

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

**CRIMINAL CASES DECIDED AND GRANTED REVIEW
FOR THE OCTOBER 2008-09 TERMS
THRU JANUARY 25, 2010**

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I. FIRST APPEARANCE, RIGHT TO COUNSEL, AND CONFESSIONS

A. Confessions

- 1. Suppression Due to Delay in Appearance Before Magistrate.** *Corley v. United States*, 129 S. Ct. 1558 (2009). Title 18 U.S.C. § 3501 – read together with Fed. R. Crim. P. Rule 5(a), *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957) – requires that a confession taken more than six hours after arrest and before presentment be suppressed if there was unreasonable or unnecessary delay in bringing the defendant before the magistrate judge. Section 3501 modified *McNabb-Mallory* but did not supplant it. Johnnie Corley was convicted of bank robbery. The only evidence introduced at trial identifying Mr. Corley as a participant in the robbery consisted of two statements law enforcement obtained from him more than six hours after his arrest, and before he was brought to a federal magistrate. Mr. Corley did not see the magistrate until nearly 30 hours after his arrest. The sequence of events began when Corley was arrested at 8:00 a.m. on September 17, 2003, after federal and state law enforcement identified him as a suspect in the bank robbery. He was arrested on an outstanding bench warrant from state court. During the arrest, Corley resisted and had a physical altercation with an FBI agent. As a result, he was placed under federal arrest for assault on a federal officer and taken to a local police station for processing. At 11:45 a.m., he was taken from the police station to a hospital in Philadelphia, where he was admitted at 12:12 p.m. He received five sutures and was discharged at 3:20 p.m. Corley was next brought to the FBI office in Philadelphia, arriving at 3:30 p.m. Although the FBI offices are located in the same building as the federal magistrate judges' courtrooms and chambers, he was not presented to a federal magistrate judge. Instead, he was kept in the FBI offices for interrogation regarding the bank robbery. By this point, 7½ hours had already elapsed since his arrest. The only apparent reason for the delay in presentment following the hospital discharge was the agents' desire to question Corley. At 5:07 p.m. – still without being presented to a magistrate judge, and after being informed he was under arrest for assault on a federal officer and under investigation for bank robbery – Corley signed a waiver of rights form. He confessed shortly

afterwards, but when asked to put his confession in writing, said that he was tired and asked to continue the following day. The interrogation resumed at 10:30 a.m. on September 18. Corley signed a written confession soon afterwards. He finally appeared before a federal magistrate judge to be informed of his rights at 1:30 p.m. – 29 ½ hours after his arrest. The district court judge found that both the oral and written statements were voluntary and denied a motion to suppress the statements. The district court also found that the oral statement was made within six hours of the arrest. On appeal, the majority decision of the Third Circuit did not dispute that both statements were outside the six-hour period and that the district court erred in this regard, but ruled that governing circuit precedent allowed admission of the statements because they were given voluntarily. The Supreme Court reversed and remanded: “The question here is whether Congress intended 18 U.S.C. § 3501 to discard, or merely to narrow, the rule in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), under which an arrested person’s confession is inadmissible if given after an unreasonable delay in bringing him before a judge. We hold that Congress meant to limit, not eliminate, *McNabb-Mallory*.”

2. **Police Interrogation in Absence of Counsel When Defendant Has Not Affirmatively Accepted Appointment of Counsel.** *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009). An inculpatory statement given by a defendant to police after the court ordered the appointment of counsel may be introduced at trial as evidence against him. In so holding, the Court overruled *Michigan v. Jackson*, which presumed that a waiver of the right to counsel was invalid once counsel was appointed at arraignment, and did not require the defendant to invoke the right to counsel. The Court explained that the protections of *Miranda*, *Edwards* and *Minnick v. Mississippi*, sufficed to protect defendants against police badgering that induced them to waive the right to counsel. Under *Miranda*, the suspect must be advised of his right to counsel. Under *Edwards*, once a defendant has invoked the right to counsel, interrogation must stop. Under *Minnick*, no subsequent interrogation may take place until counsel is present. These protections meant that *Michigan v. Jackson*’s additional prophylactic layer would not be justified by the additional costs of invalidating confessions and letting criminals go free. The Court noted that, on remand, *Montejo* would be free to argue that he had made a clear assertion of the right to counsel prior to interrogation, and that the subsequent interrogation therefore violated *Edwards v. Arizona*. *Montejo* would also be free to argue that any waiver was involuntary because it was based on misrepresentations by police as to whether he was appointed a lawyer.

3. **Right to be Advised of Right to Counsel.** *Florida v. Powell*, 129 S. Ct. 2827 (cert. granted June 22, 2009); decision below at 998 So.2d 530 (Fla. 2009). Questions presented: (1) Whether the decision of the Florida Supreme

Court holding that a suspect must be expressly advised of his right to counsel during custodial interrogation, conflicts with *Miranda v. Arizona* and decisions of federal and state appellate courts; (2) And if so, does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (a) the right to talk to a lawyer “before questioning” and (b) the “right to use” the right to consult a lawyer “at any time” during questioning?

4. **Temporal Limits to Rule of *Edwards v. Arizona*.** *Maryland v. Shatzer*, 129 S. Ct. 1043 (cert. granted Jan. 26, 2009); decision below at 954 A.2d 1118 (2008). Issue presented: Whether *Edwards v. Arizona* (1981), which bars police from initiating questioning with criminal suspects who have invoked their right to counsel, applies to an interrogation that takes place 2-1/2 years later.

5. **Right of Police to Continue Interview Where *Miranda* Rights Understood, But Neither Invoked Nor Waived.** *Berghuis v. Thompkins*, 130 S. Ct. 48 (cert. granted Sept. 30, 2009); decision below at 547 F.3d 572 (6th Cir. 2008). Questions presented: (1) Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them. (2) Whether the Court of Appeals failed to afford the State court the deference it was entitled to under 28 U.S.C. §2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkins’ guilt allowed the State court to reasonably reject the claim.

6. **Admissibility to Impeach Witness of Statement Made in Absence of Knowing and Voluntary Waiver.** *Kansas v. Ventris*, 129 S. Ct. 1841 (2009). Ventris was charged with murder and other crimes. The state planted another inmate in his cell as a “human listening device,” even though Ventris’ right to counsel had attached. Predictably, Ventris made incriminating statements to his cellmate. The state later conceded that it violated Ventris’ Sixth Amendment right to counsel when it surreptitiously planted the snitch in Ventris’ jail cell. The state was prohibited from using the confession in its case-in-chief, but was allowed to use it to impeach Ventris’ own testimony at trial. Kansas held that such use was impermissible under the federal exclusionary rule and conceded that it had violated Ventris’ Sixth Amendment rights. The Supreme Court held 7-2 that this violation did not require exclusion of the informant’s testimony when offered for purposes of impeachment, reasoning that the Sixth Amendment violation occurred when the uncounseled interrogation was conducted, not at trial. The question whether to exclude the statement at trial was a separate question, involving

the “remedy” for the violation. The Court concluded that the interest in exclusion was outweighed by the need to prevent perjury and the integrity of the trial process. The Court found little appreciable police deterrence would occur as a result of exclusion because police, if they opted to obtain uncounseled statements, could not likely anticipate that the defendant would testify at trial, and would testify inconsistently with the prior uncounseled statement. Ominously, the Court refused to confirm Kansas’s concession of a Sixth Amendment violation, opening a wide door in future cases for the state or federal government to argue that no constitutional violation occurs where police obtain a voluntary statement by way of a jailhouse snitch.

II. SEARCH & SEIZURE

A. Vehicles Stops

- 1. Search of Unoccupied Vehicle Following Arrest.** *Arizona v. Gant*, 129 S. Ct. 1710 (2009). Police officers went to a house suspected of being used for narcotics activity. One officer knocked on the door, and Rodney Gant answered the officer’s knock on the door. The officers asked to speak with the homeowner, but Gant told them that the owner was not at home and would not return until later that day. Gant gave the officers information about his identity. The officers left and ran a records check on Gant and discovered that his license was suspended and that he had an outstanding warrant for driving with a suspended license. The officers returned to the house that evening, finding two individuals outside the house. After investigation, they were arrested. While the officers were handcuffing the individuals and placing them in patrol cars, Gant drove up in his car and parked in the driveway. One officer summoned Gant as he got out of his car, and Gant walked approximately 8-12 feet toward the officer. The officer told Gant that he was under arrest for driving with a suspended license, handcuffed him, and placed him in a patrol car. Officers then searched the passenger compartment of Gant’s car and found a plastic baggie containing cocaine. Gant was charged with one count of possession of a narcotic drug for sale and one count of possession of drug paraphernalia. The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses. The state Supreme Court reversed, distinguishing *New York v. Belton*, 453 U. S. 454—which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent occupant's lawful arrest—on the ground that it concerned the scope of a search incident to arrest but did not answer the question whether officers may conduct such a search once the scene has been secured. Because *Chimel v. California*, 395 U.S. 752, requires that a search incident to arrest be justified by either (a) the interest in officer safety or (b) the interest in preserving evidence, and the circumstances of Gant’s arrest implicated neither of those

interests, the state Supreme Court found the search unreasonable. The U.S. Supreme Court affirmed, holding that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. Warrantless searches "are per se unreasonable," "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U. S. 347 . The exception for a search incident to a lawful arrest applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." *Chimel*, 395 U. S., at 763. The Court rejected a broad reading of *Belton* that would permit a vehicle search incident to a recent occupant's arrest even if there were no possibility the arrestee could gain access to the vehicle at the time of the search. The safety and evidentiary justifications underlying *Chimel*'s exception authorize a vehicle search only when there is a reasonable possibility of such access. Although it does not follow from *Chimel*, circumstances unique to the automobile context also justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton v. United States*, 541 U. S. 615 (Scalia, J., concurring in judgment). Neither *Chimel*'s reaching-distance rule nor *Thornton*'s allowance for evidentiary searches authorized the search in this case. In contrast to *Belton*, which involved a single officer confronted with four unsecured arrestees, five officers handcuffed and secured Gant and the two other suspects in separate patrol cars before the search began. Gant clearly could not have accessed his car at the time of the search. An evidentiary basis for the search was also lacking. *Belton* and *Thornton* were both arrested for drug offenses, but Gant was arrested for driving with a suspended license—an offense for which police could not reasonably expect to find evidence in *Gant*'s car. The search in this case was therefore unreasonable. In the end, the Court was unpersuaded by the State's argument that an expansive reading of *Belton* correctly balances law enforcement interests with an arrestee's limited privacy interest in his vehicle. The Court found that the state seriously undervalues the privacy interests at stake, and it exaggerates both the clarity provided by a broad reading of *Belton* and its importance to law enforcement interests. A narrow reading of *Belton* and *Thornton*, together with the Court's other Fourth Amendment decisions, e.g., *Michigan v. Long*, 463 U. S. 103 , and *United States v. Ross*, 456 U. S. 798, permit an officer to search a vehicle when safety or evidentiary concerns demand. Finally, the Court held that *stare decisis* does not require adherence to a broad reading of *Belton*, because 28 years of experience has proved that the assumption underpinning that case is unfounded, authorizing "myriad unconstitutional searches."

B. Strip Searches of Public School Students. *Safford Unified School District v. Redding*, 129 S. Ct. 2633 (2009). The Supreme Court held that the strip of a 13-year-

old girl did violate the Constitution but it was not clear that the violation was established at the time of this incident. The decision below, which had ruled in favor of the child, was affirmed in part, reversed in part, and remanded. Justice Souter, wrote for the 8-1 majority on the Fourth Amendment question and a 7-2 majority on the qualified immunity question. Justice Stevens filed a partial dissent joined by Justice Ginsburg. Justice Ginsburg filed an opinion concurring and dissenting in part. Justice Thomas filed an opinion concurring in part and dissenting in part.

C. 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. Through 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).

D. **Necessity and Timing Post-Seizure Forfeiture Hearing.** *Alvarez v. Smith*, 130 S. Ct. 576 (2009). Question presented: In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the “speedy trial” test employed in *United States v. \$8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972) or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)? **DISMISSED AS MOOT with instructions that the underlying judgment of the Court of Appeals be vacated, after the Supreme Court learned during oral argument that the underlying property disputes were resolved below, leaving only an abstract legal dispute.**

III. CRIMES

- A. **Constitutionality of Statute Criminalizing Depictions of Animal Cruelty.** *United States v. Stevens*, 129 S. Ct. 1984 (cert. granted Apr. 20, 2009); decision below at 533 F.3d 218 (3rd Cir. 2008). 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. Question presented: Whether 18 U.S.C. § 48 is facially invalid under the Free Speech Clause of the First Amendment. The court of appeals, en banc, reversed a conviction for depicting animal cruelty, finding the statute facially unconstitutional. It noted that the Supreme Court has never created a First Amendment exception for animal cruelty and the Court’s determination that child pornography is unprotected speech is not analogous..
- B. **Domestic Violence.** *United States v. Hayes*, 129 S. Ct. 1079 (2009). Following a conditional guilty plea, Hayes was convicted of possession of a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). Section 922(g)(9) makes it a crime for any person convicted of a “misdemeanor crime of domestic violence” to possess a firearm. He was sentenced to five years of probation, including six months of home detention with electronic monitoring. The court of appeals reversed, holding that the indictment must be dismissed because it failed to allege that Hayes’ state misdemeanor battery conviction was based on an offense that has, as an element, a domestic relationship between the offender and the victim. The Supreme Court reversed the court of appeals, holding that although domestic relationship is something that the government must prove beyond a reasonable doubt as part of its firearms possession prosecution under §922(g)(9), domestic relationship need not be a defining element of the predicate misdemeanor offense. Mr. Hayes’s predicate conviction was for battery on his common law wife. Although the domestic relationship was present, it was not an element of the battery offense under the applicable state law. The Supreme Court pointed out that the federal law was intended to close a loophole in the original act that allowed convicted domestic abusers to keep firearms since those convictions were typically misdemeanors.
- C. **Racketeering.** *Boyle v. United States*, 129 S. Ct. 2237 (2009). The Supreme Court held that an association-in-fact enterprise under RICO, 18 U.S.C. § 1962(c), must have a “structure,” but it need not be, as Boyle sought the jury to be instructed in his bank robberies case, “an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.” The “structure” contemplated by the RICO statute has three features: a purpose, relationships among the associates, and longevity sufficient to permit the associates to pursue the enterprise’s purpose. The

Court rejected Boyle's argument the structure required additional features, such as a hierarchical structure or a chain of command. The Court also rejected the argument that its construction would create a merger of the RICO § 1962(c) crime with other federal offenses, pointing out that, in relation to conspiracy, it demands "much more" than proof of a "brief" agreement.

- D. Aggravated Identity Theft.** *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009). The federal aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), prescribes a mandatory two-year term of imprisonment for any person who, "during and in relation to" certain other specified crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." Flores-Figueroa, a Mexican native, worked at a steel plant in East Moline, Ill. He was accused of using a phony Social Security card and a phony alien registration card. The two numbers on those cards had been assigned to someone else; he argued that the enhanced mandatory minimum sentence contained in § 1028A(a)(1) did not apply to him because he used the documents without knowing the numbers were actual numbers assigned to another person. He was convicted and sentenced to 75 months in prison, including a consecutive 24 month enhancement required 1029A(a)(1). The Eighth Circuit upheld the sentence, concluding that it was not necessary to show that Flores-Figueroa knew he was using another person's identifying information. In an opinion by Justice Breyer, the Supreme Court reversed, 9-0, holding that ordinary English grammar suggests that the term "knowingly" applies to all of the statutory elements. The Court rejected the government's focus on what the words *necessarily* imply (that is -- "John knowingly threw away the homework of his sister" does not necessarily imply that John knew the homework belonged to the sister) in favor of a test that looks at the words would *ordinarily* imply (that is -- that John knew whose homework it was). It then noted that in criminal law, courts typically apply the required *mens rea* to every element in the statute. The Court rejected the government's legislative history argument without commenting on whether the statutory language was ambiguous. It rejected the government's argument about the difficulty of proving such knowledge by reference to the "classic" identity theft case, which in the Court's opinion involves using someone's information to get access to their bank account or credit card. Finally, the Court found that "concerns about practical enforceability are insufficient to outweigh the clarity of the [statutory] text." Justice Scalia (joined by Justice Thomas) concurred in part and in the judgment, taking issue with the Court's statement that courts typically apply the *mens rea* to all elements of a criminal statute. He pointed out that he hasn't canvassed all the cases so didn't know if that was true and that he was not prepared to say that it *should* be true. He also disagreed with the Court's legislative history discussion: "[t]he statute's text is clear, and I would reverse the judgment of the Court of Appeals on that ground alone." Justice Alito also concurred in part and in the judgment, because he felt that the Court's point about ordinary English usage was overstated and that context was always the paramount indicator of meaning. He noted that the language used in criminal statutes is often formulated differently from ordinary speech. Justice Alito would start with a general presumption that the specified *mens rea* applies to all of

the elements of the offense, but would also recognize that there are instances where context may rebut the presumption. He would not join any part of the opinion that “may be read to adopt an inflexible rule of construction that can rarely be overcome by contextual features pointing to a contrary meaning.” The case resolves a circuit split, and overrules contrary precedent in the Fourth, Eighth, and Eleventh circuits. Its reasoning can also be used to renew challenges to other statutes in which courts have not applied the *mens rea* to all of the elements. Justice Alito’s concurrence offers the following examples: 18 U.S.C. § 2423(a)(knowingly transporting an individual under the age of 18 with the intent that the person engage in criminal sexual activity, where courts have not required proof that the defendant knew the person’s age); 21 U.S.C. § 861(a)(1)(knowingly enticing a person under the age of 18 to violate drug laws, where courts have not required proof that the defendant knew the person’s age); 8 U.S.C. § 1327 (knowingly assisting an alien who is ineligible to enter the U.S. because s/he has been convicted of an aggravated felony, where courts do not require proof that the defendant knew the alien had been convicted of an aggravated felony). [Adapted from summary by Sara Noonan].

E. Telephone Counts in Drug Cases. *Abuelhawa v. United States*, 129 S. Ct. 2102 (2009). Whether the use of a telephone to buy drugs for personal use “facilitates” the commission of a drug “felony,” in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller’s distribution of the drugs to him (a felony). The Court answered in the negative, holding that using a telephone to make a misdemeanor drug purchase does not “facilitat[e]” felony drug distribution in violation of §843(b). Stopping with the plain meaning of “facilitate” here would ignore the rule that because statutes are not read as a collection of isolated phrases, “[a] word in a statute may or may not extend to the outer limits of its definitional possibilities.” *Dolan v. Postal Service*, 546 U. S. 481. Here it does not.

F. Mail Fraud Law– Ripe for Challenge?

1. Justice Scalia Suggests the Challenge. *Sorich v. United States*, 129 S. Ct. 1308 (cert. denied Feb. 23, 2009). The Court was presented with a petition for writ of certiorari following a mail fraud conviction under 18 U.S.C. § 1346. Although the Court denied cert, Justice Scalia dissented, setting forth a roadmap of why § 1346 remains unclear and has been creating “chaos” in the lower courts. Twenty years ago, in *McNally v. United States*, 483 U.S. 350 (1987), the Court limited the reach of the mail fraud law, holding that, although “the mail fraud statute clearly protects property rights” it does not cover the “intangible right of the citizenry to good government.” Congress promptly amended the law with 28 words that said “the term ‘scheme or artifice to defraud’ includes . . . [depriving] another of the intangible right of honest services.” Justice Scalia notes that the lower courts all agree that some conduct is still not made illegal under the statute, but it is not clear exactly what conduct that is. Justice Scalia believes the law remains unclear and that

courts should not limit it with ad hoc decisions – Congress needs to write a clear law. As a result, Justice Scalia thinks the time is ripe to “squarely confront both the meaning and the constitutionality of § 1346. He peppers his dissent with a dissent from Justice Black: “Bad men, like good men, are entitled to be tried and sentenced in accordance with law.” *Green v. United States*, 129 U.S. 301, 309 (1961) (Black, J., dissenting). Counsel looking to preserve and present a fresh issue in mail fraud cases should try this approach.

2. **Conrad Black Takes the *Sorich* Bait, Challenging Mail Fraud Law.** *Black v. United States*, 129 S. Ct. 2379 (cert. granted May 18, 2009); decision below at 530 F.3d 596 (7th Cir. 2008). In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court held that the mail fraud statute could not be used to prosecute schemes to deprive the citizenry of the intangible right to good government. Congress responded in 1988 by enacting 18 U.S.C. § 1346, which expands the definition of a “scheme or artifice to defraud” under the mail and wire fraud statutes to encompass schemes that “deprive another of the intangible right of honest services.” As Justice Scalia noted in his dissent from cert in *Sorich* (see above), twenty years later, the courts of appeals are divided on the application of Section 1346 to purely private conduct. In this case, the Seventh Circuit disagreed with at least five other circuits and held that Section 1346 may be applied in a purely private setting irrespective of whether the defendant’s conduct risked any foreseeable economic harm to the putative victim. In the alternative, the Seventh Circuit ruled that the defendants forfeited their objection to the improper instructions by opposing the government’s bid to have the jury return a “special verdict,” a procedure not contemplated by the criminal rules and universally disfavored by other circuits as prejudicial to a defendant’s Sixth Amendment rights. Questions presented: (1) Whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged “scheme to defraud” did not contemplate economic or other property harm to the private party to whom honest services were owed; (2) Whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules. The government phrased the questions somewhat differently: (1) Whether petitioners are entitled to reversal of their mail fraud convictions because the district court did not instruct the jury that, to find them guilty under an honest-services theory, the jury had to find that their fraudulent scheme “reasonably contemplated identifiable economic harm” to their employer; and. (2) Whether, by opposing the government’s request for a special verdict that would have required separate findings on property-rights and honest-services mail fraud, petitioners forfeited their claim that their mail fraud convictions must be reversed because the honest services theory was legally invalid.

3. **Proof of Duty Owed by Public Official.** *Weyhrauch v. United States*, 129 S. Ct. 2863 (cert. granted June 29, 2009); decision below at 548 F.3d 1237

(9th Cir. 2008). 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.

4. **Enron Fraud.** *Skilling v. United States*, 130 S. Ct. 393 (cert. granted Oct. 13, 2009); decision below at 554 F.3d 529 (5th Cir. 2009). (1) Whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, and, if not, whether § 1346 is unconstitutionally vague. (2) When a presumption of jury prejudice arises because of the widespread community impact of the defendant's alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.

- G. **Aiding Terrorist Organization.** *Holder v. Humanitarian Law Project*. 130 S. Ct. 48 (cert. granted Sept. 30, 2009); decision below at 552 F.3d 916 (9th Cir. 2007). Question presented: Whether 18 U.S.C. 2339B(a)(1), which prohibits the knowing provision of "any * * * service, * * * training, [or] expert advice or assistance," 18 U.S.C. 2339A(b)(1), to a designated foreign terrorist organization, is unconstitutionally vague. The court of appeals held that the term "training" is unconstitutionally vague. The court considered it "highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for [humanitarian] aid, one is imparting a 'specific skill' or 'general knowledge.'" In addition, "[e]ven if persons of ordinary intelligence could discern between the instruction that imparts a 'specific skill,' as opposed to one that imparts 'general knowledge,'" the court stated that "the term 'training' could still be read to encompass speech and advocacy protected by the First Amendment." The court concluded that the term "training" is vague "because it 'implicates, and potentially chills, [respondents'] protected expressive activities.'" The court of appeals also held that the term "expert advice or assistance" is unconstitutionally vague, noting that the statute's definition of "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge," 18 U.S.C. 2339A(b)(3), was borrowed from Federal Rule of Evidence 702. But that borrowing, the court stated, "does not clarify the term 'expert advice or assistance' for the average person with no background in law." In particular, the court concluded that "the 'other specialized knowledge' portion of the ban" would "cover constitutionally protected advocacy." Other provisions of the act were found not to be vague, so the Law Project filed a conditional cross-petition for cert raising the issue: Whether the criminal prohibitions in 18 U.S.C. § 2339B(a)(1) on provision of "expert advice or assistance" "derived from scientific [or] technical ... knowledge" and "personnel" are unconstitutional with respect to speech that furthers only lawful, nonviolent activities of proscribed organizations. The Supreme Court granted both

petitions for review.

- H. **SORNA.** *Carr v. United States*, 130 S. Ct. 47 (cert. granted Sept. 30, 2009); decision below at 551 F.3d 578 (7th Cir. 2009). 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 are: (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. There is presently a circuit split on the second question.
- I. **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.
- J. **Private Contempt of Court Actions.** *Robertson v. United States, ex Rel. Watson*, 130 Sup. Ct. ____ (cert. granted Dec. 14, 2009); decision below at 940 A.2d 1050 (D.C. C. A. 2008). Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

IV. TRIAL

A. Speedy Trial.

- 1. **Apportioning Defense Delay Against State.** *Vermont v. Brillon*, 129 S. Ct. 1283 (2009). Absent a systemic breakdown in a state public defender system, delays caused by appointed counsel are not attributed to the state for purposes of *Barker v. Wingo*, 407 U.S. 514 (1972) speedy trial analysis.
- 2. **Apportioning Delay for Preparation of Defense Motions.** *Bloate v. United States*, 129 S. Ct. 1984 (cert. granted Apr. 20, 2009); decision below at 534 F.3d 893 (8th Cir. 2008). 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" (emphasis added). Question presented: Whether time granted to *prepare* pretrial motions is excludable under § 3161(h)(1). A circuit split exists: The Fourth and Sixth Circuits have answered it in the negative; the Eighth Circuit and seven other circuits have answered it in the affirmative.

- B. Double Jeopardy and Collateral Estoppel.** *Yeager v. United States*, 129 S. Ct. 2360 (2009). When a jury returns a verdict of acquittal on some counts, and is hung on other counts, and the acquittals necessarily decided a critical issue of ultimate fact in respect of the hung counts, Double Jeopardy bars re-prosecution on these counts. Yeager was charged with fraud, and with insider trading. The jury acquitted him of the fraud counts, but was unable to render a verdict on the insider trading counts. The government re-indicted Yeager on the hung counts. Yeager moved to dismiss on Double Jeopardy grounds. The Supreme Court held that Double Jeopardy could bar re-prosecution. The Court limited *Richardson v. United States*, 468 U.S. 317, to the situation where a defendant claims that hung counts, standing alone, have a preclusive effect. The Court also distinguished *United States v. Powell*, 469 U.S. 57, to the situation where the a jury renders inconsistent verdicts of guilty and not guilty, noting that hung, mistried counts do not carry the finality of counts of conviction. The Court remanded the case to the Fifth Circuit to revisit, if it so chose, its factual determination regarding the whether the jury in Yeager's case necessarily resolved in his favor an issue of ultimate fact on the fraud counts that the government would have to prove in order to convict him of insider trading.

C. Peremptory Challenges

1. **Public Proceedings.** *Pressley v. Georgia*, 130 S. Ct. ___ (Jan. 19, 2010) (per curiam). During jury selection in Pressley'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. Pressley'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. **Erroneous Denial of Peremptory Challenge Not Structural Error.** *Rivera v. Illinois*, 129 S. Ct. 1446 (2009). Provided that all jurors seated in a criminal case are qualified and unbiased, the Due Process Clause does not require automatic reversal of a conviction because of the trial court's good-faith error in denying the defendant's peremptory challenge to a juror.

D. Confrontation

1. **Lab Reports and Crawford.** *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). In a state court prosecution for drug dealing, the prosecution submitted lab reports instead of live testimony to establish the identity and weight of the cocaine at issue. The reports were largely conclusory, containing nothing about the qualifications or experience of the analysts who conducted the testing or whether any record-keeping or storage measures had been taken to preserve the integrity of the items for testing. The reports lacked the identity of the testing method the analysts used to arrive at their conclusions or any description of the difficulties (and accompanying error rates) associated with the particular method(s) the analysts used to test for

cocaine. Nor do the reports specify the percentages of cocaine allegedly present in the substances tested or otherwise address the differences in the samples that account for why some of the bags contain white powder and others contain dark yellow solids. The reports simply provided declarations from state forensic analysts that the packages seized in connection with the defendant's arrest weighed over fourteen grams and all contained cocaine. Question presented: Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington* (2004). The Supreme Court held 5-4 that a lab chemist must be called to testify in order to admit the lab analysis as evidence in a trial.

2. **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.**

V. SENTENCING

- A. **Standard of Review for Breach of Plea Agreement.** *Puckett v. United States*, 129 S. Ct. 1423 (2009). In exchange for Puckett's guilty plea, the government agreed to request (1) a three-level acceptance-of-responsibility reduction in his offense level; and (2) a sentence at the low end of the applicable guideline range. The district court accepted the plea, but before Puckett was sentenced he assisted in another crime. As a result, the government opposed any reduction in his offense level, and the judge denied the three-level reduction. On appeal, Puckett raised for the first time the argument that by backing away from its reduction request, the government had broken the plea agreement. The Fifth Circuit found that Puckett had forfeited that claim by failing to raise it below; applied Fed. R. Crim. P. 52(b)'s plain-error standard for unpreserved claims of error; and held that, although the error had occurred and was obvious, Puckett had not satisfied the third prong of plain-error analysis in that he failed to demonstrate that his ultimate sentence was affected, especially since the judge had found that acceptance-of-responsibility reductions for defendants who continued to engage in criminal activity were so rare as "to be unknown." The Supreme Court affirmed, holding that Rule 52(b)'s plain-error test applies to a forfeited claim, like Puckett's, that the government failed to meet its obligations under a plea agreement.

B. Cruel and Unusual Life Sentence.

- 1. Juvenile Conviction.** *Sullivan v. Florida*, 129 S. Ct. 2157 (cert. granted May 4, 2009); decision below at 987 So.2d 83 (Fla. 1st DCA 2008). 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, so he will die in prison. Does this violate the Eighth and Fourteenth Amendment protections against cruel and unusual punishment?
- 2. Juvenile, Following Probation Violation.** *Graham v. Florida*, 129 S. Ct. 2157 (cert. granted May 4, 2009); decision below at 982 So.2d 43 (Fla. 1st DCA 2008). 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. Issue presented: Whether a sentence of Life imprisonment without the possibility of parole for a crime committed as a juvenile violates the federal prohibitions against cruel and unusual punishment.

C. ACCA Predicates

- 1. Battery.** *Johnson v. United States*, 129 S. Ct. 1315 (cert. granted Feb. 23, 2009); decision below at 528 F.3d 1318 (11th Cir. 2008). Questions presented: (1) Whether, when a state's highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force, that holding is binding on federal courts in determining whether that same offense qualifies as a "violent felony" under the federal Armed Career Criminal Act, which defines "violent felony" as, *inter alia*, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." (2) Whether this Court should resolve a circuit split on whether a prior state conviction for simple battery is in all cases a "violent felony"—a prior offense that has as an element the use, attempted use, or threatened use of physical force against the person of another. Further, whether this court should resolve a circuit split on whether the physical force required is a *de minimis* touching in the sense of "Newtonian mechanics" or whether the physical force required must be in some way violent in nature—that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so. The Court declined to hear the third question presented, asking the Court to overrule *Almendarez-Torres v. United States*.

D. **Mandatory Minimum Sentences.**

1. **Gun Enhancements.** *Dean v. United States*, 129 S. Ct. 1849 (2009). Dean’s gun accidentally discharged during a bank robbery, but no one was harmed. Dean was convicted of conspiring to commit a bank robbery and discharging a firearm during an armed robbery. Because the firearm was “discharged” during the robbery, he was sentenced pursuant to 924(c)(1)(A)(iii) to a 10-year mandatory minimum prison term. He appealed, contending that the discharge was accidental, and that 924(c)(1)(A)(iii) requires proof that the defendant intended to discharge the firearm. The Eleventh Circuit affirmed, holding that no proof of intent is required. The Supreme Court affirmed, holding that § 924(c)(1)(A)(iii) requires no separate proof of intent. The 10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident.

2. **Mandatory Minimums and Apprendi: Harris Revisited?** *United States O’Brien*, 130 S. Ct. 49 (cert. granted Sept. 30, 2009); decision below at 542 F.3d 921 (1st Cir. 2009). Question presented: Whether the mandatory minimum sentence enhancement under 18 U.S.C. § 924(c)(1), increasing the minimum penalty to 30-years when the firearm is a machinegun, is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence. The mandatory minimum penalties set forth in 18 U.S.C. § 924(c)(1) increase depending on the nature of the possession or the weapon possessed, from 5 years for simple possession of any firearm, to 7 years if the firearm was brandished, to 10 years if the firearm was discharged or was a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to 30 years if the firearm was a machine gun or destructive device, or was equipped with a silencer or muffler. The court of appeals phrased the issue this way: “The question posed by this appeal is whether, under a statute forbidding the carrying and use of guns in connection with a federal crime, the nature of the weapon is to be found by the judge as a sentencing matter or by the jury as an element of the crime. Most circuits have said the former; believing ourselves largely constrained by a Supreme Court decision interpreting a prior version of the statute, we reach the opposite result, albeit with some misgivings.” The government petitioned for cert. The Supreme Court will answer whether, for purposes of § 924(c)(1)’s increased mandatory minimums, the facts increasing the mandatory minimums are “sentencing factors” to be found by the judge by a preponderance of the evidence, or elements of the offense that must be charged in the indictment and found by a jury beyond a reasonable doubt. The Court’s decision may further flesh out the contours of the Sixth Amendment in addition to interpreting § 924(c), and thus could apply well beyond that statute. The statutory and constitutional issues raised here should be preserved in every case involving increasing mandatory minimums based on facts found by the judge pending the Court’s decision.

- 3. Consecutive Mandatory Minimums Under § 924(c).** *Abbott v. United States* and *Gould v. United States*, 130 S. Ct. ____ (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.
- 4. Timeliness of Order of Restitution.** *Dolan v. United States*, 130 Ct. ____ (cert. granted Jan. 8, 2010); decision below at 571 F.3d 10 (10th Cir. 2009). 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 presents the question: Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5). The circuits are split on the answer to this question: the Seventh and Eleventh Circuits have held that the court loses jurisdiction to order restitution after the time period has expired; the Second, Third, and Ninth Circuits recognize the statutory time limit, but have affirmed restitution orders based on tolling and harmless error principles; the Eighth Circuit rejects the tolling and harmless error approaches, but has affirmed orders based by borrowing principles from Bail Reform Act cases, which find that the public interest does not permit divestiture of jurisdiction based solely on untimeliness; the Tenth Circuit affirmed the order below based on a better-late-than-never approach.

- E. Resentencing Pursuant to § 3582(c)(2).** *Dillon v. United States*, 130 S. Ct. ____ (cert. granted Dec. 7, 2009); decision below at 572 F.3d 146 (3d Cir. 2009). Questions presented: (1) Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582; (2) Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.
- F. Good Time Credit.** *Barber v. Thomas*, 130 S. Ct. ____ (cert. granted Nov. 30, 2009); decision below at 533 F.3d 800 (9th Cir. 2008). The federal good time credit (GTC) statute 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 circuits, using a variety of rationales, have rejected the BOP’s claim that the statute was unambiguous, but deferred to the BOP interpretation under *Chevron* based on “term of imprisonment” being ambiguous. In this litigation, the BOP has conceded that the regulation implementing the GTC statute, and previously accorded deference, was promulgated in violation of the Administrative Procedure Act. Nevertheless, the Ninth Circuit affirmed the BOP rule under *Skidmore*. Questions presented: (1) Does “term of imprisonment” in Section 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits on the basis of the sentence imposed? (2) If “term of imprisonment” in the federal good time credit statute is ambiguous, does the rule of lenity and the deference appropriate to the United States Sentencing Commission require that good time credits be awarded based on the sentence imposed?

VI. DEATH PENALTY

- A. Double Jeopardy Protection Against State’s Efforts to Challenge Mental Incapacity Defense to Capital Punishment.** *Bobby v. Bies*, 129 S. Ct. 2145 (2009). A State court’s determination that a defendant’s mental retardation was a mitigating factor in the penalty phase of a capital case does not trigger Double Jeopardy issue preclusion, and foreclose the question whether, in the wake of the subsequently-decided decision in *Atkins v. Virginia*, the defendant is ineligible for the death penalty because he is mentally retarded.
- B. Delay in Execution.** *Johnson v. Bredesen*, 130 S. Ct. __ (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. 393 (cert. granted Oct. 13, 2009); decision below at 538 F.3d 97 (2d Cir. 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. Question presented: “Whether the court of appeals departed from this Court’s interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain-error review of an asserted ex post facto violation whether “there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct.”

VIII. CIVIL RIGHTS OF THE ACCUSED

A. Prosecutorial Immunity

- 1. Procuring & Using False Evidence.** *Pottawattamie County, IA v. Harrington*, 129 S. Ct. 2002 (cert. granted Apr. 20, 2009); decision below at 547 F.3d 922 (8th Cir. 2008). Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant’s “substantive due process” rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial. Here, the Iowa Supreme Court had vacated two underlying murder convictions based on a finding that the prosecutors failed to disclose exculpatory evidence of an alternative suspect. One defendant was never retried; the other entered a plea to second degree murder and was given a time-served sentence. Later, they filed a 1983 civil rights action claiming that the two prosecutors coerced false witness testimony, subjected them to false arrests, introduced false trial testimony and withheld exculpatory evidence. Both the district court and the court of appeals denied the prosecutors immunity from suit.

IX. CIVIL COMMITMENT

- A. **“Sexually Dangerous Persons.”** *United States v. Comstock*, 129 S. Ct. ____ (cert. granted June 22, 2009); decision below at 551 F.3d 274 (4th Cir. 2009). Question presented: Whether Congress had the constitutional authority to enact 18 U.S.C. § 4248, which 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.

X. IMMIGRATION CONSEQUENCES

- A. **Fraud as an Aggravated Felony.** *Nijhawan v. Holder*, 129 S. Ct. 2828 (2009). Question presented: “Whether petitioner’s conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an ‘offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000,’ 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded \$100 million, and the judgment of conviction and restitution order calculated total victim loss as more than \$680 million.” The Court held that, for purposes of determining whether a prior fraud offense involving a loss to the victim in excess of \$10,000 constitutes an “aggravated felony” under 8 U.S.C. § 1227(a)(ii)(A)(iii), and therefore subjects an alien to deportation, the \$10,000 threshold referred to the particular circumstances in which the offender committed the fraud, not to an element of the fraud offense. The Court found that unlike the Armed Career Criminal Act, which contemplates a “categorical approach” to determining whether prior crimes are qualifying offenses for punishment purposes, the language of the deportation provision at issue called for a “circumstance-specific application.” The Court noted that the law did not refer to generic crimes. Only three federal offenses for the fraud crime at issue had a \$10,000 threshold and, in view of the many State fraud offenses, Congress was unlikely to have intended for the deportation provision to have applied only in such limited and haphazard fashion. The Court further rejected petitioner’s argument that a “modified categorical approach” could apply, to limit the nature of the information on which an immigration court could rely. The Court found this proposal “impractical.”
- B. **Asylum For Involuntary Persecutors.** *Negusie v. Holder*, 129 S. Ct. 1159 (2009). The Immigration and Nationality Act (INA) prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding removal of, a refugee who has “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A). In this case, the petitioner claimed he was compelled against his will by credible threats of death or torture to assist or participate in acts of persecution. That involuntariness, he argued, should prevent application to him of the “persecutor bar” of 1158(b)(2)(a). The government and BIA took the position that the statute has no exception, even for involuntary conduct. The Supreme Court reversed, in an 8-1

decision holding that voluntariness must be read into the statute. The case was remanded to the BIA to now use its discretion under such a reading of the statute. Justices Stevens and Breyer concurred, but would have directly reversed the decision below, instead of simply remanding it for reconsideration in light of the Supreme Court's statutory interpretation. Justice Thomas dissented, arguing that the law is clear, without exceptions, and permits no inquiry into duress or coercion.

- C. Ineffective Assistance of Counsel re Immigration Consequences of Plea.** *Padilla v. Kentucky*, 129 S. Ct. 1317 (cert. granted Feb. 23, 2009); decision below at 253 S.W.3d 482 (Ky. 2008). 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. Padilla presents the following questions: (1) Whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the INA, is a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise; and, (2) Assuming immigration consequences are "collateral", whether counsel's gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice.
- D. Federal Misdemeanor as an Aggravated Felony.** *Carachuri-Rosendo v. Holder*, 130 S. Ct. ___ (cert. granted Dec. 14, 2009); decision below at 570 F.3d 263 (5th Cir. 2009). 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). The courts of appeals have divided 4-2 on the following question presented by this case: Whether a person convicted under state law for simple drug possession (a federal law misdemeanor) has been "convicted" of an "aggravated felony" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.
- E. IIRIRA's Prohibition on Judicial Review.** *Kucana v. Holder*, 130 S. Ct. ___ (Jan. 20, 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.

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

A. War on Terror.

1. **Indefinite Detention of Legal Resident Foreign National in U.S. *Al-Marri v. Spagone*, 129 S. Ct. 680 (cert. granted Dec. 5, 2008); decision below at 534 F.3d 213 (4th Cir. 2008); **JUDGMENT VACATED AND CASE REMANDED WITH INSTRUCTIONS TO DISMISS AS MOOT, 129 S. Ct. 1545 (mem.) (Mar. 6, 2009).**** Ali Saleh Kahlah al-Marri is a Qatari national, but a legal resident of the United States, who was detained as an enemy combatant and transferred to the U.S. Naval Brig in South Carolina, where he remains detained, but uncharged. He filed a petition for a writ of habeas corpus challenging his military detention as an enemy combatant. After the district court denied all relief, al-Marri appealed. A divided panel of the Fourth Circuit reversed the judgment of the district court and ordered that al-Marri’s military detention cease. *See Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007). Subsequently, the en banc Fourth Circuit vacated that judgment and reconsidered the appeal. Initially, the government moved to dismiss the case for lack of jurisdiction, based on section 7 of the Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600, which amended the Detainee Treatment Act (DTA) of 2005, Pub.L. No. 109-148, § 1005(e)(1), 119 Stat. 2680, 2741-42. The court of appeals denied that motion after the government conceded that the Supreme Court’s decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (June 12, 2008) declared section 7 of the MCA unconstitutional. The court of appeals addressed two substantive issues: (1) Assuming the Government’s allegations about al-Marri are true, whether Congress has empowered the President to detain al-Marri as an enemy combatant; and (2) Assuming Congress has empowered the President to detain al-Marri as an enemy combatant provided the Government’s allegations against him are true, whether al-Marri has been afforded sufficient process to challenge his designation as an enemy combatant. The en banc court held (1) by a 5 to 4 vote that, if the Government’s allegations about al-Marri are true, Congress has empowered the President to detain him as an enemy combatant; and (2) by a different 5 to 4 vote, that, assuming Congress has empowered the President to detain al-Marri as an enemy combatant provided the Government's allegations against him are true, al-Marri has not

been afforded sufficient process to challenge his designation as an enemy combatant. As a result, the en banc court reversed and remanded for further proceedings on the habeas petition. Al-Marri petitioned for cert on issue (1), which the Supreme court granted. **The government then charged Al-Marri criminally so the Supreme Court vacated its cert grant, and ordered the judgment below vacated and dismissed as moot.** He was then offered – and accepted – a plea negotiation with a sentence capped at 15 years imprisonment. He is arguing for credit for time served.

2. **Court’s Authority to Release Cleared GTMO Detainees.** *Kiyemba v. Obama*, 130 S. Ct. 458 (cert. granted Oct. 20, 2009); decision below at 555 F.3d 1022 (D.C. Cir. 2009). 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

B. Timeliness of Filing Federal Petition.

1. **Equitable Tolling of AEDPA Limitation Period Due to Gross Negligence of Counsel.** *Holland v. Florida*, 130 S. Ct. 398 (cert. granted Oct. 13, 2009); decision below at 539 F. 3d 1334 (11th Cir. 2008). Holland filed a belated habeas petition due to the “gross negligence” of his state-appointed collateral attorney, who failed to file the petition in a timely fashion, despite Holland’s repeated instructions to do so. The Eleventh Circuit determined that Holland was not entitled to equitable tolling of the AEDPA one-year time limit to excuse the late filing of his habeas petition. The test announced by the Eleventh Circuit held that “no allegation of lawyer negligence or of failure to meet a lawyer’s standard of care-in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part-can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough.” Question presented: Whether “gross negligence” by collateral counsel, which directly results in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling, or whether, in conflict with other circuits, the Eleventh Circuit was proper in determining that factors beyond “gross negligence” must be established before an extraordinary circumstance can be found that would warrant equitable tolling
2. **Alleged Defaults by Multiple State Court Proceedings.** *Cone v. Bell*, 129 S. Ct. 1769 (2009). After the State discredited Cone’s defense that he killed two people while suffering from acute psychosis caused by drug addiction, he was convicted and sentenced to death. The Tennessee Supreme Court

affirmed on direct appeal and the state courts denied postconviction relief. Later, in a second petition for state postconviction relief, Cone raised the claim that the State had violated *Brady v. Maryland* by suppressing witness statements and police reports that would have corroborated his insanity defense and bolstered his case in mitigation of the death penalty. The state postconviction court denied him a hearing on the ground that the *Brady* claim had been previously determined, either on direct appeal or in earlier collateral proceedings. The state court of appeals affirmed. Cone filed a petition for a federal writ of habeas corpus, which was denied on two grounds, (1) The *Brady* claim was procedurally barred because the state courts' disposition rested on adequate and independent state grounds that Cone had waived it by failing to present his claim in state court; (2) Even if he had not defaulted the claim, it would fail on its merits because none of the withheld evidence would have cast doubt on his guilt. The Sixth Circuit agreed with the second point, but considered itself barred from reaching the claim's merits because the state courts had ruled the claim previously determined or waived under state law. The Supreme Court reversed, holding that the state courts' rejection of Cone's *Brady* claim does not rest on a ground that bars federal review. Neither of the State's asserted justifications for such a bar—that the claim was decided by the State Supreme Court on direct review or that Cone had waived it by never properly raising it in state court—provides an independent and adequate state ground for denying review of Cone's federal claim. The state court's denial of the *Brady* claim on the ground it had been previously determined in state court rested on a false premise: Cone had not presented the claim in earlier proceedings and, consequently, the state courts had not passed on it. The Sixth Circuit's rejection of the claim as procedurally defaulted because it had been twice presented to the Tennessee courts was thus erroneous. The Supreme Court found unpersuasive the State's alternative argument that federal review is barred because the *Brady* claim was properly dismissed by the state courts as waived. Those courts held only that the claim had been previously determined, and the Supreme Court would not second-guess their judgment. Because the claim was properly preserved and exhausted in state court, it is not defaulted. Although the Court did not believe that the withheld evidence sustained Cone's insanity defense at the guilt phase, it did hold the lower federal courts failed to adequately consider whether the withheld documents were material to Cone's sentence. Both the quantity and quality of the suppressed evidence lend support to Cone's trial position that he habitually used excessive amounts of drugs, that his addiction affected his behavior during the murders, and that the State's contrary arguments were false and misleading. Because the suppressed evidence might have been material to the jury's assessment of the proper punishment, a full review of that evidence and its effect on the sentencing verdict is warranted.

- a. **Dignity of Court Proceedings and the GVR.** *Wellons v. Hall*, 130 S. Ct. ____ (Jan. 19, 2010) (per curiam). Wellon's capital rape and murder prosecution looked typical, but events occurred bend 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.

C. Successive Petitions. *Magwood v. Culliver*, 130 S. Ct. ___ (cert. granted Nov. 16, 2009); decision below at 555 F.3d 968 (11th Cir. 2009). When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a “second or successive” claim under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previous sentence on the same constitutional grounds?

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. **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.
3. **Fair Cross-Section Jury Venires.** *Berghuis v. Smith*, 129 S. Ct. 48 (cert. granted Sept. 30, 2009); decision below at 543 F.3d 326 (6th Cir. 2008). 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. 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 question presented is: Whether the

U.S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply “clearly established” Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under *Duren* where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which the Supreme Court has never applied and which four circuits have specifically rejected.

4. **Double Jeopardy.** *Renico v. Lett*, 130 S. Ct. ____ (cert. granted Nov. 30, 2009); decision below 316 Fed. App’x 373 (6th Cir. 2009). Whether the United States Court of Appeals for the Sixth Circuit, in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the State trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

E. Absence of Clear Binding Precedent—*Mills v. Maryland* and *IOC. Smith v. Spisak*, 130 S. Ct. ____ (Jan. 12, 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. **Abandoning Defenses in Penalty Phase.** *Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009). Mirzayance pled not guilty and not guilty by reason of insanity at his state-court murder trial. During the guilt phase, he sought to avoid a conviction for first-degree murder and instead obtain a second-degree murder verdict by presenting medical testimony that he was insane at the time of the crime and was, therefore, incapable of the necessary premeditation or deliberation. The jury convicted him of first-degree murder. After the trial’s NGI phase was scheduled, Mirzayance accepted his lawyer’s

recommendation to abandon the insanity plea. Counsel believed that a defense verdict was unlikely because the jury had just rejected medical testimony similar to that which would be presented to establish the NGI defense. Moreover, although counsel had planned to supplement the medical evidence with testimony by Mirzayance's parents as to their son's mental illness, the parents refused to testify at the last moment. Following his conviction, Mirzayance alleged in state postconviction proceedings that his attorney's recommendation to withdraw the NGI plea constituted ineffective assistance of counsel under *Strickland v. Washington*. The state courts denied relief. He then sought federal habeas relief, which a district court denied. The Ninth Circuit reversed, ordering an evidentiary hearing on counsel's recommendation to withdraw the NGI plea. During the hearing, the magistrate made extensive factfindings, including, that the NGI phase medical evidence essentially would have duplicated the evidence the jury rejected in the guilt phase; that counsel doubted the likelihood of prevailing on the NGI claim because the jury's finding of first-degree murder as a practical matter would cripple Mirzayance's chances of convincing the jury that he nevertheless was incapable of understanding the nature and quality of his act and of distinguishing right from wrong; that Mirzayance's parents were not simply reluctant, but had effectively refused, to testify; that counsel had made a carefully reasoned decision not to proceed with the NGI plea after weighing his options and discussing the matter with experienced co-counsel; but that counsel's performance was nevertheless deficient because Mirzayance had "nothing to lose" by going forward with the NGI phase of the trial. The magistrate also found prejudice and recommended habeas relief. The district court accepted the recommendation and granted the writ. The court of appeals affirmed, ruling, among other things, that counsel's performance had been deficient because Mirzayance's parents had not refused, but had merely expressed reluctance to testify, and because competent counsel would have attempted to persuade them to testify, which Mirzayance's counsel admittedly did not. The court essentially concluded that competent counsel would have pursued the insanity defense because counsel had nothing to lose by putting on the only defense available. In addition, the court found prejudice because, in the court's view, there was a reasonable probability the jury would have found Mirzayance insane had counsel pursued the NGI phase. The Ninth Circuit concluded that federal habeas relief was authorized under 28 U.S.C. § 2254(d)(1) because the California Court of Appeal had "unreasonabl[y] appli[ed] clearly established Federal law." The Supreme Court reversed. Whether the state-court decision is reviewed under § 2254(d)(1)'s standard or *de novo*, Mirzayance failed to establish that his counsel's performance was ineffective. (a) The State Court of Appeal's denial of Mirzayance's ineffective-assistance claim did not violate clearly established federal law. The Ninth Circuit reached a contrary result based largely on its application of an improper review standard—it blamed counsel for abandoning the NGI claim because there was "nothing to lose" by pursuing it. But it is not "an unreasonable application of clearly

established Federal law” for a state court to decline to apply a specific legal rule that has not been squarely established by the Supreme Court. Absent anything akin to the “nothing to lose” standard in the Supreme Court’s precedent, habeas relief could have been granted under § 2254(d)(1) only if the state-court decision in this case had unreasonably applied *Strickland*’s more general standard for ineffective-assistance claims: a defendant must show both deficient performance by counsel and prejudice. The question “is not whether a federal court believes the state court’s determination” under *Strickland* “was incorrect but whether [it] was unreasonable—a substantially higher threshold.” And, because *Strickland*’s is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, Mirzayance’s ineffective-assistance claim fails. It was not unreasonable for the state court to conclude that counsel’s performance was not deficient when he counseled Mirzayance to abandon a claim that stood almost no chance of success. (b) Even if Mirzayance’s ineffective-assistance claim were eligible for de novo review, it would still fail because he has not shown ineffective assistance at all. Mirzayance can establish neither the deficient performance nor the prejudice required by *Strickland*. As to performance, he has not shown “that counsel’s representation fell below an objective standard of reasonableness.” Rather, counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed because similar medical testimony had already been rejected and the parents’ testimony, which he believed to be his strongest evidence, would not be available. The Ninth Circuit’s position that competent counsel might have persuaded the reluctant parents to testify is in tension with the magistrate’s contrary findings and applies a more demanding standard than *Strickland* prescribes. The failure to show ineffective assistance is also confirmed by the magistrate’s finding that counsel’s decision was essentially an informed one “made after thorough investigation of law and facts relevant to plausible options,” and was therefore “virtually unchallengeable.” The Ninth Circuit’s insistence that counsel was required to assert the only defense available, even one almost certain to lose, is not supported by any “prevailing professional norms” of which the Supreme Court is aware. Nor has Mirzayance demonstrated that he suffered prejudice, which requires a showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” In fact, it was highly improbable that the jury, having just rejected testimony about Mirzayance’s mental condition in the guilt phase, would have reached a different result based on similar evidence at the NGI phase.

2. **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.

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."

G. Impact of New DNA Evidence on Sufficiency of Evidence at Trial. *McDaniel v.*

Brown, 130 S. Ct. __ (Jan. 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.

- 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.
- I. Clemency - Appeals of Failure to Appoint Counsel.** *Harbison v. Bell*, 129 S. Ct. 1481 (2009). (1) 18 U.S.C. § 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation, and (2) A certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(A) is not required to appeal an order denying a request for federally appointed counsel under § 3599 because § 2253(c)(1)(A) governs only final orders that dispose of a habeas corpus proceeding’s merits.

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