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The U.S. Supreme Court's October 2007 Term had a substantial and notable criminal docket. There were very significant Second, Sixth, and Eighth Amendment decisions as well as important rulings relating to basic habeas corpus principles and federal statutes. This article provides a selected overview of the Term with a heavy emphasis on those cases that may have the greatest impact upon the states. The article also suggests some questions left open by the Court's opinions and provides some preliminary indications of how several decisions are being received in state and federal courts. It concludes with a preview of some cases to watch in the Court's current Term.

SECOND AMENDMENT

In *District of Columbia v. Heller*,[1] possibly the most significant criminal decision of the October 2007 Term, the Court held that the Second Amendment confers an individual right to keep and bear arms. Respondent Heller, a law-enforcement officer, sought to enjoin the District of Columbia from enforcing its restrictive gun laws. The District of Columbia essentially prohibited possession of handguns. It was a crime to carry an unregistered firearm, and the registration of handguns was generally prohibited. There were additional restrictions on keeping lawfully owned firearms loaded or without a trigger lock; the law basically required lawfully owned firearms to be immediately inoperable. Heller lost in federal district court, but the D.C. Circuit reversed, finding that the Second Amendment protects an individual's right to possess firearms and that the District's laws violated that right.

The Supreme Court affirmed in a 5-4 opinion authored by Justice Scalia. The majority opinion begins with an analysis of the text and history of the Second Amendment. The amendment contains an operative clause and a prefatory clause. The Court found that the operative clause – "the right of the people to keep and bear Arms, shall not be infringed" – "guarantee[s] the individual right to possess and carry weapons in case of confrontation." The prefatory clause – "A well regulated Militia, being necessary to the security of a free State . . ." – fits with the operative clause and does not restrict the right to possess and carry weapons to members of an organized militia. So cast, the amendment protects "the inherent right of self-defense" and extends to the home, "where the need for defense of self, family, and property is most acute." The majority also found that its construction of the Second Amendment was consistent with interpretations of that provision from the period after ratification through the end of the 19th century. The justices characterized the 1939 case of *United States v. Miller*,[2] which found no protected right to transport a sawed-off shotgun, as turning on the lack of a relationship between that weapon and the types of arms that a modern militia might use, rather than on the fact that the defendants in the case were not themselves part of any organized militia. Finally, the Court's opinion makes clear that the Second Amendment does not prohibit restrictions on the possession of firearms by felons and people who are mentally ill, laws prohibiting carrying firearms in places such as schools and government buildings, statutes placing conditions and qualifications on the commercial sale of firearms, and restrictions on "dangerous and unusual weapons."

The four dissenting justices disagreed with the majority's view of the text and history of the Second Amendment and would hold that legislatures can regulate the civilian use of firearms as long as they do not interfere with the preservation of a well-regulated militia. In his dissent, Justice Breyer also questioned how courts will determine whether a particular firearm regulation is consistent with the amendment and which constitutional standard courts will use.

Going forward, one might expect challenges to registration laws that erect substantial barriers to possession of firearms as well as challenges to laws that require weapons to be kept unloaded or to have trigger locks or other devices that render weapons immediately inoperable. These, of course, were the restrictions struck down in *Heller*. We should also expect to see some testing of the question of what other restrictions are reasonable post-*Heller* and some difficult issues about whether particular types of weapons are unusual or usual, and thus within the scope of the Second Amendment's protections. In the first three months following *Heller*, courts have upheld laws prohibiting possession of firearms by felons,[3] by individuals

Footnotes

1. 128 S.Ct. 2783 (2008).
2. 307 U.S. 174 (1939).
3. *See* State v. Rosch, No. 59703-5-I, 2008 Wash. App. LEXIS 2207 (Wash. Ct. App. Sept. 8, 2008) (unpublished decision); United States v. Brunson, No. 07-4962, 2008 U.S. App. LEXIS 19456 (4th Cir. Sept. 11, 2008) (unpublished opinion); Reynolds v. Sherrod, No. 08-cv-506-JPG, 2008 U.S. Dist. LEXIS 60456 (S.D.Ill. Aug 08, 2008); United States v. Robinson, No. 07-CR-202, 2008 U.S. Dist. LEXIS 60070 (E.D. Wisc. July 23, 2008); United States v. Singletary, No. 5:08-CR-12(HL), 2008 U.S. Dist. LEXIS 61012 (M.D. Ga. Aug. 11, 2008). At least one court has rejected a claim that such a prohibition is unconstitutional when the predicate felony is not for a crime of violence. *See* United States v. Westry, No. 08-20237, 2008 WL 4225541 (E.D. Mich. Sept .9, 2008).

convicted of misdemeanor crimes involving domestic violence,[4] and by people subject to restraining orders.[5] Courts have likewise sustained restrictions on the possession of firearms in particular locations (or outside of the home)[6] and laws relating to sawed-off shotguns or unusual weapons.[7] There is also the question, which has been raised in the briefing in at least one case, whether the Second Amendment should be incorporated and applied to the states through the Fourteenth Amendment.[8]

FOURTH AMENDMENT

The Court issued only one Fourth Amendment opinion during the 2007 Term; it addressed the relevance of state law in determining the reasonableness of an arrest. The current Term has a much more substantial search-and-seizure docket, as noted at the end of this article.

The Respondent in *Virginia v. Moore*[9] was arrested for driving on a suspended license, a misdemeanor under Virginia law. A search incident to the arrest turned up cocaine and cash, and Moore was subsequently charged with a drug offense. He moved to suppress the evidence, pointing out that Virginia law does not generally permit an officer to arrest a defendant for driving on a suspended license. The Virginia Supreme Court ruled that the search violated the Fourth Amendment since the officer should have cited Moore instead of arresting him. The U.S. Supreme Court unanimously reversed. In an opinion by Justice Scalia, the Court found that what is reasonable under the Fourth Amendment is not determined by state-law restrictions on searches and seizures. If a state such as Virginia protects individual privacy more than the Fourth Amendment requires, a defendant must look to state law for a potential remedy rather than assert that suppression is required under the Fourth Amendment's exclusionary rule. Concurring, Justice Ginsburg emphasized that Virginia law attaches only limited consequences to a police officer's failure to follow the Commonwealth's summons-only instruction.

Moore has thus far been cited to turn aside arguments that officers who allegedly arrested suspects in violation of state law have also violated the Fourth Amendment.[10] Several federal courts have relied on *Moore* to overcome Fourth Amendment objections when state officers have arrested individuals while acting outside of the officers' respective jurisdictions.[11] A federal court of appeals extended *Moore* to a case where a search warrant was issued by a state court judge who allegedly lacked authority to authorize a search outside of his county; a split Sixth Circuit upheld the admission of evidence from the search in a federal prosecution, albeit in an unpublished opinion.[12]

Several federal courts have relied on Moore to overcome Fourth Amendment objections when state officers have arrested individuals while acting outside of [their] jurisdictions.

SIXTH AMENDMENT

This past year, the Court handed down several right-to-counsel opinions with significant implications for trial courts. The justices also tackled several important issues relating to the *Crawford v. Washington*[13] line of Confrontation Clause cases. One of the Term's *Crawford* decisions interpreted the "forfeiture by wrongdoing" doctrine. The other *Crawford* case concerned retroactivity rather than the contours of the Confrontation Clause itself.

Right to Counsel

The most notable right-to-counsel decision of the Term was

4. *See* United States v. Booker, No. CR-08-19-B-W, 2008 U.S. Dist. LEXIS 61464 (D. Me. Aug. 11, 2008); United States v. White, Crim. No. 07-361-WS, 2008 U.S. Dist. LEXIS 60115 (S.D. Ala. Aug. 6, 2008).
5. *See* United States v. Knight, Crim. No. 07-127-P-H, 2008 WL 4097410 (D. Me. Sept. 4, 2008).
6. *See* People v. Lynch, 2008 N.Y. Misc. LEXIS 4587 (N.Y. Sup. Ct. July 16, 2008) (outside home); United States v. Dorosan, Crim. No. 08-042, 2008 U.S. Dist. LEXIS 51547 (E.D. La. July 7, 2008) (post office); United States v. Hall, Crim. No. 2:08-6, 2008 U.S. Dist. LEXIS 29705 (S.D. W. Va., Apr. 10, 2008) (concealed weapon outside of the home); United States v. Walters, Crim. No. 2008-31, 2008 U.S. Dist. LEXIS 53455 (D.V.I. July 15, 2008) (within 1,000 feet of a school). For an interesting post-conviction challenge to a lengthy federal sentence (based on *Heller*), *see* Memorandum in Support of Motion for Partial Summary Judgment to Vacate Portion of Sentence Pursuant to 28 U.S.C. § 2255, in Angelos v. United States, No. 2:07-cv-936-TC (D. Utah), filed Sept. 15, 2008.
7. *See* United States v. Fincher, 538 F.3d 868 (8th Cir. 2008) (machine gun and sawed-off shotgun); Mullenix v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, No. 5:07-CV-154-D, 2008 U.S. Dist. LEXIS 51059 (E.D.N.C. July 2, 2008) (reproduction of World War II-era machine gun); United States v. Lewis, Crim. No. 2008-21, 2008 U.S. Dist. LEXIS 51652 (D.V.I. July 2, 2008) (firearm with obliterated serial number).
8. The issue has been raised in a pending case, Nordyke v. King, No. 07-15763 (9th Cir.).
9. 128 S.Ct. 1598 (2008).
10. *See* State v. Logan, No. 07-CA-56, 2008 Ohio App. LEXIS 2489 (Ohio Ct. App. June 16, 2008); United States v. Lopez, No. 07-51037, 2008 U.S. App. LEXIS 14256 (5th Cir. July 7, 2008) (unpublished decision).
11. *See* Rose v. City of Mulberry, Arkansas, 533 F.3d 678 (8th Cir. 2008); United States v. Gonzales, 535 F.3d 1174 (10th Cir. 2008); United States v. Wahl, No. 1:07cr18-SPM, 2008 U.S. Dist. LEXIS 43138 (N.D. Fla. May 30, 2008); *see also* United States v. Strasnick, No. 08-PO-224 JLA, 2008 U.S. Dist. LEXIS 45353 (D. Mass. June 10, 2008) (no Fourth Amendment violation in arrest made by federal officer, where officer had probable cause but no statutory authority to arrest); United States v. Wolf, No. CR. 07-30102-01-KES, 2008 U.S. Dist. LEXIS 62190 (D.S.D. Aug. 11, 2008) (no Fourth Amendment violation where tribal officers were allegedly not properly commissioned).
12. *See* United States v. Franklin, No. 06-6499, 2008 U.S. App. LEXIS 14080 (6th Cir. July 1, 2008) (unpublished decision).
13. 541 U.S. 36 (2004).

Rothgery is an important case on the question of when the Sixth Amendment right to counsel attaches.

Rothgery v. Gillespie County, Texas,[14] which spoke to the point at which the Sixth Amendment attaches. The Petitioner was arrested on a charge of being a felon in possession of a firearm after a background check erroneously showed a prior conviction for a felony. Officers took Rothgery before a magistrate, who made a probable-cause determination and set bail. Rothgery posted bail and was released. He had no money for counsel and made several oral and written requests for the appointment of a lawyer, which went unheeded. Rothgery was indicted almost six months later and rearrested; he could not post a higher bail amount and he was held in jail for three weeks. Counsel was eventually appointed. The lawyer obtained Rothgery's release on bail and gathered paperwork showing that Rothgery in fact had no prior felony conviction. The charges were then dismissed. Rothgery brought a federal civil rights action asserting he would not have been rearrested and jailed for three weeks had the county provided counsel within a reasonable period of time following his initial arrest and appearance in court. The district court granted summary judgment to the county, and the Fifth Circuit affirmed. In an 8-1 decision authored by Justice Souter, the Supreme Court reversed.

The majority opinion notes that the Court previously pegged commencement of the Sixth Amendment right to counsel to initiation of adversary judicial criminal proceedings, whether by way of a formal charge, preliminary hearing, indictment, information, or arraignment. The county argued that the right to counsel did not attach at the initial appearance before the magistrate, since (among other things) county prosecutors were neither present nor had yet made an affirmative decision to prosecute. The Court rejected the county's argument. The opinion notes that the overwhelming consensus is that the first formal proceeding is the point of attachment. The federal practice (including in the District of Columbia) and the practice in 43 states is to take the first step toward appointment of counsel before, at, or shortly after the initial appearance. About seven states may delay appointment until some significant time after the initial appearance; though the practice in those states is not entirely clear, the Court stated that there is no justification for the minority practice of not appointing counsel on the heels of the first appearance. Once the right to counsel has attached, an accused is at least entitled to the assistance of counsel during any "critical stage" of the proceeding. In a part of the opinion that commanded five votes, Justice Souter concluded that "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." A concurring opinion by Justice Alito (joined by Chief Justice Roberts and Justice Scalia) argues that counsel need not be appointed at any particular time, only so far in advance of trial or any pretrial "critical stage" as to guarantee effective assistance at trial. The matter was remanded to determine whether the delay in appointing counsel prejudiced Rothgery's Sixth Amendment rights.

Rothgery is an important case on the question of when the Sixth Amendment right to counsel attaches. Although the Court left significant questions open—most notably, the justices declined to state any standard for when a delay in appointment violates the Sixth Amendment—the decision may lead a number of jurisdictions to review their practices. As one example, in July 2008, the Maryland Court of Appeals decided to bypass Maryland's intermediate appellate court and directly review the question (raised in a class action lawsuit) whether indigent defendants have a right to counsel at initial bail proceedings.[15]

Indiana v. Edwards,[16] another significant Sixth Amendment case, concerns the interplay of mental illness and the right to self-representation. Respondent Edwards was charged with attempted murder and other offenses. He was committed to a mental-health facility after being found unfit to stand trial. He was eventually found fit and was tried almost six years after his arrest. Just before trial, Edwards moved to represent himself. The judge denied the motion, and he was tried with counsel. The jury convicted Edwards of several offenses but failed to reach a verdict on the charges of attempted murder and battery. Before his retrial, Edwards again asked to represent himself because, among other things, he and his lawyer disagreed on the defense to put forward. The trial court found that Edwards was competent to stand trial with counsel but was not competent to defend himself. Represented by counsel, Edwards was tried and convicted. The Indiana appellate courts found that Edwards was denied his right of self-representation under *Faretta v. California*.[17] The U.S. Supreme Court vacated the Indiana Supreme Court's judgment in a 7-2 decision authored by Justice Breyer.

The majority opinion states that "the Constitution permits judges to take a realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." Further, "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States*[18]] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." The majority found room for this holding by distinguishing the Court's earlier decision in *Godinez v. Moran*,[19] which assessed competency to waive counsel under the same standard as competency to stand trial. However, Godinez sought to waive his right to counsel and plead guilty

14. 128 S.Ct. 2578 (2008).
15. *See* Richmond v. District Court, 952 A.2d 224 (Md. 2008) (granting petition for writ of certiorari on the court's own motion). Maryland is not one of the "minority" jurisdictions referenced in *Rothgery*, but the Supreme Court decision may have influenced this action by Maryland's highest court. *Richmond* is set for argument in January 2009
16. 128 S.Ct. 2379 (2008).
17. 422 U.S. 806 (1975).
18. 362 U.S. 402 (1960) (per curiam).
19. 509 U.S. 389 (1993).

whereas Edwards intended to waive counsel and proceed to trial on his own. The Court in *Edwards* said that a different standard for competency to waive counsel should apply when a defendant intends to go to trial but declined the State's request to promulgate a specific standard. Rather, the majority indicated that trial judges "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individual circumstances of a particular defendant."

The decision drew a forceful dissent by Justice Scalia and joined by Justice Thomas. The dissenters criticized the majority for finding that "a State's view of fairness (or of other values) permits it to strip the defendant" of the right to present his or her own defense. Justice Scalia wrote that the decision to waive counsel usually harms the defendant's case, but the choice is respected because it is one that belongs to the accused. The dissenters also called the majority's holding "extraordinarily vague," noting that the Court did not state a specific standard or even accept Indiana's position that self-representation could be denied if an accused cannot communicate coherently with a court or a jury.

The Court's opinion raises a number of questions. One is the extent to which *Edwards* opens a crack in the *Faretta* doctrine. In previous cases, the Court was fairly adamant that judges could not deny a request for self-representation because an accused was unskilled in presenting a case or because the defense was likely to become a train wreck. This decision leaves room for a trial court to deny a request to waive counsel based upon an assessment of the defendant's ability to make reasoned choices with respect to which defense to present or some other aspect of the defense case, so long as such the assessment is made as part of a competency determination. And it is unclear just how much discretion has now been left to trial judges, though that discretion may be quite substantial in light of the lack of a specific competency standard and the majority's suggestion of deference to trial court determinations.[20]

Confrontation Clause/Retroactivity

The Court also significantly limited an exception to the requirement of confrontation. In *Giles v. California*,[21] the defendant was convicted of first-degree murder following a trial in which the jury was allowed to consider the decedent's prior statement to a police officer. About three weeks before she was killed, the victim reported that the defendant choked and threatened her. Her out-of-court statement was admitted because it was deemed trustworthy, and she was of course unavailable to testify. Giles's conviction was affirmed by the California appellate courts. In a 6-3 ruling, the U.S. Supreme Court vacated the decision. As the justices previously held in *Crawford v. Washington*, the Sixth Amendment's Confrontation Clause requires that a witness who has made a previous testimonial statement be present at trial for cross-examination. If the witness is unavailable, prior testimony will be introduced only if the accused had an earlier opportunity to cross-examine the declarant. The Court had previously noted two exceptions to this requirement of a previous opportunity to confront the declarant: dying declarations and "forfeiture by wrongdoing," meaning the introduction of a prior statement by a witness who was detained or kept away from the trial by the defendant. *Giles* provided the Court with the opportunity to address the contours of the "forfeiture by wrongdoing" exception.

This decision leaves room for a trial court to deny a request to waive counsel based upon an assessment of the defendant's ability to make reasoned choices . . . so long as the assessment is made as part of a competency determination.

The majority opinion, authored by Justice Scalia, concludes that the exception should only be applied "when the defendant engaged in conduct *designed* to prevent the witness from testifying." The majority drew support from the language of the exception at common law, the absence of common-law cases that admitted prior statements on a forfeiture theory where there was no conduct designed to prevent a witness from testifying, and especially the common law's exclusion of unconfronted inculpatory testimony by murder victims in the many cases in which the defendant was on trial for killing the victims but was not shown to have done so to prevent the victims from testifying. The Court vacated and remanded so that the California courts could consider the defendant's intent on remand.

Dissenting, Justice Breyer (joined by Justices Stevens and Kennedy) argued that the forfeiture-by-wrongdoing exception was (and thus still should be) much broader than held by the majority. He also asserted that because the defendant knew that killing the decedent would keep her from testifying, that knowledge would be sufficient to demonstrate the intent that law ordinarily demands. The three dissenters would establish a fairly capacious test of intent, rather than require a specific showing of motive or purpose.

Several courts have applied *Giles* in the few months since it was decided. The Missouri Supreme Court and Tennessee Court of Criminal Appeals have affirmed convictions, finding that the exception applied and noting its particular relevance in cases involving domestic violence.[22] Two courts have made clear that the standard of proof to demonstrate forfeiture is a

20. There have been only a handful of reported cases applying *Edwards* in the three months since the decision issued–not enough cases to discern any trend. However, one case to note is United States v. Duncan, No. CR-07-23-N-EJL, 2008 U.S. Dist. LEXIS 57151 (N.D. Idaho July 29, 2008) where the court applied the enhanced standard for competency to a defendant who pleaded guilty but who sought to represent himself at the penalty phase of a federal capital case. The court found that Duncan met that standard and permitted him to waive his right to counsel.
21. 128 S.Ct. 2678 (2008).
22. *See* State v. McLaughlin, No. SC88181, 2008 Mo. LEXIS 153 (Mo. Aug. 26, 2008); State v. Milan, No. W2006-02606-CCA-MR3-CD, 2008 Tenn. Crim. App. LEXIS 757 (Tenn. Ct. Crim. App. Sept. 26, 2008).

The decision is an expression of the Supreme Court's continued concern with discrimination in jury selection and an indication of the Court's willingness to review such cases.

preponderance of the evidence.[23]

Danforth v. Minnesota[24] is another *Crawford*-related case, but it addresses the power of state courts to apply a new decision retroactively on collateral review; *Danforth* does not concern the substantive reach of the Confrontation Clause. It is significant to underscore the greater available authority of the states (as opposed to federal habeas courts) to apply new rulings retroactively.

The Petitioner in *Danforth* was convicted following a trial in which the recorded statement of a six-year-old child was introduced into evidence against him. His conviction was made final before the Supreme Court decided *Crawford*. Although the Supreme Court previously determined that *Crawford* established a "new rule" that would not be retroactively applied in federal habeas corpus proceedings[25] under the principles of *Teague v. Lane*,[26] Danforth argued that the federal courts' *Teague* framework should not prevent state courts from developing more generous rules of retroactivity. In a 7-2 opinion authored by Justice Stevens, the Court agreed. *Teague*, the majority said, addressed what constitutional violations might be remedied on federal habeas corpus; it did not purport to define the scope of any new constitutional right itself. *Teague*'s general rule of nonretroactivity was also "an exercise of this Court's power to interpret the federal habeas corpus statute." For these reasons and others, the *Teague* rule limits the types of violations that will entitle someone to federal habeas corpus relief but does not affect a state court's power to grant relief for violations of new rules of constitutional law when the state is reviewing its own convictions.

EQUAL PROTECTION AND JURY SELECTION

Snyder v. Louisiana[27] is the most recent Supreme Court decision finding that a prosecutor's use of peremptory challenges violated the Fourteenth Amendment's Equal Protection Clause under the principles set forth in *Batson v. Kentucky*.[28] Five years ago, in *Miller-El v. Cockrell*,[29] the Court held that the Fifth Circuit erred in denying a certificate of appealability in a federal habeas corpus case with a *Batson* claim. When the case returned to the Court several years later in *Miller-El v. Dretke*,[30] the justices determined that the prosecution discriminated on the basis of race in the exercise of peremptory challenges. In so ruling, the Court compared the prosecution's treatment of white and nonwhite jurors. In *Snyder*, the majority again applied a comparative analysis and gave greater insight into the trial judge's role when there is a *Batson* objection.

During jury selection in *Snyder*, 36 prospective jurors survived challenges for cause. Five of the 36 were black. All five were eliminated by the prosecution through the use of peremptory challenges. When Snyder's case reached the Supreme Court, the justices focused on the prosecution's explanation for two of the challenges. *Batson* sets forth a three-step process to adjudicate a claim that a peremptory challenge was based on race-purposeful discrimination: First, a party must make a prima facie showing that the challenge was based on race. Second, if that showing has been made, the party that exercised the peremptory challenge must offer a race-neutral reason for challenging the juror. Third, in light of the parties' submissions, the trial court must decide whether the objecting party has shown purposeful discrimination. *Snyder*, like *Miller-El II*, addressed *Batson*'s third step.

In a 7-2 decision authored by Justice Alito, the Court found that the prosecution's reasons for striking a juror were not shown to be race-neutral. The prosecution offered two reasons for challenging a black juror. According to the prosecutor, the juror looked very nervous. In addition, he was a student teacher who might miss classes, and the prosecution expressed concerns about whether the juror might come back with a lesser verdict due to a need to get home quickly. The trial judge denied defense counsel's *Batson* objection, saying only that "I'm going to allow the challenge." The trial court did not make any findings about whether the juror in fact appeared nervous or whether the prosecutor was credible. Further, the case was tried in one week, and it seemed clear that this juror would be able to attend at least a weeklong trial. And applying a comparative analysis, it appeared that the prosecution did not express similar concerns with respect to white jurors who had time constraints that were at least as serious as those of the black juror. The judgment was reversed despite the dissenting opinion of Justices Scalia and Thomas, who criticized the majority for second-guessing the fact-based decisions of the Louisiana courts.

There are a few points to note. The decision is an expression of the Supreme Court's continued concern with discrimination in jury selection and an indication of the Court's willingness to review such cases. The majority opinion also provides a second recent example of comparative juror analysis in assessing the credibility of a prosecutor's race-neutral explanations. And the decision underscores the importance of a trial judge's on-the-record findings about the credibility of the prosecution's explanations. In the absence of anything in the record showing that the trial judge believed the prosecution's assertion that the challenged juror was nervous, the Supreme Court refused to presume that the judge found the offered race-neutral explanation to be credible.

23. *See* United States v. Taylor, No. 1:04-CR-160, 2008 U.S. Dist. LEXIS 68122 (E.D. Tenn. Sept. 5, 2008) (finding no forfeiture under a preponderance-of-evidence standard); *Milan*, *supra* note 22 (noting the standard, and affirming a finding of forfeiture).
24. 128 S.Ct. 1029 (2008).
25. Whorton v. Bockting, 549 U.S. 406 (2007).
26. 489 U.S. 288 (1989).
27. 128 S.Ct. 1203 (2008).
28. 476 U.S. 79 (1986).
29. 537 U.S. 322 (2003).
30. 545 U.S. 231 (2005).

CAPITAL PUNISHMENT

Kennedy v. Louisiana[31] was the third case in the last half-dozen years to hold that a capital sentence could not be imposed on certain offenders or for certain offenses. In *Atkins v. Virginia*[32] and *Roper v. Simmons*,[33] the justices ruled that the execution of mentally retarded persons and juveniles violated the Eighth and Fourteenth Amendments. In *Kennedy*, a 5-4 decision, the majority ruled that a death sentence for someone who raped, but did not kill, a child and who did not intend to assist another in killing the child also violates these amendments.

The majority opinion, written by Justice Kennedy, follows the general approach of *Atkins* and *Roper* to gauge whether there is a national consensus against capital punishment for the crime of child rape. In assessing whether a death sentence for the crime is excessive or cruel and unusual, the justices looked for objective indicia of societal standards and then analyzed whether the sentence was disproportionate. The majority determined that of the 37 jurisdictions (six states plus the federal government) that have the death penalty, only six jurisdictions authorize that sanction for rape of a child. "The evidence of a national consensus with respect to the death penalty for child rapists . . . shows divided opinion but, on balance, an opinion against it." Further, Louisiana is the only state since 1964 to have sentenced an individual to death for the crime of child rape. No individual has been executed for the rape of either an adult or child since 1964, nor has anyone been executed for any non-homicide offense since 1963. The majority also turned aside the claim that jurisdictions may not have decided to authorize the death penalty for child rape because states may have misinterpreted an earlier ruling (which prohibited the death penalty for adult rape) as applying to child victims as well. Then the justices applied their own judgment and determined that in light of the legitimate purposes of punishment, "the death penalty is not a proportional punishment for rape of a child." In an opinion written by Justice Alito, four justices dissented, taking issue with virtually every aspect of the majority opinion.

After the Court issued its ruling in June 2008, the State sought rehearing. As it turns out, the majority was not correct to assert categorically that the federal government does not authorize the death penalty for the crime of child rape. The military death penalty for rape has been in place for more than a century. The rehearing petition was denied, though Justices Thomas and Alito would have granted the petition. A statement by the five majority justices argues that "authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context."[34] Justices Scalia and the Chief Justice concurred in the denial of rehearing, though they asserted that the new evidence destroys the majority's claim that it was discerning a national consensus and not just giving effect to the majority justices' own preferences.[35]

Baze v. Rees[36] was a much-watched challenge to the administration of Kentucky's lethal injection protocol; indeed, the case led to a de facto moratorium on executions in the United States from the day after *certiorari* was granted until the decision issued.

The Chief Justice's opinion focuses upon whether particular procedures pose a substantial risk of serious harm, which must be an objectively intolerable risk of harm.

The federal government and 35 of the 36 death-penalty states either require or permit execution by means of lethal injection. At least 30 states, including Kentucky, use the same combination of drugs in their lethal-injection protocols. The first drug, sodium thiopental, is a barbiturate sedative that induces unconsciousness. The second drug, pancuronium bromide, is a paralytic agent. The third drug is potassium chloride, which induces cardiac arrest. Although it was conceded that if the three-drug combination was properly administered there would be a humane death, the Petitioners argued that there was a significant risk that Kentucky's procedures would not be properly followed. In particular, the Petitioners alleged that the first drug (the barbiturate) is critical and must be provided in sufficient quantity to prevent severe pain and conscious suffocation when the other chemicals are administered. As part of their argument, the Petitioners noted that veterinarians are prohibited from using the second drug (the paralytic agent) in euthanizing animals in the overwhelming majority of states. By a 7-2 vote, but one which failed to produce a majority opinion, the Court found that Kentucky's administration of its lethal-injection protocol does not contravene the Eighth Amendment. It is difficult to derive a clear rule from the separate opinions in this case. Perhaps the easiest way to understand the outcome is to compare the three main substantive opinions, and then review the separate opinions of Justices Alito, Stevens, and Breyer.

The judgment of the Court was announced by Chief Justice Roberts in an opinion joined by Justices Kennedy and Alito. The Chief Justice's opinion focuses upon whether particular procedures pose a substantial risk of serious harm, which must be an objectively intolerable risk of harm. The Chief Justice rejected the claim that simply because an execution method might result in pain, either by accident or because of an inescapable consequence of death, there is the sort of objectively intolerable risk of harm that amounts to cruel and unusual punishment in violation of the Eighth Amendment. Nor could the petitioners prevail simply by showing that there is an alternative procedure, such as a single-drug protocol (barbiturates only) that may be preferred. As the Chief Justice put it, an alternative protocol "must effectively address 'a substan-

31. 128 S.Ct. 2641 (2008).
32. 536 U.S. 304 (2002).
33. 543 U.S. 551 (2005).
34. Kennedy v. Louisiana, No. 07-343, 2008 U.S. LEXIS 5449 (Oct. 1, 2008) (Order denying rehearing, and Statement of Justice Kennedy respecting the denial of rehearing).
35. Kennedy v. Louisiana, No. 07-343, 2008 U.S. LEXIS 5448 (Oct. 1, 2008) (Statement of Justice Scalia respecting the denial of rehearing).
36. 128 S.Ct. 1520 (2008).

[D]espite the Court's failure to promulgage a single standard, seven justices found that the administration of Kentucky's execution protocol did not violate the Eighth Amendment on the record in this case.

tial risk of serious harm.'" The alternative procedure "must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such alternative in the face of these documented advantages, without a legitimate penological justification . . . , then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." Applying this test, the Chief Justice found on this record that the Petitioners had not shown that the risk of an inadequate dose of the first drug, as it is administered in Kentucky, is substantial.

Justices Thomas and Scalia concurred but rejected the Chief Justice's formulation. As set forth in Justice Thomas's concurrence, the two rejected "as both unprecedented and unworkable" any standard that might require courts to weigh the relative advantages and disadvantages of different methods of execution or lethal-injection protocols. In their view, "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." Thus, any comparative analysis "should be limited to whether the challenged method inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad." Justice Thomas also argued that "today's decision is sure to engender more litigation."

Justice Ginsburg, joined by Justice Souter, dissented. They agreed with the Petitioners and the plurality "that the degree of risk, magnitude of pain, and availability of alternatives must be considered." However, they disagreed with the Chief Justice's opinion with respect to the extent to which the "substantial risk" test "sets a fixed threshold for the first factor." Applying this more flexible test, the dissenters would remand to consider whether the failure to include additional safeguards to confirm that the inmate is unconscious after injection of the barbiturate, in combination with other elements of Kentucky's protocol, creates an unacceptable and readily avoidable risk of inflicting severe and unnecessary pain.

Justice Breyer concurred. He agreed with Justice Ginsburg as to how a court should review this type of Eighth Amendment claim. However, he could not find in the record or in the literature sufficient evidence to establish that Kentucky's execution protocol poses the type of significant and unnecessary risk of inflicting severe pain that the Petitioners asserted. Justice Stevens concurred, finding no Eighth Amendment violation on this record under the test set forth in either the Chief Justice's opinion or Justice Ginsburg's dissent. He used this as an occasion, however, to announce his general view that the death penalty in the United States is now patently excessive and cruel and unusual punishment in violation of the Eighth Amendment. But being bound by precedent, he joined the Court's judgment. Justice Scalia wrote separately to respond to Justice Stevens. Justice Alito wrote his own concurrence to respond to the suggestion by Justice Thomas that the case would result in greater litigation.

From the various opinions, there were three votes for the test set forth in Chief Justice Roberts's opinion, three votes for the dissent's more flexible test, and two votes for a test that essentially compares modern protocols to the methods of executions conducted throughout history. Ordinarily, when five justices do not agree on the rationale for a decision, the views of the members who decide the case on the narrowest grounds represent the holding of the Court. There is an argument that *Baze* contains no controlling opinion since it is difficult to characterize any of the concurring opinions as providing a fifth vote on a narrower ground than contained in the Chief Justice's opinion. Nevertheless, despite the Court's failure to promulgate a single standard, seven justices found that the administration of Kentucky's execution protocol did not violate the Eighth Amendment on the record in this case.

In the immediate wake of the decision in *Baze*, the de facto moratorium has lifted in a number of jurisdictions with executions taking place by lethal injection in at least Florida, Georgia, Mississippi, Oklahoma, South Carolina, Texas, and Virginia. But because *Baze* reviewed only the specific record of Kentucky's procedures, litigation has continued as judges apply *Baze* to evidence of the administration of lethal-injection protocols in other states.[37] Most courts seem to treat Chief Justice Roberts's plurality opinion as controlling.[38] Courts have tended to dispose of lethal-injection challenges by comparing their jurisdiction's protocol with the evidence discussed in *Baze* about the administration of Kentucky's protocol.[39]

FEDERAL CRIMINAL STATUTES AND SENTENCING

The last Term produced important rulings interpreting federal criminal statutes and affecting federal sentencing. The article summarizes a few of the statutory decisions, particularly those that relate to the interplay of federal and state offenses (*Logan* and *Burgess*) or apply to common add-ons for use of weapons or explosives (*Watson* and *Ressam*). The Court's sen-

37. For an online repository of a number of judicial orders relating to lethal injection, pre- and post-dating *Baze*, see: www.lethalinjection.org.

38. *See*, *e.g.*, Bennett v. State, N0. 2006-DR-01516-SCT, 2008 Miss. LEXIS 417 (Miss. Aug. 28, 2008); Emmett v. Johnson, 532 F.3d 291(4th Cir. 2008); Jackson v. Houk, No. 3:07CV0400, 2008 U.S. Dist. LEXIS 36061 (N.D. Ohio May 1, 2008); Nooner v. Norris, No. 5:06CV00110, 2008 U.S. Dist. LEXIS 60136 (E.D. Ark. Aug. 5, 2008); *but see* Henyard v. State, Nos. SC08-222, SC08-1544, SC08-1653, 2008 Fla. LEXIS 1609 (Fla. Sept. 10, 2008) (addressing the various opinions in *Baze* and noting that the holding that Kentucky's protocol did not amount to cruel and unusual punishment was the only part of the plurality opinion upon which the majority agreed).

39. *See*, *e.g.*, State v. Bethel, No. 07AP-810, 2008 Ohio App. LEXIS 2322 (Ohio Ct. App. June 5, 2008); Ex parte Chi, 256 S.W.3d 702 (Tex. Ct. Crim. App. 2008); *Emmett*, *supra* note 38; *see also* Moeller v. Weber, Civ. 04-4200, 2008 U.S. Dist. LEXIS 36190 (D.S.D. May 2, 2008) (ordering discovery to determine whether South Dakota's lethal-injection protocol is similar to Kentucky's).

tencing decisions are significant for both state and federal prosecutions, as the Court has continued to enunciate principles that apply in construing structured sentencing schemes.

Federal Statutes

The Petitioner in *Logan v. United States*[40] was convicted of being a felon in possession of a firearm. Under the Federal Armed Career Criminal Act of 1984 (ACCA), he was given an enhanced sentence on the basis of three misdemeanor battery convictions from Wisconsin. The ACCA contains an exemption provision, providing that a prior conviction may be disregarded if it "has been expunged, or set aside," or if the defendant "has been pardoned or has had civil rights restored." Logan argued that because he never lost his civil rights as a result of the three misdemeanor convictions, they fell within the exemption provision and his federal sentence was improperly enhanced.

The Court unanimously rejected the argument in an opinion written by Justice Ginsburg. Relying upon the plain language, history, and context of the statute, the Court found that never having rights taken away was not the same as having them affirmatively restored. While the ACCA defers to a state's decision to relieve an offender from the disabling effects of a conviction, Congress did not mean to exempt instances where the offender did not lose civil rights in the first place. Thus, if a state intends to allow an individual to avoid the ACCA consequences of certain convictions, it must act affirmatively to do so.

In *Burgess v. United States*,[41] the Court resolved a conflict in the way that prior state convictions might be used to enhance a federal drug sentence. Some federal drug offenses carry mandatory minimum penalties. A 10-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A) is doubled to 20 years if a defendant has previously been convicted of a "felony drug offense." The Petitioner in *Burgess* had a prior conviction in South Carolina for possessing cocaine. The State classified the offense as a misdemeanor although it carried a maximum sentence of two years' imprisonment. Burgess claimed that the State's characterization must control, relying upon 21 U.S.C. § 802(13), which says that a "felony" is any "offense classified by applicable Federal or State law as a felony." The government countered that the controlling definition was the term "felony drug offense," described in 21 U.S.C. § 802(44) as an offense involving drugs that is "punishable by imprisonment for more than one year under the law of the United States or of a State or foreign country." The district court and court of appeals agreed with the government. The Supreme Court affirmed.

The Court unanimously ruled that the definition set forth in § 802(44) alone controls. In an opinion by Justice Ginsburg, the justices point to a number of statutory features, including that "felony drug offense" is a term of art within the statute and the specific definition should control. The Court also determined that the rule of lenity would not apply since there was no ambiguity to resolve. The specific statutory definition set forth in § 802(44) is coherent, complete, and exclusive.

Watson v. United States[42] addressed the question of whether a person who trades drugs to obtain a gun "uses" a firearm "during and in relation to . . . [a] drug trafficking crime" as prohibited by 18 U.S.C. § 924 (c) (1) (A). The Petitioner in *Watson* told a government informant that he wanted to acquire a gun. The informant suggested he could pay in narcotics. Watson met with the informant and an undercover law enforcement agent. He provided the drugs in exchange for a semiautomatic pistol. Watson was indicted for a drug offense and for "using" the pistol during and in relation to that crime. He entered a conditional plea, reserving the right to challenge the factual basis for his conviction. The court of appeals affirmed. The Supreme Court unanimously reversed.

In *Burgess v. United States*, the Court resolved a conflict in the way that prior state convictions might be used to enhance a federal drug sentence.

In an opinion by Justice Souter, the Court determined that someone who provides drugs to obtain a weapon does not "use" the weapon. Though the justices previously decided in *Smith v. United States*[43] that trading a weapon to receive drugs is the "use" of that weapon, the converse is not true. Under the Court's precedents, "use" requires active employment of a firearm. Focusing on the plain language of the statute and its context, the justices found that a person who gives drugs to receive a weapon does not actively employ or use the gun. Justice Ginsburg concurred to urge the Court to overrule *Smith*. She also wryly noted that "at least when the subject is guns," "[i]t is better to receive than to give."

Ressam v. United States[44] involved an interesting (though less common) offense and a direct link to the "war on terror." Ahmed Ressam came to the United States with explosives, planning to detonate them at the Los Angeles International Airport. He was arrested entering the country and made false statements on a customs declaration. He was convicted in federal court of a number of criminal offenses, including carrying explosives "during the commission of any [federal] felony" in violation of 18 U.S.C. § 844(h)(2). The government's theory was that Ressam had carried explosives during the commission of the felony of making false statements on a customs declaration. The court of appeals reversed his conviction on the § 844(h)(2) count, finding that the carrying of the explosives had to be in relation to the commission of the other felony, and that no such relationship was shown here. Attorney General Michael Mukasey personally argued on behalf of the government in the Supreme Court, which reversed by a vote of 8-1.

The Court's opinion, authored by Justice Stevens, provides that the plain language of the statute requires reversal. The term "during" denotes a temporal link to the other felony, but the statute contains no other qualification. The statute merely

40. 128 S.Ct. 475 (2007).
41. 128 S.Ct. 1572 (2008).
42. 128 S.Ct. 579 (2007).
43. 508 U.S. 223 (1993).
44. 128 S.Ct. 1858 (2008).

Two cases decided on the same day . . . dealt with some of the impact of making the Federal Guidelines advisory. If judges are no longer strictly bound by the Guidelines, what force do they carry?

requires that an explosive be carried contemporaneously with the commission of another felony not that it be in relation to or somehow further the commission of that felony. Although the Court was concerned during oral argument that a broad construction of the statute could lead to absurd results or give extraordinary leverage to prosecutors, the majority opinion does not address those concerns. They are reflected in the dissenting opinion of Justice Breyer, who argues that because the term "explosives" includes such commonplace materials as gasoline or fertilizer, and the category of federal felony offenses is so broad, the Court's construction may lead to strange results. From the context of the statute, he would find a requirement that the explosives be carried in relation to the other felony.

Federal Sentencing

The Court has been extraordinarily active over the last decade in reviewing the constitutionality of federal and state sentencing schemes. Some of the most important decisions in recent years include *Blakely v. Washington*[45] and *Cunningham v. California*,[46] where the justices found that sentences imposed under Washington's guidelines and California's determinate-sentencing law violate the Sixth Amendment right to trial by jury, and *United States v. Booker*,[47] where the Court essentially saved the United States Sentencing Guidelines by rendering them "effectively advisory." Two cases decided on the same day last Term dealt with some of the impact of making the Federal Guidelines advisory. If judges are no longer strictly bound by the Guidelines, what force do they carry? Must judges respect all policy determinations that are reflected in Guidelines ranges? And how do courts of appeals review sentencing decisions that substantially depart from applicable Guidelines ranges?

In *Kimbrough v. United States*,[48] the Petitioner was convicted of serious federal drug and weapons offenses. The drug crimes involved crack as well as powder cocaine; for over 20 years, federal crack-cocaine offenses have carried higher Guidelines and statutory sentences than offenses related to powder cocaine. The statutory minimum for Kimbrough's offenses was 15 years, though his guideline range was 228-270 months (19 to 22 1/2 years). The guideline range for an equivalent amount of powder cocaine would have been 97-106 months. Taking into account the much criticized distinction between crack- and powder-cocaine sentences, the district court sentenced Kimbrough to the statutory minimum of 15 years. The court of appeals vacated the sentence, but the Supreme Court reversed.

In a 7-2 decision authored by Justice Ginsburg, the Court noted that sentencing judges may vary from Guidelines ranges based upon policy considerations, including disagreement with a policy of imposing much higher sentences in crack-cocaine cases. The majority specifically rejected the government's argument that federal courts are required by Congress to respect the 100:1 ratio of amounts of powder to crack cocaine that lead to equivalent Guidelines ranges. While courts must still give "respectful consideration" to the Guidelines, they are freed from this ratio and the mandatory strictures of the Guidelines. District courts should follow the instruction in *Booker* that sentences must be imposed that are sufficient but not greater than necessary to accomplish the various goals of sentencing described in federal statutes. Justices Thomas and Alito dissented. Justice Thomas continues to disagree with the remedial holding in *Booker*. Justice Alito would require sentencing judges to give significant weight to the policy decisions in the Guidelines (including, as here, various ratios), and would thus remand for reconsideration.

Gall v. United States[49] addressed a somewhat different problem: how to review the reasonableness of a federal sentence that is substantially below the applicable Guidelines range. The Petitioner in *Gall* joined a drug conspiracy but withdrew on his own and stopped selling drugs of any kind. Gall was arrested for conspiracy several years later, after he graduated from college and found a job. He pleaded guilty. The applicable Guidelines range was 30-37 months, but the judge sentenced him to three years' probation, which the district court reasoned was sufficient but not greater than necessary to serve the statutory purposes of sentencing. The court of appeals reversed. The Supreme Court reversed the court of appeals.

In a 7-2 decision and an opinion by Justice Stevens, the majority found that the sentence was reasonable. While a previous ruling of the Supreme Court had determined that in the ordinary case a reviewing court may presume that a sentence within the Guidelines is reasonable, all sentences are reviewed under a deferential abuse-of-discretion standard. Though the extent of the difference between a particular sentence and the recommended Guidelines range is relevant, the Court rejected a rule that would require extraordinary circumstances or some specific showing to justify a sentence that is outside of the Guidelines or even outside of the Guidelines range by a particular degree.[50] The Supreme Court reversed the court of appeals because its analysis appeared to resemble *de novo* review. The circuit failed to give due deference to the sentencing court's reasoned decision that the statutory factors, on the whole, justified the sentence. As in *Kimbrough*, Justices Thomas and Alito dissented.

45. 542 U.S. 296 (2004).
46. 549 U.S. 270 (2007).
47. 543 U.S. 220 (2005).
48. 128 S.Ct. 558 (2007).
49. 128 S.Ct. 586 (2007).
50. Though *Gall* has not been discussed much in state appellate courts, for an interesting debate about the use of *Gall* as guidance, *see* People v. Smith, 754 N.W.2d 284 (Mich. 2008).

FEDERAL HABEAS CORPUS

Boumediene v. Bush[51] was one of the blockbusters of the Term. Although the ruling directly concerns detainees at Guantánamo Bay, whose cases are pending before a limited number of courts, the decision should be of interest to a wide audience. *Boumediene* is now the leading case on the Suspension Clause,[52] the scope of common-law habeas corpus, and what procedures might provide an adequate substitute for habeas corpus.

In previous rulings, the Court determined that the privilege of habeas corpus extends to detainees at Guantánamo Bay. Further, the Detainee Treatment Act of 2005 (DTA) did not remove then pending habeas corpus cases from the federal courts. In response, Congress passed the Military Commissions Act of 2006 (MCA). In *Boumediene*, a 5-4 majority found, in an opinion by Justice Kennedy, that the MCA was intended to strip pending cases from the federal courts. However, because the Act did not purport to be a formal suspension of the writ, the detainees could still challenge the legality of their confinement. The question then became whether the MCA could avoid a Suspension Clause challenge because Congress has provided adequate substitute procedures for habeas corpus.

To answer this question, the majority set out some basic principles of common-law habeas corpus. The privilege of habeas corpus "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." A habeas corpus court must have the power to order the conditional release of someone who is unlawfully detained, although release need not be the exclusive remedy and is not the appropriate remedy in every case in which the writ is granted. The majority opinion also notes that "where relief is sought from a sentence that resulted from the judgment of a court of record, as is the case in most federal habeas cases, there is considerable deference owed to the court that ordered confinement." Of course, the criminal conviction "in the usual course occurs after judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence." But where a person is detained by executive order rather than after trial and conviction in a court, "the need for collateral review is most pressing." The Court then reviewed the few previous cases finding that statutory procedures were adequate substitutes for the writ, such as the decision upholding 28 U.S.C. § 2255–the motion procedure that allows federal prisoners to challenge their convictions and sentences, and a case upholding restrictions on successive petitions under the Antiterrorism and Effective Death Penalty Act, which were found not to amount to a substantial departure from common-law habeas corpus.

The majority ruled that under these principles, and by contrast with these prior cases, the procedures afforded to detainees at Guantánamo Bay are not an adequate substitute for habeas corpus. To begin with, the administrative forum for contesting detention–the Combatant Status Review Tribunal (CSRT)–constrains a detainee's ability to rebut the factual basis for the claim that the person is an enemy combatant. There is a limited means to find or present evidence, and the detainee does not have the assistance of counsel. There is a risk inherent in any process that is closed and accusatorial, said the Court, and the risk is too significant to ignore given that the consequences of error may be detention for the duration of hostilities that could last a generation or more. In addition, the DTA affords only limited judicial review of the administrative determination. Because a reviewing court is essentially limited to the question of whether the CSRT followed appropriate and lawful standards and procedures, it cannot consider newly discovered evidence that could not have been part of the administrative record, and that evidence might be critical to a detainee's argument that he is not an enemy combatant.

To answer this question, the majority set out some basic principles of common-law habeas corpus.

In light of the CSRT process, the majority concluded that the detainees' access to the courts under the statutory review provisions of the DTA is not an adequate substitute for the writ of habeas corpus. Thus, the MCA–which would strip federal courts of the power to consider habeas petitions by these detainees–effects an unconstitutional suspension of the writ.

Four justices dissented. The dissenting opinion by Chief Justice Roberts takes on, among other points, the majority's finding that the CSRT and DTA procedures are not adequate substitutes for the writ of habeas corpus.

Though *Boumediene* directly applies to a limited number of individuals, it should stand as a cornerstone case on the meaning of the Suspension Clause, the scope of common-law habeas corpus, and on which procedures may be an adequate substitute for habeas corpus.

In *Allen v. Siebert*,[53] a much less momentous case (but one still worthy of comment), the Court granted the State's petition for a writ of certiorari and summarily reversed the court of appeals. The case is notable for its explanation of how a state's dismissal of a post-conviction petition may impact the timeliness of a subsequent federal habeas corpus petition.

Siebert filed his state post-conviction petition after the expiration of a state statute of limitations, and it was dismissed as untimely. The Antiterrorism and Effective Death Penalty Act of 1996 contains a one-year statute of limitations that is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."[54] Siebert filed a federal habeas corpus petition, which the district court dismissed as untimely. The federal court of appeals disagreed, finding that Siebert's state petition was "properly filed" because the time bar was not jurisdictional and the state courts had discretion whether to enforce it. In so ruling, the circuit distinguished a prior case from the Court in which a petition was not found to be "properly filed"

51. 128 S.Ct. 2229 (2008).
52. U.S. Const., art. I, § 9, cl. 2.
53. 128 S.Ct. 2 (2007) (per curiam).
54. 28 U.S.C. § 2244(d)(2).

where the state's time bar was jurisdictional.[55] Reversing, the Supreme Court said, in a per curiam opinion, that whether a time limit "is jurisdictional, an affirmative defense, or something in between," it is a condition to filing. Justices Stevens and Ginsburg dissented and would have adopted the distinction found by the court of appeals.

A LOOK AHEAD

An early look at the Supreme Court's October 2008 Term shows that the Fourth and Sixth Amendments are back on the menu, along with issues relating to qualified immunity for officers and prosecutors, and a matter of particular importance to capital defendants. Though these cases are significant, there do not yet seem to be the same sort of blockbusters that marked the October 2007 Term's criminal docket.

As of the opening of the October 2008 Term, the Court has granted review in four search-and-seizure cases: *Herring v. United States*,[56] which asks if evidence must be suppressed under the Fourth Amendment where officers conduct an arrest and search incident to an arrest in reliance upon credible but erroneous information provided by another officer; *Arizona v. Gant*,[57] which concerns whether officers must demonstrate a threat to their safety or a need to preserve evidence to justify a warrantless vehicular search incident to arrest after the vehicle's recent occupants have been arrested and secured; *Arizona v. Johnson*,[58] which addresses whether an officer who stops a car for a minor traffic infraction may pat-down a passenger if the officer has an articulable basis to believe that the passenger is armed and dangerous but the officer has no reason to believe that the passenger is committing a criminal offense; and *Pearson v. Callahan*,[59] which asks, among other things, whether a "consent once removed" exception to the Fourth Amendment warrant requirement authorizes police to enter a home without a warrant after an informant buys drugs inside.

Pearson may also provide a vehicle for a significant qualified immunity ruling. The justices directed the parties to brief and argue whether the qualified immunity decision in *Saucier v. Katz*[60] should be overruled. A second case involving qualified immunity is *Van De Kamp v. Goldstein*,[61] which asks whether the doctrine shields the decisions of supervisors who direct policy and oversee training with respect to prosecutors' constitutional duty to disclose exculpatory evidence.

The Court has agreed to hear two Sixth Amendment right-to-counsel cases. *Kansas v. Ventris*[62] asks whether the prosecution may impeach a defendant with statements obtained without a knowing and voluntary waiver of the Sixth Amendment right to counsel. In *Montejo v. Louisiana*,[63] the justices will decide if, after the Sixth Amendment has attached, a defendant who asks for counsel and is appointed a lawyer must take an affirmative step to "accept" the appointment to receive the protections of the amendment and preclude police-initiated interrogation without counsel.

Other provisions of the Sixth Amendment are also before the Court. *Vermont v. Brillon*[64] asks whether trial delays relating to the appointment and representation of counsel may be attributable to the state and deny a defendant a speedy trial. A *Crawford* case is on the docket. *Melendez-Diaz v. Massachusetts*[65] concerns whether a state forensic analyst's laboratory report, prepared for use in a criminal case, is "testimonial" evidence that is subject to the requirements of the Confrontation Clause. In *Rivera v. Illinois*,[66] the Court will take up the question whether the erroneous denial of a defendant's peremptory challenge requires automatic reversal of a conviction. And the justices have granted review in another *Apprendi/Blakely* case. In *Oregon v. Ice*,[67] they will decide whether the Sixth Amendment requires that facts necessary for the imposition of consecutive sentences, other than facts relating to prior convictions, must be found by the jury or admitted by the defendant.

An important case for capital defendants is *Harbison v. Bell*.[68] Typically, state clemency proceedings are at the end of the road; they come after a death sentence has been affirmed by the state courts and after the defendant has lost his or her federal habeas corpus petition. *Harbison* will decide whether the statute that provides federal funds for counsel who represent state capital defendants in federal habeas corpus proceedings includes funding for counsel to continue their representation and pursue State clemency proceedings.

All-in-all, the October 2008 Term promises a bevy of important criminal law and procedure decisions, even if it lacks some of the fireworks provided by last year's headliners.

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55. Pace v. DiGuglielmo, 544 U.S. 408 (2005).
56. No. 07-513.
57. No. 07-542.
58. No. 07-1122.
59. No. 07-751.
60. 533 U.S. 194 (2001).
61. No. 07-854.
62. No. 07-1356.
63. No. 07-1529.
64. No. 08-88.
65. No. 07-591.
66. No. 07-9995.
67. No. 07-901.
68. No. 07-8521.