

CRIMINAL JUSTICE AND THE 2002-2003 UNITED STATES SUPREME COURT TERM

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I. INTRODUCTION

As an appellate court with discretionary jurisdiction, the U.S. Supreme Court can set its own agenda by selecting issues of interest and importance from the thousands of cases that arrive through petitions for a writ of certiorari.¹ Noticeable changes in the Court's attentiveness to specific issues might provide evidence that certain justices are succeeding in their efforts to shape the Court's role or agenda.² Changes may also develop from unpredictable patterns in the nature of issues addressed and decided by the state supreme courts and federal appellate courts whose decisions are challenged in the U.S. Supreme Court.³ During the U.S. Supreme

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¹ BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 13 (1996).

² For example, Justice Antonin Scalia has long argued that federal courts should reduce their involvement in various kinds of cases, *see* Stuart Taylor, *Scalia Proposes Major Overhaul of the U.S. Courts*, N.Y. TIMES, Feb. 16, 1987, at 1, and uses concepts such as standing and justiciability to keep the U.S. Supreme Court from considering various issues, *see* RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 328 (1997).

³ The Supreme Court often agrees to hear cases that concern conflicts between lower courts in the interpretation of the Constitution or federal statutes or lower court decisions that appear to conflict with the Supreme Court's own precedents. STEPHEN WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 197 (3d ed. 1988).

Court's 2002-03 Term, the number of criminal justice cases⁴ decided by the Court declined to equal the lowest totals in recent years. The Court decided only twenty-two criminal justice cases, a number equal to that of its totals in 1998-99⁵ and 1995-96.⁶ These annual totals are below those in the immediately preceding terms, twenty-seven in 2001-02⁷ and twenty-five in 2000-01.⁸ In other recent years, the Court examined a markedly greater number of criminal justice cases. In the 1999-00 Term, the Court issued thirty-one criminal justice decisions.⁹ The justices decided thirty and thirty-five criminal justice cases for 1996-97¹⁰ and 1997-98¹¹ respectively. Despite the shifts in the Court's attention to criminal justice, there is no indication that increased or reduced attention to criminal justice can be attributed to anything other than unpredictable patterns of particular cases brought to the Court each year and the justices' inclinations to tackle specific issues. As indicated by the foregoing figures, the Court's selection of criminal justice cases has increased and decreased in specific years without manifesting any consistent trends.

⁴ Although the classification of cases as "criminal justice cases" is intended to be broad and therefore include such matters as civil rights lawsuits against justice system officials, some cases that touch upon criminal matters are excluded if they primarily focus on other issues. For example, one excluded case is *Demore v. Kim*, 123 S. Ct. 1708 (2003). This case concerned the government's authority to detain pending immigration hearings a non-citizen facing deportation for committing a crime. This case was considered to concern immigration issues rather than criminal justice issues.

⁵ Christopher E. Smith, *Criminal Justice and the 1998-99 U.S. Supreme Court Term*, 9 WIDENER J. PUB. L. 23, 23 (1999).

⁶ Christopher E. Smith, *Criminal Justice and the 1995-96 U.S. Supreme Court Term*, 74 U. DET. MERCY L. REV. 1, 4 (1996).

⁷ Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2001-02 United States Supreme Court Term*, 2003 MICH. ST. DCL L. REV. 413, 413 (2003).

⁸ Christopher E. Smith & Steven B. Dow, *Criminal Justice and the 2000-01 U.S. Supreme Court Term*, 79 U. DET. MERCY L. REV. 189, 189 (2002).

⁹ Christopher E. Smith, *Criminal Justice and the 1999-2000 U.S. Supreme Court Term*, 77 N.D. L. REV. 1, 1 (2001).

¹⁰ Christopher E. Smith, *Criminal Justice and the 1996-97 U.S. Supreme Court Term*, 23 U. DAYTON L. REV. 30, 33 (1997).

¹¹ Christopher E. Smith, *Criminal Justice and the 1997-98 U.S. Supreme Court Term*, 23 S. ILL. U. L. J. 443, 443 (1999).

Analysts of the Rehnquist Court believe that “It’s definitely a conservative court in the criminal law area”¹² because it is dominated by conservatives who have “been active in narrowing or overturning many Warren and Burger Court precedents that were favorable to the rights” of individuals in the criminal justice system.¹³ In so doing, a majority of contemporary justices have made decisions “extending broad deference to government in death penalty cases, recognizing exceptions to the *Miranda* doctrine and Fourth Amendment exclusionary rule, and further expanding opportunities for police to conduct searches without a valid warrant.”¹⁴

The Supreme Court’s orientation toward criminal justice is always a matter of public importance because “Supreme Court decisions . . . define constitutional rights and provide guidelines for the appropriate exercise of authority of criminal justice officials.”¹⁵ Thus there is good reason to monitor the Court’s decision-making trends in criminal justice. In the early years of the twenty-first century, there may be even greater reason to monitor the justices’ decisions as the legal system faces an array of percolating issues related to governmental anti-terrorism efforts, such as the prosecution of suspected terrorists¹⁶ and the use of anti-terrorism laws for a variety of purposes in the criminal justice system.¹⁷

This Article will explore the Supreme Court’s impact on criminal justice during the 2002-03 Term through an empirical examination of the Court’s decision-making processes and a review of the cases. In the final analysis, the Supreme Court’s 2002-03 decisions affecting criminal justice were consistent with previously established patterns in the Rehnquist Court’s decision making: most cases favored the interests of the

¹² John O. McGinnis, professor at Northwestern University School of Law, *quoted in* Linda Greenhouse, *Will the Court Move Right? It Already Has*, N.Y. TIMES, June 22, 2003, *available at* <http://www.nytimes.com>.

¹³ JOHN A. FLITER, PRISONERS’ RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 183 (2001).

¹⁴ TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 267 (2000).

¹⁵ CHRISTOPHER E. SMITH, CRIMINAL PROCEDURE xvii (2003).

¹⁶ *See, e.g., Judge Refuses to Drop Moussaoui Case and Bars Death Penalty*, N.Y. TIMES, Oct. 2, 2003, *available at* <http://www.nytimes.com>.

¹⁷ *See, e.g., Eric Lichtblau, U.S. Uses Terror Law to Pursue Crimes From Drugs to Swindling*, N.Y. TIMES, Sept. 27, 2003, *available at* <http://www.nytimes.com>.

government but a few decisions strengthened protections for individuals drawn into the criminal justice system.

II. EMPIRICAL MEASURES OF THE SUPREME COURT'S DECISION MAKING

In the tables and discussion that follow, the labels "liberal" and "conservative" are used as a convenient shorthand to describe the outcomes supported by individual justices and the Court majority. These labels can be problematic as consistently applicable classifying categories.¹⁸ However, the use of such categories is consistent with prior empirical studies of the Supreme Court and enhances scholars' ability to make systematic comparisons of different Court terms and eras. The definitions for these labels are drawn from the classifications in the Supreme Court Judicial Data Base in which "[l]iberal decisions in the area of civil liberties are pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American], and anti-government in due process and privacy."¹⁹ By contrast, "conservative" decisions in criminal justice cases favor the government's

¹⁸ Although the term "liberal" is used to describe outcomes in which justices' favor individuals' rights over the interests of government, there are some kinds of rights in which justices with so-called conservative values are more likely to favor individuals. For example, cases concerning property rights often produce role reversals among the justices considered "liberal" and those considered "conservative" with the usual liberals supporting the government's authority to regulate property and usual conservatives supporting individuals' property rights. Such a role reversal occurred, for example, in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). Despite the problems in applying these terms to all kinds of issues, the liberal label is typically reserved for those justices supporting the claims of individuals and such support can often appear to reflect particular justice's values because of consistencies in their patterns of decision making. For example, Justices William Brennan and Thurgood Marshall earned their "liberal" labels by supporting individuals' claims in civil rights and liberties cases nearly ninety percent of the time during their service in the Rehnquist Court era. See THOMAS R. HENSLEY, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 57, 61 (1997).

¹⁹ Jeffrey Segal & Harold Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Judicial Data Base Project*, 73 *JUDICATURE* 103, 104 (1989).

interests in prosecuting and punishing offenders over recognition or expansion of rights for individuals.

Table 1 summarizes the outcomes of the Supreme Court's 2002-03 decisions according to the Court's vote totals and the direction of the Court's decisions. The decisions predominantly favored the government although a notable percentage of decisions favored individuals (36%). The table shows a mix of consensus and division in the Court's criminal justice decisions. Nearly half of the Court's decisions (10) had not more than two dissenters, yet the other half of the decisions (12) showed significant disagreement among the justices as there were at least three dissenters. Because analyses of the Rehnquist Court frequently note the ideological divisions between the conservative justices (Rehnquist, Scalia, Thomas, O'Connor, Kennedy) and the moderately liberal justices (Stevens, Ginsburg, Souter, Breyer),²⁰ a casual observer of the Court might be surprised at the degree of consensus. However, as indicated by the data, stark divisions emerge in only a portion of cases. Unlike in the late Warren Court era of the 1960s when a majority of justices supported individuals' claims in most criminal justice cases,²¹ the contemporary Court lacks a strident liberal justice who might disrupt the consensus on unanimous or near-unanimous conservative decisions.²²

TABLE 1: CASE DISTRIBUTION BY VOTE AND LIBERAL/CONSERVATIVE OUTCOME IN U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2002-03 TERM

VOTE	LIBERAL	CONSERVATIVE	TOTAL
9-0	2	5	7
8-1	1	1	2

²⁰ See, e.g., Earl M. Maltz, *Introduction*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 5 (Earl M. Maltz ed., 2003) ("In the late Rehnquist era, the conservatives have often been opposed by Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer.").

²¹ Six of the nine justices serving on the Warren Court in 1968 decided seventy percent or more of criminal justice cases in favor of individuals. CHRISTOPHER E. SMITH, *THE REHNQUIST COURT AND CRIMINAL PUNISHMENT* 7 (1997).

²² See Greenhouse, *supra* note 12. ("What was notable was the absence of a contrary voice, the kind that would once have been raised—if usually in dissent—by William J. Brennan Jr. or Thurgood Marshall, both of whom retired in the early 1990s.").

7-2	1	0	1
6-3	2	4	6
5-4	2	4	6
TOTAL	8 (36%)	14 (64%)	22

One of the most striking aspects of the cases that deeply divided the Court was the representation of liberal outcomes. Four out of the twelve 5-4 and 6-3 decisions produced liberal outcomes, which means that one or more of the Court's conservative members, typically O'Connor or Kennedy,²³ abandoned their usual colleagues to join the moderate liberals. This result may appear surprising if one focused only on 5-4 decisions in a specific term, such as the 2000-01 Term, in which conservatives controlled the outcomes in six of the seven deeply-divided decisions.²⁴ In reality, however, if one examines the 5-4 and 6-3 decisions in the prior terms, liberal outcomes are consistently evident in split decisions, ranging from a lows of three out of eleven in 1996-1997²⁵ and four out of fourteen in 1999-2000²⁶ to highs of seven out of fifteen in 2001-2002²⁷ and four out of nine in 1998-1999.²⁸

Like the preceding year in which sixty-three percent of the Court's criminal justice decisions concerned constitutional issues,²⁹ most of the Court's cases (59%) concerned constitutional issues, as was also true during the Court's 1998-99 Term³⁰ and 1999-00 Terms.³¹ By contrast, in the 2000-01 Term only forty-four percent of the criminal justice cases involved constitutional issues.³² Non-constitutional issues also comprised the majority of criminal justice decisions in the 1995-96, 1996-97, and

²³ See, e.g., Maltz, *supra* note 20, at 5 ("Most often, the votes of Justices Sandra Day O'Connor and Anthony M. Kennedy have determined the outcome of the ideological struggle between the two opposing factions of the Court.").

²⁴ Smith, *supra* note 8, at 193.

²⁵ Smith, *supra* note 10, at 33.

²⁶ Smith, *supra* note 9, at 4.

²⁷ Smith & McCall, *supra* note 7, at 417.

²⁸ Smith, *supra* note 5, at 28.

²⁹ Smith & McCall, *supra* note 7, at 419.

³⁰ Smith, *supra* note 5, at 29.

³¹ Smith, *supra* note 9, at 6.

³² Smith & Dow, *supra* note 8, at 195.

1997-98 Terms.³³ The inconsistent pattern of constitutional and non-constitutional issues decided by the Court each term reinforces the perception that, as with the number of criminal justice cases selected for decision, the selection of specific issues is determined by the ebb and flow of issues presented to the justices rather than any planned or strategic agenda.³⁴

TABLE 2: ISSUES IN CRIMINAL JUSTICE CASES IN THE SUPREME COURT'S 2002-03 TERM

CONSTITUTIONAL ISSUES: 13 (59%)	OTHER ISSUES: 9 (41%)
Right to Counsel: <i>Wiggins v. Smith</i> ³⁵	Habeas Corpus: <i>Miller-El v. Cockrell</i> ³⁶ ; <i>Price v. Vincent</i> ³⁷ ; <i>Clay v. United States</i> ³⁸ ; <i>Massaro v. United States</i> ³⁹ ; <i>Woodford v. Garceau</i> ⁴⁰
Double Jeopardy: <i>Sattazahn v. Pennsylvania</i> ⁴¹	Federal Criminal Statute: <i>United States v. Jimenez Recio</i> ⁴²
Due Process: <i>Connecticut</i>	Administrative Procedures: <i>United</i>

³³ Smith, *supra* note 6, at 5; Smith, *supra* note 10, at 34; Smith, *supra* note 11, at 446-47.

³⁴ See *supra* notes 1-10 and accompanying text.

³⁵ 123 S. Ct. 2527 (2003).

³⁶ 123 S. Ct. 1029 (2003).

³⁷ 123 S. Ct. 1848 (2003).

³⁸ 123 S. Ct. 1072 (2003).

³⁹ 123 S. Ct. 1690 (2003).

⁴⁰ 123 S. Ct. 1398 (2003).

⁴¹ 123 S. Ct. 732 (2003).

⁴² 123 S. Ct. 819 (2003).

<i>Department of Public Safety v. Doe</i> ⁴³	<i>States v. Bean</i> ⁴⁴
Eighth Amendment: <i>Ewing v. California</i> ⁴⁵ ; <i>Lockyer v. Andrade</i> ⁴⁶ ; <i>Overton v. Bazetta</i> ⁴⁷	Non-Article III Judicial Officers: <i>Roell v. Withrow</i> ⁴⁸ ; <i>Nguyen v. United States</i> ⁴⁹
<i>Ex Post Facto</i> Clause: <i>Stogner v. California</i> ⁵⁰ ; <i>Smith v. Doe</i> ⁵¹	
Fair Trial: <i>Sell v. United States</i> ⁵²	
Privacy: <i>Lawrence v. Texas</i> ⁵³	
First Amendment: <i>Virginia v. Hicks</i> ⁵⁴ ; <i>Virginia v. Black</i> ⁵⁵	
Self Incrimination: <i>Chavez v.</i>	

⁴³ 123 S. Ct. 1160 (2003).

⁴⁴ 123 S. Ct. 58 (2003).

⁴⁵ 123 S. Ct. 1179 (2003).

⁴⁶ 123 S. Ct. 1166 (2003).

⁴⁷ 123 S. Ct. 2162 (2003).

⁴⁸ 123 S. Ct. 1696 (2003).

⁴⁹ 123 S. Ct. 2130 (2003).

⁵⁰ 123 S. Ct. 2446 (2003).

⁵¹ 123 S. Ct. 1140 (2003).

⁵² 123 S. Ct. 2174 (2003).

⁵³ 123 S. Ct. 2472 (2003).

⁵⁴ 123 S. Ct. 2191 (2003).

⁵⁵ 123 S. Ct. 1536 (2003).

In theory, the Court's attention is drawn to controversial, unsettled, or emerging areas of law when it grants writs of certiorari to accept cases for hearing.⁵⁷ Thus, it is not surprising that the Court addressed continuing controversies, such as the criminalization of homosexual sex acts,⁵⁸ "three-strikes" sentencing laws,⁵⁹ and sex offender registration laws.⁶⁰ These issues garnered significant attention from critics and commentators in recent years.⁶¹ It is surprising, however, that the Supreme Court did not decide any cases concerning search and seizure during the term. From the 1995-1996 Term through the 1999-2000 Term, Fourth Amendment issues comprised the largest category of constitutional criminal justice issues addressed by the Court and more than twelve percent of the total criminal justice cases.⁶² The extent of the Court's attention to Fourth Amendment issues in subsequent terms may indicate whether the current justices regard such issues as largely settled or whether the lack of such cases in the most

⁵⁶ 123 S. Ct. 1994 (2003).

⁵⁷ See LAWRENCE BAUM, *THE SUPREME COURT* 102 (4th ed. 1992) ("The Court's Rule 10 does provide general guidance by describing some of the conditions under which the Court will hear a case. The rule emphasizes the Court's role in ensuring the certainty and consistency of law: The criteria it lists for accepting a case include the existence of important legal issues that the Court has not yet decided, conflict among courts of appeals on a legal question, conflict between a lower court and the Supreme Court's prior decisions, and departure 'from the accepted and usual course of judicial proceedings' in the courts below.").

⁵⁸ *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

⁵⁹ *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003).

⁶⁰ *Connecticut Department of Public Safety v. Doe*, 123 S. Ct. 1160 (2003).

⁶¹ See, e.g., YARBROUGH, *supra* note 14, at 138-48 (providing an analysis of Supreme Court precedent on legal status of sodomy laws); TED GUEST, *CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* 189-218 (2001) (providing an analysis of "three-strikes" sentencing laws); Wayne A. Logan, *Examining Our Approaches to Sex Offenders and the Law: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287 (2003) (providing analysis of sex offender registration laws).

⁶² Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161, 167 (2003).

recent term merely reflects the vagaries of the mixture of issues submitted to the Court during a specific term.

Table 3 shows the liberal/conservative voting patterns of individual justices for the 2002-03 Term. Justice Thomas was the justices least likely to support individuals' claims in criminal justice cases during the most recent term, with Justice Scalia and Chief Justice Rehnquist close behind. Justices Stevens stood out as the strongest supporter of individual rights in criminal justice cases, although Justices Ginsburg, Breyer, and Souter were nearly as liberal in the term's criminal justice cases. Ginsburg had been regarded as an outspoken defender of constitutional rights during her pre-judicial career as a lawyer,⁶³ but on the U.S. Supreme Court her early voting record earned her the "characterization . . . as a judicial moderate."⁶⁴ Ginsburg's level of support for individuals' claims in two earlier terms' criminal justice cases, forty-five percent (1995-96)⁶⁵ and fifty-three percent (1996-97),⁶⁶ cast her as a moderate near the middle of the Court. Ginsburg's increase in support for individuals during 1997-98 (60%),⁶⁷ 1998-99 (68%),⁶⁸ 1999-00 (68%),⁶⁹ 2000-01 (64%), and 2001-02 (63%)⁷⁰ may be attributable either to changes in her attitudes and voting strategies⁷¹ or a change in the mix of criminal justice cases presented to the Supreme Court.⁷²

⁶³ See Joyce A. Baugh, Christopher E. Smith, Thomas R. Hensley, and Scott Patrick Johnson, *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 4-5 (1994).

⁶⁴ HENSLEY, SMITH & BAUGH, *supra* note 18, at 81.

⁶⁵ Smith, *supra* note 6, at 6.

⁶⁶ Smith, *supra* note 10, at 37.

⁶⁷ Smith, *supra* note 11, at 450.

⁶⁸ Smith, *supra* note 5, at 32.

⁶⁹ Smith, *supra* note 9, at 9.

⁷⁰ Smith, *supra* note 7, at 423.

⁷¹ Justices' decisions about how to vote in Supreme Court cases are largely attributable to their values and attitudes and to the strategic choices they make to persuade colleagues or advance particular doctrines. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

⁷² See Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986-1991 Terms*, 48 POL. RES. Q. 837 (1995).

In 2000-01,⁷³ as in 1999-00,⁷⁴ there was clearer differentiation between the Court's two wings. The five most conservative justices (Rehnquist, Scalia, Thomas, O'Connor, Kennedy) stood at either twenty-eight or forty percent support for individuals. In 2001-02, the division was also pronounced, with a twenty-four percentage point difference between the most moderate conservative, O'Connor (30%) and the most moderate liberals, Breyer and Souter (54%).⁷⁵ In the most recent term, there was comparable differentiation between the four most conservative justices (Thomas, Scalia, Rehnquist, O'Connor) and the four most liberal justices (Souter, Breyer, Ginsburg, Stevens). However, Justice Kennedy assumed a middle position, as if standing in the center of a teeter-totter, by demonstrating a level of support (45%) that placed him within fifteen percentage points of O'Connor as well as Breyer and Souter.

TABLE 3: INDIVIDUAL JUSTICES' LIBERAL/CONSERVATIVE VOTING PERCENTAGES IN U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2002-03 TERM

JUSTICE	LIBERAL	CONSERVATIVE
Thomas	18% (4)	82% (18)
Scalia	23% (5)	77% (17)
Rehnquist	27% (6)	73% (16)
O'Connor	36% (8)	64% (14)
Kennedy	45% (10)	55% (12)
Souter	59% (13)	41% (9)
Breyer	59% (13)	41% (9)
Ginsburg	64% (14)	36% (8)
Stevens	73% (16)	27% (6)

The philosophical differences between the justices become accentuated when the analytical focus is limited to non-unanimous decisions.⁷⁶ As

⁷³ Smith & Dow, *supra* note 8, at 197.

⁷⁴ Smith, *supra* note 9, at 8-9.

⁷⁵ Smith, *supra* note 7, at 423.

⁷⁶ On an *en banc* court, such as the U.S. Supreme Court, individual judicial officers may feel freest to express their disagreements with the majority. When the decision makers split, their disagreements should genuinely reflect the nature and strength of their
(continued)

indicated in Table 4, O'Connor may also have served in a role similar to Kennedy's by providing a vote for individuals' claims in a significant (albeit minority) portion of the Court's non-unanimous decisions.

TABLE 4: INDIVIDUAL JUSTICES' LIBERAL/CONSERVATIVE VOTING PERCENTAGES IN NON-UNANIMOUS U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2002-03 TERM

JUSTICE	LIBERAL	CONSERVATIVE
Thomas	13% (2)	87% (13)
Scalia	20% (3)	80% (12)
Rehnquist	27% (4)	73% (11)
O'Connor	40% (6)	60% (9)
Kennedy	53% (8)	47% (7)
Souter	73% (11)	27% (4)
Breyer	73% (17)	27% (7)
Ginsburg	80% (12)	20% (3)
Stevens	93% (14)	7% (1)

Table 5 shows an analysis of interagreement between individual justices on the Supreme Court. Such interagreement tables are used to detect the existence of voting blocs on the high court.⁷⁷ The one strong three-member voting bloc was comprised of the Court's three most moderate liberals (Souter, Breyer, Ginsburg). Individual pairs of conservative justices (Rehnquist, Scalia; Scalia, Thomas) also voted

differences. By contrast, on a three-member appellate panel, a potential dissenter may be deterred by the thought that he or she must dissent alone and carry the entire burden of presenting a dissenting opinion. Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133, 134 (1990).

⁷⁷ In empirical studies of the Supreme Court, voting blocs are determined according to the "Sprague Criterion." The Sprague Criterion is calculated by subtracting the average agreement score for the entire Court from 100. The resulting number is divided by two and added to the Court average in order to establish the threshold level for defining a bloc. A bloc exists when the individual agreement scores for a set of justices exceed the threshold established by the Sprague Criterion calculation. JOHN SPRAGUE, VOTING PATTERNS OF THE U.S. SUPREME COURT 51-61 (1968).

together with sufficient regularity to meet the voting bloc criteria, but they did not form the strong four-member voting bloc (Thomas, Scalia, Rehnquist, Kennedy) that they helped to comprise in the prior term.⁷⁸ Apparently the mix of issues in the most recent term did not draw the Court's most conservative justices together to the same extent as in the recent past.

TABLE 5: INTERAGREEMENT PERCENTAGES FOR PAIRED JUSTICES IN U.S. SUPREME COURT UNANIMOUS CRIMINAL JUSTICE DECISIONS, 2002-03 TERM

	BR	GN	SO	ST	OC	RE	KE	SC	TH
BR		95	91	77	68	68	59	55	41
GN			86	82	64	64	64	50	36
SO				77	77	68	64	55	50
ST					64	55	73	50	45
OC						82	82	77	73
RE							82	86	72
KE								77	73
SC									86

- Court Mean: 69
- Sprague Criterion: 84.5
- Voting Blocs:
 - Souter, Ginsburg, Breyer: 91
 - Rehnquist, Scalia: 86
 - Scalia, Thomas: 86

A focus on non-unanimous decisions generates more pronounced differences between the justices, yet the voting blocs remained the same. Interestingly, the justices most likely to disagree with each other were not both at the endpoints of the liberal and conservative voting spectrums. Ginsburg, the justice with the second most liberal voting record, disagreed most frequently with Thomas, the most conservative justice. In addition, Stevens, the most liberal voter, agreed with Scalia, the second most conservative justice, in a surprisingly high percentage of non-unanimous decisions (27%). These apparent anomalies reinforce the impression that the justices react to the specific mix of issues presented to them in a given

⁷⁸ Smith, *supra* note 7, at 425.

term and do not reflexively vote to agree with perceived philosophical allies or disagree with perceived ideological opponents.

TABLE 6: INTERAGREEMENT PERCENTAGES FOR PAIRED JUSTICES IN U.S. SUPREME COURT NON-UNANIMOUS CRIMINAL JUSTICE DECISIONS, 2002-03 TERM

	BR	GN	SO	ST	OC	RE	KE	SC	TH
BR		93	87	67	53	53	40	33	13
GN			80	73	47	47	47	27	7
SO				67	67	53	47	33	27
ST					47	33	60	27	20
OC						73	73	67	60
RE							73	80	60
KE								67	60
SC									80

- Court Mean: 60
- Sprague Criterion: 80
- Voting Blocs:
 - Souter, Ginsburg, Breyer: 87
 - Rehnquist, Scalia: 80
 - Scalia, Thomas: 80

III. CASE DECISIONS

A. *Unanimous Decisions*

The Court handed down a total of seven unanimous decisions⁷⁹ during the 2002-03 Term involving a wide range of topics including habeas petitions,⁸⁰ Bureau of Alcohol, Tobacco, and Firearms procedures,⁸¹ prisoners' visitation rights,⁸² constitutionality of sex offender registries,⁸³

⁷⁹ *Massaro v. United States*, 123 S. Ct. 1690 (2003); *Clay v. United States*, 537 U.S. 522 (2003); *Price v. Vincent*, 538 U.S. 634 (2003); *United States v. Bean*, 537 U.S. 71 (2002); *Overton v. Bazzetta*, 123 S.Ct. 2162 (2003); *Conn. Dep't. of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *Virginia v. Hicks*, 123 S. Ct. 2191 (2003).

⁸⁰ *Clay*, 537 U.S. at 522; *Price*, 538 U.S. at 634.

⁸¹ *Bean*, 537 U.S. at 71.

⁸² *Overton*, 123 S. Ct. at 2162.

⁸³ *Conn. Dep't. of Pub. Safety*, 538 U.S. at 1.

ineffective assistance of counsel claim,⁸⁴ and trespassing at public housing projects.⁸⁵ Of these seven cases, five cases resulted in conservative rulings⁸⁶ while two cases ended in liberal rulings.⁸⁷ The existence this year of two liberal unanimous decisions breaks the trend from last year when not a single unanimous criminal justice case ended in a liberal outcome.⁸⁸

Starting first with the two liberal decisions from the 2002-2003 Term, in both *Massaro v. United States* and *Clay v. United States* the Court favored the rights of the criminally accused over the government.⁸⁹ In *Massaro*, the Court ruled that an ineffective assistance of counsel claim may be brought up in a collateral proceeding even though the defendant did not make an ineffective assistance of counsel claim in the original direct appeal.⁹⁰ Joseph Massaro was indicted and convicted of federal racketeering charges.⁹¹ Before his trial began, the prosecutors found additional evidence which might have aided Massaro's case but failed to inform Massaro's counsel for several days following the discovery.⁹² Prosecutors informed both the trial court and Massaro's counsel after the trial had started and although the trial court offered the defense a continuance, Massaro's attorney repeatedly turned down the court's offer.⁹³ Massaro was convicted and given a life sentence.⁹⁴ On direct evidentiary appeal, Massaro questioned the use of the late evidence but did not also raise an ineffective assistance of counsel claim.⁹⁵ Massaro lost

⁸⁴ *Massaro*, 123 S. Ct. at 1690.

⁸⁵ *Virginia v. Hicks*, 123 S. Ct. 2191 (2003).

⁸⁶ *Price v. Vincent*, 538 U.S. 634 (2003); *Bean*, 537 U.S. at 71; *Overton*, 123 S. Ct. at 2162; *Conn. Dep't. of Pub. Safety*, 538 U.S. at 1; *Hicks*, 123 S. Ct. at 2191.

⁸⁷ *Massaro v. United States*, 123 S. Ct. 1690 (2003); *Clay v. United States*, 537 U.S. 522 (2003).

⁸⁸ Christopher E. Smith & Madhari McCall, *Criminal Justice and the 2001-02 U.S. Supreme Court Term*, 413 MICH. ST. DCL L. REV. 413, 417 (2003).

⁸⁹ *Massaro*, 123 S. Ct. at 1690; *Clay*, 537 U.S. at 522.

⁹⁰ *Massaro*, 123 S. Ct. at 1696.

⁹¹ *Id.* at 1692.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

the evidentiary appeal and later filed a motion seeking to vacate his conviction based on an ineffective assistance of counsel claim even though he had not raised this issue originally.⁹⁶ The appeals court, citing procedural violations, denied Massaro's claim, a position that a unanimous Supreme Court reversed.⁹⁷ Writing for the Court, Justice Kennedy not only notes that ineffective assistance of counsel claims may be raised after the direct appeal, but suggests that such a strategy may be preferred in ineffective assistance of counsel claims.⁹⁸ Because the trial court record is devoted to the guilt or innocence of the defendant, the record regarding counsel's performance and whether that performance is inadequate by the standards developed in *Strickland v. Washington*⁹⁹ may be absent.¹⁰⁰ By bringing ineffective assistance claims in subsequent proceedings, the courts are able to call witnesses and take testimony specifically intended to adjudicate the ineffective claim.¹⁰¹ The Court's ruling in *Massaro*, and in its 7-2 ruling in *Wiggins v. Smith*,¹⁰² may signal a departure from decisions in recent terms where ineffective assistance of counsel claims were greeted with a great deal of skepticism by the Justices.¹⁰³

The Court's second unanimous liberal decision, *United States v. Clay*,¹⁰⁴ deals with the deadline for filing a petition for post-conviction relief.¹⁰⁵ Writing for the Court, Justice Ginsburg notes that a federal prisoner may file a motion for post-conviction relief within one year from the date on which the prisoner's conviction becomes final.¹⁰⁶ The question in *Clay* is when the one-year limitation actually begins—on the date that

⁹⁶ *Id.* at 1693.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1694-95.

⁹⁹ 466 U.S. 668 (1984). *Strickland* established a two-prong test under which claims of ineffective assistance of counsel claims would be adjudicated. Under the *Strickland* principles, a defendant had to prove both (1) deficient performance by counsel, and (2) that he or she had been prejudiced from counsel's unprofessional errors. *Id.* at 687.

¹⁰⁰ *Massaro*, 123 S. Ct. at 1694.

¹⁰¹ *Id.*

¹⁰² 123 S. Ct. 2527 (2003).

¹⁰³ *Smith & McCall*, *supra* note 88, at 431.

¹⁰⁴ 537 U.S. 522 (2003).

¹⁰⁵ *Id.* at 524.

¹⁰⁶ *Id.*

the appellate court affirms the defendant's conviction or the date when the defendant can no longer file for certiorari from the Supreme Court.¹⁰⁷ Justice Ginsburg applies the more generous of the two standards for the filing of post-conviction relief, ruling that the one-year limitation does not begin until after the defendant can no longer apply for certiorari.¹⁰⁸

As noted, the remaining unanimous decisions all resulted in conservative rulings. In *Connecticut Department of Public Safety v. Doe*,¹⁰⁹ the Court rejected a constitutional challenge to Connecticut's Megan's Law establishing a sex offender registry.¹¹⁰ Doe claimed that Connecticut's process of registering individual offenders and posting their photographs and information on its Internet registry without individual hearings violated the Due Process Clause of the Fourteenth Amendment.¹¹¹ The Court disagreed.¹¹² Chief Justice Rehnquist, writing for the Court, notes that Connecticut does not need to hold individual hearings to determine an offender's current level of danger to society because inclusion on the registry as constructed by Connecticut is not dependent upon the level of danger factor.¹¹³ Rather, Connecticut automatically includes those offenders who have been convicted of sexually based offenses and states explicitly that the registry is not intended to predict current levels of offenders' dangerousness.¹¹⁴ As such, Connecticut's sex offender list does not constitute a due process violation.¹¹⁵ *Connecticut Department of Public Safety v. Doe* is one of two constitutional challenges to Megan's Laws heard by the Court during this term. The second case, *Smith v. Doe*,¹¹⁶ is a 6-3 decision in which the Court again upheld the use of a state sex offender registry.¹¹⁷

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 538 U.S. 1 (2003).

¹¹⁰ *Id.* at 3-4, 6.

¹¹¹ *Id.* at 5-6.

¹¹² *Id.* at 7-8.

¹¹³ *Id.* at 7.

¹¹⁴ *Id.* at 5.

¹¹⁵ *Id.* at 8.

¹¹⁶ 538 U.S. 84 (2003) (reviewing Alaska's implementation of Megan's Law).

¹¹⁷ *Id.* at 87, 106.

In another unanimous, conservative decision, the Court voted to uphold restrictions on prison visitations in Michigan. The case, *Overton v. Bazzetta*,¹¹⁸ questions the ability of prison officials to restrict the family visit privileges of inmates.¹¹⁹ Responding to security concerns and problems with inmate substance abuse, the department of corrections limited all inmates to visits by immediate family and only ten other individuals.¹²⁰ Inmates committing two or more substance abuse violations are limited to visits by attorneys and clergy while inmates classified as high security risks are limited to only noncontact visits with family and friends.¹²¹ Prisoners, their friends, and family affected by the regulations allege that the restrictions violate the First Amendment right to free association and the Eighth Amendment right against cruel and usual punishment as applied to the states through the Fourteenth Amendment's Due Process Clause.¹²² Writing for the Court, Justice Kennedy notes that prison regulations are constitutional if the regulations are rationally related to legitimate penological interests even if prisoners' association rights are infringed.¹²³ Affording a great deal of deference to prison administrators, Justice Kennedy finds that the prison officials' concerns for internal security and safety as well as their desire to deter drug use are rational and legitimate reasons for the restrictions and thus the restrictions survive constitutional challenge.¹²⁴

In *Virginia v. Hicks*,¹²⁵ the Court also ruled that a state housing agency's trespass policy was not an unconstitutionally overbroad violation of the First Amendment.¹²⁶ Concerned with crime and drug dealing, a local city council in Virginia decided to "privatize" the street in front of a low-income housing development.¹²⁷ The housing development then

¹¹⁸ 123 S. Ct. 2162 (2003).

¹¹⁹ Linda Greenhouse, *In Momentous Term, Justices Remake the Law*, N.Y. TIMES, July 1, 2003, available at <http://www.nytimes.com>.

¹²⁰ *Overton*, 123 S. Ct. at 2166.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 2168.

¹²⁴ *Id.*

¹²⁵ 123 S. Ct. 2191 (2003).

¹²⁶ *Id.* at 2199.

¹²⁷ *Id.* at 2194.

enacted a trespass policy authorizing police to notify non-residents without a “legitimate business or social purpose”¹²⁸ that future violations of the trespass policy could result in arrest. Kevin Hicks, a nonresident of the development, was twice arrested for trespassing and finally given written notice that he could no longer visit the development.¹²⁹ Hicks challenged the trespassing policy as unconstitutionally overbroad and vague under the First Amendment.¹³⁰

Justice Scalia’s opinion for the Court disagreed with Hicks’ assertion, finding no constitutional deficiency with the city’s trespassing statute.¹³¹ Rather, Justice Scalia notes that the law does not substantially limit protected speech and does reflect legitimate state interests.¹³² In addition, Scalia notes, neither the reasons for the statute nor its intended purpose of preventing future trespassing implicates the First Amendment.¹³³

In two final unanimous, conservative cases, the justices tackle a case dealing with habeas petitions and double jeopardy (*Price v. Vincent*¹³⁴) and a case questioning the Bureau of Alcohol, Tobacco and Firearms procedures (*United States v. Bean*¹³⁵). In *Price*, the Court denied a defendant’s petition for habeas relief that was based on a double jeopardy argument.¹³⁶ Duyonn Vincent was on trial for first-degree murder, with second-degree murder included as a lesser charge.¹³⁷ Following the prosecution’s case in chief, defense counsel moved for a directed verdict of acquittal as to the first-degree charge.¹³⁸ The trial judge appeared to agree that second-degree was appropriate, but decided to hear arguments against the directed verdict the following morning.¹³⁹ During those arguments, defense objected, claiming that the directed verdict had been granted and

¹²⁸ *Id.* at 2195.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 2199.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 538 U.S. 634 (2003).

¹³⁵ 537 U.S. 71 (2002).

¹³⁶ *Price*, 538 U.S. at 637.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

thus continual prosecution under a first-degree charge constituted an unconstitutional violation of the Double Jeopardy Clause of the Sixth Amendment.¹⁴⁰ The trial judge eventually submitted the first-degree charge to the jury and Vincent was found guilty of it.¹⁴¹ The Supreme Court, citing past precedent and any lack of distinguishing characteristics, disagreed with Vincent's claim and denied habeas relief.¹⁴² Justice Rehnquist wrote the opinion. Finally, in *United States v. Bean*,¹⁴³ the Justices ruled that federal judges do not have the right to restore gun ownership to a person whose right to own a gun had been barred based on a felony conviction and whose petition for ownership had not been processed by the Bureau of Alcohol, Tobacco and Firearms.¹⁴⁴ Justice Thomas's opinion for the Court finds instead that judicial relief for such petitions is possible only after the ATF denies a petition, not because it declines to process a petition.¹⁴⁵ As such, failure of the ATF to act on a petition to restore gun ownership rights does not qualify for further review by federal courts.¹⁴⁶ The case reverses a ruling by the Fifth Circuit Court of Appeals in which the Circuit court had gone so far as to imply that the Second Amendment right to bear arms is incorporated to apply to the states through the Due Process Clause of the Fourteenth Amendment, a position that the Supreme Court has never adopted.¹⁴⁷

B. 8-1 Decisions

The Court handed down two decisions that were decided by an 8-1 vote count during the 2002-03 Term. In *United States v. Jimenez Recio*,¹⁴⁸ the Court overturned a decision from the Ninth Circuit dealing with conspiracy charges and produced in a conservative ruling.¹⁴⁹ In *Miller-El*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 639.

¹⁴³ 537 U.S. 71 (2002).

¹⁴⁴ *Id.* at 72.

¹⁴⁵ *Id.* at 77.

¹⁴⁶ *Id.*

¹⁴⁷ See *Bean v. Bureau of Alcohol, Tobacco and Firearms*, 253 F.3d 234 (5th Cir. 2001).

¹⁴⁸ 537 U.S. 270 (2003).

¹⁴⁹ See *id.*

v. Cockrell,¹⁵⁰ the Court reversed and remanded a ruling from the Fifth Circuit denying a certificate of appealability to review a district court's denial of habeas relief to a defendant who claimed that his death penalty trial had been tainted by the use of racially-motivated peremptory challenges by the prosecutor.¹⁵¹ *Miller-El* represented one of two death penalty cases this term and in both cases the Court handed down liberal rulings (the second case is *Wiggins v. Smith*¹⁵²).

Starting first with *Miller-El*, Thomas Miller-El was sentenced to death by a Dallas jury.¹⁵³ Miller-El challenged his conviction on grounds that the prosecutors had used their peremptory challenges to exclude ten of the potential eleven African American jurors in the jury pool in violation of *Batson v. Kentucky*.¹⁵⁴ Miller-El appealed his sentence and eventually the original trial court determined a *Batson* violation did not exist, that the prosecutors had provided ample race neutral explanations for use of the peremptory challenges, and thus there was no proof of intentional discrimination.¹⁵⁵ Miller-El filed a petition for federal habeas relief substantially relying on the *Batson* claim for justification.¹⁵⁶ The federal district court denied Miller-El's habeas petition and his application for a certificate of appealability was eventually denied by the Fifth Circuit.¹⁵⁷ The Fifth Circuit noted that Miller-El had not made a substantial showing that his constitutional rights had been violated and thus did not qualify for a certificate of appealability.¹⁵⁸

The Supreme Court, with only Justice Thomas dissenting, ruled that the Fifth Circuit should have issued a certificate of appealability to determine if the district court's denial of habeas relief was correct.¹⁵⁹ Writing for the majority, Justice Kennedy notes that in order to qualify for a habeas corpus hearing, the defendant need only present a plausible case

¹⁵⁰ 123 S. Ct. 1029 (2003).

¹⁵¹ *See id.*

¹⁵² 123 S. Ct. 2527 (2003).

¹⁵³ *Miller-El*, 123 S. Ct. at 1035.

¹⁵⁴ 476 U.S. 79 (1986).

¹⁵⁵ *Miller-El*, 123 S. Ct. at 1035.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1035-36.

¹⁵⁸ *Id.* at 1036.

¹⁵⁹ *Id.* at 1042.

of a constitutional violation and not, as the Fifth Circuit Court indicated, a substantial or winning one.¹⁶⁰ The case signaled concerns by the Court that the lower federal courts were not sufficiently monitoring the quality of justice coming from the state courts.

In a final 8-1 opinion, the Court renders a conservative decision clarifying if government intervention effectively ends a conspiracy. The case, *Unites States v. Jimenez Recio*,¹⁶¹ starts when police stop a truck carrying illegal drugs.¹⁶² Upon seizing the drugs, police arrange with the truck drivers to capture others involved in the drug trafficking by asking the drivers to call other participants and ask them to take the truck away.¹⁶³ Respondent Jimenez Recio arrived and participated in removal of the truck, was arrested, and convicted by a jury of conspiring to possess and distribute unlawful drugs.¹⁶⁴ On appeal, the Ninth Circuit reversed the convictions, holding that the evidence did not show that the respondent had joined the conspiracy before the government intervened and thus the conspiracy had effectively been terminated.¹⁶⁵ Writing for the majority, Justice Breyer finds instead that a conspiracy does not end following the defeat of the conspiracy by government intervention, even though the government's actions make it impossible for the conspiracy to succeed.¹⁶⁶ Rather, a conspiracy involves an agreement to commit a crime and thus, even if the crime is not committed, the conspiracy to commit nonetheless is punishable by law.¹⁶⁷ Further, Justice Breyer goes on to chastise the Ninth Circuit, stating that the Supreme Court's ruling in this case is consistent with the views of most all other legal commentators and courts and, at a minimum, the Ninth Circuit's opinion is inconsistent with the explicit rulings of three other federal courts of appeals.¹⁶⁸ The Ninth Circuit's

¹⁶⁰ *Id.*

¹⁶¹ 537 U.S. 270 (2003).

¹⁶² *Id.* at 272.

¹⁶³ *Id.* at 272-73.

¹⁶⁴ *Id.* at 273.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 277.

¹⁶⁷ *Id.* at 274.

¹⁶⁸ *Id.* at 275.

opinion is thus unjustified by recent precedent.¹⁶⁹ Justice Stevens concurred in part and dissented in part.¹⁷⁰

C. 7-2 *Opinion*

The Court only decided one criminal justice case by a vote count of 7-2, *Wiggins v. Smith*,¹⁷¹ but it was a significant case dealing with an ineffective assistance of counsel claim made by a death penalty defendant.¹⁷² The Court's ruling supports the ineffective assistance of counsel claim and for the second time in the term, is a liberal ruling in a death penalty case¹⁷³ and in an ineffective assistance case.¹⁷⁴ Justice O'Connor writes the opinion for the majority to which Justices Scalia and Thomas dissent.

The case starts in 1988 when police discover the murder of a seventy-seven-year-old woman in Maryland.¹⁷⁵ Kevin Wiggins was indicted for the crime and prosecutors gave notice that they intended to seek the death penalty.¹⁷⁶ Wiggins opted for a trial by judge for the guilt phase, was found guilty, and subsequently requested a jury trial for the penalty phase.¹⁷⁷ During the penalty phase, one of Wiggins's lawyers stated during the opening statement that the defense intended to introduce evidence of Wiggins's background, his difficult life, his lack of intellectual capacity and other mitigating factors.¹⁷⁸ Defense counsel did not offer any proof of these mitigating factors, did not eventually present them during the penalty phase, and Wiggins was given the death penalty by the jury.¹⁷⁹ On appeal, Wiggins challenged his conviction claiming that his lawyers' failure to investigate his background and present to the jury any mitigating

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 278-79 (Stevens, J., concurring in part, dissenting in part).

¹⁷¹ 123 S. Ct. 2527 (2003).

¹⁷² See *id.*

¹⁷³ See *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003).

¹⁷⁴ See *Massaro v. United States*, 123 S. Ct. 1690 (2003).

¹⁷⁵ *Wiggins*, 123 S. Ct. at 2531-32.

¹⁷⁶ *Id.* at 2532.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2533.

circumstances amounted to ineffective assistance of counsel in violation of the Sixth Amendment's right to counsel.¹⁸⁰

During the appeals process, Wiggins hired a licensed social worker who testified at length to the abuse Wiggins had suffered as a child.¹⁸¹ According to the social worker's report, Wiggins's alcoholic mother

[f]requently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. . . . She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner. . . . At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, and, the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion.¹⁸²

During the post-conviction proceedings, Wiggins's lawyers testified that they were aware of Wiggins's background but did not retain a social worker because they had made the tactical decision to concentrate on Wiggins's actual guilt instead of concentrating on mitigating circumstances.¹⁸³ The trial court denied Wiggins's ineffective assistance claim and the Fourth Circuit upheld the ruling.¹⁸⁴

The Supreme Court reversed the Fourth Circuit, finding that the investigation that led to Wiggins's lawyers' decision not to present mitigating evidence during the sentencing phase of the trial constitutes a Sixth Amendment violation.¹⁸⁵ As O'Connor explained, while the Court tends to give a great deal of deference to counsel's strategic choices, in this case, Wiggins's counsel did not conduct a reasonable investigation in order

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2532-33.

¹⁸² *Id.* at 2533.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 2534.

¹⁸⁵ *Id.* at 2541-44.

to justify those choices.¹⁸⁶ The Court's concern is not whether mitigating evidence should have been presented, but rather if the investigation that led to counsel's conclusion not to present mitigating evidence itself was sufficient.¹⁸⁷ Upon finding that the investigation was not sufficient, O'Connor then concludes that the presentation of mitigating evidence may well have influenced the jury's verdict, and thus the standards for an ineffective assistance claim had been met.¹⁸⁸

In dissent, Justice Scalia, joined by Justice Thomas, questions the majority's analysis that Wiggins's counsel had not conducted appropriate investigation regarding Wiggins's childhood experiences.¹⁸⁹ During the state's post-conviction proceedings, Wiggins's attorneys testified that they were aware of Wiggins's past¹⁹⁰ but chose not to present those findings because it would have made it more difficult to convince the jury that Wiggins's guilt itself was in fact questionable.¹⁹¹ Justice Scalia notes that these strategic determinations by counsel are consistent with *Strickland* and thus do not qualify as ineffective assistance of counsel.¹⁹² Finally, Justice Scalia contends that even if the social history had been presented to the jury, there is no reasonable probability that the jury would have decided the case differently.¹⁹³ Regardless of Justice Scalia's dissent, the case itself is a move away from prior decisions in which ineffective assistance of counsel claims, particularly in the context of the death penalty, were usually not supported by the justices.¹⁹⁴

¹⁸⁶ *Id.* at 2535.

¹⁸⁷ *Id.* at 2542.

¹⁸⁸ *Id.* at 2542-44. Recall again, *Strickland v. Washington*, 466 U.S. 668 (1984), establishing that a defendant had to prove both (1) deficient performance by counsel, and (2) that he or she had been prejudiced from counsel's unprofessional errors. *Id.* at 687. Here, deficient performance by counsel came when they did not investigate adequately the possible mitigating circumstances and presentation of such facts could have altered the jury's verdict. *Wiggins*, 123 S. Ct. at 2542-44.

¹⁸⁹ *Wiggins*, 123 S. Ct. at 2544 (Scalia, J., dissenting).

¹⁹⁰ *Id.* at 2533.

¹⁹¹ *Id.*

¹⁹² *Id.* at 2552 (Scalia, J., dissenting).

¹⁹³ *Id.* at 2553-54 (Scalia, J., dissenting).

¹⁹⁴ See *Smith*, *supra* note 18.

D. 6-3 Decisions

The Court issued a total of six decisions by a vote count of 6-3.¹⁹⁵ The six cases concerned a sodomy law,¹⁹⁶ forcing a defendant to take medication so that the defendant could stand trial,¹⁹⁷ Fifth Amendment self-incrimination,¹⁹⁸ sex offender registries,¹⁹⁹ the criminalization of cross-burning,²⁰⁰ and application of the Antiterrorism and Effective Death Penalty Act.²⁰¹ Of these six cases, two ended in liberal rulings²⁰² while four ended in conservative rulings²⁰³ and half of the cases are among the more significant of the term.²⁰⁴

Starting first with a liberal decision, and perhaps the most controversial criminal justice case of the term,²⁰⁵ the majority ruled in *Lawrence v. Texas*²⁰⁶ that Texas's law criminalizing homosexual behavior was an unconstitutional violation of the Due Process Clause of the Fourteenth

¹⁹⁵ *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); *Sell v. United States*, 123 S. Ct. 2174 (2003); *Chavez v. Martinez*, 123 S. Ct. 1994 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Virginia v. Black*, 123 S. Ct. 1536 (2003); *Woodford v. Garceau*, 538 U.S. 202 (2003).

¹⁹⁶ *Lawrence*, 123 S. Ct. at 2472.

¹⁹⁷ *Sell*, 123 S. Ct. at 2174.

¹⁹⁸ *Chavez*, 123 S. Ct. at 1994.

¹⁹⁹ *Smith*, 538 U.S. at 84.

²⁰⁰ *Black*, 123 S. Ct. at 1536.

²⁰¹ *Woodford v. Garceau*, 538 U.S. 202 (2003).

²⁰² *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); *Sell*, 123 S. Ct. at 2174.

²⁰³ *Chavez*, 123 S. Ct. at 1994; *Smith*, 538 U.S. at 84; *Black*, 123 S. Ct. at 1536; *Woodford*, 538 U.S. at 202.

²⁰⁴ *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), overturned *Bowers v. Hardwick*, 478 U.S. 186, and makes criminal statutes legislating sexual conduct between two consenting adults a Due Process violation; *Virginia v. Black*, 123 S. Ct. at 1536, makes it legal to criminalize cross-burning, and *Sell v. United States*, 123 S. Ct. 1925 (2003), creates rules to forcefully medicate inmates to render them capable of standing trial.

²⁰⁵ See Tony Mauro & Brenda Sapino Jeffreys, *Bye Bye Bowers, High Court Strikes Down Homosexual Conduct Laws*, 19 TEX. LAWYER 1 (2003); Marcia Coyle, *In Rulings on Gay Rights and Affirmative Action, the Court Caught Up With Social Trends*, 25 NAT'L LAW J., Aug. 4, 2003, at S1; Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1, available at <http://www.nytimes.com>.

²⁰⁶ 123 S. Ct. 2472 (2003).

Amendment and in so doing, overturned the Court's 1986 decision in *Bowers v. Hardwick*.²⁰⁷ The case starts in 1998 when John Lawrence and Tyrone Garner were arrested for having sex in their home.²⁰⁸ Lawrence and Garner were convicted of violating Texas's Homosexual Conduct law, a law outlawing sodomy when practiced by same-sex partners but not heterosexual couples.²⁰⁹ Lawrence and Garner challenged their convictions by arguing (1) that the law violated their liberty and privacy rights protected by the Due Process Clause of the Fourteenth Amendment and (2) that the law violates the Equal Protection Clause of the Fourteenth Amendment because it is restricted to same-sex couples.²¹⁰ Justice Kennedy, writing for the majority, found the Texas Homosexual Conduct law unconstitutional under the Due Process Clause of the Fourteenth Amendment.²¹¹

While the ruling in *Lawrence* is significant, the use by Kennedy of the Due Process Clause and not the Equal Protection Clause is even more important. The majority could have based their decision on the relatively narrow grounds that the law penalizes only same-sex couples and exempts heterosexual couples. Thus, the majority had the option of invalidating this law but leaving open the possibility of other state regulations of sexual behavior. Indeed, Justice O'Connor's concurring opinion notes that she would have struck down the law only on Equal Protection grounds.²¹² Such a ruling would not have overturned *Bowers v. Hardwick* and would only apply to sodomy statutes that differentiate between heterosexual and homosexual couples.

Instead, Justice Kennedy notes:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause

²⁰⁷ *Id.* at 2484; *see Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁰⁸ *Lawrence*, 123 S. Ct. at 2476.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 2486 (O'Connor, J., concurring).

gives them the full right to engage in their conduct without intervention of the government.²¹³

Thus, liberty and privacy rights inherent in the substantive meaning of the Due Process Clause preclude government intervention.²¹⁴ This use of a substantive due process argument potentially provides a precedent through which laws prohibiting openly gay individuals in the military, same sex marriages, and perhaps even prostitution could be re-examined.²¹⁵

In a scathing dissenting opinion, Justice Scalia, joined by Justices Thomas and Rehnquist, rejects every aspect of the majority opinion.²¹⁶ Justice Scalia finds no fundamental right to sexual activity, thus negating the due process argument.²¹⁷ In regard to the Equal Protection claim, Justice Scalia notes that the state has a legitimate interest in the promotion of majoritarian sexual morality and this gives the state the right to promote those interests through legislation.²¹⁸ Finally, Justice Scalia believes *Bowers* should be upheld.²¹⁹ Apart from disagreeing with the majority on the law, Justice Scalia notes that the majority opinion would cause a “mass disruption of the social order”²²⁰ and reflects a majority that has bought into the politically correct homosexual agenda.²²¹

The only other 6-3 liberal criminal justice ruling in the 2002-03 Term is *Sell v. United States*.²²² The case deals with the ability of the government to force mentally ill defendants to take medication in order to render them capable of standing trial for a non-violent offense.²²³ Charles Sell, a dentist, had a long and documented history of mental illness and

²¹³ *Id.* at 2484.

²¹⁴ *Id.*

²¹⁵ See Tony Mauro & Brenda Sapino Jeffreys, *Bye Bye Bowers, High Court Strikes Down Homosexual Conduct Laws*, 19 TEX. LAWYER 1 (2003).

²¹⁶ *Lawrence*, 123 S. Ct. at 2488-98 (Scalia, J., dissenting).

²¹⁷ *Id.* at 2492 (Scalia, J., dissenting).

²¹⁸ *Id.* at 2495 (Scalia, J., dissenting).

²¹⁹ *Id.* at 2492 (Scalia, J., dissenting).

²²⁰ *Id.* at 2491 (Scalia, J., dissenting).

²²¹ *Id.*

²²² 123 S. Ct. 2174 (2003).

²²³ *Id.*

instability.²²⁴ In 1997, the Government charged Sell with insurance fraud, and Sell was initially found competent to stand trial.²²⁵ In 1998, Sell was also indicted for attempted murder.²²⁶ During subsequent hearings, Sell's behavior was erratic, and in early 1999, Sell asked that his competence to stand trial be re-evaluated.²²⁷ Sell was found incompetent to stand trial and was hospitalized for treatment.²²⁸ Sell refused to take the antipsychotic medication that was prescribed for his mental illness and the government sought permission to forcefully medicate him so that he would be competent to stand trial, a request that the Eighth Circuit approved.²²⁹

Writing for the majority, Justice Breyer strictly limits the circumstances under which a person charged with a non-violent crime could be medicated against his or her will by the government in order to be rendered competent.²³⁰ Justice Breyer notes that before a defendant accused of serious crimes can be forcefully medicated, using the standards established in *Washington v. Harper*²³¹ and *Riggins v. Nevada*,²³² courts must find "that the treatment is medically appropriate, is substantially unlikely to have side effects that undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary to significantly further important governmental trial-objectives."²³³ Justice Breyer finds, when applying these standards, that the competency hearings did not adequately evaluate the effect the medication would have on Sell's ability to stand trial or the influence of potential side effects on Sell's ability to get a fair trial, but rather focused attention only on the fact that the medication would reduce Sell's level of dangerousness.²³⁴ Justice Scalia, joined by Justices

²²⁴ *Id.* at 2179.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 2180.

²²⁹ *Id.* at 2181.

²³⁰ *Id.* at 2185.

²³¹ 494 U.S. 210 (1990).

²³² 504 U.S. 127 (1992).

²³³ *Sell*, 123 S. Ct. at 2182.

²³⁴ *Id.* at 2180.

Thomas and O'Connor dissent, arguing that the Court lacked jurisdiction to hear the case.²³⁵

The remaining four 6-3 decisions ended in conservative rulings. First, the Court decided in *Virginia v. Black*²³⁶ that states may criminalize cross burning despite First Amendment protections to freedom of expression. In their first case dealing with hate speech since *R.A.V. v. St. Paul*,²³⁷ the justices seemed divided on the proper balance between the First Amendment and hate speech, evident in the five different opinions produced by the justices.²³⁸ In 1998, following a Ku Klux Klan rally, Barry Black burned a large cross.²³⁹ Black was arrested and charged with violating a Virginia statute that makes it a crime to burn a cross with the purpose to intimidate.²⁴⁰ The statute further states that the burning of the cross itself constitutes prima facie evidence of an intent to intimidate.²⁴¹ Black was convicted under Virginia's cross burning ban and the case eventually reached the justices on appeal.²⁴²

Writing for a 6-3 majority, Justice O'Connor finds that a properly written cross burning law could be constitutional.²⁴³ Justice O'Connor takes great care to distinguish this case from *R.A.V. v. St. Paul* by noting that in *R.A.V.*, only specific types of persons were protected by the hate speech, but here, any intimidation is illegal.²⁴⁴ In other words, it does not matter if a cross is burned to intimidate because of a person's race, gender, ethnicity, religion, political affiliation, or any other characteristic.²⁴⁵ Moreover, the majority notes that the First Amendment does not protect all speech—speech that is a true threat may be banned—and the Government is free to ban certain types of threats and not others.²⁴⁶ As such,

²³⁵ *Id.* at 2187 (Scalia, J., dissenting).

²³⁶ 123 S. Ct. 1536 (2003).

²³⁷ 505 U.S. 377 (1992).

²³⁸ *See generally Black*, 538 U.S. at 1541-69.

²³⁹ *Id.* at 1542.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 1543.

²⁴⁴ *Id.* at 1542.

²⁴⁵ *Id.* at 1549.

²⁴⁶ *Id.*

governments are free to ban cross burning in a properly constructed statute and not ban other types of threats if it so chooses.²⁴⁷

Having found that cross-burning statutes can be constitutional, O'Connor, and six other Justices, find Virginia's statute faulty because it allows the jury to infer the motive of intimidation merely by looking at the defendant's actions.²⁴⁸ That is, the statute allows the fact that a cross was burned to itself be evidence that the purpose of the action was intimidation without other proof of the defendant's motivations.²⁴⁹ Such a shortcut is inconsistent with the First Amendment.²⁵⁰

Chief Justice Rehnquist and Justices Stevens and Breyer joined Justice O'Connor's entire opinion.²⁵¹ Justices Scalia and Thomas joined Justice O'Connor regarding the viability of cross-burning statutes in general but both justices found Virginia's law to be constitutional and both filed separate dissenting opinions.²⁵² Justices Souter, Ginsburg, and Kennedy joined Justice O'Connor in finding Virginia's cross-burning statute unconstitutional, but all three justices disagree with the majority that any cross burning law could be constitutional.²⁵³ Writing for Justices Ginsburg and Kennedy, Justice Souter notes that cross burning carries with it an ideological message and, no matter how offensive, is nonetheless intended to convey feelings and beliefs protected by the First Amendment.²⁵⁴ Justice Thomas's separate dissenting opinion takes issue with the entire concept of cross burning as a form of speech, expressing instead the opinion that it is conduct, and thus no First Amendment issue exists.²⁵⁵ Following a lengthy discussion of the history and use of cross burning as a method of intimidation in the United States, Thomas notes:

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 1552.

²⁴⁹ *Id.* at 1555.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1541-52.

²⁵² *See id.* at 1552-59 (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part), 1562-69 (Thomas, J., dissenting).

²⁵³ *Id.* at 1559-62 (Souter, J., with whom Kennedy, J., and Ginsburg, J., join concurring in the judgment in part and dissenting in part).

²⁵⁴ *Id.* at 1566 (Souter, J., concurring in the judgment in part and dissenting in part).

²⁵⁵ *Id.* at 1573 (Thomas, J., dissenting).

The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.²⁵⁶

Another 6-3 conservative case of the 2002-03 Term is *Smith v. Doe*.²⁵⁷ *Smith* is the second case of the term dealing with the constitutionality of Megan's Laws in the states²⁵⁸ and for a second time, the Justices uphold the state's use of a sex offender registry.²⁵⁹ This particular case deals with retroactive application of Megan's Law by registering individuals who had committed qualified crimes prior to the state's enactment of the registry.²⁶⁰ Respondents John Doe I and II were both convicted of sexual abuse of a minor, were both released from prison in 1990, and both completed rehabilitative programs for sex offenders.²⁶¹ In 1994, Alaska enacted the Alaska Sex Offender Registration Act and both respondents were covered by the Act, even though the Act was created after the respondents had finished serving their time.²⁶² Both Does brought suit arguing that the Act, as applied to them, violated the Ex Post Facto Clause of the Constitution.²⁶³

Justice Kennedy, writing for the majority bloc consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas (Justice Souter filed an opinion concurring in judgment only), notes that the purpose of the law is not punitive and thus is constitutional.²⁶⁴ Kennedy characterizes the sex offender registry established by Alaska as a civil regulatory scheme that is not intended to further punish those required to

²⁵⁶ *Id.* at 1562 (Thomas, J., dissenting).

²⁵⁷ 538 U.S. 84 (2003).

²⁵⁸ Recalling again the 9-0 decision in *Conn. Dep't. of Pub. Safety v. Doe*, 123 S. Ct. 1160 (2003).

²⁵⁹ *Smith*, 538 U.S. at 96.

²⁶⁰ *See generally id.*

²⁶¹ *Id.* at 91.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 99.

register but rather to merely protect the public safety.²⁶⁵ In dissent, Justice Stevens, joined by Ginsburg, finds that the law violates the Ex Post Facto provision.²⁶⁶ Justice Ginsburg, dissenting and joined by Justice Breyer, further finds the law ambiguous and punitive.²⁶⁷

The Court also ruled in *Chavez v. Martinez*²⁶⁸ that a police officer is entitled to qualified immunity if the officer's conduct did not violate a constitutional right.²⁶⁹ The issue at hand is if questions asked to and answered by a defendant without a *Miranda* warning violate due process if the defendant's incriminating answers are never used in a legal proceeding against the defendant.²⁷⁰ In a judgment written by Justice Thomas, and joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, the Court finds such questioning does not violate the Fifth Amendment guarantee against self-incrimination.²⁷¹

Finally, in *Woodford v. Garceau*,²⁷² the Court analyzed the Antiterrorism and Effective Death Penalty Act and determined that a case does not become "pending" until after an application for habeas relief has been filed in federal court.²⁷³ The respondent's habeas petition was subject to the limitations of the Act because his petition for habeas relief was filed after the effective date of the Act.²⁷⁴ Justice Thomas wrote the opinion for the majority of Rehnquist, Stevens, Scalia, and Kennedy²⁷⁵ while Justice Souter filed a dissenting opinion in which Justices Ginsburg and Breyer joined.²⁷⁶ Justice O'Connor wrote an opinion concurring in judgment.²⁷⁷

²⁶⁵ *Id.* at 1148-49.

²⁶⁶ *Id.* at 1157-58 (Stevens, J., dissenting).

²⁶⁷ *Id.* at 1159 (Ginsburg, J., dissenting).

²⁶⁸ 123 S. Ct. 1994 (2003).

²⁶⁹ *Id.* at 1999.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 2006.

²⁷² 538 U.S. 202 (2003).

²⁷³ *See id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 204-10.

²⁷⁶ *Id.* at 213-15.

²⁷⁷ *Id.* at 210-13 (O'Connor, J., concurring).

E. 5-4 Decisions

The most significant aspect of the Court's 5-4 criminal justice decisions during the term is the role Justice O'Connor played as the swing vote in all of the cases. The Court handed down six decisions²⁷⁸ by a 5-4 vote, of which two decisions ended in liberal rulings,²⁷⁹ four decisions ended in conservative rulings,²⁸⁰ and Justice O'Connor was in the majority in all six cases.²⁸¹

Starting with a highly controversial conservative ruling, the Court held in *Lockyer v. Andrade*²⁸² that California's Three Strike Law allowing a non-violent third offense to be counted as a third strike if the other two strikes were violent or serious was constitutional.²⁸³ In 1995, Leandro Andrade, an individual who had been in trouble with authorities on several occasions during the past thirteen years, stole approximately \$85 worth of videotapes from one local Kmart and \$70 from another.²⁸⁴ Under California law, because Andrade had a prior conviction, the two petty theft charges could, at the discretion of the prosecutor, be counted as felonies.²⁸⁵ A jury found Andrade guilty of felonies and further found that he had been guilty of three other counts of serious felonies.²⁸⁶ Each incident counted as a "strike" under California's three strike law—a law which states that any individual convicted of three strikes could face a prison term of twenty-five years to life, even if the final strike would normally be considered a misdemeanor (but becomes a felony count due to the prior convictions).²⁸⁷

²⁷⁸ *Stogner v. California*, 123 S. Ct. 2446 (2003); *Nguyen v. United States*, 123 S. Ct. 2130 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Roell v. Withrow*, 538 U.S. 580 (2003); *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003); *Ewing v. California*, 538 U.S. 11 (2003).

²⁷⁹ *Stogner*, 123 S. Ct. 2446; *Nguyen*, 123 S. Ct. 2130.

²⁸⁰ *Lockyer*, 538 U.S. 63; *Roell*, 538 U.S. 580; *Sattazahn*, 537 U.S. 101; *Ewing*, 538 U.S. 11.

²⁸¹ See cases cited *supra* note 278.

²⁸² 538 U.S. 63.

²⁸³ *Id.*

²⁸⁴ *Id.* at 66.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

Andrade was thus sentenced to two consecutive terms of twenty-five years to life.²⁸⁸ Andrade challenged his conviction claiming that the twenty-five years to life sentence, for what essentially is a petty theft, constitutes a violation of the Eighth Amendment ban against cruel and unusual punishment.²⁸⁹ The Ninth Circuit granted habeas relief and held that the punishment was in violation of the Eighth Amendment and the state court's decision affirming the sentence was contrary to clearly established federal law.²⁹⁰

Justice O'Connor, writing for the majority of Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas, reversed the Ninth Circuit, holding California's three strike laws and the use of the law by the state court was not an unreasonable application to constitutional law.²⁹¹ Justice O'Connor states that the first task is to clarify what constitutes established federal law in regard to sentencing so that the Court can then determine if Andrade's claim that his two consecutive twenty-five years to life sentences are clearly disproportionate and thus in violation of the Eighth Amendment is valid.²⁹² Specifically, Justice O'Connor noted that the Supreme Court's cases have lacked clarity on what factors constitute a grossly disproportionate sentence and as such, do not provide clearly delineated guidelines for determining which sentences violate the Eighth Amendment.²⁹³ Because of this ambiguity, the federal court's application of the proportionality principle should be used only in the most extreme of cases.²⁹⁴ Here, the Ninth Circuit's grant of habeas relief based on clearly established guidelines that the state violated was not warranted because there are no clearly established guidelines to violate.²⁹⁵ Moreover, O'Connor further notes that facts in *Andrade* would fall somewhere between the major precedents, and thus the state's actions are not clearly disproportionate either.²⁹⁶ Although the opinion clarifies the standards for

²⁸⁸ *Id.* at 67-68.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 69.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 77.

²⁹⁵ *Id.* at 76.

²⁹⁶ *Id.* at 69-70.

federal habeas review, it also suggests that the majority would not find the “three strikes” law a gross violation of Eighth Amendment jurisprudence.

In dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, finds Andrade’s sentence violated the Eighth Amendment’s prohibition against cruel and unusual punishment because the sentence was “grossly disproportionate to the offense for which it is imposed.”²⁹⁷ Justice Souter finds the sentencing defective on two basic points. First, the Court had ruled in *Solem v. Helm*²⁹⁸ that a life sentence for a \$100 check violation was disproportionate.²⁹⁹ Here, Andrade, who was thirty-seven at the time of the crime, would not be eligible for parole for fifty years or when he is eighty-seven years old.³⁰⁰ Effectively then, even though he is eventually eligible for parole, the state has given him a life sentence that, based on the ruling in *Solem*, Justice Souter finds unconstitutional.³⁰¹ Justice Souter also finds that the sentence is an unreasonable application of federal law that indicates grossly disproportionate punishments will not be upheld.³⁰² As Justice Souter notes, “[i]f Andrade’s sentence is not grossly disproportionate, the principle has no meaning. The California court’s holding was an unreasonable application of clearly established precedent.”³⁰³ The same five-member majority also upheld California’s three-strikes law in the companion case of *Ewing v. California*.³⁰⁴

In a somewhat unusual panel of judicial votes, the majority decided in *Roell v. Withrow*³⁰⁵ that a judge could preside over proceedings when the parties participated and behaved as if the use of the magistrate judge was acceptable, even if no written consent had been submitted.³⁰⁶ Writing for the majority of Chief Justice Rehnquist and Justices O’Connor, Ginsburg, and Breyer, Justice Souter finds that consent to the use of a Magistrate

²⁹⁷ *Id.* at 77-78 (Souter, J., dissenting).

²⁹⁸ 463 U.S. 277 (1983).

²⁹⁹ *Id.* at 302.

³⁰⁰ *Lockyer*, 538 U.S. at 79 (Souter, J., dissenting).

³⁰¹ *Id.* (Souter, J., dissenting).

³⁰² *Id.* (Souter, J., dissenting).

³⁰³ *Id.* at 83 (Souter, J., dissenting).

³⁰⁴ 538 U.S. 11 (2003).

³⁰⁵ 123 S. Ct. 1696 (2003).

³⁰⁶ *See id.*

Judge can be inferred from a party's conduct.³⁰⁷ In this case, the parties appeared before the Court after they had been told that they had the right to be tried by a district court judge.³⁰⁸ Justices Stevens, Scalia, and Kennedy joined Justice Thomas's dissenting opinion holding that explicit consent is necessary.³⁰⁹

In a final conservative 5-4 ruling, the majority considered the limits of the Double Jeopardy Clause of the Fifth Amendment in the context of capital sentencing proceedings in *Sattazahn v. Pennsylvania*.³¹⁰ In 1991, David Sattazahn and an accomplice robbed the manager of a local restaurant at gunpoint in the restaurant's parking lot.³¹¹ During the course of the robbery, the manager attempted to escape, at which point both Sattazahn and the accomplice fired shots killing the manager.³¹² The trial court jury found Sattazahn guilty of first-, second-, and third-degree murder along with a variety of other charges.³¹³ During the penalty phase of the trial, the jury was deadlocked regarding the imposition of the death penalty, at which point the trial judge entered a sentence of life as required by Pennsylvania law.³¹⁴ On appeal, the Pennsylvania Superior Court found reversible error and ordered a new trial.³¹⁵ The state sought the death penalty at the subsequent trial and, in part based on guilty pleas by Sattazahn that were entered after the first trial, argued additional aggravating circumstances than those originally presented.³¹⁶ The second jury again found Sattazahn guilty of first-degree murder but this time they imposed the death penalty.³¹⁷ On appeal, Sattazahn claimed that the Double Jeopardy Clause of the Fifth Amendment was violated when the

³⁰⁷ *Id.* at 1703.

³⁰⁸ *Id.* at 1699.

³⁰⁹ *Id.* at 1705 (Thomas, J., dissenting).

³¹⁰ 537 U.S. 101 (2003).

³¹¹ *Id.* at 103.

³¹² *Id.* at 104.

³¹³ *Id.* at 103.

³¹⁴ *Id.* at 104-05.

³¹⁵ *Id.* at 105.

³¹⁶ *Id.*

³¹⁷ *Id.*

state sought the death penalty a second time after a sentence of life had already been entered.³¹⁸

Writing for the majority, Justice Scalia found no violation of the Fifth Amendment.³¹⁹ Rather, Justice Scalia notes that because the jury's finding regarding sentencing at the first trial was effectively a "nonresult," it does not qualify as an acquittal and thus jeopardy does not attach.³²⁰ During the original trial, Sattazahn was found guilty of first-degree murder but the jury was deadlocked regarding the issue of whether or not aggravating circumstances existed.³²¹ Neither the jury nor the judge effectively found Sattazahn not guilty of aggravating circumstances, but rather merely failed to render a verdict.³²² As such, the state is free to retry Sattazahn not only for first-degree murder, but also to seek the death penalty through the presentation of aggregating factors.³²³ Justice Scalia's judgment is joined by Justices Rehnquist, O'Connor, Kennedy, and Thomas.³²⁴ Justice Ginsburg, joined by Justices Souter, Stevens, and Breyer, dissented from the majority holding, finding the Double Jeopardy Clause of the Fifth Amendment had been violated.³²⁵

The Court handed down two liberal 5-4 cases and again, in both instances Justice O'Connor provided a fifth decisive vote.³²⁶ In *Stogner v. California*,³²⁷ the Court again evaluates the Ex Post Facto Clause.³²⁸ In 1993, California passed a law allowing prosecution of sex-related child abuse where the prior statute of limitations had already expired if prosecution is started within one year of a victim complaint.³²⁹ In 1998, Marion Stogner was indicted on child abuse charges from incidents

³¹⁸ *Id.*

³¹⁹ *Id.* at 106.

³²⁰ *Id.* at 106-07.

³²¹ *Id.* at 109.

³²² *Id.*

³²³ *Id.* at 112.

³²⁴ *Id.* at 102.

³²⁵ *Id.* at 118 (Ginsburg, J., dissenting).

³²⁶ *Stogner v. California*, 123 S. Ct. 2446 (2003); *Nguyen v. United States*, 123 S. Ct. 2130 (2003).

³²⁷ 123 S. Ct. 2446 (2003).

³²⁸ *Id.*

³²⁹ *Id.* at 2449.

occurring in the 1970s.³³⁰ The statute of limitations for those crimes was originally three years, but the violations had been revived by the state's new law.³³¹ Stogner sought to have the indictment dismissed, arguing that the Ex Post Facto Clause forbids resurrecting a violation for which the statute of limitations had expired.³³² Writing for the majority, Justice Breyer indeed found the law constitutionally defective based on the limits imposed by the Ex Post Facto Clause.³³³ Justice Breyer is joined by Justices Stevens, O'Connor, Souter, and Ginsburg,³³⁴ while Justice Kennedy filed a dissenting opinion joined by Chief Justice Rehnquist and Justices Scalia and Thomas.³³⁵

Finally, the Court decided in *Nguyen v. United States* that a judge who served on the Ninth Circuit panel but whose regular assignment was as a district court judge for the Northern Mariana Islands was not an Article III judge and thus not eligible to serve on the Ninth Circuit panel.³³⁶ The opinion was written by Justice Stevens and joined by O'Connor, Kennedy, Souter, and Thomas,³³⁷ while Chief Justice Rehnquist's dissent was joined by Justices Scalia, Ginsburg, and Breyer.³³⁸

IV. CONCLUSION

The Supreme Court's decision making for criminal justice issues in the 2003-03 Term was similar to its performance in prior terms with respect to the number of cases and the conservative predominance in case outcomes. The term was unusual for the absence of Fourth Amendment issues, a category of cases that is usually well-represented among the constitutional issues considered by the Court.³³⁹ Case selection in future terms will

³³⁰ *Id.*

³³¹ *Id.* at 2446.

³³² *Id.*

³³³ *Id.* at 2448.

³³⁴ *Id.* at 2448.

³³⁵ *Id.* at 2461 (Kennedy, J., dissenting).

³³⁶ *Nguyen v. United States*, 123 S. Ct. 2130 (2003).

³³⁷ *Id.*

³³⁸ *Id.* at 2139 (Rehnquist, C.J., dissenting).

³³⁹ See Smith, *supra* note 62, at 166 ("Among constitutional cases, issues arose most frequently concerning the Fourth Amendment. The predominance of search and seizure
(continued)

demonstrate whether this development indicates that most justices consider search and seizure law to be settled. The term was also notable for the Court's clarification of the constitutional permissibility of several hotly debated public policies. The Court endorsed "three-strikes" sentencing (*Ewing v. California*; *Lockyer v. Andrade*) and sex offender registration laws (*Connecticut Department of Public Safety v. Doe*; *Smith v. Doe*), but it reversed course from precedent by invalidating anti-sodomy laws (*Lawrence v. Texas*). These issues are not necessarily settled because divisions within the Court leave open the possibility that future changes in the Court's composition may lead to new decisions affecting such cases.

The Court also offered important clarifications to aspects of its own important precedents concerning rights. A majority of justices made clear, for example, that the *Miranda* rules need not be followed when detainees are not subsequently charged with any crimes (*Chavez v. Martin*). Although this decision was made specifically in the context of police investigations of crimes, it has potential implications for the detaining and questioning of suspects and witnesses in anti-terrorism efforts. The Court also seemed to issue a warning to lower courts to pay closer attention to issues of ineffective assistance of counsel, especially in death penalty cases (*Wiggins v. Smith*). This decision may counteract the widely-held view that the Supreme Court's standards for identifying Sixth Amendment violations for ineffective assistance of counsel are so vague and difficult to establish that the right provides scant protection for defendants.³⁴⁰ Similarly, the Court seemed to issue a warning to lower courts to pay closer attention to racial discrimination in jury selection (*Miller-El v. Cokerell*). This was a message that seemed to go against the justices' prior trend toward tolerating the possibility of discrimination as long as attorneys provide a rationale for excluding members of one racial group.³⁴¹

Analysis of the justices' decisions as well as other developments raise the tantalizing possibility that Justices O'Connor and Kennedy may be moderating their views on some issues affecting criminal justice. Neither

cases is not surprising in light of the many technical details affecting the legal rules on this subject.").

³⁴⁰ See, e.g., Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994).

³⁴¹ CHRISTOPHER E. SMITH, CHRISTINA DEJONG & JOHN BURROW, THE SUPREME COURT, CRIME, AND THE IDEAL OF EQUAL JUSTICE 52-55 (2003).

justice voted for conservative outcomes at the rate of their more conservative colleagues (Thomas, Scalia, Rehnquist). Both justices voted to reverse precedent and strike down the Texas anti-sodomy statute (*Lawrence v. Texas*), a decision that received broad condemnation from many political conservatives.³⁴² In 2002, O'Connor suddenly publicly voiced concerns about the imposition of death sentence on innocent people.³⁴³ In 2003, Kennedy delivered a highly-publicized speech to the American Bar Association in which he criticized the harshness of sentencing for criminal offenses and the limitations placed on federal judges' discretion by sentencing guidelines.³⁴⁴ Do these developments indicate that these justices are changing their views? Perhaps. Both justices are nearing the end of their careers and they may have heightened concern about how they will be judged by history as well as an attendant belief that history will be kindest to those jurists who are known for using judicial power to protect constitutional rights. Obviously, analysts must wait for future terms to see if these scraps of evidence accurately indicate new developments affecting the Supreme Court's decision making.

³⁴² See, e.g., Virginia Armstrong, *Sodomy, Survival, and the Supremes: Lawrence v. Texas*, 5 EAGLE FORUM'S COURT WATCH (July 18, 2003), available at http://www.eagleforum.org/court_watch/alerts/2003/july03/Lawrence-7-18-03.shtml

³⁴³ Charles Lane, *O'Connor's Clout Lies in Holding Back*, SEATTLE TIMES, Feb. 20, 2002, at A3.

³⁴⁴ Bob Ray Sanders, *Sentencing Guidelines Are Unwise, Unjust and Unnecessary*, FT. WORTH STAR-TELEGRAM, Aug. 22, 2003, available at <http://www.dfw.com/mld/startelegram/news/local/6592479.htm>.