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Hellerstein: Criminal Law Decisions

SOTTO VOCE: THE SUPREME COURT'S LOW KEY BUT NOT INSIGNIFICANT CRIMINAL LAW RULINGS DURING THE 1992 TERM

Hon. George C. Pratt:

We now will be discussing Fourth, Fifth and Sixth Amendment developments in the Supreme Court last year. For that we have Professor William Hellerstein of Brooklyn Law School. He was among those being considered as a possibility for the New York State Court of Appeals. He is eminently well qualified and a nationally known expert in the area of constitutional law, and we look forward to his comments.

Professor William E. Hellerstein:

INTRODUCTION

In my presentation last year, as in prior years, I again matched the Court's work in the criminal field for the Term with a current motion picture. Because the most significant aspect of the 1991 Term was the emergence of a possible centrist force consisting of Justices O'Connor, Kennedy and Souter the film, "Three Ninjas," seemed a fit comparison.¹ After the 1992 Term, that is no longer apt. Instead, "Last Action Hero" may bear the closest resemblance. In a number of key rulings, Justices O'Connor and Kennedy agreed with the conservative bloc, leaving Justice Souter to embark on a more singular journey in the opposite direction. This was especially true in several key criminal cases, and in true Schwarzeneggerian fashion, Justice Souter flexed substantial intellectual muscle as he challenged the conservative heavies in the never ending battle of good against evil.

The 1992 Term may have been understated, but it was not insignificant. There were no major sea-change criminal rulings

1. See William E. Hellerstein, *A Quiet Year: The Supreme Court's Criminal Law Decisions During the 1991 Term*, 9 *TOURO L. REV.* 305 (1993).

that redefined Fourth, Fifth or Sixth Amendment rights. However, the Court did decide several noteworthy Fourth Amendment cases, confronted civil forfeiture forcefully in constitutional terms for the first time, overturned an important double jeopardy ruling of extremely recent vintage and, with one exception, continued its erosion of federal habeas corpus availability. The Court also decided several important Federal Sentencing Guidelines issues and continued to add to the complexity of capital punishment litigation, a subject beyond this paper.

I. THE FOURTH AMENDMENT

The most talked about Fourth Amendment² decision of the Term was the so-called “plain touch” case, *Minnesota v. Dickerson*,³ in which the Court held that when a police officer conducting a lawful frisk feels an object other than a weapon, the officer may seize it without a warrant if the officer’s sense of touch makes it immediately apparent that the object is contraband.⁴

Two Minnesota police officers on patrol saw Dickerson leaving a building which one of the officers considered a “crack house.”⁵ Dickerson, who had been walking towards the police, spotted their squad car and abruptly changed his course.⁶ The officers pulled into an alley and ordered Dickerson to stop and submit to a patdown search.⁷ The search revealed no weapons but as one of the officers patted him down, he felt a small lump in Dickerson’s front pocket, examined it with his fingers and concluded that “it felt to be a lump of crack cocaine in cellophane.”⁸ The officer then reached into Dickerson’s pocket and retrieved a small plastic

2. U.S. CONST. amend. IV.

3. 113 S. Ct. 2130 (1993).

4. *Id.* at 2135-38.

5. *Id.* at 2133.

6. *Id.*

7. *Id.*

8. *Id.*

bag containing one fifth of one gram of crack cocaine.⁹ The Minnesota Supreme Court ruled in favor of suppression, refusing “to extend the plain view doctrine to the sense of touch,” and stating that “the sense of touch is far more intrusive into the personal privacy that is at the core of the Fourth Amendment.”¹⁰

Justice White, writing for the Court, disagreed. He saw no reason to differentiate the plain touch from the plain view exception to the Fourth Amendment’s warrant requirement:¹¹ “[u]nder [the plain view doctrine], if the police are lawfully in a position from which they view an object, [the] incriminating character [of the object] is immediately apparent, and . . . the officers have a lawful right of access to the object, they may seize it without a warrant.”¹² Justice White thought the plain view doctrine could easily be applied by analogy to a plain touch situation:

If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.¹³

Justice White rejected the argument that touch is more intrusive than sight.¹⁴ He pointed out that, under *Terry v. Ohio*,¹⁵ the frisk itself was already authorized and that the “plain touch” rationale does not authorize any greater intrusion: “[t]he very premise of

9. *Id.* at 2133-34.

10. *Minnesota v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992), *aff’d on other grounds*, 113 S. Ct. 2130 (1993).

11. *Dickerson*, 113 S. Ct. at 2137-38.

12. *Id.* at 2136-37 (citations omitted).

13. *Id.* at 2137.

14. *Id.* at 2137-38.

15. 392 U.S. 1 (1968). Absent probable cause to arrest, the appropriateness of the “stop and frisk” by a police officer must be evaluated on a reasonableness basis. *Id.* at 33. “Where such a stop is reasonable, . . . the right to frisk must be immediate and automatic if the reason for the stop is, . . . an articulable suspicion of a crime of violence.” *Id.*

Terry, after all, is that officers will be able to detect the presence of weapons through the sense of touch and *Terry* upheld precisely such a seizure The seizure of an item whose identity is already known occasions no further invasion of privacy.”¹⁶

Although the Court rejected the Minnesota Supreme Court’s rationale, Dickerson himself still prevailed because the officer’s testimony established that he did not immediately recognize the lump in Dickerson’s pocket as crack cocaine.¹⁷ Therefore, his continued exploration of Dickerson’s pocket, according to Justice White, “amounted to the sort of evidentiary search that *Terry* expressly refused to authorize”¹⁸

Dickerson raises two questions: is the Court’s rationale logically sound and how serious an incursion into Fourth Amendment rights is the “plain touch” doctrine? The Court noted that “[m]ost state and federal courts have recognized a so-called ‘plain feel’ or ‘plain touch’ corollary to the plain-view doctrine.”¹⁹ Moreover, the logic of the concept has a certain surface appeal; if a police officer can tell immediately from touch that an object is contraband, arguably little purpose is served by placing that object out of bounds until the officer obtains a warrant.

In *People v. Diaz*,²⁰ the New York Court of Appeals has provided an answer to these questions. Judge Hancock’s opinion is a solid articulation of the other side of the “plain touch” issue. As he points out,

16. *Dickerson*, 113 S. Ct at 2137-38 (citations omitted); see also *Terry*, 392 U.S. at 22. The Court in *Terry* discussed the nature and extent of the fundamental governmental interest of “effective crime prevention and detection” and stated, “it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.” *Id.*

17. *Dickerson*, 113 S. Ct. at 2138.

18. *Id.* at 2139 (citations omitted). Once the officer did not feel a weapon, he could not further explore for contraband that was not immediately apparent during the *Terry* patdown. *Id.* at 2138-39.

19. *Id.* at 2133 n.1 (citations omitted).

20. 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 (1993).

[t]he fundamental premise of the plain view exception—i.e., that items in plain view may be seized without an intrusion greater than that already authorized—is an invalid assumption if the plain touch exception is applied. For, even if the intrusion inherent in the initial act of touching is entirely authorized, the discovery and seizure of the items will entail a further intrusion.²¹

Judge Hancock reminds us that the distinction between seizures and searches is crucial:

the essential conditions which justify an exception to the requirement of a warrant to *seize* an object in the plain view of the police, simply cannot exist to justify an exception to the warrant requirement for a *search* for a concealed object which is not in plain view. Indeed, the very concept of “plain touch” is a contradiction in terms: the idea of plainness cannot logically be associated with information concerning a concealed item which is available only through the sensory perceptions of someone who touches it.²²

My concern with *Dickerson* is more pragmatic than doctrinal. Although *Dickerson* was able to salvage his favorable suppression ruling, others may be less fortunate. The existence of the “plain touch” doctrine and the facts of *Dickerson* provide a road map to police for successful warrantless searches in the street-encounter context. All that an officer need do is testify that based on his experience, he knew “immediately” when he touched the object in question, that it was contraband. While such testimony may be problematic, judges have not been unknown to defer to police “expertise” or to accept police testimony with equanimity.²³

In *Soldal v. Cook County*,²⁴ the Court reminded us to read the text of the Fourth Amendment,²⁵ an exercise that the Seventh

21. *Id.* at 111, 612 N.E.2d at 302, 595 N.Y.S.2d at 944.

22. *Id.* at 111-12, 612 N.E.2d at 302, 595 N.Y.S.2d at 944.

23. *See, e.g.,* *People v. Berrios*, 28 N.Y.2d 361, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971) (despite widespread police perjury in “dropsy” cases, burden remains with defendants to prove inadmissibility).

24. 113 S. Ct. 538 (1992).

25. The Fourth Amendment provides:

Circuit apparently shelved when it held that the unlawful towing away of the Soldals' trailer home to effect an eviction did not implicate their Fourth Amendment rights, because there was no entry into their home and thus no invasion of their privacy.²⁶

One possible explanation for the Seventh Circuit's oversight is that ever since the Court held in *Katz v. United States*,²⁷ that "the Fourth Amendment protects [privacy], not [property],"²⁸ it has become fashionable to discuss Fourth Amendment issues solely in terms of privacy interests. Those who do so, however, forget that although *Katz* signaled a departure from the property model previously used by the Court, the Court's focus on privacy interests was supplemental, not substitutional, to traditional property rights long protected by the Fourth Amendment.²⁹

In *Soldal*, the facts were these: while eviction proceedings were pending, the manager of a trailer park decided that he would take things into his own hands and forcibly evict the Soldals by having their mobile home towed.³⁰ At the manager's request, the Cook County Sheriff's department dispatched several deputies to ensure against any resistance by the Soldals.³¹ The employees of the trailer park wrenched the water and sewer connections from the trailer, tore off the trailer's canopy and skirting and disconnected the phone; the employees then hooked the trailer home to a tractor.³² Although the deputies knew that there was no eviction

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.

U.S. CONST. amend. IV.

26. *Soldal*, 113 S. Ct. at 542.

27. 389 U.S. 347 (1967) (holding that the government violates privacy interests protected under the Fourth Amendment when it monitors electronically a public phone booth conversation, even absent any physical intrusion into the phone booth).

28. *Id.* at 351.

29. *Id.* at 353.

30. *Soldal*, 113 S. Ct. at 541.

31. *Id.*

32. *Id.*

order, and that the actions of the trailer park were illegal, the deputies refused to accept Mr. Soldal's complaint for criminal trespass or otherwise interfere with the eviction.³³ Subsequently, the state court judge presiding over the eviction ruled that the eviction had been unauthorized, and ordered the now badly damaged trailer returned to the lot.³⁴

The Soldals sued in federal district court, under 42 U.S.C. § 1983, alleging that the trailer park company and its manager had conspired with the "deputy sheriffs to unreasonably seize and remove" their home in violation of their Fourth and Fourteenth Amendment rights.³⁵ The court granted the defendant's motion for summary judgment, and the Seventh Circuit affirmed,³⁶ holding that although a "seizure" in the literal sense had occurred, it was not a seizure within the Fourth Amendment because there had been no invasion of the Soldals' privacy.³⁷ The court also expressed concern that to apply the Fourth Amendment in pure property cases would burden the federal courts by federalizing areas of law traditionally relegated to the states.³⁸

In reversing, Justice White, writing for a unanimous Court, righted the matter conceptually and minimized the pragmatic concerns expressed by the Seventh Circuit.³⁹ He pointed out that the text of the Fourth Amendment "surely cuts against the novel holding below,"⁴⁰ and noted that prior cases, such as *United States v. Jacobsen*⁴¹ and *United States v. Place*,⁴² "unmistakably

33. *Id.* at 542.

34. *Id.*

35. *Id.*

36. *Soldal v. Cook County*, 942 F.2d 1073, 1075 (7th Cir. 1991), *rev'd*, 113 S. Ct. 538 (1992).

37. *Id.* at 1076.

38. *Id.* at 1075-76.

39. *Soldal*, 113 S. Ct. at 541-45.

40. *Id.* at 544.

41. 466 U.S. 109, 113 (1984). The Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.* (citations omitted).

hold that the Amendment protects property as well as privacy.”⁴³ In both cases, he observed, the Court, after deciding privacy issues, went on to engage in Fourth Amendment analyses of invasions into suspects’ possessory interests.⁴⁴ Justice White also made clear that while *Katz* and subsequent cases, such as *Warden, Maryland Penitentiary v. Hayden*,⁴⁵ and *Cardwell v. Lewis*,⁴⁶ shifted the emphasis from property to privacy, they had not “snuffed out the previously recognized protection for property under the Fourth Amendment.”⁴⁷

Justice White emphasized further that the Court’s “plain view” decisions also made untenable the Seventh Circuit’s interpretation of the Fourth Amendment.⁴⁸ He pointed out that if the Amendment’s boundaries were defined exclusively by a right of privacy, “plain view” seizures, rather than being scrupulously subjected to Fourth Amendment inquiry, would not implicate the Amendment.⁴⁹ He explained “[t]hat is because, the absence of a privacy interest notwithstanding, ‘a seizure of the article . . . would obviously invade the owner’s possessory interest.’”⁵⁰ “The plain view doctrine ‘merely reflects an

42. 462 U.S. 696, 706-07 (1983) (stating that the “Fourth Amendment ‘protects people from unreasonable government intrusions into their legitimate expectations of privacy’” and it protects property and persons from unreasonable seizures).

43. *Soldal*, 113 S. Ct. at 544.

44. *Id.*

45. 387 U.S. 294 (1967). “[T]he principal object of the Fourth Amendment is the protection of privacy rather than property . . . [and t]his shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform.” *Id.* at 304 (citations omitted).

46. 417 U.S. 583, 592, 594 (1974) (holding that the warrantless seizure of respondent’s automobile from a public parking garage and the warrantless search of the automobile’s exterior based on probable cause is reasonable under the Fourth Amendment). In *Soldal*, the Court reflected on the *Cardwell* decision, in which “both the plurality and dissenting Justices considered defendant’s auto deserving of Fourth Amendment protection even though privacy interests were not at stake.” *Soldal*, 113 S. Ct. at 545.

47. *Soldal*, 113 S. Ct. at 545.

48. *Id.*

49. *Id.* at 546.

50. *Id.* (quoting *Horton v. California*, 496 U.S. 128, 134 (1990)).

application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property."⁵¹

Justice White also made clear that the purpose of the seizure, which the Seventh Circuit deemed significant, "is wholly irrelevant to the threshold question of whether the Amendment applies."⁵²

What matters, is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all.⁵³

Lastly, Justice White thought the Seventh Circuit's fears that Fourth Amendment cognizance of pure property cases would burden the federal courts were ill-founded.⁵⁴ He pointed out that activities such as repossessions or attachments, if they involve entering a home, intruding on individuals' privacy or interfering with their liberty, "would implicate the Fourth Amendment even on the [Seventh Circuit's] own terms."⁵⁵ Also, numerous seizures of this type will survive scrutiny on "reasonableness" grounds.⁵⁶ Lastly, it is unlikely that the police will "further an enterprise knowing that it is contrary to the law, or proceed to seize property in the absence of objectively reasonable grounds for doing so."⁵⁷

There are no major implications from this decision. I think it problematical, as has been suggested, that future search-and-seizure litigants may be able to successfully assert standing by claiming a property interest in the goods seized, even if they cannot demonstrate a privacy interest in the area searched.⁵⁸

51. *Id.* (quoting *Texas v. Brown*, 460 U.S. 730, 739 (1983)).

52. *Id.* at 548.

53. *Id.*

54. *Id.* at 548-49.

55. *Id.* at 548.

56. *Id.* at 549.

57. *Id.*

58. See Ira Mickenberg, *Crime Docket Was Quiet*, NAT'L L.J., Aug. 23, 1993, at S6, S7.

However, the bulk of search and seizure issues arise in the context of challenges to searches, for which stringent standing requirements, as defined in *Rakas v. Illinois*,⁵⁹ *United States v. Salvucci*,⁶⁰ and *Rawlings v. Kentucky*,⁶¹ turn on privacy interests. I do not see *Soldal* undercutting those cases, even though what is seized may belong to someone without a cognizable privacy interest at the time of the search.

My hesitancy to see any modification in the Court's standing doctrine also stems from last Term's ruling in *United States v. Padilla*.⁶² The Court, in a unanimous *per curiam* decision, made short shrift of the Ninth Circuit's aberrational co-conspirator standing doctrine, in which a co-conspirator was deemed to have a "legitimate expectation of privacy for Fourth Amendment purposes if he [had] either a supervisory role in the conspiracy or joint control over the place or property involved in the . . . seizure."⁶³

In *Padilla*, an Arizona police officer stopped a car on suspicion.⁶⁴ Arciniega, the car's sole occupant, gave the officer an insurance card indicating that Donald Simpson, a United States Customs Agent, owned the car.⁶⁵ A fellow officer who arrived at the scene believed that Arciniega matched a drug

59. 439 U.S. 128, 133-34 (1978) (rejecting petitioner's "target" theory which would have allowed a third party to assert a violation of Fourth Amendment rights; instead the Court reiterated the *Alderman* holding which states, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted" (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969))).

60. 448 U.S. 83, 85 (1980) (overruling the "automatic standing rule" of *Jones v. United States*, 362 U.S. 257 (1960), which held that a defendant had automatic standing to challenge the legality of the search that produced the very drugs he was charged with possessing at the time of the search and stated that "anyone legitimately on the premises where a search occurs" had standing to challenge its legality).

61. 448 U.S. 98, 104 (1980) (also holding that a person must have had a legitimate expectation of privacy in the area subjected to the search to be protected under the Fourth Amendment).

62. 113 S. Ct. 1936 (1993).

63. *Id.* at 1937, *rev'g* 960 F.2d 854 (9th Cir. 1992).

64. *Id.*

65. *Id.*

courier profile and the officers asked Arciniega if they could search the car.⁶⁶ Arciniega consented and the search uncovered 560 pounds of cocaine in the trunk.⁶⁷ Arciniega agreed to make a controlled delivery of the cocaine which led to the arrest of Jorge and Maria Padilla, and later to Simpson and his wife.⁶⁸

The Padillas and Simpsons were charged with conspiracy to distribute and possess with intent to distribute cocaine.⁶⁹ They moved to suppress evidence found during the police investigation contending that such evidence was the fruit of an illegal stop of Arciniega's car.⁷⁰ The district court granted suppression holding that, as owners, the "Simpsons retained a reasonable expectation of privacy in their car, but that the Padillas could contest the stop solely because of their supervisory roles and their joint control over the . . . operation."⁷¹ The Ninth Circuit affirmed, holding that "a coconspirator's [sic] participation in an operation or arrangement that indicates joint control and supervision of the place searched establishes standing."⁷²

Reversing, the Supreme Court pointed out that no other circuit court had recognized co-conspirator standing,⁷³ and that it was directly at odds with *Rakas v. Illinois*,⁷⁴ *Rawlings v. Kentucky*,⁷⁵ and especially *Alderman v. United States*,⁷⁶ in which the Court stated expressly that co-conspirators have been accorded no special standing and were not exempt from the principle that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1937-38.

70. *Id.* at 1938.

71. *Id.*

72. *United States v. Padilla*, 960 F.2d 854, 859 (9th Cir. 1992), *rev'd per curiam*, 113 S. Ct. 1936 (1993) (citations omitted).

73. *Padilla*, 113 S. Ct. at 1938.

74. 439 U.S. 128 (1978). *See supra* note 59.

75. 448 U.S. 98 (1980). *See supra* note 61.

76. 394 U.S. 165 (1969).

introduction of damaging evidence.”⁷⁷ The Court reiterated that “[e]xpectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims. Participants in a criminal conspiracy may have such expectations or interests, but the conspiracy itself neither adds nor detracts from them.”⁷⁸

Given existing precedent, the Ninth Circuit’s boldness in embracing a co-conspirator exception was surprising. The argument in favor of an automatic standing rule is a thing of the past. It was founded on the proposition that the best way to enforce the deterrence rationale of the exclusionary rule is to reject the fruits of an unlawful search or seizure whenever they are offered in evidence, and it should not matter that the party seeking suppression is aggrieved only because he or she is in the dock. The Ninth Circuit’s co-conspirator standing rule appears to have been driven by a similar, though unstated, rationale. The Rehnquist Court is not the venue in which such a notion can expect nourishment.

II. THE FORFEITURE CASES

The Term’s most remarkable feature was the Court’s willingness to apply some brakes to the runaway vehicle of civil forfeiture. In so doing, the Court was obviously responsive to numerous voices that have been raised against the excesses of the government’s use of it in the war on drugs.

In *Austin v. United States*,⁷⁹ the Court, for the first time, held that an in rem forfeiture⁸⁰ is a punishment⁸¹ and, as such, is

77. *Padilla*, 113 S. Ct. at 1939 (quoting *Alderman*, 394 U.S. at 171-72).

78. *Id.*

79. 113 S. Ct. 2801 (1993).

80. The government sought forfeiture under 21 U.S.C. § 881, the main federal civil forfeiture statute. Paragraphs (a)(4) and (a)(7) of section 881 provide that the following are subject to forfeiture:

(a)(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of property described in paragraph (1) [controlled substances which have been manufactured, distributed, dispensed, or acquired], (2) [raw

subject to the restraints of the Excessive Fines Clause of the Eighth Amendment.⁸² Consequently, the issue of proportionality is now part of civil forfeiture, and courts must assess the relationship between the gravity of an offense and the property that is seized.

Austin, the proprietor of a South Dakota auto body shop, made the mistake of agreeing to sell two grams of cocaine to an undercover agent in his shop.⁸³ He then went to his mobile home to retrieve the cocaine and consummated the sale on his return to the shop.⁸⁴ State police officers executed a search warrant on the body shop and mobile home the next day and discovered small quantities of marijuana and cocaine, drug paraphernalia, a .22 caliber revolver, and \$4700 in cash.⁸⁵

After Austin pled guilty in state court to one count of possessing cocaine with intent to distribute and was sentenced, the federal government filed a forfeiture action against his mobile home and body shop, which were valued in excess of \$38,000.⁸⁶ Austin challenged the forfeiture on the ground that, given the relatively minor nature of his offense, it constituted a violation of

materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance], or (9) [listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported]

(a)(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment

21 U.S.C. § 881(a)(1), (2), (4), (7) (1988).

81. *Austin*, 113 S. Ct. at 2810-12.

82. *Id.* at 2803; U.S. CONST. amend. VIII.

83. *Austin*, 113 S. Ct. at 2803.

84. *Id.*

85. *Id.*

86. *Id.*

the Eighth Amendment's Excessive Fines Clause.⁸⁷ The Eighth Circuit upheld the forfeiture reluctantly, stating that it was "troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction."⁸⁸ Nonetheless, the court was constrained by its understanding that when the government is proceeding in rem, the owner's guilt or innocence is "constitutionally irrelevant" and thus, a forfeiture could not be considered excessive in relationship to any offense.⁸⁹

Writing for the Court, Justice Blackmun pointed out that the text of the Eighth Amendment, unlike the Sixth Amendment for example, contained no specific limitation to criminal cases.⁹⁰ Thus, he stated that the critical question is not whether forfeiture is civil or criminal, but whether it is monetary punishment, with which the Excessive Fines Clause is particularly concerned.⁹¹ He determined that it was, finding historical support in English and American law around the time of the adoption of the Eighth Amendment.⁹²

Consequently, while acknowledging that the Court has rejected owner-innocence as a common-law defense to in rem forfeiture, Justice Blackmun observed that the Court "consistently has recognized that forfeiture serves, at least, in part, to punish the

87. *United States v. 508 Depot St.*, 964 F.2d 814, 817 (8th Cir. 1992), *rev'd sub nom. Austin v. United States*, 113 S. Ct. 2801 (1993).

88. *Id.* at 818.

89. *Id.* at 817.

90. *Austin*, 113 S. Ct. at 2804-05; *see also* U.S. CONST. amend. VI. The Sixth Amendment provides in part:

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

91. *Austin*, 113 S. Ct. at 2806.

92. *Id.* at 2806-10.

owner.”⁹³ Justice Blackmun further emphasized that whatever the status of in rem forfeiture at common law, the statutory forfeiture provisions applicable to drug cases provide an “innocent owner” defense.⁹⁴ These exemptions, he reasoned, “serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less.”⁹⁵ Therefore, “[t]he inclusion of innocent-owner defenses . . . reveals . . . a . . . congressional intent to punish only those involved in drug trafficking.”⁹⁶

Although the Court made it clear that the Excessive Fines Clause is implicated in the civil forfeiture context, it opted not to provide guidance as to how proportionality of an in rem forfeiture should be determined.⁹⁷ Instead, it stated that “[p]rudence dictates that we allow the lower courts to consider that question in the first instance,” and it remanded the case to the district court to determine whether the forfeiture of Austin’s home and body shop was excessive.⁹⁸

Justice Scalia, concurring in part and in the judgment,⁹⁹ was concerned about the majority’s apparent belief that “only actual culpability of the affected property owner can establish that a forfeiture provision is punitive.”¹⁰⁰ He pointed out that “[i]f the

93. *Id.* at 2810 (citations omitted).

94. *Id.*; see also 21 U.S.C. § 881(a)(4)(c), (a)(7) (1988). Section 881(a)(4)(c) provides that “no conveyance shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.” 21 U.S.C. § 881(a)(4)(c) (1988). Section 881(a)(7) provides that “no property shall be forfeited . . . , to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.” 21 U.S.C. § 881(a)(7) (1988).

95. *Austin*, 113 S. Ct. at 2810-11.

96. *Id.* at 2811.

97. *Id.* at 2812.

98. *Id.* (citing *Yee v. City of Escondido*, 112 S. Ct. 1522, 1534 (1992) (expressing the Court’s preference for a fully litigated issue in the lower courts, so that the Court can have the benefit of developed arguments and a lower court opinion which addresses the issue)).

99. *Id.* at 2812-15 (Scalia, J., concurring).

100. *Id.* at 2814 (Scalia, J., concurring).

Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture."¹⁰¹ He would have postponed that question because in the instant case, the forfeiture provisions were directed toward the culpable conduct of the owner of the property and thus the *in rem* forfeiture, in fact, was a fine.¹⁰²

Justice Scalia did, however, articulate his view as to how the proportionality of an *in rem* forfeiture should be assessed:

Unlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use, to which issue the value of the property is irrelevant. Scales used to measure out unlawful drug sales, for example, are confiscatable whether made of the purest gold or the basest metal. But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense--the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.¹⁰³

At least one commentator has pointed out that Justice Scalia's test, the relationship of the property to the offense, retains potential for disproportionate forfeitures, and has called for a "hybrid balancing of the value and use of the property."¹⁰⁴

In *Alexander v. United States*,¹⁰⁵ the Court considered the constitutional implications of the forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁰⁶

101. *Id.* (Scalia, J., concurring).

102. *Id.* (Scalia, J., concurring).

103. *Id.* at 2815 (Scalia, J., concurring).

104. Steven L. Kessler, *Forfeiture And the Eighth Amendment*, N.Y. L.J., July 26, 1993, at 1.

105. 113 S. Ct. 2766 (1993).

106. 18 U.S.C. § 1963 (1988).

Alexander was convicted of multiple counts of transporting and selling obscene material through his chain of adult stores.¹⁰⁷ The jury found copies of four magazines and three videotapes being sold at Alexander's stores to be obscene.¹⁰⁸ These obscenity offenses furnished the predicates for the RICO violations.¹⁰⁹ Alexander was sentenced to six years in prison and a \$100,000 fine.¹¹⁰ In addition, the government sought and obtained forfeiture of Alexander's multi-million dollar adult business and real estate holdings.¹¹¹ Under the RICO provisions, the property was forfeited as interests in a corrupt enterprise, and as property that afforded Alexander influence over the enterprise.¹¹²

Although the Court rejected Alexander's First Amendment¹¹³ claim,¹¹⁴ he fared better with his Eighth Amendment argument.¹¹⁵ Echoing its decision in *Austin*, the Court held that the forfeiture order, considered separately from Alexander's six year sentence and \$100,000 fine, "is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"¹¹⁶ As it did in *Austin*, the Court expressed its preference that proportionality be determined by the lower courts, and it remanded the case.¹¹⁷ Given the Chief Justice's observation that Alexander "was convicted of creating and managing what the District Court described as 'an enormous racketeering enterprise,'"¹¹⁸ Alexander's prospects on remand appear slim.

Of the Court's three forfeiture rulings, *United States v. 92 Buena Vista Avenue*,¹¹⁹ may be the most surprising. Although six

107. *Alexander*, 113 S. Ct. at 2769.

108. *Id.*

109. *Id.* at 2769-70.

110. *Id.* at 2770.

111. *Id.*

112. *Id.*

113. U.S. CONST. amend. I.

114. *Alexander*, 113 S. Ct. at 2770-75.

115. *Id.* at 2775-76.

116. *Id.*

117. *Id.* at 2776; see also *supra* note 98 and accompanying text.

118. *Alexander*, 113 S. Ct. at 2776.

119. 113 S. Ct. 1126 (1993).

members of the majority produced two different opinions, the case's bottom line is that the "relation back" provision of the civil in rem drug forfeiture statute, 21 U.S.C. § 881(h),¹²⁰ does not automatically vest ownership of drug proceeds in the government at the very moment that the criminal act takes place or at the very moment that the proceeds are used to buy property.¹²¹

The claimant in the case bought a house with \$240,000 that her boyfriend gave her.¹²² Several years later, the government brought a civil forfeiture action against the house and established probable cause to believe that the money was the proceeds of her boyfriend's drug trafficking endeavors.¹²³ The district court held that the innocent owner defense was available only to a bona fide purchaser for value and not a mere donee.¹²⁴ The court also held that the innocent owner defense was available only to those claimants who acquired an interest in the property before the acts giving rise to the forfeiture occurred.¹²⁵

120. Section 881(h) provides: "All right, title, and interest in property described in subsection (a) . . . shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U.S.C. § 881(h) (1988).

121. *92 Buena Vista Ave.*, 113 S. Ct. at 1134-42. Justice Stevens, joined by Justices Blackmun, O'Connor and Souter, concluded that "neither [§ 881(h)] nor the [relation-back doctrine] makes the government an owner of property before forfeiture has been decreed." *Id.* at 1134. Justice Scalia, joined by Justice Thomas, concurred in the judgment of the plurality opinion by concluding:

It is a doctrine of *retroactive* vesting of title that operates only upon entry of the judicial order of forfeiture or condemnation: "[t]he decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree."

Id. at 1138 (Scalia, J., concurring) (quoting *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56 (1872)).

122. *Id.* at 1134.

123. *Id.* at 1127-28.

124. *United States v. 92 Buena Vista Ave.*, 738 F. Supp. 854, 860-61 (D.N.J. 1990), *aff'd on other grounds*, 937 F.2d 98 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993).

125. *Id.*

The Third Circuit reversed, holding that the term “owner” should be broadly construed and is not limited to bona fide purchasers for value.¹²⁶ As to the relation-back issue, the court declined to impute to Congress an intent to prevent anyone who obtained property after an illegal drug transaction from becoming an “innocent owner.”¹²⁷

Section 881(a)(6) provides for the forfeiture of “all proceeds traceable to” an illegal drug transaction.¹²⁸ The innocent owner provision states: “[n]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of the owner.”¹²⁹ The relation-back provision, added in 1984, states that “[a]ll right, title, and interest in property described in subsection (a) . . . shall vest in the United States upon commission of the act giving rise to forfeiture under this section.”¹³⁰

Justice Stevens, joined by Justices Blackmun, O'Connor, and Souter, pointed out that the statutory provisions at issue, most of which were added to the drug laws in 1978, were Congress' initial attempt to seize and forfeit the “proceeds” of illegal drug transactions.¹³¹ Previously, common law and statutory forfeiture had been directed only at illegal substances and their means of

126. *United States v. 92 Buena Vista Ave.*, 937 F.2d 98, 102 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993). The court interpreted the term owner to “include any person with a recognizable legal or equitable interest in the property seized.” *Id.* (quoting Act of Oct. 15, 1978, Pub. L. No. 95-633, 1985 U.S.C.A.N. 9522). This broad interpretation is consistent with the legislative intent of the statute. *See also* Act of Oct. 15, 1978, Pub. L. No. 95-633, 1985 U.S.C.A.N. at 9522-23.

127. *92 Buena Vista Ave.*, 937 F.2d at 102-03. The court found that “property referred to in [§ 881(a)] does *not* include property that has been exempted from forfeiture by means of an innocent owner defense.” *Id.* at 102.

128. 21 U.S.C. § 881(a)(6) (1988).

129. *Id.*

130. 21 U.S.C. § 881(h) (1988).

131. *92 Buena Vista Ave.*, 113 S. Ct. at 1133; *see also* The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 84 Stat. 1276 (codified as amended at 21 U.S.C. § 881(a)(6) (1988)).

production and distribution.¹³² The 1978 amendments also created the innocent owner defense.¹³³ Because each of these provisions went beyond the common law, Justice Stevens argued that the statutory scheme should be construed "with caution."¹³⁴

Because "owner" is thrice used unqualifiedly in the forfeiture scheme, Justice Stevens concluded that Congress did not intend to limit the innocent owner defense to bona fide purchasers.¹³⁵ Therefore, he concluded, a donee who acquired the funds with which the house was purchased is not disqualified "from claiming that she is an owner who had no knowledge of the alleged fact that those funds were 'proceeds traceable' to illegal sales of controlled substances."¹³⁶

The government's relation-back argument, if accepted, would mean that the claimant was never an owner of the property.¹³⁷ Justice Stevens found such argument unsupported by either common law or a fair reading of the forfeiture statute.¹³⁸ Vesting the government with ownership at the moment unlawful proceeds are used to purchase property, he pointed out, would "effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited."¹³⁹ Justice Stevens did not believe that Congress intended that result when it amended the statute in 1978 to include "proceeds" and "innocent owner" provisions.¹⁴⁰

Justice Stevens further observed that although at common law the relation-back doctrine vested title of the offending res in the government as of the date of the offending conduct, the same was

132. 92 Buena Vista Ave., 113 S. Ct. at 1133-34.

133. *Id.* at 1134; *see also* 21 U.S.C. § 881(a)(6), (7) (1988).

134. 92 Buena Vista Ave., 113 S. Ct. at 1134.

135. *Id.*

136. *Id.*

137. *Id.* The government argued that ownership of the property vested in the United States at the time the respondent used proceeds of an illegal drug transaction to pay for the property. *Id.*

138. *Id.*

139. *Id.* at 1135.

140. *Id.*

not true as to proceeds.¹⁴¹ Even if the common law rule was extended to proceeds, Justice Stevens pointed out that the government's title to the proceeds is not "self-executing;"¹⁴² title still would not have vested until a judicial determination of forfeiture had been made.¹⁴³

Statutorily, the result is no different, Justice Stevens concluded.¹⁴⁴ He argued that section 881(h)¹⁴⁵ "merely codified the common-law rule."¹⁴⁶ When Congress enacted the relation-back rule, it could have changed it, but it did not.¹⁴⁷ Justice Stevens arrived at this conclusion by construing section 881(h)'s phrase "property described in subsection (a)" to exclude proceeds owned by an individual who is unaware of their illegal source,¹⁴⁸ which under section 881(a)(6) is "not subject to forfeiture."¹⁴⁹

141. *Id.* The Court stated that it did not know of "any common-law precedent for treating proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture," therefore the relation back doctrine is not applicable. *Id.*

142. *Id.*

143. *Id.* at 1135-36. Justice Stevens quotes Chief Justice Marshall to explain "[i]t has been proved, that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense." *Id.* at 1135 (quoting *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 350-51 (1806)).

144. *Id.* at 1136.

"By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, *although their title is not perfected until judicial condemnation*; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, *when obtained*, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith."

Id. (quoting *United States v. Stowell*, 133 U.S. 1, 16-17 (1890) (emphasis added)).

145. 21 U.S.C. § 881(h) (1988); *see also supra* note 120.

146. 92 *Buena Vista Ave.*, 113 S. Ct. at 1136.

147. *Id.*

148. *Id.*

149. *Id.* at 1136-37.

Therefore, Justice Stevens reasoned, the statute must allow the assertion of an innocent-owner defense before section 881(h)'s relation-back rule applies.¹⁵⁰

Justice Scalia, joined by Justice Thomas, concurred in the judgment, but took issue with Justice Stevens' reading of the statute.¹⁵¹ He maintained that the mere fact that the application of the innocent owner provision in section 881(a)(6) must be determined before the relation-back provision can be fully applied "does not establish that the word 'owner' in (a)(6) must be deemed to include (as it would at common law) anyone who held title prior to the actual decree of forfeiture."¹⁵² Justice Scalia argued that the relation-back provision applies even to property in which an innocent owner has an interest and that section 881(a)(6) does not insulate the property of innocent owners from forfeiture: "it protects only the 'interest' of certain owners in *any* of the described property."¹⁵³

Nonetheless, Justice Scalia concurred in the judgment because of his belief that the relation-back doctrine, both at common law and under the statute, becomes effective only after forfeiture is decreed.¹⁵⁴ Thus, he agreed with Justice Stevens' view that the government's reading of the relation-back provision would divest title of even those persons who were eligible under the government's limited reading of "innocent owner" as persons who acquired the res prior to the unlawful act. What section 881(h) meant to Justice Scalia, is that title "shall vest in the United States upon forfeiture, effective as of commission of the act giving rise to forfeiture."¹⁵⁵

In dissent, Justice Kennedy, joined by Chief Justice Rehnquist and Justice White, argued that the real issue was not whether the claimant can assert an innocent owner defense, but that as a donee, her title was inferior to the Government's title.¹⁵⁶ Justice

150. *Id.* at 1137.

151. *Id.* at 1138-42 (Scalia, J., concurring).

152. *Id.* at 1139 (Scalia, J., concurring).

153. *Id.* (Scalia, J., concurring).

154. *Id.* at 1138-39 (Scalia, J., concurring).

155. *Id.* at 1140 (Scalia, J., concurring).

156. *Id.* at 1143 (Kennedy, J., dissenting).

Kennedy maintained that under the voidable title provisions of the Uniform Commercial Code,¹⁵⁷ the title to property obtained by a donee is limited to the title possessed by the donor.¹⁵⁸ On the other hand, a transferee who acquires money from a bona fide purchaser or one of his successors obtains good title.¹⁵⁹ Thus, one who has defective title can create a good title in a new holder by a transfer for value.¹⁶⁰ However, Justice Kennedy insisted that “the donee of drug trafficking proceeds has no valid claim to the proceeds, not because she has done anything wrong but because she stands in the shoes of one who has. It is the nature of the donor’s interest, which the donee has assumed, that renders the property subject to forfeiture.”¹⁶¹ Justice Kennedy bemoaned the plurality’s opinion as leaving the forfeiture scheme “in quite a mess,”¹⁶² and he believed that the plurality was “rip[ping] out the most effective enforcement provisions in all of the drug forfeiture laws.”¹⁶³

The Court’s substantial involvement in the 1992 Term with the forfeiture issue has continued into the 1993 Term with *United States v. James Daniel Good Real Property*.¹⁶⁴ The issue in *Good* is whether the Due Process Clause of the Fifth Amendment¹⁶⁵ entitles a person to notice and an opportunity for a hearing prior to seizure of real property.¹⁶⁶ The government has argued that no advance notice for a seizure is required so long as the government first obtains a warrant from a federal magistrate.¹⁶⁷ The *New York Times* called the oral argument “spirited.”¹⁶⁸

157. U.C.C. § 2-403(1) (1993).

158. *92 Buena Vista Ave.*, 113 S. Ct. at 1144 (Kennedy, J., dissenting).

159. *Id.* (Kennedy, J., dissenting).

160. *Id.* (Kennedy, J., dissenting).

161. *Id.* (citation omitted) (Kennedy, J., dissenting).

162. *Id.* at 1145 (Kennedy, J., dissenting).

163. *Id.* at 1146 (Kennedy, J., dissenting).

164. 114 S. Ct. 492 (1993).

165. U.S. CONST. amend. V.

166. *James Daniel Good Real Property*, 114 S. Ct. at 497.

167. *United States v. James Daniel Good Real Property*, 971 F.2d 1376, 1382 (9th Cir. 1992), *aff’d in part, rev’d in part*, 114 S. Ct. 492 (1993). Subsequent to the Symposium, the Court, in a 5-4 decision, held that absent

III. THE HABEAS CORPUS CASES

The Court's three habeas corpus decisions had something for everyone. For those who have been unhappy with the Court's closing of federal courthouse doors to substantive issues, as in *Stone v. Powell*,¹⁶⁹ where state violations of the Fourth Amendment¹⁷⁰ were barred, surprisingly, there was good news; it came in *Withrow v. Williams*.¹⁷¹

As you may recall, *Stone v. Powell* held that a federal habeas corpus court could no longer entertain a state defendant's claim that his conviction was the result of a state court's failure to suppress evidence that was the product of an illegal search or seizure.¹⁷² The *Stone* Court had reasoned that the exclusionary rule was not itself a personal constitutional right but was merely a judicially created rule designed to effectuate the substantive guarantees of the Fourth Amendment through deterrence of police misconduct.¹⁷³ Consequently, so long as a defendant's Fourth Amendment claims had been fully and fairly litigated in the state courts, the refusal to suppress evidence by the state courts did not furnish a basis for a writ of habeas corpus, since no constitutional right of the defendant had been violated by non-suppression.¹⁷⁴

The issue in *Withrow* was whether the Court would apply the same analysis to a police failure to comply with the requirements of *Miranda v. Arizona*.¹⁷⁵ Because the Court has frequently stated that the *Miranda* warnings are not themselves a

exigent circumstances, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. *James Daniel Good Real Property*, 114 S. Ct. at 497.

168. Linda Greenhouse, *Court Again Hears a Case on Seizure*, N.Y. TIMES, Oct. 7, 1993, at A22.

169. 428 U.S. 465 (1976).

170. U.S. CONST. amend. IV.

171. 113 S. Ct. 1745 (1993).

172. *Stone*, 428 U.S. at 474-95.

173. *Id.* at 486.

174. *Id.* at 481-82.

175. 384 U.S. 436 (1966).

constitutional right,¹⁷⁶ the prospect loomed large that the Court would deny habeas availability to *Miranda* violations, as it had to Fourth Amendment violations. By a vote of 5-4, the Court decided the two situations were constitutionally different.

In *Withrow*, police officers in Romulus, Michigan contacted Williams upon the belief that he had information regarding a double murder.¹⁷⁷ Williams agreed to accompany the officers to the police station for questioning.¹⁷⁸ At first, he denied involvement but then began to incriminate himself.¹⁷⁹ The police officers did not give Williams *Miranda* warnings and assured him that they only wanted to learn who fired the fatal shots.¹⁸⁰ When Williams continued to deny involvement, one of the officers threatened to charge him and lock him up.¹⁸¹ The tactic succeeded as Williams admitted he had furnished the murder weapon to the killer.¹⁸² Only at this point, did the police give Williams *Miranda* warnings.¹⁸³

The state courts found no *Miranda* violation.¹⁸⁴ The federal district court disagreed, holding that the police had placed Williams in custody for *Miranda* purposes when they threatened to lock him up.¹⁸⁵ The Sixth Circuit affirmed, summarily

176. See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (stating that the *Miranda* "procedural safeguards [are] not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination [is] protected"); see also *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987); *Oregon v. Elstad*, 470 U.S. 298, 305 (1985); *New York v. Quarles*, 467 U.S. 649, 654 (1984).

177. *Withrow*, 113 S. Ct. at 1748.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 1749.

183. *Id.* Williams waived his *Miranda* rights and subsequently admitted to driving the killer to the crime scene, witnessing the murders, and disposing of incriminating evidence. Williams was formally charged with murder the next day. *Id.*

184. *Id.*

185. *Id.*

rejecting the state's argument that the *Stone* rule barred Williams' *Miranda* claim.¹⁸⁶

Justice Souter, writing for the majority, agreed with the Sixth Circuit.¹⁸⁷ He pointed out that previous efforts to extend *Stone* beyond the Fourth Amendment context have been rejected,¹⁸⁸ and that there are meaningful distinctions between Fourth Amendment claims and *Miranda* claims.¹⁸⁹ *Stone*, he explained, was based on the proposition that the Fourth Amendment exclusionary rule is a "judicially crafted" remedy designed to deter police misconduct and not "a personal constitutional right."¹⁹⁰ He also pointed out that *Stone* recognized that the application of the exclusionary rule on collateral review would not meaningfully advance its deterrence rationale.¹⁹¹ On the other hand, the costs of applying the exclusionary rule on federal habeas review were quite substantial; reliable evidence would be excluded and friction between state and federal justice systems would be created unnecessarily.¹⁹² It was these "prudential concerns" which, according to Justice Souter, led to the *Stone* rule.¹⁹³

Miranda stands on an entirely different footing, Justice Souter explained.¹⁹⁴ Accepting "for purposes of this case" the premise that the *Miranda* rule is merely "prophylactic,"¹⁹⁵ it nonetheless safeguards a "fundamental trial right" -- the Fifth Amendment's

186. *Williams v. Withrow*, 944 F.2d 284, 291 (6th Cir. 1991), *aff'd in part, rev'd in part*, 113 S. Ct. 1745 (1993).

187. *Withrow*, 113 S. Ct. at 1750-55.

188. *Id.* at 1750-51; *see also* *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (claim of ineffective assistance of counsel); *Jackson v. Virginia*, 443 U.S. 307 (1979) (claim of evidentiary insufficiency); *Rose v. Mitchell*, 443 U.S. 545 (1979) (equal protection claim in grand jury selection).

189. *Withrow*, 113 S. Ct. at 1750-55.

190. *Id.* at 1750; *see also supra* note 173 and accompanying text.

191. *Withrow*, 113 S. Ct. at 1750; *see also supra* note 173 and accompanying text.

192. *Withrow*, 113 S. Ct. at 1750.

193. *Id.*

194. *Id.* at 1751-55.

195. *Id.* at 1752-53.

guarantee¹⁹⁶ that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself”¹⁹⁷ Moreover, he emphasized, *Miranda* guards against the possibility that in-custody interrogation will yield unreliable testimony.¹⁹⁸ Thus, in contrast to the Fourth Amendment exclusionary rule, the value it serves is not “divorced from the correct ascertainment of guilt.”¹⁹⁹

Justice Souter stressed also that by extending *Stone* to *Miranda*, little would be gained towards reducing the workload of the federal courts.²⁰⁰ *Miranda* claims would simply be recast as due process involuntariness claims inasmuch as the circumstances that must be reviewed in determining voluntariness include the presence or absence of *Miranda* warnings.²⁰¹ “We thus fail to see,” Justice Souter wrote, “how abdicating *Miranda*’s bright-line (or at least, brighter-line) rules in favor of an exhaustive totality-of-circumstances approach on habeas would do much of anything to lighten the burdens placed on busy federal courts.”²⁰²

Justice O’Connor, joined by Chief Justice Rehnquist, dissented in part, arguing that the “prudential concerns” adverted to in *Stone* also counseled exclusion on habeas review of *Miranda* claims.²⁰³ She saw no distinction between the Fourth Amendment exclusionary rule and suppression of statements obtained in violation of *Miranda*.²⁰⁴ “Excluding *Miranda* claims from habeas,” she pointed out, “denies collateral relief only in those cases in which the prisoner’s statement was neither compelled nor involuntary but merely obtained without the

196. *Id.* at 1753 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

197. U.S. CONST. amend. V.

198. *Withrow*, 113 S. Ct. at 1753.

199. *Id.*

200. *Id.* at 1754.

201. *Id.*

202. *Id.*

203. *Id.* at 1758-60 (O’Connor, J., dissenting).

204. *Id.* at 1760-65 (O’Connor, J., dissenting).

benefit of *Miranda's* prophylactic warnings."²⁰⁵ She also disputed Justice Souter's linkage of *Miranda* with the trustworthiness of confessions.²⁰⁶ To the extent that *Miranda* protects against the use of involuntary and hence unreliable, statements, federal courts can review the issue of voluntariness directly, she pointed out.²⁰⁷

Also dissenting in part, Justice Scalia, joined by Justice Thomas, argued that federal habeas review should be precluded as to any claim that has been fully and fairly litigated in state court, unless the claimed error "goes to the fairness of the trial process or the accuracy of the ultimate result."²⁰⁸ Justice Scalia also argued that habeas jurisdiction should be exercised in accordance with equitable principles and that the fact of a prior full and fair opportunity to litigate a claim is "the most powerful equitable consideration" that can be advanced.²⁰⁹

The *Withrow* decision again underscores how, with the current Court, federal habeas corpus, "lives on the edge." By one vote, the federal habeas door once again escaped a substantive shutdown. Both the majority and the dissenters had creditable positions. On one hand, there is strength to Justice O'Connor's position that *Miranda* violations do not create a substantial risk of untrustworthy statements by suspects, especially since involuntariness claims would not be barred from review. But it does not follow necessarily that if one accepts her argument, Justice Souter's opinion unravels. The strength of his opinion lies in its reminder that the privilege against self-incrimination, which *Miranda* sought to safeguard, does not have the singular rationale of merely protecting against untrustworthy statements.²¹⁰

205. *Id.* at 1761 (O'Connor, J., dissenting).

206. *Id.* at 1761-64 (O'Connor, J., dissenting).

207. *Id.* at 1764 (O'Connor, J., dissenting).

208. *Id.* at 1768 (Scalia, J., dissenting).

209. *Id.* at 1776 (Scalia, J., dissenting).

210. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 446-48 (4th ed. 1992) (listing, in addition to a fear of untrustworthiness, nine other rationales for the privilege against self-incrimination which, at one time or another, have found favor in judicial writings).

Withrow is an intriguing case. Despite the Court's hostility to federal habeas corpus over the last 20 years, and no decision is more hostile than *Stone v. Powell*, a majority of the Justices has resisted all attempts to extend it. Certainly, there is no more effective way to cabin federal habeas corpus than to bar relief entirely as to a discrete substantive issue. The question persists as to why *Stone* remains limited to Fourth Amendment claims. I do not have the answer, and I am not driven to find one. That is because I have never cared much for *Stone v. Powell*'s preclusion of Fourth Amendment claims. The logic of the majority opinion has always escaped me. Given that *Mapp v. Ohio*²¹¹ recognized the remedy of exclusion for violations of Fourth Amendment guarantees, that it should be a remedy enforceable only in state court and on a writ of certiorari has long struck me as irrational.

When one lives on the edge, of course, one can fall off. That is exactly what happened in *Brecht v. Abrahamson*,²¹² in which the Court again exhibited "forum-schizophrenia" as to constitutional error, though in a form less severe than *Stone v. Powell*. This time the Court, by a 5-4 vote, made it more difficult to secure federal habeas corpus relief for a federal constitutional violation than is required for state court review of the same violation. It held that federal constitutional error can be deemed harmless even if the habeas court, as required by *Chapman v. California*,²¹³ would not hold the error harmless beyond a reasonable doubt.²¹⁴ Instead, the error can be deemed harmless if the court is satisfied that it did not have a "substantial and injurious effect or influence in determining the jury's verdict."²¹⁵

Brecht was convicted of first degree murder in Wisconsin state court.²¹⁶ At his trial, he admitted firing the fatal shot but claimed

211. 367 U.S. 643 (1961).

212. 113 S. Ct. 1710 (1993).

213. 386 U.S. 18, 21-24 (1967).

214. *Brecht*, 113 S. Ct. at 1713-14.

215. *Id.* at 1714 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

216. *Id.* at 1715.

it was an accident.²¹⁷ The prosecutor impeached him by pointing out that he had failed to make such a claim before trial.²¹⁸ Some of the silence to which the prosecutor referred came after Brecht had been given *Miranda* warnings.²¹⁹

The Wisconsin Supreme Court acknowledged that the prosecutor's references to post-*Miranda* warning periods of silence violated the rule in *Doyle v. Ohio*,²²⁰ which precludes use of a defendant's silence to impeach after he has been given *Miranda* warnings.²²¹ It held, however, that under the reasonable doubt standard of *Chapman*, the test was satisfied.²²² The Seventh Circuit reached the same result, but by a different road.²²³ Reasoning that the *Doyle* rule is merely "prophylactic,"²²⁴ the court held that the *Chapman* standard need not be applied and that a less stringent test, as established in *Kotteakos v. United States*,²²⁵ is warranted when federal habeas review is sought; the test it applied was the federal standard used for non-constitutional error.²²⁶

Chief Justice Rehnquist, writing for the majority, disagreed with the Seventh Circuit as to the nature of a *Doyle* violation, pointing out that *Doyle* did more than just extend *Miranda* protections, which the Court has come to regard as

217. *Id.* at 1714.

218. *Id.* at 1714-15.

219. *Id.* at 1716.

220. 426 U.S. 610, 619 (1976) (holding "that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violates the Due Process Clause of the Fourteenth Amendment").

221. *State v. Brecht*, 421 N.W.2d 96, 104 (Wis. 1988), *rev'd sub nom. Brecht v. Abrahamson*, *rev'd*, 759 F. Supp. 500 (W.D. Wis. 1991), *rev'd*, 944 F.2d 1363 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710 (1993).

222. *Id.*

223. *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710 (1993).

224. *Id.* at 1370.

225. 328 U.S. 750, 776 (1946) (questioning whether it is "highly probable that the error had a substantial and injurious effect or influence in determining the jury's verdict").

226. *Brecht*, 944 F.2d at 1375.

prophylaxes.²²⁷ *Doyle* violations, he said, were true constitutional violations because *Doyle* is rooted in concerns of fundamental fairness and due process.²²⁸ Therefore, *Doyle* error “fits squarely” into the category of constitutional violations which the Court, in *Arizona v. Fulminante*,²²⁹ classified as “trial error.”²³⁰

However, Rehnquist pointed out that the Seventh Circuit, though off-base in its understanding of *Doyle*, arrived nonetheless at the correct harmless error standard — *Kotteakos* rather than *Chapman*.²³¹ *Chapman*, he explained, reached the Court through direct appeal and even though the Court has applied the *Chapman* “harmless error” standard “in a handful of federal habeas cases,” it had not yet squarely addressed “its applicability on collateral review.”²³²

Rehnquist emphasized that the Court has treated collateral review differently from direct review²³³ and has in fact used different standards on habeas review than would be applied to some matters on direct review.²³⁴ A prime example of this, he said, is the Court’s according retroactive effect to constitutional rulings which always apply retroactively to cases on direct review, but seldom on habeas.²³⁵ The main reason for this difference, Rehnquist asserted, is “the State’s interest in the finality of convictions” that have come to the end of the direct review process.²³⁶ The same interest, he maintained, mandates a lesser harmless error standard on collateral review: “[o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States’ interest in

227. *Brecht*, 113 S. Ct. at 1717.

228. *Id.*

229. 499 U.S. 279, 307-10 (1991).

230. *Brecht*, 113 S. Ct. at 1717.

231. *Id.* at 1716-19.

232. *Id.* at 1718.

233. *Id.* at 1719-20.

234. *Id.* at 1720-21.

235. *Id.* at 1720.

236. *Id.*

finality and infringes upon their sovereignty over criminal matters.”²³⁷

The Chief Justice also argued that given the state courts have equal, and perhaps, greater ability to evaluate the effect of trial error, it “scarcely seems logical” to require that habeas courts rehash the case using the same approach as did the state courts.²³⁸ Allowing the use of a less stringent standard on habeas review will not tempt state prosecutors to step out of line or state courts to lower their guard.²³⁹ Moreover, “[t]he imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error. The *Kotteakos* standard,” Rehnquist concluded, “fills the bill.”²⁴⁰ In a footnote, he left open the possibility that the *Kotteakos* standard might not be appropriate “in an unusual case” involving “a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct”²⁴¹

Justice Stevens joined the majority opinion but he also issued a concurrence in which he emphasized that the *Kotteakos* standard forbids “a single-minded focus on how the error may (or may not) have affected the jury’s verdict.”²⁴² Noting that *Kotteakos* calls for a de novo review of the trial record, and that the burden of showing harmlessness rests on the state, the *Kotteakos* standard “is appropriately demanding,” he concluded.²⁴³

Justice White, joined by Justice Blackmun and, for the most part, by Justice Souter, argued that there is no reason argued to have two standards for harmless constitutional error:²⁴⁴ “[e]ither state courts are faithful to federal law, in which case there is no cost in applying the *Chapman* as opposed to the *Kotteakos*

237. *Id.* at 1721.

238. *Id.*

239. *Id.*

240. *Id.* at 1721-22.

241. *Id.* at 1722 n.9.

242. *Id.* at 1724 (Stevens, J., concurring).

243. *Id.* at 1723 (Stevens, J., concurring).

244. *Id.* at 1725-28 (White, J., dissenting).

standard on collateral review; or they are not, and it is precisely the role of habeas corpus to rectify that situation.”²⁴⁵

Justice O'Connor dissented, not because collateral review is different from direct review but because the majority was painting with too broad a brush.²⁴⁶ In her view, “the harmless-error standard often will be inextricably intertwined with the interest of reliability.”²⁴⁷ Therefore, “where errors bearing on accuracy are at issue,” she was “not persuaded that the *Kotteakos* standard offers an adequate assurance of reliability.”²⁴⁸

This case, arguably, is even less sensible than *Stone v. Powell*.²⁴⁹ It is one thing to say that collateral review makes a difference when the implicated “right” is not of constitutional stature, as was the case in *Stone*, and quite something else to say that when a constitutional right is violated, a defendant’s right to a new trial is contingent on which court has so determined. A reality check on the harmless error doctrine would reveal that even the *Chapman* standard is frequently utilized by appellate courts to affirm convictions unjustifiedly.²⁵⁰ To allow further

245. *Id.* at 1728 (White, J., dissenting).

246. *Id.* at 1728-32 (O'Connor, J., dissenting).

247. *Id.* at 1730 (O'Connor, J., dissenting).

248. *Id.* (O'Connor, J., dissenting).

249. 428 U.S. 465 (1976).

250. See Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980). The author argues that “[a]lthough *Chapman* introduced the harmless constitutional error, the doctrine as presented possessed only the potential, not the doctrinal structure, for constitutional and institutional mischief.” *Id.* at 426. This test was to be stringent, and instead the Supreme Court and appellate courts have not interpreted “*Chapman* to allow a finding of harmlessness only after an appellate court had examined the error alone and found beyond a reasonable doubt that it could not have contributed to the verdict.” *Id.* The reviewing courts have focused on the entire transcript to find guilt beyond a reasonable doubt despite the constitutional error, rather than concentrating solely on the constitutional right at issue. *Id.* at 427-32. “As a result, the doctrine has become a major thief of constitutional rights without any particular notice or analysis.” *Id.* at 427; Steven A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973). The author proposes an alternative test be applied by appellate courts to determine if a trial error has affected the verdict, rather

slippage by permitting an even lower standard seems to have little justification other than in the Court's general hostility to habeas corpus. It is a hostility which is not shared by Congress²⁵¹ and is one which, in Justice White's words, has produced a habeas jurisprudence that "is taking on the appearance of a confused patchwork in which different constitutional rights are treated according to their status, . . . [a] picture [that] bears scant resemblance either to Congress' design or to our own precedents."²⁵²

In *Herrera v. Collins*,²⁵³ the truism that "facts drive the law" may have had its epiphany. The issue was whether, in the face of an allegation that a person is innocent of the murder for which he was sentenced to death, the Eighth Amendment's²⁵⁴ prohibition against cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause²⁵⁵ forbid execution.²⁵⁶ The majority opinion,²⁵⁷ written by Chief Justice Rehnquist, said "no" but "maybe." The dissent²⁵⁸ said the "maybe" meant "yes, but not now" and that the majority's "no" was, therefore, dictum. Because the facts of the case could not sustain Herrera's constitutional claims, the case proved an unsuitable vehicle for resolution of an issue of such moment.

Herrera was charged with the murder of two police officers, Rucker and Carrisalez.²⁵⁹ In January, 1982, after his trial for Carrisalez's murder, he was convicted and sentenced to death.²⁶⁰ In July, 1982, he pleaded guilty to Rucker's murder.²⁶¹ He lost his challenges to his conviction both on direct appeal and in state

than the *Chapman* test which unjustifiably distinguishes between constitutional and nonconstitutional issues. *Id.*

251. See *Brecht*, 113 S. Ct. at 1727 (White, J., dissenting).

252. *Id.* at 1728 (White, J., dissenting).

253. 113 S. Ct. 853 (1993).

254. U.S. CONST. amend. VIII.

255. U.S. CONST. amend. XIV.

256. *Id.* at 859.

257. *Id.* at 856-70.

258. *Id.* at 876-84 (Blackmun, J., dissenting).

259. *Id.* at 857.

260. *Id.*

261. *Id.*

collateral proceedings in the Texas courts.²⁶² He was also unsuccessful with a federal habeas corpus petition.²⁶³ In February 1992, a decade after his conviction, he filed a second federal habeas petition alleging that he was “actually innocent.”²⁶⁴ In support of his claim, he submitted affidavits tending to show that his now-dead brother, rather than he, had murdered the two officers.²⁶⁵

The evidence at Herrera’s trial, however, was overwhelming.²⁶⁶ Officer Hernandez, who had witnessed Carrisalez’s slaying, identified Herrera as the shooter.²⁶⁷ Carrisalez’s own dying declaration did the same.²⁶⁸ The speeding car involved in Carrisalez’s murder was registered to Herrera’s live-in girlfriend; also, Herrera was known to drive the car and he had a set of keys to the car on him when arrested.²⁶⁹ Officer Hernandez identified the car and testified that there had been only one person in it the night of the shooting.²⁷⁰ Herrera’s social security card was found alongside Rucker’s patrol car, and type A blood which Rucker but not Herrera had, was found on Herrera’s jeans and wallet.²⁷¹ Strands of Rucker’s hair were found in Herrera’s car and a handwritten letter strongly implying Herrera as Officer Rucker’s killer, was found on Herrera when he was arrested.²⁷²

Given these facts, it is not surprising that Chief Justice Rehnquist, writing for the Court, rejected Herrera’s claims and held that neither the prohibition against cruel and unusual punishment nor due process was violated by the refusal to entertain Herrera’s actual innocence claim.²⁷³ Rehnquist cited

262. *Id.* at 858.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 857.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 862-65.

Chief Justice Warren for the proposition that “the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.”²⁷⁴ This proposition, Rehnquist reminded us, “is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”²⁷⁵ Federal habeas court review of evidentiary matters, he pointed out, is limited under *Jackson v. Virginia*,²⁷⁶ to the question of whether the evidence meets minimum due process standards, not whether the federal court would reach the same conclusion as the state court.²⁷⁷ While “actual innocence” may allow for an exception to the rule precluding federal courts from consideration of abusive or successive petitions, it “is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.”²⁷⁸

The Chief Justice also emphasized that there is no due process right to an unlimited opportunity to move for a new trial on the basis of newly discovered evidence and that there have always been time limits on such motions.²⁷⁹ Texas’ 30-day limit is consistent, he said, with this tradition.²⁸⁰

If I might digress for a moment. I find this dictum more troubling than anything else in the opinion. Even in non-capital cases, the idea of a 30-day limit for newly discovered evidence strikes me as abhorrent and possibly unacceptable as a matter of due process. Herrera’s case was not appropriate for litigation of

274. *Id.* at 860 (quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963)).

275. *Id.* (citations omitted).

276. 443 U.S. 307 (1979).

277. *Herrera*, 113 S. Ct. at 861.

278. *Id.* at 862.

279. *Id.* at 864-66.

280. *Id.* at 865-66. The Court noted that 17 States require a motion for new trial based on the ground of newly discovered evidence within 60 days or less of the judgment. *Id.* In fact, some States, such as Hawaii and Tennessee, require such motion to be made within ten days of the judgment. *Id.* at 865 n.8.

this issue since the alleged new evidence was ten years late. But what about newly discovered evidence that tends to exculpate a defendant with 31 or 60 days or even a year of his conviction? Is it so clear that the Constitution affords no remedy for such arbitrariness when life or liberty are at stake?

To return to *Herrera*. Despite the holding of the case, the majority did state that “[w]e may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.”²⁸¹ What quantum of evidence as to “actual innocence” would trigger acceptance by the Court, we do not know. But I am very happy the Court said what it did. Precisely because there are jurisdictions, such as Texas, with extremely short time limitations on newly-discovered evidence, even a slight window of opportunity for a condemned man or woman is welcome.

The Chief Justice’s opinion did, however, send some sparks flying, even amongst the majority. Justice O’Connor, joined by Justice Kennedy, observed that on the facts presented, *Herrera* could not be considered “innocent” in any respect.²⁸² Therefore, while she believed that “the execution of a legally and factually innocent person would be a constitutionally intolerable event, . . . [r]esolving the issue is neither necessary nor advisable in this case.”²⁸³

Justice Scalia, joined by Justice Thomas, would have preferred that the Court hold squarely that the Constitution does not require “judicial consideration of newly discovered evidence of innocence.”²⁸⁴ True to form, he observed that “[t]here is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence brought forward after

281. *Id.* at 869.

282. *Id.* at 870 (O’Connor, J., concurring).

283. *Id.* at 870-71 (O’Connor, J., concurring).

284. *Id.* at 874 (Scalia, J., concurring).

conviction.”²⁸⁵ Nonetheless, he joined the majority’s opinion “because there is no legal error in deciding a case by assuming *arguendo* that an asserted constitutional right exists . . . ,” and because “it is improbable that evidence of innocence as convincing as today’s opinion requires would fail to produce an executive pardon.”²⁸⁶ One can ask whether all share Justice Scalia’s abiding faith in executive authority.

Justice Blackmun, joined by Justices Stevens and Souter, argued that the execution of an innocent person would violate both the Eighth Amendment and substantive due process.²⁸⁷ Most of the majority opinion, he stated, was dictum because the case was actually decided on the assumption that the Constitution does prohibit execution of innocents.²⁸⁸ As to what standard would be appropriate for an “actual innocence” claim, Justice Blackmun opted for a requirement that the petitioner must show that he is “probably innocent.”²⁸⁹

Herrera is unfinished business. It offers little guidance for lower courts in resolving claims of actual innocence. The majority has left the door ajar, however slightly, but the message is that a defendant had better not seek entry unless he really has the goods. How much is enough is left unsaid. Justice White’s brief concurrence may provide a possible benchmark in its suggestion that an actual innocence claimant would, at the very least, have to meet the *Jackson v. Virginia*²⁹⁰ standard -- “that based on proffered newly discovered evidence and the entire record before the jury that convicted him ‘no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.’”²⁹¹ The question remains whether the majority would require even more than that--whatever that could be or whether, in a capital case, the *Jackson* standard is all that the Constitution requires.

285. *Id.* at 874-75 (Scalia, J., concurring).

286. *Id.* at 875 (Scalia, J., concurring).

287. *Id.* at 876-84 (Blackmun, J., dissenting).

288. *Id.* at 876 (Blackmun, J., dissenting).

289. *Id.* at 878 (Blackmun, J., dissenting).

290. 443 U.S. 307 (1979).

291. *Herrera*, 113 S. Ct. at 875 (White, J., concurring) (quoting *Jackson v. Virginia*, 443 U.S. 307, 321 (1979)).

IV. DOUBLE JEOPARDY

In *United States v. Dixon*,²⁹² a judicial act of infanticide occurred. Only three years old, the life of *Grady v. Corbin*,²⁹³ was snuffed out by the dissenters in that case and the concurrence of Justice Thomas. To dispose of the body, the Justices leveled the most trees and produced the most complicated set of opinions in any criminal case of the Term.

As you may recall, *Grady* held that the Double Jeopardy Clause²⁹⁴ bars a second prosecution where the government seeks “to establish an essential element of an offense charged in that prosecution, [which] will prove conduct that constitutes an offense for which the defendant has already been prosecuted.”²⁹⁵ The *Grady* “same-conduct” test added an additional level of proof for the government to meet beyond that required by the “same-elements” test of *Blockburger v. United States*.²⁹⁶ Under the *Blockburger* test, the inquiry is whether each offense contains an element not contained in the other; if not, they are the “same offense” within the Double Jeopardy Clause’s meaning, and subsequent punishment or prosecution is barred.²⁹⁷

In *Dixon*, the broad issue before the Court was whether someone who previously received a contempt-of-court prison sentence can be criminally prosecuted for the same conduct.²⁹⁸ The Court answered that it depends. In one of the two cases consolidated on appeal, *Dixon* had been granted bail on condition that he not commit “any criminal offense.”²⁹⁹ While on release, he was arrested and indicted for possessing cocaine with intent to distribute.³⁰⁰ He was found guilty of criminal contempt based on

292. 113 S. Ct. 2849 (1993).

293. 495 U.S. 508 (1990), *overruled by* *United States v. Dixon*, 113 S. Ct. 2849 (1993).

294. U.S. CONST. amend. V.

295. *Grady*, 495 U.S. at 510.

296. 284 U.S. 299 (1932).

297. *Id.* at 304.

298. *Dixon*, 113 S. Ct. at 2854.

299. *Id.* at 2853.

300. *Id.*

the drug offense.³⁰¹ In the other case, Foster was under a civil protection order that he not “molest, assault, or in any manner threaten or physically abuse” his estranged wife.³⁰² In a multi-count contempt proceeding prosecuted by his wife’s attorney, Foster was charged with violating the order by way of several assaults and several threats.³⁰³ He was convicted on some of the contempt counts and acquitted on others.³⁰⁴ He was later indicted for simple assault, multiple counts of threatening to injure another, and assault with intent to kill—all based on the events underlying the contempt prosecution.³⁰⁵

Justice Scalia, who wrote the lead opinion, concluded that the *Blockburger* test was the only appropriate one.³⁰⁶ He reprised his *Grady* dissent in which he had argued that the *Grady* test lacked constitutional roots, that it was “wholly inconsistent with earlier Supreme Court precedent” and was at odds with “the clear common-law understanding of double jeopardy.”³⁰⁷ Moreover, the *Grady* rule, he argued, has already proved unstable in application, and should be overruled.³⁰⁸ Five justices agreed that *Grady* should go³⁰⁹ but only Justice Kennedy joined Justice Scalia’s opinion as to the application of the *Blockburger* test to the facts at bar.³¹⁰

Under Justice Scalia’s application of *Blockburger* to the Dixon facts, when a court order incorporates a criminal statute and the defendant is then found in contempt for violating the order through commission of the incorporated offense, a subsequent prosecution directly under the statute constitutes double

301. *Id.*

302. *Id.* at 2854.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 2860.

307. *Id.* (citing *Grady v. Corbin*, 495 U.S. 508, 526 (1990) (Scalia, J., dissenting)).

308. *Id.*

309. *Id.* at 2865 (Rehnquist, C.J., concurring).

310. *Id.* at 2852.

jeopardy.³¹¹ In that instance, the contempt offense included all elements of the drug offense and the contempt order incorporated the entire criminal code.³¹² Thus, the crime charged in Dixon's indictment was necessarily a "species of lesser-included offense" in relation to the contempt offense, and under *Harris v. Oklahoma*,³¹³ successive prosecutions for greater and lesser offenses are prohibited.³¹⁴

As to Foster, Justice Scalia concluded that the simple assault charge failed the *Blockburger* test and thus was a double jeopardy violation.³¹⁵ However, the charges of threatening and assault with intent to kill were not barred.³¹⁶ Assault with intent to kill includes the element of specific intent, but the related contempt offense does not;³¹⁷ on the other hand, the contempt offense requires knowledge of the protection order, which assault with intent to kill does not.³¹⁸ Under *Grady*, the charges left standing by *Blockburger* would be barred because to prove the criminal offense, the government proved the same conduct that constituted the contempt.³¹⁹ With *Grady*'s interment, there was no longer a double jeopardy violation.

Justice Souter wrote the major doctrinal defense of *Grady*.³²⁰ He pointed out that the Double Jeopardy Clause operates differently depending on whether the context is one of successive prosecutions or of multiple punishments.³²¹ When the issue is whether multiple punishments may be imposed for a single act, it is constitutionally sufficient to determine whether the legislature intended multiple punishments or not.³²² However, where

311. *Id.* at 2856-57 (citing *Harris v. Oklahoma*, 433 U.S. 682 (1987) (*per curiam*)).

312. *Id.*

313. 433 U.S. 682 (1987).

314. *Dixon*, 113 S. Ct. at 2857 (citations omitted).

315. *Id.* at 2858.

316. *Id.*

317. *Id.*

318. *Id.* at 2859.

319. *Id.* at 2859-60.

320. *Id.* at 2881-91 (Souter, J., concurring).

321. *Id.* at 2881 (Souter, J., concurring).

322. *Id.* at 2881-82 (Souter, J., concurring).

successive prosecutions are at issue, the interests at stake are different because “[t]he protection against successive prosecutions is the central protection provided by the Clause.”³²³ In this context, Justice Souter pointed out, the Double Jeopardy Clause prevents the government from “mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.”³²⁴ Thus, “while the government may punish a person separately for each conviction of at least as many offenses as meet the *Blockburger* test,” Justice Souter stated, “we have long held that it must sometimes bring its prosecutions for these offenses together.”³²⁵ “The limitation on successive prosecution,” he argued, “is thus a restriction on the government different in kind from that contained in the limitation on multiple punishments, and the government cannot get around the restriction on repeated prosecution of a single individual merely by precision in the way it defines its statutory offenses.”³²⁶

It is difficult to assess which side in *Dixon* has the better of the argument as to the overruling of *Grady*. One has to parse the cited precedents carefully. Justice Souter grounds his argument in precedents such as *In re Nielsen*,³²⁷ *Harris v. Oklahoma*,³²⁸

323. *Id.* at 2882 (Souter, J., concurring).

324. *Id.* at 2883 (Souter, J., concurring) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

325. *Id.* (Souter, J., concurring).

326. *Id.* (Souter, J., concurring).

327. 131 U.S. 176 (1889). Justice Souter reflected on the holding of *In Re Nielson* by stating that where “a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.” *Dixon*, 113 S. Ct. at 2885 (Souter, J., dissenting) (quoting *In re Nielsen*, 131 U.S. at 188). Justice Souter noted that *In re Nielsen*’s mention of the common rule barring subsequent prosecution for lesser-included offenses has “mislead[] the majority into thinking that *Nielsen* does nothing more than apply the familiar rule which is, of course, a corollary to the *Blockburger* test.” *Id.* at 2886 (Souter, J., dissenting).

328. 433 U.S. 682 (1977). Justice Souter found that “the analysis in *Harris* turned on considering the prior conviction in terms of the conduct actually charged. While that process might be viewed as a misapplication of a

Brown v. Ohio,³²⁹ and *Illinois v. Vitale*.³³⁰ Justice Scalia says they are either distinguishable, mere dicta, or are misdescribed by Justice Souter.³³¹ Perhaps, if overruling *Grady* had clarified double jeopardy jurisprudence measurably, *Dixon* would be welcome. However, we are merely restored to the *Blockburger* test, with which there had been considerable dissatisfaction to begin with.³³² The easiest out in *Dixon* may well have been to treat contempt differently from traditional criminal conduct and thereby place it outside the protection of the Double Jeopardy Clause entirely.

V. COMPETENCY TO STAND TRIAL

In *Godinez v. Moran*,³³³ the Court addressed an issue that had divided a number of lower federal courts:³³⁴ whether a defendant

Blockburger lesser-included-offense analysis, the crucial point is that the *Blockburger* elements test would have produced a different result." *Dixon*, 113 S. Ct. at 2887 (Souter, J., dissenting).

329. 432 U.S. 161 (1977). Justice Souter recognized that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires relitigation of factual issues already resolved by the first." *Dixon*, 113 S. Ct. at 2886-87 (Souter, J., dissenting) (quoting *Brown*, 432 U.S. at 166-67 n.6).

330. 447 U.S. 410 (1980). Justice Souter evaluated the Court's opinion in *Vitale* to indicate that an application of the *Blockburger* test would perhaps allow a claim for double jeopardy to stand even where the two offenses were not the "same." *Dixon*, 113 S. Ct. at 2887 (Souter, J., dissenting). Justice Souter noted that the Court, in *Vitale*, vacated and remanded the case for determination of whether the elements of the lesser offense were always necessarily included within the elements of the greater offense charged. *Id.* at 2888 (Souter, J., dissenting).

331. *Dixon*, 113 S. Ct. at 2860-63.

332. See *Grady v. Corbin*, 495 U.S. 508 (1990). Whatever the shortcomings of *Blockburger*, some commentators believed those of *Grady* were worse. See, e.g., Daniel J. Capra, *Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court*, 36 VILL. L. REV. 1267 (1991).

333. 113 S. Ct. 2680 (1993).

who seeks to waive his right to a trial or his right to the assistance of counsel must show a higher level of mental functioning than mere competence to stand trial.³³⁵ Justice Thomas, writing for the majority, said no.³³⁶ Justice Blackmun, joined by Justice Stevens, dissented.³³⁷

Moran pleaded not guilty to three counts of first degree murder and two psychiatrists concluded that he was competent to stand trial.³³⁸ He then requested from the Nevada trial court that his attorneys be discharged and his pleas be changed to guilty.³³⁹ The court found that Moran understood the nature of the charges against him, that he was able to assist in his own defense, that he was knowingly and intelligently waiving his right to counsel and that his guilty pleas were freely and voluntarily given.³⁴⁰ Moran was then sentenced to death.³⁴¹

Moran challenged his conviction and the trial court, after holding an evidentiary hearing, rejected his claim that he was "mentally incompetent to represent himself."³⁴² The Nevada Supreme Court dismissed his appeal and Moran fared no better in federal district court on his habeas corpus petition.³⁴³ However, the Ninth Circuit held that the state trial court's determination was based on the wrong standard and that a new hearing should be held.³⁴⁴ The court reasoned that while a defendant is competent to stand trial if he has "a rational and factual understanding of the proceedings and is capable of assisting his counsel," (the *Dusky* standard),³⁴⁵ he is competent to waive

334. *Id.* at 2684-85 n.5.

335. *Id.* at 2682.

336. *Id.* at 2682-88.

337. *Id.* at 2691-96 (Blackmun, J., dissenting).

338. *Id.* at 2682.

339. *Id.* at 2683.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Moran v. Godinez*, 972 F.2d 263, 265-66 (9th Cir. 1992), *rev'd*, 113 S. Ct. 2680 (1993).

345. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*) (stating the test for competency to stand trial as a "sufficient present ability to

counsel or plead guilty only if he has the “capacity for ‘reasoned choice’” among competing alternatives.³⁴⁶

The Supreme Court reversed, holding that the competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial and that there is no reason for treating the competency standard for either of those decisions differently than that required for standing trial.³⁴⁷ Justice Thomas maintained that the decision to plead guilty, though profound, “is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial,” such as whether to testify, whether to waive a jury trial, and whether to cross-examine witnesses for the prosecution.³⁴⁸ Nor does “the decision to waive counsel,” he concluded, “require[] an appreciably higher level of mental functioning than the decision to waive other constitutional rights.”³⁴⁹

In 1966, in *Westbrook v. Arizona*,³⁵⁰ the Court vacated a conviction, although the accused was found competent to stand trial, because there had been no inquiry into his competency to waive his right to counsel. The Ninth Circuit, as had some other federal courts, read *Westbrook* to mean that a standard higher than the *Dusky* standard was required for a waiver of the counsel right.³⁵¹ Justice Thomas wrote that this was not the meaning of *Westbrook*.³⁵² Rather, the “competence to waive” language was simply a “shorthand for the ‘intelligent and competent waiver’ requirement of *Johnson v. Zerbst*.”³⁵³ Consequently, said Justice Thomas, “*Westbrook* stands only for the unremarkable

consult with his lawyer with a reasonable degree of rational understanding” and that the defendant has “a rational as well as factual understanding of the proceedings against him”).

346. *Moran*, 972 F.2d at 266.

347. *Godínez*, 113 S. Ct. at 2686.

348. *Id.*

349. *Id.*

350. 384 U.S. 150, 150-51 (1966).

351. *Godínez*, 113 S. Ct. at 2685.

352. *Id.*

353. *Id.* at 2688; see also *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

proposition that when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.”³⁵⁴

Justice Blackmun, joined by Justice Stevens, dissented, disputing that “a defendant who is found competent to stand trial with the assistance of an attorney is, *ipso facto*, competent to discharge counsel and represent himself.”³⁵⁵ He argued that the Court’s prior rulings recognized that “competency evaluations” should be “specifically tailored to the context and purpose of a proceeding A person who is ‘competent’ to play basketball is not thereby ‘competent’ to play the violin.”³⁵⁶ Thus, the “reasoned choice” standard adopted by the Ninth Circuit, was warranted.³⁵⁷

Justice Blackmun’s position seems more consonant with contemporary legal and psychological perspectives as to a person’s varied mental level of functioning within a criminal trial setting. The ABA’s Standards for Criminal Justice recognize different functional tests for various stages of the criminal process.³⁵⁸ For example, Standard 7-5.3(d)(iii) provides that “[i]f, after [a] hearing, the court should determine that the defendant is competent to stand trial but is incompetent to waive counsel and to proceed without [the] assistance of counsel, the court should appoint counsel to represent the defendant and should proceed to trial of the case.”³⁵⁹ The American Psychiatric Association and a number of other “mental health associations filed an amicus brief on Moran’s behalf, pointing out that mental

354. *Godinez*, 113 S. Ct. at 2688.

355. *Id.* at 2694 (Blackmun, J., dissenting).

356. *Id.* (Blackmun, J., dissenting).

357. *Id.* at 2695 (Blackmun, J., dissenting).

358. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.3(d)(iii) (1989).

359. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.3(d)(iii) (1989).

health professionals are capable of evaluating degrees of competence as it pertains to trial competency.”³⁶⁰

In assessing whether the majority or the dissent has the better of the argument, it is worth noting that at the very outset of his opinion, Justice Thomas expressed skepticism as to whether there existed a significant difference between the *Dusky* standard and the Ninth Circuit’s “reasoned choice” standard.³⁶¹ Although he concluded that even if there was, it would not make a difference constitutionally,³⁶² it seems clear that Justice Thomas’ skepticism pointed the way. If that skepticism was falsely based, as is suggested by professional opinion, the majority’s rejection of the “reasoned choice” standard is less persuasive.

VI. JURY REASONABLE DOUBT INSTRUCTIONS AND HARMLESS ERROR

In *Sullivan v. Louisiana*,³⁶³ the trial judge, in a prosecution for first-degree murder and armed robbery, instructed the jury that “reasonable doubt” was a doubt that “would give rise to a *grave uncertainty*,” one that would make the jury feel that it did not have an abiding conviction of the defendant’s guilt “to a *moral certainty*,” and one that could be described as “*substantial*” and “serious doubt, for which you could give good reason.”³⁶⁴ In *Cage v. Louisiana*,³⁶⁵ the Supreme Court had already disapproved such a definition of reasonable doubt. The Louisiana Supreme Court acknowledged that the charge was bad under *Cage*, but held that the error was harmless beyond a reasonable doubt.³⁶⁶

360. Sheila Taub, *Competency Standard Clarified*, NAT’L L.J., Oct. 18, 1993, at 25, 29.

361. *Godínez*, 113 S. Ct. at 2686.

362. *Id.*

363. 113 S. Ct. 2078 (1993).

364. *Louisiana v. Sullivan*, 596 So. 2d 177, 185 n.3 (La. 1992), *rev’d*, 113 S. Ct. 2078 (1993).

365. 498 U.S. 39 (1990) (*per curiam*).

366. *Sullivan*, 596 So. 2d at 185.

In a unanimous opinion by Justice Scalia, the Court held that a reasonable doubt instruction which is constitutionally deficient is not harmless error.³⁶⁷ Justice Scalia explained that two “interrelated” constitutional guarantees are implicated when a jury is given an incorrect definition of reasonable doubt: the Sixth Amendment³⁶⁸ right to a jury verdict, and the Fifth Amendment³⁶⁹ requirement of proof beyond a reasonable doubt.³⁷⁰ The most important element of the Sixth Amendment guarantee is that “the jury, rather than the judge, [must] reach the requisite finding of ‘guilty.’”³⁷¹ When the Fifth Amendment guarantee is factored in, “the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.”³⁷²

Justice Scalia pointed out that *Chapman v. California*,³⁷³ the very case which rejected the view that all constitutional errors were reversible error,³⁷⁴ suggested the answer in this case.³⁷⁵ Under the *Chapman* analysis, he said, a reviewing court must consider what effect the error in question actually had on the verdict—not its likely effect on a hypothetical reasonable jury.³⁷⁶ However, because of the constitutionally deficient instruction Sullivan’s jury was given, the jury could be said to have found nothing “beyond a reasonable doubt.”³⁷⁷ Thus, there was no jury verdict in the case within the meaning of the Sixth Amendment.³⁷⁸ Consequently, the entire premise of harmless error review is absent:

367. *Sullivan*, 113 S. Ct. at 2080-83.

368. U.S. CONST. amend. VI.

369. U.S. CONST. amend. V.

370. *Sullivan*, 113 S. Ct. at 2081.

371. *Id.* at 2080.

372. *Id.* at 2081.

373. 386 U.S. 18 (1967)

374. *Id.* at 24 (stating that constitutional error will be harmless error unless the court declares it was “harmless beyond a reasonable doubt”).

375. *Sullivan*, 113 S. Ct. at 2081.

376. *Id.* at 2081-82; *see also Chapman*, 386 U.S. at 24.

377. *Sullivan*, 113 S. Ct. at 2082.

378. *Id.*

There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt . . . would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury’s actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.³⁷⁹

Justice Scalia pointed to the distinction between a faulty reasonable doubt charge and a jury instruction error that erects a presumption regarding an element of the offense³⁸⁰—which the Court has held is subject to harmless error analysis.³⁸¹ In the presumption case, the jury does find facts beyond a reasonable doubt, and “[a] reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt”³⁸² He also found support in the analytical framework of *Arizona v. Fulminante*,³⁸³ in which the Court drew a distinction between structural defects and mere trial errors.³⁸⁴ A

379. *Id.* (citations omitted).

380. *Id.*; see also *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that an instruction to the jury in a homicide case that “the law presumes that a person intends the ordinary consequences of his voluntary acts” violated the Due Process Clause because it may have removed from the prosecution its burden of proving every element of the offense).

381. *Sullivan*, 113 S. Ct. at 2082; cf. *Rose v. Clark*, 478 U.S. 570 (1986) (holding a *Sandstrom* error may be harmless); but see *Francis v. Franklin*, 471 U.S. 307, 325-26 (1985) (finding no harmless error where intent was plainly at issue and the “evidence of intent was far from overwhelming” in the case).

382. *Sullivan*, 113 S. Ct. at 2082.

383. 499 U.S. 279, 307-10 (1991) (finding an involuntary confession to be a ‘trial error’ subject to harmless-error analysis, while deprivation of counsel to be a ‘structural defect’ which affects the entire conduct of the trial and defies harmless-error analysis).

384. *Sullivan*, 113 S. Ct. at 2082-83.

deficient instruction on reasonable doubt, he stated, is a structural defect and is not susceptible, therefore, to harmless error analysis.³⁸⁵

Chief Justice Rehnquist wrote a separate concurrence in which he expressed doubt that an erroneous reasonable doubt instruction is actually very different from instructions embodying unconstitutional presumptions.³⁸⁶ He stated that “[o]ne may question whether . . . the ability to conduct harmless-error review is dependent on the existence of ‘beyond a reasonable doubt’ jury findings” in view of the fact that “jur[ies] do[] not [usually] make explicit factual findings.”³⁸⁷

Given the Court’s predilection for limiting the kinds of constitutional error that are immune to harmless error analysis, the *Sullivan* decision in counter-intuitive. However, in light of what remains after *Fulminante*, it is a decision of limited consequence. *Fulminante*’s “structural defect” demarcation has left little on the no harmless-error analysis side of the ledger. When the Court in *Fulminante* held that harmless error analysis may be applied to coerced confessions, a constitutional Rubicon of sorts was crossed.

VII. SENTENCING

In *Godfather III*, Al Pacino, as the aging Don, remonstrates that “Just when I thought I was out of it, they pull me back in.” The same can be said as to the Supreme Court and the sentencing process, thanks to the Federal Sentencing Guidelines.³⁸⁸ The Court’s decisions this Term reflect that it will be in the sentencing business for a long time. After all, why should the Court be free when, in some circuit courts of appeal, sentencing issues infect as much as a half of the court’s criminal docket?

385. *Id.*

386. *Id.* at 2083-84 (Rehnquist, C.J., concurring).

387. *Id.* at 2084 (Rehnquist, C.J., concurring).

388. See UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 3C1.1 (Nov. 1989); UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 4B1.2 (Nov. 1992).

In *United States v. Dunnigan*,³⁸⁹ Justice Kennedy, writing for a unanimous Court, answered affirmatively to the question “whether the Constitution permits a court to enhance a defendant’s sentence under [section 3C1.1 of the Federal Sentencing Guidelines]³⁹⁰ if the court finds the defendant committed perjury at trial.”³⁹¹

At Dunnigan’s trial, the government presented numerous eyewitnesses who testified to her dealings in cocaine.³⁹² She took the stand and denied her guilt.³⁹³ After the jury convicted her, the court found that she had deliberately given false testimony with respect to material matters in order to substantially affect the outcome of the case and her offense level was increased two levels under section 3C1.1.³⁹⁴

The Fourth Circuit reversed Dunnigan’s enhanced sentence.³⁹⁵ It distinguished *United States v. Grayson*³⁹⁶ which held that a judge could, in fixing upon a sentence, constitutionally consider its belief that a defendant lied on the stand.³⁹⁷ The Fourth Circuit reasoned that *Grayson* reflected a notion of rehabilitation that has been abandoned under the Federal Sentencing Guidelines, and that the application of section 3C1.1 to trial perjury also amounted to the kind of “wooden and reflexive” punishment of trial perjury that *Grayson* had disapproved.³⁹⁸

389. 113 S. Ct. 1111 (1993).

390. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 3C1.1 (Nov. 1989). Section 3C1.1 states: “If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by [two] levels.” *Id.* The commentary lists examples of the types of conduct to which the enhancement applies, such as “testifying untruthfully or suborning untruthful testimony concerning a material fact, . . . during any judicial proceeding.” *Id.*

391. *Dunnigan*, 113 S. Ct. at 1113.

392. *Id.* at 1114.

393. *Id.*

394. *Id.* at 1114-15.

395. *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), *rev’d*, 113 S. Ct. 1111 (1993).

396. 438 U.S. 41 (1978).

397. *Dunnigan*, 944 F.2d at 184 (citing *Grayson*, 438 U.S. at 55).

398. *Id.*

Justice Kennedy rejected both the Fourth Circuit's reasoning and Dunnigan's claim that the sentence enhancement violated her Sixth Amendment³⁹⁹ right to testify in her own defense.⁴⁰⁰ Cases such as *Grayson*, Kennedy pointed out, established clearly that "a defendant's right to testify does not include [the] right to commit perjury."⁴⁰¹ He also rejected the defense claim that section 3C1.1 exposes the defendant to the risk that enhancement will be forthcoming even when a defendant's testimony is truthful either because the court is acting automatically or makes an erroneous finding of falsity:

[o]f course, not every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury. . . . [A]n accused may give inaccurate testimony due to confusion, mistake or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress or self-defense. Her testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent. For these reasons, if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out.⁴⁰²

Justice Kennedy also rejected the argument that using section 3C1.1 to address perjury is merely a surrogate for a full-blown prosecution.⁴⁰³ He found that

[i]t furthers legitimate sentencing goals relating to the principal crime, including the goals of retribution and incapacitation It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more

399. U.S. CONST. amend. VI.

400. *Dunnigan*, 113 S. Ct. at 1117.

401. *Id.* (citations omitted).

402. *Id.*

403. *Id.* at 1118.

threatening to society and less deserving of leniency than a defendant who does not so defy the trial process.⁴⁰⁴

The Court's language in *Grayson* regarding rehabilitation, he emphasized, did not mean that now discarded goal was the only permissible justification for increasing a sentence because of perjury.⁴⁰⁵

As a matter of constitutional law, this battle was over with *Grayson*. In a pragmatic sense, *Dunnigan* presents a more severe tactical problem for defense counsel in federal prosecutions than did *Grayson*. As Justice Kennedy noted, the sentence enhancement in *Grayson* was merely permissive; the enhancement provided under section 3C1.1 is mandatory if the requisite findings are made.⁴⁰⁶ Consider also the nature of Dunnigan's testimony. She did little more than deny her guilt. She did not fabricate a defense nor did she accuse the government's witnesses of lying. While under *Grayson* there was certainly a risk of enhancement for perjury, the risk was not nearly as great as it is under section 3C1.1. Consequently, as one respected defense attorney has pointed out, "[i]t is now virtually mandatory for defense lawyers to advise clients that if they choose to testify, any sentence imposed on conviction will almost certainly be enhanced."⁴⁰⁷

In *Stinson v. United States*,⁴⁰⁸ the Court, in a unanimous opinion authored by Justice Kennedy, held that the Sentencing Guidelines Manual's commentary, which "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."⁴⁰⁹

404. *Id.* (citations omitted).

405. *Id.*

406. *Id.* at 1119.

407. Ira Mickenberg, *Crime Docket Was Quiet*, NAT'L L.J., Aug. 23, 1993, at S6.

408. 113 S. Ct. 1913 (1993).

409. *Id.* at 1915; see also UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 4B1.1 (Nov. 1992).

Stinson pleaded guilty to a five-count indictment resulting from his robbery of a bank.⁴¹⁰ The district court sentenced him as a career offender under the Guidelines Manual, section 4B1.1,⁴¹¹ which *inter alia*, requires that “the instant offense of conviction be a crime of violence.”⁴¹² The court found that Stinson’s offense of possession of a firearm by a convicted felon was a crime of violence as that term was defined in Sentencing Guideline 4B1.2(1).⁴¹³ While the case was on appeal, however, the Sentencing Commission promulgated Amendment 433, which added a sentence to the section 4B1.2 commentary that expressly excluded the felon-in-possession offense from the “crime of violence” definition.⁴¹⁴ Nevertheless, the Eleventh Circuit affirmed Stinson’s sentence, adhering to its earlier interpretation that the crime in question was categorically a crime of violence

410. *Stinson*, 113 S. Ct. at 1915.

411. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 4B1.1 (Nov. 1992). Section 4B1.1 provides:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Id.

412. *Stinson*, 113 S. Ct. at 1915 (quoting UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, § 4B1.1 (Nov. 1992)).

413. *Id.*; see also UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, § 4B1.2 (Nov. 1992). Section 4B1.2, provides in part: “[t]he term ‘crime of violence’ means any offense under federal or state law punishable by imprisonment for a term exceeding one year -- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another” *Id.* In the commentary, the “crimes of violence” include: “murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.” *Id.*

414. *Stinson*, 113 S. Ct. at 1916. The commentary to the Federal Sentencing Guidelines Manual states: “[t]he term ‘crime of violence’ does not include the offense of unlawful possession of a firearm by a felon.” UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 4B1.2 (Nov. 1992).

and holding that the commentary to the Guidelines is not binding on the federal courts.⁴¹⁵

In vacating and remanding the Eleventh Circuit's decision, Justice Kennedy concluded that the commentary at issue in the case is of a type that, in the Sentencing Commission's words, "interpret[s a] guideline or explain[s] how it is to be applied."⁴¹⁶ This sort of commentary, he pointed out, is controlling and enjoys the same status as policy statements.⁴¹⁷

Justice Kennedy also provided some guidance as to how the commentary should be utilized. First, he instructed, it is not to be treated like a legislative committee report because frequently, commentary will not be issued contemporaneously with the guideline it interprets but will have been added long after the guideline was promulgated.⁴¹⁸ Second, it should not be treated like the legislative rules an agency promulgates in interpreting the statute it administers, because "[c]ommentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute."⁴¹⁹ "Rather, commentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice."⁴²⁰

Justice Kennedy further explained that it is the guidelines themselves that are the "equivalent of legislative rules," because it was the guidelines that were promulgated pursuant to delegated congressional authority and through informal rulemaking procedures.⁴²¹ The functional purpose of the commentary, therefore, is to assist in the interpretation and application of the

415. *United States v. Stinson*, 957 F.2d 813, 815 (11th Cir. 1992), *vacated*, 113 S. Ct. 1913 (1993).

416. *Stinson*, 113 S. Ct. at 1917 (quoting UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 1B1.7 (Nov. 1992)).

417. *Id.* at 1917-18.

418. *Id.* at 1918.

419. *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

420. *Id.*

421. *Id.* at 1919.

rule.⁴²² Consequently, as with the standard applied to an agency's interpretation of its own legislative rules, the Guidelines commentary is binding authority, so long as it does not violate the Constitution or a federal statute and is not "'plainly erroneous or inconsistent with the regulation'" it interprets.⁴²³

In *Parke v. Raley*,⁴²⁴ the Court again dealt with a sentencing enhancement issue. However, unlike *Dunnigan*, the issue involved not the basis for enhancement but the procedures employed.⁴²⁵ In 1986, Raley was charged with robbery and with being a persistent felony offender under a Kentucky statute that enhances sentences for repeat felons.⁴²⁶ Raley moved to suppress his 1979 and 1981 felony guilty pleas that formed the basis for the enhanced penalty.⁴²⁷ His claim was that both were invalid because the records of the two cases contained no transcripts of the proceedings and hence did not affirmatively show, as required by *Boykin v. Alabama*,⁴²⁸ that his pleas were knowing and voluntary.⁴²⁹ Kentucky law placed the ultimate burden of persuasion on the state, but a presumption of regularity attached to the judgments once the state proved their existence, and the burden then shifted to Raley to produce evidence of their invalidity.⁴³⁰

The Sixth Circuit held that the Kentucky procedure was a violation of due process, as determined by its prior decision in *Dunn v. Simmons*,⁴³¹ which held that when a defendant challenges the knowingness and voluntariness of a guilty plea, and a transcript of the colloquy mandated by *Boykin* is not available, the state must bear the entire burden of proving the

422. *Id.*

423. *Id.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

424. 113 S. Ct. 517 (1992).

425. *Id.* at 519.

426. *Id.* at 520.

427. *Id.*

428. 395 U.S. 238 (1969).

429. *Parke*, 113 S. Ct. at 520.

430. *Id.*

431. 877 F.2d 1275 (6th Cir. 1989), *cert. denied*, 494 U.S. 1061 (1990).

validity of the plea and may not rely on the presumption of regularity that normally attends final judgments.⁴³²

Justice O'Connor, writing for the Court, held that the Sixth Circuit had placed too much weight on the statement in *Boykin* that waiver of rights resulting from a guilty plea cannot be "presume[d] . . . from a silent record."⁴³³ She pointed out that *Boykin* involved direct review of a guilty plea conviction, whereas this case amounts to a collateral attack.⁴³⁴ "To import *Boykin's* presumption of invalidity into this very different context would, [she stated], improperly ignore another presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights."⁴³⁵ She argued, given that *Boykin* was decided 25 years ago, "it defies logic to presume from the mere unavailability of a transcript . . . that the defendant was not advised of his rights."⁴³⁶

There is nothing momentous in the Court's holding that the Due Process Clause permits a State to impose a burden of production on a defendant who challenges the validity of a prior conviction under *Boykin*. As the Court points out, States vary in their approach; some put the entire burden on the prosecution, others do not.⁴³⁷ Our own New York Court of Appeals has upheld placement of the "entire burden [on] the defendant once the government has established the fact of conviction."⁴³⁸ Had the Supreme Court upheld the Sixth Circuit in *Parke*, it would, of course, have been a matter of some moment in New York.

432. *Raley v. Parke*, 945 F.2d 137 (6th Cir. 1991), *rev'd*, 113 S. Ct. 517 (1992).

433. *Parke*, 113 S. Ct. at 523 (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).

434. *Id.*

435. *Id.*

436. *Id.* at 524.

437. *Id.* at 525.

438. *People v. Harris*, 61 N.Y.2d 9, 15, 459 N.E.2d 170, 172, 471 N.Y.S.2d 61, 63 (1983).

CONCLUSION

In sum, the 1992 Term in regard to criminal law was relatively uneventful. There were no bombshell cases and the civil forfeiture cases arguably stand out in bold relief because of the relative calm in other criminal matters. The other cases which I have discussed, though numerous, find their significance mainly in the working out of various doctrines, the major aspects of which were long ago set in motion. If I had to choose my personal favorite, I would select *Withrow v. Williams*.⁴³⁹ On the other side of the ledger, if you allowed me "one on the house" for recall, I would cancel *Brecht v. Abrahamson*.⁴⁴⁰ Perhaps the 1993 Term, with the advent of Justice Ginsberg, will be more exciting.

Hon. George C. Pratt:

Professor Hellerstein, thank you very much. Just one observation, I share your concern about the institutional implications on double jeopardy of overruling a recent precedent of that sort; but a personal view, if they had to pick a case to overrule, they could not have picked a better one than *Grady v. Corbin*.⁴⁴¹ *Grady* was Justice Brennan's last opinion and I always had the view, almost as if he had taken leave of his senses. An impossible case to apply in any context.

Professor Gary M. Shaw:

I find it is always difficult to try and find a question after Professor Hellerstein has lectured, only because I find that I usually agree with him one hundred percent. This is another one of those instances.

439. 113 S. Ct. 1745 (1993). See *supra* notes 169-211 and accompanying text.

440. 113 S. Ct. 1710 (1993). See *supra* notes 212-252 and accompanying text.

441. 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993). See *supra* notes 292-331 and accompanying text.

When I teach criminal procedure, I have to tell my students that this is a history course in the protections that the Fourth, Fifth and Sixth Amendments used to give. It seems to me there is a continuing pattern, so I really do not have a question as much as a comment. That it seems to me that this Term was simply another Term in the continuing odyssey of the Supreme Court to continue to dilute the rights protected by the Fourth, Fifth and Sixth Amendments.

In fairness to the other side, I should note that one of my students, in a student newspaper last year said that this was indeed symptomatic of a healthy detached reality or detachment from reality. There is another perspective, I suppose. You see the aspect of that other perspective in recent election results in which the fear of crime played a major part in election results. I suspect that those concerns about crime are driving the Supreme Court and many of the lower courts as well.

It is almost disturbing in one respect, for someone who takes the position that I think Professor Hellerstein and I take, to find the Supreme Court actually being outflanked by lower federal courts. It says something, I suppose, that lower federal courts are going so much further than the Supreme Court that even the Supreme Court had to reverse in cases like *United States v. Padilla*.⁴⁴² For defense counsel out there, that means that, as has been the case in recent years, the first line of defense must be the state courts. There is an increasing divergence in some respects between New York State constitutional law and federal constitutional law. You see it in the fact that, for example, New York also continues to follow *Aguilar-Spinelli*⁴⁴³ regarding the issuance of warrants as opposed to *Illinois v. Gates*.⁴⁴⁴ So it

442. 113 S. Ct. 1936 (1993) (*per curiam*), *rev'g* 960 F.2d 854 (9th Cir. 1992).

443. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969) (enunciating from *Aguilar* and *Spinelli* a two prong test, which requires reliability of the source of information and of the informant's knowledge, to determine probable cause for a search warrant to issue).

444. 462 U.S. 213 (1983) (setting forth a "totality of the circumstances" test, rather than the *Aguilar-Spinelli* two prong test, for finding probable cause to issue a search warrant).

seems to me what happened this last Term is simply another example of the Court continuing to dilute rights and for defense counsel out there, the need to rely more on state constitutional law rather than federal constitutional law.