SUPREME COURT OF THE UNITED STATES

No. 99–6218

WILBERT K. ROGERS, PETITIONER *v.* TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, WESTERN DIVISION

[May 14, 2001]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case concerns the constitutionality of the retroactive application of a judicial decision abolishing the common law "year and a day rule." At common law, the year and a day rule provided that no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act. See, *e.g.*, *Louisville, E. & St. L. R. Co.* v. *Clarke,* 152 U. S. 230, 239 (1894); 4 W. Blackstone, Commentaries on the Laws of England 197–198 (1769). The Supreme Court of Tennessee abolished the rule as it had existed at common law in Tennessee and applied its decision to petitioner to uphold his conviction. The question before us is whether, in doing so, the court denied petitioner due process of law in violation of the Fourteenth Amendment.

I

Petitioner Wilbert K. Rogers was convicted in Tennessee state court of second degree murder. According to the undisputed facts, petitioner stabbed his victim, James Bowdery, with a butcher knife on May 6, 1994. One of the stab wounds penetrated Bowdery's heart. During surgery to repair the wound to his heart, Bowdery went into car-

diac arrest, but was resuscitated and survived the procedure. As a result, however, he had developed a condition known as "cerebral hypoxia," which results from a loss of oxygen to the brain. Bowdery's higher brain functions had ceased, and he slipped into and remained in a coma until August 7, 1995, when he died from a kidney infection (a common complication experienced by comatose patients). Approximately 15 months had passed between the stabbing and Bowdery's death which, according to the undisputed testimony of the county medical examiner, was caused by cerebral hypoxia "'secondary to a stab wound to the heart.'" 992 S. W. 2d 393, 395 (Tenn. 1999).

Based on this evidence, the jury found petitioner guilty under Tennessee's criminal homicide statute. The statute, which makes no mention of the year and a day rule, defines criminal homicide simply as "the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide." Tenn. Code Ann. §39–13–201 (1997). Petitioner appealed his conviction to the Tennessee Court of Criminal Appeals, arguing that, despite its absence from the statute, the year and a day rule persisted as part of the common law of Tennessee and, as such, precluded his conviction. The Court of Criminal Appeals rejected that argument and affirmed the conviction. The court held that Tennessee's Criminal Sentencing Reform Act of 1989 (1989 Act), which abolished all common law defenses in criminal actions in Tennessee, had abolished the rule. See Tenn. Code Ann. §39–11–203(e)(2) (1997). The court also rejected petitioner's further contention that the legislative abolition of the rule constituted an *ex post facto* violation, noting that the 1989 Act had taken effect five years before petitioner committed his crime. No. 02C01–9611–CR–00418 (Tenn. Crim. App., Oct. 17, 1997), App. 7.

The Supreme Court of Tennessee affirmed on different grounds. The court observed that it had recognized the viability of the year and a day rule in Tennessee in *Percer* v. *State*, 118 Tenn. 765, 103 S. W. 780 (1907), and that, "[d]espite the paucity of case law" on the rule in Tennessee, "both parties . . . agree that the . . . rule was a part of the common law of this State." 992 S. W. 2d, at 396. Turning to the rule's present status, the court noted that the rule has been legislatively or judicially abolished by the "vast majority" of jurisdictions recently to have considered the issue. *Id.*, at 397. The court concluded that, contrary to the conclusion of the Court of Criminal Appeals, the 1989 Act had not abolished the rule. After reviewing the justifications for the rule at common law, however, the court found that the original reasons for recognizing the rule no longer exist. Accordingly, the court abolished the rule as it had existed at common law in Tennessee. *Id.*, at 399–401.

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. Those constitutional provisions, the court observed, refer only to legislative Acts. The court then noted that in *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), 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.'" 992 S. W. 2d, at 402 (quoting *Bouie* v. *City of Columbia*, *supra,* at 354) (alteration in original). The court concluded, however, that application of its decision to petitioner would not offend this principle. 992 S. W. 2d, at 402. We granted certiorari, 529 U. S. 1129 (2000), and we now affirm.

II

Although petitioner's claim is one of due process, the Constitution's *Ex Post Facto* Clause figures prominently in his argument. The Clause provides simply that "[n]o State shall . . . pass any . . . ex post facto Law." Art. I, §10, cl. 1. The most well-known and oft-repeated explanation of the scope of the Clause's protection was given by Justice Chase, who long ago identified, in dictum, four types of laws to which the Clause extends:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder* v. *Bull*, 3 Dall. 386, 390 (1798) (*seriatim* opinion of Chase, J.).

Accord, *Carmell* v. *Texas*, 529 U. S. 513, 521–525 (2000); *Collins* v. *Youngblood*, 497 U. S. 37, 41–42, 46 (1990). As the text of the Clause makes clear, it "is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government." *Marks* v. *United States*, 430 U. S. 188, 191 (1977) (citation omitted).

We have observed, however, that limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process. In *Bouie* v. *City of Columbia*, we considered the South Carolina Supreme Court's retroactive application of its construction of the State's criminal trespass statute to the petitioners in that case. The statute prohibited "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry . . . ." 378

U. S., at 349, n. 1 (citation and internal quotation marks omitted). The South Carolina court construed the statute to extend to patrons of a drug store who had received no notice prohibiting their entry into the store, but had refused to leave the store when asked. Prior to the court's decision, South Carolina cases construing the statute had uniformly held that conviction under the statute required proof of notice before entry. None of those cases, moreover, had given the "slightest indication that that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave." *Id.,* at 357.

We held that the South Carolina court's retroactive application of its construction to the store patrons violated due process. Reviewing decisions in which we had held criminal statutes "void for vagueness" under the Due Process Clause, we noted that this Court has often recognized the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Id.,* at 350; see *id.,* at 350–352 (discussing, *inter alia*, *United States* v. *Harriss,* 347 U. S. 612 (1954), *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939), and *Connally* v. *General Constr. Co.,* 269 U. S. 385 (1926)). Deprivation of the right to fair warning, we continued, can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Bouie* v. *City of Columbia,* 378 U. S., at 352. For that reason, we concluded that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' [the construction] must not be given retroactive effect." *Id.,* at 354 (quoting J. Hall, General Principles of Criminal Law 61 (2d ed. 1960)). We found that the South Carolina court's construction of the statute violated this principle because it was so clearly at odds with the statute's plain

language and had no support in prior South Carolina decisions. 378 U. S., at 356.

Relying largely upon *Bouie,* petitioner argues that the Tennessee court erred in rejecting his claim that the retroactive application of its decision to his case violates due process. Petitioner contends that the *Ex Post Facto* Clause would prohibit the retroactive application of a decision abolishing the year and a day rule if accomplished by the Tennessee Legislature. He claims that the purposes behind the Clause are so fundamental that due process should prevent the Supreme Court of Tennessee from accomplishing the same result by judicial decree. Brief for Petitioner 8–18. In support of this claim, petitioner takes *Bouie* to stand for the proposition that "[i]n evaluating whether the retroactive application of a judicial decree violates Due Process, a critical question is whether the Constitution would prohibit the same result attained by the exercise of the state's legislative power." Brief for Petitioner 12.

To the extent petitioner argues that the Due Process Clause incorporates the specific prohibitions of the *Ex Post Facto* Clause as identified in *Calder*, petitioner misreads *Bouie*. To be sure, our opinion in *Bouie* does contain some expansive language that is suggestive of the broad interpretation for which petitioner argues. Most prominent is our statement that "[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing . . . a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." 378 U. S., at 353–354; see also *id.,* at 353 ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law"); *id.,* at 362 ("The Due Process Clause compels the same result" as would the constitutional proscription against *ex post facto* laws "where the State has sought to achieve precisely the same [impermis-

sible] effect by judicial construction of the statute"). This language, however, was dicta. Our decision in *Bouie* was rooted firmly in well established notions of *due process*. See *supra*, at 5. 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.*, 378 U. S., at 351, 352, 354, 354–355. And we couched its holding squarely in terms of that established due process right, and not in terms of the *ex post facto*-related dicta to which petitioner points. *Id.*, at 355 (concluding that "the South Carolina Code did not give [the petitioners] fair warning, at the time of their conduct . . . , that the act for which they now stand convicted was rendered criminal by the statute"). Contrary to petitioner's suggestion, nowhere in the opinion did we go so far as to incorporate jot-for-jot the specific categories of *Calder* into due process limitations on the retroactive application of judicial decisions.

Nor have any of our subsequent decisions addressing *Bouie*-type claims interpreted *Bouie* as extending so far. Those decisions instead have uniformly viewed *Bouie* as restricted to its traditional due process roots. In doing so, they have applied *Bouie*'s check on retroactive judicial decisionmaking not by reference to the *ex post facto* categories set out in *Calder*, but, rather, in accordance with the more basic and general principle of fair warning that *Bouie* so clearly articulated. See, *e.g.*, *United States* v. *Lanier*, 520 U. S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); *Marks* v. *United States*, 430 U. S., at 191–192 (Due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties); *Rose* v. *Locke*, 423 U. S. 48, 53 (1975)

(per curiam) (upholding defendant's conviction under statute prohibiting "crimes against nature" because, unlike in *Bouie*, the defendant "[could] make no claim that [the statute] afforded no notice that his conduct might be within its scope"); *Douglas* v. *Buder*, 412 U. S. 430, 432 (1973) *(per curiam)* (trial court's construction of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process); *Rabe* v. *Washington*, 405 U. S. 313, 316 (1972) *(per curiam)* (reversing conviction under state obscenity law because it did "not giv[e] fair notice" that the location of the allegedly obscene exhibition was a vital element of the offense).

Petitioner observes that the Due Process and *Ex Post Facto* Clauses safeguard common interests– in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws. Brief for Petitioner 12–18. While this is undoubtedly correct, see, *e.g., Lynce* v. *Mathis,* 519 U. S. 433, 439–440, and n. 12 (1997), petitioner is mistaken to suggest that these considerations compel extending the strictures of the *Ex Post Facto* Clause to the context of common law judging. The *Ex Post Facto* Clause, by its own terms, does not apply to courts. Extending the Clause to courts through the rubric of due process thus would circumvent the clear constitutional text. It also would evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other.

Petitioner contends that state courts acting in their common law capacity act much like legislatures in the exercise of their lawmaking function, and indeed may in some cases even be subject to the same kinds of political influences and pressures that justify *ex post facto* limitations upon legislatures. Brief for Petitioner 12–18; Reply

Brief for Petitioner 15. A court's "opportunity for discrimination," however, "is more limited than [a] legislature's, in that [it] can only act in construing existing law in actual litigation." *James* v. *United States,* 366 U. S. 213, 247, n. 3 (1961) (Harlan, J., concurring in part and dissenting in part). Moreover, "[g]iven the divergent pulls of flexibility and precedent in our case law system," *ibid.*, incorporation of the *Calder* categories into due process limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system.

That is particularly so where, as here, the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging. In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements. Strict application of *ex post facto* principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles. It was on account of concerns such as these that *Bouie* 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." *Bouie* v. *City of Columbia*, 378 U. S., at 354 (internal quotation marks omitted).

We believe this limitation adequately serves the com-

mon law context as well. It accords common law courts the substantial leeway they must enjoy as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent, reevaluating and refining them as may be necessary to bring the common law into conformity with logic and common sense. It also adequately respects the due process concern with fundamental fairness and protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law. Accordingly, we conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Ibid.*

JUSTICE SCALIA makes much of the fact that, at the time of the framing of the Constitution, it was widely accepted that courts could not "change" the law, see *post*, at 5–7, 11–12 (dissenting opinion), and that (according to JUSTICE SCALIA) there is no doubt that the *Ex Post Facto* Clause would have prohibited a legislative decision identical to the Tennessee court's decision here, see *post*, at 3–4, 12. This latter argument seeks at bottom merely to reopen what has long been settled by the constitutional text and our own decisions: that the *Ex Post Facto* Clause does not apply to judicial decisionmaking. The former argument is beside the point. Common law courts at the time of the framing undoubtedly believed that they were finding rather than making law. But, however one characterizes their actions, the fact of the matter is that common law courts then, as now, were deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience. Due process clearly did not prohibit this process of judicial evolution at the time of the

framing, and it does not do so today.

III

Turning to the particular facts of the instant case, the Tennessee court's abolition of the year and a day rule was not unexpected and indefensible. The year and a day rule is widely viewed as an outdated relic of the common law. Petitioner does not even so much as hint that good reasons exist for retaining the rule, and so we need not delve too deeply into the rule and its history here. Suffice it to say that the rule is generally believed to date back to the 13th century, when it served as a statute of limitations governing the time in which an individual might initiate a private action for murder known as an "appeal of death"; that by the 18th century the rule had been extended to the law governing public prosecutions for murder; that the primary and most frequently cited justification for the rule is that 13th century medical science was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and his death; and that, as practically every court recently to have considered the rule has noted, advances in medical and related science have so undermined the usefulness of the rule as to render it without question obsolete. See, *e.g.*, *People* v. *Carrillo*, 164 Ill. 2d 144, 150, 646 N. E. 2d 582, 585 (1995); *Commonwealth* v. *Lewis*, 381 Mass. 411, 414–415, 409 N. E. 2d 771, 772–773 (1980); *People* v. *Stevenson*, 416 Mich. 383, 391–392; 331 N. W. 2d 143, 146 (1982); *State* v. *Hefler*, 310 N. C. 135, 138–140, 310 S. E. 2d 310, 313 (1984); see generally Comment, 59 U. Chi. L. Rev. 1337 (1992) (tracing the history of the rule).

For this reason, the year and a day rule has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue. See 992 S. W. 2d, at 397, n. 4 (reviewing cases and statutes).

Citing *Bouie*, petitioner contends that the judicial abolition of the rule in other jurisdictions is irrelevant to whether he had fair warning that the rule in Tennessee might similarly be abolished and, hence, to whether the Tennessee court's decision was unexpected and indefensible as applied to him. Brief for Petitioner 28–30. In discussing the apparent meaning of the South Carolina statue in *Bouie*, we noted that "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." 378 U. S., at 359–360. This case, however, involves not the precise meaning of the words of a particular statute, but rather the continuing viability of a common law rule. Common law courts frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience. Due process, of course, does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State. At the same time, however, the fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed.

Finally, and perhaps most importantly, at the time of petitioner's crime the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee. The rule did not exist as part of Tennessee's statutory criminal code. And while the Supreme Court of Tennessee 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 prosecu-

tion for murder in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta.

The first mention of the rule in Tennessee, and the only mention of it by the Supreme Court of that State, was in 1907 in *Percer* v. *State*, 118 Tenn. 765, 103 S. W. 780. In *Percer*, the court reversed the defendant's conviction for second degree murder because the defendant was not present in court when the verdict was announced and because the proof failed to show that the murder occurred prior to the finding of the indictment. In discussing the latter ground for its decision, the court quoted the rule that "it is . . . for the State to show that the crime was committed before the indictment was found, and, where it fails to do so, a conviction will be reversed." *Id.,* at 777, 103 S. W., at 783 (quoting 12 Cyclopedia of Law and Procedure 382 (1904)). The court then also quoted the rule that "[i]n murder, the death must be proven to have taken place within a year and a day from the date of the injury received." 118 Tenn., at 777, 103 S. W., at 783 (quoting F. Wharton, Law of Homicide §18 (3d ed. 1907)).

While petitioner relies on this case for the proposition that the year and a day rule was firmly entrenched in the common law of Tennessee, we agree with the Supreme Court of Tennessee that the case cannot establish nearly so much. After reciting the rules just mentioned, the court in *Percer* went on to point out that the indictment was found on July 6, 1906; that it charged that the murder was committed sometime in May 1906; and that the only evidence of when the victim died was testimony from a witness stating that he thought the death occurred sometime in July, but specifying neither a date nor a year. From this, the court concluded that it did "not affirmatively appear" from the evidence "whether the death occurred before or after the finding of the indictment." 118 Tenn., at 777, 103 S. W., at 783. The court made no mention of

the year and a day rule anywhere in its legal analysis or, for that matter, anywhere else in its opinion. Thus, whatever the import of the court's earlier quoting of the rule, it is clear that the rule did not serve as the basis for the *Percer* court's decision.

The next two references to the rule both were by the Tennessee Court of Criminal Appeals in cases in which the date of the victim's death was not even in issue. Sixty-seven years after *Percer*, the court in *Cole* v. *State*, 512 S. W. 2d 598 (Tenn. Crim. App. 1974), noted the existence of the rule in rejecting the defendants' contentions that insufficient evidence existed to support the jury's conclusion that they had caused the victim's death in a drag-racing crash. *Id.*, at 601. Twenty-one years after that, in *State* v. *Ruane*, 912 S. W. 2d 766 (Tenn. Crim. App. 1995), a defendant referred to the rule in arguing that the operative cause of his victim's death was removal of life support rather than a gunshot wound at the defendant's hand. The victim had died within 10 days of receiving the wound. The Court of Criminal Appeals rejected the defendant's argument, concluding, as it had in this case, that the year and a day rule had been abolished by the 1989 Act. It went on to hold that the evidence of causation was sufficient to support the conviction. *Id.*, at 773–777. *Ruane*, of course, was decided after petitioner committed his crime, and it concluded that the year and a day rule no longer existed in Tennessee for a reason that the high court of that State ultimately rejected. But we note the case nonetheless to complete our account of the few appearances of the common law rule in the decisions of the Tennessee courts.

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 *Bouie* and its progeny. This is so despite the fact that, as JUSTICE SCALIA correctly points out, the court

viewed the year and a day rule as a "substantive principle" of the common law of Tennessee. See *post*, at 14. As such, however, it was a principle in name only, having never once been enforced in the State. The Supreme Court of Tennessee also emphasized this fact in its opinion, see 992 S. W. 2d, at 402, and rightly so, for it is surely relevant to whether the court's abolition of the rule in petitioner's case violated due process limitations on retroactive judicial decisionmaking. And while we readily agree with JUSTICE SCALIA that fundamental due process prohibits the punishment of conduct that cannot fairly be said to have been criminal at the time the conduct occurred, see, *e.g.*, *post*, at 4, 12, 14, nothing suggests that is what took place here.

There is, in short, nothing to indicate that the Tennessee court's 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 in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case.

The judgment of the Supreme Court of Tennessee is accordingly affirmed.

It is so ordered.