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UNITED STATES SUPREME COURT: 1995 & 1996 TERMS

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This article summarizes many of the criminal law decisions decided by the United States Supreme Court during the last two terms.

SEARCH & SEIZURE

Pretextual Searches

In *Whren v. United States*, 116 S.Ct. 1769 (1996), the Supreme Court considered the constitutionality of a "pretextual" traffic stop. A unanimous Court held that the temporary detention of a motorist upon probable cause that he violated the traffic laws does not violate the Fourth Amendment, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective.

While patrolling a "high drug" area, plainclothes police observed a truck at a stoplight. It paused longer than necessary, turned abruptly without a signal, and sped off at an unreasonable rate of speed. Traffic stops were not part of these plainclothes policemen's duties. Upon approaching the vehicle to supposedly warn the driver of possible traffic violations, they saw bags of crack cocaine in the defendants' hands.

Whren argued that the Fourth Amendment test in this context should be whether a reasonable officer would have stopped the car for the purpose of enforcing a traffic violation. Whren contended that the police otherwise would be encouraged to use common traffic violations as a means to investigate different crimes. The Court said its precedents made clear that ulterior motives do not invalidate police conduct that was justified by probable cause. *United States v. Robinson*, 414 U.S. 218 (1973). Subjective intent does not matter. The Court also rejected Whren's theory that police conduct should be judged for its reasonableness according to local law enforcement practices. This would mean the meaning of the Fourth Amendment would change "from place to place and from time to time."

Finally, Whren argued that a "balancing of interests"

under the Fourth Amendment would not support inconveniencing motorist by stops from plainclothes police in unmarked cars. He argued that such a practice would inconvenience, confuse, and provoke anxiety in motorists, while only minimally advancing a government interest in traffic safety. The Court found this contention unpersuasive. A "balancing of interests" inquiry is used only for searches and seizures conducted in some extraordinary manner and which unusually invaded privacy or physical interests — for example, seizures by deadly force, unannounced entries into the home, or physical penetrations of the body. Traffic stops by plainclothes police do not fit this category.

Appellate Review

In *Ornelas v. United States*, 116 S.Ct. 1657 (1996), the Supreme Court held that decisions concerning "reasonable suspicion" to stop motorists and "probable cause" for a subsequent vehicle search should be reviewed de novo on appeal. Each inquiry raises two different issues: The first involves a determination of the historical facts that lead up to the stop (or search). The second issue involves a mixed question of law and fact: whether, from the perspective of an objectively reasonable police officer, reasonable suspicion or probable cause existed. Allowing appellate courts to independently review the second inquiry is consistent with earlier decisions of the Court — for example, *Brinegar v. United States*, 338 U.S. 160 (1949). It also prevents varied results stemming from conflicting interpretations of similar facts by different trial judges. Moreover, de novo review is necessary for appellate courts to clarify and maintain control over legal issues. Lastly, it should unify precedent and provide the police with a defined set of rules.

The Court, however, also noted that reviewing courts should review historical facts only for clear error. Additionally, "due weight" should be given to the determinations of the trial judge. This means taking into account the distinctive traits and events of a locale and the experiences that color the perception and judgment of police officers.

Knock & Announce Rule

In *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), Justice Thomas, for a unanimous Court, wrote that the common law rule of “knock and-announce” is part of the Fourth Amendment:

Our own cases have acknowledged that the common law principle of announcement is “embedded in Anglo American law,” but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now do so. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer’s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. *Id.* at 1918.

The Court indicated that exceptions to the rule must be determined on a case-by-case basis.

School Drug Searches

In *Vernonia School District 47J v. Acton*, 115 S.Ct. 2386 (1995), the Supreme Court upheld random urinalysis drug testing for public high school students who participated in athletic programs. Based on prior cases upholding drug testing in other contexts, the Court found the drug testing scheme at issue reasonable. “Fourth Amendment rights, no less than First and Fourteenth Amendment, are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.” *Id.* at 2392. See also *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives’ Assn*, 489 U.S. 602 (1989).

Erroneous Radio Reports

In *Arizona v. Evans*, 115 S.Ct. 1185 (1995), the Supreme Court decided that the exclusionary rule’s purpose to deter illegal police conduct would not be served where an officer arrests someone following a radio report of an outstanding warrant, when in fact the warrant had been quashed. Since the error was made, not by police, but by court employees, the Supreme Court held that there was no sound reason to apply the exclusionary rule.

[T]here is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. *Id.* at 1193.

SELECTIVE PROSECUTIONS

Many studies and commentators have suggested the possibility that African-Americans are selectively prosecuted for drug offenses, most notably for crack cocaine. Defendants seeking to assert a selective prosecution claim will receive little encouragement from *United States v. Armstrong*, 116 S.Ct. 1480 (1996). An en banc Ninth Circuit decided that a claim of selective prosecution by African-American defendants required that the prosecution either submit to discovery requests or drop the charges. The Supreme Court reversed, holding that a defendant who seeks discovery for a claim of selective prosecution based upon race must meet a threshold requirement — “a credible showing

of different treatment of similarly situated persons.” *Id.* at 1489. This threshold must establish both a prosecutorial intent to discriminate and a discriminatory effect. See *Oyler Boles*, 368 U.S. 448 (1962).

Armstrong argued that Federal Criminal Rule 16, which provides for defense discovery of certain documents, supported the Ninth Circuit’s decision. The Supreme Court disagreed, ruling that discovery under Rule (a)(1)(C) is limited to documents related to the prosecution’s case-in-chief.

JURY TRIAL

Petty Offense Exception

In 1968, the Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968), decided that the right to a jury trial does not apply to petty offenses. More recently, the Court in *Blanton v. North Las Vegas*, 489 U.S. 538 (1989), held that the best indicator of the seriousness of a crime is the length of the legislatively determined prison time for the offense. A maximum sentence longer than six months indicates that the legislature considered the crime to be serious. A sentence of six months or less is considered a petty offense, unless the legislature has authorized additional statutory penalties so severe as to indicate that it considered the offense serious.

Lewis v. United States, 116 S.Ct. 2163 (1996), involved multiple crimes whose aggregate punishment exceeded the six-month limit, but when taken individually did not. The defendant was a mail carrier charged with two counts of obstructing the mail. Each offense carried a maximum jail time of six months. The magistrate ordered a bench trial, commenting that she would not impose a sentence of more than six months imprisonment.

The Supreme Court held that because the legislature set the prison term at six months, it considered the offense petty. Adding two offenses together to exceed the six-month limit does not change the legislative intent, the guiding principle in the analysis. Because the majority believed that this analysis answered the question, it did not determine whether a judge’s self-imposed limitation on sentencing changes the right to a jury trial.

Mixed Questions of Fact & Law

In *United States v. Gaudin*, 115 S.Ct. 2310 (1995), the defendant was convicted of making false statements on loan applications submitted to the Department of Housing and Urban Development (HUD). To convict, the prosecution had to prove that the false statements were material to HUD’s decisions. The trial court held that such a determination was for the court, rather than the jury. The Supreme Court reversed, finding Fifth and Sixth Amendment violations.

The government conceded that materiality is an element of the offense but suggested that the jury’s responsibility to decide the essential elements of a crime is limited to factual components. The Court held that the decisions cited by the government, beginning with *Sparf & Hansen v. United States*, 156 U.S. 51 (1895), stand for the proposition that juries have always been required to decide mixed questions of law and fact, not simply facts. Indeed, the jury is responsible for the “delicate assessments of the inferences a ‘reasonable [decisionmaker]’ would draw from a given set of facts and the significance of the inferences to him.” *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

INTOXICATION DEFENSE

In *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996), the Supreme Court ruled that a state statute that precluded an accused's use of intoxication to negate a required mens rea did not violate due process. There was, however, no majority opinion. The plurality opinion, written by Justice Scalia, noted that the primary due process guide "in determining whether the principle in question is fundamental is, of course, historical practice." The common law did not initially recognize intoxication as a defense. Hall, *Intoxication and Criminal Responsibility*, 57 Harv L Rev 1045 (1944). "Eventually, however, the new view won out, and by the end of the 19th century, in most American jurisdictions, intoxication could be considered in determining whether a defendant was capable of forming the specific intent necessary to commit the crime charged." The plurality considered this delayed acceptance of the intoxication defense as evidence that the defense was not fundamental to our jurisprudence. In addition, one-fifth of the states either have never accepted the "new rule" or have recently abandoned it. Moreover, the plurality believed there was a justification for abolishing the defense. "A large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the numbers as high as half of all homicides, for example."

Justice Ginsburg's concurring opinion provided the critical fifth vote. She did not view the case as a burden of proof or evidentiary case. She concluded that the statute redefined the mens rea requirement, a substantive criminal issue that had traditionally been left to the states. The dissenters disagreed only to the extent that Justice Ginsburg's reading of the statute was precluded by the interpretation of the Washington Supreme Court. In the dissenter's view, once a state defined a crime to include a mens rea element, the state could not prevent the defendant, without a substantial justification, from introducing evidence to negate that element. Even under this view, a state is not precluded from defining a crime in such a way that it abolished intoxication as a defense.

DUE PROCESS & MENS REA

The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2252(a), forbids knowingly transporting, shipping, receiving, distributing, or reproducing visual depictions of minors engaged in sexually explicit conduct. In *United States v. X-Citement Video*, 115 S.Ct. 464 (1994), the issue turned on whether the word "knowingly" modified other parts of the statute and not merely the surrounding verbs. The Ninth Circuit held that the statute did not require that a defendant know that a performer was a minor and ruled the statute unconstitutional.

The Supreme Court reversed. The majority concluded that a scienter element is properly read into the statute, so that knowledge of a performer's minority is required for conviction. In the Court's view, to hold otherwise would entail ridiculous results unintended by Congress. If the statute had no knowledge requirement for minority status of the actors, then "a retail druggist who returns an uninspected roll of developed film to a customer 'knowingly distributes' a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct." *Id.* at 467.

Significantly, the Court believed it necessary to "read the

statute to eliminate" any constitutional doubt "so long as such a reading is not plainly contrary to the intent of Congress." *Id.* at 472. Lack of a scienter requirement for the age of the performers would have raised constitutional doubts. The Court's interpretation is supported by the tradition that a statute is to be construed where possible to avoid substantial constitutional questions. *Morrisette v. United States*, 342 U.S. 246 (1952), and *Staples v. United States*, 114 S.Ct. 1793 (1994), had held that "the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct." 115 Ct. at 469.

COMPETENCY TO STAND TRIAL

Due process requires that a defendant be mentally competent during trial. The test is whether the accused has the mental capacity to understand the nature of the proceedings and to assist counsel. Forty-six states require an accused to satisfy a preponderance-of-evidence standard when asserting a lack of mental competence to stand trial. In *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996), the state argued that its clear-and-convincing-evidence standard, a higher standard of proof, did not violate the Due Process Clause. The Supreme Court rejected this argument because it would permit a defendant who is "more likely than not" incompetent to stand trial.

The Court declined to accept Oklahoma's argument that such a standard of proof was necessary to insure prompt and orderly disposition of meritless cases. According to the Court, the defendant's right to a fair trial is more important than the state's interest in efficient operation of its criminal justice system. The Court was able to reconcile this decision with its opinion in *Addington v. Texas*, 441 U.S. 418 (1979), which held that due process requires a clear and convincing standard of proof in an involuntary civil commitment proceeding. Such proceedings, according to the Court, address entirely different substantive issues. In that case, the individual's fundamental right to liberty is protected. Here, due process protects the fundamental right not to stand trial while incompetent. Additionally, *Addington* did not purport to set standards for criminal proceedings.

DOUBLE JEOPARDY

Forfeiture

In *United States v. Ursery*, 116 S.Ct. 2135 (1996), the defendants argued that the Double Jeopardy Clause prevents the government from punishing a defendant for a criminal offense and then forfeiting his property for that same offense in a separate proceeding. In this case, the government began forfeiture proceedings against property used to produce marijuana and then began a criminal prosecution. A companion case, consolidated by the Court, involved a forfeiture proceeding for property used in money laundering and proceeds from a felonious drug transaction. The forfeiture proceeding was deferred, while the defendants were prosecuted for money laundering and drug charges.

The Supreme Court decided that *in rem* civil forfeitures are neither punishment nor criminal for double jeopardy purposes. The lower courts had relied mainly on *United States v. Halper*, 490 U.S. 435 (1989), and *Austin v. United States*, 509 U.S. 602 (1993). According to the majority, the lower courts misinterpreted these cases, which did not replace the traditional analysis for determining whether a civil sanction constituted punishment for double jeopardy purposes. The

proper analysis includes a two-part test that asks, first, whether Congress intended a particular forfeiture to be a remedial civil sanction or a criminal penalty. The second part asks whether the forfeiture proceedings are so punitive in nature that they cannot legitimately be categorized as civil proceedings, despite a congressional intent to establish a civil remedy. This two-part test is long established and most recently upheld in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

These precedents establish that “[i]n rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in *personam* civil penalties such as fines, and does not constitute a punishment for double jeopardy purposes.” 116 S.Ct. at 2137. In the Court’s view, there is no doubt that Congress intended this type of proceeding to be civil in nature. The statute’s enforcement mechanisms are civil, and there is insufficient evidence (must be the “clearest proof”) suggesting that the statutes were so punitive as to render them criminal despite a contrary congressional intent. The Court found other reasons to support its position: (1) in rem civil forfeitures have not historically been regarded as punishment; (2) there is no requirement in the statutes that the government demonstrate scienter to establish that the property is forfeitable; (3) although the statutes may have a deterrent purpose, this purpose may serve civil as well as criminal goals; and (4) the fact that the statutes are tied to criminal activity is insufficient in itself to render them punitive.

Double Punishment

In *Witte v. United States*, 116 S. Ct. 2199 (1995), the Supreme Court ruled that use of uncharged cocaine offenses for the purpose of imposing a higher sentence (within the statutorily authorized range for a related marijuana charge) did not preclude the subsequent prosecution of the cocaine charges.

Witte plead guilty to federal marijuana charges, in which the sentencing court took into account as “relevant conduct” under the sentencing guidelines the defendant’s prior involvement in an uncharged cocaine conspiracy. Witte was later indicted on the cocaine charges and moved for dismissal, arguing that he was being punished twice for the same offense. The Fifth Circuit rejected this argument, ruling that *Williams v. Oklahoma*, 358 U.S. 576 (1959), had held that use of relevant conduct to increase punishment for a charged offense does not “punish” the offender for the relevant conduct.

The Supreme Court affirmed, ruling that “petitioner’s double jeopardy theory — that consideration of uncharged conduct in arriving at a sentence within the statutorily authorized punishment range constitutes ‘punishment’ for that conduct — is not support by our precedents, which make clear that a defendant in that situation is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted.” 116 S.Ct at 2205. The Court held that *Williams* governed, regardless of whether the punishment enhancement occurs in the first or second proceeding.

Double Punishment

In *Rutledge v. United States*, 116 S.Ct. 1241 (1996), the Supreme Court unanimously held that when two statutory provisions proscribe the same offense, it is presumed that the legislature did not intend to impose two punishments. The test is whether each of the statutory provisions requires proof of a fact which the other does not. Further, concurrent convictions do not invalidate the presumption against multi-

ple punishments when a potential collateral consequence, e.g., delay of parole eligibility or an increased sentence under a recidivist statute for a future offense, exist.

Rutledge’s conviction for conspiring to distribute cocaine was a lesser included offense of his conviction for a continuing criminal enterprise. Under *Blockburger v. United States*, 284 U.S. 299 (1932), there are two offenses if each statute requires proof of a fact that the other does not. The government contended that even if the conspiracy was a lesser included offense, the presumption against multiple punishments was not violated because the concurrent sentence did not amount to punishment at all. The Court rejected that argument under *Ball v. United States*, 470 U.S. 856 (1985), which held that “the collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.” 116 S.Ct. at 1248. The imposition of a fifty dollar assessment for the second conviction was a sufficient collateral consequence.

BRADY RULE

In *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), the Supreme Court reversed a first degree murder conviction due to a *Brady* violation. While the victim loaded grocery bags into her car, a gunman shot her and took the car. The police obtained statements from six eyewitnesses. These witnesses differed significantly in their descriptions of the height, age, weight, and hair length of the assailant. An informant subsequently contacted the police, revealing that he might have bought the victim’s car from Kyles. The informant expressed concern that he would be a suspect, and several of his statements were inconsistent. The police found the murder weapon in Kyles’s apartment and the victim’s purse in the apartment complex’s garbage, both where the informant said they would be. Neither the victim’s nor Kyles’s fingerprints were found on the purse or the car, and the police never checked for the informant’s fingerprints. In a photographic lineup, three of the six eyewitnesses picked out Kyles, two were not sure, and one was not shown the photographs.

When the defense requested all exculpatory evidence, the prosecution replied that there was none. The defense was never informed of the six contemporaneous eyewitness statements, several of the informant’s tape and recorded statements, license numbers of cars near the scene (none of which matched Kyles’s car license), an internal police memorandum indicating that the informant had suggested that the police check the rubbish for the purse, and evidence linking the informant to other crimes at the same store and to an earlier murder. The prosecution’s case depended on the identifications of four of the eyewitnesses. The defense offered an alibi and asserted that the informant had “framed” Kyles. The jury deadlocked and a mistrial was declared. After the mistrial, the prosecutor interviewed the informant and additional material inconsistencies developed. At the retrial, the prosecution once again offered eyewitnesses and photographs of the scene that they argued showed Kyles’s car. Several defense witnesses testified that the informant, not Kyles, had been in the stolen car after the murder and that the informant had been near the location in Kyles’s apartment where the weapon was subsequently found by the police. Kyles was convicted and sentenced to death.

On review, the Supreme Court addressed the *Brady* issue. In *United States v. Bagley*, 473 US 667 (1985), “the

Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, i.e., the 'specific-request' and 'general- or no-request' situations." *Id.* at 1565. The Court also commented: "The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady* . . ." *Id.* at 1565.

The Court went on to explain that *Bagley* had addressed four aspects of the "materiality" requirement. First, that requirement did not mean that the defendant had to show that the undisclosed evidence would have resulted in an acquittal.

"*Bagley's* touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* at 1566 (citing *Bagley*, 473 U.S. at 678).

Second, the *Bagley* materiality requirement is "not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Third, once a reviewing court has found constitutional error "there is no need for further harmless-error review." *Id.* at 1566. Fourth, the materiality standard focuses on the "suppressed evidence considered collectively, not item-by-item." *Id.* at 1567.

"On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 1567. If in doubt, the prosecutor should disclose: "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . This is as it should be." *Id.* at 1568. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (the prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done").

In *Kyles*, the suppressed evidence "collectively" would have made a different result probable. The prosecution's eyewitness case would have been substantially weakened if the witnesses' prior statements had been revealed. One witness's crime scene description differed markedly from *Kyles's* height and weight; it was much closer to the informant's size. A second witness's statement would have "fueled a withering cross-examination, destroying confidence in *Smallwood's* story and raising a substantial implication that the prosecutor had coached him to give it." *Id.* at 1570. In closing argument, the prosecutor told the jury that these were the State's two best witnesses. In addition, the infor-

mant's inconsistent statements would have "revealed a remarkably uncritical attitude on the part of the police." *Id.* at 1571.

Polygraph Results

In *Wood v. Bartholomew*, 116 S.Ct. 7 (1995), the Supreme Court ruled that a lower court was wrong in concluding that the prosecution's failure to turn over the results of polygraph examinations of key witnesses violated *Brady*. The defendant admitted participation in a robbery, in which a person was shot and killed. The issue was whether the killing was premeditated murder or a lesser form of murder. The defendant claimed that the weapon fired accidentally. Two prosecution witnesses, the defendant's brother and the brother's girlfriend, took polygraph examinations prior to trial. Their answers were consistent with their subsequent trial testimony. When asked about their own involvement in the robbery, the examiner found her answers to be "inconclusive" and the brother's to be "deceptive." Neither examination was disclosed to the defense.

The Court ruled that *Brady* had not been violated. Polygraph results were inadmissible under state law, even for impeachment, in the absence of a stipulation. "Disclosure of the polygraph results, then, could have had no direct effect on the outcome of trial, because respondent could have made no mention of them either during argument or while questioning witnesses." *Id.* at 10. The possibility that the undisclosed information would have led the defense counsel to additional avenues of discovery was, in the Court's view, speculative. Moreover, at the habeas proceeding the trial defense counsel testified that he had made a strategic decision to limit the cross-examination of the brother. Accordingly, "it is not 'reasonably likely' that disclosure of the polygraph results — inadmissible under state law — would have resulted in a different outcome at trial." *Id.* at 11.

PEREMPTORY CHALLENGES

In *Purkett v. Elem*, 115 S.Ct. 1769 (1995), the Supreme Court granted certiorari to decide whether a race neutral explanation for a peremptory juror strike need be persuasive or even plausible. The prosecutor had used his peremptory strikes to dismiss two African-American jurors. He did so because they had long, unkempt hair with mustaches and goatees. "And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me." 115 S.Ct. at 1770.

The Eighth Circuit ruled that "the prosecution must at least articulate some plausible race-neutral reason for believing that those factors will somehow affect the person's ability to perform his or her duties as a juror" when striking a juror, who is the same race as the defendant. 25 F.3d at 683.

The Supreme Court reversed, holding that the lower court had misconstrued *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the Court had said that the proponent of the strike must give a "clear and reasonably specific explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 98 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)) The Supreme Court explained that this requirement does not mean that the reason has to make sense, only that it does not deny equal protection. *Batson* sets forth a three-step process. First, the opponent must make out a prima facie case of racial discrimination. Then, the burden shifts to the proponent of the strike to articulate a race-neutral

reason for the strike. Finally, if a race-neutral explanation is given, the trial court has to decide if the proponent has shown purposeful racial discrimination. According to the Supreme Court, the Eighth Circuit mistakenly believed that the second step required a reason that was persuasive, or even plausible. Quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991), the Court reiterated that “[u]nless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.” The ultimate burden of persuasion to prove racial discrimination never shifts from the opponent of the strike.

Justice Stevens, joined by Justice Breyer, filed a lengthy dissent, pointing out that *Batson* requires that the second step include an explanation that “relate[s] to the particular case to be tried.” *Batson*, 476 U.S. at 98. This interpretation serves to avoid pretextual reasons that disguise racially discriminatory intent. The dissent recharacterized the three-step process of *Batson*. “First, a pattern of peremptory challenges of black jurors may establish a prima facie case of discriminatory purpose. Second, the prosecutor may rebut that prima facie case by tendering a race neutral explanation for the strikes. Third, the court must decide whether that explanation is pretextual.” *Purkett*, 115 S.Ct. at 1772. For the dissent, *Batson* is meaningless unless the proponent of the strike rebuts the prima facie showing of discrimination with a “race neutral, reasonably specific, and trial related” explanation. *Id.* at 1774.

EX POST FACTO

The Supreme Court in *California Dept. of Corrections v. Morales*, 115 S.Ct. 1597 (1995), decided that a statute that changed parole hearing procedures after a defendant’s conviction (thus arguably increasing the sentence imposed) did not violate the Ex Post Facto Clause. The California statute in question was amended after Morales’ conviction to allow parole boards to defer suitability hearings for three years. Previously, prisoners were allowed annual hearings. Morales argued that such a law makes parole less accessible, thus making his sentence longer in violation of the Ex Post Facto Clause.

Justice Thomas, writing for the Court, held that the statute did nothing to effect Morales’s indeterminate sentence (15 years to life), and it did not alter the “substantive formula for securing any reductions to the sentencing range.” *Id.* at 1598. The statutory amendment simply altered the method for fixing a parole release date so that the

parole board would not have to hold another hearing in the year or two after the initial hearing. The Court emphasized that it has long refused to articulate any particular formula for measuring when legislative adjustments are of sufficient “moment” to transgress the Ex Post Facto Clause. This case aroused no need for such articulation because the amended statute’s chance for increasing punishment was far too “speculative and attenuated.”

HABEAS CORPUS

The Supreme Court in *Thompson v. Keohane*, 116 S.Ct. 457 (1995), addressed the question of whether state court “in custody” rulings, which determine whether *Miranda* warnings are due, qualify for a presumption of correctness under 28 U.S.C. § 2254(d). The Ninth Circuit had affirmed denial of a habeas petition on the grounds that the issue raised a factual issue. Consequently, the presumption of correctness applied.

The Supreme Court, however, held that determining whether a suspect is “in custody” is a mixed question of law and fact; a question which state trial courts are in no better position than federal courts to answer. In prior cases, the Court has held that factual issues for section 2254(d) purposes are those which are “basic, primary, or historical facts.” *Miller v. Fenton*, 474 U.S. 104, 112 (1985). In certain instances, factual issues extend beyond what are considered the “what happened” facts. These might include competency to stand trial or juror impartiality — issues judged according to witness credibility and demeanor. These issues are more properly resolved by the trial court. In contrast, other issues, such as the voluntariness of a confession or the effectiveness of counsel’s assistance, should be considered questions of law in this context.

Under this last line of cases, there are “what happened” issues that warrant the presumption of correctness and there are questions on the “ultimate question” which are outside of the statutory presumption. This has to do with the “uniquely legal dimension” of the “ultimate question.” *Miller v. Fenton*, 474 U.S. 104, 116 (1985). For example, in the cases such as the one at hand, there is a difference between the circumstances surrounding the defendant’s confession and whether a reasonable person would have felt that he or she was not at liberty to end the interrogation and leave. The Court held that the determination is one of mixed law and fact, placing it outside the statutory presumption.