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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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ROGERS *v.* TENNESSEE

CERTIORARI TO THE SUPREME COURT OF TENNESSEE

No. 99–6218. Argued November 1, 2000– Decided May 14, 2001

Following James Bowdery’s death some 15 months after petitioner stabbed him, petitioner was convicted in Tennessee state court of second degree murder under the State’s criminal homicide statute. Although that statute makes no mention of the common law “year and a day rule”—under which no defendant could be convicted of murder unless his victim died by the defendant’s act within a year and a day of the act, see, e.g., *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 239—petitioner argued on appeal that the rule persisted as part of the State’s common law and, as such, precluded his conviction. The Tennessee Court of Criminal Appeals disagreed and affirmed the conviction. In affirming, the State Supreme Court abolished the rule, finding that the reasons for recognizing the rule at common law no longer existed. The court disagreed with petitioner’s contention that application of its decision abolishing the rule to his case would violate the *Ex Post Facto* Clauses of the State and Federal Constitutions, observing that those provisions refer only to legislative Acts. The court also concluded that application of its decision to petitioner would not run afoul of *Bouie v. City of Columbia*, 378 U. S. 347, 354, in which this Court held that due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue.

Held: The Tennessee Supreme Court’s retroactive application to petitioner of its decision abolishing the year and a day rule did not deny petitioner due process of law in violation of the Fourteenth Amendment. Pp. 4–15.

(a) To the extent petitioner argues that the Due Process Clause incorporates the specific prohibitions of the *Ex Post Facto* Clause, he misreads *Bouie*. *Bouie* contains some dicta suggestive of the broad

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interpretation for which petitioner argues, see, *e.g.*, 378 U. S., at 353–354, but the decision was rooted firmly in well established notions of *due process*. Its rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct, see, *e.g.*, *id.*, at 351, 352, 354, 354–355. Subsequent decisions have not interpreted *Bowie* as extending so far as petitioner suggests, but have uniformly viewed *Bowie* as restricted to its traditional due process roots. In doing so, they have applied *Bowie*'s check on retroactive judicial decisionmaking not by reference to the scope of the *Ex Post Facto* Clause, but, rather, in accordance with the more basic and general principle of fair warning that *Bowie* so clearly articulated. See, *e.g.*, *United States v. Lanier*, 520 U. S. 259, 266. While petitioner's assertion that the two Clauses safeguard common interests is undoubtedly correct, he is mistaken to suggest that these considerations compel extending the *Ex Post Facto* Clause's strictures to the context of common law judging through the rubric of due process. Such an extension would circumvent the *Ex Post Facto* Clause's clear text, which expressly applies only to legislatures; would evince too little regard for the important institutional and contextual differences between legislating and common law decisionmaking; would be incompatible with the resolution of uncertainty that marks any evolving legal system; and would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. It was on account of such concerns that *Bowie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. See 378 U. S., at 354. That restriction adequately serves the common law context as well. Pp. 4–11.

(b) The Tennessee court's abolition of the year and a day rule was not unexpected and indefensible. Advances in medical and related science have so undermined the rule's usefulness as to render it without question obsolete, and it has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue. Despite petitioner's argument to the contrary, the fact that a vast number of jurisdictions outside Tennessee have abolished the rule is surely relevant to whether its abolition in his case, which involves the continuing viability of a common law rule, can be said to be unexpected and indefensible by reference to the law as it then existed. *Bowie, supra*, at 359–360, distinguished. Perhaps most importantly, at the time of petitioner's crime the rule had only the most tenuous foothold as part of Tennessee's criminal law. It did not

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exist as part of the State's statutory criminal code, and while the Tennessee Supreme Court concluded that the rule persisted at common law, it also pointedly observed that the rule had never once served as a ground of decision in any murder prosecution in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta. These cases hardly suggest that the Tennessee court's decision was "unexpected and indefensible" such that it offended the due process principle of fair warning articulated in *Bowie* and its progeny. There is nothing to indicate that abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. Far from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking that brought the law into conformity with reason and common sense. Pp. 11–15.

992 S. W. 2d 393, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion. SCALIA, J., filed a dissenting opinion, in which STEVENS and THOMAS, JJ., joined, and in which BREYER, J., joined as to Part II. BREYER, J., filed a dissenting opinion.