Criminal Law and Procedure

The Supreme Court's 21st Century Trajectory in Criminal Cases

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With the recent, important changes in the composition of the U.S. Supreme Court, the Court has effectively pushed the field of criminal law and procedure into new and occasionally unintended directions. Generally, the decisions have not appeared especially partisan or ideologically driven. Nor does any particular alignment of justices regularly manifest itself. There have, however, been several interesting cases that suggest certain trends for the future—in particular, noteworthy developments in sentencing, the death penalty, and Fourth Amendment jurisprudence. Some of these cases were decided before all of the personnel changes took place, but they remain relevant in terms of identifying trends.

I. SENTENCING

Foremost in the category of cases with unforeseen results are the decisions following the Court's holding in *Apprendi v. New Jersey* (2000).[1] In *Apprendi*, the Court held that the Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, require any fact used to enhance a sentence beyond the statutory maximum, other than the fact of a prior conviction, be found by a jury beyond a reasonable doubt. The *Apprendi* Court effectively negated state statutory provisions that allowed a trial judge to enhance a sentence if the judge found, by a preponderance of the evidence, certain conditions which related to the offense. In *Apprendi*, the enhancement was based on the finding that the defendant committed the crime with a purpose to intimidate a person or group because of, *inter alia,* race.

The decision triggered a flurry of questions, cases, and quandaries concerning its application in state court to consecutive sentencing and the death penalty, as well as to retroactivity and harmless error,[2] and in federal court to the entire sentencing scheme set forth in the Sentencing Reform Act of 1984.[3]

Within two years of *Apprendi*, the Supreme Court in *Ring* v. *Arizona*[4] held that it was impermissible for "the trial judge, sitting alone" to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty.[5] The Court rested the jury trial guarantee on whether an increase in a defendant's authorized punishment was imposed contingent on a finding of a fact. Sidestepping what constitutes "authorized punishment," and relying on *Apprendi*, the Court viewed Arizona's enumerated aggravating factors as "the functional equivalent of an element of a greater offense," calling for the Sixth Amendment guarantee of a jury determination.[6]

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By 2004, the Supreme Court had before it another case, *Blakley v. Washington*,[7] arising from a state court, but one involving a statutory sentencing scheme that provided for a "standard range" of sentencing. The state trial judge had enhanced the defendant's sentence for second degree kidnapping to 90 months, based on an aggravating factor—the defendant's cruelty.[8] This was above the upper limit of the "standard range" (53 months), but below the statutory maximum for second degree kidnapping (10 years). In *Blakley*, the Court—in a 5-4 decision authored by Justice Scalia—followed *Apprendi* to invalidate the sentence, holding the defendant had the right to have any fact used to enhance the sentence above "statutory maximum of the standard range" be determined by the jury beyond a reasonable doubt. The Court treated the upper limit of the state's standard range of sentencing as the "statutory maximum," above which the constitutional due process and jury guarantees applied.

The consequences of the *Blakely* decision were immediately apparent. Justice O'Connor wrote: "[B]ecause the practical consequences of today's decision may be disastrous, I respectfully dissent," noting the "'effect' of today's decision will be greater judicial discretion and less uniformity in sentencing." She pointed to the "damage" that would be done to the state and federal statutory schemes meant to replace earlier indeterminate sentencing laws, the latter of which she described as a "system of unguided discretion [that] inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories." The federal scheme meant to replace indeterminate sentencing was the Sentencing Reform Act (SRA). It was the next target.

United States v. Booker and the Sentencing Reform Act

Federal sentencing had been reformed significantly with the passage of the SRA in 1984. The SRA was written to overcome perceived deficiencies in indeterminate sentencing and the rehabilitative ideal.[9] It created the United States Sentencing Commission, and directed the Commission to devise guidelines to be used for sentencing, effectively making all federal criminal sentences determinate.[10] Importantly, it made the Sentencing Commission's guidelines binding on the courts, allowing the judge to depart from the applicable guideline only if the judge found an aggravating or mitigating factor that the Commission did not adequately consider when formulating guidelines.[11] If such a factor were found, the judge had to state "the specific reason" for imposing a sentence different from that described in the guideline.

By 2005, the Court faced squarely whether *Apprendi* and *Blakely* required finding a Sixth Amendment violation in the application of the federal sentencing guidelines under the SRA, with *United States v. Booker* and *United States v. Fanfan*. The case involved sentencing by a federal judge who found by a preponderance of evidence factors that enhanced Booker's

sentence. Booker appealed to the Seventh Circuit, claiming that the sentencing guidelines violated his Sixth Amendment rights, as the judge, and not a jury, determined his sentencing range with facts other than his criminal history. The Seventh Circuit found that the judge's application of the guidelines did violate the Sixth Amendment under *Blakely*. On petition from the United States, the Supreme Court took both Booker's case and a similar case from Maine, *United States v. Fanfan*, to consider whether *Apprendi* applied to the federal sentencing guidelines.

The Court found a Sixth Amendment violation, but it issued two five-member majority opinions, one authored by Justice Stevens and another by Justice Breyer, with only Justice Ginsburg joining both opinions. Justice Stevens noted the federal sentencing guidelines are mandatory and binding on sentencing judges. Were they merely advisory, their application would not implicate the Sixth Amendment. Because, for *Apprendi* purposes, the maximum sentence a judge may impose is solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, the government, under Justice Steven's opinion, would have to prove to the jury all facts needed for the judge to consider in determining the sentencing range. Justice Breyer's majority, however, rejected this as a remedy, and held the mandatory nature of the guidelines must be severed from the overall sentencing law in order to overcome the Sixth Amendment violation, making the guidelines advisory only.

In reaching its decision, the majority severed and excised two provisions of the SRA: the provision that made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), and the provision governing appellate review of sentences, including de novo review of departures from the applicable range. Accordingly, after *Booke*r the Guidelines are no longer binding on sentencing courts, and they are reviewable for "unreasonableness" on appeal. The Court noted that its decision had to be applied to all cases on direct review.

In later cases, the Court plowed ahead with what standards of "reasonableness" courts of appeals should apply when reviewing sentences imposed by district courts. First, in *Rita v. United States* (2007),[12] the Court tackled whether a sentence ought to be presumed reasonable when it is *within* the range recommended by the sentencing guidelines, holding that when a district judge's discretionary decision in a particular case accords with the guidelines, the court of appeals may presume that the sentence is reasonable. Just weeks before the *Rita* decision, the Court had dismissed as moot *Claiborne v. United States*,[13] a case that involved a sentence *below* the range recommended by the guidelines. In *Gall v. United States,*[14] the Court reached the question of a sentence *below* the bottom of the guideline range and found it reasonable under a deferential abuse-of-discretion standard. And in *Kimbrough v. United States*[15] the Court first noted that *Booker* made the guidelines as applied to various cocaine offenses (both crack and powder cocaine) merely advisory. It then held that a district judge may consider the disparity between the guidelines' treatment of crack and powder offenses and subsequently determine that a *within-guidelines* sentence is "greater than necessary" to serve the objectives of sentencing.

These decisions have left many wondering how to proceed post-*Booker*. The Court has made clear that the "recommended" guidelines range is relevant, but that courts of appeals must review all sentences—"whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard."[16] After the *Kimbrough* decision was released, there was much commentary on the lack of uniformity and consistency that would result. Not surprisingly, at the *Kimbrough* argument, Justice Scalia openly stated: "Indeed, it might be quite impossible to achieve uniformity through advisory guidelines, which is why Congress made them mandatory." Justice Thomas went further, writing in his dissenting opinion that, in making the guidelines mandatory, "Congress did not mandate a reasonableness standard of appellate review.… By rejecting this statutory approach, the *Booker* remedial majority has left the Court with no law to apply and forced it to assume the legislative role of devising a new sentencing scheme."[17]

Booker's lasting impact is that it firmly establishes the federal sentencing guidelines as advisory. Some prognosticators have suggested that this would return the courts to the situation before the SRA. Whether or not that is the case, *Booker* has made clear that the sentencing guidelines remain an important consideration in the imposition of federal sentences. Sentencing judges still must take account of the guidelines and the other sentencing goals reflected in the SRA. The Sentencing Commission also has continued statutory responsibilities.

II. TRENDS IN CAPITAL CASES

In capital cases, the Supreme Court has largely followed a middle path for the last twenty years. The Court has pruned back the application of the death penalty by excluding certain categories of murders and murderers. At the same time, the Court has taken steps to limit the obstruction of the death penalty by some hostile federal courts and has largely refrained from imposing new procedural requirements under the "death is different" rubric that characterized its jurisprudence from the 1970s through the mid-1980s. However, hardly anyone is satisfied with the status quo, and there are indications that the Court could take a sharp turn in the next few years. That turn could be in the direction of finally making the death penalty effective again, or it could be in the direction of abolition of the punishment.

Two Decades of Turmoil

Historically, there have been very few constitutional restraints on sentencing procedure. Sentences could be mandated strictly from the crime committed,[18] or the sentencing judge could be given wide discretion over what sentence to impose and what factors and evidence to consider in imposing it.[19] However, in the 1972 case of *Furman v. Georgia*,[20] the Supreme Court grafted a procedural requirement for capital cases on to the Eighth Amendment and struck down all of the then-existing death penalty statutes on the ground that their broad scope and excessive discretion rendered them arbitrary in application. When the Court considered a new generation of capital sentencing statutes four years later in *Gregg v. Georgia,*[21] and its companion cases,[22] it decided that only "guided discretion" statutes, narrowing the scope of potentially

capital cases but providing for sentencer discretion, would pass constitutional muster. Mandatory sentencing systems, enacted by California, New York, and several other states in the well-founded belief that they were required by *Furman*, were declared unconstitutional in *Woodson* v. *North Carolina*.[23]

Furman was not expressly based on the danger of racial prejudice. However, as Justice Thomas noted years later, "[i]t cannot be doubted that behind the Court's condemnation of unguided discretion lay the specter of racial prejudice—the paradigmatic capricious and irrational sentencing factor."[24] There can also be little doubt that the prejudice of greatest concern was prejudice against black defendants, i.e., that black men were being sentenced to death while white men were sentenced to life for indistinguishable crimes.[25] The post-*Furman* reforms approved in the *Gregg* cases were a great success in addressing this problem, as the opponents' own studies reveal. A study of Georgia cases funded by the NAACP Legal Defense and Education Fund concluded, "What is most striking about these results is the total absence of any race-of-defendant effect."[26]

In the years that followed *Gregg*, the Supreme Court was not content to simply leave in place the reforms it had wrought. Instead, it continued to invent additional procedural requirements for capital cases. Narrow, shifting majorities on the Court produced a haphazard serious of decisions with no unifying theme. Justices Brennan and Marshall remained dead-set against the death penalty in all cases, and occasionally they garnered enough additional votes to strike down a sentence that appeared unfair or unjustified to another three justices. The Supreme Court struck down, as unconstitutionally vague, language that numerous state legislatures had copied from the draft Model Penal Code.[27] The Court forbade the use of probation reports in the way that the courts had routinely used them in noncapital cases and a way it had previously upheld in a capital case.[28] In *Booth v. Maryland* (1987),[29] the Court declared victim impact evidence unconstitutional in capital cases. The next year in *Mills v. Maryland*, the Court created a new requirement that jurors cannot be required to agree on the mitigating circumstances, but rather that each juror must decide them for himself, striking down a standard instruction drafted by a committee of the Maryland bar and approved as a rule of court by that state's highest court.[30]

By far the most extensive of the post-*Gregg* requirements, though, was the rule of *Lockett v. Ohio*.[31] That case expanded the requirement of sentencer discretion to include a requirement that the sentencer be allowed to consider any and all circumstances the defendant proffered as mitigating.[32] This sweeping judicial fiat had no basis in the text or history of the Eighth Amendment. Ironically, it was authored by Chief Justice Warren Burger. Burger had been appointed by President Nixon, who had campaigned on a promise to appoint "strict constructionists" to the Court. Justice White denounced the opinion, although concurring in the result for other reasons, as a betrayal of the *Furman* principle of evenhandedness.[33] Just two years earlier, the Court had upheld sentencing systems in Florida and Texas that instructed the juries to consider a discrete number of circumstances. Eventually, the Court held in *Hitchcock v. Dugger* [34] and *Penry v. Lynaugh* [35] that *Lockett* required the reversal of sentences in cases where the jury had been instructed precisely in the terms of the statutes it had previously upheld.

A Procedural Plateau

In the 1990s and continuing to the present day, the Court's capital sentencing procedure jurisprudence has been largely in a state of equilibrium. The Court has not created major new rules unique to capital cases, as it did previously, but with one exception it has continued to enforce the restrictions it previously created. The equilibrium is probably due in part to a realization on the part of the Court that its procedural mandates had gone far enough. As early as 1987, the Court had declined to open up a major new branch of litigation based on statistics claiming sentencing bias based on the race of the victim.[36] However, the trend was also undoubtedly affected by changes in the Court's membership.

William Rehnquist, who had consistently dissented from expansion of constitutional restrictions on capital sentencing, succeeded Warren Burger as Chief Justice, and the equally conservative Antonin Scalia took Rehnquist's associate justice seat. Anthony Kennedy succeeded Lewis Powell and at least initially was more restrained about inventing constitutional limitations.[37] David Souter succeeded William Brennan, and while he has not been as favorable to the prosecution in criminal cases as many had hoped, he was certainly much more favorable than the intransigent Brennan.[38]

Justice Scalia had originally gone along with enforcing precedents established before he joined the Court. He wrote the *Hitchcock* decision, for example. However, by 1990, Justice Scalia denounced the contradiction between the evenhandedness principle of *Furman* and the *Lockett* line of cases and announced he would no longer follow the latter.[39] He concluded, as Justice White had earlier, that the *Lockett* rule could not be reconciled with the principle of *Furman*, and he announced that he would not follow *Lockett* in the future.

In the 1991 case of *Payne v. Tennessee*,[40] the Court overruled *Booth v. Maryland* and allowed victim impact evidence in capital cases. *Booth* and *Lockett* in combination had created the intolerable imbalance of allowing the defense to bring in all the problems of the defendant's entire life, while the victim remained little more than a name and an unseen, unknown abstraction.[41] *Booth* is the only pro-defendant capital case to be overruled in the modern era, though. All the other "death is different" restrictions on sentencing procedure, no matter how thin their justification, remain as constitutional mandates, beyond the ability of legislatures to modify in the light of experience.

Justice Marshall's dissent in *Payne* was his last death penalty opinion. He retired that summer and was succeeded by Justice Thomas, the most dramatic change in viewpoint of any Supreme Court succession in many years. By 1993, in a concurring opinion in *Graham v. Collins*,[42] Justice Thomas concluded that the "anything goes" rule of mitigation in the *Lockett* line of cases had gone too far and "makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman*."[43] However, other developments precluded a major correction of this dubious line.

First, Justice Blackmun's position on constitutional limitations on capital punishment had drifted a long way. He had always been personally opposed to it, but in 1972 he dissented in *Furman*, stating his opposition as a matter of policy but acknowledging that the policy was not for the judiciary to make. "We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible."[44] By 1996, he had yielded to temptation and announced that he would vote for exactly the overstep he had denounced twenty-four years earlier.[45]

Second, Bill Clinton was elected President in 1992. Justice White retired at the end of that term and was succeeded by Ruth Bader Ginsburg. While not a hard-core opponent of capital punishment in the Brennan-Marshall mode, she tends to favor the defendant in capital cases to a considerably greater degree than did Justice White. Stephen Breyer succeeded Justice Blackmun the following year, though that succession was not a large change, given how far Justice Blackmun had drifted.

Third, Justice O'Connor, who held the deciding vote on many matters in this era, remained solidly committed to maintaining and even expanding the *Lockett* line. In a 1987 case of the rape and murder of a teenage girl, she wrote of "defendants who commit criminal acts that are *attributable* to a disadvantaged background,"[46] simply assuming a hotly disputed causal connection between background and crime. It is evident in her opinions from *Brown* until her retirement that she considers the "bad childhood" defense strongly mitigating,[47] while others consider it weak to irrelevant.[48]

As discussed in Part I, the Court has made one major change in sentencing procedure that affects capital cases, but it was not based on a "death is different" rationale. In a line of cases beginning with *Apprendi v. New Jersey*,[49] a noncapital case, the Court extended the Sixth Amendment right of jury trial to certain factors affecting sentencing. Specifically, under *Apprendi* the jury trial right extends to factors that have a function which the Court finds practically indistinguishable from elements that distinguish a higher degree of offense from a lower one. In *Ring v. Arizona*,[50] the *Apprendi* rule was applied to disapprove a practice expressly approved by the Court against the same challenge four times from 1976 to 1990.[51] The *Ring* opinion contains one brief paragraph on stare decisis,[52] and it makes no mention at all of the massive reliance of multiple states on the *Walton* precedent.

Trimming the Outliers: Lockett, Habeas, and Effective Assistance

With the close division on the Court preventing major doctrinal changes in either direction on capital sentencing procedure, much of Court's capital case work since 1991 has consisted of correcting what it perceives as errors in application of its precedents by lower courts. Those precedents were being applied quite differently in different courts and regions. The Supreme Court has reversed death sentences where it believed lower courts had been too limited in applying the *Lockett* rule[53] and reinstated them where the lower courts, primarily the Ninth Circuit, had been too expansive.[54]

The Court also moved to rein in the excessive reversals of death sentences by changing the law of habeas corpus. That writ had originally been a very limited procedure to review the legality of detention, and a habeas court could not look behind a judgment of conviction by a court of general jurisdiction.[55] At the height of the Warren Court era, habeas corpus had become for all practical purposes a second appeal, and a third, and a fourth.[56] Federal district courts had as much leeway to overturn decisions of the states' highest courts as did the Supreme Court itself, and there were no firm limits on the number of times a judgment could be attacked. State court decisions that correctly followed Supreme Court precedents in effect at the time could be attacked in federal court with a claim that a new rule should be created and imposed retroactively on the states.[57]

In 1989, the Court cracked down on the creation and application of new rules of procedure on habeas corpus in *Teague v. Lane*.[58] In 1991, the Court limited the repeated use of habeas corpus to attack a judgment already upheld on a first petition.[59] In 1996, Congress acted to crack down harder on repeated petitions and to forbid lower federal courts from overturning state court decisions merely because the courts disagreed on a question not yet settled by the Supreme Court. The state court decision could be collaterally attacked only if it were contrary to or an unreasonable application of Supreme Court precedent.[60] In the 2000 case of *Williams v. Taylor*,[61] the habeas petitioner sought to effectively nullify this provision by interpreting it to make essentially no change in the law, contrary to all the statements of both supporters and opponents as the bill passed through Congress,[62] and contrary to the interpretation of every federal court of appeals to consider the question to that point. Astonishingly, four justices voted for this repeal-by-interpretation,[63] with only a bare majority affirming that the statute meant what everyone believed it meant when it was enacted.[64] The Court has applied this statute numerous times since then to correct misuses of habeas corpus by lower federal courts to overturn death sentences.[65]

From 2000 through the end of Justice O'Connor's tenure, the Court gave closer scrutiny to claims of ineffective assistance of counsel in the penalty phase. The Court had recognized a right to such assistance in *Strickland v. Washington* (1984),[66] but it denied relief in that case and did not grant certiorari to review a denial of relief on that ground until *Williams v. Taylor*.[67] In *Williams*, the Court held 6-3 that the defendant's attorneys had been ineffective in their failure to discover and present the "bad childhood" mitigation evidence.[68] Three years later, in *Wiggins v. Smith*, a 7-2 opinion by Justice O'Connor, counsel was deemed ineffective for not hiring a "forensic social worker" to compile a "social history report."[69]

Finally, in 2005 the Court overturned a death sentence in a case from the Third Circuit, *Rompilla v. Beard*.[70] Rompilla's trial counsel had investigated his family history by interviewing the members of his family, a seemingly reasonable approach. The Court found that he was ineffective because a file he should have examined for other reasons contained leads that contradicted what the family had told him. Justice Kennedy wrote the dissent in this 5-4 case. "Today the Court brands two committed criminal defense attorneys as ineffective... because they did not look in an old case file and stumble upon

something they had not set out to find.... Under any standard of review the investigation performed by Rompilla's counsel in preparation for sentencing was not only adequate but also conscientious."[71] Seven months later, Justice O'Connor was succeeded by Justice Alito, the author of the Third Circuit opinion upholding Rompilla's sentence. The Court has not granted review to any death row inmates claiming ineffective assistance in the penalty phase since then.

Trimming the Outliers: Categorical Exclusions

While the Court has pulled back from creating new sentencing procedure requirements specifically for capital cases, it has moved full speed ahead creating new categorical exclusions. That is, the Court has carved out categories of offenders and offenses exempt from the death penalty altogether, regardless of the procedure by which the penalty is determined.

Justice White first proposed a categorical exclusion in place of a procedural requirement in his opinion concurring in the judgment in *Lockett*. Rather than requiring that the jury be allowed to consider any and all mitigating circumstances, a rule he saw as an "about-face" from *Furman*,[72] Justice White would have exempted Sandra Lockett on the ground that she was merely an accomplice to a robbery and had no intent to kill.[73] Justice White later found a majority for his no-intent rule as applied to felony-murder accomplices in *Enmund v. Florida*,[74] but the Court later backed off somewhat in *Tison v. Arizona*.[75] Execution of killers under 18 received a similarly muddled treatment in *Thompson v. Oklahoma*[76] and *Stanford v. Kentucky*.[77] *Penry v. Lynaugh* effectively precluded execution of severely or profoundly retarded persons,[78] but mild to moderate retardation was a mitigating factor to be weighed by the sentencer, not a categorical exclusion.[79] The Court excluded the death penalty as the punishment for rape of an adult woman, reserving the question of rape of a child, in *Coker v. Georgia*.[80]

Beginning in 2002, the Court's attitude toward categorical exclusions suddenly changed. *Atkins v. Virginia*[81] excluded the mildly and moderately retarded, effectively overruling *Penry*. The 6-3 majority included Justice O'Connor, who wrote *Penry*, and Justice Kennedy, who joined that part of *Penry*.[82] Three years later, *Roper v. Simmons*,[83] a bare majority redrew the age limit at the eighteenth birthday. Justice Kennedy wrote the opinion. After another three years, *Kennedy v. Louisiana* answered the question left open in *Coker* and prohibited the death penalty for any nonfatal crime against an individual victim.[84] Justice Kennedy wrote the opinion again, and again the decision was 5-4. The two newest justices, Chief Justice Roberts and Justice Alito, were in the dissent. In six years, the Court had gone much further with categorical exclusions than it had in the preceding twenty-six.

Where Next?

Why the sudden change? Justice Kennedy's opinion in *Kennedy* contains a hint. The opinion notes the *Furman* requirement of greater consistency, the *Lockett* requirement of greater individualization, and the "tension" between the two. "This has led some Members of the Court to say we should cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude," the opinion says, citing Justice Scalia's *Walton* concurrence. "For others the failure to limit these same imprecisions by stricter enforcement of narrowing rules has raised doubts concerning the constitutionality of capital punishment itself," the opinion continues, citing Justice Stevens' concurrence in *Baze v. Rees*. And what of the Court as a whole, as distinct from its individual members? "Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed."[85]

This intriguing passage states that the recent categorical limitations are a response to a body of caselaw that all recognize is unsatisfactory. The long series of narrowly divided opinions since 1972 has not produced a "happy medium" but rather a situation that no one is happy with. Thirty-six years after the anti-death-penalty side thought it had abolished that punishment, America still has the death penalty. Twelve years after Congress enacted the Antiterrorism and Effective Death Penalty Act, though, the death penalty is still ineffective. The process of review takes too long, costs too much, and too often results in reversal. The Supreme Court has long recognized deterrence as a major reason for the death penalty,[86] and there is now strong empirical support for a deterrent effect.[87] However, there is also empirical support for the common belief that the deterrent effect is weakened by long delays and frequent overrulings.[88]

Does this passage from *Kennedy* presage a major change in the Court's death penalty jurisprudence? Given that no one believes that the status quo is desirable policy or mandated by the original understanding of the Constitution, a major change seems due. If there is a change, what direction will it take? That may depend, to a large extent, on who is elected President this November. With the Court as close to even division as it is, a single appointment could make a dramatic shift. It is not difficult to see new appointees from the political left being willing to take the path that Justices Blackmun and Stevens have already taken, that the problems are unsolvable and capital punishment must be scrapped altogether. Even without such a sweeping decree, capital punishment could be slowly killed by application of the *Lockett* and *Strickland* rules in a way that makes it prohibitively expensive. A candidate who states that he personally supports the death penalty may nonetheless appoint justices who will end it.

On the other hand, it is equally likely that new appointees with a conservative bent may agree with Justices Scalia and Thomas that *Lockett* is both illegitimate and the cause of the problem, and that *Lockett* should simply be overruled. If we could eliminate all the litigation over *Lockett* and over whether counsel were effective in investigating and presenting the evidence that *Lockett* requires, a very large chunk of the review process would disappear. Add full enforcement of the Antiterrorism and Effective Death Penalty Act of 1996, and a genuinely enforced death penalty could finally be at hand.

III. THE FOURTH AMENDMENT

In recent years, the Supreme Court has continued to protect the privacy and sanctity of the home.[89] Vehicles have received less protection, and some categories of people— notably parolees—have been stripped of some privacy protections. In many of these cases, the Court seems interested in drawing bright lines. The issue worthy of most attention relates to the exclusionary rule. At least one of the recent decisions suggests

that the Court is prepared to consider significant developments in that rule. With four search and seizure cases on the docket this fall, the Court will have a good opportunity to leave its mark in this area.

The Home

In *Kyllo v. United States* (2001),[90] a federal agent used a thermal-imaging device to scan a triplex to determine whether Kyllo was using high-intensity lamps to grow marijuana. The results led to a warrant and to Kyllo's arrest. In a 5-4 opinion delivered by Justice Scalia, the Court held that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." Justice Stevens, dissenting, argued that the procedure: "did not invade any constitutionally protected interest in privacy," and was therefore not a violation of the Fourth Amendment.

The Roberts Court rendered its first Fourth Amendment opinion in *Georgia v. Randolph*.[91] In a 5-3 decision, with Justice Alito taking no part, the Court held that without a search warrant, police could not constitutionally search a house in which one resident consents to the search while another resident objects. The Court distinguished this case from the "co-occupant consent rule" announced in *United States v. Matlock*,[92] which permitted one resident to consent in the co-occupant's absence.

Scott Randolph and his wife Janet had separated, but were residing in the same home when the events in question took place. She called the police to report that after a domestic dispute her husband took their son away. When officers reached the house, in addition to her other complaints, she told them that her husband used cocaine. Shortly thereafter, Scott returned and denied the cocaine charge. (He said that it was his wife who abused drugs and alcohol.)

One of the officers asked Scott for permission to search the house, but he refused to give it. The officer then asked Janet for consent, which she readily gave. In fact, she led the officer upstairs to a bedroom that she identified as Scott's, where the sergeant noticed a section of a drinking straw with a powdery residue. He left the house to get an evidence bag from his car. When the officer returned to the house, Janet withdrew her consent, but the police obtained a search warrant, and they seized evidence that was used against Scott at trial.

The Supreme Court held that when two co-occupants are present and one consents to a search while the other refuses, the search is not constitutional. Justice David Souter, in the majority opinion, wrote: "it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions." As such, a police officer conducting a search in this situation would not meet the reasonableness requirement of the Fourth Amendment. The Court emphasized a theme that runs through many of its recent Fourth Amendment cases: the formalism and simplicity that comes with a bright line rule.

In his first published dissent, Chief Justice Roberts argued that when a co-tenant shares his home he should assume the risk that his co-occupant may admit authorities without his consent:

> A person assumes the risk that his co-occupants—just as they might report his illegal activity or deliver his contraband to the government—might consent to a search of areas over which they have access and control.

Vehicles

In *Brendlin v. California*,[93] the Roberts Court unanimously held that when a vehicle is stopped at a traffic stop, the passenger as well as the driver is seized within the meaning of the Fourth Amendment. In this case, police stopped Karen Simeroth's car for expired registration. Bruce Brendlin, who had a warrant out for his arrest, was riding in the passenger seat. Police found methamphetamine, marijuana, and drug paraphernalia in the car and on Simeroth's person. In state court, Brendlin filed a motion to suppress the evidence, claiming that the stop was an unreasonable seizure in violation of the Fourth Amendment.

The trial court held that Brendlin had not been "seized" within the meaning of the Fourth Amendment, so it denied the motion. The California Supreme Court held that the driver of the car is the only one detained in a traffic stop. The movement of any passengers is also stopped as a practical matter, but the court considered this merely a necessary byproduct of the detention of the driver. Since he was never "seized," he could not claim a violation of the Fourth Amendment.

In an opinion authored by Justice Souter, the Court said: "We resolve this question by asking whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself." The Court concluded that Brendlin would have reasonably believed himself to be detained and subject to the authority of the police. Thus, he was justified in asserting his Fourth Amendment rights.[94] To accept the state's arguments, the Court said, would be to "invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal."[95]

Parolees

Randolph and *Brendlin* are generally considered pro-defendant and pro-civil liberties. Other cases have favored police authorities and their search for evidence. *Samson v. California*,[96] decided just weeks after Justice O'Connor left the Court, determined that parolees may be subjected to warrantless, suspicionless searches of their person and property by government officials at any time.[97]

A police officer recognized Donald Samson on the street and knew him to be on parole. The officer had heard from other officers that Samson "might have a parolee at large warrant." He parked his police car and approached Samson. Sampson told the officer that he "was in good standing with his parole agent," and the officer confirmed over his police radio that Samson was not subject to a parole warrant. He was, however, on parole for a prior parole violation.

The officer conducted a search of Samson based solely on his status as a parolee. One of Samson's conditions of parole stated that he had agreed to "search and seizure by a parole officer or other peace officer at any time of the night or day,

with or without a search warrant or with or without cause." This condition was required by California Penal Code Section 3067 (a). The officer found methamphetamines in Samson's possession. In a 6-to-3 decision authored by Justice Thomas, the Court held that Samson "did not have an expectation of privacy that society would recognize as legitimate." Parole allows convicted criminals out of prison before their sentence is completed. An inmate who chooses to complete his sentence outside of direct physical custody, however, remains in the Department of Correction's *legal* custody until the conclusion of his sentence, and therefore has significantly reduced privacy rights. The written consent to suspicionless searches, along with reduced privacy interests as a parolee, combined to make the search constitutional.[98]

Justices Stevens, Souter, and Breyer dissented, arguing that parolees have an expectation of privacy greater than that of prisoners, which was violated in this case.

The Exclusionary Rule

Certainly the most controversial Fourth Amendment case yet to come from the Robert's Court is *Hudson v. Michigan*,[99] in which the majority called into question the central role of the exclusionary rule to Fourth Amendment analysis. In a 5-4 decision that was re-argued after Justice O'Connor's departure, the Court affirmed the Michigan State Court of Appeals in refusing to exclude evidence gathered in legally questionable circumstances.

The Detroit police, executing a search warrant for narcotics and weapons, entered Booker Hudson's home in violation of the "knock-and-announce" rule. The Court, in an opinion by Justice Scalia, held that the exclusionary rule should not be applied in this circumstance. In so holding, the Court explained that the knock and announce rule exists to protect interests such as preventing "violence in supposed self-defense by the surprised resident," giving the suspect "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry," and giving residents "the 'opportunity to prepare themselves for' the entry of the police." These interests, as the Court reasoned, have "nothing to do with the seizure of the evidence." As such, the Court held that the exclusionary rule should not apply.

On one hand, *Hudson* might be seen as adding just one additional exception to numerous others that attach to the exclusionary rule. Unlike previous cases, however, a majority of the Court strongly implied that several existing remedies are viable alternatives, or even superior alternatives.[100] That may mean that the Court is prepared to quit chipping away at the exclusionary rule, and actually re-think its viability as the primary remedy for each and every Fourth Amendment violation, regardless of the circumstances of the harm that it may cause.

Justice Scalia wrote in his opinion for the majority that: "We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost a half century ago."[101] New developments in the law since the exclusionary rule was originally applied to the states—such as the expansion of civil rights plaintiffs' access to § 1983 suits, the provision of attorneys fees to victorious parties in such suits, and "a new emphasis on internal police discipline"—justify creating broad exceptions to the exclusionary rule. The lingering question, of course, is whether a rule that is so riddled with exceptions should remain the rule.[102]

The Court's most recent Fourth Amendment case, *Virginia v. Moore* (2008),[103] held that when state law calls for non-custodial ticketing, an unauthorized custodial arrest can nevertheless support a search incident to the arrest of the defendant. Virginia police stopped David Lee Moore after receiving a radio call alerting them that he was driving on a suspended license. State law specified that this infraction called for the issuance of a citation and summons to appear in court. The officers, however, arrested Moore. After reading him his *Miranda* rights, they asked for and received consent to search his hotel room. Once they arrived at the room, they decided to search his person, and they discovered sixteen grams of crack cocaine.

The Court held unanimously that the search did not violate Moore's constitutional rights. Writing for an eight-justice majority (with Ginsburg concurring), Justice Scalia stated that the existence of probable cause gave the arresting officer the right to make the arrest and perform a reasonable search of the accused to ensure the officer's safety and to safeguard evidence. States may impose stricter requirements, Scalia wrote, but "when states go above the Fourth Amendment minimum, the Constitution's protections concerning search and seizure remain the same."

As with several search and seizure cases that it has decided recently, the Court seemed interesting in making a bright line rule to assist officers who have to make the decisions. There are also elements of concern about the reach of the exclusionary rule in this case. That certainly is where most Court observers are focused. There are now so many exceptions to the exclusionary rule, it seems clear that unless the Court's precedents absolutely require its application, a majority of the justices are reluctant to exclude evidence for a reason unrelated to its reliability.

The exclusionary rule was adopted in federal courts in 1914.[104] It was not, however, made binding on the states until 1961.[105] Since the vast majority of criminal cases have always been tried in state courts, the exclusionary rule had only a limited impact. When it was confined to federal cases, as Justice Rehnquist pointed out, its chief "beneficiaries... were smugglers, federal income tax evaders, counterfeiters, and the like."[106] Once it was made applicable to the states, it was immediately controversial.

One of the exclusionary rule's strongest critics was Chief Justice Burger. In *Bivens v. Six Unknown Federal Narcotics Agents*,[107] he filed a dissent, arguing that civil sanctions or other means could be used to enforce constitutional rights. The idea of police deterrence, according to Burger, was nothing more than a "wistful dream" with no support, because there was no direct sanction of the police. The prosecutor, who ends up losing the case, had no part in the wrongdoing; the time lapse between the violation and the sanction was so long that any educational value was lost; that police do not always aim toward prosecution, but rather toward stopping crime; the cost (releasing criminals) was

too high; and that there was no proportionality to this remedy (a murderer gets the same relief as a petty criminal).

Over the years, the Court has tried to address many of Burger's concerns by crafting exceptions.[108] Thus, evidence which is acquired in violation of the Fourth Amendment can be used or heard by a grand jury in determining the sufficiency of an indictment, and it can also be used in civil suits.[109] It can also be admitted to impeach the credibility of the defendant's trial testimony[110] or at sentencing.[111] The inevitable discovery doctrine allows admission of evidence that might otherwise have been excluded, and the independent source exception allows evidence to be admitted in court if knowledge of the evidence is gained from an independent source that is completely unrelated to the illegality at hand.[112] If a magistrate is erroneous in granting a police officer a warrant, and the officer acts on the warrant in good faith, then the evidence resulting in the execution of the warrant is not suppressible.[113]

These exceptions were carved into the exclusionary rule because it is far too blunt of a remedy. There are cases where exclusion makes sense, but too often it fails to protect the citizen's constitutional rights, it interferes with the efforts at trial to reach justice, and it makes society more dangerous by letting wrongdoers avoid punishment.

The Court currently has four search and seizure cases on the docket.[114] Those cases will present the Court with the opportunity to address the numerous problems with the exclusionary rule. One would be surprised to see it entirely abandoned, but one would be even more surprised to see it retained without significant modification.

CONCLUSION

Criminal cases are often controversial, and the Supreme Court rarely avoids criticism. In recent years, many commentators have expressed concern over whether the Roberts Court would sufficiently protect the rights of criminal defendants. It is certainly clear that some recent decisions will make it easier to deter crime by punishing violators. Other cases, however, show that the current Court is very concerned about the rights of those accused of crime.

In cases reviewed herein, the Supreme Court gave district court judges more discretion in sentencing (most demanded for downward departures from the Sentencing Guidelines), struck down some death penalty laws, and protected the sanctity of the home (while suggesting that the exclusionary rule might be tweaked). That certainly does not suggest a pro-prosecution bias on the part of the justices. In fact, on a recent panel at the ABA's annual meeting this past August, the former U.S. Solicitor General under President Clinton, Drew S. Days, III, of Yale Law School, reviewed recent criminal cases and concluded that they showed that the Roberts Court is particularly concerned about whether people are adequately protected in the criminal process.[115]

Looking ahead, the Roberts Court is poised to continue addressing criminal law and criminal procedure issues with an eye toward protecting society from crime and protecting citizens from over-aggressive governmental actors. That can be a hard line to draw, and well-intended people can disagree over where it should be drawn, but carefully drawing it is an obligation that has been recognized every justice on the Court. That is at least one element of what all Americans should want from their Supreme Court.

Endnotes

1 530 U.S. 466, 120 S.Ct. 2348 (2000).

2 *See* Baroni & Leinenweber, *Illinois* Apprendi *Case Law: Two and a Half Years of Broad Application and Rapid Evolution*, Journal of DuPage County Bar Ass'n DCBA Brief (Jan. 2003).

3 P.L. No. 98-473, 98 Stat. 1987, 18 U.S.C. 3351 et seq., and 28 U.S.C. 991-98.

4 536 U.S. 584 (2002).

5 *Id.* at 588-89.

6 *Id.*

7 542 U.S. 296 (2004).

8 The trial judge could exceed the "standard range" if he or she finds "substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code Ann. §9.94A.120(2).

9 Mistretta v. United States, 488 U.S. 361, 367 (citing S. Rep. No. 98-225 (1983)).

10 28 U.S.C. 991, 994.

11 *Mistretta*, 488 U.S. at 368, n. 4; 18 U.S.C. 3553(a), (b).

12 551 U.S. ___ (2007).

13 551 U.S. ___ (2007).

14 552 U.S. ___ (2007).

15 552 U.S. ___ (2007).

16 551 U.S. ___ (2007).

17 *See* Otis, William G., *From Apprendi to Booker to Gall and Kimbrough: The Supreme Court Blunders its Way Back to Luck-of-the-Draw Sentencing*, 9 Engage: The Journal of the Federalist Society Practice Groups 2, 42.

18 *See* Apprendi v. New Jersey, 530 U.S. 466, 478-79 (2000) (describing criminal sentencing "as it existed during the years surrounding our Nation's founding").

19 *See, e.g.,* Williams v. New York, 337 U.S. 241, 245 (1949).

20 408 U. S. 238.

21 428 U. S. 153 (1976).

22 Proffitt v. Florida, 428 U. S. 242 (1976); Jurek v. Texas, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

23 428 U.S., at 305.

24 Graham v. Collins, 506 U. S. 461, 484 (1993) (concurring opinion).

25 *See id.* at 482-83.

26 D. Baldus, G. Woodworth & C. Pulaski, *Equal Justice and the Death Penalty* 150 (1990); *see also* D. Baldus, G. Woodworth, G. Young, & A. Christ, *The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis*, Executive Summary 14 (2001) ("no significant evidence of disparate treatment on the basis of race of the defendant"); D. Baime, Report to the Supreme Court Systemic Proportionality Review Project: 2000-2001 Term 61 (2001), http://www.judiciary.state.nj.us/baime/baimereport.pdf (New Jersey); R. Paternoster, et al., An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction 26 (2003); Scheidegger, *Smoke and Mirrors on Race and the Death Penalty*, 4 Engage: The Journal of the Federalist Society Practice Groups 2, 42.

27 *See* Maynard v. Cartwright, 486 U.S. 356, 363-364 (1988); Model Penal Code §210.6(3)(h) (1962 draft), quoted in Gregg, 428 U.S., at 193-94, n.44.

28 *See* Gardner v. Florida, 430 U.S. 349 (1977); *cf.* Williams v. New York,

337 U.S. 241, 245 (1949).

29 482 U.S. 496.

30 486 U.S. 367.

31 438 U. S. 586 (1978) (plurality opinion).

32 *See id*., at 605.

33 *See id*., at 622.

34 481 U.S. 393 (1987).

35 492 U.S. 302 (1989).

36 *See* McCleskey v. Kemp, 481 U.S. 279 (1987); *see also* Scheidegger, *supra* note __, at 42. The rule proposed in *McCleskey* would have effectively imposed a racial quota on capital sentencing, a quota that could not be achieved given the discretion mandated by *Gregg*, *Woodson*, and *Lockett*.

37 *See, e.g.,* Johnson v. Texas, 509 U.S. 350, 364-65 (1993) (giving a narrow interpretation to *Penry*, preserving *Jurek* to some extent); *but see* Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007) (*per curiam*) (giving a broad interpretation to *Penry* and effectively abandoning the narrower interpretation in *Johnson*); *see also id*. at 1679-1680 (Roberts, C.J., dissenting).

38 *See, e.g.,* Stringer v. Black, 503 U.S. 222, 238 (1992) (Souter, J., dissenting).

39 Walton v. Arizona, 497 U.S. 639, 661-73 (1990), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002).

40 501 U.S. 808 (1991).

41 *See id*., at 822.

42 506 U.S. 461, 478-500 (1993).

43 *Id*. at 500.

44 408 U.S. at 411.

45 Callins v. Collins, 510 U.S. 1141, 1143 (1994).

46 California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis added).

47 *See, e.g.,* Williams v. Taylor, 529 U.S. 362, 415-16 (2000) (concurring opinion).

48 *See, e.g.,* James Q. Wilson, *Sorry I Killed You, But I Had A Bad Childhood*, 17 Cal. Lawyer (6) 42 (1997).

49 530 U.S. 466 (2000). *See supra* notes 1-8 and accompanying text.

50 536 U.S. 584 (2002).

51 *See* Walton v. Arizona, 497 U.S. 639, 647-48 (1990).

52 536 U.S., at 608.

53 *See, e.g.,* Smith v. Texas, 543 U.S. 37 (2004) (*per curiam*).

54 *See, e.g.,* Ayers v. Belmontes, 549 U.S. 7 (2006).

55 *Ex parte Watkins*, 28 U.S. 193, 207 (1830).

56 *See* Sanders v. United States, 373 U. S. 1 (1963) (virtually eliminating the rule against successive petitions); Fay v. Noia, 372 U.S. 391 (1963), *overruled by* Coleman v. Thompson, 501 U. S. 722 (1991) (virtually eliminating rule against claims defaulted on appeal).

57 *See, e.g.*, Harris v. Pulley, 692 F. 2d 1189 (CA9 1982), *rev'd* Pulley v. Harris, 465 U.S. 37 (1984) (declaring California death penalty law unconstitutional because it has no comparative proportionality review, a feature not required by any Supreme Court precedent.)

58 489 U.S. 288.

59 McCleskey v. Zant, 499 U.S. 467 (1991).

60 28 U.S.C. §2254(d)(1).

61 529 U.S. 362 (2000).

62 "As one commentator accurately recounts, in both houses of Congress section 2254(d) 'was called a "deference" standard by every member who spoke on the question, opponents as well as supporters.' Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 945 (1998)." Matteo v. Superintendent, 171 F. 3d 877, 890 (CA3 1999).

63 *See* 529 U.S., at 389.

64 *See id*. at 412-13.

65 *See, e.g.,* Bell v. Cone, 535 U. S. 685 (2002); Brown v. Payton, 544 U.S. 133 (2005).

66 466 U.S. 668.

67 529 U.S. 362 (2000).

68 529 U.S., at 395.

69 539 U.S. 510, 517-18, 524 (2003).

70 545 U.S. 374 (2005).

71 *Id*. at 296-397 (dissenting opinion).

72 438 U.S., at 622.

73 *See id*. at 628.

74 458 U.S. 782 (1982).

75 481 U.S. 137 (1987).

76 487 U.S. 815 (1988).

77 492 U.S. 361 (1989).

78 492 U.S. 302, 333 (1989).

79 *See id*., at 340.

80 433 U.S. 584, 597 (1977).

81 536 U.S. 304 (2002).

82 *Penry* himself received a third penalty trial after *Atkins*. The jury found he is not retarded. *See* Penry v. State, 178 S.W.3d 782, 785 (Tex. Crim. App. 2005).

83 543 U.S. 551 (2005).

84 128 S.Ct. 2641, 2659-60 (2008). The opinion leaves open the question of crimes against society as a whole such as treason and espionage.

85 *Id*. at 2659.

86 Gregg v. Georgia, 428 U.S. 153, 185-186 (1976) (lead opinion).

87 "The literature is easy to summarize: almost all modern studies and all the refereed studies find a significant deterrent effect of capital punishment." Rubin, Testimony Before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Committee on the Judiciary, United States Senate, An Examination of the Death Penalty in the United States, 109th Cong., 2d Sess., February 1, 2006, S. Hrg. 109-540, <http://judiciary.senate.gov/testimony.cfm?id=1745&wit_id=4991>

88 Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Studies 283 (2004); Mocan & Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. Law & Economics 453 (2003).

89 *But see* Hudson v. Michigan, 126 S.Ct. 2159 (2006), discussed *infra*.

90 533 U.S. 27 (2001).

91 126 S. Ct. 1515 (2006).

92 415 U.S. 164 (1974).

93 551 U.S. ___ (2007), *available at* <http://www.oyez.org/cases/2000-2009/2006/2006_06_8120/> (last visited Thursday, July 24, 2008).

94 The Court noted that its ruling would not extend to more incidental restrictions on freedom of movement, such as when motorists are forced to slow down or stop because other vehicles are being detained.

95 *Cf. Indianapolis v. Edmond*, 531 U.S. 32 (2000) (highway checkpoint programs, whose primary purpose is the discovery and interdiction of illegal narcotics, found inconsistent with the Fourth Amendment).

96 126 S.Ct 2193 (2006).

97 In *United States v. Knights*, 534 U.S. 112 (2001) the Court upheld a California law providing that individuals on probation could be stopped and searched at any time during the probationary period upon reasonable suspicion of criminal activity, as opposed to the usual requirement of probable

cause. The Court found that such searches were "reasonable" under the Fourth Amendment. Writing for a unanimous Court, Chief Justice Rehnquist held that probation was merely one stop along a "continuum" of possible punishments facing a convicted criminal ranging from "solitary confinement in a maximum-security facility to a few hours of mandatory community service."

98 *Cf.* Ferguson v. City of Charleston, 532 U.S. 67 (2001) (testing and prosecution of pregnant women for cocaine use held unconstitutional); Lawrence v. Texas, 539 U.S. 558 (2003) (privacy for homosexuals).

99 126 S.Ct. 2159 (2006).

100 In 1988, the Justice Department released the *Guidelines on Constitutional Litigation*, which criticized the Exclusionary Rule, saying that it "lacks a constitutional basis." U.S. Dep't of Justice, Office of Legal Pol'y, *Guidelines on Constitutional Litigation* (Feb. 19, 1988). These *Guidelines* instructed prosecutors to urge that the Exclusionary Rule not be applied in cases where a "more efficacious sanction," such as disciplinary action or civil suit against the officer violating the Constitution, may be applied. The *Guidelines* suggested that the Exclusionary Rule should not be applied "where the responsible officer will or has been subjected to disciplinary action" or "where a civil suit is pending against the responsible officer."

101 At oral argument in *Hudson*, Justice Scalia remarked to counsel for the petitioner that *Mapp* was outdated. He said that "*Mapp* was a long time ago. It was before section 1983 was being used, wasn't it?" For a transcript of the first oral argument, *see* 2006 WL 88656 (U.S.), 74 USLW 3422.

102 The attorney for the defendant in *Hudson*, David A Moran, has written:

> I have found through experience that when one argues a case in the United States Supreme Court, it can be more than a bit difficult to put the resulting decision in perspective. Depending on whether one wins or loses (and I've had both experiences), it is all too easy to think of the case as either the most important breakthrough in years or the death of the law as we know it. I hope the reader will apply the appropriate degree of skepticism, therefore, when I say that my 5-4 loss in *Hudson v. Michigan*1 signals the end of the Fourth Amendment as we know it.

David A Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment, 2005-2006*, Cato Supreme Court Review 283 < http://www.cato.org/pubs/scr/2006/moran.pdf> (last visited Thursday, July 24, 2008).

103 <http://www.scotusblog.com/wp/wp-content/uploads/2008/04/06-1082.pdf> (last visited Thursday, July 24, 2008).

104 Weeks v. United States, 232 U.S. 383 (1914).

105 Mapp v. Ohio, 367 U.S. 643 (1961).

106 California v. Minjares, 443 U.S. 916 (1979).

107 403 U.S. 388 (1971).

108 Does strict adherence to the exclusionary rule lead to a restrictive reading of the Fourth Amendment? *See* Christopher Sloboggin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. Ill. L. Rev. 363 (1999).

109 United States v. Calandra, 414 U.S. 338 (1974) (The exclusionary rule is inapplicable at grand jury hearings.)

110 I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (exclusionary rule inapplicable at civil deportation hearings); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule inapplicable at civil tax hearings).

111 United States v. McCrory, 930 F.2d 63, 69 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992).

112 Nix v. Williams, 467 U.S. 431 (1984) (inevitable discovery); People v. Arnau, 58 NY2d 27, 32-33 (1982) (independent source exception).

113 United States v. Leon, 468 U.S. 902 (1984) (if evidence is seized under the authority of an invalid warrant, it will not be suppressed if a reasonable officer acting in good faith would have relied on the warrant). *See also* Rakas v. Illinois, 439 U.S. 128 (1978) (if the police did not violate the defendant's personal constitutional rights, he would lack standing to object to the admission of the resulting illegally obtained evidence); Wong Sun v. United States, 371 U.S. 471 (1963) (if the evidence is so attenuated from the illegal conduct of the police that it cannot be said that it was obtained from the exploitation by the police of that illegal conduct, then the evidence will not be suppressed).

114 In *Pearson, et al. v. Callahan*, the Court will decide whether, for qualified immunity purposes, police officers may enter a home without a warrant on the theory that the owner consented to the entry by previously permitting an undercover informant into the home. In *Herring v. United States*, the issue is whether the good-faith exception to the exclusionary rule applies when evidence seized incident to a warrantless arrest, conducted in sole reliance on an inaccurate report from other law enforcement personnel regarding the existence of an outstanding warrant. In *Arizona v. Gant*, the Court will evaluate whether the Arizona Supreme Court effectively "overruled" the bright-line rule of *New York v. Belton,* by requiring in each case that the State prove after-the-fact that the search of a vehicle's recent occupant justifies a contemporaneous warrantless search of the automobile's passenger compartment on that basis of inherent danger. Finally, in *Arizona v. Johnson*, the Court will address whether, in the context of a vehicular stop for a minor traffic infraction, an officer may conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but had no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense.

115 *See SCOTUS Review, American Press & War, the 14th Amendment, Human Rights, Climate Change, Women in Law, and Immigration*, Bar Watch Bulletin August 0, 2008 <http://www.fed-soc.org/publications/pubid.1144/pub_detail.asp>.