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Criminal Justice and the 1999-2000 U.S. Supreme Court Term

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CRIMINAL JUSTICE AND THE 1999-2000 U.S. SUPREME COURT TERM

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I. INTRODUCTION

During the U.S. Supreme Court's 1998-99 Term, the number of criminal justice cases decided by the Court declined in conjunction with a decline in the total number of cases decided by the Justices.[1] After deciding thirty and thirty-five criminal justice cases for 1996-97[2] and 1997-98[3] respectively, the Court decided only twenty-two such cases in 1998-99.[4] The pattern shifted during the 1999-2000 Term. Despite issuing opinions in only seventy-four cases, the fewest decisions in nearly fifty years,[5] the number of criminal justice decisions increased to thirty-one.[6] Noticeable changes in the Court's attentiveness to specific issues may provide evidence that certain Justices are succeeding in their efforts to shape the Court's role or agenda.[7] However, there is no indication that increased attention to criminal justice can be attributed to

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1. *See* Linda Greenhouse, *The Justices Decide Who's in Charge*, N.Y. TIMES, June 27, 1999, 4 (Week in Review), at 1 ("The Court did not make many decisions: only 75, half the number of cases decided each Term in the mid-1980s, and the June 23 end of the Term was the earliest closing date in 30 years.").

2. Christopher E. Smith, *Criminal Justice and the 1996-97 U.S. Supreme Court Term*, 23 U. DAYTON L. REV. 29, 33 tbl.1 (1997).

3. Christopher E. Smith, *Criminal Justice and the 1997-98 U.S. Supreme Court Term*, 23 S. ILL. U. L.J. 443, 443 (1999).

4. Christopher E. Smith, *Criminal Justice and the 1998-99 U.S. Supreme Court Term*, WIDENER J. PUB. L. (forthcoming 2001).

5. Marcia Coyle, *A Small, Potent Docket*, NAT'L L.J., Aug. 7, 2000, at A1.

6. This study includes a few cases that other analysts categorize as primarily concerning issues other than criminal law and procedure. For example, *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000), garnered justifiable attention as the latest indicator of the Rehnquist Court's stance on abortion, *see, e.g.*, Sylvia A. Law, *Rulings on Abortion and Grandparents' Visitation*, NAT'L L.J. Aug. 7, 2000, at A26. The narrow five-to-four decision struck down Nebraska's "partial birth abortion" law. *See Stenberg*, 120 S. Ct. at 2598. In this article, it is counted as a case about criminal justice decisions because it concerned the constitutional validity of a criminal statute. Similarly, *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), and *Hill v. Colorado*, 120 S. Ct. 2480 (2000), are classified as constitutional law cases concerning the First Amendment. This study includes them among criminal justice-related cases because *Los Angeles Police Department* concerned a law limiting access to police records, and *Hill* concerned a criminal statute addressing leafleting outside abortion clinics.

7. For example, Justice Antonin Scalia has long argued that federal courts should reduce their involvement in various kinds of cases, *see* Stuart Taylor, Jr., *Scalia Proposes Major Overhaul of U.S. Courts*, N.Y. TIMES, Feb. 16, 1987, 1 (National Desk), at 1, and uses concepts such as standing and justiciability to keep the U.S. Supreme Court from considering various issues, *see* RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 328 (1997).

anything other than unpredictable patterns of particular cases brought to the Court each year and the Justices' inclinations to tackle specific issues.

Analysts argue that the Rehnquist Court has continued the Burger Court's "'counterrevolution' in due process jurisprudence brought about by dramatic changes in the Court's personnel and by society's response to [a perceived] explosion of violent and drug-related crime."[8] It has also been asserted that the Rehnquist Court Justices may lack understanding about and sensitivity to the operations and impacts of the criminal justice process because none of these justices ever had the experience of representing a defendant in a felony case.[9] Despite these concerns, an analysis of the Court's civil liberties decisions concluded that "[l]ittle evidence existed in the 1995 and 1996 Terms of the conservative constitutional counterrevolution envisaged by Presidents Reagan and Bush when they appointed a majority of the current members of the Court."[10] The Court's decisions have been predominantly conservative,[11] but many of the Warren Court's landmark civil liberties precedents[12] have never been overturned.[13] The 1999-2000 Term presented opportunities for changes because the Justices accepted cases that provided vehicles to potentially eliminate such iconic decisions as *Miranda v. Arizona*[14] and *Terry v. Ohio*.[15]

This article will explore the Supreme Court's impact on criminal justice during the 1999-2000 Term through an empirical examination of the Court's decision-making processes and a review of the cases. In the final analysis, the Supreme Court's 1999-2000 decisions affecting criminal justice were consistent with previously established patterns in the Rehnquist Court's decision making: conservative outcomes were predominant but the Court's decisions preserved landmark precedents and favored the rights of individuals in some important cases.

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8. JOHN C. DOMINO, CIVIL RIGHTS & LIBERTIES: TOWARD THE 21ST CENTURY 132 (1994).

9. Stephen J. Fortunato, Jr., *The Supreme Court's Experience Gap*, 82 JUDICATURE 251 (1999).

10. THOMAS R. HENSLEY, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, SUPREME COURT UPDATE: 1997, at 13 (1998).

11. *Id.* at 5.

12. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

13. *See* Rudolph Alexander, Jr., *The Mapp, Escobedo, and Miranda Decisions: Do They Serve a Liberal or a Conservative Agenda*, 4 CRIM. JUST. POL'Y REV. 39 (1990) (describing the Warren Court's controversial, landmark precedents).

14. 384 U.S. 436 (1966). *Dickerson v. United States*, 120 S. Ct. 2326 (2000), directly addressed the question of whether the warnings required by *Miranda* are mandated by the Constitution.

15. 392 U.S. 1 (1968). *Illinois v. Wardlow*, 528 U.S. 119 (2000), and *Florida v. J.L.*, 529 U.S. 266 (2000), both examined the continuing vitality of the requirement in *Terry* that certain prerequisites exist before police officers may stop and frisk people on the streets.

II. EMPIRICAL MEASURES OF THE SUPREME COURT'S DECISION MAKING

In several tables presented to illuminate the Supreme Court's decision-making patterns during the 1999-2000 Term, the terms "liberal" and "conservative" are used as a convenient shorthand to describe the outcomes supported by individual Justices and the Court majority. These labels can be problematic as consistently applicable classifying categories.[16] Indeed, the labels are problematic for some criminal justice cases during the most recent Term.[17] However, the use of such categories is consistent with prior empirical studies of the Supreme Court and enhances scholars' ability to make systematic comparisons of different Court Terms and eras. Here the definitions of liberal and conservative are modeled on the classifications in the Supreme Court Judicial Data Base in which "[l]iberal decisions in the area of civil liberties are pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American], and anti-government in due process and privacy."[18] By contrast, "conservative" decisions in criminal justice cases favor the government's interests in prosecuting and punishing offenders over recognition or expansion of rights for individuals.

Table 1 summarizes the outcomes of the Supreme Court's 1999-2000 decisions according to the Court's vote totals and the direction of the Court's decisions. Consistent with the post-Warren-era Supreme

16. Although the term "liberal" is used to describe outcomes in which Justices favor individuals' rights over the interests of government, there are some kinds of rights in which Justices with so-called conservative values are more likely to favor individuals. For example, cases concerning property rights often produce role reversals among the Justices considered "liberal" and those considered "conservative," with the usual liberals supporting the government's authority to regulate property and usual conservatives supporting individuals' property rights. Such a role reversal occurred, for example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Despite the problems in applying these terms to all kinds of issues, the liberal label is typically reserved for those Justices supporting the claims of individuals, and such support can often appear to reflect a particular Justices' values because of consistencies in their patterns of decision making. For example, Justices William Brennan and Thurgood Marshall earned their "liberal" labels by supporting individuals' claims in civil rights and liberties cases nearly ninety percent of the time during their service in the Rehnquist Court era. *See* THOMAS R. HENSLEY, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 57, 61 (1997).

17. For example, Justice Antonin Scalia is regarded as conservative because he is one of the Justices least likely to support individuals' claims of right. *See, e.g.*, DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA, at xii-xvii (1996). Similarly, Justice Clarence Thomas is often regarded as "a consistent member of the Court's most conservative wing." Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 2 (1997). Yet, despite their records, Scalia and Thomas were the lone "liberals" in *Fischer v. United States*, 529 U.S. 667 (2000), who favored the defendant's interpretation of a federal bribery statute.

18. Harold J. Spaeth & Jeffrey A. Segal, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Judicial Data Base Project*, 73 JUDICATURE 103, 103 (1989).

Court's prior record and reputation, the decisions predominantly favored the government[19] although a notable percentage of decisions favored individuals (38.7%). The table shows a lack of consensus among the Justices concerning criminal justice issues. In the 1995-96 and 1996-97 Terms, nearly half of all criminal justice decisions were unanimous,[20] but in 1997-98 and 1998-99 unanimous decisions dropped to a level closer to forty percent.[21] In the 1999-2000 Term, the level of consensus was similar to the preceding two Terms. Only nine out of thirty-one cases were unanimous. These nine cases were divided nearly evenly between liberal (4) and conservative (5) outcomes. By contrast, when there was disagreement among the Justices, conservative outcomes predominated. Fourteen of twenty-two nonunanimous decisions favored the government.

Table 1—Case Distribution by Vote and Liberal/Conservative Outcome in U.S. Supreme Court Criminal Justice Decisions, 1999-2000 Term

Vote	Liberal	Conservative	Total
9-0	4	5	9
8-1	1	1	2
7-2	3	3	6
6-3	1	3	4
5-4	3	7	10
TOTAL	12 (39%)	19 (61%)	31

One of the most striking aspects of the cases that deeply divided the Court was the consistency of the composition of the opposing sides in each case. All seven of the conservative 5-to-4 decisions were decided by a majority coalition of Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy squaring off against the consistent dissenters Justices Stevens, Ginsburg, Souter, and Breyer.[22] In one of the

19. LAWRENCE BAUM, THE SUPREME COURT 190 (3d ed. 1989).

> The Supreme Court of the 1970s was distinctly more conservative than the Warren Court that preceded it, and the Court of the 1980s has been even more so. . . . [T]he Court has cut back some rights that were established by the Warren Court, especially in criminal procedure—the area in which its conservatism has been strongest.

Id.

20. In 1995-96, 11 out of 22 criminal justice decisions were unanimous, Christopher E. Smith, *Criminal Justice and the 1995-96 U.S. Supreme Court Term*, 74 U. DET. MERCY L. REV. 1, 4 (1996), and in 1996-97, 13 out of 30 criminal justice decisions were unanimous, Smith, *supra* note 2, at 33.

21. In 1997-98, only 13 out of 35 criminal justice decisions were unanimous. Smith, *supra* note 3, at 445.

22. Miller v. French, 530 U.S. 327 (2000); Carter v. United States, 530 U.S. 255 (2000); Ramdass v. Angelone, 530 U.S. 156 (2000); Ohler v. United States, 529 U.S. 753 (2000); Smith v. Robbins, 528

liberal 5-to-4 decisions, O'Connor deserted her usual allies to provide the fifth vote that gave the more liberal foursome a majority.[23] The other split decisions with liberal outcomes saw Scalia and Thomas join three more liberal Justices and either Ginsburg or Breyer join the conservative wing in dissent.[24] The number of cases that deeply divided the Justices (i.e., one-third of criminal justice decisions) and the consistency of the competing coalitions highlight the possibility that President George W. Bush may influence decisions affecting a variety of issues if given the opportunity to replace any Justices who leave the Court in the near future.

For the second time in five years, the Court decided more constitutional criminal justice issues than nonconstitutional issues. Unlike the preceding year in which fifty-five percent of the criminal justice cases presented constitutional issues (as compared with the thirty-four to forty-five percent constitutional issue caseload among criminal justice cases in the prior three Terms),[25] the percentage of constitutional issues jumped to nearly sixty-five percent.

U.S. 259 (2000); Weeks v. Angelone, 528 U.S. 225 (2000); Illinois v. Wardlow, 528 U.S. 119 (2000).

23. Stenberg v. Carhart, 120 S. Ct. 2597 (2000).

24. Apprendi v. New Jersey, 120 S. Ct. 2348 (2000); Carmell v. Texas, 529 U.S. 513 (2000).

25. The Court decided 45% constitutional issues among criminal justice cases in 1995-96, Smith, *supra* note 20, at 5-6, 43% constitutional issues in 1996-97, Smith, *supra* note 2, at 34, and 34% criminal justice issues in 1997-98, Smith, *supra* note 3, at 446; Smith, *supra* note 4.

Table 2—Issues in Criminal Justice Cases in the Supreme Court's 1999-2000 Term[26]

CONSTITUTIONAL ISSUES (64.5%)	OTHER ISSUES (35.5%)
Due Process United States v. Martinez-Salazar Apprendi v. New Jersey	*Habeas Corpus* Ramdass v. Angelone Williams v. Taylor Edwards v. Carpenter Slack v. McDaniel
First Amendment L.A. Police Dep't v. United Reporting Publ'g Corp. Hill v. Colorado	*Federal Criminal Law* Fischer v. United States Jones v. United States Castillo v. United States Carter v. United States
Search and Seizure Illinois v. Wardlow Florida v. J.L. Bond v. United States	*Interstate Detainers* New York v. Hill
Self-Incrimination United States v. Hubbell	*Sentencing Statutes* United States v. Johnson Johnson v. United States
Capital Jury Instructions Weeks v. Angelone	
Confrontation Portuondo v. Agard	
Right to Counsel Martinez v. Court of Appeal Smith v. Robbins Roe v. Flores-Ortega Williams v. Taylor	
Sixth Amendment Trial Rights Ohler v. United States	
Ex Post Facto Garner v. Jones Carmell v. Texas	
Miranda Warnings Dickerson v. United States	
Privacy Stenberg v. Carhart	
Separation of Powers Miller v. French	

26. The citations to the cases included in the table are as follows: *United States v. Martinez-Salazar*, 528 U.S. 304 (2000); *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000); *Ramdass v. Angelone*, 530 U.S. 156 (2000); *Williams v. Taylor*, 529 U.S. 420 (2000); *Edwards v. Carpenter*, 529 U.S. 446 (2000); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999); *Hill v. Colorado*, 120 S. Ct. 2480 (2000); *Fischer v. United States*, 529 U.S. 667 (2000); *Jones v. United States*, 529 U.S. 848 (2000); *Castillo v. United States*, 530 U.S. 120 (2000); *Carter v. United States*, 530 U.S. 255 (2000); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Florida v. J.L.*, 529 U.S. 266 (2000); *Bond v. United States*, 529 U.S. 334 (2000); *New York v. Hill*, 528 U.S. 110 (2000); *United States v. Hubbell*, 120 S. Ct. 2037 (2000); *United States v. Johnson*, 529 U.S. 53 (2000); *Johnson v. United States*, 529 U.S. 694 (2000); *Weeks v. Angelone*, 528 U.S. 225 (2000); *Portuondo v. Agard*, 529 U.S. 61 (2000); *Martinez v. Court of Appeal*, 528 U.S. 152 (2000); *Smith v. Robbins*, 528 U.S. 259 (2000); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000); *Ohler v. United States*, 529 U.S. 753 (2000); *Garner v. Jones*, 529 U.S. 244 (2000); *Carmell v. Texas*, 529 U.S. 513 (2000); *Dickerson v. United States*, 120 S. Ct. 2326 (2000); *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000); *Miller v. French*, 530 U.S. 327 (2000).

In theory, the Court's attention is drawn to unsettled or emerging areas of law when it grants writs of certiorari to accept cases for hearing.[27] During this Term, however, one might conclude that persistent problems rather than emerging issues defined the Court's criminal docket. For example, the number of cases concerning the right to counsel plus an additional related case among those in the *habeas corpus* category[28] reflect continuing questions about the quality and effectiveness of defense counsel.[29]

Table 3 shows the liberal/conservative voting patterns of individual Justices for the 1999-2000 Term. Chief Justice Rehnquist emerged as the Justice least likely to support individuals' claims in criminal justice cases during the most recent Term. Justices Stevens and Souter stood out as the strongest supporters of individual rights in criminal justice cases, although Justice Ginsburg was nearly as liberal in the Term's criminal justice cases. Ginsburg had been regarded as an outspoken defender of constitutional rights during her pre-judicial career as a lawyer,[30] but on the U.S. Supreme Court her early voting record earned her the "characterization . . . as a judicial moderate."[31] Ginsburg's level of support for individuals' claims in two earlier Terms' criminal justice cases, forty-five percent (1995-96)[32] and fifty-three percent (1996-97),[33] cast her as a moderate near the middle of the Court. Ginsburg's increase in support for individuals during 1997-98 (60%),[34] 1998-99 (68%),[35] and 1999-2000 (68%) may be attributable either to

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27. *See* BAUM, *supra* note 19, at 96.

> [The Supreme Court's] Rule 17 proclaims some of the conditions under which the Court will hear a case. The rule emphasizes the Court's role in enhancing the certainty and consistency of the law: The criteria it lists for accepting a case include the existence of important legal issues that the Court has not yet decided, conflict among courts of appeals on a legal question, conflict between a lower court and the Supreme Court's prior decisions, and departure "from the accepted and usual course of judicial proceedings" in the courts below.

Id.

28. Edwards v. Carpenter, 529 U.S. 446 (2000).

29. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

30. *See* Joyce Ann Baugh, Christopher E. Smith, Thomas R. Hensley, & Scott Patrick Johnson, *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 4-5 (1994).

31. HENSLEY, SMITH & BAUGH, *supra* note 16, at 81.

32. Smith, *supra* note 20, at 6.

33. Smith, *supra* note 2, at 37.

34. Smith, *supra* note 3, at 450.

35. Smith, *supra* note 4.

changes in her attitudes and voting strategies[36] or to a change in the mix of criminal justice cases presented to the Supreme Court.[37]

Previously, the mix of issues facing the Court moved Justice Breyer's level of support for individuals from fifty-one percent in 1997-98[38] to forty-five percent in 1998-99,[39] thereby creating a more strongly conservative-oriented split between the six Justices who supported individuals in forty-five percent or less of criminal justice cases (Rehnquist, Thomas, Scalia, O'Connor, Kennedy, and Breyer) and the three Justices who supported individuals in sixty-four to seventy-three percent of such cases (Souter, Ginsburg, and Stevens). In 1999-2000, there was clearer differentiation between the Court's two wings. The five most conservative Justices (Rehnquist, Scalia, Thomas, O'Connor, and Kennedy) were clustered between twenty-three percent and thirty-six percent. Justice Breyer, the Justice who arguably defined the "center" of the Court for criminal justice cases, was clearly differentiated from the conservatives by supporting individuals in an additional twenty percent of cases (55%). However, Breyer was similarly differentiated from the remaining three Justices who were even more liberal at sixty-eight to seventy-one percent support for individuals.

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36. Justices' decisions about how to vote in Supreme Court cases are largely attributable to their values and attitudes and to the strategic choices they make to persuade colleagues or advance particular doctrines. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 10 (1998).

37. Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986-1991 Terms*, 48 POL. RES. Q. 837, 852-54 (1995).

38. Smith, *supra* note 3, at 450.

39. Smith, *supra* note 4.

Table 3—Individual Justices' Liberal/Conservative Voting Percentages in U.S. Supreme Court Criminal Justice Decisions, 1999-2000 Term

JUSTICE	LIBERAL	CONSERVATIVE
Rehnquist	22.6% (7)	77.4% (24)
O'Connor	32.3% (10)	67.7% (21)
Thomas	32.3% (10)	67.7% (21)
Scalia	32.3% (10)	67.7% (21)
Kennedy	35.5% (11)	64.5% (20)
Breyer	54.8% (17)	45.2% (14)
Ginsburg	67.7% (21)	32.3% (10)
Souter	71.0% (22)	29.0% (9)
Stevens	71.0% (22)	29.0% (9)

The philosophical differences between the Justices become accentuated when the analytical focus is limited to nonunanimous decisions.[40] As indicated in Table 4, the Justices were clustered into two groups with Breyer occupying the middle territory.

Table 4—Individual Justices' Liberal/Conservative Voting Percentages in Nonunanimous U.S. Supreme Court Criminal Justice Decisions, 1999-2000 Term

JUSTICE	LIBERAL	CONSERVATIVE
Rehnquist	13.6% (3)	86.4% (19)
O'Connor	27.3% (6)	72.7% (16)
Thomas	27.3% (6)	72.7% (16)
Scalia	27.3% (6)	72.7% (16)
Kennedy	31.8% (7)	68.2% (15)
Breyer	59.1% (13)	40.9% (9)
Ginsburg	77.3% (17)	22.7% (5)
Souter	81.8% (18)	18.2% (4)
Stevens	81.8% (18)	18.2% (4)

40. On an *en banc* court, such as the U.S. Supreme Court, individual judicial officers may feel freest to express their disagreements with the majority. When the decision makers split, their disagreements should genuinely reflect the nature and strength of their differences. By contrast, on a three-member appellate panel, a potential dissenter may be deterred by the thought that he or she must dissent alone and carry the entire burden of presenting a dissenting opinion. Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133, 134 (1990).

Table 5 shows an analysis of interagreement between individual Justices on the Supreme Court. Such interagreement tables are used to detect the existence of voting blocs on the high Court.[41] Justices Stevens, Souter, and Ginsburg formed the only strong voting bloc that contained more members than the various pairs of Justices who voted together with regularity. Although there were conservative voting blocs for criminal justice cases in various preceding terms,[42] the last time a three- or four-member liberal voting bloc was evident was during the 1996-97 Term.[43] Apparently the mix of issues considered by the Court in its most recent Term polarized the Court sufficiently to produce a liberal voting bloc. Yet the mix of issues did not generate enough agreement among the Justices who are consistently conservative to lead them to vote in a way that met the criteria for a voting bloc.

Table 5—Interagreement Percentages for Paired Justices in U.S. Supreme Court Unanimous Criminal Justice Decisions, 1999-2000 Term[44]

Table 5	Ginsburg	Stevens	Breyer	O'Connor	Kennedy	Rehnquist	Thomas	Scalia
Souter	96.8	93.5	83.9	61.3	51.6	51.6	48.4	41.9
Ginsburg		90.3	80.6	64.5	54.8	54.8	45.2	38.7
Stevens			83.9	61.3	58.1	51.6	48.4	41.9
Breyer				71.0	61.3	58.1	51.6	51.6
O'Connor					74.2	90.3	74.2	67.7
Kennedy						87.1	77.4	71.0
Rehnquist							77.4	71.0
Thomas								93.5

A focus on nonunanimous decisions generates more pronounced differences between the Justices, but the voting blocs maintain a similar composition. Interestingly, although Rehnquist had the most conservative record and Souter and Stevens had the most liberal records, the Justices most likely to disagree with each other were Scalia and Ginsburg.

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41. In empirical studies of the Supreme Court, voting blocs are determined according to the "Sprague Criterion." The Sprague Criterion is calculated by subtracting the average agreement score for the entire Court from 100. The resulting number is divided by two and added to the Court average in order to establish the threshold level for defining a bloc. A bloc exists when the individual agreement scores for a set of Justices exceed the threshold established by the Sprague Criterion calculation. JOHN D. SPRAGUE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT 51-61 (1968).

42. Smith, *supra* note 3, at 452-53; Smith, *supra* note 20, at 8-9.

43. Smith, *supra* note 2, at 39.

44. Court mean: 66.1. Sprague Criterion: 83.1. Voting blocs included: Souter, Ginsburg, & Stevens at 93.5; Scalia & Thomas at 93.5; Rehnquist & O'Connor at 90.3; Rehnquist & Kennedy at 87.1; Souter & Breyer at 83.9; and Stevens & Breyer at 83.9.

Table 6—Interagreement Percentages for Paired Justices in U.S. Supreme Court Nonunanimous Criminal Justice Decisions, 1999-2000 Term[45]

Table 6	Ginsburg	Stevens	Breyer	O'Connor	Kennedy	Rehnquist	Thomas	Scalia
Souter	95.5	90.9	77.3	54.5	31.8	31.8	27.3	18.2
Ginsburg		86.4	72.7	50.0	36.4	36.4	22.7	13.6
Stevens			77.3	45.5	40.9	31.8	27.3	18.2
Breyer				59.1	45.5	40.9	31.8	31.8
O'Connor					63.6	86.4	63.6	54.5
Kennedy						81.8	68.2	59.1
Rehnquist							68.2	59.1
Thomas								90.0

III. CASE DECISIONS

A. UNANIMOUS DECISIONS

The Court's most notable unanimous decision addressed the landmark Warren Court precedent *Terry v. Ohio*.[46] In *Terry*, the Court permitted a police officer to stop and frisk suspicious people on the street when certain indicators provided sufficient justification to make the search and seizure "reasonable" under the Fourth Amendment.[47] Foremost among these indicators was the officer's personal observation of suspicious behavior that led him to reasonably conclude that criminal activity was afoot *and* that the suspicious person was armed.[48] Such searches were justified on the need to protect the safety of officers and members of the public from armed individuals who appeared to be planning or carrying out a crime.[49] In later cases, the Court altered the prerequisites by, for example, permitting a frisk based on a tip from a known informant rather than just an officer's own observations.[50] When the Supreme Court took up the case of *Florida v. J.L.*[51] in 1999-2000, the possibility existed that the Justices would further reduce or eliminate the circumstances that must exist before a stop-and-frisk can occur.

45. Court mean: 51.6. Sprague Criterion: 75.8. Voting blocs included: Souter, Ginsburg, & Stevens at 90.9; Scalia & Thomas at 90.9; Rehnquist & O'Connor at 86.4; Rehnquist & Kennedy at 81.8; Souter & Breyer at 77.3; and Stevens & Breyer at 77.3.

46. 392 U.S. 1 (1968).

47. *Id.* at 30-31.

48. *Id.*

49. *Id.*

50. In *Adams v. Williams*, 407 U.S. 143 (1972), the informant's tip about a person seated in a car carrying a gun and drugs led the officer to reach through the car window to seize the gun from the car driver's waistband.

51. 529 U.S. 266 (2000).

In *Florida v. J.L.*, an anonymous caller told police that a young African-American male standing at a particular bus stop and wearing a plaid shirt was carrying a weapon.[52] Officers went to the bus stop, observed that one of the three African-American youths at the bus stop was wearing a plaid shirt, and proceeded to frisk each young man.[53] The young man wearing the plaid shirt had a handgun in his pocket that served as the basis for criminal charges.[54] The Florida Supreme Court declared the search invalid because the police had no basis for trusting the reliability of the anonymous telephone tip.[55] Two state justices dissented and asserted that the protection of officers and the public required a "firearms exception" that would permit searches for and seizures of guns based on anonymous tips alone.[56]

The Justices unanimously affirmed the decision of the Florida Supreme Court and thereby solidified *Terry*'s fundamental premise that police officers do not possess unlimited discretion to stop and frisk people on the streets.[57] Justice Ginsburg's opinion on behalf of the Court distinguished the instant case from two prior cases in which informant's tips were accepted as the basis for a stop-and-frisk.[58] In one prior precedent, the tip came from a known informant, thus providing an indicator of reliability.[59] In the other case, the officers made further observations that verified the tip's accuracy before conducting the search.[60] By contrast, in the instant case there was no suspicious behavior observed by the officers.[61] They conducted the search based entirely on the anonymous tip of unproven reliability.[62] In a concurring opinion, Justice Kennedy noted that there might be other situations in which indicators of reliability might provide the basis for a stop-and-frisk resting on an anonymous tip.[63]

The Justices had a consensus in support of individuals' claims in three other cases. In *Williams v. Taylor*,[64] the Justices agreed that a

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52. *Id.* at 268.

53. *Id.*

54. He was charged with carrying a concealed weapon and being a minor unlawfully in possession of a firearm. *Id.* at 269.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 270-71.

59. *Id.* (citing Adams v. Williams, 407 U.S. 143 (1972)).

60. *Id.* (citing Alabama v. White, 496 U.S. 325 (1990)). In *Alabama v. White*, prior to the search, officers' observations confirmed the accuracy of an anonymous tip that predicted that a woman carrying drugs would leave a specific location at a certain time and drive to another specified location. 496 U.S. at 326.

61. *J.L.*, 529 U.S. at 271.

62. *Id.*

63. *Id.* at 274 (Kennedy, J., concurring).

64. 529 U.S. 420 (2000).

habeas petitioner was entitled to an evidentiary hearing in a capital case in which a juror, upon questioning by the judge during *voir dire* about relationships with actors in the case, failed to inform the trial court that she was acquainted with a deputy sheriff (her ex-husband) and the prosecutor (her divorce attorney).[65] The two other cases concerned statutory interpretation regarding federal statutes governing arson[66] and firearms.[67]

Among the cases in which there was a consensus favoring the government's position, the most notable concerned Sixth Amendment rights. In *Martinez v. Court of Appeal of California*,[68] the Court decided that criminal appellants have no right to represent themselves in appeals. In explaining the decision, Justice Stevens' opinion distinguished the *Martinez* case from that of the claimant in *Faretta v. California*.[69] The *Faretta* decision established the principle that criminal defendants have a constitutional right to represent themselves at trial.[70] The Court distinguished *Martinez* by noting that the Sixth Amendment, which provided the source of the *Faretta* right, applies only to trials and not to criminal appeals.[71] Moreover, the Court concluded that the Due Process Clause does not provide a right to self-representation.[72] Stevens' opinion also noted that the *Faretta* decision reflected a long historical tradition dating back to earlier eras in which few attorneys were available to represent criminal defendants.[73] The opinion concluded that the same tradition of self-representation did not exist with respect to appeals.[74]

In *United States v. Martinez-Salazar*,[75] the Court found neither Sixth Amendment nor Due Process Clause violations when a defendant was forced to use a peremptory challenge to exclude a juror who should have been excluded for cause when the defense attorney raised a challenge during *voir dire*.[76] A potential juror had indicated several times during questioning that he would favor the prosecution.[77] Despite this admission and protests from the defense, the trial judge refused to remove him for cause.[78] Thus the defense expended one of its ten

65. *Id.* at 440-41.
66. Jones v. United States, 529 U.S. 667 (2000).
67. Castillo v. United States, 530 U.S. 120 (2000).
68. 528 U.S. 152 (2000).
69. 422 U.S. 806 (1975).
70. *Id.* at 836.
71. *Martinez*, 528 U.S. at 159.
72. *Id.* at 159-60.
73. *Id.* at 156-57.
74. *Id.* at 163.
75. 528 U.S. 304 (2000).
76. *Id.* at 317.
77. *Id.* at 308.
78. *Id.* at 309.

allotted peremptory challenges to remove the potential juror.[79] Justice Ginsburg's opinion for the unanimous Court noted that defendants do not have a Sixth Amendment right to use peremptory challenges.[80] The Sixth Amendment provides a right to an impartial jury but peremptory challenges are only auxiliary tools used to advance the goal of fulfilling that right.[81] According to Ginsburg, the defendant had the chance to permit the pro-prosecution juror to be seated and then subsequently file an appeal based on the trial judge's refusal to dismiss the juror for cause.[82] Instead, the Court concluded that the defense had made a conscious choice to use one of its peremptory challenges, rather than risk the uncertainty of an appeal on the issue of the judge's action in refusing to dismiss the juror.[83] In the view of the Justices, the defense was not compelled to use its peremptory challenge.[84]

The other unanimous decisions with conservative outcomes involved a variety of issues. One decision permitted defense attorneys to waive time limits under the Interstate Agreement on Detainers without the express consent of the defendant.[85] In another case, the Justices declined to reduce an offender's period of supervised release by the amount of time that the offender was erroneously incarcerated.[86] The remaining unanimous decision permitted the default of an ineffective assistance of counsel claim in habeas proceedings even when the claimant said that ineffective assistance of counsel was the reason for the default.[87]

B. THE 8-TO-1 DECISIONS

The Court's most highly publicized 8-to-1 decision touched upon a criminal investigation that grew out of the Whitewater scandal.[88] Webster Hubbell, a close friend of President Clinton and a former law partner of Hilary Clinton, pleaded guilty to mail fraud and tax evasion.[89] As part of his plea agreement, he promised to provide information to the Whitewater Independent Counsel.[90] While Hubbell was in prison, the Independent Counsel served a subpoena seeking additional documents from Hubbell, but Hubbell asserted his Fifth Amendment privilege

79. *Id.*
80. *Id.* at 311.
81. *Id.*
82. *Id.* at 315.
83. *Id.* at 316.
84. *Id.* at 315.
85. New York v. Hill, 528 U.S. 110 (2000).
86. United States v. Johnson, 529 U.S. 53 (2000).
87. Edwards v. Carpenter, 529 U.S. 446 (2000).
88. United States v. Hubbell, 530 U.S. 27 (2000).
89. *Id.* at 31.
90. *Id.*

against compelled self-incrimination in declining to respond.[91] The Independent Counsel obtained a court order directing Hubbell to respond to the subpoena and granting him immunity to the extent allowed by law.[92] The documents obtained in this fashion were used to indict Hubbell on additional tax and fraud charges.[93] Hubbell challenged the prosecution as a violation of his Fifth Amendment rights.[94]

Writing for the majority, Justice Stevens concluded that the indictment must be dismissed. As Stevens observed:

> In sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response to a subpoena-seeking discovery of those sources.[95]

Although the contents of the documents produced in response to the subpoena did not constitute "compelled testimony" for Fifth Amendment purposes, the act of producing those documents did constitute "testimony."[96] Thus Hubbell's rights were violated when he was forced to produce documents that were subsequently used as the basis of a prosecution against him.[97] Chief Justice Rehnquist dissented in the case.[98]

A concurring opinion by Justice Thomas, joined by Justice Scalia, agreed that the Court had properly applied the doctrine of treating the production of documents as testimony for Fifth Amendment purposes.[99] However, the Court's two advocates of an originalist approach to constitutional interpretation[100] argued that this doctrine may be inconsistent with the Fifth Amendment's original meaning[101] and therefore they expressed a willingness to reconsider the doctrine in a future case.[102] Thus the Court's near-consensus in this case is somewhat illusory because the

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91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 31-32.
95. *Id.* at 43.
96. *Id.* at 45-46.
97. *Id.*
98. *Id.* at 49.
99. *Id.*
100. *See* CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT 31-32 (1993) (explaining Scalia's adoption of original intent analysis to constitutional interpretation); Christopher E. Smith, *Bent on Original Intent*, 82 A.B.A. J. 48 (1996) (describing Thomas' adherence to original intent analysis to constitutional interpretation).
101. *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring).
102. *Id.*

possibility clearly exists that Fifth Amendment doctrines could change if the Court's composition changes, or if Thomas and Scalia convince their colleagues to move in a new direction.

The Court's other 8-to-1 decision produced a conservative result by interpreting a federal statute to provide U.S. district judges with the authority to impose an additional time period of supervised release after an offender has been returned to prison to serve out a sentence for violating restrictions during an earlier release.[103] The decision provided a good illustration that the labels "conservative" and "liberal" that are generally applied to Justices do not always provide accurate predictions about which Justices will support which results. Some issues will divide Justices in ways that differ from the usual ideological patterns, and this case obviously did so because Scalia was the lone Justice to adopt the "liberal" position of supporting the individual's claim. Scalia harshly criticized the Court's interpretation of certain words in the statute[104] and seized the opportunity to chastise his colleagues for encouraging lower court judges to make the law mean whatever the judge wants it to mean.[105]

C. THE 7-TO-2 DECISIONS

Two of the most important "liberal" decisions of the Term produced 7-to-2 results. In the most highly publicized case, *Dickerson v. United States*,[106] the Court examined a Fourth Circuit decision declaring that *Miranda* warnings are not constitutionally required and therefore Congress can enact statutes[107] to free law enforcement officers from the requirements of the Warren Court's 1966 landmark decision.[108] The case was the product of a lengthy crusade by University of Utah law professor Paul Cassell,[109] who represented a conservative legal foundation in arguing the case before the Court when the Clinton administration declined to defend the Court of Appeals decision. The issue provided the Supreme Court with a clear opportunity to overturn the

103. Johnson v. United States, 529 U.S. 694 (2000).

104. *Id.* at 716 n.1 (Scalia, J., dissenting) ("Thus, when the Court admits that it is giving the word 'revoke' an 'unconventional' meaning, it says that it is choosing to ignore the word 'revoke.'").

105. *Id.* at 727 (Scalia, J., dissenting) ("Today's decision invites [lower court judges] to return to headier days of not-too-yore, when laws meant what judges knew they ought to mean.").

106. 120 S. Ct. 2326 (2000).

107. *See* 18 U.S.C. § 3501 (1994) (stating that voluntariness, rather than the provision of *Miranda* warnings, is the touchstone for determining the admissibility of incriminating statements obtained during custodial questioning).

108. Miranda v. Arizona, 384 U.S. 436 (1966).

109. Tony Mauro, *Legal Renegade's Mission: Upend Enduring Decision*, USA TODAY, Mar. 1, 1999, at A1; Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

landmark *Miranda* decision. However, the Court ultimately disappointed *Miranda*'s critics by strongly endorsing the Warren Court's landmark decision as enunciating constitutionally-mandated rules for police procedures.

Chief Justice Rehnquist's majority opinion relied on the language and reasoning of the *Miranda* precedent as well as considerations of stare decisis to overrule the lower appellate court.[110] According to Rehnquist:

> Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now. . . . *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. . . . [O]ur subsequent cases [after *Miranda*] have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief. . . . In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves.[111]

Because a seven-member majority supported Rehnquist's opinion, critics were put on notice that there is little reason to make further efforts to overturn *Miranda* unless and until the Court's composition changes significantly.

A strong dissenting opinion by Scalia, joined by Thomas, criticized the Court sharply for its "judicial arrogance"[112] in "imposing its Court-made code upon the States."[113] Consistent with his penchant for graphic language and strong condemnations of those with whom he disagrees,[114] Scalia went so far as to question the sanity of people who would support the judicial preservation of *Miranda* warnings:

> Far from believing that *stare decisis* compels this result, 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

110. *Dickerson*, 120 S. Ct. at 2336.
111. *Id.*
112. *Id.* at 2348.
113. *Id.*
114. SMITH, *supra* note 100, at 60-67.

> States. This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people.[115]

The *Dickerson* decision was not entirely surprising. The Rehnquist Court has appeared disinclined to overturn landmark precedents. Such actions raise the risk of political mobilization and backlash that would place the Justices in the unwanted position of being in the center of explosive political debates. Instead, the Court has made incremental changes and created exceptions to landmark rulings in order to give police and prosecutors flexibility without being accused of wiping away the famous decisions of the Warren Court.[116] Indeed, one commentator has implicitly argued that conservative Justices have an incentive to preserve liberal landmark precedents in order to give fellow conservatives a focal point and motivation for continued political and legal mobilization in pursuit of conservative policy goals.[117]

By contrast, the Court's liberal decision in *Bond v. United States* [118] seems surprising. In *Bond*, a U.S. Border Patrol Agent squeezed the soft luggage on the overhead rack of a Greyhound bus.[119] In one duffel bag, he felt a brick-like object.[120] Bus passenger Bond admitted that he owned the duffel bag, and he consented to a search of the bag.[121] The bag was found to contain a "brick" of methamphetamine.[122] Bond was convicted on drug charges.[123] He sought to suppress the introduction of the drugs as evidence against him, arguing that his Fourth Amendment rights were violated when the agent, with no basis for suspicion, manipulated and squeezed the duffel bag.[124] In essence, Bond claimed that the random squeezing of soft-sided luggage by law enforcement officials looking for contraband constitutes an impermissible "unreasonable" search under the Fourth Amendment.[125] On behalf of a seven-member majority, Chief Justice Rehnquist concluded that Bond's rights were violated.[126] Rehnquist found that Bond had a reasonable expectation of privacy when he placed his possessions in the duffel bag,

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115. *Dickerson*, 120 S. Ct. at 2348.

116. Christopher E. Smith, *Turning Rights into Symbols: The U.S. Supreme Court and Criminal Justice*, 8 CRIM. JUST. POL'Y REV. 99, 103-13 (1997).

117. Alexander, *supra* note 13, at 49 (describing the *Miranda* decision as a symbol for "the legal system's favoritism of criminals and the need to right the unbalance").

118. 529 U.S. 334 (2000).

119. *Id.* at 335.

120. *Id.* at 336.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

and that this expectation—and his Fourth Amendment rights—were violated when the agent manipulated the bag.[127] In dissent, Justice Breyer, joined by Scalia, argued that bus passengers do not have a reasonable expectation of privacy because they must expect that their soft-sided luggage will be touched and moved around in the course of traveling by commercial transportation.[128]

The decision may be considered surprising because of commentators' views that the Rehnquist Court "has placed the Fourth Amendment's ban on unreasonable searches and seizures at the bottom" of its hierarchy of priorities to be protected in the Bill of Rights.[129] Thus the Rehnquist Court has "decided cases affecting nearly every aspect of Fourth Amendment issues, and in most cases the Court either favored government by interpreting precedents in a conservative manner or created new conservative interpretations of existing precedents."[130] By declining to use the opportunity to further diminish the scope of Fourth Amendment rights, the Court's decision runs counter to the predominant trends in search and seizure cases during the Rehnquist Court era.[131]

The Court's other liberal decision with two dissenters was a *habeas corpus* decision,[132] in which the majority concluded that a dismissal for failure to exhaust state remedies did not constitute a first petition subject to the successive petition defense.[133]

The Court addressed various issues in its conservative decisions with seven-member majorities. The Court found no First Amendment violation in limiting media access to arrestees' addresses.[134] In another case, a prosecutor's summation challenged the credibility of a testifying defendant by arguing that the defendant had the opportunity to tailor his testimony after being present in the courtroom to hear the testimony of the victim and other witnesses.[135] The majority rejected the defendant's

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127. *Id.* at 338-39.

128. *Id.* at 340-43.

129. CHARLES H. WHITEBREAD & CHRISTOPHER S LOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 4 (3d ed. 1993).

130. HENSLEY, SMITH, & BAUGH, *supra* note 16, at 448.

131. *Id.* at 450-51.

132. Slack v. McDaniel, 529 U.S. 473 (2000).

133. Procedural decisions of the Supreme Court, as well as the Antiterrorism and Effective Death Penalty Act of 1996, have provided additional bases for dismissal of habeas petitions. *See, e.g.*, Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993). Although these changes were intended to reduce the burden on courts and government lawyers who must handle habeas petitions, the changes have sometimes made habeas processes more complex for judges and lawyers. *See* Christopher E. Smith, *Judicial Reform of Habeas Corpus: The Advocates' Lament*, 44 CLEV. ST. L. REV. 47 (1996); Christopher E. Smith, *Judicial Policy Making and Habeas Corpus Reform*, 7 CRIM. JUST. POL'Y REV. 91, 91 (1995).

134. L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999).

135. Portuondo v. Agard, 529 U.S. 61 (2000).

subsequent claims that the prosecutor's comments violated the Sixth Amendment right to confrontation, the Fifth Amendment right to be present at trial, and the Fourteenth Amendment right to due process.[136] The final case in this category involved the interpretation of a bribery statute.[137]

D. THE 6-TO-3 DECISIONS

The Court's lone liberal decision in a 6-to-3 case involved the issue of standards for evaluating ineffective assistance of counsel and interpretation of federal habeas statutes.[138] With respect to the central issue concerning the right to counsel, the majority found that a defendant's attorney provided unconstitutionally ineffective representation by failing to present significant mitigating evidence in a capital case.[139]

The conservative decisions in this category involved a variety of issues. One case concerned the constitutionality of a Colorado statute regulating leafleting outside of abortion clinics.[140] The majority found no violation of the leafleteers' First Amendment rights.[141] The case provides an illustration of the limitations of the "liberal" and "conservative" labels. The issue of abortion may have cast a significant shadow over the case. Thus "liberal" votes in favor of protecting anti-abortion protesters' rights were cast by three of the Court's more conservative Justices (Thomas, Scalia, and Kennedy).

In another case, the Court found that changes in Georgia's schedule of parole hearings did not violate the Ex Post Facto Clause even though many prisoners had to wait several extra years for each hearing.[142] The Court also vacated and remanded an ineffective assistance of counsel case after determining that an attorney need not always consult with a defendant before failing to file a notice of appeal following an entry of a guilty plea.[143]

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136. *Id.* at 71-73, 75.
137. Fischer v. United States, 529 U.S. 667 (2000).
138. Williams v. Taylor, 529 U.S. 362 (2000).
139. *Id.* at 398-99.
140. Hill v. Colorado, 120 S. Ct. 2480 (2000).
141. *Id.* at 2499.
142. Garner v. Jones, 529 U.S. 244 (2000).
143. Roe v. Flores-Ortega, 528 U.S. 470 (2000).

E. THE 5-TO-4 DECISIONS

The Court examined the *Terry* doctrine in a case that divided the Justices along their predominant jurisprudential fault line, with the five most conservative Justices constituting the majority and the four most liberal Justices in dissent. In *Illinois v. Wardlow*,[144] a man fled upon seeing police officers drive into an area characterized as one known for drug activities. Police stopped the man and found a handgun in his possession when they frisked him.[145] He was convicted on weapons charges, but the Illinois Supreme Court reversed his conviction because it said that sudden flight does not create the required reasonable suspicion to justify a *Terry* stop.[146] The U.S. Supreme Court reversed.[147]

According to Rehnquist's majority opinion, when a person runs at the sight of police officers in a high-crime area, officers have reasonable suspicion to conduct a stop and frisk.[148] As described by Rehnquist: "Headlong flight–wherever it occurs–is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[149] In effect, the Court adopted a totality-of-circumstances test that permits police officers to include flight as a significant indicator of suspiciousness.

On behalf of four Justices concurring in part and dissenting in part, Stevens agreed with the majority that the Court should not adopt a per se rule that either permits running away to justify a stop or precludes the use of flight as a determining factor.[150] These four Justices disagreed, however, with the majority's conclusion that the stop-and-frisk was justified by the facts of this case. Stevens noted that the officer involved in the stop testified that he could not remember whether he was in a marked or unmarked car.[151] Thus Stevens concluded that if the officers were in unmarked cars, the record does not eliminate the possibility that the defendant ran for his own reasons without knowing that police officers were in the passing cars.[152] This scenario would counteract the officers' underlying inference that he ran *because* police officers were driving down the street.[153] According to Stevens: "I am not persuaded

144. 528 U.S. 119 (2000).
145. *Id.* at 122.
146. *Id.* at 122-23.
147. *Id.* at 126.
148. *Id.* at 124-25.
149. *Id.* at 124.
150. *Id.* at 126.
151. *Id.* at 137.
152. *Id.*
153. *Id.* at 138.

that the mere fact that someone standing on a sidewalk looked in the direction of a passing car before starting to run is sufficient to justify a forcible stop and frisk."[154] It appeared that the four dissenters were much more open than their colleagues to the possibility that people could run down the street for innocent reasons. Indeed, Stevens even endorsed the possibility that it is understandable for innocent people to run when they see the police because of perceptions of police brutality or because of the risk of harm to bystanders during police-citizen encounters in some neighborhoods:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices.[155]

Although the majority and dissenters agree on the desirability of a totality-of-circumstances test, it is clear that their applications of the test are quite different. The majority's application appears to be very deferential to police discretionary judgments about suspiciousness and potentially has wide applicability since stops can be triggered by people running in areas labeled as "high crime" or "known for criminal activity." By contrast, the dissenters would not accept the factors of a person's presence in a high crime area or a person's flight, alone or in combination, as the primary basis for reasonable suspicion. Instead, the dissenters would require detailed articulation of facts specific to each situation to provide the basis for the *Terry* stop.

There is a risk that the Court's decision will open the door to a variety of additional cases that test the contours of the *Wardlow* decision. What if a person jogs away at the sight of the police? Rehnquist emphasized in *Wardlow* that the stop was triggered by "head-long flight," but his rationale could be used to support stopping someone who is merely jogging. What if the person merely walks away very quickly? What if the person is not in a high crime area but is recognized by the police as someone with a criminal record? Because of the majority's apparent deference to the judgments of police officers on the street, it seems likely

154. *Id.* at 140.
155. *Id.* at 132-33.

that stops could be justified in all of these circumstances. Much will depend on the level of scrutiny and skepticism applied by lower court judges who are confronted with motions to suppress evidence gained from stop-and-frisk searches.

The most controversial 5-to-4 decision concerned the constitutionality of state statutes criminalizing so-called "partial birth abortions."[156] Justice O'Connor's concurrence provided the needed fifth vote for the Court's four most liberal Justices to strike down Nebraska's law. O'Connor agreed that the statute imposed an impermissible burden on a woman's privacy-based right to make choices about terminating a pregnancy.[157] The decision has limited impact on criminal justice. For the moment, it prevents states from having laws like Nebraska's but that situation could change with a new appointment to the Court. The case serves as a reminder, however, of the intersections between criminal law and other legal issues that are usually discussed as constituting separate areas of law, such as the right to privacy.

In conservative decisions that deeply divided the Justices, a consistent pattern emerged. In all seven cases, including *Illinois v. Wardlow*, the five-member majority was composed of the Court's most conservative Justices (Rehnquist, Scalia, Thomas, O'Connor, and Kennedy) who squared off against the four most liberal members (Ginsburg, Stevens, Souter, and Breyer). Thus these cases touched upon the deepest ideological or jurisprudential faultlines that run through the Court.

In one conservative decision, the majority found that California has adequate procedures for evaluating ineffective assistance of counsel claims in appellate cases.[158] In endorsing the California procedures, the Justices indicated that states do not need to apply a single standard in evaluating the constitutional adequacy of actions by appointed appellate counsel. The Court determined in a different case that a defendant cannot claim that evidence has been erroneously admitted at trial when the defendant presented that evidence.[159] In two cases, the Court endorsed the constitutional adequacy of capital jury instructions[160] and another endorsed jury instructions in a robbery case by interpreting a federal criminal statute.[161] Another decision rejected prisoners' arguments in order to find that the Prison Litigation Reform Act of 1995 does not violate the separation of powers principle.[162]

156. Stenberg v. Carhart, 120 S. Ct. 2597 (2000).
157. *Id.* at 2617.
158. Smith v. Robbins, 528 U.S. 259 (2000).
159. Ohler v. United States, 529 U.S. 753 (2000).
160. Ramdass v. Angelone, 530 U.S. 156 (2000); Weeks v. Angelone, 528 U.S. 225 (2000).
161. Carter v. United States, 530 U.S. 255 (2000).
162. Miller v. French, 530 U.S. 327 (2000).

An obvious difference between the Court's liberal and conservative decisions that split the Court most closely is that at least one of the five most conservative Justices must join a majority that produces five-member decisions favoring liberal outcomes. However, the *Stenberg* case concerning Nebraska's "partial birth" abortion statute was the only instance in which a relatively conservative Justice (O'Connor) joined the four most liberal Justices (Stevens, Souter, Ginsburg, and Breyer) in order to form a five-member majority. In the other two close cases favoring individuals, the Justices divided in ways that differed from their usual ideological alliances. In *Apprendi v. New Jersey*,[163] conservatives Scalia and Thomas joined Stevens, Souter, and Ginsburg in deciding that juries must decide if a crime is hate-motivated for purposes of sentence enhancements. The judge cannot decide after the verdict that the crime was motivated by hate.[164] Justices Scalia and Thomas joined their more liberal colleagues Stevens, Souter, and Breyer to form a majority in *Carmell v. Texas*.[165] In that case, the Court decided Texas violated the Ex Post Facto Clause by changing the applicable legal rules for presenting evidence of sex crimes and then using these rules in a trial for crimes that occurred before the rules were changed.[166] Justice Ginsburg, who had one of the most liberal voting records in criminal justice cases, wrote the dissenting opinion on behalf of conservatives Rehnquist, O'Connor, and Kennedy.[167] Thus, during the 1999-2000 Term, cases that activated the Court's most consistent ideological alliances nearly always produced conservative results. Only once (*Stenberg v. Carhart*) did the four most liberal Justices stay together when a conservative Justice came to join them to form a five-member majority.

IV. CONCLUSION

Is it true that the contemporary Justices who comprise the most frequent majorities on the Rehnquist Court are leading the law on a "course [that] heads in almost exactly the reverse direction from the one the Warren Court pursued in the 1960s[?]"[168] While law enforcement officials manifest few fears about the Supreme Court imposing new constitutional requirements upon them,[169] they also cannot expect the Court to undo entirely the doctrines put into place by the Warren Court.

163. 530 U.S. 255 (2000).
164. *Id.* at 353-56.
165. 529 U.S. 513 (2000).
166. *Id.* at 552-53.
167. *Id.* at 553.
168. EDWARD LAZARUS, CLOSED CHAMBER 510 (1998).
169. Christopher E. Smith & John Hurst, *The Forms of Judicial Policymaking: Civil Liability and Criminal Justice Policy*, 19 JUST. SYS. J. 341 (1997).

During the 1999-2000 Term, the Court reaffirmed the Warren Court landmarks of *Miranda v. Arizona* and *Terry v. Ohio*. The Court created new flexibility in undertaking *Terry* searches by treating flight as an important element of suspicious behavior.[170] However, the decision in *Florida v. J.L.* demonstrated that the Court has not abandoned the underlying *Terry* principle that there must be a basis for reasonable suspicion before such stops and frisks can be undertaken.[171]

As in its prior terms, the Rehnquist Court Justices supported individuals' claims in a substantial minority of cases.[172] Despite the Rehnquist Court's deserved reputation for conservative decisions and policy preferences, the dominance of conservative Justices does not mean an absence of protection for constitutional rights. The scope of the rights protected may be narrower than during the Warren Court era,[173] but during the 1999-2000 Term the Rehnquist Court decided in favor of individuals in cases concerning such issues as Fourth Amendment searches and seizures,[174] Sixth Amendment ineffective assistance of counsel,[175] ex post facto laws,[176] *Miranda* warnings,[177] and the Fifth Amendment privilege against compelled self-incrimination.[178] It should be noted that among the foregoing six case examples in which the Court supported the protection of constitutional rights, Rehnquist and Scalia were the most frequent dissenters. Yet each of them dissented in only three of these cases, so it would not be accurate to say that any Justices have shown absolute determination to make criminal justice-related rights mere slogans rather than substantive protections. On the other hand, it is quite clear from Table 3 that the Justices diverge quite significantly in their visions of the Constitution's impact on criminal justice and in their inclination to support legal claims asserted by individual defendants and convicted offenders. When this evident

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170. Illinois v. Wardlow, 528 U.S. 119 (2000).

171. 529 U.S. 266, 269 (2000).

172. *See supra* Table 1.

173. *See* WHITEBREAD, *supra* note 129, at 6.

> A second noticeable trait exhibited by the Court since 1970 is its devotion to "totality of circumstances" analysis as distinct from a rule-oriented approach to criminal procedure. The Warren Court appeared to prefer the adoption of specific rules to guide law enforcement officers, as well as the courts which evaluate their behavior. . . . In practical terms, the end result of totality of circumstances analysis has been a relaxation of constitutional restrictions on law enforcement.

Id.

174. Bond v. United States, 529 U.S. 334 (2000); Florida v. J.L., 529 U.S. 266 (2000).

175. Williams v. Taylor, 529 U.S. 362 (2000).

176. Carmell v. Texas, 529 U.S. 513 (2000).

177. Dickerson v. United States, 120 S. Ct. 2326 (2000).

178. United States v. Hubbell, 530 U.S. 27 (2000).

divergence is examined in light of the relatively large number of closely-divided 5-to-4 decisions (ten out of thirty-one criminal decisions), it is obvious that new appointments to the Court after the 2000 election may have a significant impact on criminal justice in the very near future. A change of one vote either might solidify or, alternatively, reverse the Court's current position on a number of issues.