

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

**CRIMINAL CASES DECIDED AND GRANTED REVIEW
FOR THE OCTOBER 2010-11 TERMS
THRU JANUARY 26, 2012**

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I. RIGHT TO COUNSEL AND CONFESSIONS

A. *Miranda*.

1. ***Miranda's Application to Minors Questioned at School.*** *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (June 16, 2011). J.D.B. was 13 years old when he was questioned by police, without being given *Miranda* warnings. The North Carolina courts declined to find his age relevant to whether he was in police custody. The Supreme Court reversed (5-4), holding that, in determining whether a child is in "custody" for *Miranda* analysis purposes, courts must take account of the age of the child, noting that children are less mature and responsible than adults. The Court found that a child's age will not be a determinative, or even a significant, factor, but it is a reality that courts cannot ignore.

2. ***Miranda's Application to Prisoners.*** *Howes v. Fields*, 131 S. Ct. 1047 (cert. granted Jan. 24, 2011); decision below at 617 F.3d 813 (6th Cir. 2010). Fields was serving a 45-day sentence for disorderly conduct, when a sheriff's deputy received a complaint that he had engaged in unrelated sexual conduct with a minor. The deputy went to the Sheriffs Department where Fields was being held to investigate the accusation. Fields was escorted from his cell in the holding area to a conference room in the administrative area of the Sheriffs Department. He was neither shackled nor handcuffed. The door to the conference room was not locked and was left open during part of the interview. Fields was not given *Miranda* warnings, but was told that, "I could leave whenever I wanted to." The deputy informed Fields that he was investigating a criminal sexual conduct case involving the victim. Fields, who holds a bachelor's degree in psychology and a master's degree in counseling, indicated that the victim visited his house frequently and that he was like a father-figure to him. The first several hours of the interview involved a general discussion about Fields and the victim, but halfway through the interview, the deputy confronted Fields with the allegations. Fields denied the accusations and attempted to present a timeline of events. According to the deputy, at one point Fields got out of his chair and began yelling at him. The deputy told Fields that he could return to his cell because he was not going

to tolerate being talked to that way. Fields confirmed this incident, though he claimed the deputy told him to “sit my f---ing ass down” and that “if I didn’t want to cooperate, I could leave.” Fields did not ask to return to his cell, but instead sat back down and continued the interview. Fields acknowledged that he believed a jailer would have taken him back to his cell if he had asked. After several hours, Fields admitted to engaging in oral sex with the victim and manually masturbating the victim. State court decisions in Michigan determined that *Miranda* warnings were not necessary after considering the circumstances surrounding the questioning. The Sixth Circuit rejected the un-*Mirandized* statements and granted habeas relief, establishing a “bright-line” test for questioning prisoners under *Miranda*: Whenever a suspect who is incarcerated is questioned away from the general prison population about conduct that occurred outside the prison, *Miranda* warnings must be given regardless of the surrounding circumstances or whether the coercive pressures that *Miranda* was crafted to protect against are present. This is not a new rule, the Sixth Circuit held, but instead follows clearly established law, the Supreme Court’s 42-year-old decision in *United States v. Mathis*, 391 U.S. 1 (1968). Question Presented: Whether the Supreme Court’s clearly established precedent under 28 U.S.C. § 2254 holds that a prisoner is always “in custody” for purposes of *Miranda* any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison regardless of the surrounding circumstances?

- B. Right to Counsel in Post-Conviction Proceedings.** *Martinez v. Ryan*, 131 S. Ct. ____ (cert. granted June 6, 2011); decision below at 623 F.3d 731 (9th Cir. 2011). Some states prohibit raising ineffective assistance of counsel claims on direct appeal, instead instructing that such claims are to be made in collateral post-conviction proceedings. Yet, the right to counsel does not ordinarily inhere in post-conviction proceedings, which deprives the defendant of the assistance of counsel when first raising ineffectiveness claims. Question presented: Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first postconviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.
- C. No Right to Counsel in Civil Proceedings Leading to Jail (But Alternative Procedural Safeguards Must be Observed).** *Turner v. Rogers*, 131 S. Ct. 2507 (June 20, 2011). Turner, who is indigent, was incarcerated for twelve months after a family court judge found him in civil contempt of an order to pay child support for his minor child. Turner had no lawyer at the contempt hearing, and the family court never advised him of his right to counsel. On appeal, Turner challenged his incarceration under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Turner argued that, as an indigent defendant, he had a constitutional right to appointed counsel in civil contempt proceedings that result in incarceration. The Supreme Court of South Carolina rejected that argument on the

ground that the right to counsel applies only in criminal contempt proceedings. Turner petitioned for cert, arguing that holding is in direct conflict with the decisions of twenty-two federal courts of appeals and state courts of last resort. Moreover, he argued, it is irreconcilable with the Supreme Court's precedent, which seemingly held that the Constitution requires appointment of counsel in any proceeding that may result in the defendant's incarceration, regardless whether the proceeding is civil or criminal. The Supreme Court reversed, but did not grant the broad constitutional right to counsel in civil cases that Turner had sought. Instead, the Court held (5-4) that the Fourteenth Amendment's Due Process Clause does not automatically require the state to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. In this case, however, the petitioner's incarceration violated due process because he received neither counsel nor the benefit of alternative procedural safeguards that would reduce the risk of an erroneous deprivation of liberty. Separately, the Court decided that this case was not moot, even though Turner had already served his sentence and alleged no collateral consequences, because it is "capable of repetition" while "evading review." Justice Breyer wrote for the majority, while Justice Thomas dissented, joined by Justice Scalia, and in joined part by the Chief Justice and Justice Alito.

II. SEARCH & SEIZURE

A. **Good Faith Exception to Exclusionary Rule.** *Davis v. United States*, 131 S. Ct. 2419 (June 16, 2011). Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. Police had searched a vehicle in a manner that, at the time, complied with binding Circuit precedent – precedent that was later overruled by the United States Supreme Court in *Arizona v. Gant*. The Court noted that the deterrent value of suppression is diminished when the police act in compliance with then-binding circuit law. The Court further noted that Davis, because his case was pending when *Gant* was decided, could retroactively "invoke" the new Supreme Court precedent. But this did not mean he could automatically obtain its remedy of exclusion. The Court also rejected the argument that failure to fully apply Fourth Amendment over-rulings retroactively would prevent the Supreme Court from reconsidering prior Fourth Amendment decisions. The Court noted that in a future case it might allow the specific defendant who convinces the Supreme Court to overrule its precedent to benefit from its decision.

B. Search of Dwelling

1. **Police-Created Exigent Circumstances.** *Kentucky v. King*, 131 S. Ct. 1849 (May 16, 2011). Police were conducting a buy-bust operation with a CI. Officers entered an apartment building in hot pursuit of a person who sold crack cocaine to the informant. They heard a door slam, but were not certain into which of two apartments the dealer fled. A strong odor of marijuana emanated from one of the doors, which prompted the officers to believe the

dealer had fled into that apartment. The officers knocked on the door. They then heard noises which indicated that physical evidence was being destroyed. The officers entered the apartment and found large quantities of drugs. It was the wrong apartment; instead of finding a crack-selling drug dealer, they found a few pot-smokers sitting on the couch. The Kentucky Supreme Court held that this evidence should have been suppressed, ruling that (1) the exigent circumstances exception to the warrant requirement did not apply because the officers created the exigency by knocking on the door, and (2) the hot pursuit exception to the warrant requirement did not apply because the suspect was not aware he was being pursued. The Supreme Court reversed, 8-1, in a decision authored by Justice Alito. The Court held that the exigent circumstances exception to the Fourth Amendment warrant requirement applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. In ruling, the Court clarified the proper test for determining police-created exigent circumstances, overruling the test applied by Kentucky and various other tests applied in the federal circuits. A warrantless entry based on exigent circumstances, the Court held, is reasonable when the police did not create the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment. This rule follows the principle that warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. The Court remanded to the Kentucky Supreme Court to determine whether an exigency existed under this test. Assuming an exigency did exist, the officers' conduct – banging on the door and announcing their presence – was entirely consistent with the Fourth Amendment. Justice Ginsburg was the sole dissenter, warning, “The Court today arms the police with a way routinely to dishonor the Fourth Amendment’s warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant.”

2. **Dog Sniff at the Door.** *Florida v. Jardines*, 132 S. Ct. ___ (cert. granted Jan. 6, 2012); decision below at 73 So.3d 34 (Fla. 2011). Police received a Crime Stoppers tip that Jardines was growing marijuana in his house. About a month later, a detective and drug task force conducted surveillance at Jardines' house. Observing no activity, the detective, a canine officer and his trained police dog “Franky” walked up the sidewalk to the front porch. Franky alerted at the front door. At that point, the canine officer and the dog left. The detective knocked on the front door to obtain consent to search, but there was no response. He then personally smelled the odor of marijuana. The detective also noticed the air conditioning running constantly for fifteen minutes, which, in his experience, is a sign of a grow house. While the task force remained behind in public areas to secure the scene, the detective left to get a search warrant. A search pursuant to the warrant revealed that the house was a marijuana grow house. Jardines was charged with possession of

over 25 pounds of marijuana and stealing electricity from Florida Power & Light. He moved to suppress, arguing that the warrantless dog sniff violated the Fourth Amendment. The trial court granted the motion to suppress, but an intermediate appellate court reversed. The Florida Supreme Court then reinstated the suppression order, holding “that a ‘sniff test,’ such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a ‘search’ within the meaning of the Fourth Amendment.” The Supreme Court granted cert to determine “[w]hether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause?”

- C. **Attachment of GPS as Search of Vehicle.** *United States v. Jones*, 132 S. Ct. ____ (Jan. 23, 2012). Police attached a global positioning system (“GPS”) device to the defendant’s vehicle to track his public movements for approximately four weeks. The court of appeals found this unreasonable under the Fourth Amendment. The government petitioned for cert, claiming that attachment of a GPS is not a search. The Supreme Court affirmed in a decision written by Justice Scalia (refined and confused by concurring opinions), holding that attaching a GPS to a car is a search within the terms of the Fourth Amendment. Eighteenth century trespass principles guided the Court’s majority decision, holding that the common-law trespassy test was not supplanted by more recent decisions, such as *Katz*, which added “reasonable expectation of privacy” to the Fourth Amendment formulation. Here, the Court found that trespasses provide a route to Fourth Amendment protection parallel to the *Katz* reasonable expectation of privacy. The Court distinguished the beeper cases of *Knott* and *Karo*, as well as vehicle and open fields cases. In deciding the case, the Court did not reach the question whether 24/7 surveillance implicates the Fourth Amendment. Justice Alito concurred in the judgment (joined by Justices Ginsburg, Breyer and Kagan), taking issue with Justice Scalia’s evaluation of the Fourth Amendment’s meaning at the time of ratification and preferring to find a reasonable expectation of privacy that was violated by the attachment of the GPS device. Justice Sotomayor’s opinion explained why she believes that 24/7 surveillance constitutes a search; she also offered a preview of the potential need to redefine reasonable expectations of privacy in the digital age. Despite indications from Justices Scalia and Alito that they would not go that far (hypothesizing a two-day monitoring of a seller of stolen electronics or a 6-month monitoring of a suspected terrorist), the Court left the 24/7 surveillance question unresolved. The Court also refused to consider the government’s alternative argument, that if this was a search, it was reasonable because officers had a reasonable suspicion—the government never made that argument in the courts below so the argument was deemed “forfeited.” The majority does not specifically address the impact of its decision: Is a warrant required based on probable cause? Is some lesser standard acceptable, such as reasonable suspicion? Are the accepted exceptions to the warrant requirement, such as exigency, applicable to excuse failure to obtain a warrant? The majority decision holds only that attachment of the GPS was a “search.” Justice Sotomayor’s concurrence is the only opinion that makes reference to “without a valid warrant” and “without consent,” and

even these references are in passing. And, since the government forfeited in this case the arguments concerning these questions, it is safe to say they remain unresolved.

D. Application of Exclusionary Rule to DMV Records. *Tolentino v. New York*, 131 S. Ct. 1387 (cert. granted Nov. 15, 2010); decision below at 14 N.Y.3d 382 (2010), **(cert dismissed as improvidently granted, Mar. 29, 2011)**. Jose Tolentino was driving in Manhattan at 7:40 p.m. on New Year’s Day 2005. Several New York City police officers stopped his vehicle because they believed he was playing his music too loudly. During the stop, they ascertained his identity and ran a computer check of his New York State Department of Motor Vehicles (“DMV”) records. That check revealed that Tolentino’s license had been suspended, and that he had received at least ten suspensions on at least ten different dates for failure to answer a summons or pay a fine. He was charged with one count of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree. Tolentino moved to suppress the DMV records, arguing that his vehicle was stopped by the police for no apparent reason, and that the police exploited this illegality to perform a DMV record search that resulted in the discovery that his driver’s license had been suspended and had not been reinstated. The motion to suppress was denied because the New York courts found that DMV records are a type of identity-related evidence, and as such, are not subject to suppression. In support of this decision, the court cited the Supreme Court’s decision in *Immigration and Naturalization Service (INS) v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). In his petition for cert, Tolentino contends that this finding is based on a misreading of the *Lopez-Mendoza* case, and he notes a 4-3 circuit split among the federal circuits regarding the applicability of the exclusionary rule to pre-existing identity-related government records accessed through police action violative of the Fourth Amendment. Question presented by petitioner: Whether pre-existing identity-related governmental documents, such as motor vehicle records, obtained as the direct result of police action violative of the Fourth Amendment, are subject to the exclusionary rule? Question as rephrased by state: Whether the exclusionary rule applies to preexisting government records obtained after an allegedly unlawful traffic stop, where the only link between the two is that the police learned the petitioner’s identity as a result of the stop? Post briefing and oral argument, the Supreme Court dismissed the cert as improvidently granted.

E. Pretext Material Witness Warrant to Detain and Investigate Terrorism Suspect. *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (May 31, 2011). Al-Kidd was arrested on a material witness warrant issued by a federal magistrate judge under 18 U.S.C. § 3144 in connection with a pending prosecution. He later filed a *Bivens* action against the former Attorney General of the United States, seeking damages for his arrest. Al-Kidd alleged that his arrest resulted from a policy implemented by the former Attorney General of using the material witness statute as a “pretext” to investigate and preventively detain terrorism suspects. In addition, Al-Kidd alleged that the affidavit submitted in support of the warrant for his arrest contained false statements. Ashcroft was denied absolute or qualified immunity in the lower court and petitioned for certiorari. The Supreme Court reversed, holding that the objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant

cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.

- F. Warrantless Interrogation of Child.** *Camreta v. Greene* and *Alford v. Greene*, 131 S. Ct. 2020 (May 26, 2011). Child protective services and a local law enforcement agency received a report that a nine-year old girl was being sexually abused by her father. Based upon this report, a child protective services caseworker and a deputy sheriff interviewed the girl at her public school without first obtaining a warrant or parental consent. Splitting with the Fifth Circuit, which had held under similar circumstances that the traditional warrant/warrant exception analysis sets too high a threshold when investigating allegations of child abuse, the Ninth Circuit held the interview violated the girl’s Fourth Amendment right to be free from “unreasonable” seizures absent a warrant, court order, exigent circumstances, or parental consent. The Ninth Circuit’s holding relied on the Supreme Court’s decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and concluded the balancing tests of *Terry v. Ohio* and *New Jersey v. T.L.O.* do not apply to in-school seizures conducted with law enforcement. The panel reasoned that *Ferguson* barred the application of the *Terry/T.L.O.* standard where “law enforcement personnel or purposes” are too deeply involved in a seizure. Thus, it held “the general law of search warrants applies to child abuse investigations” where law enforcement is involved and, absent a warrant or court order, exigent circumstances, or parental consent, S.G.’s interview was unconstitutional. Both the deputy sheriff and caseworker petitioned for cert.
- Question presented by the deputy sheriff:** Does the Fourth Amendment require a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father? **Questions presented by the caseworker:** (1) To assess the constitutionality of the child’s interview, the Ninth Circuit applied the traditional warrant/warrant-exception requirements that apply to seizures of suspected criminals. Should the Ninth Circuit, as other circuits have done, instead have applied the balancing standard that this Court has identified as the appropriate standard when a witness is temporarily detained? (2) The Ninth Circuit addressed the constitutionality of the interview in order to provide “guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment[,]” and it thus articulated a rule that will apply to all future child-abuse investigations. Is the Ninth Circuit’s constitutional ruling reviewable, notwithstanding that it ruled in petitioner’s favor on qualified immunity grounds? The Supreme Court answered the latter question first, holding that it had authority to review the question of qualified immunity, even though the petitioners had prevailed below. Second, it held the case is moot since S.G. is now nearly 18 years-old and has moved away from the community in which these events occurred. This mootness determination led the Court to vacate the underlying judgment and its determination of a constitutional violation.

III. CRIMES

- A. Invitation to Challenge Constitutionality of Federal Body Armor Prohibition.** *Alderman v. United States*, 131 S. Ct. 700 (**cert. denied** Jan 10, 2011). Justices Thomas and Scalia dissented from the denial of certiorari in a case that challenged the constitutionality of 18 U.S.C. § 11009(e)(2)(A), which makes it unlawful for a person to “purchase, own, or possess body armor, if that person has been convicted of a felony that is . . . a crime of violence.” Justice Thomas’ dissent, joined by Justice Scalia, argues that the court of appeals’ “implic[it] assump[tion]” of the federal law’s constitutionality, based on the 33-year-old case of *Scarborough v. United States*, 431 U.S. 563 (1977), effectively nullifies the Supreme Court’s later sea-change decisions limiting Congress’ police power under the Commerce Clause. *See Lopez v. United States*, 541 U.S. 549 (1995); *United States v. Morrison*, 529 S. Ct. 598 (2000). *Lopez* requires that a federal law is authorized under the Commerce Clause only if it regulates: (1) use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; or (3) “activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce.” *Lopez* rejects a general federal police power under the Commerce Clause. The dissent contends that “*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook . . .” Such a law, according to the dissenting justices, trespasses on the states’ rights and traditional state police powers. They caution that, “[i]f the *Lopez* framework is to have any continuing vitality, it is up to the Court to prevent it from being undermined by a 1977 precedent that does not squarely address the constitutional issue.” This dissent is an obvious invitation for counsel to raise anew Commerce Clause challenges to this statute, and other felon-in-possession laws.
- B. Tenth Amendment Limitations on Criminal Law – Standing.** *Bond v. United States*, 131 S. Ct. 2355 (June 16, 2011). Petitioner admitted that she tried to injure her husband’s paramour by spreading toxic chemicals on the woman’s car and mailbox. Instead of allowing local officials to handle this domestic dispute, the federal prosecutor indicted petitioner under a federal law, 18 U.S.C. § 229(a), enacted by Congress to implement the United States’ obligations under a 1993 treaty addressing the proliferation of chemical and biological weapons. Facing a sentence of six years in prison, petitioner challenged the statute as exceeding the federal government’s enumerated powers and impermissible under the Tenth Amendment. After losing that argument in the district court, she pleaded guilty, reserving the right to appeal her pretrial motions. Declining to reach petitioner’s constitutional arguments, and in acknowledged conflict with decisions from other courts of appeals, the Third Circuit held that, when the state and its officers are not party to the proceedings, a private party has no standing to challenge the federal statute under which she is convicted as in excess of Congress’s enumerated powers and in violation of the Tenth Amendment. The Supreme Court reversed, holding that a criminal defendant has standing to challenge the constitutionality of a federal criminal statute on the grounds that measure interferes with the powers reserved to

the States under the Tenth Amendment.

C. Sufficiency of Federal Nexus in Federal Murder Conviction. *Fowler v. United States*, 131 S. Ct. 2045 (May 26, 2011). Fowler was convicted of murdering a Haines City Police officer with intent to prevent a him from communicating information about a federal offense to a federal law enforcement officer or judge of the United States, in violation of 18 U.S.C. § 1512(a)(1)(C). Fowler and others, including Gamble, had robbed a Holiday Inn and planned to rob a NationsBank the next day. They gathered in a vehicle at a cemetery, dressed in black. The vehicle contained masks, guns, and gloves. The police officer stumbled upon their vehicle and called in to his dispatcher that he was going to investigate a suspicious vehicle. He ordered the occupants from it, and he seemed to recognize one of the occupants. They eventually disarmed him and the officer was eventually found dead. Gamble cooperated and implicated Fowler in the killing. Fowler questions whether a defendant may be convicted of murder under §1512(a)(1)(C) without proof that information regarding a possible federal crime would have been transferred from the victim to federal law enforcement officers or judges.. The Eleventh Circuit affirmed Fowler’s conviction even though there was no evidence that information allegedly obtained by the deceased officer on the date of his death would have been transferred to a federal law enforcement officer or judge. In the Eleventh Circuit’s opinion, the “possible or potential communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C). Here, the federal nexus requirement was clearly satisfiedThese [the offenses which Fowler, Gamble, and others allegedly were perpetrating on the morning of the officer’s killing] were all federal crimes and could have led to a federal investigation and prosecution. These facts adequately support Fowler’s conviction for violating §1512(a)(1)(C).” The Supreme Court reverses, rejecting the 11th Circuit’s “possible or potential communication”-“possible crime” formulation. In an opinion by Justice Breyer (joined by Roberts, C. J., and Kennedy, Thomas, Sotomayor, and Kagan, JJ), the Court held that, in such circumstances, the government must show that there was a “reasonable likelihood” that a relevant communication would have been made to a federal officer. Justice Scalia concurred in the judgment, but argued forcefully that proof needed to be beyond a reasonable doubt, not the lower “reasonable likelihood standard. Justices Alito and Ginsburg dissented. The case was remanded for a determination of whether there has been plain error here, since the defendant admits he failed to preserve the issue in the lower courts.

D. First Amendment Limits on Criminal Sanctions for Stolen Valor. *United States v. Xavier Alvarez*, 132 S. Ct. ___ (cert. granted Oct. 17, 2011); decision below at 617 F.3d 1198 (9th Cir. 2010). The Stolen Valor Act of 2005, 18 U.S.C. § 704(b) prohibits a person from “falsely represent[ing],” verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.” The crime is a misdemeanor, punishable by up to 6 months imprisonment. Alvarez entered a conditional guilty plea to a charge he made a false representation of having earned a military award, in violation of the Act. The district court sentenced him to three years probation. The Ninth Circuit reversed the

conviction on the ground that section 704(b) is facially unconstitutional, in violation of the First Amendment, and remanded for further proceedings. The Solicitor General petitioned for cert, which the Supreme Court granted, presenting the question: Whether 18 U.S.C. § 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

IV. TRIAL

- A. Speedy Trial – Tolling Time For Motions and Transportation.** *United States v. Tinklenberg*, 131 S. Ct. 2007 (May 26, 2011). The Sixth Circuit reversed Tinklenberg’s conviction on one speedy trial ground, although ruled that a second ground would not have provided relief. The Sixth Circuit held that the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(D), only excludes the time in which pretrial motions are filed and pending if they could possibly cause any delay of trial. Separately, the Sixth Circuit held that weekends and holidays relating to the defendant’s transfer to a hospital for an evaluation do not count in the time limited for such transportation under §3161(h)(1)(F). Transportation is covered by §3161(h)(1)(F), which excludes from the 70-day calculation “delay resulting from transportation of any defendant ... to and from places of examination ..., except that any time consumed in excess of ten days ... shall be presumed to be unreasonable.” The lower courts had agreed that a total of 20 transportation days had elapsed when Tinklenberg was evaluated for competency, and that because the government provided no justification, all days in excess of the 10 days specified in the statute were unreasonable. Yet, the Sixth Circuit exempted 8 weekend days and holidays from the count on the theory that subparagraph (F) incorporated Federal Rule of Criminal Procedure 45(a), which, at the time, excluded such days when computing any period specified in “rules” and “court order[s]” that was less than 11 days. Thus, the Circuit considered only two transportation days excessive, and the parties concede that the eight extra days were enough to make the difference between compliance with, and violation of, the Act. The Supreme Court reversed both holdings. First, it found that time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under §3161(h)(1)(D). Second, the Court exercised its discretion to hold that Rule 45 is not incorporated in the Speedy Trial Act, thus weekends and holidays are not excluded from the section (F) computation. Adding back the holiday and weekend days, the speedy trial time had expired here, so the Sixth Circuit’s reversal of the conviction was upheld.
- B. Suggestive Identification Evidence.** *Perry v. New Hampshire*, 132 S. Ct. ____ (Jan. 11, 2012). Nashua police received a call reporting that an African-American male was trying to break into cars parked in the lot of the caller’s apartment building. Police went to the scene, found Perry in the vicinity and began to question him. At the same time, another officer went to the caller’s apartment and asked her to describe the man. The witness pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot next to a police officer. Perry was arrested based on this ID. Perry moved to suppress the witness’ identification on the ground that admitting it at trial would violate due process. New

Hampshire courts denied relief because there was no state action involved in the suggestive ID – it was merely coincidental. He then petitioned the Supreme Court, asking it to hold that due process requires pretrial screening for eyewitness reliability even in cases in which the suggestive circumstances were not arranged by law enforcement. He argued that suggestiveness, whether created by police or not, presents the grave risk that mistaken identification will yield a miscarriage of justice. The Supreme Court rejected his effort to extend the Due Process clause in this manner. Writing for an 8-1 majority, Justice Ginsburg reasoned that “[o]ur decisions . . . turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at post-indictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.”

C. Confrontation

1. **Victim’s Statement Near Violent Crime Scene Not Testimonial Hearsay.** *Michigan v. Bryant*, 131 S. Ct. 1143 (Feb. 28, 2011) (Justice Kagan recused). Officers responding to a radio run that someone had been shot found Anthony Covington lying in a gas station outside his car—grabbing his sides in considerable pain, and blood oozing out of his stomach. When a police officer asked “what happened,” Covington responded that he had been shot, that somebody named “Rick” had shot him through a door, and he provided a description of his attacker. Officers described the victim as nervous and in obvious pain, constantly grabbing his side, and talking in a halting manner. After waiting with the victim for five or ten minutes until an ambulance arrived, an officer moved from the victim’s location to the place identified as the scene of the shooting to attempt to locate and apprehend the shooter. Bryant was located there. The victim died several hours later. Covington’s statements were admitted at Bryant’s trial and he was convicted of second degree murder. On appeal, the Supreme Court of Michigan held that the Sixth Amendment’s Confrontation Clause, as construed in *Crawford v. Washington*, 541 U. S. 36 (2004), and *Davis v. Washington*, 547 U. S. 813 (2006), rendered Covington’s statements inadmissible testimonial hearsay, and the state court reversed Bryant’s conviction. In a 5-1-2 decision authored by Justice Sotomayor, the Supreme Court reversed, holding that the circumstances of the interaction between Covington and the police objectively indicate that the “primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency.” *Davis*, 547 U. S., at 822. Therefore, Covington’s identification and description of the shooter and the location of the shooting were not testimonial statements, and their admission at Bryant’s trial did not violate the Confrontation Clause. In reaching this conclusion, the majority declared that the “primary purpose”

inquiry required an objective evaluation of the circumstances and the parties' intent. Here, the setting for the statements was at or near a crime scene, not at a police station. The existence of an "ongoing emergency" encompasses not just the threat to the first victim, but to the public and to the first responders, and can depend on whether a gun is involved. In addition, the informality of the encounter is a factor that can distinguish it from a formal station house interrogation. The motives of a victim in speaking to police must be viewed objectively, by taking into consideration the actions of the police as first responders. The shooting victim's primary motives were not to establish past events potentially relevant to later criminal prosecution. Justice Thomas concurred in the result, but would have ruled based upon his view that the police questioning lacked sufficient formality and solemnity for the answers to be considered testimonial. Justice Scalia filed a blistering dissent, contending that the Court majority distorted the meaning of existing Confrontation Clause jurisprudence, leaving it in a shambles, and making the Court the "obfuscator of last resort." He found the police officers' explanation of an ongoing emergency implausible, rather the facts showed it was five officers conducting successive interrogations of a dying man and preserving his testimony regarding his killer. He sees the majority's decision as a dramatic curtailment of rights under the Confrontation Clause. Justice Ginsburg joined Justice Scalia's dissent, adding that she would have been prepared to decide the continuing viability of the dying declaration exception to the Confrontation Clause, post-*Crawford*, an exception that may have applied here except that prosecutors expressly abandoned the issue in this case.

2. **Gas Chromatograph Blood Alcohol Report.** *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (June 23, 2011). The Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. The Court noted that the representations in a forensic report – for example, the indication that no circumstance affected the analysis' validity – were the type of topic that is subject to cross-examination. They therefore fell within Confrontation Clause protection. The Court noted that substitute expert witness testimony did not satisfy the Confrontation Clause, as surrogate testimony would not convey what the person who prepared and certified the report knew, did, or observed.
3. **DNA Test.** *Williams v. Illinois*, 131 S. Ct. ____ (cert. granted June 28, 2011); decision below at 238 Ill. 2d 125 (2011). Question presented: Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause. This case involved a rape and kidnaping, with a positive DNA

analysis. The lab analyst was called to testify, but the actual lab report itself was not admitted. The expert witness had no part in making the analysis, and no personal knowledge of how the test was done. The Illinois Supreme Court ruled that the state could introduce the substance of a forensic analyst's report on a DNA test of evidence by putting an expert witness on the stand and having her analyze the results, which showed a DNA match. The state court concluded that there was no violation of the defendant's Confrontation right because the findings of the lab report were being admitted not for their truth, but only to explain the expert's opinion about the results. These events are similar to those hypothesized by Justice Sotomayor in her *Bullcoming* concurrence last Term. There the Court ruled that a lab supervisor could not be a surrogate witness in place of a lab technician who prepared a report but did not appear, so the lab test was not admissible. Justice Sotomayor, however, explained that the decision was limited as she identified circumstances not covered by it, including if "an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." In her view, the report would not have been admitted even though a witness gave an opinion about the test result.

- D. Brady Violations.** *Connick v. Thompson*, 131 S. Ct. 1350 (Mar. 29, 2011). Prosecutors in the Orleans Parish District Attorney's Office hid exculpatory evidence, violating John Thompson's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Despite no history of similar violations, the office was found liable under § 1983 for failing to train prosecutors under a theory that inadequate training may give rise to municipal liability if it shows "deliberate indifference" and actually causes a violation. See *City of Canton v. Harris*, 489 U.S. 658, 389-91 (1978); *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-07 (1997). A pattern of violations is usually necessary to show culpability and causation, but, Thompson argued, in rare cases one violation may suffice. *Bryan County*, 520 U.S. at 409. The Supreme Court rejected this theory of liability and reversed in a 5-4 decision authored by Justice Thomas, holding that a district attorney's office may not be held liable under §1983 for failure to train its prosecutors based on a single *Brady* violation. The fact that prosecutors have gone to law school, learn ethics, are subject to bar sanctions for ethical breaches, and practice with other prosecutors who are skilled in ethical obligations is plenty enough for a prosecutor's office to escape civil liability for a single *Brady* breach. "In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law. *Bryan Cty.*, 520 U. S., at 409. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain." The majority's naive understanding of criminal trial practice was rebutted in no uncertain terms by the dissenters (Justice Ginsburg, joined by Breyer, Sotomayor & Kagan), who challenged the unreal world view of the majority opinion, and recounted the deliberate indifference of the DA and his staff to a proper understanding of *Brady* obligations. To the dissenters, a single *Brady* violation, coupled with deliberate indifference to the obligation, is actionable

under *City of Canton*. Justice Scalia concurred with the majority (joined by Alito) because prosecutors make mistakes and he cannot imagine what training might have prevented the *Brady* violation – mistake – in this case.

1. **Brady Violations: *Connick, Direct Appeal Edition*. *Smith v. Cain*, 132 S. Ct. ____ (Jan. 10, 2012).** In the wake of recurrent *Brady*/*Giglio* violations in the DA’s office of Harry Connick follows this case involving five counts of first degree murder, a Life sentence without possibility of parole and more allegations of suppressed exculpatory evidence. Juan Smith was convicted of first-degree murder based on the testimony of a single eyewitness. During state postconviction relief proceedings, Smith obtained police files containing statements by the eyewitness contradicting his testimony; on the night he was first interviewed and again, a week later, he said he could not identify the perpetrators of the crime. Smith argued that the prosecution’s failure to disclose those statements violated *Brady v. Maryland*, 373 U. S. 83. In case we need reminding—as Louisiana prosecutors and courts do—*Brady* held that due process bars a state from withholding evidence that is favorable to the defense and material to the defendant’s guilt or punishment. The state trial court rejected Smith’s *Brady* claim, and the Louisiana Court of Appeal and Louisiana Supreme Court denied review. The Supreme Court reversed 8-1, in a brief and direct opinion written by Chief Justice Roberts, holding that *Brady* requires that Smith’s conviction be reversed. In the Supreme Court, the state did not dispute that the eyewitness’s statements were favorable to Smith and that those statements were not disclosed to him. The Court had no trouble finding a fatal *Brady* violation here. Under *Brady*, evidence is material if there is a “reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Cone v. Bell*, 556 U. S. 449, 469–470. A “reasonable probability” means that the likelihood of a different result is great enough to “undermine[] confidence in the outcome of the trial.” *Kyles v. Whitley*, 514 U. S. 419, 434. Evidence impeaching an eyewitness’s testimony may not be material if the State’s other evidence is strong enough to sustain confidence in the verdict, *United States v. Agurs*, but here, the eyewitness’s testimony was the only evidence linking Smith to the crime, and the eyewitness’s undisclosed statements contradicted his testimony. The eyewitness’s statements were plainly material, and the State’s failure to disclose those them violated *Brady*. Although Justice Thomas dissented, the ruling comes as no surprise, since counsel for the state was asked at oral argument whether she had considered confessing error.

E. **Double Jeopardy Resulting from Hung Lesser Included Offenses. *Blueford v. Arkansas*, 132 S. Ct. ____ (cert. granted Oct. 11, 2011); decision below at 2011 Ark. 8, ____ S.W.3d ____ (Ark. 2011).** Alex Blueford was charged with capital murder, but the state waived the death penalty. At trial the jury was instructed to consider capital murder and three lesser included offenses: first degree murder, manslaughter, and negligent homicide. The jury was instructed that it should not consider a lesser-included offense unless it first unanimously agreed that Blueford was not

guilty of a greater offense: It should consider first degree murder only if it unanimously agreed that Blueford did not commit capital murder; it should consider manslaughter only if it unanimously agreed that he did not commit capital murder or first-degree murder; and it should consider negligent homicide only if it unanimously agreed that he did not commit capital murder, first-degree murder, or manslaughter. The jury forewoman announced in open court that the jury was “unanimous against” two charges – capital murder and first-degree murder. She also explained that the jury deadlocked on the manslaughter charge and that, accordingly had not proceeded to decide the negligent homicide charge. Blueford moved the trial court to accept a partial verdict of acquittal on capital murder and first degree murder, a practice that five other states have held is required by the Double Jeopardy clause. The trial court denied the motion and granted a mistrial. Prior to retrial on all charges, the trial court rejected Blueford’s motion to dismiss the capital murder and first-degree murder charges on Double Jeopardy grounds. Blueford filed an interlocutory appeal in the Arkansas Supreme Court. It affirmed the Double Jeopardy claim as to capital murder and first-degree murder, because it was “unpersuaded” by the contrary decisions of other states. The U.S. Supreme Court granted cert to decide the conflict among decisions: Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars the re-prosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.

V. SENTENCING

- A. **Life Without Parole.** *Miller v. Alabama* and *Jackson v. Hobbs*, 132 S. Ct. ___ (cert granted Nov. 7, 2011); decisions below at 63 So. 3d 676 (Ala. 2011) and 2011 Ark. 49 (2011) (to be heard in tandem). *Miller* and *Jackson* are two of only 73 fourteen-year-olds nationwide who are serving Life Without Parole (LWOP) sentences. Their cases present the issue left undecided by *Graham v. Florida* and *Sullivan v. Florida*: Whether the Eighth Amendment forbids a life-without-parole sentence for a young juvenile convicted of a homicide offense. Their cases are somewhat different, as are the questions presented by their petitions, yet the Supreme Court granted cert in both cases and ordered that they be argued in tandem. **Miller** was sentenced to a mandatory sentence of life imprisonment without parole for a homicide offense committed when he was only fourteen years old. Questions presented in *Miller* are: (1) Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments’ prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children? (2) Does imposition of mandatory sentence of life imprisonment without parole on a fourteen-year-old child convicted of homicide - a sentence imposed pursuant to a statutory scheme that categorically precludes consideration of the offender’s young age or any other mitigating circumstances - violate the Eighth and Fourteenth Amendments’ prohibition on cruel and unusual punishments? **Jackson** was sentenced to life imprisonment without the possibility of parole for an offense committed when he was fourteen years old, but, while Jackson’s offense involved a homicide, he was convicted only on the theory

that he was an accomplice to a robbery in which an older boy shot a shop attendant. Jackson did not commit the killing and was not shown to have had any intent or awareness that the attendant would be shot. The robbery “plan,” such as it was, was spur-of-the moment, formed just before the robbery, while Jackson, his cousin, and another older teen were walking together through a housing project. Because Arkansas law made a life-without-parole sentence mandatory upon Jackson’s homicide conviction, neither his age nor any of these other mitigating circumstances could be considered by his sentencer. The questions presented in *Jackson* are similar to those in *Miller*: Questions (1) and (3) mirror questions (1) and (2) in *Miller*. Question (2) in *Jackson*, however, adds a felony-murder wrinkle to the Eighth Amendment claim: Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?

B. ACCA Predicates – A Change of Direction?

- 1. Fleeting Police in a Vehicle.** *Sykes v. United States*, 131 S. Ct. 2267 (June 9, 2011). The Seventh Circuit held that “fleeing police in a vehicle in violation of Ind. Code § 35-44-3-3(b)(1)(A) is sufficiently similar to ACCA’s enumerated crimes in kind, as well as the degree of risk posed, and counts as a violent felony under ACCA.” The Supreme Court affirmed, holding that a prior conviction under this Indiana law is a violent felony under the ACCA’s residual clause. *Sykes* adds a new component to the analysis of whether a crime is a violent felony. The Indiana statute at issue in *Sykes* sets forth multiple variations of “fleeing” offenses. One provision criminalizes flight where the defendant “operates a vehicle in a manner that creates a substantial risk of bodily injury to another.” The provision under which *Sykes* was convicted prohibits vehicle flight from a law enforcement officer after the offender has, by visible or audible means, identified himself and ordered the person to stop.” The Court rejected *Sykes*’ argument that only the former presented a serious potential risk of physical injury to another. In reaching this conclusion, the Court relied heavily on the fact that the two offenses were punished similarly (both Class D felonies carrying terms of between six months and three years). The Court expressly declined to decide if it matters under the residual clause “whether a crime is a lesser included offense even in cases where that offense carries a less severe penalty than the offense that includes it.”
- 2. “Is” Means “Was”, not “Is.”** *McNeill v. United States*, 131 S. Ct. 2218 (June 6, 2011). The Armed Career Criminal Act (ACCA) applies to a person who “violates section 922(g)” and “has three previous convictions . . . for a violent felony or a serious drug offense.” 18 U.S.C. § 924(e)(1). A “serious drug offense” is defined in relevant part as “an offense under State law . . . for which a maximum term of imprisonment of ten years or more *is prescribed*

by law.” § 924(e)(2)(A)(ii). The Fourth Circuit affirmed the district court’s classification of McNeil’s North Carolina drug offenses as “serious drug offenses” under ACCA, even though at the time of his federal sentencing, North Carolina’s current sentencing law did not prescribe a maximum term of imprisonment of at least ten years for those state drug offenses. The Supreme Court affirmed, holding that a federal sentencing court must determine whether “an offense under State law” is a “serious drug offense” by consulting the “maximum term of imprisonment” applicable to a defendant’s prior state drug offense at the time of the defendant’s conviction for that offense. Subsequent changes in the law are not applicable at ACCA sentencings, the Court held, under a plain-text reading of the law. Ignoring the plain text, which uses the present-tense “is” (and does not use the word “was”) Justice Thomas wrote for the full Court: “We hold that the ‘maximum term of imprisonment’ for a defendant’s prior state drug offense is the maximum sentence applicable to his offense when he was convicted of it.”

C. **Mandatory Minimum Sentences.**

1. **Cocaine Base vs. Powder.** *DePierre v. United States*, 131 S. Ct. 2225 (June 9, 2011). Title 21 U.S.C. § 841(b)(1)(A) requires the imposition of a ten-year mandatory minimum sentence upon persons who engage in a drug-related offense involving either (a) five kilograms or more of “coca leaves” or “cocaine,” or (b) fifty grams (.05 kilograms) or more of those substances, or of a mixture of those substances, “which contain[] cocaine base.” Is the term “cocaine base” limited only to “crack” or does it encompass every form of cocaine that is classified chemically as a base—which would mean that the ten-year mandatory minimum applies not only to “crack”, but also to an offense involving 50 grams or more of raw coca leaves or of the paste derived from coca leaves. The Supreme Court held, unanimously, the term “cocaine base” includes all cocaine in its chemically basic form, not just crack cocaine. Its holding abrogates contrary decisions in the Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits that had interpreted “cocaine base” to mean only crack, and, perhaps, other smokeable types of cocaine base.

D. **Rehabilitation As a Permissible Sentencing Factor.**

1. **Post-Sentencing Good Behavior A Permissible Sentencing Factor at Resentencing.** *Pepper v. United States*, 131 S. Ct. 1229 (Mar. 2, 2011) (Justice Kagan recused). In 2003, Pepper pled guilty to conspiracy to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 846. With the benefit of the safety valve, Pepper’s sentencing guidelines range was 97–121 months. The government moved for a 15% downward departure for substantial assistance. The district court went lower, however, sentencing Pepper to 24-months in prison, followed by 5 years supervised release, a 75% downward departure from the low end of the Guidelines range. The Government appealed and the Eighth Circuit reversed, in light of

the intervening Supreme Court decision in *Booker*. Pepper completed his 24-month sentence three days after Pepper I was issued and began serving his term of supervised release. In 2006, the district court conducted a resentencing hearing at which Pepper presented evidence that he was no longer a drug addict, having completed a 500-hour drug treatment program while in prison; that he was enrolled in community college and had achieved very good grades; and that he was working part time. Pepper's father testified that he and his son were no longer estranged, and Pepper's probation officer testified that a 24-month sentence would be reasonable in light of Pepper's substantial assistance, postsentencing rehabilitation, and demonstrated low recidivism risk. The district court again sentenced Pepper to 24 months, granting a 40 percent downward departure based on Pepper's substantial assistance, and a further downward variance based on Pepper's rehabilitation since his initial sentencing. In Pepper II, the Eighth Circuit again reversed and remanded for resentencing, concluding that his postsentencing rehabilitation could not be considered as a factor supporting a downward variance, and directing that the case be assigned to a different district judge. The Supreme Court vacated Pepper II in light of the intervening Supreme Court decision in *Gall v. United States*. In Pepper III, the Eighth Circuit reversed and remanded again. At the second resentencing hearing, Pepper informed the new district judge that he was still in school, was about to be promoted at his job, and had married and was supporting his new family. Noting the nearly identical remand language of Pepper II and Pepper III, the court observed that it was not bound to reduce Pepper's range by 40 percent for substantial assistance. Instead, it found him entitled to a 20 percent reduction and refused to grant a further downward variance for postsentencing rehabilitation. It imposed a 65-month prison term and 12 months of supervised release. In Pepper IV, the Eighth Circuit once again rejected Pepper's postsentencing rehabilitation argument. It also rejected his claim that the law of the case from Pepper II and Pepper III required the District Court to reduce the applicable Guidelines range by at least 40 percent. Finally, here, the Supreme Court reversed the Eighth Circuit, holding that when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now advisory federal sentencing guidelines range. Writing for a 7-1 (or 5-2-1) majority, Justice Sotomayor held that 18 U.S.C. § 3742(g)(2)—which by its terms prevents reliance on non-departure grounds at resentencing, thus necessarily rejecting consideration of post-sentence rehabilitation—is unconstitutional as a result of the Court's holding in *Booker*. Separately, the Supreme Court affirmed the Court of Appeals' ruling that the law of the case doctrine did not require the district court in this case to apply the same percentage departure from the Guidelines range for substantial assistance that had been applied at petitioner's prior sentencing. Justice Breyer concurred, coming close to dissent, in an opinion in which he expressed his disappointment about how really advisory guidelines now are and cautioning

that, in his opinion, district judges cannot disregard the guidelines “at will.” Justice Alito concurred with a similar theme, that although the guidelines are not binding, district courts must still give them significant weight. Justice Thomas dissented, contending that *Booker*’s advisory sentencing scheme went further than constitutionally necessary, and he therefore concluded that the sentencing statute should be followed as written. Despite the reservations of the concurrences and dissent, Justice Sotomayor’s majority opinion includes five solid votes reiterating an advisory sentencing guidelines process.

2. **Lengthening Initial Sentence to Improve Prospects of Rehabilitation.** *Tapia v. United States*, 131 S. Ct. 2382 (June 16, 2011). Tapia was sentenced to 51 months imprisonment following her jury-trial conviction for bringing in an illegal alien for financial gain, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii), bringing in an illegal alien without presentation, in violation of 8 U.S.C. § 1324(a)(2)(B)(iii), aiding and abetting, in violation of 18 U.S.C. § 2, and bail jumping, in violation of 18 U.S.C. § 3146. In sentencing her, the district court stated that it was imposing a 51-month sentence, instead of the mandatory minimum 3 year sentence, to ensure Tapia would get the benefit of BOP’s 500 Hour Drug Program. Tapia appealed, contending that the district court committed plain error by basing her 51-month sentence on speculation about whether and when Tapia could enter and complete the Bureau of Prison’s 500-hour drug abuse treatment program. She relied upon the plain language of 18 U.S.C. § 3582(a), which provides: “The court in determining whether to impose a term of imprisonment . . . shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that *imprisonment is not an appropriate means of promoting correction and rehabilitation.*” The Ninth Circuit rejected her argument and affirmed, even though there is a circuit split on this question. Compare *United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007); *In re: Sealed Case*, 573 F.3d 844 (D.C. Cir. 2009), with *United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994); *United States v. Hawk Wing*, 433 F.3d 622, 629-30 (8th Cir. 2006); *United States v. Jimenez*, 605 F.3d 415, 424 (6th Cir. 2010). The Solicitor General agreed with Tapia’s interpretation. The Supreme Court reversed, holding that 18 U.S.C. § 3582(a) does not permit a sentencing court to impose or lengthen a prison term in order to foster a defendant’s rehabilitation. The Court relied on the plain language of the statute, and the fact that sentencing courts when imposing terms of incarceration are not authorized by statute to ensure that offenders participate in prison rehabilitation programs, but are authorized to consider rehabilitation when imposing probation or supervised release.

- E. **Consecutive Federal/State Sentences.** *Setser v. United States*, 131 S. Ct. ___ (cert granted June 13, 2011); decision below at 607 F.3d 128 (5th Cir. 2010). Question presented: Whether a district court has the authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence. Following

longstanding precedent, the Fifth Circuit held that 18 U.S.C. § 3584 authorizes district courts to order a federal sentence to run consecutively to an undischarged state sentence. In the process, the court acknowledged a split in the circuits and the recent recommendation by two judges that the court reconsider the issue. (The Fifth Circuit is joined by the Eighth, Tenth, and Eleventh Circuits, while the Second, Fourth, Sixth, and Ninth Circuits have held that § 3584 does not authorize a district court to impose a federal sentence to be served consecutively to an undischarged state sentence.) The Solicitor General conceded error in responding to the cert petition, stating that “[t]he government agrees with petitioner” that 3584(a) does not authorize district courts to order a federal sentence to run consecutively to a not-yet-imposed state sentence. But the government argued (as it has argued in a number of similar cases), that review was not warranted because the error has “scant practical effect” because the state court and BOP can decide for themselves whether to take the other sovereign’s sentence into account. The Supreme Court nevertheless granted plenary review.

- F. *Apprendi’s Application to Fines.*** *Southern Union Co. v. United States*, 132 S. Ct. ___ (cert. granted Nov. 28, 2011); decision below at 630 F.3d 17 (1st Cir. 2010). Question presented: Whether the rule in *Apprendi* applies to factfinding necessary to increase the maximum fine that may be imposed. Background: The offense of storing mercury without a permit is punishable by a term of imprisonment up to two years and a fine up to \$50,000 “for each day of violation.” 42 U.S.C. § 6928(d). Based on calculations in the PSR regarding the duration of the offense, the district court imposed a \$6 million fine and a \$12 million “community service obligation” upon the defendant company. The company appealed, arguing that the imposition of the fine based on judicial factfinding of duration violated the rule in *Apprendi*. The First Circuit held that the judge may find the facts necessary to increase the maximum fine, relying on the “reasoning and logic” of the Supreme Court’s 5-4 decision in *Oregon v. Ice*, which held that *Apprendi* does not apply to the factfinding necessary to impose consecutive sentences for separate crimes under that state’s statutory scheme. Drawn from the reasoning of *Ice*, the First Circuit’s theory was that, as with the question whether to impose consecutive sentences, “historically, judges assessed fines without input from the jury.” According to the First Circuit, *Ice* altered any “previous broad understanding” of *Apprendi*, and the “flow” of its logic applies to the factfinding necessary for increasing the maximum fine under §6928(d). As proof of the altered landscape, the court pointed to the dissenters’ accusations in *Ice* (led by Justice Scalia) that the majority created a “strange exception” to *Apprendi*. The Second, Sixth, and Seventh Circuits have held (though two before *Ice*) that the duration of unlawful storage must be proved to the jury beyond a reasonable doubt. [Summary by Jennifer Niles Coffin, Sentencing Resource Counsel Project].
- G. *Applicability of Fair Sentencing Act.*** *Hill v. United States* consolidated with *Dorsey v. United States*, 132 S. Ct. ___ (cert. granted Nov. 28, 2011); decisions below at 417 Fed. Appx. 560 and 635 F.3d 336 (7th Cir. 2011). Questions presented: *Hill*- Whether the District Court erred in not sentencing the Defendant-Petitioner pursuant to the “Fair Sentencing Act of 2010” where Petitioner was sentenced on

December 2, 2010 after the effective date of the FSA and the amendments to the Sentencing Guidelines mandated by the FSA? *Dorsey* - Did the Seventh Circuit err when, in conflict with the First and Eleventh Circuits, it held that the Fair Sentencing Act of 2010 does not apply to all defendants sentenced after its enactment? The Court has appointed Miguel Estrada to argue as amicus in support of the COA judgments in these two cases. The other circuits are split on this issue. The First and Third Circuits have held that the fair implication of the FSA as a whole is that Congress intended its ameliorative provisions to apply to all defendants sentenced on or after its enactment, effectively superseding § 109's express-statement requirement. *United States v. Douglas*, 644 F.3d 39 (1st Cir. 2011); *United States v. Dixon*, 648 F.3d 195 (3d Cir. 2011). A panel of the Eleventh Circuit came to the same conclusion in *United States v. Vera Rojas*, 645 F.3d 1234 (11th Cir. 2011), but its decision was vacated for rehearing by the en banc court, which is pending. In contrast, the Fifth, Seventh, and Eighth Circuits have held the FSA does NOT fairly imply that Congress intended it to apply to all sentencings on or after its enactment. *United States v. Tickles*, – F.3d –, 2011 WL 4953988 (5th Cir. Oct. 19, 2011); *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011); *United States v. Sidney*, 648 F.3d 904 (8th Cir. 2011). The Seventh and Eighth Circuits both denied rehearing en banc, but the ten active judges on the Seventh Circuit indicated that they are in fact evenly divided on the question. *United States v. Holcomb*, 657 F.3d 445 (7th Cir. Aug. 24, 2011) (denying en banc rehearing). [Summary by Jennifer Niles Coffin, Sentencing Resource Counsel Project].

H. Resentencing Pursuant to § 3582(c)

- 1. Impact of Binding Plea Agreement on Applicability of § 3582(c).** *Freeman v. United States*, 131 S. Ct. 2685 (June 21, 2011). Freeman entered a guilty plea in a crack case with a binding plea agreement approved under Fed. R. Crim. P. 11(c)(1)(C). Following the 2007 amendment of the crack guidelines, he sought the retroactive benefit of that change under the authority of 18 U.S.C. § 3582(c)(2). The Sixth Circuit held that § 3582(c) relief is inapplicable here, following its binding precedent in *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004). The defendant, it held, was not entitled to relief under § 3582(c)(2) because the original sentence was imposed pursuant to a binding plea agreement under Rule 11(c)(1)(C) and resentencing was not necessary to “prevent a miscarriage of justice.” The Supreme Court reversed, holding by plurality that a sentencing judge is required to consider the Guidelines when deciding whether to accept and impose the specific sentence agreed upon by the parties in an 11(c)(1)(C) plea, even in cases where the original sentence imposed varies from the Guideline range. The plurality reasoned that even an 11(c)(1)(C) sentence is “based on” the Guidelines. Because § 3582(c)(2) applies in cases when a sentence was “based on” a subsequently amended Guideline range, an 11(c)(1)(C) defendant is therefore eligible for § 3582(c)(2) relief. One caution, expressed by AFPD Tim Cone: Justice Sotomayor provided the decisive fifth vote in a separate concurrence, based on different grounds from the plurality opinion. She concluded that

Freeman was entitled to § 3582(c)(2) relief because his plea agreement expressly provided that his sentence was based on the Guidelines. Justice Sotomayor stated that in the future, “[n]othing prevents the Government from negotiating with a defendant to secure a waiver of his statutory right to seek sentence reduction under § 3582(c)(2), just as it often does with respect to a defendant’s rights to appeal and collaterally attack the conviction and sentence.” It is arguable (under *Marks v. United States*, 430 U.S. 188, 193 (1977)) that Justice Sotomayor’s concurrence (and her view that § 3582(c)(2) rights are waivable) expresses Freeman’s holding, on the ground that her concurrence expressed the “narrowest grounds” for the decision. The Supreme Court, however, has questioned *Marks*. See, e.g. *Nichols v. United States*, 511 U.S. 738, 745 (1994) (declining to follow *Marks*’ approach). The “narrowest ground” approach is arguably inapposite in cases like *Freeman*, where, as Justice Sotomayor’s concurrence states, the conclusions “differ as to the reason why,” that is, the rationales for the plurality and the concurrence are not “nested” within one another like “Russian dolls.” See *Note, Plurality Decisions in the Supreme Court of the United States, A Reexamination of the Marks Doctrine After Rapanos v. United States*, 41 Suffolk U. L. Rev. 97, 113 (2007) (citing *King v. Palmer*, 950 F.2d 771, 781-82 (D.C. Cir. 1991) (en banc)). Arguably, in cases like *Freeman*, “lower courts should treat plurality decisions as binding only for the result that a majority of the court would support based on their stated rationales.” *Id.* at 130 (citing *Rapanos v. U.S.*, 547 U.S. 715, 810 (2006) (Stevens, J., dissenting). In *Freeman*, the majority agreed only to reject the dissenters’ view that 11(c)(1)(C) defendants are categorically ineligible for § 3582(c)(2) relief. Whether some of these defendants might be ineligible on the separate grounds stated by Justice Sotomayor (because there is no mention of Guidelines in their plea agreement, or because there is an express waiver of § 3582(c)(2) in their plea agreements) remains an open question.].

VI. CRIMINAL APPEALS

- A. **Harmless Error Analysis.** *Vasquez v. United States*, 132 S. Ct. ____ (cert. granted Nov. 28, 2011); decision below at 635 F.3d 889 (7th Cir. 2011). Issues presented: Whether the Seventh Circuit violated the Supreme Court’s precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of trial counsel’s statements that his client would lose the case and should plead guilty for their truth) on this jury; and (2) Whether the Seventh Circuit violated Mr. Vasquez’s Sixth Amendment right to a jury trial by determining that Mr. Vasquez should have been convicted without considering the effects of the district court’s error on the jury that heard the case.

VII. CIVIL COMMITMENT

- A. **Applicability of SORNA to pre-SORNA Convictions.** *Reynolds v. United States*,

132 S. Ct. ____ (Jan. 23, 2012). Reynolds was convicted of violating a 2006 federal sex offender law. In an interim rule, the Attorney General thereafter applied SORNA, 18 U.S.C. § 2250, to those convicted before passage of SORNA. Reynolds pleaded guilty to one count of knowingly failing to register and update a registration, in violation of SORNA, but reserved challenges to the constitutionality of SORNA and the legality of the Attorney General's Interim Rule implementing that law. The Third Circuit rejected his Tenth Amendment challenge to the interim rule, claiming he lacked standing to raise it. It held that a pre-Act sex offender was required to register from the time the Act became law (July 27, 2006), and so could be convicted of failure to register when he moved from one state to another in September 2007. In light of that determination, the Third Circuit did not decide whether the Attorney General's Interim Rule (promulgated Feb. 28, 2007) was promulgated in violation of the nondelegation doctrine and the APA's notice and comment requirement. The Supreme Court reversed, 7-2, in an opinion by Justice Breyer, holding that a sex offender convicted before SORNA became law is not required to register until the Attorney General validly specifies that the Act's registration provisions apply to them. The Supreme Court reversed and remanded to the Third Circuit to determine whether the Interim Rule was validly promulgated. If the rule is found to be invalid, then Mr. Reynolds was not under any obligation to register under SORNA. Justice Breyer's opinion for the majority suggested that SORNA is vague and uncertain but also that it could be proper for the Attorney General to correct by administrative rule vagueness and uncertainty in a criminal statute. Justice Scalia (joined by Justice Ginsburg) dissented, describing SORNA as "poorly drafted" and observing that "it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable."

VIII. IMMIGRATION CONSEQUENCES

- A. **Impermissible Gender Discrimination.** *Flores-Villar v. United States*, 131 S. Ct. 2312 (June 13, 2011) (Justice Kagan recused). Petitioner was arrested by border patrol in San Diego as he was waiting for a bus. Although Petitioner was born in Tijuana, Mexico, his father, Ruben Trinidad Flores-Villar, is a United States citizen and has been since birth. Petitioner's father also resided in the United States for at least ten years prior to Petitioner's birth. However, at the time Petitioner was born, his father was only sixteen years old. When Petitioner was only two months old, his father and his paternal grandmother (who is also a United States citizen since birth) brought him to the United States in order to receive medical treatment at University Hospital in San Diego. Shortly thereafter, University Hospital sent a letter to the border authorities requesting a permit for Petitioner to enter the United States. The letter was written on behalf of Petitioner's father. At the time of his release from the hospital, Petitioner's biological mother signed a form authorizing him to be released to his paternal grandmother for adoption planning. Petitioner grew up in the San Diego area with his father and his paternal grandmother and attended San Diego area

schools. In fact, Petitioner had almost no contact with his biological mother. Although Ruben Trinidad Flores-Villar is not listed on Petitioner's birth certificate, he formally recognized him as his son by filing an acknowledgment of paternity with the civil registry in Tijuana, Mexico in 1985, when Petitioner was eleven years old. Petitioner's father also claimed Petitioner as his son on his income taxes. In 2006, Petitioner filed an N-600 application seeking a Certificate of Citizenship, but it was denied because his father was only 16 at Petitioner's birth, so he could not meet the requirement that he resided in the U.S. for five years after the age of 14. The district judge in the criminal case granted the government's motion *in limine*, preventing Petitioner from proving derivative citizenship, to which Petitioner objected on Equal Protection grounds. Petitioner argued that the former versions of 8 U.S.C. §§ 1401 and 1409 violated the guarantee of Equal Protection contained in the Due Process Clause of the Fifth Amendment because they imposed substantial residence burdens on the fathers of out-of-wedlock children born abroad as prerequisites to passing U.S. citizenship to the child while at the same time imposing only a minimal burden on similarly situated women. The prerequisites for men are so severe that it was impossible for Petitioner's father to qualify, yet Petitioner would be a citizen if his mother, not his father, had been a U.S. citizen. Petitioner was eventually convicted (on stipulated facts) of the section 1326 charge, and the court of appeals affirmed, relying primarily on the Supreme Court's decision in *Nguyen v. INS*, but that case approved distinctions that were biologically based: by delivering a child, a woman necessarily had strong evidence of parentage and at least an opportunity to form a relationship with the child. By requiring the father to take a formal act prior to the child's 18th birthday, the statutory scheme provided the evidence and opportunity that biology had guaranteed the mother. The residence requirements posed by the instant scheme have no biological basis: there is no reason to believe that mothers are more adept at forming ties to the United States than are fathers. Question presented: Whether the Court's decision in *Nguyen v. Immigration and Naturalization Service* (2001) permits gender discrimination that has no biological basis? The Supreme Court reached a 4-4 decision, with Justice Kagan recused because she was the SG when cert was granted in this case. So this well-teed issue remains for another case.

- B. Right to Re-enter After Travel Abroad.** *Vartelas v. Holder*, 131 S. Ct. ___ (cert. granted Sept. 27, 2011); decision below at 620 F.3d 108 (2d Cir. 2010). Panagis Vartelas, an alien who is a lawful permanent resident of the United States and who traveled abroad after being convicted of a crime involving moral turpitude, sought review of a decision of the Board of Immigration Appeals denying his motion to reopen a removal proceeding brought against him pursuant to § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as a returning alien seeking "admission" to the United States within the meaning of INA § 101(a)(13), 8 U.S.C. § 1101(a)(13), as amended by § 301(a)(13) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub L. No. 104-208, Div. C., 110 Stat. 3009-546 (1996). Vartelas moved to reopen on the ground that his attorneys had rendered ineffective assistance by failing to move before the Immigration Judge for termination of the removal proceeding on the grounds (a) that the offense of which he was convicted was within the scope of 8

U.S.C. § 1182(a)(2)(A)(ii)(II) and thus was not a removable offense, and (b) that the IIRIRA amendment should not be applied retroactively to treat him as seeking “admission.” Vartelas contended principally that the BIA applied an erroneous legal standard to his ineffective assistance claim and erred in concluding that he was not prejudiced by his attorneys’ failure to move for termination of the removal proceeding on the above grounds. The Court of Appeals found no merit in his contentions and denied relief. The Supreme Court granted cert on the question: Whether 8 U.S.C. § 1101(a)(13)(C)(v), which removes a legal permanent resident of his right, under *Rosenberg v. Fleuti*, 374 U.S. 449(1963), to make “innocent, casual, and brief” trips abroad without fear that he will be denied reentry, applies retroactively to a guilty plea taken prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act.

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

A. Timeliness of Filing Federal Petition.

- 1. Tolling AEDPA Time with Sentence-Reduction Motion.** *Wall v. Kholi*, 131 S. Ct. 1278 (Mar. 7, 2011). Kholi was convicted in 1993 of ten counts of sexual assault for molesting his stepdaughters. He was sentenced to six concurrent life sentences, consecutive to four concurrent life sentences. The Rhode Island Supreme Court affirmed his conviction in 1996. Rather than seek review on rehearing or a cert petition to the Supreme Court, Kholi filed a motion to reduce his sentence in the state trial court, as permitted by a state rule of criminal procedure. The trial court denied the motion in 1996 and the denial was affirmed by the state supreme court in 1998. Between the time he filed the motion for sentence reduction and the time it was finally ruled upon by the state supreme court, in 1997 Kholi filed a state motion for postconviction relief; it was denied by the trial court in 2003 and affirmed by the state supreme court in 2006. Nearly nine months later, in 2007, Kholi filed a federal habeas corpus petition. The Supreme Court held unanimously that Kholi’s federal habeas petition was timely because his motion in state court to reduce his sentence tolled the federal statute of limitations period. Although his motion to reduce sentence was not a motion for conviction relief, and was essentially a plea for clemency, it qualified as “collateral review” for purposes of tolling AEDPA’s one-year statute of limitations for federal habeas petitions. The Court relied, inter alia, on its own use of the words “collateral” and “review” in prior court opinions. The Court held that “the phrase ‘collateral review’ in §2244(d)(2) means judicial review of a judgment in a proceeding that is not part of direct review.”
- 2. Indeterminate Time Limit Can Be A State Procedural Bar.** *Walker v. Martin*, 131 S. Ct. 1120 (Feb. 28, 2011). California does not have a specific time limit for collaterally attacking a conviction. Under California state law, a prisoner may be barred from collaterally attacking his conviction when the prisoner “substantially delayed” filing his habeas petition. The Ninth Circuit

held that California’s undefined standard of “substantial delay” – used to evaluate the timeliness of a non-capital habeas corpus petition – is so vague that it is inevitably applied in a fundamentally inconsistent manner and is therefore inadequate to serve as a procedural bar to federal review, and that the state failed to prove a consistent application of the rule in other cases. The Supreme Court reversed 9-0. Writing for the unanimous Court, Justice Ginsburg found California’s indeterminate timeliness requirement does qualify as an independent state ground adequate to bar habeas corpus relief in federal court. On this record, the Court found no basis to conclude that California’s rule operates to the particular disadvantage of federal habeas petitioners. Despite its holding, the Court cautioned that the ruling leaves unaltered the Court’s repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights.

3. **Timeliness of Petition; Jurisdiction to Issue COA.** *Gonzalez v. Thaler*, 132 S. Ct. ____ (Jan. 10, 2012). AEDPA establishes a one-year statute of limitations for a state prisoner to file a federal habeas corpus petition. As relevant here, that limitation period runs from “the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). Gonzalez was convicted of murder in Texas state court on June 14, 2005, and was sentenced to thirty years in prison. He filed a timely appeal to the Texas intermediate court of appeals, which affirmed his conviction on July 12, 2006. Gonzalez did not file a petition for discretionary review with the Texas Court of Criminal Appeals within the thirty days permitted by state law. The court of appeals issued its mandate on September 26, 2006. Under Texas law, the issuance the appellate court’s mandate marked the conclusion of direct review in the state court system. On July 19, 2007, Gonzalez filed in Texas state court a petition for a writ of habeas corpus under Texas rules of procedure. The Texas Court of Criminal Appeals denied that petition on the merits on November 21, 2007. On January 24, 2008, Gonzalez filed a petition for writ of habeas corpus in the U.S. district court. Excluding the time during which his properly filed state habeas petition was pending, 28 U.S.C. § 2244(d)(2), Gonzalez’s federal habeas petition was filed 360 days after the state court of appeals issued its mandate concluding direct review of his conviction, and 346 days after the time period for seeking certiorari review in the U.S. Supreme Court expired. The filing, however, was 436 days after the Texas court of appeals entered its order affirming his conviction and 406 days after expiration of the time to seek discretionary review by the Texas Court of Criminal Appeals. The district court dismissed the petition. Following Fifth Circuit precedent, the district court held that Gonzalez’s direct appeal became “final” at the expiration of the time period for seeking discretionary review with the Texas Court of Criminal Appeals, not the issuance of the mandate or expiration of the time period for seeking certiorari review in the Supreme Court. The Fifth Circuit granted a certificate

of appealability and affirmed. In an 8-1 decision authored by Justice Sotomayor, the Supreme Court affirmed, holding that when a state prisoner does not seek review in a State's highest court, the judgment becomes "final" for purposes of §2244(d)(1)(A) on the date that the time for seeking such review expires. As a preliminary matter, the Court answered a procedural question, holding that the statute requiring a certificate of appealability as a prerequisite to appellate review, § 2253(c)(3) is a mandatory but nonjurisdictional rule. Therefore, the fact that the judge issuing the COA here did not indicate a constitutional issue did not deprive the Court of Appeals of jurisdiction to adjudicate the appeal. [Note - This aspect of the decision abrogates Third Circuit precedent.]. Justice Scalia dissented, contending that a COA that does not indicate a constitutional issue deprives the court of appeals of jurisdiction to act, so the judgment below should have been reversed as without jurisdiction. For Justice Scalia, "[t]erminology is destiny" and the current manner in which the Court makes the distinction between jurisdictional rules and claim processing rules is a "false dichotomy."

4. **State's Waiver of Statute of Limitations Defense.** *Wood v. Milyard*, 131 S. Ct. ___ (cert. granted Sept. 27, 2011); decision below at 403 Fed. Appx. 335 (10th Cir. 2010). Cert granted on the following two questions: 1) Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations defense? 2) Does the State's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had?

- B. **Cause and Prejudice to Excuse Procedural Default.** *Maples v. Thomas*, 132 S. Ct. ___ (Jan. 18, 2012). Convicted of murder and sentenced to death, Maples lost his direct appeal in Alabama state court. He filed a state collateral attack arguing ineffective assistance of trial counsel. He was represented pro bono on this motion by a large New York law firm. The motion was denied, and a copy of the decision was sent to the attorneys, but was returned by a law firm mail clerk because the pro bono lawyers had left the firm. No timely appeal was filed. Maples then filed a federal 2254 petition, raising ineffective assistance of trial counsel. The Eleventh Circuit held, in a split 2-1 decision, that the failure to file a timely appeal was a procedural default of the ineffectiveness claim, thus precluding federal review. A claim that is procedurally defaulted in state court may still be heard in federal habeas review by a showing of "cause" and "prejudice," *see generally, Murray v. Carrier*, 477 U.S. 478, 485-86 (1986). But the Eleventh Circuit held 2-1 that since Maples was represented by counsel, he was accountable for their default. In effect, the Eleventh Circuit's decision held that Alabama may execute a state inmate without any federal court review of the merits of serious constitutional claims because of a missed filing deadline that indisputably occurred through no fault of petitioner and after the State failed to take any action when court orders mailed to petitioner's lead attorneys of record were returned to a court clerk unopened with "Return to Sender--Left Firm" written on an envelope. Judge Barkett dissented from the per

curiam decision of her colleagues, Judges Edmondson and Hull, finding that the “interests of justice” required that the claim not be defaulted from federal review. The Supreme Court granted cert and reversed, 7-2, in an opinion authored by Justice Ginsburg. “The sole question this Court has taken up for review is whether, on the extraordinary facts of Maples’ case, there is ‘cause’ to excuse the default. Maples maintains that there is, for the lawyers he believed to be vigilantly representing him had abandoned the case without leave of court, without informing Maples they could no longer represent him, and without securing any recorded substitution of counsel. We agree. Abandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself pro se. In these circumstances, no just system would lay the default at Maples’ death-cell door. Satisfied that the requisite cause has been shown, we reverse the Eleventh Circuit’s judgment.” Despite its ruling, the Court reiterated the general rule that a lawyer’s default is visited on the client in subsequent habeas proceedings. Justice Alito concurred that the extraordinary circumstances of this case excused the default. Justices Scalia and Thomas dissented, holding that other lawyers of the New York law firm—although they never contacted the client or court and were never admitted to practice in Alabama—were effectively Maples’ counsel, so he was never abandoned by his counsel.

C. Deference to State Court Determinations

- 1. Habeas Review of Sufficiency of Evidence.** *Cavazos v. Smith*, 132 S. Ct. ___ (Oct. 31, 2011) (per curiam). Shirley Smith, was charged in state court with the death of her grandson, 7-week-old Ethan Glass. According to five dueling experts, Ethan died of either SIDS (Sudden Infant Death Syndrome) or SBS (Shaken Baby Syndrome), or of some unidentified “old trauma.” Smith was convicted and denied state appellate relief. She filed a federal habeas petition that was denied by the district court, but habeas relief was granted by the Ninth Circuit Court of Appeals. In a 6-3 per curiam decision, the Supreme Court reversed the habeas grant, holding that the Ninth Circuit has improperly substituted its judgment about the sufficiency of evidence for the judgment of the California state courts. The per curiam decision requires a restrained habeas review of sufficiency of evidence: “*Jackson v. Virginia*, 443 U. S. 307 (1979), makes clear that it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.” Additionally, “a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court may do so only if the state court decision was “objectively unreasonable.” *Renico v. Lett*, 559 U. S. ___, (2010).” “Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold. The Court of Appeals in this case substituted

its judgment for that of a California jury on the question whether the prosecution's or the defense's expert witnesses more persuasively explained the cause of a death." Three justices – Ginsburg, Breyer, and Sotomayor – would have denied certiorari, believing that this is the sort-of fact-bound decision on which Supreme Court review is customarily denied..

2. **Habeas Review of Confrontation Clause Claim.** *Hardy v. Cross*, 132 S. Ct. ___ (Dec. 12, 2011) (per curiam). In 2000, Cross was tried for kidnaping and sexual assault. This was four years before the Supreme Court decided *Crawford v. Washington*, which overruled *Ohio v. Roberts*). The victim testified reluctantly, claiming she was fearful, and her actual testimony was halting. Cross was acquitted of kidnaping, but the jury hung on the sexual assault trial. Despite some efforts by the state to locate the victim for the retrial, she was unavailable, so the trial court admitted her first trial testimony at the second trial. It was read by a prosecutor's law clerk, who lacked the halting inflection of the original testimony. The second trial was also before *Crawford* was decided. Cross was convicted. The state courts found the state had made reasonable efforts to contact the victim and found her unavailability sufficient to permit transcript testimony in place of live testimony. Cross alleged in a federal habeas petition that the state had unreasonably applied clearly established Supreme Court precedents holding that the Confrontation Clause of the Sixth Amendment precludes the admission of the prior testimony of an allegedly unavailable witness unless the prosecution made a good-faith effort to obtain the declarant's presence at trial. The district judge denied Cross' petition, but the Seventh Circuit reversed, setting forth a number of inadequacies in the state's efforts, and holding that the Illinois Court of Appeals was unreasonable in holding that the state had made a sufficient effort to secure the victim's presence at the retrial. The Seventh Circuit stressed the importance of the victim's testimony and the manner of her testimony at the first trial. The Supreme Court reversed, unanimously, in a per curiam decision, relying on the precedent in effect at the time of trial and state court appeal, *Ohio v. Roberts* (as required by *Teague v. Lane*). "As we observed in *Roberts*, when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, . . .but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising. And, more to the point, the deferential standard of review set out in 28 U. S. C. §2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken. Under AEDPA, if the state-court decision was reasonable, it cannot be disturbed."

- D. **What is "Clearly Established Federal Law."** *Greene v. Fisher*, 131 S. Ct 1813 (cert. granted Apr. 4, 2011); decision below at 606 F.3d 85 (3d Cir. 2010). For purposes of adjudicating a state prisoner's petition for federal habeas relief, what is

the temporal cutoff for whether a decision from the Supreme Court qualifies as “clearly established Federal law” under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996? This case presents the question reserved last Term in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010): Whether a decision from the Supreme Court announced before a state prisoner’s conviction became final but after his last state-court decision on the merits constitutes “clearly established Federal law” for purposes of AEDPA. The Third Circuit, acknowledging that it was creating a circuit split, held here that it does not.

E. Ineffectiveness of Counsel.

1. Remedy, If Any, For IOC In Plea Negotiations Followed By Fair Trial or Guilty Plea.

a. Subsequent Fair Trial. *Lafler v. Cooper*, 131 S. Ct. 856 (cert. granted Jan. 7, 2011); decision below at 376 Fed. App’x 563 (6th Cir. 2010). Cooper faced assault with intent to murder charges. His counsel advised him to reject a plea offer based on a misunderstanding of Michigan law. Cooper rejected the offer, and he was convicted as charged. Cooper does not assert that any error occurred at the trial. On habeas review, the Sixth Circuit found that because there is a reasonable probability that Cooper would have accepted the plea offer had he been adequately advised, his Sixth Amendment rights were violated. The writ was conditioned on Michigan re-offering the plea agreement. The question presented is: (1) Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial. A second question was added by the Court when cert was granted:(2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

b. Subsequent Less-Favorable Plea. *Missouri v. Frye*, 131 S. Ct. 856 (cert. granted Jan. 7, 2011); decision below at 311 S.W.3d 350 (Mo. Ct. App. 2010). Questions presented (1) Contrary to the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985)— which held that a defendant must allege that, but for counsel’s error, the defendant would have gone to trial—can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel’s error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms? Again, the Supreme Court added a second question: (2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and

sentenced pursuant to constitutionally adequate procedures?

2. **AEDPA Deference Due to Summary State Court Rulings; Failure to Investigate Blood Evidence.** *Harrington v. Richter*, 131 S. Ct. 770 (Jan. 19, 2011). (Justice Kagan recused). AEDPA deference applies to a state court’s summary disposition of a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Nothing in the text of §2254(d)(1) – which refers to a “decision” resulting from an adjudication” – requires a statement of reasons. Where the state court decision has no explanation, the habeas petitioner must still show there was no reasonable basis for that state court to deny relief.

a. **AEDPA Deference.** *Bobby b. Dixon*, 132 S. Ct. ___ (Nov. 7, 2011) (per curiam). In a unanimous per curiam decision, the Court underscored *Harrington*’s broad holding: A habeas court may not grant relief unless the state court’s allegedly erroneous ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement.” Here, the Court overturned the Sixth Circuit’s three independent reasons for a habeas grant, all relating to the state court’s admission of his confession to murder. First, it held that Dixon’s statement taken five days after he invoked counsel (but he was not yet in custody when he invoked counsel) did not violate *Miranda*, as the Sixth Circuit had held, since there is no right to invoke counsel other than during custodial interrogation. Second, it held the Sixth Circuit had no authority for its view that the Fifth Amendment prevents police from urging an accused to “cut a deal” before another accused did so. Third, it held that Dixon was not subjected to the impermissible police interrogation strategy known as a “two-step” – “question-first, warn later” – prohibited in *Missouri v. Seibert*, because Dixon denied guilt during the first step, so nothing was out-of-the-bag by the time the rights warning was given in step two. See also, *Oregon v. Elstad*, 470 U.S. 298 (1985) (voluntary, warned statement following voluntary but unwarned statement is admissible). In short, a unanimous Court, without full briefing, found that nothing in the Supreme Court’s precedents required the Ohio courts to do more than deny relief.

3. **Did State Adjudicate Case on Merits?** *Cavazos v. Williams*, 132 S. Ct. ___ (cert. granted Jan. 13, 2012); decision below at 646 F.3d 626 (9th Cir. 2011). The Ninth Circuit reversed a district court that denied a federal writ of habeas corpus in state prosecution in which a holdout juror was “excused” to avoid a hung jury. After contrasting the transcript in this case to the movie, *Twelve Angry Men*, Judge Reinhardt described the case. *Twelve Angry Men* made for great drama because it violated the sanctity of the jury’s secret deliberations by allowing the audience into the jury room. It was, of course, a work of

fiction. We are presented here with a similar intrusion into heated deliberations involving a holdout juror, except that this one took place in open court, and it resulted in a woman being convicted and sentenced to life imprisonment after the holdout was dismissed. Under the precedent that existed when petitioner's conviction became final (and exists today as well), the trial court's actions violated the petitioner's Sixth Amendment rights, as incorporated with respect to the states under the Fourteenth Amendment. We therefore conclude that petitioner is in custody in violation of the Constitution, reverse the judgment of the district court, and remand with instructions to grant the writ. The Supreme Court granted to resolve one of the two questions raised by the state's cert petition: Whether a habeas petitioner's claim has been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim?

4. **Failure to Present Ineffectiveness of Counsel Issue to State Court.** *Cullen v. Pinholster*, 131 S. Ct. 1388 (Apr. 4, 2011). A federal habeas court may not overturn as "unreasonable" a state court determination that trial counsel was effective by relying on evidence that was never presented to the state court. A divided Supreme Court held that federal court review of state court decisions is limited by AEDPA to the evidence that was presented to the state court that first heard the claim. Federal courts must not consider new evidence first presented in federal court, and instead may grant habeas relief pursuant to § 2254(d)(1) only if the state court decision was unreasonable in light of the evidence it had before it at the time of a petitioner's claim. Justice Alito concurred in the judgment, disagreeing with the broad rule, but finding that in this case petitioner had not properly presented the evidence in state court. Justice Breyer concurred in part and dissented in part. Justices Sotomayor, Ginsburg and Kagan dissented.
5. **Court-Ordered Replacement of Habeas Counsel Due to Client Dissatisfaction.** *Martel v. Clair*, 131 S. Ct. ___ (cert. granted June 27, 2011); decision below unpublished (2010). At the end of ten years of capital federal habeas corpus proceedings in the district court, respondent suddenly complained about and sought replacement of his court-appointed public defender with a new appointed lawyer. The district court refused, explaining that "it appears Petitioner's counsel is doing a proper job" and that "[n]o conflict of interest or inadequacy of counsel is shown," and thereupon issued its ruling denying habeas corpus relief. On appeal, however, the Ninth Circuit appointed a replacement lawyer, vacated the judgment, and remanded for further proceedings to allow the new lawyer to raise additional claims for relief. The Ninth Circuit explained that no showing of ineffectiveness of counsel was required, for it was enough that Clair had expressed "dissatisfaction" and had alleged that the public defender was failing to pursue potentially important evidence. Question Presented: Whether a condemned state prisoner in federal habeas corpus proceedings is entitled to

replace his court-appointed counsel with another court appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence.

F. DNA in Habeas and 1983 Proceedings

- 1. Getting Access to DNA in § 1983 Proceedings.** *Skinner v. Switzer*, 131 S. Ct. 1289 (Mar. 7, 2011). For ten years, Skinner has sought access to DNA testing that could prove him innocent of the murders that landed him on Death Row. After the Texas courts arbitrarily turned back his diligent attempts to take advantage of state statutes affording such relief, he sued in federal court under 42 U.S.C. § 1983 to vindicate his due process right to “fundamental fairness in [the] operation” of Texas’s scheme. The district court dismissed Skinner’s § 1983 suit solely on the ground that his claim sounded only in habeas corpus, and the Fifth Circuit summarily affirmed. The Supreme Court reversed, 6-3, holding that “a postconviction claim for DNA testing is properly pursued in a § 1983 action.”

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