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IT WAS A VERY GOOD YEAR -- FOR THE GOVERNMENT: THE SUPREME COURT'S MAJOR CRIMINAL RULINGS OF THE 1995-1996 TERM

Hon. Leon D. Lazer:

Our next speaker is Professor William Hellerstein. Professor Hellerstein was the chief of the Appeals Bureau of the Legal Aid Society. I have obviously had an opportunity to judge the capabilities of various appellate lawyers and appeals bureaus, and at least for the era when I served, certainly the Appeals Bureau of the Legal Aid Society was the best of the bureaus, including all of the ten district attorney's offices which are in the Second Department. He managed a great appeals bureau and is a great appellate lawyer. His recognition across the state is confirmed by the fact that on four occasions his name was sent to the Governor as a prospective appointee to the New York Court of Appeals. So on four occasions, at least, the nominating commission, recognized him as one of the seven best qualified people to serve on the New York's highest court. Unfortunately, the government did not recognize him as the most qualified, but we know all about the biases of the new executives when they make appointments. In the meantime, he is a leading authority on the constitutional aspects of criminal law, and the Supreme Court's view of it.

*Professor William E. Hellerstein:*¹

The 1995-1996 Term was a cornucopia of goodies for law enforcement. The government prevailed in most of the major cases, and also enjoyed a significant rejuvenation of its ability to utilize civil forfeiture as a crime-fighting instrument. Conversely, the few victories that were had by the defense were pretty one-

1. Professor of Law, Brooklyn Law School; Juris Doctor, Harvard Law School (1962).

sided and generally declarative of resolutions that were rather obvious.

I. CIVIL FORFEITURE

Commencing in 1989, to the surprise of many and to the dismay of the government, the Court decided three cases that cabined significantly the government's use of civil forfeiture in its war on crime. In *United States v. Halper*,² the Court held for the first time that a civil action for forfeiture could be so disproportionate to the size of a defendant's theft that it could constitute a second punishment for the crime and thereby violate the Fifth Amendment's Double Jeopardy Clause.³ Four years later, in *Austin v. United States*,⁴ the Court held for the first time that a civil forfeiture of property linked to a drug crime may be so disproportionate to the seriousness of the crime that it violates the Excessive Fines Clause of the Eighth Amendment.⁵ The following year, in *Department of Revenue of Montana v. Kurth Ranch*,⁶ the Court held that a state tax on marijuana, one that was imposed only upon a person after he or she has been arrested for a crime pertaining to marijuana, could be so punitive as to constitute double jeopardy if the tax statute "was motivated by a penal and prohibitory intent rather than the gathering of revenue."⁷ This trilogy of cases, and several others of lesser

2. 490 U.S. 435 (1989).

3. *Id.* at 452. In *Halper*, the defendant was convicted of defrauding Medicare of \$595.00 and sentenced to 2 years in prison and fined \$5,000.00. *Id.* at 437. The government then brought a forfeiture proceeding to impose a civil penalty of an additional \$130,000.00. *Id.* at 438. See U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" *Id.*

4. 509 U.S. 602 (1993).

5. *Id.* at 622. See U.S. CONST. amend VIII. The Eighth Amendment provides: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

6. 511 U.S. 767 (1994).

7. *Id.* at 1955. In *Kurth Ranch*, the defendants were convicted of various drug offenses after state police officers raided their farm. *Id.* at 1942.

import,⁸ appeared to signal a growing resistance by the Court to the expansive use of the civil forfeiture remedy by law enforcement authorities. In fact, three years ago, at this podium, I stated that the Court had evinced such a proclivity.⁹ However, those who believed as I did that the Court was on a roll against expanded use of forfeiture got a rude awakening this term. In a five to four decision in *Bennis v. Michigan*,¹⁰ the Court held that neither the Due Process Clause of the Fourteenth Amendment¹¹ nor the Takings Clause of the Fifth Amendment¹² requires an

Subsequent to their arrest, the state revenue department attempted to collect a state tax imposed on the marijuana and the various paraphernalia used in connection with the drug. *Id.* The defendants challenged the constitutionality of the state tax. *Id.* at 1943. The Court noted that all criminal and civil sanctions are subject to constitutional restraints. *Id.* In analyzing the statute, the Court observed that it applies when the defendant has committed a crime but before an actual conviction, *Id.* at 1947, and that it is imposed "on the possession and storage of dangerous drugs . . . when the taxpayer neither owns nor possesses when the tax is imposed." *Id.* at 1948. The Court concluded that the tax was not remedial in nature and therefore constituted a second punishment for the same offense in violation of the Double Jeopardy Clause. *Id.*

8. See *Alexander v. United States*, 113 S. Ct. 2766 (1993); *United States v. 92 Buena Vista Avenue*, 113 S. Ct. 1126 (1993) (limiting the interpretation of the "relation back" provision of the forfeiture statute to allow government ownership only after there is a forfeiture decree); *Republic National Bank of Miami v. United States*, 506 U.S. 80, 87-9 (1992) (government's quick movement of a res after winning a forfeiture judgment does not prevent the court of appeals from entertaining an appeal by the claimant since in rem forfeiture was designed to "expand the reach of the parties and to furnish remedies for aggrieved parties"); *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (absent exigent circumstances, notice and an adversary hearing are required before the government may seize real property that is allegedly subject to forfeiture under the drug laws).

9. See William E. Hellerstein, *Calmer Seas: The Supreme Court's Major Criminal Law Rulings of the 1993-94 Term*, 11 *TOURO L. REV.* 361, 383 (1995).

10. 116 S. Ct. 994 (1996),

11. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law" *Id.*

innocent owner defense.¹³ The second alarm that rang came in *United States v. Ursery*,¹⁴ which held that nothing in the Court's recent forfeiture decisions had altered the Court's long-held view that in rem civil forfeitures are neither punishment nor criminal actions for purposes of the Double Jeopardy Clause.¹⁵

Bennis drew the most press attention because Mrs. Bennis's husband was caught receiving oral sex from a prostitute in a 1977 Pontiac that was jointly owned by him and his wife.¹⁶ Under a Michigan nuisance law that was intended to curb prostitution in cars,¹⁷ the car was forfeited, including Mrs. Bennis's half-interest in it.¹⁸ Unlike many other in rem forfeiture statutes, including those enacted by Congress, and Michigan's own drug forfeiture statutes, the nuisance statute does not contain an innocent owner defense. Mrs. Bennis challenged the absence of such a defense as a violation of due process; she asserted that not only did she not engage in any wrongdoing, she did not even know what her husband was doing with their jalopy.¹⁹

Writing for the majority, Chief Justice Rehnquist held that the inclusion of an "innocent owner" defense was not required,²⁰ that a long and unbroken line of cases shows that an owner's interest

12. U.S. CONST. amend V. The Fifth Amendment provides in pertinent part: "nor shall private property be taken for public use, without just compensation." *Id.*

13. *Bennis*, 116 S. Ct. at 1001.

14. 116 S. Ct. 2135 (1996).

15. *Id.* at 2149.

16. *Bennis*, 116 S. Ct. at 996.

17. *Id.* See MICH. COMP. LAWS § 600.3801 (1988). This statute provides in pertinent part: "Any building, vehicle, boat, aircraft, or plane used for the purpose of lewdness, assignation or prostitution or gambling or kept for the use of prostitutes or other disorderly persons, . . . is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in the court rules." *Id.* MICH. COMP. LAWS § 600.3825 (1) (1988). This section states in pertinent part: "If the existence of the nuisance is established in an action . . . an order of abatement shall be entered as part of the judgment in the case, which order shall direct the removal . . . [and] direct the sale thereof in the manner provided for the sale of chattels under execution" *Id.*

18. *Bennis*, 116 S. Ct. at 996.

19. *Id.* at 998.

20. *Id.*

can be forfeited²¹ (his citations included cases dating back to early nineteenth century Admiralty cases),²² and that in two recent cases, the Court had upheld forfeitures of conveyances.²³ The Court's reliance on *Calero-Toledo v. Pearson Yacht Leasing Company*,²⁴ the most recent decision, is very interesting because Mrs. Bennis's attorneys also relied on it.²⁵ Why? Because in *Calero-Toledo*, the Court stated specifically that "it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."²⁶ This suggested that an innocent owner defense did exist and Mrs. Bennis sensibly relied on this statement.²⁷ Well, the Chief Justice said that the language was dicta and inconsistent with the actual holding of the case.²⁸ I believe it was Justice Holmes who once responded to an attorney's assertion that language in a previous decision was mere dictum by stating "We said it, didn't we?" Obviously, that did not work for Mrs. Bennis here.

Mrs. Bennis also argued that an innocent owner defense could be discerned from *Austin* and *Foucha v. Louisiana*,²⁹ a case that involved the confinement of persons acquitted by reason of insanity and which, she argued, supports the proposition that it is

21. *Id.* See *Van Oster v. Kansas*, 272 U.S. 465 (1926); *Dubbins Distillery v. United States*, 96 U.S. 395, 401 (1878).

22. *Id.* at 998. See, e.g., *Harmony v. United States*, 43 U.S. 210 (1844); *The Palmyra*, 15 U.S. 1 (1827).

23. *Van Oster v. Kansas*, 272 U.S. 465 (1926); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

24. 416 U.S. 663 (1974).

25. *Bennis*, 116 S. Ct. at 999.

26. *Calero-Toledo*, 416 U.S. at 689.

27. *Bennis*, 116 S. Ct. at 999.

28. *Id.* In *Calero-Toledo*, the Court held that the possession of the yacht was voluntarily entrusted to the lessees, and that no allegation had been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use. *Calero-Toledo*, 416 U.S. at 690.

29. 504 U.S. 71 (1992).

unfair to punish a person who is blameless.³⁰ The Chief Justice responded that both cases had only a tangential relation to the innocent owner defense,³¹ and he doubted the extent to which a forfeiture proceeding is punishment, pointing out that the Michigan statute served the deterrent purpose of interdicting prostitution.³² He added that, viewed properly as a nuisance abatement statute, the law resembled laws against dangerous driving that render car owners civilly liable for damage done by negligent operators to whom they have entrusted their cars.³³

The most startling aspect of *Bennis* is that it was Justice Ginsburg's vote that sank Mrs. Bennis. In a brief concurrence, Justice Ginsburg minimized what was at stake. Noting that the car belonged to Mr. Bennis as much as it did to his wife, she pointed out that the only issue was whether Mrs. Bennis was entitled to a portion of the proceeds from a sale of the car and not whether she was entitled to the car itself.³⁴ Moreover, the Michigan Supreme Court considered the nuisance abatement proceeding an equitable action, which to Justice Ginsburg meant that the court would police exorbitant applications of the Michigan law.³⁵ Lastly, she found nothing unfair about the trial judge's refusal to order a division of sale proceeds for the car, given that it was eleven years old and had been bought by the Bennis for six hundred dollars.³⁶

Justice Stevens (joined by Justices Souter and Breyer) dissented and he did not let Justice Ginsburg off lightly. He questioned her confidence in the Michigan Supreme Court's readiness to interdict inappropriate applications of the statute because it failed to do so in the instant case.³⁷ Moreover, for him, the car's modest value did not offset the unfairness of using Mrs. Bennis's

30. *Id.* at 77-78. See *Jones v. United States*, 463 U.S. 354 (1983); *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

31. *Bennis*, 116 S. Ct. at 1000.

32. *Id.*

33. *Id.*

34. *Id.* at 1003 (Ginsburg, J., concurring).

35. *Id.*

36. *Id.*

37. *Id.* at 1009, n.14 (Stevens, J., dissenting).

property to compensate for her husband's offense.³⁸ He distinguished between forfeitures of contraband and forfeitures of instrumentalities and he pointed out that there was not a strong enough connection between the Bennis's car and the act of prostitution committed in it for Mrs. Bennis's interest in the car to be forfeited.³⁹ He also believed that the Court had made a significant retreat from *Austin*, which he thought had rejected in rem forfeiture for totally blameless owners.⁴⁰

Justice Kennedy's separate dissent argued that cars were not boats and that forfeitures pursuant to admiralty and maritime tradition were a pragmatic resolution of the need to find "some source of compensation for injuries done by a vessel whose responsible owners were often half a world away and beyond the reach of the law and its processes."⁴¹ He emphasized that Admiralty forfeitures could continue without extending them to the automobile, "which is a practical necessity in modern life for so many people."⁴²

Because Justice Ginsburg's vote was crucial, the question remains whether she would have decided differently had the Bennis's car had been a 1996 Maserati. Probably not. Her receptivity to Michigan's decision to deter men from using the family car for illicit sexual encounters seems to transcend a car's value.⁴³ From this, I deduce the emergence of a feminist perspective. And, I do not mean to be critical. But I think she does not have great sympathy for Johns "getting a free ride," if you pardon the expression. However, the issue in *Bennis* was not whether Michigan should not be permitted to deter and punish Johns by confiscating their cars. It was whether, after taking and

38. *Id.*

39. *Id.* at 1006-07. Justice Stevens conceded the illegal activity occurred in the car, but, "it might just as well have occurred in a multitude of other locations." *Id.* at 1006.

40. *Id.* at 1004-06.

41. *Id.* at 1010-11 (Kennedy, J., dissenting).

42. *Id.* at 1011.

43. *Id.* at 1003. "Michigan has decided to deter Johns from using cars they own (or co-own) to contribute to neighborhood blight, and that abatement endeavor hardly warrants this Court's disapprobation." *Id.*

selling a car, the state should be allowed to keep the innocent co-owner's share of the proceeds.⁴⁴

In *United States v. Ursery*,⁴⁵ the Court reversed the 6th and 9th Circuits for their mistaken reliance on the *Halper-Austin-Kurth Ranch* trilogy in concluding that the Double Jeopardy Clause prohibits the government from convicting a defendant for a criminal offense and forfeiting his property for that same offense in a separate civil proceeding.⁴⁶ With Justice Stevens the lone dissenter in one of the two cases the Court,⁴⁷ in an opinion by the Chief Justice, held that nothing in those decisions had changed the Court's long-held view that in rem civil forfeitures are neither punishment nor criminal actions within the contemplation of the Double Jeopardy Clause.⁴⁸ Those who believed otherwise, he said, had overlooked an entire line of cases that antedated *Halper* and which had long recognized that parallel in rem forfeiture actions and criminal prosecutions were commonplace.⁴⁹ The Chief Justice pointed out that in *Various Items of Personal Property v. United States*,⁵⁰ the Court had specifically approved coincidental in rem forfeiture proceedings and criminal prosecutions under the Double Jeopardy Clause

44. See Stuart Taylor, Jr., *A Car is Not a Pirate Ship*, THE AMERICAN LAWYER, April 1996, at 39-40. Noteworthy also is the contrast between Justice Ginsburg's concurrence and that of Justice Thomas. Taylor points out that "[u]nlike Thomas--whose separate concurrence acknowledged the unfairness to Mrs. Bennis and expressed concern about possible abuse of forfeiture laws 'to raise revenue from innocent but hapless owners'--Ginsburg evinced neither sympathy nor concern." *Id.* at 39.

45. 116 S. Ct. 2135 (1996).

46. See *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995); *United States v. \$405,089.23 in United States Currency*, 33 F.3d 1210 (9th Cir. 1994), 56 F.3d 41 (9th Cir. 1995). Both cases were consolidated in the Supreme Court for argument.

47. *Ursery*, 116 S. Ct. at 2152. In *Ursery*, Justice Stevens dissented as a result of the defendant's house having been forfeited due to the discovery of marijuana found within it, however, he concurred in the companion case because the funds forfeited were the proceeds of unlawful activity that the claimants had no right to retain. *Id.* at 2152-53.

48. *Id.* at 2144-47.

49. *Id.* at 2144.

50. 282 U.S. 577 (1931).

when it contrasted in rem proceedings against "guilty" property with in personam proceedings against the guilty person and concluded the forfeiture is not part of the punishment for the crime.⁵¹ He further noted that in *United States v. One Assortment of 89 Firearms*,⁵² decided 53 years later, the Court reaffirmed the *Various Items* approach and developed a two prong test for determining whether an in rem forfeiture qualifies as punishment: (1) whether Congress intended the forfeiture to be criminal and punitive or, civil and remedial and, (2) whether the scheme is so punitive in purpose and effect as to negate Congress' intent.⁵³ He concluded that as to both drug forfeitures and money laundering forfeitures, Congress intended to have them governed civilly.⁵⁴ As to the second prong, although he conceded that the forfeitures may have some punitive aspects, he emphasized that they also serve important nonpunitive goals, such as "encourag[ing] property owners to take care in managing their property and ensur[ing] that they will not permit the property to be used for illegal purposes."⁵⁵ Insofar as the statutes authorize the forfeiture of proceeds of criminal activity, he added, they "serve the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts."⁵⁶ He distinguished *Halper* because it involved civil penalties, not civil forfeitures and explained that civil forfeitures are designed to do more than simply compensate the Government -- they serve "to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct."⁵⁷ He distinguished *Austin* on the ground that it was limited to the Excessive Fines Clause of the Eighth Amendment,⁵⁸ and *Kurth Ranch* on the ground that it was the functional equivalent of a successive criminal prosecution, insofar as the Montana tax had been conditioned on the commission of a

51. *Ursery*, 116 S. Ct. at 2140.

52. 465 U.S. 354 (1984).

53. *Ursery*, 116 S. Ct. at 2142.

54. *Id.* at 2147-48.

55. *Id.* at 2148.

56. *Id.* at 2147-48.

57. *Id.* at 2145.

58. *Id.* at 2146.

crime, was imposed only after the taxpayer had been arrested, and taxed the marijuana at a time when it was not owned by the taxpayer.⁵⁹

Justice Stevens, while conceding that proceeds of a crime are not property that one has a right to retain, argued that forfeiture of property such as a home, which had merely played a part in the commission of a crime, cannot be deemed anything other than punishment for the crime.⁶⁰ He raised the intriguing point that if the year were 1931 and Congress had passed a statute that authorized the forfeiture of every home in which alcoholic beverages were consumed, would the Court adhere to its position.⁶¹ Well, the point didn't count for much with the majority or, for that matter, with any other member of the Court.

What of the future? *Bennis* and *Ursery* demonstrate that previous assumptions that the Court had embarked on a road to limit the government's use of civil forfeiture were misplaced. How the Court's altered course will play out remains to be seen. The Court has yet to give us a clear test for determining when a forfeiture is excessive under the Excessive Fines Clause of the Eighth Amendment. If you recall, the Court in *Austin* remanded the case to the lower courts for their determination. Concurring in *Austin*, Justice Scalia had argued that the property's relationship to the crime, and not its value, is the only factor that should be considered on the issue of excessiveness.⁶² However, the *Austin* majority (Blackmun, White, O'Connor, Stevens, and Souter) stated that it was not ruling out the possibility that "instrumentality" is a relevant factor but that the Court of Appeals is not precluded from considering other factors in determining whether the forfeiture of Austin's property was excessive.⁶³ Since *Austin* was decided, lower courts have

59. *Id.* at 2144.

60. *Id.* at 2161 (Stevens, J., dissenting in part and concurring in part).

61. *Id.* at 2163.

62. *Austin*, 509 U.S. at 627-28 (Scalia, J., concurring).

63. *Id.* at 622.

disagreed as to the appropriate test for determining excessiveness.⁶⁴

The Audience:

One comment about the forfeiture case. Whatever Justice Ginsburg may say about it, I do not think it was feminism, because the woman involved had just succeeded in getting herself off of welfare by using that car to establish a paper route. So she may be focusing on the criminal activities of her husband, but it still does not account for how she completely overlooks the innocent owner in the case.

Professor Hellerstein:

Well, I agree. I knew I would get into some trouble with feminism. But I agree with your point. And in fact Justice Thomas expressed a little concern about that aspect in his concurring opinion.⁶⁵ Justice Ginsburg seemed hard-nosed about it. I do not want to get into more detail. I'm just a country lawyer. To get more deeply into that stuff is very, very risky.

II. SEARCH AND SEIZURE

This was yet another term of "Fourth Amendment Lite."⁶⁶ The Court decided three search and seizure cases, only one of which

64. See, e.g., *United States v. One Parcel located at 427 and 429 Hall Street*, 74 F.3d 1165 (11th Cir. 1996) (discussing circuit split). Congress is also considering H.R. 1916, entitled "The Civil Asset Forfeiture Reform Act," which is sponsored by Representative Henry J. Hyde of Illinois and Chairman of the House Judiciary Committee. Hearings on the bill were held in July, 1996 which, if passed, would eliminate the cost bond required of civil forfeiture claimants, provide appointed counsel for indigent claimants and make substantial changes to the "innocent owner defense."

65. *Bennis*, 116 S. Ct. at 1002.

66. U.S. CONST. amend. IV. The Fourth Amendment provides in pertinent part: "The right of the people to be secure in their persons, houses,

is particularly noteworthy. In *Whren v. United States*, the Court resolved the question of how courts should determine the reasonableness of traffic stops when the claim is that the police have used such a stop as a pretext in order to pursue their suspicions concerning more serious crimes. In short, the Court held that a purely objective test governs.⁶⁷ Thus, police officers who lack grounds for stopping a person they suspect of criminal activity may use the individual's commission of a traffic offense as a basis for making a stop, during which they may investigate their suspicions further.⁶⁸

Factually, *Whren* is a classic case of the type of police conduct that has concerned those sensitive to Fourth Amendment values: the use by the police of minimal violations of traffic offenses as a pretext to stop and search vehicles. Plainclothes vice-squad officers in an unmarked car observed two young black men riding in a truck in "a high drug area" of Washington, D.C.⁶⁹ They became suspicious when they saw the driver looking into the lap of his passenger while pausing for what seemed to them an unusually long time at a stop sign.⁷⁰ When the officers made a U-turn to follow the truck, the driver made a turn without signaling and sped away.⁷¹ The officers followed the truck and overtook it when it had stopped for a traffic light.⁷² One of the officers approached the driver's door, identified himself, and told the driver to put the truck in park.⁷³ At the driver's window, the officer saw two large plastic bags of what appeared to be crack cocaine in Whren's hands.⁷⁴

Charged with various drug offenses. Whren and the driver moved to suppress the drugs on the ground that the traffic stop

papers, and effects, against unreasonable searches and seizures, shall not be violated," *Id.*

67. *Id.* at 1772-74.

68. *Id.* at 1772.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

and the officer's asserted ground for approaching their truck -- to warn the driver concerning traffic violations -- was pretextual.⁷⁵ The D.C. Circuit, affirming their convictions, held that whatever the subjective beliefs of the particular officer, a traffic stop is constitutional if a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation.⁷⁶

In the Supreme Court, the defendants argued that, in the unique context of civil traffic regulations, probable cause is not enough, that use of vehicles is so heavily and technically regulated that it creates both the opportunity and temptation for police to use traffic stops as a means of investigating other crimes for which they lack grounds, or as a means of enforcing traffic laws on the basis of race.⁷⁷ They urged the Court to adopt a rule that would hold unreasonable traffic stops even though supported by the requisite level of suspicion if a reasonable police officer would not have made the stop absent an improper purpose.⁷⁸ Writing for the Court, Justice Scalia held that the temporary detention of a motorist as to whom there is probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective.⁷⁹ He distinguished the inventory search⁸⁰ and administrative inspection cases,⁸¹ in which the Court had indicated that pretextual use of those procedures would be improper, on the ground that they did not involve situations in which there is

75. *Id.*

76. *United States v. Whren*, 53 F.3d 371 (D.C. Cir. 1996).

77. *Whren*, 116 S. Ct. at 1773.

78. *Id.*

79. *Id.* at 1772-77.

80. *Florida v. Wells*, 495 U.S. 1, 4 (1990) ("An inventory search must not be used as a ruse for a general rummaging in order to discover incriminating evidence."); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) ("No showing that the police, who were following standard procedures, acted in bad faith or for the sole purpose of investigation.").

81. *New York v. Burger*, 482 U.S. 691, 716-17, n.27 (1987) (the search did not appear to be "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws").

probable cause.⁸² Where probable cause is present, he said, prior decisions foreclose the argument that ulterior motives can invalidate police conduct based upon it.⁸³ Justice Scalia also rejected the argument that because perfect compliance with traffic laws is virtually impossible, an objective test affords police carte blanche to stop whomever they wish. He noted that the Court was unable to identify a principle that would allow it to decide "at what point a code of law becomes so expansive and so commonly violated that the infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."⁸⁴ Even if such a principle were clear, he observed, the Court would not know by what standard it could decide which particular provisions of the law are sufficiently important to merit enforcement.⁸⁵ To the extent that it is alleged that the police are selectively enforcing traffic laws because of racial bias, he stated that those claims are properly dealt with under the Equal Protection Clause, not the Fourth Amendment.⁸⁶

Given the Court's current composition, *Whren* is not a surprise. More noteworthy is the Court's unanimity. The facts of the case may be simple, but the problems that lie beneath the surface of police enforcement of traffic laws are not, especially when those laws are "enforced" against African-Americans and other minorities. The petitioners' brief in *Whren* presented compelling data about the centrality of race in police determinations to stop people for minor traffic offenses, in the hope (expectation?) of finding evidence of drug offenses. And consider how easy it is. In one case, a Texas state trooper stopped a van with four black occupants after his car had passed the van, doused its lights and pulled onto the shoulder. When the van passed, the driver changed lanes to allow some distance between the van and the

82. *Whren*, 116 S. Ct. at 1773.

83. *Id.* at 1774, citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 584, n.3 (1983); *United States v. Robinson*, 414 U.S. 218 (1973), *Gustafson v. Florida*, 414 U.S. 260, 266 (1973); *Scott v. United States*, 436 U.S. 128, 138 (1978).

84. *Id.* at 1777.

85. *Id.*

86. *Id.* at 1774.

police car on the shoulder. The van was then stopped for an illegal lane change. Even though the court noted the trooper's "remarkable record" of turning traffic stops into drug arrests on 250 prior occasions, it upheld the stop.⁸⁷ In another case, a Utah deputy saw a car being driven by an African-American man straddle the center line for one second before moving to the other lane. This stop was upheld on the ground that the officer had sufficient suspicion that the driver was impaired.⁸⁸ Thus, there is a substantial empirical basis for the assertion that, in our democratic republic, there exists, independent of positive law, a crime known as "D.W.B." -- Driving While Black.⁸⁹

In contrast to Justice Scalia's *Whren* opinion, Chief Judge Seymour of the Tenth Circuit, dissenting in a pre-*Whren* case,⁹⁰ pointed out that in *Terry v. Ohio*,⁹¹ the Supreme Court was quite aware that harassment of minority groups by certain police officers does occur, and that the objective standard adopted in *Terry* was equally called for in the traffic infraction context.⁹² "It is difficult," he said, "to justify a stop as reasonable, even if supported by an observed violation, if the undisputed facts indicate that the violation does not ordinarily result in a stop."⁹³ Justice Scalia's assertion that claims premised on the selective enforcement of traffic laws based on race are properly the subject of the Equal Protection Clause strikes me as disingenuous.

87. *United States v. Roberson*, 6 F.3d 1088 (5th Cir. 1993) *cert. denied*, 510 U.S. 1204 (1994). Although the divided court concluded that the state trooper had a "legitimate basis for stopping the van," *Id.* at 1092, the court indicated its dissatisfaction with "what appears to be a common practice of some law enforcement officers to use technical violations as a cover for exploring more serious violations" *Id.*

88. *United States v. Lee*, 73 F.3d 1034 (10th Cir. 1996). *See also* *United States v. Harvey*, 16 F.3d 109 (6th Cir. 1994); *Washington v. Vogel*, 880 F. Supp. 1534 (M.D.Fla. 1995); *Lowery v. Commonwealth*, 388 S.E.2d 265 (Va. 1990).

89. Henry Louis Gates, Jr. *Thirteen Ways of Looking at a Black Man*, THE NEW YORKER, Oct. 1995 at 59.

90. *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995) *cert. denied*, 116 S. Ct. 2529 (1996).

91. 392 U.S. 1 (1968).

92. *Botero-Ospina*, 71 F.3d at 790.

93. *Id.*

especially when it is made during the same term in which the Court rejected a discovery demand by the defendant based on his claim of selective prosecution because of race⁹⁴ -- a case that I will discuss later.

The second search and seizure case, *Ornelas v. United States*,⁹⁵ is not as much a Fourth Amendment case as it is one that is determinative of the appropriate standard of appellate review that governs the issues of reasonable suspicion to stop and probable cause to search. *Ornelas* was an eight to one ruling with Chief Justice Rehnquist writing for the majority and holding that an appellate court must review those questions *de novo*.⁹⁶ Milwaukee detectives who were conducting narcotics surveillance became suspicious of a car they spotted in a motel parking lot.⁹⁷ Checks of the motel's guest list and vehicle registration records revealed two names, both of which turned up on a data base of narcotics traffickers.⁹⁸ When the defendants left the motel and went to the car, the detectives confronted them and asked whether they had any illegal drugs or contraband.⁹⁹ The defendants said no and acquiesced when the detectives asked for permission to search the car.¹⁰⁰ One of the detectives suspected that there was contraband behind a loose door panel, partly, he later testified, because a nearby screw was rusty.¹⁰¹ The detective dismantled the panel and found cocaine hidden behind it.¹⁰² The trial court found that there was reasonable suspicion to stop the defendants and that the detectives' suspicion ripened into probable cause once the loose panel was discovered. The Seventh Circuit reviewed deferentially the district court's determinations of reasonable suspicion and probable cause, stating that it would

94. *United States v. Armstrong*, 116 S. Ct. 1480 (1996).

95. 116 S. Ct. 1657 (1996).

96. *Id.* at 1662.

97. *Id.* at 1659.

98. *Id.*

99. *Id.*

100. *Id.* at 1660.

101. *Id.*

102. *Id.*

reverse only upon a finding of clear error.¹⁰³ The court found no clear error in the reasonable suspicion determination but remanded the case as to the probable cause finding for a determination whether the detective was credible when he testified about the loose panel.¹⁰⁴ A magistrate judge found the testimony credible and the district court accepted that finding. On appeal once again, the Seventh Circuit held that determination not clearly erroneous.¹⁰⁵ Chief Justice Rehnquist held that the court of appeals erred when it applied a deferential standard of review and he explained that the process for determining whether reasonable suspicion and probable cause exist requires two steps: determining the events leading up to the stop and search (the historical facts), and deciding whether those facts, viewed from the standpoint of a reasonable police officer, amounted to reasonable suspicion or probable cause (a mixed question of law and fact).¹⁰⁶ He pointed out that anything less than *de novo* review of these issues would permit Fourth Amendment questions to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause; such varied results would be inconsistent with a unitary system of law.¹⁰⁷ He noted further that independent review is necessary if appellate courts are to maintain control of, and to clarify the legal principles of, reasonable suspicion and probable cause.¹⁰⁸

Justice Scalia, the lone dissenter, argued that a deferential standard of review is the only practicable approach in search and seizure cases.¹⁰⁹ Even though he acknowledged that the determination of probable cause or reasonable suspicion involves a mixed question of fact and law, he insisted that merely labeling them mixed questions does not establish that they should receive

103. *United States v. Ornelas*, 16 F.3d 714, 719 (7th Cir. 1994).

104. *Id.* at 721-22.

105. *United States v. Ornelas*, 52 F.3d 328 (7th Cir. 1995) *cert. granted*, 116 S. Ct. 417 (1995).

106. *Ornelas*, 116 S. Ct. at 1661-62.

107. *Id.* at 1662.

108. *Id.*

109. *Id.* at 1664-65 (Scalia, J., dissenting).

de novo review.¹¹⁰ He contended that a more deferential standard of review is necessary because the district court has more expertise and also because the fact bound nature of many search and seizure cases means that individual appellate decisions lack "law-clarifying value."¹¹¹

That the Court had to resolve a split in the circuits on this issue is the most noteworthy aspect of this case. Although Justice Scalia is correct that probable cause and reasonable suspicion issues are heavily fact-driven, it does not follow that *de novo* review is unimportant. First, as the Chief Justice pointed out, the Court had never deferred on these issues to trial court determinations.¹¹² Second, the framework for appellate discussion of probable cause and reasonable suspicion is set frequently by fact patterns discerned from prior rulings. Third, and perhaps most important, trial judges, especially in high profile cases or those involving very serious felonies, are frequently reluctant to suppress crucial evidence and interdict a prosecution. Therefore, many judges tend to construe reasonable suspicion and probable cause quite broadly. Consequently, deferential review exacerbates the risk that Fourth Amendment principles will be diluted. On the other hand, *de novo* review insures that such determinations are made by a court that is institutionally removed from pressures that exist at the trial level.¹¹³

The Court's only other Fourth Amendment case last term was decided *per curiam*. In *Pennsylvania v. Labron*,¹¹⁴ the Court reversed two rulings by the Pennsylvania Supreme Court that it read as interpreting the Fourth Amendment to require the police

110. *Id.* at 1664.

111. *Id.*

112. *Id.* at 1662.

113. In *Thompson v. Keohane*, 116 S. Ct. 457 (1996), the Court reached a result similar to that in *Ornelas* about a state court's determination of whether a suspect was "in custody" during questioning and was therefore entitled to be warned of his *Miranda* rights. Justice Ginsburg, writing for a seven-member majority, concluded that the "in custody" determination is a mixed question of law and fact that must be independently reviewed by a federal court on habeas corpus review of a state court judgment. *Id.* at 466-67.

114. 116 S. Ct. 2485 (1996).

to obtain a warrant for a vehicle search if they have time to do so. The majority pointed out that the rulings were inconsistent with *California v. Carney*,¹¹⁵ and reiterated the rule that "if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more."¹¹⁶ Justice Stevens, joined in dissent by Justice Ginsburg, did not dispute the merits of the majority's Fourth Amendment position but maintained that the Pennsylvania Supreme Court had rested its decisions on the Pennsylvania Constitution.¹¹⁷

III. DUE PROCESS/FAIR TRIAL

Two Due Process/Fair Trial cases were decided this past term.¹¹⁸ In *Cooper v. Oklahoma*,¹¹⁹ a unanimous Court struck down an Oklahoma statute that required a criminal defendant to prove by clear and convincing evidence that he or she is incompetent to stand trial.¹²⁰ Four years ago, in *Medina v. California*,¹²¹ the Court held that it was *not* a denial of due process to place upon the defendant the burden of proving incompetency by a preponderance of evidence. Justice Stevens, who dissented in *Medina*, authored the opinion in *Cooper* and he rejected Oklahoma's argument that a clear and convincing standard is a reasonable accommodation of the opposing interests of the State and the defendant.¹²² He pointed out that even

115. 471 U.S. 396 (1985).

116. *Labron*, 116 S. Ct. at 2487.

117. *Id.* at 2487-92 (Stevens, J., dissenting).

118. See *Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996); *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996).

119. 116 S. Ct. 1373 (1996).

120. OKLA. STAT. tit. 22, S. 1175.4 (B) (1991) provides in relevant part, that: "The court, at the hearing on the application [for determination of competency], shall determine, by clear and convincing evidence, if the person is incompetent. The person shall be presumed to be competent for the purposes of the allocation of the burden of proof and burden of going forward with the evidence." *Id.*

121. 505 U.S. 437 (1992).

122. *Cooper*, 116 S. Ct. at 1377.

though *Medina* allows a State to require the defendant to carry the burden of proving incompetence, requiring that he do so by clear and convincing evidence rather than by a preponderance of the evidence is a very different question because it is nothing less than whether a state "may proceed with a criminal trial after the defendant has demonstrated that he is more likely than not incompetent."¹²³ In resolving the issue, Justice Stevens looked first to historical experience and then to current state practices. He observed that although the English common law cases accepted the fundamental proposition that an incompetent accused could not be put to trial, they furnished no guidance as to competency standards.¹²⁴ Nonetheless, he noted, that by framing the issue for the jury as to whether the defendant was "more likely than not" incompetent, the case law suggested a standard no more demanding than a preponderance of the evidence.¹²⁵ He pointed out also that later cases using a preponderance standard did not suggest that they were making any departure from pre-Constitution case law.¹²⁶ In other words there is significance, as Sherlock Holmes would have it, in that the dog did not bark. Justice Stevens also relied on the fact that the vast majority of states had not adopted a clear and convincing standard, and noted that Oklahoma was one of only four states that had.¹²⁷

The essence of Justice Stevens's opinion was his conclusion that imposition of a clear and convincing burden of proof creates a significant risk of an erroneous determination that the defendant is competent, and this contravened the fundamental principle that an incompetent defendant's right not to be forced to trial must be jealously guarded.¹²⁸ He noted that in *Medina* the Court, in holding that placing the burden of proof on the defendant to establish his incompetency did not violate due process, observed

123. *Id.*

124. *Id.* at 1378.

125. *Id.*

126. *Id.* at 1378-80.

127. *Id.* at 1380. *See also* CONN. GEN. STAT. § 54-56d (b)(1995); 50 PA. CONS. STAT. § 7403(a) (Supp. 1995); R.I. GEN. LAWS § 40.1-5.3-3 (Supp. 1995).

128. *Cooper*, 116 S. Ct. at 1381.

that its ruling would affect the outcome of competency determinations only in a narrow class of cases where the evidence is in equipoise, -- where the evidence that the defendant is competent is just as strong as the evidence that he is incompetent.¹²⁹ He pointed out, however, that under the Oklahoma statute, a clear and convincing standard affects a class of cases in which the defendant has already demonstrated that he is more likely than not incompetent.¹³⁰ In that type of case, Justice Stevens reasoned, the defendant's fundamental right to be tried only while competent outweighs the State's efficiency interests. He emphasized that because a defendant's other rights and his ability to communicate effectively with counsel are dependent on his competency, an erroneous determination of competence threatens the basic fairness of the trial itself.¹³¹ The weakness in the State's argument can best be seen by its attempt to benefit from *Addington v. Texas*,¹³² in which the Court held that in order to commit a person involuntarily to a civil mental hospital the State must establish by clear and convincing evidence that the person is in need of confinement. The State argued that *Addington* supported imposition of the same standard for determining incompetency. Justice Stevens responded by pointing out the crucial difference between the two situations:

The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty. The *prohibition* against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent.¹³³

The Court's unanimity in *Cooper* suggests that there is little to discuss. That only four States had placed the burden on the

129. *Id.*

130. *Id.* at 1381-83.

131. *Id.* at 1381-84.

132. 441 U.S. 418 (1979).

133. *Cooper*, 116 S. Ct. at 1384.

defendant to establish incompetence by a clear and convincing standard signals that they were well out of the mainstream. In fact, Justice Stevens suggested that Oklahoma and Connecticut may have been prompted to enact this requirement as the result of *Addington*. If that is the case, they seriously misread *Addington*.

In *Montana v. Egelhoff*,¹³⁴ by a five to four vote, the Court upheld the constitutionality of a Montana statute that precludes a jury from considering voluntary intoxication on the issue of a defendant's intent to commit the crime, even when intent is a necessary element of the crime.¹³⁵ The justices were in substantial disagreement as to how to even characterize the statute and Justice Ginsburg's vote was decisive since she concurred in the judgment, but not in Justice Scalia's plurality opinion. Justice O'Connor dissented and was joined by Justices Stevens, Souter, and Breyer, Justice Ginsburg's more usual companions.

The Montana Supreme Court found the statute violative of due process because it deprived the defendant of his right to present all relevant evidence to rebut the State's proof of each element of the offense, and because it also shifted impermissibly to the defendant the burden of proof on an element of the crime of deliberate homicide.¹³⁶ Justice Scalia's plurality opinion, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, held that a defendant's right to have a jury consider voluntary intoxication evidence in determining whether he possesses the requisite mental state is not a fundamental principle of justice.¹³⁷ He conceded that over the last century most jurisdictions have

134. 116 S. Ct. 2013 (1996).

135. MONT. CODE ANN., § 45-2-203 (1995) provides:

"A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition."

Id.

136. *State v. Egelhoff*, 900 P.2d 260 (Mont.), *cert. granted*, 116 S. Ct. 593 (1995).

137. *Egelhoff*, 116 S. Ct. at 2021.

come to allow voluntary intoxication as a defense on the issue of specific intent.¹³⁸ He concluded, however, that such acceptance is too recent and has not received sufficiently uniform and permanent allegiance to qualify as fundamental.¹³⁹ He also pointed out that Montana's nonacceptance implements a moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences.¹⁴⁰ He distinguished both *Chambers v. Mississippi*¹⁴¹ and *Crane v. Kentucky*,¹⁴² upon which Egelhoff relied. *Chambers*, he said, does not stand for a broad rule that the exclusion of relevant exculpatory evidence violates a defendant's right to present a defense, and *Crane* does not stand for the proposition that making the prosecution's burden lighter violates due process.¹⁴³ Any evidentiary rule, he observed, can have that effect and the Court has often held that states may facilitate the prosecutor's task unless the change itself violates a fundamental principle of justice.¹⁴⁴

Unlike the plurality, Justice Ginsburg viewed the statute as much more than merely an evidentiary proscription. She believed it was a conscious choice by the Montana Legislature to redefine the meaning of "purposefully" and "knowingly;" this made evidence of voluntary intoxication logically irrelevant to proof of the defendant's requisite mental state.¹⁴⁵ However, she saw nothing unconstitutional about this because, given the common law tradition of nonrecognition of voluntary intoxication as a defense and adherence by a significant minority of states to that tradition, it did not offend a fundamental principle of justice.¹⁴⁶

138. *Id.* at 2018-19.

139. *Id.* at 2021.

140. *Id.* at 2020.

141. 410 U.S. 284 (1973).

142. 476 U.S. 683 (1986).

143. *Id.* at 2021-22.

144. *Id.* at 2222.

145. *Id.* at 224. (Ginsburg, J., concurring).

146. *Id.* at 2025. In a separate dissent, Justice Souter argued that the statute could be upheld if interpreted as Justice Ginsburg read it, but that the Montana Supreme Court's interpretation precluded such a reading and that the state,

Dissenting, Justice O'Connor brought still a different perspective to the Montana statute; she believed that the only reason it was enacted was to improve the prosecution's chances of obtaining a conviction.¹⁴⁷ She argued that this could not be achieved without violation of the Due Process Clause because the statute effectively deprived the defendant of his due process right to present a defense.¹⁴⁸

Justice Breyer, joined by Justice Stevens, also dissented and stated that even read Justice Ginsburg's way, as a statute that redefined the requisite mental state, the statute's constitutionality was open to doubt.¹⁴⁹ However, he rejected Justice Ginsburg's interpretation and suggested that if the Montana Legislature had wanted to equate voluntary intoxication, knowledge and purpose, it would have written a statute that plainly said so.¹⁵⁰ Moreover, he argued, to read the statute Justice Ginsburg's way rendered voluntary intoxication the legal equivalent of purpose and knowledge but only where external circumstances would establish purpose or knowledge.¹⁵¹ He pointed out that this produced anomalous results:

[a]n intoxicated driver stopped at an intersection who unknowingly accelerated into a pedestrian would likely be found guilty, for a jury unaware of intoxication would likely infer knowledge or purpose. An identically intoxicated driver racing along a highway who unknowingly sideswiped another car would likely be found innocent, for a jury unaware of intoxication would likely infer negligence.¹⁵²

In light of Justice Ginsburg's controlling vote, this case turned on how the Montana statute was characterized. Had Justice Ginsburg considered it evidence-precluding as to an element of a crime rather than a redefinition of the crime itself, the statute

therefore, had failed to demonstrate why, as an evidence-preclusion rule, the statute was justified. *Id.* at 2033 (Souter J., dissenting).

147. *Id.* at 2031 (O'Connor, J., dissenting).

148. *Id.* at 2030.

149. *Id.* at 2035 (Breyer, J., dissenting).

150. *Id.*

151. *Id.* at 2035.

152. *Id.*

likely would not have been sustained. For some reason, she chose not to accept the interpretation placed upon the statute by the Montana Supreme Court. As Justice Souter pointed out, not accepting the interpretation given a state statute by the State's highest court is a significant departure from normal practice.¹⁵³ Justice Ginsburg's choice to depart is a puzzlement and it turned the case.

IV. SIXTH AMENDMENT/RIGHT TO JURY TRIAL

In *Lewis v. United States*,¹⁵⁴ the defendant was charged with two misdemeanor counts of obstructing the mails. Each count carried a maximum sentence of six months and therefore each, standing alone, was a "petty offense" to which the right to trial by jury did not attach.¹⁵⁵ However, the defendant could have been subject to consecutive sentences if convicted of both counts. The trial court denied the defendant's motion for a jury trial and also stated that it would not impose a sentence of more than six months, even if the defendant were convicted of both counts. The Court granted certiorari to resolve a difference among the circuits on the issue of whether petty offenses, when aggregated in a single prosecution, require a jury trial.¹⁵⁶

In a five to four decision, written by Justice O'Connor, the Court held that the scope of the Sixth Amendment jury trial right does not change just because a defendant faces multiple charges.¹⁵⁷ She noted that the maximum penalty has long been the criterion for determining whether an offense was "petty," that it signified a legislature's judgment about the severity of the crime, and that a prosecutor's and judge's decision to try multiple counts together has no effect on this legislative determination.¹⁵⁸

153. *Id.* at 2033 (Souter, J., dissenting), citing *R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992); *Murdock v. Memphis*, 20 Wall. 590 (1875).

154. 116 S. Ct. 2162 (1996).

155. *Id.* See *Blanton v. North Las Vegas*, 489 U.S. 538 (1989); *Baldwin v. New York*, 399 U.S. 66 (1970).

156. *Lewis*, 116 S. Ct. at 2166.

157. *Id.* at 2165.

158. *Id.* at 2166-67.

She pointed out that a judge's decision that the jury trial right applies when counts are joined would amount to a substitution of the judge's assessment for that of the legislature.¹⁵⁹ Also, she emphasized that the offenses with which Lewis was charged were presumptively petty and that where the legislature has determined that an offense is petty, the Court does not look to the potential prison term faced by a particular defendant who is charged with more than one such petty offense.¹⁶⁰ She distinguished *Codispoti v. Pennsylvania*,¹⁶¹ in which the defendant faced multiple charges of criminal contempt, on the ground that the legislature had set no specific penalty, so the Court had to look at the punishment actually imposed.¹⁶²

Justice Kennedy, joined by Justice Breyer, concurred in the judgment but only because the magistrate judge said at the outset that she would not sentence the defendant to more than six months.¹⁶³ He called the majority opinion "one of the most serious incursions on the right to jury trial in the Court's history,"¹⁶⁴ and expressed the view that *Codispoti* and *Taylor v. Hayes*¹⁶⁵ established that the right to jury trial extends to a defendant who is sentenced in one proceeding to more than six months imprisonment.¹⁶⁶

The major hurdle that confronted Lewis was the paucity of authoritative source material for the proposition that aggregation of petty offenses triggers the Sixth Amendment right to a jury trial. He also argued that since the Sixth Amendment states that in "all criminal *prosecutions*," there is a right to jury trial, the

159. *Lewis*, 116 S. Ct. at 2166.

160. *Id.* at 2168.

161. 418 U.S. 506 (1974).

162. *Lewis*, 116 S. Ct. at 2167-68.

163. *Lewis*, 116 S. Ct. at 2172 (Kennedy, J., concurring).

164. *Id.* at 2169.

165. 418 U.S. 488 (1974).

166. *Lewis*, 116 S. Ct. at 2170-71. Justice Stevens, joined by Justice Ginsburg, agreed with Justice Kennedy's Sixth Amendment analysis but parted company with him as to the effect of the magistrate judge's representation that she would not sentence Lewis to more than six months if he were convicted. *Id.* He maintained that the right to a jury trial cannot be defeated by a judge's promise of a short sentence. *Id.* at 2173-74 (Stevens, J., dissenting).

Framers must have intended the jury trial right to exist in cases of aggregated petty offenses. But the Court did not even address that argument and it is easy to understand why--it simply proves too much because such a literal reading would also encompass *any* prosecution including a petty offense that is not punishable by more than six months. Lewis's interpretivist Sixth Amendment argument thus impaled itself on the Court's venerable jurisprudence holding that there is no right to a jury for a petty offense.¹⁶⁷

Justice Kennedy's vehement denunciation of the Court's decision was driven substantially by his concerns about prosecutorial abuse insofar as a prosecutor, seeking to circumvent a defendant's jury trial right, could decide to carve up charges into segments punishable by no more than six months apiece.¹⁶⁸ If Justice Kennedy's fear is real, rather than theoretical, then the *Lewis* decision is a matter for legitimate concern. However, the Court did not appear to share Justice Kennedy's trepidations and I have not observed or heard from others that prosecutors have proceeded in such a fashion.

IV. EQUAL PROTECTION/SELECTIVE ENFORCEMENT

Defendants who challenge prosecutorial charging decisions on equal protection grounds have generally faced an uphill struggle. Although courts have shown greater sensitivity where First Amendment rights are implicated,¹⁶⁹ those claiming discriminatory enforcement have not met with much success. In *United States v. Armstrong*,¹⁷⁰ the Court did not ease the way for such challenges in the future. The defendants in *Armstrong* were charged with conspiracies to possess and distribute more than

167. *See, e.g.*, *Baldwin v. New York*, 399 U.S. 66 (1970).

168. *Lewis*, 116 S. Ct. at 2171 (Kennedy, J., concurring).

169. *See, e.g.*, *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc) (Government in a failure to register for the draft prosecution should be required to explain the reasons for moving against the defendant, a leader in the anti-Vietnam War movement).

170. 116 S. Ct. 1480 (1996).

fifty grams of crack cocaine.¹⁷¹ They claimed that the Los Angeles United States Attorney's office decided to prosecute them because they were black and they moved to dismiss the indictment or, alternatively, for discovery of information possessed by the government that they believed would substantiate their claim.¹⁷² They submitted an affidavit by a "Paralegal Specialist" employed by the Office of the Federal Public Defender that alleged that in all twenty-four drug prosecutions closed by that office in 1991 that were brought under the same statutes under which the defendants were prosecuted, the defendant was black.¹⁷³ The government denied that race played any part in the decision to prosecute and it submitted a Drug Enforcement Administration Report that stated that the manufacture and distribution of crack are controlled by Jamaicans, Haitians, and Black street gangs.¹⁷⁴ The defendants countered with affidavits from various criminal justice and drug treatment personages that asserted that although whites as well as blacks use crack, only blacks are prosecuted for crack offenses in Los Angeles.¹⁷⁵ The district court granted the discovery motion and when the government refused to comply, it dismissed the indictment. A divided panel of the Ninth Circuit reversed,¹⁷⁶ but an *en banc* panel affirmed the district court's order of dismissal.¹⁷⁷

With Chief Justice Rehnquist writing for the majority, the Supreme Court reversed. He held that the government's obligation under Rule 16 of the Federal Rules of Criminal Procedure¹⁷⁸ to turn over to the defendant materials which it

171. *Id.* at 1483.

172. *Id.*

173. *Id.*

174. *Id.* at 1484

175. *Id.*

176. *United States v. Armstrong*, 21 F.3d 1431 (9th Cir. 1994).

177. *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995) *cert. granted*, 116 S. Ct. 377 (1995).

178. FED. R. CRIM. P. 16 (a)(1)(c). This rule provides in pertinent part: Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions

possesses and are material to the preparation of the defendant's defense does not include all claims that might constitute a "sword" attacking the charges against a defendant; the phrase "defendant's defense" refers only to a defendant's response, or "shield" to the prosecution's case-in-chief.¹⁷⁹ To interpret Rule 16 otherwise, he stated, would disrupt the symmetry in the rule and create an anomaly because the government's work product in other prosecutions would be open to defense inspection, while the government's work-product in the defendants' own case would, because of Rule 16 (a)(2),¹⁸⁰ remain off limits.¹⁸¹

Although the Court held that Rule 16 is unavailable for a selective enforcement discovery quest, it specified that discovery was available if the defendant could make a significant showing.¹⁸² The Chief Justice emphasized that a selective

thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id.

179. *Armstrong*, 116 S. Ct. at 1485. When it comes to matters that would benefit a defendant, the Chief Justice has an apparent affection for the "sword"- "shield" metaphor in defeating a defendant's claim. *Id.* at 1485. *See, e.g.,* *Ross v. Moffitt*, 417 U.S. 600 (1974) (holding that an indigent defendant is not entitled to the assistance of counsel in pursuing a discretionary appeal or petition for certiorari.) In disposing of the defendant's due process claim there, the Chief Justice emphasized that "[i]t is ordinarily the defendant, rather than the State, who initiates the appellate process . . . and that the "defendant needs an attorney on appeal not as a shield . . . but rather as a sword to upset the prior determination of guilt." *Id.* at 610-11.

180. FED. R. CRIM. P. 16 (a)(1)(A)(2). This rule provides:

Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and D of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses except as provided in 18 U.S.C. § 3500.

Id.

181. *Armstrong*, 116 S. Ct. at 1485.

182. *Id.* at 1488.

prosecution claim asks the court to tread upon the province of the executive by calling into question the presumption that a prosecutor has not violated equal protection principles.¹⁸³ To rebut that presumption, a defendant must demonstrate that the prosecutorial policy had a discriminatory effect, that it was motivated by a discriminatory purpose, and that similarly situated individuals of a different race were not prosecuted.¹⁸⁴ On one hand, he underscored the need for requiring a similarly rigorous standard for discovery in aid of a selective prosecution claim -- that of a credible showing of different treatment, while on the other hand, he did not think a defendant should find the showing too difficult to make.¹⁸⁵ Nonetheless, he held that the defendants did not make that showing. He suggested that they could have investigated whether similarly situated persons of other races were prosecuted by the State of California, and were known to federal law enforcement officers but were not prosecuted in federal court.¹⁸⁶ The problem with the defendants' submission, he stated, was that it failed to identify individuals who were not black, who could have been prosecuted for the offenses for which they were charged, but were not.¹⁸⁷

Justice Stevens was the only dissenter.¹⁸⁸ Although he agreed with the Court that Rule 16 is inapplicable to selective prosecution claims, he argued that the district court possessed inherent authority to order discovery and that the order in this case was proper when considered in light of the need for judicial

183. *Id.* at 1486.

184. *Id.* at 1487-88.

185. *Id.* at 1489.

186. *Id.*

187. *Id.*

188. *Id.* at 1492 (Stevens, J., dissenting). Justice Souter concurred but stated that he joined the Court's discussion of Rule 16 only as to the facts of this case. *Id.* at 1489 (Souter, J., concurring). Justice Ginsburg also concurred but emphasized that the majority's holding regarding Rule 16 applies only to selective prosecution claims. *Id.* (Ginsburg J., concurring). Justice Breyer concurred in part and in the judgment but believed that the Court had taken too narrow a view of Rule 16, and stated that the rule "does not limit a defendant's discovery rights to documents related to the Government's case-in-chief." *Id.* at 1489-90 (Breyer, J., concurring).

vigilance over certain types of drug prosecutions.¹⁸⁹ In his view, that need was underscored in this case by three factors: the severity, under federal law, of sentences for crack cocaine as compared to sentences for powder cocaine, the disparity between state and federal sentences for crack offenses, and undisputed statistics showing that the brunt of the elevated federal penalties falls heavily on African-Americans.¹⁹⁰

Unquestionably, for those who believe strongly that federal law enforcement with respect to cocaine offenses is discriminatory against minorities, especially African-Americans, this decision is a disappointment. However, that not even Justice Stevens could offer a compelling argument for affirmance demonstrates more the weakness of the litigation strategies below than the Court's hostility to affording a defendant claiming racially selective prosecution an adequate avenue to establish the claim. Armstrong's moving papers were relatively thin, consisting of an affidavit of a so-called Paralegal Specialist and a responsive submission that whites as well as blacks use cocaine. In light of such a meager showing, it is understandable that the Court was reluctant to impose on the government the burden of producing data about its prosecutorial practices.

V. HABEAS CORPUS

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, [hereinafter "Antiterrorism Act"]¹⁹¹ which contains extremely formidable obstacles for a state prisoner seeking to obtain habeas corpus relief through a second or successive petition. Within weeks the Court, with four justices dissenting, granted certiorari¹⁹² in *Felker v. Turpin*¹⁹³ to consider the Act's constitutionality and ordered the case to be heard in June.

189. *Id.* at 1492 (Stevens, J., dissenting).

190. *Id.* at 1492-93.

191. Pub. L. No. 104-132, 110 Stat. 1220 (1996).

192. *See Felker v. Turpin*, 116 S. Ct. 1588 (1996). Justices Stevens, Souter, Ginsburg, and Breyer dissented.

193. 116 S. Ct. 2333 (1996).

Scholars and lawyers, as well as the four justices, felt that the Court should not deal with the complex issues raised by the Act in such precipitous fashion. Nonetheless, when the decision upholding the act was rendered on June 28, 1996, the Court was unanimous.

The Antiterrorism Act requires dismissal of a claim presented by a state prisoner in a second or successive petition if the claim was also presented in a prior petition, and also compels dismissal of a claim that was not presented in a prior federal application unless certain extremely rigorous conditions are met.¹⁹⁴ To effectuate these strict standards, the Act creates a gatekeeping mechanism whereby a petitioner must make a motion in the court of appeals for leave to file a second or successive habeas application in the district court, and a three-judge panel determines whether the petitioner has made a *prima facie* showing that the substantive requirements for successive applications have been met.¹⁹⁵ The act further provides that a panel's grant or denial of authorization to file a second or successive petition is not appealable and may not be the subject of a petition for a writ of certiorari.¹⁹⁶

Eugene Wayne Felker, who was sentenced to death, filed with the Supreme Court a document entitled "Petition for Writ of Habeas Corpus, for Appellate or Certiorari Review of the Decision of the United States Circuit Court for the Eleventh

194. Antiterrorism Act § 106(b)(2). The statute requires dismissal of any claim raised in a prior application by the same petitioner and dismissal of a claim raised for the first time in a second or successive petition unless:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id.

195. Antiterrorism Act § 106 (b)(3)(A).

196. Antiterrorism Act § 106 (b)(3)(E).

Circuit, and for Stay of Execution."¹⁹⁷ The court of appeals had dismissed his second habeas petition for failure to meet the standards of section 106(b)(2) of the Act.¹⁹⁸ The issues that confronted the Supreme Court were the extent to which the act applied to a petition for habeas corpus filed in the Supreme Court, whether the application of the act suspended the writ of habeas corpus in Felker's case itself, and whether its preclusion of review by certiorari constitutes an unconstitutional restriction on the Supreme Court's jurisdiction.¹⁹⁹

Writing for the Court, Chief Justice Rehnquist held that although the Antiterrorism Act imposes new conditions on the Court's authority to grant relief, it does not deprive the Court of its jurisdiction to entertain original habeas corpus petitions.²⁰⁰ He explained that the act's preclusion of review, by appeal or certiorari, of grants and denials of permission to file second or successive petitions is similar to an 1868 act that was at issue in *Ex parte Yerger*.²⁰¹ As to that act, which repealed a previous expansion of habeas and appellate jurisdiction, he noted that it did not repeal the Court's power, conferred by the Judiciary Act of 1789 and expanded by an 1867 Act, to grant habeas corpus as

197. *Felker*, 116 S. Ct. at 2337.

198. *Id.*

199. *Id.*

200. *Id.* See 28 U.S.C. §§ 2241, 2254 (1994). 28 U.S.C. § 2241(a) provides:

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

Id.

Section 2254(a) provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is custody in violation of the Constitution or laws or treaties of the United States.

Id.

201. 75 U.S. 85 (1868).

an original matter.²⁰² Similarly, he reasoned, the Antiterrorism Act does not address the Court's power to hear original habeas petitions and to find an implied repeal of that power would be no more appropriate in this instance than it was in *Ex Parte Yerger*.²⁰³ He concluded, therefore, since the Antiterrorism Act does not disturb the Court's authority to grant an original habeas petition, which is an exercise of its appellate jurisdiction, the no-review provision does not violate Article III, Section 2 of the Constitution.²⁰⁴

The Chief Justice also held that the Antiterrorism Act did not violate the suspension of habeas corpus provision of the Constitution.²⁰⁵ Although he acknowledged that the scope of habeas corpus today is much broader than when the Constitution was framed, he concluded that the Suspension Clause limits the power of Congress to suspend the writ in its present form. Even so, he noted, the Act does not amount to a suspension of the writ because its gatekeeper provision merely transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court.²⁰⁶

The *Felker* decision mirrors the approach taken by the Court during the Reconstruction Era and is reflected in cases such as *Yerger* and *Ex Parte McCordle*.²⁰⁷ By construing a statute as a reduction in the Court's appellate jurisdiction but not a total cancellation of it, the Court again leaves for the enjoyment of the

202. *Felker*, 116 S. Ct at 2338-39.

203. *Id.*

204. *Id.* U.S. CONST. Art. III, § 2 provides in pertinent part:

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id.

205. *Id.* at 2339-40. U.S. CONST. art. I, § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*

206. *Felker*, 116 S. Ct. at 2340.

207. 74 U.S. 506 (1868).

scholars the unresolved (and unresolvable?) debate over the extent of Congressional power to affect the Supreme Court's appellate jurisdiction.²⁰⁸

But what of the people on death row? Oh yes, Virginia, despite the nasties in Congress, Christmas remains and the Supreme Court still has original jurisdiction to entertain a habeas corpus petition. But will Santa Claus ever come? That is quite a different question. As the Chief Justice reminded us, even before the Antiterrorism Act became law, the Court's own Rule 20.4 required a habeas petitioner to "show exceptional circumstances warranting the exercise of the Court's discretionary powers and show that adequate relief cannot be obtained in any other form or from any other court," and that original writs are "rarely granted."²⁰⁹ Enter the Antiterrorism Act, accompanied by the Chief Justice's observation that the act imposes new requirements for the granting of relief which themselves inform the Court's authority to grant habeas relief.²¹⁰ In this setting, Felker's habeas claims stood no chance of success and they received a terse burial by the Chief Justice who concluded that they did not materially differ from numerous other claims made by successive habeas petitioners.²¹¹ In the film, *The Hustler*, Paul Newman (Fast Eddie) at the conclusion of his round of pool shots says to Jackie Gleason (Minnesota Fats), "I didn't leave you much, Fats." Gleason replies, "Fast Eddie, you left me just enough." I doubt that Fats would say the same about the Court's jurisdiction to entertain original writs for habeas corpus.

The next habeas case, *Gray v. Netherland*,²¹² is particularly disturbing. Gray, a death row inmate, sought habeas relief

208. See Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953); Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896-99 (1984).

209. *Felker*, 116 S. Ct. at 2341.

210. *Id.* at 2339.

211. *Id.*

212. 116 S. Ct. 2074 (1996).

alleging that he had been denied due process because he was not given adequate notice of particular evidence the prosecution intended to use against him at the penalty phase of his trial. In a five to four decision the Court, in an opinion by Chief Justice Rehnquist, rejected Gray's due process claim because to credit it would constitute a new constitutional rule and that it would, therefore, contravene the "new constitutional rule" principle of *Teague v. Lane*.²¹³

At the outset of Gray's capital murder trial, the prosecution informed him that at the penalty phase, it would introduce statements he made to a co-defendant admitting to specified uncharged murders that due to their notoriety were known as "the Sorrells murders."²¹⁴ However, at the penalty hearing, the prosecution introduced not only Gray's statements about the Sorrells murders but also photographs and police testimony which implicated him in them.²¹⁵ The Chief Justice acknowledged that Gray had not been notified of the additional evidence until one day before it was presented.²¹⁶ However, he noted that rather than seek a continuance, Gray's attorney chose to move to exclude the evidence for lack of notice.²¹⁷ Therefore, for Gray to prevail on these facts, Gray had to establish that due process requires that he receive more than a day's notice, that it required a continuance whether or not he sought one, or that, if he chose not to seek a continuance, exclusion was the only appropriate remedy for the inadequate notice.²¹⁸ Even if Gray could sustain this burden, he must still lose, the Chief Justice held, because adoption of a rule that a capital defendant must be afforded a meaningful opportunity to explain or deny the evidence introduced against him at sentencing would be a new rule and therefore inconsistent with *Teague*.²¹⁹

213. *Id.* at 2084. See *Teague v. Lane*, 489 U.S. 288 (1989).

214. *Gray*, 116 S. Ct. at 2078-79.

215. *Id.* at 2078.

216. *Id.*

217. *Id.*

218. *Id.* at 2083.

219. *Id.*

Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, dissented asserting that there is nothing new in a rule that capital defendants must be afforded a meaningful opportunity to defend against the State's penalty phase evidence.²²⁰ She argued that the rule was clearly violated by the fact that the prosecution had given the defense assurances that prevented the defense from conducting the investigation required to counter the testimony presented by the prosecution.²²¹ She also criticized the majority's emphasis on the absence of a formal request by defense counsel for a continuance, stating her belief that the district court's statement that counsel had pleaded for additional time to prepare, was more than adequate to protect Gray's lack of notice claim.²²² The existence of a fair trial right, she stated, "should not turn on whether counsel next says, 'please exclude this evidence, as opposed to please give me more time.'"²²³

In my view, the majority cut it much too thinly. With life or death in the balance, the majority's characterization of Gray's claim as calling for a new constitutional principle is disingenuous. If the issue is addressed in straight, common sense language, the only question is whether a prosecutor should be permitted to represent one thing to the defense and to then sandbag the defendant by drastically departing from that representation. As Justice Ginsburg perceptively pointed out, the majority applied a divide and conquer approach to Gray's claim. First, as to Gray's claim that the state had misled him, the majority concluded that the claim may not have been raised or addressed in the lower courts. With the "misleading" claim dispatched, the majority then recast the issue as a "notice-of-evidence" claim for which there was no established constitutional principle and rendered it prey to the *Teague* doctrine.²²⁴ The question can be asked whether given what was at stake, the Virginia prosecutors should be allowed to pull such a stunt. Or, if you don't like that formulation (because the issue of whether they

220. *Id.* at 2090 (Ginsburg, J., dissenting).

221. *Id.* at 2091.

222. *Id.* at 2092 n.11.

223. *Id.*

224. *Id.* at 2090-91.

"misled" Gray may not be entirely moribund)²²⁵ whether defense counsel's failure to request clearly that he needed a continuance should be sufficient to offset what the prosecutors did. Some might say that only lawyers can arrange such constructs.

The last case, which I shall discuss only briefly, has been rendered academic by subsequent legislation. In *Lonchar v. Thomas*,²²⁶ the issue was whether a federal court may dismiss a first federal habeas petition for general "equitable" reasons apart from those set forth in the relevant statutes, Federal Habeas Corpus Rules, and precedents. In an opinion by Justice Breyer, the Court said "no" because at this stage in our history, habeas corpus is governed heavily by statute.²²⁷ Lonchar was sentenced to death in 1987 and for the next seven years, he not only did not seek to block his execution, he opposed all efforts by others to do so.²²⁸ However, in June 1995, he filed habeas petitions, first in state and then in federal court, raising numerous claims which he was litigating only to forestall his execution until the method used to kill him would be changed so that he could be an organ donor.²²⁹ Despite Lonchar's long delay in seeking habeas relief, the district court held that Habeas Corpus Rule 9,²³⁰ not some generalized equitable authority to dismiss governed the case, and

225. *Gray*, 116 S. Ct. at 2082-83. The majority did remand the case for the Court of Appeals to determine whether the misrepresentation claim had been properly raised. *Id.*

226. 116 S. Ct. 1293 (1996).

227. *Id.* at 1295-96.

228. *Id.*

229. *Id.*

230. *Id.* at 1296. See 28 U.S.C. § 2254 (1994). Federal Habeas Corpus Rule 9(a) provides:

Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Id. at 1300.

it granted a stay of execution; the Eleventh Circuit vacated the stay on equitable principles.²³¹

The Supreme Court agreed unanimously that the Eleventh Circuit should be reversed but disagreed as to why. Justice Breyer, writing for five members of the Court, first held that as a preliminary matter, if a district court cannot dismiss a petition on the merits before the petitioner's scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot on account of the petitioner's execution.²³² On the central issue of whether the district court possesses equitable authority to dismiss a last minute petition, Justice Breyer relied on *McCleskey v. Zant*²³³ for the proposition that over the years, equitable principles governing habeas corpus have been formalized into statutes, rules, and well-established Supreme Court precedents, and thus equitable considerations not encompassed in these sources may no longer serve as the basis for rejection of a habeas petition.²³⁴ He further emphasized that arguments against ad hoc departure from settled rules are particularly strong when dismissal of a first habeas petition is at issue; such a dismissal is especially serious because it denies the petitioner the protections of the Great Writ entirely.²³⁵ He pointed out that the Habeas Corpus Rules allow district courts ample discretionary authority to tailor the proceedings to dispose quickly, efficiently, and fairly of first habeas petitions that lack substantial merit, but that in cases of delay, Rule 9(a), in contrast to Rule 9(b), which allows for the dismissal of a successive petition as an "abuse of the writ, requires a showing of prejudice

231. *Id.* The district court, in granting a stay to allow time to consider the state's other grounds in its motion to dismiss the petition, held that Lonchar's six year delay in filing the federal habeas petition "could not constitute an independent basis for rejecting the petition." *Id.* The Eleventh Circuit vacated the stay, holding that the scope of the evaluation of the federal habeas petition should extend beyond an analysis of Rule 9. *Id.*

232. *Id.* at 1296-97.

233. 499 U.S. 467 (1991).

234. *Lonchar*, 116 S. Ct. at 1301-02.

235. *Id.* at 1302.

to the state before a first habeas petition may be dismissed.²³⁶ Justice Breyer concluded that Rule 9 itself thus represents the drafters' balancing of the interests, and any equitable considerations not embodied in the rule cannot provide a district court with authority to circumvent the prejudice requirement.²³⁷ The Chief Justice, joined by Justices Scalia, Kennedy, and Thomas, agreed that a stay should have been issued but he argued that precedent established that district courts could consider the eleventh hour nature of a request for a stay of execution even as to a first habeas petition.²³⁸

For those who rejoiced over the Court's sensitivity in *Lonchar* to the history of the Great Writ and to its special importance to first-time habeas seekers, the celebration is short-lived. In the Antiterrorism Act, Congress has enacted time limitations for the bringing of habeas petitions and has thereby obviated the type of problem that confronted the Court in *Lonchar*.²³⁹

In sum, the Court's most interesting turn was its altered course in the forfeiture cases, which signaled a meaningful change in the government's favor. When one plugs the forfeiture cases change into the remainder of the Court's criminal rulings this term, a more general pattern similar to the last few terms emerges. The Court is substantially enlisted on the side of government in the battle against crime. However, one interesting aspect of the past term is that the Court's work in the criminal field ceded center stage to Congress, which passed two major pieces of criminal

236. *Id.* at 1300-02. See 28 U.S.C. § 2254 (1994). Federal Habeas Corpus Rule 9(b) provides in pertinent part: "A second or successive petition may be dismissed if . . . the judge finds that the failure of the petitioner to assert [the grounds raised] in a prior petition constituted an abuse of the writ." *Id.*

237. *Id.* at 1300.

238. *Id.* at 1304-07 (Rehnquist, C.J., concurring).

239. See Antiterrorism Act § 105. The act amends § 2244 (d)(1) by imposing a 1 year period of limitation running from certain specified dates, and with regard to capital cases, the Act amends § 2254 by specifying that a habeas petition "must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of time for seeking such review," with appropriate tolling provisions for certiorari and state collateral review proceedings.

legislation, the Antiterrorism Act and the Prison Litigation Reform Act.²⁴⁰ In *Felker*, the Court has already been exposed to various provisions of the Antiterrorism Act. In the future, I am certain that it will have to deal with other provisions of that Act and with the host of issues raised by the Prison Litigation Reform Act. Nonetheless, in terms of the Court's criminal law rulings, it was a vintage year for government. Next year probably will not be very different. Thank you.

240. Pub. L. No. 104-134, 110 Stat. 1321-66 to 1321-77 (1996).

