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JUSTICE SCALIA FOR THE DEFENSE?

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> [T]he studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way—by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.[1]

In dissenting from the 2005 *Roper v. Simmons* decision that held that imposition of the death penalty on juvenile defendants violates the Eighth Amendment to the U.S. Constitution, Justice Scalia continued to solidify his prosecution-oriented, law-and-order reputation.[2] Widely considered to be one of the most politically conservative Justices on the United States Supreme Court, many believe that his ideology results and rulings are hostile to the rights of criminal defendants.[3] Despite Scalia's reputation, the impact of his decisions often benefits criminal defendants.

A large number of scholars have studied Justice Scalia's writings and examined his judicial philosophy.[4] Some scholars have focused on his background—upbringing, religion, and education—searching

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1. Roper v. Simmons, 543 U.S. 551, 619 (2005) (Scalia, J., dissenting).
2. *See id.* at 607–30.
3. *See* Joan Biskupic, *Supreme Court: Suspects Must Assert Right to Silence*, USA TODAY (June 24, 2010, 12:07 PM), http://www.usatoday.com/news/washington/judicial/2010-06-01-supreme-court-miranda-rights_N.htm; Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1, *available at* http://www.nytimes.com/2007/07/01/washington/01scotus.html; Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. TIMES, Mar. 25, 2008, at A14, *available at* http://www.nytimes.com/2008/03/25/us/25bar.html; Reuters, *Scalia Says He Sees a Role for Physical Interrogations*, N.Y. TIMES, Feb. 13, 2008, at A17, *available at* http://www.nytimes.com/2008/02/13/us/13scalia.html.
4. *See, e.g.*, George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

for the origins of his viewpoint.[5] Others have focused on his political beliefs and strong conservative attitude.[6] Justice Scalia has self-described his judicial philosophy as adhering to the "original meaning" of the Constitution and has defended his rulings with historical evidence.[7] Most scholarship focuses on understanding the method he uses to reach certain results.[8] In contrast, this article looks at his jurisprudence from a different perspective: not to attempt to understand why he reaches a certain result, but to understand what impact his decisions have on the rights of criminal defendants.

Scholarship, legal writings, and popular media describe Justice Scalia, to one level or another, as being prosecution oriented.[9] This conclusion stems from his conservative political philosophy. As several scholars have pointed out, "[i]n Fourth Amendment, Fifth Amendment, Sixth Amendment, Eighth Amendment, Death Penalty, and Habeas Corpus criminal justice cases, 'Scalia consistently joined the other conservative judges as a relatively dependable vote against assertions of rights by criminal defendants.'"[10] Particular significance is often attached to what is interpreted as Justice Scalia's enthusiastic support for the death penalty.[11]

In contrast to his pro-prosecution reputation, his rulings often positively impact the rights of criminal defendants.[12] Some scholars

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5. *See id.* at 1298–1300.
6. Shawn Burton, Comment, *Justice Scalia's Methodological Approach to Judicial Decision-Making: Political Actor or Strategic Institutionalist?*, 34 U. TOL. L. REV. 575 (2003).
7. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) ("[W]e must take the long view, from the original meaning of the Fourth Amendment forward."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183–85 (1989).
8. *See, e.g.*, Burton, *supra* note 6, at 576.
9. Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 598 (1995) ("Among the Rehnquist Court [J]ustices, Justices Thomas and Scalia are most hostile to the rights of criminal defendants."); James Edward Wyszynski, Jr., Comment, *In Praise of Judicial Restraint: The Jurisprudence of Justice Antonin Scalia*, 1989 DETROIT C. L. REV. 115, 161 (1989) ("From the beginning of his appointment process, commentators attempted to paint Justice Scalia as an extremist, a conservative judicial activist, who was determined to undo all that the Court had accomplished with its social agenda of the last quarter-century.").
10. Burton, *supra* note 6, at 585 (quoting DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 177 (1996)).
11. Christopher E. Smith & Madhavi McCall, *Justice Scalia's Influence on Criminal Justice*, 34 U. TOL. L. REV. 535, 549 (2003) ("[Justice Scalia's] commitment to capital punishment may loom especially large in his decisions and opinions on the subject.").
12. *See infra* Part I.

have begun to notice[13] and to explain these decisions through an understanding of Justice Scalia's judicial philosophy.[14] Whether or not such decisions compliment his overall judicial philosophy, in many unexpected areas, Justice Scalia expresses himself as a strong defender of the rights of the accused over the power of the government.

This article examines criminal United States Supreme Court decisions written by Justice Scalia: majority opinions, concurring opinions, and dissents. Rather than analyzing the impact of Justice Scalia's judicial philosophy or legal theory on his decisions, this article examines the impact of Justice Scalia's decisions on the rights of criminal defendants. Part I describes scholars who have analyzed Justice Scalia's judicial theory and found that it has an unexpectedly positive impact on criminal defendants. Part II examines all cases in which Justice Scalia has written majority, concurring, or dissenting opinions that favor the prosecution. Finally, Part III examines the cases where Justice Scalia has ruled for the defense and finds that the overall impact of Justice Scalia's decisions in a variety of areas has been to the benefit of criminal defendants.

I. JUSTICE SCALIA SURPRISES SCHOLARS

Prior to his appointment to the United States Supreme Court, Justice Scalia served as an appellate judge for the D.C. Circuit, where he had a pro-prosecution reputation.[15] Shortly after he became a member of the Supreme Court, scholars began to notice that his conservative political ideology did not necessarily translate into rulings that upheld police power over the rights of the criminal defendant.[16] As early as 1990, four years after Justice Scalia's appointment, Professor George Kannar posited that Justice Scalia did not reach stereotypically conservative decisions and in some cases

13. *See, e.g.*, Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005).

14. *See* discussion *infra* Part I.

15. Kannar, *supra* note 4, at 1321 ("Though his printed opinions as a circuit judge dealing with criminal procedure issues are few, and the measure is a crude one, it is notable that every one of his D.C. Circuit opinions dealing with criminal procedure—four majority opinions and one dissent—supported the prosecution side.").

16. *See, e.g., id.* There are numerous articles and books that examine the foundation, history, and definition of Justice Scalia's judicial philosophy. This article is limited to an analysis of articles describing the impact of his judicial theory to the rights of the criminal defendant.

even wrote decisions that strongly favored criminal defendants[17]: "[I]t is the basic constitutional methodology he has adopted—combining respect for stare decisis with a 'restrained' interpretation of precedent and the Constitution's text—which so frequently, and automatically, takes him to the defendant's side."[18] Professor Kannar focused on Justice Scalia's Catholic education, demanding intellectual upbringing, and the social environment of his childhood, and found that the combination of these elements led Justice Scalia to embrace the original meaning of the Constitution.[19]

Professor Kannar reviewed cases early in Justice Scalia's tenure on the Supreme Court that surprisingly disfavored the prosecution. He wrote that, contrary to expectations, Justice Scalia "strongly rejected any appeal to a 'law and order' ideology as part of Fourth Amendment decision-making"[20] and for double jeopardy analysis.[21] In an early indication of Justice Scalia's views on the [C]onfrontation [C]lause, Professor Kannar noted that "Justice Scalia articulated a surprisingly strong and absolute defense of what he saw as basic Confrontation Clause principles."[22] Professor Kannar found that these unexpected results stem from Justice Scalia's adherence to his judicial technique of original meaning, rather than from any political agenda.[23]

Some scholars, while describing Justice Scalia's pro-prosecution bias, also recognize that his decisions do not always reflect a commitment to conservatism.[24] Others have suggested that his judicial philosophy makes him more neutral so that he does not favor prosecution over defense or vice versa.[25] Clearly, there is suspicion

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17. *See id.*
18. *Id.* at 1302.
19. *Id.* at 1315–17.
20. *Id.* at 1327.
21. *Id.* at 1338. Professor Kannar wrote,

> Double jeopardy was not about common sense or law enforcement policy or keeping bad people in places where they could do no harm. As with the Fourth Amendment and the [C]onfrontation [C]lause, in the law of double jeopardy, outcome-related "policy" considerations simply had no role. The Court should just learn to live with the unpleasant fact that, every so often, adhering to the "rules" does create windfalls.

Id.

22. *Id.* at 1330.
23. *Id.* at 1331.
24. Smith & McCall, *supra* note 11, at 548 ("It should be acknowledged that Scalia's commitments do not all lead inevitably to conservative policy outcomes.").
25. *See* Wyszynski, Jr., *supra* note 9, at 120, 144–45 (discussing the impact of Justice Scalia's use of judicial restraint).

that when Justice Scalia rules for the defense, he does so reluctantly and against his own personal beliefs.[26]

More recently, Professor Stephanos Bibas noted that Justice Scalia's versions of originalism and formalism result in decisions that may seem to benefit criminal defendants precisely because the Constitution strongly protects such rights.[27] In examining Justice Scalia's decisions concerning the Confrontation Clause and the right to have juries make findings beyond a reasonable doubt, Professor Bibas examined certain cases that show Justice Scalia's idealization of the rights embodied in the Constitution to protect the accused may likewise benefit some criminal defendants in the modern criminal justice system.[28] However, Professor Bibas found that because the current criminal justice system has turned so far away from jury trials, the reality of Justice Scalia's rulings may give no practical benefit to the large majority of criminal defendants who forgo a jury trial and plead guilty.[29]

When analyzing the Confrontation Clause,[30] Professor Bibas found that Justice Scalia's adherence to originalism successfully reinterprets the Constitution in a manner that revives the right to cross-examine witnesses in a meaningful way: "My point is not that the Clause is limited to the particular scenario that the Framers had in mind. Rather, that historical scenario illuminates the plain meaning of the text (exclusion of out-of-court testimony), which in turn is what governs today."[31] By reversing a long series of cases that permitted the admission of hearsay evidence that met a loose reliability standard and resulted in conflicting applications, Professor Bibas found that Justice Scalia's adherence to originalism allowed him to reject decades of mistaken Supreme Court decisions while simultaneously relying upon history to revive the Confrontation Clause.[32]

However, Professor Bibas argued that since few cases currently are resolved through trial, originalism and formalism lack relevance in

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26. Burton, *supra* note 6, at 602–03 ("That is, Scalia's mechanistic method of interpretation necessarily resulted in a ruling at odds with his personal beliefs, specifically a distaste for criminal defendants.").
27. *See* Bibas, *supra* note 13, at 192.
28. *See id.* at 204.
29. *See id.* at 197, 199.
30. A landmark case concerning the Confrontation Clause, *Crawford v. Washington*, 541 U.S. 36 (2004), is discussed in greater detail below. *See infra* notes 247–64 and accompanying text.
31. *See* Bibas, *supra* note 13, at 191.
32. *See id.* at 192.

the modern sentencing process.[33] The Constitution not only protects the criminal defendant from an oppressive government, but it also protects the right of the people to participate in the criminal justice system through the jury system.[34] As Professor Bibas explained that "[w]hile we normally speak of separating legislative, executive, and judicial powers, juries also play a role in the separation of powers (or checks and balances) in criminal procedure. By safeguarding juries against judicial encroachment, the Constitution protects juries' power to check judges, legislatures, and prosecutors."[35] This juror right is essentially the right of the U.S. citizen to participate directly in government and overrule any of the three branches of governmental powers being asserted against another citizen: the legislative branch (by refusing to convict a defendant because a law as written by the legislature is unjust), the executive branch (by refusing to convict a defendant because the law as applied by the prosecutor against an individual is unjust), and the judicial branch (by refusing to follow the judge's instructions if they are unjust). The jury system is the daily embodiment of self-government.

After describing Justice Scalia's exaltation of the power of the jury, Professor Bibas asserted that juries have lost the position they once held at the time of the Revolutionary War: "The disappearance of juries undermines . . . [the] idealized eighteenth-century rule in yet another way. The eighteenth-century separation of powers is anachronistic in twenty-first century criminal procedure—there are hardly any juries left to protect."[36] Because the overwhelming majority of cases are resolved through a guilty plea rather than a trial,[37] Professor Bibas feared that "[b]y stretching originalism and formalism beyond their limits, the Court over-reached and created an

33. *See id.* at 195–97 (pointing out the impracticality of abolishing the practice of plea bargaining given its modern day popularity, despite the fact that originalism may suggest its abolition is constitutionally required).

34. *See id.* at 195.

35. *Id.* at 187.

36. *Id.* at 197.

37. *Id.* at 196–97. Professor Bibas wrote,

> Article III of the Constitution mandates that '[t]he trial of all Crimes . . . *shall* be by Jury,' giving citizen-jurors a non-waivable, structural check on judicial and prosecutorial overreaching. Unlike the Sixth Amendment, Article III is not phrased as a right belonging to the accused. It was meant to be a right of We the People to administer justice . . . . Yet, today, jury trials resolved fewer than four percent of criminal cases.

Id.

unworkable sentencing mess."[38] Professor Bibas essentially argued that trial rights are important to preserve, when and if a case actually reaches trial.[39] However, because so many cases are resolved through plea-bargaining, Justice Scalia's exaltation of the jury system simply ignores the experience of the modern criminal defendant.[40]

Professor Bibas's dose of reality (that juries do not resolve many cases anymore) makes a compelling point: Justice Scalia's opinions that seem to favor a criminal defendant may have the opposite result.[41] However, dividing cases into trials and guilty pleas does not fully reflect a criminal defendant's experience in the criminal justice system. Even if ultimately resolved pursuant to a guilty plea, many criminal cases involve multiple hearings prior to the guilty plea and may include issues that are resolved during pretrial motions.[42] Issues impacting sentencing may well be litigated in a large number of cases that ultimately result in guilty pleas. Such litigation occurs during preliminary hearings, motions to suppress evidence, and other preliminary motions practice.[43] Additionally, Justice Scalia's rulings concerning the Confrontation Clause likely benefit every single defendant whose case involves cross-examination of witnesses during any stage of the criminal process, not merely those cases that ultimately are resolved by a jury trial.[44] Thus, Professor Bibas's analysis of Justice Scalia's reliance upon originalism and formalism does not fully illuminate the impact of his decisions on criminal defendants.[45]

II. JUSTICE SCALIA FOR THE PROSECUTION

Decisions involving criminal defendants receive much attention from a wide audience that includes scholars, practitioners, and media.[46] Justice Scalia's adherence to the original meaning of the Constitution sometimes results in holdings that negatively impact the accused, but such cases do not appear dependent upon any political

38. *Id.* at 199.
39. *See id.*
40. *Id.* at 197–98.
41. *See id.* at 198 (discussing the impact of the *Blakely* decision on plea bargaining).
42. *See* Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMP. L. 125, 138 (1999).
43. *See, e.g.*, FED. R. CRIM. P. 10–17.1; FED. R. EVID. 104, 1101.
44. *See* Bibas, *supra* note 13, at 190–91.
45. *See id.* at 204.
46. *See supra* notes 3, 11, 16.

agenda.[47] Three main themes emerge from Justice Scalia's decisions that negatively impact criminal defendants: practicality, finality, and deference to the Constitution's separation of powers. Because the themes of practically and finality often overlap in his writings, they are discussed together in this article. On the practical side, Justice Scalia's decisions often rest on common-sense arguments, indicating a suspicion that the rest of the Court exists in a lofty, idealistic world far removed from reality.[48] His desire for finality expresses his belief that criminal cases need to end at some point, and that these cases may ultimately result in the defendant serving a long sentence or even being executed.[49] He admits that this is the price paid for finality.[50] Additionally, Justice Scalia's insistence that the Court remain within its constitutionally mandated role as interpreter, and not author, of the law necessitates his use of historically based arguments to support his decisions.[51]

A. Death Penalty Cases

Justice Scalia's conservative and prosecution preferences seem most pronounced in capital punishment cases.[52] However, a close reading of Justice Scalia's rulings does not reveal a strong preference for or defense of capital punishment. Instead, Justice Scalia makes two broad points: (1) the death penalty was widely practiced at the time the Constitution was ratified, thus the original intent of the Constitution did not include abolition of capital punishment and (2) the Supreme Court's reasoning in this area, instead of an exercise in intellectual consistency and adherence to any particular theory of Constitutional interpretation, is instead an attempt by the Justices opposed to capital punishment to eliminate executions regardless of

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47. *See infra* Part II.A–B.

48. *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 332, 339, 341 (1999) (Scalia, J., dissenting).

49. *See* Fex v. Michigan, 507 U.S. 43 (1993). Justice Scalia writes for the majority and finds that the 180-day time period under Interstate Agreement on Detainers (IAD) for bringing Mr. Fex to trial on charges in another state did not commence until the request was delivered to the court and the prosecutor of the detainer-issuing jurisdiction. *Id.* at 52. In the *Fex* decision, Justice Scalia finds that picking a different meaning for the word *delivered* makes no better sense, and while acknowledging that unfortunate consequences may result, points out that the result is "no worse than what regularly occurred before the IAD was adopted." *Id.* at 50.

50. *See* Bousley v. United States, 523 U.S. 614, 635–36 (1998) (Scalia, J., dissenting) (citing Schlup v. Delo, 513 U.S. 298, 324 (1995)).

51. *See* Thompson v. Oklahoma, 487 U.S. 815, 872–73 (1988) (Scalia, J., dissenting); *see also infra* text accompanying notes 62–64.

52. *See infra* notes 55-58, 66, 82, 110–13 and accompanying text.

the fact that the death penalty clearly does not violate the Eighth Amendment.[53] In his analysis, Justice Scalia routinely exposes and criticizes the inconsistencies, inaccuracies, and novel justifications that the majority on the Court relies upon to strike down death penalty laws.[54]

Although since overruled, Justice Scalia has consistently asserted the right of the government to execute defendants who were juveniles at the time of the offense.[55] Justice Scalia dissented from the majority's ruling in *Thompson v. Oklahoma,*[56] which held that the execution of a criminal defendant who was fifteen years old at the time of the crime was unconstitutional. Justice Scalia also authored the now overruled decision in *Stanford v. Kentucky*,[57] which held that the execution of defendants who were sixteen- and seventeen-year-old juveniles at the time of the offense did not violate the Constitution. In so finding, Justice Scalia emphasized that the Constitution gives the legislature the power to determine death penalty eligibility.[58]

In his dissenting opinion in *Thompson v. Oklahoma*, Justice Scalia reminded the Court of the role of the legislature and the limitations placed on judicial authority:

> We have in the past studiously avoided that sort of interference in the States' legislative processes, the heart of their sovereignty. Placing restraints upon the manner in which the States make their laws, in order to give 15-year-old criminals special protection against capital punishment, may well be a good idea, as perhaps is the abolition of capital punishment entirely. It is not, however, an idea that is ours to impose.[59]

Interestingly, Justice Scalia does not endorse capital punishment or the execution of juveniles as something that he personally favors; rather, he asserts the rights of the individual state legislatures to determine whether or not to have a death penalty and to determine

53. *See* Baze v. Rees, 553 U.S. 35, 88–87, 93 (2008) (Scalia, J., dissenting); Stanford v. Kentucky, 492 U.S. 361, 368 (1989), *overruled in part by* Roper v. Simmons, 543 U.S. 551 (2005).
54. *See infra* text accompanying notes 82–91.
55. *See Stanford*, 492 U.S. 361.
56. 487 U.S. 815, 838, 859 (1988).
57. 492 U.S. at 380.
58. *Id.* at 370–72.
59. *Thompson*, 487 U.S. at 877.

age eligibility.[60] While some of his language may appear to endorse executing juveniles, Justice Scalia's dissent results from his view that the reasoning that underlies the court decision is flawed. Justice Scalia scornfully dismissed the argument that juveniles are too immature to understand the severity of murder: "It is . . . absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong . . . ."[61]

In both *Thompson* and *Stanford*, Justice Scalia emphasized that since the "evolving standards of decency" is one consideration in Eighth Amendment jurisprudence, the best standard for what society currently believes is decent is to examine the laws that are passed and enforced.

> The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to *identify* the "evolving standards of decency"; to determine, not what they *should* be but what they *are*. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism.[62]

Even these controversial and overruled pro-death-penalty writings of Justice Scalia involving juveniles do not reveal that he personally endorses the death penalty. Instead, what he endorses is the constitutional idealism of self-government. He consistently objects to any claims that judges know better than the citizenry.[63] Justice Scalia believes that to override laws written by duly elected representatives of the people and to replace them with judicial beliefs

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60. *Id.* In fact, Justice Scalia himself has asserted that he has no preference for a death penalty:

> I take no position on the desirability of the death penalty, except to say that its value is eminently debatable and the subject of deeply, indeed passionately, held views—which means, to me, that it is preeminently not a matter to be resolved here. And especially not when it is explicitly permitted by the Constitution.

Baze v. Rees 553 U.S. 35, 93 (2008) (Scalia, J., concurring).

61. *Stanford*, 492 U.S. at 374.

62. *Id.* at 378.

63. *Id.* at 377–79.

"is to replace judges of the law with a committee of philosopher-kings."[64]

Justice Scalia's majority opinions often involve technical procedural issues. Writing for the majority in *Sattazahn v. Pennsylvania*, Justice Scalia found that neither the Double Jeopardy nor Due Process Clauses bar the jury from considering a death sentence on a retrial where a defendant appealed his conviction and sentence of life imprisonment imposed by default because a jury failed to agree on the sentence.[65] In refusing to extend the Supreme Court's earlier ruling that defendants cannot be resentenced to death after they were previously sentenced for life imprisonment,[66] Justice Scalia adhered to his belief that jury decisions must be deferred to—but only after a jury has made a finding beyond a reasonable doubt. And because the life sentence in *Sattazahn* was imposed by default after the jury failed to reach a sentence and the defendant appealed the conviction seeking a new trial, the prosecutor was free to seek the death penalty again at the retrial.[67] In the *Sattazhan* decision, Justice Scalia expressed no preference whatsoever for or against the death penalty, but merely limited his analysis to the relevant legal principles.

Justice Scalia has dissented in death penalty cases involving issues of jury qualification, eligibility for the death penalty, and various jury instruction cases.[68] In 1976, the Supreme Court held that the death

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64. *Id.* at 379.

65. 537 U.S. 101, 116 (2003).

66. *Id.* at 106–09. "Since, we concluded, a sentence of life imprisonment signifies that '"the jury has already acquitted the defendant of whatever was necessary to impose the death sentence,"' the Double Jeopardy Clause bars a State from seeking the death penalty on retrial." *Id.* at 106 (quoting Bullington v. Missouri, 451 U.S. 430, 445 (1981)).

67. *See generally id.* (rejecting the argument that double jeopardy was triggered by the prosecution seeking death on retrial after a default sentence of life imprisonment had already been imposed).

68. *See* Roper v. Simmons, 543 U.S. 551, 607–30 (2005) (Scalia, J., dissenting) (eligibility for death penalty); Simmons v. South Carolina, 512 U.S. 154, 178–85 (1994) (Scalia, J., dissenting) (jury instructions); Morgan v. Illinois, 504 U.S. 719, 739–52 (1992) (Scalia, J., dissenting) (jury qualifications). Although not a death penalty case, Justice Scalia also dissented in a case designed to streamline and reduce death penalty appeals. *See* Hohn v. United States, 524 U.S. 236, 254–65 (1998) (Scalia, J., dissenting). In *Hohn*, the majority held that the Supreme Court had jurisdiction to review a denial of application for certificate of appealability under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at 253 (majority opinion). Justice Scalia's dissent argued that there was no right to appeal. *See id.* at 264 (Scalia, J., dissenting) ("The purpose of AEDPA is not obscure. It was

penalty did not violate the Eighth Amendment to the Constitution in *Gregg v. Georgia*,[69] which ushered in the modern death penalty era in the United States. *Gregg* upheld a statutory scheme requiring bifurcation in capital punishment trials: first, a hearing to determine whether or not the defendant is guilty,[70] followed by a separate hearing to determine whether the defendant should be sentenced to death or life imprisonment.[71] The Court approved the process where the jury makes an individualized decision based on aggravating and mitigating factors in deciding whether a death sentence is appropriate for a defendant at the sentencing phase.[72] Additionally, the statutory scheme at issue offered an appeal to the highest court in the state to ensure that the death penalty is proportionate in each case based on the crime itself and the individual characteristics of the defendant.[73]

One area in which Justice Scalia disagrees with the current jurisprudence is the jury selection process in capital punishment cases.[74] Potential jurors in capital murder cases typically undergo more extensive voir dire than jurors in noncapital cases.[75] For example, jurors are questioned about their opinion on the death penalty and their ability to consider the option of a death sentence if the defendant is convicted of capital murder. Known as the *Witherspoon*[76] qualification or death qualification,[77] the Supreme Court suggested in 1968 that any potential juror who would never impose the death penalty in any circumstance must be removed from the jury for cause.[78] The juror must be removed because, in telling

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to eliminate the interminable delays in the execution of state and federal criminal . . . justice system[s] produced by various aspects of this Court's habeas corpus jurisprudence.").

69. 428 U.S. 153 (1976).

70. *Id.* at 163.

71. *Id.*

72. *Id.* at 193–95 ("[S]uch standards . . . provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary.").

73. *Id.* at 198.

74. *See* Morgan v. Illinois, 504 U.S. 719, 739–52 (1992) (Scalia, J., dissenting) (arguing that jurors should not be disqualified simply because they would always impose the death penalty for capital murder).

75. Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 Through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255, 263 (2008).

76. Witherspoon v. Illinois, 391 U.S. 510 (1968).

77. *See* Bell v. Cone, 535 U.S. 685, 708 n.5 (2002) (Stevens, J., dissenting) ("death-qualification").

78. *Witherspoon*, 391 U.S. at 522–23 & n.21. Justice Stewart, writing for the majority, stated,

the court that he or she could never even consider imposing a death sentence, the juror admits that he cannot follow the jury instructions that require the juror to consider a death sentence.[79]

Defendants responded with two arguments to counter death qualification. First, the juror's right to serve on a jury was unfairly limited as a result of this ruling.[80] Secondly, because all individuals who oppose the death penalty must be removed from the jury, then in the interest of fairness, all jurors who would vote for death in every case regardless of the facts should also be removed for cause during death qualification.[81] While the Court has yet to rule on the issue of a juror's constitutional right to serve on a capital punishment case despite opposing the death penalty, the Court did rule on the issue of jurors who would automatically impose death.

In *Morgan v. Illinois*, Justice Scalia dissented from the majority's ruling that the Due Process Clause requires the disqualification of any juror who would automatically impose a sentence of death in a capital murder trial.[82] In his critique of the majority's holding, he argued that in order to reach its conclusions the Court must misread precedent, ignore contradictions within its own reasoning, and take "a great leap over an unbridgeable chasm of logic."[83] He first

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> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. at 523 n.21. While *Witherspoon* did not explicitly require removal of a juror for cause for refusing to impose the death penalty, "it is clear from . . . the progeny of *Witherspoon* that a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." *Morgan*, 504 U.S. at 728.

79. *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) ("[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'").

80. *See, e.g.*, Adam M. Clark, *An Investigation of Death Qualification as a Violation of the Rights of Jurors*, 24 BUFF. PUB. INT. L.J. 1 (2005).

81. *See, e.g.*, Ross v. Oklahoma, 487 U.S. 81, 84 (1988); Hunt v. State, 321 Md. 387, 414, 583 A.2d 218, 231 (1990); People v. Coleman, 759 P.2d 1260, 1269 (Cal. 1988).

82. Morgan v. Illinois, 504 U.S. 719, 739 (Scalia, J., dissenting).

83. *Id.* at 740, 749–50.

emphasized the Court's contradictory prior cases, which simultaneously hold that the "Sixth Amendment (which is binding on the states through the Fourteenth Amendment) does not require a jury trial at the sentencing phase of a capital case,"[84] yet "[i]n a separate line of cases . . . we have said that the exclusion of persons who merely 'express serious reservations about capital punishment' from sentencing juries violates the right to an '*impartial* jury' under the *Sixth Amendment*."[85] Thus, Justice Scalia further demonstrated the circular reasoning of the majority that admittedly does not rely upon the Sixth Amendment but instead finds that the Due Process Clause of the Fourteenth Amendment requires that "any sentencing jury be 'impartial' *to the same extent* that the Sixth Amendment requires a jury at the guilt phase to be impartial."[86] Although not a Sixth Amendment ruling, the Court must rely upon cases interpreting the Sixth Amendment in order to reach its conclusions.[87]

After emphasizing the Court's flawed reasoning, Justice Scalia then rejected the Court's conclusion that the *Morgan* holding is merely a logical extension of *Witherspoon*:

> *Witherspoon* and succeeding cases held that the State was not constitutionally *prevented* from excluding jurors who would on no facts impose death; from which the Court today concludes that a State is constitutionally *compelled* to exclude jurors who would, on the facts establishing the particular aggravated murder, invariably impose death.[88]

In Illinois, if aggravating factors are proven during the sentencing phase of a death penalty case, a juror may vote for a death sentence even if mitigating factors are also proven: "The people of Illinois have decided . . . that murder with certain aggravators will be punished by death, unless the jury chooses to extend mercy."[89] Justice Scalia explained that even if a juror asserts during voir dire that he would always impose a death sentence if aggravating factors are proven, such an assertion does not violate Illinois law because the

84. *Id.* at 740; *see* Clemons v. Mississippi, 494 U.S. 738, 745–46 (1990); Walton v. Arizona, 497 U.S. 639, 647–49 (1990); Cabana v. Bullock, 474 U.S. 376, 385 (1986); Spaziano v. Florida, 468 U.S. 447, 464 (1984); *see also* McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986).

85. *Morgan*, 504 U.S. at 740 (quoting Witherspoon v. Illinois, 391 U.S. 510, 518 (1968)).

86. *Id.*

87. *Id.* at 727–28.

88. *Id.* at 749.

89. *Id.* at 751.

law allows the juror to so decide.[90] Justice Scalia thus distinguished between the *Witherspoon*-disqualified juror, who would never follow the law,[91] and the *Morgan*-disqualified juror who is in fact acting in accordance with the death penalty process in Illinois.

Another area of litigation in death penalty cases concerns whether or not defendants have the right to a jury instruction that informs jurors of the parameters of a life sentence.[92] Because jurors may incorrectly believe that a life sentence allows for parole after a term of years,[93] defendants subjected to a possible death sentence argued that when the alternative to death is a sentence of life without parole, due process requires that jurors should be given a jury instruction with that information.[94] In *Simmons v. South Carolina*, the Supreme Court agreed with the defendant and held that South Carolina "may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole."[95] Basically a "truth in sentencing" result, the *Simmons* case ensured that jurors who consider imposing a life sentence will realize that the defendant will, in fact, spend the rest of his or her life in prison.[96]

Justice Scalia acknowledged that the majority's rule seemed reasonable yet dissented because he believes that the Constitution does not require that jurors be given a definition of a life sentence.[97] Justice Scalia found that the Due Process Clause neither mandates the jury instruction nor was there evidence in the record demonstrating that the defendant was sentenced to death because the jury feared releasing Simmons on parole.[98] Instead, Justice Scalia found that in requesting a death sentence the prosecutor relied on "the brutal murder of a 79-year-old woman in her home, and three prior crimes confessed to by petitioner, all rapes and beatings of elderly women,

90. *Id.*
91. *Id.* at 750–51.
92. *See* Kristie Ellison Shufelt, Recent Development, Kelly v. South Carolina*: When Parole Eligibility is a Matter of Life and Death*, 81 N.C. L. REV. 1333, 1333–34 (2003); C. Lindsey Morrill, Note, *Informing Capital Juries About Parole: The Effect on Life or Death Decisions*, 90 KY. L.J. 465, 466–67 (2002).
93. William W. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1624 (1989).
94. Simmons v. South Carolina, 512 U.S. 154, 160–61 (1994).
95. *Id.* at 171.
96. *See id.*
97. *Id.* at 184–85 (Scalia, J., dissenting).
98. *Id.* at 180–81.

one of them his grandmother," and he was sure that the "sheer depravity of those crimes, rather than any specific fear for the future"[99] that resulted in the death sentence. In part, Justice Scalia found that the majority's reasoning in *Simmons* is grounded in a misunderstanding of the evidence considered by the jury and their unsupported assumptions.

Indeed, Justice Scalia warned that because many other states do not offer life without parole, forcing the jury instruction in South Carolina might adversely harm a defendant elsewhere.[100] Justice Scalia warned that prosecutors could then argue the possibility of parole to jurors as another reason to impose the death penalty.[101] Coming from a Justice with a law-and-order reputation, this is an uncharacteristically pro-defense, strategic perspective.

Justice Scalia consistently objects to the Supreme Court using the Due Process Clause to develop special rules for death penalty criminal procedure. In *Shafer v. South Carolina*,[102] Justice Scalia dissented from the majority's expansion of the *Simmons* rule.[103] In *Shafer*, the defense attorney and the prosecutor disagreed over whether or not the issue of future dangerousness had been presented to the jury.[104] The Court held that a jury instruction that defined life as life without the possibility of parole must be given whenever future dangerousness is at issue.[105] Justice Scalia again voiced his concern that the majority was improvising rules for capital murder without constitutional authority[106]: "Providing such information may well be a good idea (though it will sometimes harm rather than help the defendant's case)—and many States have indeed required it. The Constitution, however, does not."[107] Essentially, Justice Scalia found no constitutional power to develop special criminal procedure rules applicable to death penalty cases[108] and warned that such rules may ultimately harm criminal defendants.[109]

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99. *Id.* at 181.

100. *Id.* at 183 ("Preventing the *defense* from introducing evidence regarding parolabilty is only half of the rule that prevents the *prosecution* from introducing it as well. If the rule is changed for defendants, many will think that evenhandedness demands a change for prosecutors as well.").

101. *Id.* at 183–84.

102. 532 U.S. 36 (2001).

103. *Id.* at 55 (Scalia, J., dissenting).

104. *Id.* at 54.

105. *Id.* at 51.

106. *Id.* at 55 (Scalia, J., dissenting).

107. *Id.* (citations omitted).

108. *Id.*; *accord* Atkins v. Virginia, 536 U.S. 304, 337–38 (2002) (Scalia, J., dissenting). Justice Scalia wrote,

Justice Scalia's insistence that the Court limit itself to the power described in the Constitution is highlighted in recent cases concerning eligibility for the death penalty.[110] In *Atkins v. Virginia*, the Supreme Court held that the Eighth Amendment prevents the execution of individuals with mental retardation.[111] Similarly in *Roper v. Simmons*, the Supreme Court held that execution of criminal defendants who were juveniles at the time of their offense violates the Constitution.[112] In both cases, Justice Scalia wrote scathing dissents.[113]

In *Atkins* and *Roper*, Justice Scalia found unpersuasive the Court's willingness to consider laws of other countries in applying the

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> Today's decision is the pinnacle of our *Eighth Amendment* death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the *Eighth Amendment*; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.

Id.

109. *Shafer*, 532 U.S. at 55 (Scalia, J., dissenting).

110. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008). Justice Scalia joined Justice Alito in his dissent and argued the following:

> The Court today holds that the *Eighth Amendment* categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be. The Court provides two reasons for this sweeping conclusion: First, the Court claims to have identified "a national consensus" that the death penalty is never acceptable for the rape of a child; second, the Court concludes, based on its "independent judgment," that imposing the death penalty for child rape is inconsistent with "'the evolving standards of decency that mark the progress of a maturing society.'" Because neither of these justifications is sound, I respectfully dissent.

Id. (Alito, J., dissenting) (citations omitted).

111. 536 U.S. 304, 321 (2002).

112. 543 U.S. 551, 578–79 (2005).

113. *See Atkins*, 536 U.S. at 337–53 (Scalia, J., dissenting); *Roper*, 543 U.S. at 607–30 (Scalia, J., dissenting).

"evolving standards of decency" aspect of the Eighth Amendment[114]: "But the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called 'world community,' and respondents to opinion polls."[115] In *Roper*, Justice Scalia again objected to the Court's consultation of laws of other nations when interpreting the U.S. Constitution[116]: "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage."[117]

Justice Scalia commented on the naiveté of relying upon the claims of other countries concerning their criminal justice systems, stating that "the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact adheres to a rule of no death penalty for offenders under 18."[118] Similarly, Justice Scalia noted that many protections for criminal defendants are uniquely American rights.[119] Thus, the majority should be more suspicious of the laws of other countries that may not be enforced in those countries and may also be less favorable to the rights of

114. *Atkins*, 536 U.S. at 346–48 (Scalia, J., dissenting) ("Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."); *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.").

115. *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting).

116. *Roper*, 543 U.S. at 622.

117. *Id.*

118. *Id.* at 623.

119. *Id.* at 624. Justice Scalia wrote,

> [T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-pronounced exclusionary rule, for example, is distinctively American.

Id.

criminal defendants[120] than the rights found in the United States Constitution.[121]

Once again, Justice Scalia did not express a personal opinion supporting capital punishment. In fact, Justice Scalia appeared perhaps even neutral on the topic itself: "There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court."[122] Rather, Justice Scalia objected to the Supreme Court replacing the opinion of the citizens, as expressed through laws passed by popularly elected state legislators, with the Supreme Court's own opinion.[123] Additionally, Justice Scalia expressed his irritation that those opposed to the death penalty are attempting to bring about its abolition, not by legislation, but by making its imposition unlikely: "The heavily outnumbered opponents of capital punishment have successfully opened yet another front in their guerilla war to make this unquestionably constitutional sentence a practical impossibility."[124] In referencing the "heavily outnumbered opponents of capital punishment," Justice Scalia underlined his belief in the political system, where the popular vote of elected officials results in the passage of laws voicing the will of the people.[125] Thus, much of Justice Scalia's reputation for

120. Justice Scalia further notes other areas of law in which the United States is completely at odds with those of most other countries:

> The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution's requirement that 'Congress shall make no law respecting an establishment of religion' . . . . And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability.

Id. at 625 (citation omitted).

121. *Id.* at 626–27.

122. Atkins v. Virginia, 536 U.S. 304, 353 (2002).

123. *Roper*, 543 U.S. at 607–08. Justice Scalia wrote,

> In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment." . . . What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed.*

Id. (citation omitted).

124. Simmons v. South Carolina, 512 U.S. 154, 185 (1994).

125. *See id.* at 178–80, 184–85.

supporting the death penalty stems from what is presumed to be his preference because of the results he reaches. However, his support is not for the death penalty, but for the rights of the people to choose their own laws.

While Justice Scalia routinely asserts the constitutional right of individual states to retain the death penalty as a potential punishment within the criminal justice system, his impact is minimized by the small percentage of death penalty cases. The overall impact of Supreme Court death penalty decisions is actually quite narrow, and often limited to other capital murder cases.[126] For example, in the majority of murder cases, defendants are not eligible for the death penalty;[127] they simply have not committed a crime that is punishable by death under the relevant state or federal statute.[128] Thus, because murder is only a small percentage of all crime, and because very few of those murders qualify as a possible death penalty case, then the total impact of Justice Scalia's impact on criminal defendants is by definition much narrower.

There are significant differences in death penalty cases that make Justice Scalia's impact on death penalty jurisprudence seem wider than it actually is. First, the majority of death penalty cases go to trial—a much higher percentage than overall felony cases, where the vast majority result in guilty pleas due to plea bargaining.[129] Thus, a

126. *See* Eric Tennen, *The Supreme Court's Influence on the Death Penalty in America: A Hollow Hope?*, 14 B.U. PUBL. INT. L.J. 251, 257–67 (2005) (discussing specific death penalty cases). Of course, the author realizes that saying a Justice rules for the defendant in many areas, except capital punishment, is a little like saying, "[o]utside of the killings, [Washington, D.C.] has one of the lowest crime rates in the country." Judi Hasson, *Mayor: D.C. Crime Rates Low*, USA TODAY, Mar. 24, 1989, at A2. Nonetheless, as discussed *infra*, there are many reasons to distinguish between capital punishment and all other crimes in this assessment.

127. *See* Steven F. Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 724 (2007); *see also* Frank Green and Reed Williams, *Many Factors Figure in Death-Penalty Cases*, RICHMOND TIMES DISPATCH, Oct. 3, 2010, at Local News, *available at* http://www2.timesdispatch.com/news/2010/oct/03/exec03-ar-538839/ (suggesting roughly one third of murder cases are eligible for the death penalty).

128. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2008—STATISTICAL TABLES tbl. 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/ pdf/cp08st.pdf (listing crimes punishable by death, by state).

129. MATTHEW R. DUROSE ET AL., FELONY SENTENCES IN STATE COURTS, 2006 - STATISTICAL TABLES 24 (2009), *available at* http://bjs.ojp.usdoj.gov/ content/pub/pdf/fssc06st.pdf. "But only some of those tests are implicated in prosecutions, and only a small fraction of those cases actually proceed to trial. . . . ([N]early 95% of convictions in state and federal courts are obtained via guilty plea)." Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2540 (2009) (citation omitted).

competent defense attorney who represents clients accused of a capital crime must read multiple cases in which Justice Scalia favored the prosecution's argument over the defendant subject to the death penalty. Certainly many of these death penalty decisions have impact beyond death penalty cases;[130] even defense attorneys who never represent a defendant charged with capital murder will be familiar with such decisions.

Additionally, Justice Scalia's reasoning in juvenile death penalty cases has been overturned, and he primarily writes dissents in many other death penalty cases.[131] Even if his decisions stem from personal animosity toward criminal defendants or personal support of the death penalty, such decisions lack widespread impact.

B. General Criminal Cases

Justice Scalia has ruled for the government and against the defendant in cases concerning issues of criminal procedure and the Fourth, Fifth, and Sixth Amendments.[132]

1. Criminal Procedure

Justice Scalia's decisions in criminal procedure consistently apply a strict construction approach to statutory interpretation,[133] adhere to the plain meaning of the words used by the drafters of the statutes, and enforce procedural rules and deadlines.[134] Such an approach sometimes benefits the prosecution and sometimes the defense, depending on whether the rule of lenity[135] applies. In *Deal v. United States*, the Court did not apply the rule of lenity because there was no

130. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 596 (1978) (holding that jurors who clearly manifest that they cannot "abide by existing law" may be properly excluded from the jury).

131. *See* Stanford v. Kentucky, 492 U.S. 361 (1989), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005); *see also, e.g.*, *Roper*, 543 U.S. at 607–30 (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 337–54 (2002) (Scalia, J., dissenting).

132. *See* discussion *infra* Part II.B.1–3.

133. *See, e.g.*, United States v. Williams, 553 U.S. 285, 293–97 (2008) (upholding the PROTECT Act as not overly broad under the Fifth Amendment and as complying with the Due Process Clause using a strict approach to statutory construction).

134. *See* Sell v. United States, 539 U.S. 166, 186–87 (2003) (Scalia, J., dissenting) (refusing to reach the merits of the case because it was not a "final decision" and thus not properly before the Court).

135. Rule of lenity is defined as "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." BLACK'S LAW DICTIONARY 1449 (9th ed. 2009).

ambiguity in the statute and thus allowed an enhanced sentence to stand.[136]

Particularly in cases involving procedural default, Justice Scalia's decisions seem to ruthlessly apply rules without consideration for mercy.[137] One example is *Puckett v. United States*, where Justice Scalia wrote for the majority in holding that a procedurally defaulted claim for violation of a plea bargain is subject to plain-error review.[138] While the Government conceded the violation on appeal, Justice Scalia noted that during the sentencing, Puckett's attorney never objected that "the Government was violating its obligations under the plea agreement by backing away from its request for the reduction. . . . And he did not move to withdraw Puckett's plea on grounds that the Government had broken its sentencing promises."[139] Although Justice Scalia recognized the severity of the Government's behavior, he expressed vindication in the ultimate result:

> It is true enough that when the Government reneges on a plea deal, the integrity of the system may be called into question, but there may well be countervailing factors in particular cases. Puckett is again a good example: Given that he obviously did not cease his life of crime, receipt of a sentencing reduction for *acceptance of responsibility* would have been so ludicrous as itself to compromise the public reputation of judicial proceedings.[140]

Justice Scalia strictly applied procedural default to produce this result.[141] Yet Justice Scalia appeared unconcerned with the unfairness of the government's plea agreement violation because of his view that the defendant was ultimately to blame; the combination of the defendant's failure to object with his continued criminal

136. 508 U.S. 129, 131–32 (1993) (holding that "conviction" within the meaning of the statute refers to a finding of guilt by a judge or jury that precedes the entry of a final "judgment of conviction" and the statute does not require that a previous sentence become final in order for an enhanced sentence to be imposed for the instant offense).

137. *See* Carlisle v. United States, 517 U.S. 416, 421, 430 (1996) (holding that the defendant's failure to make a timely motion under Rule 29(a) of the Federal Rules of Civil Procedure created a procedural default, and thus the Court had no authority to grant a judgment of acquittal, despite the defendant's claim of actual innocence).

138. 129 S. Ct. 1423, 1428 (2009).

139. *Id.* at 1427.

140. *Id.* at 1433.

141. *Id.* at 1428.

behavior after the guilty plea was entered but before he was sentenced.[142]

Justice Scalia's interest in the *process* aspect of criminal procedure leads him to prefer a system that promotes finality. In dissenting from the majority in one case on the issue of appeal from a guilty plea despite procedural default when there is a claim of actual innocence, Justice Scalia acknowledged the emotional appeal of being sure that only the guilty are convicted, even as he underlined that impossibility:

> It would be marvelously inspiring to be able to boast that we have a criminal-justice system in which a claim of 'actual innocence' will always be heard, no matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault. But of course we do not have such a system, and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could.[143]

Here, his focus on a reliable, workable, and final process led him to reject the defendant's claim.

Justice Scalia's preferences for stare decisis and adhering to the plain meaning of the Constitution prompted him to dissent in *Yeager v. United States,* a case involving the Double Jeopardy Clause.[144] The majority found that the jury's acquittal of the defendant on some counts and inability to reach a verdict on others precludes retrial of the hung counts.[145] In dissent, Justice Scalia stated,

> Until today, this Court has consistently held that retrial after a jury has been unable to reach a verdict is part of the original prosecution and that there can be no second jeopardy where there has been no second prosecution. Because I believe holding that line . . . is more consistent with the Court's cases and with the original meaning of the Double Jeopardy Clause, I would affirm the judgment.[146]

142. *Id.* at 1431, 1433.
143. Bousley v. United States, 523 U.S. 614, 635 (1998) (Scalia, J., dissenting).
144. 129 S. Ct. 2360 (2009).
145. *Id.* at 2362–63.
146. *Id.* at 2374 (Scalia, J., dissenting).

While Justice Scalia indicated a preference that the Court return to the original meaning of the Double Jeopardy Clause,[147] at a minimum he objects to the expanded doctrine announced by *Yeager*.[148]

2. Fourth Amendment

Justice Scalia's Fourth Amendment rulings have received particular notice for their harsh impact on the rights of criminal defendants.[149] Although he does not consistently rule against criminal defendants,[150] decisions involving what constitutes *probable cause* and prescribing the parameters of a search likely have wide impact.[151] Regardless of the impact, much of Justice Scalia's pro-prosecution reputation results from his ruling against the rights of the defendant in cases involving search and seizure.[152]

In 2006, Justice Scalia wrote the majority opinion in two Fourth Amendment cases. In *United States v. Grubbs*,[153] Justice Scalia wrote that anticipatory search warrants comply with the Constitution as long as two conditions are met: "It must be true not only that *if* the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place,' . . . but also that there is probable cause to believe the triggering condition *will occur*."[154] Anticipatory search warrants are signed by a magistrate but can only be executed when and if the triggering condition occurs.[155] The Court found such warrants valid and, moreover, found that the triggering condition does not need to be specified in the warrant itself.[156] As Justice Scalia wrote, the Fourth Amendment "specifies only two matters that must be 'particularly

147. *Id.* at 2371 ("This case would be easy indeed if our cases had adhered to the Clause's original meaning.").

148. Justice Scalia expands on this point in *Sattazahn v. Pennsylvania*, which upheld retrial in a capital murder case. *See* discussion *supra* Part II.A.

149. *See* Gerald F. Uelman, *Knock and Announce Violations After* Hudson v. Michigan, CHAMPION, Sept./Oct. 2006, at 62 ("Courts should be reminded of these tragedies before they buy into Justice Scalia's characterization of the knock and announce requirement as 'the right not to be intruded upon in one's night clothes.'").

150. *See infra* note 247 and accompanying text.

151. *See* Jodi Levine Avergun, Note, *The Impact of* Illinois v. Gates*: The States Consider the Totality of the Circumstance Test*, 52 BROOK. L. REV. 1127, 1127–30 (1987).

152. *See supra* note 15 and accompanying text.

153. 547 U.S. 90 (2006).

154. *Id.* at 96–97 (citation omitted) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

155. *Id.*

156. *Id.* at 99.

describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized.'"[157]

In *Hudson v. Michigan*,[158] Justice Scalia wrote the decision and held that there is no remedy for knock-and-announce violations. In *Hudson*, the officers only waited mere seconds before forcing their way into a home to execute a search warrant.[159] Even though the Court found that the knock-and-announce rule was violated, it also found that the application of the exclusionary rule was not a remedy for such a violation.[160] Noting the privacy and dignity issues that the knock-and-announce rule was designed to protect, Justice Scalia nonetheless recognized that the warrant was going to be served however the police decided to enter: "What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant."[161] Thus, because the government had a warrant to search and seize, and because exigent circumstances would have suspended the knock-and-announce rule anyway, the Court declined to extend the exclusionary rule under these circumstances.[162]

In Fourth Amendment search and seizure issues, Justice Scalia has dissented in cases upholding a defendant's rights. In *Ornelas v. United States*, Justice Scalia dissented from the majority's holding that the court of appeals should have reviewed de novo the district court's determination of probable cause to search.[163] Justice Scalia found the de novo review to have practical difficulties that would impose a heavy burden on the courts of appeals and would have instead relied upon the trial court's discretion as the appropriate standard of review.[164] Reviewing cases for abuse of discretion promotes Justice Scalia's interest in finality of judgments because such a standard is likely to prevent or limit appellate review in many cases.

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157. *Id.* at 97 (alteration in original).
158. 547 U.S. 586 (2006).
159. *Id.* at 588.
160. *Id.* at 594.
161. *Id.*
162. "But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even 'reasonable suspicion' of their existence, *suspend the knock-and-announce requirement anyway.*" *Id.* at 596, 599.
163. 517 U.S. 690, 700 (1996) (Scalia, J., dissenting).
164. *Id.* at 700–05.

In *Georgia v. Randolph*, Justice Scalia dissented from the majority's holding that a warrantless search was unreasonable as to the husband who was physically present at his home at the time of the search and actively refused to consent even though his wife consented to a search.[165] After criticizing the majority's opinion for lacking historical integrity, Justice Scalia interjected reality into the issue and made an argument more in line with contemporary feminist theory[166] than one might expect from a conservative judge:

> Given the usual patterns of domestic violence, how often can police be expected to encounter the situation in which a man urges them to enter the home while a woman simultaneously demands that they stay out? The most common practical effect of today's decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes—which is, curiously enough, *precisely* the power that Justice Stevens disapprovingly presumes men had in 1791.[167]

Justice Scalia made the practical point that police typically receive domestic violence calls in which the victim is a woman.[168] If the abuser is allowed to keep the police out of the home, the victim may be further harmed once the abuser shuts the door on the police.[169] In *Randolph*, the Supreme Court essentially broke a tie: two people with equal rights to the home disagreed over whether the police could enter. The majority found that the objection of the husband overruled the consent of the wife.[170] While the majority sided with the rights of the accused, it is Justice Scalia who reminded us that the overwhelming majority of victims in domestic assault cases are women.

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165. 547 U.S. 103, 142–45 (2006) (Scalia, J., dissenting).

166. *See generally* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992) (discussing feminist theory on protection of women from their abusers).

167. *Randolph*, 547 U.S. at 145.

168. *See id.*

169. *Id.* at 127, 138–40 (Roberts, C.J., dissenting, joined by Justice Scalia).

170. *Id.* at 106 (majority opinion) (holding that while police may enter a house, any evidence obtained will be suppressed when used against the objecting occupant).

3. Fifth and Sixth Amendment

Justice Scalia wrote the majority opinion in *Brogan v. United States*, which upheld the constitutionality of imposing criminal liability on a defendant for simply denying wrongdoing to investigators in violation of a federal statute.[171] Addressing the Fifth Amendment aspect of the case, Justice Scalia wrote that "[w]hether or not the predicament of the wrongdoer run to ground tugs at the heartstrings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie."[172] Thus, while a defendant is free to stand silent and say nothing in response to accusatory questions, he will be charged with a crime if he lies.[173] Justice Scalia's emphasis on the fact that innocent persons would not find themselves having to choose between lying and standing uncomfortably silent implies that he is not concerned with the guilty criminal, only the innocent accused.

In Sixth Amendment cases, Justice Scalia has dissented from majority opinions involving codefendants' statements and ineffective assistance of counsel claims.[174] In his dissent from the majority's holding in *Gray v. Maryland*,[175] Justice Scalia objected to the extension of a rule requiring that the defendant's name be omitted from a nontestifying codefendant's statement.[176] In *Gray*, the defendant's name was removed from the statement and replaced with blanks and the word *deleted*.[177] In finding that it did not fall within the class of statements to which *Bruton's*[178] protective rule applies, Justice Scalia again interjected a real-world view into his dissent:

> The United States Constitution guarantees, not a perfect system of criminal justice (as to which there can be considerable disagreement), but a minimum standard of fairness. Lest we lose sight of the forest for the trees, it

171. 522 U.S. 398, 399, 404 (1998).

172. *Id.* at 404.

173. *See id.*

174. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1494 (2010) (ineffective assistance of counsel); Gray v. Maryland, 523 U.S. 185, 200 (1998) (codefendant's statements).

175. 523 U.S. at 200.

176. *Id.*; Bruton v. United States, 391 U.S. 123, 126 (1968) (excluding evidence of codefendant's confession incriminating defendant when codefendant did not testify because it violates the Confrontation Clause).

177. *Gray*, 523 U.S. at 188.

178. 391 U.S. at 137 (holding that a nontestifying codefendant's confession that implicates a defendant is not admissible at their joint trial unless all references to the defendant are redacted).

> should be borne in mind that federal and state rules of criminal procedure—which can afford to seek perfection because they can be more readily changed—exclude non-testifying-codefendant confessions even where the Sixth Amendment does not.[179]

By emphasizing that protections for criminal defendants stem not only from the Sixth Amendment, but also from federal and state rules, Justice Scalia expressed his preference that the Court refrain from constitutionalizing procedural rules for criminal trials.[180]

Justice Scalia again argued that the Constitution does not guarantee a perfect system in his dissent from the holding in *Padilla v. Kentucky*.[181] Defendant Padilla pled guilty to a narcotics transportation charge without being warned by his attorney that he was subject to automatic deportation despite the fact he was a forty-year legal resident of the United States and served in the United States armed forces during Vietnam.[182] Justice Scalia objected to the Court's stretching of the Sixth Amendment to fit this admittedly compelling case[183]: "In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world . . . ."[184] While Justice Scalia acknowledged that the trial attorney gave inaccurate advice, he would not have overturned the conviction because the advice pertained to a collateral matter, deportation, which was not the subject of the case for which the defendant was entitled to effective assistance of counsel.[185]

In *Dickerson v. United States*,[186] the Court held that an act of Congress did not have the authority to overrule *Miranda v. Arizona*[187] because the warning system required by *Miranda* was

179. *Gray*, 523 U.S. at 204.
180. *See supra* Part II.A. (discussing how Justice Scalia repeatedly objects to the Court's development of new procedures that apply exclusively to capital punishment cases).
181. 130 S. Ct. 1473, 1494 (2010) (Scalia, J., dissenting).
182. *Id.* at 1477–78 (majority opinion).
183. *See id.* at 1494–95 (Scalia, J., dissenting).
184. *Id.* at 1494.
185. *Id.* at 1494–97.
186. 530 U.S. 428 (2000).
187. 384 U.S. 436 (1966) (noting that every person in police custody has the right to remain silent, which must be substantially conveyed to the suspect before he can knowingly and intelligently waive his right).

constitutionally based.[188] Justice Scalia dissented, finding that history, logic, and the Constitution compel overruling *Miranda*[189]: "The Court therefore acts in plain violation of the Constitution when it denies effect to this Act of Congress."[190] Because the *Miranda* decision did not hold that the Sixth Amendment required warnings, and subsequent cases clearly held that failure to warn a criminal defendant pursuant to *Miranda* did not violate the Constitution,[191] Justice Scalia found that the Constitution requires the overruling of *Miranda*:

> I believe we cannot allow to remain on the books even a celebrated decision—*especially* a celebrated decision—that has come to stand for the proposition that the Supreme Court has power to impose extraconstitutional constraints upon Congress and the States. This is not the system that was established by the Framers . . . .[192]

The legislature is empowered with writing the laws, not the Supreme Court. Since the Court overstepped its role by writing into law that *Miranda* warnings must be given prior to a custodial interrogation, Justice Scalia believed that *Miranda* should be overturned.[193] This result does not stem from an argument about the appropriate warnings given to criminal defendants but from the appropriate power that the Supreme Court should be exercising.[194]

Justice Scalia authored two recent opinions that appear to negatively impact the defendant's rights. *Montejo v. Louisiana* held that neither the defendant's request for counsel at arraignment nor the court's appointment of counsel invalidated a waiver to police-initiated interrogation.[195] Recognizing that many criminal defendants

188. *Dickerson*, 530 U.S. at 432.

189. *Id.* at 448–50, 456 (Scalia, J., dissenting).

190. *Id.* at 446.

191. Justice Scalia wrote,

> The Court concedes only "that there is language in some of our opinions that supports the view that *Miranda's* protections are not 'constitutionally required.'" It is not a matter of *language*; it is a matter of *holdings*. The proposition that failure to comply with *Miranda's* rules does not establish a constitutional violation was central to the holdings of *Tucker, Hass, Quarles, and Elstad.*

Id. at 454 (citations omitted).

192. *Id.* at 465.

193. *Id.*

194. *Id.*

195. 129 S. Ct. 2079, 2086, 2092 (2009).

are indigent, Justice Scalia indicated that the appointment of counsel has become automatic in a number of states.[196] Therefore, requesting an attorney is not an assertion that the defendant wants his attorney before questioning begins:[197]

> When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary. There is no "*initial* election" to exercise the right . . . . No reason exists to assume that a defendant like Montejo, who has done nothing at all to express his intentions with respect to his *Sixth Amendment* rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring.[198]

Montejo raises the concern that indigent defendants will have a more difficult time proving that a request for appointment of counsel meant that they did not want to speak with the police instead of merely requesting an attorney for trial.[199] Those who hire private counsel will undoubtedly expect the attorney to be an immediate barrier between the defendant and every interaction with the police and the prosecution.[200]

Justice Scalia minimized those concerns and found that such statements could still be challenged under the Sixth Amendment[201]: "If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it."[202] Although *Montejo* decided a narrow issue, it may have significant impact: indigent defendants are not likely to share Justice Scalia's view that the relationship between police and suspects is between equals, in which the suspect can easily terminate the interview.[203].

Equally of concern is *Maryland v. Shatzer,* where a defendant's statements were ruled admissible after he asserted his right to silence

196. *Id.* at 2083.
197. *Id.* at 2086.
198. *Id.* at 2086–87 (citation omitted).
199. *Id.* at 2084.
200. *See id.* at 2095 (Stevens, J., dissenting).
201. *See id.* at 2091–92 (majority opinion).
202. *Id.* at 2091.
203. *See id.* at 2090.

because there was over a two-week break in custody between the first and second attempts at interrogation.[204] As a result, Mr. Shatzer's statement, taken after he had once asserted his *Miranda* rights, was not suppressed at his trial.[205] Yet the majority went much further than merely finding Mr. Shatzer's statement admissible, holding that once two weeks expire from the first interview in which the defendant invoked his *Miranda* rights, police may then contact the defendant again, re-*Mirandize* him, and then inquire if he wants to waive those previously asserted rights.[206]

Justice Scalia found that a break in custody lasting two weeks would be long enough between the first time a suspect is asked if he would like to speak with police and declines, and the second time he is asked.[207] Justice Scalia wrote that "14 days. . . . provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."[208] In holding that police may once again question a suspect fourteen days after he has asserted his *Miranda* rights, the Court likely encourages the police to find a way to exploit the rules, similar to the technique used when police had defendants confess first, *Mirandized* them, and then have them confess again.[209] The Court's ruling in *Shatzer* invites similar police manipulation of suspects and thus negatively impacts the rights of the accused.[210]

Justice Scalia explained the historical relationship between the judiciary and the grand jury system in *United States v. Williams*.[211] Writing for the majority, Justice Scalia found that the circuit court cannot interfere with the independence of the grand jury by writing regulations requiring a prosecutor to present exculpatory evidence to it.[212] His opinion relied upon an historical explanation of the role of the grand jury as well as precedent that other constitutional rules do

204. 130 S. Ct. 1213, 1227 (2010).
205. *Id.*
206. *Id.* at 1222–23.
207. *Id.* at 1223.
208. *Id.*
209. *See* Missouri v. Seibert, 542 U.S. 600, 604 (2004) (striking down the police department's practice of interrogating a suspect without advising them of their *Miranda* rights, getting a confession, and then obtaining a *Miranda* waiver and having the suspect recite his or her prior confession).
210. *See Shatzer*, 130 S. Ct. at 1227 n.1 (Thomas, J., concurring) (noting different techniques that police officers could use in an attempt to manipulate suspects).
211. 504 U.S. 36, 47 (1992).
212. *Id.* at 45, 47.

not apply to the grand jury.[213] "In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people."[214] While this ruling did not benefit criminal defendants, Justice Scalia noted that the role of the grand jury was to preserve power for the people instead of the governmental authorities.[215] Justice Scalia also suggested that "Congress is free to prescribe" rules requiring that exculpatory material be presented to the grand jury but that the courts do not have such authority.[216]

In *Mitchell v. United States*, Justice Scalia dissented from the majority holding that the Fifth Amendment prevents a sentencing judge from drawing an adverse inference from the defendant's silence during a sentencing hearing.[217] The Court limited its ruling to prevent a sentencing judge from drawing an adverse inference in determining facts relating to the circumstances and details of the crime.[218] Justice Scalia agreed that the Fifth Amendment allows the defendant to remain silent at sentencing but found the majority's holding historically inconsistent, unworkable, and ludicrous—in light of the fact that the sentencing judge's entire role during sentencing is to determine the facts and judge what sentence is appropriate for the defendant.[219] Emphasizing the impracticality of the majority's opinion, Justice Scalia indicated that the Court itself was embarrassed by its own ruling:

> Today's opinion states, in as inconspicuous a manner as possible at the very end of its analysis (one imagines that if the statement were delivered orally it would be spoken in a

213. *Id.* at 47–49. Justice Scalia wrote,

> In *United States v. Calandra*, . . . a grand jury witness faced questions that were allegedly based upon physical evidence the Government had obtained through a violation of the Fourth Amendment; we rejected the proposal that the exclusionary rule be extended to grand jury proceedings . . . . [W]e declined to enforce the hearsay rule in grand jury proceedings, since that "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules."

Id. at 50 (quoting Castello v. United States, 350 U.S. 359, 364 (1956)).

214. *Id.* at 47 (citing Stirone v. United States, 361 U.S. 212, 218 (1960)).

215. *Id.*

216. *Id.* at 55.

217. 526 U.S. 314, 331 (1999) (Scalia, J., dissenting).

218. *Id.* at 328 (majority opinion).

219. *See id.* at 338–39 (Scalia, J., dissenting).

> very low voice, and with the Court's hand over its mouth), that its holding applies only to inferences drawn from silence "in determining the facts of the offense."[220]

Since the ruling requires the "[sentencing] judge to avert his eyes from the elephant in the courtroom when it is the judge's job to size up the elephant,"[221] Justice Scalia predicted that the impracticality of this ruling will produce more litigation attempting to understand what the Court meant.[222]

Justice Scalia wrote a wide variety of decisions that negatively impact criminal defendants.[223] His original meaning approach to analyzing the Constitution results in rulings that reflect the criminal procedure status during the Revolutionary War Era.[224] Such an approach may favor the prosecution, especially in death penalty cases.[225] However, in areas of wide applicability that are commonly prosecuted, Justice Scalia's decisions have had a hugely positive impact on the rights of the criminal defendant.

III. JUSTICE SCALIA FOR THE DEFENSE

Justice Scalia's positive impact on the rights of criminal defendants has been largely unnoted. Justice Scalia has authored a variety of

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220. *Id.* at 339.

221. *Id.* at 341.

222. *Id.* at 340.

223. *See, e.g.*, Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009) (holding that a criminal defendant's request for counsel at arraignment does not give rise to a presumption that a subsequent waiver of *Miranda* rights is invalid); Portuondo v. Agard, 529 U.S. 61, 79 (2000) (holding that a prosecutor calling the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and tailor his testimony accordingly does not violate his right to be present at trial and confront his accusers); Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551, 574 (2005) (holding that imposing capital punishment on a 16- or 17-year-old murderer is not cruel and unusual).

224. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 53–54 (2004) (applying an originalist analysis and holding that the Confrontation Clause excludes testimonial hearsay statements); United States v. Gaudin, 515 U.S. 506, 512–14 (1995) (using an originalist analysis to hold that a judge may not withhold any element of a criminal offense from the jury); Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) (using an originalist analysis and holding that a sentence that is not otherwise cruel and unusual does not become unconstitutional because it is mandatory).

225. *See* Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 984–85 (2010) ("[V]iewed through [the lens of an originalist], the death penalty, having been in the late eighteenth century neither unusual nor considered cruel, is constitutionally permissible.").

opinions in which the rights of the criminal defendant were upheld, even against long-accepted prosecutorial procedures.[226] Justice Scalia has authored both majority and dissenting opinions that favor the criminal defendant, in areas of law including the Sixth Amendment, Fourth Amendment, and Double Jeopardy Clause. Whatever his underlying rationale for these decisions, their impact benefits every single criminal defendant.

A. Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[227]

1. To Be Confronted with the Witnesses Against Him

Justice Scalia has long adhered to the text of the Sixth Amendment in arguing for a strong defense of the right of the accused to confront the witnesses against him. Early in his tenure on the Supreme Court, Justice Scalia wrote the majority opinion in *Cruz v. New York*, holding that the Confrontation Clause barred the admission of a nontestifying codefendant's confession at Cruz's trial because the confession was not admissible against defendant Cruz, only against the codefendant.[228] Justice Scalia wrote that the factors that must be considered for admission of the codefendant's statement were identical to those announced in *Bruton*[229]: "[T]he likelihood that the instruction [to not consider the codefendant's confession against Cruz] will be disregarded; the probability that such disregard will have a devastating effect; and the determinability of these facts in advance of trial."[230] Thus, the Court held that the confession by the nontestifying codefendant could not be introduced at a joint trial,

226. *See infra* Part III.A.1.
227. U.S. CONST. amend. VI.
228. 481 U.S. 186, 193 (1987).
229. Bruton v. United States, 391 U.S. 123, 125–26 (1968); *see also supra* note 178 and accompanying text.
230. *Cruz*, 481 U.S. at 193 (citations omitted).

even if the jury was instructed to disregard it and even if the defendant's own confession were admissible.[231]

In *Cruz*, Justice Scalia adhered to the text of the Constitution and to the earlier *Bruton* decision that found the nontestifying codefendant's statement to be "evidence" against the defendant even when it was not admitted against him at all, but only against the codefendant.[232] Justice Scalia emphasized the fact that the jury would likely consider the nontesifying codefendant's confession against the defendant and noted that the defendant was likely objecting to the admission of the codefendant's confession precisely because he is distancing himself from his own confession[233]: "But in the real world of criminal litigation, the defendant is seeking to *avoid* his confession—on the ground that it was not accurately reported, or that it was not really true when made."[234] The inability of the defendant to confront the nontestifying codefendant through cross-examination resulted in the majority's ruling against the admissibility of such statements.[235]

Particularly extraordinary considering the timing of the decision, in *Coy v. Iowa*,[236] Justice Scalia authored the majority opinion that strongly protects the Confrontation Clause during an era when there was widespread hysteria concerning child-sexual-abuse cases[237] and various attempts were being made in the criminal justice system to make testifying in a courtroom less upsetting and stressful for child witnesses.[238] In *Coy*, the defendant was accused of sexually assaulting two girls who were camping outside in a backyard tent.[239] Over the defense's objection, the trial court allowed a screen to separate the defendant from the victims while they testified.[240] The defendant could "dimly" see the girls, but they could not see him.[241]

231. *Id.*
232. *Id.* at 192–93.
233. *See id.* at 191–93.
234. *Id.* at 192.
235. *Id.* at 193.
236. 487 U.S. 1012 (1988).
237. *See, e.g.*, McMartin v. Children's Inst. Int'l, 212 Cal. App. 3d 1393 (1989) (discussing alleged child abuse which occurred at a preschool in the city of Manhattan, California).
238. *See* Maryland v. Craig, 497 U.S. 836, 860 (1990) (holding the necessary use of one-way closed-circuit television to obtain testimony of a child witness in a child abuse case does not violate the Confrontation Clause).
239. 487 U.S. at 1014.
240. *Id.* at 1014–15.
241. *Id.*

The Court reversed his conviction and remanded the case because of the Sixth Amendment violation.[242]

Explaining the importance of the Confrontation Clause, Justice Scalia stressed in the holding in *Coy* that "[t]his opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"[243] Throughout his subsequent Sixth Amendment decisions, Justice Scalia consistently returns to this theme and to the history of the right to confront witnesses.

In *Coy*, Justice Scalia emphasized that the Confrontation Clause demands the defendant and the accuser be able to see each other during the testimony, despite the fact that witnesses may be traumatized by the courtroom experience: "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs."[244] The costs Justice Scalia referenced include the negative impact on the prosecution's case.[245] In contrast, the criminal defendant benefits from this decision.[246] Justice Scalia's description of the importance of face-to-face confrontation demonstrates not only his commitment to the original meaning of the Constitution, but also his ability to view issues from both the prosecution and the defense perspective.

Crawford v. Washington continued Justice Scalia's movement to return the Court to the original meaning of the Confrontation Clause—one that is extraordinarily protective of the rights of the accused.[247] *Crawford* held that even reliable hearsay, when testimonial in nature, is inadmissible unless the defendant was afforded the opportunity to cross-examine the witness pursuant to the Confrontation Clause of the Sixth Amendment.[248] In *Crawford*, the Court rejected the decades of precedent following *Ohio v. Roberts*[249] that allowed judges to determine the admissibility of hearsay based

242. *Id.* at 1022.
243. *Id.* at 1017 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)).
244. *Id.* at 1020.
245. *See id.*
246. *See id.*
247. 541 U.S. 36 (2004).
248. *Id.* at 68.
249. 488 U.S. 56 (1980).

upon reliability factors.[250] Writing for the *Crawford* majority, Justice Scalia expressed the accused's perspective, stating that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[251] Instead, the Sixth Amendment prescribes that the defendant have the opportunity "to be confronted with the witnesses against him."[252] Justice Scalia wrote that simply applying the right to confront accusers is the best test for reliability of evidence.[253]

In so deciding, Justice Scalia emphasized the absurd rulings that resulted from the application of the former *Ohio v. Roberts* reliability test, because "[w]hether a statement [was] deemed reliable depend[ed] heavily on which factors the judge consider[ed] and how much weight he accord[ed] each of them. Some courts w[ound] up attaching the same significance to opposite facts."[254] There was no predictability or rational explanation for why some statements were admitted pursuant to the reliability test and others were excluded.[255] Justice Scalia found such a result to be fundamentally unfair to the criminal defendant.[256]

Justice Scalia reminds us that the Framers feared the power of government[257]: "They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people . . . ."[258] Justice Scalia articulated a concern held by modern criminal defendants as well: the massive power of the government will override the rights of the defendant.[259] Justice Scalia's empathetic response to the plight of the criminal defendant, combined with the fact that he did not express any concern about the adverse impact of this decision on the ability to convict defendants, is what is so surprising about his opinion in this case.

Finally, Justice Scalia concluded in *Crawford* that the best test of the reliability of evidence is the framework designed by the drafters

250. *Crawford*, 541 U.S. at 60–69; *Roberts*, 488 U.S. at 66.
251. *Crawford*, 541 U.S. at 62 (emphasis omitted).
252. *Id.* at 42 (quoting U.S. CONST. amend. VI).
253. *Id.* at 69.
254. *Id.* at 63.
255. *Id.*
256. *Id.* at 61.
257. *Id.* at 66 ("The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.").
258. *Id.* at 67.
259. *See id.* at 56 n.7.

of the Constitution.[260] The Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[261] Justice Scalia distinguished the admissibility of certain hearsay exceptions from evidence that is testimonial in nature and therefore barred by the Confrontation Clause[262]: "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[263] The issue left unresolved by *Crawford* was a comprehensive definition of *testimonial* evidence.[264]

Two years later, Justice Scalia had the opportunity to expand on his definition of *testimonial evidence*. In *Davis v. Washington*, the Court granted certiorari on two domestic violence cases; statements made by the victim at the scene were admitted into evidence over the defense's objection that the victim did not appear to testify and to be cross-examined.[265] Domestic violence cases are notorious for having reluctant witnesses, who are either too afraid of the defendant to testify or who have reconciled with the defendant and therefore no longer wish to prosecute.[266] In response to witness reluctance, courts either routinely allowed the police officer to recount the witness statements or, as in *Davis*, played recordings of the witness's statement for the jury.[267]

During these highly charged, emotional cases, Justice Scalia coolly demanded Sixth Amendment confrontation, despite the difficulties for the prosecution and that criminal defendants will likely be acquitted for lack of evidence. Domestic-violence victims also argued that the nature of domestic violence requires "greater flexibility in the

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260. *Id.* at 67.

261. *Id.* at 61.

262. *Id.* at 56.

263. *Id.* at 68.

264. *Id.* However, Justice Scalia did give some guidance as to the meaning of testimonial evidence:

> We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closet kinship to the abuses at which the Confrontation Clause was directed.

Id.

265. 547 U.S. 813, 817, 828 (2006).

266. *See* Sarah Rogers, Note, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24 OHIO ST. J. ON DISP. RESOL. 349, 367–68 (2009).

267. *See Davis*, 547 U.S. at 817 ("The relevant statements in *Davis v. Washington*, No. 05-5224, were made to a 911 emergency operator . . . .").

use of testimonial evidence [because domestic violence] is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial."[268] Nevertheless, Justice Scalia found that the Constitution prefers that the guilty go free rather than convicting defendants who did not have the opportunity to confront the witnesses against them.[269]

Justice Scalia defined the terms and explained the difference between *testimonial* and *nontestimonial* statements for purposes of the Confrontation Clause:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[270]

Criminal defendants could not have found a more pro-defense version of the definition of testimonial statements than this one announced by Justice Scalia. Excepting the beginning sections of emergency 9-1-1 recordings, virtually every statement to a police officer investigating a crime becomes testimonial under this definition.[271]

Justice Scalia continued his defense-oriented interpretation of the Confrontation Clause in *Giles v. California*, which concerned the issue of forfeiture by wrongdoing[272] and mentioned briefly in the *Davis* decision.[273] In *Giles*, the complaining witness had been killed by the defendant prior to trial.[274] The issue for the Court was whether the defendant's killing of the witness was enough for the defendant to forfeit his right to object to admission of her former statement concerning a prior assault charge or whether there had to be evidence

268. *Id.* at 832–33.
269. *See id.* at 833.
270. *Id.* at 822.
271. *See id.*
272. 554 U.S. 353, 358 (2008).
273. *See Davis*, 547 U.S. at 833 ("That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. We take no position on the standards necessary to demonstrate such forfeiture . . . .").
274. *Giles*, 554 U.S. at 357.

that the defendant killed her to keep her from becoming a witness against him.[275] Justice Scalia examined the common law rule of forfeiture by wrongdoing and found that the prosecution must demonstrate the defendant's intent prior to admission of such testimony: "The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[276]

Justice Scalia emphasized that a straightforward application of the defendant's Confrontation Clause rights demanded this result: "It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve . . . those underlying values."[277] In other words, the Confrontation Clause requires that the defendant be given the opportunity to confront the witnesses. Prior to the admission of any nonconfronted statements against the defendant, the prosecution must prove *both* that it is the defendant's fault the witness is unavailable *and* that the defendant intended to make the witness unavailable to testify.[278]

Justice Scalia acknowledged the concern that the prosecution of domestic violence cases may be more difficult as a result of this ruling, but he nevertheless refused to return to the procedure of having judges admit statements into evidence based on an *Ohio v. Roberts* reliability type standard:

> In any event, we are puzzled by the dissent's decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.[279]

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275. *Id.*
276. *Id.* at 359.
277. *Id.* at 375.
278. *Id.* at 359–61.
279. *Id.* at 376.

Domestic violence cases fill many court dockets, and some jurisdictions have developed family courts or other specialty courts to handle the large number of cases.[280] These cases were routinely prosecuted through the nonconfronted statements of witnesses who did not appear to testify.[281] Justice Scalia's opinion unconditionally defended the rights of the criminal defendant in a situation that has widespread impact in frequently prosecuted domestic violence cases.[282]

Expanding on his defense-oriented interpretation of the Confrontation Clause, Justice Scalia wrote the opinion in *Melendez-Diaz v. Massachusetts*.[283] The Court held that routine laboratory analyses of narcotics, which had long been introduced into evidence by affidavit, were testimonial hearsay.[284] In order to introduce the results of such testing, the analyst must testify in person, meet the requirements of an "unavailable" witness under Federal Rule of Evidence 804, or the defendant must waive his objection to the analyst's absence.[285] In his holding, Justice Scalia rejected the Government's suggestion that the defense could have subpoenaed the analysts if the defense wanted to ask them questions: "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."[286] Justice Scalia remarked that the issue in this case was straightforward and dictated by the ruling in *Crawford*: "The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits."[287] The admission of the analysis of the narcotics over the defense objection was reversible error.[288]

Justice Scalia dissented from the ruling in *Michigan v. Bryant* that the Confrontation Clause was not violated when a dying victim's

280. *See* Amy Karan et al., *Domestic Violence Courts: What Are They and How Should We Manage Them?*, 50 JUV. & FAM. CT. J. 75, 75–76 (1999).

281. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 751–52 (2005).

282. *See id.* at 748–50.

283. 129 S. Ct. 2527 (2009).

284. *Id.* at 2530–33; *id.* at 2543–44 (Kennedy, J., dissenting) ("The Court sweeps away an accepted rule governing the admission of scientific evidence.").

285. *See id.* at 2532, 2540–42 (majority opinion).

286. *Id.* at 2540. Justice Scalia continued, articulating the defendant's perspective: "[The Confrontation Clause's] value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses." *Id.*

287. *Id.* at 2542.

288. *Id.*

statements were admitted under the excited utterance exception to the hearsay rule.[289] Justice Scalia first criticizes the majority's justification:

> Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution.[290]

Justice Scalia's dissent further accused the majority of attempting to overturn the *Crawford* line of cases, arguing that "perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in shambles."[291]

In its analysis, the *Bryant* case focused on the reliability of the hearsay statements, which was the exact reasoning that the Court had overruled in the *Crawford* decision.[292] Justice Scalia forcefully dissented from the *Bryant* majority and asserted the rights of the criminal defendant, despite the fact that without the victim's statements the defendant may not have been convicted.[293] He further reiterates his rejection of admitting statements without confrontation:

> [W]e did not disavow multifactor balancing for reliability in *Crawford* out of a preference for rules over standards. We did so because it "d[id] violence to" the Framers' design. It was judges' open-ended determination of what was reliable that violated the trial rights of Englishmen in the political trials of the 16th and 17th centuries. . . . . Not even the least dangerous branch can be trusted to assess the reliability of uncross-examined testimony in politically charged trials or trials implicating threats to national security.[294]

289. 131 S. Ct. 1143, 1168 (2011).
290. *Id.*
291. *Id.*
292. *Id.* at 1174.
293. *Id.* at 1171–72.
294. *Id.* at 1176. (alteration in original) (citations omitted).

Justice Scalia found that because the primary purpose of the police questioning was obviously to catch and prosecute the defendant, the statements were testimonial and inadmissible without cross-examination.[295]

Justice Scalia's response to any concerns that these Confrontation Clause decisions will negatively impact the prosecution demonstrates that he is a staunch defender of the rights of the accused: "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."[296] Justice Scalia also brushed aside concerns that requiring the laboratory analyst to testify will overburden the criminal justice system[297] as irrelevant to whether or not the defendant is afforded his rights pursuant to the Constitution.[298]

2. To Have the Assistance of Counsel for His Defense

Justice Scalia has also defended the right to counsel. In *United States v. Gonzalez-Lopez*, Justice Scalia wrote for the majority and held that the defendant's right to an attorney of his choice is not subject to a harmless-error analysis.[299] On appeal, the government conceded that the district court erred when it denied Gonzalez-Lopez the right to hire a specific attorney.[300] Justice Scalia held that the right to counsel contains the right to have the attorney who the defendant chooses when the defendant is paying.[301] Analogizing to *Crawford*, which rejected the long line of cases that allow statements not subject to cross-examination into evidence and thus depriving the defendant of his right to confront witnesses,[302] Justice Scalia stated that when the right to counsel of choice is denied, the question does not become, was the trial fair? Instead, the test remains, did the defendant have the attorney he chose represent him?[303]

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295. *Id.* at 1172.

296. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2540 (2009).

297. "[T]here is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial." *Id.* at 2541.

298. *See id.* at 2540–42.

299. 548 U.S. 140, 152 (2006).

300. *Id.*

301. *See id.* at 144; *cf.* Wheat v. United States, 486 U.S. 153 (1988) (distinguishing from right to choose attorney when counsel is court-appointed).

302. Crawford v. Washington, 541 U.S. 36, 59 (2004).

303. *See Gonzalez-Lopez*, 548 U.S. at 146.

Because Gonzalez-Lopez was not allowed his attorney of choice, the district court committed reversible error[304]: "Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation."[305] While the dissent focused on the fairness of the trial, Justice Scalia refused to join in that discussion. Similar to *Crawford*, Justice Scalia argued that the Constitution means at least what it says.[306]

Justice Scalia forcefully dissented from the majority's ruling in *Indiana v. Edwards* and posited that the mentally ill can be denied their right to self-representation.[307] The Supreme Court had previously held in *Faretta v. California* that the Sixth Amendment right to counsel also contains within it a right to self-representation[308] and in *Godinez v. Moran* that the test for competency to waive counsel is the same as the standard for competence to stand trial.[309] However, the *Edwards* Court held that if mentally ill defendants are competent to stand trial yet their mental illness makes them incompetent to represent themselves at trial, then appointed counsel can be forced upon them over their objection and can overrule any decision the defendant makes concerning his own defense.[310]

Justice Scalia considered this issue from the perspective of the criminal defendant. He emphasized two objections to the majority's decision to force defendants to accept representation.[311] First, this decision strips the right to present a defense away from the accused because the forced attorney can ignore the defendant's preferred defense: "But to hold that a defendant may be deprived of the right to make legal arguments for acquittal simply because a state-selected

304. *Id.* at 152.

305. *Id.* at 148.

306. *See id.* at 146.

307. 554 U.S. 164, 167 (2008).

308. 422 U.S. 806, 807 (1975).

309. 509 U.S. 389, 391 (1993).

310. *Edwards*, 544 U.S. at 167; *see also* Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 315–17 (2009) (discussing problems with the competency standard).

311. *Edwards*, 554 U.S. at 179–80 (Scalia, J., dissenting). Justice Scalia stated,

> The right reflects a "nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. . . . [I]n the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber."

Id. at 182 (quoting *Faretta*, 422 U.S. at 807, 821).

agent has made different arguments on his behalf is . . . to 'imprison a man in his privileges and call it the Constitution.'"[312] Secondly, Justice Scalia argued that the majority allows mentally ill defendants to be treated as less equal under the law: "In singling out mentally ill defendants for this treatment, the Court's opinion does not even have the questionable virtue of being politically correct."[313] Finally, Justice Scalia noted that in the *Edwards* case itself, the forced attorney did no better than the defendant could have done pro se: the defendant was convicted despite the trial court's decision that the defendant needed forced representation to save him from himself.[314]

Both *Gonzalez-Lopez* and *Edwards* demonstrate that Justice Scalia's impact on the Sixth Amendment right to counsel strongly favors the accused. Both cases inject a realist's focus into the criminal justice system by discussing how these situations will play out in an actual courtroom. While the holdings discuss two separate aspects of right to counsel, they both stress the importance of the defendant's ability to make this decision, which is of paramount importance to him or herself, as opposed to allowing the government, which is already prosecuting him *and* judging him, to additionally decide what is best for his defense. Such a perspective that so clearly expresses the viewpoint of the accused is criminal-rights oriented.

3. By an Impartial Jury[315]

Justice Scalia dissented from the majority decision in *Georgia v. McCollum,* which held that the Equal Protection Clause prohibited a defendant from utilizing peremptory challenges to strike jurors based on race.[316] While *McCollum* certainly had the commendable goal of

312. *Id.* at 189 (quoting Adams v. U.S. *ex rel.* McCann, 317 U.S. 269, 280 (1942)).

313. *Id.*

314. *See id.* Justice Scalia wrote,

> The facts of this case illustrate this point with the utmost clarity. Edwards wished to take a self-defense case to the jury. His counsel preferred a defense that focused on lack of intent. Having been denied the right to conduct his own defense, Edwards was convicted without having had the opportunity to present to the jury the grounds he believed supported his innocence.

Id.

315. U.S. CONST. amend. VI. Justice Scalia finds that the Fifth Amendment Due Process clause works in conjunction with the Sixth Amendment's right to a jury trial to require jury findings beyond a reasonable doubt. United States v. Gaudin, 515 U.S. 506, 509–10 (1995); Sullivan v. Louisiana, 508 U.S. 275, 277 (1993).

316. 505 U.S. 42, 59 (1992); *Id.* at 69 (Scalia, J., dissenting).

eliminating racial discrimination, Justice Scalia objected to both the fiction of considering a defendant to be a "state actor"[317] for purposes applying the Equal Protection Clause to him and also to the Court's interference with the defendant's use of preemptory challenges[318]: "In the interest of promoting the supposedly greater good of race relations in the society as a whole[,] . . . we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair."[319] Justice Scalia exhibited a profound understanding of the issue in this case for the criminal defendant.

When exercising peremptory challenges, criminal defendants are not acting for the state, despite the majority's ruling.[320] To suggest this to a criminal defendant would be absurd: In whose interests are you exercising these strikes? Is it the government's? The least legally learned criminal defendants understand that it is in their interest, and theirs alone, to have jurors sympathetic to them on the jury, and to remove jurors who may be hostile to them —even if there is a slight chance the hostility stems from the juror's race. The irony of the *McCollum* case is that prosecutors historically were the ones using racially based strikes to discriminate against the criminal defendant.[321] Justice Scalia's dissent explained the absurdity of concluding that a criminal defendant used racially based strikes in a manner to discriminate, instead of to benefit, the criminal defendant.[322] Only the defendant's rights are at risk during a criminal trial.[323]

Justice Scalia's defense of the jury trial system also has included his insistence that the jury make findings of guilt by the standard of beyond a reasonable doubt. In a per curiam opinion, the Court held that the Louisiana jury instruction on reasonable doubt[324] was

317. *Id.* at 70 (Scalia, J., dissenting) ("A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state.").

318. *Id.*

319. *Id.*

320. *Id.* at 64–65 (O'Connor, J., dissenting).

321. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 84 & n.3 (1986).

322. *McCollum*, 505 U.S. at 69–70 (Scalia, J., dissenting).

323. *See id.*

324. Here is the instruction:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable

constitutionally flawed.[325] Writing for the majority three years later in *Sullivan v. Louisiana*, Justice Scalia found that the exact same jury instruction constituted reversible error in a case where the defendant had been sentenced to death[326]: "The right to a trial by jury reflects, we have said, 'a profound judgment about the way in which law should be enforced and justice administered.' The deprivation of that right . . . unquestionably qualifies as 'structural error.'"[327] Justice Scalia emphasized that the jury must make findings beyond a reasonable doubt in order for a verdict to be constitutionally valid[328]: "But the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings."[329] Thus, Justice Scalia overturned a death sentence because of an improper burden of proof instruction without expressing any concern that he was enabling a defendant who was probably guilty to escape a death sentence.

Similarly, *United States v. Gaudin*[330] reiterated the Court's position that the Fifth Amendment due process rights combined with the Sixth Amendment right to a jury trial "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[331] Rejecting three arguments by the government to the contrary, Justice Scalia made the constitutional issue in *Gaudin* seem both obvious and simple: "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to

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> one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*

State v. Cage, 554 So.2d 39, 41 (La. 1989) (emphasis added).

325. Cage v. Louisiana, 498 U.S. 39, 41 (1990) (per curiam).

326. 508 U.S. 275, 278 (1993).

327. *Id.* at 281–82 (citation omitted) (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).

328. *Id.* at 278.

329. *Id.* at 281.

330. 515 U.S. 506 (1995).

331. *Id.* at 510 (citing Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993)).

have the jury decide materiality."[332] Because the trial court withheld from the jury the issue of materiality of Gaudin's false statements and made that finding by itself, Gaudin's conviction was reversed.[333]

Justice Scalia revisited the issue of jury determination of guilt and dissented from the majority opinion in *Almendarez-Torres v. United States*.[334] The majority held that a statute authorizing an increased sentence for an aggravating element was merely a sentencing factor that did not need to be considered by the jury.[335]

The approach used by Justice Scalia in *Gaudin* reappeared in *Apprendi v. New Jersey*.[336] The majority found that the prosecutor violated the Due Process Clause of the Fourteenth Amendment when the prosecutor filed a motion alleging new facts after the defendant had entered a guilty plea, which enhanced the defendant's death penalty sentence.[337] The Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.[338]

In his *Apprendi* concurrence, Justice Scalia reminded the Court of the origins of the right to a jury trial: "Judges, it is sometimes necessary to remind ourselves, are part of the State . . . . The founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights."[339] Justice Scalia found that the right to a jury trial necessitates that the jury make any findings that result in a verdict or enhance a sentence:

> And the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury," has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.[340]

Once again, Justice Scalia articulated the most pro-defense position of all the Justices: if a jury cannot make a finding beyond a

332. *Id.* at 511.
333. *Id.* at 522–23.
334. 523 U.S. 224, 248 (1998) (Scalia, J., dissenting).
335. *Id.* at 226 (majority opinion).
336. 530 U.S. 466, 476–77 (2000).
337. *Id.* at 470-71, 475–76.
338. *Id.* at 475–76.
339. *Id.* at 498 (Scalia, J., concurring).
340. *Id.* at 499 (alteration in original).

reasonable doubt that a specific factor exists, then a judge cannot consider that factor when imposing a sentence.[341]

Perhaps Justice Scalia's strongest defense of the right to a jury trial, as well as his loudest condemnation of the erosion of that right, came in his concurrence in the case *Ring v. Arizona*.[342] The majority in *Ring* held that the jury, not the judge, must find the existence of aggravating factors in a death penalty case.[343] Justice Scalia wrote separately, giving as one of his rationales the following:

> [M]y observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt "sentencing factors" determined by judges that increase punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, cause me to believe that our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a *judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.[344]

Justice Scalia's position seems extraordinary, given his earlier writings concerning the legitimacy of the death penalty.[345] For Justice Scalia, the death penalty's legitimacy derives from the legislature and from the imposition of it by a jury, but never from judicial power.[346]

Writing for the majority in *Blakely v. Washington*, Justice Scalia reaffirmed the accused's right to a jury trial.[347] After pleading guilty to second-degree kidnapping of his wife, an additional three years were added to the defendant's sentence when a judge found the

341. *Id.* at 498–99.
342. 536 U.S. 584, 610–14 (2002) (Scalia, J., concurring).
343. *Id.* at 609 (majority opinion).
344. *Id.* at 611–12 (Scalia, J., concurring) (citation omitted).
345. *See* discussion *supra* Part II.A.
346. *See supra* notes 122–26 and accompanying text; *see also Ring*, 536 U.S. at 611–12 (Scalia, J., concurring).
347. 542 U.S. 296, 305–06, 313–14 (2004).

aggravating factor of "deliberate cruelty."[348] The second-degree kidnapping charge did not include the element of deliberate cruelty, and the defendant objected to the trial judge making that finding after the guilty plea.[349] Pursuant to the holding in *Apprendi,* the Court reversed Blakely's conviction because a judge, and not a jury, made findings as to the aggravating factor that enhanced the defendant's sentence.[350]

In *Blakely*, Justice Scalia not only reviewed the history of the right to a jury trial, but he also responded to his critics who alleged that *Apprendi* negatively impacts criminal defendants. Referencing history, Justice Scalia stressed that "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[351] Justice Scalia argued that ensuring that the jury must make findings beyond a reasonable doubt prior to sentencing enhancement does not negatively impact criminal defendants: "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding."[352] Justice Scalia thus asserted that the plea bargaining power of the defendant is not harmed and may even be strengthened by the reasoning or the holdings in *Apprendi* and *Blakely*.[353]

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348. *Id.* at 299–300.

349. *Id.* at 298–300.

350. *Id.* at 301, 303–05.

351. *Id.* at 306. Ressponding to Justice Breyer's dissent, the majority via Justice Scalia assereds that *Apprendi* does not harm the defendant's position in plea bargaining, and anyway,

> the Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It guarantees the *right* to jury trial. It does not guarantee that a particular number of jury trials will actually take place. That more defendants elect to waive that right (because, for example, the government at the moment is not particularly oppressive) does not prove that a constitutional provision guaranteeing *availability* of that option is disserved.

Id. at 312.

352. *Id.* at 310.

353. Justice Scalia wrote,

> The implausibility of Justice Breyer's contention that *Apprendi* is unfair to criminal defendants is exposed by the lineup of *amici* in this case. It is hard to believe that the National Association of Criminal Defense Lawyers was somehow duped into arguing for the wrong side. Justice Breyer's only authority asking that defendants be protected from *Apprendi* is an article written not by

These cases interpreting the Sixth Amendment benefit criminal defendants because they view the trial through the eyes of the criminal defendant. Justice Scalia's holdings in the area of Sixth Amendment law have widespread impact. His Confrontation Clause cases ensure that a defendant's objections to hearsay will be tested, not only under evidentiary hearsay exceptions, but under the more demanding rules barring admission of out-of-court testimonial statements.

These rulings significantly impact widely and routinely prosecuted crimes such as narcotics violations and driving while intoxicated cases. Indeed, until fiscal year 2009, cases involving narcotics charges were the most common type of case currently prosecuted in federal court.[354] Justice Scalia deferred to defendants' choice in the area of assistance of counsel, demanding that criminal defendants be afforded their constitutional rights.[355] Finally, Justice Scalia's rulings on the right to a jury trial have contributed to the powerful decline[356] of the Federal Sentencing Guidelines and have given defendants the power of knowledge: no longer do they plead guilty to one crime and get sentenced for another. A jury must make that decision, unless a defendant stipulates to such additional facts.[357]

B. Double Jeopardy

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to

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a criminal defense lawyer but by a law professor and former prosecutor.

Id. at 312. Justice Scalia continues his approach in his dissent in *United States v. Booker*, 543 U.S. 220 (2005), arguing that the majority's opinion disregarded the historical practice of "having *juries* find the facts that expose a defendant to increased prison time." *Id.* at 304 (Scalia, J., dissenting).

354. U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2009, at 5 (2010), *available at* http:/www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

355. *See supra* Part III.A.2.

356. *See* Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 180–81 (1995).

357. *Blakely*, 542 U.S. at 310.

> be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[358]

Justice Scalia wrote the decision in *United States v. Dixon*, finding the Double Jeopardy Clause to bar prosecution of an underlying criminal charge once a defendant had been convicted of criminal contempt for violating a civil protection order.[359] The *Dixon*[360] case split the court between those Justices who asserted that double jeopardy never bars such prosecutions and those who felt all subsequent prosecutions were barred.[361] Justice Scalia wrote that criminal charges may be prosecuted after a criminal conviction for violation of a civil protection only when they have different elements.[362]

Justice Scalia noted that the "same-elements test . . . inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."[363] While some of the dissenting Justices argued that Justice Scalia did not protect the rights of the accused against retrial,[364] this decision essentially expanded double jeopardy protections.[365] For example, defendant Dixon was convicted of contempt of court for violating his bail

358. U.S. CONST. amend. V (emphasis added).

359. 509 U.S. 688, 692–93, 696 (1993).

360. The *Dixon* case also overruled *Grady v. Corbin*, 495 U.S. 508 (1990), a case from which Justice Scalia dissented. *Dixon*, 509 U.S. at 689; *Grady*, 495 U.S. at 526 (Scalia, J., dissenting).

361. Justices Stevens, Scalia, Kennedy, Souter, and White agreed that the Double Jeopardy Clause barred prosecution of the criminal charges underlying the criminal contempt conviction. *Dixon*, 509 U.S. at 696–700; *Id.* at 730 (White, J., concurring in part and dissenting in part); *Id.* at 743–44 (Souter, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justices O'Connor, Thomas, and Blackmun dissented from the majority as to that holding. *Id.* at 714 (Rehnquist, C.J., concurring in part and dissenting in part) ("[A]s a general matter, double jeopardy does not bar a subsequent prosecution based on conduct for which a defendant has been held in criminal contempt."); *Id.* at 741 (Blackmun, J., concurring in part and dissenting in part).

362. "Applying the [same-elements test], the result is clear: These crimes were different offenses and the subsequent prosecution did not violate the Double Jeopardy Clause." *Id.* at 701–02 (majority opinion).

363. *Id.* at 697.

364. *Id.* at 733–40 (White, J., concurring in part and dissenting in part).

365. *See id.* at 691, 704, 707–11 (majority opinion).

release conditions.[366] His violation was being arrested for possession with intent to distribute cocaine.[367] After being convicted of the bail release violation, the Court held he could not be charged with the *far more serious crime* of possession with intent to distribute.[368] Dixon's sentence for the contempt charge was 180 days in jail.[369] Had he been tried and subsequently convicted of the underlying criminal charge, he would have faced a sentence of many years in prison.[370]

Justice Scalia emphasized the process of the contempt proceeding:

> At the show-cause hearing [for violation of terms of bail release], four police officers testified to facts surrounding the alleged drug offense; Dixon's counsel cross-examined these witnesses and introduced other evidence. The court concluded that the Government had established "'beyond a reasonable doubt that [Dixon] was in possession of drugs and that those drugs were possessed with the intent to distribute.'" The court therefore found Dixon guilty of criminal contempt[,] . . . which allows contempt sanctions after expedited proceedings without a jury.[371]

Justice Scalia thus demonstrated that the contempt hearing followed the same procedure and found the exact same facts that a jury in a criminal trial would have to find in order to convict Dixon of the criminal charge.[372] Because the government chose to proceed with the show-cause hearing on the contempt charge that carried a minor penalty, it had to forgo any further prosecution of the defendant for the more serious crimes with the same elements that would have resulted in a much harsher penalty.[373]

Justice Rehnquist dissented and articulated the pro-prosecution viewpoint that Justice Scalia's decision rejected the rule that "double jeopardy does not bar a subsequent prosecution based on conduct for which a defendant has been held in criminal contempt. . . . [because] contempt of court has different elements than the substantive criminal charges in this case[,] . . . they are separate offenses."[374] While

366. *Id.* at 691–92.
367. *Id.* at 691.
368. *Id.* at 691–92.
369. *Id.* at 692 (citing D.C. CODE § 23-1329(c) (1989)).
370. *Id.* at 718 (Rehnquist, J., dissenting) (citing D.C. CODE § 33-541(a)(2)(A) (1989)).
371. *Id.* at 691–92 (majority opinion) (second alteration in original) (citation omitted).
372. *See id.* at 698–700.
373. *Id.* at 698, 700; *see also id.* at 718 (Rehnquist, C.J., dissenting).
374. *Id.* at 714 (Rehnquist, C.J., dissenting).

Justice Scalia's holding does not prevent another trial after every criminal contempt hearing,[375] it has a positive impact on the rights of criminal defendants because bail violation hearings, which occur frequently, often involve allegations of new criminal behavior.[376] The Double Jeopardy Clause protects criminal defendants who have their bond revoked and a contempt sentence imposed against them from being tried for crimes for which they have already been punished.[377]

Another double jeopardy case, *Smith v. Massachusetts*,[378] is as much interesting for the unusual coalition of Justices agreeing that a Double Jeopardy Clause violation occurred[379] as it is for its positive impact on the rights of criminal defendants. Writing for the majority, Justice Scalia held that once a trial judge acquits a defendant of one criminal charge during a trial on several different counts, the judge may not reverse that holding and reinstate the charge.[380] While the dissent viewed the trial judge's change of mind as correcting an error that did not implicate the Double Jeopardy Clause,[381] Justice Scalia demonstrated an understanding for and sympathy to the defendant's situation: "In all jurisdictions . . . false assurance of acquittal on one count may induce the defendant to present defenses to the remaining

375. *See id.* at 713 (noting that the majority's decision does not prohibit subsequent prosecutions for some of the charges of Foster, the *Dixon* companion case, following the criminal contempt hearing).

376. *See* Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1277, 1280–81 (2004) (discussing how some contempt charges may limit further prosecution of the defendant); Melissa Weiss, Note, *Interpreting Searches of Pretrial Releases Through the Lens of the Fourth Amendment Special Needs Exception*, 35 HOFSTRA L. REV. 363, 374–75 (2006) (discussing the rise in public concern over a connection between defendants released on bail and crime).

377. *Dixon*, 509 U.S. at 697, 700.

378. 543 U.S. 462 (2005).

379. Justices joining Justice Scalia in the majority: Stevens, O'Connor, Souter, and Thomas. Justices joining Justice Ginsburg in dissent: Rehnquist, Kennedy, and Breyer. *Id.*

380. *Id.* at 473.

381. Justice Ginsburg wrote,

> [The defendant] was subjected to a single, unbroken trial proceeding in which he was denied no opportunity to air his defense before presentation of the case to the jury. I would not deny prosecutors in such circumstances, based on a trial judge's temporary error, *one* full and fair opportunity to present the State's case.

Id. at 480 (Ginsburg, J., dissenting).

counts that are inadvisable—for example, a defense that entails admission of guilt on the acquitted count."[382]

As Justice Scalia recognized, once the judge acquits the defendant on one count after the prosecution's presentation of its case, the defendant presents his defense relying on that acquittal as he formulates trial strategy regarding which witnesses to present and what arguments to make.[383] Justice Scalia explained that "[t]he Double Jeopardy Clause's guarantee cannot be allowed to become a potential snare for those who reasonably rely upon it. If, after a facially unqualified midtrial dismissal of one count, the trial has proceeded to the defendant's introduction of evidence, the acquittal must be treated as final . . . ."[384] While this decision may prevent the trial court from fixing its mistakes, the dissent was only concerned with allowing the trial court to fix mistakes to further benefit the *prosecution*.[385] Justice Scalia ensured that the defendant's rights were protected. He expressed no interest in fixing the prosecutor's mistakes[386]: "Requiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause—even when the acquittal was erroneous because the evidence was sufficient."[387] Justice Scalia recognized that this holding requires that even if a defendant is guilty, the Double Jeopardy Clause prevents prosecution, thus favorably impacting the rights of criminal defendants.

Justice Scalia had previously issued a similarly demanding defense of the defendant's double jeopardy rights in his dissent in *Jones v. Thomas*.[388] The majority in Jones treated the defendant's claim dismissively because the defendant was clearly guilty, and the Missouri court corrected the mistake by imposing a sentence that

382. *Id.* at 472 (majority opinion).

383. *Id.* at 472 n.6.

384. *Id.* at 473.

385. *Id.* at 473 n.7.

386. Justice Scalia wrote,

> Moreover, a prosecutor can seek to persuade the court to correct its legal error before it rules, or at least before the proceedings move forward. Indeed, the prosecutor in this case convinced the judge to reconsider her acquittal ruling on the basis of legal authority he had obtained during a 15-minute recess before closing arguments. Had he sought a short continuance at the time of the acquittal motion, the matter could have been resolved satisfactorily before petitioner went forward with his case.

Id. at 474–75 (citations omitted).

387. *Id.* at 473 n.7.

388. 491 U.S. 376, 389 (1989) (Scalia, J., dissenting).

seemed appropriate for the severity of the crime.[389] The majority felt that to find otherwise would be giving the defendant a benefit he did not deserve[390]: "But neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls."[391]

Justice Scalia dissented and, in an unexpected manner, argued that the Double Jeopardy Clause does in fact exist to provide such windfalls:

> The Double Jeopardy Clause is and has always been, not a provision designed to assure reason and justice in the particular case, but the embodiment of technical, prophylactic rules that require the Government to turn square corners. Whenever it is applied to release a criminal deserving of punishment it frustrates justice in the particular case, but for the greater purpose of assuring repose in the totality of criminal prosecutions and sentences. . . . With technical rules, above all others, it is imperative that we adhere strictly to what we have stated the rules to be. A technical rule with equitable exceptions is no rule at all. Three strikes is out. The State broke the rules here, and must abide by the result.[392]

Once again, Justice Scalia's interpretation of the Double Jeopardy Clause is absolute, even when the results interfere with law enforcement and prosecution. Justice Scalia does not hide behind an idealistic view of criminals or the criminal justice system. Instead, he confronts the reality that following the rules may result in releasing the guilty and asserts that such results are exactly what are intended by a system designed to protect the innocent.

C. Rule of Lenity/Strict construction

As noted in Justice Scalia's pro-prosecution cases, he often decides a case based on the procedures of the criminal justice system.[393] Where the process benefits the accused, such as the rule of lenity,[394]

389. *Id.* at 381–82 (majority opinion).
390. *Id.* at 382 n.2.
391. *Id.* at 387.
392. *Id.* at 396 (Scalia, J., dissenting).
393. Kannar, *supra* note 4, at 1321.
394. When a law is unclear, "we adhere to the familiar rule that 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) (citation omitted).

Justice Scalia follows the rule and finds for the defendant; where the process does not favor either the prosecution or the defense, Justice Scalia's decisions will favorably impact the defendant when appropriate.[395] Justice Scalia does not flinch from upholding the rights of the defendant when he finds he must do so in order to follow the law.

Justice Scalia applied the rule of lenity in *United States v. Santos*, and writing for the majority, held that the ambiguous term *proceeds* in the statute must be interpreted in favor of the defendant.[396] Justice Scalia defended the rule of lenity:

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly . . . .[397]

In his explanation, Justice Scalia emphasized the difficulty of interpreting poorly drafted statutes: "When interpreting a criminal statute, we do not play the part of a mind reader."[398] Thus, while Justice Scalia is ruling for the defendant, his larger point is that legislatures need to write laws that everyone can understand and follow. He implicitly scolded the government for suggesting that the Court clear up ambiguities in the law to the prosecution's benefit: "We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."[399]

Quite often, Justice Scalia dissented from majority opinions precisely because the Court failed to follow the rule of lenity. For example, in *Smith v. United States*,[400] Justice Scalia dissented from the holding that the exchange of a gun for narcotics satisfied the element of "use" of the firearm during and "in relation to" drug trafficking.[401] Justice Scalia ridiculed such an interpretation of the word *use*, because the legislature clearly intended to punish individuals who used a firearm *as a weapon* during narcotics

395. *Id.*
396. 553 U.S. 507, 514 (2008).
397. *Id.* at 514.
398. *Id.* at 515.
399. *Id.* at 519.
400. 508 U.S. 223 (1993).
401. *See id.* at 241–45 (Scalia, J., dissenting).

offenses.[402] "It would also be reasonable and normal to say that he 'used' [the MAC-10] to scratch his head. When one wishes to describe the action of employing the instrument of a firearm for such unusual purposes, 'use' is assuredly a verb one could select."[403] However, the legislature obviously did not mean to punish defendants who happened to scratch their heads with a firearm during a narcotics offense through imposition of this statute anymore than the legislature meant to punish this specific defendant who traded his firearm for drugs. Even if the word *use* in the statue was ambiguous, Justice Scalia would have reversed the conviction pursuant to the rule of lenity.[404]

Justice Scalia again applied the rule of lenity and dissented from the holding in *Bryan v. United States*.[405] The majority found that the defendant's conviction for willfully violating the statute was valid even if the defendant was not aware of the licensing requirement he violated.[406] Justice Scalia found that there was no evidence demonstrating that the defendant knew he was violating the law and therefore wrote that the rule of lenity should have resulted in reversal of the conviction.[407] Recognizing the complexity of the modern criminal justice system, Justice Scalia found the rule of lenity to have enhanced importance: "In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction consistent application . . . ."[408]

In *Holloway v. United States*[409] and *James v. United States*,[410] Justice Scalia applied the rule of lenity and argued that the defendants should not have been convicted in either case.[411] In *Holloway*, Justice Scalia expressed the pro-defense viewpoint when he dissented from a decision written by Justice Stevens, who wrote from the pro-prosecution perspective.[412] *Holloway* held that the intent requirement (to seriously harm or kill the driver) of a carjacking statute is satisfied by evidence of the defendant's conditional intent to harm the driver if

402. *Id.* at 246.
403. *Id.* at 242–43.
404. *See id.* at 244–46.
405. 524 U.S. 184, 205 (1998) (Scalia, J., dissenting).
406. *Id.* at 199 n.33 (majority opinion).
407. *Id.* at 202–03 (Scalia, J., dissenting).
408. *Id.* at 205.
409. 526 U.S. 1 (1999).
410. 550 U.S. 192 (2007).
411. *Id.* at 219 (Scalia, J., dissenting); *Holloway*, 526 U.S. at 20 (Scalia, J., dissenting).
412. *See* 526 U.S. at 20 (Scalia, J., dissenting); *see also id.* at 12 (majority opinion) (rejecting Justice Scalia's application of the rule of lenity in favor of the defendant).

necessary to steal the car.[413] Justice Scalia argued that when the statute requires that the defendant act "with the intent to cause death or serious bodily harm," conditional intent does not satisfy this *mens rea*.[414] Justice Scalia criticized the majority for misinterpreting the law simply to punish the defendant's behavior, despite the fact that the defendant lacked the necessary intent.[415]

Justice Scalia emphasized that defendant Holloway specifically did not want to seriously harm or kill the driver because Holloway wanted the driver to give up the car upon demand.[416] His *mens rea* was the *opposite* of the intent necessary for conviction under the statute, and Justice Scalia objected to the Court's consideration of conditional intent: "It is difficult enough to determine a defendant's actual intent; it is infinitely more difficult to determine what the defendant planned to do upon the happening of an event that the defendant hoped would not happen . . . ."[417] Justice Scalia invoked the rule of lenity as an alternative and stated that "[if] the statue is not, as I think, clear in the defendant's favor, it is at the very least ambiguous and the defendant must be given the benefit of the doubt."[418]

The majority in *James* held that the Florida conviction of attempted burglary satisfied the violent-felony element in a federal statute.[419] Justice Scalia dissented and argued that attempted burglary does not satisfy the element because otherwise it is impossible to know whether one is in violation of the law[420]: "The rule of lenity, grounded in part on the need to give '"fair warning"' of what is encompassed by a criminal statute demands that we give this text the more narrow reading of which it is susceptible."[421] Justice Scalia focused on ensuring that the law clearly indicated what is prohibited, not on ensuring that criminal defendants are convicted.[422]

Justice Scalia applied the rule of scienter in his dissent from the child pornography case of *United States v. X-Citement Video, Inc.*[423] The majority held that the term *knowingly* applied to the elements of

413. *Id.* at 12.
414. *Id.* at 12–13 (Scalia, J., dissenting) (quoting 18 U.S.C. § 2119 (1994 & Supp. III)).
415. *Id.*
416. *Id.* at 12.
417. *Id.* at 19.
418. *Id.* at 21.
419. James v. United States, 550 U.S. 192, 195 (2007).
420. *Id.* at 214, 216, 225 (Scalia, J., dissenting).
421. *Id.* at 219 (citation omitted).
422. *Id.* at 215–16.
423. 513 U.S. 64, 80 (1994) (Scalia, J., dissenting).

the crime despite the fact that to do so made no grammatical sense.[424] To rule otherwise would have meant that the defendant's conviction would have been reversed, because if Congress omitted a scienter requirement, then the statute violates the Constitution and is unenforceable.[425] Justice Scalia criticized the Court for upholding the conviction instead of ruling that the statute was fatally flawed: "The Court today saves a single conviction by putting in place a relatively toothless child-pornography law that Congress did not enact."[426]

Justice Scalia's use of strict construction of statutes also benefits criminal defendants. In *Johnson v. United States*,[427] Justice Scalia wrote that in order to determine whether a prior conviction is a violent felony for sentencing-enhancement purposes in federal court, a court must look to whether the prior conviction was considered violent in the jurisdiction where the defendant was convicted.[428] Thus, although the common law considered the conviction to be violent, Justice Scalia found that the defendant's prior battery conviction under Florida law was not a violent felony.[429] Because it was not a violent felony, the sentence could not be enhanced under the federal law.[430]

Similarly, in *United States v. Rodriguez-Moreno*,[431] Justice Scalia dissented from the majority's ruling that the venue in a kidnapping and firearm conviction was properly found, even though the defendant did not possess a firearm in that jurisdiction.[432] Justice Scalia argued that the case was tried in the wrong jurisdiction and that the conviction could not stand:

> The short of the matter is that this defendant, who has a constitutional right to be tried in the State and district where his alleged crime was "committed," has been prosecuted for using a gun during a kidnapping in a State and a district where all agree he did not use a gun during a kidnapping. If to state this case is not to decide it, the law has departed

424. *Id.* at 68–69, 77–78 (majority opinion).
425. As Justice Scalia explains, the statute is unconstitutional because "by imposing criminal liability upon those not knowingly dealing in pornography, it establishes a severe deterrent, not narrowly tailored to its purposes, upon fully protected First Amendment activities." *Id.* at 86 (Scalia, J., dissenting).
426. *Id.* at 87.
427. 130 S. Ct. 1265 (2010).
428. *Id.* at 1269–70.
429. *Id.* at 1271–72, 1274.
430. *Id.* at 1268–74.
431. 526 U.S. 275 (1999).
432. *Id.* at 282–83 (Scalia, J., dissenting).

> further from the meaning of language than is appropriate for a government that is supposed to rule (and to be restrained) through the written word.[433]

Justice Scalia once again defended the right of the criminal defendant to be convicted only for the crime he has actually committed. He strenuously objected to the Court's distortion of the facts in order to uphold this conviction.

In *United States v. Resendiz-Ponce*,[434] Justice Scalia dissented from the majority's holding that an indictment alleging attempted illegal reentry into the country did not need to specifically allege an overt act.[435] Justice Scalia argued that the defect constituted reversible error because "the Government *was* required to state not only that Resendiz-Ponce 'knowingly and intentionally attempted to enter the United States of America,' but also that he 'took a substantial step' toward that end."[436] An indictment that does not allege the elements of the offense should not stand.[437]

Justice Scalia vigorously dissented from a case that punished behavior that was not a crime at the time of the act. In *Rogers v. Tennessee*,[438] the Supreme Court upheld the conviction of a defendant by allowing the Tennessee court to retroactively abolish the common law "year and a day rule."[439] Justice Scalia vigorously dissented and argued that the majority violated the Ex Post Facto Clause[440]: "To begin with, let us be clear that the law here was altered after the fact. Petitioner . . . was innocent of murder under the law as it stood at the time of the stabbing, because the victim did not die until after a year and a day had passed."[441] Justice Scalia reviewed the history of the Due Process Clause and the prohibition against ex post facto laws and further emphasized that the goal of those provisions is to give notice (or fair warning) of what is against the law.[442] Justice Scalia

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433. *Id.* at 285 (citations omitted).
434. 549 U.S. 102 (2007).
435. *Id.* at 117 (Scalia, J., dissenting); *id.* at 107 (majority opinion).
436. *Id.* at 116 (Scalia, J., dissenting).
437. *See id.* at 108 (majority opinion).
438. 532 U.S. 451 (2001).
439. *Id.* at 453. "At common law, the year and a day rule provided that no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of that act." *Id.*
440. *Id.* at 467–71, 478 (Scalia, J., dissenting).
441. *Id.* at 468.
442. *Id.* at 470.

objected to the unfairness of retroactively changing the law to apply against this defendant.

D. Fourth Amendment

> 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.[443]

Justice Scalia wrote several Fourth Amendment decisions that favorably impact the rights of criminal defendants in the context of home searches. In *Arizona v. Hicks*,[444] Justice Scalia wrote for the majority and found that a police officer violated the "plain view" exception to the Warrant Clause when he moved stereo equipment to find and record its serial number.[445] Although the officer was lawfully on the premises of the home in response to exigent circumstances, the Court held that the officer needed probable cause in order to search the equipment without a warrant.[446] Even though the equipment itself was plainly visible to the officers, there was nothing incriminating about the equipment.[447] The officer could not seize the equipment until he searched it for the serial number information and then investigated with that number to determine that the equipment had been stolen.[448]

Justice Scalia's decision rejected the suggestion that such a search was merely a cursory inspection that is justifiable under a reasonable suspicion standard.[449] He further expressed no concern about any negative impact on police investigation: "It may well be that, in such circumstances, no effective means short of a search exist. But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."[450]

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443. U.S. CONST. amend. IV (emphasis added).
444. 480 U.S. 321 (1987).
445. *Id.* at 325.
446. *Id.* at 326–27.
447. *Id.* at 324 (explaining that the stereo had to be moved to find the incriminating numbers, which was outside the exigency).
448. *Id.* at 323.
449. *Id.* at 328–29.
450. *Id.* at 329.

In *Kyllo v. United States*,[451] Justice Scalia again protected the sanctity of the home against governmental intrusion. Police aimed a thermal imaging device at defendant Kyllo's home, which indicated that parts of the home were relatively hotter than other parts of the home.[452] Using the information gained from the thermal imaging device, the police obtained and executed a search warrant and discovered more than 100 marijuana plants being grown inside Kyllo's house.[453]

The Court held that the scanning of the home with the thermal imaging device was a search under the Fourth Amendment and thus the police should have obtained a warrant prior to the scan.[454] Justice Scalia wrote that "'[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"[455] The Court was challenged with applying the constitutional rules from a previous era to new technology that enables the user to view inside a home. In the holding, Justice Scalia explained that a search using a device that sees inside a house and is not in general public-use requires a warrant.[456] This result is dictated by the fact that the "Fourth Amendment draws a firm line at the entrance to the house. That line . . . must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant."[457]

IV. CONCLUSION

Perhaps it is too simplistic to note that the impact of Justice Scalia's decisions may be more positive for criminal defendants precisely because the Constitution itself favors the rights of criminal defendants against the power of the government. The drafters of the Constitution feared an oppressive, powerful government that would strip away the rights of the people.[458] Thus, a Justice who subscribes to originalism is a Justice whose decisions must positively impact criminal defendants in the area of constitutional criminal procedure.

Specifically, Justice Scalia wants the criminal defendant to have what the Constitution gives him—but no more. He objects when the

451. 533 U.S. 27 (2001).
452. *Id.* at 30.
453. *Id.* at 29–30.
454. *Id.* at 40.
455. *Id.* at 31 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).
456. *Id.* at 40.
457. *Id.* (emphasis omitted) (citation omitted).
458. *See supra* notes 257–59 and accompanying text.

Court tries to write new procedures or new protections into the Constitution. However in many areas, such as his decisions concerning the rule of lenity and strict construction, Justice Scalia takes the defendant's point of view and argues vigorously for the rights of the defendant against the power of the government.[459]

Justice Scalia acknowledges that his approach to constitutional jurisprudence may limit the power of the prosecution to convict, but he neither denies such a result nor does he twist the rule of law to protect government power. He does not allow a favorable result for a criminal defendant to influence his understanding of the law and thus applies the law fairly. Characteristic of his approach, he recognizes that sometimes witnesses do not appear for trial, thereby destroying the government's ability to prosecute: "When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free."[460]

459. *See supra* Part III.C.

460. Davis v. Washington, 547 U.S. 813, 833 (2006) (emphasis omitted).