majority said nothing about criminalization of a person who did not answer an officer’s inquiry. If a State now wishes to criminalize a person’s refusal to identify himself, it may,

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<sup>4</sup> 124 S. Ct. 2451 (2004).

<sup>5</sup> *Id.* at 2455.

<sup>6</sup> 392 U.S. 1, 30 (1968) (holding that a police officer’s reasonable suspicion is sufficient to warrant a stop and frisk of a citizen and does not violate the Fourth Amendment).

as Nevada did, choose to do so, after *Hiibel*.<sup>7</sup>

But you may also recall that Justice White, in his *Terry* concurrence, wrote that when an officer approaches an individual, even under a legitimate stop, and requests identification, the individual can walk away and does not have to answer the police officer's inquiry.<sup>8</sup> That proposition was repeated several times in subsequent Supreme Court majority decisions such as *Berkemer v. McCarty*<sup>9</sup> and *Illinois v. Wardlow*.<sup>10</sup> To sustain the Nevada statute, the Court had to dispense with the point made by Justice White and later embraced by a majority of the Court. And the Court did so by describing their prior statements as just "dicta."<sup>11</sup>

There were two issues in *Hiibel* that divided the Court. The first was the Fourth Amendment issue.<sup>12</sup> Was the request for identification unreasonable? Did it go beyond *Terry*? The Court

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<sup>7</sup> *Hiibel*, 124 S. Ct. at 2461. See NEV. REV. STAT. ANN. § 171.123 (2004) (stating that a police officer may detain a person to ascertain his identity; any person so detained shall identify himself).

<sup>8</sup> *Terry*, 392 U.S. at 34 (White, J., concurring).

<sup>9</sup> 468 U.S. 420 (1984) (holding that persons temporarily detained in an ordinary traffic stop are not in custody for the purposes of *Miranda* and that the police officer may ask the detainee a moderate amount of questions; however, the detainee is not obligated to respond and unless the detainee's answers provide the officer with probable cause to arrest him, he must be released).

<sup>10</sup> 528 U.S. 119 (2000).

<sup>11</sup> *Hiibel*, 124 S. Ct. at 2459.

<sup>12</sup> *Id.* at 2457. See U.S. CONST. amend. IV, which provides:

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

said it did not.<sup>13</sup> Despite Justice White's belief that a person did not have to respond to a police officer's request for identification,<sup>14</sup> and the Court's subsequent acceptance of that principle, the Court has now held that a state may criminalize that refusal because the demand for identity is merely the counterpart of *Terry*.<sup>15</sup>

The second issue in the case involved the Fifth Amendment privilege against self-incrimination.<sup>16</sup> The Court held that there is no violation of the privilege because disclosing one's name to a police officer constitutes no real danger of self-incrimination, and the Fifth Amendment privilege protects only against disclosures that a witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used.<sup>17</sup> Having so concluded, the Court felt no need to resolve the question of whether disclosing one's identity is, in fact, testimonial.

In dissent, Justice Stevens argued that the compelled statement at issue was testimonial and it had informational and incriminating worth even if the name itself is not inculpatory: "A name," he said, "can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a wide range of data bases."<sup>18</sup> In his dissent, Justice Breyer stated that he could discern no legitimate reason for

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<sup>13</sup> *Hiibel*, 124 S. Ct. 2459 ("The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop.").

<sup>14</sup> *Terry*, 392 U.S. at 34 (White, J., concurring).

<sup>15</sup> *Hiibel*, 124 S. Ct. at 2459.

<sup>16</sup> *Id.* at 2460.

<sup>17</sup> *Id.* at 2460-61.

<sup>18</sup> *Id.* at 2464 (Stevens, J., dissenting).

the Court to repudiate the language in its prior cases that a person detained in an investigative stop can be questioned but is not obliged to answer, that answers may not be compelled, and that refusal to answer furnishes no basis for arrest.<sup>19</sup>

What questions arise? Can a refusal to identify oneself be criminalized even when the police do not have reasonable suspicion to stop a person and ask for identification? The Court made it clear that the police still need to have reasonable suspicion.<sup>20</sup> Can the police ask a person to provide information beyond identity? The Court did not answer this question but it did state that “as we understand it, the statute does not require a suspect to give the officer a driver’s license or any other document.”<sup>21</sup>

Consider the possible implications of *Hiibel* in New York. New York does not have a statute like Nevada’s that criminalizes a refusal to identify oneself to the police. But we do have a statute that penalizes the obstruction of governmental administration.<sup>22</sup>

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<sup>19</sup> *Id.* at 2465 (Breyer, J., dissenting).

<sup>20</sup> *Hiibel*, 124 S. Ct. at 2460.

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

<sup>22</sup> N.Y. PENAL LAW § 195.05 (McKinney 2004) provides:

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service or by means

Since the Court in *Hiibel* read the Nevada statute not to require a suspect to give the officer a driver's license or any other document,<sup>23</sup> does the decision have any bearing on Section 140.50 of New York's Criminal Procedure Law<sup>24</sup> which is the original stop and frisk law that was before the Court in a companion case to *Terry*, *Sibron v. New York*?<sup>25</sup>

What, in fact, may a police officer in New York do when executing a legitimate stop and frisk of a person? Section 140.50 provides that with reasonable suspicion, a police officer is authorized to stop an individual and request that he disclose his name, address and give an explanation of his conduct. Clearly, that goes beyond the Nevada statute upheld in *Hiibel*. However, if a police office asks a person to explain his conduct, the officer is striking deeply into Fifth Amendment territory. If that person refuses, can he be charged with obstruction of governmental administration? I do not think so but there could be a creative district attorney out here on Long Island or somewhere else who might try to put *Hiibel* together with our obstruction statute and try to make a case.

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of releasing a dangerous animal under circumstances evincing the actor's intent that the animal obstruct governmental administration.

<sup>23</sup> *Hiibel*, 124 S. Ct. at 2457.

<sup>24</sup> N.Y. CRIM. PRO. LAW § 140.50 (McKinney 2004).

<sup>25</sup> 392 U.S. 40 (1968).



The next case meriting discussion is *Illinois v. Lidster*,<sup>26</sup> a 6-to-3 decision, with a modest dissent by Justice Stevens, finding no Fourth Amendment violation.<sup>27</sup> But first I must make mention of two highly relevant precedents. The first is *Michigan Department of State Police v. Sitz*,<sup>28</sup> in which the Court upheld sobriety checkpoints on the ground that even though a checkpoint stop constituted a seizure, it was not a terribly invasive one. First, the stop was not done at the officer's discretion; second, there was a legitimate public interest in curtailing drunk driving and its consequences.<sup>29</sup> The second case is *City of Indianapolis v. Edmond*,<sup>30</sup> in which the City argued that, since the Supreme Court upheld the sobriety checkpoint, it should also sustain the constitutionality of a narcotics interdiction checkpoint.<sup>31</sup> The Court did not agree and struck it down as a violation of the Fourth Amendment.<sup>32</sup> The Court emphasized that a sobriety checkpoint is one thing because the consequences of drunk driving constitute an immediate threat to public safety. However, the primary purpose of the drug interdiction checkpoint is law enforcement, and where

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<sup>26</sup> 540 U.S. 419 (2004) (holding that a highway checkpoint designed to obtain information about a recent hit-and-run accident, which resulted in the defendant being charged with driving while intoxicated, was constitutional as it advanced a grave public concern and the police appropriately tailored the stop to fit important criminal investigatory needs).

<sup>27</sup> *Id.* at 429 (Stevens, J., dissenting in part).

<sup>28</sup> 496 U.S. 444 (1990).

<sup>29</sup> *Id.* at 455.

<sup>30</sup> 531 U.S. 32 (2000) (holding that a highway drug checkpoint's primary purpose was to uncover evidence of criminal wrongdoing and therefore, it violated the Constitution).

<sup>31</sup> *Id.* at 40-41.

<sup>32</sup> *Id.* at 41-42.

that is the case, the reasonable suspicion requirement of the Fourth Amendment must be adhered to.

*Lidster* falls in between the two cases because the checkpoint at issue was primarily for a law enforcement purpose, but unlike *Edmond*, it was not to look for evidence of drug crimes committed by the occupants of the stopped cars; it was for the purpose of seeking information from the cars' occupants that could possibly help in solving a crime committed by others as the police were seeking information about a hit and run accident that occurred a week earlier at the same location.<sup>33</sup> The Court held that this was a legitimate purpose because the police purpose in stopping cars to gather such information was no different than a police officer stopping a pedestrian on the street and making a similar inquiry.<sup>34</sup> Unfortunately for Mr. Lidster, he was inebriated and almost hit two police officers with his Minivan as he approached the checkpoint, which led to his arrest for driving under the influence.<sup>35</sup>

For people in cars and for people near cars, the past term did not augur well. Let me start with *Maryland v. Pringle*.<sup>36</sup> Pringle was the front seat passenger in a car driven by a Mr. Partlow.<sup>37</sup> There was another passenger in the backseat named

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<sup>33</sup> *Lidster*, 540 U.S. at 422.

<sup>34</sup> *Id.* at 423.

<sup>35</sup> *Id.* at 422.

<sup>36</sup> 540 U.S. 366 (2003).

<sup>37</sup> *Id.* at 368.

Smith.<sup>38</sup> Partlow was stopped for speeding in his Nissan Maxima.<sup>39</sup> When he was pulled over by the police, and asked for his driver's license, he opened the glove compartment and the police officer observed in the compartment a large roll of cash which, of course, set off a few bells and whistles for the officer.<sup>40</sup> However, a police computer check turned up nothing untoward. More police arrived and Partlow consented to a search of the car.<sup>41</sup> The search produced \$763 from the glove compartment and, more significantly, five plastic bags containing cocaine were found in the backseat armrest; it was a matter of considerable importance that no contraband was found in or near the front passenger seat in which Pringle was seated.<sup>42</sup> When one of the officers asked the occupants to whom the drugs belonged, no one responded.<sup>43</sup> Consequently, the police arrested everyone.<sup>44</sup>

The issue before the Court was whether there was probable cause to arrest Pringle for possession of drugs found in the backseat armrest; the Court unanimously said yes. The Court reasoned that it was reasonable for the police to infer that any or all three of the car's occupants had knowledge of, and exercised dominion and control over, the cocaine, and thus a reasonable officer could conclude that there was probable cause to believe that

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Pringle*, 540 U.S. at 368.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 368-69.

<sup>44</sup> *Id.* at 369.

Pringle committed the crime of possession of cocaine, either solely or jointly.<sup>45</sup>

To arrive at this result, the Court had to distinguish two previous cases. The first one was *Ybarra v. Illinois*.<sup>46</sup> In *Ybarra*, the officers were executing a search warrant in a bar.<sup>47</sup> They started frisking every patron in the bar.<sup>48</sup> The Court disallowed that conduct on the ground that the search warrant was being executed in a public tavern and there was no reason to believe that everyone in the tavern was engaged in a common enterprise.<sup>49</sup>

The second case, which was closer factually to the *Pringle* situation, was an old one from 1948, *United States v. DiRe*.<sup>50</sup> DiRe was a passenger in a car and the police had probable cause to arrest both the driver and another occupant, but not DiRe.<sup>51</sup> The Court held that the search of DiRe was not constitutional because the police had no information that singled DiRe out.<sup>52</sup> The Court distinguished Pringle's situation from *DiRe*, because unlike *DiRe*,

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<sup>45</sup> *Id.* at 372.

<sup>46</sup> 444 U.S. 85 (1979).

<sup>47</sup> *Id.* at 87-88 (stating a search warrant was issued to search the tavern and bartender for controlled substances on the basis of information obtained from a reliable informant that he had seen tin-foil packets in the bar on numerous occasions).

<sup>48</sup> *Id.* at 88.

<sup>49</sup> *Id.* at 90.

<sup>50</sup> 332 U.S. 581 (1948).

<sup>51</sup> *Id.* at 583 (explaining that although an informant told the authorities that the informant was going to purchase phony gasoline ration coupons from a man named Buttita, the authorities searched and took into custody not only Buttita but also DiRe, a passenger in Buttita's car, who they subsequently arrested after finding counterfeit gasoline ration coupons in his pockets).

<sup>52</sup> *Id.* at 595. "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587.

the officer did not know which of the three men possessed the drugs and thus, there was probable cause to arrest all three occupants.<sup>53</sup> The Court also emphasized the “relatively small” size of the car in which the three men were found<sup>54</sup> which, of course, raises an interesting question for future cases: how does the Court’s analysis in *Pringle* apply to a larger vehicle, such as an SUV, or even a team bus, with more than three passengers in it?

The next automobile case is *Thornton v. United States*,<sup>55</sup> and it raised a difficult issue in regard to the scope of the search incident to arrest doctrine. In *Thornton*, an officer became suspicious of the defendant who was driving a Lincoln Town Car because the tags were licensed to a Chevrolet.<sup>56</sup> The defendant pulled into a parking lot, parked his car and walked away from it, as the officer drove in behind, walked after him and then asked for his license.<sup>57</sup> The defendant appeared nervous and rambling, so the officer asked him if he had any narcotics or weapons on him. The defendant said no and the officer then frisked the defendant with his consent, found bags of marijuana and crack cocaine and arrested him.<sup>58</sup> After handcuffing and placing the defendant in the backseat of his patrol car, the officer searched the defendant’s car

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<sup>53</sup> *Pringle*, 540 U.S. at 368-69 (maintaining that if none of the men admitted ownership or information about the drugs or money found in the car, all three occupants would be arrested).

<sup>54</sup> *Id.* at 373.

<sup>55</sup> 124 S. Ct. 2127 (2004).

<sup>56</sup> *Id.* at 2129.

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

<sup>58</sup> *Id.*

and found a gun under the seat.<sup>59</sup>

The Court upheld the defendant's conviction for possession of the handgun by a vote of 7-to-2, but the vote was 5-to-4 as to whether denial of suppression of the handgun was properly grounded in the search incident doctrine. To understand *Thornton*, one has to refer back to *New York v. Belton*,<sup>60</sup> in which the Court reversed the New York Court of Appeals which had held that, once the occupant of a vehicle has been removed from it by the arresting officer, a subsequent search of the car cannot be justified as a "search incident to arrest" doctrine because *Chimel v. California* restricted a search incident to arrest to the "grabbable" area, proximate to the arrestee.<sup>61</sup> In *Belton*, although the defendant was not within the grabbable area, the Court upheld the search of his car because he had been arrested in his car and the police needed a bright line rule. The rule that emerged was that when a police officer has made a lawful arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest.<sup>62</sup>

In *Thornton*, the issue was whether the rationale of *Belton*

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<sup>59</sup> *Id.*

<sup>60</sup> 453 U.S. 454 (1981).

<sup>61</sup> *Id.* at 462-63; see *Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that it is reasonable for officers to search any "area into which an arrestee might reach in order to grab a weapon or evidentiary items" because otherwise the officers' safety as well as the successful completion of the arrest would be at risk and that searches in the absence of a warrant are limited to areas in the room of the arrest).

<sup>62</sup> *Belton*, 453 U.S. at 462-63.

also justified the search of a vehicle where the arrestee was arrested after he had parked his car and walked away from it. The five-member majority, in an opinion by Chief Justice Rehnquist, held that it did and, as in *Belton*, the Court reaffirmed the need of the police to have a bright line rule.<sup>63</sup> That Thornton was not in the car when he was arrested was inconsequential; he was still near it.<sup>64</sup> If this sounds strained, it is. The rationale of the search incident doctrine has always been twofold: protect the officer's safety by removing an arrestee's ability to reach for a weapon and prevent the destruction of contraband or evidence within an arrestee's reach. But one could have said the same thing about *Belton*, as *Belton* also was in no position to grab a weapon or anything else from his car. That is why, even after it had been reversed in *Belton*, the New York Court of Appeals affirmed *Belton*'s conviction, not on a search incident rationale, which it found unwarranted under the New York Constitution, but under the automobile exception to the warrant requirement, insofar as the officer in *Belton* had probable cause to believe there was contraband in the car itself.<sup>65</sup> The Court reasoned that the "grabbable area" doctrine simply cannot sensibly be applied to facts that did not warrant it and that once a court starts down that

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<sup>63</sup> *Thornton*, 124 S. Ct. at 2129 (concluding that "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle.").

<sup>64</sup> *Id.* at 2131 (stating that "[i]n all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.").

<sup>65</sup> *People v. Belton*, 432 N.E.2d 745, 746 (N.Y. 1982) ("We do not find it necessary to consider the Supreme Court's rationale as applied to our

path and extends a rule beyond any true justification for it, it opens the door to a greatly enlarged area of warrantless searches.<sup>66</sup>

In extending the search incident doctrine in *Thornton*, the majority declared that the Court in *Belton* had placed no reliance on the fact that the officer ordered the occupants out of the vehicle or initiated contact with them while they remained in it.<sup>67</sup> Consequently, there is no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car.<sup>68</sup> The Chief Justice emphasized that the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.<sup>69</sup> Therefore, he concluded, while an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it does not turn on whether he was inside or outside the car when the officer first initiated contact with him; so long as an arrestee is the sort of "recent occupant" of a vehicle as

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Constitution, however, for we now hold on a different rationale that the search and seizure were not improper under the State Constitution.").

<sup>66</sup> *Id.* at 747 ("Once the exception is employed to justify a warrantless search for objects outside an arrested person's reach it no longer has any distinct spatial boundary. As Judge Wachtler . . . put it, 'search and seizure law [becomes] uncontrollable when the rubric [is] adopted and the rationale discarded.' ") (citing *People v. Brosnan*, 298 N.E.2d 78, 86 (N.Y. 1973)).

<sup>67</sup> *Thornton*, 124 S. Ct. at 2131.

<sup>68</sup> *Id.* at 2131-32.

<sup>69</sup> *Id.* at 2131.



Thornton was, the police may search that vehicle incident to the arrest.<sup>70</sup>

Justice Scalia concurred in the affirmance of Thornton's conviction. But as the New York Court of Appeals had maintained in the *Belton* remand, he too believed that the majority's application of search incident doctrine in this case stretched that doctrine beyond its breaking point.<sup>71</sup> Thus, he could not accept that *Belton* extends to someone who was not apprehended in the car and, in fact, was a distance from it. He pointed out that the Court's *Belton* jurisprudence had reached the point where the police now view the search incident doctrine as applicable to any situation where a car is involved.<sup>72</sup> To make his point, he noted that lower courts had stretched the search incident doctrine to cover a situation where, at the time of the search of the car, the defendant had already arrived at the stationhouse.<sup>73</sup>

Justice O'Connor concurred, stating that the majority opinion was a logical extension of *Belton*, but that she also agreed with Justice Scalia that lower courts now treat the ability of the police to search a vehicle incident to the arrest of a recent occupant as an entitlement rather than as an exception justified by the twin rationales of the search incident doctrine. However, she did not

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<sup>70</sup> *Id.* at 2131-32.

<sup>71</sup> *Id.* at 2137-38 (Scalia, J., concurring).

<sup>72</sup> *Thornton*, 124 S. Ct. at 2134-35 (Scalia, J., concurring) (criticizing the view that since an officer is entitled to search at the time of an arrest, he should, therefore, be entitled to the same search after securing the defendant in the police vehicle).

<sup>73</sup> See *United States v. Mitchell*, 82 F.3d 146, 149 (7th Cir. 1996); *United States v. Karlin*, 852 F.2d 968, 970 (7th Cir. 1988).

think this was the appropriate case in which to pursue Scalia's analysis.<sup>74</sup>

In dissent, Justice Stevens minced no words in arguing that matters have really gotten out of hand. He emphasized that *Belton* was concerned only with the narrow but common circumstance of a search occasioned by the arrest of a suspect who was seated in or driving an automobile at the time the police approached and that *Belton's* bright line rule was not needed for cases in which the arrestee is first accosted when he is a pedestrian, because *Chimel* provides all the guidance that is necessary.<sup>75</sup> Consequently, the *Chimel* rule should provide the same protection to a "recent occupant" of a vehicle as it would for a recent occupant of a house. Otherwise, he said, without some limiting principle, the Court's decision will contribute to a "massive broadening of the automobile exception . . . when police have probable cause to arrest an individual but not to search his car."<sup>76</sup>

The Court's belief that it had again furnished the police with a bright line rule may be more evanescent than the Court thinks. Consider this: the police have probable cause to arrest Joe who is spending the night in a room in a Motel 6. Knowing he will be at that location, they arrive in the early morning and wait

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<sup>74</sup> *Thornton*, 124 S. Ct. at 2133 (O'Connor, J., concurring in part) ("While the approach Justice Scalia proposes appears to be built on firmer ground, I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit.").

<sup>75</sup> *Id.* at 2139 (Stevens, J., dissenting) (stating that neither *Belton* nor *Chimel* would have permitted this kind of search).

<sup>76</sup> *Id.* at 2140 (citing *Robbins v. California*, 453 U.S. 420, 452 (1981) (Stevens, J., dissenting)).

outside Joe's room, which is on the ground floor. Prior to turning in, Joe had parked his car directly in front of his room. Joe wakes up and exits his room. The police arrest him immediately. At the time, Joe is only five feet from his car. Under the *Belton* doctrine as extended in *Thornton*, can the police search the car as incident to the arrest? Well, the *Thornton* majority said that there was both a temporal and spatial element to the search of Thornton's car.<sup>77</sup> In my hypothetical, the "spatial" element would be met. Joe was only five feet from the car when the police arrested him. However, as to the temporal element, the answer is more problematical; Joe spent the night in his room and hours had elapsed during which he had no contact with the car. Would it make a difference if only an hour had elapsed before he was arrested? Thirty minutes? Future cases, you can be sure, will present these types of questions.

The last Fourth Amendment case that I want to talk about was more easily resolved by the Court than *Thornton*. The issue presented was when the police are executing a search warrant, how much time must elapse before the premises may be entered forcibly? It was only a few years ago that the Court finally answered the question of whether the Fourth Amendment required that the police must first knock and announce their purpose when executing a warrant.<sup>78</sup> The Court said yes. But the Court did not

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<sup>77</sup> *Id.* at 2131-32.

<sup>78</sup> *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (rejecting a blanket exception to the "knock and announce" rule and holding that "[i]n order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by . . . allowing the destruction of evidence.").

instruct as to when it is reasonable for the police to dispense with the knock and announce requirement, leaving it to resolution on a case-by-case basis. A similar approach was taken in the context of a forcible entry after the police have knocked and announced their presence.

In *United States v. Banks*, the police went to the defendant's apartment to execute a search warrant for cocaine.<sup>79</sup> They called out "police search warrant," knocked loudly on the front door, and waited fifteen to twenty seconds for a response. Receiving none, they broke the door down. The defendant, who was in the shower, heard nothing until the crash of the door.<sup>80</sup> A unanimous Court, in an opinion by Justice Souter, held that the fifteen to twenty second delay was reasonable and thus did not violate the Fourth Amendment.<sup>81</sup> The Court further held that the standards which bear on whether police officers can legitimately enter after knocking are the same as those which apply to a determination of whether there was an obligation to knock and announce at all.<sup>82</sup> The Court stressed that it would not employ "categories and protocols" as the Ninth Circuit has been inclined to do.<sup>83</sup> Nor was a bright-line rule warranted in these circumstances; the Court would just apply a reasonableness rule, that turns on the

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<sup>79</sup> 540 U.S. 31, 33 (2003).

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

<sup>81</sup> *Id.* ("The question is whether their 15-to-20-second wait before a forcible entry satisfied the Fourth Amendment and 18 U.S.C. § 3109. We hold that it did.").

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 41.

nature of the exigency known to the officers; after waiting fifteen to twenty seconds without a response, the police could fairly suspect that the cocaine would be gone if they waited any longer.<sup>84</sup>

What if the police are executing a warrant to search for items that are not as readily destructible as drugs? Will a fifteen to twenty second waiting period again be deemed reasonable? I do not think so. For example, if the item that the police have a warrant for is a stolen grand piano, they may have to wait a little longer; it is not easy to flush a piano down the toilet. And, that is the less than mysterious message of the case: the waiting period has to be reasonable given the facts and circumstances of the case.

### *The Fifth Amendment Cases*

Let me turn now to the three “fruits of the poisonous tree” cases decided by the Court last term. All three involved evidence derived from improper police interrogation practices in the first instance. The first case was *United States v. Patane*, and concerned evidence that, in the Court’s view, qualified as “good fruits” and thus was admissible in evidence against the defendant.<sup>85</sup> In this case, the defendant was arrested for violating a restraining order.<sup>86</sup> When the officer began reading the defendant his *Miranda* rights, he said that he knew his rights, and the officer did not complete the warnings.<sup>87</sup> The officer then asked the defendant

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<sup>84</sup> *Banks*, 540 U.S. at 35.

<sup>85</sup> 124 S. Ct. 2620 (2004).

<sup>86</sup> *Id.* at 2625.

<sup>87</sup> *Id.*

about a handgun he knew the defendant owned and the defendant told him where in his home the gun could be found; the officer subsequently retrieved the gun from the defendant's bedroom.<sup>88</sup> The defendant was ultimately convicted of being a felon in possession of a weapon.<sup>89</sup>

The issue before the Court was whether the gun was admissible because it was the fruit of a *Miranda* violation, to wit, the officer's failure to complete the reading of the required warnings. The Court, in a 5-to-4 decision, held that the gun was admissible.<sup>90</sup> The Court split along traditional "conservative" and "liberal" lines.<sup>91</sup>

The genesis of the problem in this case, as well as the next one, stems from a long-standing debate about the relationship between *Miranda* and traditional fruits of the poisonous tree doctrine. However, some thought that the underlying issues of that debate had been resolved by the Court's decision in 2000 in *Dickerson v. United States*.<sup>92</sup> Those who so believed were mistaken. What was the debate about? Starting in 1974, then Associate Justice Rehnquist took the position that the *Miranda* warnings were not constitutional mandates but were merely

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

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

<sup>90</sup> *Patane*, 124 S. Ct. at 2627-28.

<sup>91</sup> Justice Thomas announced the judgment of the Court and delivered an opinion, in which Chief Justice Rehnquist and Justice Scalia joined. Justice Kennedy filed an opinion concurring in the judgment which Justice O'Connor joined. Justice Souter filed a dissenting opinion, in which Justices Stevens and Ginsburg joined. Justice Breyer also filed a dissenting opinion.

<sup>92</sup> 530 U.S. 428 (2000).

prophylactic, separate and apart from the privilege against self-incrimination, and as the years passed, more Justices embraced Rehnquist's position.<sup>93</sup> Thus, unlike a truly coerced confession whose fruits have always been inadmissible, a violation of *Miranda*, while rendering the defendant's statement inadmissible, did not also require the suppression of the fruits of that violation. This dichotomy presented a fundamental structural problem under the framework of our Constitution: if the *Miranda* warnings mandated by the Supreme Court are not constitutional mandates, then how can the states be required to comply at all with *Miranda*? Under the Supremacy Clause of Article VI of the Constitution, the States are not required to comply with non-constitutional mandates. The answer to the puzzle came in, of all places, Chief Justice Rehnquist's opinion in *Dickerson*, which held that *Miranda* was indeed a constitutional mandate.<sup>94</sup>

One would have thought that with *Dickerson* decided, the "prophylaxis" issue had been resolved. But it reappeared in Justice Thomas' plurality opinion where he stated, once again, that *Miranda* "is a prophylactic employed to protect against violations of the Self-Incrimination Clause, but that the "clause is not implicated by the admission into evidence of the physical fruit of a

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<sup>93</sup> See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (stating that *Miranda* warnings "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self incrimination was protected").

<sup>94</sup> *Dickerson*, 530 U.S. at 444 ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

voluntary statement.”<sup>95</sup> The failure to give the proper warnings, he said, violates nothing until the confession is used in evidence against the defendant.<sup>96</sup> And, if the confession is never introduced at trial, admission of its fruits must be justified by the necessity of protecting the actual right of self-incrimination. Since a statement obtained in violation of *Miranda* does not mean that the statement is involuntary, any further extension of *Miranda* must be justified by the necessity for the protection of the actual right against self-incrimination.<sup>97</sup> Thus, concluded Justice Thomas, there need be no blanket rule requiring suppression of statements noncompliant with *Miranda* because it cannot be justified by reference to the Fifth Amendment goal of assuring trustworthy evidence or by any deterrence rationale; such a rule would fail the Court’s requirement that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it.<sup>98</sup>

Justice Kennedy concurred in the judgment, stating that there was no need to decide whether the failure to give the defendant full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there was “‘[any]thing to deter’ so long as the unwarned statements are not later introduced at trial.”<sup>99</sup> He pointed out that in the Court’s

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<sup>95</sup> *Patane*, 124 S. Ct. at 2626.

<sup>96</sup> *Id.* at 2629.

<sup>97</sup> *Id.* at 2630.

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

<sup>99</sup> *Id.* at 2631 (Kennedy, J., concurring) (“Unlike the plurality, however, I find it unnecessary to decide whether the detective’s failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself . . .”).



previous cases that involved evidence obtained following unwarned interrogation, the evidence was deemed admissible because the Court determined that the concerns underlying *Miranda* must be accommodated to other objectives of the criminal justice system. He noted that the instant case was even stronger than cases which admitted a defendant's subsequent statement because the admission of nontestimonial physical evidence, such as Patane's handgun, did not run the risk of admitting a defendant's coerced incriminating statement against him; nor can the deterrence rationale justify the exclusion of physical evidence that has important probative value.<sup>100</sup>

It is difficult to assess whether a majority of the Court will regress to the "prophylaxis" principle. However, the real issue remains one of deterrence. That is because, in a particular case, the police may be more interested in locating physical evidence than in obtaining a statement from the accused. In such an instance, the police may intentionally dispense with *Miranda* warnings and enjoy the "fruits" of their endeavors. As Justice Souter pointed out in his dissent, the Court has created "an unjustifiable invitation" to police "to flout *Miranda* when there may be physical evidence to be gained."<sup>101</sup> Justice Breyer, in his dissent, stated that he would suppress the physical fruits of a *Miranda* violation unless the failure to provide the *Miranda* warnings was done in good faith.<sup>102</sup>

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<sup>100</sup> *Patane*, 124 S. Ct. at 2631 (Kennedy, J., concurring).

<sup>101</sup> *Id.* at 2632 (Souter, J., dissenting).

<sup>102</sup> *Id.* (Breyer, J., dissenting).

In *Missouri v. Seibert*, the Court determined that certain *Miranda* violations can produce “bad fruits.”<sup>103</sup> In this case, the police employed a not uncommon interrogation practice; it was the “question first, warn later” technique. Ms. Seibert was arrested in connection with an arson/murder. At the police station, without being *Mirandized*, she was questioned for thirty to forty minutes, and confessed.<sup>104</sup> The interrogating officer then gave her a twenty-minute break to go to the bathroom and get water; after she returned, he gave her *Miranda* warnings and she signed a waiver.<sup>105</sup> The officer resumed questioning, confronted her with her pre-warning statements, and got her to repeat the information.<sup>106</sup> At the suppression hearing, the officer admitted that he made a conscious decision to withhold *Miranda* warnings. The issue before the Court was whether Ms. Seibert’s second statement could be introduced into evidence.

In a 5-to-4 ruling, the Court held that the statement must be suppressed.<sup>107</sup> Justice Souter wrote a plurality opinion in which Justices Stevens, Ginsburg and Breyer joined. He reasoned that *Miranda* was based on the recognition that the coercion inherent in a custodial interrogation blurs the line between voluntary and involuntary statements and increases the risk that the privilege against self-incrimination will not be respected.<sup>108</sup> To reduce the

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<sup>103</sup> 124 S. Ct. 2601 (2004).

<sup>104</sup> *Id.* at 2606.

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

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

<sup>107</sup> *Id.* at 2613.

<sup>108</sup> *Seibert*, 124 S. Ct. at 2607-08.

risk of coerced confessions and to protect the privilege, the *Miranda* rule's purpose was to allow for a real choice between talking and remaining silent, and to eliminate the need for courts to consider the circumstances in every challenge to the voluntariness of a statement.<sup>109</sup> He emphasized that the threshold issue in a "question first, warn later" interrogation is whether in those circumstances the delayed *Miranda* warnings could function effectively, as *Miranda* requires.<sup>110</sup> He concluded that they could not because, by any objective measure, it is likely that warnings withheld until after interrogation and confession will be ineffective in preparing a suspect for successive interrogation that is close in time and similar in content.<sup>111</sup> He explained further that the manifest purpose of the "question first" technique is to obtain "a confession the suspect would not make if he understood his rights at the outset."<sup>112</sup> Thus, when the warnings are "inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"<sup>113</sup>

Justice Souter pointed out that the instant case was different from *Oregon v. Elstad*,<sup>114</sup> in which the omission of *Miranda*

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<sup>109</sup> *Id.* at 2608.

<sup>110</sup> *Id.* at 2610.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 2611.

<sup>113</sup> *Seibert*, 124 S. Ct. at 2611 (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)).

<sup>114</sup> 470 U.S. 298 (1985).

warnings was inadvertent; the suspect had incriminated himself in a brief conversation in his home, and the later *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.<sup>115</sup> In the instant case, the “unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill.”<sup>116</sup> The warned phase proceeded after only a fifteen to twenty minute pause, in the same place, with the same officer, who did not advise Ms. Seibert that her statement could not be used against her. These facts, Souter maintained, challenged any claim that the warnings were comprehensible or efficacious to the point that a reasonable person in the suspect’s shoes could not have understood them to convey a message that she retained a choice about continuing to talk.<sup>117</sup>

Justice Kennedy’s concurrence provided the necessary fifth vote for reversal but his opinion limited the scope of the plurality opinion.<sup>118</sup> His main point was that *Elstad* reflects a balanced and pragmatic approach to enforcing *Miranda* and he rejected, as too broad, the plurality’s test — that whenever a two-stage interview occurs, the post-warning statement’s admissibility depends on whether the midstream warnings could have been effective enough to accomplish their objective.<sup>119</sup> He also criticized the plurality’s

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<sup>115</sup> *Id.* at 318.

<sup>116</sup> *Seibert*, 124 S. Ct. at 2612.

<sup>117</sup> *Id.* at 2611-12.

<sup>118</sup> *Id.* at 2616 (Kennedy, J., concurring) (stating that the plurality’s test “cuts too broadly”).

<sup>119</sup> *Id.* at 2615 (citing *Elstad*, 470 U.S. at 309).

test as too murky. Instead, he would apply a rule that when the “question first” technique is intentionally used, post-warning statements relating to the substance of the pre-warning statements should not be admissible unless “curative” techniques have been instituted, such as a substantial break in time and circumstances between the two parts of the interrogation and/or warning that the pre-warning statements are likely to be inadmissible.<sup>120</sup>

Never a friend of the fruits exclusion doctrine, Justice O'Connor dissented, in an opinion joined by the usual suspects, Rehnquist, Scalia, and Thomas. She maintained that the two-step interrogation procedure at issue should be analyzed under basic voluntariness standards.<sup>121</sup> In her view, the plurality had “devoured” *Elstad*, and she rejected Kennedy’s “deliberate” or “calculated” test as inconsistent with cases that have rejected intent-based tests.<sup>122</sup>

Despite the fact that Justice Kennedy’s concurrence lessened the impact of this case, I still believe it is an important one. Prior to the decision, a good many police departments employed the “question first, warn later” technique. If they continue do so, they will be taking a considerable risk that the product, or fruit if you will, of their labors will be inadmissible as evidence.

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<sup>120</sup> *Id.* at 2614.

<sup>121</sup> *Seibert*, 124 S. Ct. at 2619-20 (O'Connor, J., dissenting).

<sup>122</sup> *Id.* at 2618-19.

The third and final “fruits” case decided last term was *Fellers v. United States*.<sup>123</sup> It had the potential to produce a decision of considerable significance but, given the Court’s decision to remand the case to give the lower court a chance to address the core issue first, it went out with a whimper. Unlike *Patane* and *Seibert*, *Fellers* involved fruits of a Sixth Amendment right to counsel violation because *Fellers* was questioned after he had been indicted. Thus, the issue presented, but not reached, was whether the fruit of a Sixth Amendment violation is more readily suppressible than the fruit of a Fifth Amendment violation.

Analysis here began with the principle espoused by the Court in *Massiah v. United States*,<sup>124</sup> a case in which there had been no custodial interrogation of the defendant at all. *Massiah* was in a car with his cohort, Colson.<sup>125</sup> Colson, seeking a good deal for himself, had agreed to help the government with regard to *Massiah* and he succeeded in getting *Massiah* to incriminate himself while the two men were talking in the car.<sup>126</sup> The crucial feature of the case was that *Massiah* had already been indicted.<sup>127</sup> Thus *Massiah*’s statement to Colson, the Court held, was inadmissible because once a person is indicted, the Sixth Amendment right to counsel attaches and the government may not deliberately elicit a statement from the defendant.<sup>128</sup> The Court has

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<sup>123</sup> 540 U.S. 519 (2004).

<sup>124</sup> 377 U.S. 201 (1964).

<sup>125</sup> *Id.* at 203.

<sup>126</sup> *Id.* at 202-03.

<sup>127</sup> *Id.* at 201.

<sup>128</sup> *Id.* at 205.

never departed from that principle.<sup>129</sup>

In *Fellers*, the issue was not the admissibility of the first statement that the defendant made to the police, but of a subsequent one that had, in fact, been preceded by *Miranda* warnings. Fellers had been indicted for conspiracy to distribute methamphetamine. The police went to his home with an arrest warrant and told him that they had come to discuss his involvement with drug distribution. During the course of a brief discussion, Fellers made inculpatory statements. At the jail, he was given a full set of *Miranda* warnings, signed a waiver, and reiterated his earlier statements. The lower court had held that Fellers' jailhouse statements were admissible because the police had not interrogated Fellers in his home under *Elstad*.<sup>130</sup>

In a unanimous opinion written by Justice O'Connor, the Court held that the lower court erred in holding that the absence of an "interrogation" foreclosed the defendant's claim that his jailhouse statements were the illicit fruits of the violation of his Sixth Amendment right to counsel.<sup>131</sup> Justice O'Connor pointed out that, once a defendant has been indicted, the issue is whether the police "deliberately elicited" information from him, not whether they interrogated him.<sup>132</sup> Thus, because the officers' discussion with Fellers took place after he had been indicted, outside the presence of counsel, and in the absence of any waiver

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<sup>129</sup> See *United States v. Henry*, 447 U.S. 264 (1980); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Maine v. Moulton*, 474 U.S. 159 (1985).

<sup>130</sup> *Fellers*, 540 U.S. at 521.

<sup>131</sup> *Id.* at 524.

<sup>132</sup> *Id.*

of Fellers' Sixth Amendment rights, their conduct violated the Sixth Amendment standards established in *Massiah*. But what about the fruits of the statement obtained in violation of *Massiah*? Well, we are going to have to wait a while for the Supreme Court to answer that question. The Court remanded the case to the Sixth Circuit because the lower court had erred in concluding that Fellers had not been subjected to custodial interrogation when it should have applied the Sixth Amendment standard of "deliberate elicitation"; because of that error, the lower court never reached the fruits issue.<sup>133</sup>

### *The Sixth Amendment Cases*

With regard to the last two cases that I shall discuss, I am reminded of that old television series, *Sanford and Son*, starring the comedian, Redd Foxx. Whenever Fred Sanford, played by Foxx, heard bad news, he would raise his eyes to the sky, grab his heart, and commence a dialogue with his departed wife, exclaiming, "this is the big one!" Well, *Blakely v. Washington*<sup>134</sup> and *Crawford v. Washington*<sup>135</sup> are both "big ones."

*Blakely* involved a Washington sentencing scheme under which the facts admitted in the defendant's plea, standing alone, supported a maximum sentence of fifty-three months, but pursuant to which the judge imposed a ninety-month sentence after finding

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<sup>133</sup> *Id.* at 524-25.

<sup>134</sup> *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

<sup>135</sup> *Crawford v. Washington*, 124 S. Ct. 1354 (2004).



that the defendant had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range.<sup>136</sup> The question was whether the judge's finding of deliberate cruelty and imposition of an exceptional sentence violated the defendant's Sixth Amendment right to a jury trial.<sup>137</sup>

Justice Scalia's opinion for the majority held that the imposition of the enhanced sentence, based on a finding by the judge alone, deprived the defendant of his right to a trial by jury.<sup>138</sup> Applying the rule announced previously in *Apprendi v. New Jersey*,<sup>139</sup> the Court reiterated that any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum had to be submitted to a jury, and proved beyond a reasonable doubt.<sup>140</sup> Justice Scalia made it clear that whether:

the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*<sup>141</sup>), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.<sup>142</sup>

*Blakely*, of course, raises serious questions as to the constitutionality of the entire federal sentencing guidelines scheme

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<sup>136</sup> *Blakely*, 124 S. Ct. at 2534.

<sup>137</sup> *Id.* at 2536.

<sup>138</sup> *Id.* at 2543.

<sup>139</sup> 530 U.S. 466 (2000).

<sup>140</sup> *Blakely*, 124 S. Ct. at 2536.

<sup>141</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>142</sup> *Blakely*, 124 S. Ct. at 2538.

because its features do not differ significantly from the State of Washington's. Justice Breyer's dissent, in which Justice O'Connor joined, expressed the concern that the Court would not be able to distinguish the Federal Sentencing Guidelines.<sup>143</sup> Nor can I. But we will have an answer soon enough.

*Crawford v. Washington*,<sup>144</sup> like *Blakely*, also rocked the foundations of the criminal justice system and raised many questions about its meaning and scope. The factual permutations emanating from this case are even more diverse than those which arose from *Blakely* and we will not have answers to most of them for some time. Crawford was charged with attempted murder and assault. At the time of the incident, his wife was present.<sup>145</sup> During police questioning, she made statements that tended to negate Crawford's justification defense.<sup>146</sup> Due to Washington's marital privilege, she was unavailable to testify for the prosecution at trial.<sup>147</sup> Consequently, the trial court allowed the prosecution to play a tape-recording of her out-of-court statements during presentation of its case-in-chief.<sup>148</sup> The Washington Supreme Court upheld the admissibility of those statements because they bore " 'particularized guarantees of trustworthiness.' " <sup>149</sup>

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<sup>143</sup> *Id.* at 2561 (Breyer, J., dissenting).

<sup>144</sup> 124 S. Ct. 1354 (2004).

<sup>145</sup> *Id.* at 1357.

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

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

<sup>148</sup> *Id.* at 1358.

<sup>149</sup> *Crawford*, 124 S. Ct. at 1358 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *overruled by Crawford*, 124 S. Ct. at 1354).

In a 7-to-2 decision, the Supreme Court reversed. Justice Scalia, who wrote the Court's opinion, held that the State's use of the wife's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the Constitution is confrontation.<sup>150</sup> He explained that the principal evil at which the Confrontation Clause is directed is the civil-law mode of criminal procedure, particularly the use of *ex parte* examinations as evidence against the accused.<sup>151</sup> Thus, he emphasized that the primary object of the Confrontation Clause was testimonial hearsay, and interrogations by law enforcement officers fell squarely within that category because the Framers would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable and the defendant had had a prior opportunity for cross-examination.<sup>152</sup>

To arrive at this holding, the Court had to overrule its decision in *Ohio v. Roberts*,<sup>153</sup> under whose regime we had operated for almost a quarter century. *Roberts* allowed an unavailable witness's statement in evidence if the statement bore "adequate indicia of reliability" because it fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."<sup>154</sup> Justice Scalia explained that *Roberts* departed from historical principles because it allowed into evidence

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<sup>150</sup> *Id.* at 1374.

<sup>151</sup> *Id.* at 1364, 1365.

<sup>152</sup> *Id.* at 1364-68.

<sup>153</sup> *Roberts*, 448 U.S. at 56.

<sup>154</sup> *Id.* at 66.

statements consisting of *ex parte* testimony upon a mere reliability finding.<sup>155</sup> This ran up against the Confrontation Clause's command that reliability be assessed "by testing in the crucible of cross-examination."<sup>156</sup> Justice Scalia further pointed out that *Roberts*'s framework was unpredictable: whether a statement was deemed reliable depended on which factors a judge considered and how much weight she gave them.<sup>157</sup> But the fatal flaw in *Roberts*, he explained, is its "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."<sup>158</sup>

It should be apparent that *Crawford* constitutes a sea change in the rules of evidence that operate daily in the courts of our nation. Under the now discredited *Roberts* regime, constitutional analysis focused on the reliability of the out-of-court statement. Under *Crawford*, the issue is whether the statement at issue is "testimonial." But what does "testimonial" mean? The Court did not provide many answers. What about 911 calls? For example, an unidentified caller says, "Hey, I see a crime in front of me and the defendant is black or white and wearing this or that," and that is introduced into evidence. Let the fun begin.

Recently, my former colleague at the Legal Aid Society, Bronx County Supreme Court Justice Phylis Bamberger, wrote a

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<sup>155</sup> *Crawford*, 124 S. Ct. at 1370-72.

<sup>156</sup> *Id.* at 1370.

<sup>157</sup> *Id.* at 1356.

<sup>158</sup> *Id.* ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

very exhaustive opinion in regard to 911 calls in *People v. Cortes*.<sup>159</sup> She held that a 911 call was testimonial and inadmissible because reporting a crime preserved on tape is the modern equivalent, made possible by technology, of the depositions taken by magistrates or Justices of the Peace.<sup>160</sup> She stated that historical materials are very important in determining whether a particular out-of-court statement is or is not testimonial.<sup>161</sup> She also suggested that the category of statements that historically were considered “testimonial” is broader than that which Justice Scalia contemplated in *Crawford*.<sup>162</sup>

In closing, I feel comfortable in stating that you will share my belief that the Supreme Court’s term, in terms of constitutional criminal law jurisprudence, was truly a memorable one. Thank you for inviting me to address you at this symposium.

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<sup>159</sup> 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004).

<sup>160</sup> *Id.* at 415.

<sup>161</sup> *Id.* at 407 (“Recent scholarship examining decisions of the English courts is therefore significant to resolving the admissibility question under the Sixth Amendment of the Federal Constitution.”).

<sup>162</sup> *Id.* at 404 (stating that since *Crawford* left “interrogation” undefined, “the Court left the outside parameters of the definition unresolved”).

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