SUPREME COURT OF THE UNITED STATES

No. 92–1500

PAUL CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER ET AL.,
PETITIONERS *v.* CHRISTOPHER BOHLEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 23, 1994]

JUSTICE STEVENS, dissenting.

The nonretroactivity principle announced in the plurality opinion in *Teague* v. *Lane*, 489 U. S. 288 (1989), is a judge-made defense that can be waived. *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990). In recent years, the Court has fashioned harsh rules regarding waiver and claim forfeiture to defeat substantial constitutional claims. See, *e.g.*, *Coleman* v. *Thompson*, 501 U. S. ___ (1991); *Murray* v. *Carrier*, 477 U. S. 478 (1986). If we are to apply such a strict approach to waiver in habeas corpus litigation, we should hold the warden to the same standard. Accordingly, given the treatment accorded the private litigant in *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp*., 510 U. S. ___ (1993) *(per curiam)*, I would hold that petitioner Caspari forfeited his *Teague* defense under this Court's Rule 14.1(a).

Distinguishing *Izumi*, the Court explains that the intervention question in that case was "wholly divorced from the question on which we granted review," whereas here the *Teague* issue "is a necessary predicate to the resolution of the question presented in the petition." *Ante*, at 5. Yet *Izumi* itself opened by acknowledging that it "would have to address" the intervention issue "[i]n order to reach the merits of this case." 510 U. S., at ___ (slip op., at 1). It is no more "necessary" to answer the *Teague* question in this case than it was, for example, in *Collins*, *supra*.

On the merits, I agree with the Court of Appeals. Under Missouri law courts must make findings of fact that persistent offender status is warranted for those convicted of certain offenses when the prosecutor establishes requisite facts by proof beyond a reasonable doubt.[1] That status subjects the defendant to more severe sentences, Mo. Rev. Stat. §558.016.1 (Supp. 1982), and deprives him of the opportunity to have a jury sentence him. §557.036.2. The sentence enhancement thus has the same legal effect as conviction of a separate offense; the separate sentencing hearing likewise is the practical equivalent of the trial. Missouri law acknowledges as much by properly requiring prosecutors to prove the factual predicate for the enhanced sentence beyond a reasonable doubt.

A defendant opposing such an enhancement undoubtedly has a constitutional right to counsel and to the basic procedural protections the Due Process Clause affords. I have no hesitation in concluding that these protections include the right not to be "twice put in jeopardy" for the same offense. U. S. Const., Amdt. 5. I would affirm the judgment of the Court of Appeals.

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[1]Mo. Rev. Stat. §558.021.1(2) (Supp. 1982). A "persistent offender" had previously been adjudged guilty of two or more felonies committed at different times. §558.016.3. Missouri also mandates an enhanced sentence if the prosecutor proves that the defendant is a "dangerous offender"—meaning one who is being sentenced for a felony during which he knowingly "murdered or endangered or threatened the life" of another, who "knowingly inflicted or attempted or threatened to inflict serious physical injury" on another, or who is guilty of certain felonies. §558.016.4. It is unfair to afford the prosecutor two opportunities to satisfy either provision.