

# **FAMOUS CRIMINAL APPEALS DURING THE 2005–2006 TERM OF THE UNITED STATES SUPREME COURT**

DERRICK AUGUSTUS CARTER\*

## INTRODUCTION

Part of the terror of a great crime is due to the unsavory, yet captivating, abnormalities which challenge our individual proclivities. Juxtaposing barbaric behavior through the prisms of dignified trial rules is the task of trial judges, legislative bodies and appellate courts. The 2005–2006 Term presented issues of daily conventions: drug dealing, pornography, domestic assaults, felony-murders, police shootings, teenage brawls, bar fights, fraud, duress and insanity. These crimes generally occurred as acts of intimacy between husbands and wives, as arguments between friends, and as traps between those locked in the confines of an emotional relationship. Passions, addictions, lust, fear, and revenge throng these pages.

Across the gulf which separates the ordinary citizen from the criminal, one walks a narrow abyss. A bad day, a road rage incident, a death, or a gross mistake may alter one's life forever and unwittingly lead to compelling legal questions. A famous criminal appeal presents empathetic, ordinary facts or presents facts where the mighty have fallen. A famous criminal appeal embarks on new law and procedure or resolves difficult contentious arguments which have a great bearing on the judicial processes. A famous criminal appeal applies the competing statutes, ascertains guilt or reversal, and directs our future conduct. There is an old saying that bad people take no interest in the lives of good people, but good people perversely hunger for the exploits of the bad. The most notorious criminal, if caught, must yield to the untiring principles of

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jurisprudence.<sup>1</sup> Just below God, appellate courts are the depots between heaven and hell.

There are many sides to a criminal or civil appeal—depending on the number of parties presenting the case. The prosecutor, or plaintiff, presents the sordid and revolting facts and the applicable law. The defense presents the understandable and defensible, the duality of human character. Multiple litigants add their dimensions. The judiciary applies the rules, statutes, and Constitution to resolve our explosive and planned conduct. Chief Justice John Marshall declared in *Marbury v. Madison*,<sup>2</sup> that “it is emphatically the province and duty of the judicial department to say what the law is.”<sup>3</sup>

During the 2005–2006 Term,<sup>4</sup> the country endured the continuing saga of deaths and mutilations of the war in Iraq.<sup>5</sup> Hurricane Katrina struck Louisiana, Mississippi, and the Gulf area in late August 2005 causing numerous deaths and destruction.<sup>6</sup> Hurricane Rita, equally devastating, soon followed and hit Louisiana and Texas in late September 2005.<sup>7</sup> Severe flooding, fires, social upheaval, and political quagmires displaced thousands of people from their homes.

In national political news, House Majority Leader, Tom Delay was indicted in several major political scandals and fund probes.<sup>8</sup> Vice-President Dick Cheney shot a fellow hunter in the face during a quail

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<sup>1</sup> See, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (reversing the death sentences of the “Scottsboro Boys” for violation of their Sixth Amendment right to counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing appointed counsel for indigent defendants); *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring the infamous Miranda warnings before interrogation); *Batson v. Kentucky*, 476 U.S. 79 (1986) (discrimination during the jury selection); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (demanding racial integration of public schools).

<sup>2</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>3</sup> *Id.* at 177.

<sup>4</sup> The United States Supreme Court’s Term began in October 2005 and ran through June 2006.

<sup>5</sup> Richard Opiel Jr., *Up to 130 Killed in Iraq, Drawing a Shiite Warning, 2 Big Suicide Bombings, Faction Warns of Revenge—7 Americans Also Reported Killed*, N.Y. TIMES, Jan. 6, 2006, at A1.

<sup>6</sup> Howard Witt, *New Orleans Ravaged, 80 Percent of City Submerged After Levees Burst*, CHI. TRIB., Aug. 31, 2005, at A1.

<sup>7</sup> Bill Glauber & Ofelia Casillas, *Rita Assaults Coast, New Orleans Levees Fail*, CHI. TRIB., Sept. 24, 2005, at A1.

<sup>8</sup> Jim Drinkard, Andrea Stone & Kathy Kiely, *Delay Indicted in Fund Probe*, USA TODAY, Sept. 29, 2005, at A1.

hunting expedition.<sup>9</sup> Former Illinois Governor Jim Ryan, who issued a moratorium on the state's death penalty, was found guilty in April 2006, of unrelated federal corruption charges.<sup>10</sup>

In sports, the Chicago White Sox beat the Houston Astros in a 4–0 sweep during the October 2005, World Series.<sup>11</sup> In the Super Bowl, the Pittsburgh Steelers beat the Seattle Seahawks in February 2006, with the Rolling Stones performing the half-time show.<sup>12</sup> In July 2006, Italy beat France to win the World Cup.<sup>13</sup> In Cultural events, “Crash” won the best movie in the March 2006 Oscar Awards.<sup>14</sup>

Political, cultural, sports, and world events place an important background in distinguishing the collection of yearly Supreme Court decisions. It takes years for the pressing cases to work their way to the United States Supreme Court.<sup>15</sup> “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”<sup>16</sup> In many societies, it takes revolutions to accomplish the impact of American courts. “Many coups d’état in small countries have achieved less social change than [the] quiet coup d’état in [an American] court.”<sup>17</sup> “The [Supreme] Court must constantly reexamine the way in which law enforcement agencies, legislatures, and the Court itself strike the balance between the rights of defendants and the interests of society at large.”<sup>18</sup>

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<sup>9</sup> Dana Bash, *Cheney Accidentally Shoots Fellow Hunter*, CNN.COM, Feb. 13, 2006, available at <http://www.cnn.com/2006/POLITICS/02/12/cheney/>.

<sup>10</sup> Matt O’Connor & Rudolph Bush, *Ryan Guilty*, CHI. TRIB., Apr. 18, 2006, at A1.

<sup>11</sup> Dan McGrath, *Believe It! White Sox Bring World Series Title Back to Chicago with Historic Sweep*, CHI. TRIB., Oct. 27, 2005, at A1.

<sup>12</sup> Jon Pareles, *ABC Avoids a Lyric Malfunction but Allows Mick’s Midriff*, N.Y. TIMES, Feb. 6, 2006, at D5.

<sup>13</sup> Andy Gardiner, *Bravo! Italy Wins in Shootout*, USA TODAY, July 10, 2006, at C1.

<sup>14</sup> ‘Crash’ Rides Oscar Tide back into Theaters, MSNBC.COM, Mar. 7, 2006, available at <http://www.msnbc.msn.com/id/11717021/>.

<sup>15</sup> For instance, issues concerning insurance and the damages rendered by Hurricane Katrina are making their way up the ladder. See, e.g., Liam Plevin & Paulo Prada, *Katrina Suits Put U.S. Judge in Eye of Storm, Trumpet-Playing Senter Places Onus on Insurers to Prove Water Damage*, WALL ST. J., Feb. 10–11, 2007, at B1.

<sup>16</sup> SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW, REFLECTIONS OF A SUPREME COURT JUSTICE* 70 (2003) (quoting Alexis de Tocqueville).

<sup>17</sup> JACOB ZIEGEL, *LAW AND SOCIAL CHANGE* 27 (1973).

<sup>18</sup> O’CONNOR, *supra* note 16, at 11.

Criminal procedure is simply “not perfectible,” it’s ever-changing.<sup>19</sup> “Important issues are at stake when the machinery of the state proceeds against the least favored members of our society.”<sup>20</sup>

Criminal procedure issues address “we, the people” against governmental overreaching.<sup>21</sup> While the Constitution is the cornerstone of our nation’s commitment to principles of representative government and majority rule, the Bill of Rights is the anti-majoritarian assurance with a government pledge.<sup>22</sup> The Bill of Rights, the first ten amendments to the United States Constitution, guarantees certain fundamental freedoms, limiting the government’s intrusion on individual citizens’ liberties.<sup>23</sup>

The Justices interpret the Constitution. Justice Breyer and Justice Douglas, for instance, interpret the Constitution as “a living document,” adjusting to the major social and political issues.<sup>24</sup> Justice Scalia and

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974).

<sup>22</sup> O’CONNOR, *supra* note 16, at 59.

<sup>23</sup> *Id.*; The *First Amendment*—Freedom of Press, Freedom of Speech, Freedom of Religion, and the right to peaceably assemble to “petition the Government for a redress of grievances;” *Second Amendment*—a well regulated militia and the right to bear arms; *Third Amendment*—No Soldier shall in time of peace be quartered in any house without the consent of the owner, and during war only as prescribed by law; *Fourth Amendment*—the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure and for warrants particularly describing the place to be searched and things to be seized; *Fifth Amendment*—citizens have rights against double jeopardy; against self-incrimination, nor shall any citizen be deprived of life, liberty or property without due process of law, nor shall property be taken for public use without just compensation; *Sixth Amendment*—In criminal prosecutions, the accused has a right to a speedy and public trial, to an impartial jury, to be informed of the accusations, to be confronted with the witnesses against him or her, to have the right to call witnesses [compulsory process], and to the assistance of counsel; *Seventh Amendment*—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury; *Eighth Amendment*—against Excessive bail, excessive fines, and against cruel and unusual punishment; *Ninth Amendment*—“The enumeration of certain rights shall not be construed to deny or disparage others retained by the people;” *Tenth Amendment*—The powers not delegated to the federal government by the Constitution, nor prohibited by the States, are reserved to the States or to the people.

<sup>24</sup> Justice Douglas advanced a right to privacy embedded in the First Amendment and “penumbras, formed by emanations” from various other amendments, including the Third,  
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Justice Thomas interpret the Constitution according to the dictates of our Founding Fathers, “originalism.”<sup>25</sup> Each judge brings a doctrinal perspective and a vote to the compelling issues of the day.<sup>26</sup> America is a country of change, new ideas, new technology, new wealth, and new issues.<sup>27</sup> “One generation’s heresy is the next generation’s orthodoxy.”<sup>28</sup>

During the 2005–2006 Term, startling questions required resolution. Should the exclusionary rule be the exclusive remedy for a search and seizure violation?<sup>29</sup> If a husband and wife, or co-tenants, disagree on granting consent to a home search, whose voice rules?<sup>30</sup> If a foreign national, upon arrest, is not told of the right to consult with his or her respective consulate, as required in the Vienna Convention, is the consequent confession admissible?<sup>31</sup> Is the Sixth Amendment violated when a person is denied his or her retained counsel of choice?<sup>32</sup> Is the Confrontation Clause of the Sixth Amendment violated when statements made to 911 operators or statements made on the scene are admitted when the declarant doesn’t testify at trial?<sup>33</sup> Can the insanity defense be resolved on the simple proposition whether the accused knew right from wrong?<sup>34</sup>

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Fourth, and Fifth Amendments. See JEFFREY ROSEN, *THE SUPREME COURT, THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 130 (2006).

<sup>25</sup> Frequently originalists, conservative judges, are misconstrued as “strict constructionists.” But

[s]ome of the Court’s more liberal justices were, at times, strict constructionists. Justice Hugo Black, one of the court’s greatest defenders of free speech, took a strict constructionist view when he interpreted the First Amendment’s provision that “Congress shall make no law . . . abridging the freedom of the speech, or of the press.” To [Justice] Black, “no law meant no law . . . .” On the other hand, [Justices] Scalia and Thomas are considered strict constructionists, but they don’t always take that approach.

JAN CRAWFORD GREENBURG, *SUPREME CONFLICT, THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 183–93* (2007).

<sup>26</sup> See *supra* note 24 and accompanying text.

<sup>27</sup> MICHAEL LEWIS, *NEXT, THE FUTURE JUST HAPPENED* 137 (2001).

<sup>28</sup> IRVING STONE, *THE PASSIONS OF THE MIND* 563 (Doubleday & Co. 1971).

<sup>29</sup> *Hudson v. Michigan*, 547 U.S. 586 (2006).

<sup>30</sup> *Georgia v. Randolph*, 547 U.S. 103 (2006).

<sup>31</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

<sup>32</sup> *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

<sup>33</sup> *Davis v. Washington*, *Hammon v. Indiana*, 547 U.S. 813 (2006).

<sup>34</sup> *Clark v. Arizona*, 548 U.S. 735 (2006).

Is it proper to shift the burden of proof onto the defendant to prove the defense of duress?<sup>35</sup> Are anticipatory search warrants, which are not presented to the home residents, constitutional?<sup>36</sup> Can *Blakely*<sup>37</sup> errors, concerning jury verdicts on sentencing issues, be harmless?<sup>38</sup> Can the President of the United States establish secret military commissions to try detainees at Guantanamo Bay with no due process rights?<sup>39</sup> In death penalty cases, if the aggravating circumstances and the mitigating circumstances are equal, is it proper to instruct the jury that the jury must find for the death penalty?<sup>40</sup>

The 2005–2006 Term presented a change in the composition of the Court. Justice Rehnquist<sup>41</sup> died during the Term and Justice Sandra Day O'Connor retired in January, 2006.<sup>42</sup> John Roberts became Chief Justice.<sup>43</sup> Judge Samuel Alito was appointed to the Bench.<sup>44</sup> The Justices for the 2005–2006 Term included: Chief Justice John Roberts, Justice John Paul Stevens, Justice Antonin Scalia,<sup>45</sup> Justice Anthony Kennedy, Justice David Souter, Justice Stephen Breyer,<sup>46</sup> Justice Clarence Thomas,<sup>47</sup> Justice Ruth Bader Ginsburg, and Justice Samuel Alito.

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<sup>35</sup> *Dixon v. United States*, 548 U.S. 1 (2006).

<sup>36</sup> *United States v. Grubbs*, 547 U.S. 90 (2006).

<sup>37</sup> *Blakely v. Washington*, 542 U.S. 296 (2003) (explaining that an exceptional sentence violates the Sixth Amendment right to trial by a jury if the facts supporting the sentence were neither admitted by the defendant nor found by a jury).

<sup>38</sup> *Washington v. Recuenco*, 548 U.S. 212 (2006).

<sup>39</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>40</sup> *Kansas v. Marsh, II*, 548 U.S. 163 (2006).

<sup>41</sup> Justice Rehnquist wrote several books. One is WILLIAM REHNQUIST, *THE SUPREME COURT, HOW IT WAS, HOW IT IS* (1987).

<sup>42</sup> See Sandra Day O'Connor, *Reflections of a Retired Justice*, USA TODAY, June 8, 2006, at 21A (stating that judicial independence is imperiled and electing judges is not wise). Justice O'Connor also weighed in on the immigration debate noting that Spanish was her grandmother's first language. *Id.* Justice O'Connor recently wrote a book. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW, REFLECTIONS OF A SUPREME COURT JUSTICE* (2003).

<sup>43</sup> Sheryl Gay Stolberg & Elisabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice*, N.Y. TIMES, Sept. 30, 2005, at A1.

<sup>44</sup> See GREENBURG, *supra* note 25, at 285–315 (2007).

<sup>45</sup> Justice Scalia wrote *THE OPINIONS OF JUSTICE ANTONIN SCALIA: THE CAUSTIC CONSERVATIVE* (Paul I. Weizer ed., 2004) and *A MATTER OF INTERPRETATION: FEDERAL COURT AND THE LAW* (Amy Gutmann ed., 1998).

<sup>46</sup> Justice Breyer wrote *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

This Article presents the holding, the facts, and an analytical assessment of the major criminal law decisions during the 2005–2006 Term. This Article orchestrates interesting perspectives by the Justices during oral arguments and this Article integrates perspectives from literature. The stories begin with the search and seizure cases: whether curtailing the exclusionary rule in “knock and announce” cases is tantamount to releasing a “computer virus on the Fourth Amendment.”<sup>48</sup>

## I. SEARCH AND SEIZURE CASES

A. Hudson v. Michigan<sup>49</sup>: *On the Right to Privacy—the Police Must Knock-and-Announce Before Barging into one’s home. But What if the Police Don’t Wait? Curtailing the Exclusionary Rule to Knock-and-Announce Cases.*

### 1. The Holding

The exclusionary rule is inapplicable to this technical knock-and-announce violation because the police possessed a valid search warrant.<sup>50</sup> The Court recognized a “social costs” balancing test on the exclusionary rule.<sup>51</sup> Moreover, sufficient civil remedies exist to deter errant police behavior.<sup>52</sup>

### 2. The Facts

The police obtained a search warrant for drugs and firearms at the home of petitioner Booker Hudson.<sup>53</sup> “When the police arrived to execute the warrant, they announced their presence, but waited . . . three or five seconds before turning the knob of the unlocked front door and entering Hudson’s home.”<sup>54</sup>

Petitioner Hudson argued in a suppression motion that the violation of the “knock and announce” rule, by entering too soon, required suppression

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<sup>47</sup> Justice Thomas wrote MY GRANDFATHER’S SON: A MEMOIR (2007).

<sup>48</sup> Transcript of Oral Argument at 50, Hudson v. Michigan, 547 U.S. 586 (2006) (No. 04-1360), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-1360b.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1360b.pdf) (May 18, 2006) (emphasis added).

<sup>49</sup> 547 U.S. 586 (2006).

<sup>50</sup> *Id.* at 594.

<sup>51</sup> *Id.* at 591, 96.

<sup>52</sup> *Id.* at 596–99.

<sup>53</sup> *Id.* at 588.

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

of the evidence.<sup>55</sup> The Michigan Supreme Court held that suppression of the evidence was an inappropriate remedy because the police entry, although flawed, was made pursuant to a valid warrant.<sup>56</sup>

### 3. Justice Scalia for the Majority<sup>57</sup>

Justice Scalia recognized the ancient principle of the knock-and-announce rule, which serves several interests: (1) the protection of human life “because an unannounced entry may provoke violence in supposed self-defense by surprised residents;”<sup>58</sup> (2) the rule protects property from unnecessary destruction; (3) the rule gives residents an opportunity to comply with the police demands; (4) the knock-and-announce rule preserves privacy, maintains dignity and extends courtesy.<sup>59</sup>

There are several exceptions to the knock-and-announce rule when the police can enter forcibly: (1) when circumstances “present a threat of physical violence;” (2) when evidence is potentially destroyed; or (3) when knocking and announcing would be futile.<sup>60</sup> In the instant case, the prosecution curiously conceded that none of the exceptions applied and the prosecution also conceded that a knock-and-announce violation occurred because the police prematurely entered the home.<sup>61</sup>

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<sup>55</sup> *Id.* The Rule is an ancient principle that the police must knock and announce their presence before simply barging into someone’s home. *Id.* at 589 (citations omitted). As noted within, there are several exceptions to this principle. *Id.* at 589–90.

<sup>56</sup> The Michigan Supreme Court noted the conflicting case authority, but ruled that “suppression of the evidence is not the appropriate remedy for a violation of the ‘knock and announce’ requirement under either the Fourth Amendment or [the Michigan Constitution].” *People v. Hudson*, 639 N.W.2d 255, 255 (2001) (table).

<sup>57</sup> Joined by Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito. *Hudson*, 547 U.S. at 587.

<sup>58</sup> *Id.* at 594. For a discussion of the extreme dangers when the police ignore knock-and-announce rules, see *infra* notes 92–94 and accompanying text (discussing a case in Atlanta, in which an elderly lady shot two police officers when they barged into her home and the police in turn shot and killed the old lady).

<sup>59</sup> *Hudson*, 547 U.S. at 594 (citing *Wilson v. Arkansas*, 514 U.S. 927, 931–36 (1995) (reaffirming the ancient knock-and-announce principles)).

<sup>60</sup> *Id.* at 589–90 (citing *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (holding that the Fourth Amendment does not permit an automatic exception to the knock and announce requirement for felony drug searches)).

<sup>61</sup> In *United States v. Banks*, 540 U.S. 31, 40–41 (2003), the Court suggested a “reasonable wait time,” of approximately 15–20 seconds. See also *Hudson*, 547 U.S. at 590.

Justice Scalia then focused on whether the exclusionary rule should apply to this technical search and seizure violation. The Court reexamined the purposes behind the venerable exclusionary rule, that being primarily to deter unlawful police behavior.<sup>62</sup> The Court held that the exclusionary rule generates “substantial social costs,” which frequently sets the guilty free and impinges on the truth-seeking functions and law enforcement objectives.<sup>63</sup> The Court balanced the deterrent benefits of the exclusionary rule versus the substantial social costs of releasing guilty offenders.<sup>64</sup> In this balance, the Court sided with the prosecutor and concluded there were substantial social costs of releasing a guilty person over a technical defect.<sup>65</sup>

The exclusionary rule, continued Justice Scalia, may not be premised on the mere fact that a constitutional search violation was a ‘but-for’ cause of obtaining the evidence.<sup>66</sup> The ‘but-for’ causation stream is attenuated by the possession of the search warrant.<sup>67</sup> The warrant supersedes the causation chain.<sup>68</sup> The search warrant presented an independent basis for the search and cured the technical error.<sup>69</sup>

Justice Scalia continued that sufficient civil remedies exist to deter errant police behavior without resorting to the exclusionary rule. “It is clear, at least, that the lower courts are allowing colorable knock-and-announce [civil] suits to go forward, unimpeded by assertions of qualified immunity.”<sup>70</sup> There is also the increased professionalism of the police forces, “including new emphasis on internal police discipline.”<sup>71</sup> “There have been ‘wide-ranging reforms in the education, training, and supervision of police officers,’”<sup>72</sup> and “[f]ailure to teach and enforce

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<sup>62</sup> *Hudson*, 547 U.S. at 591.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 594–97.

<sup>65</sup> *Id.* at 593. “The penalties visited upon the Government, and in turn upon the public . . . must bear some relation to the purposes which the law is to serve.” *United States v. Ceccolini*, 435 U.S. 268, 279 (1978).

<sup>66</sup> *Hudson*, 547 U.S. at 592–93.

<sup>67</sup> *Id.* at 593.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 594.

<sup>70</sup> *Id.* at 598.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 599 (quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990* 51 (1993)).

constitutional requirements exposes municipalities to financial liability.<sup>73</sup> In short, Justice Scalia opined that if the police made it a practice to barge into homes without knocking, the police would be liable for civil tort claims.<sup>74</sup> So, sufficient motivations still exists for the police to adhere to the Fourth Amendment.

#### 4. *Justice Kennedy Concurring*

Justice Kennedy emphasized that the reach of this decision concerning the exclusionary rule only applies to knock-and-announce cases, where the officers have a search warrant.<sup>75</sup>

#### 5. *Justice Breyer Dissenting*<sup>76</sup>

Justice Breyer reaffirmed the necessity of the exclusionary rule to deter unlawful government behavior. Civil judgments, he said, are rare and governmental immunity doctrines prevents tort suits as an effective option.<sup>77</sup> The illegal manner of the entry was a but-for cause of obtaining the evidence.<sup>78</sup>

Justice Breyer stressed that the inevitable discovery and independent source doctrines fall short.<sup>79</sup> There were no secondary searches occurring which would have purged the illegality of the first search.<sup>80</sup> The doctrine of attenuation falls short also because a valid search warrant does not supersede the need to knock and announce.<sup>81</sup> Based on the factual dangers of guns and drugs, the police could have retrieved a “No-knock warrant.”<sup>82</sup> The prosecutor could have argued the exigency that the search for guns and

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 597–98.

<sup>75</sup> *Id.* at 603 (Kennedy, J., concurring). This was a five to four decision, and Justice Kennedy may hold the swing vote regarding application of the Exclusionary rule to other search cases.

<sup>76</sup> Joined by Justices Stevens, Ginsburg, and Souter. *Id.* at 604 (Breyer, J., dissenting).

<sup>77</sup> *Id.* at 610–11.

<sup>78</sup> *Id.* at 615.

<sup>79</sup> “The inevitable discovery exception rests upon the principle that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a ‘later, lawful seizure’ that is ‘genuinely independent of an earlier, tainted one.’” *Id.* at 616 (quoting *Murray v. United States*, 487 U.S. 533, 542 (1988)).

<sup>80</sup> *Id.* at 619–22.

<sup>81</sup> *Id.* at 622–23.

<sup>82</sup> *Id.* at 623.

drugs created the need for a no-knock entry.<sup>83</sup> But the prosecutor intentionally abandoned this argument throughout the appeal.<sup>84</sup>

#### 6. Commentary

The exclusionary rule is in play.<sup>85</sup> *Hudson* presents the opportunity for a trifecta attack: one, a search warrant may operate to sever the causal chain and purge the error, somewhat akin to good faith. The warrant acts as an independent source of authenticity. Two, the exclusionary rule is not the sole source of deterrence. Current civil rights statutes exert more leverage to deter errant police officers and encourage training and professionalism, under threat of tort liability.<sup>86</sup> Three, there are damaging social costs of releasing guilty defendants despite reliable trial evidence. This country is one of the few countries in the world which applies the

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<sup>83</sup> *Id.* at 623–24. (“Why did the prosecutor not argue in this very case that, given the likelihood of guns, the no-knock entry was lawful? From what I have seen in the record, he would have won.”).

<sup>84</sup> *Id.*

<sup>85</sup> This was one of the rare cases where the parties argued this case twice. The first oral argument occurred on January 19, 2006. Transcript of Oral Argument at 1, *Hudson*, 547 U.S. 586 (No. 04-1360), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-1360.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1360.pdf) (Jan. 19, 2006).. The Court called for a second oral argument [in light of the new composition of the Court] for May 18; 2006. Transcript of Oral Argument (May 18, 2006), *supra* note 48. Professor David Moran from Wayne State Law School, and formerly from the Michigan Appellate Defender Office (as the author), argued for the petitioner. *Id.* During the second oral argument, Wayne County Prosecutor, Timothy Baughman, joked in his opening address:

Justice Robert Jackson once said that when he was arguing cases before the Court, he always gave three arguments: the well-structured argument he rehearsed, the disjointed and confused argument he delivered to the Court, and the brilliant argument he thought of in the car on the way home. I have the rare opportunity to deliver the argument I thought of in the car on the way home.

*Id.* at 33.

<sup>86</sup> *Hudson*, 547 U.S. at 596–99.

exclusionary rule to errant police behavior.<sup>87</sup> It's a powerful, and frequently, disproportionate remedy.<sup>88</sup>

*Hudson* reenacts the arguments faced in the venerable case of *Mapp v. Ohio*,<sup>89</sup> but *Hudson* delivers a crushing blow to the formerly effective exclusionary rule remedy. At oral argument in *Hudson*, Justice Scalia stressed that *Mapp* “was a long time ago . . . before [U.S.C.] 1983, [the Civil Rights Statute] was being used.”<sup>90</sup> As civil rights law and police professionalism have evolved, the need for the exclusionary rule has become attenuated.<sup>91</sup>

There are extreme dangers, however, when the police ignore knock-and-announce rules and treat them as “technicalities.” In Atlanta, for instance, an 88-year old woman, Miss Kathryn Johnston, was killed on November 21, 2007, in a shootout with police who burst into her home without knocking and announcing.<sup>92</sup> In a unique twist to this incident, Miss Johnston responded to the sudden police intrusion by shooting and wounding three plainclothes policemen.<sup>93</sup> The undercover informant later publicly declared that the police entered the wrong house.<sup>94</sup> Barging into someone's home is the ultimate search and seizure violation and presents drastic consequences when the police ignore the secure protections provided in the Fourth Amendment.

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<sup>87</sup> This point was noted in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), concerning the rights of foreign nationals to be informed of their right to speak to their respective consulate upon arrest. *Id.* at 344 & n.3. The issue concerned whether the exclusionary rule is a proper remedy for a violation. *Id.* at 343.

<sup>88</sup> *Hudson*, 547 U.S. at 599.

<sup>89</sup> 367 U.S. 643 (1961) (holding that the exclusionary rule is a Constitutional remedy applicable to the States under the Fourteenth Amendment).

<sup>90</sup> Transcript of Oral Argument (May 18, 2006), *supra* note 48, at 32.

<sup>91</sup> At oral argument, the Justice Kennedy asked whether the exclusionary rule should apply to other defects in the search (i.e., what if a nighttime search was made when the warrant only authorized a daytime search?). *Id.* at 62. The parties disagreed whether the exclusionary rule would apply. *Id.* at 64–67. Justice Breyer also worried whether dismantling the exclusionary rule would release a “computer virus loose in the Fourth Amendment.” (emphasis added). *Id.* at 50.

<sup>92</sup> Larry Copeland, *Shootings by Police Spur Debate, Critics Seek Answers on Use of Deadly Force*, USA TODAY, Nov. 29, 2006, at 3A.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

B. *United States v. Grubbs*<sup>95</sup>—*Search and Seizure: Securing a Search Warrant in Anticipation of a Crime. Anticipatory Warrants.*

1. *Holding*

Anticipatory warrants, which depend on a future, contingent event do not violate the Fourth Amendment.<sup>96</sup> An anticipatory search warrant authorizing the search of defendant's residence, without stating the future, contingent event (the delivery of a pornographic tape), was supported by sufficient probable cause.<sup>97</sup>

2. *Facts*

"Jeffrey Grubbs purchased a videotape containing child pornography from a Web site operated by an undercover postal inspector."<sup>98</sup> The inspector arranged a future delivery of the pornographic tape to Grubbs residence.<sup>99</sup> The postal inspector submitted a search warrant application to the federal magistrate, accompanied by a long affidavit, describing the proposed operation.<sup>100</sup> The affidavit explained that execution of the search would occur once the residents received the pornographic package.<sup>101</sup>

Once the residents received and signed for the package, the inspector and his team of officers arrived and commenced the search.<sup>102</sup> During the search, the police presented Grubbs with a copy of the warrant, but omitted the 25-page affidavit which explained the operation and contingencies.<sup>103</sup> Grubbs argued that without the affidavit, which explained the triggering events, the warrant by itself lacked probable cause.<sup>104</sup>

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<sup>95</sup> 547 U.S. 90 (2006).

<sup>96</sup> *Id.* at 97–98.

<sup>97</sup> *Id.* at 99.

<sup>98</sup> *Id.* at 92.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* See also *United States v. Grubbs*, 377 F.3d 1072, 1074 (9th Cir. 2004).

<sup>102</sup> *Grubbs*, 547 U.S. at 93.

<sup>103</sup> *Id.* See also *Grubbs*, 377 F.3d at 1074–75.

<sup>104</sup> *Grubbs*, 547 U.S. at 93. The Ninth Circuit held that the execution of the warrant after the anticipated event, without the affidavit, violated the Particularity Clause of the Fourth Amendment. *Grubbs*, 377 F.3d at 1077–78. Additionally, a warrant assures the homeowner of the lawful authority and limitations for the search. *Id.* The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

(continued)

3. *Justice Scalia Wrote for the Majority.*<sup>105</sup>

Most anticipatory search warrants are subject to some future condition, called the triggering event.<sup>106</sup> The triggering condition in this case was the successful receipt of the video package by the residents of the house.<sup>107</sup> “Because the probable-cause requirement looks to whether evidence will be found when the search is conducted, all warrants are, in a sense, ‘anticipatory.’”<sup>108</sup> “Anticipatory warrants are . . . no different in principle from ordinary warrants.”<sup>109</sup>

Neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure<sup>110</sup> require that the police officer conducting a search

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violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*

(emphasis added). In *Groh v. Ramirez*, 540 U.S. 551 (2004), the Court established that the purpose of the particularity requirement is (1) to guide law enforcement personnel on the object of the search and (2) for the homeowner to know what is to be seized. *Id.* at 561.

<sup>105</sup> Joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Breyer. *Grubbs*, 547 U.S. at 91. Justices Souter, Stevens, and Ginsburg joined in part. *Id.* Justice Alito took no part in decision. *Id.*

<sup>106</sup> *Id.* at 94.

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

<sup>108</sup> *Id.* at 95.

<sup>109</sup> *Id.* at 96.

<sup>110</sup> Rule 41 was recently amended. Rule 41(f) provides that

[ t]he officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or leave a copy of the warrant and receipt at the place where the officer took the property.

FED. R. CRIM. P. 41(f)(1)(C)(3). The Supreme Court recognized in *Groh* that “[q]uite obviously, in some circumstances—a surreptitious search by means of a wiretap, for example, or the search of empty or abandoned premises—it will be impracticable or imprudent for the officers to show the warrant in advance.” 540 U.S. at 562 n.5. Rule 41(g) allows that

[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return. . . . If [the [court] grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

present the property owner with a copy of the warrant before conducting the search.<sup>111</sup> “The Constitution protects property owners not by giving” owners a license to debate the police “over the basis of the warrant, but by interposing” an impartial judgment on the propriety of the search before a judicial officer.<sup>112</sup> “[T]he Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself . . . .”<sup>113</sup>

#### 4. Justice Souter Concurring<sup>114</sup>

It is not settled whether an owner has the right to demand to see a copy of the warrant before the police conducts its search.<sup>115</sup> “[I]f a later case holds that the homeowner has a right to inspect the warrant on request,” the stated conditions involved in an anticipatory warrant would be open to serious challenge if the officers fail to provide this information.<sup>116</sup>

#### 5. Commentary

Other doctrinal approaches may also resolve this issue. The previous case, *Hudson v. Michigan*, establishes that a proper warrant may purge technical search violations and circumvent the exclusionary rule.<sup>117</sup> With the warrant in this case, there was an independent basis for the search, which simply presented a technical defect, almost *harmless error*.<sup>118</sup> The Fourth Amendment requires particularity of place to be searched and things to be seized, which, in *Grubbs*, was addressed by the body of the warrant, which referred to the affidavit.<sup>119</sup>

One might also balance the deterrent benefit of the exclusionary rule against the social cost of releasing a guilty offender. The police team

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FED. R. CRIM. P. 41(g).

<sup>111</sup> *Grubbs*, 547 U.S. at 98–99.

<sup>112</sup> *Id.* at 99.

<sup>113</sup> *Id.*

<sup>114</sup> Joined by Justices Stevens and Ginsburg. *Id.* (Souter, J., concurring).

<sup>115</sup> Justice Souter cited *Groh* where “the Court was ‘careful to note that the right of an owner to demand to see a copy of the warrant before making way for the police had not been determined, and it remains undetermined today.’” *Id.* at 101 (citing *Groh v. Ramirez*, 540 U.S. 551, 562 n.5 (2004)).

<sup>116</sup> *Id.* at 101–02.

<sup>117</sup> *Hudson v. Michigan*, 547 U.S. 586, 592 (2006).

<sup>118</sup> *Id.* at 593. Justice Clarence Thomas noted in *Washington v. Recuenco*, 548 U.S. 212, 218 (2006), “[m]ost Constitutional errors can be harmless.”

<sup>119</sup> *United States v. Grubbs*, 377 F.3d 1072, 1073–74 (9th Cir. 2004).

members possessed the full warrant during the search and each team member previously read the full scope of the warrant, including the affidavit. From the prosecution's point of view, this was simply a matter of production to the homeowner. The warrant presented to the homeowner incorporated the affidavit by reference.<sup>120</sup> In short, the homeowners, arguably, were placed on notice of the existence of the affidavit.

Rule 41(g) of the Federal Rules allows a homeowner the opportunity to contest the warrant and, practically speaking, receive retroactive discovery of the full scope of the warrant.<sup>121</sup> The police need not wait an hour for the homeowner to read the 25-page affidavit before pursuing the search. This is more a matter of discovery, then an unconstitutional search.

A prosecutor might also invoke *United States v. Leon*,<sup>122</sup> the good faith exception. The lead police officer contended that he had a copy of the affidavit with him during the search and that his team members had read the full affidavit, explaining the anticipatory event, on the previous evening.<sup>123</sup> The officer "conceded that the affidavit was not presented to Mr. Grubbs . . . and that no copy of the affidavit was left at the residence . . ." <sup>124</sup> Arguably, the police are not required to present the affidavit at the outset of the search. Such a production, with or without *Miranda* warnings, would prompt incriminating statements and deliberate elicitation, from homeowners, in violation of *Rhode Island v. Innis*.<sup>125</sup> Good faith existed through the warrant and through the officers' awareness of the contingencies.<sup>126</sup> Additionally, the warrant incorporated the affidavit by reference, and criminal procedure rules allow homeowners to subsequently contest the validity of the search warrants.<sup>127</sup> In short, technical search warrant defects invite a *Hudson* and *Leon* analysis.

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<sup>120</sup> *Grubbs*, 547 U.S. at 92.

<sup>121</sup> See *supra* note 110 and accompanying text.

<sup>122</sup> 468 U.S. 897 (1984) (realizing a good faith exception to the warrant requirement when the police honestly achieve a warrant from a magistrate).

<sup>123</sup> *Grubbs*, 377 F.3d at 1075.

<sup>124</sup> *Id.*

<sup>125</sup> 446 U.S. 291 (1980) (holding that *Miranda* applies to express questioning and any actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect).

<sup>126</sup> See *Grubbs*, 547 U.S. at 92; *Grubbs*, 377 F.3d at 1075.

<sup>127</sup> See *supra* note 110 and accompanying text.

C. *Georgia v. Randolph*<sup>128</sup>—*Search and Seizure: Refusal of Consent by Joint Occupant Supersedes Grant of Consent by Co-occupant. A Husband and Wife Who Disagree Regarding the Propriety of a Search. What's Love Gotta to do with It?*

1. *Holding*

A warrantless search was unreasonable and invalid as to a physically present defendant who expressly refused consent, even though the joint occupant consented to the search.<sup>129</sup>

2. *Facts*

Scott Randolph and his wife Janet Randolph were married, though separated.<sup>130</sup> The wife returned to live with her husband.<sup>131</sup> Later, there was a domestic dispute and the wife called the police.<sup>132</sup> When the police arrived at the house, the wife claimed her husband was a cocaine user.<sup>133</sup> The husband arrived home and he, in return, lodged the same complaint about his wife.<sup>134</sup>

The officers asked the couple if the police could search the house.<sup>135</sup> The husband steadfastly refused to give permission.<sup>136</sup> The police officers asked the wife and she eagerly granted consent.<sup>137</sup> She led an officer upstairs to the bedroom, where the officer found drug paraphernalia.<sup>138</sup>

<sup>128</sup> 547 U.S. 103 (2006).

<sup>129</sup> *Id.* at 106. Most of the federal Court of Appeals cases and State appellate court cases, which considered the question, concluded that consent remains effective in the face of an expressed objection. *See, e.g.*, *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995); *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Sumlin*, 567 F.2d 684, 687 (6th Cir. 1977). Many state courts reached the same conclusion. *See, e.g.*, *Love v. State*, 138 S.W.3d 676, 680–82 (Ark. 2003); *State v. Leach*, 782 P.2d 1035, 1037–40 (Wash. 1989) (en banc).

<sup>130</sup> *Randolph*, 547 U.S. at 106.

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

<sup>132</sup> *Id.* at 107.

<sup>133</sup> *Id.* She also stated that evidence of drug use was in the house. *Id.*

<sup>134</sup> *Id.* A child was involved, but this case did not concern domestic violence.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* Comedian Phyllis Diller once said, “Never go to bed mad. Stay up and fight.”

TUTTLE DICTIONARY OF QUOTATIONS 16 (Bloomsbury Publ. 1989).

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

The officer left and obtained a search warrant.<sup>139</sup> Upon returning, the police found more drugs.<sup>140</sup>

3. *Justice Souter for the Majority*<sup>141</sup>

The Court acknowledged that the general rule is that the consent of one person who possesses common authority over the premises is valid over the *absent* nonconsenting person who possesses common authority.<sup>142</sup> Common authority is justified by the mutual use of the property.<sup>143</sup>

Without question, the police could enter a dwelling to protect a resident from domestic violence or some other exigency, but the matter here concerned when the police may enter solely to search for evidence.<sup>144</sup> A physically present co-tenant's expressed refusal of consent to a police search supersedes the consent of the fellow co-tenant.<sup>145</sup>

4. *Justice Breyer Concurring*

Justice Breyer offered that if an abuse victim called a police officer to the house, such an exigency would provide a special reason for an immediate police entry.<sup>146</sup>

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<sup>139</sup> *Id.* In the factually similar case of *Illinois v. McArthur*, 531 U.S. 326 (2001), the wife alleged her husband possessed drugs in the house and the police properly sought a warrant before entering the house. *Id.* at 328. Another police officer detained the husband on the porch and accompanied the husband to ensure the preservation of the evidence until the warrant arrived. *Id.* at 329.

<sup>140</sup> *Randolph*, 547 U.S. at 107.

<sup>141</sup> Joined by Justices Stevens, Kennedy, Ginsburg, and Breyer. *Id.* at 105. Justice Stevens, *id.* at 123 (Stevens, J., concurring), and Justice Breyer, *id.* at 125 (Breyer, J., concurring) filed separate concurring opinions.

<sup>142</sup> *Id.* (majority opinion).

<sup>143</sup> *Id.* (citing *United States v. Matlock*, 415 U.S. 164, 181 (1974) (addressing third party's reasonable apparent common authority to grant consent); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (addressing reasonable belief that third party had actual authority to consent)).

<sup>144</sup> *Id.* at 117–19.

<sup>145</sup> *Id.* at 120–23.

<sup>146</sup> *Id.* at 126–27 (Breyer, J., concurring).

5. *Chief Justice Roberts Dissenting*<sup>147</sup>

If two tenants share a house, each has assumed the risk of privacy invasion.<sup>148</sup> Additionally, innocent co-tenants frequently seek to “disassociate . . . themselves from ongoing criminal activity.”<sup>149</sup>

D. *Brigham City, Utah v. Stuart*<sup>150</sup>—*Search and Seizure: Warrantless Entry Allowed when There Is Imminent Injury*. “An Odd flyspeck of a Case.”<sup>151</sup>

1. *Holding*

The police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with injury.<sup>152</sup>

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<sup>147</sup> Joined by Justice Scalia. *Id.* at 127 (Roberts, C.J., dissenting). During oral argument, Justice Clarence Thomas, who rarely asks questions, asked a series of questions concerning the applicability of *Coolidge v. New Hampshire*, 403 U.S. 443, 487–90 (1971), where a co-occupant brought the contraband to the police. Transcript of Oral Argument at 51–52, *Randolph*, 547 U.S. 103 (No. 04-1067), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-1067.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1067.pdf).

<sup>148</sup> *Randolph*, 547 U.S. at 142 (Roberts, C.J., dissenting). During oral argument, Chief Justice Roberts asked a good question concerning assumption of risk:

What about the telephone call between a husband and wife, and the wife tells the police, “Listen in on this call?” She’s consented to the monitoring of the conversation, the husband has not. Maybe he even begins the call by saying, “I—don’t let anybody else listen to this.” It’s clear that that is admissible, isn’t it?

Transcript of Oral Argument, *supra* note 147, at 31. The assumption of risk theory applies to electronic eavesdropping. In *United States v. White*, 401 U.S. 745 (1971), the Court held that one party to a conversation can consent to government eavesdropping.

<sup>149</sup> *Randolph*, 547 U.S. at 138 (Roberts, C.J., dissenting). See, e.g., *United States v. Hendrix*, 595 F.2d 883, 884–86 (D.C. Cir. 1979) (noting that wife asked police to save her baby and retrieve defendant’s gun); *People v. Cosme*, 397 N.E.2d 1319–20, 1323 (noting that woman requested that law enforcement remove drugs from a shared closet).

Of course, without an opportunity to investigate criminal behavior, innocent co-tenants lend themselves to be associated with the very criminal activity they seek to avoid.

<sup>150</sup> 547 U.S. 398 (2006).

<sup>151</sup> *Id.* at 407 (Stevens, J., concurring).

<sup>152</sup> *Id.* at 400 (majority opinion).

## 2. Facts

Four police officers responded to a call regarding a loud party at a residence.<sup>153</sup> Upon arriving at the house, the officers heard shouting from inside and “proceeded down the driveway to investigate.”<sup>154</sup> The officers observed “two juveniles drinking beer in the backyard.”<sup>155</sup> The officers also saw, through the screen door, an altercation taking place inside the home.<sup>156</sup> The officers saw four adults attempting to restrain an unruly teenager.<sup>157</sup> The teenager “broke free and struck one of the adults in the face.”<sup>158</sup> The fight continued.<sup>159</sup> The officers announced their presence, entered the house, and the fight ended.<sup>160</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 401.

<sup>155</sup> *Id.*

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

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

<sup>158</sup> *Id.* (citations omitted). The Utah Court never bought the *emergency aid* doctrine to this teenager’s brawl. *Id.* at 404. The U.S. Supreme Court had a different view. *Id.* One is reminded of comedian Tim Allen’s story of the differences between teenage boys and teenage girls:

Take two equally equipped ‘68 Roadrunners, with the 440 Magnum. Put four girls in one, four guys in the other. You send them both out to get a six-pack of beer, and tell them to be back at midnight.

The girls will probably return by eleven o’clock. One beer is half empty and warm, with lipstick on the rim. The car’s cleaner than when you left it, it smells like a mix of Chanel No. 5 and gossip. Everyone’s chatting happily and planning how to get together soon for dinner.

The guys—if they ever come back—one is missing, there’s blood everywhere, no one’s talking. The beer’s gone, a second six-pack is also empty, some liquor bottles are in the backseat, there are spent shell casings on the floor, butt prints all over the windows, a tire is flat, one fender’s all dented, the muffler’s hanging off, and a big piece of animal is strapped on the hood.

Two different worlds.

TIM ALLEN, DON’T STAND TOO CLOSE TO A NAKED MAN 69 (1994).

<sup>159</sup> *Stuart*, 547 U.S. at 401.

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

The officers arrested several people engaged in the fight.<sup>161</sup> Defendants filed a motion to suppress, which was granted in the lower courts.<sup>162</sup> The Utah Supreme Court rejected the “emergency aid doctrine,” because there was no objectively reasonable belief that an injured person was in the home.<sup>163</sup>

### 3. Chief Justice Roberts for a Unanimous Court

Warrants are generally required to search a person’s home or his person unless the exigencies are so compelling that the warrantless search is objectively reasonable.<sup>164</sup> One obvious exigency is the need “to assist persons who are seriously injured” or are “threatened with serious injury.”<sup>165</sup> The officer’s subjective motivation, arguably to make a premature arrest rather than to quell violence, is irrelevant, as long as the circumstances, viewed objectively, justify the action.<sup>166</sup> Also, there was no violation of the knock-and-announce rule as the officers announced their presence, which was ignored by those participating in the scuffle.<sup>167</sup> “[I]t would serve no purpose to require [the officers] to stand dumbly at the door awaiting a response while those within brawled on, oblivious to [the officers’] presence.”<sup>168</sup>

### 4. Justice Stevens Concurring

“*This is an odd flyspeck of a case.*”<sup>169</sup> The conclusion here is so obvious, one wonders how this case even reached the United States Supreme Court.<sup>170</sup> Even more perplexing, said Justice Stevens, is how the

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 401–02 (citing *Brigham City v. Stuart*, 122 P.3d 506, 513 (Utah 2005)).

<sup>164</sup> *Id.* at 402.

<sup>165</sup> *Id.* at 403.

<sup>166</sup> *Id.* at 404–05. At oral argument, Justice Souter suggested twice that in determining the test for proper arrests, “*the objective police officer who sets the [legal] standard is deemed to know at least as much as the officer on the scene actually knows.*” Transcript of Oral Argument at 22, *Stuart*, 547 U.S. 398 (No. 05-502), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-502.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-502.pdf) (emphasis added). Justice Scalia favorably responded to Justice Souter’s suggested test, “A good way to put it.” *Id.*

<sup>167</sup> *Stuart*, 547 U.S. at 406–07.

<sup>168</sup> *Id.* at 407.

<sup>169</sup> *Id.* (Stevens, J., concurring) (emphasis added).

<sup>170</sup> Many U.S. Supreme Court cases already state the holding enunciated in this case. See, e.g., *Michigan v. Tyler*, 436 U.S. 499 (1978) (holding that warrantless entry was  
(continued)

lower courts found that the police entry was a search violation.<sup>171</sup> “[T]he Court’s unanimous opinion restating well-settled rules of federal law . . . [made it] hard to imagine the outcome was ever in doubt.”<sup>172</sup>

*E. Samson v. California*<sup>173</sup>—*Search and Seizure: Parolees. “It’s Hard Out Here for a Pimp . . . .”*<sup>174</sup>

### 1. *The Holding*

A California state statute that required all parolees to submit to warrantless and suspicionless searches and seizures by any law enforcement officer at any time does not violate the Fourth Amendment.<sup>175</sup>

### 2. *Facts*

Defendant Samson was on parole “following a conviction for being a felon in possession of a firearm.”<sup>176</sup> A police officer saw Samson walking down a street with a woman and child.<sup>177</sup> The officer was aware that Samson was on parole, but the officer approached Samson to determine whether there were outstanding parole warrants against him.<sup>178</sup> Once the officer determined that Samson had no such warrants, the officer searched Samson because of Samson’s status as a parolee.<sup>179</sup> During the search, the officer found a plastic baggie containing drugs.<sup>180</sup>

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permitted in order to fight a fire); *Mincey v. Arizona*, 437 U.S. 385 (1978) (holding that there is no “murder scene” search exception to the Fourth Amendment).

<sup>171</sup> *Stuart*, 547 U.S. at 407 (Stevens, J., concurring).

<sup>172</sup> *Id.* The Utah Supreme Court had held that the entry was illegal because it was primarily motivated by the desire to make an arrest, and involved a minor injury, and there was no emergency. *Id.* at 401–02 (majority opinion). See also *United States v. Cervantes*, 219 F.3d 882, 887–92 (9th Cir. 2000) (holding that under the emergency doctrine, a search must not be primarily motivated by intent to arrest and seize evidence).

<sup>173</sup> 547 U.S. 843 (2006).

<sup>174</sup> TERRENCE HOWARD & TARAJI P. HENSON, *It’s Hard out Here for a Pimp, on HUSTLE & FLOW* (Atlantic 2005).

<sup>175</sup> *Samson*, 547 U.S. at 846.

<sup>176</sup> *Id.* Parole allows an inmate, who is serving a prison sentence, early release with conditions. See CAL. PENAL CODE § 3000 (West 2007). Probation allows a defendant to avoid prison in the first place, but places conditions on the release. See CAL. PENAL CODE § 1203 (West 2007).

<sup>177</sup> *Samson*, 547 U.S. at 846.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 846–47.

<sup>180</sup> *Id.* at 847.

The California statute provided that every prisoner eligible for release on state parole “shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.”<sup>181</sup> The trial court and the California Court of Appeals held that the search was lawful.<sup>182</sup>

### 3. *Opinion by Justice Thomas*<sup>183</sup>

The Court held that by virtue of their status alone, parolees “do not enjoy the absolute liberty to which every citizen is entitled.”<sup>184</sup> The parolee agreement clearly established the parole conditions.<sup>185</sup> A parolee’s expectation of privacy is significantly diminished.<sup>186</sup>

As compared with probation searches, parolee searches are “necessary for the promotion of legitimate governmental interests.”<sup>187</sup> A parolee “is more likely than the ordinary citizen to violate the law.”<sup>188</sup> Parolees have a greater “incentive to conceal their criminal activities and quickly dispose of incriminating evidence than” the ordinary citizen.<sup>189</sup> The Court noted that “parolees are on the ‘continuum’ of state-imposed punishments.”<sup>190</sup> “On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.”<sup>191</sup> The Court found that the State of California properly recognized the realities of recidivism in protecting citizens from potential criminal enterprises outweighed a parolee’s limited expectation of privacy.<sup>192</sup> Therefore, “a requirement that searches be based on individualized suspicion would undermine the State’s ability to effectively

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<sup>181</sup> CAL. PENAL CODE § 3067(a) (West 2000).

<sup>182</sup> *Samson*, 547 U.S. at 847. The court of appeals relied on *People v. Reyes*, 968 P.2d 445, 450 (Cal. 1998) (“Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing.”). *Samson*, 547 U.S. at 847.

<sup>183</sup> Joined by Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, and Alito. *Id.* at 845.

<sup>184</sup> *Id.* at 848–49.

<sup>185</sup> *Id.* at 850.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 853–55.

supervise parolees and protect the public from criminal acts by reoffenders.”<sup>193</sup>

#### 4. *Justice Stevens Dissenting*<sup>194</sup>

Justice Stevens stressed that such searches should be based on individualized suspicion or at least be based on the special needs doctrine.<sup>195</sup>

## II. CONFESSIONS

There was very little activity during the 2005–2006 Term regarding confessions and interrogations. In recent Supreme Court adjudication, the Court upheld *Miranda v. Arizona*<sup>196</sup> in *Dickerson v. United States*.<sup>197</sup> Since *Dickerson*, the Court has narrowed *Miranda* in several respects. In *United States v. Patane*,<sup>198</sup> the Supreme Court held that the failure to give a suspect the complete *Miranda* warnings did not require suppression of the *physical fruits* because the Fifth Amendment is only intended to eliminate incriminatory evidence, not physical evidence.<sup>199</sup> Besides, the suspect interrupted the officer during the *Miranda* recitation and told the officer that he knew his rights.<sup>200</sup> In *Chavez v. Martinez*,<sup>201</sup> the Court held that there was no civil rights violation when the police officer forcibly interrogated the suspect at a hospital because the police did not intend to use the confession at trial.<sup>202</sup> In *Missouri v. Seibert*,<sup>203</sup> the Court held that police tricks designed to elicit improper statements and then cure them with belated *Miranda* warnings were improper.<sup>204</sup> *Sanchez-Llamas v.*

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<sup>193</sup> *Id.* at 854. The Court emphasized that their holding in *Samson* is consistent with the Court’s recent holding in *United States v. Knights*, 534 U.S. 112 (2001), where the Court held that probationers could be required to submit to surprise searches.

<sup>194</sup> Joined by Souter, and Breyer. *Samson*, 547 U.S. at 857 (Stevens, J., dissenting).

<sup>195</sup> *Id.* at 858.

<sup>196</sup> 384 U.S. 436 (1966).

<sup>197</sup> 530 U.S. 428 (2000).

<sup>198</sup> 542 U.S. 630 (2004).

<sup>199</sup> *Id.* at 643–44.

<sup>200</sup> *Id.* at 635.

<sup>201</sup> 538 U.S. 760 (2003).

<sup>202</sup> *Id.* at 764.

<sup>203</sup> 542 U.S. 600 (2004) *See also* *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (presenting 17 year old to police station for questioning as a matter of “custody,” the Court held youth was not “in custody” for purposes of *Miranda*).

<sup>204</sup> *Id.* at 604.

*Oregon*<sup>205</sup> did not concern *Miranda*, but applied *Miranda* rationale to a treaty violation and possible exclusionary rule issue.<sup>206</sup>

A. *Sanchez-Llamas v. Oregon and Bustillo v. Johnson (companion case)*—  
*Confession: Treaty Rights of Foreign Nationals; Exclusionary Rule*

1. *Holding*

Assuming that Article 36 of the Vienna Convention confers rights upon arrested foreign nationals, detained in the United States, to have American government officials notify the arrested person's native consulate, the remedy does not require suppression of the detainee's statements made to the American police.<sup>207</sup> Article 36 objections are subject to the same habeas procedural default rules that generally apply to federal law claims and the treaty objection must be raised at trial.<sup>208</sup>

2. *Facts*

There are two cases. The first case concerned Petitioner Moises Sanchez-Llamas, a Mexican national, who was involved in an exchange of gunfire with police where one officer was wounded.<sup>209</sup> The police arrested Sanchez-Llamas and gave him the *Miranda* warnings in English and Spanish.<sup>210</sup> At no time, did the officers "inform him that he could ask to have the Mexican Consulate notified of his detention."<sup>211</sup>

Shortly after his arrest, the "police interrogated Sanchez-Llamas with the assistance of an interpreter."<sup>212</sup> Sanchez-Llamas made several incriminating statements.<sup>213</sup> He was charged with aggravated murder, attempted murder, and several other offenses.<sup>214</sup> Before trial, Sanchez-Llamas moved to suppress his statements because they were involuntary and because the police failed to comply with the notification provisions of

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<sup>205</sup> 548 U.S. 331 (2006).

<sup>206</sup> *Id.* at 337.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 358–60.

<sup>209</sup> *Id.* at 339.

<sup>210</sup> *Id.* at 339–40.

<sup>211</sup> *Id.* at 340.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

Article 36 of the Vienna Convention.<sup>215</sup> The trial court and appellate courts denied the motion.<sup>216</sup>

The second case concerned Mario Bustillo, a Honduran national, who was involved in an alleged altercation with another individual outside a restaurant in Springfield, Virginia.<sup>217</sup> Several witnesses identified Bustillo as the person who struck an individual in the head with a baseball bat.<sup>218</sup> The individual died.<sup>219</sup> The police arrested Bustillo and charged him with murder.<sup>220</sup> The police never informed Bustillo that he could request to have the Honduran Consulate notified of his detention.<sup>221</sup>

At trial, the defense presented significant evidence that someone else committed the murder.<sup>222</sup> The jury convicted Bustillo of first degree murder.<sup>223</sup> After his conviction, Bustillo argued in a state habeas proceeding that the police violated his right to consular notification under the Vienna Convention.<sup>224</sup> At this hearing, “the Honduran Consulate executed an affidavit stating ‘it would have endeavoured to help Mr. Bustillo in his defense’” and locate the real perpetrator.<sup>225</sup> Bustillo also argued ineffective assistance of counsel for the defense attorney’s failure to advise Bustillo of the right to notify the consulate.<sup>226</sup>

The state habeas court dismissed the claim because Bustillo failed to raise the issue at trial or during the direct appeal.<sup>227</sup> The state habeas court also dismissed the claim of ineffective assistance of counsel because the claim was barred by the statute of limitations and was meritless under *Strickland v. Washington*.<sup>228</sup>

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 341.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 342.

<sup>228</sup> *Id.*; 466 U.S. 668 (1984).

### 3. *Decision by Chief Justice Roberts*<sup>229</sup>

The Court entertained three questions: (1) whether Article 36 of the Vienna Convention grants rights that may be invoked by arrested foreigners; (2) “whether suppression of [the] evidence is a proper remedy for a violation of Article 36;” and (3) whether Article 36 may be deemed forfeited under state procedural rules because a defendant failed to raise the objection at trial.<sup>230</sup> The Vienna Convention was drafted in 1963 to encourage, promote, and develop friendly relations among nations.<sup>231</sup> “The Convention consists of 79 articles regulating various aspects of consular activities.”<sup>232</sup> The United States ratified the Convention in 1969.<sup>233</sup>

Article 36 of the Convention provides that “if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State, if a national of that State is arrested or committed to prison or to custody pending trial.”<sup>234</sup> Article 36 (1)(b) further states that “[the] authorities shall inform the person concerned, [i.e. the detainee], without delay of his rights.”<sup>235</sup> As for the first question, whether the Vienna Convention invokes rights to foreign citizens, the Court assumed that was correct.<sup>236</sup>

As for the second question, regarding suppression of the statement, the Treaty fails to prescribe specific remedies for Article 36 violations—the remedy is up to the domestic law state.<sup>237</sup> The exclusionary rule is a unique American phenomenon, which is universally rejected by nearly every other country.<sup>238</sup> Chief Justice Roberts determined that the United States Supreme Court does not hold a supervisory power over the courts of the States, and cannot direct the state courts, barring constitutional law

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<sup>229</sup> Joined by Justices Scalia, Kennedy, Thomas, and Alito; Justice Ginsburg concurred as to the judgment. *Sanchez-Llamas*, 548 U.S. at 335–36.

<sup>230</sup> *Id.* at 342.

<sup>231</sup> *Id.* at 337.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 338.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 339.

<sup>236</sup> *Id.* at 343.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 343–44 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (noting that the exclusionary rule is “unique to American jurisprudence”)).

issues, to apply the exclusionary rule.<sup>239</sup> The United States Supreme Court's only authority to create a state remedy lies in the treaty itself.<sup>240</sup> It is well established that a treaty binds the States pursuant to the Supremacy Clause, and that the States "must recognize the force of the treaty in the course of adjudicating the rights of litigants."<sup>241</sup>

"But where a treaty does not provide a particular remedy . . . it is not for the federal courts to impose one on the States through lawmaking of their own."<sup>242</sup> Under American domestic law, the exclusionary rule is not a remedy to be applied lightly.<sup>243</sup>

The failure to inform a defendant of his Article 36 rights is unlikely to produce unreliable confessions.<sup>244</sup> Article 36 has nothing to do with confessions or search and seizures.<sup>245</sup> "Article 36 does not guarantee defendants any assistance at all."<sup>246</sup> It only secures a right to have a consulate informed of an arrest or detention, not to have a consulate intervene.<sup>247</sup> Every foreign national is entitled to due process and an attorney, and is protected against compelled self-incrimination, through the standard *Miranda* warnings.<sup>248</sup> "*A [foreign] defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to the police.*"<sup>249</sup>

#### *a. Procedural Default*

The state of Virginia has a general rule that in state habeas cases a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review.<sup>250</sup> Normally, "such rules constitute an

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<sup>239</sup> *Id.* at 345 (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.")).

<sup>240</sup> *Id.* at 346.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 347.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 349.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 350 (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by" the Fifth and Sixth Amendments).

<sup>249</sup> *Id.* (emphasis added).

<sup>250</sup> *Id.*

adequate and independent state law ground preventing” the federal courts from reviewing the claim.<sup>251</sup> The procedural rules of the forum state govern the implementation of the treaty in that state.<sup>252</sup>

It is true that the failure to inform Bustillo of his right to consular notification would prevent him from becoming aware of his Article 36 rights and therefore unaware of asserting them at trial, nevertheless, “claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.”<sup>253</sup>

#### 4. Justice Ginsburg, Concurring in the Judgment

Bustillo has conceded that his trial attorney was aware of his client’s rights under the Vienna Convention.<sup>254</sup> Moreover, a defendant who is prejudiced under the Convention may be able to show that his or her confession was involuntary under *Miranda v. Arizona*.<sup>255</sup>

#### 5. Justice Breyer Dissenting<sup>256</sup>

“[S]ometimes state procedural default rules must yield to the Convention’s insistence that domestic laws ‘enable full effect to be given to the purposes for which [Article 36’s] rights are intended.’”<sup>257</sup> The Convention requires that government officials inform an arrested person, without delay, of his or her Article 36 Rights to communicate with the consular post.<sup>258</sup> Petitioners should not be denied the right to present these arguments by state procedural bars where the authorities failed to inform the foreign national of his rights.<sup>259</sup> “The Convention is a Treaty. And ‘all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

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<sup>251</sup> *Id.* (recognizing that “there is an exception if a defendant can demonstrate both ‘cause’ for not raising the claim at trial, and ‘prejudice’ from not having done so”).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 360.

<sup>254</sup> *Id.* at 363–64 (Ginsburg, J., concurring).

<sup>255</sup> *Id.* at 361.

<sup>256</sup> *Id.* at 365 (Breyer, J., dissenting). Joined by Justices Stevens, and Souter. *Id.* Justice Ginsburg joined in part. *Id.*

<sup>257</sup> *Id.* at 366.

<sup>258</sup> *Id.* at 370.

<sup>259</sup> *Id.* at 370–71.

thereby.”<sup>260</sup> Due to the stature and the gravity of the Convention’s mandates, ordinary procedural default rules should be modified.<sup>261</sup>

### III. SPEEDY TRIAL

*Barker v. Wingo*<sup>262</sup> is the venerable case concerning Speedy Trial violations. In *Barker*, the court identified four factors in a speedy trial delay: assertion of the right; prejudice; reason for the delay; and length of the delay.<sup>263</sup> *Zedner v. United States*<sup>264</sup> concerns a federal speedy trial statute and presents another compelling facet to a settled issue.<sup>265</sup>

#### A. *Zedner v. United States: Federal Speedy Trial and Waiver. The Seven Year Slow-Train.*

##### 1. *Holding*

The Federal Speedy Trial Act<sup>266</sup> does not allow a criminal defendant to waive “for all time” the statutory deadline for commencing a trial.<sup>267</sup> The defendant who waived the implementation of the Speedy Trial Act, could nonetheless, raise a speedy trial violation on appeal.<sup>268</sup>

##### 2. *Facts*

The defendant was indicted on several counts of attempting to defraud a financial institution.<sup>269</sup> This was a complex case requiring several “ends-of-justice” continuances.<sup>270</sup> At some point, the trial judge became concerned that the excessive continuances would violate the Federal

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<sup>260</sup> *Id.* at 372 (quoting U.S. CONST. art. VI, cl. 2).

<sup>261</sup> *Id.* at 396–97.

<sup>262</sup> 407 U.S. 514 (1972).

<sup>263</sup> *Id.* at 530.

<sup>264</sup> 547 U.S. 489 (2006).

<sup>265</sup> *Id.* at 492.

<sup>266</sup> 18 U.S.C. §§ 3161–74 (2000).

<sup>267</sup> *Zedner*, 547 U.S. at 509.

<sup>268</sup> *Id.* at 503.

<sup>269</sup> *Id.* at 493. In March 1996, Mr. Jacob Zedner allegedly attempted to open accounts at seven financial institutions using counterfeit \$10 million United States bonds. *Id.* The quality of the work was nearly comical. *Id.* One bond contained misspellings, such as “Thunted States” and the “Onited States” (for United States), “Dhtladelphla” (for Philadelphia), “Cgicago” (for Chicago). *Id.* Much of the delay in this case concerned Defendant’s competency and withdrawal of counsel issues. *Id.* at 495.

<sup>270</sup> *Id.* at 493.

Speedy Trial Act.<sup>271</sup> To avoid the statute, the trial court suggested that the defendant would have to waive “for all time” any speedy trial objections.<sup>272</sup> The defense agreed and the prosecutor did not object.<sup>273</sup>

There were many delays in the case. Some delays were due to the court’s congested docket; some to the complexity of the case; some to change of counsel; and some to the determination of defendant’s competency.<sup>274</sup> The trial finally began more than seven years after the defendant was indicted.<sup>275</sup> On appeal, the defendant argued that, irrespective of his waiver, the excessive delay violated his statutory right to a speedy trial.<sup>276</sup>

### 3. *Majority Opinion by Justice Alito*<sup>277</sup>

The Federal Speedy Trial Act generally requires a federal criminal trial to begin within seventy days after a defendant is charged.<sup>278</sup> The Act contains a detailed scheme where certain specified periods of delay are not counted.<sup>279</sup>

The Act demands that requested continuances fit within one of the specific exclusions established in several subsections. One subsection covers ends-of-justice continuances that would apply in the instant case.<sup>280</sup>

<sup>271</sup> *Id.* See Speedy Trial Act, 18 U.S.C. §§ 3160–74.

<sup>272</sup> *Zedner*, 547 U.S. at 493–94.

<sup>273</sup> *Id.* at 494, 505.

<sup>274</sup> *Id.* at 495–96.

<sup>275</sup> *Id.* at 496.

<sup>276</sup> At oral argument, the prosecution argued this was “sandbagging the judge.” Transcript of Oral Argument at 21–22, 43, *Zedner*, 547 U.S. 489 (No. 05-5992), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-5992.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-5992.pdf).

<sup>277</sup> Joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer. *Zedner*, 547 U.S. at 492. Justice Scalia concurred. *Id.*

<sup>278</sup> Speedy Trial Act, 18 U.S.C. §§ 3160–74.

<sup>279</sup> The Act excludes “delay resulting from other proceedings concerning the defendant,” 18 U.S.C. § 3161(h)(1), “delay resulting from the absence or unavailability of the defendant or an essential witness,” 18 U.S.C. § 3161(h)(3), “delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial,” 18 U.S.C. § 3161 (h)(4), and “a reasonable period of delay when the defendant is joined for trial and a codefendant as to whom the time for trial has not run and no motion for severance has been granted,” 18 U.S.C. § 3161 (h)(7).

<sup>280</sup> 18 U.S.C. § 3161 (h)(8)(A) provides:

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at

(continued)

Justice Alito noted that the Speedy Trial Act was designed to protect a defendant's right to a speedy trial and the Act was designed with the public interest firmly in mind.<sup>281</sup> The public interest cannot be served if defendants can opt out of the Act at will, through a prospective waiver.<sup>282</sup>

"Allowing prospective waivers would seriously undermine the Act because there are many cases in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest."<sup>283</sup> Defendant's waiver "for all time" was inappropriate and he could raise the speedy trial claim on appeal.<sup>284</sup>

The government also argued that basic principles of judicial estoppel precluded the defendant, who waived the Speedy Trial claim, from enjoying the benefits of the seven year delay, and then challenging the delay on appeal.<sup>285</sup> Judicial estoppel "generally prevents a party from prevailing in one phase of a case and then relying on a contradictory argument to prevail in another phase."<sup>286</sup> Justice Alito rejected the judicial estoppel argument because (1) it was the trial judge who first suggested and required that the defendant waive the Act and (2) the prosecution did not object.<sup>287</sup>

Moreover, the trial judge failed to make an expressed finding that the ends-of-justice delays outweighed other interests, as required by the strict

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the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the *ends of justice* served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the *ends of justice* served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(emphasis added).

<sup>281</sup> *Zedner*, 547 U.S. at 501.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 502.

<sup>284</sup> *Id.* at 503.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 504 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

<sup>287</sup> *Id.* at 505.

provisions of the Speedy Trial Act.<sup>288</sup> According to the statute, the failure to make expressed findings cannot be cured by a harmless error analysis.<sup>289</sup>

The sanction for a violation of the Speedy Trial Act was dismissal, but the Court remanded the case to the district court to determine whether the dismissal should be with or without prejudice whether the prosecution can re-indict.<sup>290</sup>

#### IV. RIGHT TO COUNSEL

During the 2004–2005 Term, the Court decided several “right to counsel” cases which had a very big impact on criminal jurisprudence. *Iowa v. Tovar*,<sup>291</sup> concerned the extent to which “a trial judge, before accepting a guilty plea from an uncounseled defendant, must elaborate on the right to representation.”<sup>292</sup> *Florida v. Nixon*,<sup>293</sup> held that counsel’s strategy at a death penalty sentencing phase to concede guilt is reasonable trial strategy.<sup>294</sup> In *Rompilla v. Beard*,<sup>295</sup> the Court held that a capital defendant’s “lawyer is bound to make reasonable efforts to obtain and review material that . . . the prosecution will probably rely on as evidence” of sentencing aggravation.<sup>296</sup> And in *Halbert v. Michigan*,<sup>297</sup> the Court held counsel is required to represent indigent persons on first-tier guilty plea review applications.<sup>298</sup>

A. *United States v. Gonzalez-Lopez*<sup>299</sup>: *Right to Retained Counsel of Choice*. “*There’s Somethin’ Wrong in the Neighborhood, Who You Gonna Call?*”<sup>300</sup>

##### 1. *Holding*

A defendant may establish a violation of his Sixth Amendment right to select retained counsel of his choice without the need for showing that the

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<sup>288</sup> *Id.* at 506.

<sup>289</sup> *Id.* at 508.

<sup>290</sup> *Id.* at 509.

<sup>291</sup> 541 U.S. 77 (2004).

<sup>292</sup> *Id.* at 81.

<sup>293</sup> 543 U.S. 175 (2004).

<sup>294</sup> *Id.* at 178.

<sup>295</sup> 505 U.S. 374 (2005).

<sup>296</sup> *Id.* at 377.

<sup>297</sup> 545 U.S. 605 (2005).

<sup>298</sup> *Id.* at 610.

<sup>299</sup> 548 U.S. 140 (2006).

<sup>300</sup> RAY PARKER, JR., *Ghostbusters*, on GHOSTBUSTERS (Arista 1984).

attorney who ultimately represented him rendered deficient performance or that the defendant was prejudiced as a result of counsel's representation.<sup>301</sup> The denial of retained counsel of choice was a structural defect requiring automatic reversal without a review for harmless error.<sup>302</sup>

## 2. Facts

Defendant "Cuauhtemoc Gonzalez-Lopez was charged in the Eastern District of Missouri with conspiracy to distribute more than 100 kilograms of marijuana."<sup>303</sup> There were elaborate pre-trial proceedings in which the defendant attempted to retain California attorney Joseph Low to represent him.<sup>304</sup> At one early point, Gonzalez-Lopez was represented by two attorneys: Mr. Low, from California, and Mr. Fahle, a Texas attorney.<sup>305</sup> Low had been granted provisional entry as co-counsel which was later rescinded by the magistrate when at a suppression hearing attended by both attorneys, Low violated a court rule restricting cross-examination of a witness to one lawyer.<sup>306</sup> Low remained in contact with Gonzalez-Lopez and made additional pre-trial requests for admission pro hac vice which were denied by the trial court.<sup>307</sup> Fahle withdrew as counsel and asserted

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<sup>301</sup> *Id.* at 148.

<sup>302</sup> *Id.* at 150, 152; *see also id.* at 159 (Alito, J., dissenting) ("[S]tructural defects always lead to automatic reversal." (citing *Arizona v. Fulminante*, 499 U.S. 279, 306–10 (1991))).

<sup>303</sup> *Id.* at 142 (majority opinion).

<sup>304</sup> *Id.* at 142–43. Defense attorney Low had previously appeared before the trial judge in another case and had successfully negotiated a good guilty plea. Brief for the Respondent at 2–3, *Gonzalez-Lopez*, 548 U.S. 140 (2006) (No. 05-352), 2006 WL 838892, [hereinafter Respondent Gonzalez-Lopez Brief]. Note there is a great advantage in the right attorney during plea negotiations. One is reminded of a statement by the character in Nelson Algren's *A Walk on the Wild Side*:

[A criminal has] got to wire himself to the courts, the state's attorney's office, the police department, [and a good lawyer]. He can't trust just any old lawyer . . . . He got to have someone who can operate behind the bench as well as in front of it, behind the public prosecutor as well as in front of him. Then if he takes a fall he got a choice—Should it be one to life for armed robbery or one-to-three for simple robbery?

NELSON ALGREN, *A WALK ON THE WILD SIDE* 311–12 (1993).

<sup>305</sup> *Gonzalez-Lopez*, 548 U.S. at 142; *see also* Respondent Gonzalez-Lopez Brief, *supra* note 304, at 2.

<sup>306</sup> *Gonzalez-Lopez*, 548 U.S. at 142.

<sup>307</sup> *Id.*

that Low's actions amounted to interference, and thus constituted professional misconduct.<sup>308</sup>

With the defendant's preference for Low's representation having been forbidden by the magistrate, he retained Missouri attorney Karl Dickhaus to represent him.<sup>309</sup> The trial judge repeatedly denied Low's requested representation *pro hac vice*.<sup>310</sup> The trial judge also refused to allow Low as second counsel.<sup>311</sup> The issue concerned "whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction."<sup>312</sup>

### 3. Justice Scalia for the Majority<sup>313</sup>

The right at stake is the right to retained counsel of choice; not the right to the effective assistance of counsel.<sup>314</sup> Effective assistance of counsel issues requires a showing of prejudice and imposes a baseline standard of proficiency.<sup>315</sup> Deprivation of counsel of choice prevents the defendant from being represented by the lawyer he or she retains, regardless of the quality of the representation or comparative effectiveness.<sup>316</sup>

Since it was previously conceded by the government that the trial judge erroneously denied Gonzalez-Lopez his right to retained counsel of choice, the issue concerned remedy.<sup>317</sup> The denial of retained counsel of

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<sup>308</sup> *Id.* at 142–43. The Eighth Circuit eventually found that Low's actions "were entirely proper." See Respondent Gonzalez-Lopez Brief, *supra* note 304, at 7 (citing *United States v. Gonzalez-Lopez*, 403 F.3d 558, 566 (8th Cir. 2005)).

<sup>309</sup> Mr. Dickhaus had "never tried a federal criminal case." Respondent Gonzalez-Lopez Brief, *supra* note 304, at 4. He was merely substituting for defense attorney Low, who "was confident his application for admission *pro hac vice* ultimately would be granted." *Id.*

<sup>310</sup> *Id.* at 4–5.

<sup>311</sup> *Gonzalez-Lopez*, 548 U.S. at 143. As indicated in note 308 *supra*, the trial judge's ruling was reversed by the Eighth Circuit Court of Appeals.

<sup>312</sup> *Gonzalez-Lopez*, 548 U.S. at 142.

<sup>313</sup> Joined by Justices Stevens, Ginsburg, Souter, and Breyer. *Id.* at 142.

<sup>314</sup> See *id.* at 146 ("[T]he right at stake here is the right to counsel of choice[;] . . . and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'") (footnote omitted).

<sup>315</sup> *Id.* at 146–47.

<sup>316</sup> *Id.* at 147–48.

<sup>317</sup> *Id.* at 148. The Court concluded that Gonzalez-Lopez was erroneously deprived of his Sixth Amendment right to counsel of choice. *Id.*

choice qualifies as structural error which requires automatic reversal.<sup>318</sup> In addition to denial of retained counsel, structural defects also include errors such as the denial of self-representation and the denial of trial by jury.<sup>319</sup> However, Justice Scalia did maintain that “*the right to counsel of choice does not extend to defendants who require counsel to be appointed for them.*”<sup>320</sup>

#### 4. Justice Alito Dissenting<sup>321</sup>

Justice Alito contended that there should be some showing of prejudice or harmless error analysis.<sup>322</sup>

#### 5. Commentary

The red herring in this case concerned how an out-of-state attorney had greater standing to represent the defendant than a Missouri attorney. The federal court of appeals determined that the trial judge’s dismissal of Mr.

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<sup>318</sup> *Id.* at 150. Justice Scalia noted that denial of retained counsel made it

impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

*Id.*

<sup>319</sup> *Id.* at 148–49. In *Arizona v. Fulminante*, 499 U.S. 279 (1991) (concerning a coerced confession induced by threats of physical violence), the Court divided constitutional errors into two classes. The first class concerned “trial errors,” because those errors may be quantitatively assessed to determine if they were harmless beyond a reasonable doubt. *Id.* at 307–08. Most constitutional errors fall into this class. *Id.* at 306. The second class of constitutional errors concern “structural defects.” *Id.* at 309–10. These defects defy harmless error analysis because they affect the framework of the trial. *Id.* at 309–10. These structural defects include the denial of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); or the denial of the right of self-representation, *Faretta v. California*, 422 U.S. 806 (1975); or the denial of the right to trial by jury by an improper reasonable doubt instruction, *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

<sup>320</sup> *Gonzalez-Lopez*, 548 U.S. at 151 (emphasis added).

<sup>321</sup> Joined by Chief Justice Roberts and Justices Kennedy and Thomas. *Id.* at 152 (Alito, J., dissenting).

<sup>322</sup> *Id.* at 159–60.

Low was improper.<sup>323</sup> Mr. Low, from California, had proper standing *pro hac vice* to represent the defendant.<sup>324</sup> The Government conceded throughout the appeal that defendant Gonzalez-Lopez was erroneously deprived of his counsel of choice.<sup>325</sup> Mr. Low had previously appeared before the federal Missouri trial judge in another case and the attorney successfully negotiated a sound guilty plea.<sup>326</sup>

This case concerned whether the error of counsel amounted to a structural error, requiring automatic reversal, or a substantive error, requiring a harmless error analysis.<sup>327</sup> Denial of retained counsel of choice is a structural error, even if the retained attorney is out-of-state.<sup>328</sup>

## V. TRIAL ISSUES

*Crawford v. Washington*,<sup>329</sup> decided in 2004, concerned the admission of testimonial statements by witnesses who do not testify at trial (discussed in *Davis v. Washington*,<sup>330</sup> below). In *Crawford*, the Court ruled that testimonial pretrial statements by defendant's wife, who did not testify at trial due to the marital privilege, denied the defendant his right of cross-examination.<sup>331</sup> The following cases concern the statements of witnesses who call 911 Operators or witnesses who make statements at the scene.

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<sup>323</sup> See *supra* note 306.

<sup>324</sup> Respondent Gonzalez-Lopez Brief, *supra* note 305, at 8.

<sup>325</sup> *Gonzalez-Lopez*, 548 U.S. at 148.

<sup>326</sup> Respondent Gonzalez-Lopez Brief, *supra* note 305, at 2–3.

<sup>327</sup> *Gonzalez-Lopez*, 548 U.S. at 148.

<sup>328</sup> This presupposes that the out-of-state attorney has abided by the state's individual court rules concerning *pro hac vice*.

<sup>329</sup> 541 U.S. 36 (2004).

<sup>330</sup> 547 U.S. 813 (2006).

<sup>331</sup> *Crawford*, 541 U.S. at 40 (“[the defendant’s wife] . . . did not testify because of the state marital privilege . . .”); see also *id.* at 68 (“In this case, the State admitted [his wife’s] . . . testimonial statement against [him] . . ., despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment.”). The *Crawford* case concerned the testimonial nature of formal statements from a witness resulting from police interrogations, affidavits, and prior testimony and whether these statements were admissible if the witness doesn’t testify at trial.

A. *Davis v. Washington and Hammon v. Indiana: Confrontation and Use of Nontestifying Witness Statements.*

1. *Holding*

Statements made in the course of a 911 call, during an ongoing emergency, are nontestimonial, and hence admissible if the declarant is unavailable to testify.<sup>332</sup> Statements made on the scene to the police about recent *past* events are testimonial and inadmissible, if the declarant is unavailable to testify.<sup>333</sup> When the primary purpose of the police interrogation is to establish past events, then such statements are testimonial and subject to the Sixth Amendment's confrontation clause.<sup>334</sup>

2. *Facts*

This opinion covers two joined cases: the first from the state of Washington and the second from the state of Indiana. The first case, *Davis*, concerned statements made to a 911 operator.<sup>335</sup> In the ensuing conversation, the operator ascertained that a woman was involved in a domestic disturbance with her former boyfriend.<sup>336</sup> As the conversation continued, the operator learned that the boyfriend was recently on the premises.<sup>337</sup> The operator gathered other significant background information about the boyfriend.<sup>338</sup> Soon the police arrived.<sup>339</sup>

The caller did not testify at trial.<sup>340</sup> The trial court admitted, over objection, the recording of the caller's exchange with the 911 operator.<sup>341</sup> The appellate courts of the state of Washington affirmed the conviction holding that the statements were nontestimonial, hence admissible.<sup>342</sup>

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<sup>332</sup> See *Davis*, 547 U.S. at 822; see also *id.* at 827 ("A 911 call, . . . and at least the initial interrogation conducted in connection with a 911 call, is ordinarily *not* designed primarily to 'establish or prove' some *past* fact, but to describe *current* circumstances requiring police assistance.") (alterations in original omitted) (all emphases added).

<sup>333</sup> See *id.* at 822.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 817.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 818.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 819.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

### 3. *Hammon v. Indiana*

In the *Hammon* case, the police responded to a domestic disturbance.<sup>343</sup> The police found a woman alone on the front porch, appearing somewhat frightened, but she told the officers that “nothing was the matter.”<sup>344</sup> The husband was in the kitchen.<sup>345</sup> One officer stayed with the wife and the other officer stayed with the husband.<sup>346</sup> The wife later signed a battery affidavit at the scene wherein she stated that her husband beat her.<sup>347</sup>

The wife did not testify at the bench trial.<sup>348</sup> The prosecution introduced her statements through the testimony of the police officer.<sup>349</sup> The trial court admitted the affidavit as a “present sense impression,” and the wife’s statements as “excited utterances.”<sup>350</sup> The husband was convicted.<sup>351</sup> The Indiana Court of Appeals and Indiana Supreme Court affirmed the conviction, finding that the statements taken at the scene were not testimonial, and thus, consequently admissible.<sup>352</sup>

### 4. *Opinion by Justice Scalia*<sup>353</sup>

The Court clarified “testimonial statements” in the context of police interrogations. Under *Crawford*, it was unclear as to the boundaries of what constituted a testimonial statement. The Indiana Supreme Court defined it as “one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings.”<sup>354</sup> Testimonial statements are generally inadmissible if the declarant fails to testify at

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 820.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 821.

<sup>352</sup> *Id.*; see also *Hammon v. State*, 829 N.E.2d 444, 457–59 (Ind. 2005).

<sup>353</sup> Joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, Breyer, and Alito. *Davis*, 547 U.S. at 815.

<sup>354</sup> *Id.* at 821–22. See also *Hammon*, 829 N.E.2d at 456. The defense unsuccessfully claimed at oral argument that any accusation of a witness to a known law enforcement official must be testimonial. See Transcript of Oral Argument at 4, *Hammon*, 547 U.S. 813 (No. 05-5705), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-5705.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-5705.pdf).

trial.<sup>355</sup> Such statements are unreliable, self-serving, and untested through cross-examination.<sup>356</sup>

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>357</sup>

Applying this analysis to the *Davis* case, the 911 call described a current circumstance requiring police assistance.<sup>358</sup> The caller was speaking about events as they were occurring.<sup>359</sup> The statements were necessary to resolve the current emergency, rather than an indication of a past event.<sup>360</sup> The caller's present sense impression or excited utterance showed immediacy.<sup>361</sup> Although the 911 operator continued to question the caller and receive details that did not relate to the current emergency, such statements could be redacted to exclude those portions of the conversation which then became testimonial.<sup>362</sup>

Applying this analysis to the *Hammon* case, concerning on the scene statements, Justice Scalia arrived at a different conclusion. The statements made by the wife to the officers on the scene were part of an investigation into possible past criminal conduct.<sup>363</sup> There was no emergency in progress; no fighting; no immediate threats.<sup>364</sup> The wife gave a subsequent

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<sup>355</sup> *Davis*, 547 U.S. at 821; *see also* *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

<sup>356</sup> *Crawford*, 541 U.S. at 62.

<sup>357</sup> *Davis*, 547 U.S. at 822.

<sup>358</sup> *Id.* at 827.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 831.

<sup>362</sup> *Id.* at 829.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

statement after the alleged event.<sup>365</sup> Consequently, the wife’s statements and her affidavit were testimonial.<sup>366</sup>

Justice Scalia added this important caveat. If there was evidence that the defendant intimidated the witness from testifying at trial, then prior testimonial statements could be admissible.<sup>367</sup> The Constitution does not give the “criminal a windfall”<sup>368</sup> because “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”<sup>369</sup>

##### 5. Justice Thomas Concurring and Dissenting

Justice Thomas concurred with the result reached in *Davis*, but dissented as to the *Hammon* case.<sup>370</sup> In the *Hammon* case, Justice Thomas recognized that domestic battery incidents frequently present a continuing danger.<sup>371</sup> The police were unsure whether the suspected violence would resume once they left.<sup>372</sup>

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<sup>365</sup> *Id.* at 829–30.

<sup>366</sup> *Id.* at 830.

<sup>367</sup> *See id.* at 833. The standards to determine intimidation were left to another day. Chief Justice Roberts at oral argument thought that the standard was by preponderance of the evidence. *See* Transcript of Oral Argument, *supra* note 354, at 23.

<sup>368</sup> *Davis*, 547 U.S. at 833.

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

<sup>370</sup> *Id.* at 834.

<sup>371</sup> *Id.* at 841 (Thomas, J., concurring in part, dissenting in part). According to defense counsel at oral argument, several states, such as Michigan and Oregon, were considering recent legislation that would make witness accusations of domestic violence admissible so long as they are made reasonably fresh within 24 hours of the event. *See* Transcript of Oral Argument, *supra* note 354, at 10. The Michigan statute is MICH COMP LAWS ANN. § 768.28c (West Supp. 2007):

(1) Evidence of a statement by a declarant is admissible if all of the following apply:

(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(continued)

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(d) The statement was made under circumstances which would indicate the statement's trustworthiness.

(e) The statement was made to a law enforcement officer.

(2) For the purpose of subsection (1)(d), circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

(3) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

(4) Nothing in this section shall be construed to abrogate any privilege conferred by law.

(5) As used in this section:

(a) "Declarant" means a person who makes a statement.

(b) "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(i) Causing or attempting to cause physical or mental harm to a family or household member.

(ii) Placing a family or household member in fear of physical or mental harm.

(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

*(continued)*

B. *Holmes v. Carolina*<sup>373</sup>—*Trial Issues: Evidence, Issues of Third-Party Guilt.*

1.  *Holding*

A criminal defendant’s federal constitutional rights are violated by a state evidence rule which bars the defendant from introducing proof of third-party guilt if the prosecution has introduced forensic evidence which strongly supports a guilty verdict.<sup>374</sup>

2.  *Facts*

An 86 year old woman was beaten, raped, and robbed in her home.<sup>375</sup> She later died from her injuries.<sup>376</sup> The jury found defendant Holmes guilty of murder and sexual offenses and he was sentenced to death.<sup>377</sup>

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(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(c) “Family or household member” means any of the following:

(i) A spouse or former spouse.

(ii) An individual with whom the person resides or has resided.

(iii) An individual with whom the person has or has had a child in common.

(iv) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, “dating relationship” means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(6) This section applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006.

<sup>372</sup> *Davis*, 547 U.S. at 841.

<sup>373</sup> 547 U.S. 319 (2006).

<sup>374</sup> *Id.* at 330–31.

<sup>375</sup> *Id.* at 321.

<sup>376</sup> *Id.* at 321–22.

<sup>377</sup> *Id.* at 322.

Upon the state's postconviction review, his conviction was reversed.<sup>378</sup> At the second trial, the prosecution relied heavily on forensic evidence; such as defendant's palm print, defendant's clothes fibers, a mixed DNA analysis, and the victim's blood type found on defendant's clothes.<sup>379</sup> The prosecution produced a witness who testified he had seen defendant Holmes in the area within an hour of the attack.<sup>380</sup>

The defense attacked the forensic evidence by introducing testimony that law enforcement agents contaminated much of the evidence.<sup>381</sup> Defense experts testified that the police procedures mishandled the DNA evidence and fingerprint evidence.<sup>382</sup> Defendant Holmes also attempted to introduce evidence that a third party committed the murder.<sup>383</sup> Proposed defense witnesses testified at a pretrial hearing that the third party confessed to the killing.<sup>384</sup> The trial court excluded defendant's third-party guilt evidence saying that such evidence was inadmissible if it merely cast a bare suspicion upon another person.<sup>385</sup>

The South Carolina Supreme Court held that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.<sup>386</sup>

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<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 322–23.

<sup>383</sup> *Id.* at 323.

<sup>384</sup> *Id.*

<sup>385</sup> The trial court cited *State v. Gregory*, 16 S.E.2d 532 (1941), which held that third-party evidence is admissible if it “raises a reasonable inference or presumption as to the defendant’s own innocence,” but it is not admissible if it “merely casts a bare suspicion upon another person.” *Id.* at 323–24 (quoting *Gregory*, 16 S.E.2d at 534). On appeal, the South Carolina Supreme Court affirmed quoting *State v. Gay*, 541 S.E.2d 541, 544–45 (2001), that “where there is strong evidence of an appellant’s guilt, especially when there is strong forensic evidence, the proffered evidence about a third party’s alleged guilt does not raise a reasonable inference as to the appellant’s own innocence.” *Id.* It should also be noted that Justice Thomas, who rarely asks questions during oral argument, asked a couple of questions regarding the applicability of the *Gregory* case. Transcript of Oral Argument at 43–44, *Holmes*, 547 U.S. 319 (No. 05-1327), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-1327.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1327.pdf).

<sup>386</sup> *Holmes*, 547 U.S. at 324.

### 3. Justice Alito for a Unanimous Court

Whether rooted in the Due Process Clause or the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.<sup>387</sup> Evidence tending to show the commission of a crime by another person may be introduced by an accused when it is inconsistent and raises a reasonable doubt of the defendant's own guilt, but frequently such evidence is so remote that it is excluded.<sup>388</sup> Such evidence may be excluded where it does not sufficiently connect another suspect to the crime.<sup>389</sup>

However, the South Carolina's Supreme Court's rule too broadly focused on the strength of the prosecution's case.<sup>390</sup> Once the trial court viewed the prosecution's case as strong, the evidence of third-party guilt was excluded even if that evidence would have great probative value and did not pose an undue risk of harassment and confusion of the issues.<sup>391</sup> The South Carolina Court inadequately assessed the credibility of the prosecution's forensic evidence, which had been called into question by capable defense experts.<sup>392</sup> "Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case."<sup>393</sup>

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<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 327. Sometimes verdicts are based on the most puzzling anomalies. "There is a point at which you have to go beyond the mere evidence by using your [instincts] or you will not discover the truth." CHARLES PALLISER, *THE UNBURIED* 350 (2000).

<sup>389</sup> *Holmes*, 547 U.S. at 327.

<sup>390</sup> *Id.* at 329.

<sup>391</sup> *Id.*

It is mal-practice of the courts to confine evidence and discussion to the bounds of apparent relevancy. Yet experience has shown, and a true philosophy will always show, that a vast, perhaps the larger, portion of truth arises from the seemingly irrelevant. It is through the spirit of this principle, if not precisely through its letter, that modern science has resolved to *calculate upon the unforeseen*.

EDGAR ALLEN POE, *The Mystery of Marie Rogêt*, in *THE COMPLETE TALES OF EDGAR ALLEN POE*, 149, 174 (Oxford Univ. Press 1998).

<sup>392</sup> *Holmes*, 547 U.S. at 329.

<sup>393</sup> *Id.* at 330.

## VI. DEFENSES

Something is always lost when it comes to an insanity test. The current movement in insanity has been to do away with the Model Penal Code's approach of cognitive and volitional determinations.<sup>394</sup> "A cognitive disorder is one that undermines a person's ability to perceive reality accurately. A volitional disorder is one that undermines a person's ability to control his or her conduct."<sup>395</sup> Some states simply require the jury to determine whether the accused, in the mental state, knew right from wrong.<sup>396</sup> Many states have eliminated the partial defense of "diminished capacity."<sup>397</sup> There is even some movement towards abolishing the insanity defense.<sup>398</sup>

A. Clark v. Arizona<sup>399</sup>: *Insanity as Knowledge of Right and Wrong. Aliens Inhabiting the Body of Government Officials. The Men in Black*<sup>400</sup> *Defense.*

1. *Holding*

Arizona's insanity test, stated solely in terms of the defendant's capacity to tell whether an act was right or wrong, is constitutional.<sup>401</sup> Arizona can also restrict defense evidence of mental illness and incapacity as it bears on the claim of diminished capacity and mens rea.<sup>402</sup>

2. *Facts*

Eric Clark was driving his pickup truck with his music blaring loudly.<sup>403</sup> He was circling a neighborhood in the early morning hours.<sup>404</sup>

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<sup>394</sup> MODEL PENAL CODE § 4.01 (1962), provides that a person is not responsible for his or her criminal conduct if, at the time of the conduct, as a result of mental disease or defect, the person lacked substantial capacity to (1) appreciate the criminality of one's conduct; or (2) conform one's conduct to the requirements of the law.

<sup>395</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.03(A) n.40 (4th ed. 2006).

<sup>396</sup> *Id.* § 25.04(C)(1)(a).

<sup>397</sup> *Id.* § 26.03(A)(1)-(2).

<sup>398</sup> *Id.* § 25.06(B) n.146 (noting laws in Idaho, Kansas, Montana, and Utah as well as a 2002 New Hampshire Supreme Court decision).

<sup>399</sup> 548 U.S. 735 (2006).

<sup>400</sup> *See, e.g., MEN IN BLACK* (Columbia Pictures 1997).

<sup>401</sup> *Clark*, 548 U.S. at 742.

<sup>402</sup> *Id.* at 742, 771.

<sup>403</sup> *Id.* at 743.

<sup>404</sup> *Id.*

A city police officer, in a marked car, responded to the complaints and the officer pulled Mr. Clark to the side of the road.<sup>405</sup> The officer, in full police uniform, told Mr. Clark to stay put, but less than a minute later, Clark shot the officer, who soon died.<sup>406</sup> Clark was arrested later that day.<sup>407</sup>

Clark was charged with first degree murder for intentionally killing a law enforcement officer in the line of duty.<sup>408</sup> After several competency examinations, Clark elected a bench trial.<sup>409</sup> The prosecution's theory of the case was that defendant Clark had intentionally lured an officer to the scene to kill the officer.<sup>410</sup> Clark told several witnesses a few weeks earlier that he wanted to shoot police officers.<sup>411</sup> The defense theory was that Clark thought he was shooting an "alien," who was inhabiting the body of government officials.<sup>412</sup>

Under the Arizona statute, a defendant is sane unless he or she demonstrates that "at the time of the commission of the criminal act, he or she was afflicted with a mental disease or defect of such severity that he or she did not know the criminal act was wrong."<sup>413</sup>

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<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*; see ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2001) (providing that first degree murder includes intentionally or knowingly causing "the death of a law enforcement officer who is in the line of duty").

<sup>409</sup> *Clark*, 538 U.S. at 743.

<sup>410</sup> *Id.* at 744.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at 745.

<sup>413</sup> ARIZ. REV. STAT. ANN. § 13-502(A) (2001) provides that

[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a

(continued)

The trial judge found Clark guilty of first-degree murder of a police officer and found that Clark had not shown “he was insane at the time.”<sup>414</sup> “The judge noted that though Clark was indisputably afflicted with paranoid schizophrenia at the time of the shooting, the mental illness did not distort Clark’s perception of reality so severely” that Clark did not know he was shooting a police officer.<sup>415</sup> Based on this finding Clark knew his actions were wrong.<sup>416</sup>

On appeal, Clark argued that the Arizona insanity statute too narrowly eliminated the cognitive portion of the venerable *M’Naghten* standard, regarding a clinical understanding of one’s acts.<sup>417</sup> Clark also argued that the trial court impermissibly denied Clark an opportunity to present evidence of incapacity which would bear on Clark’s mens rea.<sup>418</sup>

### 3. *Opinion by Justice Souter*<sup>419</sup>

The four main variants of traditional insanity tests include the cognitive incapacity (understanding), the moral and legal incapacity (knowing right from wrong), the volitional incapacity (irresistible

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mental disease or defect or an abnormality that is manifested only by criminal conduct.

This statute was subsequently interpreted in *State v. Mott*, 931 P.2d. 1046, 1050–54 (1997) (en banc), which held “Arizona does not allow evidence of a defendant’s mental disorder, short of insanity, either as an affirmative defense or to negate the *mens rea* elements of a crime.”

<sup>414</sup> *Clark*, 548 U.S. at 746.

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

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 747–48. The landmark English rule in *M’Naghten’s Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843), states that

the jurors ought to be told . . . that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

*Id.* at 210, 8 Eng. Rep. at 722.

<sup>418</sup> *Clark*, 548 U.S. at 746–47, 756.

<sup>419</sup> Joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito; Justice Breyer concurred in the result. *Id.* at 741.

impulse), and the product of mental illness (state of mind).<sup>420</sup> Justice Souter noted that “no particular formulation ha[d] evolved into a baseline for due process.”<sup>421</sup> The insanity test was, therefore, “substantially open to state choice.”<sup>422</sup>

Arizona’s statute focused on the moral and legal incapacity standard, yet the trial court also found that the cognitive standard was fulfilled.<sup>423</sup> First, the trial judge admitted the defense evidence bearing on cognitive incapacity.<sup>424</sup> Second, Clark’s psychiatric expert and lay witnesses testified to Clark’s delusions.<sup>425</sup> Incorporating both the cognitive and moral incapacity standard, the Court concluded that the trial judge properly found that Clark knew right from wrong.<sup>426</sup>

Additionally, the trial judge properly denied Clark’s efforts to present affirmative evidence bearing on mens rea, in short, diminished capacity.<sup>427</sup> Clark wanted to present “observation evidence” from lay witnesses that aliens were inhabiting the bodies of local people, including government agents.<sup>428</sup> The right to present relevant evidence for the defense may be curtailed if the state has good reasons.<sup>429</sup> The trial judge may exclude

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<sup>420</sup> *Id.* at 749.

<sup>421</sup> *Id.* at 752.

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

<sup>423</sup> *Id.* at 751, 755–56.

<sup>424</sup> *Id.* at 755.

<sup>425</sup> *Id.* at 756.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* at 779.

<sup>428</sup> *Id.* at 757–58. At oral argument, Justice Souter framed the diminished capacity question perfectly:

[The State recognizes that it is difficult] for some people to conform themselves to the criminal law than others. [The State] knows it’s harder for some than others. But [the State doesn’t] care how much harder it is, unless it gets to the point that we define [it] as insanity. Because unless [the State] requires something as serious as insanity to excuse, everybody’s going to have an excuse, and there isn’t going to be any criminal law.

[Justice Souter]: “[I]s that unconstitutional?”

[Defense Counsel Goldberg]: “No, it’s not.”

Transcript of Oral Argument at 17–18, *Clark*, 548 U.S. 735 (No. 05-5966), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-5966.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-5966.pdf).

<sup>429</sup> *Clark*, 548 U.S. at 770.

defense evidence if its probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury.<sup>430</sup> Diminished capacity evidence consists of judgments “fraught with multiple perils” which are elusive and uncategorical.<sup>431</sup> The state is free to recognize that judgments addressing the basic categories of capacity “requires a leap from the concepts of psychology,” which are devised for treatment, “to the concepts of legal sanity,” which are devised for criminal responsibility.<sup>432</sup> The state may be free to channel the risks concerning expert testimony, but experts themselves admit empirical and conceptual disagreements adding up to the risk of undue reliance.<sup>433</sup> Arizona’s rule serves to preserve the State’s chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of the jurors.<sup>434</sup>

#### 4. *Justice Kennedy Dissenting*<sup>435</sup>

While the states have substantial latitude in construing various insanity tests, their authority has constitutional limits.<sup>436</sup> Whether rooted in the Due Process Clause or the Compulsory Process Clause or the Confrontation Clause, “the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.”<sup>437</sup> To deny defendant the opportunity to negate mens rea, the jury is forced “to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness.”<sup>438</sup>

### B. *Dixon v. United States*<sup>439</sup>—*Defenses: Duress Defense and Burden of Proof. The Boyfriend Made Me Do It.*

#### 1. *Holding*

It is proper to place the burden of proof on the defendant to establish the defense of duress by a preponderance of the evidence.<sup>440</sup> In addition, modern common law developments do not support shifting the burden to

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<sup>430</sup> *Id.*

<sup>431</sup> *Id.* at 776–77.

<sup>432</sup> *Id.* at 777.

<sup>433</sup> *Id.* at 778.

<sup>434</sup> *Id.* at 779.

<sup>435</sup> Joined by Justices Stevens and Ginsburg. *Id.* at 781 (Kennedy, J., dissenting).

<sup>436</sup> *Id.* at 781.

<sup>437</sup> *Id.* (citations omitted).

<sup>438</sup> *Id.* at 800.

<sup>439</sup> 548 U.S. 1 (2006).

<sup>440</sup> *Id.* at 17.

the government to disprove the defendant's duress defense beyond a reasonable doubt.<sup>441</sup>

## 2. *Facts*

Keshia Dixon purchased multiple firearms at two gun shows.<sup>442</sup> She provided an incorrect address and falsely stated that she was not under indictment for a felony.<sup>443</sup> At trial, petitioner admitted that she intended to make false statements, but she claimed that she acted under duress because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him.<sup>444</sup>

Petitioner Dixon contended that the trial court's jury instructions erroneously required her to prove duress by a preponderance of the evidence.<sup>445</sup> Additionally, she claimed, the jury instructions should have required the prosecution to rebut her duress defense beyond a reasonable doubt.<sup>446</sup>

## 3. *Justice Stevens for the Majority*<sup>447</sup>

The false statement crimes for which petitioner was convicted required that the prosecution prove beyond a reasonable doubt that she acted knowingly and willfully.<sup>448</sup> "Criminal liability is normally based upon the

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 3.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at 3–4.

<sup>445</sup> *Id.* at 4–5.

<sup>446</sup> *Id.* at 5. There is no federal statute defining duress. *Id.* at 4 n.2. However, the Court presumed the accuracy of the following district court description of the duress elements: (1) An unlawful and imminent threat of such a nature as to induce in a defendant a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation where it was probable that she would be forced to perform the criminal act; and (3) there was no reasonable alternative to violating the law. *Id.*

<sup>447</sup> Joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, and Alito. *Id.* at 3.

<sup>448</sup> Petitioner Dixon was indicted and convicted on one count of receiving a firearm while under indictment, contrary to 18 U.S.C. § 922(n), and eight counts of making false statements in connection with the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6). *Dixon*, 548 U.S. at 3–4. The crimes for which petitioner was convicted required that she acted "knowingly" and "willfully." *Id.* at 5. The term "knowingly" required "proof of knowledge of the facts that constitute the offense." *Id.* The term  
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concurrence of two factors, an evil meaning mind and an evil doing hand.”<sup>449</sup>

The defense of duress does not negate a defendant’s state of mind when the applicable offense requires a defendant to have acted knowingly or willfully.<sup>450</sup> To the contrary, the duress defense permits the defendant to avoid liability because coercive conditions negate “a conclusion of guilt even though the necessary mens rea was present.”<sup>451</sup> The long-established common law rule is that the burden of proving a duress defense rests on the defendant.<sup>452</sup>

The Court gave no weight to the Model Penal Code’s requirement that the prosecution must disprove duress beyond a reasonable doubt.<sup>453</sup> There was no evidence that Congress endorsed the Code’s view or incorporated the Model Penal Code into the Safe Streets Act.<sup>454</sup> Congress intended the petitioner to bear the burden of proving the duress defense by a preponderance of the evidence.<sup>455</sup>

#### 4. Justice Kennedy Concurring

The defense of duress is uniquely within the knowledge of the defendant.<sup>456</sup> Obviously, the person who allegedly coerced the defendant to buy the guns is unwilling to testify.<sup>457</sup> The prosecution may be without any practical means of disproving the defendant’s allegations.<sup>458</sup> This

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“willfully” required the defendant to have acted with knowledge that her conduct was unlawful. *Id.* at 5–6.

<sup>449</sup> *Dixon*, 548 U.S. at 7 (citations omitted).

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* (citations omitted).

<sup>452</sup> *Id.* at 13. “Until the end of the 19th century, common law courts generally adhered to the rule that the proponent of an issue bears the burden of persuasion on the factual” presentation of the issue. *Id.* at 8. At common law, the burden of proving affirmative defenses rested on the defendant. *Id.* at 8.

<sup>453</sup> *Id.* at 15–16 (noting there was no evidence that Congress adopted the Model Penal Code’s view of the federal criminal statute in this case, thus, the Model Penal Code did not accurately reflect federal common law.) Under the MODEL PENAL CODE § 2.09 (1962), duress is an affirmative defense. A person must be coerced beyond a reasonable firmness to resist. *Id.* Under MODEL PENAL CODE § 1.12(4) (1962), the burden of proving duress rests on the prosecution or defense, depending on whose interest will be furthered by the defense.

<sup>454</sup> *Dixon*, 548 U.S. at 16.

<sup>455</sup> *Id.* at 17.

<sup>456</sup> *Id.* at 18 (Kennedy, J., concurring).

<sup>457</sup> *Id.* at 19.

<sup>458</sup> *Id.*

difficulty is a good reason to maintain the usual rule of “placing the burden of production and persuasion on the party raising the issue.”<sup>459</sup>

5. *Justice Breyer Dissenting*<sup>460</sup>

The burden of production of the duress defense should rest on the defendant, but the prosecution must have the burden of persuasion beyond a reasonable doubt.<sup>461</sup> “[T]he question of duress resembles that of *mens rea*, an issue that is always for the prosecution to prove beyond a reasonable doubt.”<sup>462</sup> Where a defendant acts under duress, such a defendant lacks any “semblance of a meaningful choice.”<sup>463</sup> The defendant had no free will.<sup>464</sup>

## VII. SENTENCING

A recent trilogy of cases decided in previous years dramatically altered sentencing jurisprudence: *Apprendi v. New Jersey*,<sup>465</sup> *Blakely v. Washington*,<sup>466</sup> and *United States v. Booker*.<sup>467</sup> The thrust of these cases is that factors which aggravate a person’s sentence, which formerly were

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<sup>459</sup> *Id.*

<sup>460</sup> Joined by Justice Souter. *Id.* at 20 (Breyer, J., dissenting).

<sup>461</sup> *Id.* at 21. At oral argument, the defense pointed out the irony that had Petitioner Dixon used the guns to shoot the man threatening her kids, then she would have been entitled to the self-defense claim, where the prosecution would have to rebut her self-defense claim beyond a reasonable doubt. Transcript of Petitioner at 52, *Dixon*, 548 U.S. 1 (No. 05-7053), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-7053.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-7053.pdf). Here, the petitioner selected the least grievous of approaches, submitting to the duress, and she has placed herself in a worse position. *Id.*

<sup>462</sup> *Dixon*, 548 U.S. at 23.

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

<sup>465</sup> 530 U.S. 466 (2000) (holding that any factor or statute which increases the penalty for a crime beyond the maximum penalty provided by the underlying conviction, must be submitted to a jury and proven beyond a reasonable doubt). This case concerned a hate crimes statute which was an added penalty to an assault conviction. *Id.*

<sup>466</sup> 542 U.S. 296 (2004) (holding that maximum sentence concerns the maximum statutory range of the underlying conviction.).

<sup>467</sup> 543 U.S. 220 (2005) (holding that aggravated factors in the sentencing guidelines must be decided by a jury). To remedy a gross inequity, the Supreme Court firmly suggested that the federal sentencing guidelines could no longer be mandatory, but advisory. *Id.* at 245.

decided by a judge and proven by a preponderance of the evidence, must now be decided by a jury and proven beyond a reasonable doubt.<sup>468</sup>

A. Washington v. Recuenco<sup>469</sup>: *Sentencing—Harmless Error Analysis May Apply to Blakely Errors.*

1. *Holding*

Some *Blakely* errors may be harmless.<sup>470</sup> *Blakely* errors stemming from the failure to submit a specific sentencing element to the jury, where the jury directly passed on the sentencing element, is not a structural error requiring automatic reversal.<sup>471</sup>

2. *Facts*

Defendant was convicted of assault in the second degree based on the jury's finding that he assaulted his wife with a deadly weapon.<sup>472</sup> On appeal, the Washington Supreme Court vacated the sentence because of a *Blakely* error in which the trial judge enhanced the sentence without the jury passing on the greater question of whether the defendant used a firearm.<sup>473</sup> Even though the jury found that the defendant possessed a deadly weapon (a gun), the specific enhancement added by the judge concerned a "firearm."<sup>474</sup> A deadly weapon could be a knife, bow, or a firearm used as a club.<sup>475</sup> Because the trial judge subjected the defendant

<sup>468</sup> See *supra* text accompanying notes 465–67.

<sup>469</sup> 548 U.S. 212 (2006).

<sup>470</sup> *Id.* at 221–22.

<sup>471</sup> *Id.* at 222.

<sup>472</sup> *Id.* at 214.

<sup>473</sup> *Id.* at 215–16. The basic rule was previously announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). When a judge, rather than a jury, decides a fact that increases the defendant's punishment above the applicable standard range, the Sixth Amendment's jury trial right is violated. *Id.* at 474–97. This is true regardless of whether the fact is called an element or whether it is called a sentencing factor because elements and sentencing factors are functionally equivalent under the Sixth Amendment of the United States Constitution. *Id.* at 479, 483–84. This holding was upheld in *Blakely v. Washington*, 542 U.S. 296 (2004) (concerning state sentencing factors); and *United States v. Booker*, 543 U.S. 220 (2005) (concerning federal sentencing guidelines).

<sup>474</sup> *Recuenco*, 548 U.S. at 215.

<sup>475</sup> Justice Ginsburg included the relevant Washington law definitions of the terms "deadly weapon" and "firearm.":

"Deadly weapon," Washington law provides, encompasses any  
"implement or instrument which has the capacity to inflict death and

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to a firearm enhancement based on the jury's finding that defendant was armed with a deadly weapon, the State conceded that a *Blakely* error occurred.<sup>476</sup> The State, however, argued that the error was harmless.<sup>477</sup> The jury was aware that the deadly weapon was a firearm.<sup>478</sup> The Washington State Supreme Court, however, pursuant to an earlier decision, vacated defendant's sentence because *Blakely* errors were considered "structural errors," requiring automatic reversal.<sup>479</sup>

### 3. *Decision by Justice Thomas*<sup>480</sup>

"[M]ost constitutional errors can be harmless."<sup>481</sup> Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not a structural error.<sup>482</sup> The error was harmless when the jury concluded from the evidence that defendant threatened his wife with a gun.<sup>483</sup> The prosecution opted to charge defendant with assault with a deadly weapon,

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from the manner in which it is used, is likely to produce or may easily and readily produce death," including, inter alia, a "pistol, revolver, or any other firearm." § 9.94A.602. "Firearm" is defined, more particularly, to mean "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." § 9.41.010(1). A handgun (the weapon Recuenco held), it thus appears, might have been placed in both categories.

*Id.* at 226 (Ginsburg, J., dissenting).

<sup>476</sup> *Id.* at 216 (majority opinion).

<sup>477</sup> *Id.*

<sup>478</sup> The defendant was charged with "intentiona[l] assault with a deadly weapon, to-wit: a handgun." *Id.* at 215 (citation omitted).

<sup>479</sup> *Id.* at 216; *State v. Recuenco*, 110 P.3d 188, 192 (Wash. 2005). The Washington State Supreme Court relied on *Washington v. Hughes*, 110 P.3d 192, 205 (Wash. 2005) (holding that *Blakely* errors were structural errors that always require automatic reversal).

<sup>480</sup> Joined by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Breyer, and Alito. *Recuenco*, 548 U.S. at 213.

<sup>481</sup> *Id.* at 218 (citations omitted). Prior to reaching the *Blakely* error discussion, Justice Thomas rejected defendant's claim that the Washington Supreme Court decision "rested on adequate and independent state-law grounds." *Id.* at 216–18 ("[Defendant's] interpretation of Washington law . . . is not determinative of the question that the Supreme Court of Washington decided and on which we granted review.").

<sup>482</sup> *Id.* at 220. The Court previously held in *Neder v. United States*, 527 U.S. 1, 8 (1999) (regarding mail fraud), that harmless error analysis applies to these errors because "instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9.

<sup>483</sup> *Recuenco*, 548 U.S. at 220.

rather than assault with a firearm, which was a higher charge.<sup>484</sup> The evidence of a gun was directly before the jury.<sup>485</sup> The defendant and the jury were on notice of the firearm element.<sup>486</sup> The handgun used in the offense might have been placed in either category, as a firearm or a deadly weapon.<sup>487</sup> The trial judge made a finding necessary to fill a gap in an incomplete jury verdict.<sup>488</sup>

#### 4. *Justice Ginsburg Dissenting*<sup>489</sup>

Under Washington law, assault with a deadly weapon is a lesser included offense of assault with a firearm.<sup>490</sup> The assault charge carried a sentence of three to nine months.<sup>491</sup> The deadly weapon enhancement added one mandatory year to the sentence.<sup>492</sup> The firearm enhancement added three years to the sentence.<sup>493</sup> The jury was not instructed on the firearm enhancement element.<sup>494</sup> The jury considered the firearm solely as a deadly weapon offense.<sup>495</sup> Regardless of how overwhelming the evidence, the trial judge is barred from overriding the jurors' independent judgment.<sup>496</sup>

#### 5. *Commentary*

*Recuenco* resolves a critical issue concerning unitary trials where the prosecutor litigates the liability issues and sentencing enhancement issues in one proceeding. If, for instance, the sentencing enhancement features of the case are so intricate to the *res gestae* event then the jury will hear the sentencing issues at the time of the liability stage. In this instance, a unitary trial on liability and sentencing issues may suffice.

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<sup>484</sup> *Id.* at 215. It is conceivable that the gun could be used as a club or that the gun could be inoperable.

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

<sup>487</sup> See *supra* note 475 and accompanying text.

<sup>488</sup> *Recuenco*, 548 U.S. at 215.

<sup>489</sup> Joined by Justice Stevens. *Id.* at 224 (Ginsburg, J., dissenting).

<sup>490</sup> *Id.* at 226–27.

<sup>491</sup> *Id.* at 224.

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

<sup>495</sup> *Id.* at 224–25.

<sup>496</sup> *Id.* at 225, 228–29.

## VIII. HABEAS

During the 2005–2006 Term, the Court decided several habeas cases of narrow procedural import. In *Rice v. Collins*,<sup>497</sup> concerning the habeas standards of review on *Batson* challenges, the Supreme Court stressed the deference owed to the state trial judge’s rulings.<sup>498</sup> On direct review in federal court, the credibility findings of the trial court are reviewed for clear error.<sup>499</sup> On habeas review, a federal court must find that state court’s conclusion was “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”<sup>500</sup>

In *Miller-El v. Dretke*,<sup>501</sup> during the 2004–2005 Term, the Supreme Court disapproved of the various prosecution tactics designed to thwart minorities from the jury in this repeatedly litigated case from Texas, where prosecutors were exposed for implementing tactics like “jury shuffling” to eliminate minorities from the trial.<sup>502</sup>

Another case of procedural import concerned timeliness of the habeas petition, in *Day v. McDonough, Florida Department of Corrections*,<sup>503</sup> where the habeas petitioner inadvertently filed beyond the one year limitation.<sup>504</sup> The State’s pre-trial pleadings agreed that the petition was timely filed.<sup>505</sup> The federal magistrate, however, inspected the petition and correctly determined that the petition was untimely filed and dismissed the habeas action.<sup>506</sup>

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<sup>497</sup> 546 U.S. 333 (2006).

<sup>498</sup> *Id.* at 335.

<sup>499</sup> *Id.* at 338.

<sup>500</sup> *Id.*

<sup>501</sup> 545 U.S. 231 (2005); *see also* *Johnson v. California*, 545 U.S. 162 (2005).

<sup>502</sup> *Miller-El*, 545 U.S. at 253.

<sup>503</sup> 547 U.S. 198 (2006).

<sup>504</sup> *Id.* at 201–02.

<sup>505</sup> *Id.* at 201.

<sup>506</sup> *Id.* The State acknowledged that a statute of limitations defense is not jurisdictional, therefore, the courts are under no *obligation* to raise the time bar *sua sponte*. *Jackson v. Secretary for Dep’t of Corrections*, 292 F.3d 1347 (11th Cir. 2002) (holding that district court possessed the discretion to raise *sua sponte* the timeliness of a state prisoner’s habeas petition). Day relied on Rule 4 of the Rules Governing Section 2254 Cases (Habeas Rules). *Day*, 547 U.S. at 207. “Habeas Rule 4 provides that district courts ‘must promptly examine’ state prisoner habeas petitions and must dismiss the petition ‘[i]f it plainly appears . . . that the petitioner is not entitled to relief.’” *Id.* (citing R. GOVERNING SEC. 2254 CASES 4) Once an answer has been filed, Day argued, the court loses authority to rule, *sua sponte*, that the petition is untimely. *Id.* Day then argued that under Habeas Rule 11 that  
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The Supreme Court held that even though the State did not contest the issue of the timeliness of the habeas petition and theoretically waived objection, the federal district court has discretion to dismiss *sua sponte* a habeas petition which was filed late—after the one-year limitation.<sup>507</sup>

In 2004, on a terrorism case, *Hamdi v. Rumsfeld*,<sup>508</sup> the Court considered the legality of the government's detention of an American citizen as an "enemy combatant" and the due process standards.<sup>509</sup> The Supreme Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker."<sup>510</sup> In 2006, the country awaited the significant case concerning the legality and due process rights of detainees at Guantanamo Bay, in *Hamdan v. Rumsfeld*.<sup>511</sup>

A. *House v. Bell*<sup>512</sup>—*Habeas Petition: Actual Innocence Standard*.

1.  *Holding*

A federal habeas petitioner who presented new evidence of DNA test results, and presented evidence of a third party's guilt, and presented evidence regarding the mishandling of blood evidence made a sufficient "gateway" showing of actual innocence in order to proceed with his late habeas petition.<sup>513</sup>

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the Federal Rules of Civil Procedure should apply. And under the federal Civil Procedure rules a defendant forfeits a statute of limitations defense not asserted in its answer or in an amendment. *Id.* at 207–08; *see also* FED R. CIV. P. 8(c), 12(b), 15(a).

<sup>507</sup> *Day*, 547 U.S. at 202.

<sup>508</sup> 542 U.S. 507 (2004).

<sup>509</sup> *Id.* at 509.

<sup>510</sup> *Id.* Related habeas issues curtailing Presidential power were presented in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>511</sup> 548 U.S. 557 (2006). The second Iraq-American war, from 2002–07, was based on politically false notions that Iraq harbored weapons of mass destruction. Mark Danner, *The War on Terror: Four Years on; Taking Stock Of The Forever War*, N.Y. TIMES, Sept. 11, 2005. Hundreds of middle eastern detainees are being held through 2008, without due process, counsel, or hearings, at Guantanamo Bay, Cuba. Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantanamo*, N.Y. TIMES, June 13, 2008, at A1. Suicide bombs and civil war exists in Iraq through 2008. Richard A. Oppel Jr. & Sabrina Tavernise, *Ethnic Clashes and Bombers Kill 61 in Iraq*, N.Y. TIMES, July 29, 2008, at A1.

<sup>512</sup> 547 U.S. 518 (2006).

<sup>513</sup> *Id.* at 520.

## 2. *Facts*

Approximately twenty years ago in Tennessee, a woman was murdered.<sup>514</sup> A jury convicted the petitioner, Paul Gregory House, of the crime and sentenced him to death.<sup>515</sup> Very late in the habeas scheme, House presented elaborate evidence protesting his innocence.<sup>516</sup> He offered DNA evidence incriminating the victim's husband, who purportedly confessed to the killing.<sup>517</sup> House presented significant evidence regarding the mishandling of valuable blood evidence.<sup>518</sup> One Court of Appeals judge "described the case as a real-life murder mystery, an authentic who-done-it where the wrong man may be executed."<sup>519</sup>

Nevertheless, the lower courts found that House was procedurally barred because he did not demonstrate sufficient cause for the default in failing to present this evidence in proper time.<sup>520</sup>

## 3. *Decision by Justice Kennedy*<sup>521</sup>

The general rule is that prisoners asserting innocence as a gateway to procedurally defaulted habeas claims must establish that in light of the newly discovered evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."<sup>522</sup>

<sup>514</sup> *Id.* at 521.

<sup>515</sup> *Id.* The evidence against House included a prior conviction for aggravated sexual assault in another Utah, scratches and bruises on his arms and hands, bruises on his knuckle, and a false alibi. *Id.* at 526–27.

<sup>516</sup> *Id.* at 534–35. "I repeat that it is no more than fact that the *larger* portion of all truth has sprung from the collateral." EDGAR ALLEN POE, *supra* note 391, at 174. "The history of human knowledge has so uninterruptedly shown that to collateral, or incidental, or accidental events we are indebted for the most numerous and most valuable discoveries." *Id.*

<sup>517</sup> *House*, 547 U.S. at 540–41, 549.

<sup>518</sup> *Id.* at 541–48.

<sup>519</sup> *Id.* at 536 (quoting *House v. Bell*, 386 F.3d 668, 709 (6th Cir. 2004) (en banc) (Gilman, J., dissenting)).

<sup>520</sup> *Id.* at 533–36.

<sup>521</sup> Joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 520.

<sup>522</sup> *Id.* at 537 (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Schlup's claim of innocence was accompanied by an assertion of constitutional error at trial, ineffective assistance of counsel, and the withholding of evidence by the prosecution. *Schlup*, 513 U.S. at 307. Consequently, Schlup's conviction was not entitled to the same degree of respect as in the similar case of *Herrera v. Collins*, which was a claim of innocence in an error free  
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Under this strict standard, continued Justice Kennedy, “[t]here is no dispute that House presented some new, reliable evidence; the State has conceded as much.”<sup>523</sup> The trial judge must make “a probabilistic determination” about what a “reasonable, properly instructed” jury would find with this evidence.<sup>524</sup> The trial court does not make an independent factual determination.<sup>525</sup> “[T]he gateway actual-innocence standard is ‘by no means equivalent to the standard of *Jackson v. Virginia*,’ which governs claims of insufficient evidence.”<sup>526</sup> The trial court must determine “how reasonable jurors would react to the overall, newly supplemented record.”<sup>527</sup>

In this case, House presented significant DNA evidence that the victim’s husband could have been the murderer.<sup>528</sup> This is “the rare case” where had the jury heard all the supplemental evidence, it is likely that no reasonable juror would have convicted House.<sup>529</sup> He was not

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trial. 506 U.S. 390, 393 (1993). In short, Schlup’s claim was procedural; Herrera’s claim was substantive.

<sup>523</sup> *House*, 547 U.S. at 537.

<sup>524</sup> *Id.* at 538. The Supreme Court stressed that in reviewing a belated “actual innocence” claim, a habeas court must consider

all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial. . . . The [habeas] court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.

. . . A petitioner’s burden at the gateway stage is to demonstrate that more likely than not. . . any reasonable juror would have reasonable doubt.”

*Id.*

<sup>525</sup> *Id.*

<sup>526</sup> *Id.* (citations omitted).

<sup>527</sup> *Id.*

<sup>528</sup> *Id.* at 540–41. The semen stains found in the victim belonged to the husband, not petitioner House. *Id.* at 540. At oral argument, the Court had serious concerns whether rape was a proper aggravating circumstance against Mr. House. Transcript of Oral Argument at 49–54, *House*, 547 U.S. 518 (No. 04-8990), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-8990.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-8990.pdf).

<sup>529</sup> *House*, 547 U.S. at 554.

exonerated,<sup>530</sup> however, but he could proceed on remand where the trial court must apply the correct standard.<sup>531</sup>

4. *Chief Justice Roberts Dissenting*<sup>532</sup>

House did not satisfy the actual innocence standard.<sup>533</sup> The district court judge made a sufficient factual finding of reliability.<sup>534</sup> A petitioner does not pass the gateway threshold if it is “more likely than not that there is any juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt.”<sup>535</sup> “I therefore find it more likely than not that in light of this new evidence, at least one juror, acting reasonably, would vote to convict House.”<sup>536</sup>

B. *Beard v. Banks*<sup>537</sup>—*Prison Conditions: Access to News and Periodicals*.

1. *Holding*

The state policy of conditionally depriving problem prisoners of access to newspapers, periodicals, and photographs does not violate petitioner’s First Amendment rights.<sup>538</sup>

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<sup>530</sup> *Id.* at 555. Typically, if an appellate court declares that there is insufficient evidence for a conviction, the appellant is exonerated and soon released. However, the ruling in this case falls short of a declaration of insufficient evidence. The ruling here establishes that Petitioner Paul House established a “gateway” showing that no reasonable juror would have convicted him had they known of this supplemental evidence. The Supreme Court held that House may proceed with his habeas claim. *Id.*

<sup>531</sup> *Id.* The Court determined that the federal district court did not clearly apply *Schlup*’s predictive standard regarding whether reasonable jurors would have reasonable doubt. *Id.* at 540. Moreover, the Supreme Court was uncertain about the basis for some of the district court’s conclusions. *Id.* Again, this was not a case of conclusive exoneration for Mr. House. *Id.* at 555. The evidence indicated that he could have been the murderer and the evidence equally indicated that the victim’s husband could have been the murderer. *See supra* notes 515, 517–18 and accompanying text. In *Herrera v. Collins*, 506 U.S. 390, 417 (1993), belated federal habeas claims of actual innocence are viewed with great suspicion and require an “extraordinarily high” burden to meet.

<sup>532</sup> Joined by Scalia and Thomas. *House*, 547 U.S. at 555 (Roberts, C.J., concurring in part, dissenting in part). Justice Alito took no part in the decision. *Id.*

<sup>533</sup> *Id.* at 556 (Roberts, C.J., concurring in part, dissenting in part).

<sup>534</sup> *Id.*

<sup>535</sup> *Id.* at 565 (citations omitted).

<sup>536</sup> *Id.* at 572.

<sup>537</sup> 548 U.S. 521 (2006).

<sup>538</sup> *Id.* at 525.

## 2. *Facts*

Inmate Ronald Banks, filed a section 1983 action against the Pennsylvania Department of Corrections.<sup>539</sup> He claimed that a prison policy of forbidding dangerous inmates all access to newspapers, magazines, and photographs bears no reasonable relation to any legitimate penological objective and violates the First Amendment.<sup>540</sup>

## 3. *Decision by Justice Breyer*<sup>541</sup>

Restrictive prison regulations are permissible if they were reasonably related to legitimate penological interests.<sup>542</sup> The prison established several reasons for the policy: to motivate better behavior with difficult prisoners, to minimize the amount of property inmates controlled in their cells, and to assure prison safety from fires.<sup>543</sup>

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<sup>539</sup> *Id.* at 527.

<sup>540</sup> *Id.*

<sup>541</sup> Joined by Chief Justice Roberts and Justices Kennedy and Souter. *Id.* at 524. Justices Thomas and Scalia concurred. *Id.* at 536 (Thomas, J., concurring).

<sup>542</sup> *Id.* at 528. Comedian Tim Allen discussed the dangerousness of prison behavior:

Prison is filled with guys in whom their lunatic is free. The lunatic is finally where he wants to be. He's in a place where lunacy works. The more of a lunatic you are, the better you get along with the other lunatics. Prison is a wonderful place for the lunatic to be since it's the lunatic in you that gets you there.

TIM ALLEN, *supra* note 158, at 71. On the other hand,

[n]o matter how drastically you deprive a prisoner of the benefits of society, abridge his civil and legal rights, unman and torture him, unless you take his life, you can't take away his time. Many inmates die violently in prisons, almost all suffer in ways beyond an outsider's comprehension, but life goes on and since it does, miracles occur. Bodies languish, spirits are broken, yet in some rare cases, the prison cell becomes the monk's cell, exile a spiritual retreat, isolation the blessed solitude necessary for self-examination, self-discipline.

JOHN EDGAR WIDEMAN, *BROTHERS AND KEEPERS* 35–36 (FirstVintage Books ed. 1995) (1984).

<sup>543</sup> The Court noted,

Turner v. Safley, 482 U.S. 78 (1987) and Overton v. Bazzetta, 539 U.S. 126 (2003), contain the basic substantive legal standards governing this case. This Court recognized in *Turner* that imprisonment does not

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#### 4. *Justice Stevens Dissenting*<sup>544</sup>

Even the worst prisoners “retain constitutional protections, . . . including their First Amendment rights.”<sup>545</sup> “What is perhaps most troubling about the prison regulation . . . is that the rule [resembles] state-sponsored mind control.”<sup>546</sup> “The State may not ‘invad[e] the sphere of intellect and spirit’” which is protected by the First Amendment.<sup>547</sup>

C. *Hamdan v. Rumsfeld*<sup>548</sup>—*Habeas: Due Process—Detainee at Guantanamo Bay, Cuba. “A Few Good Men.”*

##### 1. *Holding*

Nothing in the Authorization for Use of Military Force (AUMF)<sup>549</sup> or Detainee Treatment Act of 2005 (DTA)<sup>550</sup> expanded the President’s authority to establish independent military commissions.<sup>551</sup> The three year delay in charging the petitioner, Hamdan, with a crime illustrates that it was practicable to apply regular court-martial procedures.<sup>552</sup> Conspiracy offenses, due to their wide net, are unjustified crimes under the common law of war.<sup>553</sup> Detainees in conflict between signatory nations and nonsignatory nations are to be tried by a regularly constituted court, such

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automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment. But at the same time the Constitution permits greater restriction of such rights in a prison than it would allow elsewhere. As *Overton* pointed out, courts owe ‘substantial deference to the professional judgment of prison administrators.’ And *Turner* reconciled these principles by holding that restrictive prison regulations are permissible if they are ‘reasonably related’ to legitimate penological interests, and are not an ‘exaggerated response’ to such objectives.

*Banks*, 548 U.S. at 528 (citations omitted).

<sup>544</sup> Joined by Justice Ginsburg *Id.* at 542 (Stevens, J., dissenting).

<sup>545</sup> *Id.*

<sup>546</sup> *Id.* at 552.

<sup>547</sup> *Id.*

<sup>548</sup> 548 U.S. 557 (2006).

<sup>549</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>550</sup> Pub. L. No. 109-148, 119 Stat. 2680 (2005).

<sup>551</sup> *Hamdan*, 548 U.S. at 593–94.

<sup>552</sup> *Id.*

<sup>553</sup> *Id.* at 599–612.

as court-martial rather than a military commission.<sup>554</sup> The military commission convened to try Petitioner Hamdan violated both the Uniform Code of Military Justice (UCMJ) and the Geneva convention.<sup>555</sup>

## 2. *Facts*

Pursuant to Congress' Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," the United States Armed Forces invaded Afghanistan.<sup>556</sup> During the hostilities, militia forces captured petitioner Hamdan, a Yemeni national, and turned him over to the United States military, which transported him to prison in Guantanamo Bay, Cuba in June 2002.<sup>557</sup> Over a year later, the President deemed Hamdan eligible for trial by a military commission for

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<sup>554</sup> *Id.*

<sup>555</sup> *Id.* at 567.

<sup>556</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224–25 (2001). Pursuant to this resolution, the President of the United States, George W. Bush, issued a comprehensive military order intended to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (Nov. 16, 2001). Those subject to the November 13, 2001 Presidential Order included

any noncitizen for whom the President determine[d] that "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States. Any such individual "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death." The Order vested in the Secretary of Defense, Donald Rumsfeld, the power to appoint military commission to try individuals subject to the Order. The power was then delegated to John Altenberg, Jr., a retired Army major general . . . .

*Hamdan*, 548 U.S. at 568–69.

<sup>557</sup> *Hamdan*, 548 U.S. at 566. A military tribunal in July 2004 determined that Hamdan's continued detention at Guantanamo Bay was warranted because Hamdan was an "enemy combatant." *Id.* at 570. "An 'enemy combatant' is defined by the military order as 'an individual who was part of or supporting Taliban or al Qaeda forces, to associated forces that are engaged in hostilities against the United States or its coalition partners.'" *Id.* at 570 n.1 (citations omitted).

unspecified crimes.<sup>558</sup> After another year, in July 2004, Hamdan was charged with conspiracy to commit offenses triable by an independent military commission.<sup>559</sup>

In a habeas petition, Hamdan claimed that the independent military commission lacked authority to try him because “neither congressional Act nor the common law of war supports” a trial by a military commission for a conspiracy charge.<sup>560</sup> Additionally, Hamdan argued that the procedures

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<sup>558</sup> *Id.* at 569–70. On July 13, 2003, The President announced that Salim Hamdan and five other detainees at Guantanamo Bay were subject to his Order and thus triable by military commission. *Id.* at 569. In December 2003, military counsel was appointed to represent petitioner Hamdan. *Id.* In February 2004, petitioner Hamdan’s counsel filed motion requesting the charges and for speedy trial. *Id.* The legal advisor to the commission denied the attorney’s request and ruled that petitioner Hamdan was not entitled to any of the procedural safeguards established in the Uniform Code of Military Justice. *Id.* Finally, in July 2004, after Hamdan appealed to the federal district court, the Government charged Hamdan with a conspiracy offense. *Id.*

<sup>559</sup> *Id.* Only two paragraphs of a large document charged Petitioner Hamdan with conspiracy. *Id.* at 569–70. Paragraph 12 charged that “from on or about February 1996 to on or about November 24, 2001,” Hamdan “willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named member of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.” *Id.*

Paragraph 13 of the charges listed four “overt acts” that Hamdan was alleged to have committed sometime between 1996 and November 2001 in furtherance of the “enterprise and conspiracy”:

- (1) [Hamdan] acted as Osama bin Laden’s bodyguard and personal driver, believing all the while that bin Laden and his associates were involved in terrorists acts prior to and including the attacks on September 11, 2001; (2) [Hamdan] arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden’s bodyguards . . . ; (3) [Hamdan] drove or accompanied Osama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures, [during] which bin Laden encouraged attacks against Americans; and (4) [Hamdan] received weapons training at al Qaeda-sponsored camps.

*Id.* at 570.

<sup>560</sup> *Id.* at 567. At oral argument, counsel for Petitioner Salim Hamdan, Mr. Neal Katyal, explained the problem of charging conspiracy counts in the law of war:

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adopted to try him violated the basic tenets of military and international law, “including the principle that a defendant must be permitted to see and hear the evidence against him.”<sup>561</sup>

The federal district court granted habeas relief and stayed the commission’s proceedings, concluding that the President’s authority to establish military commissions extended only to “offenders or offenses triable by [such commission] under the law of war,” which includes the Third Geneva Convention.<sup>562</sup> The federal district court also held that Hamdan is entitled to that Convention’s full protections until he is adjudged not to be a prisoner of war.<sup>563</sup> The district court determined the military commission convened to try him was established in violation of both the Uniform Code of Military Justice and Article 3 of the Third Geneva Convention because the secret commission had the “power to

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Mr. Katyal: “*The only charge in this case is one of conspiracy. And conspiracy has been rejected as a violation of the laws of war for—in every tribunal to consider the issue since World War II. It has been rejected in Nuremberg, it’s been rejected in the Tokyo tribunals, it’s been rejected in the international tribunals for Rwanda and Yugoslavia, and, most importantly, it’s been rejected by the Congress of the United States, in 1997.*”

Transcript of Oral Argument at 14–15, *Hamdan*, 548 U.S. 557 (No. 05-184), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-184.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf).

Mr. Katyal: “*And here’s why. Because the stand alone offense of conspiracy is rejected by international law, because it’s too vague. And this Court has said that the test for a violation of the laws of war is when universal agreement and practice make it a violation. The world rejects conspiracy, because if it’s adopted it allows so many individuals to get swept up within its net.*”

*Id.* at 22.

Mr. Katyal: “*And so, for example, under the Government’s theory, a little old lady in Switzerland who donates money to al Qaeda, and that turns out to be a front for terrorists acts and so on, might be swept up within this broad definition of conspiracy. And that’s why international law has so rejected the concept of conspiracy.*”

*Id.*

<sup>561</sup> *Hamdan*, 548 U.S. at 567.

<sup>562</sup> *Id.* at 571.

<sup>563</sup> *Id.*

convict” Hamdan based on evidence Hamdan “would never see or hear.”<sup>564</sup> The D.C. Circuit Court of Appeals reversed.<sup>565</sup>

### 3. Justice Stevens for the Majority<sup>566</sup>

“[A]s a matter of comity, federal courts should normally abstain from intervening in pending court-martial proceedings against member of the Armed Forces.”<sup>567</sup> “[M]ilitary discipline and . . . the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts.”<sup>568</sup> “[F]ederal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created . . . the Court of Military Appeals . . . .”<sup>569</sup>

Hamdan, however, was never a member of the U.S. Armed Forces, so concerns about comity and military discipline were immaterial.<sup>570</sup> The Commission, which was convened to try Hamdan, was not part of the system of military courts, which, unlike the Commission, include an independent review panel.<sup>571</sup> In the instant situation, Hamdan had few due

<sup>564</sup> *Id.*

<sup>565</sup> *Id.*

<sup>566</sup> Justices Kennedy, Souter, Ginsburg, and Breyer joined in significant part. *Id.* at 566.

<sup>567</sup> *Id.* at 585.

<sup>568</sup> *Id.* at 586 (citing *Schlesinger v. Councilman*, 420 U.S. 738 (1974)). In *Councilman*, an army officer was referred to a court-martial on charges he violated the UCMJ by selling, transferring, and possessing marijuana. *Id.* at 739. The petitioner argued the charges were not “service connected;” the federal district court agreed and issued a permanent injunction. *Id.* at 739–40. The appeals court affirmed. *Id.* at 740. However, the Supreme Court reversed holding that the court-martial possessed sufficient subject-matter jurisdiction over the question: “Although the [federal] district court may have had subject matter jurisdiction, we think that the balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention, by injunction or otherwise, in pending court martial proceedings.” *Id.*

<sup>569</sup> *Hamdan*, 548 U.S. at 586 (citing *Councilman*, 420 U.S. at 758). The Court of Military Appeals consists of civilian judges who are completely “removed from all military influence or persuasion.” *Id.* (quoting *Councilman*, 420 U.S. at 758).

<sup>570</sup> *Id.* at 587. This factor makes *Hamdan* more similarly situated to *Ex parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, seven German saboteurs were in New York and Florida after arriving in the United States via submarine. *Id.* at 22. The President convened a military commission to try the captured saboteurs, who then filed habeas petitions in federal district court. *Id.* at 19. The Supreme Court affirmed the jurisdiction of the Military Commission. *Id.* at 48.

<sup>571</sup> *Hamdan*, 548 U.S. at 587.

process rights under a separately established Commission.<sup>572</sup> “Hamdan and the government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any [jurisdictional] basis . . . .”<sup>573</sup>

*a. The Common Law of War*

The common law governing military commissions developed from three general situations.<sup>574</sup> “First, they have substituted for civilian courts at times and in places where martial law has been declared.”<sup>575</sup> Second, “commissions have been established to try civilians ‘as part of a temporary military government over occupied enemy territory . . . where civilian government cannot and does not function.’”<sup>576</sup> The third type of commission was constituted as a fact-finding body to determine, typically on the battlefield, whether the defendant violated the law of war.<sup>577</sup>

The law of war assumes jurisdiction

[f]irst, . . . “only of offenses committed within the field of the command of the convening commander.” The “field of command” in these circumstances means the “theatre of war.” Second, the offense charged “must have been committed within the period of the war.” No jurisdiction exists to try offenses “committed either before or after the war.”<sup>578</sup>

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<sup>572</sup> *Id.*

<sup>573</sup> *Id.* at 589–90. The Court acknowledged that there were plenty of statutes and one case, *Quirin*, that granted the President the authority to establish military commissions in “circumstances where justified under the ‘Constitution and Laws,’ including the law of war.” *Id.* at 594–95. The Court’s difficulty in this case was determining whether Hamdan’s military commission was justified. *Id.* at 595. The Court then sought common law interpretation. *Id.* at 595–613.

<sup>574</sup> *Id.* at 595–96. The law of war was explained in *Quirin*, 317 U.S. at 28 (discussing that the law of war derives from “rules and precepts of the law of nations;” it is the body of international law governing armed conflict).

<sup>575</sup> *Hamdan*, 548 U.S. at 595.

<sup>576</sup> *Id.* at 596 (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946)).

<sup>577</sup> *Id.*

<sup>578</sup> *Id.* at 597. The Court quoted the classic treatise written by Colonel William Winthrop, who the Court called the “Blackstone of Military law.” *Id.*; see also *Reid v. Covert*, 354 U.S. 1, 19, n.38 (1957). The Court also cited *Reid*, where a civilian wife killed her husband, a sergeant in the Air Force, at an airbase in England. *Id.* at 3. The Court held that the military court was an improper forum for her trial in a time of peace. *Id.* at 5.

*b. The Conspiracy Charges*

The charge against Hamdan related to a suspected involvement with Osama bin Laden before September 11, 2001.<sup>579</sup> The crime of conspiracy has rarely been tried by any law of war military commission and does not appear in the Geneva Convention or the Hague Convention, which are the major treaties on the law of war.<sup>580</sup> Because the charge of conspiracy did not support the Commission’s jurisdiction, the Commission lacked authority to try Hamdan.<sup>581</sup>

Moreover, there was no “military necessity” for a Commission.<sup>582</sup> “Guantanamo Bay is . . . far removed from any hostilities.”<sup>583</sup> “Hamdan is charged not with an overt act for which he was caught redhanded in a theatre of war . . . but with an agreement . . . which long predated the attacks of September 11, 2001 . . . .”<sup>584</sup> This may well be a crime, but it was not an offense of the law of war.

*c. Procedural Protections*

“The accused . . . is entitled to a copy of the charges against him, both in English and his own language . . . , to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial.”<sup>585</sup> The President suspended due process safeguards with the Military Commissions, in contravention to the safeguards afforded in the Court of Military Justice and courts-martial.<sup>586</sup>

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<sup>579</sup> *Hamdan*, 548 U.S. at 598–99.

<sup>580</sup> *Id.* at 604–05.

<sup>581</sup> *Id.*

<sup>582</sup> *Id.* at 612 (“*Hamdan’s tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities.*”) (emphasis added).

<sup>583</sup> *Id.*

<sup>584</sup> *Id.*

<sup>585</sup> *Id.* at 613–14. Hamdan objected to the procedures outlined in this military commission. Chief among his objections were that he could be convicted on evidence that he neither saw nor heard, that evidence was not subject to the standard criminal or court-martial procedural rules, and that he will be excluded from his own trial. *Id.* at 616–17.

<sup>586</sup> *Id.* at 617 ([“T]he difference between military commissions and court-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial.”). The Court further stated that

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“The military commission [was] . . . a tribunal of necessity to be employed when courts-martial lacked jurisdiction either over the accused or the subject matter.”<sup>587</sup> While exigent circumstances may have lent commissions their legitimacy, this was no basis for abandoning accepted procedural criminal and military court safeguards by the President.<sup>588</sup>

The procedures also violated the Geneva Convention.<sup>589</sup> Common Article 2 of the Geneva Convention provides that the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.<sup>590</sup> Common Article 3, then, requires that Hamdan be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>591</sup> “[I]n undertaking to try Hamdan

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[n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. . . . [T]he only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial. . . . [For instance like] the right to be present.

*Id.* at 624–25.

<sup>587</sup> *Id.* at 624.

<sup>588</sup> *Id.*

<sup>589</sup> *Id.* at 625–35. The 1929 Geneva Convention was adopted by the 1949 Geneva Convention. *Id.* at 628–29.

<sup>590</sup> *Id.* at 630. The Court noted that Article 2 also requires that “High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory ‘Power,’ and must so abide vis-à-vis the nonsignatory if ‘the latter accepts and applies’ those terms.” *Id.*

The U.S. Government raised the issue that al Qaeda was not a signatory party to the Geneva Convention. *Id.* at 628–29. “Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a ‘High Contracting Party’—a signatory of the Conventions, the protections of those Conventions are not . . . applicable to Hamdan.” *Id.* at 629. In response, Hamdan argued that several provisions of the Geneva Convention requires compliance even between unsigned parties. For instance, “Article 5 of the Third Geneva Convention requires that if there is ‘any doubt’ whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a ‘competent tribunal.’” *Id.* at 629 n.61.

<sup>591</sup> *Id.* at 630.

and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”<sup>592</sup>

4. *Justice Breyer Concurring*<sup>593</sup>

“Congress has not issued the Executive a “blank check.”<sup>594</sup> However, “nothing prevents the President from returning to Congress to seek the authority he believes necessary.”<sup>595</sup> To require congressional authority, “strengthens the Nation’s ability to determine—through democratic means—how best to do so.”<sup>596</sup> “The Constitution places its faith in those democratic means.”<sup>597</sup>

5. *Justice Kennedy Concurring*<sup>598</sup>

Trials by military commission raises significant issues concerning separation of powers.<sup>599</sup> “[O]ffenses will be defined, prosecuted, and adjudicated by executive officials without independent review.”<sup>600</sup> The structure and composition of the military commission deviates from conventional court-martial standards for no evident practical reason.<sup>601</sup> When special military commissions have been convened they have typically followed the structure of courts-martial.<sup>602</sup> The commissions, embedded in secrecy, lack an acceptable independence from the Executive.<sup>603</sup> The government has made no demonstration of practical need for the special rules of a commission.<sup>604</sup>

<sup>592</sup> *Id.* at 635.

<sup>593</sup> Joined by Justices Kennedy, Souter, and Ginsburg. *Id.* at 636 (Breyer, J., concurring).

<sup>594</sup> *Id.* At oral argument, Mr. Neal Katyal, counsel for petitioner Hamdan, quoted Thomas Paine, who warned, “He who—that would make his own liberty secure must guard even his enemy from oppression, for if he violates that duty, he establishes a precedent that will reach unto himself.” Transcript of Oral Argument, *supra* note 560, at 83.

<sup>595</sup> *Hamdan*, 548 U.S. at 636.

<sup>596</sup> *Id.*

<sup>597</sup> *Id.*

<sup>598</sup> Joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 636 (Kennedy, J., concurring).

<sup>599</sup> *Id.* at 638.

<sup>600</sup> *Id.*

<sup>601</sup> *Id.* at 648–50.

<sup>602</sup> *Id.* at 644.

<sup>603</sup> *Id.* at 645.

<sup>604</sup> *Id.* at 653.

6. *Justice Scalia Dissenting*<sup>605</sup>

The federal courts, including the Supreme Court, have no jurisdiction to hear this case.<sup>606</sup> The recently enacted Detainee Treatment Act, on December 30, 2005, provides that no court, justice, or judge shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee.<sup>607</sup>

7. *Justice Thomas Dissenting*<sup>608</sup>

The Court must defer to the President's wartime exercise of his commander in chief authority.<sup>609</sup> Unlawful combatants, such as Hamdan, violated the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the killing and disabling of peaceable citizens or soldiers.<sup>610</sup>

8. *Justice Alito Dissenting*<sup>611</sup>

Common Article 3 is satisfied because the military commissions (1) qualify as practical military courts; (2) the commissions were established in accordance with proper domestic law; (3) and any procedural improprieties can be addressed on appeal.<sup>612</sup>

9. *Commentary*

Since the Court's decision in this case, Congress passed legislation in October 2006 erasing the rights of Guantanamo prisoners to go before a federal judge to challenge their basic detention, called the Military Commissions Act of 2006,<sup>613</sup> which deprived the federal courts of jurisdiction to consider their habeas claims.<sup>614</sup> The United States Court of

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<sup>605</sup> Joined by Justices Thomas and Alito. *Id.* at 655 (Scalia, J., dissenting).

<sup>606</sup> *Id.*

<sup>607</sup> *Id.* at 656. The majority easily side-steps this by saying this case and others were pending before December 30th. *Id.* at 572–84 (plurality opinion).

<sup>608</sup> Joined in part by Justices Scalia and Alito. *Id.* at 678 (Thomas, J., dissenting).

<sup>609</sup> *Id.*

<sup>610</sup> *Id.* at 693.

<sup>611</sup> Joined by Justices Scalia and Thomas. *Id.* at 725 (Alito, J., dissenting).

<sup>612</sup> *Id.* at 733.

<sup>613</sup> Pub. L. 109-366, 120 Stat. 2600 (2006).

<sup>614</sup> *Supreme Court Turns Down Detainees' Habeas Corpus Case*, N.Y. TIMES, Apr. 3, 2007, at A14: ("45 [detainees at Guantanamo] sought to challenge the constitutionality of a new law stripping federal judges of the authority to hear challenges to the open-ended  
(continued)

Appeals for the District of Columbia ruled in February 2007 that the writ of habeas corpus could not be invoked by the Guantanamo detainees.<sup>615</sup> In effect, the Pentagon could continue the ongoing rounds of special military trials for terrorism suspects arrested after the September 11, 2001 attacks; the very thing ruled unconstitutional in *Hamdan v. Rumsfeld*.

A group of Guantanamo detainees moved for a writ of certiorari to the United States Supreme Court, but on April 2, 2007, the Supreme Court refused to hear the appeals by the Guantanamo prisoners held for more than five years without formal charges, *Boumediene v. Bush* and *Al Odah v. United States*.<sup>616</sup> The detainees appealed, claiming that the Court of Appeals ruling conflicted with *Hamdan v. Rumsfeld*.<sup>617</sup>

Congress took Justice Breyer's concurring opinion in *Hamdan v. Rumsfeld* to heart, where Justice Breyer noted: "Nothing prevents the President from returning to Congress to seek the authority he believes necessary."<sup>618</sup> And so the President did; and Congress did; and the statute eliminating the federal courts from jurisdiction to consider habeas challenges was passed—again.<sup>619</sup>

However, on June 12, 2008, the Court held that Guantanamo prisoners could raise habeas claims in federal courts.<sup>620</sup> Justice Kennedy, writing for the majority, stated that the Detainee Treatment Act of 2005 "review procedures are an inadequate substitute for habeas corpus."<sup>621</sup> Further, the Court stated that detainees "need not exhaust the review procedures in the

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confinement of foreign citizens held at the American naval base in Cuba and designated as enemy combatants.").

<sup>615</sup> *Boumediene v. Bush*, 476 F.3d 981, 991–92 (D.C. Cir. 2007).

<sup>616</sup> 542 U.S. 466 (2004).

<sup>617</sup> Speculation suggested that Justice Kennedy holds the swing vote in an evenly divided Court. *Supreme Court Turns Down Detainees' Habeas Corpus Case*, *supra* note 614. The Court was left to decide whether the Detainee Treatment Act of 2005, Title X, 119 Stat. 2739, was a constitutionally adequate statutory substitute for the habeas corpus writ. *Boumediene*, 476 F.3d at 1005.

<sup>618</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

<sup>619</sup> Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600.

<sup>620</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

<sup>621</sup> *Id.* By doing so, the Court found only habeas provision of section 7 of the 2007 Military Commission Act unconstitutional. *Id.* "Accordingly, both the [Detainee Treatment Act] and the [combatant status review tribunals] process remain intact." *Id.*

Court of Appeals before proceeding with their habeas actions in the District Court.”<sup>622</sup>

## IX. DEATH PENALTY

During the 2004–2005 Term, in *Roper v. Simmons*,<sup>623</sup> the Court held that the Eighth Amendment forbids imposition of the death penalty on persons who were under the age of eighteen at the time they committed their crimes.<sup>624</sup> During the 2005–2006 Term the Court focused on a procedural case concerning lethal injection, *Hill v. McDonough*,<sup>625</sup> and the Court focused on the burden of proof when aggravating and mitigating circumstances are equal, in *Kansas v. Marsh, II*.<sup>626</sup>

### A. *Hill v. McDonough: Death Penalty, Through Lethal Injection, Challenged as Civil Rights Case Versus Habeas Petition.*

#### 1. *Holding*

A state death row claim that lethal injection would likely constitute cruel and unusual punishment, in violation of the Eighth Amendment, may proceed as a civil rights action under Section 1983,<sup>627</sup> rather than a habeas corpus petition, which would have barred petitioner’s claim.<sup>628</sup>

#### 2. *Facts*

Petitioner Clarence Hill challenged the constitutionality of the lethal injection procedure used in the state of Florida.<sup>629</sup> Florida used a “three-

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<sup>622</sup> *Id.* Yet, the Court stated that “[t]he Executive is entitled to a reasonable period of time to determine a detainee’s status before a court entertains that detainee’s habeas corpus petition.” *Id.* at 2276.

<sup>623</sup> 543 U.S. 551 (2005).

<sup>624</sup> *Id.* at 578.

<sup>625</sup> 547 U.S. 573 (2006).

<sup>626</sup> 548 U.S. 163 (2006).

<sup>627</sup> 42 U.S.C. § 1983 (2000).

<sup>628</sup> *Hill*, 547 U.S. at 576. Three prior cases presented similar issues: *Nelson v. Campbell*, 541 U.S. 637 (2004); *Heck v. Humphrey*, 512 U.S. 477 (1994); and *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

<sup>629</sup> *Hill*, 547 U.S. at 578–79. The Florida Supreme Court heard a similar argument in *Sims v. State*, 754 So. 2d 657 (Fla. 2000). In *Sims*, the inmate had acquired detailed information about the lethal injection procedure and the inmate contended that the three drug sequence of injections would cause great pain if the drugs were not administered properly. *Id.* at 667–68. The Florida Supreme Court rejected this argument as too speculative. *Id.* at 668.

drug sequence” procedure.<sup>630</sup> Petitioner claimed the procedure of injections would cause great pain.<sup>631</sup> “There was an ensuring risk, Hill alleged, that he could remain conscious and suffer severe pain as the pancuronium paralyzed his lungs and body and the potassium chloride caused muscle cramping and a fatal heart attack.”<sup>632</sup> Petitioner Hill filed the civil rights action three days before his scheduled execution because he was barred from filing his new claim as a successive habeas petition.<sup>633</sup>

The federal district court and the Eleventh Circuit Court of Appeals construed the civil rights appeal as a petition for a writ of habeas corpus and ordered the appeal dismissed for noncompliance with the requirements for a second and successive petition.<sup>634</sup> The question before the United States Supreme Court concerned whether petitioner’s claim must be brought by a habeas writ petition or whether the petition may proceed as a civil rights violation under Section 1983.<sup>635</sup>

### 3. *Justice Kennedy for a Unanimous Court*

“Federal law opens two main avenues to relief on complaints related to imprisonment:” a habeas petition or a civil rights complaint.<sup>636</sup> “Challenges to the lawfulness of confinement or to particulars affecting its duration are the province of the habeas corpus.”<sup>637</sup> “An inmate’s challenge to the circumstances of his confinement may be brought under [Section] 1983, pertaining to a civil rights violation.”<sup>638</sup>

Challenges to the procedure of the injection do not challenge the death penalty itself.<sup>639</sup> The petitioner challenged the protocol of a method which

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<sup>630</sup> *Hill*, 547 U.S. at 578.

<sup>631</sup> *Id.*

<sup>632</sup> *Id.*

<sup>633</sup> *Id.* at 577–78.

<sup>634</sup> *Id.* at 578.

<sup>635</sup> *Id.* at 576.

<sup>636</sup> *Id.* at 579.

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> In *Nelson v. Campbell*, 541 U.S. 637 (2004), an inmate also challenged a lethal injection procedure as a habeas action where the complainant had severely narrow peripheral veins, and Alabama planned to apply an invasive procedure on his arm or legs to enable the injection. *Id.* at 640–41. The inmate was not seeking to permanently enjoin the use of the death penalty and the inmate conceded the existence of an acceptable alternative procedure. *Id.* at 646–48.

allegedly caused “a foreseeable risk of gratuitous and unnecessary pain.”<sup>640</sup> The petitioner conceded that there were other methods of lethal injection the Department could choose that would be constitutional.<sup>641</sup> Under these circumstances, said Justice Kennedy, a civil rights injunctive claim may proceed because the claim does not seek to bar the execution itself, but the method of execution.<sup>642</sup>

To avoid endless civil rights actions that might contest a particular death penalty’s method, every civil rights petition must still meet rigorous requirements for a stay of execution, including a showing of a significant possibility of success on the merits.<sup>643</sup>

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<sup>640</sup> *Hill*, 547 U.S. at 580.

<sup>641</sup> *Id.* The resolution of this case follows the resolution in *Nelson v. Campbell*. See *supra* note 639 and accompanying text. At oral argument, Justice Breyer mentioned an article in the *Lancet* which introduced the opinion of doctors that a “significant number of executed people are conscious when they die, and that’s painful.” Transcript of Oral Argument at 28, *Hill*, 547 U.S. 573 (No. 05-8794), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-8794.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-8794.pdf). The article suggested that there were ways to avoid excessive pain by giving them more sodium pentothal. *Id.* at 28–29. But doctors, as a general matter of ethics, avoid involvement in death penalty executions.

<sup>642</sup> *Hill*, 547 U.S. at 580.

<sup>643</sup> *Id.* at 584. The Government claimed that similar civil rights actions challenging the manner of execution would be never ending, as inmates would seek to forestall execution. *Id.* at 581. The Government contended that an inmate must identify an acceptable alternative method of execution to show a legitimate claim. *Id.* at 582. At oral argument the government failed to explain the reason for this contention until Chief Justice Roberts summarized the government’s reasons:

The reason that the Petitioner has to come up with this—an alternative is that otherwise it’s plausible, at least, to suspect the reason he’s bringing the action is as a challenge to the execution itself. . . . [I]t has to be brought under habeas. If it’s just a challenge to the method, it can be brought under 1983. If he’s unwilling to say there is a valid method, then it starts to look like a challenge to the execution that has to be brought under habeas.

Transcript of Oral Argument, *supra* note 641, at 37–38. The Court was sensitive to the government’s claims, but was unwilling to impose a “heightened pleading requirement.” *Hill*, 547 U.S. at 582.

Alternatively, the State of Florida posited that challenges to procedures “implicating the direct administration of an execution must proceed as a habeas action.” *Id.* at 583. The Court rejected this argument because “[a]ny incidental delay caused by allowing [Petitioner] to file suit does not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action.” *Id.*

#### 4. Commentary

In *Baze v. Rees*,<sup>644</sup> the Supreme Court finally determined that lethal injection is constitutional. At issue was administration of the three drug protocol used in thirty states.<sup>645</sup> The Court held that the risk of pain resulting from improper administration of the drugs did not violate the Eighth Amendment.<sup>646</sup> It also held that the state's "failure to adopt petitioners' proposed alternatives [does not] demonstrate that the [state's] execution procedure is cruel and unusual."<sup>647</sup>

#### B. *Kansas v. Marsh, II*<sup>648</sup>—*Death Penalty: Aggravating and Mitigating Circumstances in Equipose; plus, Independent State Grounds.*

##### 1. Holding

A Kansas death penalty statute which established a presumption in favor of death by directing the jury to impose the death penalty when the aggravating and mitigating circumstances are equal, in "equipose," was constitutional.<sup>649</sup> Moreover, the state decision rested on insufficient state grounds because the state supreme court rested its decision on federal constitutional law.<sup>650</sup>

##### 2. Facts

Michael Lee Marsh broke into a lady's home and waited for her to return.<sup>651</sup> Once the lady returned home with her nineteen month old daughter, Defendant Marsh repeatedly shot the lady, stabbed her, and slashed her throat.<sup>652</sup> The home was set on fire with the toddler inside, and the toddler burned to death.<sup>653</sup>

The jury found three aggravating circumstances for the death of the toddler and the jury determined that those circumstances were not outweighed by any mitigating circumstances.<sup>654</sup> Marsh was sentenced to

<sup>644</sup> 128 S. Ct. 1520 (2008).

<sup>645</sup> *Id.* at 1527.

<sup>646</sup> *Id.* at 1534.

<sup>647</sup> *Id.*

<sup>648</sup> 548 U.S. 163 (2006).

<sup>649</sup> *Id.* at 173.

<sup>650</sup> *Id.* at 169.

<sup>651</sup> *Id.* at 166.

<sup>652</sup> *Id.*

<sup>653</sup> *Id.*

<sup>654</sup> *Id.*

death for the death of the toddler.<sup>655</sup> Marsh was also sentenced to life without parole for the death of the lady.<sup>656</sup>

On appeal, Marsh challenged the Kansas statute which read:

If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in [the Kansas statute] exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise the defendant shall be sentenced as provided by law.<sup>657</sup>

Marsh argued that the statute established an unconstitutional presumption in favor of death because it directed “imposition of the death penalty when the aggravating and mitigating circumstances are in equipoise.”<sup>658</sup> The Kansas Supreme Court agreed and concluded that the statute violated the Eighth and Fourteenth Amendments of the United States Constitution because “in the event of equipoise, i.e., the jury’s determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required.”<sup>659</sup>

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<sup>655</sup> *Id.*

<sup>656</sup> *Id.*

<sup>657</sup> *Id.*

<sup>658</sup> *Id.* at 166–67. In short, the instruction presented to the jury that if the jury found the aggravating and mitigating circumstances were equally balanced, the jury had to impose the death penalty. *Id.* at 167. At oral argument, the attorney for the State of Kansas reminded the Court that “mercy” was a properly submitted mitigating factor. Transcript of Oral Argument at 4, *Marsh, II*, 548 U.S. 163 (No. 04-1170), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-1170b.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1170b.pdf). And the trial court specifically instructed the jury that “mercy,” by itself, could be sufficient to warrant a life sentence, rather than death. *Id.*

<sup>659</sup> *Marsh, II*, 548 U.S. at 167. As clarified at oral argument, the issue was if the jury was ever really in equipoise. Transcript of Oral Argument, *supra* note 658, at 12–13. There was nothing in the facts of the case to indicate that the jury was actually in equipoise. *Id.*

### 3. *Justice Thomas for the Majority*<sup>660</sup>

As the issue pertains to jurisdiction, federal law authorizes the Supreme Court to review the final judgment of the highest court of a State when the validity of the state statute is decided on federal constitutional grounds.<sup>661</sup> The Kansas Supreme Court rested its decision on the Eighth and Fourteenth Amendments to the Constitution and on state decisions which relied on federal law.<sup>662</sup>

The defendant appropriately bore the burden of proffering mitigating circumstances, but the defendant did not bear the burden of demonstrating the mitigating circumstances outweigh aggravating circumstances.<sup>663</sup> The State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence.<sup>664</sup> The Kansas jury instructions informed the jury “that a determination that the evidence is in equipoise is a decision for—not a presumption in favor of—death.”<sup>665</sup>

### 4. *Justice Scalia Concurring*

As to the jurisdictional issue, when state courts “erroneously invalidate” state actions on state law grounds, it is generally none of the United States Supreme Court’s business.<sup>666</sup> But when state courts “erroneously invalidate” state actions because federal law and the United States Constitution requires it, review by the United States Supreme Court “is the only possible way to vindicate” a State Supreme Court decision.<sup>667</sup> “Turning a blind eye to federal constitutional error that benefits criminal defendants . . . would change the uniform ‘law of the land’ into a crazy quilt.”<sup>668</sup>

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<sup>660</sup> Joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito. *Marsh, II*, 548 U.S. at 165.

<sup>661</sup> *Id.* at 168.

<sup>662</sup> *Id.* at 169.

<sup>663</sup> *Id.* at 173.

<sup>664</sup> *Id.* Per Justice Thomas, *Walton v. Arizona*, 497 U.S. 639 (1990) principally resolved this case. In *Walton*, the Court held that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances. *Id.* at 650.

<sup>665</sup> *Marsh, II*, 548 U.S. at 179.

<sup>666</sup> *Id.* at 183–84 (Scalia, J., concurring).

<sup>667</sup> *Id.* at 184.

<sup>668</sup> *Id.* at 185.

### 5. *Justice Stevens Dissenting*

A similar issue was presented in *Walton v. Arizona*, where this Court upheld the legitimacy of the challenged statute.<sup>669</sup> However, Justice Stevens asserted that the *Walton* plurality did not confront “the problem of equipoise that [Justice Blackmun] believed Arizona law to present . . . .”<sup>670</sup> Further, he stated “it is fundamentally wrong for the presiding judge at the trial—who should personify the evenhanded administration of justice—to tell the jury . . . that doubt concerning the proper penalty,” where the scales are evenly balanced, “should be resolved in favor of death.”<sup>671</sup>

### 6. *Justice Souter Dissenting*<sup>672</sup>

The Constitution forbids a mandatory death penalty when aggravating and mitigating factors are of equal weight.<sup>673</sup> “The statute produces a death sentence exactly when a sentencing impasse,” a tie, demonstrates “that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal.”<sup>674</sup>

Because of the remarkable achievements demonstrated with DNA evidence and its impact on wrongful convictions, we are in a “period of new empirical argument about how death is different.”<sup>675</sup> “The cautionary lessons of recent experience” with wrongful convictions in states such as Illinois address the dangerous, tie-breaking potential of the Kansas statute.<sup>676</sup> “[T]he same risks of falsity that infect proof of guilt” raise similar questions about sentences, especially when the jury finds the evidence in equipoise.<sup>677</sup>

## CONCLUSION

On a practical level, the public wants a body of uncompromised, learned judges to rule and settle contentious litigation.<sup>678</sup> Judicial decisions

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<sup>669</sup> *Id.* at 199 (Stevens, J., dissenting).

<sup>670</sup> *Id.* at 200. Therefore, stare decisis would not bind the Court as the majority claimed.  
*Id.*

<sup>671</sup> *Id.* at 201.

<sup>672</sup> Joined by Justices Stevens, Ginsburg, and Breyer. *Id.* at 203 (Souter, J., dissenting).

<sup>673</sup> *Id.*

<sup>674</sup> *Id.* at 206–07.

<sup>675</sup> *Id.* at 208–10.

<sup>676</sup> *Id.*

<sup>677</sup> *Id.*

<sup>678</sup> The tally for the 2005–06 Term: Justice Scalia wrote five criminal opinions for the majority position: *Hudson v. Michigan* on the exclusionary rule; *United States v. Grubbs* on  
(continued)

must resolve ambiguities, guide future conduct, establish coherence, and acknowledge tradition. Moreover, judicial decisions must be flexible, cure inequities, reform injustices, and evolve with a tremendously advancing nation.

Judicial decisions of broad constitutional issues redefine our daily freedoms. From a person's control of his or her own body to desegregation in society to seat belt use, judicial decision-making concerns every facet of American existence. Judicial supremacy is a major political facet, hiding under the guise of "law." Judicial supremacy is not a bad thing,

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anticipatory warrants; *United States v. Gonzalez-Lopez* on counsel of choice; *Davis v. Washington* on admissibility of 911 statements. He affirmed three times and reversed two: *United States v. Gonzalez-Lopez* and *Hammon v. Indiana*, the companion case to *Davis v. Washington*.

Justice Souter wrote two criminal decisions for the majority: *Georgia v. Randolph* on co-tenant consent searches; *Clark v. Arizona* on the insanity standard of right and wrong. He affirmed once and reversed in *Georgia v. Randolph*. Justice Souter is perhaps the most active Justice during oral arguments in criminal cases. He frequently states his questions in articulate, even eloquent, doctrinal statements.

Chief Justice Roberts wrote two criminal decisions for the majority: *Brigham City v. Stuart* on warrantless entry when imminent injury; and *Sanchez-Llamas v. Oregon* and the companion case, *Bustillo v. Johnson* on treaty rights of foreign nationals. He affirmed all three cases.

Justice Thomas wrote three criminal decisions for the majority: *Samson v. California* on parolees; *Washington v. Ruceuenco*, concerning the harmless error standard with *Blakeley* claims; *Kansas v. Marsh, II* on aggravating and mitigating circumstances in equipoise. He affirmed them all.

Justice Alito wrote two criminal decisions for the majority: *Zedner v. United States* on statutory speedy trial statute; *Holmes v. South Carolina* on issues of third-party guilt. He reversed both convictions.

Justice Kennedy wrote three criminal decisions for the majority: *Rice v. Collins* on jury and habeas standards; *House v. Bell* on the habeas actual innocence standard; *Hill v. McDonough* on the death penalty and lethal injection. He affirmed one conviction and reversed two: *House v. Bell* and *Hill v. McDonough*.

Justice Stevens wrote two criminal decisions for the majority: *Dixon v. United States* on the duress defense and burden of proof; *Hamdan v. Rumsfeld* concerning Guantanamo Bay military commissions. He affirmed one and reversed in *Hamdan v. Rumsfeld*.

Justice Breyer wrote one criminal decision for the majority: *Beard v. Banks* on prison access to news. He affirmed.

Justice Ginsburg wrote one criminal decision: *Day v. McDonough* concerning the habeas petition timeliness issue. She affirmed.

All in all, there were 22 criminal decisions (including companion cases). 13 convictions were affirmed. 8 reversed. About a 1/3 reversal rate in criminal cases.

necessarily. But some might question the legitimacy of a process where nine unelected people decide cases based on personal political values. The entire nomination process for Supreme Court justices is a political ordeal. We can never eliminate the political impact of decision-making, but it is important to acknowledge that politics comes into play.<sup>679</sup> Nearly every judge will honestly state that his or her decision is based on an objective appraisal of the law, but in large measure, the judge's political views sets the tone for that appraisal.

Many judges decide cases based on a governing statute or precedent, contrary to the judges' individual feelings. On significant constitutional appeals, however, the personal political disposition will, in many cases, reflect the ultimate decision of the judge. No judge can completely sever his or her political views. Indeed, our political views make us as much a character as a soul, heart, and mind. But it's a myth to think that judicial decisions on significant constitutional questions are based purely on objective appraisals of the law. Judges necessarily impose the values of one social class, their own, upon the entire community, and they bind the law to traditional, elite values that will rarely evolve or correct injustices. The constitution is the supreme law of the American land; "the judiciary is the authoritative voice of the constitution; therefore, the judiciary is the authoritative source of supreme law."<sup>680</sup> Chief Justice Hughes made his celebrated remark that "[w]e are under a Constitution, but the Constitution is what the judges say it is."<sup>681</sup>

This ensemble of criminal cases provides a temperature reading of criminal tendencies and processes used to unravel guilt. Personal disasters are an eye shadow away. As if in a case loop, the stories within reflect a concise rhythm of tensions, family dysfunctions, sexual proclivities, and trial defenses. Troubles with a teenager and the unbridgeable chasm of values are reflected in *Brigham City, Utah v. Stuart*.<sup>682</sup> Many people on the fringes of life, or even normal people, suspect aliens are inhabiting

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<sup>679</sup> E.g., ROSEN, *supra* note 24, at 132–33 (discussing that Justice Hugo Black and Justice William O. Douglas were essentially realists who believed "that law was essentially politics").

<sup>680</sup> CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM 189 (2001); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>681</sup> LUC B. TREMBLAY, THE RULE OF LAW, JUSTICE, AND INTERPRETATION 20 (1997).

<sup>682</sup> See *supra* Part I.D.

human bodies, in which case see *Clark v. Arizona*.<sup>683</sup> Every self-respecting pornography advocate should have an anticipatory warrant shoved up their nose, à la *Grubbs v. United States*.<sup>684</sup> Marital conflict is a common theme resulting in domestic disputes and incriminating statements, as in *Georgia v. Randolph*, on consent searches, and *Davis v. Washington*, regarding 911 statements.<sup>685</sup>

While these cases may contort the common day occurrences, they present the social and political values of our times. The cases conjure disquieting suggestions of the abuses at Abu Ghraib and the indefinite confinement of prisoners at Guantanamo Bay. Innocent people, without due process rights, absorb the pain of the world in times of great calamity.

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<sup>683</sup> See *supra* Part VI.A.

<sup>684</sup> See *supra* Part I.B.

<sup>685</sup> See *supra* Parts I.C & V.A.

