The Criminal Justice Section
of the
American Bar Association

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ANNUAL REVIEW
of the
SUPREME COURT'S TERM, CRIMINAL CASES

**Summaries of all Opinions and their Rationales,
as well as a Narrative Overview and some Statistics,
regarding the
Criminal Law (and related) Opinions of the
United States Supreme Court
October Term 2006 (Oct. 2006-June 2007)**

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CRIMINAL LAW (and related) DECISIONS
of the U.S. Supreme Court
From the October 2006 Term
(prepared August 2007)

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ABA Panel Presenting the Criminal Law (and Related) Opinions
of the
United States Supreme Court
Issued During the October 2006 Term

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(San Francisco CA – August 10, 2007)

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Explanatory Notes for these Materials

In the pages that follow, summaries of the Supreme Court's decisions are grouped by subject matter. Some decisions address more than one subject, and the author has placed them in the topic group that, in his view, best fits. Within subject categories, the cases are presented in chronological order, because that can help demonstrate how doctrine developed within particular areas as the Term progressed. The goal is to be broadly inclusive for the criminal law practitioner. Thus, civil cases that relate to criminal law topics are also included.

To aid quick assimilation of the Term's work, the Table of Contents (above) lists all the cases with a brief description of their holding or issue. Below, following these explanatory notes and a brief Overview of the Term, each decision is summarized in greater detail.

Each summary presents the case name, current citation, and citation to the lower court's opinion. Then follow summaries of the case's facts, majority opinion(s), and any separate opinions. The name of any writing Justice is **bolded**. Providing an accurate and comprehensive representation of each opinion's content has been the goal, rather than brevity. But to aid quick "skim" reading, each summary also **bolds the central holding(s).** In order to provide the most representative flavor of opinions, quotations have been used whenever possible. Comments that appear in [brackets] are the authors' own thoughts, not the Court's.

Also included are a few interesting dissents or concurrences regarding denials of certiorari, and a list of the questions presented in criminal cases in which certiorari has already been granted for next Term (OT 2007).

Finally, the booklet concludes with a chart showing which Justices wrote which opinions (including separate opinions) this past Term.

These materials are the product of Professor Little and his research assistant, Sharif Jacob (Hastings Class of 2007). They, and not the other panelists, bear full responsibility for errors and any opinions expressed. Interested readers should of course review the actual opinions in full and arrive at their own interpretations, rather than rely on the authors'. Also, certain changes from the Court's original slip opinions may have been made for ease of reading or understanding. For example, emphasis in quotations may sometimes be added or omitted without indication; footnotes and citations may be omitted; and changes in capitalization and punctuation or other non-substantive changes may have been made. Please send any comments, suggestions or corrections to Professor Little at the contact points on the cover of these materials.

Brief Overview of the Supreme Court's Term with regard to Criminal Law

It seems clear that the first full Term with President Bush's new appointees, Chief Justice Roberts and Associate Justice Alito, has produced a Court that is "conservative," or at least more pro-government, in criminal cases, particularly habeas. Nevertheless, the Court did rule in favor of defendants in a number of cases, and in particular some closely watched capital cases (Panetti and the "Quarterman trilogy" out of Texas involving Penry error).

It also appears that despite the numbers (criminal cases made up, as usual, about a third of the docket), the Court as a whole is just less interested in criminal cases than it used to be, even though there are plenty of "splits" and important legal issues out there that could be decided. When one examines the quality of the Court's docket over all, it does seem to be, as others have noted, more a "business" or "intellectual property" or "political" court than it is a Court interested in the rights of criminal defendants.

Nevertheless, in a Term where the Court issued written opinions in only 70 or so cases (it depends how one counts), 31 decisions were "criminal law related" and 25 were what we would call "fully criminal" subject matters. If numbers were all that counted, the Court is plainly spending much of its time on criminal law issues. But whether that actually indicates their interest, or simply the more "simple" nature of identifying "splits" for certiorari in the criminal law area, or some other theory, can be debated without end.

Turning specifically to the Court's criminal docket this Term, if one "theme" must be identified it clearly would be habeas corpus and (often intertwined) death penalty cases – although there were, as always, other fascinating sentencing Guidelines and Fourth Amendment cases as well. Over half of the 25 "fully criminal" decisions were habeas and/or death penalty cases.

In the habeas arena, the majority of the Court seems plainly to be interested in reining in what it perceives as excessively non-deferential or "independent" federal review of state criminal convictions. On the other hand, the "middle" is fair-minded enough that other cases are decidedly in favor of criminal defendants. The result is a "moderate" court that may, in some rough sense, actually achieve "justice" overall, even though one can argue (and the Justices certainly do) about any particular result.

As an aside, it just can't be ignored that the Ninth Circuit took it on the chin in the criminal area this Term; and in particular, three decisions written by Judge Stephen Reinhardt were singled out for reversal. The Court is plainly impatient with (a) "hiding" divided panel decisions in unpublished opinions, and (b) the failure to "correct" decisions in the *en banc* process. It can be debated whether the Ninth Circuit is "wrong" or just different than the current majority, whether it is reversed more often than other Circuits (in fact, based on caseload numbers alone, the Ninth Circuit

has the lowest reversal percentage of overall caseload among the Circuits), and whether "splitting" the Circuit would actually change anything. But it seems to be undeniable that at least some Justices' chambers (or maybe the "cert pool" law clerks) are on the lookout for "outlier" Ninth Circuit opinions to review.

Singling out specific cases, the decisions that seem "big" in this Term are: Rita (Guidelines sentencing, although not relevant to large portion of bar that does not try federal cases); Brendlin (4th Amendment, passenger seized when car is stopped); Wilkie (5th A, Federal statutes; not "extortion" for government to harass property owner to grant easement; Fry v. Pliler (habeas, harmless error: bit of a "wonks case" but important discussion about how to review state court decisions); Panetti (how the mentally ill death row inmate has to be evaluated, continuing suspicion about executions); and maybe Whorton (Crawford not retroactive for habeas cases).

"Inside baseball" about the Justices: What follows is pure opinionated claptrap: Justice Stevens now clearly occupies the "Senior Justice" seat in the way that Justice Brennan used to, for a minority and, more often than might be expected, a well-constructed majority. Justice Alito continues to show he is very, very smart and not shy about "splitting" with his alleged fellow conservatives. Justice Scalia continues to insult even his would-be friends (Justices Alito and Roberts) when they disagree with him. Justice Kennedy obviously controls the middle. And Justice Ginsburg continues to show little interest in the criminal side of the docket, as does Chief Justice Roberts, which is perhaps not surprising given their civil litigation backgrounds as lawyers.

Next Term's cases already look very interesting, with more Sentencing Guideline issues, a very interesting child pornography case, and Presidential-power issues already granted on. Over half of the grants for next Term are criminal-law-or-related, and unless the Court issues some unusual summer grants soon, the docket will be smaller than ever and criminal law cases will continue to make up a third to a half of the Court's work.

Best wishes until next year,

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Detailed Summaries of
Supreme Court OT 2006 Criminal Law Opinions

FOURTH AMENDMENT

Wallace v. Kato, No. 05-1240, 127 S. Ct. 1091 (Feb. 21, 2007), affirming Wallace v. City of Chicago, 440 F.3d 421 (7th Cir. 2006).

Andrew Wallace was convicted of murder in Illinois state court. On appeal, his conviction was reversed because, the court found, the police had arrested Wallace without probable cause. The prosecutor then dropped the charges against him. This process took about eight years, from arrest to the dropping of charges.

Less than a year after the prosecutor dropped the charges, but over nine years after the arrest, Wallace filed a § 1983 suit for false arrest. The district court granted summary judgment against Wallace and the Seventh Circuit affirmed.

Holding (7[5-2]-2) **Scalia**; Stevens concurring in the judgment with Souter; Breyer dissenting with Ginsburg: "**[T]he statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process."** Although the length of a § 1983 statute of limitations is a question of state law for analogous torts (here two years), **"the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law."** "[A]ccrual generally occurs when the plaintiff has a present and complete cause of action. However, '[l]imitations begin to run against an action for false imprisonment when the alleged false imprisonment ends.'" (citation omitted) "[A] false imprisonment ends once the victim becomes held pursuant to [legal] process—when, for example, he is bound over by a magistrate or arraigned on charges." Thus, "the statute of limitations on Wallace's § 1983 claim commenced to run when he appeared before the examining magistrate and was bound over for trial. Since more than two years elapsed" here, "the action was time barred."

The majority recognized two problems with its own approach and offered two solutions in dicta. Heck v. Humphrey (1994) bars a § 1983 suit for unconstitutional imprisonment or conviction until the conviction has been reversed or otherwise set aside by government action. This creates the first problem: A plaintiff will have to file his § 1983 false imprisonment claim as soon as he is held over by legal process, even though the claim will later become Heck-barred if he is convicted. The Court's solution: "If a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court . . . to stay the civil action until the criminal case or the likelihood of a criminal case is ended." "If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, Heck will require dismissal; otherwise, the civil action will proceed . . . ."

This solution creates a second problem. A prisoner who now timely files his § 1983 action soon after arrest, but is then convicted, will face a bar to his suit until and unless he can get the conviction reversed. If the statutory period elapses between the conviction and the reversal, without tolling, the statute of limitations would prevent the prisoner from refiling suit after his reversal. Hence the majority's second solution: if a Heck-barred prisoner's conviction is reversed, tolling must operate to allow the prisoner some [unspecified] time to refile the suit.

Stevens concurring in the judgment with Souter: Relying on Heck, Wallace argues that "his federal cause of action did not accrue until after the criminal charges against him were dropped." However, "[i]n concluding that Heck's damages claim was not cognizable under § 1983, we found that the writ of habeas corpus, and not § 1983, affords the 'appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement.'" "[B]ecause a habeas remedy was never available to [Wallace] in the first place [since he was never in custody during his trial and appeal], Heck cannot postpone the accrual of petitioner's § 1983 Fourth Amendment claim."

Breyer dissenting with Ginsburg: Equitable tolling should "toll the running of the limitations period: (1) from the time charges are brought until the time they are dismissed or the defendant is acquitted or convicted, and (2) thereafter during any period in which the criminal defendant challenges a conviction (on direct appeal, on state collateral challenge, or on federal habeas) and reasonably asserts the behavior underlying the § 1983 action as a ground for overturning the conviction."

Scott v. Harris, No. 05-1631, 127 S. Ct. 1769 (Apr. 30, 2007), reversing Harris v. Coweta County, 433 F.3d 807 (11th Cir. 2005)

Harris sped away from police attempting to pull him over for speeding. Police chased Harris for nearly ten miles at speeds over eighty-five miles per hour. Finally, Officer Scott, was was pursuing Harris, rammed Harris' car from behind. Harris lost control, crashed, and was rendered a quadriplegic. The police videotaped the chase [and, apparently for the first time, the Supreme Court appended a web-link to its copy of the chase videotape]. The district court and the Eighth Circuit agreed that Officer Scott should not receive, in Harris's § 1983 suit, qualified immunity for his decision to ram Harris's car to end the chase.

Holding (8-1) Scalia; Ginsburg concurring; Breyer concurring; Stevens dissenting: **"A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."** First, although summary judgment facts are normally viewed in the light most favorable to the nonmoving party, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Here, the contemporaneous videotape flatly contradicts Harris' assertion that he did not pose a threat to bystanders. "The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."

Next, "[i]n resolving questions of qualified immunity, courts are required to resolve a 'threshold question:" whether the officer's conduct violated a constitutional right. Saucier v. Katz (2001). "If, and only if, the court finds a violation of a constitutional right, 'the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." This second step proves unnecessary here. Scott's "decision to terminate the car chase by ramming his bumper into Harris' vehicle constituted a 'seizure' that was "reasonable" in the context shown here. "Culpability is relevant . . . to the reasonableness of the seizure -- to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them." Harris' actions undoubtedly placed innocent bystanders at risk, and although Scott's action was likely to cause Harris serious injury, Harris' culpability in putting himself and the public at risk tips the balance in Scott's favor.

Ginsburg concurring: I do not read the Court's opinion to establish a *per se* rule about police chases. Instead, it conducts a fact-specific reasonableness inquiry.

Breyer concurring: "[W]e should overrule the requirement . . . that lower courts must first decide the 'constitutional question' before they turn to the 'qualified immunity question.'" Here it seems clear the right was not "clearly established."

Stevens dissenting: The roads were largely clear of traffic and pedestrian, so there was little risk bystanders would be hurt. The Court's interpretation of the videotape on this point interferes with a proper question for the jury.

Los Angeles County, California, v. Rettele, No. 06-605, 127 S.Ct. 1989 (May 21, 2007) (*per curiam*), reversing 186 Fed. Appx 765 (9th Cir. 2007).

Officers properly obtained a search warrant for a house and were authorized to search for four African-American suspects, at least one of which might be armed. When they arrived to execute the warrant at 7 am (they had no nighttime authorization), a Caucasian individual answered the door. Securing him, the officers went into a bedroom where they found Rettele and his girlfriend in bed. They were also both Caucasian. The officers ordered them out of bed and ordered them to stand, nude, for a couple of minutes while they secured the premises. Retelle sued under § 1983, and the Ninth Circuit in an unpublished opinion ordered, 2-1, that a grant of qualified immunity was unjustified because reasonable officers should not have executed the warrant in this manner once they saw the occupants were white, not black.

Holding (9-0), **Per Curiam**; Stevens concurring in the judgment with Ginsburg: "We need not pause long in rejecting [the Ninth Circuit's] unsound proposition." **"The presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well." The officers had authority to "secure the premises," and their actions here were unreasonable given the suspicion of weapons.** "There is no allegation that the deputies prevented [the couple] from dressing longer than necessary to protect their safety." "Innocent … people like Rettele and Sadler unfortunately bear the cost" of mistakes despite probable cause. **[Ed. Note**: Interestingly, there is no discussion of (although there is mention of) the fact that the house had been sold to Retelle by the suspects three months before the search. An argument about "stale" probable cause to believe the suspects would be in the house seems at least possible.]

Stevens concurring in the judgment only with Ginsburg: First, the judges below "should not have announced their decision in an unpublished opinion." Second, I would reverse solely on the ground that the constitutional right that Rettele claims is not "clearly established," thereby making qualified immunity appropriate, and "disavow the unwise practice of deciding constitutional questions in advance of the necessity for doing so."

Brendlin v. California, No. 06-8120, 127 S.Ct. 2400 (June 18, 2007), vacating 38 Cal. 4th 1107 (Cal. 2006).

Officers stopped a car without reasonable suspicion to suspect wrongdoing; their attention was attracted by expired registration tags although they also saw a temporary permit and a dispatcher told them a registration application was pending. Brendlin was a front-seat passenger, not the driver. Once the car was stopped, officers recognized Brendlin, arrested him for a parole violation, and found drugs and drug paraphernalia on his person, and methamphetamine manufacturing evidence in the car. The California Supreme Court ruled that a passenger is not "seized" for Fourth Amendment purposes when the car is stopped, until he is truly not free to leave.

Holding (9-0, **Souter**): **When a vehicle is stopped by officers, the passengers as well as the driver are "seized," such that Fourth Amendment rules apply. "Brendlin was seized from the moment [the driver's] car came to a halt on the side of the road."** Prior cases show that "a person is seized… when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement. Thus, an unintended person may be the object of the detention, so long as the detention is willful and not merely the consequence of an unknowing act." And "there is no seizure without actual submission." When a person responds to governmental action with "passive acquiescence," the test is whether "a reasonable person would have believed that he was not free to leave," or "decline the officer's requests or otherwise terminate the encounter."

"We have said over and over in *dicta* that during a traffic stop an officer seizes everyone in the vehicle" (citations omitted). In the circumstances here, "we think … that any reasonable person would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." There is a "societal expectation of unquestioned police command." The officers' subjective motive is not relevant (unless an intent to detain is conveyed to the person). The show of authority here is reasonably understood as "at least partly directed at" the passenger. This is different from someone simply detained in traffic because officers have stopped another vehicle; that is an "incidental restriction on freedom of movement" that no reasonable person would think of as "directed at him or his car." Meanwhile, the incentives to officers to engage in "roving patrols" directed at passengers, without suspicion, is a consequence that supports our holding today.

FIFTH AMENDMENT (Deprivation of Property without Due Process)

Wilkie v. Robbins: See summary under "Federal Statutes," below.

SIXTH AMENDMENT

A. Apprendi-Blakely Jury Trial Right for Higher Sentence Facts

Cunningham v. California, No. 05-6551, 127 S. Ct. 856 (Jan. 22, 2007), reversing in part 2005 Cal. Lexis 7128 (Cal. 2005).

Cuningham was convicted of sexual abuse of a minor under age fourteen. Under California's determinate sentencing law (DSL), "that offense is punishable by imprisonment for a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years." "[T]he DSL obliged the trial judge to sentence Cunningham to the 12-year middle term unless the judge found one or more additional facts in aggravation. Based on a post-trial sentencing hearing, the trial judge found by a preponderance of the evidence six aggravating circumstances . . . ." "Concluding that the aggravators outweighed the sole mitigator, the judge sentenced Cunningham to the upper term of 16 years."

Holding (6-3) Ginsburg; Kennedy dissenting with Breyer; Alito dissenting with Kennedy and Breyer: **A sentencing scheme that allows a trial judge to impose a higher sentence based on facts-not-found-by-a-jury violates the Sixth Amendment, even though the trial judge's decision is subject to reasonableness review on appeal.** Apprendi (2000) has already made clear that facts that raise a statutory maximum sentence "must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." And Blakely (2004) has made clear that "the relevant statutory maximum is not the maximum

sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." "Under California's DSL, an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance." "[T]herefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." **"Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment."**

The California Supreme Court "attempted to rescue the DSL's judicial factfinding authority by typing it simply a reasonableness constraint, equivalent to the constraint operative in the federal system post-Booker." "It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable. Booker's remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless." So long as sentencing judges are finding new facts to go above what otherwise is the statutorily-required range, the Sixth Amendment is violated.

Kennedy dissenting with Breyer: To contain the expanding harm caused by Apprendi, the Court "could distinguish between sentencing enhancements based on the nature of the offense, where the Apprendi principle would apply, and sentencing enhancements based on the nature of the offender, where it would not." Facts related to the nature of the offense are usually presented to the jury as part of the case in chief. However, facts related to the nature of the defendant—such as defendant's character—are often withheld from the jury and thus more appropriate for judicial fact finding.

Alito dissenting with Kennedy and Breyer: "The California sentencing law that the Court strikes down today is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in" United States v. Booker (2005). "Both sentencing schemes grant trial judges considerable discretion in sentencing; both subject the exercise of that discretion to appellate review for 'reasonableness'; and both . . . require a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury's verdict."

B. Confrontation Clause

Whorton v. Bockting, No. 05-595, 127 S. Ct. 1173 (Feb. 28, 2007), reversing Bockting v. Bayer, 408 F.3d 1127 (9th Cir. 2005).

Bockting was indicted for sexual assault of his six-year-old stepdaughter. At Bockting's trial, his stepdaughter was too distressed to testify against him. The trial court permitted the stepdaughter's mother to recount at trial to the stepdaughter's prior statements describing Bockting's sexual assaults. The jury convicted Bockting. The Nevada Supreme court evaluated Bockting's Confrontation Clause objection under the then-controlling Supreme Court decision Ohio v. Roberts (1980), and found no error. But while Bockting's appeal from denial of his federal habeas petition was pending before the Ninth Circuit, Crawford v. Washington (2004), which overruled Roberts, was decided. The Ninth Circuit granted Bockting relief, holding that Crawford applies retroactively on collateral review.

Holding (9-0) Alito: **The holding of Crawford v. Washington (2004) does not apply retroactively in federal habeas corpus cases.** First, "new rules" normally do not apply to cases that were final on direct review before the new rule is announced. A new rule is one that "was not dictated by precedent existing at the time the defendant's conviction became final" (Saffle v. Parks (1990)), and Crawford plainly announced a "new rule."

A "new" constitutional rule applies retroactively on collateral review only if "the rule is a 'watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the

criminal proceeding.'" Saffle (quoting Teague v. Lane (1989)). "In order to qualify as watershed, a new rule must [1] be necessary to prevent 'an impermissibly large risk of an inaccurate conviction'" and "'[2] alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" Schriro v. Summerlin (2004). Crawford's rule is not a "watershed" rule by these standards. It is true that Crawford "may improve the accuracy of fact-finding in some criminal cases," but it might also reduce accuracy in some cases in so far as "unreliable out-of-court nontestimonial statements" may now admissible under the Sixth Amendment. The Crawford rule is not as profound and sweeping as the rule of Gideon v. Wainwright (1963). **[Ed. Note:** In fact, the Court seems to state a more difficult standard for "watershed" rules, saying that the new rule must actually "constitute" a "bedrock principle" that is "essential to fairness," rather than just "alter our understanding."]

C. Ineffective Assistance of Counsel

Schriro v. Landrigan (summarized below under Habeas Corpus).

EIGHTH AMENDMENT

A. Death Penalty Cases.

Ayers v. Belmontes, No. 05-493, 127 S. Ct. 469 (Nov. 13, 2006), reversing Belmontes v. Brown, 414 F.3d 1094 (9th Cir. 2005).

Belmontes was convicted of capital murder. During the sentencing phase of trial, Belmontes introduced evidence to show that he would behave well in the future if imprisoned but not executed. Specifically, Belmontes argued that his past good behavior in prison—working up to the number two position on his prison job and converting to Christianity—demonstrated that he would again behave well if returned to prison. The trial court judge instructed the sentencing jury to consider, as required by "factor (k)" in the then-required statutory jury instruction, that "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The judge refused to instruct the jury specifically that it could consider Belmontes' likely future behavior as a mitigating factor, and the jury sentenced Belmontes to death.

Holding (5-4) Kennedy; Scalia concurring with Thomas; Stevens dissenting with Souter, Ginsburg, and Breyer: **In the context shown here, instructing a capital sentencing jury to consider "any other circumstance which extenuates the gravity of the crime" without specifically instructing the jury to consider mitigating evidence of future good behavior does not violate the defendant's eighth amendment right to have all mitigating evidence considered at sentencing.** A sentencing instruction violates a capital defendant's Eighth and Fourteenth Amendment right to present mitigating evidence when "'there is a reasonable likelihood that the jury understood the instruction in a manner that resulted in its failure to consider constitutionally relevant evidence.'" Boyde v. California (1990). In two prior cases, the Supreme Court approved the use of the exact same catchall instruction because the instruction was interpreted [over strong dissents] to not preclude a sentencing jury from considering

evidence of precrime character (Boyde) and post-crime rehabilitation (Payton, 2005).[1] Here, similarly, the "catchall" instruction did not prevent the jury from considering Belmontes' future behavior. It would be "counterintuitive" to interpret the catchall instruction to mean that "a defendant's capacity to redeem himself through good works could not extenuate his offense." Furthermore, the defendant's presentation of forward-looking evidence, the prosecution and defense counsels' discussion of that evidence during closing arguments, and the judge's additional jury instruction to consider "'all of the evidence'" "eliminate any reasonable likelihood that a juror would consider [Belmontes'] future prospects to be beyond the bounds of proper consideration."

Scalia concurring with Thomas: "[L]imiting a jury's discretion to consider all mitigating evidence does not violate the Eighth Amendment."

Stevens dissenting with Souter, Ginsburg, and Breyer: The catchall jury instruction "sent the unmistakable message that California juries could properly give no mitigating weight to evidence that did not extenuate the severity of the crime." "[I]t is difficult, if not impossible, to see how evidence relating to future conduct even arguably 'extenuated the gravity of the crime.'"

Abdul-Kabir v. Quarterman, No. 05-11284, 127 S. Ct. 1654 (Apr. 25, 2007), reversing Cole v. Dretke, 418 F.3d 494 (5th Cir. 2005).

[Abdul-Kabir is one of a trilogy of decisions, decided on the same day together with Smith and Brewer below, that arise out of Texas death penalty cases and a Texas jury instruction (which is no longer given) that the Court previously held in Penry (1989) to unconstitutionally deny the jury a full and non-confused opportunity to consider mitigating evidence of any kind.]

Abdul-Kabir: The defendant was convicted of capital murder by a Texas jury for robbing and killing his stepbrother's grandfather. At the sentencing trial, Abdul-Kabir presented evidence of his unhappy childhood, and expert testimony that damage to his central nervous system had resulted in a lack of impulse control. The sentencing jury was told to answer two special issues: (1) Did Abdul-Kabir deliberately kill the victim? (2) Would Abdul-Kabir probably commit criminal acts of violence in the future? Under the Texas regime then in place, the jury's affirmative answers to these two special issues required the judge to impose a death sentence." The prosecutor told the jury that Abdul-Kabir's "bad upbringing" did not prevent them from answering yes to the special issues, and the judge refused to instruct the jury that they could answer no to either special issue based on "any evidence which . . . mitigated against the imposition of the Death Penalty." The jurors answered yes to both questions and Abdul-Kabir was sentenced to death. On habeas, Abdul-Kabir argued that the Texas instructions violated the constitutional rule that a capital jury must be allowed to consider all mitigating evidence, and pointed out that the U.S. Supreme Court had struck down the Texas instructions for this reason in Penry. The district court and Fifth Circuit denied relief.

Holding (5-4) Stevens; Roberts dissenting with Scalia, Thomas, and Alito; Scalia dissenting with Thomas and Alito, joining in part: **Penry v. Lynaugh (1989) clearly established that during capital sentencing, a "special instruction is necessary when the defendant's evidence may have meaningful relevance to the defendant's moral culpability 'beyond the scope of the special issues.'"** A jury may be precluded from giving meaningful

[1] [**Ed. Note**: This decision suggests that restrictive AEPDA standards for federal habeas review can "leak" backwards into pre-AEDPA cases. Payton was decided under AEDPA, but this case was pre-AEDPA. Justice Breyer's concurring opinion in Payton that provided the essential fifth vote said that it was AEDPA's deferential standard of review that caused the outcome. Nonetheless, the Court applied Payton's post-AEDPA reasoning to support of its holding here.]

relevance to the defendant's mitigation evidence not only as a result of the jury instructions, "but also as a result of prosecutorial argument dictating that such consideration is forbidden."

Here, the testimony regarding Abdul Kabir's rough childhood and possible neurological damage was irrelevant to either of the special verdict issues, except to show that Abdul Kabir would be dangerous in the future. Furthermore, the prosecutor suggested that the jury should disregard Abdul Kabir's mitigating evidence. Absent a special instruction that would resolve the confusion created by these instructions, affirmance of Abdul-Kabir's death penalty was "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Habeas relief should have been granted.

Roberts dissenting with Scalia, Thomas, and Alito: "This Court had considered similar challenges to the same instructions no fewer than five times in the years before the state habeas courts considered the challenges at issue here." "Four of the cases rejected the defendant's challenge. Only one [Penry] upheld it." "The Court today nonetheless picks from the five precedents the one that ruled in favor of the defendant, and anoints that case as the one embodying 'clearly established Federal law.'" "In doing so the Court fails to give any meaningful weight to the two pertinent precedents subsequent to Penry . . . even though those cases adopted a more 'limited view' of Penry . . . than the Court embraces today."

Scalia dissenting with Thomas and Alito, joining in part: "'[L]imiting a jury's discretion to consider all mitigating evidence does not violate the Eighth Amendment.'" See Ayers v. Belmontes (summarized above) (2006) (Scalia, J., concurring).

Smith v. Texas, No. 05-11304, 127 S. Ct. 1686 (Apr. 25, 2007), reversing Ex parte Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006).

Smith was also convicted of murder and sentenced to death, after the Supreme Court's decision in Penry v. Lynaugh (1989) (Penry I) but before Penry v. Johnson (2001) (Penry II). In Penry I, the Court held that two special-issue questions submitted to Texas capital juries to guide their sentencing determinations did not allow sufficient consideration of some types of mitigating evidence. [See Abdul –Kabir summary, above.] In light of Penry I, Smith's trial court instructed the jury that if they felt that death should not be imposed, but that the correct answer to each special issue question was yes, the jury should falsely answer one of the special issue questions no. Smith did not object to this nullification charge, but after Smith's sentencing, "Penry II held a similar nullification charge insufficient to cure the" constitutional problem. Texas state courts denied Smith relief in collateral review, but the U.S. Supreme Court reversed in Smith v. Texas (2004) (Smith I). On remand, the Texas Court of Criminal Appeals again denied Smith relief, holding that having failed to object to the nullification charge, Smith now had to show "egregious harm" to obtain relief.

Holding (5-4) Kennedy; Souter concurring; Alito dissenting with Roberts, Scalia, and Thomas: **A state court's erroneous interpretation of federal law cannot be the predicate for imposition of an adequate and independent state procedural bar.** The Criminal Court of appeals wrongly understood Smith I as having reversed because the nullification charge itself prevented the jury from considering Smith's mitigation evidence. "While the ethical and logical quandary caused by the jury nullification charge may give rise to distinct error, this was not the basis for reversal in Smith I." Rather, we reversed "because the nullification charge had not cured the underlying Penry error."

Souter concurring: "In some later case, we may be required to consider whether harmless error review is ever appropriate in a case with error as described in" Penry I. But not here.

Alito dissenting with Roberts, Scalia, and Thomas: Because Smith failed to raise an objection to the nullification charge, the Texas Court of Criminal Appeals was entitled to apply its own state law "egregious harm" rule. Because this rule creates an adequate and independent state-law ground for the state court decision, the Court must dismiss for want of jurisdiction.

Brewer v. Quarterman, No. 05-11287, 127 S. Ct. 1706 (Apr. 25, 2007), reversing Brewer v. Dretke, 442 F.3d 273 (5th Cir. 2006).

This is the third Penry case of the Term, companion to Abdul-Kabir and Smith, above. Brewer was convicted in Texas of murder committed during a robbery, and sentenced to death. At sentencing, Brewer introduced evidence of hospitalization for depression, past drug use, and his father's physically abusive behavior. Brewer's lawyer did not present expert testimony. The trial judge rejected jury instructions that would give explicit consideration to this mitigating evidence, and instead asked the jury to determine only the two "special issues" under Texas law (see Abdul-Kabir summary, above): whether (1) Brewer killed deliberately and (2) he posed a risk of future dangerousness. The jury's affirmative answer to both required a death sentence. The Fifth Circuit affirmed denial of habeas relief.

Holding (5-4) Stevens; Roberts dissenting with Scalia, Thomas, and Alito; Scalia dissenting with Thomas and Alito, joining in part: "**[A] sentencing jury must be able to give a 'reasoned moral response' to a defendant's mitigating evidence—particularly that evidence which tends to diminish his culpability—when deciding whether to sentence him to death."** Like the evidence of mental retardation and child abuse in Penry I (1989), "Brewer's mitigating evidence served as a 'two-edged sword' because it tended to confirm the State's evidence of future dangerousness as well as lessen his culpability for the crime." "It may well be true that Brewer's mitigating evidence was less compelling than Penry's, but . . . that difference does not" distinguish Penry. Neither does Brewer's lack of expert testimony. "Nowhere in our Penry line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability."

"[T]he Texas special issues do not provide for adequate consideration of a defendant's mitigating evidence when that evidence functions as a 'two-edged sword.'" "'The mitigating evidence presented may have served as a basis for mercy even if a jury decided that the murder was committed deliberately and that [Brewer] posed a continuing threat.'"

Roberts dissenting with Scalia, Thomas, and Alito: The state court reasonably distinguished Penry based on the fact that Brewer was only hospitalized once for depression, whereas Penry had a permanent mental illness, and Brewer offered no expert testimony. The transient quality of Brewer's disorder made it more likely that the jury would consider this evidence when deciding future dangerousness.

Scalia dissenting with Thomas and Alito, joining in part: See my dissent in Abdul-Kabir v. Quarterman, supra.

Uttecht v. Brown, No. 06-413, 127 S.Ct. 2218 (June 4, 2007), reversing 451 F.3d 946 (9th Cir. 2006).

As Justice Kennedy began his majority opinion [**Ed. Note**: and need we read any further?], Brown "robbed, raped, tortured and murdered" one woman in Washington state, and two days later did the same in California except that this victim lived to testify against him. He was sentenced to death. On federal habeas, a Ninth Circuit panel ruled that it had been constitutional error under Witherspoon (391 U.S. 510 (1968) and Witt (469 U.S. 412 (1985)) to

dismiss one juror ("Juror Z") for "cause" who appeared to have views against imposing the death penalty, even though defense counsel said "we have no objection."

Holding (5-4), **Kennedy**; Stevens dissenting; Breyer dissenting: **Witt requires deference to the trial court, "regardless of whether the trial court engages in explicit analysis of substantial impairment" of the juror's duty by his or her views about the death penalty.** Trial court decisions based in part on juror "demeanor" are included within this rule of deference. And "ambiguity" may be resolved by the trial court "in favor of the State," because some jurors simply can't be "unmistakably clear" about their views. Here, **"from our own review of the state trial" transcript, "the trial court acted well within its discretion in granting the State's motion to excuse Juror Z."** When defense counsel, who otherwise acted with "tenacity," said no objection, that was "an invitation to remove Juror Z" who, on this record, exhibited "considerable confusion" about his obligations as a juror. "It was error to find that Juror Z was not substantially impaired." **[Ed. Note**: This ruling apparently goes beyond a procedural "failure to accord due deference" ruling, it is a substantive ruling on the merits of applying Witt.]

Stevens dissenting with Souter, Ginsburg and Breyer: "An individual's opinion that a life sentence without the possibility of parole is the severest sentence that should be imposed in all but the most heinous cases does not even arguably" meet the "substantially impair" standard of Witt. Thus it was error to strike this juror. The majority "blindly accepts" the state court's determination to the contrary; "even AEDPA does not permit us to abdicate our judicial role in this fashion." And defense counsel's failure to object, "though perhaps not strategically sound," is irrelevant, under Washington state law and our precedents. The majority "redefines" the Witt standard, and gets it "horribly backwards." Witt permits exclusion only of jurors who will not impose death "in all circumstances," it does not require only those "jurors who will impose the death penalty." (Justice Stevens points out that the decision below was written by Judge Kozinski, who clerked for Chief Justice Burger.)

Breyer dissenting with Souter: I write to emphasize that the lawyer's "no objection" should "play no role in our analysis." Indeed it should be treated "as if a proper objection has been made." To rely on it for the "atmospherics" that a transcript cannot yield is wrong. On the record, it was "constitutionally erroneous" to excuse Juror Z.

Panetti v. Quarterman, No. 06-6407, 127 S.Ct. 2842 (June 28, 2007), reversing 448 F.3d 815 (5th Cir. 2006).

The Eighth Amendment prohibits the execution of a person who is currently insane. Ford v. Wainwright, 477 U.S. 399 (1986). Panetti, who had been sentenced to death for a grisly double murder, undisputedly "made a substantial showing" in state court that "he was not competent to be executed." Panetti's past history, his crime, and his behavior at trial [at which he was permitted to represent himself (!)] indicated serious mental illness. He was later found incompetent in Texas to waive his state habeas counsel. However, he did not claim he was incompetent to be executed, until his direct appeal and habeas proceedings were denied and final, and his execution date was scheduled.

The state court initially denied his motion without hearing, and Texas appellate courts dismissed for lack of jurisdiction. Panetti filed a new federal habeas suit, and the district court stayed it to provide the state court opportunity "to consider evidence of [Panetti's] current mental state. Panetti filed 10 motions related to his claim. The state court engaged in a number of procedural irregularities, including refusing to transcribe its proceedings, appointing a mental health expert without input from Panetti and not allowing Panetti's requested experts, providing

ex parte information to the State, failing to hold scheduled hearings, and failing to rule on filed motions. Instead, the state trial court found that Panetti had not proved by a preponderance that he was incompetent to be executed.

The federal district court found that the state court proceedings were "constitutionally inadequate" under Ford, and thus not due deference, but affirmed on the merits because "the Fifth Circuit test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution." The Fifth Circuit affirmed.

Holding (5-4, **Kennedy**; Thomas dissenting): First, we have jurisdiction, as we interpret § 2244(b) to not bar a "second" federal habeas petition that is file under Ford "as soon as the [mental incompetency] claim is ripe."

Second, Ford's plurality opinion plus Justice Powell's concurring opinion there provides "clearly established law" on procedures here. The petitioner must be given a "fair hearing" complying with "fundamental fairness." This includes "an opportunity to submit evidence and argument …, including expert psychiatric evidence that may differ from the State's own psychiatric examination." The state court failed to "allow … counsel the opportunity to make an adequate response to evidence solicited by the state court." This violates Ford, and thus is an "unreasonable" application of "clearly established" law. "Even a general standard may be applied in an unreasonable manner." Thus its substantive decision is due no deference under AEDPA habeas statutes.

Third, as a substantive matter, Ford requires that a prisoner have a "rational understanding" of the state's rationale for execution, not just know of the penalty and what the state says. We recognize that the concept of "rational understanding is difficult to define," but Ford does not make it irrelevant. The Fifth Circuit erred in ruling to the contrary. Here Panetti proffered experts who would say that Panetti sincerely believes the State is executing him to stop him from preaching. The Fifth Circuit should have "considered" the argument that Panetti has "severe mental illness" that "prevent[s] him from comprehending the meaning and purpose of the punishment."

However, "we do not attempt [here] to set down a rule governing all competency determinations." Without more evidentiary record development, "we find it difficult to amplify our conclusions or to make them more precise." [Interestingly, while remanding to the Fifth Circuit "for further proceedings consistent," the Court concludes by saying "these issues may be resolved in the first instance by the District Court" (emphasis added).

Thomas dissenting with Roberts, Scalia and Alito: The Court should defer to the many state and federal rulings that Panetti is not incompetent to be executed, particularly since this is clearly a prohibited "second or successive" habeas petition. We have rejected, in Burton v. Stewart, 127 S.Ct. 793 (Jan. 9, 2007), a rule that a claim may be raised in a second petition any time it is not ripe for the first petition. This makes sense, and even if it did not, that "cannot override AEDPA's plain meaning."

As for process, it is not clear that Justice Powell's Ford concurrence can constitute "clearly established" law, and even if it did, it is not clear that the state violated the general concepts put forth there. Panetti's declarations from a law professor and a psychologist do not make the "high showing" that Ford requires initially to obtain a full-blown adversarial hearing. Moreover, Panetti had "unlimited opportunity" to present whatever truly psychiatric evidence he had, but he submitted none in state court. Panetti has no clearly established right to state-funded expert testimony, discovery, or an oral hearing.

Because we lack jurisdiction under AEDPA, we need not address the substantive standard for competency. But there is no doubt the Court is imposing "additional constitutional

requirements" not "clearly established" under Ford. Its ruling is a "half-baked holding that leave the details of the insanity standard for the District Court to work out." It's new "rational understanding" standard is not even consistent with the way we normally resolve Eighth Amendment claims; there is no reference to history, standards of decency, or other legislatively enacted standards. The majority's "approach today – settling upon a preferred outcome without resort to the law – is foreign to the judicial role as I know it."

B. Prison Conditions and Deliberate Indifference

Erickson v. Pardus, No. 06-7317, 127 S.Ct. 2197 (June 4, 2007) (*per curiam*), vacating 198 Fed. Appx 694 (10th Cir. 2006).

Erickson, a prisoner, alleged that the prison doctors removed him from treatment for hepatitis C, violating the Eighth Amendment by showing deliberate indifference to his serious medical needs. He alleged that continuous, life-threatening damage to his liver was occurring while his medication was suspended. Apparently the prison was responding to finding one of the syringes made available to Erickson (and others) for the medication, in the trash and modified for the injection of illegal drugs. The Tenth Circuit affirmed dismissal of his § 1983 lawsuit, saying that he had failed to allege any harm caused by the prison's decisions, "other than what he already faced from the Hepatitis C itself."

Holding (7-2), **Per Curiam**; Scalia [dissenting] and Thomas dissenting: It was error to dismiss Erickson's complaint as "too conclusory," particularly since he was proceeding without counsel. He sufficiently alleged "a short and plain statement of his claim" (FRCivP 8(a)(2)), and in addition made "specific allegations" in support of his claim that the removal of his medication was "endangering his life." It may be that dismissal will prove correct, for any number of possible reasons, but "that is not the issue here." As a matter of Eighth Amendment pleading specificity, Erickson's pleadings were sufficient.

Scalia: I "would deny the petition for a writ of certiorari."

Thomas dissenting: I have repeatedly stated my view that the Eighth Amendment does not extend to injuries related to imprisonment conditions. I would also "draw the line at actual. Serious injuries," not "exposure to the risk of injury."

FOURTEENTH AMENDMENT

A. Substantive Due Process

Gonzales v. Carhart, Nos. 05-380 & 05-1382, 127 S. Ct. 1610 (Apr. 18, 2007), reversing 413 F.3d 791 (8th Cir. 2005), & Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006).

Doctors who perform second trimester abortions sought a permanent injunction against enforcement of the Partial-Birth Abortion Act of 2003 ("the Act"). The Act makes it a criminal offense for a doctor to perform a partial birth abortion, one of two abortion methods commonly used during the second trimester. In a partial birth abortion, the doctor generally pulls the fetus head first from the womb until the fetus' head lodges in the cervix. Then, the doctor terminates the fetus while it remains intact. The other method, dilation and evacuation, requires the doctor to dilate the patient's cervix and dismember the fetus in the womb. Although the Act includes an

exception for partial birth abortions necessary to save the life of the mother, it does not include an exception for partial birth abortions necessary to preserve the health of the mother.

Holding (5-4) Kennedy; Thomas concurring with Scalia; Ginsburg dissenting: **On its face, the Partial-Birth Abortion Act of 2003 does not violate the substantive due process clause of the Fourteenth Amendment.** "[T]he government has a legitimate and substantial interest in preserving and promoting fetal life." Before viability, the government may not impose an undue burden on abortion. However, "'regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.'" Planned Parenthood of Se. Pa. v. Casey (1992).

"[T]he Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face." Four features of the act show it is not void for vagueness. The Act only prohibits (1) an abortion in which the fetus is vaginally delivered (2) up to an "anatomical landmark" specified in the act—i.e. "'in the case of a head-first presentation, [until] the entire fetal head is outside the body of the mother.'" 18 U.S.C. § 1531(b)(1)(A). Furthermore, the Act requires (3) an overt act and (4) a specific mens rea.

The Act is not overbroad because it only prohibits partial birth abortion; it does not prohibit dilation and extraction. "If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability." "Removing the fetus [via dismemberment in the womb] does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery."

The Act does not impose an undue burden on previability abortion. The Act serves the government's legitimate interest in promoting respect for life because it maintains a boundary between abortion and killing a child after delivery. Medical experts disagree over whether a ban on partial birth abortion creates health risks. When medical uncertainty exists regarding whether an abortion procedure is ever necessary to preserve a woman's health, Congress is free to ban the procedure without providing a health exception. The Act remains open to as-applied challenges.

Thomas concurring with Scalia: The Court should overrule Roe v. Wade (1973).

Ginsburg dissenting with Stevens, Souter, and Breyer: In Stenberg v. Carhart (2000), "we expressly held that a statute banning intact D&E was unconstitutional in part because it lacked a health exception." "We noted that there existed a 'division of medical opinion' about the relative safety of intact D&E, but we made clear that as long as 'substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health,' a health exception is required." Stenberg. The majority's holding that no health exception is required when there is medical uncertainty directly conflicts with Stenberg.

HABEAS CORPUS

Carey v. Musladin, No. 05-785, 127 S. Ct. 649 (Dec. 11, 2006), reversing Musladin v. Lamarque, 427 F.3d 653 (9th Cir. 2005).

Musladin was convicted of first degree murder in California trial court. During the trial, some of the victim's family sat in the front row while wearing buttons displaying a photo of the victim. The trial court denied Musladin's motion to order the family not to wear the buttons. The California Court of Appeal affirmed. On federal habeas, the district court denied relief but the Ninth Circuit reversed.

Holding (9[6-3]-0) Thomas; Stevens concurring; Kennedy concurring; Souter concurring: **Clearly established federal law does not hold that allowing the victim's family to wear buttons with the victim's image during the defendant's trial denies the defendant his right to a fair trial.** Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), a federal court may grant an application for a writ of habeas corpus on a claim adjudicated on the merits in state court only if the state court's "decision was contrary to or involved an unreasonable application of [the Supreme Court's] applicable holdings."

"[C]ertain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial" in violation of the Fourteenth Amendment. However, the Supreme Court's prior cases only identified government-sponsored practices that denied defendants fair trials. See Holbrook v. Flynn (1986); Estelle v. Williams (1976). Here, private spectator conduct allegedly caused the prejudice. The Supreme Court "has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial."

Stevens concurring: When Supreme Court dicta contains "explanatory language that is intended to provide guidance to lawyers and judges in future cases," it qualifies as clearly established federal law.

Kennedy concurring: "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." Had the wearing of buttons "created an environment so raucous that calm deliberation by the judge or jury was likely compromised in a serious way," "relief under the [AEDPA] would likely be available even in the absence of a Supreme Court case addressing the wearing of buttons." **[Ed. Note**: Thus the Court does not state any "clear rule" about what "clearly established" means, here. The level of generality that is permitted will continue to be outcome-determinative in this area.]

Souter concurring: "[T]here is no serious question that [our fair trial jurisprudence] reaches the behavior of spectators." However, federal law does not clearly establish whether allowing trial spectators to wear buttons with the victim's photo creates a sufficient risk that jurors will reach a guilty verdict out of sympathy for the victims.

Burton v. Stewart, No. 05-9222, 127 S. Ct. 793 (Jan. 9, 2007), vacating Burton v. Waddington, 142 Fed. Appx. 297 (9th Cir. 2005).

A Washington state court sentenced Burton to 562 months in prison for rape, robbery, and burglary. While state review of his sentence was still pending, Burton filed his first habeas petition in district court. The petition raised exhausted claims challenging the constitutionality of his conviction, but not unexhausted claims that could have challenged his sentence. The claims challenging his sentence were still pending in state court. The federal courts adjudicated the petition on the merits and denied relief. Three years later, after the state courts denied relief on his sentencing claims, Burton filed a second habeas petition in district court without first requesting permission from the court of appeals to do so. In the second petition, Burton challenged only the constitutionality of his sentence.

Holding (9-0) *per curiam*: **Under AEDPA, a state prisoner who omits some unexhausted claims from his first federal habeas corpus petition cannot, after the first habeas petition is adjudicated on the merits, file a second habeas petition raising those now-exhausted claims without first obtaining the permission of the court of appeals. [Ed. Note:** Because of this holding, the Court did not reach the question on which certiorari had been granted, *i.e.* whether Blakely v. Washington (2004) announced a new rule and, if so, whether the

rule applies retroactively on collateral review. But in light of Whorton, above, the answer to this question may seem clearer now.]

AEDPA requires a state prisoner to obtain the permission of the court of appeals before filing in the district court a "second or successive" habeas application challenging his custody. 28 U.S.C. § 2244(b). Mixed petitions are those that contain exhausted and unexhausted claims.

Burton argues that his second habeas petition is not a "second or successive" petition within the meaning of AEDPA and is thus exempt from the requirement to obtain permission to file from the court of appeals. It is true that when a prisoner withdraws a mixed petition, exhausts the remaining claims, and returns to district court with a fully exhausted petition, the later filed petition is not a "second or successive" petition. However, a prisoner—like Burton—with unexhausted claims who chooses to proceed to adjudication of those claims may not later assert that a subsequent petition is not "second or successive" because the claims in his new petition were unexhausted at the time he filed his first petition. "Burton's [instant] petition was a "second or successive" habeas application for which he did not seek, much less obtain, authorization to file." "Because he did not do so, the District Court was without jurisdiction to entertain it."

Lawrence v. Florida, No. 05-8820, 127 S. Ct. 1079 (Feb. 20, 2007), affirming 421 F.3d 1221 (11th Cir. 2005).

A Florida jury convicted Lawrence of murder and sentenced him to death. The Florida Supreme Court affirmed and the U.S. Supreme Court denied certiorari. 364 days later, Lawrence filed an application for collateral review in Florida trial court, which denied relief and the Florida Supreme Court affirmed. Lawrence filed a petition for certiorari seeking U.S. Supreme Court review of that ruling, and the Supreme Court denied certiorari. While this cert petition was pending, and only 113 days after the Florida Supreme Court denied relief on collateral review, Lawrence filed a federal habeas petition. The district court dismissed the habeas petition as untimely under AEDPA's one-year limitations period, and the Eleventh Circuit affirmed.

Holding (5-4) Thomas; Ginsburg dissenting with Stevens, Souter, and Breyer: **Section 2244(d)(2)'s one-year statute of limitations is not tolled during the pendency of a prisoner's certiorari petition seeking Supreme Court review of state court denial of post-conviction relief.** Section 2244(d)(2) tolls the limitations period while an "application for State post-conviction or other collateral review" "is pending." "Read naturally, the text of the statute must mean that the statute of limitations is tolled only while state courts review the application."

Ginsburg dissenting with Stevens, Souter, and Breyer: When a prisoner petitions the Supreme Court for certiorari review of state court denial of post-conviction relief, the application for post-conviction relief "remains live." Thus, § 2244 (d)'s "statute of limitations is tolled during the pendency of a petition for certiorari."

Schriro v. Landrigan, No. 05-1575, 127 S.Ct. 1933 (May 14, 2007), reversing 441 F.3d 638 (9th Cir. 2006).

Landrigan was sentenced to death in Arizona for a murder committed after he escaped from prison. Landrigan had two prior violent convictions, one for second degree murder and one for a stabbing committed in prison that only fortuitously did not result in death. At his sentencing, he objected to his lawyer's attempt to put on mitigating evidence from his birth mother and ex-wife, "interrupted repeatedly when counsel tried to proffer anything that could have been considered mitigating," and told the judge "if you want to give me the death penalty, just bring it on, I'm ready for it." (He also later wrote the U.S. Supreme Court in this case, asking for his case to be dropped and to be executed.) On the other hand, Landrigan's counsel

seems to not have investigated other sources of mitigating evidence, including psychiatric and other experts on organic brain disorders. An en banc Ninth Circuit reversed the district court's denial of his ineffective assistance habeas petition without an evidentiary hearing, saying that counsel's failure to investigate other mitigating evidence could have been ineffective and an evidentiary hearing was required.

Holding (5-4), **Thomas**; Stevens dissenting with Souter, Ginsburg and Breyer): The Ninth Circuit should not have overruled the Arizona courts' factual determination that Landrigan had instructed his counsel not to offer any mitigating evidence. That determination was reasonable on the record. Given that fact, Landrigan's counsel's failure to investigate couldn't be ineffective, since Landrigan told him not to and would have undermined it in any case. **It was not an abuse of discretion to deny a federal evidentiary hearing. "If district courts were required to develop even the most insubstantial factual allegations in evidentiary hearings, [they] would be forced to reopen factual disputes that were conclusively resolved in the state courts."** There is no "clearly established" law to the contrary; Wiggins (539 U.S. 510 (2003)) and Rompilla (545 U.S. 374 (2005)) were different.

In addition, it is not "clearly established" that an "informed and knowing" standard applies to a defendant's decision not to introduce evidence. Even if that standard applied, Landrigan did not raise it in the state courts, and it is satisfied on this record anyway. Finally, the district court reasonably concluded that "any additional evidence would have made no difference in the sentencing." The original 2-1 Ninth Circuit panel got it right, and it was wrong to overrule them *en banc*.

Stevens dissenting with Souter, Ginsburg and Breyer: Landrigan was at least entitled to an evidentiary hearing, and the Court of Appeals was correct to make that limited ruling. There was significant mitigating evidence about Landrigan's background and brain disorder that counsel should have investigated. Landrigan's intransigence was (a) a product of his brain disorder, and (b) limited to evidence just from his ex-wife and birth mother, not experts. The majority's opinion is a "cramped reading of the record" and a "parsimonious appraisal of a capital defendant's constitutional right to … meaningful consideration of all relevant mitigating evidence" (citing Abdul-Kabir from earlier this Term). Also, the "informed and knowing" standard clearly applies here. The majority should not say to the contrary, and they are wrong that it was satisfied. (And Landrigan couldn't raise it because the State never proposed that waiver was an issue until Landrigan was done there). Finally, the conclusion that the proffered mitigating evidence would not have made a difference is likely wrong, and can't be decided without an evidentiary hearing. (It is significant that one of the three original panel judges [Wardlaw; the other two were not on the *en banc* court] "switched her vote and joined the *en banc* majority.") Repeatedly citing Justice Kennedy [who is in the majority here], Justice Stevens reminds that very few federal habeas applications result in relief, or even evidentiary hearings, so that "doing justice does not always cause the heavens to fall."

Roper v. Weaver, No. 06-313, 127 S.Ct. 2022 (May 21, 2007) (*per curiam*), dismissing writ as improvidently granted, from 438 F.3d 832 (8th Cir. 2006).

Holding (6 [5-1] -3), **Per Curiam**; Roberts concurring in the judgment; Scalia dissenting with Thomas): Although we granted on a question involving federal habeas review of an allegedly inflammatory state prosecutorial closing argument, we now dismiss the writ. Weaver was convicted of murder with two codefendants and sentenced to death. His codefendants both received federal habeas relief for the same closing argument reason. But Weaver's habeas was initially handled differently, because the district judge erroneously dismissed it without prejudice while Weaver sought certiorari from his state judgment. Weaver did not appeal that dismissal,

but simply refilled after cert was denied. Unfortunately, the passage of AEDPA intervened, and the state now argues that the new AEDPA standards should preclude relief. "We find it appropriate to exercise our discretion to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner."

Roberts concurring in the judgment: I don't agree with all the reasons given, but I concur in the judgment of dismissal.

Scalia dissenting with Thomas and Alito: The three codefendants are not similarly situated; Weaver neglected to appeal from the district court's erroneous dismissal, and the result was that his habeas petition was filed after AEDPA, unlike his codefendants'. That statutory difference is clear legal reason to rule as we originally intended in this case. Weaver neglected to tell us about the erroneous dismissal until after we granted cert here; this lack of diligence "has not only not been sanctioned, it has been rewarded." Today's decision is simply "a rare manifestation of judicial clemency unrestrained by law."

Fry v. Pliler, No. 06-5247, 127 S.Ct. 2321 (June 11, 2007), affirming 209 Fed. Appx 622 (9th Cir. 2006).

The question addressed by the full Court is what "harmless error" standard of review applies on habeas, when a state court has failed to apply (or even mention) the correct "harmless beyond reasonable doubt" standard under Chapman for constitutional error in its direct review. While agreeing that a less stringent "substantial and injurious effect" standard applies (under Brecht), the dissent would go further and apply that standard to find non-harmless error here,

Fry was tried three times for a double murder. The first two trials were "hung" by votes of 6-6 and 7-5; the third resulted in a conviction after five weeks of deliberation. At the third trial, defendant put on some evidence that another man had committed the murders, but the judge excluded the testimony of a witness (a cousin of the other alleged killer) who said she had heard her cousin admit to committing a double murder similar to the one for which Fry was on trial. On appeal, the California appellate court ruled that there was "no possible prejudice" that could have resulted because the testimony was "cumulative." The California court did not specify its standard of review. On habeas, the federal courts ruled that Fry did not show "a substantial and injurious effect on the jury's verdict, under Brecht v. Abrahamson, 507 U.S. 619 (1993). But other courts have ruled that when a state court does not apply the required "harmless beyond reasonable doubt" standard on direct review (Chapman v. California, 368 U.S. 18 (1967)), that more stringent standard should be applied on habeas.

Holding (9-0/ 5-4): **Scalia**; Breyer concurring and dissenting in part; Stevens concurring and dissenting in part, with Souter, Ginsberg and (in part) Breyer): Unanimous ruling: even if a State court does not specify that it has applied the required Chapman standard, **on habeas a federal court must apply the less stringent Brecht standard to determine "harmless" constitutional error.** This has been assumed in prior decisions, and flows logically from our decision in Brecht. The reasons that a more deferential standard applied on habeas in Brecht do not counsel a different result just because the state courts failed to specify the standard. Thus, even assuming the state court decision was an "unreasonable application" of the constitutional right to present a defense, and that it failed to apply Chapman as required, the question on habeas is whether the Brecht "substantial and injurious effect" standard is met. Nothing in AEDPA changes that, nor do we need to decide if this standard would hold true if states were to eliminate constitutional appellate review entirely.

Ruling 5-4: We will not re-examine whether the Brecht standard was satisfied here. The Ninth Circuit held (2-1) that it was not, and the certiorari question here does not fairly encompass that issue.

Stevens, dissenting in part with Souter and Ginsberg: We should decide that the Brecht standard was met here, and that CA9 was wrong about that. The parties briefed that question on the merits, and they and the Solicitor General addressed it at oral argument. It fits within the question on which we granted review. Here, the Chambers "right to present a defense" error was clear, and it is inherently "prejudicial." The Brecht standard still imposes a "significant burden of persuasion on the State," and that burden was not carried here. The case was obviously extremely close, the only eyewitness's description differed markedly from Fry's, and the excluded witness was a "disinterested" relative of the other alleged killer.

Breyer, dissenting in part: I agree with much of what Justice Stevens says, but rather than decide the harmlessness of the error here, I would remand for CA9 to "reconsider," in light of Justice Stevens' points, its Brecht analysis.

Bowles v. Russell, No. 06-5306, 127 S.Ct. 2360 (June 14, 2007), affirming 432 F.3d 668 (6th Cir. 2005).

A district court extended Bowles' time to file an appeal from denial of his habeas petition, under Fed. R. App. Pro. 4(a)6), which allows a district court to extend the filing period by 14 days, if the original filing period has been missed and a motion to reopen is filed within 180 days and other conditions are met. The district court's order, however, "inexplicably" specified a deadline date that was 17 days after the date of its order -- three more days than the federal Rule allows. Bowles filed his notice of appeal on the 17th day. The Tenth Circuit ruled that the 14-day extension period is "mandatory and jurisdictional" and dismissed Bowles' appeal for lack of jurisdiction.

Holding (5-4), **Thomas**; Souter dissenting: **The 14-day period in Rule 4(a)(6) is jurisdictional, and there is no basis in law to allow for an "excusable neglect" exception.** This is not just a "claims processing rule" that can be waived in the interests of justice. Although we have been "careless" in the past with regard to using "jurisdictional" terminology, "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century" and a contrary ruling now "would require the repudiation of a century's worth of precedent and practice." Because Rule 4(a)(6)'s deadline is in furtherance of the Congressional statute that sets a 30-day deadline for filing notices of appeal (28 U.S.C. § 2107), it is a "jurisdictional … statutory time limit." This holding "makes good sense" **[Ed. Note:** Since when does Justice Thomas look to policy reasons?] because Congress sets the jurisdictional limits for federal courts. "[T]his Court has no authority to create equitable exceptions to jurisdictional requirements." Congress can change the rule if it likes. And while we don't overrule it, we restrict the Harris Truck Lines decision (see the dissent) to its facts.

Souter dissenting with Stevens, Ginsburg and Breyer: "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch." "We have the authority to recognize an equitable exception," and we should say so "as it certainly seems reasonable to rely on an order from a federal judge." "In recent years we have tried to clean up our language" and restrict "jurisdictional" to its proper, narrow, confines. "Time prescriptions, however emphatic, are not properly typed 'jurisdictional'" unless Congress expressly so specifies. Arbaugh, 546 U.S. at 510 (2006) (unanimous among the current members of the Court). I doubt that "Congress meant to create" such a mandatory, no-exceptions, time limit here. Harris Truck Lines (371 U.S. 215 (1962)) recognized that even the

statutory § 2107(c) period could be "excused" for "unique circumstances." The Court's "refusal to come to grips" with Harris and Arbaugh "leaves the Court incoherent" – apparently "no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this Court."

FEDERAL STATUTES AND RULES

A. Federal Guidelines Sentencing.

Rita v. United States, No. 06-5754, 127 S.Ct. 2456 (June 21, 2007), affirming 177 Fed. Appx. 357 (4th Cir. 2006).

After Booker (543 U.S. 220 (2005)), the federal sentencing Guidelines are not mandatory and federal sentences are reviewed on appeal for "reasonableness." The question here is whether a court of appeal may apply a "presumption of reasonableness" to a federal sentence when it is within the now-discretionary Guidelines range.

Rita was convicted of lying before a grand jury investigating machinegun firearms violations. The district court sentenced him to 33 months imprisonment, which it found was the bottom of the properly calculated Guidelines range and was "appropriate" under 18 U.S.C. § 3553. The Fourth Circuit affirmed, saying not only that a sentence within the properly calculated range is "presumptively reasonable," but also that it believed that "most sentences will continue to fall within the applicable guideline range."

Holding (8[6-2]-1 (**Breyer;** Stevens concurring with Ginsburg (in part); Scalia concurring in part with Thomas and concurring in the judgment; Souter dissenting). Demonstrating that the Justices remain confused and split regarding the implications of Apprendi and Blakely for criminal sentencing, the six-Justice majority holds that **a "presumption" of reasonableness is not an impermissible method for channeling appellate review of sentences, particularly since it is merely "an appellate court presumption" and is (and plainly must be) rebuttable**. The "presumption" here is "not binding," does not impose a "particular burden of persuasion or proof," and does "not reflect strong judicial deference." It merely reflects the fact that both the Sentencing Commission and the trial court agree on the reasonableness of the range, thus making it more likely that the sentence is "reasonable." And the calculated Guidelines range is supposed to reflect the factors specified in § 3553, attempting to fairly address the "considerable disagreement within the criminal justice community." Nor is a "presumption of unreasonableness" allowed for non-Guidelines sentences. In sum, the "presumption" merely embodies an "abuse of discretion" standard of appellate review. **Trial level courts "do not enjoy the benefit of a legal presumption that the Guidelines sentence should apply**, and must develop the appropriate sentence through "thorough adversarial testing."

There is no Sixth Amendment constitutional problem with the presumption here. The Sixth Amendment does not completely disable judges from finding facts relevant to sentencing, and here there is no legally required effect of such Guidelines fact-finding.

Applying this analysis, the 33-month sentence imposed here is not "unreasonable." The sentencing judge need not provide a "lengthy explanation" or "a full opinion in every case," but merely "set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis" for his sentencing judgment. If he goes outside the Guildelines, the judge should "explain why he has done so," "articulating reasons, even if brief." [Ed. Note: it is unclear whether this is a legal requirement, as the majority begins by saying a judge "will normally go further."] Here the judge's reasons were "brief but legally sufficient."

Although "the judge might have said more," "context and the record make clear" that he considered the evidence and arguments and applied reasonable reasoning. (Ed. Note: Significantly, the Court declines to consider an argument related to "personal characteristics" factors that the Guidelines expressly say are "not ordinarily relevant," thereby setting up future litigation on the legality and Blakely analysis of such factors.)

Stevens, concurring, joined by Ginsburg in part: Although I did not agree with the Booker remedial opinion, I agree we now have to apply it. One thing Booker did was to basically reinstate the old Koon abuse of discretion standard, "guided by the[] § 3553(a) factors." "Appellate judges must still always defer to the sentencing judge's individualized sentencing determination." The required appellate review must now also include the "personal characteristics" factors that the Guidelines say are "not ordinarily relevant [the issue the majority opinion declines to address], because they are in § 3553(a). I don't agree with Justice Scalia's "purely procedural review" standard, because Booker "plainly contemplated … a substantive component." Finally, I think Justice Souter "overestimates" the "gravitational pull" that a presumption of reasonableness will have on sentencing and appellate courts. "I trust" that judges "will now recognize that the Guidelines are truly advisory." That said, I think it was a "serious omission" for the sentencing judge here not to comment on the defendant's good service to his country as a veteran. I join the Court in affirming only because of "the importance of paying appropriate respect to the exercise of a sentencing judge's discretion."

Scalia, concurring in part and in the judgment, with Thomas: "I accept Booker's remedial holding," but I don't agree that "reasonableness." Although not present in this case (so I concur in part), in some cases the Guidelines sentence will not be justifiable as "reasonable" without reference to facts not found by the jury. Thus the majority "reintroduce[s] the constitutional defect that Booker purported to eliminate." Hypotheticals, I now explain, show this. **[Ed note:** Significantly, perhaps, although Justice Scalia here invokes Justice Alito's dissenting opinion from Cunningham on this point earlier this Term, Justice Alito joins the majority opinion here and not Justice Scalia's.] I would limit appellate reasonableness review "to the sentencing procedures mandated by statute." Not making clear that the Sixth Amendment precludes all "substantive" sentencing review will "produce chaos" because judges and defendants "will be unable to figure out" whether there is true constitutional error present. "It is irresponsible to leave this patent inconsistency hanging in the air." This is "Guidelines-light" [so in the original, may be changed to "Guidelines-lite" in the final U.S. Reports.] Finally, Justice Scalia takes a poke at Justice Ginsburg (who, it must be admitted, has not been a model of consistency or clarity in the string cases from Apprendi to Rita), noting that she earlier wrote in Cunningham that she "did not intend to overrule Blakely."

Souter dissenting: "Applying the Sixth Amendment to current sentencing law has gotten complicated, and someone coming cold to this case might wonder how we reached this point." [So a lengthy recounting of the doctrinal line follows.] "It seems fair to ask just what has been accomplished by Apprendi and its associated cases." The way to avoid "trivializ[ing] the jury right" is to hold that their can be no "presumption" of reasonableness to a Guidelines sentence. If Congress really wants a mandatory Guidelines system, it can legislate one – with the proviso that all facts necessary to sentence "within an upper Guidelines subrange" [whatever that means] must be found by jury trial.

Claiborne v. United States, 127 S.Ct. 2245 (June 4, 2007): The court dismissed this much-watched case as moot (thereby vacating the Eighth Circuit's opinion), upon notification that Claiborne had died. The Court then immediately granted certiorari in Gall v. United States, No. 06-7949 (set for argument Oct. 2, 2007), which hopefully presents the same question(s)

regarding how "reasonableness" review should proceed for outside-the-Guidelines (or at least below-Guidelines) sentences.

B. Other Federal Statutory Cases

Attempt Statutes: United States v. Resendiz-Ponce, No. 05-998, 127 S. Ct. 782 (Jan. 9, 2007), reversing 425 F.3d 729 (9th Cir. 2005).

Resendiz-Ponce was convicted of attempting to reenter the United States after having previously been deported. The indictment did not allege any specific act constituting a substantial step aimed at reentering (such as showing border inspectors a fake ID). Instead, the indictment merely alleged that Resendiz-Ponce "attempted" to enter the United States without consent after having been deported.

Holding (8-1) Stevens; Scalia dissenting: We have held that a defendant cannot violate § 1326(a) unless he commits an overt act qualifying as a "substantial step" toward completion of his goal. Although "an indictment must set forth each element of the crime that it charges" (Almendarez-Torres v. United States (1998)), we do not need to decide here the question on which we granted certiorari (whether omission of an element can be harmless error), because the indictment here did not omit the "overt act" element. By alleging that defendant "attempted" to enter the United States, the indictment implicitly alleged that defendant engaged in the overt act element of attempted reentry. **"Not only does the word 'attempt' as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements. Consequently, an indictment alleging attempted illegal reentry under 8 U.S.C.S. § 1326(a) need not specifically allege a particular overt act or any other 'component part' of the offense."** Moreover, Fed. R. Crim. Pro. 7(c)(1) requires only a "plain, concise, and definite written statement of the essential facts." This indictment's use of the word "attempt" in combination with the specific of the date and location of the attempted re-entry satisfies the two constitutional requirements (fair notice and future double jeopardy bar) for indictments.

Scalia dissenting: "[A] n indictment must allege all the elements of the charged crime." "'Attempt' contains two substantive elements: the intent to commit the underlying crime, and the undertaking of some action toward commission of that crime." "It should follow, then, that when the Government indicts for attempt to commit a crime, it must allege both that the defendant had the intent to commit the crime, and that he took some action toward its commission." We wouldn't hold that the government could omit the intent element, would we? The government should be required to allege that the defendant "took a substantial step," even if it need not specify what that step was. There is no historical exception for federal "attempt" crimes.

Prison Litigation Reform Act: Jones v. Bock, Nos. 05-7058 & 05-7142, 127 S. Ct. 910 (Jan. 22, 2007), reversing 135 Fed. Appx. 837 (6th Cir. 2005), Williams v. Overton, 136 Fed. Appx. 859 (6th Cir. 2005), and Walton v. Bouchard, 136 Fed. Appx. 846 (6th Cir. 2005).

The Prison Litigation Reform Act of 1995 requires prisoners to exhaust prison grievance procedures before filing suit in federal court. The Sixth Circuit affirmed the dismissal of three prisoner suits for failure to exhaust. The first prisoner, Jones, failed to attach copies of his grievance to his complaint and failed to provide a detailed description of the grievance procedures he exhausted. The second prisoner, Williams, did not name in his grievance any of the defendants he ultimately sued. The third prisoner, Walton, filed a complaint that contained both exhausted and unexhausted claims.

Holdings (9-0) Roberts: **(1)** "**[F]ailure to exhaust is an affirmative defense under the PLRA, and . . . inmates are not required to specially plead or demonstrate exhaustion in their complaints." (2) A prisoner does not fail to exhaust his remedies merely because he does not identify in his grievance one of the defendants the prisoner ultimately sues. (3) The PLRA does not require dismissal of the prisoner's entire complaint when it contains both exhausted and unexhausted claims.**

(1) "[T]he usual practice under the Federal Rules [of Civil Procedure] is to regard exhaustion as an affirmative defense." "[C]ourts should not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." (2) The rule that the prisoner must name all defendants in the grievance "lacks a textual basis in the PLRA." (3) If a complaint contains both exhausted and unexhausted claims, the court proceeds with the exhausted claims and dismisses the unexhausted claims. There is no indication in the PLRA that Congress intended to depart from this general practice.

False Claims Act: Rockwell International Corp. v. United States, No. 05-1272, 127 S.Ct. 1397 (March 27, 2007), reversing 92 Fed. Appx. 708 (10th Cir. 2006).

James Stone, an engineer at the Rocky Flats nuclear weapons plant, wrote an internal memo in 1982 stating that a process for disposing of toxic sludge by mixing it with cement (called "pondcrete"), would not work because the piping system would not work. Stone was laid off, and in 1987 he went to the FBI with allegations about Rockwell's administration of the Rocky Flats plant. The government "raided" the facility with a search warrant, newspapers published investigative reports, and by 1992 Rockwell pleaded guilty to environmental violations. Meanwhile, Stone filed this qui tam lawsuit under seal in 1989. Rockwell moved to dismiss, as the Act precludes suits bases on "public disclosure of allegations." 31 U.S.C. § 3730(e)(4)(A). Stone contended, however, that he was "an original source of the information," which allows his claim to go forward. Id. The government finally intervened and joined Stone's suit, and the district court allowed the case to proceed to trial, but not on Stone's original "pondcrete" allegations. The jury awarded $1.3 million, but on allegations that arose after Stone had left Rockwell.

Holding (8-2, Breyer not participating), **Scalia**; Steven dissenting: Stone is not an "original source" and his claim are thus statutorily precluded. First, the statutory bar is jurisdictional, so we must decide it. Second, the "information" that Stone must be the "original source" for must be (a) the information on which his original false claim allegations were based, and more importantly, (b) underlying the allegations on which the false claims case proceeds to resolution. Otherwise a relator would be "free to plead a trivial theory of fraud for which he has some direct and independent knowledge, and later amend the complaint to include theories copied from the public domain." **Because the lawsuit here was ultimately based on "pondcrete" allegations under a theory different than Stone's 1982 critique, and on problems that arose after Stone left Rockwell, he cannot be an "original source."** However, the government need not worry that the lack of jurisdiction over Stone's claims ousts the government of jurisdiction too. We rule that **once the government intervenes, the lawsuit becomes one "brought by the Attorney General" under § 3730 if the private relator is dismissed**. [This means that Stone loses his judgment here, but the government does not.]

Steven dissenting with Ginsburg: The statute means that an "original source" must be the source of the publicly-disclosed allegations, not of the allegations in the complaint (amended or otherwise). So if theories of recovery are later amended, that does not affect the jurisdiction over the suit originally. The court's contrary rule will require trial courts to re-examine jurisdiction every time the complain is amended or a pretrial order narrows the issues for trial, and can drive

a "wedge" between the government and private relators. Here, it was Stone's information provided to the FBI that led to the June 1989 disclosed allegations, even if he had the wrong causation theory, although I would remand for whether he was an original source of other allegations.

Armed Career Criminal Act: James v. United States, No. 05-9264, 127 S. Ct. 1586 (Apr. 18, 2007), affirming 430 F.3d 1150 (11th Cir. 2005).

The Armed Career Criminal Act ("ACCA") imposes a mandatory sentence of fifteen years imprisonment for possession of a firearm if the defendant has three prior convictions "for a violent felony." James pled guilty to possession of a firearm after being convicted of a felony. James had three prior convictions, one of which was for attempted burglary in violation of Florida law. Florida defines attempted burglary as "overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein."

Holding (5-4) Alito; Scalia dissenting with Stevens and Ginsburg; Thomas dissenting: "**Attempted burglary, as defined by Florida law, is a 'violent felony' under" the Armed Career Criminal Act.** The ACCA defines a "violent felony" as a crime punishable by imprisonment for more than one year that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Attempted burglary as defined by Florida law is not a clause (i) crime because "use, attempted use, or threatened use of physical force" is not an element of the crime. "Nor does it qualify as one of the specific crimes enumerated in clause (ii)."

However, attempt offenses may qualify as residual clause (ii) crimes "when they involve conduct that presents a serious potential risk of physical injury to another." "[T]he most relevant common attribute of the enumerated offenses of burglary, arson, extortion, and explosives use is not 'completion.'" "Rather, it is that all of these offenses, while not technically crimes against the person, nevertheless create significant risks of bodily injury or confrontation that might result in bodily injury."

To determine whether attempted burglary qualifies as an ACCA violent felony, the Court "consider[s] whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." Attempted burglary as defined by Florida law it is a crime that "involves conduct that presents a serious potential risk of physical injury to another." "[T]he risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses[:] completed burglary." Like burglary, attempted burglary risks "a face-to-face confrontation between the burglar and . . . an occupant, a police officer, or a bystander . . . who comes to investigate."

Scalia dissenting with Stevens and Ginsburg: The Court fails to provide clear guidance to the district courts on how to apply the ACCA. "The one guideline the Court does suggest is that the sentencer should compare the unenumerated offense at issue with the 'closest analog' among the four offenses that are set forth (burglary, arson, extortion, and crimes involving the use of explosives), and should include the unenumerated offense within ACCA if the risk it poses is 'comparable.'" However, in many cases, it will not be "obvious which of the four enumerated offenses is the closest analog." "Is, for example, driving under the influence of alcohol more analogous to burglary, arson, extortion, or a crime involving use of explosives?"

"And if an analog *is* identified, what is to be done if the offense at issue does *not* present a comparable risk?" "[I]t seems inconceivable that . . . the offense [should] be excluded from ACCA for that reason." "For example, it does not comport with any conceivable congressional intent to disqualify an unenumerated crime that is most analogous to arson and presents nowhere near the risk of injury posed by arson, but presents a far greater risk of injury than burglary, which Congress has explicitly included."

Furthermore, "attempted burglary [does not] categorically involve conduct that poses at least as much risk of physical injury to another as completed burglary."

Thomas dissenting: The ACCA violates the Sixth Amendment because it allows judges to make a finding that raises a defendant's "'sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant.'" United States v. Booker (2005) (Thomas, J., dissenting in part).

Credit Suisse Securities v. Billing, No. 05-1157, 127 S.Ct. 2383 (June 18, 2007), reversing 426 F.2d 130 (2d Cir. 2005).

Investors filed suit against investment banks acting as underwriters for initial public offerings, alleging that certain practices ("tying" and "laddering") violated the antitrust laws. The district court dismissed, ruling that federal securities laws implicitly precluded application of the antitrust laws to the conduct alleged, but the Second Circuit reversed and reinstated the lawsuit.

Holding (7-1, Kennedy not participating), **Breyer**; Stevens concurring in the judgment; Thomas dissenting): Because this lawsuit presents a "substantial risk of injury to the securities market," and there is a "diminished need for antitrust enforcement," there is a "clear incompatibility" between this lawsuit and the securities law such that it should be dismissed. Three precedents state that there can be such an "implicit" preclusion of antitrust lawsuits when there is a conflict with the securities laws. Four "critical" factors to apply emerge from these precedents. [The Court applies these factors, in detail not repeated here.] Also, our precedents already have rejected the argument that the "savings clauses" in the securities laws preserve all antitrust actions (cf. Thomas dissent below); the parties didn't raise this argument below and we won't reexamine it here. The main reasons there is incompatibility here are that "securities expertise" is needed to evaluate the antitrust claims – and the SEC opposes relief here – and there is a "risk of inconsistent court results" because "nonexpert judges and … nonexpert juries" will evaluate antitrust lawsuits around the country. The SEC says that if the underwriters' conduct is not "immunized" from antitrust attack, it will "disrupt the full range of the Commission's ability" to regulate and disrupt activities "of tremendous importance to the economy of the country. And because the SEC already regulates much of the challenged conduct here, there is less need for private antitrust enforcement. We reject the SG's suggested compromise position; this conduct is implicitly exempted from antitrust challenge.

Steven concurring in the judgment: Underwriter agreements "should be treated as procompetitive joint ventures." So we should flatly hold that the conduct here does not violate antitrust laws, rather than say it is immunized. So I concur in the judgment only.

Thomas dissenting: The securities laws are not just "silent" regarding antitrust actions. They in fact say that "the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." The federal antitrust laws were on the books when these savings clauses were written, and "all" means all. None of our precedents "offered any analysis of the savings clauses," and "omitted reasoning has little claim to precedental value. … I would not allow the Court's prior silence on this issue to erect a

perpetual bar …." A "straightforward application" of the savings clauses' plain language leads to the conclusion that plaintiffs' antitrust lawsuit "must proceed."

Tellabs Inc. v. Makor Issues & Rights, Ltd., No. 06-484, 127 S.Ct. 2499 (June 21, 2007), vacating 437 F.2d 588 (7th Cir. 2006).

First sentence of the opinion: "this Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions…." But Congress has also sought to limit abusive private suits, as in the Private Securities Litigation Reform Act of 1995, which requires plaintiffs to plead "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," i.e., scienter. Here, the Seventh Circuit ruled that a plaintiff's fraud allegations should be evaluated only with inferences most favorable to the plaintiff and applying a "reasonable person could infer" standard.

Holding (8-1), **Ginsburg**; Scalia concurring; Alito concurring; Steven dissenting: Courts applying the PSLRA must **"consider not only inferences urged by the plaintiff … but also competing inferences rationally drawn" from the allegations, appended documents, and judicial notice facts; and the inference of scienter "must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."** Thus, in addition to taking all the pleaded facts as true and considering any documents incorporated by reference and other "judicial notice" facts, a district court "must take into account plausible opposing inferences." And the ultimate inference of fraudulent intent must be "powerful or cogent," meaning "at least as compelling" as any counter-inference. The facts here are remanded for evaluation under the correct standard.

Scalia concurring: I think the statute requires the inference of scienter must be "more plausible than the inference of innocence." This is the "natural reading of the statute." Also, the Court errs in giving any weight at all to a House legislative report.

Alito concurring. I agree with Justice Scalia as to the standard. Also, the court should consider "only those facts alleged 'with particularity'" as the statute says.

Stevens [former Seventh Circuit Judge and current Seventh Circuit Justice] dissenting: I think a standard of "probable cause" would be easier to administer than the Court's new standard, and is more consistent with the statute. Citizens can be compelled to produce their private papers in the criminal context upon probable cause, and the same standard, with which judges are already familiar, should be applied here. And I think the plaintiffs' allegations here meet that standard.

Hobbs Act Extortion: Wilkie v. Robbins, No. 06-219, 127 S.Ct. 2588 (June 25, 2007), reversing 433 F.3d 755 (10th Cir. 2006).

The Bureau of Land management neglected to record an easement across a ranch in Wyoming, so when Robbins bought the ranch and recorded the deed (with no knowledge of the BLM easement), BLM lost its easement. When Robbins said he would not grant the easement again without negotiation, BLM said (allegedly, complaint taken as true) responded that the federal government does not negotiate, and embarked on a bitter campaign of harassment with the purpose of compelling Robbins to grant the easement. Most of the alleged harassment was lawful (if nasty) technical regulatory enforcement, nasty remarks, and encouraging others to do mean things to Robbins. "Any single one of the offensive and sometimes illegal actions … might have been brushed aside as a small imposition, but … in the aggregate" the federal campaign against him needed redress, or the government would be allowed to inflict "death by a thousand cuts." Thus after many months of abuse, Robbins' federal RICO lawsuit alleged that

BLM and its agents engaged in a pattern of extortionate conduct designed to obtain Robbins' property, that is, an easement over his property. He also included a Bivens claim alleging Fourth and Fifth Amendment violations.

The Tenth Circuit ruled in the government's interlocutory appeal that Robins' suit could proceed. He had a Fifth Amendment right to exclude the government from his property, and retaliation "with the intent to extort" the easement was Hobbs Act (and Wyoming) extortion. Even if the government had a "legal entitlement to demand the easement," doing it "in a wrongful manner" was actionable under RICO and Bivens.

Holding (7-2, **Souter**; Thomas concurring with Scalia; Ginsburg dissenting in part with Stevens): First, a Bivens action should not be extended to this context. Regarding step one in the (newly developed in this case, two-step) Bivens analysis, he had available "an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." As for step two, on balance a Bivens action to challenge an allegedly excessive degree of governmental "hard-bargaining," where hard bargaining itself is lawful, seems unwise, and would spawn more difficulties than justice. Justice Souter, in typical fashion, carefully and fairly develops both sides of the argument, but ultimately rules against allowing the new sort of Bivens claim that Robbins seeks. The government is "within its rights" to "enforce [land regulations] to the letter," even with the purpose of pressuring Robbins into granting the easement. It is merely "hard bargaining intended to induce the plaintiff to come to legitimate terms." [Ed. Note: The difficulty here is that this might be said of all extortion claims that are not founded on threats of violence, and echoes a great deal of literature wondering about the theory of extortion as a crime in general.] The few illegal actions alleged here are not sufficient, themselves, to justify a constitutional claim.

Second, as to RICO and Hobbs Act extortion, the Hobbs Act (18 U.S.C § 1951(a), does not expressly criminalize extortion committed solely by governmental actors to benefit the federal government. Such action would not have been recognized as extortion under common law (absent some bribery), and Congress intended to encapsulate the common law. So no extortion claim here, and thereby no predicate acts for RICO.

Thomas concurring with Scalia: AS we have written before (Malesko), "Bivens in a relic," and the Court ought not assume it has the power to create new causes of action. Thus we would limit Bivens to its "precise circumstances" and not extend it even if the Court's two-step analysis seemed to "logically" require it.

Ginsburg dissenting in part with Stevens: We should recognize a constitutional cause of action for the government's "seven-year campaign of relentless harassment and intimidation to force Robbins" to give up his property right "without fair compensation." "This is no ordinary case of hard-bargaining or bureaucratic arrogance." Marbury v. Madison (1803) says that "the very essence of civil liberty" is providing a legal remedy for injuries, particularly when the government inflicts those injuries. There is no "carefully calibrated administrative regime" that could substitute as a fair remedy here. No will the "floodgates" open, as this level of harassment coupled with a vindictive motive is "rare." And the "egregious nature" of the actions here should overcome any claim of qualified immunity.

IMMIGRATION LAW

Lopez v. Gonzales, No. 05-547, 127 S. Ct. 625 (Dec. 5, 2006), reversing 417 F.3d 934 (8th Cir. 2005).

The Immigration and Nationality Act defines an aggravated felony to include "'illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18).'" 8 U.S.C.S. § 1101(a)(43)(B). Section 924(c)(2) of title 18 defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act." Section 101(a)(43) of the INA further provides that "the term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law."

The Attorney General may not cancel the removal of an otherwise deportable aggravated felon.

Jose Antonio Lopez is a legal permanent resident. He was convicted of "aiding and abetting another person's possession of cocaine," a felony under South Dakota law. However, the equivalent federal law crime—possession of cocaine—is a misdemeanor. The INS began removal proceedings against Lopez. He wanted to seek cancellation of removal. But, the immigration judge concluded that the drug crime was an aggravated felony (rendering Lopez ineligible for cancellation of removal) and ordered him removed.

Holding (8-1) Souter; Thomas dissenting: **Conduct that is a felony under state law but a misdemeanor under the Controlled Substances Act is not a "felony punishable under the Controlled Substances Act" within the meaning of the Immigration and Nationality Act.** Familiar canons of statutory construction reveal the meaning of the INA. Plain usage "count[s] for a lot here." "[O]rdinarily 'trafficking' means some sort of commercial dealing." "Commerce, however, was no part of Lopez's South Dakota offense of helping someone else" possess cocaine. Also, "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Since other subsections of § 924 expressly refer to guilt under state law, § 924(c)(2)'s failure to refer to state law implies that a "felony punishable under the Controlled Substances Act" is a crime punishable as a felony under the CSA. Finally, § 101(a)(43) of the INA—which provides that "the term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law"—does not mean that every state law felony constitutes an aggravated felony regardless of whether or not there is a federal felony counterpart. Instead, § 101(a)(43) performs two functions. First, if a state crime actually constitutes "illicit trafficking," "the state felony conviction would count as an 'aggravated felony,' regardless of the existence of a federal felony counterpart." Second, "a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony." Thus, a state felony conviction for possession of a controlled substance cannot constitute an aggravated felony drug trafficking offense under § 1101(a)(43)(B).[2]

Thomas dissenting: "A plain reading of [§ 924(c)(2)] identifies two elements: First, the offense must be a felony; second, the offense must be capable of punishment under the [CSA]. No one disputes that South Dakota punishes Lopez's crime as a felony. Likewise, no one disputes that the offense was capable of punishment under the CSA. Lopez's possession offense therefore satisfies both elements, and the inquiry should end there." (citations omitted).

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[2] [**Ed. Note**: The Lopez holding would also seem to apply in at least two other circumstances not presented by Lopez's facts. Specifically, the Court's holding also determines whether an alien previously convicted of a state law felony drug crime is eligible for asylum, see 8 U.S.C. §§ 1158(b)(2)(A)(ii), (b)(2)(B)(i), or subject to an automatic sentencing enhancement after conviction for a new federal crime, see United States Sentencing Commission, Guidelines Manual § 2L1.2 (Nov. 2005).]

Gonzales v. Duenas-Alvarez, No. 05-1629, 127 S. Ct. 815 (Jan. 17, 2007), vacating 176 Fed. Appx. 820 (9th Cir. 2006) (Pregerson, J.).

Conviction of a "theft offense" punishable by a year or more in prison subjects certain aliens to removal. 8 U.S.C. § 1101(a)(43)(G). Luis Duenas-Alvarez was convicted of violating a California statute that criminalizes acting as an accessory or accomplice to theft of a vehicle. The attorney general sought removal of Duenas-Alvarez.

Holding (9[8-1]-0) Breyer; Stevens concurring in part, dissenting in part: "**The term 'theft offense' in 8 U.S.C.S. § 1101(a)(43)(G) includes the crime of aiding and abetting a theft offense."** To define a deportable offense listed in § 1101(a), the Court looks to "'the generic sense in which the term is now used in the criminal codes of most States.'" Taylor v. United States (1990). When determining whether a particular prior conviction was for a generic offense as defined by a majority of the states, a court should generally look to the state statute defining the crime, not to the facts of the particular prior case. However, where the specific state law under which the alien was convicted criminalizes more conduct than the generic majority approach (e.g., law of conviction criminalizes joyriding while majority requires all the elements of larceny), the Court must determine whether the jury was actually required to find or the defendant actually admitted each of the elements required by the majority approach. "To find that a state statute creates a crime outside the generic definition of a listed crime in a federal immigration statute requires . . . a realistic probability . . . that the state would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender . . . may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues."

The common law distinguished among four types of participants in a felony: (1) first-degree principals, those who actually committed the crime; (2) second-degree principals, accomplices present at the crime; (3) accessories before the fact, accomplices who helped the principal before the crime; and (4) accessories after the fact, persons who helped the principal after the crime took place." However, every American jurisdiction has eliminated the distinction between first degree principals, second degree principals, and accessories before the fact. Because criminal law now uniformly treats accomplices (other than accessories after the fact) and principals alike, the generic majority definition of theft covers accomplices as well as principals. Thus, the criminal activities of accomplices to a generic theft must falls within the scope of §1101(a)(43)(G) deportable theft.

Stevens concurring in part, dissenting in part: "[W]e would be well advised to withhold comment on issues of California law until after they have been addressed by the Court of Appeals in the first instance."

DISSENTS FROM, OR CONCURRENCES WITH, ORDERS

Caldwell v. Quarterman, No. 05-10671, 127 S.Ct. S.Ct. 431 (Oct. 10, 2006), cert. denied from 429 F.3d 521 (5th Cir. 2005).

Stevens concurring in denial of certiorari: Caldwell resolved criminal charges in Texas by pleading guilty and receiving "deferred adjudication probation." Some years later they violated their probation and were sentenced to lengthy prison terms. The Fifth Circuit ruled that their federal habeas actions challenging this were outside AEDPA's one-year statute of limitations. But there is a substantial question whether "deferred adjudication" is a "final judgment" under AEDPA. "Our decision to deny certiorari is supported by at least two valid considerations."

First, "the Fifth Circuit had a justifiable basis for concluding that a nonliteral reading is consistent with Congress' intent to 'curb the abuse of the statutory writ of habeas corpus' and 'address problems of unnecessary delay.'" "Second, the Court of Appeals expressly limited its holding to 'instances where a petitioner' brings an untimely challenge to 'substantive issues relating to an original order of deferred adjudication probation.'" Thus "this narrow holding is unlikely to produce injustice."

United States v. Omer, No. 05-1101, 127 S.Ct. 1118 (Jan. 16, 2007), cert. denied from 395 F.3d 1087 (9th Cir. 2005).

Scalia concurring in denial of certiorari: Earlier this Term, in United States v. Resendiz-Ponce, the Court ruled that an indictment charging federal "attempt" need not allege an overt act because that element is impliedly included in the word "attempt." "My dissent … warned that the Court's opinion . . . would provide a license for the Government to avoid explicating the elements of a criminal offense whenever it feels the 'common parlance' of the crime's name evokes them." In this bank fraud case, the SG filed a supplemental brief recommending that certiorari be denied because although a material misrepresentation was not alleged in the indictment, that element is impliedly included in the word "fraud." Although "that is not the reason I concur in" denial here [**Ed. Note:** and what is the reason? Justice Scalia doesn't say], "[i]t may . . . be a good reason—depending upon how the crime of fraud fares in our new some-crimes-are-self-defining jurisprudence. Another frontier of law opened by this Court, full of opportunity and adventure for lawyers and judges."

Joseph v. United States, No. 06-5590, 127 S.Ct. 1121 (Jan. 16, 2007), cert. denied from 178 Fed. Appx. 162 (3d Cir. 2006).

Stevens concurring in denial of certiorari: "In Dickerson v. United States, 530 U.S. 428 (2000), we held that the first sentence of 18 U. S. C. §3501(a) is unconstitutional. In this case the Court of Appeals affirmed the District Court's rejection of the petitioner's request for an instruction relating to the voluntariness of her confession—an instruction that the third sentence of §3501(a)requires." "As the Solicitor General concedes, that holding was erroneous." But the error appears to have been harmless. "[O]ur denial does not endorse the incorrect reasoning in the opinion of the Court of Appeals."

Boumediene v. Bush, No. 06-1195, 127 S.Ct. 1478 (Apr. 2, 2007), cert. denied from 476 F.3d 981 (DC Cir. 2006), cert granted on rehearing, 127 S.Ct. ___ (June 29, 2007).

The Guantanamo Bay detainees here challenge the D.C. Circuit's decision that Congress "stripped" the federal court's of habeas jurisdiction here in the Military Commissions Act of 2006, 120 Stat. 2600. The Solicitor General opposed certiorari because the action is not "final" and the detainees will be able to challenge any final decision under the Detainee Treatment Act of 2005.

Stevens and Kennedy concurring in denial of certiorari: "[T]raditional rules governing our decision of constitutional questions . . . and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus . . . make it appropriate to deny these petitions at this time." However, "[i]f petitioners later seek to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act of 2005 or some other and ongoing injury, alternative means exist for us to consider our jurisdiction over the allegations made by petitioners before the Court of Appeals." [**Ed. Note**: The Court later reversed itself on June 29, 2007, and granted certiorari on a petition for rehearing, an unprecedented event in the last 50 years.]

Breyer with Souter and Ginsburg (joining in part) dissenting from the denial of certiorari: "Petitioners, foreign citizens imprisoned at Guantanamo Bay, Cuba, raise an important question: whether the Military Commissions Act of 2006 deprives courts of jurisdiction to consider their habeas claims, and, if so, whether that deprivation is constitutional." "[P]etitioners plausibly argue that the lower court's reasoning is contrary to this Court's precedent. This Court previously held that federal jurisdiction lay to consider petitioners' habeas claims." Rasul v. Bush (2004) "Our analysis [in Rasul] proceeded under the then-operative statute, but petitioners urge that our reasoning applies to the scope of the constitutional habeas right as well."

INTERESTING CRIMINAL LAW CERTS GRANTED FOR NEXT TERM

1. Gall v. U.S., No. 06-7949 (set for argument on Oct. 2, 2007): how should "reasonableness review" be applied to federal sentences that are outside the properly-determined Guidelines range.

2. Kimbrough v. U.S., No. 06-6330 (set for argument on Oct. 2, 2007): Is it reasonable to consider that heavier sentences are required for crack cocaine than for powder cocaine, in determining federal sentences under now-discretionary Guidelines?

3. Watson v. U.S., No. 06-571 (set for argument on Oct. 9, 2007): Whether trading gun for drugs constitutes "use" of the firearm in connection with a narcotics crime?

4. Medellin v. Texas, No. 06-984 (set for argument Oct. 10, 2007): Does President have power to require states to consider Vienna Convention claims, to satisfy World Court orders?

5. Boumediene v. Bush, No. 06-1195 and Al Odah v. Bush, No. 06-1196. These consolidated cases present further questions arising from the Guantanamo Bay detainees situation, including whether Congress validly "stripped" the federal courts of habeas jurisdiction in the Military Commissions Act of 2006, 120 Stat. 2600.

6. Stoneridge Investment Partners v. Scientific Atlanta, No. 06-0043. Securities fraud. Whether § 10(b)(5) liability runs to party who engages in deceptive transactions, but does not make deceptive public statements regarding those transactions?

7. United States v. Williams, No. 06-0694. Whether 18 U.S.C. § 2252A(a)(3)(B), which prohibits knowingly distributing material purporting to be child pornography, is unconstitutionally vague or overbroad?

8. United States v. Santos and Diaz, No. 06-1005. Does "proceeds" from illegal activities, as used in the federal money-laundering statute, mean gross receipts, or only profits?

9. Snyder v. Louisiana, No. 06-10119. Batson case, after remand for court to reconsider in light of 2005 Miller-el v. Dretke decision, where prosecutor referred to black defendant capital case as his "O.J. Simpson case" and then struck all five African-American potential jurors.

10. Logan v. United States, No.06-6911. Under sentencing enhancement provision of Armed Career Criminal Act, may a conviction for battery for which defendant's civil rights were

never lost, count as a prior violent felony, where a conviction would not count if civil rights had been lost and then restored?

11. Danforth v. Minnesota, No. 06-8273. May states use test for retroactivity of constitutional decisions different than federal test in Teague v. Lane, which results in broader retroactive application of Crawford v. Washington than in federal courts?

Who Wrote What in OT 2006-2007

Majority opinions are in bold,
Concurrences are in italics,
Dissents are underlined.

ROBERTS
Jones
Abdul-Kabir
Brewer

STEVENS
Abdul-Kabir
Brewer
Resendiz-Ponce
Wallace
Rettele
Musladin
Rita
Credit Suisse
Duenas-Alvarez
Scott
Ayers
Uttecht
Landrigan
Fry
Rockwell
Tellabs

KENNEDY
Ayers
Smith
Uttecht
Panetti
Carhart
Musladin
Cunningham

SCALIA
Wallace
Scott
Fry
Rockwell
Ayers
Rita
Tellabs
Abdul-Kabir
Brewer
Erickson
Roper
Resendiz-Ponce
James

THOMAS
Musladin
Lawrence
Landrigan
Bowles
Wilkie
Carhart
Panetti
Erickson
James
Credit Suisse
Lopez

SOUTER
Brendlin
Wilkie
Lopez
Smith
Musladin
Bowles
Rita

GINSBURG
Cunningham
Tellabs
Scott
Carhart
Lawrence

BREYER
Rita
Credit-Suisse
Duenas-Alvarez
Wallace
Uttecht
Fry

ALITO
Whorton
James
Tellabs
Cunningham
Smith

Per Curiam opinions: Rettele, Erickson, Burton, Roper