9-14-2007

Section 6: Criminal Law

Institute of Bill of Rights Law, William & Mary Law School

VI. CRIMINAL

In This Section:

Kimbrough v. United States

(06-6330)

Ruling Below: (*U.S. v. Kimbrough*, 174 Fed.Appx. 798 (4th Cir. 2006), *cert granted*, 127 S.Ct. 2933, 2007 WL 1660977 (U.S.), 75 U.S.L.W. 3661, 75 U.S.L.W. 3657).

Kimbrough plead guilty to distributing more than 50 grams of crack cocaine and possessing a firearm in connection with a drug-related crime. The sentencing guideline range was to be between 168 and 210 months for the drug charges and 60 months for the firearms charge. The district court sentenced Kimbrough to 120 months on each of the drug charges, served concurrently, and 60 months for the gun charges, serving consecutively. The Fourth Circuit Court of Appeals held that the sentence was per se unreasonable because it fell outside the guidelines range and was based on disagreements over disparities between crack and powder cocaine sentences. The Fourth Circuit stated it was bound by precedent to vacate the sentence.

Questions Presented: (1) In carrying out the mandate of §3553(a) to impose a sentence that is "sufficient but not greater than necessary" on a defendant, may a district court consider either the impact of the so-called "100:1 crack/powder ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio? (2) In carrying out the mandate of §3553(a) to impose a sentence that is "sufficient but not greater than necessary" upon a defendant, how is a district court to consider and balance the various factors spelled out in the statute, and in particular, subsection (a)(6), which addresses "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct"?

UNITED STATES of America,
Plaintiff-Appellant,
v.
Derrick KIMBROUGH,
Defendant-Appellee

United States Court of Appeals
for the Fourth Circuit

UNPUBLISHED

Decided May 9, 2006

PER CURIAM:

The Government appeals the district court's imposition of a sentence outside of the United States Sentencing Guidelines range based, in part, on the district court's disagreement with the disparity between sentences for crack and powder cocaine violations. We have jurisdiction to review the sentence pursuant to 18 U.S.C.A. § 3742 (West 2000). We review post-*Booker* sentences for reasonableness. *United States*

v. *Hughes,* 401 F.3d 540, 546-47 (4th Cir. 2005).

Derrick Kimbrough pleaded guilty to distributing fifty or more grams of crack cocaine, distributing cocaine, conspiring to distribute fifty grams or more of crack cocaine, and possessing a firearm in connection with a drug trafficking crime. The sentencing guideline range was 168 to 210 months imprisonment for the drug counts and 60 consecutive months for the firearm count. Based, in part, on the district court's disagreement with the sentencing disparity for crack and powder cocaine violations, the district court sentenced Kimbrough to 120 months on each of the three drug violations, to be served concurrently, and sixty months on the firearms charge, to be served consecutively. According to our recent decision in *United States v. Eura,* 440 F.3d 625 (4th Cir. 2006), a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses. Because the district court concluded that the crack to powder cocaine disparity warranted a sentence below the applicable sentencing guideline range, we are constrained to vacate Kimbrough's sentence and to remand the case for resentencing. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

VACATED AND REMANDED.

"Crack Sentences Questioned"

The Los Angeles Times
June 12, 2007
David G. Savage

The Supreme Court agreed for the first time Monday to reconsider the long prison terms meted out to the mostly black defendants who are convicted of selling crack cocaine. [The case is ***Kimbrough v. United States.***]

At least 25,000 defendants per year are sent to federal prison on crack-cocaine charges, and their prison terms are usually 50 percent longer than drug dealers who sell powder cocaine.

This disparity, with its racial overtones, has been controversial for two decades since Congress ramped up the "war on drugs" in response to a crack epidemic sweeping many cities. Crack was targeted for stiffer penalties because it was viewed as more dangerous than powder cocaine.

At the time, lawmakers set mandatory minimum prison terms for drug sellers based on the quantity of drugs sold. A sale of five grams of crack cocaine triggers the same five-year prison term as selling 500 grams of powder cocaine, even though they are the same substance.

Critics have said this 100-to-1 disparity is unfair and racially biased because dealers in crack cocaine are more often black, while powder cocaine is said to be sold more often to whites and by whites.

But until now, neither lawmakers, the Justice Department nor the courts have been willing to lessen the prison terms for crack dealers.
In a speech to the American Bar Association four years ago, Justice Anthony M. Kennedy called these mandatory minimum sentences "unwise and unjust." He urged the lawyers to lobby Congress to repeal the mandatory minimum sentences.

Despite pleas from family members and legal activists, the laws have remained unchanged.

For its part, the Supreme Court did not signal Monday a willingness to say these sentences are unconstitutional. Instead, the justices agreed to decide whether trial judges should have more leeway to impose somewhat lighter sentences in crack-cocaine cases.

In the fall, the justices will hear the case of a convicted drug dealer from Norfolk, Va., who was given a 15-year prison term for selling both crack and powder cocaine. The trial judge noted the U.S. sentencing guidelines called for a prison term of between 19 and 22 years, in part because the crack-cocaine sale raised the stakes. But he also noted the defendant, Derrick Kimbrough, had served honorably in the Army.

But the U.S. court of appeals in Richmond ruled the defendant must be given the 19- to 22-year prison term called for in the sentencing rules.

"'Crack' vs. Powder Cocaine: The Sentencing Dilemma"

SCOTUS Blog
June 11, 2007
Lyle Denniston

The U.S. Sentencing Commission's latest report to Congress on cocaine sentencing can be found at the Commission's website, under "Report to Congress—Federal Cocaine Sentencing Policy." It recommends that Congress alter the 100-to-1 crack-to-powder ratio, but, in the meantime, proposes a reduction in the Sentencing Guideline range for cocaine offenses. That change in range will take effect Nov. 1 unless Congress objects. (The report is 202 pages long.)

Congress in 1986 adopted a federal sentencing policy that those who commit crimes involving "crack" cocaine are to be punished on a 100-to-1 ratio compared to those whose crimes involve cocaine in powder form. The U.S. Sentencing Commission for years has asked Congress to narrow the difference, to no avail. Yet Congress has never ordered the Commission to put the ratio into the federal Sentencing Guidelines. And federal trial judges in recent months have been experimenting with easing up, comparatively, on cocaine crime sentences. That combination of conflicting circumstances may be sorted out by the Supreme Court, in the new Term that starts on Oct. 1.

Here is an example of how the 100-to-1 ratio works: an individual who deals five grams of crack cocaine faces the same sentence as a defendant who deals 500 grams of powder cocaine under the Guidelines.

On Monday, the Court—long reluctant to review the 100-1 crack-to-powder ratio—opted to grant review of a clear-cut test case on the issue. It is ***Kimbrough v. U.S.*** (docket 06-6330). The diligent efforts of a federal public defender in Alexandria, VA—Michael S. Nachmanoff—appeared to have helped persuade the Court that the time had come to take on the question.

Because the case raises the question of a federal judge's power to set a sentence that may fall below a Guideline range, the Court seems to have concluded that it should expand its interest in below-range sentencing to include the basic controversy over crack vs. powder sentencing in the new era of advisory rather than mandatory use of the Guidelines. The Court had signaled its interest in below-range sentencing by agreeing to hear this Term the case of *Claiborne v. U.S.* (06-5618), but that case has been ordered vacated as moot because of the death of Mario Claiborne. On Monday, the Court, along with granting review of the ***Kimbrough*** case, also announced that it will consider next Term another case on the core question of the "reasonableness" of below-range sentences. That new case is *Gall v. U.S.* (06-7949). (The Court also has apparently decided to go ahead, this Term, with a decision in the Guidelines case of *Rita v. U.S.*, 06-5754, testing whether a sentence within a Guideline range is to be presumed on appeal to be reasonable.)

Relying on the Court's 2005 decision in *U.S. v. Booker* turning the Guidelines regime into an advisory scheme only, the ***Kimbrough*** petition asks the Court to clarify how much authority—if any—sentencing judges have

to vary the 100-to-1 ratio in order to ensure that punishment for a cocaine conviction is "sufficient but not greater than necessary" and does not lead to "unwarranted disparity" in sentencing. It asks two questions, paraphrased here:

(1) may a District Court judge consider the Sentencing Commission's repeated reports finding that the 100-to-1 crack vs. powder disparity exaggerates the seriousness of crack crimes, and (2) how is a District Court to balance the various factors that Congress has told sentencing judges to consider, especially avoidance of sentencing disparity, under the Guidelines regime.

Nachmanoff's client is Derrick Kimbrough, a Gulf War veteran and construction worker, who was arrested by city police officers in Norfolk, Va., with another man and charged with conspiracy with intent to distribute cocaine and possession with intent to distribute it. Prosecutors said that the two were found with 56 grams of crack cocaine and 92.1 grams of cocaine powder. Kimbrough had prior misdemeanor offenses, but no prior felonies.

All things considered, including a firearm offense, Kimbrough faced a sentence in a Guideline range of 228 to 270 months—that is, 19 to 22 1/2 years. His defense lawyer, arguing that the Guidelines regime directs a judge to take in a variety of factors, urged the trial judge to set a total sentence of 180 months—or 15 years. On the crack vs. powder issue, the lawyer noted that Kimbrough actually had more powder than crack when arrested (almost twice as much), and called attention to the findings of the Sentencing Commission, in repeated reports, that the ratio exaggerates the relative harmfulness of crack.

The judge, noting that the sentencing law directed the court not to impose a sentence greater than necessary to serve the sentencing factors, called a sentence of 19 to 22 1/2 years "ridiculous." The judge said that the 100-to-1 punishment disparity drove the offense level in the case higher than necessary to do justice. Those statements were based on the Sentencing Commission's views. Following the 100-to-1 factor, the judge concluded, would result in an inappropriately high sentence. The term was set at 180 months—that is, 15 years. That, the judge said, was "clearly long enough under the circumstances."

The Fourth Circuit Court, in a brief opinion reacting to the government's appeal of the sentence, struck down the 180-month term. Based on its basic ruling on the issue in *U.S. v. Eura* (a case now pending in a petition in the Supreme Court, 05-11569), the Circuit Court ruled that a District Court may not vary from the advisory sentencing range on the basis of the 100-to-1 ratio or on the views of the Sentencing Commission. "In arriving at a reasonable sentencing," that Court had said in the *Eura* case, "the District Court simply must not rely on a fact that would result in sentencing disparity that totally is at odds with the will of Congress."

The Justice Department has been opposing Supreme Court review of the crack vs. powder question, and has done so, for example, in the *Eura* case. In response to Kimbrough's appeal, the Department suggested that the Court might want to hold it until it had decided the *Claiborne case*, or perhaps even deny it outright because of the government view that judges cannot set a sentence below the range simply because they disagree with a sentencing policy adopted by Congress—that is, the 100-to-1

ratio. The government also had contended that there is no split in the Circuit Courts on that question.

But Kimbrough's petition and reply argues that, as of now, there is a definite split. "On one end of the spectrum are the Fourth and Eighth Circuits, which have held that under no circumstances can a district court consider either the ratio or the [Sentencing Commission] reports. . . . In the middle is the dissenting judge in the Fourth Circuit, whose position has been adopted by the Seventh and Eleventh Circuits, and possibly by the Second Circuit, which would permit a district court to use the Sentencing Commission reports in evaluating the case before it. . . . Finally, on the other end of the spectrum is the Third Circuit, joined by the dissenting judges in the Eighth and Eleventh Circuits, which would allow a district court to consider the 100:1 ratio. . . . Accordingly, this Court should step in now to resolve the issue."

The case was ready for the Court's consideration in February, but it took no action on it. Then, in March, public defender Nachmanoff notified the Court that the split had deepened further, with the D.C. Circuit Court directing sentencing judges to consider the 100-to-1 ratio "and the problems it raises" in crack cases—thus aligning that Circuit with the Third Circuit's view. . . .

"Commission Recommends Lighter Minimum Sentence for Crack Cocaine Conviction"

The Associated Press
April 28, 2007
Kasie Hunt

WASHINGTON—A first-time crack-cocaine conviction should mean a lower federal minimum sentence than under current guidelines, according to a judicial agency that has raised concerns about a disparity in punishment for people caught with crack or powder cocaine.

The U.S. Sentencing Commission voted to lower the recommended sentencing range for those caught with 5 grams or more of crack cocaine from 63 months to 78 months to a range of 51 months to 63 months. Those with at least 50 grams should serve 97 months to 121 months in prison, not 121 months to 151 months, as the guidelines now say, the commission said late Friday.

At issue is a 1986 law that includes what critics have called the 100-to-1 disparity: Trafficking in 5 grams of cocaine carries a mandatory five-year prison sentence, but it takes 500 grams of cocaine powder to warrant the same sentence.

This is the fourth time the commission, an independent agency in the judicial branch, has recommended that Congress narrow the sentencing gap. Previous recommendations, which were not adopted, have included raising the penalties for powder cocaine and lowering them for crack.

The commission's guidelines are designed to ensure that federal sentences do not vary widely from courtroom to courtroom. They were mandatory until 2005. That year, the Supreme Court said making the guidelines mandatory violated a defendant's Sixth Amendment right to a jury trial because they call for judges to make factual decisions that could add to prison time, such as the amount of drugs involved in a crime.

The commission planned to send its recommendation to Congress before May 1. Lawmakers would have until Nov. 1 to reject the new guidelines before they would become law.

Advocates for changing the law point to crime statistics that show crack is more of an urban and minority drug while cocaine powder is used more often by the affluent, and that harsher penalties for crack cocaine unfairly punish blacks.

"This unjust policy is based on little more than politics and urban myths, yet it's been allowed to stand for over 20 years, devastating African-American communities in the process," said Caroline Fredrickson, director of the ACLU's legislative office in Washington.

In November, U.S. District Judge Reggie B. Walton told the agency that federal laws requiring dramatically longer sentences for crack cocaine than for cocaine powder were "unconscionable" and contributed to the perception within minority communities that courts are unfair.

While Congress would have to overturn the 1986 law to erase minimum sentences, the commission's new rule "provides some relief to crack cocaine offenders impacted by the disparity created by federal cocaine

sentencing policy," the commission said in a statement.

But the Justice Department has urged the commission to let Congress deal with the inconsistency. "While we are willing to discuss addressing the disparity in the ratio between crack and powder cocaine, we believe that it should be done in the broader context of sentencing reform," spokesman Brian Roehrkasse said.

House Judiciary Committee Chairman Rep. John Conyers, D-Mich., a longtime advocate of equalizing penalties for crack and powder cocaine, has said he will hold hearings to address the issue.

[The court will address these issues in ***Kimbrough v. United States.***]

"Lawmakers Consider Lessening Crack Penalties"

USA Today
March 11, 2007
Donna Leinwand

Momentum is building in Congress to ease crack cocaine sentencing guidelines, which the American Civil Liberties Union and other critics say have filled prisons with low-level drug dealers and addicts whose punishments were much worse than their crimes.

Federal prison sentences for possessing or selling crack have far exceeded those for powder cocaine for two decades. House Crime Subcommittee chairman Robert Scott, D-Va., a longtime critic of such sentencing policies, plans to hold hearings on crack sentences this year. In the Senate, Republican Jeff Sessions of Alabama is drawing bipartisan support for his proposal to ease crack sentences.

"I believe that as a matter of law enforcement and good public policy that crack cocaine sentences are too heavy and can't be justified," Sessions says. "People don't want us to be soft on crime, but I think we ought to make the law more rational."

The mandatory federal sentencing guidelines passed by Congress in 1986 require a judge to impose the same sentence for possession of 5 grams of crack as for 500 grams of powder cocaine: five years in prison.

Congress passed the sentencing laws just after the fatal crack overdose of University of Maryland basketball star Len Bias on June 19, 1986, and as crack was emerging in urban areas, says Alfred Blumstein, a professor at Carnegie Mellon University in Pittsburgh who researches crime. Crack cocaine was associated with violent, open-air drug markets, he says.

"There was a lot of public concern about violence," Blumstein says.

Jesselyn McCurdy with the ACLU says much of the violence associated with crack stemmed from territorial disputes between dealers, not from those using the drug. She says the stricter sentences for crack have filled prisons with low-level, primarily African-American addicts rather than the major drug traffickers Congress sought to punish. An ACLU study in October 2006 found that 80% of crack defendants were black.

"People have seen how it plays out in racial disparities," McCurdy says. "The stumbling block on both sides of the aisle has been this issue around appearing to be soft on crime. But this is about equalizing an injustice."

Sessions' bill would lessen the sentencing disparity by increasing punishments for powder cocaine and decreasing them for crack. Crimes involving crack would still draw stiffer sentences, but the difference would not be as dramatic. The bill has drawn support from Democratic Sen. Ken Salazar, a former state attorney general from Colorado, Democratic Sen. Mark Pryor, a former state attorney general from Arkansas, and Republican Sen. John Cornyn, a former Texas Supreme Court justice and attorney general.

In the House of Representatives, two bills

calling for Congress to equalize the sentences for powder cocaine and crack were filed in January.

"We're going to address all the mandatory minimums," said Scott, chairman of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security. "The crack cocaine is probably the most egregious because of its draconian number of years for relatively small amounts."

Opposition to weaker sentences has come from police, prosecutors and law enforcement agencies such as the Justice Department and the Drug Enforcement Administration.

"We believe the current federal sentencing policy and guidelines for crack cocaine offenses are reasonable," Justice spokesman Dean Boyd says.

Higher penalties for crack offenses reflect its greater harm, he says, adding that crack traffickers are more likely to use weapons and have more significant criminal histories than powder cocaine dealers.

"Congress thought by having very harsh sentences, it would deter the spread of crack into the inner cities and around the country," Sessions says. "The truth is, it didn't stop it. It spread very rapidly. Now we need to ask ourselves, what is the right sentence for this bad drug. I think it's time to adjust. I think it's past time to do this."

Scientists say there is no pharmaceutical justification for having different sentencing rules for crack and powder cocaine.

The powder is cocaine hydrochloride salt, which can be snorted into the nose or dissolved in water and injected. Crack is cocaine mixed with water and ammonia or baking soda then heated to remove the hydrochloride. The resulting pure cocaine rock can be smoked.

"Once the cocaine is in your bloodstream, there's absolutely no difference between powder cocaine and crack cocaine," says Bruce Goldberger, director of toxicology at the University of Florida College of Medicine.

The quicker the drug enters the bloodstream, the more intense its effects, he said. Two of the quickest routes are smoking, which is done with crack, and injecting, which is done by dissolving the powder and shooting it into the bloodstream.

[The court will address these issues in ***Kimbrough v. United States.***]

Report to Congress on Federal Cocaine Sentencing Policy

United States Sentencing Commission
May 15, 2007
Executive Summary

. . . Since 1995 the Sentencing Commission has advocated for amendment of the 100:1 statutory ratio that triggers penalties for crack and powder cocaine offenders. As part of its priorities for its 2006-2007 amendment cycle, the Sentencing Commission continued its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy, including reevaluating its 2002 report to Congress, *Cocaine and Federal Sentencing Policy*.

The Commission held two hearings to discuss federal cocaine sentencing during which the Commission received testimony from witnesses representing the Department of Justice, Federal judiciary, defense bar, law enforcement, academics, treatment and medical experts, and interested community activists, among others. The Commission also received a number of letters from Members of Congress and the public about this important issue. The Commission also conducted its own research and analyses of sentencing data and trends, reviewed the most recently available literature on the issue, and conducted an exhaustive case law review. This extensive research effort culminated in the enclosed 2007 Report to the Congress: Cocaine and Federal Sentencing Policy.

The 2007 Report

In this 2007 report, the Commission concludes, as it did in 2002, that—

(1) The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine.

(2) The current quantity-based penalties sweep too broadly and apply most often to lower level offenders.

(3) The current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.

(4) The current severity of crack cocaine penalties mostly impacts minorities.

Accordingly, through its report, the Commission again unanimously and strongly urges Congress to act promptly on the following recommendations:

(1) the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.

(2) Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.

(3) Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.

The Commission further recommends that any legislation implementing these recommendations include emergency amendment authority for the Commission to incorporate the statutory changes in the Federal sentencing guidelines. Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders. . . .

Sample Statistics and Other Information from the 2007 Report on Federal Cocaine Sentencing Policy

Number of Cocaine Offenders Across Time (See Fig. 2-1, 2007 Report)

Year	Crack	Powder
1992	2,301	6,671
2002	4,795	5,243
2006	5,397	5,744

FY2006 Average Sentence Length (See Fig. 2-2, 2007 Report)

Crack = 122 months
Powder = 85 months

Difference in Sentences Across Time (See Fig. 2-3, 2007 Report)

1992 = 25.3% difference between powder and crack cocaine sentences
2006 = 43.5% difference between powder and crack cocaine sentences

Race and Demographics (See p.15-17, 2007 Report)

- Blacks still comprise the majority of crack offenders, but that is decreasing from 91.4% in 1992 to 81.8% in 2006. White offenders now comprise 8.8% of crack defendants, up from 3.2% in 1992.

- Powder cocaine defendants are now predominantly Hispanic, growing from 39.8% of defenders in 1992 to 57.5% in 2006. White powder cocaine defendants have declined from 32.3% in 1992 to 14.3% in 2006.

- In 2006, nearly all crack defendants were U.S. citizens, whereas only 60.6% of powder cocaine defendants were U.S. citizens.

Offender Function (FY2005 Data Sample) (See Figs. 2-4 to 2-6, 2007 Report)

Crack [Cocaine]

- 55.4% of crack defendants were categorized as street-level dealers receiving average sentences of 97 months
- 22.7% of crack defendants were categorized as wholesalers receiving average sentences of 142 months (but of these, almost 40% did not perform this function routinely)

Powder [Cocaine]

- 33.1% of powder defendants were categorized as couriers or mules receiving average sentences of 60 months
- 24.1% of powder defendants were categorized as wholesalers receiving average sentences of 78 months

Application of Role Adjustments for Each Offender Function FY 2005 Drug Sample (Figs. 2-23 and 2-24, 2007 Report)

	Powder Cocaine		Crack Cocaine	
Function	**Mitigating Role**	**Aggravating Role**	**Mitigating Role**	**Aggravating Role**
Importer/High-Level Dealer	3.8%	16.0%	0.0%	4.4%
Organizer/Leader/Grower/Manufacturer Financier/Money Launderer	2.8%	51.4%	0.0%	52.6%
Wholesaler	2.7%	0.9%	2.7%	3.8%
Manager Supervisor	3.8%	30.4%	8.7%	43.5%
Pilot/Captain/Bodyguard/Chemist/Cook Broker/Steerer	24.6%	3.3%	9.5%	0.0%
Street-level Dealer	8.9%	0.0%	7.0%	1.1%
Courier/Mule	44.4%	0.0%	50.0%	0.0%
Renter/Loader/Lookout/Enabler/ User/All Other	35.2%	1.1%	40.0%	0.0%

[. . .]

Violence Involvement in Powder and Crack Cocaine Offenses (Fig 2-20, 2007 Report and Fig. 19, 2002 Report)

	Powder Cocaine		Crack Cocaine	
	2000 Drug Sample	**2005 Drug Sample**	**2000 Drug Sample**	**2005 Drug Sample**
No Violence	91.0%	93.8%	88.4%	89.6%
Death	3.4%	1.6%	3.4%	2.2%
Any Injury	1.4%	1.5%	4.5%	3.3%
Threats	4.2%	3.2%	3.7%	4.9%

The reduction in violence associated with crack cocaine trafficking since 1992 is consistent with the aging of the crack cocaine traffickers and users.

[. . .]

Other Findings

- 500 grams of powder cocaine, the quantity required to trigger the five-year mandatory minimum yields between 2,500 and 5,000 doses. Five grams of crack cocaine, the quantity required to trigger application of the five-year mandatory minimum yields between ten and 50 doses. (See p.62, 2007 Report)

- Crack cocaine and powder cocaine are both powerful stimulants, and both forms of cocaine cause identical effects (See pp. 61-62, 64, 2007 Report)

- Cocaine patients present at treatment having the same symptoms and receive the same treatment regardless of the drug ingested. (See p. 62, 66, 2007 Report)

- Although both forms of the drug are addictive, the risk of addiction may be greater for crack cocaine than powder cocaine on the *typical* user because of their different methods of *typical* administration (typically crack cocaine is smoked and powder cocaine is snorted). (See pp. 62-66, 2007 Report)

- The negative effects of prenatal exposure to crack cocaine are identical to the effects of prenatal exposure to powder cocaine and are significantly less severe than previously believed. (See pp. 61, 67-70, 2007 Report)

- In 2002, fourteen states maintained some form of distinction between crack cocaine and powder cocaine offenses. Only one state, Iowa, maintained a 100:1 ratio between the two forms of the drug but that was only for purposes of the statutory maximum penalties. (See p.73, 2002 Report) In 2007, only *thirteen* states maintain such a distinction. (See pp. 98-106, 2007 Report for a discussion of state cocaine sentencing policy)

"Justice Department Releases Report Analyzing Crack and Powder Cocaine Penalties"

U.S. Department of Justice
March 19, 2002
Press Release

WASHINGTON, D.C.—The Justice Department's Office of Legal Policy today released an analysis of prison sentences for federal cocaine offenses. The report concludes that, for comparable quantities of cocaine, the differential between prison sentences for crack traffickers and powder traffickers is much smaller than commonly believed.

"The public debate over the crack-powder disparity has proceeded on bad facts and misconceptions. If this policy debate is to have any real meaning, it must be premised on correct facts," said Viet D. Dinh, Assistant Attorney General for Legal Policy.

Public debate over sentences for federal cocaine offenses has focused on the 100 to1 differential in the amounts of powder and crack cocaine that trigger the 5- and 10-year mandatory minimum sentences. This differential is commonly distorted to imply that sentences for crack cocaine are vastly greater than sentences for powder cocaine. A closer examination of the federal penalty structure for cocaine offenses reveals that the often-cited 100 to 1 differential is misleading. The Office of Legal Policy's analysis, based on actual sentences imposed for 46,413 crack and powder defendants between 1996-2000, demonstrates that:

Crack defendants convicted of trafficking in less than 25 grams of cocaine received an average sentence that is 4.8 times longer than the sentence received by a defendant convicted of trafficking the comparable quantity of powder. The ratio between average crack and powder sentences for defendants convicted of trafficking in between 15 and 49.9 kilograms of cocaine is 2.4 to 1.

For defendants who possessed weapons, the ratio between average crack and powder sentences for lower amounts of cocaine is 2.9 to 1. For the highest amounts of cocaine, the ratio is 1.6 to1.

For defendants with the highest criminal history levels, the average sentence for crack defendants ranged from 1.6 to 1.3 times longer (depending on the amount of cocaine) than the average sentence for defendants convicted of trafficking like quantities of powder.

For defendants with the lowest criminal histories convicted of trafficking the lower quantities of cocaine, the average crack sentence is 8.3 times greater than the average powder sentence—1,637 out of 22,896 (or 7 percent) of crack defendants examined in this study fall into this category. However, for offenders convicted of trafficking in higher amounts of cocaine, the ratio of average crack to powder sentences is 2 to 1.

Crack cocaine is a dangerous drug that has a devastating effect on its victims. For example, in one recent study, 86.7 percent of women surveyed were not involved in prostitution in the year before starting crack use; fully one-third became involved in prostitution in the year after they began use. Women who were already involved in prostitution dramatically increased their involvement, with rates nearly

four times higher than before beginning crack use.

Another recent study found that women who used crack cocaine had much higher than average rates of victimization than women who did not. Among an Ohio sample of 171 adult female crack users, 62 percent had been physically attacked since the onset of crack use. Rape was reported by 32 percent of the women since they began using crack, and among these. 83 percent reported being high on crack when the rape occurred, as were an estimated 57 percent of the perpetrators.

These and many other statistics and studies tell the story of the devastation that cocaine, and crack cocaine specifically, bring to the nation—especially its minority communities. Lowering crack penalties would simply send the wrong message—that we care more about crack dealers then we do about the people and the communities victimized by crack.

Further, lowering crack penalties is inconsistent with a rejuvenated national fight against illegal drug use. The recently released Attorney General's drug enforcement strategy has two essential elements: modifying individual behavior to discourage and reduce drug use and addiction, and disrupting the market for illegal drugs. Lowering penalties for trafficking crack cocaine would be inconsistent with both objectives.

In his testimony today before the U.S. Sentencing Commission, Deputy Attorney General Larry D. Thompson expressed the Department's view that the current federal sentencing policy and guidelines for crack cocaine offenses are proper, and that it would be more appropriate to address the differential between crack and powder cocaine by recommending that penalties for powder cocaine be increased. The Department would oppose any effort by the Commission to issue guidelines that do not adhere to the congressionally enacted statutes that define and prescribe penalties for federal cocaine offenses.

Gall v. United States

(06-7949)

Ruling Below: (*U.S. v. Gall*, 446 F.3d 884 (8th Cir. 2006), *cert granted,* 127 S. Ct. 2933, 168 L. Ed. 2d 261, 2007 U.S. LEXIS 7525).

In early 2000, Brian Gall entered into and participated in a conspiracy to distribute the drug "ecstasy" in Iowa. In August of that same year, Gall withdrew from the conspiracy after earning an estimated $30,000 through distribution of ecstasy. Four years later, Gall was indicted for involvement in the conspiracy and turned himself in. Gall pleaded guilty and was sentenced to probation, although his guideline range under the U.S. Sentencing Guidelines was 30-37 months imprisonment. The Government appealed, asserting that the sentence was unreasonable.

Questions Presented: Whether, when determining the "reasonableness" of a district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.

UNITED STATES of America, Appellant,
v.
Brian Michael GALL, Appellee.

United States Court of Appeals
for the Eighth Circuit

Decided May 12, 2006

[Excerpt: Some footnotes and citations omitted.]

SMITH, Circuit Judge.

Brian Michael Gall pleaded guilty to conspiracy to distribute a mixture containing methylenedioxymethamphetamine ("MDMA"), a Schedule I controlled substance, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846. The district court imposed a sentence of 36 months' probation and a $100 special assessment. The government appeals the sentence, arguing that it is unreasonable. We conclude that Gall's sentence is unreasonable. Accordingly, we remand the case for resentencing.

I. Background

In February or March 2000, Gall entered into an agreement with Luke Rinderknect and others to distribute MDMA, also known as ecstacy. Initially, Gall purchased 100 ecstasy tablets from Rinderknect on six occasions between February and May 2000. During this period, Gall traveled from Iowa City, Iowa, to Pell, Iowa, to purchase ecstasy from Rinderknect.

In May 2000, Rinderknect decided to move to Burbank, California. Before leaving Iowa, he arranged a meeting with Gall and Theodore Sauerberg to facilitate the ongoing distribution of ecstasy in his absence. During the meeting, the parties agreed that Sauerberg would accept delivery of ecstasy from Rinderknect and transfer the drugs to Gall. When Gall received the drugs from Sauerberg, he distributed them to other individuals, including Ross Harbison, Jason Story, Brooks Robinson, Mark Goodding, and Corey Coleman. After receiving payment from his customers, Gall delivered the drug proceeds to Sauerberg. Sauerberg then delivered the cash to Rinderknect.

One month after the initial meeting in Iowa City, Rinderknect mailed a package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Sauerberg then distributed the ecstasy to Gall in 1,000 tablet increments. Pursuant to the agreement, Gall distributed the ecstasy to other individuals, including Coleman who purchased a total of 1,500 to 2,000 tablets. Gall knew his customers were redistributing the drugs within the community. As the drugs were distributed, Gall paid Sauerberg for the ecstasy. After Sauerberg collected the $85,000 purchase price from Gall, he contacted Rinderknect who flew to Iowa and obtained the cash.

Approximately one to two months later, Rinderknect mailed a second package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Again, Sauerberg distributed the ecstasy to Gall in 1,000 tablet increments. After distributing the ecstasy, Gall remitted $85,000 to Sauerberg, who delivered the money to Rinderknect.

In September 2000, Gall decided to leave the drug conspiracy. Rinderknect traveled to Iowa City and met with Gall. Gall told Rinderknect that he was getting out of the drug business over concerns that Sauerberg was telling too many people about their ecstasy distribution business. Rinderknect sold no more ecstasy to Gall as he requested. According to Gall, he stopped selling ecstasy in August 2000 when he moved in with a new roommate and started studying for his major at the University of Iowa. Goodding testified that Gall stopped selling ecstasy in August 2000 because he did not like the trouble of having to deal with people. Gall estimated that he made $30,000 while a member of the ecstasy conspiracy.

After college graduation in 2002, Gall moved to Mesa, Arizona. Federal agents approached Gall in Arizona, requesting to speak with him about his involvement with ecstasy sales while living in Iowa. Unknown to Gall, law enforcement had already arrested Rinderknect and Sauerberg, who had implicated Gall. Gall admitted to the agents his involvement in the conspiracy. In 2004, Gall was charged in an indictment with conspiracy to distribute MDMA. Gall made arrangements to return to Iowa from his home in Winter Park, Colorado, when he learned there was a federal arrest warrant issued for him. Upon his return to Iowa, he turned himself in to federal authorities.

Because Gall withdrew from the conspiracy in September 2000, the parties stipulated that the November 1, 1999 edition of the United States Sentencing Guidelines applied to Gall's offense conduct. The presentence report ("PSR") assigned Gall responsibility for 10,000 tablets of ecstasy. The parties stipulated that for the purpose of calculating a Guidelines sentence, Gall would be held accountable for 2,500 grams of ecstasy, or 10,000 tablets, which under the 1999 Guidelines equals 87.5 kilograms of

marijuana. Pursuant to U.S.S.G. § 2D1.1, 87.5 kilograms of marijuana placed Gall at a base offense level of 24. Because he qualified for the safety valve pursuant to U.S.S.G. § 5C1.2, Gall's offense level was reduced by two levels to 22. An additional three-level reduction for acceptance of responsibility resulted in a total offense level of 19.

Gall's criminal history included a conviction for failure to maintain control of his vehicle and underage alcohol possession in March 1997. As part of his sentence, Gall was ordered to pay a fine and undergo treatment for alcohol abuse. No criminal history points were assessed for this conviction pursuant to U.S.S.G. § 4A1.2(c). Gall was also convicted in December 1997 of improper storage of a firearm on a public highway. This conviction added one criminal history point pursuant to U.S.S.G. § 4A1.1(c). Finally, in March 2000, Gall was convicted of possession of marijuana for which he received a deferred judgment; no criminal history points were assigned to this conviction. With a Category I criminal history, Gall's advisory Guidelines range was 30 to 37 months' imprisonment.

At Gall's sentencing hearing, his father, Tom Gall, testified that he had observed a change in his son's life and that his son had started his own business and was doing well. He added that contractors rely on his son for expertise in installing windows. Finally, he commented that his family would be devastated if his son went to jail.

Gall's mother, Vicki Gall, testified that she believed her son realizes that he made a "stupid mistake" and that he has really learned from it. She added that during the last year, her son has become more mature. She concluded by questioning the value of incarcerating someone who had already made positive changes in his life.

Gall's counsel requested a sentence of probation, asserting that Gall was not in need of rehabilitation because he had already done an admirable job of rehabilitating himself. His counsel noted letters of support sent to the district court sent by Gall's friends and family. In addition, his counsel argued that a felony conviction is a severe consequence that would follow Gall throughout his life. Gall's counsel distinguished Gall from the codefendants who received prison sentences by noting Gall's withdrawal from the conspiracy and his assumption of a crime-free lifestyle. Counsel concluded his remarks by reminding the court that Gall's family, along with two contract employees, "work pretty much exclusively for Mr. Gall" and were depending on Gall.

The government requested a sentence of 30 months' imprisonment, a sentence at the low end of the advisory Guidelines range. The government argued this sentence was appropriate, considering Gall already received a significant benefit by being sentenced under the 1999 Guidelines. In 1999, the Guidelines stated that 1 gram of ecstasy equated to 35 grams of marijuana. The current Guidelines equate 1 gram of ecstasy to 500 grams of marijuana, which is 14 times the conversion quantity that Gall faced. In addition, Gall's recommended sentence only included drug quantities for the period of his participation in the conspiracy not foreseeable drug quantities during the entire conspiracy. Also, Gall benefited from a two-level safety-valve reduction. Finally, the government argued that a 30-month sentence was appropriate because the other coconspirators also received prison sentences.

Before announcing its sentence, the district court denied a defense request to depart from the advisory Guidelines range based upon aberrant behavior and extraordinary acceptance of responsibility. The court concluded that departure requests for remorse, post-offense rehabilitation, and voluntary cessation of criminal activity were best considered within the confines of 18 U.S.C. § 3553(a).

After considering the Guidelines, the district court stated, both at the hearing and in its subsequent sentencing memorandum, that it was going to impose a sentence other than that contemplated by the Guidelines and sentenced Gall to 36 months' probation. In imposing the sentence of probation, the court stated that it had considered the § 3553(a) factors. Particularly, the court stated that it took into account "the defendant's voluntary and explicit withdrawal from the conspiracy in September of 2000; the defendant's exemplary behavior while on bond; the support manifested by family and friends who have attested to the defendant's character; the lack of criminal history, especially a complete lack of any violent criminal history; and the immaturity of the defendant."

* * *

The district court sentenced Gall to a term of 36 months' probation as a reflection of "the seriousness of joining a conspiracy to distribute MDMA or Ecstacy." Recognizing that probation is not recommended when the Guidelines range falls outside of Zone A, the district court concluded that probation was nevertheless appropriate because Gall's offense level was based "solely on drug quantity." The court stated, "While not denigrating the seriousness of the offense conduct in this case, the Court finds the offense level based solely upon drug quantity does not adequately reflect the offense conduct."

The government now appeals, arguing that the sentence is unreasonable in light of all of the § 3553(a) factors because the district court (1) gave unreasonable weight to Gall's withdrawal from the conspiracy; (2) improperly relied on studies showing that adolescents are less culpable for their actions than adults; (3) gave unreasonable weight to Gall's post-offense rehabilitation and behavior while on pre-trial release; (4) failed to acknowledge that Gall's lack of criminal history was accounted for in the Guidelines calculation; (5) incorrectly concluded that a sentence of probation reflects the seriousness of the offense; (6) did not consider whether a sentence of probation affords adequate deterrence to future criminal conduct; and (7) did not consider whether a sentence of probation creates unwarranted sentencing disparities among defendants with similar records who committed similar crimes.

II. Discussion

"Under *Booker*, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Claiborne*, 439 F.3d 479, 480 (8th Cir. 2006). To determine the proper sentence, "the district court must first calculate the applicable guidelines sentencing range." *Id.* After calculating the advisory Guidelines range, the district court "may then impose a sentence outside the range in order to 'tailor the sentence in light of the other statutory concerns' in § 3553(a)." *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 245-46, 125 S.Ct.

738, 160 L.Ed.2d 621 (2005)).

In the present case, neither party challenges the district court's determination of the Guidelines sentencing range; therefore, "we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion." *Id.* at 481.

"We have determined that a sentence imposed within the guidelines range is presumptively reasonable." *United States v. Myers*, 439 F.3d 415, 417 (8th Cir. 2006). "While it does not follow that a sentence outside the guidelines range is unreasonable," a sentence outside of the Guidelines range "'may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper factor or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.'" *Id.* at 417-18 (quoting *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005)).

The district court must clearly explain why it imposed a sentence outside of the Guidelines range. *United States v. Gatewood*, 438 F.3d 894, 896 (8th Cir. 2006). While we do not require "a rote recitation of each § 3553(a) factor," the district court should explain why it varied from the Guidelines and the extent of the variance. *Id.* "'Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" *Claiborne*, 439 F.3d. at 481 (quoting *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir. 2005)). Therefore, "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be." *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006).

Here, the district court imposed a sentence of probation when the bottom of Gall's advisory Guidelines range was 30 months' incarceration. In essence, this amounts to a 100% downward variance, as Gall will not serve any prison time. Such a variance is extraordinary. "An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); see also Claiborne, 439 F.3d at 481 (holding that the district court's imposition of a 15-month sentence when the Guidelines range was 37 to 46 months' imprisonment, a 60% downward variance, was unreasonable). We conclude that this extraordinary variance is not supported by extraordinary justifications.

First, the district court gave too much weight to Gall's withdrawal from the conspiracy because the court failed to acknowledge the significant benefit Gall received from being subject to the 1999 Guidelines. Gall was held responsible for 10,000 tablets of MDMA at a conversion rate of 1 gram of MDMA to 35 grams of marijuana, resulting in a base offense level of 24. Under the current Guidelines, however, Gall's base offense level would have been 32 because 1 gram of MDMA equates to 500 grams of marijuana. In addition, Gall was not held accountable for quantities of ecstasy distributed by other members of the

conspiracy subsequent to his withdrawal. Under U.S.S.G. § 1B1.3, Gall could have been held responsible for other members' reasonably foreseeable acts. *United States v. Smith*, 240 F.3d 732, 737 (8th Cir. 2001) ("A defendant convicted of conspiracy is properly held accountable for all reasonably foreseeable acts and omissions of any co-conspirator taken in furtherance of the conspiracy.").

Second, the district court gave significant weight to an improper factor when it relied on general studies showing persons under the age of 18 display a lack of maturity, which often results in impetuous and ill-considered actions. This general study, however, does not explain how Gall's specific behavior in the instant case was impetuous or ill-considered. Furthermore, Gall sold ecstacy as a 21-year-old adult, not as an adolescent.

Third, the district court did not properly weigh the seriousness of Gall's offense. While the district court observed that Gall's offense level did not adequately reflect the offense conduct because it was based "solely on drug quantity," the district court ignored the serious health risks ecstasy poses. Ecstasy causes increased body temperature, which can lead to liver, kidney, and cardiovascular system failure; increases in heart rate and blood pressure; and severe anxiety and depression, which can occur days or weeks after taking ecstasy. National Institute on Drug Abuse, (2003), at www.nida.nih.gov/infofax/ecstasy.html (last visited March 31, 2006). Gall sold 10,000 ecstasy pills during the time he participated in the drug conspiracy. The potential harm posed by this quantity of illegal drugs should not be lightly discounted.

Fourth, the record does not show that the district court considered whether a sentence of probation would result in unwarranted sentencing disparities. See 18 U.S.C. § 3553(a)(6). "Congress has made avoiding unwarranted disparity a legislative priority." *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006). Therefore, we find that the district court failed to consider a relevant factor that should have received significant weight.

Finally, the district court placed too much emphasis on Gall's post-offense rehabilitation. Even if Gall's rehabilitation "is dramatic and hopefully permanent," a sentence of probation for participating as a middleman in a conspiracy distributing 10,000 tablets of ecstasy with a personal profit of $30,000 "'lies outside the limited range of choice dictated by the facts of the case.'" *Id.* (quoting *Haack*, 403 F.3d at 1004).

III. Conclusion

Accordingly, the judgment of the district court is **REVERSED** and the case is **REMANDED** to the district court for resentencing.

"U.S. Supreme Court Picks Up Replacements for St. Louis Man"

Daily Record (St. Louis, MO.)
June 12, 2007
Allison Retka

The U.S. Supreme Court has taken up another Eighth Circuit case[, ***Gall v. U.S.,***] on federal sentencing guidelines after dropping a St. Louis-based appeal when the petitioner was shot and killed last month in an attempted car theft. This new case, first filed in the federal court in Des Moines, Iowa, addresses a lenient sentence issued to an Iowa university student who sold $30,000 in Ecstasy tablets as part of a statewide drug ring. After considering his age—21 years old—and his limited criminal history, the district court gave Brian Michael Gall 38 months probation when federal guidelines mandated a 30-month prison sentence. Also on Monday, the nation's highest court took up another case, *Kimbrough vs. U.S.*, which deals with the discrepancies in punishing crack cocaine crimes under federal sentencing guidelines. That these two cases were taken up just a week after the court dismissed a pending appeals case from Mario Claiborne, a St. Louis man who was fatally shot May 29 near Grand Boulevard, is no accident, said Matthew Shors, a Washington, D.C., attorney for the American Civil Liberties Union. "Clearly what happened . . . was the court decided in light of Claiborne being dismissed to grant both these cases," said Shors, who drafted an amicus brief in Claiborne's case on behalf of the ACLU. "They sound familiar in a lot of ways. It's the question of what kind of circumstances do you have to have to justify extraordinary discrepancies from the contemplated guidelines range." While a decision on Claiborne's case was expected sometime this month, neither Gall nor Kimbrough will be considered by the Supreme Court until the next term, which starts Oct. 1. Prosecutors and criminal defense attorneys took note of Claiborne's appeal because the case addressed the ability of a district judge to issue a substantially lower sentence than federal sentencing guidelines prescribe. The 8th U.S. Circuit Court of Appeals disagreed with U.S. Judge Carol E. Jackson when in 2005 she sentenced Claiborne to 15 months in prison for possession and intent to sell crack cocaine, a sentence less than half the three-year minimum of federal guidelines. According to police reports, Claiborne was shot at a BP gas station on South Grand Boulevard after one of his companions left his vehicle and drove off in a nearby truck that had been left empty and idling. As the companion fled in the truck and Claiborne followed after in his own car, the truck's owner opened fire on Claiborne's vehicle, striking him in the back. Claiborne managed to drive himself to Saint Louis University Hospital, where he was pronounced dead at 3:15 a.m. on May 30. The U.S. Supreme Court dismissed his case June 4.

"A Possible Sentencing 'Safe Harbor' in New Rulings"

The National Law Journal
June 25, 2007
Marcia Coyle

WASHINGTON—If federal appeals courts may now presume that a criminal sentence falling within the advisory Federal Sentencing Guidelines is reasonable, will district judges abandon new-found sentencing discretion for the safe harbor of the guidelines?

The U.S. Supreme Court on June 21 held that federal appellate courts may apply a rebuttable presumption of reasonableness to a district court sentence within the guidelines. *Rita v. U.S.*, No. 06-5754.

The important question now, according to sentencing scholars and practitioners, is how district judges will view the decision when imposing sentences.

The presumption is an appellate court presumption, not a sentencing court presumption, emphasized Justice Stephen G. Breyer, who was writing for the 8-1 majority. Sentencing judges don't lose discretion and should continue subjecting a defendant's sentence to the "thorough adversarial testing" demanded by federal sentencing laws, he added.

But a dissenting Justice David H. Souter countered, "What works on appeal determines what works at trial." If the U.S. Sentencing Commission's views are as weighty as the majority says they are, he added, "A trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range."

The *Rita* case, in which Victor Rita challenged his 33-month guideline sentence for perjury and obstruction of justice, presented a question that had divided the circuits since the justices' major sentencing ruling in *U.S. v. Booker*, 543 U.S. 220 (2005).

In *Booker*, the high court held that the mandatory federal guidelines violated the Sixth Amendment right to jury trial and ruled the guidelines to be only advisory. It also held that appellate courts should review sentences under a standard of reasonableness.

After *Booker*, a number of circuits began to apply a rigid presumption of reasonableness to any sentence that fell within the guideline range for that crime.

The Bush administration had argued that seven circuits applied a presumption of reasonableness, but none had ever held that the presumption was a per se one requiring adherence to the guidelines in every case. The administration argued, and the high court agreed, that there may be cases where reliance on the guidelines is not reasonable.

Besides emphasizing that the presumption is for appellate courts alone and is not a binding presumption, Breyer also stressed that there is no presumption of unreasonableness for sentences falling

outside of the guideline range.

"The decision confirms, by my light, that the guidelines provide a relatively safe harbor for [district judges]," said Douglas Berman of Ohio State University Michael E. Moritz College of Law.

But although the decision offers a safe harbor, it also suggests "the waters outside of port are relatively calm for judges as well," said Jeffrey Fisher of Stanford Law School.

"The lesson today is that after *Booker* it's OK if district courts want to give people heavy sentences, and there's going to be some deference to that whether the sentence is suggested by the guidelines or other reasons," said Fisher.

If a court wants to give a lower sentence, he added, five justices suggest appellate courts "better not mess with that unless they have extremely good reason to do so." The decision was "not the best we would have hoped for," said Carmen Hernandez, president-elect of the National Association of Criminal Defense Lawyers, "but it does allow for the judge who wants to be a judge and exercise judicial discretion to do the right thing."

* * *

[The court will address these issues in ***Gall v. United States.***]

Snyder v. Louisiana

(06-10119)

Ruling Below: *State v. Snyder*, No. 1998-KA-1078 (Supreme Court of Louisiana), *cert granted, Snyder v. Louisiana,* 2007 U.S. LEXIS 8326, June 25, 2007.

Petitioner Allen Snyder, a black man, was convicted and sentenced to death by an all-white jury for the fatal stabbing of his wife's male companion. Prior to trial, the prosecutor reported to the media that this was his "O. J. Simpson case." At trial, the prosecutor peremptorily struck all five African-Americans who had survived cause challenges and then, over objection, urged the resulting all-white jury to impose death because this case was like the O. J. Simpson case, where the defendant "got away with it." On initial review, a majority of the Louisiana Supreme Court ignored probative evidence of discriminatory intent, including the prosecutor's O. J. Simpson remarks, denying Snyder's *Batson* claims. On remand, a bare majority adhered to its prior holding, again disregarding substantial evidence establishing discriminatory intent, including the prosecutor's references to the O. J. Simpson case, the totality of strikes against African-American jurors, and evidence showing a pattern of practice of race-based peremptory challenges by the prosecutor's office. In addition, the majority imposed a new and higher burden on Snyder, asserting that *Rice v. Collins*, 546 U.S. 333 (2006), permitted reversal only if "a reasonable fact-finder [would] necessarily conclude the prosecutor lied" about the reasons for his strikes.

Questions Presented: (1) Did the majority below ignore the plain import of *Miller-El* by failing to consider highly probative evidence of discriminatory intent, including the prosecutor's repeated comparisons of this case to the O. J. Simpson case, the prosecutor's use of peremptory challenges to purge all African Americans from the jury, the prosecutor's disparate questioning of white and black prospective jurors, and documented evidence of a pattern of practice by the prosecutor's office to dilute minority presence in petit juries? (2) Did the majority err when it imported into a direct appeal case the standard of review this Court applied in *Rice v. Collins*, an AEDPA habeas case? (3) Did the majority err in refusing to consider the prosecutor's first two suspicious strikes on the ground that defense counsel's failure to object could not constitute ineffective assistance of counsel because *Batson* error does not render the trial unfair or the verdict suspect?

STATE of Louisiana
v.
Allen SNYDER

Supreme Court of Louisiana

Decided September 6, 2006

[Excerpt: Some footnotes and citations omitted.]

WEIMER, J. Defendant was convicted of first degree murder and sentenced to death. On direct appeal, this court ultimately affirmed defendant's conviction and sentence. Currently, the case is on remand from the United States Supreme Court, which directed that we again review defendant's *Batson* claims, this time in light of *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). After reviewing defendant's *Batson* complaints cumulatively in light of the entire record as directed by *Miller-El*, we find the trial court did not err in determining the venire persons were not excused by the State in a racially discriminatory manner. Therefore, for the reasons that follow, the judgment affirming defendant's conviction and sentence is reinstated. . . .

. . . The Equal Protection Clause of the United States Constitution prohibits engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges. *Batson*. The *Miller-El* decision that forms the basis for this remand was the third in a trilogy of Supreme Court opinions related to the allegedly discriminatory exercise of peremptory challenges in criminal trials. The trilogy presents a pendulous treatment by the Court of the issue of the evidentiary burden placed on a criminal defendant who claims that equal protection has been denied through the State's use of peremptory challenges to exclude individuals from the petit jury on the basis of race.

In *Swain v. Alabama*, the Supreme Court recognized that a State's purposeful or deliberate denial of participation as jurors on account of race violates the Equal Protection Clause. Reviewing the "very old credentials" of the peremptory challenge system, the Court noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." The majority of the Court sought to accommodate both the prosecutor's historical privilege of peremptory challenge free of judicial control and the constitutional prohibition on exclusion of persons from jury service on account of race. Because the State may not exercise its challenges in contravention of the Equal Protection Clause, the Court held it was impermissible for a prosecutor to use challenges to exclude African-Americans from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to them "the same right and opportunity to participate in the administration of justice enjoyed by the white population." Thus, proof by a defendant that members of his race were struck from his jury was insufficient; a defendant's burden was to show the circumstances under which prosecutors were responsible for striking minority jurors beyond the facts of a particular case. Proof of repeated striking of African-Americans over a number of cases was necessary to establish a violation of the Equal Protection Clause.

Twenty-one years after Swain, the Court swung the pendulum in the opposite direction, finding that the evidentiary formulation of Swain was inconsistent with standards that had developed during those years for assessing a prima facie case under the Equal Protection Clause. In *Batson v. Kentucky*, the Court called the Swain requirement "a crippling burden of proof" that had made prosecutors' peremptory challenges "largely immune from constitutional scrutiny." The Court held that a defendant could establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of

peremptory challenges at the defendant's trial. Evidence of a pre-existing pattern of discrimination in previous cases was no longer required.

Another 19 years later, in *Miller-El*, the Supreme Court moved the pendulum back toward middle ground. Stating that although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s "wide net," the Court noted the net should not have been consigned to history; *Batson*'s individualized focus had an inherent weakness of its own caused by its very emphasis on the particular reasons a prosecutor might give. "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Miller-El*. Thus, the Court reiterated—this time in a habeas proceeding—*Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. *Id.*

Nevertheless, the Court left the *Batson* test intact in *Miller-El* and reaffirmed that position in *Rice v. Collins*. Louisiana law codifies the *Batson* ruling in LSA-C.Cr.P. art. 795(C), which provides:

> No peremptory challenge made by the state or the defendant shall be based solely upon the race of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory racially neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

The race-neutral explanation need not be persuasive or even plausible. *Collins*. It will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The ultimate burden of persuasion as to racial motivation rests with, and never shifts from, the opponent of the peremptory challenge. *State v. Tyler*. The trial court's findings with regard to a *Batson* challenge are entitled to great deference on appeal. When a defendant voices a *Batson* objection to the State's exercise of a peremptory challenge, the finding of the absence of discriminatory intent depends upon whether the trial court finds the prosecutor's race-neutral explanations to be credible. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell.*

The three-step *Batson* process which guides the courts' examination of peremptory challenges for constitutional infirmities has recently been described again by the Supreme Court as follows:

> A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-

> neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Internal quotations and citations omitted.]

The Court's decision in *Miller-El v. Dretke*, a multifaceted and fact-bound opinion on the merits of defendant's claim to habeas relief, further clarifies the analysis to be used in *Batson*'s third and final step. Although the case is a federal habeas case, it nevertheless indicates the type of evidence to be considered and the appropriate scope of an evaluation of the prosecutor's reasons to be applied by the trial court at the time a *Batson* challenge is raised, which are later pertinent to direct review by the appellate courts.

The *Miller-El* opinion begins by recognizing *Batson*'s weakness is its "very emphasis on the particular reasons a prosecutor might give." *Miller-El*. The Court continued, "Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." *Id. Miller-El*, therefore, redirects attention to "*Batson*'s explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination," *Id.*, and to the trial judge's duty under *Batson* "to assess the plausibility" of the prosecutor's proffered reason for striking a potential juror "in light of all evidence with a bearing on it." (Emphasis supplied.) *Id.*

. . . After a detailed discussion of all the evidence presented in support of defendant's *Batson* challenge, the Court concluded that the totality of the evidence showed the trial court was unreasonable and erroneous in determining the prosecutor's strikes of two potential jurors were not racially motivated. The Court summarized the myriad pieces of evidence that together yielded its decision. The Court found the existence of several disturbing factors that together indicated the prosecution's proffered race-neutral reasons were mere pretext for discriminatory intent: (1) the "bare statistics," which showed that out of 20 black members of the 108-person venire panel, only 1 served, *Id.*; (2) a "comparative juror analysis," or a side-by-side comparison, of some African-American panelists who were struck and white panelists who were allowed to serve, *Id.*; (3) the "broader patterns of practice" that occurred during jury selection, which included inexplicable jury shuffling and disparate questioning of African-American and non-African-American panelists, *Id.*; and (4) historical evidence that the particular District Attorney's office involved in the case had for decades followed a known, formal, and specific policy of systematically excluding African-Americans from juries. The Court readily acknowledged that the significance of some of the evidence of discriminatory intent was "open to judgment calls," but reasoned that when the evidence was viewed cumulatively, it was "too powerful to conclude anything but discrimination."

. . . [T]he Court's next *Batson*-third-step case, *Collins*, illustrates the difficulties courts face in attempting to review a trial court's resolution of a *Batson* challenge. In that case, a *Batson* challenge was made after the prosecution struck a young, African-American female panelist, and the challenge was rejected by the state courts and the federal district court. However, when defendant sought collateral habeas corpus relief in the federal courts, the Ninth Circuit Court of Appeals reversed on grounds that the trial court had acted unreasonably by crediting the prosecutor's race-neutral reasons for striking the juror. *Collins v. Rice.*

The Supreme Court reversed, finding the Court of Appeals had "improperly substituted its evaluation of the record for that of the state trial court." *Collins*. The Court found the record did not demonstrate that a reasonable fact finder must necessarily conclude the prosecutor lied about his reasons for striking the panelist. *Id.* at 975. . . .

Application of Principles

Miller-El and *Collins* necessarily shape this court's response to the Supreme Court's present remand order and our reconsideration of the *Batson* issue, but do not require a detailed reconsideration of the voir dire of the five African-American prospective jurors peremptorily struck by the State. As we stated in *Snyder I*, the State's use of five of its peremptory challenges to strike African-American prospective jurors who survived challenges for cause resulted in defendant's being tried by an all-white jury. Now defendant re-argues that the State's use of "close to half" of its peremptory strikes to "exclude an entire group comprising only fourteen percent of the qualified pool" is compelling evidence that the State's strikes were made on the impermissible basis of race.

Considering this argument, this court's current task is eased by an initial winnowing out of some of the challenged jurors. Currently, defense counsel makes no argument with regard to Loretta Walker, almost certainly because the record offers ample affirmative support for the prosecutor's challenge.

With respect to two other prospective jurors, Greg Scott and Thomas Hawkins, Jr., this court previously found that the defendant waived any *Batson* claim on appeal by failing to object when the prosecutor struck the jurors, although defense counsel noted their race for the record. More importantly, defense counsel did not ask the prosecutor to articulate his race-neutral reasons for excusing Greg Scott and Hawkins when the *Batson* challenge was posed after the State struck Elaine Scott from the third panel of prospective jurors. *Snyder*. There is nothing in *Miller-El* or *Collins* that casts doubt on the correctness of this portion of *Snyder I*.

Despite defense counsel's reiteration of the argument concerning the remaining two potential jurors, we turn to our previous decision regarding these persons:

> Defense counsel did . . . lodge the proper *Batson* objections to the State's use of peremptory challenges against potential jurors Jeffrey Brooks [and] Elaine Scott. . . . The State originally accepted Brooks as a juror, but later backstruck him. The prosecutor's reasons for striking Brooks were that he appeared "very nervous" throughout questioning and that he would be missing class, as a

> student teacher, if chosen to serve on the jury. The prosecutor stated, "He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase." Defense counsel responded by stating:
>
> His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.
>
> As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

The court allowed the State to exercise a peremptory challenge on Brooks.

With respect to prospective juror Elaine Scott, the district attorney excused her, stating, "I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly—I wrote it down, that she thinks she could, and that's the reason for our challenge." However, when asked again by the prosecution if she could impose the death penalty, she responded, "I could." She also responded affirmatively when asked if she could listen to the evidence and consider whether to accept or reject the insanity defense and hold the defense to its burden of proof. Nevertheless, the trial court accepted the State's explanation as race neutral and excused Elaine Scott.

The trial court entertained the State's race neutral reasons for the exclusions without making a finding as to whether defendant had made a prima facie showing of purposeful racial discrimination. A trial court's "demand that a prosecutor justify his use of peremptory strikes is tantamount to a finding that the defense has produced enough evidence to support an inference of discriminatory purpose." *State of Louisiana v. Green*. Nevertheless, the issue of whether the defense established a prima facie case of discrimination is moot once the prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination. *Id.*

Here, the trial court did not find that defendant had established purposeful discrimination and overruled the *Batson* objections. These rulings appear correct. Although not required by the case law, the State's proffered reasons were plausible, supported by the record and race-neutral. [Citations omitted.] The prosecutor's reasons constituted "legitimate" grounds for the exercise of a peremptory strike. [Citation omitted.] None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State's discriminatory use of peremptory challenges. Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Therefore, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent.

After carefully reviewing the entire record of voir dire, we find no abuse of discretion or error by the trial court in its denial of defendant's *Batson* claims. The trial court

heard the prospective jurors and concluded there were reasonable bases for the challenges in question. The record does not show that the State employed a tactic of purposeful discrimination in its exercise of peremptory challenges. [Record references and footnote omitted.]

. . . At the beginning of the voir dire, the trial court gave a brief explanation of the jury selection process. The court announced the eligibility requirements for jury service and then asked the members of the venire who had any basis for disqualification or a significant reason that would warrant excusal to approach the bench. Each venire member approached the bench individually and provided his or her reason for ineligibility or for excusal. Some persons were questioned further by the State or the defense as to their reasons, and then the court either excused them or denied their requests.

During this preliminary voir dire process, the State consistently inquired of a potential juror whether or not his or her particular problem would prevent concentration on the evidence so as to impair the juror's decision-making task. For example, when speaking to potential juror Chauffe, a single-mother of a school-aged child who claimed transportation problems, the prosecutor asked: "If you got selected on this jury anyway, despite what you're telling us, do you think that you would be able to pay attention to the evidence in the case, and listen to the Judge, and be a good juror? Or do you feel you would be worrying too much and not be able to listen to the evidence?" When Chauffe answered the second question affirmatively, the court excused her. The prosecutor asked the same type of question of prospective jurors Pickett, Nguyen, Laws, Perkins, and Miller.

Later, when the State exercised a peremptory challenge to backstrike Brooks, the race-neutral reason given was the prosecutor's reservations about this student teacher's ability to consider the issues without being distracted by his concerns about school. This reason was consistent with the concern voiced in the questioning of other potential jurors during the pre-voir dire process mentioned above.

Further, acknowledging that the peremptory challenge of Brooks requires a more detailed discussion than the challenge of Scott, we note defense counsel's comparison of the State's challenge of Brooks with the State's acceptance of Yeager and Sandras, both white males on the fifth panel. Yeager expressed concern with jury service because he had a commitment to an event scheduled for Sunday that he had been an integral part of for many years. Sandras reported he taught at the University of New Orleans, had just begun the semester, and would have a problem with any "prolonged absence." We note that both of these men were employed and apparently already had established careers; Brooks, on the other hand, was attempting to complete his college courses in order to begin a career in teaching.

The fact that Brooks actually approached the bench on his own volition and raised his teaching obligations as a hardship excuse indicates he was truly concerned, more so than Sandras and Yeager. When Brooks approached the bench to raise a hardship concern at the beginning of the jury selection proceeding, Brooks stated to the court that "there is something I'm missing right now that will better me towards my teaching career." On the other hand, Sandras and Yeager merely responded to defense counsel questioning posed to their panel regarding any jurors' personal reasons or

pre-existing obligations which would make it difficult to concentrate or serve on the jury. Thus, Brooks initiated the concern about the trial being a hardship, while Sandras and Yeager merely responded to questions.

. . . There was no indication that race was the underlying reason for backstriking Brooks any more than race was a consideration in the prosecutor's questions to the other potential jurors. . .

The final part of our analysis is based on a review of the record as a whole as instructed by the Supreme Court in *Miller-El* ("[A]ll relevant circumstances" and "all evidence with a bearing" on the *Batson* issue must be considered.) First, we consider the proceeding at which the issue of racial prejudice was raised prior to the beginning of voir dire.

At a July 29, 1996 hearing to determine whether the State would be permitted to introduce at trial evidence of five incidents of domestic violence allegedly committed by defendant against his estranged wife to show defendant's motive and intent, the State made reference to "another case that was on television everyday for the last couple of years . . . where this very thing happened." Thereafter, on August 16, 1996, defense counsel filed a motion *in limine* specifically requesting the State be precluded at trial from referring to or making comparisons with O. J. Simpson or his trial, as such references would serve no purpose other than to confuse and prejudice the jury. The prosecutor responded:

> I think [the defense motion is] premature. . . . I can assure the Court that I'm not going to get up in my opening voir dire and say [that] "we're here for the Jefferson Parish O. J. Simpson . . . case." I have no intentions of doing that. I have no—perhaps in argument, I don't know. . . .
>
> I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O. J. Simpson case. . . . I just ask [the court] not to grant this motion.

After the hearing, the trial court denied defendant's motion based on the prosecutor's representations.

Voir dire began against this backdrop on August 27, 1996.

Next, we note that the State did, in fact, make an indirect reference to the O. J. Simpson case during its rebuttal argument at the penalty phase of the trial. . . .

The portion of the State's rebuttal argument that the defendant now complains about was in direct response to the above quoted argument. Specifically, the prosecutor stated:

> It's been very clear, and this is the last thing I'm going to say about Allen Snyder, that the kind of person he is, as Mr. Olinde described him in his opening statement, he's egocentric, and he has shown no remorse. More than that, as he stabbed his wife 15 times, put her through what Dr. Harkness described as a near-death experience, as she lay there gushing blood, as Mary Snyder sat in that seat right there, he left her there. He left her there to die. And when Detective Labat took the

> statement from him 12 hours later, . . . not a word at any time where you would have heard him, how's my wife? Is she okay? Not a word. Is that because he's depressed or because he's got a far deeper problem? . . .

. . . However, other than suggesting inferences to be drawn from the bare facts of the prosecutor's remarks both prior to and subsequent to the voir dire, defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of the peremptory challenges. The inferences defense counsel suggests are no more compelling than other race neutral inferences to be drawn when one considers the prosecutor's remarks in context. The remark at the motion in limini referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that Simpson feigned suicidal intent. Neither remark referred to Simpson's or Snyder's race. Counsel's citations to authorities concerning the Simpson trial never were, and are not now, part of the record before this court for review.

Miller-El directs that we cumulate all relevant items tending to point to racial discrimination and view them together when considering whether the trial court's determination of the existence of discrimination is clearly erroneous. Nevertheless, *Miller-El* directs that this court examine the precise reasons given by the State for its strike of Scott and Brooks. This court cannot attempt to hypothesize another reason that the State may have had for its strikes. As stated by the Court, the State must "stand or fall on the plausibility of the reasons he gives." *Miller-El*. Consequently, we find that when the entirety of the record of defendant's case is reviewed, the record shows that the prosecution's stated reasons for striking Scott and Brooks were not pretextual. A review of this record compels a conclusion that race did not play an impermissible role in the exercise of these strikes.

When we view the totality of the evidence discussed herein, as *Miller-El* directs, despite the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, we find the trial court's decision to allow the strikes of Scott and Brooks was not clearly erroneous. Considering the evidence in the record before us, a contrary conclusion would be an improper substitution of this court's evaluation for that of the trial court similar to that struck down in *Collins*. The record before us simply does not demonstrate that a reasonable fact finder must necessarily conclude the prosecutor lied about his reasons for striking Scott or Brooks. Applying *Miller-El* and *Collins*, the prosecutor's demeanor was evaluated by the trial court which found no discriminatory intent. The explanations were reasonable and the proffered rationale had some basis in accepted trial strategy.

We conclude defendant did not carry his ultimate burden of persuasion that the State exercised peremptory challenges in a purposefully discriminatory manner. We reiterate that Snyder's "proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent." *Snyder*. Accordingly, we reinstate the following decree.

DECREE

In accordance with the above reasons

assigned by this court, we unconditionally affirm the judgment of the trial court and the sentence of death. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that court denies his petition for certiorari; and either (a) the defendant, having filed for or and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that court denies his petition for rehearing, the trial judge shall, upon receiving notice from this court under LSA-C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution as provided by LSA-R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under LSA-R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed in the state courts.

AFFIRMED.

KIMBALL, *J. dissenting:*

I believe that a review of the entirety of this record performed using the vigorous analysis directed by the *Miller-El* Court reveals the trial court erred in allowing the State to peremptorily challenge Mr. Brooks. Consequently, I dissent from the majority's conclusion that defendant did not prove the State exercised peremptory challenges in a purposefully discriminatory manner.

At the outset, the raw numbers characterizing the selection of defendant's jury must be noted as they were in *Miller-El*. The State used five of its peremptory challenges to strike 100 percent of the African-American prospective jurors who survived challenges for cause. This resulted in defendant being tried by an all-white jury. Defendant argues that the State's use of "close to half" of its peremptory strikes to "exclude an entire group comprising only fourteen percent of the qualified pool" is compelling evidence that the State's strikes were made on the impermissible basis of race. While the fact that prosecutors used their peremptory strikes to exclude 100 percent of the eligible African-American panelists does not prove intentional racial discrimination, *Miller-El* cautions that "'[h]appenstance is unlikely to produce this disparity.'"

. . . Considering this injection of racial issues, and the fact that the prejudicial arguments were made to an all-white jury, I believe it is only reasonable to conclude that Mr. Brooks was peremptorily challenged by the State on the basis of his race when the entirety of the facts is considered. This is especially true in light of the fact that the trial court did not articulate its reasons for overruling the *Batson* challenge. While one may infer that the trial court found the State's reasons credible, this court, on appellate review, is not privy to the reasons for this credibility determination. One simply cannot tell whether it was something in the demeanor of the prosecution or in the behavior or attitude of Mr. Brooks that caused the trial court to believe the State's race-neutral reasons were not pretextual. The backstrike of Mr. Brooks followed the *Batson*-challenged peremptory strike of Ms. Scott, which had excluded the third of four African-American panelists to be examined. The State's backstrike of Mr. Brooks then removed the only African-American juror the State had accepted for service. With these circumstances as a backdrop, which

Miller-El teaches are clearly relevant to the *Batson* analysis, the State's exercise of a peremptory challenge is suspicious.

. . . It is possible the State had genuine concern about Mr. Brooks's state of mind despite his apparent acceptance of Dean Tillman's assurances to the trial court. *Collins*. However, there was no pre-strike foreshadowing of genuine State concern over the possibility of Mr. Brooks having time-schedule anxieties. No attempt was made by the State to verify its hypothesis and develop an objective basis for its strike. *See Miller-El*.

. . . In my view, the acknowledged time concerns of Mr. Sandras and Mr. Yaeger seem equally significant as the time concerns attributed to Mr. Brooks. The majority discounts the similarities among these potential jurors by pointing out that Mr. Brooks initiated the discussions regarding his concerns about missing his obligations, while Mr. Sandras and Mr. Yeager merely responded to questions. However, in no instance did the State question Mr. Sandras or Mr. Yeager about their admitted concern regarding the time they would spend in court, and away from their personal activities, if selected to serve on the jury. The State chose to strike only Mr. Brooks, in part because of his stated concerns about missing a portion of his student teaching duties. The similarities among Mr. Brooks, Mr. Sandras, and Mr. Yaeger, and the State's uneven treatment of these panelists does not make the State's proffered reasons for striking Mr. Brooks *per se* pretextual. Both Mr. Sandras and Mr. Yaeger may have exhibited legitimate traits and qualities that made the State believe they would make more desirable jurors than Mr. Brooks. The factor that calls the State's strike of Mr. Brooks into question is the total lack of interest prosecutors exhibited in the admitted time concerns of Mr. Brooks, Mr. Sandras and Mr. Yaeger until it needed to justify with race-neutral reasons its strike of Mr. Brooks.

Miller-El directs that appellate courts cumulate all relevant items tending to point to purposeful discrimination and view them together when considering whether the trial court's determination of the existence of purposeful discrimination is clearly erroneous. The record shows that issues of racial prejudice existed at the outset of this case when defendant attempted to foreclose the possibility of the State mentioning the O. J. Simpson trial during his own trial. Defendant was tried by an all-white jury after the State used five of its peremptory strikes to challenge 100 percent of the eligible African-American panelists. In the absence of the trial court's independent and objective assessment on the record of Mr. Brooks's demeanor and attitude, the record tends to belie the prosecutor's stated race-neutral reasons for striking him. Rather than seeming uncertain and nervous, Mr. Brooks appears from a reading of the cold transcript to be engaged, forthcoming and communicative. Additionally, although the State offered the fact that Mr. Brooks might want to manipulate his deliberation to cut the trial short because of his stated concerns about missing his student teacher duties as a race-neutral reason for its strike, the State did not ask Mr. Brooks one question regarding this concern. Moreover, the State accepted without question on the issue at least two panelists who voiced similar concerns and might conceivably have the same motivation for cutting the trial short. Finally, we note that the State injected race into the proceedings directly when it did, in fact, mention the O. J. Simpson case during its penalty phase argument over the

defendant's objection.

When viewed in isolation, perhaps none of the factors above would constitute enough evidence to overturn the trial court's determination in light of the great deference afforded its factual determinations. However, the totality of the evidence discussed herein, combined with the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, leads to the conclusion that the trial court's decision to allow the strike of Mr. Brooks was clearly erroneous. In my view, the cumulative evidence of pretext is compelling and too powerful to conclude anything but intentional racial discrimination motivated the State's strike of Mr. Brooks. Consequently, I would reverse defendant's conviction and sentence.

JOHNSON, *J. dissenting:*

When this case was first before this court on original review in *Snyder I* I stated:

I would have more confidence in the fair-mindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all white jury for this black defendant. In my view, this violation of *Batson v. Kentucky*, coupled with the prosecutor's inflammatory and prejudicial comparison of this case to the O. J. Simpson trial, require that we set aside the death sentence and remand the case for re-sentencing.

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to a trial by a jury of his peers. I still believe that racial discrimination in the jury selection process offends the Equal Protection Clause of the Fourteenth Amendment and a pattern of strikes against African American jurors still gives rise to an inference of discrimination. Once the inference of discrimination is present, the prosecutor then has the burden of articulating a race-neutral explanation for striking the African American jurors. The trial judge serves as the gatekeeper, ensuring that racial prejudice, which impedes the securing of equal justice, does not invade our judicial system. As the gatekeeper, the trial judge must decide whether the prosecutor has articulated a genuine concern, or whether the reason articulated is merely a guise to accomplish his/her discriminatory purpose. Verbalized facially neutral reasons can be a pretext for conscious or unconscious racism.

In the present case, the prosecutor's action in accepting the first African-American juror seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions. Nonetheless, defense counsel noted in the record which excluded jurors were African-American. The *Batson* challenges to the remaining three African-American jurors, including the one juror who was accepted and later backstruck, were overruled by the trial court. The trial court accepted the prosecutor's "race-neutral" explanations and the majority found them to be "plausible, supported by the record and race neutral."

The prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidenced by his reference to the O. J. Simpson trial during closing arguments. In *State v. Green*, we recognized that "for a *Batson* challenge to succeed, it is not enough that a racially discriminatory result be evidenced; rather, that result 'must ultimately be traced to a racially

discriminatory purpose.'" Here we have a racially discriminatory result. An all-white jury selected by peremptorily excluding the five African-Americans from the venire, and the prosecutor's racially discriminatory purpose of inflaming the jury by referring to O. J. Simpson getting away with murder in California.

Because of the nationwide media focus on O. J. Simpson, the defense made a pre-trial motion to exclude any references to the O. J. Simpson case. This motion was denied by the trial judge based on the prosecutor's assurance that he would not, at any time during the course of taking evidence or before the jury, mention the O. J. Simpson case. It is blatantly clear that the prosecutor did not intend to keep his word. The prosecutor had no need to make reference to this defendant not getting away with murder during the penalty phase of the trial. At this point, the defendant had already been convicted of the crime, so there was nothing for him to "get away with." The prosecutor utilized the O. J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors.

. . . The defendant's own confession, plus the testimony of his ex-wife, Mary Snyder who survived this brutal attack, along with that of Gwen Williams, the witness who came to the aid of Ms. Snyder during the attack, support the defendant's conviction of first-degree murder. The prosecutor's improper and clearly inflammatory comments did, however, create a substantial risk that the death penalty would be imposed. In my opinion, the defendant's death sentence should be set aside and this matter remanded for re-sentencing.

The United States Supreme Court granted defendant's writ of habeas corpus, vacated the judgment of this court and remanded the case to the Court to reconsider defendant's *Batson* claims in light of its recent opinion in *Miller-El v. Dretke*. In *Miller-El*, the Supreme Court reaffirmed its position that racial discrimination by any state in jury selection offends the Equal Protection Clause of the 14th Amendment to the United States Constitution. This rule is meant to ferret out discrimination from our judicial system. In this case, the majority's opinion concludes that although the prosecution is required by *Batson* to give race neutral reasons for a peremptory challenge, the race neutral reasons need not be *persuasive* or even *plausible*. The trial court need only find the prosecution's race neutral explanations to be *credible*. They conclude that the burden of proof never shifts from the defendant who must prove the State's discriminatory intent.

. . . In this case, the State used its seventh peremptory challenge to back strike Jeffery Brooks, who had initially been accepted in the first panel of prospective jurors called for examination. Upon the defense's *Batson*'s challenge to the State's later backstrike of Mr. Brooks, the State responded that Mr. Brooks was very uncertain, and "looked nervous to me throughout the questioning," and that Mr. Brooks's concern about missing class as a student teacher might lead him "to go home quickly, come back with guilty of a lesser verdict so there would not be a penalty phase." The trial court allowed the peremptory challenges without a ruling as to whether the State's explanation was race-neutral or credible.

The *Batson* violations herein resulted in the defendant being denied his right to be tried

by a jury of his peers. In *Snyder I*, I was of the opinion that these *Batson* violations required a setting aside of the death penalty, but not the conviction (guilt phase), since the evidence seemed to be persuasive. Now, I am of the opinion that these flagrant *Batson* violations require that the defendant's conviction and sentence must be set aside, and the case remanded for a new trial. The defendant in a capital case is entitled under the Sixth and Fourteenth Amendments to an impartial jury in both the guilt and the penalty phase.

For the aforementioned reasons, I respectfully, dissent.

"Batson and the 'O. J. factor'"

SCOTUSBlog.com
June 23, 2007
Lyle Denniston

WASHINGTON—For the second time in two years, the Supreme Court is pondering what to do about this scenario:

A black man is convicted of murder. His trial is before an all-white jury, composed that way in part because prosecutors struck all potential black jurors.

In the penalty phase of the trial, the defense counsel seeks to head off a death sentence by discussing "mitigating circumstances." When police arrived at the home of the convicted man some 12 hours after the murder, counsel said, the man "was curled up in a fetal position. He was suicidal. He kept saying 'They're coming to get me. They're coming to get me.' . . . Doors were being barricaded. The furniture was being used as a barricade. . . . I'll ask you if that is not suggestive of some sort of disturbance" (apparently, meaning mental disturbance). The prosecutor's rebuttal then includes the following:

". . . it was 12 hours later when he called [police], huddled up, claiming that he was suicidal, barricaded himself in his house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of. . . ."

At that point, the defense counsel objected. After a bench conference, the prosecutor continued: "The most famous murder case . . happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he got away with it. Ladies and gentlemen, is it outside the realm of possibility that that's not what that man [in this case] was thinking about when he called in and claimed that he was going to kill himself?"

That is what the defense lawyer for Allen Snyder, on death row in Louisiana, has called "the O. J. card," suggesting that it was a calculated maneuver by the prosecutor to use O. J. Simpson's controversial acquittal for murder to get an all-white jury in Louisiana to give Snyder the death penalty.

Now, the Snyder case is back before the Supreme Court, with the prospect that the Court may act on his appeal as early as Monday. The case, ***Snyder v. Louisiana*** (06-10119), was considered by the Justices at their Conference on Thursday. It reached the Court in the context of a claim that the jury that convicted Snyder of the stabbing murder of his estranged wife's boyfriend was all-white because prosecutors intended it to be that way, and used their automatic ("peremptory") challenges to achieve that end. Once having such a jury assembled, the appeal argues, a prosecutor—who had referred before trial to the case as his "O. J. Simpson case"—knew the jury was open to a racial plea for death.

The jury process, the appeal contends, violated the Supreme Court's 1986 ruling in *Batson v. Kentucky*, barring the use of race-based peremptory challenges in jury selection. It also asserts that the Louisiana Supreme Court did not follow the Supreme

Court's post-*Batson* decision, *Miller-El v. Dretke* in 2005. mandating a full analysis of the circumstances of jury selection to detect Batson violations.

But the case also raises, implicitly, the larger question of whether prosecutors' references to the O. J. Simpson case, in trials involving charges against blacks, are a form of jury contamination that puts a vivid emphasis on race in jury selection and in other phases of the trial and sentencing.

State prosecutors, though, have urged the Supreme Court to bypass the case, saying that Snyder's lawyer did not preserve many of the claims about a Batson violation, and did not show that prosecutors in the case were exploiting the race issue with the jury. The state court, Louisiana's attorneys contend, faithfully applied *Batson* and *Miller-El.*

The case was before the Supreme Court in the 2004-5 Term (docket 04-6530). On June 27. 2005, two weeks after the Court had decided *Miller-El*, it vacated a prior (2004) ruling against *Snyder* by the Louisiana Supreme Court and told the state court to apply the *Miller-El* ruling.

On reconsideration, the Louisiana court, dividing 4-3 last September, applied *Miller-El* and once more upheld the conviction and death sentence. As to "the O. J. card" allegation by defense counsel, the state court said that "defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of the peremptory challenges. . . . The remark during rebuttal referred to the fact that Simpson feigned suicidal intent," but did not refer "to Simpson's or Snyder's race. . . A review of this record compels a conclusion that race did not play an impermissible role in the exercise of these strikes."

One of the dissenting state judges complained of "the prosecutor's inflammatory and prejudicial comparison of this case to the O. J. Simpson trial." Two others found prosecutors had injected "racial issues" into the case, noting that the prosecutor, before trial, had made a reference to Simpson case, said when challenged that he would not do so during the trial, but then did so in rebuttal at the penalty phase.

Snyder's new appeal to the Supreme Court, filed by Marcia A. Widder of the Capital Appeals Project in New Orleans, does not rely solely on "the O. J. card" question, although it does put strong emphasis on that. Other factors in claiming a Batson violation were the facts of striking all five blacks on the jury panel, different lines of questioning white and blacks on the panel, and evidence "showing a pattern or practice of race-based peremptory challenges by the prosecutor's office."

There were a total of nine blacks in the 85-member jury pool from which the 12 members of the jury were chosen. Four were removed for cause on prosecution motions, and the remaining five were removed with peremptory challenges. (After the jury of 12 had been selected, the state did not strike a black woman who was chosen as an alternate; the alternates were never used at the trial.)

On a *Batson*-related issue, the appeal contends that the state court imported into its review of this case—a case on direct appeal—a deferential standard that the Supreme Court had laid down only in cases involving federal habeas review of state court decisions. The Louisiana court said it could overturn the trial judge's findings of no *Batson* violation based on the prosecutor's race-neutral reasons for striking

black jurors only by finding that the prosecutor had lied about those reasons. That would be improper second-guessing of the trial court, the state supreme court said, relying on the strong deference the Supreme Court had commanded for habeas review in *Rice v. Collins* in 2006.

Finally, the appeal challenges the state court's refusal to consider in its *Batson* and *Miller-El* analysis the prosecution's first two strikes of black members of the pool because the defense did not object at the time. This failure, the appeal asserts, showed that Snyder's trial lawyer was ineffective of failing to raise an objection, but the state court said such a failure to object on Batson grounds is never prejudicial to the accused.

The appeal is supported by the Cornell Law School Death Penalty Project and by the Louisiana Association of Criminal Defense Lawyers.

The Cornell brief argues that there is an "ugly specter of racially motivated resistance" by lower courts to the Supreme Court's *Miller-El* decision. It accused the Louisiana court of "recalcitrance," and suggests it is "particularly shameful in light of the prosecutor's deliberate and premeditated racial purge of the jury, a purge aimed at securing a receptive audience for his racially inflammatory closing argument."

The brief of the state criminal defense group complains that the state's Supreme Court has refused to find a *Batson* violation unless a prosecutor concedes that the reason for striking a juror was that he was a single black male. "Nothing else has been sufficient," it argues. In Jefferson Parish, where the *Snyder* case originated, "prosecutors strike black jurors at more than three times the rate they strike white jurors," the defense group contends.

"Court Rejects Rehearing for Death Row Inmate"

Times-Picayune (New Orleans)
December 16, 2006
Paul Purpura

NEW ORLEANS—The state Supreme Court, which has twice upheld a 1996 first-degree murder conviction that sent a Kenner man to death row, declined Friday to rehear the case. [The U.S. Supreme Court later agreed to hear the case, ***Snyder v. Louisiana.***]

Allen Snyder, 44, who is black, was convicted by an all-white Jefferson Parish jury of killing Harold Wilson, 29, of St. Rose. Wilson was a companion of Snyder's estranged wife, Mary Snyder, who was slashed in the attack outside her mother's River Ridge home in 1995.

In appeals, Snyder's attorneys argue that Judge Kernan "Skip" Hand of the 24th Judicial District Court in Gretna erred in allowing then-prosecutor Jim Williams to strike five black people from serving on the jury.

That, Snyder's attorneys argued, meant he didn't get a fair trial.

Racial discrimination has no place in jury selection, according to a 1986 U.S. Supreme Court ruling, *Batson vs. Kentucky*.

The state Supreme Court upheld the conviction in 1999. But the U.S. Supreme Court last year ordered the state's high court to revisit the case and reconsider the role race played during jury selection.

The nation's high court took the stance in light of its ordering a new trial for Thomas Miller-El, a black man who was convicted and sentenced to die for killing a motel clerk during a 1985 robbery in Texas. Black potential jurors in Dallas County were improperly kept off the trial jury in Miller-El's case, the court found.

Considering the *Miller-El* decision, the state Supreme Court in September again upheld the conviction by a 4-3 margin, finding there was no error during jury selection. Chief Justice Pascal Calogero and Associate Justices Bernette Johnson and Catherine Kimball dissented, saying Snyder deserves a new trial.

Those same justices, ruling on a request by Snyder's attorneys, on Friday said Snyder should get a rehearing.

Jelpi Picou Jr., executive director of the Louisiana Capital Appeals Project, which is guiding Snyder's appeal, said they will now consider taking the case to the U.S. Supreme Court.

"We're certainly disappointed that the court didn't grant a rehearing," Picou said.

"Racial Currents May Drag Verdict Under"

Times-Picayune (New Orleans)
September 15, 2006
James Gill

NEW ORLEANS—Having engineered an all-white jury for the murder trial of a black man, then-Jefferson Parish assistant district attorney Jim Williams drew an analogy with the O. J. Simpson case in his closing remarks.

It was 1996, a year after a California jury nullified Simpson out of the hoosegow. Simpson "got away with it," Williams declared, but Allen Snyder should be executed. The jury voted as Williams urged.

The state Supreme Court last week and for the second time decided that the prosecution had no racial motive in rejecting all five black members of the jury pool and then dragging in Simpson as a bugaboo.

Kitty Kimball, Bernette Johnson and Chief Justice Pascal Calogero came down emphatically in favor of giving Snyder a new trial, but their four brethren ruled that Williams had "race-neutral" reasons for comparing the two cases, since both Simpson and Snyder were accused of wife battering and both had purportedly entertained suicidal thoughts as the cops closed in.

Williams had not "referred to Simpson's or Snyder's race," the majority noted. You don't often find a line as funny as that in Supreme Court opinions.

A jury would not have needed to be particularly alert to identify the race of the defendant sitting a few yards away. And anyone who thought Orenthal J. Simpson was white must have been living an extremely sheltered life for decades.

After 11 years as a star running back in the NFL, Simpson remained in the public eye as a sports announcer and movie star. He was constantly seen on television running through airports promoting rental cars and even hosted Saturday Night Live.

Television news cameras followed Simpson's slow progress along the interstate after the killing of his wife and her friend. The arrest was covered by every media outlet in Christendom, and millions watched the trial live on television.

By 1996, there can't have been many people in the white 'burbs who thought Simpson innocent, and there can't have been any who thought he was Caucasian. The furious debate that followed his acquittal was framed largely in racial terms.

In his career as a prosecutor—he has since gone over to the defense side—Williams did not pussyfoot around in seeking to put defendants on death row and might not have scrupled to mention race if he thought it would help held his cause. But it wasn't necessary, because the implication was obvious, except to a majority of the state Supreme Court.

Counsel in a criminal case can bump any potential juror by way of "peremptory" challenge so long as the motive is not to exclude a racial group. That prosecutors gave the heave-ho to all available blacks in

this case does not prove an improper motive, but it is bound to raise suspicions.

As the U.S. Supreme Court noted when considering a racially skewed jury in a Texas case, "Happenstance is unlikely to produce this disparity." The court overturned the conviction in that case, and later ordered the Louisiana Supreme Court to apply its reasoning to the Snyder appeal. [The U.S. Supreme Court agreed to hear the cases, ***Snyder v. Louisiana.***]

The state supremes did not take this as a repudiation of their 1999 ruling against Snyder and decided that the Texas case was not sufficiently analogous to warrant a change of heart. Barring a rehearing at the state level, which would seem unlikely to produce a different result, Snyder's attorneys will hope the big supremes see things their way.

If that happens, prosecutors so many years later will have a harder job proving their case. If Snyder did indeed injure his wife and kill her companion, as the evidence would appear to suggest, a retrial will serve as a reminder that playing by the rules is ultimately in everyone's interest.

"Court Ordered to Revisit Ruling"

Times-Picayune (New Orleans)
July 2, 2005
Paul Purpura

NEW ORLEANS—The U.S. Supreme Court has ordered Louisiana's high court to revisit its 1999 decision to uphold a murder conviction that sent a black Kenner man to death row, saying the state's justices should reconsider their finding that race had no role during jury selection.

In light of the U.S. Supreme Court's June 13 decision that overturned a black Texas man's murder conviction and death sentence because prosecutors struck nearly all African-Americans from the jury, justices Monday ordered the Louisiana court to reconsider Allen Snyder's case. [The U.S. Supreme Court later agreed to hear the case. ***Snyder v. Louisiana.***]

Snyder, 43, was convicted of first-degree murder in August 1996 by an all-white Jefferson Parish jury that also recommended the death penalty. He was found guilty of repeatedly slashing his estranged wife, Mary Snyder, and another man, Harold Wilson, with a knife when he found them in a car outside her mother's River Ridge home in August 1995. His wife survived, but Wilson died.

Snyder's attorneys since his trial have sought to have the conviction overturned, in part because they claim Jefferson Parish prosecutors were racially driven during jury selection, court records show.

Attorneys are allowed to remove potential jurors "for cause," such as a juror knowing a witness in the case. The attorneys also are allowed peremptory challenges, or strikes, which do not require a reason for removing the person from the jury pool.

But under a 1986 U.S. Supreme Court ruling, *Batson v. Kentucky*, lawyers are not allowed to exclude people from a jury because of their race.

Two weeks ago, the U.S. Supreme Court restated its *Batson* ruling in deciding that Thomas Miller-El should get a new trial on grounds that Dallas County, Texas, prosecutors improperly excluded black people from the jury that convicted him of murdering a hotel clerk during a robbery in 1985. Miller-El was sent to death row.

Conn Regan, chief of trials for the Jefferson Parish district attorney's office, declined to comment. "We haven't seen the opinion," he said.

Although the cases are different, the timing of the high court's ruling in the *Miller-El* case boded well for Snyder, said his attorney, Marcia Widder of the Capital Appeals Project in New Orleans.

"In *Miller-El,* the United States Supreme Court explained that *Batson* claims must be closely scrutinized by both the trial court and the appeal courts," Widder said. "That was not done in Mr. Snyder's case."

The nation's high court wants the Louisiana Supreme Court to reconsider Snyder's case on the *Batson* issues, Widder said. "The Louisiana Supreme Court in turn may either decide the issue itself or send the case back

to the trial court for further proceedings," she said.

The ruling does not remove Snyder from death row, Widder said. But Snyder should get a new trial if a court rules that the *Batson* ruling was violated, she said.

It is unclear when the state Supreme Court will revisit the case.

This would be the third time the state's high court has dealt with Snyder's case and the second time it has wrangled with *Batson* allegations. Recently, the high court rejected a defense appeal claiming Snyder was not mentally competent to stand trial.

But the Louisiana Supreme Court's action in question this week is based on its April 1999 ruling in which a majority of justices rejected the defense argument that 24th Judicial District Judge Kernan "Skip" Hand erred in allowing then-prosecutor Jim Williams to strike African-Americans from the jury.

The Jefferson Parish district attorney's office two years ago was accused of systematically excluding blacks from juries by the Louisiana Crisis Assistance Center, a charge that District Attorney Paul Connick Jr. refuted as a politically motivated attack on his office by a defense lawyers group opposed to the death penalty.

In Snyder's case, his lawyers have said prosecutors used peremptory challenges to strike all five black people who were not cut for cause.

In its 1999 majority opinion, the Louisiana Supreme Court said Hand's rulings on Batson issues during jury selection "appear correct" and that Snyder's attorney at trial did not challenge all of Williams' strikes on whether they were racially neutral.

But Justice Bernette Johnson and former Justice Harry Lemmon dissented.

Johnson said Snyder's death sentence should have been set aside because of the jury selection issue and because Williams, during the trial, compared the Snyder case to O. J. Simpson's murder acquittal and urged the jury to not let Snyder "get away with it." Johnson called Williams' words "inflammatory and prejudicial."

Simpson was acquitted in October 1995 of murdering his wife and another man.

Lemmon wrote in his dissenting opinion that the "racial bias overtones of the entirety of this rather simple trial require reversal of the conviction and sentence of a black defendant tried by an all-white jury."

"Killer Gets Death in Slashing"

Times-Picayune (New Orleans)
August 23, 1997
Joe Darby

Nearly a year after a Jefferson Parish jury ordered Allen Snyder sentenced to death for first-degree murder, his sentence was imposed Friday.

Snyder was convicted and condemned to death Aug. 30 for the slashing death of Harold Wilson, 29, of St. Rose, a companion of Snyder's estranged wife.

Snyder, 35, of Kenner, was represented by public defenders during his trial, but after his conviction he hired Marion Farmer, a former St. Tammany Parish district attorney, to represent him. Farmer filed a motion for a new trial, but the hearing had been put off 10 times at the defense's request.

After hearing Farmer's motions for a new trial Friday, Judge Kernan "Skip" Hand of the 24th Judicial District Court denied his request and sentenced Snyder to die by lethal injection. Snyder made no statement before sentencing.

Farmer said he will appeal Hand's decision to the state Supreme Court. Additionally, all death penalty cases are automatically put on appeal.

Farmer claimed that in his 30 years of law practice, he had never seen so many reversible errors in a murder case.

Among his contentions were claims that the indigent-defender attorneys had not had sufficient time to prepare their case, that the question of Snyder's mental state was not sufficiently raised at trial, and that a bloody photo of the victim, as well as old photos of Snyder in martial arts outfits, inflamed jurors.

Farmer also said that prosecutors excluded all black people from the jury, resulting in an all-white jury that would likely be more prejudicial against Snyder, who is black.

He said the jury was unnecessarily inflamed again when prosecutor Jim Williams compared Snyder's case to that of O. J. Simpson.

Evidence showed that on Aug. 16, 1995, Snyder lurked in the bushes outside the Metairie home of the mother of Mary Snyder, his estranged wife. He waited until Wilson and Snyder drove up, then charged the car, slashing Wilson to death and severely cutting his wife, testimony showed.

Prosecutor Donnie Rowan said that the defense had time to prepare its case, that several doctors had found that Snyder was mentally able to stand trial and that the state has a right to show graphic photos that depict the defendant's intent to kill.

Rowan also said there were legitimate comparisons between Snyder's case and that of Simpson.

Hand ruled that the prosecution had given sufficiently racially neutral reasons for excluding black potential jurors. In selecting a jury, attorneys strike jurors who they feel may not be favorable to their side, in confidential conferences at the judge's bench.

"Man Gets Death Penalty"

Times-Picayune (New Orleans)
August 31, 1996
Joe Darby

NEW ORLEANS—The Jefferson Parish jury that convicted Allen Snyder of first-degree murder decided Friday that he should die for the slashing death of a 29-year-old St. Rose man.

Harold Wilson was stabbed numerous times as he sat with Snyder's estranged wife in his car on Wicker Neal Street in River Ridge on Aug. 16, 1995. Snyder also badly cut his wife, Mary Snyder, in the attack.

Judge Kernan "Skip" Hand will sentence Snyder Sept. 16.

Wilson's wife, Dorena Wilson, told jurors her husband was a good man, a loving father and a hard worker who built up his own business, a flooring company.

"My son still asks for his daddy every day," she said of her 4-year-old boy. "I tell him his daddy is in heaven, but he asks me when daddy will come down and play with him."

Howard Moore, Wilson's father, said he could not describe the pain that his son's murder has brought to his family. "Our family is like one," he said. "Howard was not just a son, he was my best friend."

Defense attorney Cesar Vasquez put on the stand relatives, friends and a former employer of Snyder's who testified that until the defendant lost control of his life because of his wife's alleged infidelity, he had been a good family man who cherished his children.

However, evidence showed that Snyder had pleaded guilty to two counts of distribution of cocaine in St. Charles Parish in 1989.

Prosecutors also provided testimony that Snyder had severely abused his estranged wife for several months prior to the stabbings, after he had found out that she was seeing someone else, a man who later moved to Houston.

Mary Snyder had gone out with Wilson for the first time on the night of the killing, she said, but was not romantically involved with him. Snyder, who an eyewitness said had been lying in wait with his knife outside Mary Snyder's mother's house, rushed upon Wilson and Mary Snyder after they drove up and parked some time after midnight, evidence showed.

Dr. Sara Deland, a forensic psychiatrist testifying for the defense, said Snyder was suffering from a major depression in the weeks before the killing, but under cross examination said there is no direct link between depression and criminal acts of violence.

Expert witnesses for the state, psychologist Thomas Hannie Jr. and Dr. Robert Davis, a forensic psychiatrist, both testified that Snyder has refused to accept responsibility for his actions and blames others for his troubles.

Vasquez asked the jury to recommend a sentence of life in prison, saying that would be sufficient punishment because he would wake up every day in Angola thinking about the consequences of his actions. Vasquez

said Snyder had cracked because he was working 12 hours a night to support his family while his wife was having an affair.

Prosecutor Jim Williams countered that the members of Wilson's family are the ones serving a life sentence. "They will wake up every day knowing that their son, their brother, their husband, was brutally murdered. Instead of worrying about his killer, look at what his actions did to the lives of other people."

Danforth v. Minnesota

(06-8273)

Ruling Below: *Danforth v. State*, No. A04-1993 (Supreme Court of Minnesota), *cert granted, Danforth v. Minnesota,* 2006 Minn. LEXIS 506, May 21, 2007.

Danforth, in jail for sexually abusing a child, filed multiple petitions for postconviction relief, alleging he was entitled to relief based on the rules established by subsequent cases. Danforth seeks to retroactively apply those rules to the case at point.

Questions Presented: (1) Are state supreme courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*? (2) Did *Crawford v. Washington*, 541 U.S. 36 (2004), announce a "new rule of constitutional criminal procedure," as *Teague* defines that phrase and, if it did, was it a watershed rule of procedure subject to full retroactive application?

Stephen DANFORTH,
Petitioner-Appellant
v.
STATE of Minnesota,
Respondent

Supreme Court of Minnesota

Decided July 17, 2006

[Excerpt: Some footnotes and citations omitted.]

Heard, considered, and decided by the court en banc.

ANDERSON, G. Barry, Justice:

Stephen Danforth was convicted of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (2004), on March 6, 1996. This conviction arose out of the sexual abuse of J.S., a 6-year-old boy. J.S. was found incompetent to testify at trial, but a videotaped interview of J.S. conducted at a non-profit center was admitted into evidence. On appeal, the court of appeals affirmed Danforth's conviction but remanded for resentencing. *State v. Danforth*, 573 N.W.2d 369, 371 (Minn. App. 1997) (*Danforth I*), *rev. denied* (Minn. Feb. 19, 1998). On remand, Danforth was sentenced to imprisonment for 316 months. The court of appeals affirmed this sentence on appeal. *State v. Danforth*, 1999 Minn. App. LEXIS 462, No. C5-98-2054, 1999 WL 262143, at *1 (Minn. App. May 4, 1999) (*Danforth II*), *rev. denied* (Minn. July 28, 1999). Alleging various trial errors, Danforth filed a petition for

postconviction relief. The postconviction court denied the petition and the court of appeals affirmed. *Danforth v. State*, 2001 Minn. LEXIS 95. No. C6-00-699, 2000 WL 1780244, at *1 (Minn. App. Dec. 5, 2000) (*Danforth III*), *rev. denied* (Minn. Feb. 13, 2001).

After the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Danforth filed a second petition for postconviction relief alleging he was entitled to relief based on the rules established by those cases. The postconviction court denied Danforth relief, finding that neither *Crawford* nor *Blakely* applied retroactively to Danforth's case; the court of appeals affirmed. *Danforth v. State*, 700 N.W.2d 530, 532 (Minn. App. 2005) (*Danforth IV*). We granted review of the *Crawford* issue only and requested that the Office of the State Public Defender represent Danforth on this appeal.

Danforth argues that this court is free to apply a broader retroactivity standard than that of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and that he is entitled to the benefit of *Crawford* under *state* retroactivity principles. He also argues that, even using the framework of *Teague*, *Crawford* should be retroactively applied to his case. We reaffirm our holding in *State v. Houston*, 702 N.W.2d 268, 270 (Minn. 2005), that we are required to apply *Teague*'s principles when analyzing the retroactivity of a rule of federal constitutional criminal procedure. Because we conclude that, under *Teague*, *Crawford* does not apply retroactively to Danforth's case, we affirm.

I.

We recently held that the retroactivity principles of *Teague* control when determining the retroactive effect of a federal constitutional rule of criminal procedure. *Houston*, 702 N.W.2d at 270. Under *Teague*, a new rule is usually not retroactively applicable to a defendant's case once the defendant's case has become final. *Teague*, 489 U.S. at 310 (plurality opinion). It is undisputed that Danforth's case was final before *Crawford* was decided.

For the first time in his brief to this court, Danforth argues that this court is free to apply a broader retroactivity standard than that in *Teague* and that he is entitled to the benefit of *Crawford* under state retroactivity principles. We choose to address this issue in the interests of justice.

We have stated that, when dealing with a new rule of federal constitutional criminal procedure, we are "compelled to follow the lead of the Supreme Court in determining when a decision is to be afforded retroactive treatment." *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004). This conclusion is based on *American Trucking Associations, Inc. v. Smith*, in which a plurality of the Supreme Court stated that the retroactive effect of its federal constitutional decisions is a question of federal law and that the Court has "consistently required that state courts adhere to [the Court's] retroactivity decisions." 496 U.S. 167, 177-78, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990) (plurality opinion); *see also Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 918, 110 S. Ct. 3202, 111 L. Ed. 2d 734 (1990). In *Houston*, we applied *O'Meara*'s principles to hold that we *must* follow the *Teague* framework when determining whether a postconviction petitioner is entitled to have a new rule of federal constitutional criminal procedure applied retroactively to his or her case. *Houston*, 702 N.W.2d at 270. Minnesota is not the only state to have determined that a

Teague analysis is required when determining whether a new rule of federal constitutional criminal procedure can be applied retroactively to cases on state postconviction review. *See Page v. Palmateer*, 336 Ore. 379, 84 P.3d 133, 134-38 (Or. 2004).

Danforth argues that *Teague* dictates the limits of retroactive application of new rules only in *federal* habeas corpus proceedings and does not limit the retroactive application of new rules in *state* postconviction proceedings. Danforth is incorrect when he asserts that state courts are free to give a Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court. In *American Trucking Associations*, the plurality rested its retroactivity analysis in part on *Michigan v. Payne*, 412 U.S. 47, 93 S. Ct. 1966, 36 L. Ed. 2d 736 (1973). *Am. Trucking Ass'ns, Inc.*, 496 U.S. at 178. In *Payne*, the Court reversed the decision of the Michigan Supreme Court, which had applied *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). retroactively to Payne's case, and held that *Pearce* would not apply to errors occurring before *Pearce* was decided. *Payne*, 412 U.S. 49, 57, 36 L. Ed. 2d 736.

In light of *Payne* and *American Trucking Associations*, we cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles. While the Supreme Court has not explicitly addressed retroactivity principles in state postconviction proceedings, the Court has drawn a line between cases that are "pending on direct review," and cases that are "final." *See Schriro v. Summerlin*, 542 U.S. 348, 351, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) ("When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still *pending on direct review*. *As to convictions that are already final*, however, the rule applies only in limited circumstances." (citation omitted) (emphasis added)). Once a case is "final," a new rule of federal constitutional criminal procedure can be retroactively applied to the case only if retroactive application is warranted under the *Teague* framework. *Schriro*, 542 U.S. at 351-52. The Court, therefore, has created a retroactivity framework with only two procedural categories of cases: (1) those on direct review and (2) those that are final. Since we have already concluded that a petition for postconviction relief does not constitute "direct review," *see Houston*, 702 N.W.2d at 270, and it is undisputed that Danforth's case was final at the time of the *Crawford* decision, we must apply *Teague* when determining whether *Crawford* can be retroactively applied to Danforth's case.

We are aware that other states have declined to apply *Teague* or have emphasized that they apply *Teague* as a matter of choice when determining the retroactivity of new rules of federal constitutional criminal procedure in state postconviction proceedings. *See Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990); *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296-97 (La. 1992); *State v. Whitfield*, 107 S.W.3d 253, 266-68 (Mo. 2003); *Colwell v. State*, 118 Nev. 807, 59 P.3d 463, 470-71 (Nev. 2002); *Cowell v. Leapley*, 458 N.W.2d 514, 517-18 (S.D. 1990). The principal rationales given in these decisions are: (1) a state may give a new rule of federal constitutional criminal procedure greater retroactive effect than that given by the Supreme Court and (2) state postconviction proceedings involve different interests than federal habeas proceedings. *See Whitfield*, 107 S.W.3d at 267-68; *Colwell*, 59 P.3d at 470-71; *Cowell*, 458 N.W.2d at 517-18. *Teague*'s framework is based, in part, on concerns unique to federal habeas corpus decisions. *See Teague*, 489 U.S. at 308

("[W]e have recognized that interests of *comity* and finality must also be considered in determining the proper scope of habeas review." (emphasis added)). Notwithstanding these different policy concerns, in light of *Payne*, *American Trucking Associations*, and the dichotomy drawn by *Teague* between cases on "direct review" and "final" cases, we reaffirm our decision in *Houston* and conclude that we are not free to fashion our own standard of retroactivity for *Crawford*. Therefore, the retroactivity of *Crawford* to Danforth's case must be analyzed under *Teague*.

II.

Danforth argues that, even using a *Teague* analysis, *Crawford* applies retroactively to his case because: (1) *Crawford* did not announce a "new" rule and, alternatively, (2) *Crawford* established a "watershed rule" of criminal procedure and therefore is fully retroactive under an exception to *Teague*'s general rule. Whether *Crawford* applies retroactively to cases final at the time *Crawford* was decided is a purely legal issue reviewed de novo. *See Houston*, 702 N.W.2d at 270. We address each of Danforth's arguments in turn.

A.

Under *Teague*, we inquire "whether the rule of federal constitutional criminal procedure is new, or whether it is merely a predictable extension of a pre-existing doctrine." *Houston*, 702 N.W.2d at 270. If the rule is "new," it generally will not be applicable to cases that became final before the rule was announced. *Teague*, 489 U.S. at 310. Danforth argues that *Crawford* did not announce a new rule of constitutional procedure but that *Crawford*'s decision was "dictated by precedent dating back to the 1800s." The state, citing the decisions of several federal circuit courts on this issue, argues that holding that *Crawford* established a new rule is the better-reasoned position.

Crawford's "holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" *See Graham v. Collins*, 506 U.S. 461, 467, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (quoting *Teague*, 489 U.S. at 301). *Teague*'s limit on the retroactivity of new rules of constitutional procedure "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990). As we have stated, the test to determine whether a rule of procedure is "new" for *Teague* purposes is not whether the rule "is logically an extension of some precedent," but rather "whether 'reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt *compelled* by existing precedent to rule in his favor.'" *Houston*, 702 N.W.2d at 271 (quoting *Graham*, 506 U.S. at 467) (emphasis added) (internal quotation omitted)). This test is meant "to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990).

Applying these principles to this case, we examine the change *Crawford* worked on the legal landscape. As we have stated, prior to *Crawford*, the admissibility of an out-of-court statement under the Confrontation Clause was guided by *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *abrogated by Crawford*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 *See State v.*

Bobadilla, 709 N.W.2d 243, 248 (Minn. 2006). Under *Roberts*, a hearsay statement could be admitted without violating a defendant's rights under the Confrontation Clause if: (1) the declarant was unavailable at trial and (2) the statement bore "adequate 'indicia of reliability.'" 448 U.S. at 66. Sufficient reliability was inferred when the evidence fell "within a firmly rooted hearsay exception." *Id.* If the evidence did not fall within such an exception, it was only admissible upon "a showing of particularized guarantees of trustworthiness." *Id.*

Crawford "significantly altered the rules governing the admissibility of testimonial out-of-court statements against criminal defendants at trial." *Wright*, 701 N.W.2d 802 at 808. Stating that the *Roberts* test had a "demonstrated capacity" to admit statements in contravention of the Confrontation Clause, the Supreme Court held that "testimonial" evidence is inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *See Crawford*, 541 U.S. at 53-54, 63, 68. The Court declined to provide a complete definition of "testimonial," but stated that the term covered, "at a minimum, prior testimony at a preliminary hearing, before a grand jury, or at a former trial[,] and police interrogations." *Id.* at 68.

The rule in *Crawford*, therefore, was not compelled by *Roberts*—*Crawford* replaced the more flexible reliability inquiry of *Roberts* with a bright-line rule for a certain class of hearsay statements. Nonetheless, Danforth argues that *Crawford* did not announce a new rule because "the Supreme Court has always held that testimonial statements made without cross-examination were inadmissible under the Confrontation Clause." This argument rests on the fact that *Crawford* based its rule on the "Framers' understanding" of the Confrontation Clause, *see* 541 U.S. at 59, 68, and the Court's statement that "the results of our [prior] decisions have generally been faithful to the original meaning of the Confrontation Clause," *id.* at 60.

Danforth's argument is flawed because it misconstrues the test governing whether a rule is new for *Teague* purposes. We do not ask whether *Crawford*'s rule is faithful to the original meaning of the Confrontation Clause or whether the results of relevant Supreme Court precedent are consistent with the rule in *Crawford*. Instead, we ask "whether 'reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt *compelled* by existing precedent to rule in his favor.'" *Houston*, 702 N.W.2d at 271 (quoting *Graham*, 506 U.S. at 467 (emphasis added) (internal quotation omitted)). As noted earlier, prior to *Crawford*, *Roberts* guided a court's inquiry concerning whether the admission of an out-of-court statement violated the Confrontation Clause. *Bobadilla*, 709 N.W.2d at 248; *see also State v. King*, 622 N.W.2d 800, 807 (Minn. 2001). Put another way, Danforth's argument requires "reasonable jurists" to have foreseen *Crawford*'s significant modification—if not outright overruling—of *Roberts*. When conducting an analysis under *Teague*, the Supreme Court has never required such prescience of lower courts. Furthermore, such a requirement would not "validate[] reasonable, good—faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414. Consequently, *Crawford* established a new rule of federal constitutional criminal procedure for the purposes of *Teague*.

B.

There are two exceptions to *Teague*'s general rule that new rules of federal constitutional criminal procedure are not retroactively

applicable to cases that were final when that new rule was announced. *Teague*, 489 U.S. at 311. The first exception establishes that *Teague*'s "bar does not apply to rules forbidding punishment 'of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Beard v. Banks*, 542 U.S. 406, 416, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)). The second exception, which is "known as the 'watershed rule' exception, applies when the new rule 'requires the observance of those procedures that are implicit in the concept of ordered liberty' or 'alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of any particular conviction.'" *Houston*, 702 N.W.2d at 270-71 (quoting *Teague*, 489 U.S. at 311). Danforth argues that, if *Crawford* established a new rule for *Teague* purposes, the rule is a "watershed rule" within *Teague*'s second exception. The state argues, and the court of appeals held, that the rule established by *Crawford* does not fall within this narrow exception. *Danforth IV*, 700 N.W.2d at 531-32.

Since the Supreme Court adopted the *Teague* framework, it has yet to find a new rule of federal constitutional criminal procedure that qualifies as a "watershed rule." Such a rule "must be one without which 'the likelihood of an accurate conviction is seriously diminished.'" *Houston*, 702 N.W.2d at 273 (quoting *Teague*, 489 U.S. at 313). A watershed rule must do more than simply improve the accuracy of a proceeding; it must be "essential to fundamental fairness of a proceeding." *Id.* The only rule that the Supreme Court has stated would fall within this exception is the right to trial counsel established by *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). *Beard*, 542 U.S. at 417. These rules are extremely rare, and the Supreme Court recently stated that it is unlikely any watershed rules have yet to be announced. *Schriro*, 542 U.S. at 352.

The rule announced in *Crawford* cannot meet the stringent requirements of this exception. First, *Crawford* imposed a bright line rule of exclusion for a certain class of hearsay statements based on the original intent of the Confrontation Clause. *See* 541 U.S. at 59, 68. Even when dealing with a fundamental right, the appropriate inquiry under *Teague* is not whether the new rule reflects the framers' intent, but whether jurisprudence under the "old rule" seriously diminished the accuracy of a criminal proceeding. *See Schriro*, 542 U.S. at 355-56. Given that, prior to *Crawford*, Confrontation Clause jurisprudence focused on the reliability of out-of-court statements, *see Roberts*, 448 U.S. at 66, the likelihood of obtaining an accurate conviction is not seriously diminished in the absence of the rule established by *Crawford*. Indeed, the Supreme Court has indicated that some new rules of criminal procedure, though constitutionally based, may actually decrease the likelihood of an accurate determination of guilt or innocence. *See Butler*, 494 U.S. at 411, 416 (stating that a *violation* of the procedural rule in *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), may *increase* the likelihood of an accurate determination of guilt or innocence). The same argument could be made here, for while in some cases a *Crawford* violation would decrease the likelihood of an accurate determination of guilt or innocence (i.e., admitting an unreliable statement), in other cases statements admissible under the *Roberts* test but excluded under the *Crawford* test would be highly reliable and helpful to the jury's determination. While the additional protections of *Crawford* effectuate the

original meaning of the Sixth Amendment, the absence of *Crawford*'s bright line rule would not "seriously diminish the likelihood of obtaining an accurate determination" of innocence or guilt. *See Butler*, 494 U.S. at 416.

Similarly, the Supreme Court has also looked at pre-existing protections for defendants when examining whether a new procedural rule is an "'absolute prerequisite to fundamental fairness'" as required by *Teague*'s second exception. *See Sawyer*, 497 U.S. at 243-44 (quoting *Teague*, 489 U.S. at 314). Given the pre-existing Confrontation Clause protections for defendants under *Roberts*, *Crawford*'s rule is not "essential to the fundamental fairness of a proceeding." *Houston*, 702 N.W.2d at 273.

For all of the above reasons, the rule established by *Crawford* does not qualify as a "watershed rule" for the purposes of *Teague*'s second exception. Therefore, *Crawford* established a new rule of federal constitutional criminal procedure that is not within one of *Teague*'s exceptions and, given that Danforth's case was final at the time of the *Crawford* decision, Danforth cannot receive the retroactive application of *Crawford* to his case.

AFFIRMED.

"Court Query on *Teague* Retroactivity"

SCOTUSBlog.com
March 21, 2007
Lyle Denniston

The Supreme Court indicated on Tuesday that at least some Justices are interested in claims by state prisoners that they should be able to get more retroactive benefit out of U.S. Supreme Court decisions that lay down new rules of criminal procedure. The Court's electronic docket shows an order asking the state of Minnesota to discuss that question.

Here is the inquiry the Court posed in the pending case of ***Danforth v. Minnesota*** (06-8273): "Are state supreme courts required to use the standard announced in *Teague v. Lane,* 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?."

A number of state courts have divided on that question.

In the case of Stephen Danforth, who filed the petition in 06-8273, the Minnesota Supreme Court declared: "Danforth argues that *Teague* dictates the limits of retroactive application of new rules only in *federal* habeas corpus proceedings and does not limit the retroactive application of new rules in *state* post-conviction proceedings. Danforth is incorrect when he asserts that state courts are free to give a Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court. . . . We cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles" (emphasis in original).

The Minnesota court, though, noted that other state courts have declined to apply *Teague*'s retroactivity principles or have found they could apply those principles as a matter of choice only. It cited decisions in Indiana, Louisiana, Missouri, Nevada and South Dakota.

In Danforth's case, the Supreme Court decision that he wanted to apply retroactively to his criminal case was *Crawford v. Washington*, a 2004 ruling limiting use at trial of out-of-court "testimonial statements" that had not been subject to cross-examination.. The Minnesota court, applying *Teague*, ruled that *Crawford* was not to be applied retroactively in state cases. In that regard, the state court anticipated what the Supreme Court itself would decide in *Whorton v. Bockting* (05-595) on Feb. 28.

But, Danforth's public defender lawyers have argued that, if the retroactivity question is governed not by *Teague* but by Minnesota law, Danforth would be able to take advantage of the *Crawford* ruling in his criminal sexual conduct case involving a six-year-old boy; his conviction became final no later than 1999.

Under *Teague v. Lane*, a criminal law

decision by the U.S. Supreme Court is generally not applicable to state cases where the conviction had become final and the prisoner is making a post-conviction challenge. But a new rule does apply retroactively if the rule is "a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." The Court has never found a new procedure ruling that qualifies for retroactivity under *Teague*.

Danforth's lawyer filed his Supreme Court appeal on Dec. 6, and the state of Minnesota opted not to respond. The petition raised two issues—the first was the question about federal vs. state retroactivity principles, and the second was specifically about *Crawford* retroactivity. The Court in January asked for a response. The state filed a brief opposing review on Feb. 12, but only responded to the second question, arguing that *Crawford* should not be applied retroactively.

Danforth's defender replied to that, arguing that the state had acted as if the second question were the only one raised. The retroactivity issue, the reply said, is of "vital importance to state courts, state-court practitioners, state-court judges, state-court prosecutors, and state-court defendants. This Court should grant certiorari of this case to answer it."

The case had been set for Conference on March 16, but the Court took no action on it then. The case obviously had been held pending the ruling in *Whorton*. After the petition was set for Conference this week, the Court on Tuesday asked the state for a further response, dealing with the *Teague* question as Danforth's lawyer had phrased it. It is unclear how many Justices concurred in asking the question.

By raising it, however, the Court put off consideration. The state's response on the *Teague* point is due April 19. Danforth's lawyer will be able to file a reply.

"Judge Raises Repeat Pedophile's Sentence Because of His History"

Star-Tribune Newspaper of the Twin Cities Mpls.-St. Paul
August 5, 1998
James Walsh

Stephen Danforth, a former lawyer and repeat pedophile, was sentenced Tuesday to more than 26 years in prison for molesting a 6-year-old boy nearly three years ago.

Danforth was convicted of first-degree criminal sexual conduct, and sentenced by Hennepin County District Judge Richard Solum to 18 years in prison, more than two years ago. But the state Court of Appeals ruled in December that Danforth, who has a history of molesting boys, had to be re-sentenced to a longer term.

Solum's sentence was five years longer than recommended by state guidelines for someone with no history of sex offenses. But the repeat sex offender statute requires at least double the guidelines sentence.

District Judge Dan Mabley, took the case after Solum retired in June.

After Mabley asked Danforth, 47, whether he wished to make a statement before sentencing, Danforth began reading a letter he had intended to send to Solum. As he did two years ago while defending himself, Danforth proclaimed his innocence while striking out at the "vicious prosecutors who have conspired to stamp out child abuse."

Mabley listened for several minutes, then interrupted: "Mr. Danforth, I can't undo what the jury did. Even Judge Solum can't undo what the jury did. The question is, what is the appropriate sentence?"

After promising to limit his remarks, Danforth resumed talking about how the charges were false. Mabley told Danforth that enough was enough.

Finding that Danforth met the criteria for the repeat-offender statute—and that he needs long-term treatment or supervision beyond the presumptive sentence and supervised release—Mabley sentenced Danforth to 26 years.

Mabley said he believes a psychiatrist's report that Danforth is a pattern sex offender. Mabley, who said he thinks Danforth has little chance of completing sex offender treatment, also sentenced him to at least 10 years of supervised probation "if you are ever released."

Danforth was convicted of sexually touching and penetrating the 6-year-old boy, the son of a friend, at a swimming pool in Richfield in July 1995. The boy's 4-year-old sister saw the molestation when she walked into a changing room.

The law school graduate said the boy's family pressured him to make up the accusations. He said at trial that he sometimes fooled around in his underwear with the boy and kissed him once. But, Danforth claimed, he never abused him.

Danforth said he resolved to turn to looking at pictures of children for his sexual gratification after a 1988 conviction for having sex with several boys. [The Supreme Court is set to hear the case, ***Danforth v. Minnesota,*** this term.]

"Jury Ponders Sex Abuse Case Against Ex-Attorney"

Star-Tribune Newspaper of the Twin Cities Mpls.-St. Paul
March 5, 1996
David Peterson

A former attorney told a jury in Minneapolis on Monday that although he is guilty of a multitude of "petty insanities and strange practices," he did not sexually molest a 6-year-old boy last summer.

In closing arguments after two weeks of testimony, 45-year-old Stephen Danforth looked and sounded like an exasperated college professor trying to deliver a four-hour lecture in half an hour.

The defendant, who represented himself during the trial, asked jurors to acquit him of one count of first-degree criminal sexual conduct despite his history of child sexual abuse and despite the sexually explicit material found in his possession.

"Call me a voyeur, fine," he said, "but don't find me guilty of this heinous thing."

The boy accused him of abusing him in the men's changing room at a swimming pool in Richfield in July. His 4-year-old sister said she saw it happen, although she was unable to identify the defendant in the courtroom.

During closing arguments, one juror left the courtroom twice to vomit. She admitted to Judge Richard Solum that she'd drunk too much the previous night. Solum dismissed her from the jury. Said prosecutor Kathryn Quaintance, out of the jury's earshot: "This case could make anyone go on a bender."

Both sides in the case agreed that Danforth had developed a strange relationship with a troubled family whose members knew of his criminal record for sexual abuse and kept an eye on him for that reason. He became an uncle figure for the younger children in the family.

Danforth said he sometimes fooled around in his underwear with the boy who later accused him, and kissed him once. "Was that silly? Yeah. Foolish? Yeah." But the criminal accusation resulted from the parents' paranoia, their "long and growing, smoldering dislike" for him, and coaching of the children, he said.

A gray-haired, balding man in a gray suit, his glasses halfway down his nose, Danforth delivered arguments laced with literary allusions—he referred at one point to his own "Pervert's Progress"—and spoke so rapidly that the judge and the court reporter asked him to slow down.

After a prison term for child molestation, he said, he resolved to turn to pictures of children for sexual gratification. "I've become a voyeur," he said. "That's what I do . . . but if you think for one second that for some infinitesimal thrill" he would molest a child, that's wrong.

Judge Solum started by reminding Danforth that he'd been found in contempt twice during the trial, and ended by advising him repeatedly to wrap it up. Danforth concluded his arguments by saying, "I wish I had more time to tell you the whole story."

In her arguments, prosecutor Quaintance said the child witness failed to identify the

defendant because his appearance has changed greatly. She said that nothing about the children's demeanor indicated any coaching. They liked Danforth, she said, and it was painful for them to reveal the truth.

She showed a videotape she said Danforth had taken of a young boy using the toilet. The camera then followed him and focused in on his naked genitals. As the tape continued she stood beside the TV monitor and kept saying that contrary to Danforth's claim, "This wasn't accidental." [The Supreme Court is set to hear the case, ***Danforth v. Minnesota,*** this term.]

"Former Attorney Practices Self-Defense in Child Sex Abuse Case"

Star-Tribune Newspaper of the Twin Cities Mpls.-St. Paul
February 16, 1996
John McIntyre

A former attorney stepped before a jury in a Hennepin County courtroom Thursday and gave the opening statement in his own defense at his trial on charges of sexually assaulting a child.

Stephen Danforth, 45, was charged with first-degree criminal sexual conduct last summer after a 6-year-old boy told investigators that he had sexually assaulted him in the men's changing room at a swimming pool in Richfield in July.

"Those are false accusations," Danforth told the jury Thursday. "At no time did I abuse him. . . . I'm innocent."

Kathryn Quaintance, the assistant county attorney who is prosecuting the case, quietly but bluntly explained the charge during her brief opening statement: Criminal sexual conduct in the first degree is sexual conduct with penetration.

She told the jury that it would learn how Danforth "worked himself into the family. How he gained trust . . . especially the boy's."

She said he took the family, which was troubled, on trips and bought presents.

But during a trip to the pool, Danforth sexually abused the boy, she said. The boy's 4-year-old sister wandered into the changing room and saw the assault, Quaintance said.

She said jurors will see a videotape that places Danforth and the two children in the changing room together.

In his opening statement Danforth told the jury that although he'd been to law school he hadn't worked in a courtroom for 20 years. His statement, he said, would not be the "slick, professional presentation of Mrs. Quaintance's."

More than two hours and three dozen prosecution objections later, it was clear that Danforth wasn't being modest.

His wandering monologue was often repetitious and interrupted by prosecution objections—nearly three dozen, most sustained—and admonishments from District Judge Richard Solum to discuss the evidence and avoid arguing the case.

Still, several threads of Danforth's defense emerged.

He acknowledged that he'd been in trouble before. According to police reports, he was convicted of three counts of criminal sexual conduct in the first degree for having sexual contact with several juveniles.

He told the jury he'd become almost an "uncle" to the boy. But family members were aware of Danforth's record and were worried that he might assault their son. "It rose to a hair-trigger state of apprehension built on the imagination or dreams of a little boy," Danforth said. When an allegation arose, they were ready to believe it, he said.

He said that despite the claims of sexual penetration, medical reports showed no sign of pain or injury to the boy. Moreover, he said, witnesses would testify that the boy remained affectionate toward Danforth in the days that followed the alleged assault. The boy's account of the assault parrots a story provided by parents and therapists, Danforth said.

"His testimony will leave you with the impression of a child whose mind was worn down, who surrendered," Danforth said.

After he finished, and the jury was released for lunch, Quaintance angrily told Solum that Danforth extended his opening statement from a planned 25 minutes to manipulate the system and tire out the two young witnesses who were waiting to testify. They did not testify Thursday. The issue of the children's welfare arose earlier Thursday when Quaintance asked Solum to review the questions Danforth would ask on cross-examination.

"It's clear he has no idea what parameters of proper cross-examination are," Quaintance said. "Clearly, a proven pedophile's right to defend himself isn't a right to go free-for-all on children."

Danforth replied that it was unheard of for a judge to review a lawyer's "script" for cross-examination. Furthermore, he said, he won't know what questions he'll ask until the case unfolds. "They are accusers," he said of the children. "It's up to the jury to decide if they're victims."

Solum set limits on how much Danforth could ask about previous sexual assaults against the children. [The Supreme Court is set to hear the case, ***Danforth v. Minnesota,*** this term.]

"Child Sex Abuser Given Prison Sentence"

Star-Tribune Newspaper of the Twin Cities Mpls.-St. Paul
February 25, 1988
Larry Oakes

A Twin Cities man described by court officials as one of the most cunning pedophiles to be prosecuted locally in recent years was sentenced Tuesday in Hennepin County District Court to almost seven years in prison.

Stephen Danforth, 36, who police say previously lived in Wisconsin, had pleaded guilty to having sex with four boys at his Minneapolis apartment, and paying them to pose nude for photographs.

Danforth, also known as Stephen Danforth Rabideau, also has pleaded guilty in Ramsey County to having sex with some of the same victims while living in St. Paul.

His sentencing on those counts was scheduled for May 3. A Ramsey County judge ruled Wednesday that Danforth's sentencing could be delayed until that date to give time for a psychiatric profile requested by the defense.

Danforth's attorney, Marilyn Knudsen, declined to comment on his behalf.

Authorities said they have evidence that during the past decade in both Wisconsin and Minnesota, Danforth lured at least 10 children—eight boys and two girls—into sexual relationships by being friendly to them and offering them money, gifts and trips.

St. Paul police have said that Danforth took boys to Wisconsin and Disney World in Florida, among other places.

Judy Johnston, an assistant Hennepin County attorney, said Danforth, who ran a legal research firm in Minneapolis, preyed upon children who had no meaningful relationships with their fathers, and often saw the children with the approval of their mothers.

"They thought he was just a friendly guy who cared about their kids," Johnston said.

Danforth's hold on the children was so strong that none initially would talk to police and some still have mixed feelings, officials said.

At Danforth's sentencing, Hennepin County District Judge Henry W. McCarr said that based on a pre-sentence evaluation, Danforth would be "an ongoing danger to society" if his sentence was limited to his requested probation and treatment.

Johnston said that in preparing for trial against Danforth on the local cases, the prosecution located six alleged victims from Wisconsin who were prepared to testify that Danforth engaged in the same conduct with them in Madison in the mid-1970s.

Danforth was charged in connection with some of those incidents, but the charges were dropped when he agreed to treatment, Johnston said.

The alleged victims' testimony would have been introduced not as additional charges, but as supporting evidence of the defendant's criminal behavior.

Johnston, a member of a county attorney's team formed to prosecute child sex cases, said Danforth is "one of the more serious offenders we've prosecuted for this crime . . . because of the number of victims, the length of victimization, the fact that he continued even after he knew he was being investigated, and his strong verbal and manipulative skills."