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# United States Supreme Court: 2000 Term

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## UNITED STATES SUPREME COURT: 2000 TERM

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This article summarizes most of the United States Supreme Court's criminal procedure decisions of the last term.

### CONFESSIONS: MIRANDA

The most publicized criminal procedure decision of the term was Dickerson v. United States, 120 S.Ct. 2326 (2000), which offered the Supreme Court the opportunity to overrule Miranda v. Arizona, 384 U.S. 436 (1966). Two years after *Miranda* was decided, Congress passed 18 U.S.C. § 3501, which provides for the admissibility of a confession as long as the totality of the circumstances demonstrate that the confession was voluntary. Unlike *Miranda*, § 3501 does not require that the suspect be warned of the right against self-incrimination and the right to counsel.

The Supreme Court, in a 7-2 decision, held that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts." 120 S.Ct. at 2329-30.

In holding that *Miranda* was a constitutional decision, the Court relied on: (1) the fact that *Miranda* had been applied to proceedings in state courts, a domain in which the Supreme Court's authority is limited to enforcing the Constitution, (2) the text of the *Miranda* opinion, which commences with the statement that certiorari was granted "to give concrete constitutional guidelines for law enforcement agencies and courts to follow," 384 U.S. at 441-42, and goes on to include other references to the Court's belief that it was adopting a constitutional rule, and (3) the *Miranda* Court's encouragement of legislative action to protect the right against self-incrimination, as long as such action was "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." Id. at 467.

The court of appeals, in its decision overruling *Miranda* and upholding § 3501, relied on cases in which the Supreme Court had recognized exceptions to *Miranda*. The Court agreed that it had made exceptions, but that these cases stood only for the principle that "no constitutional rule is immutable." 120 S.Ct. at 2335. An alternative argument in favor of the court of appeals' decision was made by the *amicus curiae*, who stated that § 3501 is as effective as *Miranda*. The Court did not agree, since "§ 3501 explicitly eschews a requirement of pre-interrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession." Id. The *Miranda* Court imposed specific warnings because it believed the traditional totality-of-the circumstances test involved too much of a risk that an involuntary statement would be admitted into evidence. Since the test in § 3501 required only the totality of the circumstances, without the specific warnings from *Miranda*, the Court held that "[s]ection 3501 therefore cannot be sustained if *Miranda* is to remain the law." Id. at 2336.

The Court stated that it would not overrule *Miranda*, based on the principle of stare decisis. In order for the Court to depart from precedent, there must be a "special justification." Id. (quoting Payne v. Tennessee, 501 U.S. 808, 842 (1991)). The Court found no such justification for overruling *Miranda*, which "has become embedded in routine police practice to the point where the warnings have become part of our national culture." Id.

### SEARCH AND SEIZURE

#### Flight as Justification for a *Terry* Stop

In Illinois v. Wardlow, 120 S.Ct. 673 (2000), the defendant fled upon seeing police officers patrolling in an area known for narcotics trafficking. Two officers caught Wardlow and conducted a protective pat-down search for weapons. Discovering a .38-caliber handgun, the officers arrested the defendant. The Supreme Court, in a 5-4 opinion, upheld the stop.

Police have a right to stop and question individuals, and individuals have a right to not respond. "And any 'refusal to

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cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.' But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning." Id. at 676 (quoting Florida v. Bostick, 501 U.S. 429, 437 (1991)(citation omitted)).

**In order for a police officer to conduct a *Terry* stop, the officer needs reasonable suspicion. An "inchoate and unparticularized suspicion or 'hunch'" does not rise to the level necessary to constitute a reasonable suspicion. Terry v. Ohio, 392 U.S. 1, 27 (1968). However, officers are allowed to consider all relevant factors, including the characteristics of the surroundings and the individual's behavior. The Court, in an opinion by Chief Justice Rehnquist, ruled that the defendant's unprovoked flight upon seeing the officer and his presence in a high crime area are relevant and constitute a "reasonable, articulable suspicion that criminal activity is afoot." 120 S.Ct. at 675. As the Court put it: "Headlong flight — wherever it occurs — is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." Id. at 676. The Court, however, did not adopt a per se rule under which flight always justified a stop.**

### Terry Stops: Anonymous Tips

The issue in Florida v. J.L., 120 S.Ct. 1375 (2000), was whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a stop and frisk. An anonymous caller reported that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. The call was not recorded, nothing was known about the informant, and the informant did not give any other information to show whether he had any familiarity with the suspect's affairs or future movements. The police responded to the report, arriving at the scene within six minutes. There were three black males at the bus stop, and one was wearing a plaid shirt. The officers did not see a firearm, and the males did not act in any unusual way upon seeing the approaching officers. One officer frisked the male wearing the plaid shirt (J.L.) and found a firearm. The second officer frisked the other two men and found nothing.

The Court ruled, in a unanimous vote, that the frisk was unconstitutional. The Court noted that the "reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J. L." Id. at 1379. The Court also stated that an "anonymous tip lacking indicia of reliability ... does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm." Id. at 1380.

In so ruling, the Court rejected a "firearms exception," under which a lower standard of suspicion would suffice: "A second major argument advanced by Florida and the United States as amicus is, in essence, that the standard *Terry* analysis should be modified to license a 'firearm exception.' Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position." Id. at 1379.

Justice Kennedy, writing a concurrence in which the Chief Justice joined, distinguished different types of anonymous tips: "If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable." Id. at 1381. In contrast, an informant who places his anonymity at risk, by approaching an officer in person or by calling a police station with caller identification, for instance, should be treated differently.

### Manipulation of Baggage

The Supreme Court in Bond v. United States, 120 S.Ct. 1462 (2000), addressed the issue of whether a Border Patrol Agent's tactile inspection of the outer surface of a carry-on bag constituted a search within the meaning of the Fourth Amendment. In a 7-2 decision, the Court held that it did.

Bond was a passenger on a bus that stopped in Texas for a border patrol check. The agent boarded the bus and verified the citizenship of the passengers. As the agent left the bus, he ran his hand along the luggage stored in the overhead bins, squeezing each bag. The agent felt something "brick-like" in Bond's bag. Bond admitted the bag belonged to him and gave the agent permission to open it. Upon inspection, the agent discovered a brick of methamphetamine.

The court of appeals affirmed the decision of the district court, holding that the agent's "manipulation of the bag was not a search within the meaning of the Fourth Amendment." United States v. Bond, 167 F.3d 225, 227 (5th Cir. 1999). The Supreme Court reversed, in a decision written by Chief Justice Rehnquist.

The Fourth Amendment grants the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ...." The Court held that "[a] traveler's personal luggage is clearly an 'effect' protected by the Amendment." 120 S.Ct. at 1464. In analyzing whether the manipulation of the luggage was a search, the Court looked at two elements: (1) "whether the individual, by his conduct, has exhibited an actual expectation of privacy" and (2) "whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable.'" Id. at 1465 (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)). As to the first element, the Court found that Bond had exhibited an expectation of privacy by putting his belongings in a bag and placing the bag above his seat. As to the second element, the Court found that although it is reasonable for a traveler to expect his or her bag to be handled, it is not reasonable to expect that others will "feel the bag in an exploratory manner." Id. Because the two elements were satisfied, the Court held that the agent's manipulation of the bag violated the Fourth Amendment.

### Crime Scene Exception

In Flippo v. West Virginia, 120 S.Ct. 7 (1999), the defendant was vacationing with his wife at a state park, when he called 911 to report an attack on himself and his wife. The officers who responded to the call found petitioner with injuries to his head and legs and his wife inside the cabin with fatal head wounds. The officers questioned the defendant and took him to a hospital. They closed off the area and later searched the cabin for 16 hours. When they found a briefcase inside the cabin, they opened it and seized the

contents, which included evidence.

The defendant was indicted for the murder of his wife and moved to suppress the evidence discovered in the closed briefcase. The police had not obtained a warrant. His motion to suppress the evidence was denied. The Supreme Court reversed, holding that there is no general "crime scene exception" to the warrant requirement, citing Mincey v. Arizona, 437 U.S. 385 (1978), which had rejected any general murder scene exception. The Court remanded, noting that its decision was limited to this one issue and that it was not commenting on any other possible theories that might satisfy the Fourth Amendment.

## FIFTH AMENDMENT: IMMUNITY

The first issue addressed by the Supreme Court in United States v. Hubbell, 120 S.Ct. 2037 (2000), was whether the defendant's disclosure of the existence of documents was protected by the privilege against self-incrimination. The second issue was whether the government could prepare criminal charges against the defendant based on the contents of documents produced after a grant of immunity. The Court, in an 8-1 decision, found for the defendant on both issues.

As part of a plea bargain, Hubbell pled guilty to mail fraud and tax evasion and agreed to provide the Independent Counsel with information relating to the ongoing Whitewater investigation. In an attempt to discover whether Hubbell was indeed providing the promised information, the Independent Counsel served him with a subpoena duces tecum, asking for the production of documents before a grand jury in Little Rock, Arkansas. Hubbell appeared and invoked his Fifth Amendment privilege against self-incrimination; he refused to state whether he had any documents responsive to the subpoena. The prosecutor produced an order directing Hubbell to answer and granting him immunity. Hubbell then produced 13,120 pages of documents, answering that those were all of the responsive documents, except for a few protected by the attorney-client and work-product privileges. The contents of the documents led the Independent Counsel to bring criminal charges against Hubbell for tax-related crimes as well as mail and wire fraud.

### "Act of Production" Rule

Writing for the majority, Justice Stevens noted that the protection of the Fifth Amendment is limited to "testimonial" evidence. The Court explained that criminal suspects can be compelled to engage in conduct that might be incriminating, such as providing blood samples or handwriting exemplars, but could not be compelled to *communicate* incriminating facts or beliefs. The Court held that Hubbell's production of documents was testimonial in nature.

In Fisher v. United States, 425 U.S. 391 (1976), the Court had held that incriminating documents must be produced if their creation was not "compelled." In *Fisher*, the documents in question were working papers used by an accountant in preparing an income tax return. These documents were voluntarily prepared, so they were not "compelled." However, the Court has recognized that the *act of producing* documents can sometimes have a *testimonial* effect. For example, in United States v. Doe, 465 U.S. 605 (1984), the mere turning over of documents to the grand jury was a protected testimonial communication, since production was an admission of the witness's control of the documents, the documents' existence, and their authenticity. The Court held that Hubbell's testimony was "compelled" as described in *Doe*. In comparing Hubbell's case to *Fisher*, the Court found that in *Fisher* the Government already knew the documents existed and were with the taxpayer's attorneys, whereas in Hubbell's case, the Government had no prior knowledge of the documents Hubbell produced.

### Immunity

The Court held that the Fifth Amendment extended not only to incriminating evidence but also to information that can lead to the discovery of incriminating evidence. The Court held that "respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution." 120 S.Ct. at 2046. In Kastigar v. United States, 406 U.S. 441 (1972), the Court had held that a person with immunity does not have to prove that his or her testimony was used improperly. Instead, the burden is on the prosecution "to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Id. at 460. In this case, the Government could not do so; in fact the Government admitted it only learned of the crimes because of the documents produced by Hubbell.

The Government argued that it was not going to use the documents at trial, but the Court stated that the question was not whether the Government would use the documents later, but whether "it has already made 'derivative use' of the testimonial aspect of that act [of production] in obtaining the indictment against respondent and in preparing its case for trial. It clearly has." 120 S.Ct. at 2046.

Justice Thomas wrote a concurring opinion, joined by Justice Scalia. Justice Thomas stated that only allowing the Fifth Amendment privilege against self-incrimination for testimonial evidence may be inconsistent with the original meaning of the Fifth Amendment. He argued that "witness" was broadly defined at common law to mean "one who gives evidence." Id. at 2053. Justice Thomas stated, "In a future case, I would be willing to reconsider the scope and meaning of the Self-Incrimination Clause." Id. at 2050.

## COMMENT ON DEFENDANT'S PRESENCE

In Portuondo v. Agard, 120 S.Ct. 1119 (2000), the prosecutor, in her summation, called the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly. The defendant argued that these comments burdened his Sixth Amendment right to be present at trial and to be confronted with the witnesses against him, as well as his Fifth and Sixth Amendment rights to testify on his own behalf.

The Court, in an opinion by Justice Scalia, rejected these arguments. The Court refused to extend the rule in Griffin v. California, 380 U.S. 609 (1965). *Griffin* involved comments upon a defendant's refusal to testify. The trial court instructed the jury that it was free to consider the defendant's failure to deny or explain facts within his knowledge. The Supreme Court held that such a comment, by "solemnizing the silence of the accused into evidence against him," unconstitutionally "cuts down on the privilege [against self-incrimination] by making its assertion costly." Id. at 614. *Griffin* was thus based on the Fifth Amendment. "The prosecutor's comments in this case, by contrast, concerned respondent's *credibility as a witness*, and were therefore in accord with our longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'" 120 S.Ct. At 1125

(quoting Brown v. United States, 356 U.S. 148, 154 (1958)). See also Perry v. Leeke, 488 U.S. 272, 282 (1989)("When [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses — rules that serve the truth-seeking function of the trial — are generally applicable to him as well."); Jenkins v. Anderson, 447 U.S. 231, 235-36 (1980) (A defendant who takes the stand is "subject to cross-examination impeaching his credibility just like any other witness.") (quoting Grunewald v. United States, 353 U.S. 391, 420 (1957)); Reagan v. United States, 157 U.S. 301, 305 (1895).

## PRIOR CONVICTIONS: "DRAWING THE STING"

The defendant in Ohler v. United States, 120 S.Ct. 1851 (2000), was charged with drug offenses. She had a previous felony conviction for methamphetamine possession. The Government filed motions *in limine* for admission of Ohler's prior conviction as impeachment evidence under Federal Evidence Rule 609(a)(1). The district court subsequently ruled that the prior conviction would be admissible if Ohler testified.

Ohler did testify, and during her testimony she admitted to the prior conviction. She was found guilty. Ohler appealed, arguing that the trial court erred in allowing the prior conviction to be used as impeachment evidence. The court of appeals affirmed, holding that Ohler waived her objection since she introduced the evidence in direct examination. In a 5-4 decision, the Supreme Court affirmed. The Court first cited the general waiver rule that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." Id. at 1853.

Ohler contended that the waiver rule should not apply in her situation. She argued that it would be unfair to force a defendant to wait for the prosecution to introduce the prior conviction, since the jury might think the defendant was trying to hide something. The Court questioned whether a defendant's credibility would really be threatened in this situation. The Court went on to say that even if the jury did find the defendant more credible for introducing the evidence during direct examination, that credibility would be unwarranted because the jury would not know that the only reason the defendant introduced the prior conviction was because he or she failed to have it excluded.

Ohler also argued that her right to testify was unconstitutionally burdened. The Court stated that there was no such burden: "[T]he rule in question does not prevent Ohler from taking the stand and presenting any admissible testimony which she chooses." Id. at 1855. Accordingly, "a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was in error." Id.

Because this decision is not constitutionally based, it does not automatically apply in state court.

## ELEMENTS OF CRIMES: JURY TRIAL

In Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), the accused shot into the house of an African-American family. He admitted to the shooting and stated that he had fired the shots because he did not want the family in the neighborhood (he later retracted the statement). Apprendi was indicted on 23 counts, including four different shootings and unlawful possession of weapons.

New Jersey has a hate crime statute, which allows the trial judge to extend the term of imprisonment if the judge finds, by a preponderance of the evidence, that the defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N. J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000).

After plea bargaining, Apprendi pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb. Each second-degree offense was punishable by 5 to 10 years. The plea agreement gave the State the right to request an enhanced sentence for the shooting at the African-American family's home, based on the hate crime statute. Under the statute, if Apprendi was found guilty of a hate crime, he could face 10 to 20 years for the second-degree offense instead of 5 to 10 years. The plea agreement also gave Apprendi the right to challenge any hate crime sentence.

The State filed a motion for an extended sentence, and the judge found, by a preponderance of the evidence, that Apprendi's actions violated the hate crime statute. Apprendi was sentenced to 12 years for the count relating to the shooting, despite the maximum penalty of 10 years. Apprendi appealed, arguing that the Due Process Clause required a jury must find him guilty of a hate crime beyond a reasonable doubt in order for him to be punished in accordance with the statute.

The Supreme Court, in a 5-4 decision, held that the trial court did err: "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." 120 S.Ct. at 2362-63.

The Court explained that the Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process, "[t]aken together ... indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Id. at 2355-56 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)). After discussing the development of trial by jury in the criminal law setting, the Court stated:

> The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. Id. at 2359.

The Court also pointed out that the requirement of "proof beyond a reasonable doubt," as established by In re Winship, 397 U.S. 358, 364 (1970), was based in part on the fact that criminal defendants face a loss of liberty and stigmatization if convicted. By increasing the maximum sentence, the loss of liberty and amount of stigma are likewise increased; therefore, the Court reasoned that the "defendant should not ... be deprived of protections that have, until that point, unquestionably attached." 120 S.Ct. at 2359.

The Court cited several of its previous decisions. It referred to Jones v. United States, 526 U.S. 227 (1999), which applied the same rule – that increases in maximum sentences based on any fact other than a prior conviction must be made by a jury based on proof beyond a reasonable doubt – to a federal statute. In McMillan v. Pennsylvania,

477 U.S. 79 (1986), the Court allowed for "sentencing factors" to be determined by a judge. However, the *McMillan* Court held that states could not use sentencing factors to alter maximum sentences or to create separate offenses with separate penalties. Id. at 87-88. In concluding, the Court stated, "The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." 120 S.Ct. at 2366.

Justice Thomas, in a concurring opinion (joined in part by Justice Scalia), engaged in a historical analysis of what is meant by a "crime" and concluded that the majority's rule is not broad enough. He argued that a "'crime' includes every fact that is by law a basis for imposing or increasing punishment," id. at 2368, including the fact of prior conviction.

## RIGHT TO COUNSEL

### Self-Representation on Appeal

In Martinez v. California Court of Appeal, 120 S.Ct. 684 (2000), the defendant was a paralegal charged with converting a client's money to his own use. He represented himself at trial and was acquitted of grand theft but convicted of embezzlement. Martinez filed a notice of appeal, along with a motion to represent himself. The California Court of Appeal denied the motion, and the California Supreme Court denied Martinez' application for a writ of mandate.

The Supreme Court affirmed the decision of the California Supreme Court, holding that requiring Martinez to be represented by a state-appointed attorney did not deprive Martinez of any constitutional right. In Faretta v. California, 422 U.S. 806 (1975), the Court held that there is a constitutional right to go to trial without counsel. The Court determined that the holding in *Faretta* was limited to trial and did not extend to appeal.

The Court analyzed the rationale of *Faretta* and determined that, although some of the reasoning applied to appeals, there were distinctions. The *Faretta* Court relied on the fact that the right to self-representation had been recognized throughout history. However, the reason for the right was originally because there were few competent lawyers, and this reasoning does not have the same force today. Also, appeals were not widely recognized in colonial United States, and there was no criminal appeal in England until 1907. The *Faretta* Court's reliance on the Sixth Amendment does not apply, since the Sixth Amendment only deals with trial.

The *Faretta* Court also relied on individual autonomy as a reason for self-representation. The Court agreed that individual autonomy was equally relevant to trial and appellate procedure. However, the Court stated that courts must balance the defendant's autonomy with the integrity and efficiency of the legal system: "Considering the change in position from defendant to appellant, the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level." Martinez v. California Court of Appeal 120 S.Ct. 684, 692 (2000). In addition, the Court called its holding "narrow," as the states can modify their constitutions to include a right to self-representation on appeal.

### Ineffective Assistance: Consultation on Appeals

In Roe v. Flores-Ortega, 120 S.Ct. 1029 (2000), the defendant pled guilty pursuant to a California rule permitting a defendant both to deny committing a crime and to admit that there was sufficient evidence for conviction. State law demanded the filing of a notice of appeal within 60 days of conviction. The defendant was in lock-up for the first 90 days after sentencing, and his appointed public defender did not file the notice of appeal. When the defendant tried to file a notice of appeal after about four months, it was rejected as untimely. The defendant then alleged ineffective assistance of counsel based on his appointed public defender's failure to file a notice of appeal on his behalf after promising to do so. The Ninth Circuit adopted a per se rule of ineffectiveness for failure to file a notice of appeal unless the accused specifically instructs counsel not to do so.

On review, the Supreme Court rejected the per se rule as inconsistent with Strickland v. Washington, 466 U.S. 668 (1984). Instead, the Court held that "counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known." 120 S.Ct. at 1036. The Court also observed: "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance." Id. at 1035 (citation omitted).

Further, to demonstrate prejudice the defendant must show that counsel's deficient performance actually caused his harm. "Accordingly, we hold that, to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id. at 1038. Because of the record, the Court remanded: "Based on the record before us, we are unable to determine whether Ms. Kops had a duty to consult with respondent (either because there were potential grounds for appeal or because respondent expressed interest in appealing), whether she satisfied her obligations, and, if she did not, whether respondent was prejudiced thereby." Id. at 1040.

### Ineffective Assistance: *Anders* Briefs

In Smith v. Robbins, 120 S.Ct. 746 (2000), the respondent was convicted in state court of second-degree murder and grand theft of an automobile. His appointed counsel believed that an appeal would be frivolous. The counsel followed the requirements set forth in People v. Wende, 25 Cal.3d 436, 600 P.2d 1071 (1979), by filing a brief summarizing the procedural and factual history of the case, with citations to the record. The defendant also availed himself to his right under *Wende* to file a pro se supplemental brief.

The issue before the Supreme Court was whether the defendant had been denied effective assistance of counsel. The California procedure set forth in *Wende* did not require counsel to discuss the merits of the case or state that, upon review, he has concluded an appeal would be frivolous. Instead, counsel submitting a *Wende* brief offers to brief any

issues directed by the court. In contrast, Anders v. California, 386 U.S. 738 (1967), requires appellate counsel to raise issues in an appellate brief when seeking to withdraw from representation because he believes that the appeal would be frivolous.

The Court noted that the states are permitted to devise their own procedures, so long as those procedures are within the confines of the Constitution. States will not be forced to use a single solution in dealing with difficult problems of policy: "[T]he *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may — and, we are confident, will — craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders*. The Constitution erects no barrier to their doing so." 120 S.Ct. at 759. The *Wende* procedure "affords adequate and effective appellate review for criminal indigents. Thus, there was no constitutional violation in this case simply because the *Wende* procedure was used." Id. at 763.

The Court next discussed some of the weaknesses of the *Anders* rule as well as some advantages of the *Wende* rule. For example, *Wende* "requires both counsel and the court to find the appeal to be lacking in arguable issues, which is to say, frivolous." Id. at 761. Also, under *Wende* counsel does not seek to withdraw but is available to brief issues that the appellate court finds meritorious.

**Ineffective Assistance: Capital Sentencing**

In Williams v. Taylor, 120 S.Ct. 1495 (2000), the defendant, while in custody on an unrelated offense, wrote a letter confessing to killing a man. After questioning, Williams admitted he killed the man and took three dollars from his wallet. He was convicted of robbery and capital murder. At the sentencing hearing, the prosecution offered evidence of Williams' prior convictions for armed robbery, burglary, and grand larceny. The prosecution entered Williams' confession letter and described Williams' attack of an elderly woman and his conviction for arson while awaiting trial. Expert witnesses for the prosecution testified that Williams posed a continuing threat to society.

Williams' counsel offered character testimony by Williams' mother and two neighbors (one of whom was asked to testify while in the audience at the proceedings). His counsel also entered recorded testimony from a psychiatrist stating that Williams had removed bullets from his gun in earlier robberies so that he would not hurt anyone. In closing argument, Williams' counsel stated that it would be difficult for the jury to justify sparing Williams' life. Counsel did not investigate Williams' juvenile record because they thought the law prohibited them from doing so. If they had performed such an investigation, they would have discovered mitigating factors such as physical abuse and his parents' arrest for criminal neglect of their children. Williams' counsel also failed to introduce evidence of Williams' borderline mental retardation and sixth-grade education. In addition, counsel did not introduce evidence of Williams' good behavior in prison, such as helping bust a drug ring and turning in a guard's lost wallet, nor did they put on testimony from prison officials who believed Williams was nonviolent. An accountant who was respected by the community and had visited Williams in prison as part of a ministry program called Williams' counsel and offered to testify on Williams' behalf. Counsel failed to return his call.

Based on the evidence at the sentencing hearing, the jury unanimously fixed the punishment at death, and the trial judge imposed the death sentence. The Virginia Supreme Court affirmed the conviction and the sentence.

Williams filed a petition for habeas corpus with the state court. The Circuit Court found that the trial was valid but that Williams's counsel was ineffective at the sentencing hearing. Based on its finding, the Circuit Court recommended a rehearing on the sentencing phase. The Virginia Supreme Court reversed. Even assuming Williams' counsel was ineffective, the Virginia Supreme Court determined that the omitted evidence would not have affected the sentence and that Williams had not demonstrated the hearing was unfair.

Williams then sought a federal writ of habeas corpus. The federal trial court reversed, affirming the decision of the state Circuit Court. But the federal court of appeals reversed, construing 28 U.S.C. § 2254(d)(1), which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), as requiring a grant of habeas relief only if the state court "'decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.'" 163 F.3d 860, 865 (4th Cir. 1998) (quoting Green v. French, 143 F.3d 865, 870 (4th Cir. 1998)). Since the court of appeals found the decision of the state trial court to be reasonable, it did not grant Williams' petition.

In reversing, the Supreme Court first interpreted § 2254(d)(1) and then applied the statute to Williams' claim of ineffective assistance of counsel. Justice O'Connor delivered the opinion of the court on the issue of statutory interpretation (joined by Chief Justice Rehnquist and Justices Thomas, Scalia, and Kennedy). The Court stated that the 1996 version of § 2254(d)(1), which governs Williams' case, changed the previous rule that federal courts owed state courts no deference in habeas cases. Now, in order to obtain federal habeas relief, a defendant must show that the state's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (1994 ed. Supp. III). The Court interpreted the "contrary to" clause to mean that a writ may be granted "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." 120 S.Ct. at 1523. The Court interpreted the "unreasonable application" clause to mean that a writ may be granted "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. The Court stated that the Fourth Circuit erred in relying on the statement in Green v. French, 143 F.3d 865 (4th Cir. 1988), that a petition for habeas corpus could only be granted if the state court applied federal law "in a manner that reasonable jurists would all agree is unreasonable." 143 F.3d at 870. The Court explained that this "standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one." 120 S.Ct. at 1522.

Justice Stevens delivered the opinion of the court on the issue of statutory application (joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer). The Court held that the decision of the Virginia Supreme Court, rejecting Williams' claim of ineffective counsel, was both "contrary to" and an "unreasonable application" of established law. The Court cited Strickland v. Washington, 466 U.S. 668 (1984), the current law for proving ineffective assistance of counsel:

"First, the defendant must show that counsel's performance was deficient....Second, the defendant must show that the deficient performance prejudiced the defense...." Id. at 687. The Court stated that the Virginia Supreme Court erred in holding that Lockhart v. Fretwell, 506 U.S. 364 (1993), modified *Strickland*. The counsel in *Lockhart* was deficient, but the counsel's ineffectiveness did not prejudice the defendant. The Court stated that decisions such as *Lockhart*

> do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel does deprive the defendant of a substantive or procedural right to which the law entitles him. In the instant case, it is undisputed that Williams had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer. 120 S.Ct. at 1513.

## JURY CHALLENGES

In United States v. Martinez-Salazar, 120 S.Ct. 774 (2000), a potential juror indicated a bias for the prosecution. The trial judge erroneously refused to dismiss the juror for cause, and the defendant then exercised a peremptory challenge to remove that juror. The defendant also exhausted all the remaining peremptory strikes. The issue was whether Martinez-Salazar was denied any right under Federal Criminal Rule 24.

The Court noted that peremptory challenges are not guaranteed by the Constitution. "We have long recognized the role of the peremptory challenge in reinforcing a defendant's right to trial by an impartial jury. But we have long recognized, as well, that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension." Id. at 779 (citations omitted). Consequently, the defendant's Sixth Amendment right to an impartial jury is not violated by his use of a peremptory challenge to remove a potential juror that should have been removed for cause. So long as the jury that sits for the trial is impartial, the defendant has been afforded his Sixth Amendment right.

As for due process, the Court noted that a "hard choice is not the same as no choice. Martinez-Salazar, together with his codefendant, received and exercised 11 peremptory challenges (10 for the petit jury, one in selecting an alternate juror). That is all he is entitled to under the Rule." Id. at 781. The Court further commented: "In choosing to remove Gilbert rather than taking his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." Id. at 781-82.

The Court also noted the limitations on its holding: "It is not asserted that the trial court deliberately misapplied the law in order to force the defendants to use a peremptory challenge to correct the court's error. Accordingly, no question is presented here whether such an error would warrant reversal. Nor did the District Court's ruling result in the seating of any juror who should have been dismissed for cause. As we have recognized, that circumstance would require reversal." Id. at 782 (citation omitted).

## EX POST FACTO

### Changes in Evidence Rules

In Carmell v. Texas, 120 S.Ct. 1620 (2000), the Supreme Court addressed a subject for the first time in many years – the application of the Ex Post Facto Clause to changes in evidence rules. Prior to September 1, 1993, a Texas statute required one of three types of support for testimony by victims in certain sex crimes prosecutions – indecency with a child, sexual assault, and aggravated sexual assault. The support for testimony included: (1) corroboration by other evidence, (2) corroboration by someone whom the witness informed within six months of the offense (a type of "fresh complaint" rule), or (3) the testimony alone, even without corroboration or fresh complaint, if the victim was younger than 14 at the time of the offense. Effective September 1, 1993, the statute was amended. The new statute included the same three requirements, but the age for the victim in the third requirement was changed to under 18.

Carmell was convicted of 15 sexual offenses against his stepdaughter. He appealed four of his convictions, which involved conduct prior to September 1, 1993, during which time the victim was older than 14. Carmell argued that application of the new statute violated the Ex Post Facto Clause. Under the old statute, the victim's testimony would require corroboration. A Texas appellate court found against Carmell, ruling that the statute was procedural and did not increase the punishment nor change the elements of the offense.

The Supreme Court reversed, in an opinion delivered by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Breyer. The Court determined that the statute violated the Ex Post Facto Clause because it "'alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Id. at 1626 (quoting Calder v. Bull, 3 Dall. 386, 390 (1798)). Texas relied on Hopt v. Territory of Utah, 110 U.S. 574 (1994), in which the retroactive application of a witness competency provision was upheld as constitutional. Texas argued the statute in Carmell's case was likewise a witness-competency rule that did not affect the definition of the crime, its punishment, or the sufficiency of the evidence required to convict. The Court rejected this argument, ruling that the statute was not a mere witness-competency provision but was instead a sufficiency-of-the-evidence rule. The language in the Texas statute stated that "[a] conviction ... is supportable on," whereas the language in *Hopt* referred to "determining the competency of witnesses."110 U.S. at 587-88. Consequently, the Texas statute did not "simply enlarge the class of persons who may be competent to testify," nor did it "only remove existing restrictions upon the competency of certain classes of persons as witnesses." Id. at 589-90.

In reversing, the Supreme Court quoted from Joseph Story's comments on the Ex Post Facto Clause:

> If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the

commission of future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty, essentially depend. Commentaries on the Constitution § 1338 at 211, n.2.

### Extension of Intervals Between Parole Hearings

In Garner v. Jones, 120 S.Ct. 1362 (2000), the Court confronted a different ex post facto issue. The question before the Court was whether the retroactive application of a Georgia law permitting the extension of intervals between parole considerations violated the Clause. In 1974 respondent began serving a life sentence for murder. He escaped five years later and committed another murder.

Apprehended and convicted in 1982, he was sentenced to a second life term. At the time of respondent's second conviction, the Parole Board was required to consider parole after three years. In 1985, the rules were amended to require reconsideration every eight years. The board reinstated its earlier three-year rule and considered respondent for parole in 1992 and 1995. He was denied both times. In 1995, the Board resumed scheduling parole reconsiderations at least every eight years, and so at respondent's 1995 review it set the next consideration for 2003. The Board's policy permits inmates to show a change in their individual circumstances, which could expedite reconsideration for parole.

On review, the Supreme Court ruled as follows: "The states must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." Id. at 1368. "The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience." Id. at 1369. "The Board's stated policy is to provide for reconsideration at 8-year intervals 'when, in the Board's determination, it is not reasonable 'to expect that parole would be granted during the intervening years.'" Id. at 1369-70 (citation omitted). Thus, the State's new policy did not act to increase respondent's punishment for the crime he committed prior to the enactment of the new policy.

## INTERSTATE DETAINERS

The issue in New York v. Hill, 120 S.Ct. 659 (2000), was whether defense counsel's agreement to a trial date outside the time period required by Article III of the Interstate Agreement on Detainers (IAD) bars the defendant from seeking dismissal because trial did not occur within that period. The IAD is a compact entered into by 48 States, the United States, and the District of Columbia to establish procedures for the resolution of one jurisdiction's outstanding charges against a prisoner of another. If a defendant is not brought to trial within the applicable 180-day period, the IAD requires that the indictment be dismissed with prejudice.

Defendants may waive their most basic rights and constitutional protections. "Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." United States v. Olano, 507 U.S. 725, 733 (1993). Fundamental rights require the defendant's personal involvement for an effective waiver. E.g., Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938) (right to counsel); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (right to plead not guilty). For other rights, however, their attorneys may effectively waive the right. "Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has — and must have — full authority to manage the conduct of the trial." Taylor v. Illinois, 484 U.S. 400, 417-18 (1988). In such cases, the defendant is "deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Link v. Wabash R. Co., 370 U.S. 626, 634 (1962) (quoting Smith v. Ayer, 101 U.S. 320, 326 (1880)).

Certain rights, including scheduling matters, may be waived by the action of counsel alone. "[T]he IAD 'contemplate[s] a degree of party control that is consonant with the background presumption of waivability.'" Id. at 665-66. Furthermore, the IAD is a scheduling arrangement and therefore can be waived by counsel.

## DEATH PENALTY

### Jury Instructions

Weeks v. Angelone, 120 S.Ct. 727 (2000), raised the issue whether the Constitution is violated when a trial judge directs a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to a question regarding the proper consideration of mitigating circumstances. The defendant was a passenger in a car, which he had previously stolen, when a State Trooper stopped the car after it sped by. The officer asked the driver and defendant to step out of the car, at which time the defendant fired his 9-millimeter semiautomatic pistol six times, killing the officer. The defendant was arrested the next morning, and at that time he confessed to the crime. A jury trial ensued, and the jury asked the judge two questions during its deliberations. The judge answered the second question by instructing the jury to reread the second paragraph of the jury instructions.

On review, the Court ruled: "Given that petitioner's jury was adequately instructed, and given that the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry, the question becomes whether the Constitution requires anything more. We hold that it does not." Id. at 732-33. The Court went on to write: "At best, petitioner has demonstrated only that there exists a slight *possibility* that the jury considered itself precluded from considering mitigating evidence. Such a demonstration is insufficient to prove a constitutional violation under *Boyde*, which requires the showing of a reasonable *likelihood* that the jury felt so restrained." Id. at 734 (citing Boyde v. California, 494 U.S. 370 (1990)).