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VII. CRIMINAL

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(04-1244) / (04-1352)


The National Organization for Women ("NOW") and two health clinics sued individuals, Operation Rescue and other organizations protesting abortion at the clinics, alleging violations of federal laws against extortion under the Hobbs Act and Racketeer Influenced and Corrupt Organizations Act ("RICO"). A jury found for NOW, and their judgment was affirmed by the Seventh Circuit Court of Appeals. Defendants then faced a nationwide injunction, preventing them from protesting abortion at clinics. On appeal, the Supreme Court reversed and remanded the case back to the Seventh Circuit, holding that the injunction was void, as defendants had not obtained property from plaintiffs and thus had not committed extortion. On remand, the Seventh Circuit found that the Supreme Court’s decision did not address whether defendants’ alleged acts or threats of violence could justify an injunction. Defendants appealed to the Supreme Court in an attempt to finally and completely strike down limits against their protests.

Question Presented: Whether the Supreme Court’s failure to address the issue of acts or threats of violence in its earlier ruling stating that abortion protests did not amount to extortion under the federal Hobbs Act and RICO statute left room for suits on those grounds to limit such protests.

NATIONAL ORGANIZATION FOR WOMEN, Inc., et al.,
Plaintiffs-Appellees,
v. Joseph M. SCHEIDLER, et al., Defendants-Appellants

United States Court of Appeals
for the Seventh Circuit

Decided February 26, 2004

[Excerpt: some footnotes and citations omitted]

ORDER:

This case comes to us on remand from the Supreme Court of the United States.

In 1986, the National Organization for Women (NOW) and two health clinics that perform abortions ("plaintiffs"), filed this class action alleging that defendants, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler, and other individuals and organizations that oppose abortion, engaged in conduct amounting to a pattern of extortion in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO) . . .

After the Court in NOW I remanded the case, the district court conducted a seven-week trial, at which the plaintiffs introduced evidence of hundreds of acts committed by
the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. In response to special interrogatories, the jury found that the defendants or others associated with PLAN committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 18 U.S.C. § 1952, 23 instances of attempting to violate the Travel Act, and four "acts or threats of physical violence to any person or property." On this basis, the jury awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants appealed a number of issues relating to the conduct of the trial and the issuance of the injunction. We affirmed the district court's judgment in all respects.

The defendants then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted with respect to two of the three questions presented by the petition. Scheidler v. Nat'l Org. for Women, Inc., 535 U.S. 1016 (2002). Specifically, the Court limited its grant of certiorari to the following questions:

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO].

2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" and which defines "extortion" as "the obtaining of property from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear"—criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

In its opinion, the Court explained that it granted certiorari to determine "whether petitioners committed extortion within the meaning of the Hobbs Act" and "whether respondents, as private litigants, may obtain injunctive relief in a civil action" under RICO. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 397 (2003) (NOW II). The Court held that "petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." It therefore "reversed without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO," and held that "without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated."

On remand to this court ... [p]laintiffs argue that, although the Court in NOW II disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving "acts or threats of physical violence to any person or property."
violence to any person or property" and, accordingly, the Court did not decide whether these acts alone could support the district court's injunction. In response, defendants contend that the Hobbs Act does not outlaw "physical violence" apart from extortion and robbery, and therefore the Supreme Court's holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction. We remand to the district court to address this issue—which never before in this litigation has been the subject of full briefing or judicial consideration—in the first instance.

Although "an order limiting the grant of certiorari does not operate as a jurisdictional bar," Piper Aircraft Co. v. Reyno, 454 U.S. 235, 246 (1981), the Supreme Court has consistently adhered to its Rule 14.1(a), which provides that "only the questions set out in the petition, or fairly included therein, will be considered by the Court." Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 202 (2002); Glover v. United States, 531 U.S. 198, 205 (2001). Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold sub silentio that the four acts or threats of physical violence found by the jury cannot support the injunction. We note that the Court's opinion in NOW II makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion.

Instead, we remand to the district court to determine whether the four predicate acts involving "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction that it imposed. As part of this inquiry, the court may find it necessary to interpret the language of the Hobbs Act, which provides that "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to any person or property" constitutes an independent ground for violating the Hobbs Act or, rather, relates back to the grounds of robbery or extortion. In the alternative, the court may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient standing alone to support the nationwide injunction. As the parties' ... submissions offer only a preliminary discussion of these issues, and neither this court nor the district court has addressed them previously, we consider it best to remand the case to the district court. We therefore REMAND this case to the district court for further proceedings consistent with NOW II and this order.

Remanded.
Before leaving for its summer recess, the Supreme Court announced Tuesday that it would take up, for the third time, a long-running dispute between aggressive anti-abortion protesters and the National Organization for Women.

At issue is whether the protesters can be sued under the federal antiracketeering law with conspiring to shut down abortion clinics.

* * *

The new abortion protest case is an old one for the court. It began in the mid-1980s, a time of bombings, break-ins and fires at abortion clinics around the nation. NOW's lawyers maintained that a small group of protesters—including Joseph Scheidler and the Pro-Life Action League—were conspiring to shut down the clinics and were using illegal means to do it.

NOW sued the group under the federal antiracketeering law and, after a seven-week trial, a jury in Chicago found the protesters guilty of multiple acts of extortion, threats, conspiracy and violence.

Besides awarding damages, a judge handed down a nationwide order that barred protesters from trespassing on or near abortion clinics.

The protesters, who denied that they had engaged in violence, appealed to the Supreme Court, contending that NOW's suit violated their free-speech rights under the 1st Amendment. The justices turned away their claim.

The protesters then argued that they could not be sued as racketeers because they were not seeking to extort money from clinics.

The Supreme Court rejected that argument in a 1994 ruling.

But two years ago, the high court switched course and ruled that protesters could not be guilty of extortion under federal law because they were not trying to take over abortion clinics. The federal extortion law was intended to deal with mobsters who used threats and violence to take over legitimate businesses.

Although the high court's ruling was seen as likely to end the case, the U.S. appeals court in Chicago refused to cancel the nationwide order against abortion protesters. Its judges said "acts or threats of physical violence" were enough to keep the suit alive.

This year, lawyers for Scheidler asked the Supreme Court to take up the case for the third time. They said the judges in Chicago had shown a "flagrant disregard" for the high court's earlier ruling. The court said it would hear the case of Scheidler vs. NOW in the fall.

Jay Sekulow, counsel for the American Center for Law and Justice, said the case offered "a critically important opportunity to remove a dark cloud that has been hanging over the pro-life community for nearly 20 years."
But Nancy Keegan, president of NARAL Pro-Choice America, said the case offered another reminder about the importance of Supreme Court justices. Will they "support violence, vandalism and intimidation, or will they side with the American women?" she asked.
The nation's longest-running fight over abortion—now in its 19th year—will have at least one more round. The Supreme Court may decide later this month whether that round will be in the Court itself, or in a U.S. District Court in Chicago. Filed in 1986, the case brought by abortion rights advocates seeking to use the 1970 RICO anti-racketeering law to stop clinic blockades is back at the Court for the third time.

Before the Court at its closed-door meeting on June 16 are two new appeals: Scheidler, et al., v. National Organization for Women, et al. (docket 04-1244) and Operation Rescue v. NOW, et al. (04-1352). (The case was originally scheduled to be considered June 9, but has now been reset for the 16th.)

There are several issues raised, but they come down to a claim that the 7th Circuit in its most recent ruling failed to follow the Supreme Court's 2003 decision in this case by sending the dispute back to District Court for one further proceeding. The leaders of the Pro-Life Action Network (in 04-1244) and Operation Rescue contend that the Supreme Court brought the whole case to a halt in 2003, and now the Circuit Court is wasting everybody's time and resources by prolonging it.

Although most of the public and judicial attention to the case has focused on the once-novel notion that RICO could be used to put a stop to anti-abortion forces' attempts to shut down abortion clinics, there now lurks in the case a major issue of criminal law. That is whether the federal Hobbs Act (18 U.S.C. 1951) criminalizes only extortion and robbery, or whether it also sweeps more broadly and bans acts of violence or threats of violence that obstruct interstate commerce, whether or not those acts or threats involve extortion or robbery.

If, ultimately, that broadening were to occur, it could make the Hobbs Act—a law enacted in 1946 to curb labor-management racketeering—into a sweeping federal anti-violence law.

The Supreme Court very likely would be interested in that issue, and, no doubt, so would the Justice Department. The problem at this stage, however, is that the 7th Circuit's latest ruling—while suggesting that the Hobbs Act could be read that broadly—stressed that it was not deciding that issue, and noted that that question could disappear after the new round in District Court.

The Supreme Court, though, could hear part of the case without getting to that issue itself, if it confined its review to clarifying the scope of its 2003 ruling. That may well be the decisive issue as the Justices on Thursday ponder a grant or denial of review.

This marathon case has long been considered a titanic struggle in the sidewalk wars over abortion. Attorneys for NOW and for a nationwide class of abortion clinics won a major legal breakthrough when the Supreme Court, in its first ruling in the case in 1994, ruled that RICO could be used as a challenge to clinic blockades. That sent the case to trial, resulting in $276,000 in damages against anti-abortion forces.
demonstrators, plus a nationwide injunction against their blockades.

But, in the second trip to the Supreme Court, the Justices by an 8-1 vote on February 26, 2003, found insufficient evidence of extortion—under either the Hobbs Act or state extortion law—to serve as predicate criminal acts for a RICO violation. As part of that ruling, the Court wiped out the nationwide injunction.

The central issue that has arisen since then is whether the Supreme Court meant to end the case right there, eliminating all bases for a RICO violation and thus for an injunction.

But the 7th Circuit, in an order on remand from the Supreme Court on February 26, 2004, and a refusal on January 28 of this year to reconsider that order, said part of the clinics' case remains alive.

There were four acts of violence or threats of violence found by the jury that were not among those at issue before the Supreme Court in 2003, the Circuit Court found.

Thus, the District Court should first consider whether those would supply an independent basis for a new, narrower injunction against the blockaders.

"The only remaining question," it said, "is whether any injunction is appropriate to redress the four acts of physical violence that the jury found had taken place and that were not encompassed within the Supreme Court's ruling. This does not open Pandora's Box. It merely resolves the final loose ends in this long-running litigation in a manner that is fair to both sides and that acknowledges the need to resolve all properly presented issues."

Three judges who wanted en banc rehearing argued that the Supreme Court in 2003 had held that there was no extortion, and that should mean that "no Hobbs Act violation possibly exists."
Disappointing activists who thought the highest court in the land had sided with them, Chicago's federal appeals court has set the stage for another round in a legal battle between anti-abortion protesters and the clinics they target.

The 7th U.S. Circuit Court of Appeals on Thursday directed a judge to determine whether four acts or threats of physical violence attributed to protesters were enough to support an injunction barring anti-abortion activists around the nation from engaging in certain tactics.

U.S. District Judge David H. Coar imposed the injunction after a jury in 1998 found that a coalition of anti-abortion groups had used force and intimidation in a long-running campaign against clinics that offer abortion services.

The injunction bars the Pro-Life Action Network and other entities and individuals from interfering with the right of any clinic in the United States at which abortions are performed to conduct its business.

The injunction also bars the same parties from interfering with the right of any patient to obtain services at those clinics.

Coar entered a judgment in which he trebled the $85,926.92 in damages that the jury found had been caused to the business and property of two clinics as a result of the protesters' actions.

The clinics—Delaware Women's Health Organization Inc. and Summit Women's Health Organization Inc.—were among the plaintiffs that had filed suit accusing anti-abortion protesters of violating federal racketeering law.

Also a named plaintiff in the nationwide class-action lawsuit was the National Organization for Women Inc.

The plaintiffs brought suit in 1986 alleging that certain members of the anti-abortion movement had employed tactics that amounted to extortion in a bid to shut down facilities where abortions are performed.

Those tactics included illegally blocking clinic entrances, destroying equipment and threatening doctors and patients, the suit alleged.

 Defendants in the suit included PLAN and anti-abortion activists Joseph Scheidler and Timothy Murphy.


But the U.S. Supreme Court revived the suit with a ruling that the Racketeering Influenced and Corrupt Organizations Act does not require proof that a defendant acted with an economic motive. National Organization for Women Inc. v. Scheidler, 510 U.S. 249 (1994) (NOW I).

The case was reassigned to Coar when it was

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was returned to the U.S. District Court for the Northern District of Illinois.

Following a seven-week trial, a jury found that the defendants or others acting in concert with PLAN were guilty of four acts or threats of violence as well as 117 additional acts that constituted predicate acts under RICO.

The case went back up to the 7th Circuit after Coar entered judgment against the defendants and issued the injunction.

In 2001, the appeals court refused to strike down the injunction after holding that private parties as well as the government may seek such injunctions under RICO, 18 U.S.C. § 1961. National Organization for Women Inc. v. Scheidler, 267 F.3d 987 (7th Cir. 2001).

Last year, the Supreme Court ruled 8-1 that the protesters did not commit extortion because they had not obtained property from the abortion providers as required by the Hobbs Act, 18 U.S.C. sec1951. Scheidler v. National Organization for Women, 537 U.S. 393 (2003) (NOW II).

PLAN's position before the high court was supported by groups concerned about the effect that injunctions such as the one entered by Coar might have on social and political protest. These groups included People for the Ethical Treatment of Animals, the Southern Christian Leadership Conference and Concerned Women for America.

After the case went back to the 7th Circuit, PLAN and the other defendants remaining in the suit contended that the injunction could not stand because the Supreme Court's ruling on the extortion issue covered all of the predicate acts found by the jury.

But NOW and the clinics argued that the Supreme Court had addressed only the 117 extortion-based acts and had not decided whether the other four acts were sufficient to support the injunction.

On Thursday, the 7th Circuit agreed with NOW.

In an unpublished order, a three-judge panel of the 7th Circuit said it was sending the case back to U.S. District Court for a ruling on whether the four acts or threats of physical violence called for continuing the nationwide injunction.


Fay Clayton of Chicago, an attorney for NOW and the clinics, said she was pleased that the 7th Circuit had directed Coar to explore the matter of the four predicate acts.

"It's a very good opinion," Clayton said. "It's exactly what we had requested."

Clayton rejected what she said was the protesters' position that the Supreme Court had ruled on an issue—whether those four acts or threats are a sufficient basis for the injunction—that was never brought before it.

But Chicago attorney Thomas L. Brejcha Jr., who represented the protesters, said the high court had considered those four alleged acts in ruling in favor of his clients.

"I don't think you could read the last two paragraphs of the Supreme Court decision and think there was anything left in the
case," Brejcha said.

Murphy also said he was disappointed with the 7th Circuit's order. "I was convicted of things that I did not do at events that I was not at," said Murphy, who like the other defendants claimed witnesses for the plaintiffs falsely accused protesters of engaging in violent acts. "So the whole thing is kind of Kafka-esque."
Tonight you’ll hear on the news that *Scheidler v. NOW* is a seminal abortion case. You’ll see protesters with signs, and chanting, and even a little shoving. You'll see footage of pro-life activist Joe Scheidler and his colleagues asking why people who kill babies and maim women are innocents while abortion protesters are persecuted as racketeers and bankrupted in court. You'll see attorney Fay Clayton, and NOW President Kim Gandy on the steps of the high court, insisting that women seeking abortions were physically brutalized by pro-life protesters in the 1980s. You may even get to hear Operation Rescue protesters, heckling with such pithy lines as: Babykiller! and Liar! (One of my great frustrations about this case is that, with 30 years to invent better jeers, both sides of this debate keep shouting the same banal sound bites.) My eternal gratitude to the first Fraygrant who comes up with something more original than, What about the dead babies or, It’s my body.

If you were to base your opinion of today’s case on what you see on the news tonight, you would come away thinking that the high court heard one hell of an abortion case today and that the future of abortion stands in the balance as it hasn’t since the court decided *Roe v. Wade* in 1973. Actually, what the court heard today was rather a tedious little case about statutory interpretation. It may have real consequences for free speech in this country but will impact abortion law not at all. It’s a testament to how utterly bonkers both sides in this debate have become, that they alone can’t see that.

In the mid-’80s, Operation Rescue members joined with other pro-life activists to create the Pro-Life Action Network, or PLAN, led by Joe Scheidler, Randall Terry, Timothy Murphy, and others. PLAN sought to aggressively interfere with clinic workers and abortion-seekers through missions, ranging from prayer vigils and leafleting to violent attacks or threats of violence against individual abortion clinics. It is undisputed in this case that in at least some incidents, clinic staff and patients were violently assaulted (pinned against a glass wall until it broke, etc.), although PLAN’s attorney, Roy T. Englert, seems to take the position that since there were only four truly violent incidents (as opposed to 30, alleged by NOW), this violence is a-OK.

NOW, adopting a new strategy in 1986, filed suit against PLAN for violating the federal racketeering statute "the Racketeer Influenced and Corrupt Organizations Act." RICO provides better penalties than garden-variety trespass statutes. NOW’s theory was that PLAN’s missions represented a pattern of extortion that differs very little from a Tony Soprano-type shakedown, except with less leather jackets. NOW lost in both the trial court and at the 7th Circuit Court of Appeals but prevailed in the Supreme Court in 1994, when the court unanimously held in *NOW v. Scheidler* that it was not necessary under RICO that the extortionists in question benefit financially from their racketeering.

So the case went back to the trial court in Chicago, where a jury found for NOW and a judge awarded $257,780 in damages against PLAN and issued a permanent national
injunction prohibiting PLAN from trespassing on or committing violence at abortion clinics. PLAN appealed to the 7th Circuit and lost, then appealed to the Supreme Court, where we find ourselves today. The only issues before the court: Does RICO allow private parties to seek injunctive relief? And can extortion "which requires that the racketeer in question obtain property through the wrongful use of actual or threatened force" be used to prosecute political protesters?

Englert opens on this point: Since when is stopping people from accessing abortion clinics obtaining property under the law? Were the civil rights boycotts of racist white merchants' extortion? When Carry Nation trashed saloons with hammers, was that extortion?

Justice John Paul Stevens, presiding again today because Chief Justice William H. Rehnquist is benched while recovering from leg surgery, points out that those people weren't charged with extortion. Justice Sandra Day O'Connor asks, Aren't we talking about acts that constitute criminal offenses?

Englert replies "so cheerfully that it makes my teeth hurt "Oh yes! Yes they were trespassing!" O'Connor points out that it was more than trespassing; in some cases, the PLAN missions involved assault. Englert agrees, again cheerfully. Maybe it was assault, he tells her, but it was not extortion.

Englert goes on to explain that there is no property being obtained in these cases, so extortion cannot be found. Justice David Souter suggests that if strangers take control of your property, they have obtained it. No, says Englert, control is not property. Property is property.

Stevens pulls a Socratic shaming tactic out from his law school years, quizzing Englert on an 1890 New York case involving work stoppage. When counsel admits that the case is not coming to mind, Stevens cites the case name. Englert again admits that he's blanking on the reference. People shift uneasily.

This also has nothing to do with the future of abortion.

Solicitor General Ted Olson, who filed a brief that supports NOW's position only somewhat more than PLAN's, has 10 minutes to argue in favor of stretching the racketeering statutes past any plausible meaning. This is perhaps no surprise since his bosses would like nothing better than to use RICO (and FISA, and Bahamian maritime law) to prosecute any suspect in the war on terror who can't be prosecuted under normal criminal statutes.

Justice Anthony Kennedy wonders whether any time any protester trespasses for any reason, he's committed a Hobbs Act violation. Olson responds that if the aim is to shut down a clinic, then the protester has obtained control of that property.

Justice Antonin Scalia wonders whether this construction of the word obtained doesn't sail too close to the wind of First Amendment rights. And Olson, sailing too close to the wind of Scalia, tries to argue that even in civil rights cases, if the aim was to shut down a business through protest, then yes, there was extortion. This response gives at least an inkling of why organizations such as People for the Ethical Treatment of Animals have sided with the Operation Rescue crowd in this case. If you can't throw a little blood or toss a few pointy sledge hammers, what good is a protest anyhow?
The final attorney is NOW's representative, Fay Clayton, who is in the unenviable position of arguing against what looks like free political speech. She and Justice Scalia do a few rounds on whether the RICO statute authorizes a private party to seek an injunction, and let me just note that I'd rather be pinned against a glass wall by Operation Rescue members than have to debate statutory interpretation with Antonin Scalia. Still, when Justice Stephen Breyer suggests that perhaps this issue was left ambiguous in the statute due to congressional mistake, and Clayton responds that Even if it was a mistake, this is a bill passed by Congress and signed by the president. This is the bill we interpret, Scalia jumps in to agree. I'm with you on that! He exclaims. Clayton laughs. I know you are, Justice Scalia.

Even the justices who seem most supportive of Clayton's case appear skeptical of her claim that the property being taken here includes clinic workers, clinic operators, and visitors to the clinic. Justice Breyer is incredulous. A woman's right to seek services is property? he asks. She's not just going shopping, replies Clayton. She has an appointment.

Clayton argues that there is a clear line demarking protest and seizing property: If my clients at NOW went into the Augusta Golf Course and started tearing up the green, that's extortion. Justice Ruth Bader Ginsburg tries to bring up Carry Nation again, but Scalia interrupts to smirk, Carry Nation, that notorious extortionist.

Souter tries to draw a different principled distinction between obtaining property and protest: The civil-rights protesters boycotting lunch counters didn't seek to close businesses. They sought to change them. PLAN protesters try to close down clinics.

Outside there's lots of terrible roaring and gnashing of terrible teeth (and hurling of tired insults), but all this has nothing to do with anyone's right to choose, unless the right at issue is to choose to protest violently, which as I've suggested once before strikes me as thuggery rather than protected political speech.

I will take just one more second to note, however, that the next time I pronounce a term the lamest ever or opine on the chief justice's likelihood of living injury-free for the next 20 years or offer wacked-out, sports-book-type odds on either of the above, kindly take me out back and thrash me. This would not constitute racketeering. It would be for my own good.
Civil disobedience, including methods such as those used by the Rev. Martin Luther King Jr. and his followers, is threatened by the government's application of organized-crime laws to antiabortion protesters who staged aggressive blockades and sit-ins at women's health centers in the 1980s and '90s, attorneys for the protesters told the Supreme Court yesterday.

"Classic protest actions venerated in American history would be crimes," Roy Englert, who represents leaders of the Pro-Life Action League, told the court. Englert's clients, along with Operation Rescue, were found liable in 1998 by a Chicago jury for acts of coercion and violence that violated federal racketeering and extortion laws. The jury awarded more than $250,000 in damages to clinics in Milwaukee and Delaware, and a federal judge later ordered a permanent nationwide halt to the protests.

The U.S. Court of Appeals for the 7th Circuit in Chicago upheld the verdict and the injunction in 2001, and the antiabortion activists appealed to the Supreme Court.

An attorney for abortion rights supporters told the court that upholding the verdict and the injunction would not chill nonviolent protest, but would prevent the authors of a violent campaign of intimidation from escaping unpunished.

"We ask the court not to turn the clock back on 50 years of [anti-racketeering] law," Fay Clayton, an attorney for the National Organization for Women (NOW), told the court.

As it comes to the court, the case turns on issues of federal statutory law; the court rejected the protesters' appeal based on the First Amendment to the Constitution.

Englert argued yesterday that the 7th Circuit misread extortion law when it ruled that denying doctors and patients access to the clinics was equivalent to forcing them to hand over their property. And Englert said the lower court misread racketeering law by giving private parties such as the clinics a right to ask a federal judge for an order barring further protests.

But with demonstrators from both sides of the abortion debate pacing near the imposing white steps of the Supreme Court, and with issues of political speech clearly, if indirectly, implicated, all the elements of an emotional confrontation were in place.

The Supreme Court upheld the use of anti-racketeering laws against the antiabortion activists in 1994, ruling that the statutes could be applied even to groups that act out of non-economic motives. The laws were particularly potent because they permit plaintiffs to sue for treble damages.

That year, however, Congress passed a law that makes a repeat of the most aggressive antiabortion demonstrations unlikely. The Freedom of Access to Clinic Entrances Act (FACE) specifically bans the use of force, threats or blockades to interfere with access to reproductive health care, including abortions.

Looking ahead, a victory for NOW could
empower institutions facing aggressive protests by advocates of non-abortion-related causes, such as animal rights groups or anti-globalization activists, to deal with the protesters essentially as gangsters.

They could sue in federal court under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that the protesters committed extortion under the Hobbs Act, which makes it a federal crime to coerce someone into giving up his or her property if that obstructs interstate commerce. They could also ask a federal judge to order the protesters to cease operating nationwide.

Representing the federal government, Solicitor General Theodore B. Olson told the court that it should uphold the 7th Circuit's broad interpretation of extortion, saying the protesters had disrupted the clinics' right to control their businesses, which, he said, "is a well-recognized and longstanding right of property."

He agreed with the protesters, however, that the clinics, as private parties, could not seek a court order against them; RICO reserves that power for the attorney general, Olson said.

Several justices seemed troubled that defining the antiabortion protesters' conduct in this case—which even the protesters concede violated various state laws—as federal extortion might place too powerful a legal club in the hands of those who may want to eliminate controversial but sincere civil disobedience.

"I'm rather concerned about this problem," Justice Stephen G. Breyer said. "This threatens to bring us constantly into the difficult situation where we have to figure out whether the definition sails too close to the wind for First Amendment purposes," Justice Antonin Scalia said.

Clayton said the key distinction was whether protesters used violence—which, she said, the antiabortion protesters did, but the civil rights protesters of the 1960s did not.

"If NOW went down to the Augusta National Golf Club to tear up the greens and said they wouldn't stop until the club admitted a woman, they'd be violating the Hobbs Act," Clayton argued.

Clayton seemed to win a measure of sympathy from Justice Sandra Day O'Connor, who interrupted Englert to remind him that "in some cases there were assaults," so "to paint a picture that what we're talking about is pure speech . . . that is not the case."

Englert insisted throughout the argument that his clients could not deny having broken laws against trespassing and other offenses, but that their actions did not rise to the level of extortion because they had not actually taken property.

Englert noted that "activists of all stripes" were supporting his clients in friend-of-the-court briefs, including such groups as People for the Ethical Treatment of Animals, which has staged aggressive protests at fast-food restaurants, and School of the Americas Watch, which has been involved in demonstrations against U.S. foreign policy.

A decision in the cases, Scheidler v. NOW, No. 01-1118, and Operation Rescue v. NOW, No. 01-1119, which have been consolidated, is expected by the end of June.
Paul Gregory House was convicted and sentenced to death for a 1985 murder. The case against him was built on a great deal of circumstantial evidence. Forensic evidence and two apparent confessions by the victim's husband now call that conviction into question. The District Court rejected his petition for a writ of habeas corpus on procedural grounds. The Sixth Circuit affirmed in an 8-7 vote. Six of the dissenters believed that House had proved his innocence. The majority concluded that the case against House was still strong enough to prevent reaching the conclusion that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."

Questions Presented:

1) Did the majority below err in applying this Court's decision in Schlup v. Delo to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts—merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

2) What constitutes a "truly persuasive showing of actual innocence" pursuant to Herrera v. Collins sufficient to warrant freestanding habeas relief?

Paul Gregory HOUSE, Petitioner-Appellant,

v.

Ricky BELL, Warden, Respondent-Appellee.

United States Court of Appeals
for the Sixth Circuit

Decided October 6, 2004

[Excerpt: Some footnotes and citations omitted]

OPINION:


This court granted a certificate of appealability as to all issues. However, House has limited his brief to a discussion of only two claims: 1) Whether the manner in
which the Tennessee courts applied the state law doctrine of waiver during House's post-conviction proceedings constitutes an adequate and independent state procedural bar to his ineffective assistance of counsel claims; and 2) assuming that the Tennessee courts properly deemed House's claims to be waived, whether that waiver should be excused on the grounds that House has established his actual innocence under Schlup v. Delo, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995). After the Tennessee Supreme Court declined a request by an en banc panel of this court to answer certified questions relating to issues of state law, House v. Bell, 311 F.3d 767 (6th Cir. 2002), this court is again faced with the same claims.

Having considered the arguments of the parties regarding the two claims that are before us, we affirm the district court's denial of the writ for the reasons set forth below.

I.

* * *

Because factual determinations by state courts are entitled to a presumption of correctness, 28 U.S.C. § 2254(e)(1), we will describe the factual circumstances surrounding the murder for which House was convicted by quoting from the Tennessee Supreme Court's opinion denying him relief in his direct appeal:

The victim of the homicide was Mrs. Carolyn Muncey, who lived with her husband and two young children on Ridgecrest Road in rural Union County, Tennessee. . . .

In March 1985 appellant Paul Gregory House was released from a prison in Utah and moved to the rural community in which the Muncey family lived. . . .

. . . He was shown to have had one prior conviction for aggravated sexual assault, a charge to which he pled guilty on March 16, 1981 in Salt Lake County, Utah. Apparently he was placed on parole in that state, and supervision of his parole was transferred to Tennessee when he returned to this state. He was approximately twenty-three years old at the time of the homicide in this case.

Mrs. Muncey disappeared from her home in the late evening of Saturday, July 13, 1985. Her badly beaten body was found on the following afternoon at about 3 p.m., lying partially concealed in a brush pile about 100 yards from her home. . . .

When the body of Mrs. Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat and underclothing. Her body was badly bruised, and there were abrasions and blood giving every evidence that she had been in a fierce struggle. Apparently a severe blow to her left forehead had caused her death. It appeared, however, that she had also been partially strangled. A pathologist testified that the blow to her left forehead caused a concussion and hemorrhage to the right side of the brain from which she died, probably one or two hours after being struck. He testified that she probably would have been unconscious after having been struck. He estimated the time of her death at between 9 p.m. to 11 p.m. on Saturday, July 13, but emphasized that this was at best a rough estimate.

Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial. There was evidence showing that he knew Mr. and Mrs. Muncey and had been with them socially on a few occasions. . . .
[Two witnesses saw appellant along the road where the body was found. They later became suspicious, returned to the sight, and then found the body. Appellant originally denied having left Turner's trailer at all that night.]

***

On Sunday afternoon various witnesses observed that appellant had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. Appellant explained that these injuries had been sustained innocently earlier during the week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13. Appellant also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were bloodstained, and scientific evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with appellant's own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

Some of the most damaging evidence against appellant was given by his girlfriend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing either his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where appellant told her he had lost them.

Appellant told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after the appellant's return to the trailer that Ms. Turner first noticed the bruises and abrasions on his hands referred to previously.

***

Although the evidence against appellant was circumstantial, it was quite strong. Particularly incriminating was the testimony that he had emerged from an embankment where the body was found, wiping his hands on a dark cloth, without disclosing to anyone the presence of the body. Damaging also were the discovery of his bloodstained trousers and the testimony of Ms. Turner, which a trier of fact could have found sufficient to demolish his alibi and to demonstrate that he had been in a heavy struggle near the time when the homicide must have occurred. A classic case for determination by a jury was presented, and the evidence clearly is sufficient to support the conviction.

Following the sentencing hearing, the jury imposed the death penalty.

***
The first issue House has raised on appeal involves his contention that both the Tennessee courts and the district court erred when they concluded that his claims of ineffective assistance of counsel were procedurally barred.

***

The district court was correct when it determined that House's ineffective assistance of counsel claims had been procedurally defaulted [because they had not been raised in a timely manner by petitioner or his attorney.]

III.

We now turn to House's other claim. House argues that even if his ineffective assistance of counsel claims have been procedurally defaulted, he has established his actual innocence of the crime for which he was convicted, a showing which, if made, revives his ineffectiveness claims. In Schlup v. Delo, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995), the Supreme Court held that a petitioner must show either cause and prejudice or a miscarriage of justice in order to obtain habeas review of an otherwise procedurally defaulted claim. House seeks to invoke the miscarriage of justice exception here. With respect to a miscarriage of justice, a petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime." Schlup, 513 U.S. at 324. . . . The Court cautioned that this exception is rare and should be applied only in the extraordinary case, concluding that, "to establish the requisite probability [that a petitioner is actually innocent], the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id., 513 U.S. at 327.

Because the district court conducted an evidentiary hearing on this issue, there is testimony about events beyond that which was presented during the original trial. House contends that this new evidence is sufficient to establish his actual innocence. We will summarize that evidence and the district court's response to it before explaining why, in our view, House has failed to show that it is more likely than not that no reasonable juror would have convicted him.

House testified for the first time at the evidentiary hearing. He offered this version of the night of murder: "I went for a walk. I got jumped, ran around, came back." He went on to explain that the terrain was hilly and that it was dark[.]

***

As the factual summary of the Tennessee Supreme Court attests, [the more detailed] version of events is relatively consistent with the one presented by Donna Turner during the trial. When asked why he initially lied to investigators by telling them he had not left the trailer at all, House responded, "I was on parole. I didn't want to draw attention to myself."

In short, House's testimony merely restates a scenario presented to the jury that had convicted him. Moreover, the district court, which had the opportunity to assess House's demeanor, found his testimony to be less than credible.

During the evidentiary hearing, House devoted considerable time to the trial testimony of Billy Ray Hensley, the witness
who saw House near the spot where the body was discovered. Specifically, House introduced maps and photographs in order to show that Hensley could not have seen what he purported to see from the place where he claimed to have been.

** **

On cross-examination, Hensley conceded that he could not have seen House while he was actually "down in the embankment." He would have first seen him at the top of the bank. Defense counsel also tried to bring out some inconsistencies in Hensley's statements concerning precisely when and where he first saw House. . . .

The exhibits introduced by House during the evidentiary hearing were designed to show that Hensley could not have seen House coming up the embankment. However, even if we accept House's contention that Hensley could not have seen him until he emerged onto the road, it is undisputed that House was seen in the general vicinity of the body carrying a black rag. Moreover, trial counsel effectively cross-examined Hensley regarding his inconsistent statements about when and where he saw House. Thus, in our view, House's attack on Hensley's testimony advances his cause little, if at all.

In addition to presenting his own version of events while attempting to cast doubt on the accuracy of Hensley's testimony, House takes aim at the physical evidence that linked him to the crime.

** **

[There was a great deal of evidence and expert testimony suggesting that physical evidence, particularly the victim's blood samples and the appellant's blue jeans, had been mishandled.] With respect to the blood, the court determined:

Without question, one or more tubes of Mrs. Muncey's blood spilled at some time. It is likely the spillage occurred prior to the receipt of the evidence by [the] laboratory hired by Mr. House's trial attorney. Based upon the evidence introduced during the evidentiary hearing, however, the court concludes that the spillage occurred after the FBI crime laboratory received and tested the evidence.

. . . The enzyme deterioration, as well as Mr. Muncey's alleged confession and the blood spillage, does not negate the fact that Agent Scott saw what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer and that the blood was in fact from Mrs. Muncey.

Memorandum Opinion, February 16, 2000, at 45-46.

As indicated in the passage above, House not only presented evidence to the district court that undermined the case against him, he also offered an alternative theory of the crime: that Mr. Muncey killed his wife.

At the evidentiary hearing, House produced witnesses who testified about Mr. Muncey's alcoholism and also his physical abuse of his wife. One acquaintance, Kathy Parker, testified that "[Mrs. Muncey] was constantly with black eyes and busted mouth." A friend, Hazel Miller, testified that Mr.
Muncey told her that he was going to get rid of his wife a few months before her death. In the district court, Mr. Muncey acknowledged that he "smacked" his wife at least once.

As for the day of the murder, Mr. Muncey was supposed to have helped to dig a grave. He had gone over to his father's place, helped to work on some cars, and then dug the grave. However, rather than go home, he decided to attend the weekly dance at the C & C Recreation Center, where, according to his testimony, he stayed until midnight. When he arrived home, he found his wife missing.

Kathy Parker told the district court that Mr. Muncey visited her on a Friday in 1985 after the murder. Friends were sitting around drinking when Mr. Muncey "started crying and going on and rambling off." According to Parker, he was "talking about what happened to his wife and how it happened and he didn't mean to do it, but I don't know exactly what all was said." She went on, "He said they had been into an argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen." According to Parker, Mr. Muncey was drunk when he made this confession. After hearing it, Parker claimed, "I freaked out and run him off." The next day Parker's sister, Penny Letner, also testified to having heard such a confession from Little Hube. Once again, she recalled that he was "pretty well blistered." According to Letner, Mr. Muncey confessed to killing his wife when he returned home[...].

Letner had not been drinking. She was frightened by the talk and left the party. As a young mother of 19, she testified that she had been too scared to report the confession.

Based upon the statements of Letner and Parker, House posits the following scenario:

When Mr. Muncey got home, he and his wife resumed their fight. He hit her at least once and she fell. When he checked, he found that he had killed her. He took her body down by a creek running near their home and hid it with some brush and branches.

Whether Mr. Muncey ever went back to the dance is uncertain. Constable Wallace, who was providing security at the dance, testified that he never saw Mr. Muncey return after he left around 10:30 p.m. Mr. Muncey claimed during the hearing that he never left the dance until it broke up some two or more hours later.

Petitioner's Brief at 33-34. House also points out that Dennis Wallace did not think that Mr. Muncey seemed upset when he reported his wife's disappearance or when the body was recovered. Also, the morning after the murder, Mr. Muncey asked a neighbor, Artie Lawson, to tell people that he was at the dance. Since she had not
attended it herself, Ms. Lawson declined. Her daughter, Mary Atkins, testified that she not only saw Little Hubie at the dance, but that she saw him hit his wife.

The district court discounted the testimony of Letner and Parker, finding their testimony lacking in credibility[. . .] Instead, the court credited the testimony of Laura Muncey Tharp, the victim's daughter, who testified at both the trial and evidentiary hearing:

* * *

According to Ms. Tharp, her parents got along fine. They argued, but she did not recall any physical pushing or hitting. If they argued, she could hear them if she was in her bedroom. The family did not have air conditioning in the home. She did not hear any arguments that night.

The court found Ms. Tharp a very credible witness. She had no reason to lie. Her testimony during the evidentiary hearing was consistent with her trial testimony.


As the preceding recitation makes clear, House has mounted a concerted attack on his conviction. Indeed, it is fair to say that he has presented a colorable claim of actual innocence. However, as the Supreme Court has made clear, that is not the standard that we are bound to apply. To prevail, House must do more than raise questions about the reliability of portions of trial testimony or the manner in which physical evidence was handled or analyzed; he must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 327. Moreover, in weighing the new evidence we review the factual findings of the district court for clear error. Campbell v. Coyle, 260 F.3d 531, 539 (6th Cir. 2001).

The following facts that implicate House are undisputed: he lied to investigators about his whereabouts on the night of the murder; he gave inconsistent versions of the origins of the scratches and bruises on his hands and arms; he was seen near where the body was discovered on the day after the murder; he lied about what he was wearing on the night of the murder; blue jeans belonging to House, spattered with blood mixed with mud, were found at the bottom of Ms. Turner's laundry hamper; House has a deep voice and Laura Muncey testified that the man who came to the trailer on the night of the murder had a deep voice; and, according to Ms. Sutton, the blood and mud found together on House's blue jeans had been mixed together, which "certainly eliminates the possibility of any stains being created by contamination in an evidence container." We note that the fact that mud may not have been present at the crime scene, and may have been scarce in the surrounding area, cannot be taken as proof that there was no mud anywhere on the route between Ms. Turner's trailer and the scene of the crime.

With respect to House's theory that Mr. Muncey committed the murder, we defer to the finding of the district court that Ms. Letner and Ms. Parker, who allegedly heard Muncey's confession, were not credible. Furthermore, the content of Ms. Letner's testimony, indicating that Mr. Muncey killed his wife upon returning to the trailer, is belied by the presence of the children in the trailer, who heard no such confrontation, and
the lack of any signs of a struggle. House's theory that a deep laceration cutting across Mrs. Muncey's head was caused when she fell and hit her head is inconsistent with the testimony of Dr. Carabia, who indicated that the laceration could only have resulted from a violent blow. The fact that Mr. Muncey may have asked his neighbor to say that she saw him at the dance during the time of the murder is insufficient to tip the balance in favor of House's theory.

Regarding House's attacks on the scientific evidence that incriminated him, he has succeeded in showing that the semen attributed to him during the trial was that of Mr. Muncey and that, at some point, the blood evidence appears to have been mishandled, resulting in spillage. However, the fact that the semen found on the victim's clothing came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer, nor does the lack of any physical evidence of sexual contact contradict the notion that the murderer lured Mrs. Muncey from her home with a sexual motive. As for the mishandling of the blood evidence, the theory that the blood on House's jeans came from the vials of blood gathered at Mrs. Muncey's autopsy is based upon a speculative theory regarding enzyme degradation that was contradicted by other testimony in the record, and an analysis of the blood stain pattern does not demonstrate that the stains could not have resulted from Mrs. Muncey's murder. The lack of any blood spatter on House's shoes is inconclusive as well, because it is not clear when House took his shoes off. Finally, the district court's conclusion that "the spillage occurred after the FBI crime laboratory received and tested the evidence" cannot be characterized as clearly erroneous. The only unchallenged blood evidence, the testimony indicating that the blood and mud on the jeans were mixed, tends to support the conclusion that House committed the murder.

Despite his best efforts, the case against House remains strong. We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.

IV.

All of the issues before us having been decided, the judgment of the district court is affirmed.

DISSENT:

MERRITT, Circuit Judge, dissenting. I regard this as the rare or extraordinary case in which the petitioner through newly discovered evidence has established his actual innocence of both the death sentence and underlying homicide. The Court's opinion, like the Attorney General's argument for the State, regards as "undisputed" old evidence and inferences that are now contradicted by other evidence in the case. It fails to describe adequately the persuasive case of actual innocence that the petitioner's newly discovered evidence raises. Nor does it adequately describe the legal standards to be applied.

This dissent will first describe the constitutional standards applicable in "actual innocence" cases such as this one. There are four actual innocence theories applicable in this case based on the body of newly discovered evidence presented at the federal habeas hearing: (1) a "free-standing," substantive, so-called "Herrera" actual innocence claim, (2) a procedural, or "gateway," so-called "Schlup" actual
innocence claim, (3) the more limited "gateway" claim that the petitioner is "actually innocent of the death penalty" because the new body of evidence shows that petitioner is not now eligible for the death penalty because the rape aggravator has been disproved, and (4) a free-standing, substantive "actual innocent of the death penalty" claim. It will then outline the evidence in detail and apply the standards in four parts, as follows:

First, at the state trial in Maynardville, Union County, Tennessee, in 1986, and in its argument to uphold the death verdict in the Tennessee Supreme Court, the State relied on rape as the motive for the kidnapping and the murder of Carolyn Muncey. There was no other motive offered. It relied on a semen specimen on her nightgown as proof that House tried to rape her. Newly discovered DNA evidence now conclusively establishes that the semen was her husband's. There is now absolutely no evidence of sexual assault. The new evidence disproves the motive the jury accepted as the basis for the kidnapping and murder and the aggravating circumstances the jury found as its basis for the death penalty.

Second, besides the semen evidence, the State introduced at the trial one other piece of highly incriminating scientific evidence: evidence of Carolyn Muncey's blood on House's blue jeans worn on the night of the murder. At the 1999 federal habeas hearing, the State's case was undermined by the State's own medical examiner, Dr. Cleland Blake. As "Consultant in Forensic Pathology" for the Tennessee Bureau of Investigation for 22 years, Dr. Blake has testified for the prosecution in the past in hundreds of cases. Four vials of blood were extracted at the time Carolyn Muncey was autopsied. Dr. Blake, the State's medical examiner, testified at length that he had no doubt that the blood on House's pants was spilled from one of these four vials of blood shipped to the lab by local law enforcement agents—spilled either accidentally or intentionally. There is no explanation besides spillage for the fact that one of the four vials of blood was empty. The new body of evidence shows conclusively that the vials of blood were not properly handled and shipped by law enforcement and that the blood that spilled from the vials cannot otherwise be accounted for.

Third, testimony from five new witnesses offered at the habeas hearing implicates Mr. Muncey in his wife's murder.

Fourth, the evidence completely undermines the reliability of the testimony of Billy Ray Hensley, the witness who said that on Sunday afternoon before the victim's body was found, he saw House coming up the embankment on Ridgecrest Road where the body was later found that day. Based on his own testimony and an examination of the record, it would have been impossible for Hensley to see House as he claimed.

... Local law enforcement officials from the Sheriff's office testified that immediately after the murder they had two suspects, House and the victim's husband, Hubert Muncey, called "Little Hube." Mr. Muncey grew up and was well-known in the local community. Although "Little Hube" had a history of severe domestic abuse, the local police chose House as the murder suspect when he told them two days after the body was found that he had just recently moved into the local Luttrell community and that he had a sexual assault conviction in Utah and after they had developed other incriminating evidence.

In its opinion in 1987, affirming House's
conviction, the Supreme Court of Tennessee noted the semen evidence and rape as the motive for the homicide. It noted that House had "never confessed to any part in the homicide, and the testimony linking him to it was circumstantial." The Court also observed that the Munceys "had been having marital difficulties and that she had been contemplating leaving him." The case comes down to the question of whether the newly discovered evidence undermining the case against House and incriminating Mr. Muncey is sufficiently strong—despite the uncertainties that remain—to preclude a rational juror from finding guilt beyond a reasonable doubt and to make the execution of House "constitutionally intolerable."

1. Standards for Actual Innocence Claims

_Schlup v. Delo_, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995), is the only Supreme Court case that has discussed and compared the standards to be applied in three of the four different types of actual innocence claims that may be asserted in habeas: (1) "free standing," (2) "gateway" and (3) "innocent of the death penalty" gateway claims. There, in an opinion for six members of the Court, Justice Stevens wrote that it is "firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt," and that "the analysis [of actual innocence claims] must incorporate the understanding that proof beyond a reasonable doubt marks the boundary between guilt and innocence." _Id. at 328._

This starting point is a major factor for all types of actual innocence claims. For such claims, this factual analysis is always a "probabilistic determination" about the behavior of a reasonably instructed juror. _Id. at 329._

1. Gateway, Actual Innocence Claims.—In _Schlup, 513 U.S. at 316_, the Court stated that for substantive, free-standing claims where the "conviction was the product of a fair trial," the "evidence of innocence would have had to be strong enough to make an execution 'constitutionally intolerable.'" Yet, when a claim of innocence is coupled with an assertion of constitutional error at trial, the "conviction may not be entitled to the same degree of respect." _Id._ Thus, the "evidence of innocence need carry less of a burden." _Id._ In _Schlup_, as in House's gateway claim in the instant case, the claim of constitutional error at the original trial was ineffective assistance of counsel; and the actual innocence claim was used as a "gateway" to overcome procedural default in order to reinstate the ineffective assistance claim and render it again cognizable. For such gateway or procedural claims, the _Schlup_ opinion holds that a petitioner must demonstrate that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." _Id. at 327._

2. Gateway Innocent of the Death Penalty Claims.—The Court in _Schlup_ discussed and left intact the standard for claims of "innocent of the death penalty" (claims that the evidence of aggravating circumstances at the sentencing phase of the case is insufficient to render the defendant eligible for the death penalty)—a standard announced in the previous case of _Sawyer v. Whitley_, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992). In such "innocent of the death penalty" claims governed by _Sawyer_, the question is always whether the petitioner's proof of innocence is sufficient to overcome a procedural default and render a defaulted constitutional claim again cognizable. Quoting _Sawyer_, the Court said that claims of actual innocence of the death penalty at the sentencing phase "must focus on those elements which render the
defendant guilty of the death penalty" and show "by clear and convincing evidence" that "no reasonable juror would have found the petitioner eligible for the death penalty" beyond a reasonable doubt. *Schlup*, 513 U.S. at 323. This is the standard applicable to the question of innocence of the rape-homicide aggravator found by the jury at House's trial. If found, it would make House's ineffective assistance of counsel claim at the penalty phase of the case cognizable.

3. Free-standing Actual Innocence Claims.—In *Herrera v. Collins*, 506 U.S. 390, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993), the Supreme Court did not spell out a standard for free-standing substantive claims of actual innocence in cases which presuppose a fair trial. Instead, it merely noted that the required "threshold showing" would be "extraordinarily high." 506 U.S. at 417. In a concurring opinion, Justice White sets out a very demanding standard:

... To be entitled to relief, however, petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt."

As laid out below, the White standard is appropriate to apply in free-standing actual innocence claims. Justice White's proposed standard borrows language from *Jackson*, in which the Court established the test governing habeas review of claims of insufficient evidence. In *Jackson*, the Court found that due process guaranteed by the *Fourteenth Amendment* requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of the element of the offense," 443 U.S. at 316. . . .

With free-standing actual innocence claims, petitioners are not claiming that their trial violated constitutional due process requirements due to insufficient evidence. Instead *Herrera* claims are to provide relief to one who faces the death penalty and can make a truly persuasive case of innocence. In order to prevent what the Supreme Court describes as "constitutionally intolerable," *Schlup*, 513 U.S. at 316, courts must consider newly discovered evidence in addition to the trial record. The proof established at the original trial must be examined in light of what is newly proffered to determine if all the available evidence would support conviction. The White standard is appropriate for use in free-standing actual innocence cases as it is a very high standard that will only be met in exceptional cases where new evidence has unquestionably undermined the case against the petitioner. It also forces courts to make an objective determination regarding what a fact finder could find rather than what a hypothetical juror would find.

Utilizing Justice White's standard would permit courts to adequately address the rare case of actual innocence without becoming bogged down by non-meritorious claims. Justice O'Connor in *Herrera* noted the Court's concern that if the standard for free-standing actual innocence cases is set too low, "federal courts will be deluged with frivolous claims of actual innocence." 506 U.S. at 426 (O'Connor, J., concurring). . . .

The inquiry as to whether any rational juror could convict also seeks to make the determination of actual innocence more
objective. As the Supreme Court wrote, describing the standard, "the use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion," whereas "the use of the word 'would' focuses the inquiry on the likely behavior of the trier of fact." Id. Whether a rational fact finder would have the ability to convict the petitioner in light of all available, reliable, and relevant evidence "requires a binary response." Id. Either the evidence is sufficient to support the conviction or it is not. The analysis thus interferes with the original trial determination only to the extent necessary to ensure that a prisoner is not executed when the available evidence cannot support his conviction. This Court should adopt Justice White's standard from Herrera, and the writ should issue if in light of newly discovered evidence, no rational trier of fact could find proof of guilt beyond a reasonable doubt.

4. Free-standing Innocent of the Death Penalty Claims.—Although not discussed in Schlup or other cases, for cases raising a substantive, non-gateway claim that the condemned prisoner is not eligible for the death penalty at sentencing, the standard should be the same as the White standard. The petitioner must demonstrate no rational fact finder examining the trial record and the new evidence could impose the death penalty. If he can disprove the aggravator for which he was sentenced to death, it is plainly unconstitutional for the sentence to stand.

In my view . . . the petitioner has carried his burden of proof on all four theories. He has clearly shown both that a reasonable juror would have a substantive and serious doubt as to his guilt and that the cumulative evidence is insufficient to enable a rational juror to convict House or sentence him to death for the murder of Carolyn Muncey.

VI. Conclusion

Justice Scalia has referred to the question before us of actual innocence as death penalty's most "embarrassing question," a question he hoped "with any luck we [the Supreme Court] shall avoid ever having to face" in a "convincing" case. Herrera v. Collins, 506 U.S. at 428. Justice O'Connor has referred to this "embarrassing question" as a serious current problem: "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." Speech to Women Lawyers in Minnesota, July 2, 2001.

This case and the few empirical studies that we have reinforce Justice O'Connor's view that the system is allowing some innocent defendants to be executed.

High on the list of the causes for mistakes are the kinds of errors we see in this case: the misinterpretation or abuse of scientific evidence, the adverse inferences drawn from the prior record of a defendant, particularly one who is a stranger in the local community, the failure of counsel to uncover (until it is too late) witnesses who could exonerate the defendant, and the existence of one or more other suspects with a motive to commit the offense. Once the initial trial and appeal have occurred, it is clear from the studies that the state, and its officials who have prosecuted, sentenced and reviewed the case, are inclined to persevere in the belief that the state was right all along. They tend to close ranks and resist admission of error. Intelligent citizens who strongly believe in the reliability of the capital sanction are also inclined to persevere in the belief that a case raising the
"embarrassing question" will never really arise and close ranks with the state in resisting the admission of error. This case is a good example of how these errors can lead to the execution of a defendant who is actually innocent.

[Judge Ronald Gilman wrote a separate dissent. Gilman believed that the evidence presented a close case. While agreeing with Judge Merritt's opinion that House had passed through the Schlup "actually innocence" gateway, Gilman did not believe that the proof in favor of House was so strong that an unconditional writ of habeas corpus should be issued. Gilman instead urged the issuance of a conditional writ that would free House unless he were provided a new trial by the state.]
The Supreme Court on Tuesday accepted an appeal from a Tennessee death row inmate who contends that DNA evidence proves his innocence of the murder for which he was convicted and sentenced to death 20 years ago.

The case will provide the court's first occasion, in the years since exonerations based on DNA have become widespread, to reconsider the standards for reopening death penalty cases to present claims of innocence. Those standards, developed by the court in a series of cases in the early 1990's, are nearly impossible to meet.

The court's action on Tuesday came a day after the formal conclusion of the 2004-2005 term. The justices granted review in three new cases to be argued in the next term, which begins Oct. 3, while turning down several cases that might have given them an opportunity to elaborate on their two decisions on Monday about government displays of the Ten Commandments.

The justices were not actually on the bench, and there was no word of Chief Justice William H. Rehnquist's possible retirement plans.

The Tennessee inmate, Paul Gregory House, came within one vote of persuading a federal appeals court to reopen his case last October when the United States Court of Appeals for the Sixth Circuit, in Cincinnati, denied his petition for a writ of habeas corpus by a vote of 8 to 7. Of the seven dissenters, six concluded that he had proved his innocence, while the remaining judge said Mr. House was entitled, at least, to a new trial.

His Supreme Court appeal, filed by the federal defender's office in Knoxville, Tenn., is supported by a brief filed by the Innocence Project, a legal clinic in New York that has been a leader in the effort to use DNA evidence to challenge findings of guilt. Its brief said that the project's methods had proved the innocence of 155 people, in part by using DNA to refute seemingly airtight scientific evidence that the prosecution used to persuade the jury.

In Mr. House's case, the prosecution had claimed to the jury, based on blood typing, that semen stains found on the clothing of the murder victim were his. But DNA testing 15 years later showed that the stain was not Mr. House's semen but that of the victim's husband.

Since the prosecution's theory of the case was that Mr. House, a previously convicted sex offender, had murdered the victim after raping her, the new evidence shows that he was wrongly convicted, his lawyers maintain. In addition, the prosecution presented the evidence of rape as the "aggravating factor" for the jury to consider in deciding whether to sentence Mr. House to death.

Judge Gilbert S. Merritt, one of the dissenting judges on the Sixth Circuit, said in his opinion that "without any evidence of rape, the state has lost its motive, its theory of the case and the aggravating circumstance on which the state and the jury relied for its death verdict."
The majority, however, concluded that the fact that Mr. House did not rape the victim, a neighbor named Carolyn Muncey, did not prove that he did not murder her, and that the case against him remained strong. "We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence," the majority said in an opinion by Judge Alan E. Norris.

All eight of the judges in the majority were appointed by Republican presidents, while all seven of the dissenting judges were appointed by Democrats.

Mr. House's Supreme Court appeal, House v. Bell, No. 04-8990, argues that the split on the appeals court mirrors general confusion among the federal appeals courts over how to evaluate similar claims of innocence on the basis of newly discovered evidence.

The Supreme Court's precedents set a high procedural threshold for presenting claims in federal court that were never made during the course of state court appeals. Under a 1995 decision, Schlup v. Delo, inmates seeking federal court review in such a circumstance must pass through a procedural "gateway" by establishing that the federal court's failure to hear the case would be a "fundamental miscarriage of justice." Such an exception to the usual procedural barriers should be "rare" and confined to an "extraordinary case," the court said.

Mr. House's lawyers argue that the justices should clarify that in deciding whether this standard has been met, and that a court should look at the evidence from the perspective of the jury and ask whether a juror, confronted with the new evidence, would have reasonable doubt about the verdict even if the new evidence did not completely dismantle the prosecution's case.

The Innocence Project's brief argues that objective scientific proof like DNA evidence should be given extra weight, especially when it refutes a "false fact" the prosecution has previously presented to jurors.
"Execution May Occur Despite Votes of 7 Judges"

New York Times
October 7, 2004
Adam Liptak

"We are faced," Judge Ronald Lee Gilman wrote, dissenting in a death penalty case yesterday, "with a real-life murder mystery, an authentic 'who-done-it' where the wrong man may be executed."

But Judge Gilman was the only one of 15 judges of the United States Court of Appeals for the Sixth Circuit, in Cincinnati, who thought the case presented anything like a close question.

Eight other judges said the defendant, Paul Gregory House, should be executed. Six said he was not guilty and should be freed immediately. The vote, with Judge Gilman alone saying that Mr. House merely deserves a new trial, was 8 to 7. Unless the Supreme Court intervenes or Mr. House dies first from the multiple sclerosis he has, he will be executed.

Closely divided appeals court decisions are common. But judges tend to differ on questions of law. Yesterday's decision, which turned on sharply divergent interpretations of the same evidence where a man's life is at stake, was quite unusual.

"This is unprecedented," said Eric M. Freedman, a law professor at Hofstra University. "A case in which six judges find that the defendant didn't do the crime is more than just a legal curiosity. In any rational legal universe, there is now at least reasonable doubt about the defendant's guilt."

Mr. House was convicted of murdering a neighbor, Carolyn Muncey, in Union County, Tenn., in 1985. The prosecution argued that he had first raped her, saying that semen found on her clothing matched his blood type. The jury cited the rape as a reason for imposing death.

But DNA testing, which was not available at the time, has proved that the semen was that of Mrs. Muncey's husband, Hubert.

At a recent Federal District Court hearing to determine whether Mr. House should be allowed to reopen his case, witnesses testified that Mr. Muncey was an alcoholic who beat his wife. Two witnesses said he had confessed to killing his wife while drunk. A third witness said he had asked her to supply him with an alibi for the murder. Three others also implicated Mr. Muncey, who denied the accusations.

The judges in the majority discounted all of this.

"The lack of any physical evidence of sexual contact," Judge Alan E. Norris wrote for the majority, does not "contradict the notion that the murderer lured Mrs. Muncey from her home with a sexual motive."

The witnesses who said they had heard Mr. Muncey's confession were not credible, the majority said, because they had not come forward until recently. And the testimony of the witness who said Mr. Muncey had asked her to provide him with an alibi was "insufficient to tip the balance in favor of House's theory," Judge Norris wrote.

Six dissenting judges took a different view.
"Without any evidence of rape," Judge Gilbert S. Merritt wrote for that group, "the state has lost its motive, its theory of the case and the aggravating circumstance on which the state and the jury relied for his death verdict."

"There is no reasonable basis," Judge Merritt continued, "for disbelieving the six witnesses who now incriminate Mr. Muncey as the perpetrator of the crime."

"House has shown that is highly probable that he is completely innocent of any wrongdoing whatever," Judge Merritt concluded. "House should be immediately released."

Stephen M. Kissinger, a lawyer for Mr. House, said his client would ask the Supreme Court to hear an appeal. He said he was optimistic.

"I've practiced law for 20 years," Mr. Kissinger said, "and this is far and away the best innocence claim I've ever seen." He added that he had gained acquittals for people "who had claims half as good as this."

A spokeswoman for the Tennessee attorney general declined to comment.

The court divided yesterday along strictly political lines. Every judge in the majority was appointed by a Republican president, including four appointed by President Bush in the last two years. Every dissenting judge, including Judge Gilman, was appointed by a Democratic president.

Only Judge Gilman found the case excruciatingly difficult.

"Was Carolyn Muncey killed by her down-the-road neighbor Paul House, or by her husband, Hubert Muncey?" Judge Gilman asked. "At the end of the day, I am in grave doubt."

He said that doubt required at least a new trial.

"Under the circumstances where we face the execution of a man," he wrote, "I believe that our system of justice demands no less."
It was a question I had to ask the bearded man:

"Did you kill Carolyn Muncey?"
"No," answered Paul Gregory House. "Never even thought about it. Had no reason to. She was a nice person."

Then I asked him: "You've been locked up since July 1985. How does it feel being incarcerated for a crime that you and some others say you didn't commit?"

"It really doesn't feel good," House, a 42-year-old state death row inmate replied. "It makes me quite angry, in fact."

I had taken a trip to the state's Riverbend Maximum Security Prison in west Nashville Wednesday to interview the condemned prisoner who was convicted in 1986 of murdering Carolyn Muncey, a wife and mother, in Union County.

Before Wednesday, I had never met House but wrote a column in this space last Sunday saying he was still on death row despite the fact that six of the 15 judges on the U.S. 6th Circuit Court of Appeals said House is not guilty of Carolyn Muncey's murder and should be freed immediately. A seventh judge on the court of appeals said in a dissenting opinion that House should at least have a new trial.

"I would like to be set free, but I would accept a new trial," House told me as he sat in a wheelchair in a visiting room in Riverbend's infirmary. House suffers from multiple sclerosis and cannot walk on his own. His attorney, federal public defender Stephen M. Kissinger of Knoxville, has said he is afraid House won't live long enough to see his case appealed to the U.S. Supreme Court.

"They have found so much stuff over the years that makes you wonder what are all those Republicans on the 6th Circuit Court of Appeals thinking about," House added. He was referring to the fact that the eight judges on the Sixth Circuit who voted to uphold his death penalty were all appointed by Republican presidents.

Since House's conviction in 1986 for Muncey's 1985 murder, which he was accused of committing during an attempted rape, DNA has shown that the semen evidence used to help convict House was really that of her husband, Hubert Muncey. The physical evidence of blood tying House to Carolyn Muncey's murder has also been rebutted.

"It's been like hell," House said, referring to his almost 20 years in Tennessee's prison system.

As I sat talking to House, I couldn't help but think about another death row case on which I had reported back in 1978. It was the case of inmate Richard Austin. Then-Tennessean editor John Seigenthaler had gotten word that Austin, a professional pool shark out of Memphis, might not be guilty of the heinous crime of hiring a "hit man" to murder a police informant. As a result, Seigenthaler asked me and the late Tennessean reporter Nat Caldwell to look into the case.
Upon doing so, we discovered that Austin's lawyer, Robert I. Livingston, despite his client's claim of innocence, refused to call the actual trigger man, Jack Charles Blankenship, as a witness during Austin's trial.

In an interview in July 1978, Blankenship told Caldwell and me that he told Livingston before the trial that Austin was not in any way involved in the murder.

Blankenship was allowed by prosecutors in the case to plead guilty to the murder of Julian Watkins, in which he was hired for $1,000. He was sentenced to life.

In 1997, the U.S. 6th Circuit Court of Appeals overturned Austin's original sentence and ordered that he receive a new trial. A second jury imposed the death sentence once again and Austin, now 65, remains on Tennessee's death row.

Why can't Paul Gregory House at least get a new trial in light of the new evidence showing that he did not murder Carolyn Muncey? Surely, state officials wouldn't want to see any innocent man executed.

"The new evidence discloses that Mr. Muncey, with a flood of tears, confessed to two women friends after the murder that he had killed his wife," U.S. 6th Circuit Court of Appeals Judge Gilbert Merritt of Nashville wrote in a dissenting opinion in House's appeals case. "He told a third woman that he was going to 'get rid' of Carolyn a few weeks before the murder.

"He asked a fourth woman to provide him with an alibi on the night of the murder and gave testimony about his whereabouts that night at the time of the murder that has now been contradicted by a local law enforcement officer. The state offered no evidence that any of these witnesses was biased in favor of House or prejudiced against Mr. Muncey."

Merritt later added in his opinion: "The case comes down to the question of whether the newly discovered evidence undermining the case against House and incriminating Mr. Muncey is sufficiently strong—despite the uncertainties that remain—to preclude a rational juror from finding guilt beyond a reasonable doubt and to make the execution of House 'constitutionally intolerable.'"

"Mr. House, let me ask you again, did you kill Carolyn Muncey?" I said.

"No, I did not," he answered Wednesday. "I am just a poor, innocent man sitting on death row."
Oregon v. Guzek

(04-928)


Randy Guzek was convicted along with two others in a 1987 robbery and double murder. He has been convicted three times for the crime and three times sentenced to death. The first two death sentences were vacated for reasons explained more fully in the opinion below. During his third sentencing phase, Guzek sought to introduce evidence of an alibi covering the time of the murders. The Oregon Supreme Court vacated the third death sentence because the trial court erred in its instructions to the jury on sentencing options. In giving guidance for remand, the state court instructed that the alibi evidence is admissible in mitigation under Or. Rev. Stat. § 163.150(1) and the Eighth Amendment. Guzek filed a petition for certiorari seeking to overturn Oregon's death penalty. That petition was rejected. The United States Supreme Court will consider Oregon's separate petition regarding the presentation of alibi evidence.

Question Presented: Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in the penalty phase that would allow the jury to consider residual or lingering doubt from the guilt phase?

STATE OF OREGON, Plaintiff on Review,

v.

RANDY LEE GUZEK, Defendant on Review.

Supreme Court of Oregon

Decided March 4, 2004

[Excerpt: Some footnotes and citations omitted]

OPINION:

RIGGS, J.

This case is before us on automatic and direct review of a judgment that imposed a sentence of death for aggravated murder. This court previously affirmed defendant's conviction of two counts of aggravated murder, State v. Guzek, 310 Ore. 299, 304, 797 P.2d 1031 (1990) (Guzek I), but twice vacated his sentence of death and remanded for further penalty-phase proceedings, as discussed below. On this third review, the state concedes—and we agree—that the trial court erred in failing to instruct the jury on the "true-life" sentencing option and that this court again must vacate the sentence of death. Accordingly, as discussed further below, we vacate the sentence of death and remand to the trial court for further proceedings. In the discussion that follows, we also address issues of law that are likely to arise on retrial, if the state again pursues a death sentence. See, e.g., State v. Smith, 310 Ore. 1, 21-22, 791 P.2d 836 (1990) (court
addressed issues likely to arise on remand despite already having determined that remand was necessary).

I. FACTS

The following facts are taken from this court's opinion in Guzek I, 310 Ore. at 301-02, and from the record from defendant's third penalty-phase proceeding. The victims, Rod and Lois Houser, knew defendant because he had been a high school acquaintance of their niece, who lived with them in rural Deschutes County. Defendant and the niece had dated. After the niece ended their relationship, defendant acted with hostility toward her—in her words, "stalking" her—prompting Rod Houser to warn defendant away from the Housers' home.

In June 1987, defendant and two associates planned to burglarize a particular residence and kill its occupant. When the three men arrived at that residence, however, they were thwarted by the presence of too many people. One of defendant's associates suggested that they target the Housers' home instead. The three men then went to defendant's home, obtained a rifle and a pistol, and went to the Housers' home with the intention of killing the Housers and stealing their property.

When Rod Houser answered defendant's knock at the door, one of defendant's associates, at defendant's prompting, shot Rod Houser repeatedly, killing him. Defendant then found and shot Lois Houser three times, killing her. The three men then ransacked the home and stole a great deal of personal property. The Housers' niece was not at home at the time.

The Housers' two daughters went to their parents' home two days later, worried because they had not been able to reach their parents by telephone. The daughters discovered their parents' bodies inside the ransacked home. Later, the daughters saw and identified their parents' belongings in defendant's possession. As noted, defendant ultimately was convicted of two counts of aggravated murder and sentenced to death.

II. PROCEDURAL HISTORY

Beginning with defendant's first appeal, we describe the procedural history of this case in some detail, because that history provides important background information for much of the discussion that follows. First, we note that, after defendant's first penalty-phase trial, in an unrelated case on remand from the United States Supreme Court, this court concluded that the Eighth Amendment to the United States Constitution requires that a penalty-phase jury consider and answer a general mitigation question, to ensure that the jury has the opportunity to give effect to any mitigating evidence relevant "outside or beyond" particular statutory issues submitted to the jury. State v. Wagner, 309 Ore. 5, 13, 786 P.2d 93, cert den, 498 U.S. 879, 112 L. Ed. 2d 171, 111 S. Ct. 212 (1990) (Wagner II). Because the court in defendant's case had not submitted a general mitigation question to the jury, this court vacated defendant's sentence and remanded the case for a new penalty-phase proceeding. Guzek I, 310 Ore. at 305-06.

The next year, another decision of the United States Supreme Court again affected defendant's penalty-phase proceedings. According to the interpretation of the Eighth Amendment in effect at the time of defendant's crimes, the introduction of "victim-impact" evidence in the penalty phase of a capital trial constituted cruel and unusual punishment under the Eighth Amendment. See Booth v. Maryland, 482
On review of that second death sentence, defendant argued that the victim-impact evidence that the state had introduced against him was not relevant to any of the questions that the jury was required to consider under the applicable death-penalty statutory scheme, ORS 163.150(1)(b) (1989). This court agreed and remanded the case for further proceedings. State v. Guzek, 322 Ore. 245, 270, 906 P.2d 272 (1995) (Guzek II).

After a third penalty-phase proceeding, defendant again was sentenced to death. That sentence is before us now.

III. TRUE-LIFE SENTENCING OPTION

In his third penalty-phase proceeding, defendant moved to have the trial court instruct the jury on the true-life sentencing option. To that end, he expressly waived all ex post facto guarantees that otherwise would have protected him from retroactive application of the true-life option. The trial court denied defendant's motion and did not instruct the jury regarding true life.

After a jury again sentenced defendant to death, this court explained that a criminal defendant may waive protection from ex post facto laws, including the protection against the application of a later-enacted version of the death-penalty statutory scheme. State v. McDonnell, 329 Ore. 375, 388, 987 P.2d 486 (1999) . . . . Accordingly, as the state recognizes, the trial court's decision not to instruct the jury regarding the true-life sentencing option was reversible error. We therefore must vacate defendant's sentence of death and remand for further proceedings.

* * *

IV. ISSUES LIKELY TO ARISE ON REMAND

Defendant raises other issues on review. Below, we address some of those issues, which are likely to arise on remand. Specifically, we address . . . . the admissibility of certain evidence that the trial court excluded during defendant's third penalty-phase proceeding that defendant again might offer in a subsequent penalty-phase proceeding.

* * *

[A. The prohibition against ex post facto laws contained in Article I, section 21, of the Oregon Constitution precludes the admission on remand of "any aggravating evidence" against defendant under current versions of Oregon statute. The victims' "right to be heard" under Article I, section 42, of the Oregon Constitution supersedes any protection afforded defendant under Article I, section 21.}
B. If evidence is offered in the penalty phase to impeach the testimony of state witnesses, the trial court must determine whether that evidence has a nonhearsay purpose. If so, it cannot be excluded on the basis of the hearsay rule alone.

C. Exclusion of Alibi Evidence

We now turn to defendant's argument that the trial court erred in excluding his alibi evidence during his third penalty-phase proceeding.

According to the state's case, the Housers were murdered in the early morning hours of June 28, 1987. At his third penalty-phase proceeding, defendant sought the admission of two items of evidence that tended to show that he could not have been at the Housers' home at that time: (1) the transcript of defendant's grandfather's testimony, admitted during the guilt phase, that defendant had been with him from 9:00 p.m. on June 28 until 2:00 a.m. on June 29, 1987; and (2) the testimony of defendant's mother that defendant had been at her home from shortly after 2:00 a.m. on the morning of June 29, 1987, and that, when she awoke at 4:20 a.m. on the same day, defendant was sleeping on a loveseat at her house. The trial court excluded that evidence, apparently on relevance grounds.

On review, defendant argues that the trial court erred in excluding that evidence because it was "mitigating evidence" relevant to the fourth question under ORS 163.150(1)(b), that is, "whether the defendant should receive a death sentence." ORS 163.150(1)(b)(D). The state responds that the trial court properly excluded that evidence because alibi evidence, by definition, is relevant to only a defendant's guilt of the crime charged and, therefore, is not relevant to sentencing. Because the analysis of their relevance is different, we address separately the two different types of alibi evidence that defendant sought to present to the jury. The transcript of defendant's grandfather's testimony—like the transcript of any other witness's testimony—was relevant and subject to consideration in the penalty phase, regardless of its substance, because it was "previously offered and received" during the trial on the issue of guilt. ORS 163.150(1)(a); see also ORS 138.012(2)(b) (if reviewing court vacates death penalty, transcript of all testimony, all exhibits, and other evidence properly admitted in prior guilt and penalty-phase proceedings deemed admissible in remanded penalty-phase proceeding). The trial court therefore erred in sustaining the state's objection to admission of that evidence.

We turn to the question of the relevance of defendant's remaining alibi evidence—specifically, his mother's testimony. The state begins its argument with the unassailable premise that capital penalty-phase proceedings occur only if a jury has found a defendant guilty of the substantive offense. From that, the state urges that we infer that evidence of innocence is irrelevant to the penalty-phase proceeding. However, as is clear from this court's case law, as well as decisions of the United States Supreme Court, the question of relevance of a capital defendant's proffered evidence in a penalty-phase proceeding is not that simple. Its relevance is, instead, a matter of statutory construction in the context of federal constitutional requirements. . . .

We begin by setting out the relevant parts of the death-penalty statutory scheme. ORS 163.150(1)(a) provides, in part:

"In the [penalty-phase] proceeding, evidence may be
presented as to any matter that the court deems relevant to sentence including, but not limited to, * * * mitigating evidence relevant to the issue in paragraph (b)(D) of this subsection[.]"

(Emphasis added.) ORS 163.150(1)(b) provides, in part:

"Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

* * *

"(D) Whether the defendant should receive a death sentence."

The jury instructions accompanying ORS 163.150(1)(b) are set out in ORS 163.150(1)(c), which provides:

"(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b) of this subsection, any mitigating circumstances offered in evidence, including but not limited to the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed.

"(B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection 'no' if, after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors believe that the defendant should not receive a death sentence."

(Emphasis added.)

Our task here is to determine whether defendant's proffered evidence constitutes "mitigating evidence" that is "relevant" to the question set out in ORS 163.150(1)(b)(D), that is, "whether defendant should receive a death sentence."

At the outset, we note that the wording of ORS 163.150(1)(c)(B)— instructing the jury to consider "any" mitigating evidence concerning "any" aspect of the defendant's character or background, or "any" circumstances of the offense—suggests, on its face, that the statutory category of "mitigating evidence" is quite broad and, possibly, unlimited. It likely would follow under such a reading that defendant's mother's testimony would qualify as "mitigating evidence" under the statutory provisions, because it arguably relates to circumstances surrounding the offense that mitigate in defendant's favor (that is, defendant's argument that he had not been involved in the crime).

However, we must read the applicable text in its proper context, PGE, 317 Ore. at 611, which, here, most notably includes earlier versions of the statutory scheme and its development through successive legislatures. As this court has explained
before (and as discussed further below), ORS 163.150(1)(b)(D) was enacted in 1989 and originally provided:

"If constitutionally required, considering the extent to which the defendant's character and background, and the circumstance of the offense may reduce the defendant's moral culpability or blameworthiness for the crime, whether a sentence of death be imposed."

Or Laws 1989, ch 790, § 135b (emphasis added). Also in 1989, the legislature created a statutory jury instruction pertaining to all four questions set out in ORS 163.150(1)(b), now set out at ORS 163.150(1)(c)(A).

In 1991, the legislature amended ORS 163.150(1)(b)(D) to reflect its current wording, that is, "whether the defendant should receive a death sentence." Or Laws 1991, ch 885, § 2. Also in 1991, the legislature enacted the jury instruction specifically accompanying ORS 163.150(1)(b)(D), set out as ORS 163.150(1)(c)(B), in the following form:

"In determining the issue in subparagraph (D) of paragraph (b) of this subsection, the court shall instruct the jury to answer the question 'no' if one or more of the jurors find there is any aspect of the defendant's character or background, or any circumstances of the offense, that one or more of the jurors believe would justify a sentence less than death."


* * *

Turning to the original version of ORS 163.150(1)(b)(D), the above-emphasized phrase, "if constitutionally required," clarified that the requirement that a trial court instruct a jury respecting consideration of relevant evidence admitted under that statutory provision hinged on whether a constitutional provision required consideration of the evidence. The case law construing ORS 163.150(1)(b)(D) clearly explains the constitutional source at issue, as well as the intended scope of relevant "mitigating evidence" under the statutory scheme in its current form, as discussed below.

In State v. Stevens, 319 Ore. 573, 580-82, 879 P.2d 162 (1994), this court reviewed the legislative history of ORS 163.150(1)(b)(D), from its enactment in 1989 through its amendment in 1991. In short, the court explained that the legislature originally had enacted that statute in light of the United States Supreme Court's decision in Penry v. Lynaugh, 492 U.S. 302, 328, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), which had invalidated a three-question statutory death-penalty scheme on the ground that it did not allow the jury to consider fully the effect of the defendant's mitigating evidence regarding his diminished mental capacity. Stevens, 319 Ore. at 580-81. More specifically, in Penry, the Court held that, under the Eighth Amendment, a jury "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the crime." Stevens, 319 Ore. at 581 (quoting Penry, 492 U.S. at 328).

The court in Stevens further explained that, shortly after the legislature enacted ORS 163.150(1)(b)(D) in 1989, this court held in Wagner II, 309 Ore. at 18-19, that that statute did not satisfy the Eighth Amendment directive set out in Penry. Wagner II, 309
Ore. at 18-19. Consequently, the legislature in 1991 amended ORS 163.150(1)(b)(D) to its present form (that is, "whether the defendant should receive a death sentence") and enacted the corresponding jury instruction set out in ORS 163.150(1)(c)(B). Stevens, 319 Ore. at 581-82. The court in Stevens specifically noted that, in amending ORS 163.150(1)(b)(D) in 1991, the legislature intended to codify—and indeed precisely adopted—this court's proffered wording from Wagner II. Stevens, 319 Ore. at 582.

After reviewing the development of ORS 163.150(1)(b)(D) through its 1991 amendment, the legislative history of that statute, the Supreme Court's decision in Penry, and this court's decision in Wagner II, this court in Stevens concluded:

"The passage of the original fourth question after Penry and the modification of that question following Wagner II make it clear that the legislature intended the scope of the statutory fourth question to be co-extensive with the scope of the fourth question held in Penry and Wagner II to satisfy the requirements of the Eighth Amendment to the Constitution of the United States. Accordingly, cases dealing with the Eighth Amendment fourth question and with the evidence relevant to that question inform our inquiry as to the scope of the evidence that is relevant under the statute."

319 Ore. at 582-83 (emphasis added). See also Guzek II, 322 Ore. at 258 (citing Stevens for proposition that, in enacting fourth question, legislature was "attempting to bring Oregon's death penalty scheme in compliance with Penry"). The court in Stevens then went on to examine Supreme Court decisions that discussed the phrase "mitigating evidence relevant to a defendant's background and character or the circumstances of the crime," 319 Ore. at 583 (internal quotation marks omitted), as those decisions related to the evidentiary issue in Stevens.

In sum, this court concluded in Stevens that, in using the phrase "any aspect of the defendant's character or background, or any circumstances of the offense" in the jury instruction set out in ORS 163.150(1)(c)(B), the legislature intended to limit the admission of "mitigating evidence" in penalty-phase proceedings so as to satisfy the Eighth Amendment. Specifically, the legislature intended to ensure the admissibility of such evidence that the Eighth Amendment requires that a penalty-phase jury consider. The remaining question, then, involves a determination whether the alibi evidence that defendant proffered at his third penalty-phase proceeding—specifically, his mother's testimony—fell within that federal constitutional category.

We begin our discussion with the plurality decision in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), which was a precursor to Penry. The defendant in Lockett was charged with aggravated murder resulting from a robbery of a pawnshop. According to the state's evidence, the defendant had participated with others in the planning of the robbery; however, she had remained in the car outside the pawnshop during the robbery and ensuing murder of the pawnbroker.

* * *
The applicable statutory scheme required the trial court to sentence the defendant to death unless it found, by a preponderance of the evidence, that one or more of three statutory mitigating factors applied, relating to the potential existence of duress, coercion, or provocation; the potential existence of psychosis or mental deficiency; and the potential role of the victim in the offense. Finding that none of those factors applied (particularly, the "psychosis or mental defect" factor), the trial court sentenced the defendant to death. 438 U.S. at 593-94.

Before the Supreme Court, the defendant argued that the statutory scheme violated the Eighth Amendment. After reviewing its jurisprudence, a plurality of the Court stated:

"We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

438 U.S. at 604 (first emphasis in original; second emphasis added). The plurality added that "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of [the] offense." Id. at 604 n 12.

The plurality then evaluated the statutory scheme at issue in light of the foregoing rule and concluded that, in permitting the consideration of only three specific mitigating factors, that scheme violated the Eighth Amendment. Specifically, under the scheme,

"the absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision."

Id. at 608 (emphasis added).

In a companion case issued the same day, Bell v. Ohio, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978), the same plurality vacated a death sentence imposed on another defendant under the same state statutory scheme. . . .

Before the Supreme Court, the defendant argued that his youth, his cooperation with the police, and "the lack of proof that he had participated in the actual killing strongly supported an argument for a penalty less than death." Id. at 641-42. A plurality of the Court agreed that, under Lockett, the defendant's sentence violated the Eighth Amendment because the statutory scheme had precluded the trial court "from considering the particular circumstances of his crime and aspects of his character and record as mitigating factors." Id. at 642.

Almost four years after Lockett and Bell, a majority of the Supreme Court adopted and applied the rule set out in those cases, that is, that "the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a
mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (quoting Lockett, 438 U.S. at 604). In adopting that rule, the court noted that, "in some cases, such evidence properly may be given little weight." Id. at 115.

Lockett and its progeny stand for the proposition that, under the Eighth Amendment, a court must allow a defendant to present at sentencing, and a sentencer must be able to consider, any evidence relevant to any circumstances of the offense that mitigates against imposition of the death penalty. As demonstrated by Lockett and Bell, that includes evidence that a defendant played an insignificant role in the offense or otherwise possessed a less culpable mens rea, notwithstanding an earlier guilt finding of intentional participation in capital murder. Further, the Court's statement in Eddings, 455 U.S. at 110, that a sentencer is free to accord a defendant's proffered mitigating evidence little weight clarifies that evidence that is not particularly trustworthy still is admissible under the command of the Eighth Amendment if it is relevant to a defendant's character or record, or to the circumstances of the offense.

* * *

[T]he . . . factual distinction between Lockett and Bell, on the one hand, and the case at bar, on the other [a difference in the underlying felonies of which they were convicted], is of no consequence in light of the Supreme Court's decision in Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979), issued the year after Lockett and Bell. The defendant in Green had been convicted of murder, as had a codefendant. Unlike the defendants in Lockett and Bell, it appears that the defendant in Green had been convicted of the murder itself—that is, of the intentional killing of the victim—rather than of more limited, intentional participation in an underlying capital felony. At sentencing, the defendant sought to introduce testimony of a third person that the codefendant had stated to that person that the codefendant had killed the victim after sending the defendant on an errand. The defendant had not sought to introduce that testimony during the guilt phase of his trial. The trial court excluded the evidence on hearsay grounds, and the Georgia Supreme Court affirmed. 422 U.S. 95-96; Green v. State, 242 Ga 261, 272-73, 249 S.E.2d 1, 9-10 (1978).

In a brief per curiam, eight-to-one decision, the Supreme Court reversed. The Court stated:

"Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, and substantial reasons existed to assume its reliability."

Id. at 97 (emphasis added). Thus, in Green, the Supreme Court concluded that, under Lockett, the defendant's evidence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider, notwithstanding that the defendant already had been

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As can be seen, the facts of Green appear to be analogous to the facts at issue here. As in Green, defendant here already had been convicted of the murders of the victims, and, notwithstanding those earlier convictions, defendant sought to introduce evidence at his third penalty-phase proceeding—which he did not seek to introduce during the guilt phase—that, if believed, would have shown that he had not been present at the victims' home at the time of the murders. Applying the Court's reasoning in Green, we conclude that such evidence was "highly relevant to a critical issue" in the penalty phase, Green, 442 U.S. at 97, and therefore was required to be considered by the jury under the Eighth Amendment. It follows that that evidence also qualified as "mitigating evidence" under the statutory scheme set out in ORS 163.150(1)(a), (b)(D), and (c)(B). Accordingly, the trial court erred in excluding that evidence at defendant's third penalty-phase proceeding, and, if the state again pursues the death penalty on remand, and if defendant again offers his alibi evidence, that evidence shall be admissible.

[The court added in a footnote: We note that, in Franklin v. Lynaugh, 487 U.S. 164, 172, 174, 108 S. Ct. 2320, 101 L. Ed. 2d 155, rehearing den, 487 U.S. 1263, 101 L. Ed. 2d 976, 109 S. Ct. 25 (1988); id. at 187-88 (O'Connor, J., concurring), a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an instruction that a penalty-phase jury consider any residual or lingering doubts remaining from the guilt phase. However, nothing in that decision lessened the direction from Lockett, Bell, Eddings, and Green that the Eighth Amendment does require that a defendant be permitted to introduce, and a jury be able to consider, mitigating evidence relevant to any circumstances of the offense, such as evidence that would lessen the defendant's culpability in the offense. Simply stated, a "residual" or "lingering doubt[]" remaining from the guilt phase, Franklin, 487 U.S. at 174, is qualitatively different from actual "evidence" proffered during the penalty phase.]

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The sentence of death is vacated, and the case is remanded to the circuit court for further proceedings.
The Supreme Court agreed on Monday to decide whether a convicted murderer has the right, during the penalty phase of the trial, to present evidence that casts doubt on the jury's finding of guilt in an effort to avoid a sentence of death.

The court accepted a death-penalty case from Oregon to answer a question that has divided the state and lower federal courts in the years since an ambiguous Supreme Court opinion addressed it in 1988. The state is appealing a ruling by the Oregon Supreme Court that gave a defendant the right to present evidence of an alibi that, if accepted in the penalty phase, would show that he could not have been at the scene of the double murder for which the jury had just convicted him.

The Supreme Court's precedents make clear that in a capital murder trial's penalty phase, which has many attributes of a separate trial, the defendant must be able to offer "any aspect" of his personal background or of the circumstances of the offense to show why a death sentence would be inappropriate.

The one exception has been evidence offered to demonstrate lingering doubt about the guilty verdict itself. In its 1988 decision, the Supreme Court held that a defendant did not have a constitutional right to have the judge instruct the jury that it should consider any "residual" doubt about guilt when deciding on a sentence.

But that decision, Franklin v. Lynaugh, did not address the more basic question of whether, aside from the eventual jury instructions, the defendant had the right to present such evidence to the jury in the first place. That question, which has confused the lower courts, is the issue the justices have now agreed to decide in Oregon v. Guzek, No. 04-928, the case they accepted on Monday.

The defendant, Randy Lee Guzek, was convicted in 1988 of murdering the aunt and uncle of his former girlfriend. He was sentenced to death, but the Oregon courts vacated his death sentence in 1990 and again in 1991, ordering new proceedings as the result of United States Supreme Court decisions in other death penalty cases. Each time, Mr. Guzek was re-sentenced to death.

In 2004, the Oregon Supreme Court once again overturned the death sentence, finding several errors. It ruled that in any subsequent hearing, Mr. Guzek should be permitted to present transcripts of statements from his mother and grandfather that were admitted during the guilt phase.

Taken together, the two statements provided an account of Mr. Guzek's whereabouts on the night of the murder that, if credited, made it highly unlikely that he had been at the murder scene. The state court's 3-to-2 decision held that Mr. Guzek had a right to present the evidence of his alibi under the Eighth Amendment, which prohibits cruel and unusual punishment.

The issue in the case, which will not be argued until next fall, might have some bearing on the forthcoming death penalty hearing for Zacarias Moussaoui, who
pleaded guilty last week to taking part in the conspiracy that led to the Sept. 11, 2001, terrorist attacks. While pleading guilty to a capital offense, Mr. Moussaoui announced his intention to contest the death penalty. Judge Leonie M. Brinkema of Federal District Court, who has presided over the case, said Friday that access to high-level Qaeda detainees could provide mitigating evidence for Mr. Moussaoui and would be "highly relevant to the sentencing phase." Mr. Moussaoui has long claimed that these witnesses, to whom the government has denied him access, would exonerate him.
**"Justices to Review Loan Offsets: Court to Decide Whether a 10-Year Limit Shields Student Debts"**

*Washington Post*

April 26, 2005

Charles Lane

* * *

The court announced that it will decide a case about what kind of evidence capital crime defendants may introduce to save themselves from the death penalty.

Defendants who have been convicted of a death-penalty offense face a second hearing at which a jury must decide whether to impose death or a lesser penalty. At these sentencing hearings, the defense has a constitutional right to introduce mitigating evidence to persuade jurors to spare the defendant's life.

At issue in the case the court agreed to hear yesterday, *Oregon v. Guzek*, No. 04-928, is whether the Constitution requires a state to permit the defense to introduce claims that the defendant is innocent as mitigating evidence.

The court's ruling could have a significant impact at a time when death penalty opponents are seeking to heighten public doubts about capital punishment based on recent death row exonerations.

The prosecution's job at sentencing hearings might become more difficult if the court were to say that the defense has an absolute right to try to reinforce "residual doubts" among jurors who have already concluded that a defendant is guilty beyond a reasonable doubt—but not, perhaps, beyond any doubt.

In a fragmented 1988 decision, the Supreme Court ruled that the Constitution does not require a trial judge to instruct a jury to consider such evidence. Most courts have interpreted that to mean that the defense has no right to introduce the evidence on its own.

But last year the Supreme Court of Oregon ruled 3 to 2 that convicted double-murderer Randy Lee Guzek must be allowed to present testimony at his sentencing hearing from his grandfather and mother, who placed him elsewhere at the time of the crimes.

In its appeal to the U.S. Supreme Court, the state of Oregon asked the court to intervene "to establish a uniform interpretation of whether the Eighth Amendment creates a constitutional right to offer evidence and argument of residual doubt in a penalty-phase proceeding." The Eighth Amendment bans "cruel and unusual punishments."

Oral argument will take place in the fall, and a decision is likely by July 2006.
Summary: The jury should have been allowed to consider a "true life" sentence for Randy Lee Guzek, the Oregon Supreme Court rules.

The Oregon Supreme Court on Thursday overturned the death sentence of a convicted Deschutes County killer for the third time.

In a widely anticipated move, the court followed its own 1999 precedent in saying that the trial judge should have allowed jurors to consider sentencing Randy Lee Guzek to life in prison without parole. Guzek was convicted in 1988 of killing Rod and Lois Houser in their Terrebonne home in 1987.

Prosecutors, although disappointed in the outcome, were pleased by one part of the ruling, which cleared up any question that victims had a constitutional right to testify in the penalty phase of a capital murder case.

"I think this case is a very strong step forward for victims' rights in Oregon, and we're real happy about that," said Deschutes County District Attorney Michael T. Dugan.

Dugan said he had not decided whether to again seek the death penalty for Guzek but pointed out that three different 12-member juries had voted unanimously that he should die for his crimes.

"I am very mindful of the 36 jurors who have made this decision in the past," Dugan said.

Guzek was convicted with two other men of killing the Housers during a late-night burglary. Guzek, then 18, shot Lois Houser three times with a handgun, chased her up a staircase and shot her again as she huddled inside a closet. He then ripped the rings off her fingers.

Rod Houser was shot 20 times by Mark Wilson, who is serving a life sentence for the killing. Donald Cathey also is serving a life sentence for participating in the crime, although he did not kill anyone.

Guzek's first death sentence was overturned in 1990 because the U.S. Supreme Court had ruled that Oregon's death penalty statute failed to allow defendants to present enough evidence that they should not be executed.

Another jury sentenced Guzek to death in 1991, but the Oregon Supreme Court reversed the sentence in 1995, saying that the trial court improperly allowed testimony about the effects of the killings on the victims' relatives.

A jury sentenced Guzek to death for a third time in 1997.

The third reversal stems from the trial judge's refusal to allow the jury to consider sentencing Guzek to "true life," meaning life without the possibility of parole.

At the time Guzek killed the Housers, jurors had two sentencing options in a death penalty case: death or life with the possibility of parole. The Legislature added the "true life" option in 1989. Guzek sought to have his 1997 jury consider true life, but
the judge refused.

The Oregon Supreme Court first addressed the issue in 1999, overturning the sentence of Death Row inmate Michael McDonnell. Like Guzek, McDonnell was first convicted before the true-life option was available but wanted the jury to consider it on retrial.

Since then, the court overturned the death sentences of Robert Paul Langley and serial killer Dayton Leroy Rogers on the same grounds. Only McDonnell has been sent back to Death Row. The Langley and Rogers cases have been plagued by delays. Langley awaits a new penalty phase in Marion County. Rogers awaits a new sentencing trial in Clackamas County.

Dugan said he had to consider the cost of another trial but that he also wanted to talk to the surviving members of the Housers' family.

"One of the daughters who made the discovery of her dead parents had substantial mental breakdowns that led to her death last year. She could never get over it," Dugan said.

"So Guzek has one more victim to his caseload here. I need to sit and talk with the Housers. This has taken quite a toll on them."
Does the Eighth Amendment require Texas courts to give explanatory jury instructions on mitigating evidence in capital sentencing cases? The court, 6-3, said no.

After the murder conviction of Donald Gene Franklin, the trial court refused to give five "special requested" jury instructions submitted by Mr. Franklin that would have told the jury that any evidence that they felt mitigated against the death penalty should be taken into account in answering the two Special Issues required by the state death penalty statute.

Justice White wrote for the court that the trial court's refusal to give the requested special instructions did not violate Mr. Franklin's Eighth Amendment right to present mitigating evidence.

"We find unavailing [petitioner's argument] that the sentencing jury may not be precluded from considering 'any relevant, mitigating evidence,'" Justice White said. "Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities. And we have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

Justice O'Connor, joined by Justice Blackmun, filed a concurring opinion. Justice Stevens filed a dissent that was joined by Justices Brennan and Marshall.
Michael Marsh was convicted of first degree murder and sentenced to death under a Kansas statute that specifically required the imposition of the death penalty if mitigating circumstances did not outweigh aggravating circumstances. After Marsh's trial and sentencing, the Kansas Supreme Court held in another case that the death penalty statute was unconstitutional if applied to impose the death penalty when mitigating and aggravating circumstances were evenly balanced. Marsh then appealed his conviction and sentence, arguing that the court could not simply read into the law an exception for "tie" situations, and therefore the statute must be found unconstitutional on its face. The court reconsidered its earlier ruling and agreed with Marsh, reversing his capital murder conviction and declaring the death penalty statute unconstitutional.

**Question Presented:** Whether a state capital sentencing statute may provide for the imposition of the death penalty when the sentencing jury finds an equal balance between mitigating and aggravating evidence.

This is an appeal by the defendant, Michael L. Marsh II, from convictions of capital murder of Marry Elizabeth Pusch (M.P.), first-degree premeditated murder of Marry Ane Pusch (Marry), aggravated arson, and aggravated burglary. Marsh has been sentenced to death for the capital offense, life imprisonment with a mandatory minimum term of 40 years for the murder of Marry, 51 months for aggravated arson, and 34 months for aggravated burglary. The district court ordered the last three sentences to be served consecutively.

On appeal, Marsh raises 18 issues arising from the guilt phase of the trial and 16 issues from the penalty phase. We begin by observing that there is a heightened scrutiny of trial proceedings in a capital case. Beck v. Alabama, 447 U.S. 625, 637-38 (1980). However, because we conclude K.S.A. 21-4624(e) is unconstitutional on its face, precluding application of the death penalty, we will not apply a heightened scrutiny
standard of review to the remaining issues on appeal.

We deem the following issues to be controlling: (1) Is there substantial competent evidence to support each of Marsh's convictions? (2) Was evidence improperly excluded by the district court? (3) Is K.S.A. 21-4624(e) unconstitutional on its face? (4) Is there substantial competent evidence to support imposition of a hard 40 sentence for the premeditated murder of Marry? and, (5) Is the hard 40 sentencing scheme set forth in K.S.A. 2003 Supp. 21-4635(a) unconstitutional?

FACTS

On the evening of June 17, 1996, Marry and her 19-month-old daughter, M.P., were murdered in their Wichita home. Marry died as a result of multiple gunshot wounds to her head and a knife wound to her heart. The perpetrator or perpetrators apparently did not physically harm M.P before setting the house afire and leaving the child to die in the ensuing conflagration. M.P. sustained severe burns to her body, resulting in multiple organ failure and death on June 23, 1996.

Fire investigators determined the fire was intentionally started with an accelerant applied to Marry's body. An autopsy revealed Marry had been shot 3 times, stabbed in the heart, and her throat slashed. The county coroner concluded Marry had died as a result of her wounds, with her body set afire after death.

In the initial stages of investigation, detectives interviewed Marry's husband, Eric Pusch (Pusch), who mentioned having spent most of June 17 with a friend, Michael Marsh, before going to work at approximately 4:30 p.m. as a delivery man for a local Pizza Hut. This led the police to interview Marsh.

A series of interviews with Marsh resulted in his confession to shooting Marry and abandoning M.P. when he fled the residence. He told the detectives his motive was to obtain money from the Pusch family. According to Marsh, he planned to be in the home when Marry and M.P. arrived, tie them up, and wait until Pusch got home. He would then threaten Pusch with harm to his wife and child to obtain the money needed for a trip to Alaska. Marsh indicated his plan went awry when Marry and M.P. arrived at the house earlier than he had anticipated; he panicked and shot Marry. Initially, he told detectives he could not recall how many times he pulled the trigger; subsequently, he indicated firing the gun once. Marsh was equivocal regarding the fire. At one point he indicated he probably did set the fire; at another point he stated he could not remember; and, finally, he denied setting the fire. Marsh denied Pusch was in any way involved in committing the crimes.

* * *

The jury found Marsh guilty of capital murder of M.P., first-degree murder of Marry, aggravated arson, and aggravated burglary. At the penalty phase of the trial, the State relied upon the following statutory aggravating factors to support a death sentence: (1) Marsh knowingly or purposely killed or created a great risk of death to more than one person; (2) he committed the crime in order to avoid or prevent a lawful arrest or prosecution; and (3) he committed the crime in an especially heinous, atrocious or cruel manner. The jury found all three aggravating circumstances existed and were not outweighed by any mitigating circumstances and unanimously agreed to a sentence of death.
At sentencing, the trial judge found sufficient evidence to support the sentence of death recommended by the jury. . . .

SUFFICIENCY OF THE EVIDENCE

[The court rejected Marsh's argument that the evidence was insufficient to convict him.]

* * *

THE EXCLUSION OF MARSH'S EVIDENCE

[The lower court erred in failing to consider evidence suggesting a third party may have been responsible for the crime. Therefore, a new trial must be ordered.]

* * *

CONSTITUTIONALITY OF K.S.A. 21-4624(e)

At the penalty phase of Marsh's trial, the district court's jury instructions and verdict forms followed the language of K.S.A. 21-4624(e) by requiring a death sentence if the jury found aggravating circumstances were not outweighed by mitigating circumstances. . . .

* * *

Under the authority of this provision, Marsh's jury was directed that a tie must go to the State. In the event of equipoise, i.e., the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required.


In Kleypas, we first held that the weighing equation in K.S.A. 21-4624(e) as written was unconstitutional under the Eighth and Fourteenth Amendments. We avoided striking the statute down as unconstitutional on its face only by construing it to mean the opposite of what it said, i.e., to require aggravating circumstances to outweigh mitigating circumstances. This reasoning compelled us to vacate Kleypas' death sentence and remand the case for reconsideration of the death penalty under proper instructions on the weighing equation.

In Kleypas, after the majority determined that K.S.A. 21-4624(e) as written violated the Eighth and Fourteenth Amendments, it added:

Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise.

"The legislative intent in passing the death penalty act is obvious. K.S.A. 21-4624 provides for a death sentencing scheme by which a sentence of death is imposed for certain offenses. By simply invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist, the defendant shall be sentenced to death, the intent of the
legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the Eighth Amendment prohibition against cruel and unusual punishment. Our holding requires that this case be remanded for the jury to reconsider imposition of the death penalty."

Here, Marsh correctly notes, and the State concedes, that Kleypas requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions on the weighing equation. Marsh makes the further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of our Kleypas decision that saved the statute through judicial construction must be overruled. We agree.

After a discussion of applicable case law, the Kleypas majority succinctly summarized why K.S.A. 21-4624(e) as written did not comport with the Eighth and Fourteenth Amendments:

The legislature cannot mandate a death sentence for any category of murder. The legislature is limited to defining who is eligible, within constitutional limits, to receive the death penalty. It is for the jury, within permissible guidelines, to determine who will live and who will die. The issue is not whether the penalty of death is per se cruel and unusual punishment. Furman [v. Georgia, 408 U.S. 238] did not hold that the death penalty was cruel and unusual punishment per se under the Eighth Amendment. Here the issue, as that before the Furman court, is whether the process used to select which defendant will receive the irrevocable penalty of death “comports with the basic concept of human dignity at the core of the [Eighth] Amendment.” Gregg [v. Georgia] 428 U.S. 153, 183.

The weighting equation in K.S.A. 21-4624(e) is a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its "reasoned moral response" to the mitigating circumstances? We conclude it does not. Nor does it comport with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a 'tie goes to the defendant' when life or death is at issue. We see no way that the weighting equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments.

* * *

Since Kleypas was decided, there have been no persuasive Eighth or Fourteenth Amendment cases helpful to a resolution of the facial constitutionality questions. Although Ring v. Arizona, 536 U.S. 584 (2002), overruled Walton v. Arizona, 497 U.S. 639 (1990), which had been relied upon by the Kleypas majority, it did so only on a distinct point of law, i.e., whether a jury or a judge must make the findings required on aggravating and mitigating circumstances.

In their dissents today, Justices Davis and Nuss ... joined by Chief Justice McFarland, argue first that equipoise will be rare. We
cannot know this.

Second, they focus on cases that predate *Walton* and analyze distinct statutory language, asserting these decisions mean the Constitution guarantees capital defendants only an opportunity to have mitigating evidence considered by the jury. These cases, obviously, do not control.

Finally, our dissenting colleagues protest that we should rely on language in Justice Blackmun's *Walton* dissent to conclude that a majority of the United States Supreme Court has already implicitly decided that the equipoise provision before us is constitutional. Simply stated, that position failed to draw a majority in *Kleypas*. . . . It still fails to draw a majority for good reason. . . . [W]e feel compelled to re-emphasize that a majority of the United States Supreme Court has never squarely addressed or decided the facial constitutionality of the equipoise provision before us. This remains true, no matter how lower federal courts or other state courts have interpreted the ruling in *Walton*. . . . After full reconsideration, we reject reliance on Justice Blackmun's *Walton* dissent and continue to adhere to the *Kleypas* majority's reasoning and holding that K.S.A. 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendments.

This brings us to the next issue: whether *Kleypas* properly construed the statute to reverse the effect of equipoise under the weighing equation. As Justice Davis recently emphasized, "it is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. . . .

* * *

. . . . In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. . . . *State v. Engles*, 270 Kan. 531 (2001).

* * *

Applying these . . . canons in *Kleypas*, we held that the unconstitutional weighing equation in K.S.A. 21-4624(e) could be construed to carry out the legislature's intent to enact a constitutional death penalty statute. . . .

As articulated by the United States Supreme Court, the rule of constitutional doubt is that the Supreme Court will not strike down a statute as unconstitutional if the statute can be construed, in a manner consistent with the will of Congress, to comport with constitutional limitations. . . .

. . . . However, both the United States Supreme Court and this court have acknowledged that the power to construe away constitutional infirmity is limited. . . . "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96 (1985). The maxim cannot apply where the statute itself is unambiguous. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001).

Our formulation of the avoidance doctrine is similar to that of the federal courts. . . .
The avoidance doctrine is not an available tool of statutory construction if its application would result in rewriting an unambiguous statute. The court's function is to interpret legislation, not rewrite it. *State v. Beard, 197 Kan. 275, 278 (1966).*

... The Kleypas majority erred in substituting a weighing equation with exactly the opposite effect of the equation provided by the legislature. The holding eviscerated the legislature's clear and unambiguous intent regarding equipoise and thus overstepped the judiciary's authority to interpret legislation rather than make it. Chief Justice McFarland's dissent, which argues that the legislature apparently did not mind the interference misses the point. The appropriate, limited judicial response to the problem identified for the first time in Kleypas was to hold K.S.A. 21-4624(e) unconstitutional on its face and let the legislature take such further action as it deemed proper.

... The second holding of Kleypas—that the equipoise provision could be rescued by application of the avoidance doctrine—is not salvageable under the doctrine of stare decisis. That holding of Kleypas is overruled. Stare decisis is designed to protect well settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true in a situation like the one facing us here. Kleypas' application of the avoidance doctrine was not fully vetted. It is young and previously untested. Its rewriting of K.S.A. 21-4624(e) was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature.

Our decision today to confine the application of the avoidance doctrine to appropriate circumstances recognizes the separation of powers and the constitutional limitations of judicial review and rightfully looks to the legislature to resolve the issue of whether the statute should be rewritten to pass constitutional muster. This is the legislature's job, not ours. This decision does more in the long run to preserve separation of powers, enhance respect for judicial review, and further predictability in the law than all the indiscriminate adherence to stare decisis can ever hope to do.

HARD 40 SENTENCE SUFFICIENCY

Marsh contends there was insufficient evidence to support the district court's finding of aggravating circumstances not outweighed by mitigating circumstances. Where the sufficiency of the evidence is challenged for establishing the existence of an aggravating circumstance in a hard 40 proceeding, the standard of review to be applied is whether, after reviewing all the evidence, viewed in the light most favorable to the State, a rational factfinder could have found the existence of the aggravating circumstances by a preponderance of the evidence.

... Here, we agree with the district judge's finding that] any one of the aggravating circumstances was not outweighed by mitigating circumstances. The district court's imposition of the hard 40 sentence is upheld.
HARD 40 SENTENCE CONSTITUTIONALITY

[The court rejected Marsh's argument that the Kansas hard 40 sentencing scheme was unconstitutional.]

CONCLUSION

We conclude K.S.A. 21-4624(e) is unconstitutional on its face, thus rendering moot guilt and penalty phase issues dependent on imposition of the death penalty. We have carefully considered all of the issues of trial error raised by Marsh; we hold those not discussed in this opinion insufficient to constitute reversible error in this case.

We affirm Marsh's convictions and sentences for aggravated burglary and the premeditated murder of Marry; we reverse and remand for new trial Marsh's convictions for the capital murder of M.P. and aggravated arson.

Affirmed.

DAVIS, J., dissenting, joined by NUSS, J.:

I respectfully dissent from the majority's holding that the weighing equation in K.S.A. 21-4624(e) is unconstitutional on its face. In my opinion, K.S.A. 21-4624(e) was constitutional when it was passed by the Kansas Legislature and remains constitutional today.

In State v. Kleypas, 272 Kan. 894, 40 P.3d 139 (2001), the majority held that the . . . weighing equation was unconstitutional but attempted to salvage the death penalty by rewriting the equation language to provide that the aggravating circumstances must outweigh the mitigating circumstances before death may be imposed . . .

The majority, in this case, voids the entire death penalty law because in the extremely unlikely event that a jury would find that the aggravating circumstance or circumstances exactly equal the mitigating circumstances, death must be imposed. The majority claims that in such an unlikely event a tie must go to the defendant. According to the majority, because under the weighing equation adopted by the Kansas Legislature the tie goes to the State, the entire death penalty is unconstitutional.

. . . I agree with the majority that the Kansas Legislature consciously chose the weighing equation but strongly disagree that the language used is unconstitutional under the Eighth Amendment. I may personally disagree with the legislature's policy decision that a tie goes to the State but I cannot conclude that its enactment is unconstitutional because of that language unless the United States Constitution, as interpreted by the United States Supreme Court, supports such a conclusion. An analysis of the United States Supreme Court jurisprudence, as well as other decisions addressing this point, does not support such a conclusion and, in fact, supports the opposite conclusion.

In the extremely unlikely event that the jury does find the aggravating circumstances and the mitigating circumstances to be exactly equal, K.S.A. 21-4624(e), as written, does mandate that the sentence be death. However, a careful examination of the United States Supreme Court's death penalty jurisprudence shows that this result does not
violate the Eighth Amendment.

There is no question that the Eighth Amendment imposes several requirements with regard to capital sentencing. . . . In order for a capital sentencing scheme to pass constitutional muster, it must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983).

The Kansas Death Penalty Act narrows the class of persons eligible for the death penalty in two ways. First, it requires a conviction of capital murder for death penalty eligibility rather than simply applying the death penalty to all first-degree murders. Second, it narrows that eligibility even further through the weighing of aggravating and mitigating factors during the penalty phase. Thus, the Kansas Legislature has limited and channeled the discretion of judges and juries "so as to minimize the risk of wholly arbitrary and capricious action" in accord with Gregg v. Georgia.

Further, even though the Eighth Amendment requires that jury discretion be guided, it also requires that the sentencer be allowed to retain sufficient discretion to consider all relevant mitigating evidence, so that it can ensure that "death is the appropriate punishment in a specific case." Lockett v. Ohio, 438 U.S. 586, 601 (1978). To this end, the sentencer cannot "be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . ." [I]t must be noted that Kansas lists eight important mitigating circumstances and puts no limit on the number of such circumstances a defendant may present. The jury is instructed that it must consider and give effect to this evidence.

Once these core principles are satisfied, however, the Eighth Amendment requires no more. Rather, the Supreme Court has made it clear that within the above guidelines, states are given wide latitude to adopt the procedure through which these principles are carried out. The majority opinion says that the failure of the legislature to allow death only when aggravating circumstances outweigh mitigating circumstances is unconstitutional.

In enacting its death penalty statute, Kansas has chosen to follow the Florida system, which provides for aggravating circumstances which are then weighed against any mitigators found to exist as set forth above. See Stringer v. Black, 503 U.S. 222, 229-231 (1992). The Supreme Court held that the Florida system satisfied constitutional requirements in Proffitt v. Florida, 428 U.S. 242 (1976).


* * *

Blystone and Boyd stand . . . for the proposition that it is not unconstitutional for a weighing equation to mandate death upon certain findings, so long as the jury is allowed to consider and give effect to all relevant mitigating circumstances. They
also confirm that a weighing equation which mandates death upon the jury's finding that aggravating circumstances outweigh mitigating circumstances satisfies this standard. They did not, however, address whether other versions of the weighing equation, specifically the weighing equation used in *K.S.A. 21-4624(e)*, meet this standard. That question was left for the next "weighing equation" case, *Walton*. . . .

. . . The Arizona weighing equation in *Walton* provided that the sentencer (in that case, a judge) was to weigh the aggravating circumstances against the mitigating circumstances and impose death if there were "no mitigating circumstances sufficiently substantial to call for leniency." Although the words used are different, Arizona, then and now, has interpreted this weighing equation to mean exactly the same as the one used in *K.S.A. 21-4624(e)*: Death is the penalty unless the aggravating circumstances are outweighed by the mitigating circumstances.

Further, one of the issues in *Walton* was the same equipoise question faced in *Kleypas* and now in this case, the validity of the weighing equation under the Eighth Amendment. . . .

***

The Supreme Court of the United States addressed Walton's argument that because the Arizona statute provided that the court must impose the death penalty if one or more aggravating circumstances are found and the mitigating circumstances are insufficient to call for leniency, this created an unconstitutional presumption that death was the proper sentence. The Court rejected this contention. . . .

***

Justices Blackmun, Brennan, Marshall, and Stevens dissented from this holding, arguing that the fact that the Arizona statute required death if the aggravating and mitigating circumstances were in equipoise statute required death if the aggravating and mitigating circumstances were in equipoise statute violated the Eighth Amendment. The dissenting opinion in *Walton* is the reason the majority in this case holds *K.S.A. 21-4624(e)* unconstitutional. *Walton*, however, rejected the equipoise argument, holding just the opposite of the majority opinion in this case.

*Walton* not only reaffirmed the holdings in *Blystone* and *Boyde* that it is not a violation of the Eighth Amendment to mandate death upon certain findings, such as that the aggravating factors outweigh the mitigating factors, but also extended that rationale to a weighing equation such as that used in Arizona which mandated death unless the mitigating factors were sufficiently substantial to call for leniency, that is, unless aggravating factors were not outweighed by the mitigating circumstances.

It is clear to me that the United States Supreme Court's opinion in *Walton* answered the equipoise question. . . .

Cases decided by the United States Supreme Court since *Blystone*, *Boyde*, and *Walton* have continued with the theme established in those cases. In *Harris v. Alabama*, 513 U.S. 504, 512 (1995), the Supreme Court . . . reiterated: "We have rejected the notion that 'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.'” Similarly, in *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998), the Court stated:

In the selection phase, our cases have established that . . . the state may shape and structure the jury's consideration of mitigation so long
as it does not preclude the jury from giving effect to any relevant mitigating evidence. Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence.

But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." (Emphasis added.)

Given the United States Supreme Court's continued insistence that the Constitution does not require a specific method for balancing aggravating and mitigating circumstances, and its specific approval of Arizona's weighing equation which is identical in practice to that in K.S.A. 21-4624(e), I find it difficult to understand how the majority [concludes] that K.S.A. 21-4624(e) is unconstitutional on its face . . . .

** * *

There seems to be a general feeling among the majority that the weighing equation which mandates death in the highly unlikely event that the jury finds the aggravating and mitigating circumstances to be exactly equal in weight is somehow "unfair." While it is certainly within the province of this court to interpret the Eighth Amendment, we cannot do so in a vacuum. We cannot simply rely on our own inchoate feelings, but instead have a duty to examine, analyze, and apply the United States Supreme Court's jurisprudence on the matter. . . .

** * *

This is not to say that we should not strike down statutes which clearly infringe on the Constitution. However, when a court takes such a step it is imperative that a clearly articulated reason be given and that it be explained how that reason fits into the United States Supreme Court's jurisprudence . . . The cases examined compel the opposite conclusion from the majority's decision. ** **

I respectfully dissent from the majority opinion because I conclude that K.S.A. 21-4624(e), as passed by the Kansas Legislature in 1994, was and is today constitutional under the Eighth Amendment to the United States Constitution.

NUSS, J., dissenting:

I join Justice Davis for the reasons discussed in his dissenting opinion. I write a separate dissent primarily to elaborate upon one of his reasons: the controlling authority, over the instant case's issue of death at equipoise, of Walton v. Arizona, 497 U.S. 639 (1990).

** **

. . . The [Walton] dissenters . . . left no doubt that they believed the plurality incorrectly permitted the tie to go to the State. They ended their analysis by "concluding that the Constitution bars Arizona from placing upon a capital defendant the burden of proving that mitigating circumstances are 'sufficiently substantial to call for leniency'" a phrase that the dissenters admitted was interpreted by the Arizona Supreme Court as requiring the defendant to prove his mitigating factors outweighed his aggravating factors.

In my view, the four dissenters were correct in their interpretation of their colleagues' plurality opinion. The plurality conceivably required a capital defendant to prove more
than his or her mitigating factors "outweighed" his or her aggravating factors; rather, e.g., that they "substantially outweighed" them. Today, however, we need not try to determine the outer reaches of the plurality opinion regarding the defendant's burden of proof; rather, we need only acknowledge that death at equipoise is within [its] constitutional boundaries.

***

As Justice White concluded:

. . . So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

***

*Walton* clearly controls the issue of death at equipoise contained in the Kansas death penalty statute, *K.S.A. 21-4624*. Additionally persuasive, as Justice Davis points out in his dissent, are the interpretations of *Walton* by . . . the Arizona Supreme Court. . . .

Since *Walton*, the Arizona Supreme Court has repeatedly interpreted its death penalty statute to require the defendant to prove mitigating factors which outweigh the aggravating factors in order to avoid a sentence of death. . . .

. . . [A]fter *Walton*, Arizona has executed capital defendants under the authority of its interpretation of that statute, with 22 executions since 1992. Three of those executions occurred after the Arizona Supreme Court affirmed the defendants' death penalty sentences (post-*Walton*), and the United States Supreme Court denied their petitions for writs of certiorari. One should be leery of reading too much into those denials, but one wonders: If the Supreme Court believed that Arizona was interpreting *Walton* in a way that violated a petitioner's constitutional rights, would not the Court have granted at least one petition to stop one of those three executions?

***

. . . Marsh's argument that *K.S.A. 21-4624(e)* is facially unconstitutional because it mandates death at equipoise should be quickly dispatched by our court.

***

In conclusion, this court is bound by the United States Supreme Court's plurality holding in *Walton* until such time as that Court . . . changes its mind. And *Walton* mandates that the death at equipoise concept contained in our death penalty statute, *K.S.A. 21-4624*, is constitutional.

McFARLAND, C.J., dissenting:

I respectfully dissent. I agree with Justice Davis that the weighing equation contained in *K.S.A. 21-4624(e)* is constitutional as written. . . . *Kleypas* was a 4 to 3 decision, consisting of a majority opinion and two written dissents. None of the three opinions took the position that the Kansas death penalty law must be struck down as constitutionally impermissible. The majority opinion upheld the law with an extremely minor judicial construction relative to equipoise, with the three
dissenters upholding the law as written. In the case before us, another 4 to 3 decision, the majority concludes the death penalty is fatally flawed and rejects the majority's action in *Kleypas* which remedied the perceived equipoise flaw. There has been no change in relevant constitutional law as expressed by the United States Supreme Court. The only change has been the composition of the Kansas Supreme Court occasioned by the retirements of Justices Larson, Six, Lockett, and Abbott. While fidelity to the doctrine of stare decisis is not an "inexorable command," we should be highly skeptical of reversing an earlier decision where nothing has changed except the composition of the court. . . .

***

Whatever one's opinion on the moral validity of the death penalty, the fact remains that in 1994, the legislature, acting on behalf of the people of Kansas, passed into law an act providing for the death penalty as a possible punishment for a narrow, clearly defined group of intentional and premeditated murders. *State v. Kleypas* was the first case to consider the validity of that death penalty, and our decision was eagerly awaited by the people of Kansas as a test of whether the death penalty that the legislature had enacted would pass constitutional muster.

Through our opinion in *Kleypas*, we told the legislature, and by extension the people of Kansas, that the death penalty law it had enacted was constitutional as construed by this court. . . .

***

. . . Our decision in *Kleypas* is a mere 3 years old, and nothing this court has said in the interim has evidenced our intention to abandon its underlying principles. Similarly, there has been nothing in the jurisprudence of the United States Supreme Court during that time to show that our decision in *Kleypas* was incorrect.

Nor have "facts . . . so changed, or come to be seen so differently, as to have robbed the old rule [established by the *Kleypas* decision] of significant application or justification." *Planned Parenthood v. Casey*, 505 U.S. at 855. There has been no significant change in the factual underpinnings of our *Kleypas* decision, and no change in facts that would cause its central holding to be rendered obsolete.

The majority's decision today, by the barest of margins, discards our 3-year old decision in *Kleypas*, not because that decision has become unworkable, or the laws or facts underpinning it have changed, or a United States Supreme Court decision mandates it, but simply because this new majority has the power to do so. . . .

***

It is ironic that the majority, in its professed desire to avoid usurping the power of the legislature, does so by frustrating the legislature's clear intent to pass a constitutional death penalty. There is no indication that the legislature, in passing the Kansas death penalty law, was particularly concerned that the sentence be death in the event that the aggravating and mitigating circumstances were exactly equal. . . . By invalidating the Kansas death penalty law on the basis of its application to a technical event that is almost certain never to arise in the real world, the majority opinion thwarts the intention of the legislature, ostensibly, in order to pay tribute to it.

The only currency and legitimacy this court
possesses is the confidence of the public that we will decide cases based on the consistent application of the law, rather than on the proclivities of individual court members. Attorneys, trial courts, and the public have the right to know that a point of law, once settled, will remain the settled law of the state and not be overturned every time the composition of the court changes. Our fidelity to the doctrine of stare decisis need not be absolute, but we should not abandon our prior decisions without a compelling reason to do so. No compelling reason has been shown herein and, as a result, I believe the majority opinion is a breach of that fidelity.

...In Kleypas, in a 4 to 3 decision, all seven justices agreed the Kansas death penalty law was constitutional, either as construed in a very minor respect (majority) or as written (dissent). To now strike down the Kansas death penalty law is, in my opinion, wholly inappropriate and unjustified, and I dissent therefrom.
The somewhat confused procedural history of Kansas' death penalty law has followed it to the Supreme Court, so the Justices' agreement on Tuesday to hear an appeal by the state may not lead to a significant pronouncement on a key constitutional question. That question is whether a "tie" in a jury's death penalty findings goes to the state, or to the individual on trial. But that is not the only issue the Court will be hearing.

* * *

The Court's only order Tuesday granting review of a new case involves Kansas' capital punishment law, enacted in 1994. It specifies that, if the jury finds aggravating and mitigating circumstances to be equally balanced, a death sentence must be imposed—in other words, a "tie" goes to the state.

The Kansas Supreme Court, in a 4-3 decision in 2001 in the case of State v. Kleypas, ruled that this weighing equation would violate the Eighth Amendment ban on cruel and unusual punishment (and the Fourteenth Amendment). "Fundamental fairness," the state court said then, "requires that a tie goes to the defendant when life or death is at issue."

However, the state court at that time did not strike down the law as written. Rather, it said, the law could be construed in such a way as to uphold the intent of the legislature to have a death sentence that would satisfy the Constitution. So, it construed the law at that time to mean that aggravating circumstances must outweigh mitigating factors for a death penalty to be imposed.

When a new case, involving convicted murderer Michael Lee Marsh II of Wichita, reached the state court last year, the tribunal—in another 4-3 vote—struck down the law. Rejecting an argument by the dissenters that the Supreme Court had already implicitly decided that such an "equipoise" provision would be valid, the majority said the Court had issued no such ruling.

The majority went on to say that it had been wrong in failing to strike down the law in 2001 in order to save its constitutionality. "The avoidance doctrine is applied appropriately only when a statute is ambiguous, vague, or overbroad... The court's function is to interpret legislation, not rewrite."

Taking the case on to the Supreme Court, the state of Kansas raised a single question: "Does it violate the Constitution for a state capital-sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?"

But, in granting review, the Court added two questions of its own—and, depending upon the answers, either query could lead to a decision without the Justices resolving the "equipoise" question.

The two new issues are: "Does this Court
have jurisdiction to review the judgment of the Kansas Supreme Court under 28 USC 1257, as construed by Cox Broadcasting Corp. v. Cohn (1975)?” and “Was the Kansas Supreme Court’s judgment adequately supported by a ground independent of federal law?”

On the central constitutional question, the state’s appeal argues that the ruling “resurrects a conflict in constitutional interpretation that this Court resolved in Walton v. Arizona [1990].” It argues that the state and federal courts are divided on the issue. (The Supreme Court itself overruled Walton in 2002, but on other grounds in Ring v. Arizona.)

The new case is Kansas v. Marsh (04-1170). It will come up for argument in the new Term starting in October.

The case involves a multiple murder in 1996, during a planned robbery. Michael Marsh was convicted of capital murder, first-degree murder, aggravated arson and aggravated burglary. In the capital sentencing phase, the jury was instructed that a tie between aggravating and mitigating circumstances must lead to a death sentence. The jury agreed unanimously on that sentence.
Kansas death penalty supporters may get their day in front of the U.S. Supreme Court, but they'll first have to show they have good reason to be there. In a case tangled with legal complexities, the Supreme Court on Tuesday agreed to consider the appeal of Michael Marsh, convicted of murder. The case could also affect the fate of seven other men under death sentences at the state prison at El Dorado.

The justices, however, said they first would consider whether they even have authority to review the decision handed down late last year by the Kansas Supreme Court. That sets up a legal gauntlet of sorts that Kansas Attorney General Phill Kline has to clear before he gets to make his arguments in favor of capital punishment.

The state's highest court ruled 4-3 in December that the Kansas law is unconstitutional because it tips justice in favor of state execution and away from the rights of the individual.

That's a claim that went unchallenged by the state during its arguments in Marsh's appeal.

Kline said he understood why then-Attorney General Carla Stovall relied instead on a 2001 decision in the case of Gary Kleypas.

In that case, the court said the law was unconstitutional. But the justices ruled that District Courts could fix the problem by instructing the jury to let life outweigh death.

"The state simply said we're not going to argue that," Kline said during a news conference. "It's already been decided in Kleypas. There needs to be a re-sentencing of Mr. Marsh with that jury instruction present."

That's one view.

"In fact, they conceded that it was unconstitutional," said Rebecca Woodman, the state's chief public defender in handling capital murder appeals.

Because the state didn't make a challenge to that contention in Marsh, it could prevent the U.S. Supreme Court from taking up the death penalty arguments.

It's similar to not making an objection during trial. The issue that wasn't objected to cannot then be brought up on appeal by the losing side.

"They cannot hear it if the issue is not preserved," Woodman said.

Said Kline: "Our position is since the court raised that issue, we have the right to bring it before the (U.S.) Supreme Court at this time."

Four other people have been sentenced to death under the Kleypas guidelines. Those include Jonathan and Reginald Carr, convicted in Wichita's notorious 2001 quadruple homicide. If the Kansas Supreme Court's ruling stands, those death penalties
could be erased in favor of life in prison.

Only a jury can impose a death sentence, and crucial to those deliberations are the weighing of factors that make the murder more deserving of execution.

During the penalty phase of a capital murder trial, the state presents what it calls aggravating factors—reasons the law says qualifies the defendant for the death penalty. These include killing during a rape, killing to eliminate witnesses or killing with unusual cruelty.

The jury may also consider reasons to let a judge hand down a life prison sentence. These are called mitigating factors. They may range from age to the capacity to understand the crime. They might even include trauma suffered by the defendant at the hands of the eventual victim—such as a case of domestic violence where the battered spouse retaliates with deadly violence.

Kansas law says that when aggravating factors equal mitigating factors, jurors should choose death. But the Kansas Supreme Court ruled that a tie should go to life. Otherwise, the court said, the law violates the due process guarantees in the 14th Amendment of the U.S. Constitution and the prohibition of cruel and unusual punishment in the Eighth Amendment.

In its decision, the state's high court noted that Stovall warned lawmakers the wording skirted the Constitution before legislators passed it in 1994.

Three years after the Kleypas decision, with three new members sitting on the bench, the majority of the state's high court decided the jury instruction that Kleypas prescribed wasn't enough.

"They decided the court could not rewrite it to mean the exact opposite of what it says," Woodman said.

The nation's highest court will also consider when it can step in and look at what a state supreme court rules.

"Being able to prevail before the United States Supreme Court, when you have a lower, or a Kansas Supreme Court decision, in opposition, is a difficult chore," Kline said.

Either way, death penalty proponents must get past those questions first.

"It's one strike and you're out," said Richard Ney, a Wichita lawyer and death penalty opponent.

Ney also pointed out that it could be six months before the U.S. Supreme Court hears arguments. It could be several more months before the ruling comes.

In the meantime, the death penalty in Kansas remains on hold. Appeals will be postponed. Cases currently going through the system will be subject to the same suspect law on appeal.

Executions will be delayed for years, Ney said, while expenses of bringing the cases pile up.

"You're looking at a 10-year-old law, where you haven't had one case make it past the first appeal," Ney said. "And we haven't even gotten to the big time of appeals yet. All of these cases will end up going to the federal district courts and the appellate courts."

It could be many years before Kansas
actually sees a death sentence carried out. New Jersey, which passed its capital punishment law a dozen years before Kansas, has yet to put any convict to death.

The last execution in Kansas came by hanging in 1965.

Prosecutors in Sedgwick County, the state's most aggressive in seeking the death penalty, said they are undeterred.

"We never stop trying to ensure that the rightful sentence imposed is inflicted," said Kevin O'Connor, chief litigator for the Sedgwick County district attorney's office.

When talking about any capital murder case, O'Connor said, the accused is only part of the case.

"It's important to remember the people that they killed, who were killed in horrible ways," he said. "We will never forget those individuals."
“Kansas Justices Rule Death Penalty Unconstitutional”

Kansas City Star
December 18, 2004
Tony Rizzo and David Klepper

In a decision that could spare the lives of some of Kansas’ most infamous killers, the state Supreme Court ruled Friday that the state’s death penalty law is unconstitutional.

Convicted Johnson County serial killer John E. Robinson Sr. is one of those sentenced to death whose case is affected by the 4-3 decision in the Sedgwick County case of Michael L. Marsh II.

A total of seven men in Kansas could have their death sentences invalidated by the ruling, authorities said.

And it could prevent prosecutors from seeking death sentences in pending capital murder cases such as the recently filed case against Benjamin Appleby, who is charged in the death of Leawood, Kan., teenager Ali Kemp.

Sedgwick County District Attorney Nola Foulston and Kansas Attorney General Phill Kline both said they will ask the U.S. Supreme Court to review Friday’s decision that invalidates Kansas’ 10-year-old law. Kline said he is asking Johnson County District Attorney Paul Morrison to assist with the appeal.

"This is an enormously significant decision that, unless overturned by the United States Supreme Court, will invalidate every death sentence given in Kansas," Foulston said in a written statement.

The decision authored by Justice Donald Allegrucci makes it clear that the technical flaw in the law cited by the majority is an issue that must be addressed by the Kansas Legislature, which could re-write it "to pass constitutional muster."

"The court is just saying there is a constitutional problem with the death penalty, and the Legislature needs to fix it," said Kansas state Sen. John Vratil, a Republican and chairman of the Senate Judiciary Committee.

The offending section of the law, according to the majority, has to do with the way jurors are instructed to decide if a death sentence or life in prison is imposed.

The Kansas law as written requires jurors to vote for death if the "aggravating factors" offered by prosecutors and the "mitigating factors" offered by the defense balance each other out, the justices said.

In essence the fact that a tie goes to the state—or prosecution—renders the law unconstitutional, the court said.

The three dissenting justices disagreed, and argued that the U.S. Supreme Court has already "implicitly approved" the Kansas law by upholding an Arizona law that is "functionally identical" to the one in Kansas.

Friday’s decision involved the appeal of Michael Marsh II of Wichita, who was sentenced to die for the June 1996 deaths of Marry Ane Pusch, 21, and Marry Elizabeth Pusch, who was 19 months old.

The ruling overturned the court’s own 2001 ruling in the case of Gary Wayne Kleypas,
who was sentenced to death for the 1996 killing of Carrie Williams in Pittsburg, Kan.

That decision, again a 4-3 split, also pointed out what they called the unconstitutional nature of the way mitigating and aggravating factors are weighed by juries. But the court upheld his conviction, ordered a new sentencing hearing, and provided alternative language to instruct jurors in a constitutional way.

Foulston said prosecutors have relied on that decision ever since in pursuing capital cases.

But with Friday's decision, the court's majority determined that it was the job of the Legislature, not the court, to correct the constitutional problems.

Besides Allegrucci, the justices voting in the majority were Marla Luckert, Robert Gernon and Carol Beier. The dissenting justices were Robert Davis, Lawton Nuss and Chief Justice Kay McFarland.

The Legislature will likely discuss remedying the death penalty statute when it reconvenes Jan. 10, Vratil said.

But legislators opposed to the death penalty could block the changes.

"Drafting the fix will be relatively easy. Passing that fix may be another question," Vratil said. "In the six years I've been in the Senate, we haven't had a vote on the death penalty. I can easily imagine that there is a significant amount of legislators who oppose the death penalty."

Kansas City lawyer Sean O'Brien, a capital litigation specialist who defended Robinson in his Johnson County trial, called the court's ruling a sound legal decision that corrects an earlier decision of the court.

"They're doing what they should have done in the first place," O'Brien said.

He said Kansas is now back to "square one" and has the chance to re-evaluate whether having a death penalty is worth the tremendous cost of prosecuting such cases.

The current capital murder law in Kansas pertains to cases of premeditated first-degree murder where seven special circumstances are involved. They include murders committed during a sexual assault, kidnapping of a child, and killing of a police officer or corrections officer.

Trials are conducted in two phases. If a defendant is convicted of capital murder then the same jury is asked to consider either a sentence of death by lethal injection or life in prison.

Prosecutors present aggravating factors such as the defendant's previous convictions for violent crimes or the cruel manner in which the crime occurred. The defense presents mitigating factors such as the lack of criminal history, the age of the defendant or the presence of emotional or mental problems at the time of the crime.

Jurors must find beyond a reasonable doubt that at least one aggravating factor exists. If the aggravating factors are not outweighed by the mitigating factors, then a death sentence is called for.

That wording, taken at face value, implies that if the factors are equal in the minds of jurors, then death is still the penalty.

In its Kleypas ruling, the court suggested that if the instruction instead read that a sentence of death shall be imposed if the aggravating factors outweigh the mitigating factors, then it would be constitutional.
Former Attorney General Carla Stovall foresaw the problem in 1995 when she suggested to the Legislature that the language be adopted to prevent the problem pointed out by the Supreme Court.

The fact that the Legislature chose to word the law the way it did despite the attorney general's advice shows its intent, according to the majority decision Friday.

It's an issue that has never been directly addressed by the U.S. Supreme Court, according to the majority.

Besides Robinson, Marsh and Kleypas, the four other men affected directly by the decision are Gavin Scott, Douglas Belt and brothers Jonathan and Reginald Carr. All four of those cases were prosecuted in Sedgwick County.

Prosecutors are also concerned that pending cases such as that of Appleby and Errik Harris, charged with killing four persons in Kansas City, Kan., in Wyandotte County could be affected.

Both Morrison and Wyandotte County District Attorney-elect Jerry Gorman, said they were assessing the possibilities.

Both are concerned that even if the Legislature fixes the problem, if Friday's decision is upheld, it could preclude seeking a death sentence in either case because the prosecutors would have to rely on the law that was in place at the time the crimes occurred.

O'Brien said that the cases of Robinson and the others currently sentenced to death will now be sent back to trial courts for re-sentencing without the possibility of death. The only issue will now be if they receive life sentences with no chance of parole for 40 years or 50 years, depending on the law in place at the time of their crimes.

Kline said it will likely be five to six months before the U.S. Supreme Court announces whether it will hear the appeal. He knows the U.S. Supreme Court typically hears only a fraction of the requested appeals.

"We're very hopeful they will hear it," Kline said. "But I can't predict."

Kline said the ruling has the effect of "thwarting the administration of justice" and "wreaking emotional havoc" on the families of victims. He said he felt the ruling was based on the personal opinions of recently appointed justices, rather than law.

"Courts are supposed to act differently than Legislatures," he said, and "not base their decisions on personal prejudices or predilections."

Kline said the 2001 Kleypas ruling appeared to indicate the changes suggested by Stovall in 1995 weren't necessary. But if the Legislature had heeded Stovall's advice, Kline said, "we would not be facing this today."

Until the U.S. Supreme Court decides if it will hear the appeal, Kline said his office will continue to prosecute capital cases as it had before the ruling.

Janie Williams of Parsons, Kan., said she wasn't sure if her reaction to Friday's ruling could be printed in a family newspaper. Kleypas was convicted and sentenced to death in the murder of Williams' daughter, Carrie. The Kansas Supreme Court ordered a new sentencing hearing for Kleypas in 2001, and the Williams family has been waiting for three years for court action.

"You live in limbo," she said. "It always
seems like it's the victim's family that gets penalized."

She was unhappy not only about the decision, but about its timing, as well. "I'm not very happy that they did this just before Christmas," she said. "It affects my kids, it affects my grandkids, it affects her (Carrie's) friends. It's kind of spineless of them to do it right before Christmas."

The Kansas Coalition Against the Death Penalty released a statement applauding Friday's decision.

The group said it thought it would be a "colossal mistake" for the Legislature to "fix" the flawed statute.

"The people of Kansas can be safe without a death penalty," the group stated.
The Supreme Court's new ban on executing those who were juveniles at the time of their crimes is a logical sequel to a 2002 ruling in which the justices barred executions of the mentally retarded. The rulings are the mark of a court that wants to reserve the death penalty for the nation's worst killers and that is concerned about how the sentence has been used in some cases.

The court's trepidation comes during a new era of scrutiny for the death penalty. About a dozen inmates have been released from death rows with the help of DNA testing since 1994, and the pace of executions nationwide has slowed amid concerns that some death row inmates might be wrongly executed.

So does all this mean that the Supreme Court—which banned the death penalty in 1972, then re-instated it four years later—could be headed for another historic shift on capital punishment?

Not likely.

The nine justices on today's court repeatedly have endorsed the idea of capital punishment. Unlike in previous decades, when then-justices William Brennan and Thurgood Marshall dissented from every decision allowing capital punishment, no justice on the current court opposes the death penalty on ideological grounds.

Instead, the often-heated debate over the death penalty among the current justices has focused on who should be subject to the ultimate punishment and whether state procedures are fair.

Writing for the majority in Tuesday's 5-4 ruling, Justice Anthony Kennedy said that criminals younger than 18 cannot be treated the same as adults. "Differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," he wrote, citing juveniles' immaturity and susceptibility to peer pressure. That rationale, which removes 70 juveniles from death rows nationwide, could have ramifications for many more juvenile defendants.

"The trends in the states have been to both punish and sentence juvenile offenders more and more like adults," Northwestern University law professor Steven Drizin says. "This reminds everybody that there are significant differences."

Tuesday's case involved Christopher Simmons, who in 1993 was a 17-year-old high school junior when he orchestrated the abduction and murder of Shirley Crook. Simmons and a friend wrapped Crook's face in duct tape, bound her hands and feet with electrical wire and threw her from a bridge while she was still alive. She drowned in the waters below.

At Simmons' trial, testimony indicated that he had planned the crime and then had bragged about it afterward. He was convicted of murder and sentenced to death.

In 2003, however, Missouri's Supreme Court ruled that juvenile executions should be
considered unconstitutional. The court cited the U.S. Supreme Court's 2002 decision that found there was a new national consensus against executing the mentally retarded. The Missouri judges said a similar consensus had developed against executing juvenile offenders. They noted that 18 of the 38 states with the death penalty barred such executions and that 12 other states banned all executions.

Affirming that decision Tuesday, the Kennedy-led majority said there was a new consensus against such executions. The courts consideration of whether a punishment is "cruel and unusual" requires it to look at "evolving standards of decency" and therefore national consensus.

Another key question for the justices was whether the death penalty is "proportionate" to juvenile crimes. On that question, the majority said no. It noted the USA was virtually alone in sanctioning executions of juvenile offenders. Kennedy said that "the United States now stands alone in a world that has turned its face against the juvenile death penalty."

That echoed the argument by Washington lawyer Seth Waxman, who represented Simmons. "The death penalty has to be reserved for the worst of the worst," he said.

Missouri Attorney General Jay Nixon, who had appealed the Simmons case to the justices, said, "We respect the decision of the court. . . . There has never been any question about (Simmons') guilt . . . and this decision confirms that he will spend the rest of his life in prison."

Alabama Attorney General Troy King said that for murder victims' sake, he was "deeply disappointed" in the ruling.

He said it failed "to recognize that the removal of this deterrent from prosecutors . . . will likely lead to more tragedy, more brutality and to more victims."

One of the killers who could be indirectly affected by the ruling is Lee Boyd Malvo, who was convicted in two of the 10 sniper slayings in the Washington area in 2002 and sentenced to life in prison.

Malvo, who was 17 at the time of the crimes, could have faced the death penalty in other trials. Now, there is no reason to try him again.

Dissenting from Tuesday's decision were Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia and Clarence Thomas. They said they did not believe there was a genuine national consensus against the juvenile executions.

Scalia angrily said the court's majority had substituted its own views for a legislative consensus.
Both the result and the reasoning of the Supreme Court's decision this week in *Roper v. Simmons* were heartening to opponents of capital punishment. Not only did the court outlaw the death penalty for those who kill before they turn 18, but its analysis could easily lead to additional constitutional constraints on capital punishment.

Yet it is doubtful that the court will follow the national trend of skepticism about the death penalty any further. More likely, the case is the last exhausted gasp of a very strange jurisprudence that the court will now be happy to put to rest.

The Eighth Amendment prohibits "cruel and unusual punishments," but for much of its history the United States has allowed the death penalty. In 1958, the court ruled that "evolving standards of decency" should define what constitutes "cruel and unusual," and since then it has been forced to confront the legality of capital punishment in various types of cases. Could the death penalty be imposed for nonfatal crimes? When the defendant did not kill intentionally or at least in a manner exhibiting "extreme indifference to human life"?

In answering these kinds of questions (in both of these cases, the response was no), the court committed itself to a challenging set of tasks. First, it would examine the patterns of state laws or court decisions to determine by a rough empiricism whether the death penalty in a particular category has become cruel by virtue of being literally unusual. Of course, this approach raises the perfectly reasonable question of how the scope of the Bill of Rights, which was designed to limit the powers of legislative majorities, could depend in part on the decisions of those very majorities.

Next, the court would consult various other sources for evidence of some sort of moral consensus. In doing so, the court would refer to philosophical or moral principles or political attitudes outside the realm of law altogether—and even to international expressions of moral value. This strategy provokes the (again perfectly reasonable) complaint that unelected jurists are now acting like pollsters, assessing the public's moral values. Or, worse, they are becoming arbiters of moral value themselves.

Three years ago the court used this approach, looking at trends among the states as well as the scientific consensus on the definition and significance of retardation, to strike down executions of the mentally retarded. And this week the court reconsidered how this test applies to the question of age. In 1988, it ruled that defendants who killed before their 16th birthday could not be executed; now the age is 18.

As in earlier cases, the court looked at trends among the states and at legal, scientific and philosophical understandings about when people are mature enough to forfeit their lives for their crimes. What was notable was how candid the court was about two factors that influenced its judgment: the justices' own notions about the morality of executing young killers, and the
international condemnation of executing people for crimes committed when they were juveniles.

Justice Antonin Scalia was practically apoplectic in his exasperated dissent. "This is no way to run a legal system," he wrote, denouncing this latest round of trend-spotting as irrational and unreliable. And indeed, the change in attitudes toward age has been far less evident than the change in attitudes toward retardation.

Given Justice Scalia's analytic dexterity and rhetorical brilliance, his dissent is utterly convincing. But it is also completely beside the point. In Roper, the court exposed its somewhat intellectually embarrassing Eighth Amendment jurisprudence. But it did so in order to overcome the greater embarrassment of one last specific, egregious category of capital punishment.

Having noted that only the United States and Somalia had refused to ratify a United Nations convention barring the execution of juvenile criminals, the court's decision comes down to this: on matters of criminal punishment, the United States "now stands alone in a world that has turned its face against the juvenile death penalty." Justice Scalia scorns the court's deference to "the so-called international community" and self-appointed role as the "authoritative conscience of the nation." Yet instead of denying the charge, the court revels in it.

At any rate, there is little prospect of more tortured Eighth Amendment jurisprudence. Executing the mentally ill? The universal availability of some kind of "not guilty by reason of insanity" verdict, and the established constitutional rule that states cannot execute someone "presently insane," mean that this category need not be litigated. Executing those under 21? In Roper, the court was unusually categorical: "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."

Of course, America retains its outlier status, at least compared with most democratic nations, as a nation that allows the death penalty at all. And the court may issue some further decisions fine-tuning procedures or standards of proof for the use of the death penalty, or requiring enhanced guarantees of adequate representation for capital defendants. It would probably take a truly horrifying event, like a post-execution exoneration through DNA evidence, to sway public opinion so much against the death penalty that the court would consider declaring the practice itself unconstitutional.

For now, opponents of capital punishment can hope that state-legislated improvements in criminal procedure and technology, along with political constraints, will address their concerns about wrongful executions. That way, the court will be spared the awkwardness of returning to the cruel and unusual task of assessing America's evolving standards of decency.
The idea of putting a person to death for a murder committed at age 17 or younger strikes many of us as grotesque. So it may seem fitting that five Supreme Court justices held on March 1 that juvenile executions violate "the evolving standards of decency that mark the progress of a maturing society"—the touchstone since 1958 for determining whether punishments are unconstitutionally "cruel and unusual."

Justice Anthony Kennedy's majority opinion gives six cogent-sounding reasons for this judgment:

[1] The trend in state legislatures has been toward ending juvenile executions.

[2] Only six states have executed someone convicted as a juvenile since 1989.

[3] Juveniles are less calculating than adults and thus less likely to be deterred by fear of death.

[4] Their crimes tend to be less "morally reprehensible" and less indicative of "irretrievably depraved character" because juveniles are less mature and have a less-developed sense of moral responsibility.

[5] Emphasizing the Court's assertion three years ago that "in the end, our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment," Kennedy declares his personal view, joined by four others, that juvenile executions should be banned.

[6] "The United States now stands alone in a world that has turned its face against the juvenile death penalty," with all other nations having officially ended the practice.

A Bogus Consensus

All of this is good enough to convince me that we should end juvenile executions. So why did four justices dissent in the case, *Roper v. Simmons*? Because they were right to oppose ending juvenile executions by judicial fiat. The dissenters shred each of the majority's six arguments:

[1] A trend that 20 of the 38 death-penalty states have declined to join is far from the national "consensus"—the traditional measure of "evolving standards of decency"—that Kennedy claims. Indeed, just 16 years ago, the Court upheld the death penalty for 16- and 17-year-old murderers in *Stanford v. Kentucky*. While four more state legislatures have ended juvenile executions since then, for a total of 18, that's not even a majority of the 38, let alone a "consensus."

Kennedy pads his bogus "consensus" by adding to these 18 states the 12 others that have entirely abolished the death penalty. But none of the 12 suggested that juvenile killers should be ineligible for the maximum penalty faced by adult killers.

[2] The number of juvenile executions has held steady or even gone up since Stanford. And their infrequency reflects only the facts that most murderers are adults and that capital juries are instructed to consider youth as a mitigating factor.

[3] The defendant in this very case,
Christopher Simmons, showed how calculating a juvenile killer can be. He told friends he wanted to murder someone; planned to break into a house, tie up his victim, and throw her off a bridge; and assured accomplices that they "could get away with it" because they were juveniles—a prediction now partially validated by the Court. On entering his victim's bedroom and recognizing her, Simmons bound and gagged her with duct tape, took her to a bridge, tied her hands and feet with electrical wire, and threw her into the Meramec River.

[4] As further evidence of his moral depravity, Simmons bragged to friends that he had killed "because the bitch seen my face." His lawyer, stressing that under state law Simmons was too young to drink, serve on a jury, or see certain movies, argued that he did not deserve death. The jury disagreed.

Some of the mental health experts who successfully urged the Court to find that juveniles lack the moral reasoning ability to be held responsible for murder have made inconsistent arguments in past cases. When the issue was whether minors should have access to abortion without parental involvement, the American Psychological Association asserted that girls as young as 14 "develop abilities similar to adults in reasoning about moral dilemmas."

[5] It is presumptuous and anti-democratic for five life-tenured lawyers to appoint themselves the nation's moral conscience and to look inward—rather than to elected representatives, voters, juries, or the Constitution itself—to discern the nation's "evolving standards of decency."

Especially when the justices' own moral consciences are so malleable. The same Kennedy who authored Simmons had joined Justice Antonin Scalia's 1989 ruling that nothing in the Constitution forbids juvenile executions. As Scalia stresses, Kennedy's explanation for this reversal is "not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution has changed." This brand of "interpretation" mocks Alexander Hamilton's injunction in The Federalist No. 78 that the judiciary should be "bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."

[6] One key to understanding the Court's reliance on international and foreign law, laid out in amicus briefs by the European Union and several countries, may be the justices' summer sojourns to glittering international conferences. They may be embarrassed by their foreign friends' concern that America seems so indifferent to world opinion—so barbaric, even.

I might be embarrassed too. But should the meaning of our Constitution be determined—and should democratic governance be set aside—by what Scalia calls "the subjective views of five members of this Court and like-minded foreigners"?

And if international standards are to be our guide, what of the facts that—by decree of the Supreme Court—the United States alone broadly bars prosecutors from using illegally seized evidence; is one of only six countries to allow abortion on demand until the fetus is viable; and is quite exceptional in requiring strict separation of church and state?

What of the fact that the United Nations Convention on the Rights of the Child, which the Court cites approvingly for its ban on executing juveniles, also bans sentencing
them to life without parole—a penalty that the states authorize and that Kennedy cited with approval? By the way, the United States has refused to ratify that convention.

Public Support

The subjectivity of the justices' "independent judgment" is also underscored by Kennedy's side debate with Justice Sandra Day O'Connor's separate dissent. She agrees with the majority's interpretative method, its internationalist bent, and its 2002 precedent in *Atkins v. Virginia* [which she joined] banning execution of mentally retarded murderers.

But 16- and 17-year-old murderers should not enjoy the same constitutional protection, O'Connor asserts in *Simmons*, while suggesting that she would welcome a statutory ban. Why? Because there is "continuing public support" for juvenile executions and because "at least some 17-year-olds" may deserve death. Yet Kennedy stresses that the impropriety of the juvenile death penalty "gained wide recognition earlier than the impropriety of executing the mentally retarded."

Scalia's "purely originalist approach" [as he describes it] has its own problems. Scalia would uphold any punishment deemed constitutional at the time of the Framers, leaving it to elected officials to discern "evolving standards of decency." That would make the Eighth Amendment a dead letter. When it was adopted, children as young as 7 could be executed, among other punishments now universally deemed barbaric.

So the Court must draw a line somewhere to designate how young is too young for the death penalty. In 1988, it drew a more defensible line in *Thompson v. Oklahoma*, holding that killers 15 years old and younger should not be executed.

But in its impatience with 20 states' current unwillingness to draw their own legal lines where it [or I] would like, the current Court majority has assumed the power to act essentially as a continuing constitutional convention.

"It seems inevitable," editorialized the New York Times, "that, one day, Americans will look back on this latest narrowing of the categories of people eligible for execution as another intermediate step toward the Court's entire rejection of the death penalty."

Oh, good. I don't like the death penalty, either. And if the voters in the 38 death penalty states remain too benighted to do the right thing themselves, what standing do they have to second-guess the "evolving standards of decency" decreed by five moral guardians and the world's greatest newspaper?
WASHINGTON—In 1992, before delivering the Supreme Court’s ruling in an abortion case, Justice Anthony Kennedy, who has a penchant for self-dramatization, stood with a journalist observing rival groups of demonstrators and mused: "Sometimes you don't know if you're Caesar about to cross the Rubicon or Captain Queeg cutting your own tow line."

Or perhaps you are a would-be legislator, a dilettante sociologist and freelance moralist, disguised as a judge.

Last Tuesday, Kennedy played those three roles when, in yet another 5-4 decision, the court declared it unconstitutional to execute people who murder when under 18. Such executions, it said, violate the Eighth Amendment proscription of "cruel and unusual" punishments because . . . well, Kennedy's opinion, in which justices Stephen Breyer, Ruth Bader Ginsburg, David Souter and John Paul Stevens joined, is a tossed salad of reasons why those five think the court had a duty to do what state legislatures have the rightful power and, arguably, the moral responsibility to do.

Although the court rendered an opposite decision just 16 years ago, Kennedy says the nation's "evolving standards of decency" now rank such executions as cruel and unusual. One proof of this, he says, is: Of the 38 states that have capital punishment, 18 bar executions of those who murder before age 18, five more than in 1989. So he constructs a "national consensus" against capital punishment of juvenile offenders by adding a minority of the states with capital punishment to the 12 states that have decided "that the death penalty is inappropriate for all offenders."

But "inappropriate" is not a synonym for "unconstitutional." Kennedy simply assumes that those 12 states must consider all capital punishment unconstitutional, not just wrong or ineffective or more trouble than it is worth—three descriptions that are not synonymous with "unconstitutional."

While discussing America's "evolving standards of decency," Kennedy announces: "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty."

Why is that proper when construing the U.S. Constitution? He is remarkably unclear about that. He says two international conventions forbid executions of people who committed their crimes as juveniles. That, he thinks, somehow illuminates the meaning of the Eighth Amendment.

Kennedy, self-appointed discerner of the national consensus on penology, evidently considers it unimportant that the United States attached to one of the conventions language reserving the right "to impose capital punishment . . . for crimes committed by persons below eighteen years of age." The United States never ratified the other convention Kennedy cites. In his extra-judicial capacity as roving moralist, Kennedy sniffily disapproves of that nonratification as evidence that America is committing the cardinal sin of being out of step with "the world community."
Kennedy the sociologist says "any parent knows" and "scientific and sociological studies" show that people under 18 show a "lack of maturity" and an "underdeveloped sense of responsibility" and susceptibility to "negative influences" and a weak aptitude for "cost-benefit analysis." All this means, he says, that young offenders "cannot with reliability be classified among the worst offenders." Well. Is it gauche to interrupt Kennedy's seminar on adolescence with some perhaps pertinent details?

The 17-year-old in the case the court was considering bragged about planning to do what he then did: He broke into a woman's home, put duct tape over her eyes and mouth, wrapped her head in a towel, bound her limbs with electrical wire, then threw her off a railroad trestle into a river where, helpless, she drowned.

Justice Scalia, joined in dissent by Justices William Rehnquist and Clarence Thomas (Justice Sandra Day O'Connor dissented separately), deplores "the new reality that, to the extent that our Eighth Amendment decisions constitute something more than a show of hands on the current Justices' current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time (with the time frames now shortened to a mere 15 years)."

Kennedy occupies the seat that 52 Senate Democrats prevented Robert Bork from filling in 1987. That episode accelerated the descent into the scorched-earth partisanship that was raging in the Senate Judiciary Committee at the very moment Tuesday morning that Kennedy was presenting the court majority's policy preference as a constitutional imperative. The committee's Democrats were browbeating another appellate court nominee, foreshadowing another filibuster.

The Democrats' standard complaint is that nominees are out of the jurisprudential "mainstream." If Kennedy represents the mainstream, it is time to change the shape of the river. His opinion is an intellectual train wreck, but useful as a timely warning about what happens when judicial offices are filled with injudicious people.
In banning capital punishment for juvenile offenders last week, the Supreme Court once again demonstrated its pivotal role in domestic and, indeed, world affairs.

The 5 to 4 ruling swept aside laws in 20 states that permitted juries to sentence 16- or 17-year-old murderers to death, thus ending the United States' status as the last country on Earth that sanctioned the execution of those who commit crimes when they are younger than 18.

And, to a large extent, this result was due to a remarkable evolution by a single justice: Anthony M. Kennedy.

It is sometimes said that justices "grow in office," producing opinions and casting votes on the court that confound the expectations of those who appointed them. Kennedy, 68, a 1988 appointee of President Ronald Reagan, has shown his unpredictability in the past. He changed his mind in the middle of a crucial 1992 case, casting a fifth vote to uphold Roe v. Wade; he disappointed conservatives again with a landmark pro-gay-rights opinion in 2003.

Liberals gnashed their teeth when Kennedy flirted with permitting the Florida recount to continue in 2000—before casting a fifth vote to shut it down and propel George W. Bush into the White House.

But it is not often that a member of the court reconsiders his past views on a major issue as thoroughly as Kennedy did last week, when he supplied the court's four-justice liberal bloc the fifth vote it needed to abolish

the death penalty for juveniles.

In 1989, during his first full term, Kennedy voted with a five-justice majority to uphold the death penalty for juvenile offenders. In that case, *Stanford v. Kentucky*, he joined an opinion by fellow Reagan appointee Antonin Scalia.

Reaching the opposite result in last week's case, *Roper v. Simmons*, Kennedy, writing for the majority, argued that times have changed. The number of states that either have no capital punishment or do not allow it for offenders under 18 had reached 30—evidence, Kennedy wrote, of "a national consensus" against the juvenile death penalty that had emerged since Stanford.

But his opinion also repudiated the legal reasoning he embraced in Scalia's opinion 16 years ago.

For example, the 1989 opinion calculated "national consensus" differently, excluding non-death-penalty states from the count; last week, Kennedy wrote that Stanford was wrong about that.

In 1989, Scalia, with Kennedy's support, wrote there was "no relevance" to laws that set 18 or more as the legal age for adult activities such as drinking and voting—and that it was "absurd" to consider them.

Last week, Kennedy appended to his opinion a list of state laws setting the age for voting, jury service or marriage without parental consent at 18 or above. "The age of 18 is the point where society draws the line
for many purposes between childhood and adulthood," Kennedy wrote. "It is, we conclude, the age at which the line for death eligibility ought to rest."

In 1989, Kennedy agreed with Scalia in brushing aside scientific studies on the relative immaturity of adolescents. Such data could not prove capital punishment fails to deter all 16- and 17-year-olds, or that juveniles are inherently less morally blameworthy than adults; judgments about deterrence and blameworthiness should be left up to legislatures and juries, the Scalia-Kennedy opinion said.

Last week, though, Kennedy cited "scientific and sociological studies" for the proposition that "it would be misguided to equate the failings of a minor with those of an adult." The weighing of such factors could not be left up to juries, Kennedy wrote, because there is "an unacceptable likelihood" that jurors would be "overpower[ed]" by the brutal details of some teenage crimes.

Kennedy had joined Scalia in 1989 in "emphatically rejecting" the suggestion that the court could apply its "own informed judgment" to the question of whether death is too harsh a punishment for any juvenile crime. Last week, he wrote that that part of Stanford had been "inconsistent with prior . . . decisions."

And, although he had joined Scalia in 1989 in "rejecting the contention . . . that the sentencing practices of other countries are relevant," this time Kennedy wrote that "it is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty."

Not surprisingly, Scalia's dissent in Roper last week took aim at Kennedy, albeit without attacking him by name.

"The votes in today's case demonstrate that the offending of selected lawyers' moral sentiments is not a predictable basis for law—much less a democratic one," he noted.

Invoking the motto that adorns the court's main entrance, Scalia, 68, added: "What kind of Equal Justice under Law is it that—without so much as a 'Sorry about that'—gives as the basis for sparing one person from execution arguments explicitly rejected in refusing to spare another?"

But Justice John Paul Stevens, the only member of the court's current liberal bloc who was on the bench in 1989, and who has now lived to see his dissent in Stanford become the law of the land, fired back in defense of Kennedy.

Stevens, 84, wrote that if Scalia's view of the Bill of Rights—that its meaning was fixed by the common-law standards of 1791—were to prevail, there would be nothing unconstitutional about the execution of a 7-year-old child.

"[T]hat our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text," Stevens wrote.
Leeander Blake invoked his *Miranda* right to counsel while in police custody after having been arrested for murder. A police officer gave Blake a list of charges against him, which wrongly indicated that Blake would face the death penalty. The officer then stated that Blake probably wanted to talk, after which Blake waived his right to counsel and made several incriminating statements. The trial court suppressed those statements, holding that the officer’s actions were the functional equivalent of interrogation and a violation of Blake’s *Miranda* rights. On appeal, the Maryland Court of Special Appeals agreed with the state’s claim that the officer was merely commenting on the seriousness of the charges. The Maryland Court of Appeals then reversed, reinstating the trial court’s ruling suppressing the statements. The officer’s remark was directed at Blake, was likely to elicit a response, and therefore amounted to an illegal interrogation.

**Question Presented:** Whether comments regarding talking to the police made to a defendant in police custody who had previously invoked his *Miranda* right to counsel constitute an illegal interrogation, even if the defendant later waived his right to counsel.

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This case is an interlocutory appeal filed by the State from an Order in the Circuit Court for Anne Arundel County granting Leeander Jerome Blake's motion to suppress his incriminating statements on the grounds that the police elicited his statements in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981). The Court of Special Appeals disagreed with the Circuit Court, and in an unreported opinion, reversed. This Court granted Blake's petition for writ of certiorari to consider the single question of whether the police actions in question constituted the functional equivalent of interrogation following petitioner's invocation of his *Miranda* rights, thereby violating petitioner's right against compelled self-incrimination. We shall hold that the police actions constituted the functional equivalent of interrogation, thereby violating petitioner's rights, and, under the circumstances presented herein, the trial court properly suppressed petitioner's statements.
I.

Petitioner was indicted by the Grand Jury for Anne Arundel County for the offenses of first degree murder, second degree murder, and manslaughter. Straughan Lee Griffin, a resident of Annapolis, was shot and killed in front of his home on September 19, 2002. His assailants shot him in the head, stole his automobile, and ran over his body as they fled from the scene.

Petitioner filed an omnibus pre-trial motion to suppress all evidence seized by the State. We focus here on his motion to suppress his incriminating statements.

On October 25, 2002, Terrence Tolbert was arrested in connection with the murder of Straughan Lee Griffin. Tolbert implicated petitioner in the crime. Between 4:30 and 5:00 a.m. on the following day, the Anne Arundel County police arrested petitioner at his home. Petitioner was wearing boxer shorts and a tank top and no shoes. He was handcuffed and transported by uniformed officers to the Annapolis Police Department.

The police took petitioner to a room identified as an "intake room" or "booking room." Detective William Johns, the lead detective, advised petitioner of his rights pursuant to Miranda v. Arizona. Petitioner invoked his right to counsel, indicating he did not wish to speak with the police officers without an attorney, and after signing the police advice of rights form, he then was placed in a holding cell at approximately 5:25 a.m.

At 6:00 a.m., Detective Johns, accompanied by uniformed Officer Curtis Reese, went to petitioner's cell and gave him a copy of the arrest warrant and statement of charges. Detective Johns explained the charges to petitioner and told him that they were serious charges, and that he needed to read the document carefully and make sure he understood it.

The statement . . . was a District Court of Maryland computer print-out listing the charges. The statement of charges indicated that petitioner was charged with first degree murder, second degree murder, armed robbery, armed carjacking, and use of a handgun in a crime of violence. The penalty stated on the document for the offense of first degree murder was, in all capital letters, "DEATH." Petitioner's date of birth, reflected on the statement of charges, was June 1, 1985; he was seventeen years of age. As a person under the age of eighteen years at the time of the offense, petitioner was not eligible for the death penalty.

Detective Johns testified that after he handed petitioner the charging document and turned to leave, Officer Reese, apparently having followed Detective Johns to the cell block area, appeared and said, in a tone Detective Johns characterized as loud and confrontational, "I bet you want to talk now, huh!" Detective Johns said that he was surprised by Officer Reese's statement, that it was unexpected, and that Detective Johns said, very loudly within petitioner's hearing, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Detective Johns testified that he was concerned that "Officer Reese's outburst would violate Mr. Blake's request for counsel prior to being questioned" and, as a result, he told Officer Reese that petitioner had asked for an attorney and they could not reinitiate any kind of conversation with him.

Petitioner remained in the cell block, wearing only his boxer shorts and t-shirt. Approximately one-half hour after the earlier contact, Detective Johns went back to
petitioner's cell to give petitioner his clothing. . . . Petitioner then said, "I can still talk to you?" Detective Johns responded: "Are you saying that you want to talk to me now?" Petitioner responded "yes." Detective Johns left the cell area and returned after a few minutes. He told petitioner that he would have to read him his rights again and that he would be back in a few minutes. Petitioner then was taken back to the intake room, was re-advised of his *Miranda* rights, which he waived, and agreed to provide a statement in the absence of an attorney.

Petitioner made certain incriminating statements to Detective Johns as he explained his involvement in the events of September 19, 2002 . . .

Petitioner testified at the hearing on the motion to suppress. He testified that . . . the detective initiated the conversation again, stating: "Mr. Blake, do you wish to still talk to me?" In response, petitioner said, "May I still talk to you?" The detective allegedly responded, "Yes." Petitioner denied first asking Detective Johns if he could talk to him.

In response to a question asking petitioner what caused him to speak to Detective Johns after he had invoked his *Miranda* rights, petitioner stated:

"First, it was what Officer Reese said to me, 'I bet you want to talk now, huh!' I was scared, cold. Never went through nothing like this. And I saw my charges and I saw I was facing death."

The Circuit Court granted petitioner's motion to suppress his statements. Judge Pamela North [noted] that petitioner had invoked his right to counsel and that pursuant to *Miranda*, no further interrogation could ensue. Judge North found the following:

I believe the State's argument misses the mark when it focuses on what Johns intended or did not intend. Reese is also a police officer. He constitutes State action. And he clearly intended that the Defendant make a statement.

* * *

So the question is how do we know what Reese intended. Well, let's analyze the remark he made. Defendant is handed a statement of charges indicating to him, a seventeen-year-old, indicating to him for the first time that he is being charged with murder and he can get the death penalty.

Reese's statement was, 'I bet you want to talk now, huh!' This is not a vague appeal to Defendant's conscience like the remarks were in *Brewer versus Williams*. First, the statement itself suggests he should want to talk. And the word, 'now,' that is, 'I bet you want to talk now' clearly refers Defendant to what has just been handed to him. In other words, look at those charges, look at that penalty, and I'll bet you will want to talk.

* * *
It is a statement made specifically for the purpose of getting Mr. Blake to talk. In fact, Mr. Blake's question is in direct response to Reese's previous statement. The police left the cellblock area immediately after Reese made that statement.

Is there any possible interpretation of that statement that it is, as the State has urged the Court to find, simply an innocent offhanded comment not meant or expected to elicit an incriminating response? I don't think so. Examples of innocent offhanded comments not likely to elicit an incriminating response would be, quote, 'Here are some clothing for you.' Or, 'Please move away from the door so I can unlock it.' Or, 'Do you need a drink of water?'

* * *

There was no lengthy period of time as we see in some cases to break the chain of events and to prove attenuation. In any event, viewing the evidence under the totality of the circumstances, the Defendant did invoke his right to counsel.

He was thereafter interrogated by police in violation of Miranda and Edwards. The State must prove his subsequent . . . waiver was not the result of the previous coercive unlawful police conduct. And they have not met that heavy burden."

The trial court . . . granted Blake's motion to suppress as to any and all statements he made at the Annapolis police department and at the Maryland State Police Barracks.

The State noted a timely appeal to the Court of Special Appeals. A divided intermediate appellate court, in an unreported opinion, reversed the judgment. We granted petitioner's writ of certiorari to answer the following question: "Did the police actions in question constitute the functional equivalent of interrogation?"

II.

There is no dispute in this case that petitioner was in custody and had invoked his right to counsel. The first question is whether the statement of Officer Reese constituted "police-initiated custodial interrogation" in contravention of Edwards v. Arizona, 451 U.S. 477 (1981).

Petitioner argues that Officer Reese's
comment, made in conjunction with Detective Johns's passing to petitioner a copy of the statement of charges which incorrectly informed him he was facing the death penalty, was the functional equivalent of interrogation. He maintains that the comment was made specifically for the purpose of getting petitioner to talk and the officer knew or should have known that, under the circumstances, the comment was likely to elicit an incriminating response. Petitioner argues that his subsequent statements were suppressed properly because they were a product of the unlawful police-initiated interrogation which violated Edwards.

The State's argument is that Officer Reese's remark to petitioner was not interrogation—that petitioner initiated contact with the police after he read the charging documents and then voluntarily waived his Miranda rights before making incriminating statements. The State contends that Officer Reese's remark was not the functional equivalent of interrogation—that it was nothing more than a comment on the seriousness of the charges and, in a sense, a rhetorical question. Even if Officer Reese's remark is viewed as interrogatory or as an invitation to talk, the State maintains that Detective Johns removed any alleged taint from the remark when he admonished Officer Reese immediately that they could not talk to petitioner because he had invoked his right to counsel.

III.

***

Miranda v. Arizona, 384 U.S. 436 (1966), dictates that when a suspect is taken into custody, the person is entitled to certain procedural safeguards before law enforcement officers may interrogate that person. Those rights include the right to consult with an attorney. Once a suspect asks to speak with an attorney, that person may not be interrogated further until either counsel has been made available or until the suspect validly waives the earlier request for an attorney. . . . Under the rule developed in Edwards, "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." The Supreme Court held that once a suspect has invoked his right to counsel, the police may not make a subsequent attempt to elicit a waiver and then a statement by re-advising him of his Miranda rights. A constitutionally valid statement may be obtained by the police in two ways: if the suspect initiates further conversation with the police or if an attorney has been made available to the suspect. Smith v. Illinois, 469 U.S. 91, 94-95 (1984). Following a suspect's request for counsel, a valid waiver of that right cannot be established by showing only that the accused responded to further police-initiated interrogation. The burden is on the State to prove that, after invoking his or her right to counsel, the accused responded to further police-initiated discussion with the police. If we find that petitioner did not initiate further discussions with the police, following Edwards, we do not consider whether he subsequently waived his right to counsel.

Interrogation means more than direct, explicit questioning and includes the functional equivalent of interrogation. The Supreme Court, in Rhode Island v. Innis, 446 U.S. 291 (1980), set out the test for establishing when a suspect, who is in custody and has invoked the right to counsel but does not yet have the assistance of
"The Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Although the test of whether the police should know their words or actions are reasonably likely to elicit an incriminating response is an objective one, the intent of the police is not irrelevant. If a police officer acts with a purpose of getting a suspect to talk, it follows that the officer has reason to know that his or her conduct was reasonably likely to elicit an incriminating response. We focus on the defendant's perspective rather than on the police officer's intent. Arizona v. Mauro, 481 U.S. 520, 528 (1987).

"Interrogation," as used in Miranda, has been further explicated in Innis, as follows:

. . . [T]he Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response."

The State maintains that petitioner's rights under Miranda and Edwards were not violated because the police were presenting petitioner merely with the charging document, a duty they were mandated to perform under Maryland law. The State characterizes Officer Reese's comment as nothing more than a comment on the seriousness of the charges and as a rhetorical question, concluding that his comment does not constitute interrogation. The answer to this argument depends upon the answer to the question as to whether, under Innis, the police officers engaged in activities which they should have known were reasonably likely to elicit an incriminating response. No one disputes here that once petitioner invoked his Miranda rights, there was no express questioning.

The Circuit Court found that the comment of Officer Reese amounted to the functional equivalent of interrogation. We agree.

Petitioner clearly and unequivocally invoked his right to counsel under Miranda. Thereafter, within a very short period of time, Detective Johns gave petitioner the charging document listing the penalty to which petitioner was subjected as "DEATH." Officer Reese initiated
communication with petitioner when he said to him, "I bet you want to talk now, huh!" Whether the remark made by Officer Reese was the functional equivalent of interrogation depends in part on whether the officer's comment was directed towards petitioner and was reasonably likely to elicit a response.

It is undisputed that Officer Reese's comment was directed towards petitioner. The remaining question is whether the comment was reasonably likely to elicit a response. Officer Reese made his comment to petitioner when Detective Johns gave petitioner the charging document advising him that he was subject to the death penalty; any reasonable officer had to know that his comment was reasonably likely to elicit an incriminating response. When the charging document was given to petitioner, containing a false statement of the law with respect to the penalty of death, it was accompanied by an officer's statement which served no legitimate purpose other than to encourage petitioner to speak. Detective Johns's reaction supports this conclusion.

* * *

Merely presenting an accused with a charging document, without more, is not the functional equivalent of interrogation. . . . In Maryland, when a defendant is arrested without a warrant, a copy of the charging document must be served on the defendant promptly after it is filed. In the instant case, the officers' conduct does not fall into the category of fulfilling a legal duty and merely serving a charging document upon a defendant. Instead, we have an interrogatory type statement by an officer concomitant with the serving of a document containing the most egregious misstatement as to the penalty for the offense.

The State argues that even if Officer Reese's statement was interrogation, the detective told petitioner that they could not talk to him, and it was petitioner who reinitiated interrogation, and then knowingly and intelligently waived his Miranda rights. The State maintains that if the suspect reinitiates contact with the police, and then waives his rights, police questioning may then commence.

Relying on Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983), the State argues that petitioner's question, "Can I still talk to you?" is strong evidence that petitioner initiated the further contact with the police.

The law is clear that a suspect may validly waive Miranda rights, but once the right to counsel has been invoked, additional safeguards are necessary.

In Bradshaw, the Court found that the accused in fact initiated the conversation and that there was no violation of the Edwards rule. In assessing whether the accused initiated the interrogation, the Court observed that the accused's question, "Well, what is going to happen to me now?", although ambiguous, was, "in the ordinary dictionary sense of that word," initiation. Nonetheless, the Court stated:

"While we doubt that it would be desirable to build a superstructure of legal refinements around the word 'initiate' in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue. There are some inquiries, such
as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.

Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation. That the police officer so understood it is apparent from the fact that he immediately reminded the accused that 'you do not have to talk to me,' and only after the accused told him that he 'understood' did they have a generalized conversation. On these facts we believe that there was not a violation of the Edwards rule.

One court concluded that "initiation" by a defendant "occurs when the defendant evinces 'a willingness and a desire for a generalized discussion about the investigation.'" (quoting Bradshaw).

In finding that petitioner's question was "in direct response to" Officer Reese's coercive statement, Judge North found that the police reinitiated the contact. The court also found that petitioner "initiated a conversation with [Detective Johns after he [was] interrogated without counsel twenty-eight minutes earlier. . . ."

We agree with Judge North that petitioner did not initiate further contact with the police and that the police violated the Edwards rule. Although petitioner's question to Detective Johns, "I can still talk to you?" might be considered an "initiation" of contact with the officers in the "dictionary sense" of the word as used in Bradshaw, it could hardly be said that, under the circumstances, petitioner initiated the contact as that term is contemplated in the legal sense. Petitioner had requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected. There was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation.

We reject the State's argument that, even if Officer Reese interrogated petitioner in violation of Miranda and Edwards, Detective Johns somehow cured the violation by declaring in a loud voice: "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now. . . ." The break in time from Officer Reese's improper interrogation to petitioner's inquiry was very short, indicating that the latter was a continuation of the former.

The record supports the Circuit Court's finding that petitioner's question was in direct response to Officer Reese's unlawful
interrogation and was the product of impermissive interrogation. Under these circumstances, we conclude that petitioner did not "initiate" conversation with the police.

***

We hold that all statements made by petitioner after he invoked his Miranda rights are inadmissible and the motion to suppress the statements was properly granted.

Reversed.
DEATH PENALTY, the charge read.

"I bet you want to talk now, huh?" an officer told the cold, tired 17-year-old accused of a brutal carjacking and murder in downtown Annapolis.

A half-hour later, the defendant did, telling police he was there but wasn't the gunman.

More than two years later, some legal experts believe that the case of Leeander Jerome Blake may give the U.S. Supreme Court a chance to reexamine the decision that has governed police interrogations for more than two decades: Edwards v. Arizona.

A descendant of the landmark 1966 Miranda decision that forced officers to read suspects their rights, the court's 1981 ruling in Edwards went further, dictating that once a defendant invokes those rights and asks for an attorney, all interrogation must stop until an attorney is present.

Defendants who change their mind must do so voluntarily and must initiate the conversation with police.

The high court agreed Monday to hear the Blake case to consider whether the Maryland Court of Appeals was correct last year when it threw out Blake's statement to police and ordered him freed.

The question before the court: When police officers violate Edwards, can they take corrective action to ensure that the defendant's constitutional rights remain intact?

"If the court is very lenient in treating this, it could create a significant hole in the protection Miranda provides," said Georgetown University law professor David Cole. "If they were to too broadly construe the concept of suspects' initiating conversations, it could create an end run around Miranda rights."

Law enforcement officials said a court ruling could provide needed guidance on Miranda and Edwards rules and help them preserve a case even after committing what they consider minor violations of defendants' rights.

"I think it would be a signal from the Supreme Court that there has to be some common sense in reviewing cases like this, that minor errors should not always result in the suppression of evidence," said Bill Johnson, executive director of the National Association of Police Organizations. "Especially when steps are taken to correct the error."

Blake and co-defendant Terrence Tolbert were charged in the Sept. 19, 2002, carjacking and killing of Straughan Lee Griffin outside his home in the historic district of Annapolis.

The crime shocked the city's residents. There hadn't been a murder in the brick-lined historic district since the 1960s.
Tolbert was arrested Oct. 25, 2002. Police roused Blake from his residence at an Annapolis public housing complex at 5 a.m. the following day. Still in his underwear, he was taken to the Annapolis Police Department and read his Miranda rights. Blake said he didn't want to speak without an attorney and was placed in a holding cell.

Nearly a half-hour later, a detective and an officer gave Blake a statement of the charges and told him to read the document carefully. The charges stated, in large print and in capital letters, that he faced the death penalty. This was not true. Juveniles in Maryland are not subject to the death penalty.

"I bet you want to talk now, huh?" Officer Curtis Reese said, according to court records.

"No, he doesn't want to talk to us," Detective William Johns said, upset and shoving Reese out of the room. "He already asked for a lawyer. We cannot talk to him now."

After about another half-hour, Johns returned to the cell, this time with clothes for Blake.

"I can still talk to you?" Blake asked.

Johns asked Blake whether he wanted to talk. Blake said yes.

The suspect was read his Miranda rights again and gave a statement that he was at the scene of the crime but that Tolbert did the killing and driving. Tolbert was convicted and sentenced to life in prison.

But Blake went free after the Maryland Court of Appeals held that there had been a violation of Edwards.

Prosecutors won a victory Monday when the Supreme Court agreed to hear the matter. State Attorney General J. Joseph Curran Jr., who took the case to the high court, argued that even if Blake's rights were violated, the detective took proper actions to correct any influence the violation might have had on Blake. Moreover, Blake had nearly a half-hour to think about the charges and decide whether to give a statement, Curran said.

"The limited issue is whether there can be a curative action. Even assuming there was improper interrogation, can that be corrected?" Curran said.

Blake's attorney, Kenneth Ravenell, said his client's statement was not given voluntarily.

"Our position is what caused the defendant to choose to speak to the police was an illegal police interrogation," he said.

The high court has never ruled whether Edwards allows for "curative measures," Curran said. Lower courts have issued conflicting opinions.

Some law experts believe the case could provide the high court a chance to scale back Edwards and Miranda protections. Chief Justice William H. Rehnquist and Justice Antonin Scalia in particular are longtime critics of the opinions.

"If you don't like Edwards and you want to reverse it, then maybe this is the case you do it with," said Mark Graber, a constitutional law professor at the University of Maryland.
Friends of Annapolis carjacking and murder victim Straughan Lee Griffin yesterday struggled to come to terms with a court ruling that forces prosecutors to dismiss charges against one of two suspects in a crime that stunned the city's Historic District.

A year and a half after police charged Leeander Blake, 18, and Terrence Tolbert, 21, with murder for allegedly shooting Mr. Griffin in the head outside his Historic District home, there still hasn't been a trial. Yesterday's ruling by the Court of Appeals means Mr. Blake can never be brought to trial, even if new evidence implicating him surfaces.

"It's difficult to point fingers because all along the way things have gone the way we didn't want to see them (go)," said Laura Townsend, a friend of Mr. Griffin. "It seems like the scales of justice weigh too heavily on the side of the defendant."

Greg Gerner, Mr. Griffin's business partner at Performance A/V, which coordinates visual effects for concerts and conventions, said the court's ruling in Mr. Blake's case has shaken his faith in the justice system.

"I'm more than a little upset at the handling of the case—that it would allow one of the two to basically walk away," he said. "For all his family and friends to not have a sense of justice, it really leaves you feeling empty."

Linda Griffin, Mr. Griffin's sister, declined to comment on behalf of the family.

In a unanimous ruling, the Court of Appeals held yesterday that statements Mr. Blake made acknowledging his role in the murder were coerced by police and are not admissible because he had already asked to talk to a lawyer.

State's Attorney Frank R. Weathersbee said this morning that he and the Attorney General's Office are considering filing a petition with the U.S. Supreme Court seeking a review of yesterday's ruling by the Maryland Court of Appeals.

Mr. Blake will remain incarcerated until the Circuit Court receives the official mandate from the Court of Appeals, a process that could take up to three weeks, prosecutors said.

Mr. Blake was wearing boxer shorts, a tank top and no shoes when police arrested him at his Robinwood home on a cold October morning and took him in for questioning.

He invoked his right to remain silent and was put in a holding cell. A half-hour later Detective William Johns, accompanied by Officer Curtis Reese, returned with papers charging Mr. Blake with first-degree murder. The papers said he could face the death penalty, which was not correct because of his age.

As they left, Officer Reese said in a loud tone, "I bet you want to talk now, huh?" Detective Johns rebuked him and they left. But 28 minutes later Mr. Blake changed his mind and agreed to talk to the detective.

He gave a statement, the contents of which
have not been made public, before taking a police polygraph test, after which he made additional statements.

Officer Reese denied making the statement in court.

Mr. Blake's attorney, Kenneth Ravenell, argued that the comment was intended to get Mr. Blake to talk and so the statements should be thrown out. Circuit Court Judge Pamela L. North agreed, saying she suspected Detective Johns and Officer Reese had employed a "good cop, bad cop" routine.

Later, another judge threw out statements given by Mr. Tolbert.

Rather than go to trial without them, prosecutors decided to appeal both rulings after consulting with the Griffin family and the Attorney General's Office.

It was an all-or-nothing gamble because the law required the defendants to be set free. It also forces prosecutors to dismiss the indictment if they lose.

The Court of Appeals has since reversed the finding in Mr. Tolbert's case. A trial is set for Sept. 21.

The Court of Special Appeals reversed Judge North and Mr. Blake was reincarcerated. But the Court of Appeals upheld her ruling that the comment amounted to an interrogation.

"We hold that all statements made by petitioner after he invoked his Miranda rights are inadmissible and the motion to suppress the statement was properly granted," the court said.

This year the General Assembly passed a bill giving judges discretion to release defendants in future cases. Gov. Robert L. Ehrlich Jr. is expected to sign it May 26.

Legislation to eliminate the automatic dismissal provision failed to pass.

State's Attorney Frank R. Weathersbee said yesterday that he was not second-guessing his decision to make the appeal.

"I'm convinced we made the right decision. It was a tough case for the court," he said.

A spokesman for Annapolis police said the handling of the arrests has not resulted in any changes in department procedures.

"We looked at it and we don't see it as a policy matter," Officer Hal Dalton said. "Our view has been Officer Reese made an inadvertent, off-the-cuff remark. . . . The lesson is be careful what you say and eliminate such remarks."

Officers annually receive one to two hours of training on changes in the law from county prosecutors, he said. Unlike the courts, which hold onto cases for months before making rulings, police officers must make on-the-spot legal determinations when searching a suspect, conducting an interview or using deadly force.

"It's a hazard of the trade," he said. "We have to decide in a split second and it's reviewed over and over for years ad nauseum."

Officer Reese resigned before internal affairs investigators completed a report on the incident, Officer Dalton said.

"It's frustrating. We feel like we had our man. We proved it substantially and the confession was the icing on the cake," he said.
"Murder Links 3 Lives Tragically"

The Capital (Annapolis, MD)
December 29, 2002
Brian Haynes

It was nearly midnight when the phone rang, and Neal Griffin could tell by the tone in his mother's voice that something was wrong. She told him to come over—right away.

As he drove to his parents' house, Mr. Griffin figured his 78-year-old father had died, but when he walked in, his father was alive and well.

With him were grim-faced police officers and a chaplain.

His mother, Virginia Griffin, broke the news.

"It's Lee," she said. "They shot Lee."

Hours before on Sept. 19, Straughan Lee Griffin, a successful entrepreneur and popular member of the Eastport Yacht Club, had been shot, then run over by his own Jeep Cherokee in a carjacking outside his home in the Historic District of Annapolis.

"It was incomprehensible," Neal Griffin said from his Portsmouth, Va., home. "It's still incomprehensible."

And to many, it's just as bewildering why two teen-agers showed up in the charming brick-paved cul-de-sac where Lee Griffin had lived to commit such a shocking act of violence.

The questions surrounding the reasons and the final moments of Lee Griffin's life might have to wait until the suspects go to trial.

Confused friends and relatives only know for sure that the lives of Lee Griffin, 51, Leeander Jerome Blake, 17, and Terrence Tolbert, 19, were forever linked by a single night, a single moment, a single gunshot.

Now relatives and friends of a beloved man struggle through the grief, and two teen-agers who survived one of the city's roughest neighborhoods face the biggest fight of their young lives.

"Three lives have been lost," Neal Griffin said. "Three mothers have lost their sons."

Growing up near Portsmouth, Lee Griffin idolized the Rolling Stones and the Grateful Dead. Two decades later, he was touring with them.

In between, the second of Virginia and Straughan "Jack" Griffin's four children graduated from the College of William and Mary and got into the business of setting up and running large video screens for concerts and conventions.

He used that experience to co-found Performance A/V, which he helped build into an industry leader.

In 1997, Lee Griffin's dream job helped him buy his $290,000 dream house in the tiny neighborhood tucked between the State House and the Naval Academy.

He was so proud of his three-story home that he ordered a vanity license plate with "I CMB" in honor of his address at 1...
Cumberland Court.

The move to Annapolis also signaled a shift in Lee Griffin's personal life, his brother said.

"He just sank so much time into" building his business, Neal Griffin said. "Now he was putting more time into people."

The man with the crooked smile made quick friends in his new hometown and its maritime community. When he wasn't traveling, he was dining with friends downtown or taking them out on his 27-foot sailboat named after the Grateful Dead song "Box of Rain."

On the night he was killed, Lee Griffin was just yards from his house. Two young African Americans surprised him near his Cherokee, and seconds later he lay dead in the street.

"It's a dramatic, horrible loss," said Anne Herrington, one of Mr. Griffin's closest friends.

"Sometimes it's like it's not even real. It's like he's on a business trip and he'll call back."

Mr. Tolbert and Mr. Blake grew up just a few doors from each other in Robinwood, a rough neighborhood where drug dealing and violence seem to lurk on every corner.

Unlike many of his peers in the public housing neighborhood, Mr. Tolbert graduated from Annapolis High School, and Mr. Blake, a junior, was a good student and seemed destined to graduate.

"I don't want the court to look at my friends as animals," said Russell Tinker. "They are not species of animals. They are two people who come from good, loving families."

But police and prosecutors say they are killers. After their arrests Oct. 26, both were indicted on first-degree murder charges. They have been held at the Jennifer Road Detention Center awaiting trial.

The arrests weren't the first for either teen.

Mr. Blake had been arrested twice this year on drug distribution charges, according to published reports. The outcomes of those cases are sealed because he was charged as a juvenile.

Lawanda Pierce, his mother, told a judge during her son's bail review that he always went to school and was a well-behaved child.

She declined to be interviewed after the hearing and wasn't available for comment.

Neal Griffin, who watched from the courtroom audience, felt sympathy for the single mother.

"Probably one of her worst nightmares is that the projects could eat one of her kids," he said. "And it just did."

Mr. Tolbert's past is also sprinkled with criminal run-ins. His juvenile record includes burglary, theft and reckless endangerment.

His adult record includes a September conviction for gambling and a pending October case on charges of second-degree assault, disorderly conduct and resisting arrest.

In an August case that's also pending, Mr. Tolbert was charged with driving under the influence after county police pulled him over him in Odenton.

He failed a field sobriety test and was
carrying a container of suspected PCP, according to charging documents.

Hardship came to Mr. Tolbert long before then.

As an 8-year-old in 1991, he was jolted by 13,000 volts of electricity after reaching into an open transformer box near his home. Doctors had to amputate his right arm.

But the accident didn't seem to slow him down, and he was soon riding a bike and playing computer games again, people who knew him said.

Mr. Tolbert and his mother, Juanita Johns, sued the Annapolis Housing Authority and Baltimore Gas and Electric Co. seeking $25 million. A judge dismissed their case against BGE, but the housing authority paid a $200,000 settlement, half of which was set aside in a trust fund for Mr. Tolbert.

Ms. Johns couldn't be reached for comment.

Over the years, the family tapped into the fund to pay for things like a new computer, a flight to his grandmother's home in Chicago and a senior trip to Disney World with his high school class.

When the money was released to Mr. Tolbert in January, the fund still held more than $150,000, court records show.

When the arrests came down, conflicting feelings swept through the community of sailors and friends who had known Lee Griffin.

Some wanted quick retribution. Others, like Ms. Herrington, took a milder stance.

"Most people want them to die," she said. "I don't quite feel that way. . . . It's not just about vengeance. It's about justice."

Neal Griffin said his family shares that feeling and trusts that the court system will impose a suitable punishment. He said his family is not focusing anger and hatred on the two teens because that won't bring his brother back or change the culture that creates violent youths.

Since the slaying, Neal Griffin has put his support behind a group of his brother's friends who started a sailing program for at-risk youths.

The program, called Box of Rain, will build self-esteem, teamwork and other life skills for children living in the city's poorest neighborhoods.

Larry Griffin, a community activist and friend of Lee Griffin, hopes the sailing program will help to bridge the gap in a city where many African Americans living in poverty feel left out.

"It's two different cities," he said.

On one side of the city, luxury yachts line City Dock and shoppers spend freely in Main Street stores. On the other side, parents struggle to make ends meet and keep their children away from the drugs and violence that surround them.

Robert Eades, a community activist who watched Mr. Tolbert grow up, thought he would be one of the few to make it out.

"When you see young children caught up in this whirlpool . . . it just saddens me," Mr. Eades said. "Who are we going to save? It looks like we can't save nobody sometimes."

Scott Randolph arrived home to find that his wife had contacted police and consented to a warrantless search of their home. He disagreed with his wife's decision and asked the police to stop. Over his objection, the police began to search their home and found Randolph's drugs. After his arrest, Randolph moved to have the evidence suppressed as the fruit of an illegal search under the Fourth Amendment. The trial court refused to suppress the evidence, but on appeal the Georgia Court of Appeals and the Georgia Supreme Court reversed that ruling, holding that the police were required to obtain Randolph's consent because he was present and able to object.

**Question Presented:** Can police search a home without a warrant when one co-habitant consents but the other co-habitant is present and does not consent?

---

**The STATE of Georgia**

v.

Scott Fitz RANDOLPH.

Supreme Court of Georgia

Decided November 8, 2004

[Excerpt: some footnotes and citations omitted]

BENHAM, J:

The Court of Appeals granted an interlocutory appeal to review the trial court's denial of defendant Scott Fitz Randolph's motion to suppress evidence seized from his home in a warrantless search conducted by law enforcement officers pursuant to permission given by Randolph's wife in Randolph's presence after Randolph had refused to give the officers permission to search. The Court of Appeals determined the motion to suppress should have been granted. We granted the State's petition for a writ of certiorari to decide whether an occupant may give valid consent to search common areas of a premises shared by another occupant who is present and objects to the search.

Inasmuch as we are faced with a situation in which two persons have equal use and control of the premises to be searched, we conclude the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search. Accordingly, we affirm the judgment of the Court of Appeals.
The Fourth Amendment [to the U.S. Constitution] generally prohibits the warrantless entry of a person’s home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises.

Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). In U.S. v. Matlock, the U.S. Supreme Court noted a clear indication in case law that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." Both this Court and the Court of Appeals of Georgia have rejected legal challenges to warrantless searches conducted with the consent of a person who shared with the defendant common control and authority over the area searched. The basis for the decisions in these cases was the recognition that "any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." U.S. v. Matlock, 415 U.S. at 171.

[However, in neither Matlock nor any of the Georgia cases . . . were law enforcement officers faced with the physical presence of joint occupants, with one consenting to the search and the other objecting. While one co-inhabitant may have assumed the risk that a second co-inhabitant will consent to a search of common areas in the absence of the first co-inhabitant, the risk assumed by joint occupancy goes no further—the risk "is merely an inability to control access to the premises during one's absence." 3 LaFave, Search and Seizure, § 8.3 (d), p. 731 (3rd ed. 1996). While a co-inhabitant has authority to consent to a search of joint premises, "a present, objecting party should not have his constitutional rights ignored [due to a] property interest shared with another." Silva v. State, 344 So2d. 559, 562 (Fla. 1977). We agree with the Supreme Court of Washington, which concluded in State v. Leach, 113 Wash.2d 735, 744 (1989):

Where the police have obtained consent to search from an individual possessing, at best, equal control over the premises, that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent. However, should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent. Any other rule exalts expediency over an individual's Fourth Amendment guaranties.

Accordingly, we affirm the judgment of the Court of Appeals which reversed the trial court's denial of Randolph's motion to suppress.

Affirmed.

HUNSTEIN, J., Dissenting:

We granted certiorari in this case in order to address the admissibility of evidence seized during a warrantless search where a person with shared authority to grant consent to search does so despite the objection of the subject of the search. Ignoring the nearly uniform interpretation of United States v. Matlock, 415 U.S. 164 (II) (1974), that the
third-party consent rule applies even when a present subject of the search objects, the majority has chosen to follow a ruling that expresses the minority view on this issue. Because I believe the rule announced in State v. Leach, 113 Wn.2d 735 (Wash. 1989), that any co-occupant's opposition to the search can vitiate the express consent of another co-occupant with common authority over the premises, represents an unjustified break with Georgia case law, I must dissent.

The majority acknowledges that consent is a well-recognized exception to the warrant requirement of the Fourth Amendment, see Illinois v. Rodriguez, 497 U.S. 177 (II) (1990), and that a warrantless search without probable cause does not violate the Fourth Amendment if the authorities have obtained the voluntary consent of a person authorized to grant such consent. It also acknowledges that Georgia has long relied on the Matlock rule by correctly stating that our courts have consistently "rejected legal challenges to warrantless searches conducted with the consent of a person who shared with the defendant common control and authority over the area searched." Nevertheless, even though the facts of this case clearly establish the authority of Randolph's wife to consent to a search of their shared home and bedroom and that Randolph as the joint occupant of the home assumed the risk that his wife would expose their common private areas to such a search, the majority ignores the approach sanctioned by numerous federal and state courts and unpersuasively cites to only a few cases and a general treatise on criminal law to conclude that a challenge to a search is not fully resolved by proof of effective consent when any co-occupant is present and protests. In my opinion the majority's claim of unconstitutionality of the search based on express refusal is not more viable than a claim based on lack of express consent. Under Matlock the co-occupant that expressly refuses to give consent to search does not enjoy a greater expectation of privacy because in sharing the property the co-occupant assumed the risk that another would consent to a search.

I would not hold the express refusal of one co-occupant to be paramount. Instead, I would embrace the principles recognized in Matlock to look not to the defendant's presence or absence but to whether or not he assumed the risk that the third party who possessed common authority over the premises would permit inspection in his own right. In my view, Randolph assumed the risk that because of his diminished expectation of privacy he had in the home he shared with his wife, she would "expos[e] their common private area to such a search," and that his opposition to the presence of police in his home would not override his wife's consent. I would conclude that even though Randolph was present and objected, once Randolph's wife gave valid consent to the search of the home she shared with Randolph, that was sufficient to authorize the search. Accordingly, I would reverse the Court of Appeals and affirm the decision of the trial court on this evidentiary issue.

* * *
What are police supposed to do when they ask to search a house for drugs and one occupant says yes while the other says no?

The U.S. Supreme Court on Monday agreed to answer that question in a Georgia case in which Scott Fitz Randolph denied police access to his house, but his wife welcomed police in and led them to her husband's drug hiding place. The case is *Georgia v. Randolph*, No. 04-1067, and will be argued in the fall.

Federal and state courts have divided on the issue, though the brief for Georgia notes that most federal circuits, the 1st, 5th, 6th, 7th, 9th, 10th, 11th and D.C., have ruled that warrantless police searches are permissible in similar circumstances.

Only the state courts of Florida, Minnesota and Washington state have ruled as Georgia's Supreme Court did, finding that allowing the search to take place over the objection of a resident who was present at the time violated the Fourth Amendment's bar on unreasonable searches and seizures.

Randolph, an attorney in Americus, Ga., was charged with cocaine possession in July 2001, after his wife called police in the midst of a domestic disturbance. When police arrived, she told them Randolph was using cocaine and gave them permission to search the house. Randolph then arrived home and repeatedly objected to the search, but his wife encouraged police to proceed.

Before he went on trial, Randolph succeeded in having the evidence suppressed as the fruit of an illegal search. The Georgia Court of Appeals and the Georgia Supreme Court agreed with his position.

"The consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene," wrote Georgia Supreme Court Justice Robert Benham last November.

The court found that the closest U.S. Supreme Court precedent, the 1967 case of *United States v. Matlock*, was not relevant because it upheld the consent of one occupant who was present when police arrived, over the refusal of an occupant who was not present. In Randolph's case, Benham noted, both people with control over the house were on hand when the police asked to search the premises.

Senior Assistant Georgia Attorney General Paula K. Smith, in her petition to the high court, said local police had obtained valid consent from Randolph's wife, and that is all that is needed because they both have "common authority over the couple's marital home."

If the high court upholds the Georgia Supreme Court ruling, she added, "Georgia citizens will be left with a rule which, in application, turns upon the timing of a request to search."

Richard Thomas, an assistant district attorney who argued for Georgia in the courts below, said Monday, "If you or your wife are there and your wife wants to invite
her friends in, how can you as her husband deny that? If she can invite her friends in, why can't she invite the police in? That's the point we've been making the whole time."

But Randolph's lawyer Wilbur T. Gamble III of Dawson, Ga., said the Georgia Supreme Court ruling should be allowed to stand, even if it perpetuates a conflict between courts in different jurisdictions.

"Each state has the inherent right to extend the protection of one's right to privacy if a state so chooses," said Gamble.

Gamble also argued that the Constitution's Fourth Amendment clearly gives Randolph's interests precedence over his wife's.

Said Gamble: "Which is more important: the right to be free from an illegal or unwarranted search of one's property, or the property right of one to allow a search?"
Scott Randolph didn't want police to search his home after officers showed up to answer his wife's domestic disturbance call. Mrs. Randolph had no such reservations.

She not only let them in but led officers to evidence later used to charge Randolph with drug possession.

The Supreme Court said Monday it will use the case to clarify when police can search homes. The high court previously has said searches based on a cohabitant's consent are OK, but it's not clear whether that applies when another resident is present and objects.

Lower courts are divided on the issue, with most holding that consent from one person is sufficient.

* * *

Mrs. Randolph called police on July 6, 2001, to report a disturbance and asked them to come to their house in Americus, Ga. The two had separated, but she moved back in two days earlier with Randolph's consent.

When police arrived, she complained that Randolph had taken away their son and had been using cocaine. A few minutes later, Randolph returned home and told police the son was at a neighbor's house.

Officers asked to search the couple's home, but Randolph objected. Mrs. Randolph, however, consented and led police to the couple's bedroom where officers saw a straw with white powder.

Mrs. Randolph later withdrew her consent, but police obtained a search warrant based on what officers saw earlier, seized 25 "drug-related" items and charged Scott Randolph with drug possession. A trial court upheld the searches, but a Georgia appeals court reversed it in a ruling the state Supreme Court affirmed last November.

In siding with Randolph, the courts ruled police must defer to an objecting occupant's position when two people have equal use and control of the home. They said police could not violate Randolph's privacy rights, particularly in a case where a feuding wife had consented over his objections.

"When possible, Georgia courts strive to promote the sanctity of marriage and to avoid circumstances that create adversity between spouses," the appeals court stated. "Allowing a wife's consent to search to override her husband's previous assertion of his right to privacy threatens domestic tranquility."

In their Supreme Court filing, Georgia prosecutors said the ruling "focuses arbitrarily on the rights of the objecting occupant, to the detriment of the consenting occupant who was trying to report a crime and who had just as much access and control over the home as her husband."

Randolph counters that states have the authority to give their citizens privacy rights that go beyond the U.S. Constitution. A husband's interest in privacy outweighs the wife's property right to allow a search, he argues.

According to court filings, three other states
also have ruled that all cohabitants present must consent before police may search a home. They are Florida, Minnesota and Washington.
Police cannot enter a home to conduct a warrantless search if one spouse consents but the other does not, the Georgia Supreme Court ruled Monday.

In a 4-3 ruling, the court threw out evidence of cocaine use by an Americus lawyer stemming from a July 2001 search of his home.

Writing for the majority, Justice Robert Benham said that such an issue—the presence of joint occupants with one consenting to a warrantless search and the other objecting—had never reached the state's highest court before.

The search occurred after the wife of lawyer Scott Fitz Randolph called police to report a domestic disturbance. After police arrived, Mrs. Randolph accused her husband of using large amounts of cocaine.

When the police sergeant asked to search the house, Randolph responded with an unequivocal no, but his wife consented, the ruling said. She took the sergeant to an upstairs bedroom, where he saw a piece of cut straw on a dresser with some white residue.

Randolph later was indicted on charges of cocaine possession. A Sumter County judge rejected a motion by Randolph's lawyer to suppress the evidence on the grounds that it was the fruit of an illegal search. But the judge allowed Randolph, who has remained free on bond, to file a pretrial appeal.

Last December, in a 5-2 decision, the Georgia Court of Appeals found the search unconstitutional. On Monday, the Georgia Supreme Court affirmed that finding.

"It's the right decision," said Randolph's lawyer, W.T. Gamble III. "One person can't trump another person's rights. It's different if only one person is home and consents. But when you're both there and one of them objects, that's another story."

Assistant District Attorney Richard Thomas said the drug case against Randolph is gutted without evidence from the search. Thomas said his office is considering an appeal to the U.S. Supreme Court.

Justice Carol Hunstein dissented from Monday's ruling. "Once Randolph's wife gave valid consent to the search of the home she shared with Randolph, that was sufficient to authorize the search," wrote Hunstein, who was joined by Justices George Carley and Harris Hines.
This case addresses the proper remedy for a violation of a "knock and announce" statute, which requires police officers to knock on a door and announce their presence before entering to search a home. Hudson's home was searched in execution of a search warrant, which turned up drugs and a firearm. He argues that the evidence should be suppressed because of the police violated the knock and announce statute. The trial court agreed and dropped the charges. The court of appeals reversed and the Michigan Supreme Court denied leave to appeal.

Note: The principle case under consideration is an order of the Michigan Supreme Court refusing to reconsider its 1999 decision in People v. Stevens. An excerpt from Stevens follows on pages 517-527.

Question Presented: Does the inevitable discovery doctrine create a per se exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and announce" violation, as the Seventh Circuit and the Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as the Sixth and Eighth Circuits, the Arkansas Supreme Court, and the Maryland Court of Appeals have held?

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Booker T. HUDSON, JR. Defendant-Appellant.

Supreme Court of Michigan

472 Mich. 862, 692 N.W.2d 385

Decided January 31, 2005

JUDGES: CAVANAGH, J., would grant leave to appeal.

are not persuaded that the questions presented should be reviewed by this Court.

OPINION: On order of the Court, the application for leave to appeal the June 17, 2004 judgment of the Court of Appeals is considered, and it is DENIED, because we

CAVANAGH, J., would grant leave to appeal to reconsider People v Stevens, 460 Mich. 626; 597 N.W.2d 53 (1999).
PEOPLE of the State of Michigan, Plaintiff-Appellee  
v.  
Booker T. HUDSON, Jr., Defendant-Appellant.  

Michigan Court of Appeals  
2004 WL 1366947 (Mich.App.)  
Decided June 17, 2004  
[UNPUBLISHED]

NEFF, ZAHRA and MURRAY, JJ.

MEMORANDUM.

Defendant was charged with possession of less than fifty grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. Following a bench trial, he was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and sentenced to eighteen months' probation. Defendant appeals his conviction as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that the evidence, which was seized during the execution of a search warrant, should have been suppressed because the police violated the knock and announce statute, MCL 780.656.

Although the trial court agreed with defendant's argument and initially dismissed the charges, this Court reversed and remanded, ruling that suppression was not an appropriate remedy as stated in People v. Vasquez (After Remand), 461 Mich. 235; 602 NW2d 376 (1999), and People v. Stevens (After Remand), 460 Mich. 626; 597 NW2d 53 (1999). People v. Hudson, unpublished order of the Court of Appeals, entered May 1, 2001 (Docket No. 230594). Our Supreme Court denied leave to appeal. People v. Hudson, 465 Mich. 932; 639 NW2d 255 (2001). Because there has not been any change in the law or the relevant facts, this Court cannot, pursuant to the law of the case doctrine, decide the issue any differently on this appeal. Grace v. Grace, 253 Mich.App 357, 362-363; 655 NW2d 595 (2002). Moreover, regardless of the correctness of the decisions in Vasquez and Stevens, those decisions are binding on this Court. People v. Beasley, 239 Mich.App 548, 559; 609 NW2d 381 (2000).

Affirmed.
PEOPLE of the State of Michigan, Plaintiff-Appellant,  
v.  
Eugene Charles STEVENS, Defendant-Appellee.

Supreme Court of Michigan  
460 Mich. 626; 597 N.W.2d 53  
Decided July 20, 1999

Note: The following decision addresses the substance of the question in Hudson v. Michigan, namely, whether suppression of evidence is an appropriate remedy for the violation of a "knock and announce" statute.

[Excerpt: Some citations and footnotes omitted]

OPINION:
BRICKLEY, J.

We granted leave in this case to determine whether the Fourth Amendment requires the exclusion of evidence obtained under a valid search warrant, and during a search of proper scope, because of a violation of the "knock and announce" principles. . . . Given that the evidence would have been discovered despite any police misconduct and that excluding the evidence because of the misconduct puts the prosecution in a worse position than it would have been without the police misconduct, we hold that the inevitable discovery exception to the exclusionary rule applies in the present case. Additionally, we fail to discern any legislative intent to have the exclusionary rule apply to violations of our "knock and announce" statute. Accordingly, the trial court erred in granting defendant's motion to suppress.

FACTS

At approximately 6:00 p.m. on August 10, 1994, the police purchased narcotics from the defendant's female companion. The police then followed the woman to defendant's home where she had told a confidential informant she kept the "stash." After the police determined that the defendant was on probation for a controlled substance conviction, they decided to raid the house. The police obtained a search warrant and arrived back at the house at 12:32 a.m. on August 11, 1994, at which time there were no lights on in the house and the police did not observe any signs of activity or hear any footsteps. The officers knocked on the door repeatedly and announced in a loud voice that they were police officers. After an eleven-second wait, the officers began a forced entry that took an additional fifteen to eighteen seconds. The defendant was found sleeping in his bedroom, which was approximately twenty-five feet from the front door.

Corporal Alex Ramirez of the Dearborn Police Department participated in the raid. He testified that it was the general practice of the Dearborn Police to wait ten or eleven seconds before beginning a forced entry. Additionally, Corporal Ramirez testified that, when executing a search warrant, the Dearborn Police Department made no
distinction between daytime and nighttime executions relative to the time the officers wait between the knock and announcement and forcing entry into the dwelling. Ramirez also testified that the fact that defendant was on probation for a controlled substance conviction made no difference in how long Ramirez waited before forcing entry into the house. The trial court found that this entry violated the knock-and-announce statute, MCL 780.656; MSA 28.1259(6). Additionally, the trial court found that the police officers acted unreasonably in executing the search warrant and that the defendant's constitutional guarantee under the Fourth Amendment had been violated. Therefore, the subsequent search and seizure of evidence were constitutionally invalid, and the exclusionary rule should be applied. The trial court thus granted the defendant's motion to suppress.

The prosecutor appealed, and the Court of Appeals vacated the trial court's order and remanded the case for reconsideration in light of People v Polidori, 190 Mich. App. 673; 476 N.W.2d 482 (1991). That Court found:

Although there is no Michigan case that directly deals with the sanction that should follow a violation of the knock-and-announce statute, we agree with a number of other jurisdictions that the requirement that officers identify themselves and state their authority and purpose before entering a private residence has its roots in the Fourth Amendment.

Consequently, when the method of entry violates the knock-and-announce statute, the exclusionary rule may come into play if the Fourth Amendment standard of reasonableness is also offended. Because the primary purpose of the constitutional guarantee is to prevent unreasonable invasions, if a police officer has a reasonable cause to enter a dwelling to make an arrest, his entry and search are not unreasonable. If the police officers have a basis to conclude that evidence will be destroyed or lives will be endangered by delay, strict compliance with the statute may be excused. Similarly, if events indicate that compliance with the

ANALYSIS

I

The prosecutor brings this appeal, arguing that, while the police officers may have violated the knock-and-announce statute, MCL 780.656; MSA 28.1259(6), the Court of Appeals erred in finding that the exclusionary rule applies where the police make a search of proper scope under a valid warrant.

In deciding to grant the defendant's motion to suppress, the trial court relied upon People v Polidori, 190 Mich. App. 673; 476 N.W.2d 482 (1991). That Court found:

Although there is no Michigan case that directly deals with the sanction that should follow a violation of the knock-and-announce statute, we agree with a number of other jurisdictions that the requirement that officers identify themselves and state their authority and purpose before entering a private residence has its roots in the Fourth Amendment.

Consequently, when the method of entry violates the knock-and-announce statute, the exclusionary rule may come into play if the Fourth Amendment standard of reasonableness is also offended. Because the primary purpose of the constitutional guarantee is to prevent unreasonable invasions, if a police officer has a reasonable cause to enter a dwelling to make an arrest, his entry and search are not unreasonable. If the police officers have a basis to conclude that evidence will be destroyed or lives will be endangered by delay, strict compliance with the statute may be excused. Similarly, if events indicate that compliance with the
statutory requirements would be a useless gesture, the requirement that the police officers wait for admission may also be excused.

There is no claim that a search carried out in compliance with the statute would have resulted in the destruction of the evidence, increased the danger to the police officers, or been a useless gesture. Under these circumstances, we can only conclude that the police officers acted unreasonably when they executed the search warrant. Because there was no evidence introduced at the suppression hearing to justify the simultaneous forced entry of defendant's home, we can find no reason to excuse the police officers from complying with the requirements of our knock-and-announce statute.

In affirming the trial court in the present case, the Court of Appeals relied on People v Asher, 203 Mich. App. 621, 624; 513 N.W.2d 144 (1994), in holding that "if the method of entry violates the knock-and-announce statute, the exclusionary rule must apply."

II

We first consider whether police officers' violation of the defendant's Fourth Amendment rights requires exclusion of the evidence. The introduction into evidence of materials seized and observations made during an unlawful search is prohibited by the exclusionary rule. Additionally, the exclusionary rule prohibits the introduction into evidence of materials and testimony that are the products or indirect results of an illegal search, the so-called "fruit of the poisonous tree" doctrine. Wong Sun v United States, 371 U.S. 471; 83 S. Ct. 407; 9 L. Ed. 2d 441 (1963).

... US Const, Am IV, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Therefore, the Fourth Amendment protects citizens from unreasonable searches and seizures.

The federal constitutional protections against unreasonable searches and seizures have been extended to state proceedings through the Due Process Clause of the Fourteenth Amendment. Under the circumstances of this case, art 1, § 11 of the Michigan Constitution is to be construed as providing the same protection as that of its federal counterpart. Therefore, defendant's motion to suppress implicates his federal constitutional rights.

III

In determining whether exclusion is proper, a court must "evaluate the circumstances of this case in the light of the policy served by the exclusionary rule...." Brown v Illinois, 422 U.S. 590, 604; 95 S. Ct. 2254; 45 L. Ed. 2d 416 (1975). "The rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it..... Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of
illegally seized evidence in all proceedings or against all persons." Id. at 599-600 (citations omitted).

The exclusionary rule has its limitations... as a tool of judicial control... [In] some contexts the rule is ineffective as a deterrent. ... Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. ... [A] rigid and unthinking application of the... rule... may exact a high toll in human injury and frustration of efforts to prevent crime. [Terry v Ohio, supra 392 U.S. 1, 13-15.]

As stated by this Court:

The exclusionary rule forbids the use of direct and indirect evidence acquired from governmental misconduct, such as evidence from an illegal police search.

Three exceptions to the exclusionary rule have emerged: the independent source exception, the attenuation exception, and the inevitable discovery exception. [People v LoCicero (After Remand), 453 Mich. 496, 508-509; 556 N.W2d 498 (1996) (citations omitted).]

In Nix v Williams, the United States Supreme Court considered whether there is an exception to the exclusionary rule for evidence that inevitably would have been discovered regardless of the constitutional violation. In explaining the deterrent purpose of the exclusionary rule, the Court stated:

The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections.

This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

By contrast, the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct. Nix v Williams, 467 U.S. 431, 442-443; 104 S. Ct. 2501; 81 L. Ed. 2d 377 (1984).

The inevitable discovery exception generally permits admission of tainted evidence when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of police misconduct. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means... then the deterrence rationale has so little basis that the evidence should be received." Id. at 444. If the evidence would have been inevitably obtained, then there is no rational basis for excluding the evidence from the jury. In fact, suppression of the evidence would undermine the adversary system by putting the prosecution in a worse position than it would have been in had there been no police misconduct. Id. at 447.

The United States Court of Appeals for the First Circuit set forth the following factors in applying the inevitable discovery doctrine:

There are three basic concerns which surface in an inevitable discovery analysis: are the legal means truly independent; are both the
use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection?  

[United States v Silvestri, 787 F.2d 736, 744 (CA 1, 1986).]

* * *

While the [United States Supreme] Court either declined or found no need to address the issue whether a possible Fourth Amendment violation required suppression of the evidence in both Wilson and Ramirez, it is quite clear from the Court's statements that there has to be a causal relationship between the violation and the seizing of the evidence to warrant the sanction of suppression.

IV

The Fourth Amendment must be applied under a standard of reasonableness. Ker v California, 374 U.S. 23; 83 S. Ct. 1623; 10 L. Ed. 2d 726 (1963). "In some circumstances an officer's unannounced entry into a home [notwithstanding a valid search warrant] might be unreasonable under the Fourth Amendment." Wilson, supra at 934. "The general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant." United States v Ramirez, 523 U.S. 65, 118 S. Ct. 992 at 996, 140 L. Ed. 2d 191.

"The Fourth Amendment has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." United States v Leon, 468 U.S. 897, 906; 104 S. Ct. 3405; 82 L. Ed. 2d 677 (1984). Repeatedly, the United States Supreme Court has emphasized "that the State's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." Pennsylvania Bd of Probation & Parole v Scott, 524 U.S. 357, 118 S. Ct. 2014, 2019; 141 L. Ed. 2d 344 (1998).

The Court has stressed that the "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. Application of the exclusionary rule "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'" Rather, the rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" Illinois v Krull, 480 U.S. 340, 347; 107 S. Ct. 1160; 94 L. Ed. 2d 364 (1987)(citations omitted.).

As [a judicially created remedy], the rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons," but applies only in contexts "where its remedial objectives are thought most efficaciously served". . . . Moreover, because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its "substantial societal costs." [Scott, supra, 118 S. Ct. 2019.]

The exclusionary rule is not meant to put the prosecution in a worse position than if the police officers' improper conduct had not occurred, but, rather, it is to prevent the prosecutor from being in a better position because of that conduct. Nix, supra at 443.

Significant disincentives to obtaining evidence illegally—including the possibility
of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. . . . In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce. [Id. at 446.]

The Nix Court was addressing whether the prosecution must prove the absence of bad faith when seeking to invoke the inevitable discovery exception. The existence of both state and federal disincentives for police misconduct, other than exclusion of evidence, is also applicable in an analysis of the inevitable discovery exception for violations of the "knock and announce" requirement.

MCL 780.657; MSA 28.1259(7) provides: Any person who in executing a search warrant, wilfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $ 1,000.00 or imprisoned not more than 1 year.

Additionally, 42 USC 1983 allows civil remedies when the knock-and-announce principles have been violated. In Aponte Matos v Toledo Davila, 135 F.3d 182 (CA 1, 1998), the plaintiffs brought a 42 USC 1983 action against police officers who searched the plaintiffs' home for violation of plaintiffs' Fourth Amendment rights by failing to knock and announce before breaking down the door with an ax. The United States Court of Appeals for the First Circuit found the officers immune because the search took place before the United States Supreme Court's decision in Wilson and was, therefore, reasonable. However, implicit in the court of appeals analysis is that subsequent searches that violated Wilson would fall within the reach of § 1983.

[42 USC 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.]

Admittedly, the exclusionary rule is sometimes needed to deter police from violations of constitutional and statutory protections, even though this may be at a great cost to society. However, in the present case, the evidence would have been discovered despite any police misconduct. Additionally, there are both state and federal disincentives to deter police misconduct.

Given that the evidence would have been inevitably discovered, allowing the evidence in does not put the prosecution in any better position than it would be in had the police adhered to the knock-and-announce requirement. However, excluding the evidence puts the prosecution in a worse position than it would have been in had there been no police misconduct. Therefore, the inevitable discovery exception to the exclusionary rule should be available to the
prosecution in the present case.

* * *

Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court.

DISSENT: CAVANAGH, J.

While the majority offers a plausible rationale for its decision, upon closer scrutiny, acceptance of that rationale requires (1) a willingness to offer a decision that is based, entirely, on dicta from cases which, in fact, did not even approach, much less decide, the question we are presented with today, (2) a willingness to make a substantial departure from the teachings of the United States Supreme Court on Fourth Amendment matters, and (3) a willingness to adopt the prosecutor's artificially divided view of the factual scenario that typically underlies this type of case, a view the likes of which have never been favored by our nation's Supreme Court. Finding myself unwilling to make even one, much less three, of these leaps of "logic," I must respectfully dissent.

I

* * *

. . . [T]his Court has, on numerous occasions, been compelled to apply exclusionary sanctions to statutory violations. Initially, we did so while addressing a denial of a statutory right to immediate bail[. . .]

From there, we have seen several instances in which statutory violations have resulted in suppression of evidence (i.e., application of an exclusionary rule). Indeed, this practice is so apparent as to have drawn both discussion and criticism from certain judges and commentators. Likewise, our cases have been sufficiently clear to draw academic criticism toward those few decisions that have purported to hold that an exclusionary rule can never be applied to a statutory violation.

Moreover, as was correctly noted below, our Court of Appeals has for some time held that the knock and announce rule has its basis in the Fourth Amendment and that, where the reasonableness of that mandate is violated, an exclusionary sanction is appropriate. See, e.g., People v Polidori, 190 Mich. App. 673; 476 N.W.2d 482 (1991). Given that the decision in Polidori actually preceded the Supreme Court's recognition of a Fourth Amendment basis for the knock and announce principle, and thus came to rest on the appropriate, Fourth Amendment based remedy, I see no reason to turn back the clock to encompass what has previously been a minority view below (and a nonexistent view above). Because the majority, however, decides the case on the basis of the constitutional issue, I proceed onward.

II

The majority offers us what is seemingly cast as a view offered by some of our federal circuits, albeit apparently a minority one. In reality, however, what the majority has done is to come very close to itself crafting a conflict among the circuits.

Seeking to bring itself within the confines of Schueler v Weintrob, 360 Mich. 621, 633-634; 105 N.W.2d 42 (1960), the majority aims to demonstrate the absence of a United States Supreme Court decision, and a disagreement among the federal circuits, in order for this Court to adopt the view which it deems most appropriate. In doing so, the majority visits on us, by way of the margin, the teachings of two cases, pronounces them fit vehicles to attach our state's
jurisprudence to, and moves on. I fear, however, the majority has chosen to burden two most unworthy beasts.

Initially, the majority quotes United States v Jones, 149 F.3d 715, 716-717 (CA 7, 1998), for the admitted dicta that "it is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant . . . ." What might be hard to understand from that quotation is just how inapplicable that case is to our situation.

As an initial matter, the question before the court in Jones was whether evidence that had been seized by other officers from a defendant as he exited a residence should somehow be suppressed on the basis of a purported subsequent knock and announce violation that occurred after the seizure of the evidence. While the court felt the need to briefly discuss the state of knock and announce law in the course of its four paragraph opinion, the most important sentence followed the one quoted above. "But because the entry at the front door played no role in the chain of events leading to Jones's seizure on the lawn, we, too, can leave the inevitable-discovery question for another day." Thus, the Seventh Circuit did not, in Jones, apply the inevitable discovery test to a knock and announce violation. Rather, it reached the conclusion, fairly obvious from the factual recitation above, that there was simply no causal link between the entry and the prior seizure of evidence.

Next we are offered the recent decision of the Seventh Circuit, United States v Stefonek, 179 F.3d 1030; 1999 WL 356407 (CA 7, 1999). Again, while this case might make interesting reading, the case itself pertains to challenges to a warrant for being overbroad. The court, after finding that the evidence would have been discovered in any event . . . did at least apply the inevitable discovery exception, though in the context of an overbroad warrant that failed to address the items to be seized with sufficient specificity.

The court also addressed another purpose of the warrant, "that of informing the person whose premises are to be searched of the scope of the search, so that he (or, as in this case, she) can monitor the search while it is being conducted and make sure it stays within bounds." It was here that the court said "the purpose of handing the occupant (when present) the warrant, like that of the 'knock and announce' rule, is to head off breaches of the peace by dispelling any suspicion that the search is illegitimate." The court found, however, that "this purpose, whatever its precise relation to the Fourth Amendment ( Wilson v Arkansas [514 U.S. 927; 115 S. Ct. 1914; 131 L. Ed. 2d 976 (1995)]) suggests that there may be some, has no relevance to this case; Stefonek was not present when the search was conducted."

. . . It is from this foundation of sand that the majority builds its decision regarding the "most appropriate" course to follow here.

III

That said, I turn to the constitutional question. It can no longer be seriously disputed that the knock and announce principle has its roots in the Fourth Amendment requirement of reasonableness, and that it forms a part of any inquiry into such reasonableness:

At the time of the framing, the common law of search and seizure recognized a law enforcement officer's authority to break open the doors of a
dwelling, but generally indicated that he first ought to announce his presence and authority. In this case, we hold that this common-law "knock and announce" principle forms a part of the reasonableness inquiry under the Fourth Amendment.

[Wilson v Arkansas, 514 U.S. 927, 131 L. Ed. 2d 976, 115 S. Ct. 1914.] Wilson found our Supreme Court offering an extensive survey of the origins of knock and announce principles... The Court noted that it had dealt with knock and announce cases before:

But we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

[Wilson, 514 U.S. 927 at 934, 131 L. Ed. 2d 976, 115 S. Ct. 1914.]

Thus, far from being some disposable piece of mere judge-made limitation on police activity, or even a statutory requirement, the basic principle underlying the knock and announce requirement is indeed embodied in our constitution. It must follow that decisions which would curtail this requirement must be carefully scrutinized for intrusion upon the basic requirement embodied in the Fourth Amendment.

The majority ventures forth to focus on footnote 4 of Wilson, which the majority would read to indicate that "the Supreme Court reserved the question whether the inevitable-discovery exceptions to the exclusionary rule apply to searches deemed unreasonable only because officers armed with a warrant failed to make a proper announcement at the door." Slip op at 12.

* * *

Fortifying the suggestion that the majority searches to create a question, where in reality none lies, is the fact that the Court, in two cases involving violations of knock and announce principles, ruled in favor of the application of the exclusionary rule. Miller v United States, 357 U.S. 301; 78 S. Ct. 1190; 2 L. Ed. 2d 1332 (1958), and Sabbath v United States, 391 U.S. 585; 88 S. Ct. 1755; 20 L. Ed. 2d 828 (1968). Of course, the majority could argue, both of these cases predated the Nix decision, and, thus, were one to accept the majority's logic, that subsequent decision undermined the prior rule. I would suggest however, that, where Nix did not concern a knock and announce case (and could, the Court appears to believe, be arguable toward such a case only by way of analogy), it would seem more prudent for us to follow the law as it currently has been stated by the Court, and leave it to the advocates to argue for changes in recognition of subsequent decisions and "newer" logic.

IV

A

The prosecutor suggests that, where the police are in possession of a valid warrant,
and yet are somehow deficient in the manner of announcing their entry as they execute the warrant, it is only their entry, not the search itself, that suffers from a taint of unreasonableness. In essence, the prosecutor, and now the majority, are saying that, where the entry is unlawful or unreasonable, the remainder of the search is nonetheless lawful because it occurs pursuant to a (presumably) lawfully obtained and valid warrant.

To accept this argument, one must accept the prosecutor's view of the dichotomy of the situation. The essence of this argument is that the search itself is wholly detached from the execution of the warrant. Whatever happens during the entry, it does not affect the basis for the warrant, and, therefore, the warrant itself remains lawful. Given the presence of this lawful warrant, whatever evidence is in dispute would have been "inevitably" discovered pursuant to the lawful warrant.

It must be noted as an initial matter that this argument, quite simply, knows no bounds. Under a rationale such as this, the evidence will always have been "inevitably" discovered. In the majority's view, there is simply no relationship between the knock and announce violation and the discovery of the evidence. That said, it must follow that there will never be any such relationship, no matter how severe and unwarranted the knock and announce violation is.

We are left, by the majority, with a rule which says that, whatever constitutional intrusion there might be under Wilson, we simply ignore it and concern ourselves not in the least with either sanctioning it or avoiding encouragement that it might continue. The true effect of the majority's decision is simply to do what it cannot do otherwise, ignore Wilson. The result of the majority's effort, however, stands on no firmer ground than would a simple refusal to accept the constitutional nature of the knock and announce principle.

***

B

***

The Court had little use for [the notion that a blanket exception to the exclusionary rule might apply]. "We disagree with the court's conclusion that the Fourth Amendment permits a blanket exception to the knock-and-announce requirement for this entire category of criminal activity." After noting that "the question we must resolve is whether this fact justifies dispensing with case-by-case evaluation of the manner in which a search was executed," the Court answered with a resounding negative. "If a per se exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless."

That per se exception, totally discarding any case-by-case evaluation is, of course, the system the majority leaves us with today. While the majority may well complain that this dissent "equates" the exclusionary rule with the Fourth Amendment (not the case, in fact), one must consider whether the Fourth Amendment will offer any protection beyond the parchment it rests on under the majority's decision.
The majority today has embarked on a path chosen most unwisely. We are not the first Court to be offered such a path, but, unfortunately, appear to be the more gullible. Interestingly, the very prosecutor appearing before us offered the Court in Wilson the same opportunity the majority accepts today. . . .

* * *

I will conclude with a notion from the unanimous Court in Richards, yet another that I fear the majority has passed in the night, intent as it is in reaching its destination:

It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'"


"We hold that this common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment," except, says the majority, in Michigan. Here we need not concern ourselves with such things, the results being "inevitable" in any event. . . .
The Supreme Court has held, in *Wilson v. Arkansas*, that when police enter a home, the Fourth Amendment ordinarily requires that they first knock and announce their purpose to the inhabitants. The reason for the requirement (which I will call "knock-and-announce") is to avoid the fear and unwarranted exposure occasioned by a surprise search. With a warning, residents know that they are not about to be robbed, and they might even have time to throw on a robe if they are undressed.

On occasion, "countervailing factors" will permit a no-knock entry into a home. In *Richards v. Wisconsin*, however, the Court specifically rejected an across-the-board exception to knock-and-announce for felony drug cases. If whole categories of cases were permitted to excuse the failure to knock-and-announce, the Court reasoned, then there would be little left to the rule.

The Court recently granted review in *Hudson v. Michigan*, a case that addresses the consequences of police violation of knock-and-announce. Specifically, the Court will consider whether evidence obtained after an illegal no-knock home entry should be admissible, across the board, on the theory that it would have been "inevitably discovered" if police had followed the rules.

The question provides an opportunity for the Court to consider the rationale behind the inevitable discovery doctrine, and whether it applies in the knock-and-announce context.

The Independent Source Doctrine: A Related Exception to the Exclusionary Rule

To understand inevitable discovery, it is useful first to consider a related exception to the Fourth Amendment exclusionary rule: the independent source doctrine.

In its most straightforward form, the independent source rule stands for an unremarkable proposition: If the police violate the Fourth Amendment to perform one search but conform their conduct to the demands of the Fourth Amendment in performing another search, then the fruits of the legal search do not become inadmissible by virtue of the illegal one. For two concededly separate events, this disposition makes perfect sense.

The independent source doctrine became more controversial, however, when the Supreme Court applied it to evidence that resulted from both a legal search and an illegal search. In *Murray v. United States*, the Court considered what consequences should follow when police perform an illegal search and find evidence (which they leave in place) and then subsequently perform a legal search of the same premises and find the same evidence (which they seize). The Court held that the evidence is admissible if both the basis for the second search and the officers' decision to proceed with the second search existed before—and independently of—the performance of the initial, illegal search.
Even if an illegal search intervenes, in other words, evidence ultimately seized during a legal search can, in some cases, be attributed to the legal search, and accordingly admitted into evidence.

Determination of when the legal search and its results are truly "independent" of the initial illegality calls for a hypothetical inquiry into what would have happened if there had been no intervening illegality.

The Inevitable Discovery Doctrine

Inevitable discovery takes the hypothetical reasoning process of the independent source doctrine one step further.

In an inevitable discovery case, two things are always true. First, police have violated the Fourth Amendment. Second, as a direct consequence of the Fourth Amendment violation, police have discovered and seized evidence incriminating to the person whose Fourth Amendment rights were violated.

Under these circumstances, the exclusionary rule would ordinarily require the suppression of the incriminating evidence. Unlike in the case of independent source, the evidence here cannot be attributed to a legal search.

The inevitable discovery doctrine, however, can nevertheless save the evidence from suppression. It does so by adding a layer of hypothetical inquiry to the independent source scenario.

Inevitable discovery asks the judge to imagine that the police did not commit the Fourth Amendment violation—the one that they did, in fact, commit, and that did directly lead to the seizure of the evidence. It then asks whether the evidence that was in reality obtained through the illegal search would have ultimately surfaced through legal police conduct that would have ultimately occurred if given the chance.

Under Nix v. Williams, if the answer to this question is yes, then the trial judge will admit the evidence as though it had actually been uncovered by that hypothetical, legal investigation that would eventually have occurred.

Why Emphasize Causation?

The theory behind the doctrinal emphasis on causation in both independent source and inevitable discovery doctrines is this: When police conduct a search without probable cause, then the evidence they uncover would have remained hidden were it not for the Fourth Amendment violation. It follows that restoring the way things would have been if the police had refrained from violating the Constitution—that is, divesting the government of its ill-gotten gains—means suppressing the evidence that was uncovered as a result of the wrongful search.

The government, on this theory, is not entitled to obtain evidence that would never have come to light in the absence of unconstitutional conduct. The exclusionary rule enforces this position by keeping the evidence out of the courtroom.

If, on the other hand, the unlawful search that took place was not necessary to the disclosure of the illegal evidence—if, that is, the evidence either was (independently), or would have eventually been, discovered and obtained through entirely legal means—then the evidence no longer has that same character as essentially off-limits to the government.

Another way of putting this is to say that the point of suppressing evidence is to prevent...
illegal searches and seizures from putting the government in a better position than it would have occupied if it had followed the rules.

When the exclusion of evidence is understood in this light, inevitable discovery provides a way of asking whether the evidence obtained was really destined to come to light or whether it emerged only by virtue of police violating the law. Only in the latter case need the evidence be suppressed, because only then did the Fourth Amendment truly contemplate the ultimate loss of this evidence.

If, on the other hand, the evidence would have surfaced regardless of the illegal behavior, then exclusion is inappropriate, because it would prevent the jury from considering evidence that was destined to come to the government's attention.

Not All Cases Fit this "Evidentiary Destiny" Model: Warrantless Searches

There is, however, a set of Supreme Court precedents that does not fit this model of suppression. Decisions involving warrantless searches notably belong to this set.

When police carry out a warrantless search and seizure without an exigency (or other exception) to justify their failure to obtain a warrant, the resulting evidence is suppressed. The Fourth Amendment requires suppression notwithstanding the fact that the police misconduct did not involve the disclosure of evidence that was destined by the Fourth Amendment to remain hidden. Indeed, it is precisely the fact that a warrant would not have prevented the police from getting the evidence they needed that eliminates any possible justification for searching without a warrant. Had the police conformed their behavior to the dictates of the Fourth Amendment, then, they still would have gotten the evidence. Yet, the law suppresses the evidence because they did not get a warrant.

The inevitable discovery doctrine could not sensibly apply to warrantless searches without obliterating the suppression of evidence in such cases. What makes warrantless searches improper is that police failed to take a required step—intended to civilize the process—prior to performing a search. The search itself and its disclosure of hidden evidence, however, is otherwise acceptable.

The suppression of the product of a warrantless search and seizure is accordingly not—as it would be in the case of a search without probable cause—an attempt to approximate what things would have looked like had police obeyed the law. It is, instead, a straightforward punishment for police who fail to take legally required steps that would have given them legal access to the desired evidence.

Knock-and-Announce and Evidentiary Destiny

The question in *Hudson v. Michigan*, then, is where a suppression remedy for knock-and-announce violations would fit into the framework above: Would it dislodge evidence destined to be left hidden, or would it constitute a punishment for failure to take a civilizing step?

When courts suppress evidence because police violate knock-and-announce, it is virtually always the case that the circumstances in play would satisfy the inevitable discovery exception—if this
exception applied.

Indeed, suppose that, in a given case, the inevitable discovery rule is not satisfied, for a warning and announcement of purpose would likely have led to the loss of evidence. In such a case, that very probability would justify a no-knock entry and thus remove the police conduct from the class of constitutional violations altogether. Police who can show that knocking and announcing would compromise the search about to take place (either evidentiarily or safety-wise) can accordingly dispense with the requirement.

Another way of saying this is to suggest that if the inevitable discovery exception to suppression applies to knock-and-announce, then the exception will preclude the suppression of any evidence obtained as a result of a no-knock entry. The failure to knock-and-announce will either be legal due to evanescent evidence (in which case the evidence should not be suppressed because there was no Fourth Amendment violation) or the failure to knock-and-announce will be illegal but will fall within the inevitable discovery doctrine and permit admission of the evidence on that ground.

Should Exclusion or Inevitable Discovery Govern No-Knock Cases?

So the knock-and-announce requirement is very much like the warrant requirement: If the Court wants there ever to be suppression of evidence, then the inevitable discovery doctrine cannot apply.

Exclusion will not approximate the way things would have been if police had complied with the Fourth Amendment, because compliance—when legally required—does not preclude the recovery of evidence. The purpose of knock-and-

announce, like the purpose of the warrant requirement, is not to keep things hidden but rather, to force the police to take steps that civilize the investigative process.

Warrants ensure that an objective person makes a cool appraisal of police officers' basis for a search, and warrant affidavits provide a record for later review of that neutral appraisal. Knock-and-announce ensures that home searches are not quite as terrifying, humiliating and potentially lethal as they might otherwise be.

Putting the Government In A Worse Position

Many would say of both the warrant requirement and knock-and-announce, that the exclusionary rule is not appropriately applied at all. The Supreme Court has said, in Nix v. Williams, that suppression is not intended to place the government in a worse position than it would have occupied if it had complied with the Constitution. The suppression of evidence obtained after violations of either the warrant requirement or knock-and-announce does exactly that.

But the Supreme Court has applied the exclusionary rule to warrant violations and has strongly implied that the exclusionary rule will apply (and thus will not be subject to the inevitable discovery exception) in knock-and-announce cases as well.

In Wilson v. Arkansas, in which the Court officially recognized that the Fourth Amendment often requires knock-and-announce, a majority of the Court sent the particular case—in which a convicted felon appealed his conviction—back to the lower courts. The remand was for a determination of whether a valid basis for foregoing knock-and-announce was present, as the government contended.
If there were no valid basis, one could accordingly conclude, the petitioner's conviction would be reversed. And that reversal, in turn, could only happen if a violation of knock-and-announce results in suppression, notwithstanding the fact that such suppression deprives the government of evidence that it would otherwise have (and thus puts the government in a worse position than it would have occupied in the absence of a constitutional violation).

If instead, evidence should be admitted regardless of whether police violate the Fourth Amendment when they fail to knock and announce, the Supreme Court's remand of Wilson would be inexplicable. The Court could simply have said "regardless of whether the police were right to forego knock-and-announce in this case, the conviction is affirmed, because no evidentiary consequences follow from violation of knock-and-announce." Its remanding thus strongly suggests that knock-and-announce will be enforced with the exclusionary rule and that inevitable discovery will therefore not apply.

Beyond predicting what the Court will do, moreover, it seems right to bar application of inevitable discovery to the knock-and-announce rule, just as it was right for the Court to bar its application to warrant violations.

Absent exclusion, police will have very little incentive to obtain a warrant. Appearing before a magistrate takes extra time that could be spent in the pursuit of other crimes. And a lawsuit in which the plaintiff proves that police lacked a warrant (but otherwise had probable cause) will ordinarily yield little in damages—certainly not enough to motivate police to change their behavior or to tempt plaintiffs to bring such suits in the first place.

As in the case of warrants, without application of the exclusionary rule, police will have little incentive to comply with the knock-and-announce rule. Surprise—in many cases—will seem the best strategy for police in gaining control over premises in which evidence is present. Like the warrant process, knocking and announcing results in a relinquishment of some control over the investigative process, and police rarely relinquish control voluntarily.

Furthermore, a lawsuit in which a plaintiff shows that police searched properly but failed to say "Police, we have a warrant" before entering will not likely yield much in the way of damages. As with warrantless searches, then, the exclusionary rule—even in its punitive form—may be necessary to the effective deterrence of violations.

Justice Frank Murphy once said that "there is but one alternative to the rule of exclusion. That is no sanction at all." The knock-and-announce requirement is one that civilizes the search process and can prevent trauma and save lives. Exclusion accordingly seems vastly superior to no sanction at all.
“Supreme Court Agrees to Hear ACLU of Michigan ‘Search and Seizure’ Case”

June 28, 2005
ACLU of Michigan

DETROIT—On the last day of its term, the U.S. Supreme Court announced that it will hear a case brought by the American Civil Liberties Union of Michigan raising the question of whether courts should suppress evidence seized by the police when they unlawfully enter a home without first knocking and announcing their presence. The ACLU is representing the homeowner, Booker T. Hudson.

"It is undisputed that the police violated the Fourth Amendment by barging into Mr. Hudson's home without knocking and announcing," said David A. Moran, an Assistant Professor at Wayne State University Law School and the ACLU cooperating attorney who will argue the case before the Court. "The question is whether evidence should be suppressed in order to deter the police from violating the knock and announce requirement."

The ACLU said that Detroit police broke into Hudson's home without knocking and announcing, as required by law, in 2000. Once inside, the police found a small quantity of drugs and arrested Hudson for possession, which caused him to be placed on probation for 18 months. Despite the knock and announce violation, Hudson's motion to suppress the evidence found in his home was denied because of a 1999 Michigan Supreme Court ruling that evidence found after such a violation was not subject to suppression.

However, the ACLU noted that in a 1995 U.S. Supreme Court opinion, Justice Clarence Thomas writing for the Court, stressed that the knock and announce requirement protects the dignity of residents by allowing them a reasonable time to make themselves presentable before the police enter, and also protects private property by allowing a resident an opportunity to open his or her door instead of having the doors destroyed by a police battering ram.

"As a result of the Michigan Supreme Court's ruling, police in Michigan have virtually no incentive to comply with the knock and announce requirement," said Kary Moss, ACLU of Michigan Executive Director. "The Michigan Supreme Court's position on this issue encourages police to violate constitutional rights with impunity."

This issue has been disputed in courts across the country, but the Michigan Supreme Court position has been rejected by the highest state courts in Arkansas and Maryland and by the Sixth and Eighth Circuit Courts of Appeal. The Michigan Supreme Court's holding has been embraced by only the Seventh Circuit.

The Court agreed to hear Hudson v. Michigan yesterday as it issued its final decisions in the 2004 term. Oral arguments will be held in December or January, and a decision is expected by June 2006.

Professor Moran also served as the ACLU of Michigan cooperating attorney in the Supreme Court case decided last week guaranteeing poor criminal defendants the right to a lawyer on appeal.
The Fourth amendment generally requires police officers executing a search warrant of a home to knock and announce their presence before attempting a forcible entry. How long do the officers have to wait for a forcible entry to be justified? In United States v. Banks, the U.S. Supreme Court recently held that when executing a search warrant of the home for illegal drugs, a 15-20 seconds wait before forcibly entering the premises satisfies the Fourth Amendment. Justice David H. Souter wrote the unanimous decision for the Court.

The Fourth Amendment prohibits unreasonable searches and seizures. Generally, the existence of a search warrant issued by a neutral magistrate based upon a finding of probable cause renders a government search reasonable. Even when the police have a properly issued search warrant, the officers must execute the warrant in a reasonable manner. This means that the entry into the home and the search must be carried out in a reasonable manner.

Common-Law Rule

In Wilson v. Arkansas, the Supreme Court held that the Fourth Amendment incorporates the common-law rule that generally requires police officers to knock and announce their presence before entering a dwelling. The officers must identify themselves as police officers and state that they have a search warrant and intend to search the premises before attempting a forcible entry. The rule is justified on the ground that it protects both citizens and officers from violence, it protects the compelling privacy interest a person has in his home, and it protects against needless destruction of private property."

The knock and announce rule is not absolute. In Wilson v. Arkansas, Richards v. Wisconsin, and United States v. Ramirez, the Supreme Court recognized that in some cases the facts and circumstances facing the officer may justify dispensing with the knock and announce requirements. "In order to justify a no-knock entry, the police must have reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." Whether reasonable suspicion justifies a no-knock entry "depends in no way on whether police must destroy property in order to enter."

In Richards, the Court held the fact that the search relates to a felony drug investigation does not automatically justify an exemption from the knock and announce rule. Whether there is justification for dispensing with the rule depends upon a determination of whether under the particular circumstances there is reasonable suspicion that knocking and announcing would be dangerous, futile or inhibit effective investigation of crime. The Court in Richards reasoned that not all drug cases present these justifications. "For example, while drug investigation frequently does pose special risks to officers safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree." Further, the reasons
that might be thought to justify an exception for drug cases could also be invoked for other types of crimes. "Armed bank robbers, for example, are by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a per se exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment reasonableness requirement would be meaningless."

The issue in Banks was: When the police are required to knock and announce, how long do they have to wait before making a forcible entry? Based upon information that Mr. Banks was selling cocaine at his apartment, the police obtained a warrant to search the apartment. After the officers arrived on a Wednesday afternoon, the officers at the front door announced "'police search warrant' and rapped hard enough on the door to be heard by officers at the back door." "There was no indication whether anyone was home and after waiting for 15 to 20 seconds with no answer, the officers broke open the front door with a battering ram." It turned out that Mr. Banks was in the shower and claimed to not have heard anything until the crash of the door.

The U.S. Court of Appeals for the Ninth Circuit had set forth "factors" and described "categories" of cases to aid in determining what constitutes a reasonable amount of time to wait before making a forced entry. The circuit court held that, given the damage caused by the officers' forced entry, the 15-20 second delay was insufficient.

**Disagreeing With Circuit Court**

In reversing the Circuit Court, the U.S. Supreme Court disagreed with both the Circuit Court's approach and its conclusion. The Supreme Court found that the Circuit Court's attempt to articulate factors and categories for determining a reasonable time officers must wait before making a forcible entry was inconsistent with the totality of the circumstances approach. Reasonableness is a "function of the facts of the cases so various that no template is likely to produce sounder results than examining the totality of the circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones." The Supreme Court couldn't avoid the temptation of pointing out that in two pre-Banks decisions the Supreme Court also reversed Ninth Circuit attempts to impose structure in contravention of the Supreme Court's totality of the circumstances approach. The point seems to be that by now the Ninth Circuit should have gotten the message that the use of an "overlay of a categorical scheme on the general reasonableness analysis threatens to distort the 'totality of the circumstances' principle by replacing a stress on revealing facts with resort to pigeonholes." Totality of the circumstances means consideration of all of the facts and circumstances known to the officer. For example, whether a search is for illegal drugs as compared to stolen pianos "tells a lot about the chances of their respective disposal and its bearing on reasonable time."

**Totality of Circumstances**

Although acknowledging that the issue was a "close one," the Supreme Court in Banks held that under the totality of the circumstances, a 15-20 second wait was reasonable. After 15 or 20 seconds without a response, the police could fairly suspect
that the cocaine would be gone if they waited longer. In reaching this conclusion, the Supreme Court made the following points:

1. The evaluation of a reasonable waiting period depends upon the facts and circumstances known to the officers. Thus, the facts that Banks was in the shower and did not hear the officers were not pertinent to the evaluation.

2. The critical fact in evaluating the reasonableness of the waiting period is the particular exigency claimed, not the suspect's time to reach the door. In Banks, the exigency was the opportunity to get rid of cocaine, which a prudent drug dealer will keep near a commode or kitchen sink. "The significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around, and the sufficiency of the 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the drain." The reference to "during the day" when the occupants are likely to be awake suggests that a longer waiting period would likely apply to searches at night. The Court in Banks also stated that since the critical time period is that for disposing of the drugs, there is no basis for distinguishing between searches of different types of abodes, e.g., a mansion, bungalow or apartment.

3. The need to damage property is a pertinent factor in assessing the reasonableness of the waiting period. "[T]he need to damage property in the course of getting in is a good reason to require more patience than it would be reasonable to expect if the door were open."

Some jurisdictions authorize magistrates to issue no-knock warrants. The Supreme Court has not definitively resolved the constitutionality of these warrants. The Court in Richards v. Wisconsin stated in dicta that no-knock warrants seem "entirely reasonable when sufficient cause to do so can be demonstrated ahead of time." On the other hand, the fact that a magistrate denied a no-knock warrant should not be interpreted to prohibit an officer from making a no-knock entry based upon her independent evaluation of its justification at the time the warrant is executed.

It should be noted that New York Criminal Procedure Law § 690.50 provides that a police officer executing a search warrant must give notice of authority and purpose before entry and present a copy of the search warrant upon request. The statute also authorizes the issuance of a no-knock warrant.

Conclusion

What are the remedies for Fourth Amendment knock and announce violations? It seems clear that like other Fourth Amendment violations, a knock-and-announce violation by state or local officers could give rise to a § 1983 claim for relief, and, if by federal officers, to a Bivens claim for relief. The unresolved issue, left open in Wilson and in Ramirez, is whether the exclusionary rule applies to Fourth Amendment knock-and-announce violations. The circuits are in conflict on this issue.