

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

**CRIMINAL CASES DECIDED AND GRANTED REVIEW
FOR THE OCTOBER 2008-09 TERMS
THRU JUNE 29, 2009**

**PAUL M. RASHKIND
CHIEF, APPELLATE DIVISION
OFFICE OF THE FEDERAL PUBLIC DEFENDER, S.D. FLA.**

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. ____ (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. **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."

2. **Passenger Search.** *Arizona v. Johnson*, 129 S. Ct. 781 (2009). In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense? The Supreme Court held that: (1) the first condition of *Terry v. Ohio*, i.e. a lawful investigatory stop, is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation; (2) police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity; and (3) to justify a pat-down of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and

dangerous.

- B. Good Faith Exception to Exclusionary Rule When Arrest Based on Erroneous Information.** *Herring v. United States*, 129 S. Ct. 695 (2009). Officers in one jurisdiction checked with employees of a law enforcement agency in another jurisdiction and were told that there is an outstanding warrant for an individual. Acting in good faith on that information the officers arrest the person and find contraband. It turns out the warrant had been recalled. The erroneous information that led to the arrest and search is the result of a good faith mistake by an employee of the agency in the other jurisdiction. The Supreme Court held 5-4 that the Fourth Amendment does not require suppression of evidence obtained pursuant to a search incident to arrest, despite the fact that the arrest itself violated the Fourth Amendment because it was based on negligent police error.
- C. Strip Searches of Public School Students.** *Safford Unified School District v. Redding*, 129 S. Ct. ___ (June 25, 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.
- D. Necessity and Timing Post-Seizure Forfeiture Hearing.** *Alvarez v. Smith*, 129 S. Ct. ___ (cert. granted Feb. 23, 2009); decision below 524 F.3d 834 (7th Cir. 2008). 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)?

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. ___ (June 8, 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. ____ (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.

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. ____ (June 18, 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. **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. ____ (June 22, 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*, 129 S. Ct. ____ (cert. granted June 29, 2009); decision below at 275 Va. 283 (Va. 2008). 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?

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. Reasonableness Post-Booker

- 1. Kimbrough Redux.** *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam). Spears was found guilty of conspiracy to distribute at least 50 grams of cocaine base and at least 500 grams of powder cocaine. At sentencing, the district court determined that the drug quantities attributable to Spears yielded an offense level of 38, that his criminal history justified placing him in the Guidelines' criminal history category IV, and that the resulting advisory Guidelines sentencing range was 324 to 405 months' imprisonment. The district court was of the view that the Guidelines' 100:1 ratio between powder cocaine and crack cocaine quantities yielded an excessive sentence in light of

the sentencing factors outlined in 18 U. S. C. §3553(a), so the district court recalculated Spears' offense level based on a 20:1 crack-to-powder ratio. That yielded an offense level of 34 and a sentencing range of 210 to 262 months' imprisonment. The district court sentenced Spears to 240 months in prison, the statutory mandatory minimum. The sentence was reversed on appeal pre-*Kimbrough*, then GVR'd by the Supreme Court post-*Kimbrough*. On remand, the Eighth Circuit again reversed Spears' sentence and remanded for resentencing, concluding, again, that the district court "may not categorically reject the ratio set forth by the Guidelines," and replace the 100:1 quantity ratio inherent in the advisory Guidelines range with a 20:1 quantity ratio. The Supreme Court reversed "[b]ecause the Eighth Circuit's decision on remand conflicts with our decision in *Kimbrough*." The Court "clarif[ied] that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines."

2. ***Kimbrough Redux, Again.*** *Nelson v. United States*, 129 S. Ct. 890 (2009) (per curiam). The sentencing court clearly applied a presumption of reasonableness to petitioner's Guidelines range, and the circuit court affirmed. The Supreme Court reversed, re-emphasizing that its cases do not allow a sentencing court (as opposed to an appellate court) to presume that a sentence within the applicable Sentencing Guidelines range is reasonable. "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable. We think it plain from the comments of the sentencing judge that he did apply a presumption of reasonableness to Nelson's Guidelines range. Under our recent precedents, that constitutes error." (Court's emphasis).

- D. ***Apprendi Implications in Consecutive Sentences.*** *Oregon v. Ice*, 129 S. Ct. 711 (2009). Ice was convicted by a jury of two counts of first-degree burglary and four counts of first-degree sexual abuse. The court sentenced him to a total of 340 months, with three of the sentences running consecutively, based on its finding that the two burglaries of which Ice was convicted constituted "separate incidents," and that Ice's conduct during the burglaries (which formed the basis for four other convictions) demonstrated a "willingness to commit more than one offense" "caus[ing] or creat[ing] a risk of causing greater or qualitatively different loss, injury or harm to the victim." The Oregon Supreme Court reversed and remanded for resentencing, holding that the sentencing court—by imposing consecutive sentences based on its own findings and not based on jury findings—violated respondent's rights under the Sixth Amendment, as construed in *Apprendi* and *Blakely*. The U.S. Supreme Court reversed, holding the Sixth Amendment's jury trial right does not prohibit a judge from determining the predicate facts necessary to impose consecutive, rather than concurrent, sentences. Justice Ginsburg, writing for the five-Justice majority, held that "twin considerations—historical practice and respect for state sovereignty—counsel against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes." Justice Ginsburg found that the decision of whether to impose consecutive or concurrent sentences has historically been the exclusive province of judges, and thus

that permitting judges to find the facts necessary to that decision neither encroaches upon the jury's historical role as fact finder nor threatens its place as a structural protection between the state and the accused. As for state sovereignty, Justice Ginsburg noted that Oregon's attempt to "rein in the discretion judges possessed at common law to impose consecutive sentences at will" serves the policy interests in proportionality and guarding against disparities in sentence length. She also noted that extending *Apprendi* to this context would potentially affect judicial fact finding for other purposes (e.g., setting terms of supervised release, community confinement, fines or restitution, or ordering treatment), that it would be difficult for states to administer (i.e., may require bifurcated trials), and that there was no evidence that Oregon's law reflected a "pernicious manipulation" of *Apprendi*'s protections. In a forceful dissent, Justice Scalia, joined by Chief Justice Roberts and Justices Souter and Thomas, argued that "Oregon's sentencing scheme allows judges rather than juries to find the facts necessary to commit defendants to longer prison sentences, and thus directly contradicts what we held eight years ago and have reaffirmed several times since." He accused the majority of setting up a "formalistic distinction" between "facts bearing on the number of years a defendant will serve for one count (subject to the rule of *Apprendi*) and facts bearing on how many years will be served in total (now not subject to *Apprendi*)," and correctly noted both that the difference between consecutive and concurrent sentences is often more important to a defendant than a finding of guilt on any single count, and that each of the majority's arguments had been previously rejected by *Apprendi*, *Blakely*, and/or *Booker*.

E. ACCA Predicates

1. **Escape.** *Chambers v. United States*, 129 S. Ct. 687 (2009). Chambers was convicted of escape by virtue of his failure to report to serve his sentence. This conviction was used to support an ACCA sentence enhancement. The Supreme Court held that a failure to report to penal confinement, as contained in the Illinois statute punishing failure to report for penal confinement, falls outside the scope of ACCA's "violent felony" definition and therefore does not trigger the mandatory 15-year sentence for felons unlawfully in possession of a firearm who have three prior convictions. Citing *Begay v. United States*, the Court concluded that failure to report does not "involve conduct that presents a serious potential risk of physical injury to another" and therefore did not meet this part of the "violent felony" definition. The Court noted that the "inaction" involved in "failure to report" distinguished the crime from the "purposeful, violent," and "aggressive" conduct" at issue in violent felonies. Further, the Court cited a recent Sentencing Commission's Report which contained statistical data that indicated that failure to report does not involve a serious potential risk of physical injury. Note: The opinion leaves open the issue of whether "walkaways" from non-secure facilities (as opposed to failures to report) are violent felonies for ACCA and career offender purposes. There is almost no empirical evidence that non-secure facility escapes are violent but, given that many statutes (including 18 U.S.C. § 751) don't distinguish between non-secure and secure facility escapes, there may be a

Taylor “categorical approach” problem with considering walkaway escapes in isolation. (Oddly, in light of *Begay* and the U.S. Sentencing Commission escape study, there may be a decent argument that no escapes from any facility are violent felonies).

2. **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*.

F. 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.

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. ___ (June 1, 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.

VII. CIVIL RIGHTS OF THE ACCUSED

A. Prosecutorial Immunity

1. **Failure to Disclose Exculpatory Evidence.** *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). Goldstein alleged in a civil rights complaint that he was convicted of murder “entirely on the perjured testimony of two witnesses suborned” by Long Beach police officers. One of those witnesses was a jailhouse informant, Edward Fink. During the course of his testimony, Fink falsely denied having received any benefit for cooperating in the prosecution of Goldstein. Goldstein acknowledges that the deputy district attorneys who prosecuted him were never informed of the benefits Fink had received.. In December, 2002 Goldstein’s conviction was vacated by a California federal district court, and that decision was affirmed by the Ninth Circuit. He then filed the present civil rights action, alleging, in part that, “[p]rior, during and subsequent to the prosecution of Mr. Goldstein, the Los Angeles County District Attorney’s Office knew of abuses concerning jailhouse informants and of its own failure to record or disseminate that knowledge.” He further alleged that the defendants were personally aware of this information, but that they “purposefully or with deliberate indifference failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and failed to train Deputy District Attorneys to disseminate information pertaining to benefits provided to jailhouse informants and other impeachment information.” A federal district court refused to accord absolute immunity to the DA and supervising prosecutors, a decision that was affirmed by the Ninth Circuit, which held that the duties were administrative, not prosecutorial. The Supreme Court reversed, holding that in the context of 42 U.S.C. § 1983 civil rights suits, a prosecutor's absolute immunity extends to claims that the prosecution failed to disclose impeachment material due to failure to: 1) properly train prosecutors; 2) properly supervise prosecutors; or 3) establish an information system containing potential impeachment material about informants
2. **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.

- B. Obtaining *Brady* Disclosures Through § 1983 Suit.** *District Attorney’s Office v. Osborne*, 129 S. Ct. 488 (cert. granted Nov. 3, 2008); decision below at 521 F.3d 1118 (9th Cir. 2008). William Osborne, an Alaska prisoner, brought an action under 42 U.S.C. § 1983 to compel the District Attorney’s Office in Anchorage to allow him post-conviction access to biological evidence—semen from a used condom and two hairs—that was used to convict him in 1994 of kidnaping and sexual assault. Osborne, who maintains his factual innocence, intends to subject the evidence, at his expense, to STR and mitochondrial DNA testing, methods that were unavailable at the time of his trial and are capable of conclusively excluding him as the source of the DNA. The Ninth Circuit previously held that *Heck v. Humphrey*, 512 U.S. 477 (1994), does not bar Osborne’s § 1983 action because, even if successful, it will not necessarily demonstrate the invalidity of his conviction. After remand, the district court found that under the unique and specific facts of this case and assuming the availability of the evidence in question, Osborne has a limited due process right of access to the evidence for purposes of post-conviction DNA testing, which might either confirm his guilt or provide strong evidence upon which he may seek post-conviction relief. In the post-remand appeal, the Ninth Circuit affirmed the judgment of the district court. The state petitioned for cert, which was granted, to resolve the authority of a district court to entertain and grant relief of this sort in a § 1983 proceeding.

VIII. 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.

IX. IMMIGRATION CONSEQUENCES

- A. Fraud as an Aggravated Felony.** *Nijhawan v. Holder*, 129 S. Ct. ___ (June 15, 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.

X. 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.

B. Timeliness of Filing Federal Petition.

1. **Resetting Limitation Period for Out-of-Time Appeal Permitted by State Court.** *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009). Where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not “final” for purposes of §2244(d)(1)(A) until the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking certiorari review of that appeal.

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.

C. Deference to State Court Determinations.

1. **Unreasonableness of State Court Decision.** *Wood v. Allen*, 129 S. Ct. ___ (cert. granted May 18, 2009); decision below at 542 F.3d 1281 (11th Cir. 2009). Questions: (1) Whether a state court’s decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant’s severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise? (2) Whether the rule followed by some circuits, including the majority in this case, abdicates the court’s judicial review function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings?
2. **State Jury Instructions.** *Waddington v. Sarausad*, 129 S. Ct. 823 (2009). Sarausad drove with fellow gang members to a high school, in order to retaliate against a rival gang. With knowledge that his front-seat passenger was armed and going to shoot, Sarausad drove toward a group of students standing outside the school. The passenger opened fire, killing one student and wounding another. A jury convicted Sarausad of second degree murder,

second degree attempted murder, and second degree assault based on accomplice liability. The accomplice liability jury instructions mirrored a state statute and had been upheld by Washington state courts. A federal judge granted habeas relief and the Ninth Circuit affirmed, finding the instruction ambiguous under state law, because there is a reasonable probability that a jury would apply the instructions to relieve the prosecution of its obligation to prove all elements of the crime. The Supreme Court reversed, holding, that the state-court decision did not result in an “unreasonable application of . . . clearly established Federal law,” as is required for relief under sec.2254(d)(1).

3. **Ineffective Assistance of Counsel Sans State Hearing.** *Bell v. Kelly*, 128 S. Ct. 2108 (cert. granted May 12, 2008). Edward Bell asserted ineffective assistance of counsel at sentencing, and the district court found that he had diligently attempted to develop and present the factual basis of this claim in state court, on habeas, but that the state court’s fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth Circuit affirmed. Question presented: Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims “adjudicated on the merits” in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing? **NOTE: ON NOV. 17, 2008, FOLLOWING ORAL ARGUMENT, CERT WAS DISMISSED AS IMPROVIDENTLY GRANTED.** It is difficult to know precisely why cert was dismissed, but oral argument questions may provide a clue. Some justices seemed to think the issue presented involved a claim first made in federal court, but this case involves new evidence first presented to the federal court on a claim that was made and adjudicated in state court. Questions by the justices indicated a continuing interest in addressing a case in which the state prevented the petitioner from developing evidence in the state proceedings (*e.g.*, by denying time to develop the necessary facts).
4. **Adequacy of State Procedural Bar.** *Beard v. Kindler*, 129 S. Ct. 2381 (cert. granted May 19, 2009); decision below at 542 F.3d 70 (3rd Cir. 2008). 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.” Question presented: Is a state procedural rule automatically “inadequate” under the adequate-state-grounds doctrine—and therefore unenforceable on federal habeas corpus review—because the state rule is discretionary rather than mandatory? Note: Justice Alito will not participate

in this case.

- D. Erroneous Jury Instruction Not Structural Error.** *Hedgpeth v. Pulido*, 129 S. Ct. 530 (Dec. 2, 2008) (per curiam). Michael Pulido was convicted of first-degree murder for the robbery-killing of a convenience store clerk. He claimed that a murder instruction allowed the jury to convict him as an accomplice even if he had aided in the robbery only after the killing. The California Supreme Court held any instructional error to be harmless because the jury, in also returning a separate “special circumstance” verdict, explicitly found that respondent aided the robbery “during” the murder. Perceiving an ambiguity in another special-circumstance instruction, the Ninth Circuit rejected the state court’s conclusion that the jury’s special-circumstance finding had definitively cured the error in the murder instruction. Relying on circuit law it derived from the U.S. Supreme Court’s 1931 decision in *Stromberg v. California*, 283 U.S. 359 (1931), the Ninth Circuit deemed the murder instruction to be “structural error” because it concerned an “alternative” theory of guilt—aiding and abetting, as opposed to direct perpetration—and held reversal was required because the court was not “absolutely certain” that the jury had not relied on the erroneous theory. The state petitioned for Supreme Court review, claiming that *Stromberg* concerned an instructional error qualitatively different from the error claimed here, so it is not “clearly established law” governing this case. In the Supreme Court, both parties agreed that the error was not structural and that it was subject to harmless error analysis. The Supreme Court reversed, holding that the error was not structural and remanded the case so that the Ninth Circuit could engage in a harmless error analysis. The Court reaffirmed the principle, however, that “[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one. *See Stromberg v. California*, 283 U. S. 359 (1931); *Yates v. United States*, 354 U. S. 298 (1957).” Justices Stevens, Souter and Ginsburg dissented from the need for a remand, finding that the court of appeals had simply used the misnomer “structural error,” even though it conducted substantially the same harmless error analysis as had the district court, using the Court’s precedents in *Kotteakos v. United States*, 328 U. S. 750 (1946), *Brecht v. Abrahamson*, 507 U. S. 619 (1993), and *O’Neal v. McAninch*, 513 U. S. 432 (1995).
- E. Absence of Clear Binding Precedent—Extension of *Mills v. Maryland*.** *Smith v. Spisak*, 129 S. Ct. 1038 (cert. granted Feb. 23, 2009); decision below at 512 F.3d 852 (6th Cir. 2006). *Mills v. Maryland*, 486 U.S. 367 (1988) held that a capital jury must be permitted to consider any mitigating fact, not simply those enumerated by statute. Questions presented: (1) Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner’s favor questions that were not decided or addressed in *Mills*? (2) Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronin*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court’s reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S.

- F. Ineffectiveness of Counsel.** *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.

- G. Sufficiency of Evidence.** *McDaniel v. Brown*, 129 S. Ct. 1038 (cert granted Jan. 26, 2009); decision below at 525 F.3d 787 (9th Cir. 2008). Issues presented: (1) What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)? (2) Does analysis of a sufficiency-of-the-evidence claim pursuant to

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1), permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony and evidence given at trial?

- H. 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.

A current edition of the UNITED STATES SUPREME COURT REVIEW-PREVIEW-OVERVIEW is always available at:

<http://www.rashkind.com> (under "Popular Cites")