Recent Criminal Decisions of the United States Supreme Court:

The 2001-2002 Term

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The United States Supreme Court's 2001-2002 term at least gave the appearance of a more unified Supreme Court—at least when compared to the previous term, which was marked by an overwhelming number of 5-4 decisions—and featured several unanimous or near unanimous decisions. Specifically in the Fourth Amendment area, but also in other cases, the Court seemed at times to break free from the typical conservative-liberal divide that was so salient a year ago. This term, the Court confronted significant issues regarding the increased susceptibility to searches and seizures of bus passengers, students, and probationers; the death penalty and its limitations; the assistance of counsel in minor criminal cases; the constitutionally required roles of the judge and jury in criminal cases; and further interpretation of the Antiterrorism and Effective Death Penalty Act.[1]

FOURTH AMENDMENT

In a 6-3 decision, Justice Kennedy wrote the opinion for the Court in *United States v. Drayton*,[2] holding that the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse to consent to a search. Further, merely boarding a bus and questioning passengers does not result in a seizure nor is a passenger's consent to search made involuntary. The Court explained, "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." A person is not seized as long as "a reasonable person would feel free to terminate the encounter." The Court cited *Florida v. Bostick*,[3] which "addressed the specific question of drug interdiction efforts on buses." In that case, the Court clarified here, "for the most part per se rules are inappropriate in the Fourth Amendment context," which requires instead "a consideration of 'all the circumstances surrounding the encounter.'" The confinement a bus passenger feels is "the natural result of choosing to take the bus," and is not related to police conduct. Regarding the encounter between police officers and bus passengers in the present case, the Court asserted, "It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure." Instead, the Court suggested, "bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them." Ultimately, the Court explained that it "has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." Instead, it "has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning."

In *United States v. Arvizu*,[4] Chief Justice Rehnquist, writing for a unanimous Court, held that an appropriate application of the totality of circumstances test considers facts collectively, rather than in isolation, and gives due weight to the factual inferences drawn by the law enforcement officer. In this case, facts including a minivan's travel on a primitive, unpaved road typically used to circumvent a border patrol checkpoint, at a time when the area is typically unpatrolled, the driver's stiff and rigid posture as he approached the border patrol agent, and the subsequent "abnormal" behavior of the child passengers "sufficed to form a particularized and objective basis for [the agent's] stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment." The Court explained that reasonable suspicion is determined on a case-by-case consideration of the totality of the circumstances, which consequently "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" The Court suggested that "it is quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona)." Accordingly, the officer's "assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes, were entitled to some weight" and although "the facts suggested a family in a minivan on a holiday outing[, a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct."

Footnotes

1. For a more in-depth review of the decisions of the past term, *see* CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2001-2002 (Amer. Acad. of Jud. Educ. 2002).
2. 122 S.Ct. 2105 (2002).
3. 501 U.S. 429 (1991).
4. 534 U.S. 266 (2002).

Chief Justice Rehnquist wrote the opinion for a unanimous Court in *United States v. Knights*,[5] holding a warrantless search of a probationer's apartment, supported by reasonable suspicion and authorized by a condition of probation is reasonable within the meaning of the Fourth Amendment. The Fourth Amendment test of reasonableness balances "on the one hand, the degree to which [the search] intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests." The Court explained, "Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'" Therefore, "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." The Court also expressed its agreement with "'the very assumption of the institution of probation'. . . that the probationer 'is more likely than the ordinary citizen to violate the law.'" Consequently, the Court concluded, "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable."

The Court addressed suspicionless drug testing of students who participate in extracurricular activities in *Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls*.[6] Justice Thomas, writing for the 5-4 majority, held that the Student Activities Drug Testing Policy adopted by the Tecumseh (Oklahoma) School District is a reasonable means of furthering the school district's interests and does not violate the Fourth Amendment. The Court reasoned that the Fourth Amendment "imposes no irreducible requirement of [individualized] suspicion," within the frame of safety and administrative regulations, so "a search unsupported by probable cause may be reasonable when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" The Court next discussed *Vernonia School Dist. 47J v. Acton*[7] in order to determine what constitutes "special needs." The Court in *Vernonia* held that "suspicionless drug testing of athletes was constitutional." The Court not only determined that "special needs" is inherent in the public school context, but that "a finding of individualized suspicion may not be necessary when a school conducts drug testing." In order to conduct drug testing in schools, the Court balanced "the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests." The Court next uses the fact-specific balancing approach in order to determine whether the policy was constitutional. The Court explained that although the students in this situation are not athletes, as in *Vernonia*, "they voluntarily subject themselves to many of the same intrusions on their privacy as do athletes." Therefore, students have a limited expectation of privacy. The Court next suggested that the procedure is more protective of the students' privacy than the procedure in *Vernonia*. The Court concluded that the "invasion of students' privacy is not significant." Finally, the Court considered "the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them." Noting the importance of preventing drug use by schoolchildren, and the presence of drug use at the Tecumseh schools, the Court asserted that the policy was reasonable and there was no need to create a threshold test to be met before a drug testing program would be allowed. The Court stated that "the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike." Ultimately, by enacting the policy, the school district has created a reasonably effective means of addressing its legitimate concerns in "preventing, deterring, and detecting drug use."

FIFTH AMENDMENT

In a 5-4 decision, the Court in *McKune v. Lile*[8] held that the Sexual Abuse Treatment Program (SATP) provided to convicted sex offenders in Kansas serves a vital penological purpose, and offering inmates minimal incentives to participate does not amount to compelled self-incrimination prohibited by the Fifth Amendment. The SATP lasts for 18 months and involves daily counseling. Inmates address "sexual addiction; understand the thoughts, feelings, and behavior dynamics that precede their offenses; and develop relapse prevention skills." In order to take part in this program, respondent was required to complete and sign a form, committing to discuss and accept responsibility for the crime for which he has been sentenced. A sexual history form that details prior sexual activities was also required, regardless of whether these activities constitute uncharged criminal offenses. Although the information obtained for the SATP is not privileged, it does advance the rehabilitative goals of the program. Kansas may use new evidence obtained from this process against sex offenders in future criminal proceedings, as Kansas law requires uncharged sexual offenses involving minors to be reported to law enforcement authority. Justice Kennedy, in a plurality opinion for four justices, began his analysis by discussing the impact of sex offenders on the nation. He noted that once convicted sex offenders reenter society, they are more likely than any other type of offender to be rearrested for a new sexual assault or rape. The state, therefore, has a "vital interest in rehabilitating convicted sex offenders." The clinical rehabilitative programs can be successful in reducing recidivism, and confronting one's past and accepting responsibility for one's actions is an important part of that rehabilitation. Justice Kennedy opined that the program does not create a compulsion for the inmates to incriminate themselves since the consequences are not severe enough to compel a prisoner to speak about past crimes despite a desire to remain silent. This is partly due to the fact that these consequences are imposed on prisoners instead of regular citizens. Justice Kennedy pointed out that respondent's decision not to participate in SATP did not result in either an

5. 534 U.S. 112 (2001).
6. 122 S.Ct. 2559 (2002).
7. 515 U.S. 646 (1995).
8. 122 S.Ct. 2017 (2002).

extension of his term of incarceration, or in his eligibility for good-time credits or parole. Citing prior decisions, Kennedy concluded that "the government need not make the exercise of the Fifth Amendment privilege cost free." Justice O'Connor concurred in the judgment, concluding that "the alterations in respondent's prison conditions as a result of his failure to participate in [SATP] were [not] so great as to constitute compulsion" under the Fifth Amendment.

DUE PROCESS

Justice Breyer delivered the opinion of the Court in *United States v. Ruiz*,[9] holding that the Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. The Court evaluated the lawfulness of a "fast track" plea bargain process used by federal prosecutors in southern California. The fast-track plea bargain offer "asks a defendant to waive indictment, trial, and an appeal [and] in return, the government agrees to recommend to the sentencing judge a two-level departure downward from the otherwise applicable United States Sentencing Guidelines sentence." The Court acknowledged that "a federal criminal defendant's waiver of the right to receive from prosecutors exculpatory impeachment material [is] a right that the Constitution provides as part of its basic 'fair trial' guarantee." However, "[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees," such as the Fifth Amendment privilege against self-incrimination as well as the right to confront one's accusers and right to a jury trial both provided by the Sixth Amendment." Although it recognized that "the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision and the wiser that decision will likely be," the Court held that "the Constitution does not require the prosecutor to share all useful information with the defendant." Instead, "the 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—even though the defendant may not know the *specific detailed* consequences of invoking it." Often, the usefulness of impeachment information "will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the constitution does not require prosecutors to disclose." A right to pre-guilty plea disclosure of impeachment information does not exist. Such an additional safeguard not only has limited value, but "could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice."

In *United States v. Vonn*,[10] Justice Souter delivered the opinion of the Court, holding that a defendant who fails to make a timely objection to a trial judge's variance from the procedures required before accepting a guilty plea, as specified in Rule 11 of the Federal Rules of Criminal Procedure, has the burden to satisfy the plain-error rule on appeal. Further, "a reviewing court may consult the whole record when considering the effect of any error on substantial rights." According to Rule 52(a) of the Federal Rules of Criminal Procedure, "[t]he Government avoids reversal of a criminal conviction by showing that trial error, albeit raised by a timely objection, affected no substantial right of the defendant and was thus harmless." However, if a defendant fails to make a timely objection, Rule 52(b) allows that defendant to "nonetheless obtain reversal of a conviction by carrying the converse burden, showing among other things that plain error did affect his substantial rights." Rule 11(h), which tracks Rule 52(a), "is a separate harmless-error rule applying only to errors committed under Rule 11, the rule meant to ensure that a guilty plea is knowing and voluntary, by laying out the steps a trial judge must take before accepting such a plea." There is no comparable plain error rule, like that in Rule 52(b) in Rule 11(h). The Court cited Congress's Advisory Committee Notes, which explain that "by 1983 the practice of automatic reversal for error threatening little prejudice to a defendant or disgrace to the legal system prompted further revision of Rule 11." Accordingly the harmless-error provision was added to Rule 11 because "[t]he committee said it was responding to the claim that the harmless-error rule [of 52(a)] did not apply . . . [and] having pinpointed that problem, it gave a pinpoint answer." Consequently, it is likely that Congress's omission from Rule 11 of a plain-error rule did not show its intention to exclude its applicability. The Court maintained that if silent defendants were free from the burden of plain-error review, "[a] defendant could simply relax and wait to see if the sentence later struck him as satisfactory; if not, his Rule 11 silence would have left him with clear but uncorrected Rule 11 error to place on the Government's shoulders." Justice Stevens, dissenting in part, suggested, "It is . . . perverse to place the burden on the uninformed defendant to object to deviations from Rule 11 or to establish prejudice arising out of the judge's failure to mention a right that he does not know he has."

SIXTH AMENDMENT

In *Alabama v. Shelton*,[11] the Court held in a 5-4 decision that the Sixth Amendment prevented imposition of a suspended sentence that may end up in the actual deprivation of a person's liberty if the defendant was not accorded the "guiding hand of counsel" in the prosecution for the crime charged. Justice Ginsburg, writing for the majority, emphasized that the Court's Sixth Amendment analysis follows the "actual imprisonment standard," which forbids imprisonment for any offense of a person who was not represented by counsel at trial, absent a knowing and intelligent waiver. Because suspended sentences are prison terms imposed for the offense of conviction, when the prison term is triggered the defendant is incarcerated for the underlying offense rather than for a probation

9. 122 S.Ct. 2450 (2002).
10. 122 S.Ct. 1043 (2002).
11. 122 S.Ct. 1764 (2002).

violation. Such actual imprisonment for uncounseled convictions falls squarely within the Sixth Amendment's prohibition. The Court further indicated that the Constitution also bars imposition of a suspended sentence that can never be enforced. Justice Scalia, writing for the four dissenting justices, insisted that actual imprisonment is the "touchstone of entitlement to appointed counsel" and accused the majority of extending the misdemeanor right to counsel "to cases bearing the mere threat of imprisonment." Thus, the dissent contended that suspended sentences clearly do not invoke a defendant's Sixth Amendment right to counsel.

In *Mickens v. Taylor*,[12] the Court addressed the Sixth Amendment right to conflict-free representation in a murder trial. In a 5-4 decision written by Justice Scalia, the Court held that in order to demonstrate a Sixth Amendment violation of the right to counsel where a trial court failed to inquire into a potential conflict of interest about which it reasonably should have known, petitioner must "establish that the conflict of interest affected his counsel's performance" in order to void the conviction. Although the Sixth Amendment right to counsel mandates counsel that is effective in preserving the right to a fair trial, defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. The Court found that petitioner failed to demonstrate in this case that counsel's brief court-appointed representation the previous week of the murder victim whom petitioner was accused of killing affected his representation in the murder trial. The highly fractured dissenting opinions (Justices Stevens and Souter dissented separately and Justice Breyer wrote in dissent for himself and Justice Ginsburg) appear to agree that various categorical rules would be appropriate. They disagreed whether these rules should free petitioners from showing prejudice in cases of apparent unfairness or impose upon the court a duty to enquire into potential conflicts of interest about which it should know.

In an 8-1 decision, Chief Justice Rehnquist, writing for the Court in *Bell v. Cone*,[13] held that a defense counsel's failure to present any mitigating evidence or make a closing argument at a capital sentencing proceeding was not ineffective assistance of counsel, but instead a tactical trial decision. Rehnquist relied upon *Strickland v. Washington*,[14] which "announced a two-part test for evaluating claims that a defendant's counsel performed so incompetently in his or her representation of a defendant that the defendant's sentence or conviction should be reversed." To satisfy this test, the defendant must prove "both deficient performance and prejudice to the defense," which would then indicate that "counsel's assistance was defective enough to undermine confidence in a proceeding's result." As it did in *Strickland*, the Court emphasized that "'[j]udicial scrutiny of a counsel's performance must be highly deferential' and that 'every effort [must] be made to eliminate the distorting effects of hindsight.'" Consequently, "a defendant must overcome the 'presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" The Court recognized counsel's "formidable task of defending a client who had committed a horribly brutal and senseless crime against two elderly persons in their home." Although the Court suggests that there were alternatives to the attorney's decision not to reemphasize respondent's mental disease and drug addiction, his decision not to call or recall witnesses, and his waiver of a closing argument, the Court concluded that none of the alternatives "so clearly outweighs the other that it was objectively unreasonable to . . . deem counsel's choice . . . a tactical decision about which competent lawyers might disagree."

EIGHTH AMENDMENT – CRUEL AND UNUSUAL PUNISHMENT

In *Hope v. Pelzer*,[15] the Court held 6-3 that handcuffing an inmate to a hitching post or similar stationary object for a length of time in excess of that necessary to quell a threat or restore order is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. Justice Stevens, writing for the Court, said that any safety concerns had abated by the time petitioner Hope was handcuffed to the hitching post since he had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. The Court also found the practice was punitive and created a substantial risk of harm of which the officers were aware. The officials acted with "deliberate indifference to the inmates' health or safety" since the "risk of harm [was] obvious." The officers involved were not entitled to qualified immunity at the summary judgment phase since Supreme Court precedent, a Justice Department report, and Eleventh Circuit precedent gave a reasonable officer "fair and clear warning" that handcuffing Hope to a hitching post in these circumstances was unlawful.

DEATH PENALTY AND *APPRENDI*

In a 6-3 decision, Justice Stevens, writing for the majority in *Atkins v. Virginia*,[16] held that in light of the nation's "evolving standards of decency," the execution of the mentally retarded "is excessive and . . . the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." Although "those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes," the Court said that due to their disabilities "they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Consequently, their "impairments can jeopardize the reliability and fairness of capital proceedings against" them. The Court clarified that "the Eighth Amendment succinctly prohibits 'excessive' sanctions" and that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." The Court

12. 122 S.Ct. 1237 (2002).
13. 122 S.Ct. 1843 (2002).
14. 466 U.S. 668 (1984).
15. 122 S.Ct. 2508 (2002).
16. 122 S.Ct. 2242 (2002).

began its analysis by explaining that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . [and therefore t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In identifying these standards, the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." However, the Court concluded that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." As an indication of the national consensus, the Court identified 18 states, as well as the federal government, all having enacted legislation exempting mentally retarded offenders from execution: "It is not so much the number of these States that is significant, but the consistency of the direction of change." Consequently, this "provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal." In order to substantiate its support of this "legislative consensus," the Court urged that since the death penalty has been reserved for "the most serious crimes . . . the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." Moreover, the same impairments that exculpate mentally retarded offenders "also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."

In Justice Scalia's lengthy dissent, he criticized the lack of support for the Court's decision and exclaimed, "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." He argued that "the arrogance of [the Court's] assumption of power takes one's breath away." Scalia suggested that "it will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives." Revealing that the oldest of the Court's cited statutes is 14 years old, Scalia warned that "reliance upon 'trends,' even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication." He concluded, "As long as a mentally retarded offender knows 'the difference between right and wrong' . . . only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question."

In *Kelly v. South Carolina*,[17] Justice Souter delivered the opinion of the Court, which held 5-4 that when the only alternatives a jury is allowed to consider are death or life imprisonment without the possibility of parole, due process requires that a jury be clearly informed of the defendant's parole ineligibility. The decision was in keeping with the Court's decision in *Simmons v. South Carolina*,[18] which held that the jury must be informed of life incarceration without possibility of parole as an alternative to the death penalty. The state court had held *Simmons* inapplicable since the state's statutes provide a possible sentence of 30 years instead of life without parole. The Court rejected that argument with a reference to *Shafer v. South Carolina*,[19] which had explained that "under the South Carolina sentencing scheme a jury now makes a sentencing recommendation only if the jurors find the existence of an aggravating circumstance such as a finding of potential future dangerousness. When they do make a recommendation, their only alternatives are death or life without parole." Responding to the state's first point that the state supreme court found Kelly's future dangerousness not at issue in the trial, the Court considered this finding "unsupportable on the record before us." The Court's final discussion was a reiteration of the need to inform the jury of South Carolina's sentencing scheme due to reasonable assumption that jurors may not be sufficiently informed about the impossibility of parole. The Court concluded that although "[t]he State stresses that the judge told the jury that the terms 'life imprisonment' and 'death sentence' should be understood in their plain and ordinary meanings, . . . [w]e found these statements inadequate to convey a clear understanding of Shafer's parole ineligibility and Kelly, no less than Shafer was entitled to his requested jury instruction."

In *Ring v. Arizona*,[20] the Court revisited its decision upholding an Arizona sentencing statute in *Walton v. Arizona*.[21] The Court set out to determine *Walton*'s validity in light of the reasoning in *Apprendi v. New Jersey*.[22] In a 7-2 decision, Justice Ginsburg delivered the opinion of the Court, holding that *Walton* and *Apprendi* are irreconcilable. Overruling *Walton*, the Court concluded that a sentencing judge sitting without a jury is prohibited from finding an aggravating circumstance necessary for the imposition of the death penalty and since "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense' the Sixth Amendment requires that they be found by a jury." The *Walton* Court accepted that the aggravating factors in Arizona's sentencing scheme were not "elements of the offense," but rather "ranked as 'sentencing considerations' guiding the choice between life and death." It therefore could not "conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances." Ten years later, in *Apprendi*, the Court "held that the Sixth Amendment does not permit a defendant to be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive in the jury verdict alone." Attempting to reconcile its decision with *Walton*, the *Apprendi* Court focused on "[t]he key distinction . . . that a conviction of first-degree murder in Arizona carried a maximum sentence of death." For this reason, "[o]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser

17. 534 U.S. 246 (2002).
18. 512 U.S. 154 (1994).
19. 532 U.S. 36 (2001).
20. 122 S.Ct. 2428 (2002).
21. 497 U.S. 639 (1990).
22. 530 U.S. 466 (2000).

one, ought to be imposed." However, the Court now recognizes that the *Apprendi* dissent more accurately described Arizona's sentencing scheme when it explained that a "[d]efendant's death sentence required the judge's factual findings." Following "*Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect," the Court acknowledged, "In effect, 'the required finding [of an aggravated circumstance] exposed [Ring] to a greater punishment than that authorized by the jury's guilty verdict." As the Court said, "*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." Finally, the Court concluded, "Although 'the doctrine of *stare decisis* is of fundamental importance to the rule of law' . . . our precedents are not sacrosanct." Instead, the Court has "overruled prior decisions where the necessity and propriety of doing so has been established."

OTHER *APPRENDI* ISSUES

In *United States v. Cotton*,[23] Chief Justice Rehnquist, writing for a unanimous Court, held that a federal indictment's failure to include an alleged drug quantity involved in a conspiracy, which results in an enhanced statutory maximum sentence, make the enhanced sentence erroneous under *Apprendi v. New Jersey*,[24] but that the "error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings," and therefore did not rise to the level of plain error to be corrected by the appellate court. According to the plain-error test of Federal Rule of Criminal Procedure 52(b), an appellate court can correct an error not raised at trial if only if there is an "error" that is "plain," affects substantial rights, and "the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Even though the parties agree that omitting the drug quantity from the indictment was an error that was plain, and the Court assumes the error did affect substantial rights, "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." The Court said that the "overwhelming" and "essentially uncontroverted" evidence included numerous state arrests and seizures, a federal search, and the trial testimony of two cooperating co-conspirators and the Court ultimately concluded, "Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base." Ultimately, the Court stressed, "the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments." Therefore, "The real threat . . . to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial."

The Court in *Harris v. United States*,[25] set out to determine whether or not brandishing a firearm under 18 U.S.C. §924(c)(1)(A) is a sentencing factor or an element of a separate crime and to identify the validity of *McMillan v. Pennsylvania*,[26] after the Court's decision in *Apprendi v. New Jersey*.[27] In *McMillan*, the Court had "sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm." In *Apprendi*, the Court held that "other 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." In the present case, Justice Kennedy writing for a 5-4 majority held, "as a matter of statutory interpretation, §924(c)(1)(A) defines a single offense . . . [and] regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." Then, writing for a four-member plurality (not joined by Justice Breyer, who helped to form the five-member majority), Justice Kennedy tried to reconcile *McMillan* and *Apprendi*: "Read together *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis," and judicial discretion within the range authorized by the jury verdict may be narrowed "by requiring defendants to serve minimum terms after judges make certain factual findings." Justice Breyer refused to join the plurality in reconciling *McMillan* and *Apprendi*, but nonetheless agreed that *Apprendi* did not apply to mandatory minimum sentences.

Justice Kennedy began his analysis in *Harris* by stating, "Federal laws usually list all offense elements 'in a single sentence' and separate the sentencing factors 'into subsections.'" In §924(c)(1)(A), the initial paragraph lists the elements of a complete crime, but "toward the end of the paragraph is the word 'shall,' which often divides offense-defining provisions from those that specify sentences." Separate subsections follow the word "shall" and incrementally increase the minimum penalty, yet do not repeat the elements stated in the principal paragraph. Based on this structure, Kennedy feels confident in "presum[ing] that its principal paragraph defines a single crime and its subsections identify sentencing factors." Further, "[t]he incremental changes in the minimum—from 5 years, to 7, to 10—are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration." Although sentencing factors "cannot swell the penalty above what the law has provided for the acts charged against the prisoner," Kennedy observed, "[a]t issue in *Apprendi*, by contrast was a sentencing factor that did 'swell the penalty above what the law has provided,'. . . and thus functioned more like a 'traditional element.'" The *Apprendi* Court "made clear that its holding did not affect *McMillan* at all: 'We

23. 122 S.Ct. 1781 (2002).
24. 530 U.S. 466 (2000).
25. 122 S.Ct. 2406 (2002).
26. 477 U.S. 79 (1986).
27. 530 U.S. 466 (2000).

do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself.'" Kennedy emphasized, "The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries—and without contradicting *Apprendi*."

Justice Thomas, writing for the four dissenting justices in *Harris*, said that "*McMillan* . . . conflicts with the Court's later decision in *Apprendi*," and, he suggested, "[t]he Court's holding today therefore rests on either a misunderstanding or a rejection of the very principles that animated *Apprendi* just two years ago." He stressed, "As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards." Thomas contended that *Apprendi* stood for the principle that "when a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is 'by definition [an] element of a separate legal offense.'" Thus, "there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum."

FEDERAL HABEAS CORPUS

In another 5-4 decision, Justice Breyer delivered the opinion of the Court in *Carey v. Saffold*,[28] holding that under §2244(d)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the term "pending" covers the time between a lower state court's decision and the filing of a notice of appeal to a higher state court, an interval during which the time period for seeking federal habeas corpus relief is tolled. Relying on the dictionary definition of the word "pending" the Court determines that it means "through the period of continuance . . . of" or "until the . . . completion of." The Court therefore concluded that "until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'" In Justice Kennedy's dissent, he criticized the Court's assertion "that an application is pending as long as the ordinary state collateral review process is 'in continuance,'" because "that is only true, of course, if 'application' means the 'ordinary state collateral review process,' a proposition that finds no support" in the dictionary. He argued that when the word "application" is used in the laws governing federal habeas corpus, "it is clear that the statute refers to a specific legal document." However, he contended that the Court's holding "gives 'application' a new meaning . . . that embraces the multiple petitions, appeals, and other filings that constitute the 'ordinary state collateral review process.'"

In a 6-3 decision, Justice Ginsburg delivered the opinion of the Court in *Lee v. Kemna*,[29] holding that the failure to comply with state rules stipulating the requirements for continuance motions, in extraordinary cases, does not constitute state grounds adequate to bar federal habeas review. Generally, the Court "will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment . . . whether the state-law ground is substantive or procedural.'" However, "there are . . . exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." In this case, the Court found that noncompliance with Missouri Supreme Court Rules 24.09 and 24.10, which designate requirements for continuance motions, did not procedurally default petitioner's claim. Focusing specifically on Rule 24.10, the Court acknowledged that it, "like other state and federal rules of its genre, serves a governmental interest of undoubted legitimacy . . . designed to arm trial judges with the information needed to rule reliably on a motion to delay a scheduled criminal trial." But in this case "the Rule's essential requirements . . . were substantially met." In Justice Kennedy's dissent, he argued that "[a]lmost every case presents unique circumstances that cannot be foreseen and articulated by prior decisions, and general rules like Rule 24.10 are designed to eliminate second-guessing about the rule's applicability in special cases." Moreover, "[a]ll requirements of a rule are, in the rulemaker's view, essential to fulfill its purposes; imperfect compliance is thus, by definition, not compliance at all."

In *Horn v. Banks*,[30] the Court addressed the necessity of undertaking the analysis identified in *Teague v. Lane*[31] in a hearing for federal habeas corpus relief when the state properly raises the issue. In a per curiam decision, the Court held that the inquiries in the Antiterrorism and Effective Death Penalty Act (AEDPA) and *Teague* are distinct, and that the threshold question in every habeas case is whether the court is obligated to apply the *Teague* rule to the defendant's claim. The *Teague* Court had explained that new constitutional rules of criminal procedure will not be applicable to those cases that have become final before the new rules are announced, unless they fall within an exception to the general rule. After respondent Banks's first-degree murder conviction had been directly appealed, the Supreme Court decided a case that he claimed applied to his conviction. Because the government raised the question of retroactivity in the district and intermediate appellate court, the Court must apply the *Teague* analysis before considering the merits of the claim. The Court stressed that the *Teague* analysis is distinct from AEDPA standards of review and continues in force independent of, and subsequent to, the passage of the AEDPA. Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.

28. 122 S.Ct. 2134 (2002).
29. 534 U.S. 362 (2002).
30. 122 S.Ct. 2147 (2002).

Chief Justice Rehnquist, writing for an 8-1 majority in *Bell v. Cone*,[32] held a federal habeas petition challenging specific aspects of an attorney's representation is governed by *Strickland v. Washington*[33] and survives only if the petitioner proves that the state court's decision is either "contrary to" or involves "an unreasonable application of clearly established Federal law" under 28 U.S.C. §2254(d)(1). The Court began by explaining that a federal writ may be issued "under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." Alternatively, a writ may be issued "under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." The Court stressed that "an unreasonable application is different from an incorrect one." Respondent in this case argued that his ineffective assistance claim was governed by *United States v. Cronic*,[34] which "identified three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" The three situations were: a "complete denial of counsel" at a "critical stage"; where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." Respondent only claims that by "fail[ing] to 'mount some case for life' after the prosecution introduced evidence in the sentencing hearing and gave a closing statement," his attorney failed to subject prosecution's case to meaningful adversarial testing at the sentencing phase and therefore prejudice should have been presumed. However, the Court explained that in *Cronic* it used the word "entirely" to indicate "that the attorney's failure must be complete." Respondent fails to make this showing since he does not argue "that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points." The Court said that the attorney's failure in this case to adduce mitigating evidence at sentencing and his waiver of a closing argument "are of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components." Ultimately, the Court also concluded that the state court's application of *Strickland* was not an "unreasonable" one when it determined that the defense counsel's "performance was within the permissible range of competency."

CONCLUSION

Although the Court's death penalty cases have received the most publicity, their significance for the future pails in comparison to the practical effect of the Court's decisions regarding assistance of counsel in minor criminal cases and the increased deference afforded law enforcement officers in making searches and seizures. Also, the Court's decisions clarifying and solidifying *Apprendi v. New Jersey* will undoubtedly have far-reaching influence on how routine criminal cases are conducted. While the 5-4 ideological split remains an ever-present feature of this Supreme Court, many more significant decisions than last term, specifically in the Fourth Amendment context, seem to be less susceptible of change as a result of any Court appointments that may take place in the near future. This is not only due to the more unified appearance of the Court at times, but also to the atypical divisions in numerous cases.

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31. 489 U.S. 288 (1989).
32. 122 S.Ct. 1843 (2002).
33. 466 U.S. 668 (1984).
34. 466 U.S. 648 (1984).