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## **A Quiet Year: The Supreme Court's Criminal Law Decisions During the 1991 Term**

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## A QUIET YEAR: THE SUPREME COURT'S CRIMINAL LAW DECISIONS DURING THE 1991 TERM

*Hon. Leon D. Lazer:*

It is always a special treat for us to have Professor Hellerstein speak to us in the area of criminal procedure, criminal law, and the Fourth, Fifth, and Sixth Amendments. As you all know, Professor Hellerstein teaches at Brooklyn Law School. He is a graduate of Harvard Law School, served as Staff Counsel to the United States Commission on Human Rights, and as Chief Counsel for the Legal Aid Society.

*Professor William E. Hellerstein:*

In past symposiums,<sup>1</sup> I began my presentation by matching the Court's criminal decisions to Hollywood film hits of the same year. Titles such as "Predator 2" or "Field of Dreams" fit easily one perspective or another, depending on your outlook, of the Court's work. This year, the Court's work was so mild that I am at a loss to make much of a match. The best I can do is the "3 Ninjas," but it is a comparison that fits, not the Court's criminal decisions, but it's major decisions in abortion rights<sup>2</sup> and school prayer<sup>3</sup> in which a new center emerged, consisting of Justices Souter, O'Connor, and Kennedy.<sup>4</sup>

In the three prior symposiums, I came before you to describe and then to bemoan many of the Court's Fourth, Fifth, and Sixth

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1. See William E. Hellerstein, *Fourth, Fifth, and Sixth Amendments: The Supreme Court's Major Search and Seizure, Interrogation, and Criminal Jury Selection Decisions During the 1990 Term*, 9 *TOURO L. REV.* 38 (1992); William E. Hellerstein, *Fourth, Fifth, and Sixth Amendments*, 7 *TOURO L. REV.* 319 (1991); William E. Hellerstein, *Fourth Amendment*, 6 *TOURO L. REV.* 31 (1989).

2. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

3. See *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

4. See Ronald Dworkin, *The Center Holds!*, *N.Y. REV. OF BOOKS*, Aug. 13, 1992, at 29.

Amendment decisions.<sup>5</sup> While I agreed with some rulings for the prosecution, you were not terribly puzzled about discerning my unhappiness with the Court's direction. This year, you will be spared my excessive hand-ringing, Cassandra-like performances of the past. That is because, unlike in prior years, major criminal law challenges under the Fourth,<sup>6</sup> Fifth,<sup>7</sup> and Sixth<sup>8</sup> Amendments did not appear on the Court's docket this past Term. Indeed, there was not a single search and seizure case. Nonetheless, it was an interesting, if not remarkable, Term. A number of important decisions were rendered. It was Justice Clarence Thomas' first year and, yes, most of the criminal cases still were decided in favor of the prosecution.

## I. DEFENSE PEREMPTORY CHALLENGES

Perhaps the most important of the Court's criminal law decisions was *Georgia v. McCollum*,<sup>9</sup> in which the Court held that the same principles that preclude prosecutors and civil litigants from exercising peremptory jury challenges on the basis of race also apply to criminal defendants.<sup>10</sup>

In *McCollum*, the defendants, who were white, were charged with assaulting an African-American couple.<sup>11</sup> Thereafter, African-American residents in the community received a leaflet which advised them not to shop at the defendants' business.<sup>12</sup> The prosecutor, anticipating that the defendants would seek to keep African-Americans off the jury, asked the trial judge to rule that the prosecution was entitled to have defense peremptories scrutinized under the procedures established in *Batson v. Kentucky*.<sup>13</sup>

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5. See Hellerstein, *supra* note 1.

6. U.S. CONST. amend. IV.

7. U.S. CONST. amend. V.

8. U.S. CONST. amend. VI.

9. 112 S. Ct. 2348 (1992).

10. *Id.* at 2359.

11. *Id.* at 2351.

12. *Id.*

13. *Id.* at 2351-52; see also *Batson v. Kentucky*, 476 U.S. 79 (1986) (if defendant succeeded in making out prima facie case of racial discrimination in

The judge declined,<sup>14</sup> and the Georgia Supreme Court affirmed,<sup>15</sup> stating that the issue should be decided by the Supreme Court.<sup>16</sup>

Justice Blackmun, writing for a majority of six, held that *Batson* applied to criminal defendants.<sup>17</sup> First, he found that the harm caused by a defendant's use of racially motivated peremptories is the same as that addressed in *Batson*,<sup>18</sup> a conclusion virtually preordained by the Court's ruling last Term in *Powers v. Ohio*.<sup>19</sup> Reminding us that *Batson* itself had determined that the harm from racially motivated peremptory challenges "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community,"<sup>20</sup> Justice Blackmun underscored that the threat to public confidence in the judicial system is the same whether the courts permit discrimination by the defense or by the prosecution.<sup>21</sup>

Second, and in what is perhaps the most disputable portion of his opinion, Justice Blackmun found state action to exist<sup>22</sup> even though the Court previously had held that public defenders performing general defense functions are not state actors.<sup>23</sup> But here, also, he believed the result seemed preordained by the Court's decision last Term in *Edmondson v. Leesville Concrete Co.*,<sup>24</sup> in which the Court held that private litigants in a civil case

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prosecutor's use of peremptory challenges, the prosecution would be required to articulate racially neutral explanation for their use).

14. *McCullum*, 112 S. Ct. at 2352.

15. *State v. McCullum*, 405 S.E.2d 688 (Ga. 1991).

16. *Id.* at 690.

17. *McCullum*, 112 S. Ct. at 2359.

18. *Id.* at 2353-54.

19. 111 S. Ct. 1364 (1991) (holding that in trial of white defendant, prosecutor is prohibited from excluding African-American jurors on basis of race).

20. *McCullum*, 112 S. Ct. at 2353 (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)).

21. *Id.* at 2353-54.

22. *Id.* at 2354-57.

23. *Polk County v. Dodson*, 454 U.S. 312 (1981).

24. 111 S. Ct. 2077 (1991).

are state actors for *Batson* purposes.<sup>25</sup> In essence, *Edmondson* trumped *Polk County v. Dodson*,<sup>26</sup> in Justice Blackmun's view, because while *Dodson* concededly stressed the "adversarial" nature of the relationship between a public defender and the state, the function that was being performed was critically important.<sup>27</sup> And here, "[t]he exercise of a peremptory challenge," stated Justice Blackmun, "differs significantly from other actions taken in support of a defendant's defense."<sup>28</sup> Citing *Edmondson*, he emphasized that when a party helps empanel a jury by exercising a peremptory challenge, the party is wielding power conferred to establish an essentially governmental body, the jury.<sup>29</sup>

Third, Justice Blackmun held that the State has third-party standing to challenge a defendant's discriminatory use of peremptory challenges.<sup>30</sup> Justice Blackmun reasoned that the State suffers a concrete injury when the "fairness and integrity of its own judicial process is undermined," because as the representative of all its citizens, it has a close relation to potential jurors,<sup>31</sup> and because the "'barriers to suit by an excluded juror are daunting.'"<sup>32</sup>

Lastly, Justice Blackmun concluded that nothing in the *Batson* procedure threatens to infringe the rights of a criminal defendant.<sup>33</sup> Noting that peremptory challenges are merely one means to a constitutional end, rather than being constitutionally mandated themselves, he wrote that "[i]t is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based on their race."<sup>34</sup> Moreover, Justice Blackmun stated, the prohibition did not violate the Sixth

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25. *Id.* at 2088.

26. 454 U.S. 312 (1981).

27. *McCullum*, 112 S. Ct. at 2356.

28. *Id.*

29. *Id.* (citing *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991)).

30. *Id.* at 2357.

31. *Id.*

32. *Id.* (quoting *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991)).

33. *Id.* at 2358. See *supra* note 13.

34. *McCullum*, 112 S. Ct. at 2358.

Amendment right to the effective assistance of counsel.<sup>35</sup> He explained that since counsel can normally articulate the reasons for peremptory challenges without revealing strategy or privileged communications, and since nothing gives a defendant the right to carry out through counsel an unlawful course of conduct, the Sixth Amendment right to effective assistance of counsel was not violated.<sup>36</sup> The prohibition, Justice Blackmun further maintained, does not violate the Sixth Amendment right to an impartial jury.<sup>37</sup> Removing a juror whom the defendant believes harbors racial prejudice, he emphasized, is different from exercising a peremptory challenge to discriminate invidiously against jurors on account of race.<sup>38</sup>

Chief Justice Rehnquist, believing the Court to be wrong on the state action question, concurred solely on constraint of *Edmondson*.<sup>39</sup> Justice Thomas, concurring only in the judgment of the Court, was highly critical of the path the Court had chosen, stating that the Court had “exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death.”<sup>40</sup> He predicted that “black criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes.”<sup>41</sup>

Justice O'Connor dissented, based mainly on her disagreement with the Court's “functional analysis” of *Dodson*.<sup>42</sup> To her, *Dodson* makes clear that the unique relationship between criminal defendants and the State precludes attributing defendants' actions

35. The Sixth Amendment provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

36. *McCullum*, 112 S. Ct. at 2358.

37. *Id.* The Sixth Amendment provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. CONST. amend. VI.

38. *McCullum*, 112 S. Ct. at 2358-59.

39. *Id.* at 2359 (Rehnquist, C.J., concurring in part).

40. *Id.* at 2360 (Thomas, J., concurring in the judgment).

41. *Id.* (Thomas, J., concurring in the judgment).

42. *Id.* at 2361-62 (O'Connor, J., dissenting).

to the State, whatever is the case in civil trials.<sup>43</sup> Referring, also, to the NAACP Legal Defense Fund's *amicus* brief which argued that racially motivated peremptories were crucial to a minority defendant's right to a fair trial,<sup>44</sup> Justice O'Connor emphasized that "[i]n a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions."<sup>45</sup>

Justice Scalia also dissented.<sup>46</sup> He agreed with the Chief Justice and Justice Thomas that *Edmondson* logically applied to a criminal defendant's racially-based peremptories.<sup>47</sup> However, he insisted that "a bad decision should not be followed logically to its illogical conclusion."<sup>48</sup> He argued that the Court should not, in the interest of promoting race relations, "use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair."<sup>49</sup>

*McCollum* will not have a direct impact on New York because the Howard Beach case<sup>50</sup> gave us its equivalent. That does not, in the slightest, mean that the criminal defense bar will abandon its efforts to secure indirectly, through use of peremptories, what it can no longer achieve directly. For example, a former colleague of mine at the Legal Aid Society has suggested that defense attorneys should look for "ostensibly race-neutral reasons" that may actually be more common to one race than another. He

43. *Id.* at 2363 (O'Connor, J., dissenting).

44. See Brief for National Association of Criminal Defense Lawyers as Amicus Curiae at 56-57, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

45. *McCollum*, 112 S. Ct. at 2364 (O'Connor, J., dissenting).

46. *Id.* (Scalia, J., dissenting).

47. *Id.* (Scalia, J., dissenting).

48. *Id.* at 2365 (Scalia, J., dissenting).

49. *Id.* (Scalia, J., dissenting).

50. See *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990). In *Kern*, a group of white teenagers were convicted of manslaughter in connection with their attack upon three black men. *Id.* at 643, 554 N.E.2d at 1236, 555 N.Y.S.2d at 648. The court held that defense counsel may not use their peremptory challenges in a racially discriminatory way. *Id.*

suggested, for example, that in a discrete case, a defense attorney might challenge jurors who themselves are in management positions, or whose family members are so employed, because such people are "too used to making decisions about people's lives easily."<sup>51</sup> Here are just a few examples, as reported in a recent article in the American Bar Association Journal,<sup>52</sup> of articulated reasons that were found acceptable even though they may have masked a more illicit motive:

A juror was rejected, not because he was black, but because he was a member of the NAACP and the defendant had attempted to inject politics into the case.<sup>53</sup>

A juror was struck because he looked at the defendant, which might indicate a tendency to sympathize with him.<sup>54</sup>

A juror was disqualified for service on a criminal case because he stated that he had 12 years of formal education but did not say he was a high school graduate.<sup>55</sup>

A male juror in a personal injury case was rejected for being "effeminate."<sup>56</sup>

Nor will there necessarily be an immediate cessation of *Batson*-type issues. Litigation will surely continue over what constitutes a prima facie showing of discriminatory strikes and what constitutes an adequate "race-neutral" reason for excluding a juror. This prospect has already led three members of the New York Court of Appeals to call for the abolition of peremptory chal-

51. Jan Hoffman, *Defenders Dispute Jury-Bias Ruling*, N.Y. TIMES, June 26, 1992, at B8.

52. Stephanie B. Goldberg, *Batson and the Straight-Face Test: Courts Split on Gender-Based Jury Picks, Permissible Stereotyping*, 78 A.B.A. J. 82 (Aug. 1992).

53. See *United States v. Payne*, 962 F.2d 1228 (6th Cir.), cert. denied, 113 S. Ct. 811 (1992).

54. See *Williams v. Rader*, No. CIV.A.91-4185, 1992 WL 54728 (E.D. La. Mar. 9, 1992).

55. See *United States v. Hinojosa*, 958 F.2d 624 (5th Cir. 1992).

56. See *Goodman v. Lands End Homeowners Ass'n of Hilton Head*, 961 F.2d 211 (4th Cir. 1992).



lenges entirely.<sup>57</sup> There will also continue to be litigation over which classes of people are protected from discriminatory strikes. Justice Blackmun noted in his *McCullum* opinion that the Ninth Circuit has prohibited criminal defendants from striking jurors solely because of their gender,<sup>58</sup> an issue the Supreme Court itself recently ducked.<sup>59</sup>

## II. MENTAL ILLNESS

The Court decided a pair of cases that involved the manner in which mentally impaired defendants are to be tried. In *Medina v. California*,<sup>60</sup> the Court held that a state may establish a presumption that a defendant is competent to stand trial and make the defendant sustain the burden of rebutting that presumption.<sup>61</sup> *Medina* resolved a split among the states as to whether such a statute is consistent with due process and precedent.<sup>62</sup> The deci-

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57. See *People v. Bolling*, 79 N.Y.2d 317, 325-31, 591 N.E.2d 1136, 1144-45, 582 N.Y.S.2d 950, 958-59 (1992) (Bellacosa, J., concurring).

58. *McCullum*, 112 S. Ct. at 2352 n.3 (citing *United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992)).

59. *Fisher v. Alabama*, 587 So. 2d 1027 (Ala. 1991), *cert. denied*, 112 S. Ct. 1486 (1992). In *Fisher*, the Court of Criminal Appeals of Alabama upheld the defendant's conviction of capital murder, holding that the prosecutor's use of peremptory challenges to exclude women from the jury did not deprive the male defendant of a fair trial or an impartial jury. *Id.* at 1030.

60. 112 S. Ct. 2572 (1992).

61. *Id.* at 2575-76.

62. Some courts that had struck down similar statutes held that such a scheme is contrary to *Pate v. Robinson*, 383 U.S. 375, 384 (1966) (defendant whose competence is in doubt cannot be deemed to have waived his right to a competency hearing because it would violate notions of due process for incompetent to stand trial). *People v. McCullum*, 362 N.E.2d 307, 310-11 (Ill. 1977); *State v. Pruitt*, 480 N.E.2d 499, 505-06 (Ohio 1984); see also *United States v. DiGilio*, 538 F.2d 973, 988-89 (3d Cir. 1976). These courts had also held that it would be unfair to require a defendant to prove a disability that renders him incapable of proving anything. *McCullum*, 362 N.E.2d at 310; *Pruitt*, 480 N.E.2d at 506; see also *DiGilio*, 538 F.2d at 988. In contrast, other courts had upheld the statutes on the ground that competency, like sanity, is not an element of a crime that must be proven by the state beyond a reasonable doubt. *Spencer v. Zant*, 715 F.2d 1562, 1566 (11th Cir.

sion upholding the statute was not a surprise. The attempted assassination of President Reagan by John Hinckley, Jr. inspired a movement across the country to make it more difficult for a defendant to raise competency or insanity as a defense to criminal charges.<sup>63</sup>

Writing for a five-member majority, Justice Kennedy rejected the defendant's claim that the California statute<sup>64</sup> should be measured by the three-part due process balancing test established in *Mathews v. Eldridge*.<sup>65</sup> *Mathews*, which involved a due process challenge to the adequacy of Social Security benefits disability procedures, was deemed inapposite by Justice Kennedy to criminal procedure cases.<sup>66</sup> However, Justice Kennedy did acknowledge that in two previous criminal cases, the Court had cited *Mathews* as relevant.<sup>67</sup> Stating that "it is not at all clear that *Mathews* was essential to the results reached in those cases,"<sup>68</sup> Justice Kennedy held that the "proper analytical approach" was

1983) (applying Georgia law); *Wallace v. State*, 282 S.E.2d 325, 330 (Ga. 1981); *State v. Pederson*, 309 N.W.2d 490, 496 (Iowa 1981).

63. On March 30, 1981, John W. Hinckley, Jr. attempted to assassinate President Ronald Reagan. He succeeded in avoiding criminal responsibility by reason of mental illness.

64. CAL. PEN. CODE ANN. § 1368(f) (West 1982).

65. *Medina*, 112 S. Ct. at 2576 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). The *Mathews v. Eldridge* three-part balancing test requires the court to consider the following:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

66. *Medina*, 112 S. Ct. at 2576.

67. *Id.*; see *Ake v. Oklahoma*, 470 U.S. 68 (1985) (upholding due process right to psychiatric examination when sanity is significantly in question); *United States v. Raddatz*, 447 U.S. 667 (1980) (rejecting due process challenge to provision of Federal Magistrates Act which authorized magistrates to make findings and recommendations on motions to suppress evidence).

68. *Medina*, 112 S. Ct. at 2577.

set forth in *Patterson v. New York*,<sup>69</sup> in which the Court rejected a due process challenge to a New York statute which placed on the defendant the burden of proving the affirmative defense of extreme emotional disturbance.<sup>70</sup> He noted that in *Patterson*, the Court thought it obvious that “preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . , and we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.”<sup>71</sup> Under *Patterson*, the challenged rule would have to stand unless the Court, after reviewing the historical treatment of the burden of proof in competency proceedings, could say “that the allocation of the burden of proof to a criminal defendant to prove incompetence ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”<sup>72</sup> Justice Kennedy concluded that while it is clear that one who is mentally incompetent may not be made to stand trial, history shows no consistent approach to the issue of the allocation of the burden of proof on the question.<sup>73</sup>

On the issue of fundamental fairness, Medina won a pyrrhic victory. He persuaded the Court that his claim could not be defeated, as the State urged, by the decision in *Leland v. Oregon*,<sup>74</sup> where the Court held that a defendant may be made to bear the burden of proving the defense of insanity.<sup>75</sup> Justice Kennedy agreed that competency and sanity are conceptually different.<sup>76</sup> First, a verdict of not guilty by reason of insanity presupposes a defendant’s competency to stand trial.<sup>77</sup> Second, the right not to be tried while incompetent has a constitutional stature that the insanity defense has not attained.<sup>78</sup>

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69. *Id.*; *Patterson v. New York*, 432 U.S. 197 (1977).

70. *Patterson*, 432 U.S. at 207-08.

71. *Medina*, 112 S. Ct. at 2577.

72. *Id.* (quoting *Patterson*, 432 U.S. at 208).

73. *Id.* at 2577-81.

74. 343 U.S. 790 (1952).

75. *Id.* at 798-99.

76. *Medina*, 112 S. Ct. at 2579.

77. *Id.*

78. *Id.*

Having successfully dodged the *Leland* problem, Medina however, was impaled by Justice Kennedy's rejection of his reliance on the teaching of *Pate v. Robinson*<sup>79</sup> and *Drope v. Missouri*,<sup>80</sup> which held that a State's "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."<sup>81</sup> As to this, Justice Kennedy wrote:

Once a State provides a defendant access to procedures for making a competency evaluation, . . . we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial.<sup>82</sup>

The concern underlying *Pate*, Justice Kennedy maintained, was the impossibility of determining whether a defendant, who may be incompetent, has made a knowing and voluntary waiver.<sup>83</sup> Determining competency, on the other hand, is different:

Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense.<sup>84</sup>

Thus, concluded Justice Kennedy, the statute does not present an unacceptable risk that an incompetent defendant will be forced to stand trial; "it is enough that the State affords the defendant on

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79. 383 U.S. 375, 384 (1966) (holding that defendant whose competence is in doubt cannot be deemed to have waived his right to competency hearing).

80. 420 U.S. 162, 172-73 (1975) (defendant's conviction reversed and remanded because trial court failed to give proper weight to evidence indicating that defendant was incompetent to stand trial and thus "there was an insufficient basis" for determining whether defendant's suicide attempt constituted waiver of his right to be present at critical stages of proceedings).

81. *Medina*, 112 S. Ct. at 2579 (citing *Drope*, 420 U.S. at 172).

82. *Id.* at 2579.

83. *Id.* at 2579-80.

84. *Id.* at 2580.

whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial.”<sup>85</sup>

Justice O'Connor, joined by Justice Souter, concurred in the judgment but took issue with the majority's purported limitation of *Mathews*, suggesting that, in fact, the majority had credited some of the fairness considerations addressed in *Mathews*.<sup>86</sup> She did agree, however, that placing the burden of proving competency on the defendant is constitutional.<sup>87</sup> Justice Blackmun, joined by Justice Stevens, dissented.<sup>88</sup> He argued that requiring a possibly incompetent person to carry the burden of proving that he is incompetent cannot be called an “adequate” procedure within the meaning of *Pate* and *Drope*.<sup>89</sup>

In *Riggins v. Nevada*,<sup>90</sup> the defendant fared better than in *Medina*. In an opinion written by Justice O'Connor, the Court held that a defendant may not be forced to take anti-psychotic medication while standing trial unless the State demonstrates that the treatment is necessary and medically appropriate.<sup>91</sup> The Court made clear that a defendant has a constitutionally protected liberty interest in avoiding unwanted psychotropic drugs and that the side effects of such drugs can alter thought and behavior in ways prejudicial to a defendant's rights to a “full and fair trial.”<sup>92</sup>

After *Riggins* had been arrested for murder, he complained of hearing voices.<sup>93</sup> As a result, he was put on increasingly large doses of Mellaril, an anti-psychotic drug.<sup>94</sup> Subsequently, he was found competent to stand trial and moved to suspend the drug treatment.<sup>95</sup> The trial judge denied the motion.<sup>96</sup> *Riggins'* defense at trial was insanity, but he was convicted and sentenced to

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85. *Id.*

86. *Id.* at 2581-82 (O'Connor, J., concurring).

87. *Id.* at 2582 (O'Connor, J., concurring).

88. *Id.* at 2584 (Blackmun, J., dissenting).

89. *Id.* at 2585 (Blackmun, J., dissenting).

90. 112 S. Ct. 1810 (1992).

91. *Id.* at 1815.

92. *Id.* at 1814.

93. *Id.* at 1812.

94. *Id.*

95. *Id.*

96. *Id.* at 1813.

death.<sup>97</sup> The Nevada Supreme Court rejected his claim that the compelled administration of Mellaril prejudiced his defense and that the state failed to adequately justify that treatment.<sup>98</sup>

In crediting Riggins' claim, Justice O'Connor relied substantially on *Washington v. Harper*,<sup>99</sup> which held that a prison inmate has a liberty interest, protected by the Due Process Clause,<sup>100</sup> in avoiding forced administration of psychotropic drugs.<sup>101</sup> Under *Harper*, such an involuntary course of treatment is constitutionally permissible only where there is a finding of overriding justification and a determination of medical appropriateness.<sup>102</sup> That standard, Justice O'Connor concluded, also embraces persons detained for trial.<sup>103</sup>

Justice O'Connor's opinion is not entirely clear as to what the State must prove in this type of case to establish need. However, she insisted that the State "certainly would have satisfied due process" had it established, and the trial court found, that administration of anti-psychotic drugs was medically appropriate and, in light of less intrusive alternatives, essential to preserve the safety of the defendant or others.<sup>104</sup> Also, she asserted that the State "might" have been able to satisfy the need prong by proving that it could not have obtained an adjudication of the defendant's guilt or innocence otherwise.<sup>105</sup> However, she emphasized that the trial court did not require the State to make either showing; instead, it "allowed administration of Mellaril to continue without making *any* determination of the need for this course or *any* findings about reasonable alternatives."<sup>106</sup>

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97. *Id.*

98. *State v. Riggins*, 808 P.2d 535 (Nev. 1991).

99. 494 U.S. 210 (1990).

100. The Due Process Clause provides: "No person shall be held to answer for a capital, or otherwise infamous crime, . . . without due process of law." U.S. CONST. amend. V, cl. 4.

101. *Harper*, 494 U.S. at 228.

102. *Id.* at 222-23.

103. *Riggins*, 112 S. Ct. at 1815.

104. *Id.*

105. *Id.*

106. *Id.* at 1815-16.

Justice O'Connor further pointed out that the hearing record suggested that the trial judge had merely weighed the possibility that the defense would be prejudiced by changes in Riggins' demeanor resulting from continuing the drug against the chance that he would be rendered incompetent if it were discontinued, "and struck the balance in favor of involuntary medication."<sup>107</sup> The consequence of the court's action, she concluded, may well have been to impair Riggins' constitutionally protected trial rights.<sup>108</sup> Quoting medical testimony that large doses of Mellaril can make one "uptight," drowsy, or confused, she said that the medical treatment may have affected Riggins' testimony, capacity to follow the proceedings, and communications with his attorney, as well as his outward appearance.<sup>109</sup>

Justice O'Connor further pointed out that an attempt to determine from the trial record whether Riggins was actually prejudiced by being forced to remain medicated would be "futile."<sup>110</sup> It was enough that a "strong possibility" existed that the defense was impaired as a result of the use of the drug.<sup>111</sup> Even if, as the Nevada Supreme Court held, admitting expert testimony about the drug's effect on Riggins' demeanor cured some of the prejudice, Justice O'Connor maintained it did not remedy the possible problems relating to his own testimony, his communications with counsel, or his understanding of the trial.<sup>112</sup> Given the absence of a finding that the compelled administration of Mellaril was necessary to carry out an essential state policy, Justice O'Connor concluded that it cannot be said that the resulting "substantial probability of trial prejudice . . . was justified."<sup>113</sup>

Justice Kennedy wrote a separate opinion, concurring in the judgment, that is significant for several reasons. First, it is broader than the majority opinion. Second, it articulates a belief that the state will hardly ever be able to justify use of psy-

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107. *Id.* at 1816.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1817.

chotropic drugs to render a defendant competent to stand trial.<sup>114</sup> Third, it attacks Justice Thomas' dissenting view, joined in part by Justice Scalia, that an "involuntary medication order comprises some separate procedure, unrelated to the trial and foreclosed from inquiry or review in the criminal proceeding itself."<sup>115</sup>

Justice Kennedy outdistanced the majority in protecting the defendant from unwanted drug treatment by his assertion that the Due Process Clause bars the involuntary administration of antipsychotic drugs in order to render an accused competent for trial "absent an extraordinary showing . . . ."<sup>116</sup> He pointed out that there is a crucial difference between medicating a person so that he is not a danger and doing so in order to render him competent to stand trial.<sup>117</sup> In the latter instance, Justice Kennedy would require a showing that "there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to testimony at trial or to assist his counsel"<sup>118</sup> -- a showing that Justice Kennedy had "substantial reservations" about the State's ability to make.<sup>119</sup>

In his dissent, Justice Thomas acknowledged that "[p]erhaps Mellaril, in general, has a greater likelihood of affecting a person's appearance and powers of perception [than penicillin and aspirin]," but he could find no indication in the record that Riggins was "unfairly prejudiced."<sup>120</sup> In fact, he believed the record indicated "that Riggins' mental capacity was *enhanced* by his administration of Mellaril."<sup>121</sup> You can do with that what you will.

In *Foucha v. Louisiana*,<sup>122</sup> the Court again dealt with the problem of the mentally ill criminal defendant. For the Court,

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114. *Id.* (Kennedy, J., concurring).

115. *Id.* (Kennedy, J., concurring).

116. *Id.* (Kennedy, J., concurring).

117. *Id.* at 1818 (Kennedy, J., concurring).

118. *Id.* (Kennedy, J., concurring).

119. *Id.* (Kennedy, J., concurring).

120. *Id.* at 1826 (Thomas, J., dissenting).

121. *Id.* at 1823 (Thomas, J., dissenting).

122. 112 S. Ct. 1780 (1992).



this was the most difficult of the three cases dealing with a defendant who claimed a mental impairment. The case was decided by a 5-4 vote and it was one of those decisions in which the Justices were joining parts of each other's opinions. At issue was the constitutionality of a Louisiana statutory scheme that authorized the continued incarceration of insanity acquittees on dangerousness grounds after they have been cured of mental illness.<sup>123</sup>

Foucha was found not guilty of burglary by reason of insanity and was committed to a mental hospital.<sup>124</sup> Four years later, a doctor at the hospital reported that Foucha no longer suffered from a mental illness.<sup>125</sup> However, he also reported that Foucha had an untreatable antisocial personality and he "would not feel comfortable" certifying that Foucha was not a danger to himself or other people.<sup>126</sup> In fact, Foucha's antisocial personality was evidenced by various assaults by him on other inmates.<sup>127</sup> Under the Louisiana statutory scheme, Foucha bore the burden of proving that he was no longer dangerous.<sup>128</sup> The Louisiana Supreme Court held that he had not carried that burden and that there was nothing unconstitutional about confining an insanity acquittee on the basis of dangerousness alone.<sup>129</sup>

In *Jones v. United States*,<sup>130</sup> the Court stated that "[t]he committed acquittee is entitled to release when he has recovered his insanity or is no longer dangerous."<sup>131</sup> The Louisiana Supreme Court had construed this language as merely an interpretation of the District of Columbia statute at issue<sup>132</sup> and as having

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123. LA. CODE CRIM. PROC. ANN., art. 654 *et seq.* (West Supp. 1991).

124. *Foucha*, 112 S. Ct. at 1782.

125. *Id.*

126. *Id.* at 1782-83.

127. *Id.*

128. *Id.*

129. *State v. Foucha*, 563 So. 2d 1138, 1144 (La. 1990).

130. 463 U.S. 353 (1983).

131. *Id.* at 368.

132. D.C. CODE ANN. § 24-301(d)(1) (1981). The statute provides in pertinent part:

If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a

no constitutional significance.<sup>133</sup> Justice White rejected this reading, holding that because Foucha was no longer mentally ill, his continued detention violated *Jones*.<sup>134</sup>

Justice White pointed out that there were three problems with Louisiana's attempt to perpetuate Foucha's detention on the basis of his antisocial personality. First, assuming continued confinement was constitutionally permissible, Foucha could not be kept in a mental institution against his will unless the state conducted a civil commitment proceeding in which it proved his current mental illness and dangerousness.<sup>135</sup> Second, confinement requires constitutionally adequate procedures, which would include, in this kind of case, the state's proof by clear and convincing evidence that a person is mentally ill and dangerous.<sup>136</sup> Third, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"<sup>137</sup> Cases such as *United States v. Salerno*,<sup>138</sup> upholding pretrial detention of defendants who pose a danger to the community, are distinguishable, Justice White stated.<sup>139</sup> Unlike the pretrial detention provision at issue in *Salerno*, the Louisiana statute provided for neither an adversarial hearing nor strict limits on the duration of confinement.<sup>140</sup>

In a portion of his opinion that only Justices Blackmun, Stevens, and Souter joined, Justice White held that the Equal Protection Clause<sup>141</sup> was violated by the statute's requirement that

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hospital for the mentally ill until such time as he is eligible for release . . . .

*Id.*

133. *State v. Foucha*, 563 So. 2d at 1141-42 n.11.

134. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1784 (1992).

135. *Id.*

136. *Id.* at 1785.

137. *Id.* (quoting *Zinerman v. Burch*, 494 U.S. 113, 125 (1990)).

138. 481 U.S. 739 (1987).

139. *Foucha*, 112 S. Ct. at 1786.

140. *Id.* at 1786-87.

141. The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, cl. 3.

insanity acquittees prove their non-dangerousness because it failed to “provide for similar confinement for other classes of persons who have committed criminal acts and who cannot later prove they would not be dangerous.”<sup>142</sup>

Concurring in part and concurring in the judgment, Justice O'Connor asserted that a more narrowly drawn statute could be constitutionally permissible.<sup>143</sup> She suggested that an insanity acquittee who has regained sanity could be confined if “the nature and detention were tailored to reflect pressing public safety concerns related to the acquittee’s continuing dangerousness.”<sup>144</sup> She also found it unnecessary to reach the equal protection issue but offered that “the permissibility of holding an acquittee who is not mentally ill longer than a person convicted of the same crimes could be imprisoned is open to serious question.”<sup>145</sup>

Justice Kennedy dissented and was joined by Chief Justice Rehnquist.<sup>146</sup> He accused the majority of confusing the standards for civil and criminal commitment and of failing to recognize that Foucha’s confinement was based on a conclusion by the fact finder at his trial that he had committed a criminal act.<sup>147</sup> Justice Kennedy also accused the majority of overruling *Jones* without explicitly saying so.<sup>148</sup>

Justice Thomas, as he had in *Riggins*, dissented, and was joined by Chief Justice Rehnquist and Justice Scalia.<sup>149</sup> He argued that the majority had created a new fundamental right to be “free from bodily restraint,”<sup>150</sup> and asserted that *Jones* did not require the result reached by the majority.<sup>151</sup> For him, “[i]nsanity acquittees . . . stand in a fundamentally different position from

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142. *Foucha*, 112 S. Ct. at 1788.

143. *Id.* at 1790 (O'Connor, J., concurring).

144. *Id.* at 1789 (O'Connor, J., concurring).

145. *Id.* at 1790 (O'Connor, J., concurring).

146. *Id.* at 1791 (Kennedy, J., dissenting).

147. *Id.* at 1791-94 (Kennedy, J., dissenting).

148. *Id.* at 1793 (Kennedy, J., dissenting).

149. *Id.* at 1797 (Thomas, J., dissenting).

150. *Id.* at 1804 (Thomas, J., dissenting).

151. *Id.* at 1806 (Thomas, J., dissenting).

persons who have not been adjudicated to have committed criminal acts.”<sup>152</sup>

Despite the closeness of the case and the vehemence of the dissents, *Foucha* will not cause much disruption. As Justice O'Connor noted, “the great majority of States have adopted policies consistent with the Court’s holding.”<sup>153</sup> She disputed Justice Thomas’ claim that eleven states have laws comparable to Louisiana’s.<sup>154</sup> She pointed out that two of those states, California<sup>155</sup> and Virginia,<sup>156</sup> had already amended their laws to provide for the release of acquittees who do not suffer from mental illness, but may be dangerous.<sup>157</sup> Three others, New Jersey,<sup>158</sup> Washington,<sup>159</sup> and Wisconsin,<sup>160</sup> had limited the maximum

152. *Id.* at 1807 (Thomas, J., dissenting).

153. *Id.* at 1790 (O'Connor, J., concurring).

154. *Id.* (O'Connor, J., concurring).

155. CAL. PENAL CODE § 1026.2 (West Supp. 1992) (effective Jan. 1, 1994): “An application for the release of a person who has been committed to a state hospital . . . upon the ground that sanity has been restored, may be made . . . .” *Id.*

156. VA. CODE ANN. § 19.2-182.5 (Michie Supp. 1991) (effective July 1, 1992): “[T]he court shall [ ] release the acquittee from confinement if he does not need inpatient hospitalization . . . .” *Id.*

157. *Foucha*, 112 S. Ct. at 1790 (O'Connor, J., concurring).

158. N.J. STAT. ANN. § 2C: 4-8(b)(3) (West 1982). The statute provides in pertinent part: “If the court finds that the defendant cannot be released with or without supervision . . . without posing a danger to the community or to himself, it shall commit the defendant to a mental health facility . . . .” *Id.*

159. WASH. REV. CODE § 10.77.020(3) (1990). The statute provides in pertinent part:

Whenever any person has been committed . . . or ordered to undergo alternative treatment following his acquittal of a crime charged by insanity, such commitment or treatment cannot exceed the maximum possible penal sentence for any offense charged for which he was acquitted by reason of insanity.

*Id.* See also WASH. REV. CODE § 10.77.110(1) (1990). The statute provides in pertinent part:

If a defendant is acquitted of a felony by reason of insanity, and it is found that he or she is not a substantial danger to other persons, . . . the court shall direct the defendant’s final discharge. If it is found that such defendant is a substantial danger to other persons . . . the court shall order his or her hospitalization . . . .

*Id.*

duration of criminal commitment to reflect the acquittee's specific crimes and hold acquittees in facilities appropriate to their mental condition.<sup>161</sup> Of the remaining six states,<sup>162</sup> two, Kansas<sup>163</sup> and Montana,<sup>164</sup> do not condition commitment upon proof of every element of a crime.<sup>165</sup> Such laws, she suggested, "might well fail even under the dissenters' theories."<sup>166</sup>

### III. THE CONFRONTATION CLAUSE AND THE HEARSAY RULE

The Court did render a Confrontation Clause<sup>167</sup> decision but it was not much of a surprise. In *White v. Illinois*,<sup>168</sup> the Court

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160. WIS. STAT. ANN. § 971.17(1), (3)(c) (West Supp. 1991). The statute provides in pertinent part:

When a defendant is found not guilty by reason of mental disease or defect, the court shall commit such person . . . for a specified period . . . .

. . . .

If the court order specifies institutional care, the department of health and social services shall place the person in an institution that the department considers appropriate in light of . . . the protection of public safety.

*Id.*

161. *Foucha*, 112 S. Ct. at 1790 (O'Connor, J., concurring).

162. Kansas, Montana, Delaware, Hawaii, Iowa, and North Carolina. *Id.* (O'Connor, J., concurring).

163. KAN. STAT. ANN. § 22-3428(1) (Supp. 1990). The statute provides in pertinent part: "A finding of not guilty by reason of insanity shall constitute a finding that the acquitted person committed an act constituting the crime charged. . . . except that the person did not possess the requisite criminal intent." *Id.*

164. MONT. CODE ANN. § 46-14-301 (1991). The statute allows commitment of persons "found not guilty for the reason that due to the mental disease or defect the defendant could not have a particular state of mind that is an essential element of the offense charged." *Id.*

165. *Foucha*, 112 S. Ct. at 1790 (O'Connor, J., concurring).

166. *Id.* at 1790-91 (O'Connor, J., concurring).

167. The Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI, cl. 4.

168. 112 S. Ct. 736 (1992).

held that no showing of unavailability is required by the Sixth Amendment before out-of-court hearsay statements may be admitted as spontaneous statements or statements made in the course of securing medical treatment.<sup>169</sup> Nor must the proponent of the evidence produce the declarant if the declarant is available.<sup>170</sup>

As has been the situation in most of the Court's recent Confrontation Clause cases, *White* was a child sex abuse case. After being assaulted, the four-year-old child made various statements to her babysitter, her mother, and a police officer implicating the defendant, all within forty-five minutes of the incident.<sup>171</sup> Later, she again implicated White in statements made to medical personnel while she was being examined.<sup>172</sup> Although there was no finding that she was unavailable, she did not testify at trial.<sup>173</sup> Her prior statements were admitted into evidence and White was convicted.<sup>174</sup> His conviction was affirmed by the Illinois Appellate Court, which held that the statements were admissible hearsay<sup>175</sup> and that White's confrontation rights were not violated.<sup>176</sup>

Affirmance of this ruling by the Court was largely a foregone conclusion. The Court has continuously retreated from the broad language it had set forth more than ten years ago in *Ohio v. Roberts*,<sup>177</sup> which articulated the need to show a non-testifying declarant's unavailability as a precondition to admission of the declarant's out-of-court statements.<sup>178</sup> As you may recall, in *Roberts*, the Court dealt with a Confrontation Clause challenge to the admission of a transcript of a probable cause hearing which contained the testimony of a witness who was not produced at

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169. *Id.* at 739.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 740.

175. *State v. White*, 555 N.E.2d 1241, 1250 (Ill. App. Ct. 1990).

176. *Id.* at 1252-53.

177. 448 U.S. 56 (1980).

178. *White*, 112 S. Ct. at 741.

trial.<sup>179</sup> In the course of rejecting the Confrontation Clause challenge, the Court used language that implied that the clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted.<sup>180</sup>

In *White*, Chief Justice Rehnquist reminded us that the *Roberts* language had already been cabined in *United States v. Inadi*.<sup>181</sup> He pointed out that *Inadi* rejected an unavailability precondition for the admissibility of statements by a co-conspirator and that *Roberts* stands for the proposition that an unavailability analysis is a necessary part of the Confrontation Clause inquiry “only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.”<sup>182</sup> Chief Justice Rehnquist noted that *Inadi* had also considered two other factors that applied to *White*.<sup>183</sup> First, some kinds of hearsay have an evidentiary value that would disappear were the declarant to repeat the same words in court.<sup>184</sup> Second, an unavailability requirement<sup>185</sup> would do little to improve the accuracy of the fact-finding process, while imposing considerable burdens on the prosecution.<sup>186</sup> These considerations, he said, apply with “full force” in evaluating spontaneous declarations and statements made in the course of securing medical treatment.<sup>187</sup> The “factors that contribute to the statements’ reliability cannot be recaptured even by later in-court testimony.”<sup>188</sup> Moreover, “[a] statement made in a moment of excitement . . . may justifiably carry more weight than a similar

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179. *Roberts*, 448 U.S. at 59.

180. *White*, 112 S. Ct. at 741 (discussing *Roberts*, 448 U.S. at 59).

181. *Id.*; *United States v. Inadi*, 475 U.S. 387 (1986).

182. *White*, 112 S. Ct. at 741 (citing *Inadi*, 475 U.S. at 394).

183. *Id.* at 742.

184. *Id.*

185. An unavailability requirement requires as a predicate for introducing hearsay testimony a showing of the unavailability of the declarant’s testimony, whether or not physically present at the trial. CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 253 at 443-44 (Edward W. Cleary, 4th ed. 1992).

186. *White*, 112 S. Ct. at 742.

187. *Id.*

188. *Id.*

statement offered in court.”<sup>189</sup> So too, a statement made in the course of procuring medical services has “special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.”<sup>190</sup>

The Court also rejected White’s argument that, after *Coy v. Iowa*<sup>191</sup> and *Maryland v. Craig*,<sup>192</sup> a showing of necessity is required before hearsay testimony by a child can be offered in court.<sup>193</sup> Both cases, Chief Justice Rehnquist explained, involved the issue of what confrontation protections are necessary when the testimony of young children is presented via modern courtroom procedures designed to prevent children from having to testify face-to-face with defendants charged with assaulting or molesting them.<sup>194</sup> He pointed out, however, that the issue of what the Confrontation Clause requires when a witness is testifying is “quite separate from that of what the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations.”<sup>195</sup>

Although no Justice dissented in *White*, Chief Justice Rehnquist’s analysis is not flawless. His contention that it makes no sense to exclude a hearsay statement that has evidentiary value which cannot be duplicated by in-court testimony, it makes no sense to exclude the hearsay, can be challenged.<sup>196</sup> As Professors Saltzburg and Capra have pointed out, “White was not arguing that the hearsay statements should be excluded; he was arguing that *if* the declarant is available, admissibility of the statements should be conditioned on the prosecution producing the declar-

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189. *Id.* at 742-43.

190. *Id.* at 743.

191. 487 U.S. 1012 (1988) (vacating conviction resulting from trial in which child witness testified from behind screen, and in which there had been no particularized showing that procedure was necessary to avert risk of harm to child).

192. 497 U.S. 836 (1990) (upholding conviction resulting from trial in which child witness testified via closed circuit television after showing of necessity).

193. *White*, 112 S. Ct. at 743.

194. *Id.*

195. *Id.* at 743-44.

196. *Id.* at 744.



ant.”<sup>197</sup> If their argument that the jury could evaluate *both* the hearsay statement and the in-court testimony were accepted,<sup>198</sup> the jury would be getting more, not less, information.<sup>199</sup> Thus, contrary to the Court’s assertion, they argued, a production requirement is completely consistent with the truth-seeking function of the Confrontation Clause.<sup>200</sup>

Justice Thomas’ partial concurrence, joined by Justice Scalia, rescued *White* from being a merely humdrum denouement of the *Roberts-Inadi* line.<sup>201</sup> The Solicitor General, in his *amicus* brief, had urged the Court to give the Confrontation Clause an extremely narrow reading, that the “witnesses” to whom the Clause refers are only those who actually appear in court and testify, not out-of-court declarants whose statements are being related by in-court witnesses.<sup>202</sup> This, the Government argued, was the true purpose of the Confrontation Clause as it evolved historically as a manifestation of concern with trial by *ex parte* affidavit in 16th and 17th century England.<sup>203</sup>

While the Chief Justice rejected this crabbed reading of the Sixth Amendment as contrary to established precedent,<sup>204</sup> Justice Thomas embraced the Government’s argument and urged that in future cases, the Court ought to reconsider how the Sixth Amendment’s phrase “witnesses against” pertains to hearsay.<sup>205</sup> A possible reading, he argued, narrower than the current view, but faithful to the text of the clause and most of the Court’s cases, would be that the confrontation guarantee “is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions,

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197. STEPHEN S. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 1009 (4th ed. 1992).

198. *Id.*

199. *Id.*

200. *Id.*

201. *White*, 112 S. Ct. at 744 (Thomas, J., concurring).

202. *Id.* at 747 (Thomas, J., concurring).

203. *Id.* at 745-47 (Thomas, J., concurring).

204. *Id.* at 741.

205. *Id.* at 747 (Thomas, J., concurring).

prior testimony, or confessions.”<sup>206</sup> This would have the advantage of severing most of the link between the Confrontation Clause and the hearsay rule, a link for which Justice Thomas saw no textual or historical support.<sup>207</sup>

#### IV. SPEEDY TRIAL

Another Sixth Amendment case, this one involving the guarantee of a speedy trial,<sup>208</sup> resulted in a decision for the defendant by a closely divided Court. In *Doggett v. United States*,<sup>209</sup> the Court held that a defendant need not always show actual prejudice to succeed with a speedy trial claim, even if the only possible prejudice arising out of the Government’s long delay in arresting him following his indictment was impairment of his ability to respond to the charges.<sup>210</sup>

Doggett was indicted on drug charges in 1980, but was not arrested until 1988.<sup>211</sup> He left the country in 1980 and returned in 1982.<sup>212</sup> However, those responsible for apprehending Doggett spent most of the eight years under the mistaken assumption that he was still abroad, and they made little effort to find him.<sup>213</sup> Doggett was arrested after a “simple credit check” established his whereabouts, a credit check that took only a few minutes and could have been performed at any time after 1982.<sup>214</sup> A split panel of the Eleventh Circuit affirmed Doggett’s conviction, finding that Doggett had not shown any prejudice caused by the delay.<sup>215</sup>

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206. *Id.* (Thomas, J., concurring).

207. *Id.* at 747-48 (Thomas, J., concurring).

208. The Speedy Trial Clause provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .” U.S. CONST. amend. VI, cl. 1.

209. 112 S. Ct. 2686 (1992).

210. *Id.* at 2692-94.

211. *Id.* at 2689.

212. *Id.*

213. *Id.*

214. *Id.* at 2689-90.

215. *United States v. Doggett*, 906 F.2d 573 (11th Cir. 1990).

Justice Souter, writing for a 5-4 majority, stated that the main issue was whether Doggett was prejudiced by the delay, and what role any such prejudice should play in the balancing analysis required in *Barker v. Wingo*.<sup>216</sup> *Barker* identified three types of harm caused by unreasonable delay between accusation and trial: oppressive pretrial incarceration, anxiety and concern on the part of the accused, and the possibility that the accused's defense will be impaired by dimming memories and the loss of exculpatory evidence.<sup>217</sup> Justice Souter observed that, of these types of prejudice, "the most serious is the last, because the inability of a defendant to adequately prepare his case skews the fairness of the entire system."<sup>218</sup>

The Government argued that the last variety of prejudice is not really a concern of the Speedy Trial Clause but is, rather, a due process issue.<sup>219</sup> Justice Souter rejected this view, holding that "the speedy trial inquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice that *Barker* recognized."<sup>220</sup>

Justice Souter also rejected the Government's contention that Doggett failed to demonstrate actual prejudice from the delay.<sup>221</sup> He explained that "affirmative proof of particularized prejudice is not essential to every speedy trial claim."<sup>222</sup> As *Barker* recognized, "excessive delay presumptively compromises the credibility of a trial in ways that neither party can prove . . . ." <sup>223</sup> "While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, . . . it is part of the mix of relevant facts, and its importance increases with the length of delay."<sup>224</sup> Justice Souter added that official negligence lies somewhere between diligent prosecution

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216. *Doggett*, 112 S. Ct. at 2690; *Barker v. Wingo*, 407 U.S. 514 (1972).

217. *Barker*, 407 U.S. at 532.

218. *Doggett*, 112 S. Ct. at 2692.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 2693.

224. *Id.*

and bad-faith delay.<sup>225</sup> While bad-faith delay makes relief “virtually automatic,” negligence is not “automatically tolerable simply because the accused cannot demonstrate how it has prejudiced him.”<sup>226</sup> Excessive delay presumptively compromises the reliability of a trial in ways that cannot be shown, and therefore, need not be proven.<sup>227</sup>

Applying these principles to Doggett, Justice Souter concluded that a delay of eight and one-half years, caused by “inexcusable oversights” on the Government’s part, “far exceeds the threshold needed to state a speedy trial claim.”<sup>228</sup> He further added that “[w]hen the Government’s negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant’s acquiescence, . . . nor persuasively rebutted, the defendant is entitled to relief.”<sup>229</sup>

Justice O’Connor dissented tersely, stating that the harm to Doggett was “speculative.”<sup>230</sup> Citing *United States v. Loud Hawk*,<sup>231</sup> she asserted that in the past the Court has required a showing of actual prejudice.<sup>232</sup>

Again, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented, this time taking, akin to his niggardly

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 2694.

229. *Id.*

230. *Id.* (O’Connor, J., dissenting).

231. 474 U.S. 302, 315 (1986) (the Court stated that *possibility* of prejudice is not sufficient to support a claim that speedy trial rights were violated) (emphasis added).

232. *Doggett*, 112 S. Ct. at 2694 (O’Connor, J., dissenting) (citing *Loud Hawk*, 474 U.S. at 315). In *Doggett*, Justice Thomas stated that the Court had previously explained that “the Speedy Trial Clause’s core concern is impairment of liberty.” *Id.* at 2695 (Thomas, J., dissenting) (quoting *Loud Hawk*, 474 U.S. at 312). Thus, “[w]hen a criminal trial takes place long after the events at issue, the defendant may be prejudiced in any number of ways.” *Id.* (Thomas, J., dissenting). However, “[t]he Speedy Trial Clause does not purport to protect a defendant from all effects flowing from a delay before trial.” *Id.* (Thomas, J., dissenting) (quoting *Loud Hawk*, 474 U.S. at 311).

approach to the Confrontation Clause, an equally crabbed view of the speedy trial guarantee.<sup>233</sup> He argued that the Speedy Trial Clause affords protection against only two "major evils": "undue and oppressive incarceration;" and the "anxiety and concern accompanying public accusation."<sup>234</sup> Since Doggett suffered neither of the burdens during the delay, Justice Thomas maintained that the speedy trial claim was without merit even if Doggett had proven that the passage of time had prejudiced his defense.<sup>235</sup> In his view, any possibility that a defendant may not be able to defend himself due to a pretrial delay was adequately protected by the Due Process Clause and by statutes of limitations.<sup>236</sup> Any language in *Barker* that suggested that this type of prejudice was the concern of the Speedy Trial Clause, Justice Thomas argued, was mere dictum and cannot be reconciled with the Court's decisions in *United States v. Marion*<sup>237</sup> and *United States v. MacDonald*.<sup>238</sup>

It is difficult to determine what precisely to make of the decision in *Doggett*. The dissenters are not totally without justification, given cases such as *MacDonald* and *Marion*, in arguing that Doggett's situation was not the true concern of the Speedy Trial Clause. Indeed, prior to *Doggett*, lower federal courts had held rather uniformly that with respect to sealed indictments, the protections of the clause are not triggered when the indictment is

233. *Doggett*, 112 S. Ct. at 2694-95 (Thomas, J., dissenting).

234. *Id.* at 2695 (Thomas, J., dissenting) (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)).

235. *Id.* (Thomas, J., dissenting).

236. *Id.* at 2698 (Thomas, J., dissenting).

237. *Id.* at 2697-98 (Thomas, J., dissenting); *United States v. Marion*, 404 U.S. 307, 324 (1971) ("[T]he Due Process Clause . . . would require dismissal of [an] indictment if it were shown at trial and that [a] delay . . . caused substantial prejudice to [a defendant's] right's to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.").

238. *Doggett*, 112 S. Ct. at 2698 (Thomas, J., dissenting); *United States v. MacDonald*, 456 U.S. 1, 8 (1982) ("The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations.").

filed, but when it is unsealed.<sup>239</sup> Is that situation different from Doggett's? One answer might be that very few, if any, indictments remain under seal for eight and a half years, and as Justice Souter's opinion makes clear, the Court found it difficult to ignore the combination of that extraordinary delay and the government's incompetence.<sup>240</sup> Another answer might be that the sealing cases are no longer good law. What application *Doggett* will have in the future remains to be seen; it is difficult to tell what combination of factors, temporal and procedural, will turn the Court in a future defendant's favor.

## V. ENTRAPMENT

The government's management of its prosecutorial affairs came in for another jolt in one of the Term's most publicized cases, *Jacobson v. United States*,<sup>241</sup> in which the Court revisited the entrapment doctrine.<sup>242</sup> The Court has not had much to say on the subject of entrapment in recent years, its last major ruling having occurred almost 20 years ago.<sup>243</sup>

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239. See, e.g., *United States v. Watson*, 599 F.2d 1149 (2d Cir. 1979), modified on other grounds sub nom. *United States v. Muse*, 633 F.2d 1041 (2d Cir. 1980); *United States v. Hay*, 527 F.2d 990 (10th Cir. 1975); cf. *United States v. Lewis*, 907 F.2d 773 (8th Cir. 1990) (defendant's Sixth Amendment right to speedy trial was not violated as a result of 19 month post-indictment delay in bringing defendant to trial because indictment was sealed and defendant was not harmed in her ability to defend herself).

240. *Doggett*, 112 S. Ct. at 2693-94.

241. 112 S. Ct. 1535 (1992).

242. *Id.* Entrapment is the act of officers or agents of the government inducing a person to commit a crime not contemplated by that person, for the purpose of instituting a criminal prosecution against that person. See *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

243. *United States v. Russell*, 411 U.S. 423 (1973) (Court held that even defendants who have predisposition to commit crime have valid entrapment defense when law enforcement officials induce them to commit crimes). See also *Sherman*, 356 U.S. at 372 ("To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."); *Sorrells*, 287 U.S. at 451 ("[I]f the defendant seeks acquittal by reason of entrapment, he cannot complain of an

Keith Jacobson, the petitioner, was a fifty-six year old Nebraska farmer who made the mistake of placing an order, even though it was lawful at the time, for two magazines containing nude photographs of young boys.<sup>244</sup> United States Postal Inspectors came across Jacobson's name on a California adult bookstore's mailing list from which Jacobson had placed his order.<sup>245</sup> Over the next two and a half years, "two Government agencies, using five fictitious organizations and a bogus pen pal," solicited Jacobson to place mail orders for sexually explicit photographs of children.<sup>246</sup> Many of those organizations represented that they were founded to protect and promote sexual freedom of choice and that they promoted lobbying efforts through catalog sales.<sup>247</sup> Some mailings raised the spectre of censorship.<sup>248</sup> Jacobson answered a letter that described concern about child pornography as "hysterical nonsense" and decried international censorship.<sup>249</sup> He then received a catalog and ordered a magazine depicting young boys engaged in sexual activities.<sup>250</sup> He was arrested after a controlled delivery of a photocopy of the magazine, but a search of his house revealed no materials other than those sent by the Government and the magazine he had originally received from the California publisher.<sup>251</sup>

Writing for a 5-4 majority, Justice White held that the Government failed to carry its burden of proving that Jacobson's predisposition was independent of the attention the Government had directed at him for so long.<sup>252</sup> He emphasized that the order for the

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appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.").

244. *Jacobson*, 112 S. Ct. at 1537-38. Three months later, Congress enacted the Child Protection Act of 1984, 18 U.S.C. § § 2251-55 (1984 & Supp. 1990), which prohibited, and provided criminal penalties for, the receipt through the mail of sexually explicit depictions of children.

245. *Id.* at 1538.

246. *Id.* at 1539-40.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 1540.

252. *Id.* at 1543.

magazine was placed only after federal agents had spent many months ingratiating themselves to Jacobson, plumbing his interests in child pornography, and importuning him to buy such materials.<sup>253</sup> Thus, while Jacobson may have been predisposed, it was a predisposition that the Government failed to prove was separate from its own conduct.<sup>254</sup>

Justice White reasoned that prior to his contact with government agents, Jacobson only had legally ordered "Bare Boys" magazine which "merely indicate[d] a generic inclination to act within a broad range, not all of which is criminal, [and which] is of little probative value in establishing predisposition."<sup>255</sup> After contact was established, Justice White explained, Jacobson's behavior was "at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations."<sup>256</sup> To infer from those responses that Jacobson would illegally receive child pornography goes too far, Justice White stated.<sup>257</sup> In fact, he suggested that the Government's methods cut the other way on the entrapment issue stating that there is a good argument that

by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights.<sup>258</sup>

Justice White concluded that Jacobson's "ready response" to the Government's solicitation was not enough to establish his predisposition.<sup>259</sup> Thus, Justice White stated, "[t]he evidence that petitioner was ready and willing to commit the offense came only

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253. *Id.* at 1541.

254. *Id.*

255. *Id.*

256. *Id.* at 1542.

257. *Id.*

258. *Id.*

259. *Id.* at 1543.



after the Government had devoted two and one-half years to convincing him that he had or should have the right to engage in the very behavior proscribed by law.”<sup>260</sup>

Reading Justice White’s opinion, it does not seem that the decision was terribly broad. First, he made clear that Government agents are certainly entitled to make use of undercover sting operations so long as they do not implant the disposition to commit a crime in an innocent person’s mind, and then induce him to commit it.<sup>261</sup> Second, the issue was rather fact-specific: whether Jacobson’s use of the mail to fulfill his independently developed personal sexual inclinations was the product of government inducement and not of his own predisposition.<sup>262</sup>

Nonetheless, Justice O’Connor, joined in dissent by Chief Justice Rehnquist, Justice Kennedy and in part by Justice Scalia, believed that the majority had actually changed the entrapment doctrine by holding that “Government conduct may be considered to create a predisposition to commit a crime, even before any Government action to induce the commission of the crime.”<sup>263</sup> This, she argued, was a departure from the *Sherman-Sorrells*<sup>264</sup> line of cases, which held that a defendant’s “predisposition is to be assessed as of the time the Government agent first suggested the crime, not when the Government agent first became involved.”<sup>265</sup> She expressed the fear that “[t]he rule that preliminary Government contact can create a predisposition has the potential to be misread by lower courts as well as criminal investigators as requiring that the Government must have sufficient evidence of a defendant’s predisposition *before it ever seeks to contact him*.”<sup>266</sup> To her, this “would mean that the Government must have a reasonable suspicion of criminal activity before it begins an investigation . . . .”<sup>267</sup>

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260. *Id.*

261. *Id.* at 1540.

262. *Id.* at 1537.

263. *Id.* at 1545 (O’Connor, J., dissenting).

264. *See supra* note 243.

265. *Jacobson*, 112 S. Ct. at 1544 (O’Connor, J., dissenting).

266. *Id.* at 1545 (O’Connor, J., dissenting).

267. *Id.* (O’Connor, J., dissenting).

This case is a close call. There is some merit to the dissent's view that predisposition must be evaluated at the time of the offense, not the initial government contact. However, even though it found no evidence of predisposition beyond a reasonable doubt *before* government contact, Justice White did analyze the evidence of predisposition *after* the initial government contact.<sup>268</sup> One possible reading, therefore, is that "[p]resumably, the majority's analysis was whether the defendant's post-contact behavior furnished evidence of a pre-contact disposition to commit the crime."<sup>269</sup> My own view is that the majority believed that the Government had lost its sense of proportionality and had to be called on it. The duration and manner of the attempt to ensnare Jacobson was to say the least, "heavy-handed." And what seemed to upset the majority substantially was the Government's strategy of appealing to Jacobson's civic inclinations by suggesting that by ordering pornographic materials, he would strike a blow against censorship. The "sympathy" factor was denounced in both *Sherman*<sup>270</sup> and *Sorrells*.<sup>271</sup> I doubt whether the dissent's fears will be realized or even that its view of the majority's statement of the law is entirely accurate. I continue to think that entrapment defenses will not be easily sustainable by the defense in the vast majority of cases.

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268. *Id.* at 1542-43 (White, J., writing for the Court).

269. Gregory J. Wallace, *The Entrapment Defense After "Jacobson,"* N.Y. L.J., June 24, 1992, at 1, col.1.

270. *Sherman v. United States*, 356 U.S. 369, 376-77 (1958) (Court rejected argument that defendant's criminal conduct was due to his own readiness).

271. *Sorrells v. United States*, 287 U.S. 435, 448 (1932) (The Court concluded that "it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should [not] be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.").

## VI. THE GRAND JURY AND EXCULPATORY EVIDENCE

In *United States v. Williams*,<sup>272</sup> Justice Scalia, writing for a five member majority, held that the Tenth Circuit erred in holding that federal courts, under their supervisory power, could require federal prosecutors to present "substantial exculpatory evidence" to the grand jury.<sup>273</sup> Williams was indicted for making false statements to federally insured financial institutions.<sup>274</sup> He moved for dismissal of the indictments because of the Government's failure to present certain financial documents that, he claimed, negated an element of the offense -- an intent to mislead the bank.<sup>275</sup>

In reversing, Justice Scalia acknowledged that in *Bank of Nova Scotia v. United States*,<sup>276</sup> the Court had held that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, "at least where that misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.'" <sup>277</sup> However, Justice Scalia noted that *Bank of Nova Scotia* did not hold "that the courts' supervisory power could be used, not merely as a means of enforcing or vindicating legally compelled standards of prosecutorial conduct before the grand jury, but as a means of *prescribing* those standards of prosecutorial conduct in the first instance . . . ." <sup>278</sup> He concluded that a rule requiring the prosecutor to present all substantially exculpatory evidence exceeded the court's supervisory authority "[b]ecause the grand

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272. 112 S. Ct. 1735 (1992), *rev'g* 899 F.2d 898 (10th Cir. 1990).

273. *Id.* at 1737, 1746.

274. *Id.* at 1737.

275. *Id.* at 1737-38.

276. 487 U.S. 250 (1988).

277. *Williams*, 112 S. Ct. at 1741 (quoting *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in the judgment)).

278. *Id.* at 1742.

jury is an institution separate from the courts, over whose functioning the courts do not preside . . . .”<sup>279</sup>

Justice Scalia made an interesting point in observing that the grand jury itself might choose not to hear more evidence than that which suffices to support an indictment.<sup>280</sup> He reasoned that “[i]f the grand jury has no obligation to consider all ‘substantial exculpatory’ evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.”<sup>281</sup> He was therefore unwilling “to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor.”<sup>282</sup>

Justice Scalia also maintained that the Tenth Circuit’s rule contradicted the “‘common law’ of the Fifth Amendment grand jury.”<sup>283</sup> He noted that “[m]otions to quash indictments based upon the sufficiency of the evidence relied upon by the grand jury were unheard of at common law”<sup>284</sup> and that “‘it would run counter to the whole history of the grand jury institution’ to permit an indictment to be challenged ‘on the ground that there was incompetent or inadequate evidence before the grand jury.’”<sup>285</sup>

Justice Stevens, joined by Justices Blackmun, O’Connor and partially by Justice Thomas, dissented.<sup>286</sup> He read the Court’s prior cases<sup>287</sup> as recognizing that a prosecutor has a “duty to refrain from improper methods calculated to produce a wrongful

279. *Id.*

280. *Id.* at 1745.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 1746 (quoting *Costello v. United States*, 350 U.S. 359, 363-64 (1956)).

286. *Id.* (Stevens, J., dissenting).

287. *See United States v. Mechanik*, 475 U.S. 66, 71 (1986) (Court held there was no reason not to apply the harmless error rule “to errors, defects, irregularities, or variances occurring before a grand jury”); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (Court rejected defendant’s argument that indictment should be dismissed because of prosecutorial misconduct and irregularities in proceedings before grand jury).

indictment.”<sup>288</sup> Accepting that the grand jury is not “textually assigned” to any one branch of government and that it has “wide latitude to investigate violations of federal law,”<sup>289</sup> Justice Stevens argued that the freedom given to grand juries results “because Congress and the Court have generally thought it best not to impose procedural restraints on the grand jury; it is not because they lack all power to do so.”<sup>290</sup> He was

unwilling to hold that countless forms of prosecutorial misconduct must be tolerated--no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury simply because they are not proscribed by Rule 6 of the Federal Rules of Criminal Procedure<sup>291</sup> or a statute that is applicable in grand jury proceedings.<sup>292</sup>

To preserve the grand jury’s historic role as a “‘protector of citizens against arbitrary and oppressive governmental action,’”<sup>293</sup> and as the “‘primary security to the innocent against hasty, malicious and oppressive prosecution,’”<sup>294</sup> Justice Stevens would have adopted and applied the standard stated by the Justice Department’s internal operating manual: “[W]hen a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.”<sup>295</sup>

*Williams* continues the trend in which the Court has narrowed a defendant’s ability to successfully challenge an indictment because of improprieties in front of the grand jury. It puts into seri-

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288. *Williams*, 112 S. Ct. at 1750.

289. *Id.* at 1752.

290. *Id.*

291. FED. R. CRIM. P. 6.

292. *Williams*, 112 S. Ct. at 1753 (Stevens, J., dissenting).

293. *Id.* (Stevens, J., dissenting) (quoting *United States v. Calandra*, 414 U.S. 338, 343 (1974)).

294. *Id.* (Stevens, J., dissenting) (quoting *Woods v. Georgia*, 370 U.S. 375, 390 (1962)).

295. *Id.* at 1754 (Stevens, J., dissenting) (citing U.S. Dep’t. of Justice, *United States Attorneys’ Manual*, Title 9, ch. 11, ¶ 9-11.23, 88 (1988)).

ous question the Court's statement in *United States v. Dionisio*,<sup>296</sup> that the grand jury functions "to clear the innocent, no less than to bring to trial those who may be guilty."<sup>297</sup> Given the widespread cynicism already extant about the grand jury's role, i.e. in the words of our Chief Judge, its capacity to "indict a ham sandwich,"<sup>298</sup> the *Williams* decision does little to inspire greater confidence in those who operate in the federal system.

## VII. DOUBLE JEOPARDY

In another case from the Tenth Circuit, *United States v. Felix*,<sup>299</sup> the Court decided a double jeopardy case that sought to clarify some of its recent decisions, especially that in *Grady v. Corbin*,<sup>300</sup> decided two Terms ago. In *Grady*, the Court held that the Double Jeopardy Clause<sup>301</sup> 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."<sup>302</sup> In *Felix*, the Court stated that *Grady* did not alter two long-standing double jeopardy principles: that overlapping proof does not establish a double jeopardy violation, and that a substantive offense and a conspiracy to commit it are separate offenses.<sup>303</sup>

In *Felix*, federal agents had raided the defendant's methamphetamine lab in Oklahoma and shut it down.<sup>304</sup> He then at-

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296. 410 U.S. 1 (1973).

297. *Id.* at 17.

298. David Margolik, *Law Professor To Administer Courts in State*, N.Y. TIMES, Feb. 1, 1985, at B2; see also THOMAS WOLFE, BONFIRE OF THE VANITIES 603 (1987).

299. 112 S. Ct. 1377 (1992).

300. 495 U.S. 508 (1990), *rev'g* *United States v. Felix*, 926 F.2d 1522 (10th Cir. 1991).

301. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V, cl. 2.

302. *Grady*, 495 U.S. at 512.

303. *Felix*, 112 S. Ct. at 1383-84.

304. *Id.* at 1379.

tempted to resume his business elsewhere, and arranged to buy his necessities and have them delivered to him in Missouri.<sup>305</sup> That led to his arrest and trial in Missouri federal court for attempted drug manufacturing.<sup>306</sup> At that trial, the prosecution rebutted Felix's claim of lack of intent by presenting, pursuant to Rule 404(b),<sup>307</sup> evidence that he had manufactured amphetamines in Oklahoma.<sup>308</sup>

Felix was convicted in Missouri and was subsequently indicted in Oklahoma for conspiracy and substantive offenses stemming from his Oklahoma drug operation.<sup>309</sup> Two of the nine overt acts alleged to be in furtherance of the conspiracy were based on conduct that had been the subject of the earlier attempted prosecution in Missouri.<sup>310</sup> The Tenth Circuit held that the overlap of proof constituted a violation of the Double Jeopardy Clause.<sup>311</sup>

Focusing on the substantive offenses first, the Chief Justice emphasized that *Grady* disclaimed any intent to create a "same evidence" test for double jeopardy, stating that "[t]he mere overlap in proof between two prosecutions does not establish a double jeopardy violation."<sup>312</sup> This was resolved implicitly in *Dowling v. United States*,<sup>313</sup> according to Chief Justice Rehnquist.<sup>314</sup> In *Dowling*, the issue was whether the collateral estoppel component of the Double Jeopardy Clause barred the Government from introducing, as other crimes evidence, conduct that had been the subject of an earlier acquittal.<sup>315</sup> Chief Justice Rehnquist pointed out that the *Dowling* Court would not have had to reach that issue if the mere introduction of evidence

305. *Id.*

306. *Id.*

307. FED. R. EVID. 404(b). Rule 404(b) provides in pertinent part: "Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for . . . purposes, such as . . . intent . . . ." *Id.*

308. *Felix*, 112 S. Ct. at 1380.

309. *Id.*

310. *Id.*

311. *United States v. Felix*, 926 F.2d 1522, 1530 (10th Cir. 1991).

312. *Felix*, 112 S. Ct. at 1382.

313. 493 U.S. 342 (1990).

314. *Felix*, 112 S. Ct. at 1382-83.

315. *Dowling*, 493 U.S. at 348.

concerning the prior prosecution constituted a second prosecution for double jeopardy purposes.<sup>316</sup> Therefore, *Dowling* stands for the principle that the “introduction of relevant evidence of particular misconduct in a case is not the same thing as a prosecution for that conduct.”<sup>317</sup> Consequently, the Government did not in any way prosecute Felix for the Oklahoma substantive offenses merely by introducing evidence regarding them in the Missouri prosecution.<sup>318</sup>

The conspiracy issue was more difficult and Justices Stevens and Blackmun did not concur in Chief Justice Rehnquist’s analysis of this part of the case.<sup>319</sup> Chief Justice Rehnquist acknowledged that some of the language in *Grady* cast some doubt on the conspiracy conviction.<sup>320</sup> But he emphasized that nothing in *Grady* had altered the long-standing rule, established in *United States v. Bayer*<sup>321</sup> and *Pinkerton v. United States*,<sup>322</sup> that a substantive crime and a conspiracy to commit that crime are not the same offense for double jeopardy purposes.<sup>323</sup> To the extent that some language in *Grady* must be reconciled with the traditional rule, Chief Justice Rehnquist declared, “we choose to adhere to the *Bayer-Pinkerton* line of cases dealing with the distinction between conspiracy to commit an offense and the offense itself.”<sup>324</sup> In other words, it was preferable to have a bright-line rule to the “subtleties” in which some appellate courts have en-

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316. *Felix*, 112 S. Ct. at 1383.

317. *Id.*

318. *Id.*

319. *Id.* at 1385-86.

320. *Id.* at 1383.

321. 331 U.S. 532, 542 (1947) (defendant’s subsequent prosecution on charges of conspiring to defraud government of faithful services of Army officer was not barred by Double Jeopardy Clause, because defendant had previously been convicted for same conduct for substantive offense of conduct unbecoming an officer).

322. 328 U.S. 640, 645 (1946) (“[T]he commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses . . . [a]nd the plea of double jeopardy is no defense to a conviction for both offenses.”).

323. *Felix*, 112 S. Ct. at 1384.

324. *Id.* at 1385.



gaged in considering *Grady's* "multi-layered" offenses such as conducting a continuing criminal enterprise.<sup>325</sup> He noted that the "same conduct" language used by *Grady* has proved difficult to distinguish from the "same evidence" and "same transaction" tests the Court has disdained in double jeopardy analysis.<sup>326</sup>

Justice Stevens' opinion on the conspiracy charges took a narrower view in turning aside Felix's claim.<sup>327</sup> He maintained that the overt acts at issue "did not meaningfully 'establish' an essential element of the conspiracy because there is no overt act requirement in the federal drug conspiracy statute and the overt acts did not establish an agreement between Felix and his coconspirators."<sup>328</sup>

### VIII. GENERAL VERDICTS

Conspiracy charges were again a problem in *Griffin v. United States*,<sup>329</sup> in which the Court was confronted with the issue of the validity of a general verdict on a conspiracy charge when there is a problem with one of the several possible bases supporting it.<sup>330</sup> Here too, the defendant came up short as the Court drew a distinction between "evidentiary sufficiency" and "legal adequacy," and held that where the problem is the former, neither the Due Process Clause nor the supervisory power requires setting aside the verdict.<sup>331</sup>

*Griffin* had been charged in a single count with conspiracy having two objectives: to keep the Internal Revenue Service (IRS) from ascertaining taxes and to prevent the Drug Enforcement Administration (DEA) from ascertaining forfeitable assets.<sup>332</sup> Crucial testimony on the DEA objective did not material-

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325. *Id.*

326. *Id.*

327. *Id.* at 1385-86 (Stevens, J., concurring).

328. *Id.* (Stevens, J., concurring).

329. 112 S. Ct. 466 (1991).

330. *Id.* at 468.

331. *Id.* at 470-72.

332. *Id.* at 468.

ize at trial.<sup>333</sup> Griffin thus asked that the jury be instructed only on the IRS objective, or that the jury answer special interrogatories to identify the basis of its verdict.<sup>334</sup> These requests were denied and the jury returned a general verdict of guilty.<sup>335</sup>

Justice Scalia, writing for a seven-member majority, noted the absence of any historical support in the common law for Griffin's claim that allowing the general verdict to stand violated due process.<sup>336</sup> He noted:

It was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds -- even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's actions.<sup>337</sup>

Griffin's reliance on *Yates v. United States*,<sup>338</sup> was also rejected by Justice Scalia.<sup>339</sup> In *Yates*, the defendant was found guilty on a single count charging a conspiracy with two objects.<sup>340</sup> On review, the Supreme Court found one of those objects insufficient as a matter of law.<sup>341</sup> It then rejected the Government's argument that the conviction should nonetheless be upheld on the basis of the other object.<sup>342</sup> Justice Scalia emphasized that *Yates* was distinguishable because despite some broad language, the holding of the case addressed a legal problem with a basis for conviction, not merely an evidentiary problem.<sup>343</sup>

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 470.

337. *Id.* at 469.

338. 354 U.S. 298 (1957).

339. *Griffin*, 112 S. Ct. at 472.

340. *Yates*, 354 U.S. at 300. The two objects charged to the defendant were "(1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach . . . ." *Id.*

341. *Griffin*, 112 S. Ct. at 470.

342. *Id.*

343. *Id.* at 472.

Moreover, Justice Scalia pointed out, *Yates* goes beyond the decisions on which it relies.<sup>344</sup> The *Stromberg v. California*<sup>345</sup> line of cases, with the exception of *Yates*, concern instances in which there was a constitutional problem with a possible basis for conviction.<sup>346</sup> Justice Scalia thus construed *Stromberg* to mean only that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."<sup>347</sup> *Yates*, he said, was an isolated extension of the "*Stromberg* rule" from constitutional to mere legal error.<sup>348</sup> Striking down Griffin's conviction, he concluded, would amount to an unprecedented further expansion of *Stromberg* to evidentiary grounds,<sup>349</sup> and would be contrary to the holding in *Turner v. United States*,<sup>350</sup> that a general guilty verdict as to multiple acts in a single count "stands if the evidence is sufficient with respect to any one of the acts charged."<sup>351</sup>

In concurring, Justice Blackmun questioned the need for Justice Scalia's "self-guided tour of the common law," and suggested that the preferable approach would be to charge the objectives in different counts or to use special jury interrogatories.<sup>352</sup>

## IX. THE KIDNAPPING CASE

In one of the Term's most severely criticized rulings, *United States v. Alvarez-Machain*,<sup>353</sup> a bitterly divided Court held that a Mexican citizen who was forcibly abducted from his own country at the request of United States authorities and brought here to face criminal charges, had no cognizable claim that his prosecu-

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344. *Id.*

345. 283 U.S. 359 (1931).

346. *Griffin*, 112 S. Ct. at 471.

347. *Id.* at 471.

348. *Id.* at 472.

349. *Id.*

350. 396 U.S. 398 (1970).

351. *Griffin*, 112 S. Ct. at 473 (citing *Turner*, 396 U.S. at 420).

352. *Id.* at 475 (Blackmun, J., concurring).

353. 112 S. Ct. 2188 (1992).

tion in this country was barred.<sup>354</sup> Recall, if you will, that it was only two years ago that the Court held that the Fourth Amendment's Warrant Clause<sup>355</sup> does not apply to the search of a foreign national's home outside the United States.<sup>356</sup>

Alvarez-Machain, a physician, was indicted for his suspected involvement in the kidnap and murder of DEA Special Agent Enrique Camarena Salazar.<sup>357</sup> At the behest of the DEA, Alvarez-Machain was kidnapped by private parties from his office in Mexico and flown to Texas where he was arrested.<sup>358</sup> The district court held that it lacked jurisdiction to try him on the ground that his abduction violated the extradition treaty between the United States and Mexico.<sup>359</sup> The Ninth Circuit affirmed.<sup>360</sup>

Chief Justice Rehnquist, writing for a majority of six, held that forcible abductions are not forbidden, expressly or impliedly, by the terms of the extradition treaty between the United States and

354. *Id.* at 2190, 2197.

355. The Warrant Clause provides: "[N]o 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, cl. 2.

356. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Verdugo-Urquidez was both a citizen and resident of Mexico. *Id.* at 262. The United States government obtained a warrant for his arrest for narcotics-related offenses. *Id.* After he was apprehended in Mexico, he was transported to Calexico, California where he was arrested and incarcerated. *Id.* Subsequently, the DEA, after receiving authorization from the Mexican Federal Judicial Police (MFJP), conducted a search of Verdugo-Urquidez's residences in Mexicali and San Felipe, Mexico. *Id.* During this search, the DEA, in concert with the MFJP, found a tally sheet believed to evidence the quantities of marijuana smuggled into the United States by Verdugo-Urquidez. *Id.* at 262-63. He sought to suppress this tally sheet, asserting that there was neither a proper search warrant, nor any justification for the search without such warrant. *Id.* at 263. The Court held that the Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien located in a foreign country. *Id.*

357. *Alvarez-Machain*, 112 S. Ct. at 2190.

358. *Id.*

359. *United States v. Caro-Quintero*, 745 F. Supp. 599, 601 (C.D. Cal. 1990).

360. *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988).

Mexico.<sup>361</sup> Therefore, under *Ker v. Illinois*,<sup>362</sup> which held that the forcible abduction of a defendant is not a jurisdictional defense to criminal charges,<sup>363</sup> the defendant had no claim.<sup>364</sup> Moreover, the majority evaluated the sole distinguishing determinants of the case, abduction involving United States officials and Mexico's objection to this abduction, and found that these factors failed to distinguish the case at bar from *Ker*.<sup>365</sup>

The case boiled down, therefore, to whether the Court correctly read the extradition treaty between the United States and Mexico.<sup>366</sup> Chief Justice Rehnquist emphasized that the treaty "does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution."<sup>367</sup> It merely "provides a mechanism that would not otherwise exist, requiring, under certain circumstances, the United States and Mexico to extradite individuals to the other country, and establishing the procedures to be invoked when the treaty is invoked."<sup>368</sup> Moreover, "[t]he history of negotiation and practice under the Treaty [did not] show that abduction outside [its terms] constitute[d] a violation of the Treaty."<sup>369</sup> Chief Justice Rehnquist emphasized that the Mexican government was well aware of the *Ker* doctrine and of the "United States' position that it applied to forcible abductions made outside the terms of the United States-Mexico extradition treaty," yet the current version of the treaty contained nothing that would curtail *Ker*.<sup>370</sup> In fact, he pointed out, language expressly prohibiting abduction was considered and drafted by legal scholars in 1935, but no such language appears in the treaty.<sup>371</sup>

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361. *Alvarez-Machain*, 112 S. Ct. at 2194-95. Chief Justice Rehnquist was joined by Justices White, Scalia, Kennedy, Souter, and Thomas.

362. 119 U.S. 436 (1886).

363. *Id.* at 444.

364. *Alvarez-Machain*, 112 S. Ct. at 2194.

365. *Id.* at 2193.

366. *Id.*

367. *Id.* at 2194.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.* at 2194-95.

The majority also refused to invoke general principles of international law to supply an implied term prohibiting prosecution in cases in which the defendant's presence was obtained by means outside the extradition treaty.<sup>372</sup>

In their vehement dissent, Justice Stevens, joined by Justices Blackmun and O'Connor, denounced Chief Justice Rehnquist's opinion as "monstrous."<sup>373</sup> Justice Stevens argued that the treaty, by implication, prohibited the "self-help" measures to which the DEA agents had resorted.<sup>374</sup> To hold otherwise, he argued, would transform the treaty's provisions "into little more than verbiage."<sup>375</sup> For him, therefore, the Court's decision in *United States v. Rauscher*,<sup>376</sup> not *Ker*, was controlling.<sup>377</sup> What made this case different from *Ker* was the involvement of government officials in the abduction.<sup>378</sup>

The decision resulted immediately in the expression of forceful views on both sides and undoubtedly will elicit much more commentary in the future. Professor Ruth Wedgwood of Yale Law School denounced the decision as a threat to the security of the United States, stating that "[a]fter *Alvarez* a foreign country may be tempted (as we were) to go around the treaty, and grab an American executive on American territory for foreign trial."<sup>379</sup> Critical of Justice Scalia's "new 'show me where it says we can't' school of textual interpretation," she pointed out that the treaty "makes kidnapping itself a crime for which extradition must be granted unless the kidnapper is prosecuted domestically. There is no exception for abductors who work on a federal stipend."<sup>380</sup>

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372. *Id.* at 2196.

373. *Id.* at 2197, 2201 (Stevens, J., dissenting).

374. *Id.* at 2199 (Stevens, J., dissenting).

375. *Id.* (Stevens, J., dissenting).

376. 119 U.S. 407 (1886) (holding that defendant may not be prosecuted in violation of terms of extradition treaty).

377. *Alvarez-Machain*, 112 S. Ct. at 2204-05 (Stevens, J., dissenting).

378. *Id.* at 2203 (Stevens, J., dissenting).

379. Ruth Wedgwood, *A Dangerous Precedent*, NAT'L L.J., July 6, 1992, at 15, 16.

380. *Id.* at 16.

On the other hand, Charles L. Hobson, of the Criminal Justice Legal Foundation, has argued that "*Alvarez* is actually a relatively straightforward construction of the extradition treaty. While the treaty extensively regulates the extradition process, it contains no statement prohibiting abduction as a means of obtaining jurisdiction."<sup>381</sup> That being the case, argued Hobson, there was also no basis for the Court to have applied general principles of international law because "[f]oreign policy can be made only by the political branches of our government," and therefore, "[i]f a federal court went outside the treaty to resolve the dispute between the United States and Mexico, then it would have to make policy judgments on its own."<sup>382</sup>

## X. THE FORMER TESTIMONY RULE IN A SPECIAL CONTEXT

In *United States v. Salerno*,<sup>383</sup> the Court decided an important hearsay case which, even though it did not involve the Confrontation Clause, is of interest for several reasons. It reversed a decision of the Second Circuit.<sup>384</sup> The majority opinion was written by Justice Thomas.<sup>385</sup> On remand, the Circuit Court still ruled favorably for the defense.<sup>386</sup>

The case involved the hearsay exception for former testimony of an unavailable witness under Federal Rule of Evidence 804(b)(1),<sup>387</sup> which provides that the former testimony of a witness who is not presently available to testify may be admitted if, *inter*

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381. Charles L. Hobson, *The Treaty Was Not Violated*, NAT'L L.J., July 6, 1992, at 15.

382. *Id.* at 16.

383. 112 S. Ct. 2503 (1992).

384. 112 S. Ct. 2503 (1992), *rev'g* *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991).

385. *Salerno*, 112 S. Ct. at 2505.

386. *United States v. Salerno*, 974 F.2d 231 (2d Cir. 1992).

387. FED. R. EVID. 804(b)(1).

*alia*, the proponent's adversary had an opportunity and "similar motive" to develop the prior testimony when it was given.<sup>388</sup>

The defendants in *Salerno* were charged with racketeering offenses involving alleged bid-rigging on large construction contracts.<sup>389</sup> The Government immunized two witnesses in exchange for their grand jury testimony.<sup>390</sup> When they appeared before the grand jury, however, they testified that neither they nor the defendants had participated in the alleged scheme.<sup>391</sup> At trial (which lasted thirteen months), as you might expect, the two witnesses were not called by the Government.<sup>392</sup> However, the defense had different feelings and wanted them. The witnesses invoked their Fifth Amendment privilege<sup>393</sup> and refused to testify.<sup>394</sup> The defense sought to have the grand jury testimony admitted pursuant to Rule 804(b)(1), but the Government claimed it did not meet the rule's "similar motive" requirement.<sup>395</sup> The district court agreed and excluded the testimony, stating that the prosecutor's motive in questioning a grand jury witness is necessarily different from the prosecutor's motive when conducting a trial.<sup>396</sup>

The Second Circuit reversed,<sup>397</sup> holding that the Government's lack of a motive to develop the witnesses' testimony in the grand jury proceeding "was irrelevant" under the circumstances.<sup>398</sup> To

388. *Salerno*, 112 S. Ct. at 2508. The rule states in pertinent part: "Testimony given as a witness at another hearing of the same or different proceeding[] . . . [is admissible] if the party against whom the testimony is now offered[] . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." FED. R. EVID. 804(b)(1).

389. *Salerno*, 112 S. Ct. at 2505-06.

390. *Id.* at 2506.

391. *Id.*

392. *Id.*

393. The Fifth Amendment privilege against self incrimination provides: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V, cl. 3.

394. *Salerno*, 112 S. Ct. at 2506.

395. *Id.*

396. *Id.*

397. *United States v. Salerno*, 937 F.2d 797, 799 (2d Cir. 1991).

398. *Id.* at 806.



maintain “adversarial fairness,” the court stated, the rule’s “similar motive” requirement should “evaporate” in this kind of case, because the Government should not be allowed to create grand jury testimony by granting immunity and then block admission of the testimony by refusing to grant immunity at trial.<sup>399</sup>

Justice Thomas held that courts do not have authority to read the “similar motive” requirement out of Rule 804(b)(1).<sup>400</sup> He emphasized that Congress has explicitly permitted numerous exceptions to the hearsay rule and “thus presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted,” including the “similar motive” language.<sup>401</sup>

Adhering to his strictly textual approach, Justice Thomas rejected the defendants’ argument that “adversarial fairness” requires the recognition of “implicit” exceptions to the rule’s strict language.<sup>402</sup> The defendants noted that courts have departed from the Rules of Evidence to prevent a witness from telling only half the truth and permitted otherwise barred testimony when a party “opens the door” to a particular subject.<sup>403</sup>

Justice Thomas rejected the attempt to analogize the government’s decision to call the witnesses before the grand jury to “opening the door” to their testimony which, under evidentiary privilege rules, could be deemed to constitute a waiver to object to their testimony.<sup>404</sup> He pointed out that a privilege is not forfeited by taking a position which might be contradictory to the evidence, and that was all the government had done here.<sup>405</sup>

Justice Blackmun joined the majority opinion but added a concurring opinion in which he said that the district court erred to the extent that it held the motive of a prosecutor in questioning a witness before the grand jury is different, as a matter of law,

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399. *Id.*

400. *Salerno*, 112 S. Ct. at 2507.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* at 2508.

405. *Id.*

from the motive of a prosecutor in conducting a trial.<sup>406</sup> To Justice Blackmun, this was “inherently a factual inquiry.”<sup>407</sup>

Justice Stevens was the sole dissenter.<sup>408</sup> He argued that the witnesses’ testimony regarding the criminal association was key to the Government’s case, “[t]hus, when the prosecutors doubted [the witnesses’] veracity before the grand jury -- as they most assuredly did -- they unquestionably had an ‘opportunity and similar motive to develop the testimony by direct, cross, or redirect examination’ within the meaning of Rule 804(b)(1).”<sup>409</sup>

Given the manner in which the issue reached the Supreme Court, there was still work for the court of appeals to do on remand. Having engrafted onto the rule an “adversarial fairness” exception to the “similar motive” requirement, the Second Circuit never applied the latter to the facts of the case.<sup>410</sup> On remand, it did.<sup>411</sup> In an opinion written by Judge Pratt and joined by Judges Miner and Altimari, the court held that the witnesses’ grand jury testimony had in fact been elicited by prosecutors with a “similar motive” to a trial prosecutor’s motive.<sup>412</sup> In so doing, the court rejected the Government’s argument that significant differences in motive existed in that a grand jury examination is restricted by a prosecutor’s concerns about revealing details of an ongoing investigation.<sup>413</sup> Similarly rejected was the Government’s argument that it had little incentive to discredit a grand jury witness and that the issues and standards of proof differ between the grand jury and the trial.<sup>414</sup>

Judge Pratt characterized the government’s arguments as “long on policy considerations and generalities about grand jury prac-

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406. *Id.* at 2509 (Blackmun, J., concurring).

407. *Id.* (Blackmun, J., concurring).

408. *Id.* (Stevens, J., dissenting).

409. *Id.* at 2510 (Stevens, J., dissenting) (quoting FED. R. EVID. 804(b)(1)).

410. *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991).

411. *United States v. Salerno*, 974 F.2d 231, 232 (2d Cir. 1992).

412. *Id.* at 241.

413. *Id.* at 240.

414. *Id.* at 240-41.

tice, but short on specific facts.”<sup>415</sup> He found little concealing of investigative details by the grand jury questioner who mentioned wiretaps and conflicting witness testimony.<sup>416</sup> He also found a “vigorous” and aggressive cross-examination of the witnesses and a similarity of issues in the grand jury and trial.<sup>417</sup>

## XI. FEDERAL HABEAS CORPUS

Habeas corpus again drew considerable attention from the Court, and its attack on the Great Writ did not show any significant abatement. However, in two cases, *Keeney v. Tamayo-Reyes*<sup>418</sup> and *Wright v. West*,<sup>419</sup> a turn of some interest transpired. Both Justices O'Connor and Kennedy, normally hostile to state defendants' habeas claims, voted for them and attacked the Chief Justice, and Justices Thomas and Scalia's hard-right position.

In *Keeney*, the petitioner, a Cuban immigrant who understood little English, entered a *nolo contendere* plea to a charge of manslaughter.<sup>420</sup> He later attacked the plea in state court on the ground that it had not been knowing and intelligent because the interpreter had not properly translated the *mens rea* element of the crime.<sup>421</sup> The state courts rejected his argument.<sup>422</sup> He then sought federal habeas relief, claiming that the material facts regarding the translation were insufficiently developed at the state court hearing and he asked for an evidentiary hearing.<sup>423</sup> The district court denied the request, holding that his failure to develop the critical facts was due to inexcusable neglect.<sup>424</sup> The

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415. *Id.* at 240.

416. *Id.*

417. *Id.* at 240-41.

418. 112 S. Ct. 1715 (1992).

419. 112 S. Ct. 2482 (1992).

420. *Keeney*, 112 S. Ct. at 1716.

421. *Id.*

422. *Bates v. Keeney*, 744 P.2d 1101 (Or. Ct. App. 1987), *aff'd*, 749 P.2d 136 (Or. 1988).

423. *Keeney*, 112 S. Ct. at 1717.

424. *Id.*

Ninth Circuit reversed,<sup>425</sup> holding that *Fay v. Noia*,<sup>426</sup> and *Townsend v. Sain*,<sup>427</sup> mandated an evidentiary hearing unless the petitioner had deliberately bypassed the orderly procedure of the state courts.<sup>428</sup> Finding that defense counsel's neglect did not constitute a deliberate bypass, a hearing was ordered.<sup>429</sup>

Justice White, writing for the Court, held that the court of appeals erred in applying the deliberate bypass standard.<sup>430</sup> He emphasized that the Court, in recent years, had consistently abandoned that standard in favor of the "cause and prejudice standard" first announced in *Wainwright v. Sykes*.<sup>431</sup> which, in Justice White's view, "embodies the correct accommodation between the competing concerns implicated in a federal court's habeas power."<sup>432</sup> Furthermore, Justice White noted that in *Coleman v. Thompson*,<sup>433</sup> the Court extended the cause-and-prejudice test to failures to appeal altogether, thus eliminating the "irrational" distinction between *Fay* and later decisions.<sup>434</sup> "In light of these decisions," Justice White asserted, "it is similarly irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim, and to apply to the latter a remnant of a decision that is no longer upheld with regard to the former."<sup>435</sup> Given the interests in finality and uniformity of decisions, Justice

425. *Tamayo-Reyes v. Keeney*, 926 F.2d 1492 (9th Cir. 1991).

426. 372 U.S. 391 (1963) (Court articulated deliberate bypass standard for excusing habeas petitioner's failure to develop federal claim in state court proceedings).

427. 372 U.S. 293 (1963) (deliberate bypass standard articulated in *Fay* adopted as definition of "inexcusable neglect" in determining when evidentiary hearing must be granted to federal habeas corpus petitioner).

428. *Keeney*, 926 F.2d at 1500-02.

429. *Id.*

430. *Keeney*, 112 S. Ct. 1717-18.

431. 433 U.S. 72 (1977) (rejection of application of *Fay* standard of "knowing waiver" or "deliberate bypass" to excuse petitioner's failure to comply with state contemporaneous-objection rule).

432. *Keeney*, 112 S. Ct. at 1718.

433. 111 S. Ct. 2546 (1991).

434. *Keeney*, 112 S. Ct. at 1718-19.

435. *Id.* at 1719.

White stated "little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum."<sup>436</sup>

And it is at this point where it gets interesting. Justice O'Connor, joined by Justices Blackmun, Stevens, and Kennedy, dissented.<sup>437</sup> Justice O'Connor, who has been a major force in the emasculation of federal habeas corpus since taking her seat on the Court, accused the majority of changing habeas law in a "fundamental way."<sup>438</sup> She argued that "the balance of state and federal interests regarding whether a federal court will *consider* a claim raised on habeas cannot be simply lifted and transposed to the different question whether, once the court will consider the claim, it should hold an evidentiary hearing."<sup>439</sup> As a matter of *stare decisis*, *Townsend*, she maintained, merely elaborated on a long line of prior cases and did not at all depend on *Fay*.<sup>440</sup> Justice Kennedy's separate dissent argued that the Court should not take steps that would reduce the chance that a federal habeas court will have accurate facts upon which to base its decision.<sup>441</sup>

It is difficult to accept the logic of the majority opinion. There is a fundamental difference between the issue of whether a federal court can, as a threshold matter, entertain a claim, and what it may do functionally when there is no obstacle to hearing the claim. In the Court's rush to eradicate the Warren Court's work, expediency has once again triumphed over principle.

The fissures that appeared in *Keeney* emerged in even bolder relief in *Wright v. West*.<sup>442</sup> This was a case that had the potential to be a true blockbuster, one that would truly dispatch the habeas writ to the antiquity of the pre-Warren Court era. The case started out by raising the question of whether the Fourth Circuit

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436. *Id.* at 1720.

437. *Id.* at 1721 (O'Connor, J., dissenting).

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

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

440. *Id.* at 1724 (O'Connor, J., dissenting).

441. *Id.* at 1728 (Kennedy, J., dissenting).

442. 112 S. Ct. 2482 (1992).

had erred in holding that, under *Jackson v. Virginia*,<sup>443</sup> the evidence was insufficient to sustain the petitioner's larceny conviction.<sup>444</sup> However, after granting certiorari,<sup>445</sup> the Court also asked the parties to brief another question of whether a federal district court may continue to give *de novo* review to a state court's application of law to specific facts or, instead, whether the rules should be changed to allow a district court to honor a state court's reasonable decision regarding mixed questions of law and fact?<sup>446</sup> The implications of an affirmative answer to the second part of the question should be apparent; it would mean that federal courts would have to defer to state courts on applications of federal constitutional principles even when they disagreed with a state court's decision. Fortunately, having marched up the hill, the Court backed down and did not reach the issue.<sup>447</sup>

Although there were no dissents in the case, the Court was fragmented. The defendant lost because the Court concluded that, under the *Jackson v. Virginia* standard,<sup>448</sup> the evidence to convict was sufficient.<sup>449</sup> However, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, indicated that he would have performed major surgery on the Writ.<sup>450</sup> Justice Thomas expounded on his understanding of the history of the Great Writ, as the Court's past decisions have spelled out. He read that history

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443. 443 U.S. 307, 319 (1979) (claim that evidence is insufficient to support conviction as a matter of due process depends on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

444. *Wright*, 112 S. Ct. at 2485-86.

445. 931 F.2d 262 (4th Cir.), *cert. granted*, 112 S. Ct. 656 (1991).

446. 112 S. Ct. 672 (1991).

447. *Wright*, 112 S. Ct. at 2492.

448. *Id.* at 2485-86. *See supra* note 444.

449. *Id.* at 2492. Only Justice Souter declined to reverse on this ground. *Id.* at 2500 (Souter, J., concurring). Although he did not disagree with the Court's *Jackson* analysis, he believed the Court should not reach the question. *Id.* In his view, the precise evidentiary claim raised a new rule of law, which could not, under *Teague v. Lane*, 489 U.S. 288 (1989), apply retroactively in petitioner's favor. *Id.* at 2503.

450. *Wright*, 112 S. Ct. at 2486-93.

to show that although habeas review of mixed questions of fact and law currently the accepted standard, the Court's major decisions did not require it and the standard was not, therefore, founded on careful analysis.<sup>451</sup>

Justice Thomas observed that the types of claims that were cognizable in habeas have expanded over the years and that the Court's major leap occurred in *Brown v. Allen*,<sup>452</sup> where the Court held that state court determinations of constitutional claims are not *res judicata* on habeas actions, and that a federal habeas court must determine whether the state adjudication reached a "satisfactory conclusion."<sup>453</sup> According to Justice Thomas, the *Brown* Court did not make clear whether "satisfactory" meant "correct" or merely "reasonable."<sup>454</sup> Nevertheless, he argued that even *Brown* "indicated that federal courts enjoy at least the discretion to take into account consideration of the fact that a state court has previously rejected the federal claims asserted on habeas."<sup>455</sup> Later, however, in what Justice Thomas called "dictum," the Court in *Townsend* characterized *Brown* as commanding federal courts to re-examine mixed questions "independently."<sup>456</sup> According to Justice Thomas, post-*Townsend* cases never questioned this view, so the Court has "gradually come to treat as settled the rule that mixed constitutional questions are 'subject to plenary review' on habeas."<sup>457</sup> *Jackson* itself "contributed to this trend," he said, by indicating that the habeas court should itself apply the "rational trier of fact" test to the evidence instead of merely determining whether the state courts' application of that test was reasonable.<sup>458</sup>

Justice Thomas further argued that, notwithstanding this apparent adherence to a *de novo* standard, the Court had "implicitly questioned that standard, at least with respect to pure legal ques-

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451. *Id.* at 2486-89.

452. 344 U.S. 443 (1953).

453. *Id.* at 482-87.

454. *Wright*, 112 S. Ct. at 2487.

455. *Id.*

456. *Id.* at 2488.

457. *Id.* at 2489.

458. *Id.*

tions, in our recent retroactivity precedents."<sup>459</sup> Justice Thomas then cited to *Butler v. McKellar*,<sup>460</sup> where the Court defined a "new" constitutional rule for retroactivity purposes as a rule that is "susceptible to debate among reasonable minds."<sup>461</sup>

For Justice O'Connor, as well as for Justices Blackmun and Stevens, this was too much.<sup>462</sup> She disputed Justice Thomas' reading of the Court's prior cases, taking direct issue with his understanding of *Brown v. Allen*.<sup>463</sup> She asserted that Justice Thomas "understate[d] the certainty with which *Brown v. Allen* rejected a deferential standard of review of issues of law."<sup>464</sup> She contended that the passages in *Brown* upon which Justice Thomas relied to suggest that federal courts retain discretion to consider a state court's determination of an issue of law were actually discussing state court determinations of fact.<sup>465</sup>

Justice O'Connor also took issue with Justice Thomas' statement that the Court has never considered the *de novo* standard of review to apply to mixed questions of law and fact on habeas review.<sup>466</sup> She listed numerous cases in which the Court had done precisely that, such as those dealing with the suggestiveness of pretrial identification procedures,<sup>467</sup> the ineffective assistance of counsel<sup>468</sup> and the voluntariness of confessions.<sup>469</sup> She pointed out that in *Jackson* itself, the Court rejected a proposed deferential standard like the one suggested by Justice Thomas and instead "adhered to the general rule of *de novo* review of constitutional

459. *Id.*

460. 494 U.S. 407 (1990).

461. *Id.* at 415.

462. *Wright*, 112 S. Ct. at 2493 (O'Connor, J., concurring).

463. *Id.* at 2494 (O'Connor, J., concurring).

464. *Id.* (O'Connor, J., concurring).

465. *Id.* (O'Connor, J., concurring).

466. *Id.* at 2495 (O'Connor, J., concurring).

467. *Id.* at 2495-96 (O'Connor, J., concurring) (citing *Neil v. Biggers*, 409 U.S. 188 (1972)).

468. *Id.* (O'Connor, J., concurring) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

469. *Id.* (O'Connor, J., concurring) (citing *Miller v. Fenton*, 474 U.S. 104 (1985)).



claims on habeas."<sup>470</sup> Importantly, Justice O'Connor also opined that Congress' reluctance to change the rule should lead the Court to leave it alone.<sup>471</sup>

Justice Kennedy also pitched in with respect to Justice Thomas' analysis.<sup>472</sup> Not only did Justice Kennedy reject Thomas' view that *Teague v. Lane*<sup>473</sup> established a deferential standard of review of state court decisions of federal law,<sup>474</sup> he believed that *Teague* actually added justification for *de novo* review because such review "gives substantial assurance that habeas proceedings will not use a new rule to upset a state conviction that conformed to rules then existing."<sup>475</sup>

It may be too early to assess the full impact of the O'Connor-Kennedy change of direction as manifested in *Keeney* and *West*. *West* had the capacity to deliver a true knock-out blow to federal habeas and Justices O'Connor and Kennedy halted that process at least for the moment. It is possible to infer that absent congressional action, the two Justices may again join forces to avert a fatal blow by the Court itself.

But there is something afoot here that may extend beyond the realm of federal habeas. Justice O'Connor's language denouncing Justice Thomas' opinion was exceptionally strong, and one can detect strong indicia of resentment here as elsewhere.<sup>476</sup> The two cases, *Keeney* and *Wright*, therefore, may evidence a broader resistance on Justices O'Connor and Kennedy's part to Justice Thomas' first year aggressiveness in denouncing many of the

470. *Id.* at 2496 (O'Connor, J., concurring).

471. *Id.* at 2498 (O'Connor, J., concurring).

472. *Id.* (Kennedy, J., concurring).

473. 489 U.S. 288 (1989).

474. *Wright*, 112 S. Ct. at 2498 (Kennedy, J., concurring).

475. *Id.* at 2500 (Kennedy, J., concurring).

476. See, for example, Justice O'Connor's attack on Justice Thomas' dissent in *Hudson v. McMillian*, 112 S. Ct. 995 (1992), in which she stated that "[t]o deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the 'concepts of dignity, civilized standards, humanity, and decency' that animate the Eighth Amendment." *Id.* at 1001 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

Court's precedents, not just those pertaining to federal habeas corpus.

#### CONCLUSION

In sum, as to criminal cases, the 1991-92 Term was ordinary in some respects and of considerable interest in others. As I stated at the outset, there were no rulings of great significance to Fourth, Fifth or Sixth Amendment jurisprudence. There was considerable volume, indeed large enough for me to have to limit my coverage in this presentation, especially in the habeas corpus/capital case realm. For me, the Term had its greatest appeal in the dynamics among the justices -- the new alliances, the expressed angers and tensions. These will affect all cases before the Court, probably even more severely in non-criminal categories. Nonetheless, the shifts that appeared last Term will not be insignificant in the criminal field and that will make the coming Term very, very engrossing.

