

**UNITED STATES SUPREME COURT
REVIEW - PREVIEW - OVERVIEW**

**CRIMINAL CASES DECIDED AND GRANTED REVIEW
FOR THE OCTOBER 2009-10 TERMS
THRU JULY 1, 2010**

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I. RIGHT TO COUNSEL AND CONFESSIONS

A. Confessions

- 1. Right to be Advised of Right to Counsel.** *Florida v. Powell*, 130 S. Ct. 1195 (2010). The Florida Supreme Court held that *Miranda* requires that a suspect must be expressly advised of his right to counsel during custodial interrogation, including both the right to talk to a lawyer “before questioning” and the “right to use” the right to consult a lawyer “at any time” during questioning. Here, Powell was warned that he had “the right to talk to a lawyer before answering any of [their] questions,” and that he had “the right to use any of [his] rights at any time [he] want[ed] during th[e] interview.” The Florida court deemed this warning misleading because it did not specify that Powell could consult with a lawyer during questioning. The United States Supreme Court reversed 7-2, holding that *Miranda* was satisfied in this case. In determining whether police warnings were satisfactory, reviewing courts are not required to “examine [them] as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda* .’” *Duckworth v. Eagan*, 492 U. S. 195 (1989). The warnings Powell received satisfy this standard. By informing Powell that he had “the right to talk to a lawyer before answering any of [their] questions,” the Tampa officers communicated that he could consult with a lawyer before answering any particular question. And the statement that Powell had “the right to use any of [his] rights at any time [he] want[ed] during th[e] interview” confirmed that he could exercise his right to an attorney while the interrogation was underway. In combination, the two warnings reasonably conveyed the right to have an attorney present, not only at the outset of interrogation, but at all times. Justice Stevens dissented, joined by Justice Breyer, on the merits.
- 2. Temporal Limits to Rule of *Edwards v. Arizona*.** *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010). *Edwards v. Arizona* (1981) bars police from initiating questioning with criminal suspects who have invoked their right to counsel. Shatzer was in prison when he was initially questioned. He was returned to the general prison population after he invoked the right to counsel. Two and

a half years later police reinitiated interrogation. On the second encounter, Shatzer waived his *Miranda* rights. Maryland courts suppressed the confession, but the Supreme Court reversed, and in doing so created an arbitrary period of 14 days in which *Edwards*' prophylactic rule expires after a break in custody: "Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his March 2006 statements. Accordingly, we reverse the judgment of the Court of Appeals of Maryland, and remand the case for further proceedings not inconsistent with this opinion."

3. **Silence Cannot Invoke Right to Silence.** *Berghuis v. Thompkins*, 130 S. Ct. ___ (June 1, 2010). After advising Thompkins of his *Miranda* rights police interrogated him about a shooting death. He acknowledged his rights, but neither waived nor invoked them. At no point did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. He was largely silent during the 3-hour interrogation, but near the end, he answered "yes" when asked if he prayed to God to forgive him for the shooting. He moved to suppress his statements, claiming that he had invoked his Fifth Amendment right to remain silent, that he had not waived that right, and that his inculpatory statements were involuntary. The trial court denied the motion. At his first degree murder trial, the prosecution called Eric Purifoy, who drove the van in which Thompkins and a third accomplice were riding at the time of the shooting, and who had been convicted of firearm offenses but acquitted of murder and assault. Thompkins' defense was that Purifoy was the shooter. Purifoy testified that he did not see who fired the shots. During closing arguments, the prosecution suggested that Purifoy lied about not seeing the shooter and pondered whether Purifoy's jury had made the right decision. Defense counsel did not ask the court to instruct the jury that it could consider evidence of the outcome of Purifoy's trial only to assess his credibility, not to establish Thompkins' guilt. The jury found Thompkins guilty, and he was sentenced to life in prison without parole. In denying his motion for new trial, the trial court rejected as nonprejudicial his ineffective-assistance-of-counsel claim for failure to request a limiting instruction about the outcome of Purifoy's trial. The Michigan Court of Appeals rejected both Thompkins' *Miranda* and ineffective-assistance claims. The federal district court denied habeas relief, reasoning that Thompkins did not invoke his right to remain silent, was not coerced into making statements during the interrogation, and that it was not unreasonable (under AEDPA) for the state court of appeals to determine that he had waived his right to remain silent. The Sixth Circuit reversed, holding that the state court was unreasonable in finding an implied waiver of Thompkins' right to remain silent and in rejecting his ineffective-assistance-of-counsel claim. In a 5-4 decision authored by Justice Kennedy, the Supreme Court held that the state court's decision rejecting Thompkins' *Miranda* claim was correct under *de novo* review and therefore necessarily reasonable

under AEDPA's more deferential standard of review. In reaching this conclusion, the majority dramatically limited *Miranda*'s plain language by ruling that Thompkins' silence during the interrogation did not invoke his right to remain silent. Just as a suspect's *Miranda* right to counsel must be invoked "unambiguously," *Davis v. United States*, so too must the right to silence be invoked. If the accused makes an "ambiguous or equivocal" statement or no statement, the police are not required to end the interrogation or ask questions to clarify the accused's intent. The Court concluded that there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel. Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked. The unambiguous invocation requirement results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity. Had Thompkins said that he wanted to remain silent or that he did not want to talk, he would have invoked his right to end the questioning. He did neither. The Court found that Thompkins waived his right to remain silent when he knowingly and voluntarily made a statement to police. Although a waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception" and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, such a waiver may be "implied" through a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." *North Carolina v. Butler*. If the State establishes that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver. Here, Thompkins waived his right to remain silent. First, the lack of any contention that he did not understand his rights indicates that he knew what he gave up when he spoke. Second, his answer to the question about God is a "course of conduct indicating waiver" of that right. Had he wanted to remain silent, he could have said nothing in response or unambiguously invoked his *Miranda* rights, ending the interrogation. That he made a statement nearly three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Third, there is no evidence that his statement was coerced: He does not claim that police threatened or injured him or that he was fearful; interrogation took place in a standard-sized room in the middle of the day; and there is no authority for the proposition that a 3-hour interrogation is inherently coercive. The fact that the question referred to religious beliefs also does not render his statement involuntary. The Court rejected the defendant's construction of the waiver rule – that even if his answer could constitute a waiver of his right to remain silent, the police were not allowed to question him until they first obtained a waiver – because a rule requiring a waiver at the outset would be inconsistent with the Court's previous holding that courts can infer a waiver "from the actions and words of the person interrogated." Any waiver, express or implied, may be contradicted

by an invocation at any time, terminating further interrogation. When the suspect knows that *Miranda* rights can be invoked at any time, he or she can reassess his or her immediate and long-term interests as the interrogation progresses. After giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived *Miranda* rights. Thus, the police were not required to obtain a waiver of Thompkins' *Miranda* rights before interrogating him. Finally, the Supreme Court rejected Thompkin's complaint of ineffective assistance of counsel because he could not establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland v. Washington*, considering "the totality of the evidence before the judge or jury" *Id.* Here, the Sixth Circuit did not account for the other evidence presented against Thompkins. Whether considered under a deferential standard or *de novo* review, Thompkins cannot demonstrate prejudice from his lawyer's failure to request a limiting instruction. Four justices dissented, led to by Justice Sotomayor (joined by Stevens, Ginsburg & Breyer), who wrote an impassioned dissenting opinion that contends the majority holding stands *Miranda* on its head.

II. SEARCH & SEIZURE

A. Search of Dwelling

1. **Emergency Aid Exception to Warrant Requirement.** *Michigan v. Fisher*, 130 S. Ct. 546 (2009) (per curiam). Officers responding to a disturbance complaint were directed to a residence where a man was "going crazy." They found a household in chaos, a pickup truck with a smashed front, damaged fenceposts, three broken house windows, and blood on the pickup and on clothes in the pickup. Though a window they saw Fisher screaming and throwing things. They knocked on the door, but Fisher refused to answer. They could see his hand was cut so they asked him whether he needed medical attention. Fisher ignored them and told them to get a warrant (punctuated with profanity). Police then pushed the door open and entered the house. Fisher pointed a long rifle at them, so they withdrew. Later he was charged with assault and possession of a shotgun during a felony. The state trial court suppressed the evidence, holding that the warrantless police entry violated the Fourth Amendment. The Supreme Court granted cert and reversed, holding the warrantless entry was reasonable under a straightforward application of the emergency aid exception it recognized in *Brigham City v. Stuart*, 547 U.S. 398 (2006).

- B. **Electronic Privacy.** *City of Ontario v. Quon*, 130 S. Ct. ____ (June 17, 2010). Quan, a SWAT officer, sued his employer in a federal civil rights action and for violations of the federal Stored Communications Act, after being disciplined because an audit of his city-owned pager revealed an inordinate amount of personal text messages. He claimed that persons who send text messages to a SWAT team member's SWAT

pager have a reasonable expectation that their messages will be free from review by the recipient's government employer. The Supreme Court disagreed, holding that even if Quon had a reasonable expectation of privacy in his text messages, the city did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a general matter, warrantless searches "are per se unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule. The Court has earlier held that the "special needs" of the workplace justify one such exception. Under this precedent, when conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is "justified at its inception" and if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of" the circumstances giving rise to the search. Here, the search that turned up Quon's excessive personal text messages, was an audit of city-owned pagers designed to determine if the city's prepaid contract was insufficient for the volume of characters and messages legitimately used by its employees. The Supreme Court found that he search here satisfied the special needs standard and was reasonable under that approach.

III. CRIMES

- A. Unconstitutionality of Statute Criminalizing Depictions of Animal Cruelty.** *United States v. Stevens*, 130 S. Ct. ___ (Apr. 20, 2010). Title 18 U.S.C. § 48 prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. Stevens moved to dismiss the indictment, arguing that §48 is facially invalid under the First Amendment, but the district court denied the motion, and he was convicted by a jury. The court of appeals, en banc, reversed Stevens' conviction for depicting animal cruelty, finding the statute facially unconstitutional. Ordinarily, "[t]o succeed in a typical facial attack, Stevens would have to establish 'that no set of circumstances exists under which [§48] would be valid,' *United States v. Salerno*, 481 U. S. 739, 745 (1987), or that the statute lacks any 'plainly legitimate sweep,' *Washington v. Glucksberg*, 521 U. S. 702, 740, n. 7 (1997)." But, a special facial overbreadth analysis is employed in First Amendment challenges: "In the First Amendment context, however, this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' *Washington State Grange v. Washington State Republican Party*, 552 U. S. 442, 449, n. 6 (2008)" Stevens argues that §48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. The Supreme Court affirmed the

reversal of Stevens' conviction, 8-1, finding the law "create[d] a criminal prohibition of alarming breadth," and striking down the law as overly broad, in violation of the First Amendment. In reaching this conclusion, the Court refused to carve out a new First Amendment exception for animal cruelty, finding that a similar exception for child pornography is not analogous.

B. Second Amendment Right to Bear Arms. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. ___ (June 28, 2010). The Fourteenth Amendment incorporates the Second Amendment right of citizens to keep and bear arms for self-defense. The right recognized in *District of Columbia v. Heller* thus applies to the states, limiting laws that regulate gun possession.

C. Mail Fraud Law– Honest Services Prosecutions

1. Enron Fraud. *Skilling v. United States*, 130 S. Ct. ___ (June 24, 2010). In a decision written by Justice Ginsburg, the Court affirmed in part, reversed in part, and remanded, the conviction of Enron executive Jeff Skilling, who was convicted of, inter alia, mail fraud under an honest services theory. Rather than have an unconstitutionally vague mail fraud law, Justice Ginsburg's majority opinion limited the reach of the honest services prong of mail fraud statute to cases involving bribery and kickback schemes. Although the Court was unanimous on the honest services question, three Justices (Scalia, Thomas, and Kennedy) would have gone further, ruling that the honest services portion of the mail fraud law is unconstitutional. The Court rejected a challenge to fairness of the jury, which was exposed to extreme pretrial publicity. The actual holdings are: (1) Pre-trial publicity and community prejudice did not prevent Skilling from having a fair trial. (2) The "honest services" statute covers only bribery and kickback schemes. Part of the opinion vacates the Fifth Circuit's ruling on Skilling's conspiracy conviction. In a dissent on the jury holding, Justice Sotomayor (joined by Stevens and Breyer) disagreed with the Court's conclusion that Skilling had a fair trial before an impartial jury.

2. Conrad Black is Jeff Skilling's Beneficiary. *Black v. United States*, 130 S. Ct. ___ (June 24, 2010). Following its ruling in *Skilling*, the Court unanimously vacated and remanded Conrad Black's conviction, again in an opinion by Justice Ginsburg, holding that *Skilling's* limitation on the scope of honest services prosecutions renders incorrect the jury instructions given in this case. The Court also held that "a criminal defendant [] need not request special interrogatories, nor need he acquiesce in the Government's request for discrete findings by the jury, in order to preserve in full a timely raised objection to jury instructions on an alternative theory of guilt." Justice Scalia concurred in part and in the judgment (joined by Justice Thomas). Justice Kennedy separately concurred in part and in the judgment

3. Proof of Duty Owed by Public Official. *Weyhrauch v. United States*, 130

S. Ct. ___ (June 24, 2010). This case was simply GVR'd based on *Skilling*. It had presented an issue, which was left undecided: Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law?

- D. Aiding Terrorist Organization.** *Holder v. Humanitarian Law Project*, 130 S. Ct. ___ (June 21, 2010). Congress prohibited the provision of “material support or resources” to certain foreign organizations that engage in terrorist activity. 18 U.S.C. § 2339B(a)(1). That prohibition is based on a finding that the specified organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §301(a)(7), 110 Stat. 1247, note following 18 U. S. C. §2339B (Findings and Purpose). Plaintiffs sought pre-enforcement review of this criminal statute to permit them to provide support to two specified organizations, claiming that plaintiffs seek to facilitate only the lawful, nonviolent purposes of those organizations, and to prevent them from doing so violates the Constitution. “Plaintiffs challenge §2339B’s prohibition on four types of material support—‘training,’ ‘expert advice or assistance,’ ‘service,’ and ‘personnel.’” As to these activities, plaintiffs made three constitutional claims: (1) §2339B violates the Due Process Clause of the Fifth Amendment because these four statutory terms are impermissibly vague; (2) §2339B violates their freedom of speech under the First Amendment; (3) §2339B violates their First Amendment freedom of association. The Supreme Court rejected plaintiff’s claims 6-3, with Chief Justice Roberts writing for the majority, concluding that the material-support statute is constitutional as applied to the particular activities plaintiffs argued they wanted to pursue, to wit: providing support for the humanitarian and political activities of two of organizations in the form of monetary contributions, other tangible aid, legal training, and political advocacy. The Court did not address the resolution of more difficult cases that may arise under the statute in the future. Justice Breyer dissented (Ginsburg and Sotomayor joined). He agreed that the statute is not unconstitutionally vague, but disagreed on enforcement of the criminal sanction, “I cannot agree with the Court’s conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations’ lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government’s compelling interest in combating terrorism. And I would interpret the statute as normally placing activity of this kind outside its scope.”
- E. Application of SORNA to Pre-Enactment Travel.** *Carr v. United States*, 130 S. Ct. ___ (June 1, 2010). The Sex Offender Registration and Notification Act (“SORNA”) was signed into law on July 27, 2006. Pub. L. 109-248 §§ 101-55, 120 Stat. 587. SORNA requires persons who are convicted of certain offenses to register with state and federal databases. *See* 42 U.S.C. § 16913(a). The law imposes criminal

penalties of up to ten years of imprisonment on anyone who “is required to register * * * travels in interstate or foreign commerce * * * and knowingly fails to register or update a registration.” 18 U.S.C. § 2250(a). On February 28, 2007, the Attorney General retroactively applied SORNA’s registration requirements to persons who were convicted before July 27, 2006. 72 Fed. Reg. 8896, codified at 28 C.F.R. § 72.3. The two questions presented to the Court were: (1) Whether a person may be criminally prosecuted under § 2250(a) for failure to register when the defendant’s underlying offense and travel in interstate commerce both predated SORNA’s enactment. (2) Whether the *Ex Post Facto* Clause precludes prosecution under § 2250(a) of a person whose underlying offense and travel in interstate commerce both predated SORNA’s enactment. Sidestepping the *Ex Post Facto* question, the Court ruled as a matter of statutory construction that section 2250 does not apply to sex offenders whose interstate travel occurred before SORNA’s effective date. Writing for the the majority, Justice Sotomayor found that the statute’s words are written in the present tense, not the past or present perfect tense. Justice Scalia concurred, while Justice Alito dissented (joined by Thomas & Ginsburg).

1. Sidestepping Deciding *Ex Post Facto* Again. *United States v. Juvenile Male*, 130 S. Ct. ___ (June 7, 2010) (per curiam). Juvenile Male’s sex offense occurred before SORNA’s enactment. He was ordered to register as a sex offender under SORNA as a condition of supervised release, but only during the period of supervision. The Ninth Circuit vacated the requirement that the juvenile register as a sex offender, holding that “retroactive application of SORNA’s provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses before SORNA’s passage violates the *Ex Post Facto* Clause of the United States Constitution.” 590 F.3d 924, 927 (9th Cir. 2010). The United States sought review in the Supreme Court, but in May 2008 the juvenile’s term of supervision expired, so he is no longer subject to the district court’s condition that he register as a sex offender under SORNA. Meanwhile, he registered as a sex offender under Montana law. In order to determine whether there remains a live controversy, the Supreme Court asked the Montana Supreme Court to explain whether a decision in favor of the juvenile in this case would allow him to remove his name from Montana’s sex offender registry. In other words, does the juvenile’s duty to remain registered as a sex offender under state law depend on whether he was required to register under SORNA, or does he have an independent duty to register under state law? If the juvenile’s duty to register under state law is contingent on the validity of SORNA, then the issue is not moot.

F. Second Amendment Protection for Firearms. *McDonald v. City of Chicago*, 130 S. Ct. 48 (cert. granted Sept. 30, 2009); decision below unpublished. Question presented: Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment’s Privileges or Immunities or Due Process Clauses.

IV. TRIAL

A. Speedy Trial.

1. **Apportioning Delay for Preparation of Defense Motions.** *Bloate v. United States*, 130 S. Ct. ____ (Mar. 8, 2010). The Speedy Trial Act, 18 U.S.C. § 3161, *et seq.*, requires that a criminal defendant be tried within 70 days of indictment or the defendant’s first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes “delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.” Is the time requested for filing pretrial motions automatically excludable? The Supreme Court held 7-2 that the time granted to prepare pretrial motions is not automatically excludable from the 70-day limit under subsection (h)(1). Such time may be excluded only when a district court grants a continuance based on appropriate findings under subsection (h)(7). The delay at issue is governed by subsection (h)(1)(D). This provision communicates Congress’ judgment that pretrial motion-related delay is automatically excludable only from the time a pretrial motion is filed through a specified hearing or disposition point, and that other pretrial motion-related delay is excludable only if it results in a continuance under subsection (h)(7). This limitation is significant because Congress knew how to define the boundaries of subsection (h)(1)’s enumerated exclusions broadly when it so desired. Although the period of delay the government seeks to exclude in this case results from a proceeding governed by subparagraph (D), that period precedes the first day upon which Congress specified that such delay may be excluded automatically and thus is not automatically excludable. The Act does not force a district court to choose between rejecting a defendant’s request for time to prepare pretrial motions and risking dismissal of the indictment if preparation time delays the trial. A court may still exclude preparation time under subsection (h)(7) by granting a continuance for that purpose based on recorded findings.

B. Jury Trial

1. **Public Proceedings.** *Presley v. Georgia*, 130 S. Ct. 721 (2010) (per curiam). During jury selection in Presley’s cocaine trafficking case, the judge ordered the only spectator to leave the courtroom and that floor of the courthouse entirely. The court explained that prospective jurors were about to enter the courtroom and would be in the hallway of the floor of the courthouse. The judge did first question the spectator and learned he was the defendant’s uncle; he told the man he could not sit out in the audience with the prospective jurors, or remain on that floor of the courthouse, but he was welcome to return after jury selection was completed later in the afternoon. Presley’s counsel objected to the public’s exclusion from the courtroom. The

non-public jury selection was approved by the Georgia Court of Appeals and Georgia Supreme Court. Although the U.S. Supreme Court has previously held that the public has a right to attend such court proceedings under the First Amendment, this challenge was brought by the defendant as a “public trial” right of the Due Process Clause of the Sixth Amendment (made applicable to the states by the Fourteenth Amendment). The Supreme Court reversed the conviction, holding that the defendant’s Sixth Amendment right to a public trial applies with the same force as the public’s First Amendment right. Both rights require public court proceedings, unless the trial court articulates reasons for an exception to the general rule, based on the need for a fair trial, or in the interests of inhibiting disclosure of sensitive information. In those exceptional cases, the trial court must still consider alternatives to closure, such as reserving rows of the courtroom for the public, dividing the venire to reduce courtroom congestion, and instructing the prospective jurors not to engage or interact with audience members..

2. **Availability of Habeas Relief for *Batson* Violations.** *Thaler v. Haynes*, 130 S. Ct. 1171 (2010) (per curiam). Haynes was tried in a Texas state court for the murder of a police officer, and the state sought the death penalty. Two judges presided at different stages of voir dire. Judge Harper presided when the attorneys questioned the prospective jurors individually, but Judge Wallace took over when peremptory challenges were exercised. When the prosecutor struck an African-American juror, Haynes’ attorney raised a *Batson* objection. Judge Wallace determined that respondent had made out a prima facie case under *Batson*, and the prosecutor then offered a race-neutral explanation that was based on the juror’s demeanor during individual questioning; that the juror’s demeanor had been “somewhat humorous” and not “serious” and that her “body language” had belied her “true feeling.” Based on his observations of the juror during questioning by respondent’s attorney, the prosecutor stated, he believed that she “had a predisposition” and would not look at the possibility of imposing a death sentence “in a neutral fashion. Haynes’ attorney did not dispute the prosecutor’s characterization, but he asserted that her answers on the jury questionnaire “show[ed] that she was a juror who [was] leaning towards the State’s case.” After considering the prosecutor’s explanation and the arguments of defense counsel, Judge Wallace stated that the prosecutor’s reason for the strike was “race-neutral” and denied the *Batson* objection without further explanation. Haynes was convicted and sentenced to death. The Texas Court of Criminal Appeals affirmed the conviction, rejecting Haynes’ argument that “a trial judge who did not witness the actual voir dire cannot, as a matter of law, fairly evaluate a *Batson* challenge. On federal habeas, the district court also denied relief, but the court of appeals reversed, finding that, under *Snyder [v. Louisiana]*’s application of *Batson*, . . . an appellate court applying *Batson* should find clear error when the record reflects that the trial court was not able to verify the aspect of the juror’s demeanor upon which the prosecutor based his or her peremptory challenge.

The Supreme Court, in turn, summarily reversed because the basis for relief was not clearly established by Supreme Court decisions. “This case presents the question whether any decision of this Court ‘clearly establishes’ that a judge, in ruling on an objection to a peremptory challenge under *Batson v. Kentucky*, 476 U. S. 79 (1986), must reject a demeanor-based explanation for the challenge unless the judge personally observed and recalls the aspect of the prospective juror’s demeanor on which the explanation is based. The Court of Appeals appears to have concluded that either *Batson* itself or *Snyder v. Louisiana*, 552 U. S. 472 (2008), clearly established such a rule, but the Court of Appeals read far too much into those decisions, and its holding, if allowed to stand, would have important implications.” “[W]e hold that no decision of this Court clearly establishes the categorical rule on which the Court of Appeals appears to have relied, and we therefore reverse the judgment and remand the case for proceedings consistent with this opinion. Our decision does not mandate the rejection of respondent’s *Batson* claim regarding the juror. On remand, the Court of Appeals may consider whether the Texas Court of Criminal Appeals’ determination may be overcome under the federal habeas statute’s standard for reviewing a state court’s resolution of questions of fact.”

C. Confrontation

1. **Lab Reports; Requiring Notice to Question Tech.** *Briscoe v. Virginia*, 130 S. Ct. ___ (per curiam). Virginia requires an accused to assert a demand to question the technician who prepared any lab report in his case. The state Supreme Court ruled that if an accused does not follow the demand procedure, he surrenders his right to confront and cross-examine the report’s author. Is this demand rule constitutional? Some, including Justice Scalia, saw the grant of certiorari in this case as an attempt to reconsider *Melendez-Diaz*, post Justice Souter. Justice Scalia made his comment during oral argument after full briefing. **TWO WEEKS AFTER ORAL ARGUMENT, THE COURT SIMPLY PUNTED FOR NOW, REMANDING THE CASE TO THE VIRGINIA COURTS FOR RECONSIDERATION IN LIGHT OF MELENDEZ-DIAZ.**
2. **Victim’s Statement Near Crime Scene as Testimonial Hearsay.** *Michigan v. Bryant*, 130 S. Ct. ___ (cert. granted Mar. 1, 2010); decision below at 483 Mich. 132 (2009). Officers responding to a radio run that someone had been shot found Anthony Covington lying in a gas station outside his car—grabbing his sides in considerable pain, and blood oozing out of his stomach. When a police officer asked “what happened,” Covington responded that he had been shot, that somebody named “Rick” had shot him through a door, and provided a description of his attacker. The officer described the victim as nervous and in obvious pain, constantly grabbing his side, and talking in a halting manner. After waiting with the victim for five or ten minutes until the ambulance arrived, the officer moved from the victim’s location to the place

identified as the scene of the shooting to attempt to locate and apprehend the shooter. The victim died several hours later. Covington's statements were admitted at Respondent's trial, and he was convicted of second degree murder. The Michigan Supreme Court held that the statements taken at the scene where the victim was found were "testimonial," and admitted in violation of the Confrontation Clause, requiring reversal as "plain-error." Issue presented: Whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

3. **Another Confrontation Clause Issue: Video Testimony** *Wrotten v. New York*, 130 S. Ct. ____ (cert. denied June 7, 2010) (Statement of Justice Sotomayor). Although the Supreme Court denied cert in this case, apparently because it was not convinced that the order under review was a final order, Justice Sotomayor filed a Statement that highlights a viable potential issue that should be preserved. "This case presents the question whether petitioner's rights under the Confrontation Clause . . . were violated when the State introduced testimony at his trial via a two-way video that enabled the testifying witness to see and respond to those in the courtroom, and vice versa. The question is an important one, and it is not obviously answered by *Maryland v. Craig*, 497 U.S. 836 (1990). We recognized in that case that 'a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial,' but 'only where denial of such confrontation is necessary to further an important public policy.' *Id.*, at 850. In so holding, we emphasized that '[t]he requisite finding of necessity must of course be a case-specific one.' *Id.*, at 855. Because the use of video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling."

V. SENTENCING

A. Cruel and Unusual Life Sentence.

1. **Life Without Parole for Juvenile for Non-Homicide Crime.** *Graham v. Florida*, 130 S. Ct. ____ (May 17, 2010) Graham, a 16 year-old juvenile, pled guilty to armed burglary with assault or battery and attempted armed robbery. He was originally sentenced to 12 months in a pretrial detention facility, and three years probation. He violated probation by committing new crimes, including an armed home invasion, so at age 19 he was sentenced on the probation violation to Life without possibility of parole. The Supreme Court reversed the sentence, holding that the Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be

sentenced to Life in prison without parole for a non-homicide crime. Justice Kennedy wrote the majority decision (for Stevens, Ginsburg, Breyer and Sotomayor), which for the first time extended the framework for a categorical challenge under the Eighth Amendment to a sentence to a term of years (as opposed to death). The opinion has a number of useful arguments in support of mitigated sentences for juveniles. For example, the Court upheld its findings in *Roper* that juveniles are less culpable than adult offenders as shown by “developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds.” It goes further, however, noting that people who do not kill or intend to kill also have relatively diminished culpability, and that life without parole sentences “share some characteristics with death sentences that are shared by no other sentences,” including the fact that it is “a forfeiture that is irrevocable” and “deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence.” These are useful arguments to marshal in favor of mitigation at sentencings generally, and should not be limited to youthful offenders. Perhaps most useful, however, is the Court’s analysis of a sentence of LWOP for a non-homicide juvenile offender against the four purposes of sentencing: retribution, deterrence, incapacitation and rehabilitation. Defense counsel can use the analysis as a roadmap for sentencing memoranda in every case. More salient features of the opinion include (1) the Court’s reminder that “the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender;” (2) its acknowledgment that “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense;” (3) its conclusion that deterrence is not sufficient to justify the “grossly disproportionate” sentence of LWOP for an offender with a “diminished moral responsibility;” (4) its similar conclusion that “[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity,” and that incapacitation is an inadequate justification for an LWOP sentence where the characteristics of the defendant raise a question as to whether the offender is in fact incorrigible; and (5) its notation that people sentenced to LWOP “are often denied access to vocational training and other rehabilitative services that are available to other inmates,” which is true for many adult offenders serving time in BOP custody. Although each of the Court’s points is specifically directed toward juvenile offenders, they can and should be applied to other offenders with reduced culpability facing disproportionately severe sentences. Justice Stevens wrote a concurrence (joined by Ginsburg and Sotomayor), which takes a parting shot at Justice Thomas’ static view of the Eighth Amendment, which has by now been thoroughly rejected. Chief Justice Roberts concurred with the majority decision, but concluded he would have reached the same result without need for a new categorical approach. Justices Thomas, Scalia and Alito dissented. [This summary is supplemented with analysis and practice tips by Sara Silva].

- a. **Life Without Parole for Non-Homicide Crime.** *Sullivan v. Florida*, 130 S. Ct. ___ (cert dismissed May 17, 2010). Joe Sullivan was a 13-year-old mentally disabled juvenile, who lived at home, where he was subjected to physical and mental abuse. He and two other juveniles burglarized a home. After they left, later that day, the home's owner was sexually assaulted. The two other juveniles implicated Joe Sullivan and he was convicted. He was sentenced to Life imprisonment without the possibility of parole. **Cert was originally granted to determine if the sentence violated the Eighth Amendment, but FOLLOWING ORAL ARGUMENT, THE COURT DISMISSED CERT AS IMPROVIDENTLY GRANTED.**

B. ACCA Predicates

1. **Battery.** *Johnson v. United States*, 130 S. Ct. 1265 (2010). Reversing the Eleventh Circuit, the Supreme Court held 7-2 that since the Florida offense of battery by offensive touching does not require the use of physical force, it does not qualify as an ACCA predicate under 924(e)(2)(B)(I). First, the Court held that it was bound by the Florida Supreme Court's narrowing interpretation of the statutory elements of the offense. Second, the Court defined "physical force" for ACCA purposes as requiring "violent force – that is, force capable of causing physical pain or injury to another." Third, the Court refused to remand to allow the government to argue that the battery satisfied 924(e)(2)(B)(ii)'s residual "otherwise" clause, because the government had previously disclaimed reliance on that provision at sentencing.

C. Mandatory Minimum Sentences.

1. **Mandatory Minimums and *Apprendi*: *McMillan & Harris* Revisited?** *United States O'Brien*, 130 S. Ct. ___ (May 24, 2010). O'Brien and a co-defendant carried firearms during an attempted robbery. Count three of the indictment charged them with using a firearm in furtherance of a crime of violence, which carries a mandatory minimum 5-year prison term. 18 U.S.C. § 924(c)(1)(A)(i). Count four alleged use of a machinegun (a pistol that authorities believed operated as a fully automatic firearm) in furtherance of that crime, which carries a 30-year mandatory minimum term. § 924(c)(1)(B)(ii). The government moved to dismiss the fourth count on the basis that it could not establish the count beyond a reasonable doubt, but it maintained that § 924(c)(1)(B)(ii)'s machinegun provision was a sentencing enhancement to be determined by the district court upon a conviction on count three. The court dismissed count four and rejected the government's sentencing enhancement position. Both defendants then pleaded guilty to the remaining counts. The court sentenced O'Brien to a 102-month term and his

co-defendant to an 84-month term for their § 924(c) convictions. In affirming the district court's § 924(c)(1)(B)(ii) ruling, the First Circuit looked primarily to *Castillo v. United States*, 530 U. S. 120 (2000), which held that the machinegun provision in an earlier version of §924(c) constituted an element of an offense, not a sentencing factor. The court found that *Castillo* was “close to binding,” absent clearer or more dramatic changes than those made by Congress’ 1998 amendment of §924(c) or a clearer legislative history. The Supreme Court affirmed, holding unanimously that the fact that a firearm was a machinegun is an element to be proved to the jury beyond a reasonable doubt, not a sentencing factor to be proved to the judge at sentencing. Justice Kennedy arrived at this conclusion for the Court as a matter of statutory construction, applying the same five-part test the Court had applied in *Castillo* to the earlier version of the statute. Justices Stevens and Thomas concurred, but would have gone further, to overrule *McMillan & Harris*, because they believe a majority of the Court has made clear that the *Apprendi* rule should apply to mandatory minimums in the same way it applies to statutory maximums.

2. **Consecutive Mandatory Minimums Under § 924(c).** *Abbott v. United States* and *Gould v. United States*, 130 S. Ct. 1283, 1284 (cert granted Jan. 25, 2010); decisions below at 574 F.3d 203 (3rd Cir. 2009) and 329 Fed. Appx. 569 (5th Cir. 2009). The Supreme Court granted cert in two cases that have been consolidated – *Abbott* and *Gould* – to decide whether the consecutive mandatory minimum of § 924(c) applies where the mandatory minimum of the underlying offense is greater. Most courts, including the two lower courts here, have held that it does apply. The Second Circuit has held to the contrary. *See United States v. Williams*, 558 F.3d 166 (2d Cir. 2009). The question hinges on 924(c)(1)(A)’s prefatory phrase “[e]xcept to the extent that a greater minimum sentence is otherwise provided by this section or by any other provision of law” – does this encompass the underlying drug trafficking offense or crime of violence, and if not, does it include another offense for possessing the firearm in the same transaction? The Third Circuit held in *Abbott* that the defendant was subject to the mandatory consecutive sentence despite being sentenced to the 180-month mandatory minimum under ACCA because “a sentence imposed for a separate offense cannot supplant or abrogate a 924(c)sentence under the statute’s prefatory clause.” The Fifth Circuit held in *Gould* that the defendant could be sentenced to the mandatory consecutive sentence under 924(c)(1)(A) despite also being subject to a greater mandatory minimum for the underlying drug trafficking crime.
3. **Timeliness of Order of Restitution.** *Dolan v. United States*, 130 S. Ct. ____ (June 14, 2010). The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, provides that federal courts shall order restitution as part of the sentence in specified criminal cases. Section 3663A(d) further provides that an order of restitution “shall be issued and enforced in accordance with

section 3664.” Section 3664 in turn provides that if the victim’s losses cannot be obtained prior to sentencing, “the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing.” 18 U.S.C. §3664(d)(5). This case presented the question: Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5). In a 5-4 decision, with Justice Breyer writing for the majority, the Supreme Court held that in some circumstances, a sentencing court that has missed the 90-day deadline for entering an order of restitution under the MVRA may nevertheless order restitution. The majority held that the deadline for ordering restitution under the Act is not jurisdictional and not a “claims processing” rule, but one that creates a time-related directive that is legally enforceable but does not necessarily deprive the judge of authority to act even when the deadline is missed. In this case, the sentencing court made clear its intent to order restitution before the expiration of the deadline, but did not have enough information to determine the amount. As a result, the fact that the judge “filled in the blank” on the actual amount of restitution three months after the deadline had passed did not violate the statute. In response to the defendant’s concern about the appealability of a judgment that does not yet include the amount of restitution, the majority advises defendants to ask the district court to order restitution in a timely manner or seek mandamus if it does not. Chief Justice Roberts, joined by Justices Stevens, Scalia, and Kennedy dissented. They would hold that restitution must be ordered at the time of sentencing, if at all. With an actual exclamation point, Justice Roberts writes “[w]hat an odd procedure the Court contemplates!” to put the defendant in the position of having to ask the district court to impose a harsher sentence or to seek the drastic remedy of mandamus if he is worried about the finality of his judgment for purposes of appeal. He also notes that this decision does not answer the question of the validity of a restitution order that is entered after the deadline where the district court had not expressed its intent to order restitution. [Summary supplemented by Jennifer Coffin].

- D. Post-Sentence Rehabilitation As a Permissible Sentencing Factor.** *Pepper v. United States*, 130 S. Ct. ___ (cert granted June 28, 2010); decision below at 570 F.3d 958 (8th Cir. 2009). Question presented: Whether the district court has the authority to consider post-sentencing rehabilitation under 18 U.S.C. § 3553(a)? Before 2000, there was a circuit split on whether courts could consider the defendant’s post-sentencing conduct for purposes of downward departure when a defendant was resentenced after appellate remand. In 2000, the Commission resolved the split by promulgating U.S.S.G. § 5K2.19, which states that post-sentencing rehabilitation is not an appropriate basis for downward departure. Now, after *Booker*, there is once again a circuit split. Compare *United States v. Lloyd*, 469 F.3d 319, 324 (3d Cir. 2006) (stating that it “would not hold that a court never could consider a defendant’s post-sentencing rehabilitation efforts when resentencing” following a *Booker* remand, but that post-sentence rehabilitative efforts should affect the sentence only in “an unusual case”), with *United States v. Pepper*, 570 F.3d 958, 965 (8th Cir.

2009) (holding that it is impermissible to consider post-sentencing rehabilitation for purposes of a downward variance), and *United States v. Lorenzo*, 471 F.3d 1219 (11th Cir. 2006) (holding that district courts are precluded from considering post-sentencing conduct under § 3553(a), though it has recently recognized that “there is a question as to whether *Lorenzo* continues to be good law in light of [*Booker, Rita, Kimbrough, Gall, and Spears*],” see *United States v. Smith*, No. 09-13307, 2010 WL 1048819 (11th Cir. Mar. 22, 2010)). The Eighth Circuit’s decision below in *Pepper* represents the fourth time the court of appeals has considered Mr. Pepper’s case, after two appeals and a GVR in light of *Gall* and after reassignment (as ordered by the court of appeals) to a different sentencing judge. The new judge denied a variance based on post-offense rehabilitation and decided to grant less of a downward departure for cooperation under 5K1.1 that the previous judge had granted. The Eighth Circuit affirmed. Also presented is the question whether a district judge who resents on remand after reassignment is bound by the findings of the previous judge that were affirmed on appeal. [Summary by Jennifer Coffin].

- E. Resentencing Pursuant to § 3582(c)(2).** *Dillon v. United States*, 130 S. Ct. ____ (June 17, 2010). Proceedings under 18 U.S.C. § 3582(c)(2) (motions for sentence reduction base on retroactive Sentencing Guidelines amendments) are very limited and authorize only a limited adjustment in an otherwise final sentence. As a result, in a 7-1 decision, written by Justice Sotomayor, the Supreme Court held that neither *Booker*’s constitutional nor remedial holdings apply to proceedings under 18 U.S.C. § 3582(c). As such, the Sentencing Guidelines and its policy statements cannot be treated as advisory in § 3582(c)(2) proceedings. Thus, a district court must follow the mandate contained in U.S.S.G. § 1B1.10 that it impose a sentence within the amended Guidelines range unless the district court had initially imposed a sentence below the applicable Guidelines range. Finally, in light of the limited authority granted under § 3582(c)(2), a district court is not to seek to correct any other aspects of the sentence not affected by the retroactive amendment. Justice Stevens was the lone dissenter. Couching loosely in a separation-of-powers framework, he stated his view that the Commission’s now mandatory policy statement at §1B1.10 “is unfaithful to *Booker*. It is also on dubious constitutional footing, as it permits the Commission to exercise a barely constrained form of lawmaking authority. And it is manifestly unjust.” Justice Stevens also recognizes that the Commission may have exceeded its statutorily delegated authority by promulgating a binding policy statement in 2008. In some pointed criticisms of the Commission, he said that “[t]here can be no question that the purpose of the Commission’s amendments to its policy statement in §1B1.10 was to circumvent the *Booker* remedy,” and noted the Commission’s “subtle threat” to discontinue making amendments retroactive if *Booker* applies to proceedings under 3582(c). After setting forth the facts of the case, including the heartbreaking fact that Percy Dillon’s modified crack sentence is still 17-1/2 years longer than the district court thought would serve the purposes of sentencing, Justice Stevens writes: “Given the circumstances of his case, I can scarcely think of a greater waste of this Nation’s precious resources. *Cf. Barber v. Thomas, ante*, at ____ (2010) (slip op., at 1) (KENNEDY, J., dissenting) (“And if the only way to call attention to the human implications of this case is to speak in terms

of economics, then it should be noted that the Court’s interpretation comes at a cost to the taxpayers of untold millions of dollars’). Dillon’s continued imprisonment is a truly sad example of what I have come to view as an exceptionally, and often mindlessly harsh, punishment scheme.” It should be noted that the majority said that it did not address Justice Stevens’ separation-of-powers argument because it was “not fairly encompassed within the questions presented and was not briefed by the parties.” [Adapted from summary prepared by Jennifer Coffin].

- F. Good Time Credit.** *Barber v. Thomas*, 130 S. Ct. ___ (June 7, 2010). The federal good time credit (GTC) statute 18 U.S.C. § 3624(b)(1), provides for credits “up to 54 days at the end of each year of the prisoner’s term of imprisonment.” Throughout federal sentencing statutes, and elsewhere in the same sentence, “term of imprisonment” means the sentence imposed. However, the Bureau of Prisons (BOP) interprets “term of imprisonment” as unambiguously meaning time served. For each year of a sentence imposed, the BOP interpretation results in seven fewer days of available credits. The Supreme Court rejected a challenge by federal prisoners to the method used by the Bureau of Prisons to calculate such “good time” sentence reductions. The majority decision (Breyer, Sotomayor, Roberts, Scalia, Thomas & Alito sided with the BOP calculation, finding it best fit the “natural reading” of the law. The dissenters (Kennedy, Stevens and Ginsburg), would have rejected the BOP calculations and adopted a modified version of the calculation proposed by the prisoners.

VI. DEATH PENALTY

- A. Delay in Execution.** *Johnson v. Bredesen*, 130 S. Ct. 541 (cert. denied Dec. 2, 2009). Justice Stevens (joined by Justice Breyer) issued a statement in connection with the denial of certiorari in this case, in which the prisoner has been confined to a solitary cell for 29 years awaiting his execution under a sentence of death. Much of that delay is not attributed to him. The Stevens’ statement raises again whether such delay constitutes cruel and unusual punishment under the Eighth Amendment, and whether a § 1983 action may be brought to enjoin execution for the lengthy and inhumane delay. The issue was raised previously in statements regarding the denial of cert by Justice Stevens in *Lackey v. Texas*, 514 U.S. 1045 (1995) and by Justice Breyer in *Thompson v. McNeil*, 556 U.S. ___ (2009). Here, they reiterate “that executing defendants after such delays is unacceptably cruel.” Justice Thomas concurred with the denial of cert here, criticizing Justice Stevens’ “novel” Eighth Amendment argument, and arguing that it lacks any constitutional support.

VII. APPEALS

- A. Plain Error Regarding *Ex Post Facto* Application of Statute.** *United States v. Marcus*, 130 S. Ct. ___ (May 24, 2009). The Second Circuit held that a reviewing court must grant relief on a forfeited *Ex Post Facto* claim “whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct.” The court further concluded that this

standard was satisfied because the government’s evidence of pre-enactment conduct, standing alone, would have been legally sufficient to support a conviction. A unanimous Supreme Court reversed, holding that the Second Circuit’s plain-error standard conflicts with the Supreme Court’s interpretation of the plain-error rule. An appellate court may recognize a “plain error that affects substantial rights,” even if that error was “not brought” to the district court’s “attention.” Fed. R. Crim. P. 52(b). The Supreme Court has previously interpreted this rule such that an appellate court may, in its discretion, correct an error not raised at trial only when the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious; (3) the error affected the appellant’s substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. The standard the Second Circuit applied is inconsistent with the third and fourth of these criteria. It is irreconcilable with the criterion that the error “affec[t] the appellant’s substantial rights.” This condition requires the error to be prejudicial, meaning that there is a reasonable probability that the error affected the trial’s outcome, not that there is “any possibility,” however remote, that the jury could have convicted based exclusively on pre-enactment conduct. Nor does this error fall within the category of “structural errors” that may “affect substantial rights” regardless of their actual impact on an appellant’s trial. Here, a jury instruction might have minimized or eliminated the risk that Marcus would have been convicted based solely on pre-enactment conduct. A reviewing court should find it no more difficult to assess the failure to give such an instruction than to assess numerous other instructional errors previously found nonstructural. The Court further rejected Marcus’ argument that the error at issue should be labeled an *Ex Post Facto* clause violation, and that all such violations should be treated as special, structural errors warranting reversal without a showing of prejudice. For one thing, the government never argued that the statute that criminalized Marcus’ conduct applied retroactively, and Marcus’ claim is thus properly brought under the Due Process, and not the *Ex Post Facto*, clause. Moreover, the Court saw no reason why errors similar to the one at issue in this case, taken as a class, would automatically affect substantial rights without a showing of prejudice. In any event, the Second Circuit’s “any possibility,” however remote, standard also cannot be reconciled with the criterion that “the error seriously affec[t] the fairness, integrity or public reputation of judicial proceedings.” Under the Second Circuit’s approach, a retrial would be required even where the evidence supporting conviction consists of a few days of pre-enactment conduct along with several continuous years of identical post-enactment conduct. Given the tiny risk that a jury would base its conviction in these circumstances on the few pre-enactment days alone, such an error is most unlikely to cast serious doubt on the fairness, integrity, or public reputation of the judicial system.

VIII. CIVIL COMMITMENT

- A. **“Necessary and Proper” to Detain “Sexually Dangerous Persons.”** *United States v. Comstock*, 130 S. Ct. ___ (May 17, 2010). Title 18 U.S.C. § 4248, authorizes court-ordered civil commitment by the federal government of (1) “sexually dangerous” persons who are already in the custody of the Bureau of Prisons, but who

are coming to the end of their federal prison sentences, and (2) “sexually dangerous” persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial. The government instituted civil commitment proceedings against six such persons, who challenged § 4248 on the grounds that, in enacting the law, Congress exceeded its authority under the Necessary and Proper Clause. The district court and court of appeals agreed with the constitutional challenge. In a decision written by Justice Breyer (joined by C.J. Roberts, Stevens, Ginsburg & Sotomayor) , the Supreme Court reversed, holding that the Necessary and Proper Clause grants Congress constitutional authority to enact § 4248. Five reasons supported the holding. First, the Court found that the Clause constitutes a “broad” delegation of legislative authority and requires only that a statute be rationally related to the implementation of a constitutionally enumerated power, as shown by the explosion in federal criminal laws and the federal penal system. Second, § 4248 represents (to the Court) “a modest addition to a set of prison-related mental-health statutes that have existed for many decades.” Third, it was reasonable of Congress to extend its “longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their federal sentence.” Fourth, the statute properly accounts for states’ interests, apparently because, as the Court sees it, the Necessary and Proper Clause as interpreted here gives Congress “broad authority” to intrude into traditionally state-governed areas. Fifth, the Court found that the link between § 4248 and Article I is “not too attenuated” because what is “necessary and proper” can be based on a series of inferences, and is not “too sweeping” because not that many people have been subjected to it yet. Justices Kennedy and Alito concurred in the judgment only. Justices Thomas and Scalia dissented to the unlimited expansion of the Necessary and Proper Clause, beyond what was previously deemed permissible by the Court, *e.g.*, *McCulloch v. Maryland*, *United States v. Morrison*, *United States v. Lopez*, and *Printz v. United States*. NOTE: Justice Breyer’s majority opinion concludes with this limiting caveat: “We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution.” [Summary supplemented by analysis of Sara Silva]

IX. IMMIGRATION CONSEQUENCES

- A. Ineffective Assistance of Counsel re Immigration Consequences of Plea.** *Padilla v. Kentucky*, 130 S. Ct. ___ (Mar. 31, 2010). Petitioner, who has lived in this country for nearly 40 years and served in the United States Army, is a legal permanent resident of this country, not a citizen. In 2001, he was indicted for trafficking in marijuana - an offense designated as an “aggravated felony” under the Immigration and Naturalization Act (INA). Prior to entering a plea of guilty to that offense, petitioner was incorrectly advised by his counsel that the plea would not affect his immigration status. Unfortunately, because the offense was an aggravated felony, petitioner’s deportation is mandatory. Upon discovery of this fact, petitioner sought post conviction relief in Kentucky’s state courts arguing that his attorney had improperly advised him. The Supreme Court of Kentucky denied post conviction

relief holding he was not entitled to accurate advice from his attorney on immigration consequences because he had no Sixth Amendment right to counsel in that proceeding. The U.S. Supreme Court reversed, holding that as a matter of federal law, counsel must inform a client when his or her plea carries a risk of deportation. Justice Stevens' majority opinion, analyzes the sad march of immigration laws over the past 90 years, concluding, "[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." "Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence," and that advice regarding it thus falls within the Sixth Amendment's right to counsel. Because "[i]mmigration law can be complex," "[w]hen the law is not succinct or straightforward, . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case [transportation of marijuana], the duty to give correct advice is equally clear." The Court had no trouble finding that Mr. Padilla's counsel was constitutionally deficient in assuring him that he would not be deported for his conviction, and remanded to allow Mr. Padilla the opportunity to meet the prejudice prong under *Strickland*. Justices Kennedy, Ginsburg, Breyer and Sotomayor joined the Stevens' opinion. Chief Justice Roberts and Justice Alito concurred in the judgment, while Justices Scalia and Thomas dissented. **NOTE:** Counsel should consider applying this holding that counsel has a duty to warn of adverse immigration consequences, to other adverse consequences, such as the risk of higher sentences in future cases resulting from ACCA prosecutions under 18 U.S.C. § 924(e).

- B. Federal Misdemeanor as an Aggravated Felony.** *Carachuri-Rosendo v. Holder*, 130 S. Ct. ____ (June 14, 2010). Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). In this context, the Supreme Court held that an alien's second state simple drug possession conviction did not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43) where the state conviction was not based on the fact of a prior conviction. The Court rejected the government's position that conduct punishable as a felony should be treated as the equivalent of a felony conviction when the underlying conduct could have been a felony under federal law. Here, state law, like federal law, allowed for a second simple possession to be prosecuted as a felony under a recidivist enhancement. However, the state case was prosecuted as a simple possession without any reference to the prior conviction. The Court stressed that the actual conviction was the focus of the analysis and not what might have or could have been charged. Although this is an immigration case, the decision is applicable to sentencing illegal reentry cases under U.S.S.G. § 2L1.2, which contains an 8-level increase where the defendant was deported after "a conviction for an aggravated felony," and the section defines aggravated felony based on "the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)." *See* U.S.S.G. § 2L1.2, comment. n.3(A).

- C. IIRIRA’s Prohibition on Judicial Review.** *Kucana v. Holder*, 130 S. Ct. 827 (2010). Kucana moved to reopen his removal proceedings, asserting new evidence in support of his plea for asylum. An Immigration Judge (IJ) denied the motion and the Board of Immigration Appeals (BIA) sustained the ruling. The Seventh Circuit Court of Appeals concluded it lacked jurisdiction to review the administrative determination, relying on IIRIRA, 8 U.S.C. § 1252(a)(2)(B), which states that no court shall have jurisdiction to review any action of the Attorney General “the authority for which is specified under the subchapter to be in the discretion of the Attorney General.” The Supreme Court reversed, holding that 1252’s proscription of judicial review applies only to AG determinations made discretionary *by statute*, not to determinations declared discretionary by the AG himself through a regulation. Here, the motion to reopen was made discretionary solely by the Executive, a reg adopted by the AG. Relying on the very important role of a motion to reopen, and the fact Congress had not declared that the AG’s authority was discretionary, the Court reversed and remanded for further proceedings in the court of appeals.
- D. Impermissible Gender Discrimination.** *Flores-Villar v. United States*, 130 S. Ct. ___ (cert. granted Mar. 22, 2010); decision below at 536 F.3d 990 (9th Cir. 2008). Petitioner was arrested by border patrol in San Diego as he was waiting for a bus. Although Petitioner was born in Tijuana, Mexico, his father, Ruben Trinidad Flores-Villar, is a United States citizen and has been since birth. Petitioner’s father also resided in the United States for at least ten years prior to Petitioner’s birth. However, at the time Petitioner was born, his father was only sixteen years old. When Petitioner was only two months old, his father and his paternal grandmother (who is also a United States citizen since birth) brought him to the United States in order to receive medical treatment at University Hospital in San Diego. Shortly thereafter, University Hospital sent a letter to the border authorities requesting a permit for Petitioner to enter the United States. The letter was written on behalf of Petitioner’s father. At the time of his release from the hospital, Petitioner’s biological mother signed a form authorizing him to be released to his paternal grandmother for adoption planning. Petitioner grew up in the San Diego area with his father and his paternal grandmother and attended San Diego area schools. In fact, Petitioner had almost no contact with his biological mother. Although Ruben Trinidad Flores-Villar is not listed on Petitioner’s birth certificate, he formally recognized him as his son by filing an acknowledgment of paternity with the civil registry in Tijuana, Mexico in 1985, when Petitioner was eleven years old. Petitioner’s father also claimed Petitioner as his son on his income taxes. In 2006, Petitioner filed an N-600 application seeking a Certificate of Citizenship, but it was denied because his father was only 16 at Petitioner’s birth, so he could not meet the requirement that he resided in the U.S. for five years after the age of 14. The district judge in the criminal case granted the government’s motion *in limine*, preventing Petitioner from proving derivative citizenship, to which Petitioner objected on Equal Protection grounds. Petitioner argued that the former versions of 8 U.S.C. §§ 1401 and 1409 violated the guarantee of Equal Protection contained in the Due Process Clause of the Fifth Amendment because they imposed substantial residence burdens on the fathers of out-of-wedlock

children born abroad as prerequisites to passing U.S. citizenship to the child while at the same time imposing only a minimal burden on similarly situated women. The prerequisites for men are so severe that it was impossible for Petitioner's father to qualify, yet Petitioner would be a citizen if his mother, not his father, had been a U.S. citizen. Petitioner was eventually convicted (on stipulated facts) of the section 1326 charge, and the court of appeals affirmed, relying primarily on the Supreme Court's decision in *Nguyen v. INS*, but that case approved distinctions that were biologically based: by delivering a child, a woman necessarily had strong evidence of parentage and at least an opportunity to form a relationship with the child. By requiring the father to take a formal act prior to the child's 18th birthday, the statutory scheme provided the evidence and opportunity that biology had guaranteed the mother. The residence requirements posed by the instant scheme have no biological basis: there is no reason to believe that mothers are more adept at forming ties to the United States than are fathers. Question presented: Whether the Court's decision in *Nguyen v. Immigration and Naturalization Service* (2001) permits gender discrimination that has no biological basis?

X. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2241, 2254 AND 2255

A. War on Terror.

1. **Court's Authority to Release Cleared GTMO Detainees.** *Kiyemba v. Obama*, 130 S. Ct. ____ (Mar. 1, 2010). Question presented (but not resolved): Whether a federal court exercising its habeas jurisdiction, as confirmed by *Boumediene v. Bush*, 553 U.S. ____, 128 S. Ct. 2229 (2008), has no power to order the release of prisoners held by the Executive for seven years, where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy. The Court determined that there had been changed circumstances and vacated the decision below for the lower court to rule on the changes first: "[E]ach of the detainees at issue in this case has received at least one offer of resettlement in another country. Most of the detainees have accepted an offer of resettlement; five detainees, however, have rejected two such offers and are still being held at Guantanamo Bay. This change in the underlying facts may affect the legal issues presented. No court has yet ruled in this case in light of the new facts, and we decline to be the first to do so. *See, e.g., Cutter v. Wilkinson*, 544 U. S. 709, 718, n. 7 (2005) ("[W]e are a court of review, not of first view").

B. Timeliness of Filing Federal Petition.

1. **Successful Habeas Does Not Count.** *Magwood v. Patterson*, 130 S. Ct. ____ (June 24, 2010). When a criminal defendant succeeds in having his original sentence overturned, a later habeas petition challenging his new sentence should be treated as a first petition (not as a "second or successive" petition), even if it raises grounds that could have (but were not) made against the

original sentence. Justice Thomas wrote on behalf of the majority (joined by Justices Stevens, Scalia, Breyer, and Sotomayor), explaining that under the text of the federal habeas statute, when a prisoner is resentenced and appeals the new sentence, he is challenging a different judgment than was challenged in his prior habeas petition. Justice Kennedy dissented (joined by the Chief Justice and Justices Ginsburg and Alito).

2. **Equitable Tolling of AEDPA Limitation Period Due to Misconduct of Counsel.** *Holland v. Florida*, 130 S. Ct. ___ (June 14, 2010). In a 7-2 vote, with Justice Breyer writing for the majority, the Court reversed the Eleventh Circuit's decision that the petitioner's case did not constitute "extraordinary circumstances" for purposes of equitable tolling under the AEDPA. This was not a claim of "garden variety" attorney negligence, but attorney misconduct. In this case, the attorney missed the filing deadline and failed to communicate, to put it briefly. The majority rejected the district court's finding that the petitioner had not acted diligently, as the record showed that he had diligently pursued his rights by writing his attorney, providing research, repeatedly asking that the attorney be removed from his case, and finally filing his own federal habeas petition on the day he found out the filing period had expired. It also rejected the Eleventh Circuit's rigid per se rule for "extraordinary circumstances," which it found to be difficult to reconcile with general equitable principles and because it fails to recognize that sometimes an attorneys unprofessional conduct can be so egregious that it constitutes extraordinary circumstances warranting equitable tolling. Because the Eleventh Circuit had relied on an erroneous test, the Court remanded the case for further proceedings. Justice Alito filed an opinion concurring in part and concurring in the judgment. Justices Scalia filed a dissenting opinion, joined by Justice Thomas except Part I. [Summary by Jennifer Coffin].
3. **Tolling AEDPA Time with Sentence-Reduction Motion.** *Wall v. Kholi*, 130 S. Ct. ___ (cert granted May 17, 2010); decision below at 582 F.3d 147 (1st Cir. 2009). Kholi was convicted in 1993 of ten counts of sexual assault for molesting his stepdaughters. He was sentenced to six concurrent life sentences, consecutive to four concurrent life sentences. The Rhode Island Supreme Court affirmed his conviction in 1996. Rather than seek review on rehearing or a cert petition to the Supreme Court, Kholi filed a motion to reduce his sentence in the state trial court, as permitted by a state rule of criminal procedure. The trial court denied the motion in 1996 and the denial was affirmed by the state supreme court in 1998. Between the time he filed the motion for sentence reduction and the time it was finally ruled upon by the state supreme court, in 1997 Kholi filed a state motion for postconviction relief; it was denied by the trial court in 2003 and affirmed by the state supreme court in 2006. Nearly nine months later, in 2007, Kholi filed a federal habeas corpus petition. Question presented: Does a discretionary motion for reduction of sentence qualify as an "application for State post-

conviction or other collateral review” under 28 U.S.C. § 2244(d)(2), thereby tolling the time for filing a federal habeas corpus petition? Circuits are split on this question, with the First and Tenth circuits holding that such a motion does toll time, while the Third, Fourth and Eleventh circuits hold that such a motion does not toll time.

4. **Adequacy of Indeterminate Time Limit as State Procedural Bar.** *Walker v. Martin*, 130 S. Ct. ___ (cert. granted June 21, 2010); decision below unpublished. California does not have a specific time limit for collaterally attacking a conviction. Under California state law, a prisoner may be barred from collaterally attacking his conviction when the prisoner “substantially delayed” filing his habeas petition. The Ninth Circuit held that California’s undefined standard of “substantial delay” – used to evaluate the timeliness of a non-capital habeas corpus petition – is so vague that it is inevitably applied in a fundamentally inconsistent manner and is therefore inadequate to serve as a procedural bar to federal review, and that the state failed to prove a consistent application of the rule in other cases. The state petitioned for cert, asking whether, in federal habeas corpus proceedings, such a state law is “inadequate” to support a procedural bar.

- C. **Default, Dignity of Court Proceedings, and the GVR.** *Wellons v. Hall*, 130 S. Ct. 727 (2010) (per curiam). Wellons’ capital rape and murder prosecution looked typical, but events occurred behind the scenes that were unknown to the defense until after trial. There were unreported *ex parte* contacts between jurors and the judge and bailiff; a reunion was planned; and either during trial or immediately following the penalty phase, some jurors gave gifts – the judge received a chocolate shaped as a penis and the bailiff received a chocolate shaped as female breasts. Reasons for the gifts are unknown. Wellons tried in vain to raise the issue on direct appeal, but the record was trial silent about it. His efforts at post-conviction relief were stifled because the courts held the issue was decided on direct appeal. His federal habeas claim was rejected as procedurally barred, a ruling upheld by the Eleventh Circuit. A per curiam Supreme Court granted cert, vacated the decision, and remanded for reconsideration (GVR) in light of *Cone v. Bell*, 556 U.S. ___ (2009), which holds that federal habeas review is permitted when a state court declines to address the merits of a claim on the incorrect ground it has already done so. Four justices dissented. Justices Scalia and Thomas contend that no GVR is necessary or appropriate since the *Cone* portion of the Eleventh Circuit’s decision is an inconsequential imperfection. Justice Alito and the Chief Justice argued that a GVR should only be used where recent authority, not considered below, has developed. Here, *Cone* was decided before the Eleventh Circuit ruled and was considered by it. If the consideration was wrong, the dissenters argue, the case should not be decided by a GVR.

D. Deference to State Court Determinations.

1. **Unreasonableness of State Court Decision.** *Wood v. Allen*, 130 S. Ct. ____ (Jan. 20, 2010). The Court granted cert in this case to determine the interplay of two competing provisions of AEDPA. Under § 2254(d)(2), a federal court may grant habeas relief if a state prisoner’s claim was adjudicated on the merits and resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented. But, under §2254(e)(1), a determination of a factual issue made by a state court is presumed to be correct, and a petitioner has the burden of rebutting the presumption by clear and convincing evidence. Wood argued that his attorneys had been ineffective for failing to pursue and present as part of his capital defense mitigating evidence relating to his borderline intellectual functioning and IQ; these claims were rejected by the Alabama courts, which determined that counsels’ actions were strategic, not negligent. Rather than address the conflicting statutory provisions, the Court held that Wood could not prevail under either provision. In a 7-2 decision written by Justice Sotomayor, the Court held that Alabama’s determination was reasonable even under Wood’s reading of § 2254(d)(2), so there was no need to address the relationship of § 2254(e)(1). Justice Stevens (joined by Justice Kennedy) dissented, writing that a decision cannot be characterized as “strategic” unless it is a conscious choice between to legitimate and rational alternatives. Sharing the view of Eleventh Circuit Judge Barkett, who dissented below, Justice Stevens found counsels’ decision to abandon an investigation into mitigating evidence was obviously unreasonable, and the decision itself is highly persuasive evidence that counsel did not have any strategy in mind when the decision was made. After all, in post-conviction proceedings it was established that the overlooked evidence showed Wood was “educable mentally retarded,” and had the very kind of significant mental deficits that are recognized as inherently mitigating.” *Tennard v. Dretke*, 542 U.S. 274, 287 (2004).
2. **Too Much Deference.** *Jefferson v. Upton*, 130 S. Ct. ____ (May 24, 2010) (per curiam). Jefferson, who had been sentenced to death, claimed in both state and federal courts that his lawyers were constitutionally inadequate because they failed to investigate a traumatic head injury that he suffered as a child. The state court rejected that claim after making a finding that the attorneys were advised by an expert that such investigation was unnecessary. Under the governing federal statute, that factual finding is presumed correct unless any one of eight exceptions applies. 28 U.S.C. §§ 2254(d)(1)–(8) (1994). But the Eleventh Circuit considered only one of those exceptions (specifically §2254(d)(8)). And on that basis, it considered itself “duty-bound” to accept the state court’s finding, and rejected Jefferson’s claim. The Supreme Court vacated that ruling and remanded for reconsideration because the Eleventh Circuit’s decision did not fully consider several remaining potentially applicable exceptions.

3. **Adequacy of State Procedural Bar.** *Beard v. Kindler*, 130 S. Ct. 612 (2009). After murdering a witness against him and receiving a sentence of death, respondent broke out of prison, twice. Prior to his recapture in Canada years later, the trial court exercised its discretion under state forfeiture law to dismiss respondent's post-verdict motions, resulting in default of most appellate claims. On federal habeas corpus review, the court of appeals refused to honor the state court's procedural bar, ruling that, because "the state court . . . had discretion" in applying the rule, it was not "firmly established" and was therefore "inadequate." The Supreme Court reversed. Chief Justice Roberts, writing on behalf of the Court, held that a state procedural rule is not automatically inadequate under the adequate state ground doctrine—and therefore unenforceable on federal habeas review—because the state rule is discretionary rather than mandatory. Justices Kennedy and Thomas joined in a concurring opinion. Justice Alito did not participate in this case.

4. **Fair Cross-Section Jury Venires.** *Berghuis v. Smith*, 130 S. Ct. ____ (Mar. 30, 2010). In *Duren v. Missouri*, the Supreme Court established a three-prong standard for determining whether a defendant was able to demonstrate a prima facie violation of the Sixth Amendment right to have a jury drawn from a fair cross section of the community: (1) the excluded group is "distinctive"; (2) representation of this group on jury venires is not fair and reasonable in relation to the population of the community; (3) underrepresentation is due to a systemic exclusion of the group in the jury selection process.. The circuits have split on the issue about the proper test for determining what constitutes a fair and reasonable representation of a distinct group from the community within the venires (jury pool) under the second prong of *Duren*. The Michigan Supreme Court ultimately concluded that the disparities at issue here for African Americans (7.28% in the community vs. 6% in the venires during the time period measured) did not give rise to a constitutional violation. On federal habeas review, the court of appeals held that Michigan failed to apply clearly established Supreme Court precedent. The Supreme Court reversed because there is no clearly established Supreme Court precedent on the manner of computing the disparities. Writing for a unanimous Court, Justice Ginsburg noted that the circuits have adopted three different tests to determine a fair cross-section: (1) the absolute disparity test (subtracting the difference between the percentage of veniremen vs. the jury-eligible community); (2) the comparative disparity test (dividing the absolute disparity by the percentage in the jury eligible community); and (3) a statistical analysis using a standard deviation test. The Court found each of these tests imperfect, but useful, in given circumstances. Absent Supreme Court precedent requiring use of a given test—and no such precedent exists—AEDPA does not permit a federal habeas court to conclude that relief should be granted because a state court's determination is contrary to established Supreme Court precedent. Moreover, the Court held that Smith failed to demonstrate that the venire was "siphoned" of African Americans

because the venire was first used in local district courts, and, only after filling local juries, was the venire made available to the county-wide circuit court. The Court declined to discuss the Sixth Amendment directly, or to establish clear Supreme Court precedent on the second prong of *Duren*, resolving this matter only in the context of AEDPA's restrictive habeas rules. Justice Thomas concurred, noting that he is willing to reconsider (if asked) whether the fair cross-section requirement is really required by the Sixth Amendment.

5. **Double Jeopardy.** *Renico v. Lett*, 130 S. Ct. ___ (May 3, 2010). From jury selection to jury instructions in a Michigan court, Lett's first trial for first-degree murder took less than nine hours. During approximately four hours of deliberations, the jury sent the trial court seven notes, including one asking what would happen if the jury could not agree. The judge called the jury and the attorneys into the courtroom and questioned the foreperson, who seemed to say that the jury was unable to reach a unanimous verdict. The judge then declared a mistrial, dismissed the jury, and scheduled a new trial, without further clarification. After his conviction at a second trial, Lett argued that the original mistrial was declared without manifest necessity and his second trial was prohibited by double jeopardy. Michigan courts rejected his double jeopardy argument, but in federal habeas corpus proceedings the Sixth Circuit held that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent. The Supreme Court reversed, holding that the Michigan court's decision was not an unreasonable application of clearly established federal law, as required for relief by AEDPA's deferential standard of review under 28 U.S.C. § 2254. The Court recognized that the trial judge "could have been more thorough before declaring a mistrial" by asking the foreperson additional questions, or allowing further deliberations, or consulting with the prosecution and defense counsel. However, the Supreme Court's Double Jeopardy precedent provides no "rigid formula" for when to declare a mistrial due to jury deadlock. Further, AEDPA only authorizes habeas relief when a decision is contrary to clearly established Federal Law. Consequently, the Court could not conclude that it was "unreasonable" for the Michigan state court to grant a mistrial.

- E. **Absence of Clear Binding Precedent—*Mills v. Maryland* and *IOC. Smith v. Spisak***, 130 S. Ct. 676 (2010). Ohio courts sentenced Spisak to death and denied his claims on direct appeal and collateral review. He filed a federal habeas petition claiming that, at his trial's penalty phase, (1) the instructions and verdict forms unconstitutionally required the jury to consider in mitigation only those factors that it unanimously found to be mitigating, *see Mills v. Maryland*, 486 U. S. 367, and (2) his counsel's inadequate closing argument deprived him of effective assistance of counsel, *see Strickland v. Washington*, 466 U. S. 668. The District Court denied the petition, but the Sixth Circuit accepted both arguments and ordered relief. The Supreme Court reversed, holding that 28 U.S.C. §2254(d)(1) barred the Sixth Circuit from reaching contrary decisions because (1) Ohio's upholding of the mitigation jury instructions and forms was not "contrary to, or . . . an unreasonable application of,

clearly established Federal law, as determined by [the Supreme] Court”; and (2) Ohio’s decision rejecting Spisak’s ineffective assistance-of-counsel claim was not “contrary to, or . . . an unreasonable application” of the law “clearly established” in *Strickland*, §2254(d)(1), and that there was no reasonable probability that a better closing argument would have made a significant difference.

F. Ineffectiveness of Counsel.

- 1. Failure to Investigate and Present Mitigation Evidence.** *Wong v. Belmontes*, 130 S. Ct. 383 (2009) (per curiam). In a per curiam decision, the Supreme Court reversed the Ninth Circuit’s grant of habeas relief to a death row inmate. Belmontes’ claim that counsel had been ineffective for failing to investigate and present sufficient mitigating evidence during the penalty phase of his trial had been rejected by the district court, but the court of appeals had reversed that decision. Siding with the district court, the Supreme Court agreed that counsel’s performance was constitutionally deficient, but the Court ruled that Belmontes failed to demonstrate that he suffered prejudice as a result of the error.
- 2. Erroneously Narrow Application of Prejudice Prong.** *Sears v. Upton*, 130 S. Ct. ___ (June 29, 2010) (per curiam). Georgia courts misapplied the “prejudice” prong of an ineffective assistance of counsel claim when they reasoned that because counsel presented “some” mitigation evidence at the penalty phase of Sears’ trial, they could not speculate as to how additional evidence, later uncovered, regarding Sears’ upbringing and mental handicaps, would have changed the outcome. The Court remanded the case to allow the Georgia courts to reweigh the new evidence.
- 3. Failure to Investigate and Present Mitigation Evidence.** *Porter v. McCollum*, 130 S. Ct. 447 (2009) (per curiam). Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man. His commanding officer’s moving description of those two battles was only a fraction of the mitigating evidence that his counsel failed to discover or present during the penalty phase of his trial in 1988. In federal postconviction proceedings, the district court held that Porter’s lawyer’s failure to adduce that evidence violated his Sixth Amendment right to counsel and granted his application for a writ of habeas corpus. The Eleventh Circuit reversed, on the ground that the Florida Supreme Court’s determination that Porter was not prejudiced by any deficient performance by his counsel was a reasonable application of *Strickland v. Washington*, 466 U. S. 668 (1984). The Supreme Court granted cert and reversed, reinstating the district court’s grant of habeas corpus, because, “[l]ike the District Court, we are persuaded that it was objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the

significant mitigation evidence that Porter’s counsel neither uncovered nor presented.”

4. **Relevance of ABA Guidelines to Legal Competency.** *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (per curiam). Van Hook was convicted of murder in 1986. The Sixth Circuit granted habeas relief because it held that Van Hook did not receive effective assistance of counsel in the capital phase of his trial. In making this determination, it relied, in part, on detailed guidelines published by the American Bar Association in 2003. Those detailed guidelines replaced much broader ABA principles in effect at the time of Van Hook’s trial. Together, the guidelines have often been used to measure competency of counsel. The Supreme Court granted cert and reversed, noting that the detailed 2003 ABA requirements for death penalty counsel were not in existence when the trial took place, and questioning adherence to the detailed ABA requirements in determining if counsel’s conduct was inadequate under the *Strickland* standard for legal competency. Justice Alito concurred, noting that the ABA is a private bar of limited membership and he concluded that “I see no reason why the ABA Guidelines should be given a privileged position in making that determination.”

5. **Failure to Investigate Blood Evidence; Deference Due to Summary State Court Rulings.** *Harrington v. Richter*, 130 S. Ct. ___ (cert. granted Feb. 22, 2010); decision below at 578 F.3d 944 (9th Cir. 2009) (en banc). Richter and his codefendant were convicted of murder, attempted murder, burglary, and robbery. At trial, the prosecution’s evidence showed that, in stealing a safe from a residence, the defendants shot and injured one person and shot and killed another as he lay asleep on a couch in the living room. In his defense, Richter testified that he and his codefendant went to the residence, around 4 a.m., for innocent reasons, and that the codefendant entered the house while Richter waited in his pickup truck. Upon hearing gunshots, Richter said, he rushed into the house. There, he saw one victim unconscious on the bed, and the other lying in a pool of blood on the floor; his codefendant was holding a gun and screaming that “they tried to kill” him. Richter’s lawyer argued one victim had shot at the codefendant, missed, and instead shot the other victim; the codefendant then fired in self-defense then, hitting both victims. In later habeas corpus petitions, Richter claimed that his lawyer rendered ineffective assistance by not investigating and producing expert-opinion testimony that the pool of blood on the floor – photographed but never tested by anybody – theoretically might have contained blood from the victim police found on the couch; such evidence would have corroborated Richter’s testimony that he saw the victim lying on the floor, so that it would become less likely that he had been shot in cold blood, and more likely that he had been shot in the “crossfire.” The California Supreme Court summarily rejected the claim. The federal district court and a panel of the Ninth Circuit Court of Appeals also rejected respondent’s ineffective-counsel claim. The en banc court of appeals reversed, 7-4, finding that counsel’s failure to pursue to blood testing and

expert testimony was ineffective assistance of counsel. California petitioned for cert, raising the following issue: In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. section 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt? In addition to the question presented, the parties were directed by the Court to brief and argue the following additional question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?"

- 6. Failure to File Suppression Motion; Standards for Granting Habeas.** *Belleque v. Moore*, 130 S. Ct. ___ (cert. granted Mar. 22, 2010); decision below at 574 F.3d 1092 (9th Cir. 2009). Randy Moore and two others assaulted Kenneth Rogers, bound him with duct tape, forced him into the trunk of a car, drove him to a remote location and killed him with a single shot to the head. Before being charged, Moore confessed to his brother and friend, then to police, but he claimed the shooting was accidental. In addition, he consistently admitted to his attorney that he shot Rogers during a kidnaping and assault. Moore was charged with felony murder, kidnaping and assault, but his defense counsel negotiated a no contest plea to an information charging one count of murder with a firearm. He was sentenced to the mandatory minimum 300-month sentence with lifetime supervised release. In collateral review, Moore alleged that his counsel had been ineffective for failing to move to suppress his confession to police. In response, defense counsel told the state court that he did not move to suppress that confession because the state still had two other confessions to prove its case. Oregon courts denied Moore's claims. On federal habeas, the district court ruled that Moore's confession was involuntary, but that his counsel's inaction was reasonable; moreover, Moore was not prejudiced because he would have pleaded no contest regardless. The Ninth Circuit reversed, ruling that Moore's counsel acted unreasonably and that Moore was prejudiced by ineffective counsel. In so ruling, the Ninth Circuit held that *Arizona v. Fulminante* is the "clearly established" federal law to review IAC claims based on failure to move to suppress a confession. Questions presented: "(1) The Supreme Court established in *Hill v. Lockhart* the standard for assessing, in a collateral challenge to a conviction that was based on a guilty or no-contest plea, whether an attorney's deficient performance requires reversal of a conviction. In *Arizona v. Fulminante*—a direct appellate review case—the Court reviewed all the evidence presented at trial and held that the erroneous admission of a coerced confession at the trial was not harmless. (a) If a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no contest plea, does the

Fulminante standard apply, even though no record of a trial is available for review? (b) Even if the *Fulminante* standard applies in that context, is it “clearly established Federal law” for purposes of 28 U.S.C. § 2254(d)(1)? (2) In Moore’s underlying criminal case, he confessed to police that he personally shot the victim. He also confessed to two other people, and he ultimately pleaded no contest to murder. In his collateral challenge to his conviction, he alleged that his attorney should have moved to suppress the confession to police, but he offered no evidence that he would have insisted on going to trial had counsel done so. Did the Ninth Circuit err by granting federal habeas relief on Moore’s ineffective-assistance-of-counsel claim?”

7. **Failure to Present Issue to State Court and Ineffectiveness of Counsel.** *Cullen v. Pinholster*, 130 S. Ct. ___ (cert. granted June 14, 2010); decision below at 590 F.3d 651 (9th Cir. 2010). Questions presented: (1) Whether a federal court may reject a state-court adjudication of a petitioner’s claim as “unreasonable” under 28 U.S.C. § 2254, and thus grant habeas corpus relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not; (2) Whether a federal court may grant relief under 28 U.S.C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with petitioner and his mother, did not seek out a different psychiatrist and different family members.

G. DNA in Habeas and 1983 Proceedings

1. **Impact of New DNA Evidence on Habeas Claim of Insufficiency of Evidence at Trial.** *McDaniel v. Brown*, 130 S. Ct. 665 (2010) (per curiam). In *Jackson v. Virginia*, 443 U. S. 307, 324 (1979), the Supreme Court held that a state prisoner is entitled to habeas corpus relief if a federal judge finds that “upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” A Nevada jury convicted respondent of rape; the evidence presented included DNA evidence matching respondent’s DNA profile. Nevertheless, relying upon a report prepared by a DNA expert over 11 years after the trial (the “Mueller Report”), the federal district court applied the *Jackson* standard and granted the writ. The Mueller Report questioned the statistical assumptions used at trial. A divided Court of Appeals affirmed. By the time the case was argued in the Supreme Court, both sides agreed that *Jackson* was misapplied. Rather than dismiss as moot, the Supreme Court reversed, holding that the lower courts misapplied *Jackson* because the trial record includes both the DNA evidence and other convincing evidence of guilt. Analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson*, as limited under 28 U.S.C. § 2254(d)(1), does not permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial. Moreover, the Court provided some concrete guidance

for applying (or not applying) new DNA evidence in habeas proceedings:

Even if the Court of Appeals could have considered it, the Mueller Report provided no warrant for entirely excluding the DNA evidence or Romero's testimony from that court's consideration. The Report did not contest that the DNA evidence matched Troy. That DNA evidence remains powerful inculpatory evidence even though the State concedes Romero overstated its probative value by failing to dispel the prosecutor's fallacy. And Mueller's claim that Romero used faulty assumptions and underestimated the probability of a DNA match between brothers indicates that two experts do not agree with one another, not that Romero's estimates were unreliable. Mueller's opinion that "the chance that among four brothers one or more would match is 1 in 66," App. 1583, is substantially different from Romero's estimate of a 1 in 6,500 chance that one brother would match. But even if Romero's estimate is wrong, our confidence in the jury verdict is not undermined. First, the estimate that is more pertinent to this case is 1 in 132—the probability of a brothers lived in Utah. Second, although Jane Doe mentioned Trent as her assailant, and Travis lived in a nearby trailer, the evidence indicates that both (unlike Troy) were sober and went to bed early on the night of the crime. Even under Mueller's odds, a rational jury could consider the DNA evidence to be powerful evidence of guilt.

Furthermore, the Court of Appeals' discussion of the non-DNA evidence departed from the deferential review that *Jackson* and §2254(d)(1) demand. A federal habeas court can only set aside a state-court decision as "an unreasonable application of . . . clearly established Federal law," §2254(d)(1), if the state court's application of that law is "objectively unreasonable," *Williams v. Taylor*, 529 U.S. 362, 409 (2000). And *Jackson* requires a reviewing court to review the evidence "in the light most favorable to the prosecution." Expressed more fully, this means a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.*, at 326; *see also Schlup v. Delo*, 513 U. S. 298, 330 (1995) ("The *Jackson* standard . . . looks to whether there is sufficient evidence which, if credited, could support the conviction"). The Court of Appeals acknowledged that it must review the evidence in the light most favorable to the prosecution, but the court's recitation of inconsistencies in the testimony shows it failed to do that.

2. **Seeking Access to DNA in § 1983 Proceedings.** *Skinner v. Switzer*, 130 S. Ct. ___ (cert. granted May 24, 2010); decision below at 2010 WL 338018 (5th Cir. 2010). For ten years, Skinner has sought access to DNA testing that could prove him innocent of the murders that landed him on Death Row. After the Texas courts arbitrarily turned back his diligent attempts to take advantage of state statutes affording such relief, he sued in federal court under 42 U.S.C. § 1983 to vindicate his due process right to “fundamental fairness in [the] operation” of Texas’s scheme. The district court dismissed Skinner’s § 1983 suit solely on the ground that his claim sounded only in habeas corpus, and the Fifth Circuit summarily affirmed. The question presented is: May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

H. **Appellate Review of Habeas Grants.** *Corcoran v. Levenhagen*, 130 S. Ct. 8 (2009) (per curiam). Corcoran was convicted of murder and sentenced to death. In federal habeas, he raised a number of grounds, including that his sentence violated the Sixth Amendment. The district court granted a writ on that ground, ordering the state to resentence him to a penalty other than death. The Seventh Circuit reversed, then without mentioning Corcoran’s other grounds, instructed the district court to deny the writ, permitting Indiana to reinstate the death penalty. The Supreme Court granted cert and reversed, holding that the Seventh Circuit should have permitted the district court to consider the remaining unresolved challenges, or it should have explained why consideration of the other grounds was unnecessary.

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