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

**Summaries of all Opinions and their Rationales,
as well as an Overview and some Statistics,
regarding the
Criminal Law (and related) Opinions of the
United States Supreme Court
October Term 2007 (Oct. 2007-June 2008)**

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CRIMINAL LAW (and related) DECISIONS
of the U.S. Supreme Court
From the October 2007 Term
(prepared August 2008)

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ABA Panel Presenting the Criminal Law (and Related) Opinions
of the
United States Supreme Court
Issued During the October 2007 Term

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(New York City, NY – August 8, 2008)

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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 holdings. 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 the majority writing Justice is **bolded**; other writing Justices are underlined. 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 2008).

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, Morgan Weibel (Hastings Class of 2009). 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. The materials are copyrighted and are available for purchase from the ABA. Please do not reproduce without permission.

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

By any measure, OT '07 was a "big" Term for criminal cases. There were 36 criminal-or-related decisions, including 30 "pure" criminal (or 27 if you don't count the three international detention habeas cases). In a Term that produced the lowest number of merits opinions after argument (67) in over half a century,[1] the criminal caseload represented almost half the workload. This is a significant increase from the usual one-third.

There were "big" decisions too. One-third of the Court's criminal decisions was Constitutionally based. The most high-profile of these -- the Second Amendment case, Heller -- will be providing grist for gun control litigation, and scholarly commentary, for years to come, and anyone who has slogged through all 150 pages of historical debate deserves a medal. The ramifications of finding an individual constitutional right to "hold and use" handguns for self-defense in the home lead in dozens of directions.

"Big" death penalty decisions, too. Lethal injections were upheld (Baez) and executions have begun again. But the death penalty was struck down for "crimes against the individual" that do not "take a victim's life" – specifically, no death penalty for child rape, although the Court's more general language will produce litigation in other areas. And Justice Stevens' concurrence is remarkable: as one of the principle votes to uphold the death penalty in Gregg 32

[1] The best website for general Supreme Court information is the SCOTUS (Supreme Court of the United States) blog, http://www.scotusblog.com/wp/. SCOTUSblog's annual "StatPack" provides a wealth of interesting statistical information. The Court's own website is also much improved, and provides a great deal more, and faster, information than in past years. http://www.supremecourtus.gov/

years ago, he now indicates clearly that he would vote to strike it down. This is merely one huge area in which the oncoming Presidential election looms large.

Medellin, while technically a habeas case, also upholds Texas's decision to execute a Mexican national that the International Court of Justice has ruled is entitled to a new hearing, a position which even the Bush Administration was forced to agree with, in order to honor its Vienna Convention obligations. Medellin is scheduled for execution even as this Overview is typed.

Other major constitutional decisions include two fascinating Sixth Amendment decisions, Edwards (permitting States to deny self-representation at trial to mentally ill individuals) and Rothgery (reaffirming that the right to counsel attaches at the first judicial appearance, but advancing the view that this might not be the same moment that counsel must be appointed – and watch out for Justice Thomas's originalist assertion that "criminal prosecution" simply does not include most pre-trial stages!).

On the statutory front, almost forgotten now are the two Guidelines decision, Kimbrough and Gall, which both upheld a highly deferential approach to review of Guidelines "variances" (not departures, they are discretionary!). Money-laundering also received Court attention (Santos and Regalado-Cuellar) and if it weren't an election year the U.S. Department of Justice might be making much more noise about needing "corrective" legislation.

The Court also devoted a great deal of attention to the 15-year mandatory minimum provisions of the Armed Career Criminal Act (Logan, Begay, and Rodriguez), and the law-by-dictionary believers were given much material for discussion in decisions debating the meaning of "use," "during," and "felony" (Watson, Ressam, and Burgess) (Who knew those words were in need of so much exegesis?). And two civil cases (Stoneridge, securities fraud; and Bridge, RICO/mail fraud) are bound to have implications in their coupled criminal law areas.

Finally, the two other "international law" habeas decisions (Boumediene and Munaf, in addition to Medellin) demonstrate the increasingly international world we live in, and the increasingly complicated international and military law questions U.S. federal courts are forced to confront. The simple days when we could close our criminal law eyes at the border are gone, gone, gone.

With regard to the "inside baseball" of individual Justices, the statistics are interesting. (See the last page of these Summaries, a chart showing "Who Wrote What"). Most obviously, Justice Alito has fully found (or more accurately, revealed) his own voice on the Court. In last year's partial Term, Justice Alito wrote only five decisions. This Term the former U.S. Attorney (for New Jersey) penned 13 separate criminal case writings, as many as any other Justice. Even more revealing, he wrote ten separate criminal law opinions (four concurrences and six dissents), more than any other Justice. Not only is Justice Alito not afraid to say exactly what he thinks, but his opinions are refreshingly devoid of personal attacks or demeaning innuendos. "Just the facts, ma'am" seems to be his style, and in this author's view, that understated approach adds force to the positions he expresses.

Otherwise, the criminal work was pretty evenly divided among the Justices, which is a change from many prior Terms, in which some of the Justices (notably Justice Ginsburg) wrote

much less in the criminal law area. Every Justice had at least three, and no Justice had more than five (Justices Kennedy and Scalia) majority opinions. Justice Breyer, who has not written a concurrence in at least two Terms (he either agrees or he dissents), penned nine dissents, the most of anyone this Term. Justice Stevens, who has been a big criminal law dissenter in recent Terms, seems to have adopted a more conciliatory approach, writing five concurrences in some cases where one might have predicted a dissent. This may demonstrate his confidence and experienced ability to influence other writing Justices; and could it possibly also demonstrate the influence of the new Chief Justice, who has publically explained that he works hard to find consensus where possible?

Next Term again looks to be a large percentage criminal law Term, with some 19 cases already granted (see Interesting Cert Grants at the end of these Summaries). As always, however, it is impossible to predict what else may turn up between now and next June. So stayed tuned, and I'll look forward to seeing you in Chicago next August.

Best wishes until next year,

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August 2008

Detailed Summaries of
Supreme Court OT 2007 Criminal Law Opinions

FIRST AMENDMENT / DUE PROCESS

United States v. Williams, No. 06-694, 128 S.Ct. 1830 (May 19, 2008) reversing 444 F.3d 1286 (11th Cir. 2006).

A 2003 Act, passed by Congress after we invalidated a prior child pornography law, prohibits the promotion or distribution of "any … purported material in any manner that reflects the belief, or is intended to cause another to believe that the material or purported material is" child pornography. This is called the "pandering" provision. Express findings in the statute indicate that Congress believed it is impossible in today's internet world to prove that material actually uses real children. Williams, using a sexually-explicit screen name, signed into a public Internet chat room and posted a message claiming to have "good" pictures of his toddler and asking to swap photographs for other toddlers. An undercover agent struck up a conversation with Williams, who claimed to have pictures of men molesting his 4-year-old daughter. Williams later posted a hyperlink that led to seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals. Williams pled guilty to pandering child pornography and possessing child pornography, reserving the right to challenge the constitutionality of the pandering conviction. The District Court rejected his challenge and sentenced him to concurrent 60-month terms. But the Eleventh Circuit reversed the pandering conviction, finding the statute was "overbroad and impermissibly vague."

Holding (7 (5-2) -2) **Scalia**; Stevens concurring with Breyer; Souter dissenting with Ginsburg: We have consistently ruled that an overbreadth challenge has to show "substantial" overbreadth, not just that some applications (although not the one at hand) may be unconstitutional. We read this statute to require a "knowing" "transaction," that has both an objective and subjective requirement regarding the "reflects the belief" phrase. It also requires that the defendant intend that the listener believe it is child pornography, and that the material will actually depict explicit sexual conduct.

Now, because offers to engage in illegal transactions are excluded from First Amendment protection, **"offers to provide or request to obtain child pornography are categorically excluded from the First Amendment."** But no child pornography need actually exist, for a defendant to be guilty of pandering it. And "as with other inchoate crimes, … impossibility of completing the crime because the facts were not as the defendant believed is not a defense." It is also too bad that "the tendency of our overbreadth doctrine [is] to summon forth an endless stream of fanciful hypotheticals." But we see no "realistic danger" of these, and Williams' conduct was squarely within the statute. The Eleventh Circuit erred in its belief that a statute is rendered vague merely because "close cases" can be envisioned. "Close cases can be imagined under virtually any statute," and are disentangled by the requirement of proof beyond a reasonable doubt. This statute is not "substantially" overbroad nor is it vague. "Child pornography harms and debases the most defenseless of our citizens." Congress has now responded with a "carefully crafted" statute, and has been successful here.

Stevens concurring with Breyer: "First, I believe the result to be compelled by the principle that 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Second, "our duty to avoid constitutional objections makes it especially

appropriate to look beyond the text" to legislative intent where as here, a statute's text alone is unclear.

Souter dissenting with Ginsburg: "The Act punishes proposals regarding images when the inclusion of actual children is not established… as well as images that show no real children at all" – our precedents (*Ferber* and *Free Speech Coalition*) do not permit this. Practically speaking, the Court has left *Ferber* and *Free Speech Coalition* "as empty" as if the Court had formally overruled them, with no explanation for this "abrupt turn." I think that fake child pornography "falls within First Amendment protection." The Court reasons that "a proposal to commit a crime enjoys no speech protection" but here the underlying act cannot be classified as criminal "if it turns out that an actual child is not shown in the picture." Further, "[t]reating pandering itself as a species of attempt would thus mean that there is a statutory, inchoate offense of attempting to attempt to commit a substantive child pornography crime." If we follow the Court's treatment of the Act, "a class of protected speech will disappear." "True, what will be lost is short on merit, but intrinsic value is not the reason for protecting unpopular expression." We should have "faith in the jury system," and "without some demonstration that juries have been rendering exploitation of children unpunishable, there is no excuse for cutting back on the First Amendment." "I would hold it unconstitutional."

SECOND AMENDMENT

District of Columbia v. Heller, No. 07-290, 128 S.Ct. 2783 (June 26, 2008), affirming 478 F.3d 370 (D.C. Cir. 2007).

By statute, the District of Columbia bans handguns by making it a crime to carry an unregistered handgun and then prohibiting handgun registration for most persons, and requiring that any lawfully owned guns be kept either disassembled or disabled by a triggerlock or similar device. Heller is a "special police officer" who is allowed to carry a handgun while on duty at the Federal Judicial Center, but was denied permission to keep his handgun at home for purposes of self-defense. The district court dismissed his civil suit to enjoin the District from enforcing its ban against him, but the D.C. Circuit reversed, finding that the Second Amendment protects an individual right to possess guns to be used for self-defense.

Holding (5-4), **Scalia**; Stevens dissenting with Souter, Ginsburg and Breyer; Breyer dissenting with Stevens, Souter and Ginsberg: In the longest opinion (64 pages, plus 90 pages of dissenting opinions) of the Term, the Court holds that **the Second Amendment states an individual right to hold and use handguns "for self-defense in the home," and "assuming Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home."**

Because the majority finds this to be "this Court's first in-depth examination of the Second Amendment," it devotes lengthy treatment to "the meaning of the Second Amendment." The details of the interpretive analysis are too lengthy for even summary here. First, the "Operative Clause" ("the right of the people to keep and bear Arms, shall not be infringed") "guarantee[s] the individual right [as opposed to some sort of collective right] to possess and carry weapons in case of confrontation" (p. 19). Then, the "Prefatory Clause" ("A well regulated Militia being necessary to the security of a free State") means that the right to "keep and bear arms" was codified "to prevent elimination of the militia," which in turn is defined as all able-bodied males, a concept that pre-existed the Second Amendment, trained to protect the "free polity." The Amendment did not "lay down a 'novel principle,' but rather codified a right 'inherited from our English ancestors.'" All this is supported by analysis of history,

contemporaneous founding era materials, "analogous arms-bearing rights in state constitutions," and "virtually all" interpretations of the Second Amendment after its enactment. Finally, "nothing in our precedents (particularly Cruikshank (1876), Presser (1896), and Miller (1939)) forecloses our adoption of the original understanding of the Second Amendment." Miller does mean that "those weapons not typically possessed by law-abiding citizens for lawful purposes" are unprotected by the Second Amendment (p. 53), but that is all.

However, "the right secured by the Second Amendment is not unlimited" (p. 54). "Longstanding prohibitions" such as by the mentally ill or felons, on concealed weapons, carrying of firearms in sensitive places, or conditions on "commercial sale" remain undisturbed. But the "inherent right of self-defense has been central to the Second Amendment right," particularly "in the home" (p. 56). Thus handgun possession in the home for self-defense is protected; because the D.C. requirement that such guns be kept in an inoperable condition "makes it impossible for citizens to use them for the core lawful purpose of self-defense [it] is hence unconstitutional" (p. 58). Licensing is, however, still okay. Justice Breyer's dissenting view that the ban here is commensurate to founding era restrictions is rejected: they did not impose serious criminal penalties and would never have been enforced against weapons possession or use in self defense at home. A "judge-empowering" interest balancing approach is no more appropriate here than under the First Amendment. Whether or not handgun bans like this are good policy, they are simply not permitted under the Second Amendment.

Stevens dissenting, with Souter, Ginsburg and Breyer: Obviously the Second Amendment protects a right "that can be enforced by individuals" and includes a "right to use weapons for certain military purposes." But there is "no indication that the Framers … intended to enshrine the common-law right of self-defense in the Constitution." The most natural reading of the Amendment itself, and historical sources, and post-enactment precedents, all support the view that the Amendment was never intended to block legislative efforts to "regulate civilian use or misuse of weapons" (p.3). Respect for *stare decisis,* if nothing else, ought to cause the majority to follow, rather than weakly distinguish, Miller and other precedents. [**Ed.Note**: Justice Stevens takes an unusually direct shot at Justice Scalia's "plain language" approach here: "The Court proceeds to 'find' its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by its preamble. Perhaps the Court's approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow." (p. 9)]

Stevens argues that "keep and bear arms" was a term of art in 1789, meaning specifically to keep and use weapons for military purposes. The Framers did not add "for the defense of themselves." In fact, Madison specifically considered and did not follow "formulations that would have unambiguously protected civilian use of firearms" (p. 25). "Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia" (p.45). The "new constitutional right to own and use firearms for private purposes" leaves a lot yet to be determined, including "the scope of permissible regulations." The result will be "a far more active judicial role in making vitally important national policy decisions" about gun control than the Framers would ever have envisioned or supported.

Breyer dissenting with Stevens, Souter and Ginsburg: Not only is Justice Stevens correct, but even if the majority is correct about the interests protected by the Second Amendment, the DC restrictions are still reasonably not in conflict with those interests. "Saving lives, preventing injury, and reducing crime" – Justice Breyer demonstrates these empirical effects in his typically detailed, exhaustive, legislative manner. Gun violence in high-crime urban areas is a "serious, indeed life-threatening, problem," and this reasonable approach to the problem is not foreclosed even if the Amendment protects "individual self-defense." Justice

Breyer provides four pages of 18th century laws that regulated firearm possession in a way that would have interfered with the majority's view of home self-defense (including some that required that gunpowder be kept separate from the weapons, akin to the DC triggerlock provision). The DC laws have an implicit self-defense exception – DC so concedes, and in any case this Court has the authority to so interpret DC law (DC not being a state). In sum, the DC restrictions do not "disproportionately" burden the Second Amendment's interests, even as the majority describes them. The majority's contrary conclusion simply "combin[es] inconclusive historical research with judicial *ipse dixit*." The "unfortunate consequences that today's decision is likely to spawn" are unfortunate, and inconsistent with the Framer's clear desire to enact a document whose usefulness would continue even as circumstances changed.

FOURTH AMENDMENT

Virginia v. Moore, No. 06-1082, 128 S.Ct. 1598 (April 23, 2008), reversing 686 S.E.2d 395 (Va. 2006)

Moore was arrested by Portsmouth City police for driving on a suspended license. They had probable cause to believe that Moore was committing that offense. However, a Virginia statute prohibited arrest for this misdemeanor, instead requiring only that a summons be issued. A search incident to the arrest turned up illegal narcotics, but had the police complied with Virginia law and only issued a summons, no such search could lawfully have been made. A Virginia appellate panel and the Virginia Supreme Court ruled that an arrest in violation of state law, even if made with "probable cause," violated the Fourth Amendment. (This federal constitutional holding was important, as the constitutional remedy of suppression might not be available under pure Virginia state law.)

Holding (9 [8-1]-0) **Scalia**; Ginsburg concurring in the judgment: The arrest did not violate the federal constitution; **"warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the" Fourth (and against the States, the Fourteenth) Amendment. "[W]hile States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."** First we look to the "statutes and common law of the founding era," and we find no indication that the Founders thought the Fourth Amendment would provide a "redundant guarantee" for whatever restrictions state legislatures might enact. History not being "conclusive," the court applied the balancing analysis from Wyoming v. Houghton (1999): "assessing, on the one hand, the degree to which it [the practice at issue] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Here, a "long line of cases," including Atwater (2001), has upheld arrests upon probable cause for even minor offenses as "reasonable." For example, the "trash search" case, Greenwood (1988) upheld the search of trash even though the State's constitution forbade it. We now determine that we should not "change this calculus" even where a state has decided to protect privacy to some greater degree. Finally, our "dicta" in some prior federal searches, that an arrest "ordinarily depends, in the first instance, on state law" (DeFillippo, 1979), was base on "supervisory power" and doesn't change the long line of "probable cause" cases.

We note that arrests based on probable cause serve a number of important governmental interests. "Incorporating state-law arrest limitations" would make the constitutional line "varied and unpredictable" instead of clear, as well as variable among varying state-law regimes. Here, Virginia has chosen to protect privacy more, but not attach a suppression remedy to that choice.

We don't think the constitution requires that state law protections be linked to the exclusionary rule.

Finally, a search incident to arrest may be conducted pursuant to any lawful arrest, and "lawful" under the Fourth Amendment means in compliance with the constitution, not state law. So this search was valid, since the arrest was constitutional. **"When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest and to search the suspect in order to safeguard evidence and ensure their own safety."**

Ginsburg concurring in the judgment: I find more historical support that the Court does for petitioner's position, I don't think there is a "long line of cases" upholding arrests that are in violation of state law, and the DiFillippo language was not at all tied to "supervisory power." Still, I don't think states have to be constitutionally chained to the suppression remedy, and I agree that the arrest and search here don't violate the Fourth Amendment.

SIXTH AMENDMENT

A. Right to Assistance of Counsel.

Indiana v. Edwards, No. 07-208, 128 S.Ct. 2379 (June 19, 2008), vacating 866 N.E.2d 252 (Ind. 2007).

Edwards tried to steal a pair of shoes, was discovered, and fired shots, wounding a bystander. His mental competency was then repeatedly questioned and reviewed in the criminal justice system. In 2000, Edwards was declared incompetent to stand trial. In 2002, he was found competent to stand trial, although still "suffering from mental illness." But in 2003, Edwards was again found incompetent to stand trial: while he could understand the charges against him, he was "unable to cooperate with his attorney in his defense because of his schizophrenic illness." Then again, in 2004, Edwards was found competent to stand trial, and in 2005 he was tried. At the last minute he asked to represent himself, but this was denied. Edwards was convicted of theft but the jury hung on attempted murder and battery charges.

Edwards again asked to represent himself, on the remaining charges. The trial judge denied the request, saying that "he's competent to stand trial but I'm not going to find he's competent to represent himself." Edwards was convicted on all counts. But the Indiana appellate court ordered a new trial, ruling that Edwards had been deprived of his Sixth Amendment right to represent himself (Faretta, 1975). The Indiana Supreme Court agreed, even though it found "substantial basis to agree with the trial court."

Holding (7-2) **Breyer**; Scalia dissenting with Thomas: **"The Constitution permits States to insist upon representation by counsel for those competent enough to stand trial … but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"** (p. 12). Although this is a "higher" standard than mere competency to stand trial, we do not adopt a more specific standard, but will see how things play out. It is true that Duskey (1960) set a low standard of competence to stand trial: does the defendant have a "rational [and] factual understanding of the proceedings against him," and does s/he have "sufficient present ability to consult with his[/her] lawyer." And Godinez (1993) held that the competency standard to waive counsel and enter a guilty plea is the same as the Duskey standard. But Duskey involved a defendant who was represented by counsel, and Godinez involved the decision to plead guilty, not "conduct trial proceedings." Moreover, Godinez addressed whether a state may permit a "gray-area defendant" to represent himself, not

whether the State may also deny such a gray-area request. Thus our precedents do not answer the question here.

Nor do our precedents dictate a "single mental competency standard." Because "mental illness itself is not a unitary concept," judges may "take realistic account of the particular defendant's mental capacities" and the specific considerations in representing oneself at trial. Permitting mentally ill defendants to represent themselves can lead to unfairness, and undercut dignity, both objectives of the Faretta analysis. However, we do not overrule Faretta; among other things, "recent empirical research" suggests that instances of unfairness are not common.

Scalia dissenting with Thomas: "A mentally ill defendant who knowingly and voluntarily elects to proceed pro se … receives a fair trial." A state may not constitutionally "substitute its own perception of fairness for the defendant's right." Faretta expressly recognized that a defendant has the right to represent himself "even when that harms his case." In Godinez we rejected a "higher standard" premised on "competence to represent himself." Although this case is slightly different, it is even more compelling not to allow states to deny the Sixth Amendment right. "[T]he dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State – the dignity of individual choice." Thus the Court should respect the "autonomy of the individual by honoring his choices knowingly and voluntarily made." [**Ed Note**: It seems odd that neither opinion in this case seems to acknowledge bluntly that we frankly doubt that the mentally ill can "voluntarily and intelligently" so choose.] Finally, "today's holding is extraordinarily vague," and "the indeterminancy makes a bad holding worse." Rather than respecting the Sixth Amendment right to represent oneself, "trial judges will have every incentive to make their lives easier" by denying it to mentally disturbed defendants, and the vagueness of the majority will enable them to do that.

Rothgery v. Gillespie County, Texas, No. 07-440, 128 S.Ct. 2578 (June 23, 2008), vacating 491 F.3d 292 (5th Cir. 2007).

Rothergery was arrested as a felon in possession, the police records were erroneous and he was not actually a felon (he had completed a diversion program and all charges had been dismissed). The arresting officers promptly brought Rothgery before a magistrate on an "affidavit of probable cause." The magistrate set bail and committed Rothgery to jail, although he was released upon signing a surety bond. Rothgery was indigent and requested a lawyer several times, but none was appointed. Six months later, Rothgery was indicted on the same charge, and spent three weeks in jail when he could not post bail – still no lawyer. Once a lawyer was assigned, the lawyer quickly had Rothgery's bail reduced, got the paperwork to show he'd never been a felon, and got the DA to dismiss all charges. Rothgery then sued the County, alleging violation of his Sixth Amendment right to counsel. The district court granted summary judgment against Rothgery and the fifth Circuit affirmed, saying that the right to counsel did not apply to the initial magistrate hearing because "prosecutors were not aware of or involved in" the arrest and there was "no indication" that the arresting officer had any "power to commit the state to prosecute without the knowledge or involvement of a prosecutor."

Holding (8 (5-3) -1) **Souter**; Roberts concurring with Scalia; Alito concurring with Roberts and Scalia; Thomas dissenting: **"A criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the attachment of the Sixth Amendment right to counsel"** (p. 20). The right to counsel attaches when the prosecution is "commenced," which we have twice held to mean "at the initial appearance before a judicial officer" (Jackson, 1977; Brewer, 1986). We have also mentioned that this is because it

is the point at which "the government has committed itself to prosecute (Kirby, 1972), but that does not require the knowledge or involvement of a prosecutor when other governmental commitments are obvious. "By the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of prosecution, the State's relationship with the defendant has become solidly adversarial" (p. 9). Even if a prosecutor must later approve the charge to prosecute, the State has in fact committed itself to prosecution, "subject to the option to change it's official mind later" (p. 17).

Roberts concurring with Scalia: Justice Thomas's dissent is compelling, but the issue is controlled by Brewer and Jackson. "A sufficient case has not been made for revisiting those precedents."

Alito concurring, with Roberts and Scalia: "I join the Court's opinion because I do not understand it to hold that a defendant is entitled to the assistance of appointed counsel as soon as his Sixth Amendment right attaches." The question of when, precisely, the state must provide an attorney after the right "attaches" is not within the question we granted on here. [The majority expressly agrees that that question is not answered here, p. 20.] However, I think the Sixth Amendment phrase "Assistance of Counsel for his defence" means "defense at trial, not defense in relation to other objectives that may be important to the accused" (p.4). [**Ed. Note**: like bail?!?]

Thomas dissenting: "The original meaning of the sixth Amendment" does not support the majority's conclusion, nor does "any reasonable interpretation of our precedents." The words "criminal prosecution" in the Sixth Amendment meant, at the time of the Framers, the time of "formal accusation," which was distinct from "earlier stages of the process involving … the allegation of criminal conduct necessary to justify arrest and detention." Thus the right to assistance of counsel ought not to extend to those earlier stages. "A 'prosecution' [for purposes of the Sixth Amendment's original meaning] does not encompass preindictment stages of the criminal process." [**Ed Note**: Thomas does not explain how he would apply this meaning in the many States that do not use an indictment process.] And I don't think Jackson or Brewer answered the question in this case clearly enough to be binding.

B. *Crawford* Follow-ups.

Danforth v. Minnesota, No. 06-8273, 128 S.Ct. 1029 (Feb. 20, 2008), reversing 718 N.W.2d 451 (Minn. 2006).

Danforth's state conviction for criminal sexual conduct with a minor was final in 1998. It was based on a videotaped interview with the victim rather than in-court testimony. In 2004, the U.S. Supreme Court decided Crawford, constitutionally requiring confrontation in most cases. Danforth filed a state postconviction petition. But the Minnesota courts ruled that they were not free to apply a retroactivity standard broader than the U.S. Supreme Court would under Teague (1989), (and the U.S. Supreme Court last Term in Whorton confirmed that Crawford will not be applied "retroactively" to cases on collateral review.)

Holding (7-2) **Breyer**; Roberts dissenting with Kennedy: **State courts are free to apply "new" federal constitutional decisions more broadly (or not) to final state convictions as they see fit, so long as they meet minimum standards stated by the U.S. Supreme Court.** [**Ed. Note**: this decision represents a major new statement by the Court on "retroactivity," noting "our somewhat confused and confusing 'retroactivity' cases," which (the Court clarifies) might better be called "redressibility.") When we speak of "retroactivity," we "imply[] that the right at issue was not in existence prior…. But this is incorrect. ….the source of a 'new rule' is the Constitution itself, not any judicial power to create rules of law. The question is not really

one of "retroactivity," but might better be called "redressibility": "whether a violation of a right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought."

After a lengthy review of precedents, it is clear that Teague and other decisions have "considered [only] what constitutional violations may be remedied on federal habeas" (emphasis added), not whether "such a limitation on the States" is required. We now conclude that comity, as well as our constitutional power, requires that a State's authority to award "retroactive" relief is not limited by our federal decisions. **"The remedy that a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief'"** (quoting American Trucking (1990)). This may mean that similar defendants will be treated differently between different states, but "such noinuniformity is a necessary consequence of a federalist system of government."

Roberts dissenting with Kennedy: The Court's decision is "grounded on the erroneous view that retroactivity is a remedial question." That is wrong: it is a federal "choice of law" question. While "finality" may be a state interest, whether our constitutional decisions will be uniformly applied is a quintessential federal interest. Thus, although the state might apply different remedies, the question of the scope of a federal right is fundamentally a federal question for this Court under the Supremacy Clause. The majority misinterprets our precedents [**Ed. Note**: Roberts shows this pretty persuasively regarding Payne (1973) and Justice O'Connor's plurality in American Trucking.] Perhaps this is just "fine parsing of somewhat arcane precedents," but my dissent is "compelled" by the "fundamental issues at stake – our role under the Constitution as the final arbiter of federal law." "No Court but this one – which has the ultimate authority 'to say what the law is' (Marbury) – should have final say over the answer" regarding "what federal rule of decision should apply to a particular case."

Giles v. California, No. 07-6053, 128 S.Ct. 2678 (June 25, 2008) vacating 19 Cal.Rptr.3d 843, 847 (2004).

Giles fatally shot and killed his ex-girlfriend, but claimed self-defense. There were no eyewitnesses, but the body showed bullet wounds indicating that the victim raised her arm for protection and was shot while lying on the ground. At trial, the government introduced statements the victim had made to a police officer responding to a domestic violence call three weeks before the shooting, describing Giles violent threats and attacks on her. Giles was convicted and during his appeal, *Crawford* (2004), generally requiring in-court confrontation, was decided. Nevertheless, the California courts ruled that the police statements did not violate *Crawford* because of the doctrine "forfeiture by wrongdoing." Giles "forfeited his right to confront [his ex-girlfriend] because he had committed the murder for which he was on trial, and because his intentional criminal act made [his ex-girlfriend] unavailable to testify."

Holding (6 (4-2)-3), **Scalia**; Thomas concurring; Alito concurring; Souter concurring in part with Ginsburg; Breyer dissenting with Stevens and Kennedy: **Forfeiture by wrongdoing is not a "founding era exception" to the confrontation rule, and "we decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter."** The common law rule applied only when the defendant's conduct was "designed" to prevent the witness from testifying." It wasn't applied outside the context of witness-tampering in American courts until 1985. Moreover, we can't strip Giles of his confrontation right based on some prior-to-trial assessment that he is guilty of the offense he is charged with. Defendant's constitutional rights cannot be abridged due to the serious nature of crimes such as domestic violence. However, "where such an abusive relationship culminates in

murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution-rendering her prior statements admissible under the forfeiture doctrine." We vacate and remand for further proceedings under the founding era standard. And we reject the "thinly veiled invitation to overrule Crawford."

Thomas concurring: The victim's statements in this case "do not implicate the Confrontation Clause," because they are not "testimonial," as I explained in my concurrence in Hammon (2006).

Alito concurring: Like Justice Thomas, "I am not convinced that the out-of-court statement at issue here fell within the Confrontation Clause in the first place."

Souter concurring in part with Ginsburg: "I am convinced that the Court's historical analysis is sound and I join all but Part II-D-2 of the opinion." It is fairness to the defendant, however, and not the murky historical record, that supports the Court's ruling today. We ought not assume a charged defendant committed the murder, in order to introduce unconfronted statements tending to prove that he committed the murder. That would be "near circularity."

Breyer dissenting with Stevens and Kennedy: My lengthy exegesis of history persuades me that, in fact, Giles did forfeit his right to confront the victim's statements about his prior threats and violence. Old cases support application of the doctrine where the speaker has subsequently been murdered. The cases may require "intent" shown by a defendant's knowledge that murdering the witness would keep her from testifying, but they never required such a purpose or motive, and the Court is wrong to so require. This should particularly apply in domestic violence cases that end up in murder.

EIGHTH AMENDMENT

Medellin v. Texas, No. 06-984, 128 S.Ct. 1346 (March 25, 2008)

[Although this case involved death penalties imposed on Mexican nationals, the gravamen of the holding is based in habeas and international law, so the decision is summarized under "Habeas Corpus" below.]

Baez v. Rees, No. 07-5439, 128 S.Ct. 1520 (April 16, 2008), affirming 217 S.W.3d 207 (Ky. 2007).

The petitioners were both convicted of double capital murders and sentenced to death in Kentucky. After their convictions and sentences were final, they sued the Kentucky prison system, alleging that the three-drug protocol for administering their lethal injection executions might be erroneously not followed, resulting in an extremely painful death which would be undetected because they would be paralyzed by the first drug. The Kentucky Supreme Court ruled that the Eighth Amendment standard required petitioners to prove that the challenged method of execution "creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death," and because the 7-day bench trial did not prove this, Kentucky's lethal injection protocol was approved.

Holding (7 (3-1-2-1, no majority opinion) -2) Roberts announced the judgment with Kennedy and Alito; Alito concurring; Stevens concurring in the judgment; Scalia concurring in the judgment, with Thomas; Thomas concurring in the judgment, with Scalia; Breyer concurring in the judgment; Ginsburg dissenting with Souter: **Kentucky's lethal injection procedure does not violate the Eighth Amendment.**

Roberts announcing the judgment of the Court, with Kennedy and Alito: 36 States and the Federal Government have adopted lethal injection for carrying out the death penalty. 30 of these States have adopted the same three-drug protocol: the first drug induces a "coma-like unconsciousness," preventing the prisoner from feeling further pain; the second causes paralysis; and the third induces cardiac arrest causing death. [The lead opinion provides great detail about how these drugs are administered, etc.] Meanwhile, it is settled that capital punishment is constitutional, and that "the Constitution does not demand the avoidance of all risk of pain in carrying out executions." In fact, "this Court has never" struck down a State's chosen method of execution (including firing squads and electrocution). Moreover, lethal injection is concededly "humane and constitutional," so long as the protocol is properly followed. The petitioners claim only that error could cause "unnecessary pain." But they bear a "heavy burden" to show an "objectively intolerable risk of harm." Simply showing a slightly better possible alternative does not satisfy that burden. "Instead," a proffered alternative must "in fact reduce a substantial risk of severe pain." Here, petitioner's suggested one-drug protocol was not proffered below, so there is no evidence. That it is used by veterinarians is irrelevant; and the State has a significant interest in "preventing a prolonged, undignified death," which the paralytic drug does. Finally, "the standard we set forth here resolves more challenges than [Justice Stevens] acknowledges."

Alito concurring: I join Roberts' plurality, but want to emphasize that "properly understood," today's standard will not lead to "never-ending litigation" as Justice Thomas says.

Stevens concurring in the judgment: Not only does our ruling today forecast further debate about lethal injection, but also "about the justification for the death penalty itself." "The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived." Finally, I "rel[y] on my own experience" to conclude that [**Ed. Note**: a bit of a bombshell here, from one of the three Justices instrumental in upholding the Death penalty in Gregg (1976)] the death penalty is unconstitutional under the Eighth Amendment. However, I "respect precedents," and under our precedents, the petitioners have "fail[ed] to prove" that lethal injection is unconstitutional.

Scalia concurring in the judgment with Thomas: I respond here to Justice Steven's "astounding position that a criminal sanction expressly mentioned in the Constitution violates the Constitution." Once he makes clear that it is his "own experience" that resolves the question, "purer expression cannot be found of the principle of rule by judicial fiat."

Thomas concurring in the judgment with Scalia: The plurality's standard is inconsistent with the original understanding of the Eighth Amendment, and will lead to never-ending litigation. "In my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." The Framers were aware of truly barbaric methods of execution [Justice Thomas describes some in detail], and the Eighth Amendment was intended only to prevent such intentional torture. "Judged under the proper standard, this is an easy case." Lethal injection has been developed "to eliminate pain rather than to inflict it," and so is plainly constitutional.

Breyer concurring in the judgment: I agree with the dissent's standard, but resolution of the question depends more on the "facts and evidence," and "I cannot find, either in the record in this case or in the literature …, sufficient evidence" to overturn Kentucky's protocol. A "significant risk of unnecessary suffering" is required. "The lawfulness of the death penalty [itself] is not before us."

Ginsburg dissenting, with Souter: "If readily available measures can materially increase the likelihood that the protocol will cause no pain, a State fails to adhere to contemporary standards of decency if it declines to employ those measures." Thus Kentucky violates the Eighth Amendment, on my view of the evidence under this standard. Many other states have

safeguards against error that Kentucky does not use, but could. The standard on remand should be whether Kentucky's protocol "creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain."

Kennedy v. Louisiana, No. 07-343, 128 S.Ct. 2641 (June 25, 2008), reversing 957 So.2d 757 (La. 2007).

Kennedy was convicted of the rape of his 8-year-old stepdaughter, and sentenced to death under a Louisiana statute that authorizes death for the rape of a child under 12. (Kennedy denied guilt, and he and the victim initially said two neighborhood boys had committed the rape; the victim later identified Kennedy as the rapist and some circumstantial evidence supported that view.) The Louisiana courts upheld the statute against the argument that the Eighth Amendment prohibits the death penalty for crimes other than homicide.

Holding (5-4), **Kennedy**; Alito dissenting with Roberts, Scalia, and Thomas: "Based both on consensus and our own independent judgment, our holding is that **a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional** under the Eighth and Fourteenth Amendments" (p. 10). More generally**, "in cases of crimes against individuals," the "evolving" Eighth Amendment limits the death penalty to "crimes that take the life of the victim"** (p. 36). (This leaves aside crimes such as "treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State" (p. 26). We think that there is "objective indicia of a consensus against" the death penalty for rape today, even if it was common less than a hundred years ago. Only five states have such statutes. Nor do we think our 1977 Coker decision, invalidating the death penalty for adult rape, confused states into thinking they could not enact such statutes. Moreover, "evolving standards of decency" and "the necessity to constrain the death penalty" (?!) suggest that the death penalty is disproportionate "where no life was taken." In addition, "punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." [**Ed. Note**: this seems like a particularly Kennedy-esque broad statement, to which four other Justices silently acquiesce because they agree with the hard-fought result.] We think imposing the death penalty for child rape "would not further retributive purposes." And it is very hard on the victim, who may have to repeatedly testify about the crime; this "can compromise a decent legal system." This, as well as a desire to not have the perpetrator face death, might even create incentives not to report child rapes. And child-witnesses can be unreliable. "Taken in sum," these reasons "demonstrate the serious negative consequences of making child rape a capital offense;" it is "not a proportional punishment for the rape of a child."

Alito dissenting, with Roberts, Scalia and Thomas: First, the "national consensus" finding is wrong; Coker "has stunted legislative consideration of the question" and even so, six States have recently enacted child rape capital statutes, and five more have proposed legislation. There is clearly "growing alarm about the sexual abuse of children" in our society. States could write statutes that limit and guide discretion here, separating out the very worst child-rapists. But "we will never know" where our society was "evolving" to, "because the Court today snuffs out the line in its incipient stage."

Meanwhile, the Court's "policy arguments," whether right or wrong, are for legislatures, not this Court's constitutional interpretive role. And the Court's conclusion that child rapists are less "morally depraved" than murderers is debateable and plainly not accurate in some specific cases (Justice Alito compares a convenience store robbery-murder to a multiple child rapist who also tortures his victims. "I have little doubt that, in the eyes of ordinary Americans, the very

worst child rapists … are the epitome of moral depravity." And the Court's limitation of its ruling to exclude crimes against "the State" is not only unclear (drug kingpin activity?) but also unpersuasive. "The Court provides no cogent explanation why this legislative judgment should be overridden."

FOURTEENTH AMENDMENT

Snyder v. Louisiana, No. 06-10119, 128 S.Ct. 1203 (March 19, 2008) reversing 1998-1078 (La. 9.6.06), 942 So.2d 484.

Snyder was convicted of first degree murder in Louisiana and sentenced to death. During jury selection, the prosecution eliminated all five prospective black jurors, using "back strikes," which enables a party to go back and strike jurors they have already accepted, once they see the rest of the panel. Louisiana courts rejected Snyder's *Baston* challenge, but while his cert petition was pending here, we decided Miller-el v. Dretke (2005), so we remanded for consideration in light of that decision. The Louisiana Supreme Court again rejected the claim by a 4-3 vote.

Holding (7-2) Alito; Thomas dissenting with Scalia: "[**T]he trial court committed clear error in its ruling on a *Baston* objection."** First, the court must consider "all the circumstances," but here it did not appear to. Second, as to the striking of Mr. Brooks, the prosecutor said he appeared "nervous," but the trial judge said nothing to credit this, and we cannot presume it. As for the idea that his status as a student might make him likely to return a fast verdict, well, "the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'" makes the reason seem "implausible" and gives rise to "an inference of discriminatory intent." Finally, we find that there is not "any realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." [**Ed. note**: this is really quite remarkable: the Court seems to be telling Louisiana that it may not reinstate this death penalty on alternative grounds.]

Thomas dissenting with Scalia: "Petitioner essentially asks this Court to second-guess the fact-based determinations of the Louisiana courts as to the reasons for a prosecutor's decision to strike two jurors." But "the evaluation of a prosecutor's motives for striking a juror is at bottom a credibility judgment, which lies 'peculiarly within a trial judge's province.'" The court is "only paying lipservice to the pivotal role of the trial court." There is no evidence of clear error here, and "I would affirm the judgment below."

FEDERAL STATUTES

A. Guidelines Sentencing

Somewhat forgotten by the end of the Term, the Court decided two more "blockbuster" federal sentencing guidelines cases last Fall, Gall and Kimbrough. Perhaps the most interesting point for "inside baseball" observers is that in both cases, Chief Justice Roberts was in the majority, and neither opinion assignment went to Justice Breyer, who undoubtedly considers himself (with justification) as the guidelines sentencing expert on the Court, and who had crafted the ingenious Booker remedial majority.

Gall v. United States, No. 06-7949, 128 S.Ct. 586 (Dec. 10, 2007), reversing 446 F.3d 884 (8th Cir. 2006).

Booker (2005) declared the federal sentencing guidelines to be discretionary rather than mandatory ("one factor among several [that] courts must consider," Kimbrough, below), and requires "reasonableness review" for federal sentences. Here, Gall was convicted of ecstasy dealing, on remarkably sympathetic facts: he voluntarily stopped dealing and all drug use, graduated from college, maintained employment, and admitted his participation and cooperated when interviewed by federal law enforcement some years later. He pled guilty, had a great deal of community support, and was sentenced to 36 months probation despite having a guidelines range of 30-37 months imprisonment. The district court gave a lengthy statement to explain his sentence. But the Eighth Circuit reversed, saying that a sentence below the guidelines must be "proportional" to the difference between the sentence and the "advisory guideline range," and that this "extraordinary" variance had to be supported by "exceptional" reasons, which it did not find present.

Holding (7 (5-2) -2), **Stevens**; Scalia concurring; Souter concurring; Thomas dissenting; Alito dissenting: **"While the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard." "The sentence imposed by the experienced District Judge in this case was reasonable."** Although "the Guidelines should be the starting point and the initial benchmark," "requiring 'proportional' justifications for departures … is not consistent with our remedial opinion" in Booker. It is "impermissible" to have a "presumption of unreasonableness for sentences outside the Guidelines range." Rita, (2007). Mathematical formulas don't work here; they are a "classic example of attempting to measure an inventory of apples by counting oranges." Of course "a major departure should be supported by a more significant justification than a minor one. But the Court of Appeals here applied a "heightened standard" inconsistent with the requisite "abuse of discretion" review. **"The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court['s sentence]."** Gall's situation here was "unique" and the probationary sentence, which still involves significant restrictions on Gall's liberty, was "reasonable."

Scalia concurring: In Rita I explained that I think reasonableness review will produce a constitutionally flawed sentencing scheme under Apprendi and Blakely. But the "highly deferential standard adopted by the Court today will result in far fewer unconstitutional sentences."

Souter concurring: I still think the best solution would be "a new Act of Congress" requiring mandatory guidelines with jury fact-finding for upper range sentences. But my prior disagreements are "not the stuff of formally perpetual dissent."

Thomas dissenting: Consistent with my dissent in Kimbrough today, I think "the District Court committed statutory error when it departed below the applicable Guidelines range."

Alito dissenting: District courts should be required to give the Guidelines "significant weight" and "the courts of appeal must still police compliance." Otherwise, "sentencing disparities will gradually increase" over time. I also think there is a "gap between the Sixth Amendment and our remedial holdings, including today's. Finally, while the probationary sentence here might be described as one that a "reasonable jurist" might impose, the Booker Guidelines scheme requires more, to avoid sentencing disparities. "In the real world there is a huge difference between imprisonment and probation." And relying on Gall's "support" from family and friends, and his young age, was a direct rejection of the Sentencing Commission's authority.

Kimbrough v. United States, No. 06-6330, 128 S.Ct. 558 (Dec. 10, 2007), reversing 174 Fed. Appx. 798 (4th Cir. 2006, unpub.).

Kimbrough pled guilty to a crack and powder cocaine conspiracy. His Guidelines worked out to be 228-270 months, or 19 to 22.5 years. The district court, however, sentenced Kimbrough to 15 years (the mandatory statutory term), noting among other reasons the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing" and calculating that if Kimbrough's plea had been to all cocaine powder, his guidelines would have been 97-106 months. The Fourth Circuit reversed, stating that a sentence outside the guidelines range is "per se unreasonable" if based on disagreement with the powder versus crack cocaine guidelines.

Holding (7 (6-1) -2), **Ginsburg**; Scalia concurring; Thomas dissenting; Alito dissenting: The disparity between sentencing guidelines for crack and powder cocaine have been very controversial; even the Sentencing Commission has disavowed it and suggested revisions, but Congress has affirmatively rejected them. **"While the statute still requires a court to give respectful consideration to the Guidelines" (Gall, 2008), a court may consider other factors, including policy disagreements.** We do not find that Congress has directed Courts to observe the crack-powder disparity. Disapproval of the guidelines amendments is not a direction to never deviate from them in their now-discretionary form. Although some judges may disagree on such policies, they have a duty to consider "unwarranted disparities" themselves, and we trust them to do that. And in a "mine-run" [typical] case, "closer review may be in order" when the judge departs based on policy disagreements. But that is not true regarding crack cocaine, because even Congress has recognized the harshness of the disparity and thus "it would not be an abuse of discretion" for district courts to take note of that. Thus Kimbrough's 180 month sentence was reasonable. "A reviewing court could not rationally conclude that the 4.5 year sentence reduction … qualified as an abuse of discretion."

Scalia concurring: I join the opinion only because I do not take [it] to be an unannounced abandonment of" prior rulings that make the guidelines entirely advisory. Otherwise, the Sixth Amendment would be violated.

Thomas dissenting: I continue to disagree with the Booker remedy. "Congress did not mandate a reasonableness standard of appellate review – that was a standard the remedial majority in Booker fashioned out of whole cloth." Congress has said nothing about the question presented here, and the Booker remedy – making the Guidelines discretionary contrary to Congress's intent – "force[s] [the Court] to assume the legislative role of devising a new sentencing scheme." "I am now convinced that there is no principled way to apply the Booker remedy. So I dissent, because under the statute as written [albeit declared unconstitutional in Booker], the guidelines range was mandatory and did not allow the district court to depart.

Alito dissenting: As explained in my Gall dissent, district courts should be required to give "significant weight" to the Guidelines. I would remand this case for determination under that standard.

Greenlaw v. U.S., No. 07-330, 128 S.Ct. 2559 (June 23, 2008) vacating 481 F.3d 601 (8th Cir. 2007).

In sentencing Greenlaw for various drug and firearms charges, the district court erroneously imposed a 10 year sentence on one count, rather than the 25-year mandatory minimum term it required. Greenlaw's total sentence was 442 months (36+ years). Greenlaw appealed his sentence as too long; the government did not cross-appeal, but merely defended the sentence as imposed. The Eighth Circuit, however, *sua sponte* invoked the "plain error rule" to order the 15 years be added to Greenlaw's sentence.

Holding (7 (6-1) -2), **Ginsburg**; Breyer concurring in the judgment; Alito dissenting with Stevens and Breyer with respect to Parts I, II, and III: **"[A]bsent a Government appeal or cross-appeal, the sentence Greenlaw received should not have been increased. We therefore vacate the Court of Appeals' judgment."** "The cross-appeal rule ... is both informed by, and illustrative of, the party presentation principle. Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party." This Court has never applied the plain-error doctrine to the detriment of a petitioning party and "[n]othing in the text or history of Rule 52(b) suggests that the rulemakers, in codifying the plain-error doctrine, meant to override the cross-appeal requirement." The proper inference to draw is that "Congress was aware of the cross-appeal rule, and framed § 3742 expecting that the new provision would operate in harmony with the 'inveterate and certain' bar to enlarging judgments in favor of an appellee who filed no cross-appeal." Any other reading of intent "would give with one hand what it takes away with the other: § 3742(b) entrusts to certain Government officials the decision whether to appeal an illegally low sentence; but according to amicus, §§ 3742(e) and (f) would instruct appellate courts to correct an error of that order on their own initiative, thereby trumping the officials' decision. We resist attributing to Congress an intention to render a statute so internally inconsistent." Further "the strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal." Ultimately, the decision to initiate error correction rests with "top counsel for the United States," not the Courts *sua sponte*.

Breyer concurring: "I agree with Justice Alito that the cross-appeal requirement is simply a rule of practice for appellate courts, rather than a limitation on their power. …. I would leave application of the rule to the courts of appeals, with our power to review their discretion 'seldom to be called into action.'" However, now that the case is here, I agree with the majority's judgment, primarily for the reasons stated in it's footnote 9 (stressing that no "gross injustice" was created here by sentencing the defendant to 36, versus 51, years in prison).

Alito dissenting with Stevens and Breyer: The cross-appeal rule is not jurisdictional; it is best characterized as a rule of practice. "Absent congressional direction to the contrary, and subject to our limited oversight as a supervisory court, we should entrust the decision to initiate error correction to the sound discretion of the courts of appeals." We ought not "eliminate the court of appeal's ability to correct error," but instead counsel it to request supplemental briefing when it perceives an error. "I do not doubt that adversarial briefing improves the quality of appellate decision-making, but it hardly follows that appellate courts should be denied the authority to correct errors that seriously prejudice nonappealing parties." "In sum, the Court exaggerates the interests served by the cross-appeal requirement [and] overlooks an important interest …: the interest of the Judiciary and the public in correcting grossly prejudicial errors of law that undermine confidence in our legal system."

Irizarry v. U.S., No. 06-7517, 128 S.Ct. 2198 (June 12, 2008) affirming 458 F.3d 1208 (11th Cir. 2005)(*per curiam*).

Irizarry pled guilty to one count of making a threatening interstate communication for sending an e-mail threatening to kill his ex-wife and her new husband. The statutory maximum for this offense was 60 months (5 years), and the presentence report recommended a Guidelines sentencing range of 41-to-51 months, including enhancements for violating court protective orders, making multiple threats, and intending to carry out those threats. After hearing from the defendant's wife and other evidence, the district judge found that Irizarry "still intends to terrorize Ms. Smith" and that even the statutory maximum was "not high enough," and sentenced him to the maximum 60-month term as well as the maximum 3-year term of supervised release.

The defense objected that Irizarry had not been given the notice that Rule 32(h) requires of the Court's intent to impose an "upward departure." But the Eleventh Circuit affirmed, finding the sentence imposed by the district court to constitute "a variance, not a guidelines departure."

Holding (5-4) **Stevens**; Thomas concurring; Breyer dissenting with Kennedy, Souter, and Ginsburg: After Booker, the guidelines are discretionary and a sentence that is not within them is a "variance," not a departure as that term was understood when Rule 32(h) was written. **"The fact that Rule 32(h) remains in effect today does not justify extending its protections to variances; … such an extension is apt to complicate rather than to simplify sentencing procedures."** "Now faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy' that gave rise to a special need for notice in *Burns*." Moreover, here, "the record does not indicate that a statement announcing that possibility would have changed the parties' presentations in any material way; nor do we think it would in most cases. The Government admits as much in arguing that the error here was harmless."

Thomas concurring: Even though I do not agree with Booker, I agree today that Rule 32(h) does not apply to a "variance" and "did not contemplate the drastic changes to federal sentencing wrought by the Booker remedy."

Breyer dissenting with Kennedy, Souter and Ginsburg: "Fairness justifies notice," and Rule 32(h) can still reasonably be construed to apply to outside-the-Guidelines sentences today. "The Guidelines define 'departure' to mean 'imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence.' So-called variances fall comfortably within this definition."

B. Money Laundering

Regalado-Cuellar v. United States, No. 06-1456, 128 S.Ct. 1994 (June 2, 2008) reversing 478 F.3d 282 (5th Cir. 2007).

18 U.S.C. § 1956(a)(2)(B)(i) requires that to convict of one type of money-laundering, the government must prove that international transportation of funds "is designed … to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." Regalado-Cuellar was stopped in Southern Texas for driving erratically while driving towards the Mexican border. A consent search revealed a secret compartment containing plastic duct-taped bags of approximately $81,000 in cash. Animal hair was spread throughout vehicle (allegedly to conceal the smell of drugs) and it appeared that mud had been splattered strategically on the exterior to conceal bodywork preformed while installing the secret compartment. Other evidence of purposeful concealment was introduced. A jury found Regalado-Cuellar guilty, but a 2-1 panel of the Fifth Circuit ordered acquittal, holding that the statute requires that "the transportation must be undertaken in an attempt to create the appearance of legitimate wealth." Judge Smith noted the distinction between "concealing something to transport it, and transporting something to conceal it." Although the Fifth Circuit en banc later reversed that decision and affirmed Regalado-Cuellar's conviction, Circuits have split on the "legitimate wealth" requirement.

Holding (9 (6-3) -0) **Thomas**; Alito concurring with Roberts and Kennedy: **"We agree with the Government that the statute does not require proof that the defendant attempted to 'legitimize' tainted funds, [but] we agree with petitioner that the Government must demonstrate that the defendant do more than merely hide the money during its transport." "Merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money,"** because people normally

"conceal" cash when taking it across a border, if only by putting it in their wallet. The statute's text "makes clear" that a conviction requires "proof that the purpose-not merely effect-of the transportation was to conceal or disguise a listed attribute." We reverse the conviction here because no reasonable jury could conclude that that the transportation was designed to conceal something about the funds. [**Ed. Note**: Not many defendants get a 9-0 reversal of their convictions on sufficiency grounds from the U.S. Supreme Court. There must have been some pretty good lawyering here!]

However, while it is true that "one attribute in the statute, nature, is coextensive with the funds' illegitimate character (i.e. "exposing the nature of illicit funds would, by definition, reveal them as unlawful proceeds."), …. that it may be coextensive with the creation of the appearance of legitimate wealth does not mean that Congress intended that requirement to swallow the other listed attributes."

Alito concurring with Roberts and Kennedy: It is important to note that it seems clear that sending these monies to Mexico was intended to conceal the funds. And transporting the money there successfully would have had that effect. However, the statute plainly requires that the defendant know that achieving that effect was the purpose of the transportation. Had the Government simply presented evidence that it is "commonly known in the relevant circles" that "taking 'dirty' money to Mexico has" that effect, knowledge could have been inferred and this conviction upheld.

United States v. Santos, No. 06-1005, 128 S.Ct. 2020 (June 2, 2008), affirming 461 F.3d 886 (7th Cir. 2006).

Santos ran an illegal lottery in Indiana, and was indicted on federal money laundering charges for the payments he made from his collected bets to runners, collectors, and winners. The federal money-laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i) prohibits using the "proceeds" of specified unlawful activity and requires that the defendant knew the property represented such "proceeds." Because the 7th Circuit had subsequently ruled that "proceeds" must be restricted to "profits" and not just receipts, the district court vacated Santos's money-laundering convictions and the 7th Circuit affirmed.

Holding (4-1 (no majority) – 4), **Scalia**; Stevens concurring in the judgment; Breyer dissenting; Alito dissenting with Roberts , Kennedy and Breyer: "Proceeds" is undefined in the federal statute, nor has it acquired any consistent federal meaning, so we must give it its "ordinary meaning." But that meaning is ambiguous. So under the rule of lenity, we must conclude that **"proceeds" in the federal money-laundering statute is limited to "profits"** and not a larger pool of criminal "receipts," since "profits" is "always more defendant-friendly" and the government "can best induce Congress to speak more clearly." We refuse to "speculate regarding a dubious congressional intent." And defining proceeds as "receipts" creates a "merger problem": "nearly every violation of the illegal lottery statute would be a violation of the money-laundering statute." More generally, "any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient … gives his confederates their shares." There is no reason to think that Congress intended to "radically increase the sentence" for various crimes by making nearly all of them money-laundering as well. And we will not adopt the government's interpretation merely because it makes money-laundering "easier to prove." Finally, we reject Justice Stevens' novel idea that proceeds might mean "receipts" for some crimes (organized crime or drug dealing) but means "profits" for all others. [Justice Thomas does not join this portion of the plurality's opinion, thus making it the view of only three Justices.] Not only is this based improperly on thin legislative theory, but it renders the operation of the statute unpredictable and nonuniform with no such indication of statutory

intent. Justice Stevens' opinion is "the purest of dicta" (even though his concurrence provides the narrowing fifth vote for a majority today) and "forms no part of today's holding."

Stevens concurring: Since it is our job to fill in the "gaps" when Congress fails to define terms, I think Congress could have provided that proceeds means "receipts" with regard to some crimes, but not others. Justice Alito "rightly argues" in dissent that legislative history "makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates." Otherwise, however, the plurality is persuasive. (And by the way, Justice Scalia's speculation about the force of my concurrence here "can only be characterized as 'the purest of dicta'").

Breyer dissenting: I agree with Justice Alito's dissent, but the "merger problem" gives me pause, as "it is difficult to understand why Congress would have intended the Government to possess this punishment-transforming power." But there are "more legally felicitous" ways to address the problem, and the Sentencing Commission can also address it if the problem is one of sentencing fairness. [The plurality responded that (1) the other solutions have no basis in the words of the statute, and (2) the problem affects charging and plea-bargaining, not just sentencing.]

Alito dissenting with Roberts, Kennedy and Breyer: "Fairly read," proceeds in the money-laundering statute should mean "the total amount brought in." The plurality's more limited definition "frustrate[s] Congress' intent and maim[s the] statute." The context of the term in a money-laundering statute makes the "receipts" definition clear, including the legislative history, the purpose of the statute, and the difficulties (accounting and proof problems") in otherwise administering it. Lots of state and international money-laundering statutes define profits to mean "total receipts." And the "merger problem" is primarily a sentencing problem, and should be addressed there, not in limiting the statutory language. Lenity is inapplicable; "the meaning" here "emerges with reasonable clarity when the term is viewed in context."

C. RICO/Mail Fraud

Bridge v. Phoenix Bond, No. 07-210, 128 S.Ct. 2131(June 9, 2008) affirming 477 F.3d 928 (7th Cit. 2007).

Petitioner, Sabre Group arranged for related firms to bid on Sabre Group's behalf and directed them to file false attestations that they complied with the "Single, Simultaneous Bidder" rule, in the Cook County Treasurer's Office's public auction where tax liens on property of delinquent taxpayers were sold. In furtherance of this scheme, petitioners mailed the requisite notices to property owners. Respondents, other bidders who lost valuable liens as a direct result of petitioners' fraud, sued petitioners under RICO (18 U.S.C. § 1962(c)), alleging that each mailing constituted an indictable act of mail fraud, so that together the mailings constituted a "pattern of racketeering activity." Petitioners argued that respondents "must show that they relied on petitioners' fraudulent misrepresentations" in order to state a claim under RICO. Petitioners further argued that because their misrepresentations were made to the county, not respondents, there is no way the respondents could have relied on those false attestations.

Holding (9-0) **Thomas**: **A RICO plaintiff alleging mail fraud predicates need not show reliance, or that they actually received the false representations. "**Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentations." There is no textual basis "for imposing a first-party reliance requirement" in RICO. Likewise, we refuse to "let [the reliance argument] in through the back door by holding that the proximate-

cause analysis under RICO must precisely track the proximate-cause analysis of a common-law fraud claim." Further there is "no general common-law principle holding that a fraudulent misrepresentation can cause legal injury only to those who rely on it." If it is sound policy to avoid future "undue proliferation of RICO suits, the 'correction must lie with Congress.'"

D. Tax Evasion

Boulware v. U.S., No. 06-1509, 128 S.Ct. 1168 (March 3, 2008) vacating 470 F.3d 931 (9th Cir. 2006).

Boulware faced charges of tax evasion and filing a false income tax return, stemming from his diversion of funds from Hawaiian Isles Enterprises (HIE), a closely held corporation of which he was the president, founder and controlling (though not sole) shareholder. In his defense, Boulware sought to introduce evidence that HIE had no retained or current earnings and profits in the relevant taxable years and instead, that he received distributions of property that were non-taxable returns of capital up to his basis in stock. The Government moved *in limine* to bar the evidence on grounds of irrelevance, citing the Ninth Circuit Case U.S. v. Miller (1976), which requires a demonstration of "intent" on the part of the taxpayer or corporation before a diversion is treated as non-taxable return of capital, and argued that Boulware had made no such demonstration. The District Court granted the government's motion, denied Boulware's request to submit evidence on this point, and declined to instruct the jury on Boulware's return-of-capital theory. The jury found Boulware guilty on four counts of tax evasion and five counts of filing a false return. The Ninth Circuit affirmed.

Holding (9-0) **Souter**: **"A defendant in a criminal tax case does not need to show a contemporaneous intent to treat diversions as returns of capital before relying on those sections to demonstrate no taxes are owed."** "[S]ince intent to make a distribution a taxable one cannot control, it would be odd to condition nontaxable return-of-capital treatment on contemporaneous intent, when the statute says nothing about intent at all." "*Miller* erred in requiring a contemporaneous intent to treat the receipt of corporate funds as a return of capital, and the judgment of the Court of Appeals here, relying on *Miller*, is likewise erroneous." The Court did not determine whether the corporation made a distribution to Boulware "with respect to stock."

E. Securities Fraud

Stoneridge v. Scientific-Atlanta, No. 06-43, 128 S.Ct. 761 (Jan. 15, 2008) affirming 443 F.3d 987 (8th Cir. 2006).

Investors who allegedly lost money after purchasing common stock in Charter Communications Inc. sought to impose liability on Scientific Atlanta and Motorola. The defendant companies had acted as customers and suppliers in an arrangement with Charter Communications that allegedly allowed Charter to mislead its auditor into issuing a misleading financial statement. The district court dismissed and the Eighth Circuit affirmed, holding that the defendants had not made any misstatements themselves or violated any duty to the public to disclose; at most they had aided and abetted and there is no aiding and abetting liability under 10b-5 (Central Bank 1994).

Holding (5-3) **Kennedy**; Stevens dissenting with Souter and Ginsburg; Breyer not participating: **"The investors cannot be said to have relied upon any of respondents' deceptive acts in the decision to purchase or sell securities; and as the requisite reliance**

cannot be shown, respondents have no liability to petitioner under the implied right of action." Merely participating in a scheme like this, while perhaps yielding liability in other ways, does not create 10b-5 liability. We must give "narrow dimensions" to a right of action "Congress did not authorize when it first enacted the statute and did not expand when it revisited the law." "Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the §10b private causes of action." Respondents' actions as customers and suppliers fall not within the securities "realm of financing business" but instead within "ordinary business operations" governed mostly by state law. "Were implied cause of action to be extended to the practices described here, there would be a risk that the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees." Moreover, because our interpretation of reliance stops the implied cause of action from reaching "the whole marketplace in which the issuing company does business," it will not deter overseas firms from doing business in the U.S.

Stevens dissenting with Souter and Ginsburg: Charter Communications' fraud could not have been effected "absent the knowingly fraudulent actions" of the defendants to help it. Thus investors were "relying" on the defendants' "deceptive devices" and fraudulent actions, when they relied on Charter's fraudulent financial statements. The defendants "produced documents falsely claiming costs had risen and signed contracts they knew to be backdated in order to disguise the connection between the increase in costs and the purchase of advertising." Those acts "plainly describe 'deceptive devices' under any standard reading of the phrase." The present case, is easily distinguishable from Central Bank (1994), upon which the Court relies heavily, "because the bank in that case did not engage in any deceptive act and, therefore, did not *itself* violate §10(b)." "Congress enacted §10(b) with the understanding that federal courts respected the principle that every wrong would have a remedy. Today's decision simply cuts back further on Congress' intended remedy. I respectfully dissent."

F. Federal Word Definitions: "Use" of a Firearm "During" a Felony, and "Felony"

Watson v. U.S., No. 06-571, 128 S.Ct. 579 (Dec. 10, 2007), reversing 191 Fed.Appx. 326 (5th Cir. 2006 unpub., *per curiam*).

Watson traded 24 doses of OxyContin to an undercover officer for a semiautomatic pistol. He pled guilty to "using" a pistol during and in relation to a crime of drug trafficking in violation of 18 U.S.C. § 924(c)(1)(A), reserving the right to challenge this application of "use." The Fifth Circuit affirmed.

Holding (9[8-1]-0) **Souter**; Ginsburg concurring in the judgment: **"Given ordinary meaning and the conventions of English, we hold that a person does not 'use' a firearm under § 924(c)(1)(A) when he receives it in trade for drugs."** This is our third case on the meaning of "use" in this statute (which imposes a mandatory consecutive five-year term if violated). We held in Smith (1993) that trading a gun for drugs is a prohibited "use," and in Bailey (1995) that "use" requires "active employment" of the gun by the defendant. Here, "when Watson handed over the drugs for the pistol, the informant or the agent 'used' the pistol to get the drugs, just as *Smith* held, but regular speech would not say that Watson himself used the pistol in the trade." You use what you give, not what you get, in a trading transaction. This is not really an "asymmetry" that we are inclined to, or can, correct.

Ginsburg concurring in the judgment: The Court's decision means that "[i]t is better to receive than to give…, at least when the subject is guns." While the distinction "makes scant sense to me," I join the Court's judgment because "I am persuaded that the Court took a wrong

turn in *Smith v. U.S.*" I agree with Justice Scalia's dissent in Smith and "would read the word 'use' [] to mean use as a weapon, not use in a bartering transaction."

U.S. v. Ressam, No. 07-455, 128 S.Ct. 1858 (May 19, 2008), reversing 474 F.3d 597 (9th Cir. 2007).

Ressam tried to enter the U.S. via car ferry at Port Angeles, Washington with explosives hidden in his car trunk; he intended to detonate them at the Los Angeles International Airport. When the ferry docked, customs officials directed Ressam to fill out a customs declaration, on which he concededly lied. Among other crimes, Ressam was convicted of making a false statement (18 U.S.C. § 1001) and carrying an explosive "during the commission of" that felony in violation of § 844(h)(2). The Ninth Circuit Court set aside Ressam's § 844 conviction, ruling that "during" also required that the explosive be carried "in relation to" the underlying felony.

Holding (5-[2]-1) **Stevens**; Thomas concurring in part and in the judgment, with Scalia; Breyer dissenting: "**Because respondent's carrying of the explosives was contemporaneous with his violation of § 1001, he carried them 'during' that violation."** Dictionary definitions need not be consulted to arrive at this conclusion; the meaning of the statute's words is clear. "Unlike its earlier amendment to the firearm statute, [here] Congress did not also insert the words 'and in relation to' after the word 'during.' While it is possible that this omission was inadvertent, that possibility seems remote given the stark difference that was thereby introduced into the otherwise similar texts."

Thomas with Scalia concurring in part and concurring in the judgment: "Because the plain language of the statute squarely answers the question presented in this case, I join only Part I of the Court's opinion."

Breyer dissenting: The Court's interpretation will lead to absurd results where the "presence of totally irrelevant, lawful behavior trigger[s] an additional 10-year mandatory prison term." It brings within the statute's scope "a farmer lawfully transporting a load of fertilizer who intentionally mails an unauthorized lottery ticket to a friend, a hunter lawfully carrying gunpowder for shotgun shells who buys snacks with a counterfeit $20 bill, a truck driver lawfully transporting diesel fuel who lies to a customs official about the value of presents he bought in Canada for his family, or an accountant who engaged in a 6-year-long conspiracy to commit tax evasion and who, one day during that conspiracy, bought gas for his lawnmower." The "statute's context makes clear that the statutory statement does not cover a 'carrying' of explosives that is totally unrelated to the 'felony.'" However, "I cannot agree with the Ninth Circuit that the statute restricts the requisite relationship to one in which the carrying of the explosives 'facilitate' (or 'aided') the *felony*. In my view, the statute must also cover a felony committed to facilitate the *carrying of explosives*."

Burgess v. United States, No. 06-11429, 128 S.Ct. 1572 (April 16, 2008), affirming 478 F.3d 658 (5th Cir. 2007).

Burgess pled guilty to conspiracy to possess with intent to distribute 50 grams or more of cocaine base. This crime ordinarily carries a minimum 10-year imprisonment sentence, but it doubles to 20 years for defendants previously convicted of a "felony drug offense." Burgess had previously been convicted of possessing cocaine under South Carolina law, classified as a "misdemeanor" there even though it carried a possible of up to two years' imprisonment. (Burgess actually received a suspended one-year sentence for this South Carolina conviction.) The District Court found that the South Carolina offense was a "felony" within the meaning of the federal statute, and enhanced Burgess's sentence. The Fourth Circuit affirmed, and this Court granted Burgess's *pro se* certiorari petition.

Holding (9-0) **Ginsberg**: **A state drug offense classified as a misdemeanor, but punishable by more than one year's imprisonment, is a federal "felony" drug offense. The meaning is clear, and the rule of lenity cannot be invoked.** § 802(44) expressly defines "felony drug offense" to include any offense "punishable by imprisonment for more than one year." "Statutory definitions control the meaning of statutory words" used in federal statutes, and here, the definition will aid national uniformity in application of the federal drug law.

G. Qui Tam

Allison Engine v. U.S., No. 07-214, 128 S.Ct. 2133 (June 9, 2008), vacating 471 F.3d 610 (6th Cir. 2006)**.**

The False Claims Act (FCA) imposes civil liability on any person who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. § 3729(a)(2), and any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.' § 3729(a)(3). In 1985 the U.S. Navy entered into contracts with two shipbuilders who subcontracted with Allison Engine Company to build generator sets to be used in guided missile destroyers. Allison Engine subcontracted with General Tool Company to assemble the generator sets. Two employees of the General Tool Company filed a *qui tam* suit alleging that invoices submitted to the shipbuilders by the subcontractors fraudulently sought payment for work not done to contract specification. But the District Court granted judgment to the subcontractors, ruling that "absent proof that false claims were presented to the Government, respondents' evidence was legally insufficient under the FCA." A divided panel of the Sixth Circuit reversed.

Holding (9-0) **Alito**: "Contrary to the decision of the Court of Appeals below, we hold **that it is insufficient for a plaintiff asserting a §3729(a)(2) claim to show merely that "[t]he false statement's use . . . result[ed] in obtaining or getting payment or approval of the claim," or that "government money was used to pay the false or fraudulent claim."** But neither must the plaintiff show that the claims were submitted directly to the government. Rather, "a **plaintiff … must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim [and] …. that the conspirators agreed to make use of the false record or statement to achieve this end."** The plain language of the statute requires an element of intent and elimination of that element "would expand the FCA well beyond its intended role of combating 'fraud against the Government.'"

H. Consent to Proceed Before Magistrate Judge

Gonzalez v. U.S., No. 06-11612, 128 S.Ct. 1765 (May 12, 2008), affirming 483 F.3d 390 (5th Cir. 2007).

Pursuant to Peretz (1991), federal magistrate judges may preside over *voir dire* and jury selection in a felony criminal trial. However, Gomez (1989) requires the parties' consent. Here, Gonzalez was never asked by the Magistrate Judge if he consented to the Magistrate's presiding over his jury selection. Instead his counsel consented on Gonzalez's behalf, and Gonzalez (who was present) made no objections to the Magistrate's presiding over jury selection. However, Gonzalez raised the point on appeal, and the Fifth Circuit ruled counsel could waive Gonzalez's right to have an Article III judge preside over *voire dire*. The Circuits were split on the issue.

Holding (8-1) **Kennedy;** Scalia concurring; Thomas dissenting: **Express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial.** "Requiring the defendant to consent to a magistrate judge only by way of an on-the-record personal statement is not dictated by precedent and would burden the trial process, with little added protection for the defendant." The choice between an Article III judge and a magistrate judge is not among the "basic trial choices" for which a defendant's personal waiver may be required, but rather a strategic choice, better left to an attorney. "Giving the attorney control of trial management matters is a practical necessity. 'The adversary process could not function effectively if every tactical decision required client approval.'" Taylor (1988).

Scalia concurring: While I agree with the majority's conclusion, "I would not adopt the tactical-vs.-fundamental approach, which is vague and derives from nothing more substantial than this Court's say-so." "I would hold that petitioner's counsel's waiver was effective because no rule or statute provides that the waiver come from the defendant personally."

Thomas dissenting: "[I]n my view, Gomez correctly interpreted § 636(b)(3) not to authorize delegation of felony jury selection regardless of the parties' consent, and I agree with the dissenters in Peretz that the Court's contrary conclusion in that case was based on a patently 'revisionist construction of the Act.'" *Stare decisis* need not be followed in cases such as this where statutory precedent is "unworkable" or "badly reasoned." "Indeed, I suspect that Congress withheld from magistrate judges the authority to preside during felony trials precisely in order to avoid the constitutional questions Peretz now thrusts upon us."

I. Federal Rules of Evidence 401 and 403

Sprint v. Mendelsohn, No. 06-1221, 128 S.Ct. 1140 (Feb. 26, 2008), vacating 466 F.3d 1223 (11th Cir. 2007).

Mendelsohn was terminated as part of an ongoing company-wide reduction in force. Subsequently, she sued Sprint under the Age Discrimination in Employment Act, alleging disparate treatment based on her age. Medelsohn sought to introduce testimony by five other former Sprint employees who claimed that their supervisors, who were not Mendelsohn's supervisors, had discriminated against them due to age. Sprint moved to exclude the testimony, arguing that it was not relevant to whether Mendelsohn's supervisor had fired her due to her age, because none of the proposed witnesses were "similarly situated" to Mendelsohn in that they did not share the same supervisors. The District Court agreed, but the Tenth Circuit reversed, treating the order as the application of a *per se* rule that evidence from employees with other supervisors is never relevant to proving discrimination in an ADEA case.

Holding (9-0) **Thomas**: **Federal Rules of Evidence 401 and 403 do not make evidence *per se* admissible or *per se* inadmissible.** Appellate courts properly "afford broad discretion to a district court's evidentiary rulings;" "this is particularly true" regarding Rule 403, which involves "on the spot balancing." The Court of Appeals erred in concluding that the District Court applied a *per se* rule given the circumstances of this case. Although Sprint cited a categorical evidentiary precedent case, the district court did not expressly rely on that case. "An appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading, particularly when the applicable standard of review is deferential." Of course, a per se ruling would have been an abuse of discretion, as "relevance and prejudice … are determined in the context of the facts and arguments in a particular case." The Circuit should have remanded to the district court for explicit findings and conclusions "on the record."

J. Armed Career Criminal Act (ACCA)

Overview: The Court decided three cases this Term addressing the provisions of the ACCA, unsurprising in light of the severe and mandatory sentences that law generates. The ACCA provides that persons convicted of being felons in possession of a firearm (18 U.S.C. § 922(g)) shall be sentenced to enhanced mandatory imprisonment terms (such as 15 years) if they have prior convictions, variously described and limited. 18 U.S.C. § 924(e). The three cases involved creative claims to avoid the harsh and seemingly plain language of the statute provisions, and the decisions ranged from unanimity early in the Term to deeply divided Courts by Term's end. In Begay, a Breyer-led majority crafted a creative reading of the statute favoring defendants, engendering a scornful Scalia concurrence in the judgment only, while endorsing the "rule of lenity," and a strong rebuke from Justice Alito.

Logan v. U.S., No. 06-6911, 128 S.Ct. 475 (Dec. 4, 2007) affirming 453 F.3d 804 (7th Cir. 2006).

Section 921(a)(20) allows the mandatory 15-year minimum imprisonment term, for offenders with three prior violent or drug felonies, to be avoided if the prior convictions have "been expunged, or set aside," or if the offender "has been pardoned or has had civil rights restored." When Logan pled guilty to felon-in-possession, he had three prior Wisconsin battery convictions that were felonies because he was convicted as a "habitual" criminal. But under Wisconsin law, those prior convictions did not result in a loss of Logan's civil rights; he argued that they should not be counted anyway, however, because "civil rights restored" should be equated to: civil rights retained." The district court and the Seventh Circuit rejected this argument, which surprisingly had split the Circuits (and no, the Ninth Circuit was not on Logan's side!).

Holding (9-0) **Ginsburg**: **"[T]he §921(a)(20) exemption provision does not cover the case of an offender who retained civil rights at all times, and whose legal status, postconviction, remained in all respects unaltered by any state dispensation."** The ordinary meaning of the word "restore" means "to give back something that had been taken away;" here, Logan's civil rights were never removed. Logan says it is "harsh" to treat him differently, and that "absurd" anomalies result because of the differences in different states. However, other anomalies would arise from Logan's position: Maine, for example, does not remove civil rights from any offenders, so even a three-time murderer would be ineligible for the Armed Career Criminal enhancement. Moreover, Congress amended a different part of the statute 10 years later, and showed that it knew how to distinguish between "rights retained" and "rights restored." We do not know whether, or how, Congress would remedy Logan's "anomaly," and we have "no warrant to stray from [the statute's] text."

Begay v. United States, No. 06-11543, 128 S.Ct. 1581 (April 16, 2008), reversing 470 F.3d 964 (10th Cir. 2006).

Begay was convicted as a felon in possession after he drunkenly pulled the trigger of a (fortunately unloaded) rifle aimed at his relatives. He was subject, and sentenced, to the ACCA's mandatory minimum 15-year imprisonment term for § 922 convictees who have three prior convictions for a "violent felony." Begay had previously been convicted twelve times for driving under the influence of alcohol (DUI), normally a misdemeanor but treated by New Mexico as a felony each fourth time a person is convicted of DUI. The ACCA defines "violent

felony" as an offense punishable by more than one year that either "(i) has as an element the use, attempted use, or threatened use of physical force against the person or another, or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The district court and the Tenth Circuit (2-1) rejected the argument that Begay's prior offenses did not qualify as a "violent felony" under the emphasized phrase in subsection (ii).

Holding (5-4), **Breyer**; Scalia concurring in the judgment; Alito dissenting with Souter and Thomas: **Because DUI offenses do not typically involve "purposeful, violent and aggressive conduct, we conclude that DUI offense are not subsumed within the "otherwise" clause of § 924(e)(2)(B)(ii).** In applying the ACCA, offenses must be considered generically (rather than as committed in any specific instance) and here, the statutory list of examples shows that the statute covers "only similar crimes, rather than every crime that 'presents a serious potential risk of physical injury to another.'" "Purposeful, violent and aggressive conduct" is the link between the listed crimes. DUI is not this kind of crime, and doesn't show the "increased likelihood" that Congress intended to reach" that the offender is the kind of person who might deliberately point the gun and pull the trigger." [**Ed. Note**: even though, as Justice Alito points out in dissent, that is precisely what Mr. Begay did here.]

Scalia concurring in the judgment: In James (2007) last Term, I wrote how the majority's approach here is wrong. The "otherwise" clause "encompasses all crimes that present a serious risk of injury to another," so long as that risk is at least as serious as burglary, the least serious crime expressly listed by Congress. The Court's test is a "Scrabble-like" "made-for-the-case improvisation" that is "not remotely faithful to the statute that Congress wrote." However, because it is not clear that DUI poses such a serious risk, "the rule of lenity requires that I" rule for the defendant here. "I will not condemn a man to a minimum of 15 years in prison on the basis of such speculation."

Alito dissenting with Souter and Thomas: Although the "otherwise" clause "calls out for legislative correction," the Court's interpretation "simply cannot be reconciled with the statutory text." DUI is very physically dangerous to others, and Begay has an "extraordinarily dangerous record of drunk driving" – he is a "super-DUI recidivist." Justice Scalia's reading is also not faithful to the text; the statute does not say that the "serious risk" has to be equal to the enumerated offenses.

U.S v. Rodriquez, No. 06-1646, 128 S.Ct. 1783 (May 19, 2008) reversing 464 F.3d 1072 (9th Cir. 2006).

Rodriguez was convicted of felon-in-possession, and had three prior Washington state narcotics convictions. The ACCA specifies a 15-year mandatory term for persons with three prior drug offenses, if "serious" because "a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii). For Rodriguez's prior, Washington law prescribed a maximum term of 5 years, but then elsewhere prescribed double that term (i.e., 10 years) for a second or subsequent offense. There was no dispute that this 10 year term had applied to Rodriguez; but he argued that the 5 year term in the offense statute should control. The district court and Ninth Circuit agreed with Rodriguez.

Holding (6-3) **Alito**; Souter dissenting with Stevens and Ginsburg: **The "'maximum term of imprisonment ... prescribed by law' … was the 10-year maximum set by the applicable recidivist provision."** The 10 years prescribed by Washington shows that they find the offenses of a recidivist to be "serious," and Congress intended to incorporate that State assessment. Even if there are practical difficulties in determining, sometimes, whether a

recidivist state law provision applies, that will mean only that in some cases the ACCA enhancement will not be available, not that it shouldn't apply when it is clear (as we think it will be in most cases). Nor do we believe that a state guidelines structure that "caps" a recidivist sentence should define the "maximum term prescribed by law." First, guidelines can be exceeded in various cases, so they are not truly a "maximum." Second, Congress wrote the ACCA provision before most guidelines schemes existed, so Congress did not intend to incorporate them, and this is purely a statutory construction exercise.
Souter dissenting with Stevens and Ginsburg: Because the statute is ambiguous, lenity should lead us to use only the maximum terms specified in state offense statutes, not other recidivist provisions. This is particularly true where wildly varying state statutes and record-keeping will make it very difficult for district judges to apply the Court's rule clearly and consistently. And the disparities are wide and harsh: for example, in Massachusetts a third marijuana conviction has a 2.5 year maximum, while in Delaware it would be life without parole. Nothing suggests that Congress actually had in mind separate state recidivist statutes when it wrote the ACCA.

HABEAS CORPUS

A. And International Law/Treaty Obligations**:**

Medellin v. Texas, No. 06-984, 128 S.Ct. 1346 (March 25, 2008), affirming 223 S.W.3d 315 (Tex. 2006).

Medellin is one of 51 Mexican nationals convicted in U.S. state courts, who later (2004) obtained a judgment from the International Court of Justice (ICJ) in the Hague the Avena case) that their convictions should be reviewed because the U.S. had failed to comply with its treaty obligation under the Vienna Convention (Article 36) to notify the Mexican consul when the petitioners were arrested, and notify them of their right to request counsel from their home states. Medellin was sentenced to death in Texas in the 1990s for the "gang rape and brutal murder of two Houston teenagers." Medellin himself "was personally responsible for strangling at least one of the girls." Medellin did not raise his Vienna Convention claim until after his conviction had been finally affirmed on appeal in Texas; the Texas courts held the claim was thereby "procedurally defaulted." In 2006, while this Court was considering Medellin's case, the President announced that "state courts [should] give effect to the [Avena] decision in accordance with general principles of comity. However, the Texas Court of Criminal Appeals rejected Medellin's claim under the President's memo, holding that neither that Memo nor the Avena decision was "binding federal law" that would displace the State's procedural default and abuse of the writ (no successive habeas petitions) law.

Holding (5-1-3) **Roberts**; Stevens concurring in the judgment; Breyer dissenting with Souter and Ginsburg: **Absent some Congressional implementing legislation, neither the President's Memorandum nor the Avena decision constitute "binding federal law" that pre-empts state law limitations on the filing of successive habeas petitions.** "Not all international law obligations automatically constitute binding federal law enforceable in United States courts." This distinction has been clear since at least 1829 in Foster v. Neilson (Marshall, J.). The "Optional Protocol" enacted in 1970 explains that Vienna Convention disputes "shall lie within the compulsory jurisdiction of the" ICJ. But neither that Protocol, nor the Avena judgment, are "self-executing." (We leave open whether the Vienna Convention itself is self-executing.) The Protocol is "silent as to any enforcement mechanism," nor does it expressly "commit signatories to comply with an ICJ judgment." There is "no reason to believe that the President and Senate signed up for" automatic enforcement of ICJ judgments when they signed

and ratified the agreements. (And we previously held (Sanchez-Llamas, 2004) that the Vienna Convention itself does not override state procedural laws.) We use a textual approach to interpreting the Treaty, and reject the dissent's "multifactor, judgment-by-judgment analysis" (calling it a "grab-bag of no less than seven reasons"). And we do not "call into question the ordinary enforcement of foreign judgments or international arbitral agreements." But "enjoining the operation of state law" is different.

Nor do we believe that the President has the power to unilaterally transform a non-binding treaty provision, or ICJ judgment, into binding federal law to override state law. The President is not a law-maker, and under the Constitution, the power to create binding federal law under Treaties "falls to Congress." Nor can the President constitutionally order States to override their own laws, at least not absent extraordinary circumstances. He has the authority "to execute the laws, not make them."

[**Ed. Note**: Interestingly, the Bush Administration seeks to enforce the Avena judgment in this case, despite its normal support for capital punishment. So there is a bit of "role-reversal here: the Court's ruling rejects the position of the Solicitor General, while the dissent champions the unilateral power of the Executive here.]

Stevens concurring in the judgment: "There is a great deal of wisdom in Justice Breyer's dissent," and the case is "closer … than the Court's opinion allows." In the end, however, I think the Court cannot order Texas to enforce the ICJ judgment in Avena. The optional Protocol states a "promise" by the U.S. "to take additional steps to enforce ICJ judgments." This Congress has not (yet) done so. Here, "the State[s] must shoulder the primary responsibility for protecting the honor and integrity of the Nation." Oklahoma reviewed the judgments against their Avena convictees; Texas should too.

Breyer dissenting with Souter and Ginsburg: I believe that under the various exceptional circumstances present here, the Protocol and the Avena judgment "bind the [state] courts not less than would an act of the federal legislature." The normal rule historically is that most Treaty obligations are "self-executing." Here, "the President has correctly determined that Congress need not enact additional legislation." The absence of express language saying this in the Protocol is not dispositive, as the signers and ratifiers may have simply assumed it. So we should examine "practical, context-specific criteria" to determine the correct answer; there is no "magic formula." We should not leave "the fate of an international promise … in the hands of a single State." Instead, the Judicial Branch should order further judicial review of Medellin's case (complying with the Avena judgment), and those proceedings should happen in the Texas courts. It is a "workable Constitution that the Founders envisioned," and the Court's decision produces many "practical anomalies." It ought not be that "the Nation may well break its word even though the President seeks to live up to that word and Congress has done nothing to suggest the contrary." (As for the President's power, I do not have to address that question, and I will leave it in the "constitutional shade.")

Boumediene v. Bush, No. 06-1195, 128 S.Ct. 2229 (June 12, 2008), reversing 476 F.3d 981 (D.C. Cir. 2006).

"Petitioners are aliens designated as enemy combatants and detained at … Guantanamo." They filed habeas corpus petitions in Washington DC, but while appeals were pending, Congress passed the Detainee Treatment Act of 2005, directing that "no court, justice or judge shall have jurisdiction to hear or consider … an application for a writ of habeas corpus" filed by such petitioners. When the Supreme Court ruled in Hamdan (2006) that the DTA did not apply to cases filed before its enactment, Congress responded with a new statute called the Military

Commissions Act of 2006, which stripped the courts of jurisdiction even over previously filed habeas cases.

Holding (5-4) **Kennedy**; Souter concurring with Ginsburg and Breyer; Roberts dissenting with Scalia, Thomas and Alito; Scalia dissenting with Roberts, Thomas and Alito: **Persons detained at Guantanamo may invoke the writ of habeas corpus, and Congress's attempt to suspend the writ in the MCA is unconstitutional because these are not "Cases of Rebellion or Invasion" as Article I of the Constitution demands.** The cases are remanded for further proceedings consistent with this fundamental holding. "The Framers considered the writ a vital instrument for the protection of individual liberty" and "an essential mechanism in the separation-of-powers scheme." It is available to foreign nationals "because the Constitution's separation-of-powers structure … protects persons as well as citizens." No "practical concerns" counsel clearly against extending the writ to Guantanamo, and we will not allow "the political branches … to switch the Constitution on or off at will" – "Our basic charter cannot be contracted away" by a lease agreement like Guantanamo's that leaves the territory completely under U.S. control.

Moreover, because "these detainees have been denied meaningful access to a judicial forum for a period of years," their cases are "exceptional" and we will go on to resolve the Suspension Clause questions, even though the DC Circuit did not. We do not find the DTA or MCA to be "adequate substitutes" for the writ of habeas corpus. Two fundamental aspects of any habeas proceeding are that (a) a "judicial officer must have adequate authority to make a determination in light of the relevant law and facts," and must be able to (b) "formulate and issue appropriate orders for relief including, if necessary, … the prisoner's release." The DTA process does not meet these fundamental minima. Nor do prudential concerns stop us from determining that these detainees at Guantanamo may invoke the write of habeas corpus.

Souter concurring, with Ginsburg and Breyer: Two things. First, today's ruling "is no bolt out of the blue;" we clearly foreshadowed our constitutional holding in the statutory case of Rasul (2004). And "a second fact insufficiently appreciated by the dissents" is "the length of the disputed imprisonments, some of the prisoners … having been locked up for six years." This is not "judicial haste" but rather "an act of perseverance."

Roberts dissenting with Scalia, Thomas and Alito: The DTA is "the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants," and the Court acts, "before a single petitioner has even attempted to avail himself of the law's operation," and even then provides only "a set of shapeless procedures to be defined by federal courts at some future date." "All that today's opinion has done is shift responsibility … from the elected branches to the Federal Judiciary." We should not have even granted certiorari until the detainees "exhausted" the statutory procedures in the D.C. Circuit, as Congress provided. Ironically, the federal habeas procedure the majority outlines will almost certainly take longer to grant the detainees relief, if any, than would the DTA procedures. And the Court is not only wrong about the inadequacy of the DTA procedures, it also fails to give much content to whatever rights the majority thinks the detainees do have. Whether detainees can offer late-discovered exculpatory evidence is unknown, but if that is the gravest concern the majority can offer, then "the ice beneath its feet is thin indeed." "So who has won? Not the detainees…. Not Congress…. Not the Great Writ…. Not the rule of law, unless by that is meant the rule of lawyers….. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges."

Scalia dissenting, with Roberts, Thomas and Alito: The writ of habeas corpus does not, and never has, run in favor of aliens abroad." Moreover, the Court's ruling "will almost certainly cause more Americans to be killed." "The Court blunders…." "The Court warps our

Constitution … [and] blatantly misdescribes important precedents." [Justice Scalia's blistering dissent goes on to argue that history and precedent do not support the determination that habeas should be extended to aliens held in Guantanamo]. Johnson v. Eisentrager is directly opposite to the Court's decision today. Yet now, "how to handle enemy prisoners in this war will ultimately lie with the branch that knows the least….." "The Nation will live to regret what the Court has done today. I dissent."

Munaf v. Geren, No. 06-1666, 128 S.Ct. 2207 (June 12, 2008, vacating 482 F.3d 582 and 479 F.3d 1 (D.C. Cir. 2006).

An international coalition ("Multinational Force Iraq" or "MNF-I") has agreed to, among other services, detain and hold persons who are being prosecuted for Iraqi criminal violations in Iraqi courts. An American military unit that is part of MNF-I currently holds Munaf and Omar. Omar, "an American-Jordanian citizen," was captured in Iraq and detained initially as an enemy combatant, but then ordered transferred to Iraqi criminal proceedings. The district court exercised habeas jurisdiction to prohibit Omar's transfer to Iraqi authority. Munaf, a citizen of both the U.S. and Iraq, travelled to Iraq with Romanian journalists, who were then all kidnapped with Munaf and held captive for two months. When the journalists were freed, Munaf was detained as one of the orchestrators of the kidnappings. His conviction in Iraqi court was later vacated but he was ordered to remain in custody. His relatives attempted to file habeas to block his transfer to Iraqi custody, but the district court denied jurisdiction and the Circuit affirmed, distinguishing their Omar opinion because Munaf had already been convicted.

Holding (9 (6-3) – 0), **Roberts**; Souter concurring with Ginsburg and Breyer: **"The habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition."** However, the petitioners here cannot use habeas to block their transfer to Iraqi courts for Iraqi prosecution for crimes committed in violation of Iraqi law. Because the petitioners are held by "American soldiers who answer only to an American chain of command," habeas applies, and it is irrelevant that the American military unit is also a part of an international coalition. The "slip of a case" (Hirota, *per curiam*, 1948) "cannot bear the weight the government would place on it." It is different in a number of ways, including the fact that the current petitioners are American citizens. [Chief Justice Roberts also slips in a droll remark about "confusion over who General MacArthur took orders from"].

However, "these issues arise in the context of ongoing military operations conducted by American forces overseas" and we are "reluctant to intrude." "The basics" are that a preliminary injunction is "an extraordinary and drastic remedy." Here, there was not even discussion of a traditional factor, "likelihood of success on the merits," and that itself is a reason to vacate and remand. But we think it is "appropriate to proceed further" and resolve these habeas petitions on their merits, and we "terminate the litigation now." These petitioners do not seek "release," they seek protection from Iraq's "sovereign right to punish [criminal] offenses …. Committed on its soil." We have twice previously held that habeas does not lie to prevent transfer to a foreign government, even if the prosecution might be "unconstitutional" by our own standards. Wilson (19--) and Neely (1901). U.S. courts normally may not "intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy." Nor may we endorse "unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad." Finally, petitioners allege they will be "tortured" by mistreatment in Iraq prison, but this is a decision for the political branches. The Executive branch has here concluded that Iraq prison conditions meet "internationally accepted standards." (Petitioners did not raise a FARR Act claim below, which

says a person may not be removed to a country if torture will result.) "Munaf and Omar are alleged to have committed hostile and warlike acts within the sovereign territory of Iraq. …. Habeas corpus does not require the United States to shelter such fugitives for the criminal justice system of the sovereign with authority to prosecute them."

Souter concurring with Ginsburg and Breyer: This case is limited by at least eight factors the majority relies upon. In a different case, if "the probability of torture is well-documented," relief might lie, even if the Executive did not acknowledge that possibility.

B. More Traditional Habeas

Allen v. Siebert, No. 06-1680, 128 S.Ct. 965 (Nov. 5, 2007) (*per curiam*), reversing (11th Cir. 2007).

In Pace (2005), we ruled that a state postconviction petition that is rejected under state law as "untimely" is not a "properly filed" petition that can toll the one-year limitations period for federal habeas petitions under 28 U.S.C. § 2244(d)(2). Here, the Eleventh Circuit ruled that a "non-jurisdictional" time bar that was enforced by Alabama was different.

Holding (7-2), ***per curiam***: Pace's state petition, filed untimely under an Alabama court rule, was not "properly filed" to toll the federal limitations period, and his federal petition filed some four years later was thus barred. **"Whether a time limit is jurisdictional, an affirmative defense, or something in between, it is a 'condition to filing'" (Artuz, 2000). "When a postconviction petition is untimely under state law, that is the end of the matter for purposes of §2244(d)(2).**

Stevens dissenting with Ginsburg: This case should not be summarily reversed. "There is an obvious distinction" between a jurisdictional time defect in state law, and an "affirmative defense that can be waived."

Wright v. Van Patten, No. 07-212, 128 S.Ct. 743 (Jan. 7, 2008) (*per curiam*), reversing 489 F.3d 827 (7th Cir. 2007).

Van Patten pled no contest to first-degree reckless homicide. His attorney was not physically present but was linked into the courtroom via a speakerphone. The Wisconsin courts rejected his later appeal, finding no prejudice under Strickland (1985). The Seventh Circuit, however, granted relief, ruling that a presumptive prejudice standard under Cronic (1985) applied, while conceding that it was a "novel" question.

Holding (9 (8-1)-0), ***per curiam***; Stevens concurring: **Because the rule that Van Patten seeks is not "clearly established," he runs afoul of the limitation in 28 U.S.C. § 2254(d)(1) that federal habeas relief is prohibited unless the state courts "unreasonably applied clearly established federal law."** None of our precedents "clearly establish" either that ("counsel's participation by speaker phone should be treated as a complete denial of counsel," or (2) that the generous Cronic standard for "prejudice" should replace the normal Strickland standard.

Stevens concurring in the judgment: "An unfortunate drafting error in" Cronic [**Ed. Note**: which Justice Stevens wrote] "makes it necessary for" me to concur in this case. The author [i.e., me] did not "contemplate representation by attorneys who were not present in the flesh," or we would have written "present in open court" in Cronic. Thus the law is not "clearly established" and I must concur – but this does not mean the State court was correct in its evaluation of the constitutional question. (Justice Stevens notes that an "incorrect" application of federal law need not be an "unreasonable" one, citing Williams (2000), and he quotes the original Seventh Circuit panel opinion at length in a footnote.)

Arave v. Hoffman, No. 07-110, 128 S.Ct. 749 (Jan. 7, 2008), vacating 455 F.3d 926 (9th Cir. 2007).

Hoffman was convicted of murder and sentenced to death in Idaho. On federal habeas, the district court granted him relief on his ineffective assistance claim regarding sentencing, but not regarding the same claim addressing pretrial plea-bargaining. On appeal, the Ninth Circuit affirmed as the sentencing claim, but reversed as to the plea bargaining claim: it granted Hoffman relief on that claim too, and directed the district court to order the State either to release Haffman or to "offer Hoffman a plea agreement with the same material terms offered in the original plea agreement." We granted the State's cert petition on this portion of the Ninth Circuit's ruling. But now, Hoffman seeks to abandon his claim regarding plea negotiations and dismissal of our review so that he can pursue resentencing. The State agrees.

Holding (9-0), ***per curiam***: Because Hoffman's claim is now moot, "we vacate the judgment of the Court of Appeals to the extent that it addressed that claim." The case is remanded to the Ninth Circuit with directions that it direct the district court to "dismiss the relevant claim with prejudice." [**Ed. Note**: this is a simple way to wipe off the books the Ninth Circuit ruling written by Judge Harry Pregerson, which the Court pretty obviously was going to reverse.]

IMMIGRATION LAW

Dada v. Mukasey, No. 06-1181, 128 S.Ct. 2307 (June 16, 2008), reversing 207 Fed.Appx. 425 (5th Cir. 2006 unpub.).

Under various immigration statutes (citations are in the opinion), an alien who is ordered removed from the U.S. may be granted the ability leave under "voluntary departure," which avoids certain penalties, so long as they leave within the mandated period not to exceed 60 days. Aliens ordered removed also have the right to file a "motion to reopen" their removal proceedings. However, if they leave the U.S., it has the effect of "withdrawing" their motion to reopen. This leaves the alien with "two poor choices": either leave and lose the ability to pursue the motion to reopen, or stay past the voluntary departure date in order to pursue re-opening, but suffer the penalties (which can include automatic denial of a motion to reopen) for not leaving on time.

Here, Dada was ordered removed and, on his motion, was granted a voluntary departure date. Two days before that date, Dada moved to withdraw his motion for voluntary departure, and filed a motion to reopen alleging, now, a bona fide marriage to a U.S. citizen. After Dada's time to leave had expired, the Board of Immigration Appeals (BIA) denied the motion to withdraw the voluntary departure motion, and also denied Dada's motion to reopen because he had (by then) overstayed his voluntary departure date. The Fifth Circuit affirmed.

Holding (5-4) **Kennedy**; Scalia dissenting with Roberts and Thomas; Alito dissenting: **"[T]o safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen"** (p. 18). The question is purely one of Congressional intent. The statute does not expressly say that a motion for voluntary departure waives the right to file a motion to reopen, and "reading the Act as a whole," that position is "unsustainable." Further, there is "nothing the in the Act or the implementing regulations that makes the grant of voluntary departure irrevocable" – in fact, the Department of Justice currently has proposed regulations similar to our

holding. Thus, while a statute or regulation could certainly resolve the question otherwise, there is currently nothing explicit on the question. We think it "necessary to read the Act to preserve the alien's right to pursue reopening, while respecting the Government's interest in the quid pro quo of the voluntary departure arrangement" (p. 16). This "still confronts the alien with a hard choice," because the government may, within 90 days, seek to forcefully remove an alien who has been ordered removed and has not voluntarily departed. But at least the motion to reopen is not thereby lost; and it can be an abuse of discretion for the BIA not to stay an order of removal if "nonfrivolous grounds" for reopening have been presented.

Scalia dissenting with Roberts and Thomas: "[A]ll of these provisions were in effect when petitioner agreed to depart, and the Court cites no statute or regulation currently in force that permits an alien who has agreed voluntarily to depart to change his mind." All the current structure does now is "offer the alien a deal:" trade your reopening motion for the benefits that a voluntary departure gets you. Litigants are put to similar voluntary choices between the rock and the whirlpool all the time." Moreover, now the government has proposed regulations to address the situation, yet the majority now impermissibly requires "respectful adoption of that portion of the proposed regulation with which the Court agrees, and *sub silentio* rejection of that portion it disfavors." Only when a statutory provision is unconstitutional can this Court "blue-pencil a statute in this fashion, directing that one of its provisions, severable from the rest, be disregarded." The Court has "simply rewritten" the statutes and regulations "to satisfy its notion of sound policy." These are "interpretive gymnastics." The Court "lacks the authority to impose its chosen remedy."

Alito dissenting: "Since the statute does not decide the question whether an alien should be permitted to withdraw a voluntary departure request, the authority to make that policy choice rests with the agency." If the BIA denied Dada's withdrawal motion because it thought the statute prohibited it, then the BIA was wrong. Because the BIA rejected the withdrawal request without explaining why, I would vacate and remand.

MISCELLANEOUS: LAW ENFORCEMENT OFFICER IMMUNITY

Ali v. Fed. Bureau of Prisons, No. 06-9130, 128 S.Ct. 831 (Jan. 22, 2008), affirming 204 Fed.Appx. 778 (11th Cir. 2006 unpub.).

Ali, a federal prisoner, filed a federal torts claims act (FTCA) claim against prison officials after some of his personal property was allegedly lost during a prison transfer. The BOP, district court, and Eleventh Circuit all agreed that the claim was barred by the provision in 28 U.S.C. § 2680(c) that sovereign immunity applies to any claim arising from the detention of property by "any officer of customs or excise or any other law enforcement officer."

Holding (5-4) **Thomas**; Kennedy dissenting with Stevens, Souter and Breyer; Breyer dissenting with Stevens: **The term "any other law enforcement officer" applies to "law enforcement officers of whatever kind,"** including the prison officials here. The exemption does not apply only to those officers acting in a "customs or excise capacity." (Whether the property here was "detained" within the meaning of the statute was not raised here.) The word "any" in the statute "has an expansive meaning." "Had Congress intended to limit § 2680(c)'s reach as petitioner contends, it easily could have written 'any other law enforcement officer *acting in a customs or excise capacity.*'" Because the text of the provision and the structural context of this and related provisions all dictate this conclusion, general interpretive canons such as "*ejusdem generis*" and "*noscitur a sociis*" must yield. "We do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase" (p. 13).

Kennedy dissenting, with Stevens, Souter and Breyer: [**Ed. Note:** Note that Justice Ginsburg votes with the majority. Justice Kennedy's dissent is longer than the majority. Why has such an obscure case generated such lengthy disagreement? Could Justice Kennedy's dissent have begun as a majority decision, now tempered by a vote defection? Although it doesn't read like a majority transformed into a dissent.]. The Court's opinion is "so rarified that it departs from how a legislator most likely understood the words when he or she voted for the law." The general analysis, advancing a "rule which simply bars all consideration of the [normal interpretive] canons" will cause harm in future cases. We have previously noted that "the word 'any' can mean 'different things depending on the setting,'" citing Nixon v. Mo. Municipal League (2004) and three other cases including Justice Marshall in 1818. Text as well as context makes it clear that this exception to the waiver of sovereign immunity "is concerned only with customs and taxes." While the majority may be concerned with the relative triviality of the particular claim here, "sound reasons" exist to not allow that concern to warp our statutory interpretation rules.

Breyer dissenting, with Stevens: I agree with Justice Kennedy, but want to emphasize that this case extends beyond Latin interpretive canons. Everyone knows what these words mean; "rather, the issue is the statute's *scope*." "The word 'any' is of no help because all speakers (including writers and legislators) who use general words such as 'all,' 'any,' 'never,' and 'none' normally rely upon context to indicate the limits of time and place within which they intend those words to do their linguistic work." Here, "every contextual feature" as well as the "drafting history" shows that the provision concerned only customs and excise. There are over 100,000 law enforcement officers, and "it is thus not the Latin canons … but Justice Scalia's more pertinent and easily remembered English-language observation that Congress 'does not … hide elephants in mouseholes'" (Whitman, 2001) that ought to resolve this case.

DISSENTS FROM, OR CONCURRENCES WITH, ORDERS

Stephenson v. U.S., No. 07-9267, 128 S.Ct. 2991 (June 23, 2008). On petition for cert. from U.S. Court of Appeals for the Seventh Circuit, judgment vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed May 12, 2008.

Scalia dissenting with Roberts and Thomas: Petitioner plead guilty to distributing crack cocaine, waived all appellate issues in waiving his right to trial but reserved a right to appeal the validity of his guilty plea. Although Petitioner "allegedly" asked his attorney to file a notice of appeal arguing that the substance he distributed was not crack cocaine, his attorney filed nothing. On collateral review, petitioner alleged ineffective assistance of counsel but the District Court denied the claim, finding that his appeal was doomed because he waived his right to appeal and had expressly identified the substance as crack cocaine in his guilty plea. On appeal, the Court of Appeals asked the parties to address the effect of its decision in Nunez v. United States, 495 F.3d 544 (C.A.7 2007), which held Nunez's plea agreement waived his right to bring an identical ineffective-assistance claim on collateral review. The Government argued that petitioner's case was materially indistinguishable from Nunez. The Court of Appeals summarily affirmed the District Court's judgment.

"Petitioner asks us to consider his ineffective-assistance claim. That claim does not warrant our review, so I would deny his petition for certiorari. As I state in my dissent in Nunez v. United States, ante, at ----, the Solicitor General's confession of error in the Court of Appeals'

reasoning, but not its judgment, does not justify entry of a GVR order. That disposition is especially inappropriate in this case because we cannot even be sure that the Court of Appeals' summary order was premised on the alleged error. For all we know, the Court of Appeals identified a difference in the plea agreements and therefore summarily affirmed because it agreed with the District Court's reasoning on the merits of petitioner's ineffective-assistance claim. I respectfully dissent."

Nunez v. U.S., No. 07-818, 128 S.Ct. 2990 (June 23, 2008) cert. granted from 495 F.3d 544 (7th Cir. 2007).

Scalia dissenting with Roberts and Thomas: "Petitioner pleaded guilty to federal narcotics offenses and waived appellate and collateral-review rights. Despite that waiver, he demanded (the Court of Appeals assumed) that his attorney file a notice of appeal; his attorney refused. Petitioner sought habeas relief, claiming that this failure was ineffective assistance of counsel. The District Court denied relief, and the Court of Appeals affirmed, finding that petitioner had waived his right to raise even the ineffective-assistance claim on collateral review. Petitioner has filed a petition for a writ of certiorari, asking us to consider the ineffective-assistance claim. The Government argues in response that the question is not presented because the Court of Appeals' opinion rests on petitioner's collateral-review waiver. I agree with that response, and so would deny the petition for writ of certiorari."

Green v. Johnson, No. 07-10988, 128 S.Ct. 2871 (May 27, 2008), cert. denied from 508 F.3d 195. (5th Cir. 2007).

Stevens dissenting in denial of certiorari with Ginsburg: Petitioner's death sentence was filed on March 11, 2008. Although the deadline for filing a petition for certiorari will not pass until next month, Virginia plans to execute petitioner this evening. This timeline "requires us either to enter a stay or give petitioner's claim less thorough consideration than we give claims routinely filed by defendants in noncapital cases. In order to ensure petitioner the same procedural safeguards available to noncapital defendants, I would grant his application for a stay of execution."

Frazier v. Ohio, No. 07-9052, 128 S.Ct. 2077 (Apr. 21, 2008), cert. denied from 873 N.E.2d 1263 (Oh. 2007).

Stevens respecting the denial of certiorari: "While I agree with the Court's decision to deny certiorari in this case, it is appropriate to emphasize, as I have in the past, that the denial of certiorari expresses no opinion on the merits of the underlying claim."

Velazquez v. Arizona, No. 07-8946, 128 S.Ct. 2078 (Apr. 21, 2008) cert. denied from, 166 P.3d 91 (Az. 2007).

Stevens respecting the denial of certiorari: "While I agree with the Court's decision to deny certiorari in this case, it is appropriate to emphasize, as I have in the past, that the denial of certiorari expresses no opinion on the merits of the underlying claim."

Norris v. Jones, No. 07A311, 2007 WL 2999165 (U.S.) (Oct. 16, 2007)

Scalia dissenting in denial of certiorari: "I vote to grant the State's application to vacate the stay because in my view the decision of the Eighth Circuit was based on mistaken premise that our grant of certiorari in Baze v. Rees, calls for the stay of every execution in which an individual raises an Eight Amendment challenge to the lethal injection protocol. The grant of certiorari in a single case does not alter the application of normal rules of procedure, including

those related to timeliness. In this case, Jones's challenge to the lethal injection protocol, which was brought nine years after his conviction and sentence became final, was dilatory."

Smith v. Arizona, No. 07-5847, 128 S.Ct. 466 (Oct.. 15, 2007) cert. denied from 159 P.3d 531 (Az. 2007).

Breyer dissenting from denial of certiorari: Joe Clarence Smith, petitioner was first sentenced to death 30 years ago, but the Arizona courts in 1979 set the sentence aside due to constitutional error. Later that year Smith was again sentenced to death but the federal courts in 1999 set the second sentence aside on grounds of ineffective assistance of counsel. In 2004, Smith was again sentenced to death, which he now challenges as cruel and unusual punishment were he to be executed more than 30 years after he was initially convicted. "In my view, Smith can reasonably claim that his execution at this late date would be 'unusual.'" I have explained before why I think it is "cruel to keep an individual for decades on death row or otherwise under threat of imminent execution raises a serious constitutional question." I would grant the petition for certiorari in this case.

Emmett v. Kelly, No. 06-11622, 128 S.Ct. 1 (Oct. 1, 2007) cert. denied from 474 F.3d 154 (C.A.4 2007).

Stevens respecting the denial of certiorari with Ginsburg: Virginia set an execution date well in advance of the due date for petitioner's petition for certiorari before the Court making it "impossible for us to consider the merits of the petition in the normal course, and making it necessary for the Court to rule on petitioner's last-minute application for a stay of execution." After only four Members of the Court voted to grant that application the Governor of Virginia granted petitioner a reprieve to afford us the opportunity to give the petition careful consideration. "I do not dissent from the Court's decision to deny certiorari. I do, however, remain firmly convinced that no State should be allowed to foreshorten this Court's orderly review of federal constitutional claims of first-time habeas petitioners by executing prisoners before that review can be completed." "Both the interest in avoiding irreversible error in capital cases, and the interest in the efficient management of our docket, would be served by a routine practice of staying all executions scheduled in advance of the completion of our review of the denial of a capital defendant's first application for a federal writ of habeas corpus."

INTERESTING CRIMINAL LAW CERTS GRANTED FOR NEXT TERM

1. Chambers v. U.S., No. 06-11206, from 473 F3d 724 (7th Cir. 2007): Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

2. Negusie v. Mukasey, No. 07-499 (set for argument on Oct. 8, 2008), from 231 Fed. Appx 325 (5th Cir. 2007) (unpublished): Whether the "persecutor exception" under INA § 208(b)(2)(A), 8 U.S.C. § 1158(b) (2)(A) prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution?

3. Herring v. U.S., No. 07-513 (set for argument on Oct. 7, 2008), from 492 F. 3d 1212 (11th Cir. 2007): Whether the Fourth Amendment requires evidence found during a search

incident to an arrest to be suppressed, when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent?

4. Arizona v. Gant, No. 07-542 (set for argument on Oct. 7, 2008), from 216 Ariz. 1 (Az. 2007): Did the Arizona Supreme Court effectively "overrule" *New York v. Belton* by requiring in each case that the State prove after-the-fact that inherent dangers actually existed at the time of the warrantless search of an automobile's passenger compartment incident to the arrest of a vehicle's recent occupant?

5. Chrones v. Pulido, No. 07-544 (set for argument on Oct. 15, 2008), from 487 F3d 669 (9th Cir. 2007): Did the Ninth Circuit fail to conform to "clearly established" Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be "structural error" requiring reversal because the jury might have relied on it?

6. Melendez-Diaz v. Massachusetts, No. 07-591, from 870 N.E.2d 676 (Mass. App. Ct. 2007)(unpublished): Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

7. U.S. v. Hayes, No. 07-608, from 482 F3d 749 (4th Cir. 2007): Whether, to qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A), an offense must have as an element a domestic relationship between the offender and the victim.

8. Ministry of Defense of Iran v. Elahi, No. 07-615, from 495 F3d 1024 (9th Cir. 2007): Is an attachment against foreign sovereign property permissible when that property is "at issue in claims against the United States before an international tribunal," and that property is not a "blocked asset," pursuant to the terms of the 2000 Victims of Trafficking and Violence Protection Act and the 2002 Terrorism Risk Insurance Act?

9. Pearson, Et Al v. Callahan, No. 07-751 (set for argument on Oct. 14, 2008), from 494 F3d 891 (10th Cir. 2007): Does the "consent once removed" exception to the Fourth Amendment warrant requirement authorize police officers to enter a home without a warrant immediately after an undercover informant buys drugs inside?

10. Waddington v. Sarausad, No. 07-772 (set for argument on Oct. 15, 2008), from 479 F3d 671 (9th Cir. 2007): Two questions: First, in reviewing a due process challenge to jury instructions brought under 28 U.S.C. § 2254, must the federal courts accept the state court determination that the instructions fully and correctly set out state law governing accomplice liability? Second, where the accomplice liability instructions correctly set forth state law, is it an unreasonable application of clearly established federal law to conclude there was no reasonable likelihood that the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all the elements of the crime?

11. Van De Kamp v. Goldstein, No. 07-854, from 481 F3d 1170 (9th Cir. 2007): 1) Where absolute immunity shields an individual prosecutor's decisions regarding the disclosure of informant information in compliance with Brady v. Maryland, 373 U.S. 83 (1963) and Giglio

v. United States, 405 U.S. 150 (1972) made in the course of preparing for the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such informant information for all cases prosecuted by his or her agency? 2) Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning, and overseeing training and supervision of, individual prosecutors' compliance with Brady and Giglio in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under Imbler v. Pachtman, 424 U.S. 409, 430 (1976)?

12. Oregon v. ICE, No. 07-901 (set for argument on Oct. 15, 2008), from 170 P3d 1049 (Or. 2007): Whether the Sixth Amendment, as construed in Apprendi and Blakely, is violated by the imposition of consecutive sentences based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

13. Ashcroft v. Iqbal, No. 07-1015, from 490 F3d 143 (2nd Cir. 2007): 1. Whether a conclusory allegation that a cabinet- level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under Bivens. 2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

14. Cone v. Bell, No. 07-1114, from 492 F3d 743 (6th Cir. 2007): Whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of Brady, which encompasses two sub-questions: 1. Is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts? 2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

15. Arizona v. Johnson, No. 07-1122, from 170 P3d 667 (Ariz. Ct. App. 2007): In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

16. Bell v. Kelly, No. 07-1223, from 2008 WL 59946 (4th Cir. 2008)(unpublished): 1. Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing? 2. Did the Fourth Circuit err when, in conflict with decisions of several courts of appeals and state supreme courts, it categorically discounted the weight of mitigating evidence for Strickland prejudice purposes whenever the evidence could also have aggravating aspects? 3. Does Virginia's use and/or manner of administration of sodium thiopental,

pancuronium bromide, and potassium chloride, individually or together, as a method of execution by lethal injection, violate the Cruel and Unusual Punishment Clause?

17. Knowles v. Mirzayance, No. 07-1315 (set for argument in Jan. 2009): Whether the defendant's lawyer's recommendation to withdraw an insanity plea constituted ineffective assistance of counsel for purposes of federal habeas law.

18. Harbson v. Bell, No. 07-8521, from 503 F3d 566 (6th Cir. 2007): 1. Does 18 U.S.C. §3599(a)(2) and (e) (recodifying verbatim former 21 U.S.C. §848(q) (4)(B)and (q) (8)), permit federally-funded habeas counsel to represent a condemned inmate in state clemency proceedings when the state has denied state-funded counsel for that purpose? 2. Is a certificate of appealability required to appeal an order denying a request for federally-funded counsel under 18 U.S.C. §3599(a)(2) and (e)?

19. Haywood v. Drown, No. 07-10374, from 9 N.Y.3d 481 (2007): Whether a state's withdrawal of jurisdiction over certain damages claims against state corrections employees — from state courts of general jurisdiction — may be constitutionally applied to exclude federal claims under Section 1983, especially when, as here, the state legislature withdrew jurisdiction because it concluded that permitting such lawsuits is bad policy?

Who Wrote What in OT 2007-2008

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

ROBERTS
Munaf
Medellin
Baez
Rothgery
Danforth
Boumediene

STEVENS
Gall
Irizarry
Ressam
Williams
Baez
Santos
Medellin
Wright
Heller
Stonridge

KENNEDY
Boumediene
Kennedy v. La.
Stoneridge
Gonzalez
Dada
Ali

SCALIA
Heller
Williams
Santos
Va. v. Moore
Giles
Baez
Gonzalez
Begay
Gall
Kimbrough
Ind. v. Edwards
Boumediene
Dada

THOMAS
Regalado-Cuellar
Bridge
Sprint
Ali
Giles
Baez
Irizarry
Ressam
Rothgery
Snyder
Gall
Kimbrough
Gonzalez

SOUTER
Rothgery
Watson
Boulware
Giles
Gall
Boumediene
Munaf
Williams
Rodriguez

GINSBURG
Burgess
Logan
Kimbrough
Greenlaw
Va. v. Moore
Watson
Baez

BREYER
Begay
Ind. v. Edwards
Danforth
Heller
Giles
Baez
Greenlaw
Irizarry
Santos
Ressam
Medellin
Ali

ALITO
Snyder
Rodriguez
Allison
Giles
Baez
Regalado-Cuellar
Rothgery
Kimbrough
Greenlaw
Santos
Begay
Dada
Kennedy v. La

Per Curiam opinions: **Allen**; **Wright**; **Arave** (all habeas, summary reversals).