WHORTON v. BOCKTING AND THE WATERSHED EXCEPTION OF *TEAGUE v. LANE*

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I. INTRODUCTION

In *Whorton v. Bockting*,[1] the Supreme Court considered whether its rule from *Crawford v. Washington*,[2] prohibiting the admission of testimonial hearsay statements without a prior opportunity for the defendant to cross-examine the declarant, should be applied retroactively to cases on collateral appeal under the standard set forth in *Teague v. Lane*.[3] The determination rested on whether *Crawford* announced a "new rule" that should be applied retroactively by virtue of its being a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[4] In a unanimous decision, the Court held that *Crawford* did announce a "new rule" of criminal procedure, but that "this rule does not fall within the *Teague* exception for watershed rules."[5] Therefore, the respondent could not benefit from the *Crawford* rule during the collateral review of his original state court conviction.

The outcome of the case was not surprising given the high bar the Court has set for finding a watershed rule in decisions after *Teague*. Since the *Teague* standard was announced, the Court has not found a single rule that satisfies its requirements.[6] However, prior to the

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1. Whorton v. Bockting, 127 S. Ct. 1173 (2007).
2. Crawford v. Washington, 541 U.S. 35 (2004).
3. Teague v. Lane, 489 U.S. 288 (1989).
4. *Bockting*, 127 S. Ct. at 1181(quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).
5. *Id.* at 1184.
6. *See, e.g.*, Schiro v. Summerlin, 542 U.S. 348 (2004) (rejecting retroactivity for Ring v. Arizona, 546 U.S. 584 (2002)); Beard v. Banks, 542 U.S. 406 (2004) (rejecting retroactivity for Mills v. Maryland, 486 U.S. 367 (1988)); O'Dell v. Netherland, 521 U.S. 151 (1997) (rejecting retroactivity for Simmons v. South Carolina, 512 U.S. 154 (1994)); Gilmore v. Taylor, 508 U.S. 333 (1993) (rejecting retroactivity for a new rule relating to jury instructions on homicide);

decision, some commentators thought that this case might be that "rare blockbuster" that was able to satisfy the strict requirements of *Teague* and qualify for retro-application to cases on collateral review.[7] Indeed, Bockting's attorney, Nevada Public Defender Franny Forsman, remarked, "The reason that no new rule has been held to apply retroactively since *Teague* is because the court has not seen this case."[8] The Court's unanimous and authoritative decision therefore has implications beyond this particular case. If the *Crawford* rule was not a watershed rule, what is?

II. BACKGROUND

The facts of the case illustrate the dilemma judges face when trying to balance the Sixth Amendment right of criminal defendants to confront the witnesses against them with society's interest in protecting abused children from the potential trauma of facing their alleged abusers in court.

Marvin Bockting lived in Las Vegas with his wife, Laura, their three-year-old daughter, Honesty, and Laura's six-year-old daughter, Autumn, from a previous relationship.[9] Within the close quarters of the family's rented motel room, the six-year-old Autumn obtained sexual knowledge beyond her years, having taken showers with Laura and Marvin and witnessed them having sex on several occasions.[10]

On January 16, 1988, while Bockting was away from the residence, Autumn woke up crying. According to Laura's testimony during the trial, Autumn told her that Bockting had repeatedly put his "pee-pee in her pee-pee," that he had put his "pee-pee in her butt," that he made her "suck his pee-pee like a sucker" until "white bubbly stuff" came out into her mouth, and that "he put his chin on her pee-pee."[11]

Sawyer v. Smith, 497 U.S. 227 (1990) (rejecting retroactivity for Caldwell v. Mississippi, 472 U.S. 320 (1985)).

7. *See*, *e.g.*, Professor Robert Mosteller, Remarks at Duke Law School Program in Public Law Panel on Upcoming Supreme Court Term (Aug. 28, 2004). *Summary available at* http://www.law.duke.edu/features/2006/supremecourtterm.html (last visited March 4, 2007).

8. Posting of Franny Forsman to The Confrontation Blog, http://confrontationright.blogspot.com/2006/05/supreme-court-to-decide-retroactivity.html (May 15, 2006, 20:22 EST).

9. Brief of Petitioner, Whorton v. Bockting, No. 05-595, 2006 WL 2066492, at 3. (Jul. 19, 2006) [hereinafter Petitioner's Brief].

10. *Id.*

11. *Id.* These quotes are taken from Laura's testimony at trial.

When Bockting came home the next morning, Laura confronted him, but not before first asking him for the rent money and leaving him alone with the girls while she left to pay the rent.[12] Bockting denied having touched Autumn and when Laura said she was taking the child to the doctor to be checked, Bockting encouraged her to do so.[13] Bockting voluntarily left the residence. As he was leaving, Autumn seemed distraught and wanted to hug and kiss him.[14]

Two days later, Laura took Autumn to the hospital and a gynecologist examined the child. The examining doctor later testified that she found a recent tear in the rectal sphincter and a wide opening in the hymenal ring, injuries that were consistent with "blunt force" trauma.[15] She also testified that these injuries would have caused pain, particularly during urination. However, there was no testimony that Autumn was in any pain leading up to the examination.[16]

At the hospital, a police detective attempted to interview Autumn, but Autumn was too distraught to explain what happened and said only that someone had hurt her.[17] However, two days later the detective again met with Autumn and this time was able to speak to her at length, in the company of her mother. Autumn described what happened to her in the same way she had earlier conveyed it to Laura. She also demonstrated the incidents in great detail using anatomically correct dolls.[18] Following this interview, Bockting was arrested and charged with four counts of sexual assault on a minor under the age of fourteen.[19]

At Bockting's preliminary hearing, Autumn appeared to testify. However, when the prosecutor began questioning her about the incidents of abuse, she became very upset and her statements lost consistency. Still, the trial court was persuaded that there was sufficient evidence to hold Bockting for trial.[20] Prior to the start of trial, the court held an evidentiary hearing to determine whether

12. Brief of Respondent, Whorton v. Bockting, No. 05-595, 2006 WL 2736637, at 3. (Sep. 20, 2006). [hereinafter Respondent's Brief].
13. *Id.*
14. Petitioner's Brief at 3.
15. *Id.* at 4.
16. Respondent's Brief at 4.
17. Petitioner's Brief at 4.
18. *Id.*
19. *Id.*
20. Whorton v. Bockting, 127 S. Ct. 1173, 1177 (2007).

Autumn could testify. Because she was again too distressed to take the stand, the court declared her unavailable and granted the State's motion, over Bockting's objection, to allow Laura and the detective to recount her pretrial statements.[21] The court invoked a Nevada statute that allowed out-of-court statements made by a child under ten describing a sexual assault to be admitted if the court finds that the child is unavailable to testify and that "circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness."[22]

The trial court's ruling was consistent with the Supreme Court's holding in *Ohio v. Roberts*.[23] There, the Court held that the Confrontation Clause[24] permits the admission of prior hearsay statements, as long as the declarant is unavailable to testify at trial and the statement "bears adequate indicia of reliability."[25] The Court noted that the hearsay statement may be found reliable if it fits within a firmly rooted hearsay exception, or if there are "particularized guarantees of trustworthiness"[26] working in its favor. In Bockting's case, there was no firmly rooted hearsay exception involved, but the trial court allowed the hearsay statements because they were attended by particularized guarantees of trustworthiness. As the Nevada Supreme Court later found, several factors, including the "natural spontaneity" of Autumn's first description of the assaults, the level of detail in which she described them, the consistency of her story when related to the detective four days later, and her use of anatomically correct dolls, all counseled for the admission of her hearsay statements.[27]

At the end of the three-day trial, the jury found Bockting guilty on three counts of sexual assault on a minor and sentenced him to serve two consecutive life sentences and a concurrent life sentence, all with the possibility of parole.[28] After exhausting his state remedies, Bockting sought habeas corpus relief in federal court pursuant to 28 U.S.C. § 2254, arguing that his Confrontation Clause rights were

21. Petitioner's Brief at 4.
22. NEV. REV. STAT. § 51.2851(a) (2003).
23. Ohio v. Roberts, 488 U.S. 56 (1980).
24. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").
25. *Roberts*, 488 U.S. at 66 (citations omitted).
26. *Id.*
27. Bockting v. State, 109 Nev. 103, 109–12 (1993) (*per curiam*).
28. Petitioner's Brief at 5.

violated by the admission of the hearsay statements.[29] The District Court denied Bockting's petition, and Bockting appealed to the Ninth Circuit.[30]

After oral arguments in the case, but before the Ninth Circuit made its decision, the United States Supreme Court issued its decision in *Crawford v. Washington*.[31] *Crawford* abrogated the *Roberts* test, holding that testimonial statements from witnesses who do not appear at trial can be admitted "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[32] Justice Scalia, writing for a seven justice majority, wrote that *Roberts* had strayed from the original understanding of the Confrontation Clause and was too "malleable" in permitting *ex parte* testimonial statements.[33] Rather than apply this "malleable" standard, the Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[34]

Clearly, under *Crawford*, Autumn Bockting's hearsay statements would have been inadmissible because they were testimonial and Bockting had no prior opportunity to cross-examine her. But it was unclear whether the *Crawford* rule could be applied to Bockting's case, which had been properly decided under the Court's previous holding in *Roberts*. Thus, the Ninth Circuit panel requested supplemental briefing on the question of whether *Crawford* should be applied retroactively to Bockting's appeal.[35] The answer depended on whether *Crawford* constituted a "watershed rule of criminal procedure" under *Teague v. Lane*.[36]

In *Teague*, the Supreme Court held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[37] The *Teague* Court

29. *Id.*
30. *Id.* at 7.
31. Crawford v. Washington, 541 U.S. 35 (2004).
32. *Id.* at 59.
33. *Id.* (emphasis in original).
34. *Id.* at 67.
35. *Id.*
36. Teague v. Lane, 489 U.S. 288 (1989).
37. *Id.* at 310.

recognized two exceptions to this general rule. First, it would only apply to new rules of *procedural* due process, and not to new rules of *substantive* due process, which affect "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[38] Second, "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"[39] Only "watershed rules of criminal procedure"[40]—those that are "central to an accurate determination of guilt"[41]—would qualify for the exception to the general rule. As for what qualifies as a "new" rule, the Court held that, "[i]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."[42]

In subsequent cases, the Court further explicated the second *Teague* exception, demarking two requirements for a rule to qualify as watershed: first, it must be necessary to prevent "an impermissibly large risk" of an inaccurate conviction;[43] second, it must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[44] The Court has repeatedly emphasized that the watershed exception is "extremely narrow"[45] and that it is "'unlikely'" that any watershed rules "'ha[ve] yet to emerge.'"[46] Indeed, the Court has never found a rule to meet the watershed requirements.

The Court has identified *Gideon v. Wainwright*[47] as perhaps the only case that qualifies as formulating a watershed rule of criminal procedure.[48] In *Gideon*, the Court held that the Sixth and Fourteenth

38. *Id.* at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (Harlan, J., concurring)).
39. *Id.* (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring)).
40. *Id.* at 311.
41. *Id.* at 313.
42. *Id.* at 301.
43. Schiro v. Summerlin, 542 U.S. 348, 356 (2004).
44. *Id.*
45. *E.g.*, *id.* at 352.
46. *Id.* (quoting Tyler v. Cain, 353 U.S. 656 (2001)).
47. Gideon v. Wainwright, 372 U.S. 335 (1963).
48. *See, e.g.*, Beard v. Banks, 542 U.S. 406, 417 (2004) ("This Court has yet to find a new rule that falls under this exception. In providing guidance as to what might do so, the Court has repeatedly, and only, referred to the right-to-counsel rule of *Gideon v. Wainwright,* which altered the Court's understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." (internal quotations and citations omitted) (emphasis in original); Saffle v. Parks, 494 U.S. 484, 494 (1990); Gilmore v. Taylor, 508 U.S. 333, 364 (1993) (Blackmun, J., dissenting).

Amendments to the Constitution require that any indigent defendant charged with a felony be provided with counsel.[49] In the post-*Teague* cases, the Court observed that *Gideon* qualified as a watershed rule because it "'alter[ed] [the Court's] understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.'"[50] The message to prisoners seeking to have new rules applied to their collateral appeals is that the source of the new rule must be comparable to *Gideon*, and distinguishable from the line of cases in which the court has refused to apply new rules retroactively.

On appeal, a divided panel of the Ninth Circuit agreed with Bockting's argument that *Crawford* qualified as a *Teague* exception and should be applied retroactively to his case.[51] A majority of two judges concluded that *Crawford* announced a new rule of criminal procedure, and a different majority of two judges concluded that the rule should have been applied in Bockting's case because it fit within the *Teague* exception for watershed rules. Because the panel's decision conflicted with those of every other Circuit Court and State Supreme Court to consider the issue of *Crawford*'s retroactivity, the United States Supreme Court granted certiorari.[52]

III. DECISION AND RATIONALE

In a unanimous opinion the Court held that though *Crawford* announced a new rule of criminal procedure, it does not fall within the *Teague v. Lane* exception for watershed rules.[53] The opinion was a somewhat routine application of *Teague* and its progeny, but it did clarify a few essential questions that had divided the Ninth Circuit panel.

Justice Alito wrote the opinion of the Court and summarized the rule for retroactive application of new rules:

> Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. A new rule applies retroactively only if (1) the rule is substantive or (2) the rule is a

49. *Gideon*, 372 U.S. at 344–45.

50. *Beard*, 542 U.S. at 407 (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)) (brackets and emphasis in original).

51. Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005).

52. Whorton v. Bockting, 127 S. Ct. 1173 (2007).

53. *Bockting*, 127 S. Ct. at 1180.

> 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding.[54]

Following this framework, the opinion addressed first whether *Crawford* formulated a new rule or merely applied an old rule; second, whether the new rule announced was procedural or substantive; and third, whether it qualifies as retroactive under either of the two *Teague* exceptions.

With regard to the first question, Justice Alito defined a new rule as "a rule that . . . was not '*dictated* by precedent existing at the time the defendant's conviction became final.'"[55] Under this standard, *Crawford* clearly announced a new rule because it was not dictated by existing precedent.[56] Justice Alito went further in suggesting that *Crawford* actually overruled *Roberts*, and thus must be considered a new rule.[57] According to the Court, Judge Noonan of the Ninth Circuit—who had argued that *Crawford* merely applied an old rule—erred in focusing on the *holdings* of prior Confrontation Clause decisions, rather than their rationales. Though the *Crawford* Court observed that prior holdings, including that from *Roberts*, had been consistent with the proper confrontation rule that *Crawford* was announcing, it also noted that the rationales of those cases had been inconsistent with the rule it was announcing.[58] Because *Crawford*'s rationale broke with prior precedent, the *Bockting* court reasoned it was a new rule, and state courts applying the prior rule in good faith should not have their convictions disturbed unless the new rule was either substantive or a watershed rule of criminal procedure.[59]

As for the first exception, the Court quickly held that "it is clear and undisputed that the [*Crawford*] rule is procedural and not substantive."[60] The Court then devoted the bulk of its analysis to the question of whether the *Crawford* rule might qualify under the second *Teague* exception as a watershed rule of criminal procedure.

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54. *Id.* at 1180–1181 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990); Teague v. Lane, 489 U.S. 288, 311 (1989)).

55. *Id.* at 1181 (quoting *Saffle* 494 U.S. at 488; *Teague*, 489 U.S. at 301) (emphasis in original).

56. *Id.*

57. *Id.* (citing *Saffle*, 494 U.S. at 488 ("The explicit overruling of an earlier holding no doubt creates a new rule.")).

58. *Id.* (citing Crawford v. Washington, 541 U.S. 35, 57–60 (2004)).

59. *Id.*

60. *Id.*

The Court first emphasized the qualifying language of its holdings, that the watershed exception "is 'extremely narrow,'"[61] and that "it is '"unlikely' that any such rules 'ha[ve] yet to emerge.'"[62] The Court then provided another iteration of the watershed rule:

> In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.[63]

The Court held that *Crawford* does not satisfy the first requirement because it does not prevent an impermissibly large risk of inaccurate conviction.[64] The Court clarified that, in order for a new rule to satisfy this first requirement, "it is not enough to say that the rule is aimed at improving the accuracy of trial or that the rule is directed toward the enhancement of reliability and accuracy in some sense."[65] Rather, the rule must remedy an *impermissibly large* risk of an inaccurate conviction.[66]

In this regard, the Court again identified *Gideon v. Wainwright* as the guidepost, noting that "[w]hen a defendant who wishes to be represented by counsel is denied representation . . . the risk of an unreliable verdict is intolerably high."[67] In contrast, the *Crawford* rule is far narrower in scope and its effect on the accuracy of a conviction is "far less direct and profound."[68] The Court noted that the reason *Crawford* overruled *Roberts* was not because it wished to improve the accuracy of fact finding in criminal trials, but rather because it wished to return to the original understanding of the Confrontation Clause.[69] Furthermore, as the majority wrote, it is far from clear that *Crawford* is a greater guarantor of accuracy than the pre-existing rule under *Roberts*. Though *Crawford* may have improved accuracy in criminal trials involving testimonial hearsay statements, it completely eliminated any Confrontation Clause protection of non-testimonial

61. *Id.* (quoting Schiro v. Summerlin, 542 U.S. 348, 352 (2004)).
62. *Id.* (quoting *Summerlin*, 542 U.S. at 352, and Tyler v. Cain, 533 U.S. 656 (2001)).
63. *Id.* (internal quotations omitted).
64. *Id.* at 1182.
65. *Id*. (internal quotations omitted).
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

hearsay statements.[70] *Roberts* had at least required that such statements be deemed reliable before being admitted. Because *Crawford* removed such statements from the scope of the Confrontation Clause and thus permits their admission without prior cross-examination even when there are no indicia of reliability, it does not seem to promote accuracy in these cases.[71]

Thus, the effect of *Crawford* on the accuracy of the criminal fact-finding process is a mixed bag: with respect to testimonial hearsay it may promote accuracy, but with respect to non-testimonial hearsay, it is actually less of a guarantor of accuracy than the earlier *Roberts* regime. In any event, the Court cautioned that its duty under *Teague* was not to weigh both sides and decide whether there is "some net improvement in the accuracy of fact finding in criminal cases."[72] Rather, it was to determine whether the sort of testimony that would be admissible under *Roberts* "is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is 'one without which the likelihood of an accurate conviction is *seriously* diminished.'"[73] The Court had no trouble finding that it was not.

Although the Court had earlier stated that *both* requirements of the watershed exception must be met, and it had already decided that the first requirement was not, it went on to briefly discuss the second requirement as well. The Court of Appeals had erred in relying on the conclusion that the right of confrontation *itself* is a bedrock procedural rule. The proper inquiry is whether the *new rule* itself "constitute[s] a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding."[74] The Court again looked to *Gideon* for guidance in answering this question, and found that the *Crawford* rule, "while certainly important, is not in the same category with *Gideon*."[75] Whereas *Gideon* effected "a profound and sweeping change,"[76] *Crawford* lacks that "primacy" and "centrality."[77] Because the Court had already decided the case based on the first

70. *Id.*
71. *Id.*
72. *Id.* at 1183.
73. *Id.* (quoting Bockting v. Bayer, 399 F.3d 1010, 1028 (9th Cir. 2005) (Wallace, J., concurring and dissenting)).
74. *Id.* (citing Bockting v. Bayer, 399 F.3d at 1019).
75. *Id.* at 1184.
76. *Id.* (internal quotation omitted).
77. *Id.* (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).

exception, it did not elaborate on its determination that *Crawford* does not equal *Gideon* in primacy. It simply held that *Crawford* "does not qualify as a rule that 'alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'"[78]

In sum, despite a proliferation of briefs on both sides, and a fair amount of commentary suggesting that this might finally be the case to find a rule retroactive, the Court issued a remarkably unremarkable decision. The opinion was a straightforward application of *Teague* and its progeny, holding simply that "*Crawford* announced a 'new rule' of criminal procedure and that this rule does not fall within the *Teague* exception for watershed rules."[79]

IV. ANALYSIS AND CONCLUSION: THE WATERSHED EXCEPTION AFTER BOCKTING

Due in part to its simplicity, *Whorton v. Bockting* goes a long way in clarifying the standards for retroactive application of new rules of criminal procedure. From the Court's decision, one can deduce a number of relevant rules for retroactivity analysis.

First, on the question of whether a rule is new or not, the relevant inquiry is whether it was dictated by prior precedent. This part of the Court's opinion did not break any new ground, but it did clarify that, when considering whether a rule is a break from precedent, courts must look to the *rationale* behind the previous decisions, not at the *results* of those decisions.

More importantly, with regard to the question of whether a new rule is watershed, the Court clarified that the rule must *both* be necessary to prevent an unacceptable risk of an inaccurate conviction *and* alter our understanding of bedrock procedural elements necessary to a fair trial. For each avenue of inquiry, the yardstick is *Gideon*. A new rule must be equally necessary to prevent inaccurate convictions as is *Gideon* and it must be just as groundbreaking in its effect on our understanding of bedrock procedures. This is a long yard indeed.

The Court devoted the most attention to the first requirement, that the rule be necessary to prevent inaccurate convictions.

78. *Id.* (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)).
79. *Id.*

Importantly, the Court stressed that the question is not whether there is some measurable gain in accuracy derived from the new rule, but rather whether the old rule, if continually applied, would result in an *impermissibly large* risk of inaccurate fact-finding. Henceforth, any defendant attempting to have a new rule retroactively applied will have to show that the rule under which he was convicted seriously diminishes the accuracy of not only *his* trial, but the criminal proceeding in the universal sense. This is an exceedingly high standard, as it is difficult to imagine a procedural rule that has so great a tendency to produce inaccurate results and yet has been applied by the courts for however many decades prior to the new rule's announcement.

Even if a case that passed the accuracy prong were to surface, it would still have to meet the bedrock requirement before constituting a watershed rule. *Bockting* requires that the defendant prove that the new rule *itself* constitutes a "previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding."[80] It is difficult to conceive of how a rule can be both new (that is, a rule that had not been recognized for over two hundred years) and yet also "bedrock" at the same time. Here the Court offered little guidance, because it had already decided the case based on the accuracy prong of the watershed test. It suggested again that *Gideon* is the guidepost, and that the new rule must as be "sweeping" and "profound," as that landmark case, but did not explain why *Crawford* was not. Suffice it to say, though, that if *Crawford*—which had a profound effect on the manner in which criminal trials are managed—does not amount to a landmark decision, few if any cases will. It is this skepticism that seems to be the subtext of the entire decision: no new rule of criminal procedure will ever be "watershed enough" to satisfy the Court's retroactivity rules.

80. *Id.* at 1183.