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Selected Criminal-Law Cases in the United States Supreme Court in the 2009-2010 Term, and a Look Ahead

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Issues that are hot one Term are sometimes cold the next. In contrast with the 2008 Term—when the Court took on automobile searches, the scope of the Fourth Amendment exclusionary rule, and the Confrontation Clause—the big cases of 2009-2010 addressed different issues. This past year will be remembered for decisions on the right to counsel for immigrant defendants, the Eighth Amendment and juveniles, the application to the states of the Second Amendment right to keep and bear arms, and key decisions on jury-trial rights. While the 2008 Term gave us *Montejo v. Louisiana*[1]— an important holding on the Sixth Amendment right to counsel and police interrogation—this year the Court returned to interrogation but through the Fifth Amendment. The justices decided three *Miranda*[2] cases, one of which may significantly alter police practices. This article reviews some of the most significant criminal-law-related opinions of the Supreme Court's 2009 Term, emphasizing those decisions that have the greatest impact upon the states. The article concludes with a brief preview of the current Term.

SECOND AMENDMENT

One of the blockbusters of the Term was *McDonald v. City of Chicago, Ill.*,[3] which applied the Second Amendment right to keep and bear arms to the states. Two years earlier, the Court had decided *District of Columbia v. Heller*,[4] finding that the Second Amendment confers an individual right to keep and bear arms. *Heller* struck down a District of Columbia law that essentially prohibited the possession of handguns in the home. Almost immediately after *Heller* came the question whether this right should be applied to the states through the Fourteenth Amendment. Five justices have now answered in the affirmative, though no single theory commanded a majority. Perhaps the most interesting part of the decision is the discussion of the incorporation and related doctrines. (Non-enthusiasts may wish to skip ahead.)

Justice Alito delivered the opinion of the Court, though parts of the opinion represent the views of only a plurality (with Justices Kennedy, Scalia, and Chief Justice Roberts joining Justice Alito). The opinion contains a lengthy review of the history of the incorporation doctrine, as well as the Privileges or Immunities Clause of the Fourteenth Amendment. The plurality turned aside an argument that the Court should reconsider the interpretation of the Privileges or Immunities Clause provided in the *Slaughter-House Cases*.[5] There the Court gave the Clause a narrow reading, holding that it protects those rights that owe their existence to the federal government, federal laws, or the character of the nation, but that the Clause does not protect other fundamental rights. The plurality in *McDonald* saw "no need to reconsider that interpretation," and turned to the question of whether the Second Amendment right should be incorporated through the Due Process Clause of the Fourteenth Amendment.[6] After reviewing the history and framework of the incorporation doctrine (perhaps necessary because no incorporation cases had reached the Court for decades), the majority found that the right to keep and bear arms is fundamental to our scheme of ordered liberty and is deeply rooted in our nation's history and tradition. The plurality concluded that the right to keep and bear arms is incorporated through the Due Process Clause. Justice Thomas provided the fifth vote for the application of this right to the states, but under a different theory. While he joined the plurality's opinion describing the incorporation doctrine and characterizing the right to keep and bear arms as fundamental and deeply rooted in history, he would have revisited the *Slaughter-House Cases* and held that the right is guaranteed by the Privileges or Immunities Clause, as a privilege of American citizenship.

Justice Stevens, in his last dissenting opinion, agreed that the Court should not reconsider the *Slaughter-House Cases*, but saw the issue before the Court in terms of substantive due process. He would have found that the right to keep and bear arms is not implicit in the concept of ordered liberty. Justice Scalia, who joined the plurality, also wrote separately to challenge Justice Stevens's views. Justice Breyer (joined by Justices Ginsburg and Sotomayor), relying upon some of Justice Stevens's analysis, would have held that the right to keep and bear arms is not so fundamental or rooted in history that it should be incorporated through the Fourteenth Amendment's Due Process Clause and applied to the states.

Footnotes

1. 129 S.Ct. 2079 (2009).
2. Miranda v. Arizona, 384 U.S. 436 (1966).
3. 130 S.Ct. 3020 (2010).
4. 128 S.Ct. 2783 (2008).
5. 83 U.S. (16 Wall.) 36 (1873).
6. 130 S.Ct. at 3030-31.

FOURTH AMENDMENT

The previous Term gave us several Fourth Amendment blockbusters, such as *Arizona v. Gant*[7] (vehicle searches incident to arrest) and *Herring v. United States*[8] (the exclusionary rule and good-faith reliance on information in a computer database). This Term, by contrast, saw few Fourth Amendment issues. In the one case with far-reaching potential, the justices avoided the most significant question.

City of Ontario v. Quon[9]—the case that wasn't—raised the question of whether a public employee has a reasonable expectation of privacy in communications sent and received on his government-provided pager. Quon, a SWAT team officer, was issued a text pager by his department, with a monthly limit of how many characters could be sent or received without incurring additional fees. Quon went over his allotment several times. At one point, he was told that he could pay for the excess usage rather than have to city audit his messages, and he paid up. However, the City eventually decided to audit usage to see if the existing character limit was too low. The wireless company sent transcripts of the messages to the City, which discovered that many of Quon's messages were not work related, and some were sexually explicit. He was disciplined for violating rules by pursuing personal matters while on duty. Quon brought a civil-rights action; two other plaintiffs were people who had communicated by text with Quon—his wife and a fellow officer with whom he was romantically involved.

The case attracted much attention because of the question whether an employee has a reasonable expectation of privacy in electronic messages sent and received on his employer's equipment. On the facts of the case, that was not an easy question. Quon's department had a computer policy in place making clear that the City had the right to monitor and log all network activity, including e-mail and Internet use, with or without notice. But text pagers are not computers. The City initially told its employees that it would treat text messages just like e-mails. However, this notice was potentially undercut by the arrangement that allowed employees, such as Quon, to pay for any overages without audits.

In an opinion by Justice Kennedy, the Court declined to reach the reasonable-expectation-of-privacy question. Rather, the justices assumed *arguendo* that Quon had a reasonable expectation of privacy in the text messages, that the City's review of the transcript constituted a search within the meaning of the Fourth Amendment, and that the principles that apply to a government employer's search of an employee's physical office also apply when the employer intrudes upon privacy in the electronic sphere. With these assumptions, the Court simply found that the City conducted a reasonable search.

There was some debate among members of the Court as to whether to follow the approach by the plurality in *O'Connor v. Ortega*.[10] *O'Connor* addressed the framework for Fourth Amendment claims against employers. The first step of the analysis is determining whether there is an expectation of privacy because some government offices may be so open that no such expectation is reasonable, considering the "operational realities of the workplace."[11] Justice Scalia joined in most of Justice Kennedy's opinion in *Quon*, but wrote separately to argue that the "operational realities" rubric in *O'Connor* is "standardless and unsupported."[12] In the end, however, the Court said that under the approach of either the *O'Connor* plurality or Justice Scalia (who said the inquiry should be whether the Fourth Amendment applies in general to such messages on employer-issued pagers), the outcome would be the same.

The most significant aspect of *Quon* is simply how reluctant the justices were to decide about the reasonable expectation of privacy.

The most significant aspect of *Quon* is simply how reluctant the justices were to decide about the reasonable expectation of privacy. The opinion expressly noted their reluctance: "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Further, "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior."[13] Athough Justice Scalia chided the Court for this discussion—saying "[t]he-times-they-are-a-changin' is a feeble excuse for a disregard of duty"[14]—even he would not have reached the reasonable expectation of privacy question.

There was one other Fourth Amendment decision in the Term. In *Michigan v. Fisher*,[15] the Court summarily reversed the Michigan Court of Appeals, and found that officers who entered a home without a warrant were reasonable in doing so. In a per curiam opinion, the justices expanded on *Brigham City v. Stuart*,[16] where officers had entered a home to assist an injured adult and stop a fight. In *Fisher*, police responded to a report of a disturbance. They found a pickup truck in the driveway with its front smashed, damaged fence posts, and three broken windows in the house. They saw some blood on the hood of the pickup and Fisher inside the home screaming and throwing things. When an officer entered the home, Fisher pointed a gun at him and was later charged for that act. Under the circumstances, the majority found, the police had an objectively reasonable basis for entering the home. Justice Stevens, joined by Justice Sotomayor, dissented. They pointed to the findings of the trial judge, who was not persuaded that the officer had an objectively reasonable basis for believing that entering the home was necessary to avoid serious injury.

7. 129 S.Ct. 1710 (2009).
8. 129 S.Ct. 695 (2009).
9. 130 S.Ct. 2619 (2010).
10. 480 U.S. 709 (1987).
11. 130 S.Ct. at 2628 (quoting *O'Connor*, 480 U.S. at 718).
12. 130 S.Ct. at 2634 (Scalia, J., concurring).
13. 130 S.Ct. at 2629.
14. 130 S.Ct. at 2635 (Scalia, J., concurring).
15. 130 S.Ct. 546 (2009).
16. 547 U.S. 398 (2006).

Berghuis v. Thompkins is a blockbuster that may transform interrogation practices.

FIFTH AMENDMENT

The Court decided a trio of *Miranda* cases this term. Two of the three are modest holdings. *Florida v. Powell*[17] and *Maryland v. Shatzer*[18]—decided a day apart—addressed the adequacy of warnings and when an invocation of the right to counsel may cease to be effective. The third case, *Berghuis v. Thompkins,*[19] is a blockbuster that may transform interrogation practices.

In *Powell*, officers advised the defendant that he had the right to talk with a lawyer "before answering" any questions and that he had "the right to use any of these rights at any time . . . during this interview." He was not expressly told that he could have an attorney present throughout the interrogation, and so Powell claimed that the warning omitted a required admonition. Not so, said the Court, in a 7-2 decision authored by Justice Ginsburg. Citing *California v. Prysock*[20] and *Duckworth v. Eagan*,[21] the majority reiterated that the inquiry is simply whether the warnings reasonably convey the rights set out in *Miranda*, but there is no required formulation of those rights. The warnings given by Florida police were adequate. "In combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times."[22] Justice Stevens, joined by Justice Breyer, dissented. They concluded that when the warnings were given their most natural reading, the catchall clause did not meaningfully convey Powell's rights. Justice Stevens also would have found no jurisdiction to review the Florida Supreme Court's decision (finding the warning inadequate), since that court also based its conclusion on state constitutional grounds.

Shatzer answered a longstanding question. In *Edwards v. Arizona*,[23] the Court held that officers may not interrogate a suspect who has invoked the right to counsel unless the suspect initiates contact with police. But how long does an *Edwards* invocation last? As it turns out, not forever.

Shatzer was serving a sentence when he was questioned by a detective about an allegation that he had sexually abused his son. Shatzer asked for a lawyer, and the questioning ceased. Two and a half years later, a different detective learned more information and wanted to question Shatzer. He went to the prison and initiated questioning. This time Shatzer waived his rights. Shatzer made a statement that was introduced against him at trial. The Supreme Court unanimously upheld his conviction.

In an opinion written by Justice Scalia, the Court described *Edwards* and its progeny as "not a constitutional mandate, but judicially prescribed prophylaxis." Such a rule applies where its benefits outweigh the costs. The benefits—preserving the integrity of a suspect's choice and preventing badgering—"are measured by the number of coerced confessions it suppresses that otherwise would have been admitted."[24] Where a suspect has been released from pretrial custody and returned to his normal life for some time before the later attempted interrogation, an extension of *Edwards* "would not significantly increase the number of genuine coerced confessions excluded" but increases the costs by excluding voluntary confessions.[25] After concluding that a break in custody may terminate the *Edwards* protections, the majority determined that it was appropriate to fix a specific period of time to give clear guidance to police. The Court set that period at 14 days. "That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."[26] In another part of the opinion, the Court determined that Shatzer's release back into the general population was a break in *Miranda* custody. Justice Thomas concurred, but would not have extended the *Edwards* presumption for 14 days following a break in custody. Justice Stevens also concurred, although he suggested that courts should look to other concrete events or factors in addition to the passage of time, such as whether a suspect could actually seek legal advice or whether police honored a commitment to provide counsel.

Berghuis v. Thompkins[27] completes the trio and overshadows the other two. Southfield, Michigan, police officers wanted to question Thompkins about a shooting. Thompkins was arrested in Ohio, and the officers traveled there to interrogate him. They handed Thompkins a form advising him of his rights, which he refused to sign. Thompkins remained largely silent for almost 3 hours of the interrogation. After about 2 hours and 45 minutes, he gave incriminating responses to questions about whether he believed in God and prayed to God to forgive him for shooting the victim. State courts rejected Thompkins's *Miranda* claim, ruling that Thompkins had neither invoked nor waived his rights at the time before he implicitly waived them by responding. He filed a federal habeas corpus petition. The U.S. Court of Appeals determined that the ruling was contrary to clearly established federal law, and Thompkins should be granted relief. In a 5-4 decision, the Supreme Court reversed.

The majority opinion was written by Justice Kennedy. Although Michigan had primarily argued that the state court rulings were entitled to deference on federal habeas corpus review, the majority went further. Following the lead of then-Solicitor General Elena Kagan, who submitted an amicus brief, the Court instead extended the holding in *Davis v. United States*.[28] In *Davis*, the defendant had initially waived his *Miranda* rights but subsequently made ambiguous statements indicating he might want counsel; these statements were insufficient to require police to cease questioning. *Thompkins* extended the unambiguous invocation rule of *Davis* to the right to remain silent as well as to the initial invocation or waiver stage of an interroga-

17. 130 S.Ct. 1195 (2010).
18. 130 S.Ct. 1213 (2010).
19. 130 S.Ct. 2250 (2010).
20. 453 U.S. 355 (1981).
21. 492 U.S. 195 (1989).
22. Powell, 130 S.Ct. at 1205.
23. 451 U.S. 477 (1981).
24. 130 S.Ct. at 1220.
25. *Id.* at 1221-22.
26. *Id.* at 1223.
27. 130 S.Ct. 2250 (2010).
28. 512 U.S. 452 (1994).

tion. The Court found "good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously," noting that this avoids difficulties of proof and provides guidance to officers.[29] Thus, after a suspect is advised of his rights, he or she must unambiguously invoke either the right to remain silent or the right to counsel in order for officers to have a duty to cease questioning.[30] A suspect may not invoke the right to remain silent through silence, so Thompkins' refusal to talk for almost 3 hours was insufficient to require police to curtail questioning.

The majority held that Thompkins' silence was not an invocation, and that his later statements affirmatively established waiver. Relying upon *North Carolina v. Butler*[31] for the proposition that a waiver can be implied through conduct, the majority held that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police."[32] Although a valid implied waiver requires that the suspect understand his rights, the Court essentially placed the burden on the defendant to show a lack of understanding.[33] The Court found that Thompkins understood his rights, and thus knew what he was doing when he spoke. "If Thompkins wanted to remain silent, he could have said nothing in response to [the detective's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver."[34]

Thompkins leads to an important question: will an _implied_ Miranda waiver also waive a suspect's Sixth Amendment rights?

Justice Sotomayor wrote a lengthy dissent, in which she was joined by Justices Stevens, Ginsburg, and Breyer. She observed that the interrogation was very one-sided, nearly a monologue by the officers. Thompkins refused to sign a form and did not respond affirmatively to interrogation tactics, such as an invitation to tell his side of the story. On these facts, she would not have found a course of conduct sufficient to carry the prosecution's burden of establishing waiver. The dissenting justices also disagreed with the extension of *Davis*, noting a number of federal and state courts that have declined to apply a clear-statement rule when a suspect has not first given an express waiver of rights, and arguing that *Davis*

29. 130 S.Ct. at 2260.
30. For a discussion of the difference between a suspect merely remaining silent and remaining silent but triggering an officer's duty to cease questioning, *see* Laurent Sacharoff, Miranda's *Hidden Right*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1711410.
31. 441 U.S. 369 (1979).
32. 130 S.Ct. at 2264.
33. *Id.* at 2262.
34. *Id.* at 2263.

The Court ruled that where . . . the deportation consequences of a conviction are truly clear, there is a duty . . . to advise of those consequences.

should not be applied to the right to remain silent. The warnings themselves do not tell suspects that they need to use particular language to invoke the right to remain silent, and the dissenting justices cited a number of cases in which lower courts found no invocations under *Davis* even though suspects used fairly plain language. The dissenters asserted that the decision dilutes the prosecution's burden of proof of waiver "to the bare fact that a suspect made inculpatory statements after *Miranda* warnings were given and understood."[35]

In my view, *Berghuis v. Thompkins* is the Court's most significant *Miranda* ruling since *Dickerson v. United States*[36] was announced a decade ago. *Thompkins* has enormous practical implications for policing. While many law-enforcement agencies have already trained police about implied waivers and many courts have upheld them, this case finds an implied waiver on an extreme set of facts: hours of nonstop questioning using a full range of interrogation tactics on a virtually non-responsive suspect. In the wake of this case, we may expect to see more agencies training officers on implied waivers and advising that they may safely forgo seeking express waivers, even when a suspect does not initially respond to the officers' questions.

It is also worth noting what was *not* important to the Court in *Thompkins*. The majority did not discuss the effect of the officers' interrogation tactics on Thompkins or his waiver—even though the underlying premise of *Miranda* is that these tactics create inherently compelling pressures—and Thompkins's waiver was in the midst of the interrogation. The Court simply assumed that Thompkins made a unconstrained choice to speak after almost 3 hours of questioning.[37] Perhaps this was because the majority conceived that "*Miranda*'s main protection lies in *advising* defendants of their rights."[38] Nor was the quality of the record a concern to the justices. The officers did not tape the interrogation, though recording equipment was available to them, and they did not take contemporaneous notes. Thus, the officers could remember very little about what was said during the interrogation until Thompkins gave his incriminating answers.

Finally, *Thompkins* leads to an important question: will an *implied Miranda* waiver also waive a suspect's Sixth Amendment rights? One of the big cases of the 2008-2009 Term was *Montejo v. Louisiana*,[39] which overruled *Michigan v. Jackson*[40] and held that officers may approach and interrogate a suspect after his Sixth Amendment rights have attached. In *Patterson v. Illinois*,[41] the Court found that *Miranda* warnings are sufficient to convey the gist of the Sixth Amendment right to counsel and Patterson's *express Miranda* waiver also effectively waived his Sixth Amendment rights. But will an *implied Miranda* waiver also suffice? There may be reasons to find it does not—for example, if *Miranda*'s main protection is the *advice* of rights, the Sixth Amendment protects something altogether different and might deserve more stringent waiver rules—but the question remains open and courts may be beginning to address it.[42]

SIXTH AMENDMENT

There were a number of important Sixth Amendment decisions this past Term, including rulings relating to various aspects of the rights to a jury trial, to counsel, and to be free from double jeopardy. One of the most significant developments was *Padilla v. Kentucky*,[43] which established that defense counsel must in many circumstances also advise a client of the immigration consequences of a conviction.

Effective Assistance of Counsel & Immigration Consequences

Padilla was a lawful permanent resident of the United States for more than 40 years, and a Vietnam War veteran. After pleading guilty to transportation of a large amount of marijuana, he faced deportation to Honduras. Padilla sought to set aside his guilty plea, alleging that his lawyer not only failed to tell him of the immigration consequences of his plea but affirmatively misled him, saying that he "did not have to worry about immigration status" since he had been in the country for so long.[44] The state court denied his post-conviction petition, determining that deportation (now called "removal") is a collateral consequence of a conviction and thus that counsel's erroneous advice could not provide a basis for relief. The Supreme Court reversed 7-2.

Writing for the majority, Justice Stevens rejected the state court's distinction between direct and collateral consequences, saying that that distinction has never been applied to define the scope of constitutionally adequate representation under *Strickland v. Washington*.[45] Justice Stevens reviewed the history of conviction-related deportations, and particularly the recent trend toward eliminating any discretion to grant relief from deportation. In 1990, for example, Congress did away with judicial recommendations against deportation, which formerly gave sentencing judges an ability to make effectively binding recommendations, and in 1996 Congress also eliminated the Attorney General's ability to grant discretionary relief from removal. Currently, if a person has committed a removable offense, his or her deportation is practically inevitable, though there are some remnants of equitable discretion left with the Attorney General for some types of offenses (though not for offenses relating to drug trafficking). With these changes in our immigration laws,

35. *Id.* at 2272 (Sotomayor, J., dissenting).
36. 530 U.S. 428 (2000).
37. For a debate about this and other points, *see* Charles D. Weisselberg & Stephanos Bibas, *The Right to Remain Silent*, http://www.pennumbra.com/debates/debate.php?did=38.
38. 130 S.Ct. at 1113 (emphasis added).
39. 129 S.Ct. 2079 (2009).
40. 475 U.S. 625 (1986).
41 487 U.S. 285 (1988).
42. *See*, *e.g.*, Paris v. Carlton, 2010 WL 1257970, 2010 U.S. Dist. LEXIS 30206 (E.D. Tenn. 2010).
43. 130 S.Ct. 1473 (2010).
44. *Id.* at 1478.
45. 466 U.S. 668 (1984).

said the majority, it is difficult to divorce the penalty of removal from the conviction itself even though removal is a civil and not a criminal sanction.

The Court ruled that where, as here, the deportation consequences of a conviction are truly clear, there is a duty on the part of defense counsel to advise of those consequences. Justice Stevens noted that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[46] However, immigration law can be complex and there will be many situations in which the consequences of a particular plate are unclear or uncertain, and there counsel's duties are more limited. "When the law is not distinct and straightforward . . ., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." The majority expressly rejected an argument urged by the Solicitor General to limit the decision to circumstances where counsel had affirmatively provided misadvice. The Court reversed and remanded for further proceedings to determine whether Padilla could demonstrate prejudice.

Concurring, Justice Alito and Chief Justice Roberts would have accepted the limitation rejected by the majority and held that an attorney may provide ineffective assistance by misleading a noncitizen client regarding the removal consequence of a conviction. However, they disagreed that an attorney has an affirmative obligation to advise her client of the consequences of a plea. In their view, an attorney must simply refrain from unreasonably providing incorrect advice, and counsel may tell the defendant that a criminal conviction may have adverse immigration consequences and that the client might consult with an immigration attorney. The concurrence also takes issue with the majority's position that counsel has different duties depending upon whether the immigration consequences are clear or whether the law is not "distinct and straightforward." It will not always be easy to tell whether a particular provision is consistent and clear.

Justice Scalia (joined by Justice Thomas) dissented, arguing that while in the best of all worlds defendants ought to be advised of serious collateral consequences of conviction, "[t]he Constitution . . . is not an all-purpose tool for judicial construction of a perfect world."[47] In their view, there is no textual support in the Sixth Amendment for a right to counsel to include consequences that are collateral to prosecution. Thus, the Sixth Amendment provides no basis even for such a claim even when counsel has affirmatively misadvised a defendant about the immigration consequences of conviction. Of course, such a defendant may still assert, if he or she can, that a guilty plea was not knowing and voluntary, which would be a claim under the Due Process Clause.

This is an enormously important decision. Whether or not it opens the floodgates for future litigation (a claim discounted by the majority), there is no doubt that the decision must lead public defender offices and private defense practitioners to increase their knowledge of immigration law and the immigration consequences of criminal convictions. Courts may also play a role here. Justice Alito's concurrence notes that there are rules, plea forms, or statutes in 28 states and the District of Columbia requiring courts to advise criminal defendants of the possible immigration consequences of their guilty pleas. Perhaps there is room to inquire at change-of-plea hearings about whether the defendant has consulted with counsel about any immigration consequences of a conviction.

Perhaps there is room to inquire at change-of-plea hearings about whether the defendant has consulted with counsel about any immigration consequences of a conviction.

Jury-Trial Rights

The Term saw important decisions on the Sixth Amendment right to be tried by a jury drawn from sources that reflect a fair cross-section of the community and on the effect of pretrial publicity, as well as two summary reversals relating to jury selection and the right to a public *voir dire*.

In *Berghuis v. Smith*,[48] the fair-cross-section case, Diapolis Smith was convicted of murder by an all-white jury in Kent County, Michigan. At the time of his trial, African-Americans were 7.28% of the county's jury-eligible population, and 6% of the pool from which jurors could be drawn. The Michigan Supreme Court turned aside Smith's Sixth Amendment challenge, but the U.S. Court of Appeals granted his federal habeas corpus petition. The U.S. Supreme Court reversed in a unanimous decision by Justice Ginsburg, with Justice Thomas concurring.

Under *Duren v. Missouri*,[49] a defendant must satisfy a three-prong test to establish a prima facie violation of the fair-cross-section requirement: (1) the group alleged to have been excluded must be distinctive in the community; (2) the representation of this group in venires must not be fair and reasonable in relation to the number of persons in the group in the community; and (3) the underrepresentation must be due to the systematic exclusion of the group in the jury-selection process.[50] The Court ruled that Smith could not prevail under the deferential standards applied in federal habeas corpus cases; the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) demands a showing that the state court's decision involved an unreasonable application of "clearly established Federal law, as determined by the Supreme Court."[51]

Smith could not show that the Michigan Supreme Court unreasonably applied the *Duren* test because the U.S. Supreme Court had not previously specified the method courts must use to measure distinct groups in jury pools. One possible test would measure *absolute* disparity, meaning the difference between the percentage of African-Americans in the local, jury-eligible population (7.28%) and the percentage in the jury pool

46. 130 S.Ct. at 1482
47. *Id.* at 1494 (Scalia, J., dissenting).
48. 130 S.Ct. 1382 (2010).
49. 439 U.S. 357 (1979).
50. *Id.* at 364.
51. 130 S.Ct. 1388 (quoting 28 U.S.C. § 2254(d)(1)).

The defendant objected to the exclusion of a family member from the courtroom during voir dire. In a 7-2 per curiam decision, the Supreme Court summarily reversed.

(6%); here the absolute disparity would be 1.28%. Smith argued that courts should instead measure the *comparative* disparity, which is the absolute disparity (1.28%) divided by the group's representation in the jury-eligible population (7.28%); here that gives a figure of 18%. The Supreme Court noted that each measure is imperfect, and even without the deferential habeas standards, the Court would not specify which method should be used.[52] In addition, the Court ruled that Smith had not shown that underrepresentation was due to systematic exclusion. Smith claimed that the county's method of assigning jurors, sending potential jurors to local courts first and making only the remaining jurors available for the more serious cases, siphoned off African-American jurors. But Smith failed to provide sufficient evidence that this method or other possible factors caused the underrepresentation. Justice Thomas concurred, indicating that in an appropriate case he would be willing to reconsider the precedents articulating the fair-cross-section requirement.

The pretrial publicity case was *Skilling v. United States*,[53] which arose from the Enron Corporation debacle. (The decision also contains an important holding about "honest services" fraud, which is discussed later in this article). Skilling was a high-level executive at Enron, serving as CEO up until several months before the company went into bankruptcy. He was charged in federal court in Houston with conspiracy to commit honest-services wire fraud, among other charges. Skilling argued that venue should have been changed due to massive publicity about Enron, and he asserted that he was denied his Sixth Amendment right to trial by an impartial jury as well as his due-process right to a fair trial. The Fifth Circuit affirmed Skilling's conviction. By a vote of 6-3, the Supreme Court agreed and rejected these claims.

Writing for the Court, Justice Ginsburg first explained that under the circumstances, the publicity did not give rise to a presumption of prejudice requiring a change in venue. The prior cases in which the Court had found a presumption of prejudice from pretrial publicity were different. In the foundational case, *Rideau v. Louisiana*,[54] tens of thousands of potential jurors in a relatively small parish saw a televised confession by a defendant in jail, flanked by the sheriff and state troopers. In later cases, extensive media coverage manifestly tainted the proceedings by disrupting the trial or creating a carnival-like atmosphere.[55] Here, by contrast, the trial took place in Houston, the fourth largest city in the country, with a large and diverse pool of potential jurors. The news coverage of Skilling and Enron did not contain a dramatic event, such as a single confession, which might be expected to leave an indelible imprint on jurors' minds. Additionally, over four years elapsed between Enron's collapse and the trial, and Skilling was acquitted of nine insider-trading counts, which undermined a supposition of juror bias.

Next, the majority rejected Skilling's claim of actual juror bias and errors during voir dire. Although the trial judge conducted most of the voir dire, prospective jurors were required to complete a comprehensive questionnaire, drafted in part by Skilling's attorneys, jurors were examined individually, and counsel were permitted to ask supplemental questions. Although Skilling asserted that the trial judge should not have accepted jurors' promises of fairness at face value, the judge did follow up individually with jurors to uncover concealed bias. The case was far different than an earlier decision in which pretrial publicity contained graphic details leading to a pattern of deep and bitter prejudice in the community that was also reflected in voir dire.[56] Finally, the Court rejected arguments that several individual jurors were biased, emphasizing that in reviewing such claims, "the deference due to district courts is at its pinnacle," and that a finding of juror impartiality may can be overturned only for "manifest error."[57] The trial judge made specific findings about the credibility of specific jurors' assertions of impartiality. There was no manifest error in seating these jurors.

Justice Alito concurred in the judgment but wrote separately to argue that there can be no violation of the Sixth Amendment guarantee of an impartial jury unless a biased juror is actually seated at trial. He would reject the argument that the Sixth Amendment can be abridged simply by the denial of a motion for change of venue due to adverse pretrial media coverage and community hostility.[58]

Justice Sotomayor (joined by Justices Stevens and Breyer) dissented. They disputed the Court's characterization of the pretrial publicity, finding that it was more voluminous and pervasive than reflected in the majority opinion. They conceded that the motion for a change of venue was properly denied (calling the question "close"), largely because of the size of Houston and the lack of a confession or smoking gun piece of evidence in the media coverage.[59] However, they would have reversed for an inadequate voir dire, noting that the jury was selected in a process that took only five hours. Even under a deferential standard, in their view the trial judge gave short shrift to the mountainous evidence of public hostility, failed to pursue important lines of inquiry during voir dire, only rarely asked prospective jurors to describe personal interactions about the case or whether they could avoid discussing the case with others, and addressed topics in a cursory fashion. According to the dissenters, the judge also accepted on their face statements of impartiality that appeared equivocal.

52. *Id.* at 1393-94.
53. 130 S.Ct. 2896 (2010).
54. 379 U.S. 723 (1963).
55. 130 S.Ct. at 2914 (discussing Estes v. Texas, 381 U.S. 532 (1965) and Sheppard v. Maxwell, 384 U.S. 333 (1966)).
56. *Id.* at 2921-22 (distinguishing Irvin v. Dowd, 366 U.S. 717 (1961)).
57. *Id.* at 2923 (quoting Mu'Min v. Virginia, 500 U.S. 415 (1991)).
58. *Id.* at 2941 (Alito, J., concurring).
59. *Id.* at 2942, 2952 (Sotomayor, dissenting).

The defendant in *Thaler v. Haynes*[60] objected to a prosecutor's exercise of a peremptory challenge. The judge, who had not overseen the voir dire, found a prima facie case under *Batson v. Kentucky*.[61] The prosecutor offered an explanation for the challenge based on his observations of the juror's demeanor, and the judge found that the explanation was race neutral. The defendant, who was convicted, eventually brought a federal habeas corpus petition. The court of appeals found that the state court's ruling was an unreasonable application of clearly established federal law under AEDPA, as a trial judge who had not overseen the voir dire could not adjudicate a demeanor-based challenge as *Batson* requires. The Supreme Court granted the State's petition for writ of certiorari and summarily reversed in a per curiam decision.

The justices ruled that the state court's decision was not contrary to clearly established Supreme Court precedent. *Batson* noted the need for a trial judge to take into account all of the possible explanatory factors in assessing an offered reason for a peremptory challenge. Where the explanation is based on demeanor, the judge "should take into account any observations of the juror that the judge was able to make" during jury selection.[62] But *Batson* "did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor."[63] Nor did *Snyder v. Louisiana*[64] require that result.

Presley v. Georgia,[65] another summary reversal, related to the right to have members of the public attend voir dire. The defendant objected to the exclusion of a family member from the courtroom during voir dire. On appeal, the Georgia Supreme Court affirmed the conviction and found that no abuse of discretion in excluding the family member, especially since the defendant did not present the trial judge with any alternatives to consider.

In a 7-2 per curiam decision, the Supreme Court summarily reversed. There are two lines of authority that provide the right to a public trial, the First and Sixth Amendments. The Court had previously ruled that in the First Amendment context, the right to a public trial in criminal cases includes the jury-selection phase and the voir dire of prospective jurors.[66] While the justices had previously held only that the Sixth Amendment right to a public trial includes the actual proof at trial and pre-trial suppression proceedings,[67] the *Presley* Court found the extension of the Sixth Amendment right to voir dire was so well-settled that summary reversal was appropriate. Further, "there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has."[68] The trial court was required to consider alternatives to closure even when alternatives are not offered by the parties. "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."[69] While there are circumstances where a judge might conclude that safety concerns or threats of improper communications with jurors justify closing voir dire, those circumstances must be articulated along with specific findings. Justices Thomas and Scalia dissented, contending that the case should not have been decided summarily.[70]

The Term saw a very important Eighth Amendment ruling, *Graham v. Florida*, a challenge to juvenile life-without-parole sentences.

Double Jeopardy

The Court also issued a significant ruling on mistrials and the Double Jeopardy Clause. The defendant in *Renico v. Lett*[71] was tried for first-degree murder in a Michigan court. The trial was short—just nine hours—and the jury's deliberations were even shorter. The jury sent out a note, asking what would happen if jurors could not agree. The judge asked the foreperson if the jurors were going to reach a unanimous verdict, and he responded "no." Without further inquiry or further findings, the trial judge declared a mistrial. Following a retrial, Lett was convicted of second-degree murder. He challenged his conviction on the grounds that there was no manifest necessity for declaring a mistrial and so his second trial should have been barred by the Double Jeopardy Clause. The Michigan Supreme Court determined that the trial court had not abused its discretion in granting the mistrial and affirmed. However, the U.S. District Court and Court of Appeals disagreed, and would have granted Lett's federal habeas corpus petition. In a 6-3 decision authored by the Chief Justice, the Supreme Court reversed.

The Court first described AEDPA's deferential standard. To grant relief, a federal court must find an unreasonable application of clearly established federal law as determined by the Supreme Court. The majority identified *United States v. Perez*[72] as setting forth the "clearly established federal law." *Perez* provides that a trial judge may declare a mistrial whenever under all of the circumstances there is a "manifest necessity" for doing so. Prior authority also established that the decision to declare a mistrial is afforded great deference by a reviewing court. The majority then pointed to other holdings in which the Court declined to require a mechanical application of a formula to decide whether a deadlock warranted a mistrial, and stating that a trial judge is not required to make explicit findings of manifest necessity nor articulate on the record the factors informing the exercise of discretion. Given these precedents, the Court held, the state court's decision was not unreasonable under AEDPA.

60. 130 S.Ct. 1171 (2010).
61. 476 U.S. 79 (1986).
62. 130 S.Ct. at 1174.
63. *Id.*
64. 552 U.S. 472 (2008).
65. 130 S.Ct. 721 (2010).
66. *See* Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty, 464 U.S. 501 (1984).
67. See Waller v. Georgia, 467 U.S. 39 (1984).
68. 130 S.Ct. at 724.
69. *Id.* at 725.
70. *Id.* at 725 (Scalia, J., dissenting).
71. 130 S.Ct. 1855 (2010).
72. 9 Wheat. 579, 6 L.Ed. 165 (1824).

Looking at evidence from a study supplemented by the Court's own research, the justices located just 123 juvenile non-homicide offenders serving life without parole . . . .

The majority also faulted the Court of Appeals for relying upon its own precedents in determining that the state court's ruling was unreasonable.

Justice Stevens (joined by Justices Sotomayor and Breyer) dissented. He took issue with the majority's characterization of the facts. The jury deliberated only 40 minutes the first day and only a few hours on the second. The jury's note only asked what would happen if the jury could not agree; it did not indicate that the jury was already deadlocked. The judge also cut off the foreperson after asking whether the jury was hopelessly deadlocked. The entire exchange with the foreperson took only three minutes and the jury only deliberated for four hours. In addition to this haste, the judge did not poll jurors, give an instruction for further deliberations, ask defense counsel for input, or indicate on the record why a mistrial was necessary. Under these circumstances, the state court's conclusion was unreasonable.[73]

EIGHTH AMENDMENT AND CAPITAL PUNISHMENT

The Term saw a very important Eighth Amendment ruling, *Graham v. Florida*,[74] a challenge to juvenile life-without-parole sentences. The Court also handed down several decisions about defense counsel's duties in the penalty phase of a capital case, including an unusual number of summary reversals.

Juveniles and Life Without Parole

Graham asked whether the Eighth Amendment prohibited juveniles from receiving life-without-parole sentences in non-homicide prosecutions. Graham was 16 when pled guilty to attempted burglary with assault or battery in a Florida court. Adjudication was originally withheld, and he was placed upon probation. Graham was later charged with violating probation by participating in a home-invasion robbery and other charges, and he was resentenced on the original offense. Though the prosecutor argued for a determinate sentence and the presentence report urged a sentence of no more than four years, the trial court imposed a life-without-parole sentence, telling Graham that "the only thing I can do now is to try and protect the community from your actions."[75] The sentence was upheld by the intermediate state appellate court, and the Florida Supreme Court denied review. The U.S. Supreme Court vacated the sentence in a 6-3 ruling.

73. *Id.* at 1866, 1873-74 (Stevens, J., dissenting). In another part of the dissent (not joined by the other justices), Justice Stevens contended that the circuit appropriately relied upon its own precedents.
74. 130 S.Ct. 2011 (2010).
75. *Id.* at 2020.

Writing for the majority, Justice Kennedy noted that the Court's Eighth Amendment proportionality decisions have typically fallen into one of two classifications. One is challenges to the length of life or term-of-years sentences imposed in particular cases, such as in *Harmelin v. Michigan*[76] (rejecting a proportionality challenge to a life-without-parole sentence for cocaine possession) and *Ewing v. California*[77] (rejecting a challenge to a 25-years-to-life sentence for theft of golf clubs). The other type comprises categorical restrictions on the imposition of the death penalty. These may be restrictions related to the nature of the offender, as in *Roper v. Simmons*[78] (no death penalty for commission of an offense by someone under the age of 18) and *Atkins v. Virginia*[79] (no death penalty for persons with low intellectual functioning), or they may relate to the nature of the offense, as in *Kennedy v. Louisiana*[80] (no death penalty for non-homicidal child rape) and *Coker v. Georgia*[81] (no death penalty for adult rape). In *Graham*, the Court decided for the first time to take a categorical approach to a non-capital sentence. As the majority held, the case-by-case proportionality approach "is suited for considering a gross proportionality challenge to a particular defendant's sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."[82]

Taking this categorical approach, the Court then assessed whether there was evidence of a national consensus against the sentencing practice at issue in the case. The majority noted that 37 states, the District of Columbia, and the federal system permit life-without-parole sentences for some non-homicide juvenile offenders and 6 states permit such sentences for juveniles in homicide cases. But "an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent."[83] Looking at evidence from a study supplemented by the Court's own research, the justices located just 123 juvenile non-homicide offenders serving life without parole, 77 of whom were in Florida and the remaining 46 spread among 10 states.

In addition to this consensus against juvenile life-without-parole sentences in non-homicide cases, the majority found that "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification"[84] for a life-without-parole sentence. Among other reasons, juveniles are not as culpable as adults, they are less susceptible to deterrence, and they will serve longer in prison than similarly situated adults (because the sentences are imposed on them at earlier ages). In sum, while "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime . . ., [w]hat the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[85] Of course, it is still possible that juveniles who commit non-homicide offenses will be incarcerated for the rest of their lives. But the Eighth Amendment "forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society."[86]

Through a series of summary reversals, the Supreme Court sought to provide greater guidance . . . about effective assistance of counsel in capital-sentencing proceedings.

Chief Justice Roberts concurred. He would have applied the narrower proportionality framework that focuses on the specific facts of a case, the offender, and the sentence. Based on these facts and circumstances, Chief Justice Roberts would infer that Graham's sentence was grossly disproportionate, an inference confirmed by intrajurisdictional and interjurisdictional comparisons of the sentence.[87] But citing other cases with substantially more gruesome facts, the Chief Justice calls the majority's categorical decision "as unnecessary as it is unwise."[88]

Justices Thomas (joined by Justice Scalia and, in part, by Justice Alito) dissented. Justice Thomas restated an argument he has put forth before—that the Eighth Amendment applies to the method of punishment, and contains no proportionality principle—and also criticized the majority for eviscerating a distinction in approaches in capital and non-capital cases. He then argued that the majority erred in looking beyond the language of the states' statutes to find a national consensus against life-without-parole sentences for non-homicide juvenile offenders. If one looks at the "overwhelming legislative evidence . . . [n]ot only is there no consensus against this penalty, there is a clear legislative consensus *in favor* of its availability."[89] Justice Thomas also disagreed with the majority's analysis of whether juvenile life-without-parole sentences further the purposes of punishment, and he would not have struck down Graham's sentence even under the Chief Justice's narrower approach. Justice Alito additionally dissented and pointed out briefly that a sentence of a term of years, such as 40 years, would likely not be unconstitutional.[90]

Graham is significant in several respects. It applied a cate-

76. 501 U.S. 957 (1991).
77. 538 U.S. 11 (2003).
78. 543 U.S. 551 (2005).
79. 536 U.S. 304 (2002).
80. 554 U.S. 407 (2008).
81. 433 U.S. 584 (1977).
82. 130 S.Ct. at 2022-23.
83. *Id.* at 2033.
84. *Id.* at 2028 (citation omitted).
85. *Id.* at 2030.
86. *Id.*
87. *Id.* at 2037-41 (Roberts, C.J., concurring).
88. *Id.* at 2041.
89. *Id.* at 2049 (Thomas, J., dissenting). Justice Alito did not join the part of the dissent asserting that the Eighth Amendment applies only to the methods of punishment, and that it does not contain a proportionality principle.
90. *Id.* at 2058 (Alito, J., dissenting).

[The Court's] "honest-services" fraud rulings may spark larger debates about what kinds of acts should be considered fraudulent.

gorical approach to a non-capital case and it made a functional assessment of whether there was a national consensus against these sentences. It remains to be seen whether these two aspects of *Graham* will be influential.

Ineffective Assistance of Counsel and Capital Sentencing

An argued case, *Wood v. Allen*,[91] addressed whether a state court's denial of a post-conviction petition should be upheld under the deferential standard set forth under 28 U.S.C. section 2254(d)(2). An inexperienced lawyer represented the defendant in the penalty phase of his capital case. While the lawyer read a mental-health expert's report prepared for the guilt phase, he was told by a senior cocounsel that nothing in the report merited further investigation. At a post-conviction hearing in state court, the senior lawyer testified that evidence of the defendant's mental-health problems would have been presented at the penalty phase if he had been aware of it, and the junior lawyer in charge of the penalty phase testified that he did not recall considering the defendant's mental deficiencies.

In an opinion by Justice Sotomayor, the Court concluded that "the state court's finding that Wood's counsel made a strategic decision not to pursue or present evidence of Wood's mental deficiencies was not an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings."[92] Much of the evidence, the justices found, speaks "not to whether counsel made a strategic decision, but rather to whether counsel's judgment was reasonable—a question we do not reach."[93] The Court also declined to reach a question on which it granted review, whether 28 U.S.C. section 2254(e)(1) also requires proof by clear and convincing evidence to overcome a presumption that a state court's finding of fact was correct. Justice Stevens, joined by Justice Kennedy, dissented. He wrote that "the only reasonable factual conclusion" is that counsel's decision "to forgo investigating powerful mitigating evidence of Wood's mental deficits" was due to inattention and neglect, "the antithesis of a 'strategic' choice."[94]

Through a series of summary reversals, the Supreme Court sought to provide greater guidance to courts, prosecutors, and defense attorneys about effective assistance of counsel in capital-sentencing proceedings.

In *Bobby v. Van Hook*,[95] the Court granted certiorari and summarily reversed the Sixth Circuit, which had granted habeas corpus relief. In a per curiam decision, the justices held that the federal court of appeals erred by measuring counsel's performance by American Bar Association standards issued years after the trial, and emphasized that the standards are only guides as to what reasonably diligent attorneys should do.[96] Moreover, counsel's mitigation investigation was not unreasonably limited, nor was the defendant prejudiced by any failure to dig deeper.

In *Wong v. Belmontes*,[97] another per curiam summary reversal, the Court found that the trial lawyer's alleged failure to present additional mitigating evidence at the penalty phase did not prejudice the defendant in light of the facts of the crime and the mitigating evidence that was adduced for the jury. The defense lawyer had refrained from presenting certain mitigating evidence in an effort to prevent the prosecution from introducing powerful evidence of an additional homicide. The Court did not determine whether the lawyer's work had been deficient because—even assuming it was—the Court found no prejudice.

We can contrast these cases (and particularly *Wong*) with the summary reversals in *Sears v. Upton*[98] and *Porter v. McCollum*.[99] The petitioner in *Sears* was sentenced to death following a mitigation investigation that a state post-conviction court found to be inadequate. At the penalty phase, defense counsel relied upon a theory, which backfired, that portrayed the defendant as coming from a stable and loving household. The truth, which trial counsel never discovered, was quite to the contrary and it also turned out that the defendant was low-functioning due to brain damage and drug and alcohol abuse. The Supreme Court summarily reversed and remanded for the state court to make a proper determination of prejudice. Although the state court found that the trial lawyer presented some mitigation evidence, that does not foreclose an inquiry into whether counsel's failure to discover the additional evidence prejudiced the defendant.[100] Likewise, in *Porter*, trial counsel had only one short meeting with the defendant about the penalty phase, did not obtain school medical or military records, and did not interview witnesses. This fell short of professional standards just as in an earlier case, *Wiggins v. Smith*.[101] Contrary to the view of the Florida Supreme Court, counsel's failures undermined confidence in the outcome of the case, particularly in light of the moving evidence (which was not presented) of the defendant's combat experiences, childhood history, and limitations.

FIRST AMENDMENT

The Court struck down a federal criminal statute and overturned a conviction on First Amendment grounds. The defendant in *United States v. Stevens*[102] was convicted of violating 18 U.S.C. section 48, which criminalizes the commercial creation,

91. 130 S.Ct. 841 (2010).
92. *Id.* at 849.
93. *Id.* at 850.
94. *Id.* at 851-52 (Stevens, J., dissenting).
95. 130 S.Ct. 13 (2009).
96. Justice Alito concurred to emphasize that the ABA Guidelines should have no special relevance. *Id.* at 20 (Alito, J., concurring).
97. 130 S.Ct. 383 (2009).
98. 130 S.Ct. 3259 (2010).
99. 130 S.Ct. 447 (2009).
100. Justices Scalia and Thomas dissented, arguing that the state court's finding of no prejudice should be upheld. 130 S.Ct. at 3267 (Scalia, J., dissenting). Chief Justice Roberts and Justice Alito would have denied certiorari.
101. 539 U.S. 510 (2003).
102. 130 S.Ct. 1577 (2010).

sale, or possession of depictions of animal cruelty in interstate or foreign commerce. The legislation was aimed at the market for "crush videos," though the videos involved in this case were of dogfighting (which is still outlawed throughout the United States).

In an opinion by Chief Justice Roberts, the justices first declined to hold that depictions of animal cruelty are categorically unprotected by the First Amendment. Though it noted some historic and traditional categories of unprotected speech—such as defamation, fraud, and speech integral to criminal conduct—the Court rejected the government's suggestion that speech may be deemed categorically unprotected depending upon a balance of the value of the speech and societal costs. The Court then determined that section 48 was facially invalid because it was overbroad; the statute does not require that the depicted conduct be cruel. The justices also turned aside efforts to narrow the construction, such as by implying exceptions that would exempt from the prohibition depictions with certain religious, political, scientific, or other values. Finally, the Court was unconvinced by the government's assurances that it would only prosecute for acts of extreme cruelty. Justice Alito was the sole dissenter. He would have remanded to decide whether the videos were constitutionally protected but, in any event, would not have found the statute to be overbroad.

FEDERAL CRIMINAL LAW

As usual, the Supreme Court decided a number of federal criminal cases last Term. While most may be of interest primarily to federal judges and practitioners, the "honest-services" fraud rulings may spark larger debates about what kinds of acts should be considered fraudulent.

The main honest-services fraud decision is *Skilling v. United States*.[103] (The venue and jury selection issues in *Skilling* are discussed earlier in this article.) Skilling was convicted for conspiracy to commit honest-services wire fraud, among other counts. The federal mail- and wire-fraud statutes criminalize using the mails or wires in furtherance of "any scheme or artifice to defraud" as well as obtaining money by false or fraudulent pretenses, representations, or promises.[104] A number of lower federal courts had interpreted these fraud statutes to permit conviction for the deprivation of intangible rights, without any financial loss to an individual or the public. In *McNally v. United States*,[105] the Court limited the scope of these fraud statutes in a case where a public official received kickbacks for giving state business to an insurance agent but where there was no allegation that the kickbacks led to higher premiums or worse insurance for the state. Congress responded by enacting a new statute, 18 U.S.C. section 1346, that defined a "scheme or artifice to defraud" to include "any scheme or artifice to deprive another of the intangible right of honest services." This was the statute challenged in *Skilling*. The justices unanimously reversed the Court of Appeals' decision upholding Skilling's conviction for conspiracy to commit honest-services wire fraud, though they split on whether section 1346 could be given a limiting construction.

Writing for six members of the Court, Justice Ginsburg first addressed the argument that section 1346 should be struck down as unconstitutionally vague. Although the statute was meant to reinstate the body of pre-*McNally* honest-services law and that law was in disarray, the vast majority of the pre-*McNally* honest-services cases involved offenders who participated in bribery or kickback schemes in violation of a fiduciary duty. While a broad reading of the statue would raise vagueness and due-process concerns, "there is no doubt that Congress intended [the statute] to reach *at least* bribes and kickbacks."[106] Instead of invalidating the statute in its entirety, the majority gave it a limiting construction. When limited to bribery and kickback schemes, section 1346 is not unconstitutionally vague. The majority vacated the court of appeals' affirmance, and remanded to determine if the conspiracy conviction could be upheld on a different theory (as honest-services fraud was only one of three alleged objects of the conspiracy), and to assess whether a reversal on the conspiracy count would affect any of the other counts of conviction.

Justice Scalia (joined by Justices Thomas and Kennedy) concurred in the judgment, but would have struck down section 1346 as vague without providing a limiting construction. In their view, the majority's efforts to pare down the statute were beyond judicial power. They contended that no court before *McNally* construed the deprivation of honest-services in such a limited way and that the majority was essentially rewriting the statute. These justices would simply have reversed Skilling's conspiracy conviction on the grounds that section 1346 "provides no 'ascertainable standard' for the conduct it condemns."[107]

Following the decision in *Skilling*, the Court vacated the court of appeals' rulings in two other honest-services fraud cases (*Black v. United States*[108] and *Weyhrauch v. United States*[109]) and remanded for further proceedings. In *Black*, the Court additionally determined that the defendant had not forfeited his objection to honest-services fraud instructions when he objected to the prosecution's request for special verdicts; the special verdicts might have revealed whether the jury convicted on a theory of honest-services fraud.

FEDERAL HABEAS CORPUS

Two decisions on aspects of federal habeas corpus may be of broad interest.

A federal habeas corpus court will not review a claim rejected by a state court if the decision of the state court rests on a state-law ground that is independent of the federal question and adequate to support the judgment. The issue in *Beard v. Kindler*[110] was whether a state procedural rule is automatically inadequate under this doctrine if the rule is discretionary and not manda-

103. 130 S.Ct. 2896 (2010).
104. 18 U.S.C. §§ 1341, 1343.
105. 483 U.S. 350 (1987).
106. *Id*. at 2931.
107. *Id*. at 2935, 2940 (Scalia, J., concurring) (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921)).
108. 130 S.Ct. 2963 (2010).
109. 130 S.Ct. 2971 (2010).
110. 130 S.Ct. 612 (2009).

tory. Joseph Kindler was convicted of capital murder in Pennsylvania. He escaped from custody before his post-verdict motions could be heard and before he could be sentenced. Kindler was returned to Pennsylvania about seven years later. In the meanwhile, his motions were dismissed under a state rule that permits (but does not require) a court to find a claim to be forfeited when a defendant has become a fugitive. When the case got federal court, both the district court and the court of appeals determined that the fugitive-forfeiture rule did not provide an adequate basis to bar federal review. The U.S. Supreme Court reversed.

In a decision authored by Chief Justice Roberts, the Court held that "a discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others."[111] The justices noted that a contrary holding might have the perverse effect of encouraging states to adopt mandatory rules rather than permit discretion to be exercised in appropriate cases.

The question in *Magwood v. Patterson*[112] was whether a federal habeas corpus petition was "second or successive" under AEDPA. The defendant was convicted and sentenced to death. In a prior federal habeas corpus petition, he succeeded in overturning his sentence, though he was re-sentenced to death following a new penalty hearing. The state courts affirmed his new sentence and he brought another federal habeas corpus petition. The U.S. Court of Appeals for the Eleventh Circuit found that some of Magwood's claims could have been brought in the first petition and, thus, those claims should be governed by 28 U.S.C. section 2244(b), which restricts "second or successive" habeas applications. A closely divided Supreme Court reversed.

In an opinion for the Court written by Justice Thomas, the majority found that the AEDPA provision applies "only to a 'second or successive' application challenging the same state-court *judgment*."[113] In previous decisions, the Court had made clear that the phrase does not apply to all petitions filed later in time; for example, some issues such as competency to be executed may not be ripe until some time after the first petition has been filed. The majority was persuaded that a habeas corpus application challenges a judgment of confinement and "the phrase 'second or successive' must be interpreted with respect to the judgment challenged."[114] This interpretation would also be most consistent with other parts of AEDPA, including the exceptions to dismissal for successive petitions.[115] Justice Kennedy (joined by Chief Justice Roberts, and Justices Ginsburg and Alito) dissented. They would read the language of the statute differently and would incorporate pre-AEDPA abuse-of-the-writ doctrine. Under their reading of the statute, a second-in-time application would be barred as successive if it sought to raise a claim that the petitioner had a full and fair opportunity to raise previously, and a "mixed" petition would be treated as "second or successive." The dissenters were particularly concerned that the majority's construction of the statute would encourage abuse of the writ when a petitioner has succeeded on even the most minor and discrete issue relating to his sentencing.

A LOOK AHEAD

An early look at the October 2010 Term reveals some notable cases though, as of this writing, perhaps none to rival the blockbusters of this past year.

Two civil-rights cases present important questions. One is a challenge to a three-judge panel's order to reduce prison overcrowding in California.[116] Another asks whether a prosecutor's office can be liable for failure to train prosecutors about their *Brady* obligations.[117]

The Fourth Amendment and the Sixth Amendment Confrontation Clause are back on the menu. The Court is slated to decide if evidence is excluded under the Fourth Amendment when officers act in good-faith reliance on a judicial decision that is later overturned;[118] the question has vexed courts since the justices decided *Arizona v. Gant* and revised the principles of automobile searches incident to arrest.[119] Another Fourth Amendment case asks whether officers can—through their own conduct—create an exigency that may excuse them from obtaining a warrant.[120] Two Confrontation Clause cases posit whether statements by a wounded crime victim are testimonial[121] and whether the report of one lab analyst may be introduced through the testimony of a supervisor or other analyst.[122] And the Court will return once more to *Miranda*, addressing whether courts should consider a juvenile's age in deciding if he is in custody for *Miranda* purposes.[123]

There are certain to be significant rulings and some surprises.

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111. *Id.* at 618 (citation omitted).
112. 130 S.Ct. 2788 (2010).
113. *Id.* at 2796.
114. *Id.* at 2797.
115. Justice Breyer (joined by Justices Stevens and Sotomayor) concurred to point out that the decision also fits comfortably with Panetti v. Quarterman, 551 U.S. 930 (2007).
116. Schwarzenegger v. Plata, No. 09-1233.
117. Connick v. Thompson, No. 09-571.
118. Davis v. United States, No. 09-11328.
119. *See* Arizona v. Gant, 129 S Ct 1710 (2009). *Compare* State v. Karson, 235 P.3d 1260 (Kan. Ct. App. 2010) (applying good faith exception) *with* People v. McCarty, 229 P.3d 1041 (Colo. 2010) (declining to apply exception).
120. Kentucky v. King, No. 09-1272.
121. Michigan v. Bryant, No. 09-479.
122. Bullcoming v. New Mexico, No. 09-10876.
123. J.D.B. v. North Carolina, No. 09-11121.