Presented:
Conference on Criminal Appeals

May 11-13, 2005
Doubletree Hotel Austin
Austin, Texas

UNITED STATES SUPREME COURT UPDATE

Gary A. Udashen

Gary A. Udashen
Sorrels & Udashen
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100
214-468-8104 (fax)
www.sorrelsudashen.com
gau@sorrelsudashen.com

TABLE OF CONTENTS

SEARCH & SEIZURE

United States v. Banks, 540 U.S. 31, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003) 1-2

Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) 2

Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed. 1068 (2004) 2-3

United States v. Flores-Montano, 541 U.S. 149, 124 S.t. 1582, 158 L.Ed.2d 311 (2004) 4

Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) 4-5

Illinois v. Caballes, 125 S.Ct. 824, 160 L.Ed.2d 842 (2005) 5

Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004) 5-6

Devenpeck v. Alford, 125 S.Ct. 588, 160 L.Ed.2d 537 (2005) 6

Muehler v. Mena, 125 S.Ct. 1465 (2005) 6-7

STATEMENTS AND CONFESSIONS

Fellers v. United States, 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004) 7-8

Yarbrough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) 8-10

Hiibel v. Nevada, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004) 10-12

Missouri v. Seibert, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) 12-14

United States v. Patane, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004) 14-17

TRIAL - RIGHT TO COUNSEL

Iowa v. Tovar, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) 17-18

INEFFECTIVE ASSISTANCE OF COUNSEL

Florida v. Nixon, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) 18-19

CONFRONTATION

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 19-20

SUPPRESSION OF EXCULPATORY EVIDENCE

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) 20-24

DESTRUCTION OF EVIDENCE

Illinois v. Fisher, 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004) 25

JUDGMENT OF ACQUITTAL/DOUBLE JEOPARDY

Smith v. Massachussetts, 125 S.Ct. 1129 (2005) 25-26

SENTENCING

Blakely v. Washington, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) 26-27

United States v. Booker, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) 27-31

CAPITAL CASES

Tennard v. Dretke, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) 31-33

Smith v. Texas, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) 33

Roper v. Simmons, 125 S.Ct. 1183 (2005) 33-35

REVIEW GRANTED - AWAITING DECISION

Halbert v. Michigan, No. 03-10198 36

Mitchell v. Stumpf, No. 04-637 36

Johnson v. California, 04-6964 36-37

Rompilla v. Beard, 04-5462 37-38

Deck v. Missouri, 04-5293 38

SEARCH & SEIZURE

United States v. Banks, 540 U.S. 31, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003)

Issue: Knock and Announce Rule: When can officers break into a home to execute a search warrant.

Facts: Law enforcement officers went to Bank's apartment to execute a search warrant for cocaine. They called out "police" and knocked on the front door hard enough to be heard by officers at the backdoor, waited 15 to 20 seconds with no response, and then broke open the door. Banks was in the shower and did not hear the officers knock or call out their presence.

Ninth Circuit ordered evidence suppressed, finding no exigent circumstance, stating forced entry by destruction of property only permissible if there was explicit refusal of admittance or longer time lapse then present here.

Held: Justice Souter writing for unanimous court held.

1. The officers' 15-to-20-second wait before forcible entry satisfied the Fourth Amendment.

(a) The standards bearing on whether officers can legitimately enter after knocking are the same as those for requiring or dispensing with knock and announce altogether. The Court has fleshed out the notion of reasonable execution on a case-by-case basis, but has pointed out factual considerations of unusual, albeit not dispositive, significance. The obligation to knock and announce before entering gives way when officers have reasonable grounds to expect futility or to suspect that an exigency, such as evidence destruction, will arise instantly upon knocking. *Richards v. Wisconsin*, 520 U.S. 385, 394. Since most people keep their doors locked, a no-knock entry will normally do some damage, a fact too common to require a heightened justification when a reasonable suspicion of exigency already justices an unwarned entry. *United States v. Ramirez*, 523 U.S. 65, 70-71.

(b) This case turns on the exigency revealed by the circumstances known to the officers after they knocked and announced, which the Government contends was the risk of losing easily disposable evidence. After 15 to 20 seconds without a response, officers could fairly have suspected that Banks would flush away the cocaine if they remained reticent. Each of Banks' counterarguments - that he was in the shower and did not hear the officers, and that it might have taken him longer than 20 seconds to reach the door - rests on a mistake about the relevant inquiry. As to the first argument, the facts known to the police are what count in judging a reasonable waiting time, and there is no indication that they knew that Banks was in the shower and thus unaware of an impending search. As to the second, the crucial fact is not the time it would take Banks to reach the door but the time it would take him to destroy the cocaine. It is not unreasonable to think that someone could get in a position to destroy the drugs within 15 to 20 second. Once the exigency had matured, the officers were not bound to learn anything more or wait any longer before entering, even

though the entry entailed some harm to the building.

Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003).

Issue: Is finding cocaine in the back armrest of a car sufficient probable cause to arrest the front seat passenger for possession without any specific facts showing his knowledge of or dominion over the drugs?

Facts: An officer stopped a car for speeding, searched the car, seizing $763 from the glove compartment and cocaine from behind the back-seat armrest, and arrested the car's three occupants after they denied ownership of the drugs and money. Pringle, the front-seat passenger, was convicted of possession with intent to distribute cocaine and possession of cocaine. The State Court of Appeals reversed, holding that, absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, the mere finding of cocaine in the back armrest when Pringle was a front-seat passenger in a car being driven by its owner was insufficient to establish probable cause for an arrest for possession.

Held: Chief Justice Rhenquist, wrote for a unanimous court, reversed the Maryland court and found that because the officer had probable cause to arrest Pringle, the arrest did not contravene the Fourth and Fourteenth Amendments. Maryland law authorizes police officers to execute warrantless arrest where the officer has probable cause to believe that a felony has been committed or is being committed in the officer's presence. Upon recovering the suspected cocaine, the officer had probable cause to believe a felony had been committed, the question is whether he had probable cause to believe Pringle committed that crime. The "substance of all the definitions of probable cause is a reasonable ground for belief of guilt," *Brinegar v. United States*, 338 U.S. 160, 175, and that belief must be particularized with respect to the person to be searched or seized, *Ybarra v. Illinois*, 444 U.S. 85, 91. To determine whether an officer had probable cause to make an arrest, a court must examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause. *Ornelas v. United States*, 517 U.S. 690, 696. As it is an entirely reasonable inference from the facts here that any or all of the car's occupants had knowledge of, and exercised dominion and control over the cocaine, a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly. Pringle's attempt to characterize this as a guilt-by-association case is unavailing. *Ybarra v. Illinois*, *supra*, and *United States v. DiRe*, 332 U.S. 581, distinguished.

Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed. 1068 (2004)

Issue: Is a search warrant that fails to describe with particularity the place to be searched and items to be seized violative of the Fourth Amendment.

Facts: An ATF agent prepared and signed an application for a warrant to search respondents' Montana ranch, which stated that the search was for specified weapons, explosives, and records. The

application was supported by a detailed affidavit setting forth his basis for believing that such items were on the ranch and was accompanied by a warrant form that he completed. The Judge signed the warrant form even though it did not identify any of the items that petitioner intended to seize. The portion calling for a description of the "person or property" described respondents' house, not the alleged weapons; the warrant did not incorporate by reference the application's itemized list. Petitioner led federal and local law enforcement officers to the ranch the next day but found no illegal weapons or explosives. Petitioner left a copy of the warrant, but not the application, with respondents. Respondents sued petitioner and others under *Bivens* v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, and 42 U. S. C. §1983, claiming, a Fourth Amendment violation. The Ninth Circuit held that the warrant was invalid because it did not describe with particularity the place to be searched and the items to be seized. The court also concluded that *United States* v. *Leon,* 468 U. S. 897, precluded qualified immunity for petitioner because he was the leader of a search who did not read the warrant and satisfy himself that he understood its scope and limitations and that it was not obviously defective.

Held: Justice Stevens wrote opinion affirming Ninth Circuit, joined by Justices O'Connor, Souter, Ginsburg and Breyer; Chief Justice Rhenquist. Justices Kennedy, Scalia and Thomas dissented.

The court held that search was clearly "unreasonable" under the Fourth Amendment.

The warrant was plainly invalid. It did not meet the Fourth Amendment's unambiguous requirement that a warrant "particularly describ[e] ... the persons or things to be seized." The fact that the application adequately described those things does not save the warrant; Fourth Amendment interests are not necessarily vindicated when another document says something about the objects of the search, but that document's contents are neither known to the person whose home is being searched nor available for her inspection. The court stated that it is not necessary to decide whether the Amendment permits a warrant to cross-reference other documents, because such incorporation did not occur here.

Petitioner's argument that the search was nonetheless reasonable is rejected. Because the warrant did not describe the items *at all,* it was so obviously deficient that the search must be regarded as warrantless, and thus presumptively unreasonable. This presumptive rule applies to searches whose only defect is a lack of particularity in the warrant. Petitioner errs in arguing that such searches should be exempt from the presumption if they otherwise satisfy the particularity requirement's goals. Unless items in the affidavit are set forth in the warrant, there is no written assurance that the Magistrate actually found probable cause for a search as broad as the affiant requested. The restraint petitioner showed in conducting the instant search was imposed by the agent himself, not a judicial officer. Moreover, the particularity requirement's purpose is not limited to preventing general searches; it also assures the individual whose property is searched and seized of the executing officer's legal authority, his need to search, and the limits of his power to do so.

United States v. Flores-Montano, 541 U.S. 149, 124 S.t. 1582, 158 L.Ed.2d 311 (2004)

Issue: At an international border search, does the removal of a gas tank require reasonable suspicion under the Fourth Amendment?

Facts: At the international border in California, officials seized 37 kilograms of marijuana from respondent's gas tank by removing and disassembling the tank. The District Court granted a motion to suppress and the Ninth Circuit summarily affirmed.

Held: Chief Justice Rhenquist wrote for unanimous court with a concurring opinion by Justice Breyer.

The search did not require reasonable suspicion. The reasons that might support a suspicion requirement in the case of highly intrusive searches of persons simply do not carry over to vehicles. The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. *United States* v. *Ramsey,* 431 U. S. 606, 616. Congress has always granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. The privacy expectation is less at the border than it is in the interior, and the Court has long recognized that automobiles seeking entry into this country may be searched, see *Carroll* v. *United States,* 267 U. S. 132, 154. And while the Fourth Amendment "protects property as well as privacy," *Soldal* v. *Cook County,* 506 U. S. 56, 62, the interference with a motorist's possessory interest in his gas tank is justified by the Government's paramount interest in protecting the border. Thus, the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank.

Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004)

Facts The officer attempted to pull over Thornton but Thornton first parked and got out of his car. The officer then parked, approached Thornton and arrested him after finding drugs in his pocket. Incident to the arrest, the officer searched Thornton's car and found a handgun under the driver's seat. Petitioner was charged with federal drug and firearms violations. In denying his motion to suppress the firearm as the fruit of an unconstitutional search, the District Court found the automobile search valid under *New York* v. *Belton,* 453 U. S. 454, in which the Court held that, when a police officer makes a lawful custodial arrest of an automobile's occupant, the Fourth Amendment allows the officer to search the vehicle's passenger compartment as a contemporaneous incident of arrest. Thornton appealed, arguing that *Belton* was limited to situations where the officer initiated contact with an arrestee while he was still in the car. The Fourth Circuit affirmed.

Held: Chief Justice Rhenquist delivered opinion affirming the Fourth Circuit joined by Justices Kennedy, Thomas & Breyer and, in part, by Justice O'Connor. Justices Scalia and Ginsburg concurred. Justices Stevens and Souter dissented.

The Court held that *Belton* governs even when an officer does not make contact until the person arrested has left the vehicle. In *Belton,* the Court placed no reliance on the fact that the officer ordered the occupants out of the vehicle, or initiated contact with them while they remained within it. And here, there is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he was in the car. In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and evidence destruction as one who is inside. *Belton* allows police to search a car's passenger compartment incident to a lawful arrest of both "occupants" and "recent occupants." While an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car when the officer first initiated contact with him. Although not all contraband in the passenger compartment is likely to be accessible to a "recent occupant," the need for a clear rule, readily understood by police and not depending on differing estimates of what items were or were not within an arrestee's reach at any particular moment, justifies the sort of generalization which *Belton* enunciated.

Illinois v. Caballes, 125 S.Ct. 824, 160 L.Ed.2d 842 (2005)

Issue: Is a dog sniff a search governed by the Fourth Amendment?

Facts: A state trooper stopped Caballes for speeding and a second trooper drove to the scene with his narcotics-detection dog and walked the dog around Cabelles' car while the first trooper wrote respondent a warning ticket. When the dog alerted at the trunk, the officers searched the trunk and found marijuana. The court denied Caballes' motion to suppress the seized evidence, holding that the dog's alerting provided sufficient probable cause to conduct the search. The Illinois Supreme Court reversed, finding that because there were no specific and articulable facts to suggest drug activity, use of the dog unjustifiably enlarged a routine traffic stop into a drug investigation.

Held: Justice Stevens wrote opinion reversing, joined by Justices O'Connor, Kennedy, Scalia, Thomas and Breyer. Justices Souter and Ginsburg dissented. Chief Justice Rhenquist did not participate.

A dog sniff conducted during a lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004)

Issue: Legality of highway check points seeking information about recent fatal hit and run accident.

Facts: Police set up a highway check point to obtain information about a hit and run accident that occurred one week earlier at the same location and time of night. Officers stopped each vehicle for 10 to 15 seconds and asked if the occupants had seen anything happen there the previous weekend.

As Lidster approached, he drove erratically and the officers smelled alcohol on his breath. Officers administered field sobriety tests and arrested him for DWI. State appellate court found the check point invalid under *Indianapolis v. Edmund*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000).

Held: Justice Breyer wrote for court, reversing the Illinois court, joined by Chief Justice Rhenquist, and Justices O'Connor, Scalia, Kennedy and Thomas. Justice Stevens, Souter and Ginsburg concurred in part and dissented in part.

Court held that the check point was constitutional. *Edmund* was distinguished on the basis that Edmund forbids the police, under the Fourth Amendment, to make stops at a check point set up primarily for general crime control purposes. The check point in *Edmund* was to find evidence of drug crimes committed by the motorists themselves. The road block here was not to determine if persons stopped had committed a crime. In determining the reasonableness of the check point, the court looks to the gravity of the public concerns served by the seizure, the degree which the seizure advances the public interest, and the severity of the interference with individual liberty.

Devenpeck v. Alford, 125 S.Ct. 588, 160 L.Ed.2d 537 (2005).

Issue: Does the Fourth Amendment require that the offense establishing probable cause and justifying an arrest be closely related to and based on the same conduct as the offense the arresting officer identifies at the time of arrest?

Facts: Officers believed respondent was impersonating an officer and pulled over his vehicle. While questioning respondent, officer discovered that respondent was taping their conversation and arrested him for violation of the State's Privacy Act. Ninth Circuit found the arrest violative of Fourth Amendment based on fact that the offense of arrest was not closely related to the offense the officer stopped respondent for.

Held: Justice Scalia delivered opinion of unanimous court reversing the Ninth Circuit.

Court held that a warrantless arrest is reasonable under the Fourth Amendment if given the facts known to the officer, there is probable cause to believe a crime has been and is being committed. The additional requirement - that the offense establishing probable cause must be closely related to and based on the same conduct as the offense the arresting officer identifies at the time of arrest - is inconsistent with the court's precedent that holds that an arresting officer's state of mind is irrelevant to the probable cause determination. *See*, *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

Muehler v. Mena, 125 S.Ct. 1465 (2005).

Issue: Authority of officers to detain occupant of premises during search pursuant to search warrant. Can an officer question a person about her immigration status without independent reasonable suspicion?

Facts: Mena and others were detained in handcuffs during a search of premises they occupied. The search was for deadly weapons and evidence of gang membership. Ninth Circuit held that the use of handcuffs to detain Mena during the search violated the Fourth Amendment and the officers questioning of Mena about her immigration status during the detention constituted an independent Fourth Amendment violation.

Held: Chief Justice Rhenquist wrote for court reversing the Ninth Circuit on both questions, joined by Justices O'Connor, Scalia, Kennedy and Thomas. Justices Kennedy filed concurring opinion. Justice Stevens, Souter, Ginsburg and Breyer concurred.

The court held that police officers have a categorical authority to detain persons incident to a search and it does not depend on the quantum of proof justifying detention or the extent of intrusion to be imposed by the seizure. This categorical authorization to detain incident to execution of a search warrant includes the authority to use reasonable force to effect the detention. Police need no independent reasonable suspicion to question occupant who was detained during the search concerning her immigration status if the questioning did not prolong the detention. Mere police questioning does not constitute a seizure. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

STATEMENTS AND CONFESSIONS

Fellers v. United States, 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004).

Issue: Admissibility of statements made by an accused after indictment in the absence of counsel or a waiver of counsel, even when the statements are voluntary.

Facts: Police officers went to Feller's home and told him that they had come to discuss his involvement in drug distribution. They had a federal warrant for his arrest and told him that a grand jury had indicted him for conspiracy to distribute methamphetamine. During the course of a brief discussion, Fellers made several inculpatory statements. Once at the county jail, Fellers was advised of his rights under *Miranda* v. *Arizona,* 384 U. S. 436, and *Patterson* v. *Illinois,* 487 U. S. 285, signed a waiver of those rights, and reiterated his earlier statements. A Magistrate Judge recommended that the home statements be suppressed because the officers had not informed Fellers of his *Miranda* rights, and that portions of his jailhouse statements be suppressed as fruits of the prior failure to provide *Miranda* warnings. The District Court suppressed the unwarned home statements but admitted the jailhouse statements pursuant to *Oregon* v. *Elstad,* 470 U. S. 298, concluding that Fellers had knowingly and voluntarily waived his *Miranda* rights before making the statements. The Eighth Circuit affirmed the conviction.

Held: Justice O'Connor delivered opinion for unanimous court.

The court held that the Eighth Circuit erred in holding that the absence of an "interrogation" foreclosed petitioner's claim that his jailhouse statements should have been suppressed as fruits of

the statements taken from him at his home.

(a) An accused is denied the protections of the Sixth Amendment "when there [is] used against him at his trial ... his own incriminating words, which federal agents ... deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah* v. *United States,* 377 U. S. 201, 206. This Court has consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases, see, *e.g., United States* v. *Henry,* 447 U. S. 264, and has expressly distinguished it from the Fifth Amendment custodial-interrogation standard, see, *e.g., Michigan* v. *Jackson,* 475 U. S. 625. There is no question here that the officers "deliberately elicited" information from petitioner at his home. Because their discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of his Sixth Amendment rights, the officers' actions violated the Sixth Amendment standards established in *Massiah*, *supra*, and its progeny.

(b) Because of its erroneous determination that petitioner was not questioned in violation of Sixth Amendment standards, the Eighth Circuit improperly conducted its "fruits" analysis under the Fifth Amendment. In applying *Elstad, supra,* to hold that the admissibility of the jailhouse statements turned solely on whether they were knowing and voluntary, the court did not reach the question whether the Sixth Amendment requires suppression of those statements on the ground that they were the fruits of previous questioning that violated the Sixth Amendment deliberate-elicitation standard. As this Court has not had occasion to decide whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards, the case is remanded to the Eighth Circuit to address this issue in the first instance.

Yarbrough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

Issue: Was a juvenile in custody when he confessed to an offense even though he was allowed to leave with his parents afterwards?

Facts: Alvarado was involved in the theft of a truck, leading to the death of the truck's owner. Alvarado was called in for an interview with Los Angeles police. Alvarado was 17 years old at the time, and his parents brought him to the station and waited in the lobby during the interview. Alvarado was kept in a small room where only the two of them were present. The interview lasted about two hours, and Alvarado was not given a warning under *Miranda* v. *Arizona*, 334 U. S. 436. Although he at first denied being present at the shooting, Alvarado slowly began to change his story, finally admitting that he had helped try to steal the victim's truck and to hide the gun after the murder. When the interview was over, Alvarado was returned to his parents, who drove him home. Trial court denied his motion to suppress his interview statements on *Miranda* grounds. The state appellate court ruled that a *Miranda* warning was not required because Alvarado had not been in custody during the interview under the test articulated in *Thompson* v. *Keohane,* 516 U. S. 99, 112, which requires a court to consider the circumstances surrounding the interrogation and then determine whether a reasonable person would have felt at liberty to leave. The Federal District Court

agreed with the state court on habeas review, but the Ninth Circuit reversed, holding that the state court erred in failing to account for Alvarado's youth and inexperience when evaluating whether a reasonable person in his position would have felt free to leave the interview. Noting that the Supreme Court has considered a suspect's juvenile status in other criminal law contexts, see, *e.g., Haley* v. *Ohio,* 332 U. S. 596, 599, the Ninth Circuit held that the state court's error warranted habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) because it "resulted in a decision that ... involved an unreasonable application of ... clearly established Federal law, as determined by [this] Court," 28 U. S. C. §2254(d)(1).

Held: Justice Kennedy wrote opinion reversing the Ninth Circuit, joined by Chief Justice Rhenquist, Justices O'Connor, Scalia and Thomas. Justices Breyer, Stevens, Souter, and Ginsburg dissented.

The Supreme Court held the state court considered the proper factors and reached a reasonable conclusion that Alvarado was not in custody for *Miranda* purposes during his police interview.

Miranda custody test is an objective test. Two discrete inquiries are essential: (1) the circumstances surrounding the interrogation, and (2) given those circumstances, whether a reasonable person would have felt free to terminate the interrogation and leave. "Once the ... players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Thompson,* 516 U. S., at 112. Pp. 7-9.

The state-court adjudication did not involve an unreasonable application of clearly established law when it concluded that Alvarado was not in custody. The meaning of "unreasonable" can depend in part on the specificity of the relevant legal rule. If a rule is specific, the range of reasonable judgment may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over time. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations. Cf. *Wright* v. *West,* 505 U. S. 277, 308-309. Fair-minded jurists could disagree over whether Alvarado was in custody. The custody test is general, and the state court's application of this Court's law fits within the matrix of the Court's prior decisions. Certain facts weigh against a finding that Alvarado was in custody. The police did not transport him to the station or require him to appear at a particular time, cf. *Oregon* v. *Mathiason,*429 U. S. 492, 495; they did not threaten him or suggest he would be placed under arrest, *ibid.;* his parents remained in the lobby during the interview, suggesting that the interview would be brief, see *Berkemer* v. *McCarty*, 468 U. S. 420, 441-442; the officer appealed to Alvarado's interest in telling the truth and being helpful to a police officer, cf. Mathiason, 429 U. S., at 495; Comstock twice asked Alvarado if he wanted to take a break; and, at the end of the interview, Alvarado went home, *ibid*. Other facts point in the opposite direction. Comstock interviewed Alvarado at the police station; the interview lasted 4 times longer than the 30-minute interview in *Mathiason;* Comstock did not tell Alvarado that he was free to leave; he was brought to the station by his legal guardians rather than arriving on his own accord; and his parents allegedly asked to be present at the interview but were rebuffed. Given these differing indications, the state court's application of this Court's custody standard was reasonable. Indeed, a number of the facts

echo those in *Mathiason,* a *per curiam* summary reversal in which we found it clear that the suspect was not in custody.

The state court's failure to consider Alvarado's age and inexperience does not provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law. The Court's opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration. The only indications in those opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors. See, *e.g., Berkemer, supra*, at 442, n. 35, 430-432. It was therefore improper for the Court of Appeals to grant relief on the basis of the state court's failure to consider them. There is an important conceptual difference between the *Miranda* test and the line of cases from other contexts considering age and experience. The *Miranda* custody inquiry is an objective test, see *Thompson, supra*, at 112, that furthers "the clarity of [Miranda's] rule," Berkemer, 468 U. S., at 430, ensuring that the police need not "gues[s] as to [the circumstances] at issue before deciding how they may interrogate the suspect," *id*., at 431. This objective inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect, where the Court does consider a suspect's age and experience. In concluding that such factors should also apply to the *Miranda* custody inquiry, the Ninth Circuit ignored the argument that that inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics--including his age--could be viewed as creating a subjective inquiry, cf. *Mathiason, supra*, at 495-496. Reliance on Alvarado's prior history with law enforcement was improper not only under §2254(d)(1)'s deferential standard, but also as a *de novo* matter. In most cases, the police will not know a suspect's interrogation history. See *Berkemer, supra*, at 430-431. Even if they do, the relationship between a suspect's experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative. Officers should not be asked to consider these contingent psychological factors when deciding when suspects should be advised of *Miranda* rights. See *Berkemer, supra,* at 431-432.

Hiibel v. Nevada, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004)

Issue: Is state statute requiring a person to identify himself to a police officer when detained under suspicious circumstances violative of Fourth or Fifth Amendment rights?

Facts: Hiibel was arrested and convicted in a Nevada court for refusing to identify himself to a police officer. Nevada's "stop and identify" statute requires a person detained by an officer under suspicious circumstances to identify himself. The Nevada Supreme Court affirmed.

Held: Justice Kennedy wrote for court affirming the conviction, joined Chief Justice Rhenquist, Justices O'Connor, Scalia and Thomas. Justices Stevens, Souter, Ginsberg and Breyer dissented.

The court held the conviction does not violate the Fourth Amendment or the Fifth Amendment's prohibition on self-incrimination.

The court distinguished cases on similar issues. In *Papachristou* v. *Jacksonville,* 405 U. S. 156, 167-

171, the Court invalidated a traditional vagrancy law for vagueness because of its broad scope and imprecise terms. In *Brown* v. *Texas,* 443 U. S. 47, 52, the court invalidated a conviction for violating a Texas stop and identify statute on Fourth Amendment grounds, and in *Kolender* v. *Lawson,* 461 U. S. 352, the court invalidated on vagueness grounds California's modified stop and identify statute that required a suspect to give an officer "credible and reliable " identification when asked to identify himself, *id.,* at 360. The court found this case to be distinguishable. Here, the initial stop was based on reasonable suspicion, satisfying the Fourth Amendment requirements noted in *Brown*. Further, Hiibel did not allege that the Nevada statute is unconstitutionally vague, as in *Kolender*. This statute is narrower and more precise. In contrast to the "credible and reliable" identification requirement in *Kolender,* the Nevada Supreme Court has interpreted the instant statute to require only that a suspect disclose his name. It apparently does not require him to produce a driver's license or any other document. If he chooses either to state his name or communicate it to the officer by other means, the statute is satisfied and no violation occurs.

The court held that the officer's conduct did not violate Hiibel's Fourth Amendment rights. Ordinarily, an investigating officer is free to ask a person for identification without implicating the Amendment. *INS* v. *Delgado,* 466 U. S. 210, 216. Beginning with *Terry* v. *Ohio,* 392 U. S. 1, the Court has recognized that an officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. Although it is well established that an officer may ask a suspect to identify himself during a *Terry* stop, see, *e.g., United States* v. *Hensley,* 469 U. S. 221, 229, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer, see *Brown, supra*, at 53, n. 3. The Court stated it is now of the view that *Terry* principles permit a State to require a suspect to disclose his name in the course of a *Terry* stop. *Terry, supra,* at 34. The Nevada statute is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures because it properly balances the intrusion on the individual's interests against the promotion of legitimate government interests. See *Delaware* v. *Prouse,* 440 U. S. 648, 654. An identity request has an immediate relation to the *Terry* stop's purpose, rationale, and practical demands, and the threat of criminal sanction helps ensure that the request does not become a legal nullity. On the other hand, the statute does not alter the nature of the stop itself, changing neither its duration nor its location. Hiibel argues unpersuasively that the statute circumvents the probable-cause requirement by allowing an officer to arrest a person for being suspicious, thereby creating an impermissible risk of arbitrary police conduct. These familiar concerns underlay *Kolender, Brown*, and *Papachristou.* They are met by the requirement that a *Terry* stop be justified at its inception and be "reasonably related in scope to the circumstances which justified" the initial stop. *Terry*, 392 U. S., at 20. Under those principles, an officer may not arrest a suspect for failure to identify himself if the identification request is not reasonably related to the circumstances justifying the stop. Cf. *Hayes* v. *Florida,* 470 U. S. 811, 817. The request in this case was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. The stop, the request, and the State's requirement of a response did not contravene the Fourth Amendment. Pp. 6-10.

The court also rejected Hiibel's contention that his conviction violates the Fifth Amendment's prohibition on self-incrimination because disclosure of his name and identity presented no reasonable

danger of incrimination. The Fifth Amendment prohibits only compelled testimony that is incriminating, see *Brown* v. *Walker,* 161 U. S. 591, 598, and protects only against disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used, *Kastigar* v. *United States,* 406 U. S. 441, 445. Hiibel's refusal to disclose was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it would furnish evidence needed to prosecute him. *Hoffman* v. *United States,* 341 U. S. 479, 486. It appears he refused to identify himself only because he thought his name was none of the officer's business. While the Court recognizes his strong belief that he should not have to disclose his identity, the Fifth Amendment does not override the Nevada Legislature's judgment to the contrary absent a reasonable belief that the disclosure would tend to incriminate him. Answering a request to disclose a name is likely to be so insignificant as to be incriminating only in unusual circumstances. See, *e.g., Baltimore City Dept. of Social Servs.* v. *Bouknight,* 493 U. S. 549, 555. If a case arises where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense, the court can then consider whether the Fifth Amendment privilege applies, whether it has been violated, and what remedy must follow. Those questions need not be resolved here.

Missouri v. Seibert, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

Issue: Is a confession obtained following *Miranda* warnings rendered inadmissible based on a deliberate obtaining of a confession without *Miranda* warnings prior to giving the warnings and obtaining the same confession a second time?

Facts: Seibert faced murder charges concerning the death of her son. The police arrested Seibert, but did not read her her rights under *Miranda* v. *Arizona,* 384 U. S. 436. At the police station, the officer questioned her for 30 to 40 minutes, obtaining a confession. He then gave her a 20-minute break, returned to give her *Miranda* warnings, and obtained a signed waiver. He resumed questioning, confronting Seibert with her prewarning statements and getting her to repeat the information. Seibert moved to suppress both her prewarning and postwarning statements. The officer testified that he made a conscious decision to withhold *Miranda* warnings, question first, then give the warnings, and then repeat the question until he got the answer previously given. The District Court suppressed the prewarning statement but admitted the postwarning one, and Seibert was convicted of second-degree murder. The Missouri Court of Appeals affirmed, finding the case indistinguishable from *Oregon* v. *Elstad,* 470 U. S. 298, in which this Court held that a suspect's unwarned inculpatory statement made during a brief exchange at his house did not make a later, fully warned inculpatory statement inadmissible. In reversing, the State Supreme Court held that, because the interrogation was nearly continuous, the second statement, which was clearly the product of the invalid first statement, should be suppressed; and distinguished *Elstad* on the ground that the warnings had not intentionally been withheld there.

Held: Justice Souter wrote the plurality opinion affirming the State Supreme Court's decision that all of the statements should be suppressed. This opinion was joined by Justices Stevens, Ginsburg

and Breyer. Justice Kennedy concurred and Chief Justice Rhenquist, Justices O'Connor, Scalia and Thomas dissented.

This opinion concluded that, because the midstream recitation of warnings after interrogation and unwarned confession in this case could not comply with *Miranda*'s constitutional warning requirement, Seibert's postwarning statements are inadmissible.

The court held that failure to give *Miranda* warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver generally produces a virtual ticket of admissibility, with most litigation over voluntariness ending with valid waiver finding. This common consequence would not be at all common unless *Miranda* warnings were customarily given under circumstances that reasonably suggest a real choice between talking and not talking.

When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and the question-first strategy. *Miranda* addressed "interrogation practices ... likely ... to disable [an individual] from making a free and rational choice" about speaking, 384 U. S., at 464-465, and held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees, *id.,* at 467. Question-first's object, however, is to render *Miranda* warnings ineffective by waiting to give them until after the suspect has already confessed. The threshold question in this situation is whether it would be reasonable to find that the warnings could function "effectively" as *Miranda* requires. Justice Souter held that by any objective measure, it is likely that warnings withheld until after interrogation and confession will be ineffective in preparing a suspect for successive interrogation, close in time and similar in content. The manifest purpose of question-first is to get a confession the suspect would not make if he understood his rights at the outset. When the warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran* v. *Burbine,* 475 U. S. 412, 424. And it would be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Justice Souter wrote that *Elstad* does not authorize admission of a confession repeated under the question-first strategy. The contrast between *Elstad* and this case reveals relevant facts bearing on whether midstream *Miranda* warnings could be effective to accomplish their object: the completeness and detail of the questions and answers to the first round of questioning, the two statements' overlapping content, the timing and setting of the first and second rounds, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad,* the station house questioning could sensibly be seen as a distinct experience from a short conversation at home, and thus the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission. Here, however, the unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. The warned phase proceeded after only a 15-to-20

minute pause, in the same place and with the same officer, who did not advise Seibert that her prior statement could not be used against her. These circumstances challenge the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes could not have understood them to convey a message that she retained a choice about continuing to talk.

Justice Kennedy argued that when a two-step interrogation technique is used, postwarning statements related to prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Not every violation of *Miranda* v. *Arizona,* 384 U. S. 436, requires suppression of the evidence obtained. Admission may be proper when it would further important objectives without compromising *Miranda*'s central concerns. See, *e.g., Harris* v. *New York,* 401 U. S. 222. *Oregon* v. *Elstad,* 470 U. S. 298, reflects a balanced and pragmatic approach to enforcing the *Miranda* warning. An officer may not realize that a suspect is in custody and warnings are required, and may not plan to question the suspect or may be waiting for a more appropriate time. Suppressing postwarning statements under such circumstances would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence." *Elstad, supra,* at 308. In contrast, the technique used in this case distorts *Miranda*'s meaning and furthers no legitimate countervailing interest. The warning was withheld to obscure both the practical and legal significance of the admonition when finally given. That the interrogating officer relied on respondent's prewarning statement to obtain the postwarning one used at trial shows the temptations for abuse inherent in the two-step technique. Reference to the prewarning statement was an implicit, and false, suggestion that the mere repetition of the earlier statement was not independently incriminating. The *Miranda* rule would be frustrated were the police permitted to undermine its meaning and effect. However, the plurality's test--that whenever a two-stage interview occurs, the postwarning statement's admissibility depends on whether the midstream warnings could have been effective enough to accomplish their object given the case's specific facts--cuts too broadly. The admissibility of postwarning statements should continue to be governed by *Elstad*'s principles unless the deliberate two-step strategy is employed. Then, the postwarning statements must be excluded unless curative measures are taken before they were made. Such measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and waiver. For example, a substantial break in time and circumstances between the prewarning statement and the warning may suffice in most instances, as may an additional warning explaining the likely inadmissibility of the prewarning statement. Because no curative steps were taken in this case, the postwarning statements are inadmissible and the conviction cannot stand.

United States v. Patane, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004).

Issue: Does the failure to give a suspect *Miranda* warnings require suppression of the physical fruits of the suspects' unwarned but voluntary statements.

Facts: After Officer Fox began to investigate respondent's apparent violation of a temporary restraining order, a federal agent told Fox's colleague, Detective Benner, that respondent, a convicted felon, illegally possessed a pistol. Officer Fox and Detective Benner proceeded to respondent's home,

where Fox arrested him for violating the restraining order. Benner attempted to advise respondent of his rights under *Miranda* v. *Arizona,* 384 U. S. 436, but respondent interrupted, asserting that he knew his rights. Benner then asked about the pistol and retrieved and seized it. Respondent was indicted for possession of a firearm by a convicted felon, 18 U. S. C. §922(g)(1). The District Court granted his motion to suppress the pistol, reasoning that the officers lacked probable cause to arrest him, and declining to rule on his alternative argument that the gun should be suppressed as the fruit of an unwarned statement. The Tenth Circuit reversed the probable-cause ruling, but affirmed the suppression order on respondent's alternative theory. Rejecting the Government's argument that *Oregon* v. *Elstad,* 470 U. S. 298, and *Michigan* v. *Tucker,* 417 U. S. 433, foreclosed application of the fruit of the poisonous tree doctrine of *Wong Sun* v. *United States,* 371 U. S. 471, 488, to the present context, the appeals court reasoned that *Oregon* and *Tucker*, which were based on the view that *Miranda* announced a prophylactic rule, were incompatible with *Dickerson* v. *United States,* 530 U. S. 428, 444, in which this Court held that *Miranda* announced a constitutional rule. The appeals court thus equated *Dickerson*'s ruling with the proposition that a failure to warn pursuant to *Miranda* is itself a violation of the suspect's Fifth Amendment rights.

Held: Justice Thomas, joined by Chief Justice Rhenquist and Justice Scalia, reversed the appeals court and upheld the seizure of the pistol. Justices Kennedy and O'Connor concurred. Justices Souter, Stevens, Ginsburg and Breyer dissented.

Justice Thomas concluded that a failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements.

The *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause, U. S Const., Amdt. 5. That Clause's core protection is a prohibition on compelling a criminal defendant to testify against himself at trial. See, *e.g., Chavez* v. *Martinez,* 538 U. S. 760, 764-768. It cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements. See, *e.g., United States* v. Hubbell, 530 U. S. 27, 34. The Court has recognized and applied several prophylactic rules designed to protect the core privilege against self-incrimination. For example, the *Miranda* rule creates a presumption of coercion in custodial interrogations, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief. *E.g.,* 384 U. S., at 467. But because such prophylactic rules necessarily sweep beyond the Self-Incrimination Clause's actual protections, see, *e.g., Withrow* v. *Williams,* 507 U. S. 680, 690-691, any further extension of one of them must be justified by its necessity for the protection of the actual right against compelled self-incrimination, *e.g., Chavez, supra,* at 778. Thus, uncompelled statements taken without *Miranda* warnings can be used to impeach a defendant's testimony at trial, see *Elstad*, *supra*, at 307-308, though the fruits of actually compelled testimony cannot, see *New Jersey* v. *Portash,* 440 U. S. 450, 458-459. A blanket rule requiring suppression of statements noncompliant with the *Miranda* rule could not be justified by reference to the "Fifth Amendment goal of assuring trustworthy evidence" or by any deterrence rationale, *e.g., Elstad*, 470 U. S., at 308, and would therefore fail the Court's requirement that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it. Furthermore, the Clause contains its own exclusionary rule that automatically protects those subjected to coercive police interrogations

from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial. *E.g., id.,* at 307-308. This explicit textual protection supports a strong presumption against expanding the *Miranda* rule any further. Cf. *Graham* v. *Connor,* 490 U. S. 386. Finally, nothing in *Dickerson* calls into question the Court's continued insistence on its close-fit requirement.

That a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule was evident in many of the Court's pre-*Dickerson* cases, see, *e.g., Elstad*, *supra*, at 308, and the Court has adhered to that view since *Dickerson,* see *Chavez, supra, at* 772-773. This follows from the nature of the "fundamental *trial* right" protected by the Self-Incrimination Clause, *e.g., Withrow, supra*, at 691, which the *Miranda* rule, in turn, protects. Thus, the police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide full *Miranda* warnings. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence. And, at that point, the exclusion of such statements is a complete and sufficient remedy for any perceived *Miranda* violation. *Chavez, supra*, at 790. Unlike actual violations of the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter and therefore no reason to apply *Wong Sun*'s "fruit of the poisonous tree" doctrine. It is not for this Court to impose its preferred police practices on either federal or state officials.

The Tenth Circuit erred in ruling that the taking of unwarned statements violates a suspect's constitutional rights. *Dickerson*'s characterization of *Miranda* as a constitutional rule does not lessen the need to maintain the close-fit requirement. There is no such fit here. Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's pistol, does not implicate the Clause. It presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, the exclusion of unwarned statements is a complete and sufficient remedy for any perceived *Miranda* violation. *E.g., Chavez, supra*, at 790. Similarly, because police cannot violate the Clause by taking unwarned though voluntary statements, an exclusionary rule cannot be justified by reference to a deterrence effect on law enforcement, as the court below believed. The word "witness" in the constitutional text limits the Self-Incrimination Clause's scope to testimonial evidence. *Hubbell, supra,* at 34-35. And although the Court requires the exclusion of the physical fruit of actually coerced statements, statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination. This Court declines to extend that presumption further. Pp. 10-12.

Justice Kennedy, joined by *Justice O'Connor*, concluded that it is unnecessary to decide whether the detective's failure to give Patane full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is anything to deter so long as the unwarned statements are not later introduced at trial. In *Oregon* v. *Elstad*, 470 U. S. 298, *New York* v. *Quarles*, 467 U. S. 649, and *Harris* v. *New York*, 401 U. S. 222, evidence obtained following unwarned interrogations was held admissible based in large part on the Court's recognition that the concerns underlying the *Miranda* v. Arizona, 384 U. S. 436, rule must be accommodated to other objectives of the criminal justice

system. Here, it is sufficient to note that the Government presents an even stronger case for admitting the evidence obtained as the result of Patane's unwarned statement than was presented in *Elstad* and *Michigan* v. *Tucker*, 417 U. S. 433. Admission of nontestimonial physical fruits (the pistol here) does not run the risk of admitting into trial an accused's coerced incriminating statements against himself. In light of reliable physical evidence's important probative value, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation.

TRIAL - RIGHT TO COUNSEL

Iowa v. Tovar, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004).

Issue: What admonishments are required before a trial court accepts a defendant's waiver of counsel at a plea hearing?

Facts: At Tovar's arraignment for operating a motor vehicle under the influence of alcohol, Tovar affirmed that he wanted to represent himself and to plead guilty. Conducting the guilty plea colloquy required by the Iowa Rules of Criminal Procedure, the court explained that, if Tovar pleaded not guilty, he would be entitled to a speedy and public jury trial where he would have the right to counsel who could help him select a jury, question and cross-examine witnesses, present evidence, and make arguments on his behalf. By pleading guilty, the court cautioned, Tovar would give up his right to a trial and his rights at that trial to be represented by counsel, to remain silent, to the presumption of innocence, and to subpoena witnesses and compel their testimony. The court then informed Tovar of the maximum and minimum penalties for an OWI conviction, and explained that, before accepting a guilty plea, the court had to assure itself that Tovar was in fact guilty of the charged offense. To that end, the court informed Tovar of the two elements of the OWI charge: The defendant must have (1) operated a motor vehicle in Iowa (2) while intoxicated. Tovar confirmed his guilt. The court then accepted his guilty plea and imposed the minimum sentence of two days in jail and a fine. Later, Tovar was again twice charged with OWI. The third offense was a felony under Iowa law. Tovar pleaded not guilty to the felony charge and moved to preclude use of Tovar's first (1996) OWI conviction to enhance his 2000 offense from an aggravated misdemeanor to a third-offense felony. Tovar maintained that his 1996 waiver of counsel was invalid--not fully knowing, intelligent, and voluntary--because he was never made aware by the court of the dangers and disadvantages of self-representation. The trial court denied the motion, found Tovar guilty. The Supreme Court of Iowa reversed and remanded for entry of judgment without consideration of Tovar's first OWI conviction. Holding that the colloquy preceding acceptance of Tovar's 1996 guilty plea had been constitutionally inadequate, Iowa's high court ruled, as here at issue, that two warnings not given to Tovar are essential to the "knowing and intelligent" waiver of the Sixth Amendment right to counsel at the plea stage: The defendant must be advised specifically that waiving counsel's assistance in deciding whether to plead guilty (1) entails the risk that a viable defense will be overlooked and (2) deprives him of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.

Held: Justice Ginsburg reversed for a unanimous court.

The court held that neither warning ordered by the Iowa Supreme Court is mandated by the Sixth Amendment. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.

Although an accused may choose to forgo representation, any waiver of the right to counsel must be knowing, voluntary, and intelligent, see *Johnson* v. *Zerbst,* 304 U. S. 458, 464. The information a defendant must possess in order to make an intelligent election depends on a range of case-specific factors, including his education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. See *Johnson*, 304 U. S., at 464. Although warnings of the pitfalls of proceeding to trial uncounseled must be "rigorous[ly]" conveyed, *Patterson* v. *Illinois,* 487 U. S. 285, 298; see *Faretta* v. *California,* 422 U. S. 806, 835, a less searching or formal colloquy may suffice at earlier stages of the criminal process, 487 U. S., at 299. In *Patterson,* this Court described a pragmatic approach to right-to-counsel waivers, one that asks "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance [counsel] could provide to an accused at that stage." *Id*., at 298. Less rigorous warnings are required pretrial because, at that stage, "the full dangers and disadvantages of self-representation ... are less substantial and more obvious to an accused than they are at trial." *Id*., at 299.

The Sixth Amendment does not compel the two admonitions ordered by the Iowa Supreme Court. "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances ... ." *United States* v. *Ruiz,* 536 U. S. 622, 629. Even if the defendant lacked a full and complete appreciation of all of the consequences flowing from his waiver, the State may nevertheless prevail if it shows that the information provided to the defendant satisfied the constitutional minimum. Patterson, 487 U. S., at 294. The Iowa high court gave insufficient consideration to this Court's guiding decisions. In prescribing scripted admonitions and holding them necessary in every guilty plea instance, that court overlooked this Court's observations that the information a defendant must have to waive counsel intelligently will depend upon the particular facts and circumstances in each case, *Johnson*, 304 U. S., at 464.

INEFFECTIVE ASSISTANCE OF COUNSEL

Florida v. Nixon, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).

Issue: Did counsel render ineffective assistance by failing to obtain the defendant's express consent to a strategy of conceding guilt at the guilt phase of a capital trial?

Facts: Nixon was charged with capital murder and gave a detailed confession. Defense counsel thoroughly investigated the case and concluded that a finding of guilty was a certainty. Counsel concluded that the best strategy was to concede guilt and focus on the attempt to obtain a sentence

other than death by presenting evidence of Nixon's mental instability. Counsel attempted to explain this strategy to Nixon but Nixon was unresponsive, never approving or protesting the strategy. Counsel followed his proposed strategy at trial. Florida Supreme Court reversed finding the defense attorneys concession of guilt, made without the defendant's express consent, automatically meets the prejudicial ineffective assistance standard of *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657.

Held: Justice Ginsburg reversed for a unanimous court.

The court held that this was not ineffective assistance. Counsel may reasonably decide to focus on the trial's penalty phase under these facts in an attempt to convince the jury to spare the defendant's life. It was reasonable trial strategy to preserve credibility by not challenging the defendant's obvious guilt.

CONFRONTATION

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Issue: Is the admissibility of out of court statements of available witnesses barred by the confrontation clause of the Sixth Amendment?

Facts: Crawford was tried for assault and attempted murder. The State sought to introduce a recorded statement that his wife had made during police interrogation, as evidence that the stabbing was not in self-defense. The wife did not testify at trial because of Washington's marital privilege. Crawford argued that admitting the evidence would violate his Sixth Amendment right to be "confronted with the witnesses against him." Under *Ohio* v. *Roberts,* 448 U. S. 56, that right does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability,' " a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Id.*, at 66. The trial court admitted the statement on the latter ground. The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, *i.e.,* interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.

Held: Justice Scalia, joined by Justices Stevens, Kennedy, Souter, Thomas, Ginsburg and Breyer, found a confrontation clause violation. Chief Justice Rhenquist and Justice O'Connor concurred.

The court held the State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. Out of court statements by witnesses that are testimonial in nature are barred under the Confrontation Clause unless the witnesses are unavailable and defendants have a prior opportunity to cross-examine the witnesses regardless of whether the statements are deemed reliable. Abrogating *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.29 597 (1980).

The Confrontation Clause's text does not alone resolve this case, so this Court turns to the Clause's historical background. That history supports two principles. First, the principle evil at which the Clause was directed was the civil-law mode of criminal procedure, particularly the use of *ex parte* examinations as evidence against the accused. The Clause's primary object is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class. Second, the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination. English authorities and early state cases indicate that this was the common law at the time of the founding. And the "right ... to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the common-law right of confrontation, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States,* 156 U. S. 237, 243.

SUPPRESSION OF EXCULPATORY EVIDENCE

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004).

Issue: Review of state and federal court's refusal to order a new trial based on suppression of exculpatory evidence.

Facts: After police found a gun-shot corpse near Texarkana, Texas, Deputy Sheriff Willie Huff learned that the decedent had been seen with petitioner Banks three days earlier. When a paid informant told Deputy Huff that Banks was driving to Dallas to fetch a weapon, Deputy Huff followed Banks to a residence there. On the return trip, police stopped Banks's vehicle, found a handgun, and arrested the car's occupants. Returning to the Dallas residence, Deputy Huff encountered Charles Cook and recovered a second gun, which Cook said Banks had left at the residence several days earlier. On testing, the second gun proved to be the murder weapon. Prior to Banks's trial, the State advised defense counsel that, without necessity of motions, the State would provide Banks with all discovery to which he was entitled. Nevertheless, the State withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. At the trial's guilt phase, Cook testified, *inter alia*, that Banks admitted "kill[ing a] white boy." On cross-examination, Cook thrice denied talking to anyone about his testimony. In fact, Deputy Huff and prosecutors intensively coached Cook about his testimony during at least one pretrial session. The prosecution allowed Cook's misstatements to stand uncorrected. After Banks's capital murder conviction, the penalty-phase jury found that Banks would probably commit criminal acts of violence that would constitute a continuing threat to society. One of the State's two penalty-phase witnesses, Robert Farr, testified that Banks had retrieved a gun from Dallas in order to commit robberies. According to Farr, Banks had said he would "take care of it" if trouble arose during those crimes. Two defense witnesses impeached Farr, but were, in turn, impeached. Banks testified, among other things, that, although he had traveled to Dallas to obtain a gun, he had no intent to participate in the robberies, which Farr alone planned to commit. In summation, the prosecution suggested that Banks had not traveled to Dallas only to supply Farr with a weapon. Stressing Farr's testimony that Banks said he would "take care" of trouble arising during the robberies, the prosecution urged the jury to find Farr credible. Farr's admission that he used narcotics, the prosecution suggested, indicated that he had

been open and honest in every way. The State did not disclose that Farr was the paid informant who told Deputy Huff about the Dallas trip. The jury sentenced Banks to death.

Through Banks's direct appeal, the State continued to hold secret Farr's and Cook's links to the police. In a 1992 state-court postconviction motion, Banks alleged for the first time that the prosecution knowingly failed to turn over exculpatory evidence that would have revealed Farr as a police informant and Banks's arrest as a "set-up." Banks also alleged that during the trial's guilt phase, the State deliberately withheld information of a deal prosecutors made with Cook, which would have been critical to the jury's assessment of Cook's credibility. Banks asserted that the State's actions violated *Brady* v. *Maryland,* 373 U. S. 83, 87, which held that the prosecution's suppression of evidence requested by and favorable to an accused violates due process where the evidence is material to either guilt or punishment, irrespective of the prosecution's good or bad faith. The State denied Banks's allegations, and the state postconviction court rejected his claims.

In 1996, Banks filed the instant federal habeas petition, alleging, as relevant, that the State had withheld material exculpatory evidence revealing Farr to be a police informant and Banks' arrest as a "set-up." Banks further alleged that the State had concealed Cook's incentive to testify in a manner favorable to the prosecution. Banks attached affidavits from Farr and Cook to a February 1999 motion seeking discovery and an evidentiary hearing. Farr's declaration stated that he had agreed to help Deputy Huff with the murder investigation out of fear Huff would arrest him on drug charges; that Huff had paid him $200; and that Farr had "set [Banks] up" by convincing him to drive to Dallas to retrieve Banks's gun. Cook recalled that he had participated in practice sessions before the Banks trial at which prosecutors told him he must either testify as they wanted or spend the rest of his life in prison. In response to the Magistrate Judge's disclosure order in the federal habeas proceeding, the prosecution gave Banks a transcript of a September 1980 pretrial interrogation of Cook by police and prosecutors. This transcript provided compelling evidence that Cook's testimony had been tutored, but did not bear on whether Cook had a deal with the prosecution. At the federal evidentiary hearing Huff acknowledged, for the first time, that Farr was an informant paid for his involvement in Banks's case. A Banks trial prosecutor testified, however, that no deal had been offered to gain Cook's testimony. The Magistrate Judge recommended a writ of habeas corpus with respect to Banks's death sentence based on, *inter alia*, the State's failure to disclose Farr's informant status. The judge did not recommend disturbing the guilt-phase verdict, concluding in this regard that Banks had not properly pleaded a *Brady* claim based on the September 1980 Cook interrogation transcript. The District Court adopted the Magistrate Judge's report and rejected Banks's argument that the Cook transcript claim be treated as if raised in the pleadings, under Federal Rule of Civil Procedure 15(b).

The Fifth Circuit reversed to the extent the District Court had granted relief on Banks's Farr *Brady* claim. The Court of Appeals recognized that, prior to federal habeas proceedings, the prosecution had suppressed Farr's informant status and his part in the Dallas trip. The Fifth Circuit nonetheless concluded that Banks did not act diligently to develop the facts underpinning his Farr *Brady* claim when he pursued his 1992 state-court postconviction application. That lack of diligence, the Court of Appeals held, rendered the evidence uncovered in the federal habeas proceeding procedurally barred. In any event, the Fifth Circuit ruled, Farr's status as an informant was not "material" for

Brady purposes. That was so, in the Fifth Circuit's judgment, because Banks had impeached Farr at trial by bringing out that he had been an unreliable police informant in Arkansas, and because much of Farr's testimony was corroborated by other witnesses, including Banks himself, who had acknowledged his willingness to get a gun for Farr's use in robberies. The Fifth Circuit also denied a certificate of appealability on Banks's Cook *Brady* claim. In accord with the District Court, the Court of Appeals rejected Banks's assertion that, because his Cook *Brady* claim had been aired by implied consent, Rule 15(b) required it to be treated as if raised in the pleadings.

Held: Justice Ginsburg wrote an opinion reversing the lower court, joined by Chief Justice Rhenquist, Justices Stevens, O'Connor, Kennedy, Souter, and Breyer. Justices Scalia and Thomas concurred in part and dissented in part.

The court held that the Fifth Circuit erred in dismissing Banks's Farr *Brady* claim and denying him a certificate of appealability on his Cook *Brady* claim. When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.

Banks' Farr *Brady* claim, as it concerns on his death sentence, is not barred. All three elements of a *Brady* claim are satisfied as to the suppression of Farr's informant status and its bearing on the reliability of the jury's verdict regarding punishment. Because Banks has also demonstrated cause and prejudice, he is not precluded from gaining federal habeas relief by his failure to produce evidence in anterior state-court proceedings.

Pre-AEDPA habeas law required Banks to exhaust available state-court remedies in order to pursue federal-court relief. See, *e.g., Rose* v. *Lundy,* 455 U. S. 509. Banks satisfied this requirement by alleging in his 1992 state-court habeas application that the prosecution knowingly failed to turn over exculpatory evidence about Farr. Banks, however, failed to produce evidence in state postconviction court establishing that Farr had served as Deputy Sheriff Huff's informant. In the federal habeas forum, Banks must show that he was not thereby barred from producing evidence to substantiate his Farr *Brady* claim. Banks would be entitled to a federal-court evidentiary hearing if he could show both cause for his failure to develop facts in state court, and actual prejudice resulting from that failure. *Keeney* v. *Tamayo-Reyes,* 504 U. S. 1, 11. A *Brady* prosecutorial misconduct claim has three essential elements. *Strickler v. Greene*, 527 U. S. 263, 281-282. Beyond debate, the first such element--that the evidence at issue be favorable to the accused as exculpatory or impeaching--is satisfied here. Farr's paid informant status plainly qualifies as evidence advantageous to Banks. Cause and prejudice in this case parallel the second and third of the three *Brady* components. Corresponding to the second *Brady* element--that the State suppressed the evidence at issue--a petitioner shows cause when the reason for the failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence. Coincident with the third *Brady* component--that prejudice ensued--prejudice within the compass of the "cause and prejudice" requirement exists when suppressed evidence is "material" for *Brady* purposes. *Ibid.* Thus, if Banks succeeds in demonstrating cause and prejudice, he will also succeed in establishing the essential elements of his Farr *Brady* claim. Pp. 17-19.

Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim. As *Strickler* instructs, 527 U. S., at 289, three inquiries underlie the "cause" determination: (1) whether the prosecution withheld exculpatory evidence; (2) whether the petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (3) whether the State confirmed the petitioner's reliance on that policy by asserting during the state habeas proceedings that the petitioner had already received everything known to the government. This case is congruent with *Strickler* in all three respects. First, the State knew of, but kept back, Farr's arrangement with Deputy Huff. Cf. *Kyles* v. *Whitley,* 514 U. S. 419, 437. Second, the State asserted, on the eve of trial, that it would disclose all *Brady* material. Banks cannot be faulted for relying on that representation. See *Strickler,* 527 U. S., at 283-284. Third, in its answer to Banks's 1992 state habeas application, the State denied Banks's assertions that Farr was a police informant and Banks's arrest a "set-up." The State thereby confirmed Banks's reliance on the prosecution's representation that it had disclosed all *Brady* material. In this regard, Banks's case is stronger than was the *Strickler* petitioner's: Each time Farr misrepresented his dealings with police, the prosecution allowed that testimony to stand uncorrected. Cf. *Giglio* v. *United States,* 405 U. S. 150, 153. Banks appropriately assumed police would not engage in improper litigation conduct to obtain a conviction. None of the State's arguments for distinguishing *Strickler* on the "cause" issue accounts adequately for the State's concealment and misrepresentation of Farr's link to Huff. In light of those misrepresentations, Banks did not lack appropriate diligence in pursuing the Farr *Brady* claim in state court. Nor is Banks at fault for failing to move, in the 1992 state-court postconviction proceedings, for investigative assistance so that he could inquire into Farr's police connections, for state law entitled him to no such aid. Further, *Roviaro* v. *United States,* 353 U. S. 53, which concerned the Government's obligation to reveal the identity of an informant it does not call as a witness, does not support the State's position.

The State's suppression of Farr's informant status is "material" for *Brady* purposes. The materiality standard for *Brady* claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U. S., at 435. Farr was paid for a critical role in the scenario that led to Banks's indictment. Farr's declaration, presented to the federal habeas court, asserts that Farr, not Banks, initiated the proposal to obtain a gun to facilitate robberies. Had Farr not instigated, upon Deputy Huff's request, the Dallas excursion to fetch Banks's gun, the prosecution would have had slim, if any, evidence that Banks planned to continue committing violent acts. Farr's admission of his instigating role, moreover, would have dampened the prosecution's zeal in urging the jury to consider Banks's acquisition of a gun to commit robbery or his "planned violence." Because Banks had no criminal record, Farr's testimony about Banks's propensity to violence was crucial to the prosecution. Without that testimony, the State could not have underscored to the jury that Banks would use the gun fetched in Dallas to "take care" of trouble arising during robberies. The stress placed by the prosecution on this part of Farr's testimony, uncorroborated by any other witness, belies the State's suggestion that Farr's testimony was adequately corroborated. The prosecution's penalty-phase summation, moreover, left no doubt about the importance the State attached to Farr's testimony. In contrast to *Strickler*, where the Court found "cause," 527 U. S., at 289, but no "prejudice," *id.*, at 292-296, the existence of "prejudice" in this case is marked. Farr's trial testimony was the centerpiece of the Banks prosecution's penalty-phase

case. That testimony was cast in large doubt by the declaration Banks ultimately obtained from Farr and introduced in the federal habeas proceeding. Had jurors known of Farr's continuing interest in obtaining Deputy Huff's favor and his receipt of funds to set Banks up, they might well have distrusted Farr's testimony, and, insofar as it was uncorroborated, disregarded it. The jury, moreover, did not benefit from customary, truth-promoting precautions that generally accompany informant testimony. Such testimony poses serious credibility questions. This Court, therefore, has long allowed defendants broad latitude to cross-examine informants and has counseled the use of careful instructions on submission of the credibility issue to the jury. See, *e.g., On Lee* v. *United States,* 343 U. S. 747, 757. The State's argument that Farr's informant status was rendered cumulative by his impeachment at trial is contradicted by the record. Neither witness called to impeach Farr gave evidence directly relevant to Farr's part in Banks's prosecution. The impeaching witnesses, moreover, were themselves impeached, as the prosecution stressed on summation. Further, the prosecution turned to its advantage remaining impeachment evidence by suggesting that Farr's admission of drug use demonstrated his openness and honesty.

The lower courts wrongly denied Banks a certificate of appealability with regard to his *Brady* claim resting on the prosecution's suppression of the September 1980 Cook interrogation transcript. The Court of Appeals rejected Banks's contention that Rule 15(b) required the claim to be treated as having been raised in the pleadings because the transcript substantiating the claim had been aired at an evidentiary hearing before the Magistrate Judge. The Fifth Circuit apparently relied on the debatable view that Rule 15(b) is inapplicable in habeas proceedings. This Court has twice assumed that Rule's application in such proceedings. *Harris* v. *Nelson,* 394 U. S. 286, 294, n. 5; *Withrow* v. *Williams,* 507 U. S. 680, 696, and n. 7. The *Withrow* District Court had granted habeas on a claim neither pleaded, considered at "an evidentiary hearing," nor "even argu[ed]" by the parties. *Id.*, at 695. This Court held that there had been no trial of the claim by implied consent; and manifestly, the respondent warden was prejudiced by the lack of opportunity to present evidence bearing on the claim's resolution. *Id.,* at 696. Here, in contrast, the issue of the undisclosed Cook interrogation transcript was aired at a hearing before the Magistrate Judge, and the transcript was admitted into evidence without objection. The Fifth Circuit's view that an evidentiary hearing should not be aligned with a trial for Rule 15(b) purposes is not well grounded. Nor does this Court agree with the Court of Appeals that applying Rule 15(b) in habeas proceedings would undermine the State's exhaustion and procedural default defenses. *Ibid.* Under pre-AEDPA law, no inconsistency arose between Rule 15(b) and those defenses. Doubtless, that is why this Court's pre-AEDPA cases assumed Rule 15(b)'s application in habeas proceedings. See*, e.g., ibid.* While AEDPA forbids a finding that exhaustion has been waived absent an express waiver by the State, 28 U. S. C. §2254(b)(3), pre-AEDPA law allowed waiver of both defenses--exhaustion and procedural default--based on the State's litigation conduct, see, *e.g., Gray* v. *Netherland,* 518 U. S. 152, 166. To obtain a certificate of appealability, a prisoner must demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented warrant encouragement to proceed further. *Miller-El* v. *Cockrell,* 537 U. S. 322, 327. This case fits that description as to the application of Rule 15(b).

DESTRUCTION OF EVIDENCE

Illinois v. Fisher, 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004).

Issue: Does due process require dismissal of charges on ground that police, nearly 11 years after defendant was charged, destroyed the alleged cocaine seized in the course of a traffic stop?

Facts: Fisher was arrested in 1988 for possession of cocaine. Four lab tests confirmed the substance to be cocaine. He filed a motion for discovery requesting all physical evidence. In 1989, he failed to appear in court and was a fugitive for 10 years. After being arrested in 1999, he was tried for the possession. In the interim, the police following established protocol, had destroyed the evidence. The Illinois appellate court reversed the conviction, finding the destruction of the drug sample to violate due process thus requiring dismissal of the charges. The Illinois court distinguished *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) on the basis that in *Youngblood* the evidence was not destroyed subsequent to a discovery motion.

Held: In a per curiam opinion, a unanimous court found due process was not violated by the destruction of this evidence because the evidence was, at best, only potentially exculpatory and the police acted in good faith and in accordance with their normal practice in destroying the evidence.

JUDGMENT OF ACQUITTAL/DOUBLE JEOPARDY

Smith v. Massachusetts, 125 S.Ct. 1129 (2005).

Issue: Does the double jeopardy clause prohibit the reconsideration by the trial court of a judgment of acquittal entered mid-trial?

Facts: Smith was tried before a Massachusetts jury on charges related to a shooting, including unlawful possession of a firearm. At the conclusion of the prosecution's case, Smith moved for a not-guilty finding on the firearm count because "the evidence [was] insufficient as a matter of law to sustain a conviction," The trial judge granted the motion, finding no evidence to support the requirement of the unlawful possession count that the firearm have a barrel shorter than 16 inches. The prosecution rested, and the trial proceeded on the other counts. Before closing argument, the prosecution argued that under Massachusetts precedent, the victim's testimony that the defendant shot him with a "pistol" or "revolver" sufficed to establish barrel length. The judge "reversed" her previous ruling, allowing the firearm count to go to the jury. The jury convicted petitioner on all counts. In affirming, the Massachusetts Appeals Court held that the Double Jeopardy Clause was not implicated because the trial judge's correction of her ruling had not subjected petitioner to a second prosecution or proceeding, and held that state rules did not prohibit the judge from reconsidering her decision.

Held: Justices Scalia, joined by Justices Stevens, O'Connor, Souter and Thomas, reversed the state court and held that the acquittal could not be revoked. Justices Ginsburg joined by Chief Justice

Rhenquist and Justices Kennedy and Breyer dissented.

Submitting the firearm count to the jury plainly subjected petitioner to further "factfinding proceedings going to guilt or innocence," which are prohibited following a midtrial acquittal by the court, *Smalis* v. *Pennsylvania,* 476 U. S. 140, 145. The ruling here met the definition of an acquittal consistently used in this Court's double-jeopardy cases. In *United States* v. *Martin Linen Supply Co.,* 430 U. S. 564, this Court rejected reasoning identical to the Commonwealth's claim that jeopardy did not terminate midtrial because the judge's determination was legal rather than factual. How Massachusetts characterizes the ruling is not binding on this Court. *Smalis, supra,* at 144, n. 5. What matters is that, as the Massachusetts Rules authorize, the judge "evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction." *Martin Linen, supra,* at 572.

The Double Jeopardy Clause forbade the judge to reconsider the acquittal later in the trial. While the Clause may permit States to create a procedure for reconsidering a midtrial determination of insufficiency of proof, Massachusetts had no such procedure at the time of petitioner's trial. Its Rules allowed only clerical errors, or those "arising from oversight or omission," to be corrected at any time. Mass. Rule Crim. Proc. 42. A few Commonwealth cases have provided that interlocutory rulings are subject to reconsideration, but these cases, without more, do not extend that principle to a not-guilty finding under Rule 25, which purports not to be interlocutory but to end the case. A seeming dismissal may induce a defendant to present a defense to the undismissed charges when he would be better advised to stand silent. The Double Jeopardy Clause cannot be allowed to become a potential snare for those who reasonably rely on it. If, after a facially unqualified midtrial acquittal on one count, the trial has proceeded to the defendant's introduction of evidence on the remaining counts, the acquittal must be treated as final, unless the availability of reconsideration has been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence.

SENTENCING

Blakely v. Washington, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Issue: Does the Sixth Amendment require findings of fact that raise the maximum punishment available be charged in an indictment and found by a jury beyond a reasonable doubt?

Facts: Blakely pleaded guilty to kidnaping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge imposed a 90-month sentence after finding that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. The Washington Court of Appeals affirmed, rejecting Blakely's argument that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

Held: Justice Scalia, joined by Justices Stevens, Souter, Thomas and Ginsburg found a Sixth

Amendment violation. Justice O'Connor, Chief Justice Rhenquist, Justices Breyer and Kennedy dissented.

The court held because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury.

This case required the Court to apply the rule of *Apprendi* v. New Jersey, 530 U. S. 466, 490, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Here, the judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea, because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard-range sentence. Petitioner's sentence is not analogous to those upheld in *McMillan* v. *Pennsylvania,* 477 U. S. 79, and *Williams* v. *New York,* 337 U. S. 241, which were not greater than what state law authorized based on the verdict alone. Regardless of whether the judge's authority to impose the enhanced sentence depends on a judge's finding a specified fact, one of several specified facts, or *any* aggravating fact, it remains the case that the jury's verdict alone does not authorize the sentence.

United States v. Booker, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

Issue: Does the holding of *Blakely v. Washington*, apply to the Federal Sentencing Guidelines?

Facts: Under the Federal Sentencing Guidelines, the sentence authorized by the jury verdict in respondent Booker's drug case was 210-to-262 months in prison. At the sentencing hearing, the judge found additional facts by a preponderance of the evidence. Because these findings mandated a sentence between 360 months and life, the judge gave Booker a 30-year sentence instead of the 21-year, 10-month, sentence he could have imposed based on the facts proved to the jury beyond a reasonable doubt. The Seventh Circuit held that this application of the Guidelines conflicted with the *Apprendi* v. New Jersey, 530 U. S. 466, 490, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Relying on *Blakely* v. *Washington,* 542 U. S. ___, the court held that the sentence violated the Sixth Amendment and instructed the District Court either to sentence Booker within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury. In respondent Fanfan's case, the maximum sentence authorized by the jury verdict under the Guidelines was 78 months in prison. At the sentencing hearing, the District Judge found by a preponderance of the evidence additional facts authorizing a sentence in the 188-to-235-month range, which would have required him to impose a 15- or 16-year sentence instead of the 5 or 6 years authorized by the jury verdict alone. Relying on *Blakely*'s majority opinion, statements in its dissenting opinions, and the Solicitor General's brief in *Blakely,* the judge concluded that he could not follow the Guidelines and imposed a sentence based solely upon the guilty verdict in the case. The Government filed a notice of appeal

in the First Circuit and a petition for certiorari before judgment in this Court.

Held: Justice Stevens, joined by Justices Scalia, Souter, Thomas and Ginsburg, found that *Blakely* applies to the Federal Sentencing Guidelines. Chief Justice Rhenquist, Justices O'Connor, Kennedy and Breyer dissented from that ruling. Justice Breyer, joined by Chief Justice Rhenquist, Justices O'Connor, Kennedy and Ginsburg found the remedy to be that the Guidelines would not be mandatory. Justices Stevens, Scalia, Souter and Thomas dissented from that section.

Justice Stevens delivered the opinion of the Court in part, concluding that the Sixth Amendment as construed in *Blakely* applies to the Federal Sentencing Guidelines.

In addressing Washington State's determinate sentencing scheme, the *Blakely* Court found that *Jones* v. United States, 526 U. S. 227; *Apprendi* v. New Jersey, 530 U. S. 466; and *Ring* v. *Arizona,* 536 U. S. 584, made clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U. S., at ___. As *Blakely*'s dissenting opinions recognized, there is no constitutionally significant distinction between the Guidelines and the Washington procedure at issue in that case. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges. Were the Guidelines merely advisory--recommending, but not requiring, the selection of particular sentences in response to differing sets of facts--their use would not implicate the Sixth Amendment. However, that is not the case. Title 18 U. S. C. A. §3553(b) directs that a court "*shall* impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases. Because they are binding on all on judges, this Court has consistently held that the Guidelines have the force and effect of laws. Further, the availability of a departure where the judge "finds ... an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described," §3553(b)(1), does not avoid the constitutional issue. Departures are unavailable in most cases because the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is legally bound to impose a sentence within the Guidelines range. Booker's case illustrates this point. The jury found him guilty of possessing at least 50 grams of crack cocaine, based on evidence that he had 92.5 grams. Under those facts, the Guidelines required a possible 210-to-262-month sentence. To reach Booker's actual sentence--which was almost 10 years longer--the judge found that he possessed an additional 566 grams of crack. Although, the jury never heard any such evidence, the judge found it to be true by a preponderance of the evidence. Thus, as in *Blakely,* "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." 542 U. S., at ___. Finally, because there were no factors the Sentencing Commission failed to adequately consider, the judge was required to impose a sentence within the higher Guidelines range.

The Government's arguments for its position that *Blakely*'s reasoning should not be applied to the Federal Sentencing Guidelines are unpersuasive. The fact that the Guidelines are promulgated by the

Sentencing Commission, rather than Congress, is constitutionally irrelevant. The Court has not previously considered the question, but the same Sixth Amendment principles apply to the Sentencing Guidelines. Further, the Court's pre-*Apprendi* cases considering the Guidelines are inapplicable, as they did not consider the application of *Apprendi* to the Sentencing Guidelines. Finally, separation of powers concerns are not present here, and were rejected in *Mistretta*. In *Mistretta* the Court concluded that even though the Commission performed political rather than adjudicatory functions, Congress did not exceed constitutional limitations in creating the Commission. 488 U. S., at 393, 388. That conclusion remains true regardless of whether the facts relevant to sentencing are labeled "sentencing factors" or "elements" of crimes.

Justice Breyer delivered the opinion of the Court in part, concluding that 18 U. S. C. A. §3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with today's Sixth Amendment "jury trial" holding and therefore must be severed and excised from the Sentencing Reform Act of 1984 (Act). Section 3742(e), which depends upon the Guidelines' mandatory nature, also must be severed and excised. So modified, the Act makes the Guidelines effectively advisory, requiring a sentencing court to consider Guidelines ranges, see §3553(a)(4), but permitting it to tailor the sentence in light of other statutory concerns, see §3553(a).

Answering the remedial question requires a determination of what "Congress would have intended" in light of the Court's constitutional holding. *E.g., Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 767. Here, the Court must decide which of two approaches is the more compatible with Congress' intent as embodied in the Act: (1) retaining the Act (and the Guidelines) as written, with today's Sixth Amendment requirement engrafted onto it; or (2) eliminating some of the Act's provisions. Evaluation of the constitutional requirement's consequences in light of the Act's language, history, and basic purposes demonstrates that the requirement is not compatible with the Act as written and that some severance (and excision) is necessary. Congress would likely have preferred the total invalidation of the Act to an Act with the constitutional requirement engrafted onto it, but would likely have preferred the excision of the Act's mandatory language to the invalidation of the entire Act.

Several considerations demonstrate that adding the Court's constitutional requirement onto the Act as currently written would so transform the statutory scheme that Congress likely would not have intended the Act as so modified to stand. First, references to "[t]he court" in §3553(a)(1)--which requires "[t]he court" when sentencing to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"--and references to "the judge" in the Act's history must be read in context to mean "the judge without the jury," not "the judge working together with the jury." That is made clear by §3661, which removes typical "jury trial" limitations on "the information" concerning the offender that the sentencing "court ... may receive." Second, Congress' basic statutory goal of diminishing sentencing disparity depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* underlying the crime of conviction. In looking to real conduct, federal sentencing judges have long relied upon a probation officer's presentence report, which is often unavailable until *after* the trial. To engraft the Court's constitutional requirement onto the Act would destroy the system by preventing a sentencing judge

from relying upon a presentence report for relevant factual information uncovered after the trial. Third, the Act, read to include today's constitutional requirement, would create a system far more complex than Congress could have intended, thereby greatly complicating the tasks of the prosecution, defense, judge, and jury. Fourth, plea bargaining would not significantly diminish the consequences of the Court's constitutional holding for the operation of the Guidelines, but would make matters worse, leading to sentences that gave greater weight not to real conduct, but rather to counsel's skill, the prosecutor's policies, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime. Fifth, Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward,* yet that is what the engrafted system would create. For all these reasons, the Act cannot remain valid in its entirety. Severance and excision are necessary.

The entire Act need not be invalidated, since most of it is perfectly valid. In order not to "invalidat[e] more of the statute than is necessary," *Regan* v. *Time, Inc.,* 468 U. S. 641, 652, the Court must retain those portions of the Act that are (1) constitutionally valid, *ibid.*, (2) capable of "functioning independently," *Alaska Airlines, Inc.* v. *Brock,* 480 U. S. 678, 684, and (3) consistent with Congress' basic objectives in enacting the statute, *Regan, supra*, at 653. Application of these criteria demonstrates that only §3553(b)(1), which requires sentencing courts to impose a sentence within the applicable Guidelines range (absent circumstances justifying a departure), and §3742(e), which provides for *de novo* review on appeal of departures, must be severed and excised. With these two sections severed (and statutory cross-references to the two sections consequently invalidated), the rest of the Act satisfies the Court's constitutional requirement and falls outside the scope of *Apprendi v. New Jersey*, 530 U. S. 466. The Act still requires judges to take account of the Guidelines together with other sentencing goals, see §3553(a)(4); to consider the Guidelines "sentencing range established for ... the applicable category of offense committed by the applicable category of defendant," pertinent Sentencing Commission policy statements, and the need to avoid unwarranted sentencing disparities and to restitute victims, §§3553(a)(1), (3)-(7); and to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed training and medical care, §3553(a)(2). Moreover, despite §3553(b)(1)'s absence, the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range). See §§3742(a) and (b). Excision of §3742(e), which sets forth appellate review standards, does not pose a critical problem. Appropriate review standards may be inferred from related statutory language, the statute's structure, and the "sound administration of justice." *Pierce* v. *Underwood*, 487 U. S. 552, 559-560. Here, these factors and the past two decades of appellate practice in cases involving departures from the Guidelines imply a familiar and practical standard of review: review for "unreasonable[ness]." See, *e.g.,* 18 U. S. C. §3742(e)(3) (1994 ed.). Finally, the Act without its mandatory provision and related language remains consistent with Congress' intent to avoid "unwarranted sentencing disparities ... [and] maintai[n] sufficient flexibility to permit individualized sentences when warranted," 28 U. S. C. §991(b)(1)(B), in that the Sentencing Commission remains in place to perform its statutory duties, see §994, the district courts must consult the Guidelines and take them into account when sentencing, see 18 U. S. C. §3553(a)(4), and the courts of appeals review sentencing decisions for unreasonableness. Thus, it

is more consistent with Congress' likely intent (1) to preserve the Act's important pre-existing elements while severing and excising §§3553(b) and 3742(e) than (2) to maintain all of the Act's provisions and engraft today's constitutional requirement onto the statutory scheme.

Other possible remedies--including, *e.g.,* the parties' proposals that the Guidelines remain binding in cases other than those in which the Constitution prohibits judicial factfinding and that the Act's provisions requiring such factfinding at sentencing be excised--are rejected. Pp. 22-24.

On remand in respondent Booker's case, the District Court should impose a sentence in accordance with today's opinions, and, if the sentence comes before the Seventh Circuit for review, that court should apply the review standards set forth in this Court's remedial opinion. In respondent Fanfan's case, the Government (and Fanfan should he so choose) may seek resentencing under the system set forth in today's opinions. As these dispositions indicate, today's Sixth Amendment holding and the Court's remedial interpretation of the Sentencing Act must be applied to all cases on direct review. See, *e.g., Griffith* v. *Kentucky*, 479 U. S. 314, 328. That does not mean that every sentence will give rise to a Sixth Amendment violation or that every appeal will lead to a new sentencing hearing. That is because reviewing courts are expected to apply ordinary prudential doctrines, determining, *e.g.,* whether the issue was raised below and whether it fails the "plain-error" test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.

CAPITAL CASES

Tennard v. Dretke, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

Issue: Is there a nexus requirement between mitigating evidence and the crime before a defendant is entitled to a jury charge covering it? Does the Texas statute provide a constitutionally adequate means of presenting evidence of a low IQ in mitigating a capital case?

Facts: During his capital murder trial's penalty phase, Tennard presented evidence that he had an IQ of 67. The jury was instructed to determine the appropriate punishment by considering two "special issues," which inquired into whether the crime was committed deliberately and whether the defendant posed a risk of future dangerousness. These were materially identical to two special issues found insufficient, in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256, for the jury to give effect to Penry's mitigating mental retardation and childhood abuse evidence. Tennard's jury answered both special issues affirmatively and Tennard was sentenced to death. The Federal District Court denied Tennard's federal habeas petition in which he claimed that his death sentence violated the Eighth Amendment as interpreted in *Penry*, and denied a certificate of appealability (COA). The Fifth Circuit agreed that Tennard was not entitled to a COA. It applied a threshold test to Tennard's mitigating evidence, asking whether it met the Fifth Circuit's standard of "constitutional relevance" in *Penry* cases - that is, whether it was evidence of a "uniquely severe permanent handicap" that bore "nexus" to the crime. The court concluded that (1) low IQ evidence alone does not constitute a

uniquely severe condition, and no evidence tied Tennard's IQ to retardation, and (2) even if his low IQ amounted to mental retardation evidence, Tennard did not show that his crime was attributable to it. After this court vacated the judgment and remanded for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, the Fifth Circuit reinstated its prior opinion.

Held: Justice O'Connor, joined by Justices Stevens, Kennedy, Souter, Ginsburg and Breyer reversed the Fifth Circuit. Chief Justice Rhenquist, Justices Scalia and Thomas dissented.

The court held that because "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542, a COA should have issued.

(a) A COA should issue if an applicant has "made a substantial showing of the denial of a constitutional right," 28 U.S.C. §2253(c)(2), by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," 529 U.S. at 484, 120 S.Ct. 1595. Relief may not be granted unless the state court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. §2254(d)(1).

(b) The Fifth Circuit assessed Tennard's *Penry* claim under an improper standard. Its threshold "constitutional relevance" screening test has no foundation in this court's decision. Relevance was not at issue in *Penry*. And this Court spoke in the most expansive terms when addressing the relevance standard directly in *McKoy v. North Carolina*, 494 U.S. 433, 440-441, 110 S.Ct. 1227, 108 L.Ed.2d 369, finding applicable the general evidentiary standard that "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," *id.* at 440, 110 S.Ct. 1227. Once this low relevance threshold is met, the "Eighth Amendment requires that the jury must be able to consider and give effect to" a capital defendant's mitigating evidence. *Boyde v. California*, 494 U.S. 370, 377-378, 110 S.Ct. 1190, 108 L.Ed.2d 316. The Fifth Circuit's test is inconsistent with these principles. Thus, neither the "uniquely severe" nor the "nexus" element of the Fifth Circuit's test was a proper reason not to reach the substance of Tennard's *Penry* claims.

(c) Turning to the analysis that the Fifth Circuit should have conducted, reasonable jurists could conclude that Tennard's low IQ evidence was relevant mitigating evidence, and that the Texas Court of Criminal Appeals' application of *Penry* was unreasonable, since the relationship between the special issues and Tennard's low IQ evidence has the same essential features as that between those issues and Penry's mental retardation evidence. Impaired intellectual functioning has mitigating dimension beyond the impact it has on the ability to act deliberately. A reasonable jurist could conclude that the jury might have given the low IQ evidence aggravated effect in considering Tennard's future dangerousness. Indeed, the prosecutor pressed exactly the most problematic interpretation of the special issues, suggesting that Tennard's low IQ was irrelevant in mitigation, but relevant to future dangerousness.

Smith v. Texas, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004).

Issue: Did the nullification instruction submitted in this capital case allow the jury to accord full weight to the defendant's mitigating evidence.

Facts: In this capital murder case, the court in a per curiam opinion with Justices Scalia and Thomas dissenting, relied on *Tennard v. Dretke* and held that the supplemental nullification instruction directing a capital sentencing jury to give effect to mitigation evidence but allowing it to do so only by negating what would otherwise be affirmative responses to two special issues relating to deliberateness and future dangerousness, failed to adequately allow jurors to give effect to relevant mitigating evidence offered by the defendant.

Roper v. Simmons, 125 S.Ct. 1183 (2005).

Issue: Is execution of persons under 18 at time of their crimes prohibited by the Eight and Fourteenth Amendment?

Facts: At age 17, respondent Simmons planned and committed a capital murder. After he had turned 18, he was sentenced to death. His direct appeal and subsequent petitions for state and federal postconviction relief were rejected. This Court then held, in *Atkins* v. *Virginia,* 536 U. S. 304, that the Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the execution of a mentally retarded person. Simmons filed a new petition for state postconviction relief, arguing that *Atkins*' reasoning established that the Constitution prohibits the execution of a juvenile who was under 18 when he committed his crime. The Missouri Supreme Court agreed and set aside Simmons' death sentence in favor of life imprisonment without eligibility for release. It held that, although *Stanford* v. *Kentucky*, 492 U. S. 361, rejected the proposition that the Constitution bars capital punishment for juvenile offenders younger than 18, a national consensus has developed against the execution of those offenders since *Stanford*.

Held: Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, answered that persons who committed their offense when under 18 could not be executed. Justice O'Connor, joined by Chief Justice Rhenquist, Justices Scalia and Thomas dissented.

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

The Eighth Amendment's prohibition against "cruel and unusual punishments" must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework this Court has established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop* v. *Dulles*, 356 U. S. 86, 100-101. In 1988, in *Thompson* v. *Oklahoma*, 487 U. S. 815, 818-838, a plurality determined that national standards of

decency did not permit the execution of any offender under age 16 at the time of the crime. The next year, in *Stanford,* a 5-to-4 Court referred to contemporary standards of decency, but concluded the Eighth and Fourteenth Amendments did not proscribe the execution of offenders over 15 but under 18 because 22 of 37 death penalty States permitted that penalty for 16-year-old offenders, and 25 permitted it for 17-year-olds, thereby indicating there was no national consensus. 492 U. S., at 370-371. A plurality also "emphatically reject[ed]" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. *Id.,* at 377-378. That same day the Court held, in *Penry* v. *Lynaugh*, 492 U. S. 302, 334, that the Eighth Amendment did not mandate a categorical exemption from the death penalty for mentally retarded persons because only two States had enacted laws banning such executions. Three Terms ago in *Atkins,* however, the Court held that standards of decency had evolved since *Penry* and now demonstrated that the execution of the mentally retarded is cruel and unusual punishment. The *Atkins* Court noted that objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice, demonstrated that such executions had become so truly unusual that it was fair to say that a national consensus has developed against them. 536 U. S., at 314-315. The Court also returned to the rule, established in decisions predating *Stanford*, that the Constitution contemplates that the Court's own judgment be brought to bear on the question of the acceptability of the death penalty. *Id.,* at 312. After observing that mental retardation diminishes personal culpability even if the offender can distinguish right from wrong, *id.,* at 318, and that mentally retarded offenders' impairments make it less defensible to impose the death penalty as retribution for past crimes or as a real deterrent to future crimes, *id.,* at 319-320, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment places a substantive restriction on the State's power to take such an offender's life, *id.,* at 321. Just as the *Atkins* Court reconsidered the issue decided in *Penry*, the Court now reconsiders the issue decided in *Stanford*.

Both objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question, and the Court's own determination in the exercise of its independent judgment, demonstrate that the death penalty is a disproportionate punishment for juveniles.

As in *Atkins*, the objective indicia of national consensus here--the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice--provide sufficient evidence that today society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal," 536 U. S., at 316. The evidence of such consensus is similar, and in some respects parallel, to the evidence in *Atkins:* 30 States prohibit the juvenile death penalty, including 12 that have rejected it altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. Moreover, even in the 20 States without a formal prohibition, the execution of juveniles is infrequent. Although, by contrast to *Atkins*, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been less dramatic, the difference between this case and *Atkins* in that respect is counterbalanced by the consistent direction of the change toward abolition. Indeed, the slower pace here may be explained by the simple fact that the impropriety of executing juveniles between 16 and

18 years old gained wide recognition earlier than the impropriety of executing the mentally retarded.

Rejection of the imposition of the death penalty on juvenile offenders under 18 is required by the Eighth Amendment. Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins*, 536 U. S. at 319. Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. Juveniles' susceptibility to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson* v. *Oklahoma*, 487 U. S. 815, 835. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, *supra*, at 395. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. The *Thompson* plurality recognized the import of these characteristics with respect to juveniles under 16. 487 U. S., at 833-838. The same reasoning applies to all juvenile offenders under 18. Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty--retribution and deterrence of capital crimes by prospective offenders, *e.g., Atkins*, 536 U. S., at 319--provides adequate justification for imposing that penalty on juveniles. Although the Court cannot deny or overlook the brutal crimes too many juvenile offenders have committed, it disagrees with petitioner's contention that, given the Court's own insistence on individualized consideration in capital sentencing, it is arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on an offender under 18. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. When a juvenile commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. While drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest. *Stanford* should be deemed no longer controlling on this issue.

The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18. See, *e.g., Thompson*, *supra*, at 830-831, and n. 31. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom.

REVIEW GRANTED - AWAITING DECISION

Halbert v. Michigan, No. 03-10198.

Issue: Indigent defendant's right to appointed counsel for discretionary appeal of conviction following guilty plea.

Ruling Below: Defendant's application for leave to appeal is denied, in case in which defendant ultimately argued that counsel should have been appointed to assist in filing his application for leave to appeal and cited *Tesmer v. Granholm*, 114 F.Supp.2d 603 (E.D. Mich. 2000), which held that Michigan statute denying appointed counsel for discretionary first appeals to indigent defendants who have pleaded guilty or nolo contendere violates equal protection and due process requirements of U. S. Constitution.

Questions presented: (1) Do Michigan's law and practice of not appointing counsel to indigent defendants convicted by guilty plea violate petitioner's Fourteenth Amendment right to due process? (2) Is petitioner entitled to resentencing when counsel failed to render effective assistance by not objecting to improper scoring under Michigan's sentencing guidelines that resulted in petitioner receiving considerably longer sentence?

Mitchell v. Stumpf, No. 04-637.

Issue: Guilty pleas - Voluntariness - Evidence.

Ruling Below: Habeas corpus petitioner who was convicted of aggravated murder on theory that he was triggerman was denied due process right to fair trial by state's action in securing murder conviction of accomplice in separate trial on basis that accomplice was shooter; petitioner's guilty plea was unknowing and involuntary because he was not aware that specific intent was element of crime to which he pleaded guilty; petitioner is entitled to relief.

Questions presented: (1) Is representation on record from defendant's counsel and/or defendant that defense counsel has explained elements of charge to defendant sufficient to show voluntariness of guilty plea under *Henderson v. Morgan*, 426 U.S. 637 (1976)? (2) Does Due Process Clause require that defendant's guilty plea be vacated when state subsequently prosecutes another person in connection with crime and allegedly presents evidence at second defendant's trial that is inconsistent with first defendant's guilt?

Johnson v. California, 04-6964.

Issue: Jury selection - Peremptory strikes - Bias - Prima facie case.

Ruling Below: Objector seeking to establish prima facie case of group bias in use of peremptory challenges to remove potential jurors, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1985), must

show that it is more likely than not that other party's peremptory challenges, if unexplained, were based on impermissible group bias.

Question presented: In order to establish prima facie case under *Batson v. Kentucky*, must objector show that it is more likely than not that other party's peremptory challenges, if unexplained, were based on impermissible group bias?

Rompilla v. Beard, 04-5462.

Issue: Capital punishment - Jury instructions - Ineffective assistance of counsel.

Ruling Below: Habeas corpus petitioner's trial attorneys, who got to know petitioner well during course of their representation in capital murder trial and established good relationship with him, who interviewed petitioner and numerous members of his family in detail about petitioner's childhood, schooling, and background but were given no indication that petitioner had mental problems, was retarded, had suffered child abuse, or was alcoholic, and who sent petitioner to two forensic psychiatrists and one psychologist and relied on them to do whatever testing was appropriate, were not constitutionally ineffective regarding discovery of mitigating evidence during penalty phase of petitioner's capital trial, despite petitioner's claim that his attorneys were derelict in failing to obtain school, hospital, court, and prison records that reveal number of IQ test results in mentally retarded range, low achievement scores, placement in special education classes, childhood neglect, and problems with alcohol; neither prosecution's references at sentencing phase of petitioner's trial to his prior criminal conduct in order to establish aggravating factor of significant history of felony convictions, nor prosecutor's remarks stressing similarities between crime for which petitioner had previously been convicted and crime for which he was on trial, amounted to prosecution claim that petitioner presented future danger, and thus, under narrow standard of review prescribed by Antiterrorism and Effective Death Penalty Act, state court's refusal to apply to penalty phase of petitioner's trial requirement of *Simmons v. South Carolina*, 512 U.S. 154 (1994) that, when prosecution argues future dangerousness, defendant must be allowed to bring his parole ineligibility to jury's attention when only available alternative sentence to death is life imprisonment without parole - was neither "contrary to," nor "unreasonable application" of, clearly established U. S. Supreme Court precedent.

Questions presented: (1) Does *Simmons* require life-without-parole jury instruction when: only alternative to death sentence under state law is life without possibility of parole; jury asks court three questions about parole and rehabilitation during 11 hours of penalty-phase deliberations; prosecution's evidence is that defendant is violent recidivist who functions poorly outside prison and who killed someone three months after being paroled from lengthy prison term; and prosecutor argues that defendant is frightening repeat offender and cold-blooded killer who learned from prior convictions that he should kill anyone who might identify him? (2) Is state court decision denying *Simmons* claim "contrary to" and/or "unreasonable application" of clearly established Supreme Court law when state court held that history of violent convictions is irrelevant to jury's assessment of future dangerousness, while ignoring jury's questions about parole eligibility and rehabilitation and

prosecution's actual evidence and argument? (3) Has defendant received effective representation at capital sentencing when counsel does not review prior conviction records that counsel knows prosecution will use in aggravation, and when those records would have provided mitigating evidence regarding defendant's traumatic childhood and mental health impairment? (4) Has defendant received effective representation at capital sentencing when counsel's background mitigation investigation is limited to conversations with few family members; when few people with whom counsel spoke indicated to counsel that they did not know much about defendant and could not help with background mitigation; when other sources of background information, including other family members, prior conviction records, prison records, juvenile court records, and school records, were available but ignored by counsel; and when records and other family members would have provided compelling mitigating evidence about defendant's traumatic childhood, mental retardation, and psychological disturbances? (5) Does counsel's ineffectiveness warrant habeas relief under AEDPA when state court sought to excuse counsel's failure to obtain any records about defendant's history by saying records contained some information that was "not entirely helpful," by saying counsel hired mental health experts (even though those experts did not do any background investigation and never saw records), and by saying counsel spoke to some family members (even though those family members told counsel they knew little about defendant and could not help with mitigation); and when state court did not even try to address counsel's failure to interview other family members (who knew defendant's mitigating history) or counsel's complete failure to investigate aggravation that prosecution told counsel it would use?

Deck v. Missouri, 04-5293.

Issue: Capital case - Restraint of defendant in view of jury during penalty phase of trial.

Ruling Below: In first degree murder case in which jury recommended two death sentences, trial court did not abuse its discretion by overruling defendant's motion not to appear before jury at penalty phase wearing leg irons and handcuffed to belly chain, given lack of record of extent of jury's awareness of restraints, absence of claim that restraints impeded him from participating in proceedings, and risk of flight posed by evidence that defendant was repeat offender and had killed his two victims to avoid being returned to custody; even assuming that trial court abused its discretion by overruling defendant's motion, defendant has not demonstrated that outcome of his trial was prejudiced.

Question presented: Are Fifth, Sixth, Eighth, and Fourteenth Amendments violated by forcing capital defendant to proceed through penalty phase while shackled and handcuffed to belly chain in full view of jury, and if so, does burden fall on state to show that error was harmless beyond reasonable doubt, rather than on defendant to show that he was prejudiced?

Portions of the foregoing summaries are taken from FindLaw Supreme Court summaries, Criminal Law Reporter summaries and the Supreme Court syllabuses.