2003-2004 United States Supreme Court Term: Cases Affecting Criminal Law and Procedure

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Court Rules That "Statutory Maximum" for Purposes of Ruling in *Apprendi v. New Jersey* Is Maximum Sentence Judge May Impose Solely Based on Facts Reflected in Jury Verdict or Admitted by Defendant

Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 75 Crim. L. Rep. 308 (24 June 2004). The defendant in a Washington state court pled guilty to kidnapping, which was a Class B felony punishable by imprisonment up to 10 years. However, other provisions of state law limited the sentence to a "standard range" of 49 to 53 months. The judge conducted a hearing, heard evidence, found as an aggravating factor that the defendant had acted with "deliberate cruelty," and imposed a sentence of 90 months, which exceeded the standard range maximum, but not the 10-year maximum for Class B felonies. A Washington appellate court upheld the defendant's sentence. The Court reversed. The Court stated that this case required it to apply the *Apprendi* ruling, which it quoted: "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 the jury, and proved beyond a reasonable doubt." The Court noted that the defendant was sentenced to more than 3 years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by the defendant nor found by a jury beyond a reasonable doubt. The Court stated that its precedents make clear that

> the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority (emphasis in original opinion; citations and internal quotations omitted).

The Court stated that the sentencing judge in this case could not have imposed the 90-month sentence solely based on the facts admitted in the defendant's guilty plea. The judge's authority to impose to impose the 90-month sentence came only from finding the additional fact that the defendant had acted with "deliberate cruelty." The Court concluded that because this additional fact was not admitted by the defendant or submitted to a jury and proven beyond a reasonable doubt, the defendant's sentence was constitutionally invalid.

[Author's note: For a discussion of *Blakely* and its impact on North Carolina's sentencing laws, see *Blakely v. Washington* and Its Impact on North Carolina's Sentencing Laws (Faculty Paper, July 9, 2004; available on-line at http://www.iog.unc.edu/programs/crimlaw/blakelyfarbmemo.pdf).]

Evidence

Court Rules That "Testimonial" Statement Is Admissible Under the Confrontation Clause Only If the Declarant Is Unavailable and Defendant Had Had Prior Opportunity to Cross-Examine Declarant

Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 74 Crim. L. Rep. 412 (8 March 2004). The alleged victim was stabbed in his apartment. Police arrested the defendant and interrogated him and his wife, Sylvia Crawford (hereafter, Sylvia), who had witnessed the stabbing. Sylvia generally corroborated the defendant's story about the stabbing, but her account was arguably different concerning whether the alleged victim had drawn a weapon before the defendant assaulted him. The defendant asserted self-defense at his trial in a Washington state court. The state could not call Sylvia as a witness based on the state's marital privilege law, but was allowed to introduce her tape-recorded statements to the police as evidence that the stabbing was not in self-defense. The defendant objected to the introduction of Sylvia's statements as violating his right of cross-examination under the Confrontation Clause of the Sixth Amendment. The Washington Supreme Court ruled that the statements were admissible and affirmed his assault conviction. The United States Supreme Court reversed the defendant's conviction.

The Court noted that Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), had ruled that the Confrontation Clause does not bar the admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate indicia of reliability." To meet that test, the statement must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The Court reexamined this ruling by analyzing the historical background of the Confrontation Clause. The Court noted that history supports two inferences about the meaning of the clause. First, the principal evil at which the clause was directed was the civil-law mode of criminal procedure, and particularly its use against a criminal defendant of *ex parte* examinations of witnesses. Thus, the Confrontation Clause applies to "witnesses" against the accused, or in other words, those who "bear testimony." The various forms of "testimonial" statements may include *ex parte* in-court testimony or its functional equivalent—affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, confessions of others, and pretrial statements that declarants would reasonably expect to be used by the prosecution. Also included within what the Court described as "testimonial evidence" are statements taken by law enforcement officers in the course of a interrogation. The Court stated in footnote 4 that the term "interrogation" is used in its colloquial, rather than any technical legal, sense, and Sylvia's recorded statement, knowingly given in response to structured police questioning, qualified as interrogation under any conceivable definition. Near the end of its opinion, the Court stated that it would leave for future cases a comprehensive definition of "testimonial," but stated that whatever the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury or at a former trial, and to police interrogations.

The Court stated that the historical record supports a second proposition, that the framers of the constitution would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had had a prior opportunity for cross-examination. In footnote 6, the court noted one historical deviation from this principle involved testimonial dying declarations, although the court said that it need not decide in this case whether to adopt that exception. [Author's note: If a dying declaration was made to someone other than a law enforcement officer or other person performing investigative functions on behalf of the state—for example, the dying declaration was made to a family member, it would appear not to be "testimonial evidence" subject to the Confrontation Clause ruling in this case.] The Court noted that most of the hearsay exceptions existing in 1791 (when the Sixth Amendment was ratified) covered statements that were not "testimonial"—for example, business records or statements in furtherance of a conspiracy.

The Court reviewed its cases involving admissibility of prior "testimonial evidence" and the Confrontation Clause and stated that the cases have remained faithful to the historical understanding of

the clause: testimonial statements of witnesses absent from trial have been admitted only when the declarant was unavailable, and only when the defendant had had a prior opportunity to cross-examine. The court in footnote 8 noted that one case arguably in tension with this principle is White v. Illinois, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992), which involved statements of a child victim to an investigating police officer admitted as spontaneous declarations. The Court found it questionable whether these testimonial statements would ever have been admissible on that ground in 1791.

The Court rejected the reliability test of *Ohio v. Roberts* concerning testimonial evidence under the Confrontation Clause because it was inconsistent with historical reasons for the adoption of the clause and overruled *Roberts* with respect to testimonial evidence. The Court stated that when nontestimonial hearsay is at issue, it is wholly consistent with the historical design of the Confrontation Clause to allow the states flexibility in their development of hearsay law—as does *Roberts* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.

The Court concluded that in this case the trial judge admitted Sylvia's testimonial statement against the defendant despite the fact that he had no opportunity to cross-examine her. That alone was sufficient to violate the Confrontation Clause. The *Roberts* reliability analysis may not be applied to make the statement admissible against the defendant.

[Author's note: The admissibility of a confession or statement of the defendant being tried is not affected by this ruling. This ruling also does not restrict the defendant's introduction of hearsay evidence under the rules of evidence because the Confrontation Clause only restricts a government's introduction of evidence against a defendant.

Based on the Court's statements in footnote 9, this ruling (1) does not prohibit the state's introduction of a testifying witness's out-of-court "testimonial" statement, under either an exception to the hearsay rule or as a prior consistent statement (that is, for corroborative purposes), because the witness is available for cross-examination; and (2) does not prohibit the state's use of "testimonial" statements for purposes other than establishing the truth of the matter asserted, such as for impeachment of a witness.

What cases are affected by this ruling? The ruling applies to all cases in which a conviction has not yet become final. A state conviction becomes final when the availability of direct appeal to state courts has been exhausted and the time for filing a petition for a writ of certiorari to the United States Supreme Court has elapsed or a timely filed petition has been finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n. 6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); Caspari v. Bohlen, 510 U.S. 236, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994). Is this ruling retroactive to cases that have become final? A defendant must satisfy the retroactivity test of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). For recent *Teague* cases decided by the United States Supreme Court, *see* Schriro v. Summerlin, 542 U.S. ___, (June 24, 2004) (applying *Teague* test to *Ring v. Arizona*, 536 U.S. 584 (2002), and finding *Ring* was not retroactive); Beard v. Banks, 542 U.S. ___ (June 24, 2004) (applying *Teague* test to *Mills v. Maryland*, 486 U.S. 367 (1988), and finding *Mills* was not retroactive). *See also* State v. Zuniga, 336 N.C. 508 (1994) (applying *Teague* to determine whether *McKoy v. North Carolina*, 494 U.S. 433 (1990), applied retroactively in state postconviction proceeding and finding *McCoy* was retroactive).

For a discussion of *Crawford* and its impact on the admissibility of a chemical analyst's affidavit in district court, see Chemical Analyst's Affidavit and *Crawford v. Washington* (Faculty Paper, June 4, 2004; available on-line at http://www.iog.unc.edu/programs/crimlaw/blakelyfarbmemo.pdf).]

Arrest, Search, and Confession Issues

Distinguishing *City of Indianapolis v. Edmond*, Court Rules That Brief, Information-Seeking Vehicle Checkpoint Established At Same Time and Location of Unsolved Fatal Hit-and-Run That Occurred About One Week Earlier Did Not Violate Fourth Amendment

Illinois v. Lidster, 124 S. Ct. 885, 157 L. Ed. 2d 843, 74 Crim. L. Rep. 253 (13 January 2004). Just after midnight, Saturday, August 23, 1997, an unknown motorist struck and killed a bicyclist in an Illinois community. About one week later at about the same time of night and at about the same place, law enforcement officers established a highway checkpoint designed to obtain from motorists more information about the unsolved hit-and-run. The checkpoint involved stopping each vehicle for 10 to 15 seconds, asking the occupants whether they had seen anything happen the prior weekend, and handing each driver a flyer describing the case and asking for assistance in identifying the vehicle and driver. When the defendant stopped his vehicle at the checkpoint, an officer smelled alcohol on his breath that eventually led to his conviction for driving under the influence of alcohol. The defendant argued that the checkpoint violated the Fourth Amendment. Distinguishing City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (checkpoint whose primary purpose was to detect illegal drugs violated Fourth Amendment), the Court ruled that the brief, information-seeking vehicle checkpoint did not violate the Fourth Amendment. The Court noted that, unlike in *Edmond*, the primary purpose of the checkpoint in this case was not to determine whether a vehicle's occupants were committing a crime, but to ask them, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The checkpoint was neither presumptively constitutional or unconstitutional. Instead, its reasonableness is to be judged by the individual circumstances in this case, using the Fourth Amendment standard of examining the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. The court then examined these circumstances and ruled that the checkpoint did not violate the Fourth Amendment. (1) The relevant public concern was grave, a fatal hit-and-run. The checkpoint's objective was to find the perpetrator of this specific crime, not of some unknown crimes. (2) The checkpoint significantly advanced this grave public concern. The court approvingly noted the checkpoint's similar time and place with the commission of the crime, and that the officers used the checkpoint to obtain information from drivers, some of whom might well have been in the vicinity of the crime when it occurred. (3) Most importantly, the checkpoint interfered only minimally with Fourth Amendment privacy rights—a few minutes waiting in line at the checkpoint, contact with officers for a few seconds, and the officers' simple request for information and the distribution of a flyer. All vehicles were stopped systematically, and there was no allegation that the officers acted in a discriminatory or otherwise unlawful manner.

Law Enforcement Officer Had Probable Cause to Arrest Defendant Passenger and Other Occupants of Vehicle After Officer Had Found $763 of Rolled-Up Cash in Glove Compartment and Five Baggies of Cocaine Between Backseat Armrest and Back Seat

Maryland v. Pringle, 124 S. Ct. 795, 157 L. Ed. 2d 769, 74 Crim. L. Rep. 196 (15 December 2003). After a vehicle was stopped for speeding by a law enforcement officer, a consent search revealed $763 of rolled-up cash in the glove compartment and five baggies of cocaine between the backseat armrest and back seat. All three vehicle occupants—the driver; the defendant, a front seat passenger; and a backseat passenger—denied ownership of the cocaine and the money. The Court ruled that the officer had probable cause to arrest the defendant as well as the other occupants. The Court stated that it was a reasonable inference from the facts that any or all three occupants of the vehicle knew and exercised dominion and control over the cocaine. A reasonable officer could conclude there was probable cause to believe the defendant committed the crime of possession of cocaine, either solely or jointly. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be

unlikely to admit an innocent person with the potential to furnish evidence against him. Distinguishing United States v. Di Re, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948), the court noted that no one in the car was singled out as the owner of the cocaine and cash in this case.

Ruling in *New York v. Belton*, 453 U.S. 454 (1981), Allows Officer to Search Vehicle's Passenger Compartment Incident to Arrest of Recent Occupant of Vehicle

Thornton v. United States, 124 S. Ct. 2127, 158 L. Ed. 2d 905, 75 Crim. L. Rep. 177 (24 May 2004). An officer became suspicious about a vehicle driving near him and ran a check that revealed its license tags had not been issued to that vehicle. Before the officer had an opportunity to stop the vehicle, the defendant drove into a parking lot and got out of the vehicle. The officer pulled into the parking lot and stopped the defendant near his vehicle. He eventually developed probable cause to arrest him for possessing illegal drugs in one of his pockets. The officer handcuffed him and placed him in the back seat of his patrol car. He then searched the defendant's vehicle and found a handgun under the driver's seat. The Court ruled that its ruling in New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (officer who has made lawful custodial arrest of occupant of vehicle may search entire passenger compartment incident to arrest), allowed the officer to search the vehicle's passenger compartment incident to the arrest of the defendant, who was a recent occupant of the vehicle.

(1) Fourth Amendment Was Not Violated When Suspect, Who Had Been Stopped Based on Reasonable Suspicion That He Had Committed a Crime, Was Arrested For Refusing to Disclose His Name As Required by State Law
(2) Defendant's Conviction for Refusing to Disclose His Name, After Being Stopped Based on Reasonable Suspicion That He Had Committed a Crime, Did Not Violate His Fifth Amendment Privilege Against Compelled Self-Incrimination

Hiibel v. Sixth Judicial District Court of Nevada, 124 S. Ct. 2451, 159 L. Ed. 2d 292, 75 Crim. L. Rep. 269 (21 June 2004). A caller to a sheriff's department reported seeing a man assault a woman in a truck on a certain road. When the officer arrived there, he found the truck parked on the side of the road, the defendant standing by the truck, and a young woman sitting inside. The defendant was stopped by a law enforcement officer based on reasonable suspicion that the defendant had committed the assault. The officer asked the defendant for identification, explaining that he wanted to determine who the man was and what he was doing there. The defendant refused to provide identification. The defendant was convicted of willfully obstructing and delaying the officer in attempting to discharge a legal duty—based on a Nevada statute that requires a person subject to an investigative stop to disclose his name. (1) The Court ruled that the officer's request for the defendant's name was reasonably related in scope to the circumstances that justified the stop and did not violate the Fourth Amendment. (2) The Court ruled that the defendant's conviction did not violate the defendant's Fifth Amendment privilege against compelled self-incrimination because in this case the defendant's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it would furnish a link in the chain of evidence needed to prosecute him. The Court noted that a case may arise when there is a substantial allegation that furnishing identity at the time of an investigative stop would have given an officer a link in the chain of evidence needed to convict the defendant of a separate offense. In that case, a court can then consider whether the Fifth Amendment privilege applies, and, if the privilege has been violated, what remedy must follow. But those questions need not be resolved in the case before the Court.

[Author's note: The ruling in this case that the Nevada law is constitutional does not resolve the issue whether it is a violation of North Carolina law when a person refuses to give his or her name during an investigative stop. That is a matter for North Carolina state courts to decide. Unlike Nevada law, there is no North Carolina statute that requires a person who is the subject of an investigative stop based on reasonable suspicion to disclose his or her name. (There is a limited provision in G.S. 20-29 that it is a

Class 2 misdemeanor for a person operating a motor vehicle, when requested by a uniformed officer, to refuse to write his or her name for identification or give his or her name.) Without such a statute, it does not appear that a person's mere refusal to disclose his or her name is sufficient evidence by itself to arrest or convict the person of violating G.S. 14-223 (resisting, delaying, or obstructing a public officer in discharging or attempting to discharge a duty of office) absent a showing how the mere refusal to disclose resisted, delayed, or obstructed the officer in that particular investigative stop. Although a mere refusal may be insufficient to arrest a person for violating G.S. 14-223, the refusal under certain circumstances may allow an officer additional time to detain the person to determine whether a crime was committed.]

Forcible Entry Into Apartment With Search Warrant for Cocaine After Wait of Fifteen to Twenty Seconds, When Officers Had Previously Knocked on Door and Announced Their Authority, Did Not Violate Fourth Amendment

United States v. Banks, 124 S. Ct. 521, 157 L. Ed. 2d 343, 74 Crim. L. Rep. 160 (2 December 2003). Officers with knowledge that the defendant was selling cocaine at his residence obtained a search warrant to search his two-bedroom apartment. As soon as they arrived there in the afternoon, officers at the front door called out "police search warrant" and rapped hard enough on the door to be heard by officers at the back door. There was no indication whether anyone was at home, and after waiting for 15 to 20 seconds with no answer, they broke open the front door with a battering ram. The Court ruled that the forcible entry into the apartment under these circumstances did not violate the Fourth Amendment. [Author's note: This ruling did not set fifteen to twenty seconds as a Fourth Amendment required minimum waiting time before using force to enter a residence with a search warrant. The Court in its opinion stressed that each case must be decided on the totality of circumstances presented to the officers as they attempt to execute a search warrant.]

(1) Search Warrant Was Invalid Under Fourth Amendment Because It Did Not Describe Things to Be Seized and Did Not Incorporate by Reference Application's Description of Things to Be Seized
(2) Officer Was Not Entitled to Qualified Immunity Because No Reasonable Officer Could Believe That Search Warrant Complied with Fourth Amendment

Groh v. Ramirez, 124 S. Ct. 1284, 157 L. Ed. 2d 1068, 74 Crim. L. Rep. 355 (24 February 2004). An officer with the Bureau of Alcohol, Tobacco and Firearms prepared and signed an application for a search warrant to search a ranch for specified weapons, explosives, and records. The application was accompanied by a detailed affidavit setting out the basis for believing that the items were on the ranch and was accompanied by a warrant form that he completed. The magistrate signed the warrant form even though it did not describe the things to be seized; instead, the space on the warrant for listing those items merely described the house on the ranch. The warrant did not incorporate by reference the application's list of the items to be seized. (1) The Court ruled that the search warrant was invalid under the Fourth Amendment because it did not describe the things to be seized and did not incorporate by reference the application's description of the things to be seized. [Author's note: This ruling does not affect the validity of AOC-CR-119, Rev. 9/02 (Search Warrant), because the warrant language specifically incorporates by reference the items to be seized that are described on the accompanying application.] (2) The Court ruled that the officer was not entitled to qualified immunity because no reasonable officer could believe that the search warrant complied with the Fourth Amendment.

Government's Authority to Conduct Inspections Without Reasonable Suspicion or Other Justification at International Border Includes Authority to Remove, Disassemble, and Reassemble Vehicle's Fuel Tank

United States v. Flores-Montano, 124 S. Ct. 1582, 158 L. Ed. 2d 311, 74 Crim. L. Rep. 479 (30 March 2004). The Court ruled that the government's authority to conduct inspections without reasonable suspicion or other justification under the Fourth Amendment at an international border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank.

Law Enforcement Officers Deliberately Elicited Statements from Defendant in Violation of His Sixth Amendment Right to Counsel

Fellers v. United States, 124 S. Ct. 1019, 157 L. Ed. 2d 1016, 74 Crim. L. Rep. 287 (26 January 2004). A grand jury indicted the defendant for conspiracy to distribute methamphetamine. Law enforcement officers went to the defendant's home to arrest him. They knocked on the door, the defendant answered the door, and they identified themselves and asked if they could come in. The defendant invited them in. The officers advised him that they wanted to discuss his involvement in methamphetamine distribution. They informed him that they had a federal warrant for his arrest and that a grand jury had indicted him for conspiracy to distribute methamphetamine. They then told him that the indictment referred to his involvement with certain people, four of whom they named. The defendant then told the officers that he knew the four people and had used methamphetamine during his association with them. After spending 15 minutes in the defendant's home, the officers took the defendant to a county jail. There they advised the defendant for the first time of his *Miranda* rights. He waived those rights and reiterated the incriminating statements that he had made in his home. The Court ruled, relying on Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and other cases, that the officers deliberately elicited the statements that the defendant made in his home in violation of his Sixth Amendment right to counsel. The discussion at home occurred after the defendant had been indicted, outside the presence of counsel, and in the absence of any waiver of the defendant's Sixth Amendment rights. Responding to the argument that the defendant's statements were not the product of interrogation by the officers, the Court noted that standard of deliberating eliciting statements under the Sixth Amendment is different from the Fifth Amendment custodial interrogation. [Author's note: If the officers had advised the defendant of his *Miranda* rights and had obtained a valid waiver of those rights at his home, then under Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988), the statements likely would have been properly obtained. For a discussion of the distinction between Fifth and Sixth Amendment rights to counsel, the Sixth Amendment right to counsel, and waiver of the Sixth Amendment right to counsel, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, pp. 206-10 (3d. ed. 2003).] The Court remanded the case to the federal court of appeals to determine whether the defendant's statements at the county jail were admissible—that is, whether the rationale of Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), applies to the Sixth Amendment violation in this case. [Author's note: For a summary of *Elstad*, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, p. 466 (3d. ed. 2003).]

Failure to Give a Defendant *Miranda* Warnings Did Not Require Suppression of Firearm Obtained as a Result of Defendant's Unwarned But Voluntary Statement

United States v. Patane, 124 S. Ct. 2620, 159 L. Ed. 2d 667, 75 Crim. L. Rep. 324 (28 June 2004). An officer arrested the defendant at his residence for violating a restraining order involving his ex-girlfriend. When another officer began to give *Miranda* warnings, the defendant interrupted the officer, asserting he knew his rights, and neither officer attempted to complete the *Miranda* warnings. Because one of the officers had been previously informed that the defendant, a convicted felon, illegally possessed a Glock pistol, he asked the defendant about it. The defendant, after persistent questioning, told the officer that the

pistol was in his bedroom. The officer received consent from the defendant to retrieve the pistol. The pistol was admitted at his trial, and he was convicted of possession of a firearm by a convicted felon. An opinion representing the views of three Justices and announcing the judgment of the Court ruled, distinguishing Dickerson v. United States, 530 U.S. 428 (2000) (*Miranda* announced a constitutional rule that Congress may not supersede legislatively), that the Fifth Amendment's self-incrimination privilege is not implicated by the admission into evidence of the physical fruit of a voluntary statement taken in violation of the *Miranda* ruling. An opinion representing the views of two other Justices and concurring in the judgment stated that it agreed with the opinion announcing the judgment of the Court that the nontestimonial physical fruit of the defendant's unwarned statement, the Glock pistol, was admissible—although it did not necessarily agree with all of the statements in the opinion. [Author's note: State v. May, 334 N.C. 609, 434 S.E.2d 180 (1993) (physical evidence discovered as a result of a voluntary statement taken in violation of *Miranda* is admissible), is consistent with this ruling.]

When Officer as Part of Interrogation Technique Deliberately Failed to Give Required *Miranda* Warnings and Obtained a Confession, Then Twenty Minutes Later Gave *Miranda* Warnings and Obtained a Confession, Neither the First Nor Second Confessions Were Admissible

Missouri v. Seibert, 124 S. Ct. 2601, 159 L. Ed. 2d 667, 75 Crim. L. Rep. 329 (28 June 2004). An officer arrested the defendant for her involvement with a unlawful burning of a mobile home and the resulting death of a person inside. As part of a interrogation technique, the officer deliberately failed to give the defendant *Miranda* warnings, interrogated her for 30 to 40 minutes, and obtained a confession. The defendant was then given a twenty-minute break. The same officer then gave *Miranda* warnings to the defendant, obtained a waiver, interrogated her again (referring in this second interrogation to her statements she had made in the first interrogation), and obtained another confession. The trial judge suppressed the first confession but admitted the second confession. The issue before the United States Supreme Court was the admissibility of the second confession. Distinguishing Oregon v. Elstad, 470 U.S. 298 (1985) (second voluntary incriminating statement obtained with *Miranda* warnings and waiver at police station was admissible even though it occurred after the defendant had made voluntary incriminating statement at his house that was inadmissible under *Miranda* because warnings had not been given), an opinion announcing the judgment of the Court and representing the views of four Justices (a plurality opinion) ruled that the second confession was inadmissible. The opinion stated that it would have been reasonable for the defendant to regard the two interrogation sessions as a continuum in which it would have been unnatural to refuse to repeat at the second interrogation what had been said before. These circumstances challenged the comprehensibility and efficacy of the *Miranda* warnings given before the second interrogation such that a reasonable person in the defendant's shoes would not have understood the warnings to convey a message that she retained a choice about continuing to talk. A fifth Justice concurred in the judgment that the second confession was inadmissible, although he disagreed with the reasoning of the plurality opinion. He stated that the admissibility of post-*Miranda* warning statements should continued to be governed by *Oregon v. Elstad* except if the second statement is obtained in the two-step interrogation technique deliberately used in this case to undermine the *Miranda* warning. In such a case, post-*Miranda* warning statements that are related to the substance of the pre-*Miranda* warning statements must be excluded unless curative measures are taken before the post-*Miranda* warning statement is made. The curative measures discussed in his opinion were not taken in this case, so he concluded that the second confession was inadmissible. [Author's note: When a fifth vote is necessary to support a judgment of the Court, the concurring opinion defines the scope of the ruling if it rests on the narrowest grounds that supports the judgment, which it does in this case. *See, e.g.,* Chandler v. Florida, 449 U.S. 560 (1981); Grutter v. Bollinger, 539 U.S. 306 (2003); Marks v. United States, 430 U.S. 188 (1977).]

(1) State Appellate Court's Ruling That Defendant Was Not in Custody to Require *Miranda* Warnings Was Not Unreasonable Application of Federal Law Under Federal Habeas Corpus Standard
(2) Court States That Defendant's Age or Inexperience with Law Enforcement Are Not Factors in Determining Whether Custody Exists Under *Miranda*

Yarborough v. Alvarado, 124 S. Ct. 2140, 158 L. Ed. 2d 938, 75 Crim. L. Rep. 204 (1 June 2004). An officer was investigating the involvement of the defendant, a 17 year old, in committing a murder. In response to the officer's request, the parents of the defendant brought him to the sheriff's facility for questioning. Without giving *Miranda* warnings and without the parents' presence, the officer questioned the defendant for about two hours. A state appellate court ruled that the defendant was not in custody to require *Miranda* warnings. A federal appellate court ruled that the state court ruling unreasonably applied federal law under the federal habeas corpus standard, 28 U.S.C. § 2254(d)(1). The United States Supreme Court reversed the federal appellate court. (1) The Court examined its rulings on custody under *Miranda* and the facts of this case and ruled that the state appellate court ruling on custody was not an unreasonable application of federal law under the federal habeas corpus standard. (2) The Court stated that a defendant's age or inexperience with law enforcement are not factors in determining whether custody exists under *Miranda*. The Court noted that whether custody exists involves an objective, not subjective, test.

Miscellaneous

Due Process Clause Did Not Require Dismissal of Drug Charge Under *Arizona v. Youngblood* When Defendant Did Not Show That Police Had Acted in Bad Faith in Destroying Alleged Cocaine

Illinois v. Fisher, 124 S. Ct. 1200, 157 L. Ed. 2d 1060, 74 Crim. L. Rep. 2170 (23 February 2004). Chicago police arrested the defendant for possession of cocaine. Four tests conducted by crime laboratories confirmed that the white powdery substance seized from the defendant by the police was cocaine. When the defendant was charged in 1988, he filed a discovery motion requesting all physical evidence that the state intended to use at trial. The state responded that all evidence would be made available at a reasonable time and date on request. The defendant was released on bond, later failed to appear in court, and remained a fugitive until his arrest in 1999. Before trial, the state informed the defendant that the police, acting in accordance with established procedures, had destroyed the alleged cocaine earlier in 1999. The Court ruled that the Due Process Clause did not require the dismissal of the drug charge under Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (unless defendant can show bad faith by law enforcement, failure to preserve potentially useful evidence does not constitute due process violation), when defendant did not show that the police had acted in bad faith in destroying the alleged cocaine. The Court noted that the police testing of the chemical makeup of the substance inculpated, not exculpated, the defendant—at most, it was potentially useful evidence to the defendant. The Court stated that the existence of a pending discovery request did not eliminate the defendant's duty to show bad faith by the police in destroying the substance.

State's Withholding of Materially Favorable Evidence from Defendant and Knowingly Allowing State's Witness to Offer False Testimony Entitled Defendant to Habeas Corpus Review and Relief

Banks v. Dretke, 124 S. Ct. 1256, 157 L. Ed. 2d 1166, 74 Crim. L. Rep. 364 (24 February 2004). The petitioner (criminal defendant in state court) was convicted in state court of first-degree murder and sentenced to death. He filed a federal habeas petition, alleging that the state withheld materially favorable evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and other cases, and knowingly allowed a state's witness to offer false testimony in violation of Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and other cases. He sought a reversal

of his conviction and death sentence. The Court ruled that the petitioner was entitled to a reversal of his death sentence based on the effect of the state's suppression of materially exculpatory evidence on the fairness of the death penalty phase of the trial (suppression of evidence that a key state's witness was a informant paid for information in this case). The Court also ruled that the petitioner was entitled to a certificate of appealability from the federal district court's denial of his petition for a new trial, based on the state's suppression of materially favorable evidence (the pretrial coaching by prosecutors and law enforcement of a key state's witness) and knowingly allowing a state's witness to offer false testimony (the witness's denying that he had talked with anyone about his trial testimony). [Author's note: This case also contains rulings concerning various procedural aspects of federal habeas law, which are not summarized here.]

Court Rules That Sixth Amendment Does Not Mandate That Two Particular Warnings Must Be Given By Judge To Unrepresented Defendant Before Defendant Enters Guilty Plea

Iowa v. Tovar, 124 S. Ct. 1379, 158 L. Ed. 2d 209, 74 Crim. L. Rep. 424 (8 March 2004). A defendant who wished to represent himself appeared before a judge to plead guilty to the Iowa offense of operating a motor vehicle under the influence of alcohol. The Court ruled that the Sixth Amendment did not mandate that the following two warnings (required by the Iowa Supreme Court) must be given by a judge to an unrepresented defendant before the defendant enters a guilty plea: (1) there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked, and (2) by waiving the right to an attorney the defendant will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.

Ruling in *Ring v. Arizona* Is Not Retroactive

Schriro v. Summerlin, 124 S. Ct. 2519, 159 L. Ed. 2d 442, 75 Crim. L. Rep. 338 (24 June 2004). The Court ruled that its ruling in Ring v. Arizona, 536 U.S. 584 (2002) (because Arizona law authorized the death penalty only if an aggravating factor was present, the ruling in Apprendi v. United States, 530 U.S. 466 (2000), required the existence of such a factor to be proved to a jury rather than a judge), is not retroactive under the retroactivity analysis set out in Teague v. Lane, 489 U.S. 288 (1989).

Ruling in *Maryland v. Mills* Is Not Retroactive

Beard v. Banks, 124 S. Ct. 2504, 159 L. Ed. 2d 494, 75 Crim. L. Rep. 343 (24 June 2004). The Court ruled that its ruling in Mills v. Maryland, 486 U.S. 367 (1988) (unconstitutional to require jury to disregard mitigating circumstances not found unanimously), is not retroactive under the retroactivity analysis set out in Teague v. Lane, 489 U.S. 288 (1989).

Plaintiff, Criminal Defendant Sentenced to Death, May Sue Under 42 U.S.C. § 1983 to Contest Method of Execution

Nelson v. Campbell, 124 S. Ct. 2117, 158 L. Ed. 2d 924, 75 Crim. L. Rep. 184 (24 May 2004). The Court ruled that the plaintiff, a criminal defendant sentenced to death, may sue under 42 U.S.C. § 1983 to contest a method of execution involving an incision into an arm or leg to access his severely compromised veins. (See also the Court's discussion of the issuance of a stay in connection with this lawsuit.)

State Appellate Court's Ruling That Defense Counsel Was Not Incompetent Was Not Objectively Unreasonable Under Federal Habeas Corpus Standard of Review of State Court Judgment

Yarborough v. Gentry, 124 S. Ct. 1, 157 L. Ed. 2d 1, 74 Crim. L. Rep. 2047 (20 October 2003). The Court ruled that a state appellate court's ruling that defense counsel was not incompetent was not objectively unreasonable under the federal habeas corpus standard of review of a state court judgment. The Court reversed a federal appellate court ruling that had reversed the defendant's state court conviction.

State Appellate Court's Ruling That Alleged Indictment and Jury Instruction Errors Were Harmless Was Not Objectively Unreasonable Under Federal Habeas Corpus Standard of Review of State Court Judgment

Mitchell v. Esparza, 124 S. Ct. 7, 157 L. Ed. 2d 263, 74 Crim. L. Rep. 2063 (3 November 2003). The Court ruled that a state appellate court's ruling that alleged indictment and jury instruction errors were harmless were not objectively unreasonable under the federal habeas corpus standard of review of state court judgment.