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Selected Criminal Law Cases in the United States Supreme Court and a Look Ahead

Charles D. Weisselberg

Perhaps to most observers, the blockbusters from the United States Supreme Court's 2010-2011 Term were on the civil side of the docket. Yet the Court did address a number of important aspects of policing and criminal prosecutions, such as the Fourth Amendment and exigent circumstances, *Miranda* and juveniles, and the Confrontation Clause. I believe that the most significant criminal-law-related rulings from the past Term may turn out to be the Court's habeas corpus cases. The justices issued a series of opinions that interpret the federal habeas statutes to afford greater deference to state courts and that make it more difficult for federal petitioners to obtain evidentiary hearings. This article reviews the leading criminal-law-related opinions of the Supreme Court's 2010 Term, emphasizing those decisions that have the greatest impact on the States, including the habeas rulings. The article concludes with a brief preview of the current Term.

FOURTH AMENDMENT

The justices issued three significant Fourth Amendment decisions this past Term. In *Kentucky v. King*,[1] the most notable of the trio, the Court ruled that a warrantless search of a home may be supported by exigent circumstances even if those circumstances were created by police. The other opinions addressed substantial questions about retroactivity and the exclusionary rule, and about allegations of pretextual arrests.

In *King*, officers conducted a controlled buy of crack cocaine outside an apartment complex. The seller then moved quickly to the breezeway of an apartment building. Before police could get there, he entered one of two apartments off of the breezeway. Officers smelled marijuana smoke coming from the apartment on the left. They knocked and announced their presence and, hearing noises inside, believed that drug-related evidence was about to be destroyed. The officers then entered the apartment and found drugs and other contraband. The defendant, King, was charged with narcotics offenses. But it was the wrong apartment. When police eventually entered the apartment on the right, they found the suspected cocaine seller. The Kentucky Supreme Court found that the search of the apartment on the left was impermissible, saying that "police cannot 'deliberately creat[e] the exigent circumstances with the bad faith intent to avoid the warrant requirement,'" and that officers may not rely on exigent circumstances if it was "reasonably foreseeable" that the tactics used by police would create the circumstances in the first place.[2] In an 8-1 decision written by Justice Alito, the Supreme Court reversed.

The majority noted that warrantless searches are allowed "when the circumstances make it reasonable . . . to dispense with the warrant requirement."[3] The exigent circumstances rule justifies a warrantless search when the conduct of the officers before the exigency "is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed."[4] The Court did not further explain what it meant by "engaging or threatening to engage in conduct that violates the Fourth Amendment," but it acknowledged the "strong argument" that the exigent circumstances rule might not apply where the police "without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted."[5]

The Court also expressly rejected a number of rules formulated by lower courts that have limited the reach of the exigent circumstances doctrine. Among the rules rejected by the majority were those that ask whether officers deliberately and in bad faith created the exigent circumstances; whether it was reasonably foreseeable that the investigative tactics would create the exigent circumstances; whether officers had probable cause and time to secure a warrant; and whether the investigation was contrary to standard or good law enforcement practices.[6] The key question, said the majority, was simply whether officers were where they were entitled to be and whether they gained entry by means of an actual or threatened violation of the Fourth Amendment.[7] The majority then remanded for the state court to decide whether there actually were exigent circumstances on the facts of this case, though the Court also rejected the defendant's characterization that officers had threatened to enter without a warrant if the occupants did not voluntarily open the door.

Justice Ginsburg dissented, arguing that the Court "today

Footnotes

1. 1 131 S.Ct. 1849 (2011).
2. *Id.* at 1855 (quoting *King v. Commonwealth*, 302 S.W.3d 649, 656 (Ky. 2010)).
3. *Id.* at 1858.
4. *Id.* at 1858.
5. *Id.* at 1858 n.4.
6. *See id.* at 1858-62.
7. *See id.* at 1858 (noting that officers may seize evidence in plain view or seek consent to search if they are a place where they are lawfully entitled to be); *id.* at 1862 (officers may knock on a door and ask to speak with an occupant just as a private citizen may knock).

arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases."[8] In her view, the exigent circumstances exception to the warrant requirement should be more narrowly cabined, and she faulted officers for not seeking a warrant when they had probable cause and time to obtain it.[9]

Davis v. United States,[10] another Fourth Amendment case with a majority opinion authored by Justice Alito, concerns whether the exclusionary rule applies when officers rely on prior precedent in objectively good faith. Many courts had read *New York v. Belton*[11] as authorizing an automobile search incident to arrest whether or not the arrestee was within reaching distance of the car at the time of the search. Two Terms ago, the Court decided *Arizona v. Gant*[12] and held that an officer may conduct an automobile search incident to an arrest only if the arrestee was within reaching distance of the car during the search or if officers had reason to believe that evidence relevant to the crime of arrest was within the vehicle. The search in *Davis* took place before *Gant*.

The Court ruled 7-2 that the exclusionary rule did not apply to this search. The majority emphasized that the sole purpose of the exclusionary rule was to deter future Fourth Amendment violations and that prior decisions limited the rule's operation to situations in which deterrence was most effectively served. The Court said that real deterrent value was a necessary, but not a sufficient, condition for exclusion and that the analysis also must take into consideration the substantial social costs generated by the rule. Acknowledging that a number of prior cases did not take such a "discriminating" approach, the justices said that the Court has abandoned an older "reflexive" application of the exclusionary rule and has "imposed a more rigorous weighing of its costs and deterrence benefits."[13] Thus, "[p]olice practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'"[14] In the case at bench, binding precedent specifically authorized the search that turned up the gun, and "[a]bout all that exclusion would deter in this case is conscientious police work."[15]

But the principal argument by Davis and the dissenting justices was that the case should turn on retroactivity principles. Under *Griffith v. Kentucky*,[16] new criminal procedure decisions apply to cases that are pending on direct appeal or not yet final. The majority turned aside this argument, distinguishing between the retroactive application of the substantive Fourth Amendment holding in *Gant* and the remedy that follows such an application. Thus, the Court found that the search violated the Fourth Amendment under *Gant*, but principles of retroactivity did not require application of the remedy of exclusion where the purposes of the exclusionary rule would not be effectively advanced. The majority also rejected the claim that this would stunt the development of Fourth Amendment law because defendants would have no incentive to ask a court to reconsider Fourth Amendment precedents.

Davis v. United States . . . emphasized that the sole purpose of the exclusionary rule was to deter future Fourth Amendment violations.

Justice Sotomayor concurred. She pointed out that the case did not present the question of whether the exclusionary rule applies where the law governing the constitutionality of the search is unsettled. On the facts of this case, binding authority specifically authorized the search.

Justice Breyer dissented, joined by Justice Ginsburg. While agreeing that the substantive holding of *Gant* applied retroactively, the dissenters argued that the majority's distinction between the retroactive application of the rule and the availability of the remedy is highly artificial and counter to precedent.[17] The dissenters sharply disagreed with the broad use of a culpability test to determine the application of the exclusionary rule. They expressed fear for the future of the exclusionary rule, arguing that if an officer's culpability is determinative and if the Court "would apply the exclusionary rule only where a Fourth Amendment violation was 'deliberate, reckless, or grossly negligent,' then the 'good faith' exception will swallow the exclusionary rule."[18] Further, "our broad dicta in *Herring*—dicta the Court repeats and expands upon today—may already be leading lower courts in this direction."[19] And Justices Breyer and Ginsburg were concerned that the Court's ruling will make it difficult for lower courts to reconsider prior decisions.[20]

Another important Fourth Amendment case was *Ashcroft v. al-Kidd*.[21] In 2003, al-Kidd was arrested as a material witness pursuant to a warrant. The warrant alleged that al-Kidd had information crucial to a prosecution, and he was arrested checking in for a flight to Saudi Arabia. Al-Kidd was held for 16 days and then placed on supervised release for more than a year. He never was called as a witness. Al-Kidd later filed a civil rights action against former Attorney General Ashcroft, alleging that he and other material witnesses were detained because the government suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime and that there was no intention to call al-Kidd as a witness. The lower

8. *Id.* at 1864 (Ginsburg, J., dissenting).
9. *Id.* at 1865-66.
10. 131 S.Ct. 2419 (2011).
11. 453 U.S. 454 (1981).
12. 556 U.S. 332 (2009).
13. *Davis*, 131 S.Ct. at 2427 (citations omitted).
14. *Id.* at 2428 (quoting Herring v. United States, 555 U.S. 135, 144 (2009)).
15. *Id.* at 2429.
16. 479 U.S. 314 (1987).
17. *Davis*, 131 S.Ct. at 2436 (Breyer, J., dissenting).
18. *Id.* at 2439.
19. *Id.* (citations omitted).
20. Professor Orin Kerr, who represented Davis, made a number of these points in an article he wrote before his work on the *Davis* case. *See* Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077 (2011).
21. 131 S.Ct. 2074 (2011).

The Court held that the age of a minor subjected to police questioning is relevant to the Miranda custody analysis.

federal courts denied Ashcroft's motion to dismiss based on absolute and qualified immunity. The Supreme Court reversed. Although the case is a civil rights action and not a criminal appeal, it contains an important Fourth Amendment holding.

The Court held both that the complaint failed to allege a Fourth Amendment violation and that Ashcroft did not violate clearly established law. The opinion for the Court, written by Justice Scalia (and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito), addresses the allegation that the use of the material witness warrant was pretextual. The majority noted that the Fourth Amendment reasonableness inquiry is predominantly objective. Courts ask whether the circumstances, viewed objectively, justify the government's actions. "If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials."[22] There are limited exceptions where actual motivations do matter—such as special-needs and administrative-search cases—but neither category was relevant here. Nor could al-Kidd rely on checkpoint or other suspicionless stop cases because here there was a warrant issued by a judge based on individualized suspicion. The majority also rejected al-Kidd's claim that *Whren v. United States*[23] established that one may ignore subjective intent *only* where there is probable cause to believe that a violation of law has occurred. The Court concluded that "an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive."[24]

Justice Kennedy pointed out in a concurring opinion some of the challenges faced by a national officeholder when faced with inconsistent legal rules in different jurisdictions and argued that a national officeholder should be given some deference for qualified-immunity purposes. Justice Ginsburg (joined by Justices Breyer and Sotomayor) agreed that there was no clearly established law that rendered Ashcroft answerable in damages. But they also questioned whether there was a validly obtained material witness warrant, pointing to some omissions from the affidavit supporting the warrant.

Finally, the justices heard argument in another Fourth Amendment case, *Tolentino v. New York*,[25] that raised the question of whether preexisting identity-related governmental documents (such as motor vehicle records) are subject to the exclusionary rule when they are obtained as the direct result of police action that violates the Fourth Amendment. But the Court dismissed the writ of certiorari as improvidently granted.[26]

FIFTH AMENDMENT

The 2009-2010 Term gave us three *Miranda* blockbusters, including *Florida v. Powell*,[27] *Maryland v. Shatzer,*[28] and especially *Berghuis v. Thompkins*.[29] There was only one *Miranda* case in the 2010-2011 Term, *J.D.B. v. North Carolina*,[30] but it was important. The Court held that the age of a minor subjected to police questioning is relevant to the *Miranda* custody analysis.

J.D.B. was a 13-year-old student in the seventh grade. North Carolina officers suspected him of participating in several home break-ins. A uniformed police officer pulled him from his classroom and escorted him to a closed-door conference room at the school. There he was questioned by two officers with two school administrators present. Before questioning, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak with his grandmother (who was his legal guardian). J.D.B. initially denied any wrongdoing. After being confronted with a stolen camera and told by a school administrator to "do the right thing," he asked if he would still be in trouble if he returned the stolen items. The investigating officer warned that he might need to seek an order sending J.D.B. to juvenile detention if the officer believed he would continue to break into other homes. J.D.B. confessed. He was subsequently given *Miranda* warnings and acknowledged understanding them.[31] J.D.B. then gave additional information including the location of the stolen items. In juvenile court, J.D.B.'s suppression motions were denied, and he was adjudicated delinquent. The North Carolina Court of Appeals affirmed. The U.S. Supreme Court reversed in a 5-4 decision.

Writing for the majority, Justice Sotomayor first noted the compelling pressures inherent in a custodial interrogation. Whether a suspect is in custody is an objective inquiry that encompasses two discrete inquiries, including the circumstances surrounding the interrogation and whether, given those circumstances, a reasonable person would feel free to terminate the interrogation and leave. Although the inquiry is objective in nature, the majority rejected the State's argument that a child's age has no place in the custody analysis. The majority noted that a reasonable child subjected to police questioning sometimes will feel pressured to submit even when a reasonable adult would not, and "courts can account for that reality without doing any damage to the objective nature of the custody analysis."[32] Distinguishing *Yarborough v. Alvarado*,[33] where the justices held that a state court's exclusion of age from the custody determination was not objectively unreasonable under the

22. *Id*. at 2080 (quoting Whren v. United States, 517 U.S. 806, 814 (1996)).
23. 517 U.S. 806 (1996).
24. *Al-Kidd,* 131 S.Ct. at 2085.
25. 131 S.Ct. 1387 (2011).
26. *Id*.
27. 130 S.Ct. 1195 (2010).
28. 130 S.Ct. 1213 (2010).
29. 130 S.Ct. 2250 (2010).
30. 131 S.Ct. 2394 (2011).
31. It appeared from the trial court's findings that warnings were given only after the initial confession, but the point was not entirely clear, and the state courts may revisit the findings on remand. *Id*. at 2400 n.2.
32. *Id*. at 2403.
33. 541 U.S. 652 (2004).

deferential standards that apply in habeas corpus cases, the majority discussed the variety of legal contexts in which children are treated differently than adults. The Court held that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test."[34] While age may not be determinative or even significant in every case, "[i]t is . . . a reality that courts cannot simply ignore."[35]

Dissenting, Justice Alito, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, argued that including age in the custody analysis would undermine the bright-line nature of the *Miranda* rule. Until now, the *Miranda* custody determination has been a one-size-fits-all reasonable-person test, but now it must account for at least one individualized characteristic. The dissenting justices argued that there was no need to include this characteristic in the custody inquiry for at least three reasons. First, because many juveniles questioned by police are near the age of majority, a one-size-fits-all rule may not be a bad fit. Second, accounting for the circumstances of the interrogation (such as questioning at a school, as in this case) may address many of the same issues without focusing on an individual characteristic of the suspect. Third, age always can be considered as part of a voluntariness analysis. In addition, the dissenters were concerned that the ruling opens the door to considerations of other personal characteristics. For example, age may not be different from intelligence, cultural background, education, or other factors and, "[i]n time, the Court will have to confront these issues."[36] It then will have to decide whether age is different or "it may choose to extend today's holding and, in doing so, further undermine the very rationale for the *Miranda* regime."[37]

The decision in *J.D.B.* is quite intriguing for *Miranda* aficionados. Some may have thought that though it was a habeas decision, *Alvarado* foreshadowed a different result. And the ruling appears counter to the somewhat rote way in which the justices have tended to assess compliance with *Miranda*—such as by permitting flexibility in the language of the warnings, under the assumption that suspects can understand virtually any admonitions that cover the legal basics (as in last Term's *Powell* decision), and by accepting an admission as an implied *Miranda* waiver, even when that admission comes after several hours of interrogation (as in *Thompkins*). In light of the decisions from previous terms, and given the protections that the Court has afforded to minors in other contexts, it may be difficult to see *J.D.B.* as signaling a fundamental shift in the Court's approach to *Miranda*. On the other hand, the dissenters were surely correct that defendants will argue that other individual characteristics of suspects should be treated no differently than age. It will be interesting to see how courts address these and other arguments going forward.[38]

A conversation that begins in an effort to determine the need for emergency assistance . . . may evolve into testimonial statements.

SIXTH AMENDMENT

The Term produced two more opinions that mine the *Crawford v. Washington*[39] and *Davis v. Washington*[40] motherlode.

In *Michigan v. Bryant*,[41] the justices considered whether admission of a dying declaration violates the Confrontation Clause. Responding to a radio report, Detroit officers found the dying victim in a parking lot, shot. They asked him about the shooting. The victim identified the defendant and provided some details. The case was tried before *Crawford*, and the statements were admitted. The Michigan Supreme Court vacated the conviction, finding a violation of the Confrontation Clause. In a 6-2 ruling (with Justice Kagan not participating), the Supreme Court reversed.

Justice Sotomayor wrote for the Court. In *Davis*, the justices held that a statement made during police questioning may be non-testimonial if the circumstances objectively indicated that the primary purpose of the interrogation was to meet an ongoing emergency. *Bryant* provided the Court the first opportunity to apply this test outside of the domestic violence context with a victim who was found in a public location and a perpetrator whose location was unknown when the officers found the victim. A conversation that begins in an effort to determine the need for emergency assistance, and which is non-testimonial, may evolve into testimonial statements, the majority noted. The trial courts can determine when or if that transition occurs. To assess the primary purpose of the interrogation, courts may look at the parties' perception that an emergency is ongoing and the type of dispute involved. Here the justices could not say "that a person in [the victim's] situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.'"[42] Nothing in the decedent's responses indicated to the police that there was no emergency or the prior emergency had ended. Further, the situation in the questioning was informal, more like a harried 911 call than a structured stationhouse interrogation. Under these circumstances, the decedent's statements were not testimonial and their admission did not violate the Confrontation Clause.[43] Justice Thomas concurred in the judg-

34. *J.D.B.*, 131 S.Ct. at 2406.
35. *Id.*
36. *Id.* at 2415 (Alito, J., dissenting).
37. *Id.*
38. There are already a few decisions that have applied *J.D.B.* in other contexts. The Ohio Court of Appeals relied upon *J.D.B.* in construing the mens rea for assault, finding that there was insufficient evidence that the juvenile knew that his conduct probably would cause a particular result. *See* In re S.C.W., 2011 Ohio 3193, 2011 WL 2565623 (Ct. App. 2011). The Illinois Appellate Court has cited *J.D.B.* in support of the proposition that age is relevant in determining the voluntariness of a statement. *See In re P.C.D.*, No. 5-08-0659, 2011 Ill. App. LEXIS 1663 (July 8, 2011) (finding statement voluntary).
39. 541 U.S. 36 (2004).
40. 547 U.S. 813 (2006).
41. 131 S.Ct. 1143 (2011).
42. *Id.* at 1165 (quoting *Davis*, 547 U.S. at 822).
43. *Id.* at 1166-67.

[T]he analyst who was called at trial was not an adequate substitute for the analyst who conducted the test and wrote the report.

ment because the questioning by police lacked sufficient formality and solemnity for the statements to be "testimonial" in light of historical practices.

Justice Scalia dissented, using harsh language (even for him). He wrote that "[t]oday's tale" of officers conducting examinations of a dying man with the primary purpose to protect him and others from a murderer on the loose "is so transparently false that professing to believe it demeans this institution."[44] From the victim's perspective, his statements had little value except to ensure the arrest and later prosecution of the defendant. And, according to Justice Scalia, none of the officers' actions indicated that they perceived an imminent threat. Thus, "[t]he Court's distorted view creates an expansive exception to the Confrontation Clause for violent crimes."[45] Further, he argued, the majority's highly contextualized balancing test is "no better than the nine-factor balancing test we rejected in *Crawford*."[46] Justice Ginsburg also dissented, though she did not join Justice Scalia's opinion. She underscored the concern that the majority has created an expansive exception to the Confrontation Clause for violent crimes.

The other case, *Bullcoming v. New Mexico*,[47] was a sequel to *Melendez-Diaz v. Massachusetts*,[48] in which the Court found that a laboratory report identifying a substance as cocaine was testimonial within the meaning of the Confrontation Clause. *Bullcoming* involved a forensic laboratory report certifying that the defendant's blood-alcohol concentration was above the level required for an aggravated DWI offense. At trial, the State did not call the analyst who performed the test and signed the certification. Rather, prosecutors called a different scientist from the laboratory. The report was admitted into evidence as a business record. The New Mexico Supreme Court found that the report was testimonial but that its admission did not violate the Confrontation Clause. The Supreme Court reversed in a 5-4 opinion written by Justice Ginsburg.

The Court agreed that the report was testimonial. Unlike the state supreme court, however, the justices determined that the analyst who was called at trial was not an adequate substitute for the analyst who conducted the test and wrote the report. Surrogate testimony could not "expose any lapses or lies on the certifying analyst's part."[49] Nor does the Confrontation Clause itself suggest that open-ended exceptions from the confrontation requirement may be developed by the courts. In a part of her opinion joined only by Justice Scalia, Justice Ginsburg also wrote that the application of the Confrontation Clause here would not be an undue burden on the prosecution, and she rejected a claim that the defense always could retest the sample if it had any concerns about it. Justice Sotomayor concurred, largely to highlight some aspects about how this case fit within the test set forth earlier in the Term in *Bryant*.

Justice Kennedy wrote the dissent, which was joined by the Chief Justice, Justice Breyer, and Justice Alito. They argued that whether one agrees with the reasoning and result in *Melendez-Diaz*, the majority's decision was a new and serious misstep. According to the dissenting justices, the certifying analyst's role was no greater than that of anyone else in the chain of custody of the blood sample. They described the mundane task of processing samples and determining blood-alcohol content. In their view, "requiring the State to call the technician who filled out a form and recorded the results of a test is a hollow formality."[50]

EIGHTH AMENDMENT AND CAPITAL PUNISHMENT

The Term's Eighth Amendment blockbuster was *Brown v. Plata*,[51] which upheld a remedial order to reduce prison overcrowding. Because the most significant parts of *Plata* relate to the remedy, as opposed to the underlying violation of the Eighth Amendment's Cruel and Unusual Punishments Clause, I discuss the case in the Civil Rights part of this article below. In addition to *Plata*, one other Eighth Amendment case, *Bobby v. Mitts*,[52] is worth noting. In *Mitts*, the Court granted the State's petition for writ of certiorari and summarily reversed the court of appeals' grant of sentencing relief to a capital defendant.

The jury that sentenced Mitts to death had been instructed to determine beyond a reasonable doubt whether the aggravating circumstances were sufficient to outweigh the mitigating factors. Further, if the jury made such a finding, it was required to recommend a sentence of death. But if the jury found that the State failed to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors, the jury then would determine which of two possible life sentences to recommend. The court of appeals found that the instructions were contrary to *Beck v. Alabama*,[53] which held that the death penalty may not be imposed when the jury was not allowed to consider a verdict for a lesser included non-capital offense and where the evidence may have supported such a verdict. In its per curiam decision, the Court made clear that the rule in *Beck* is limited to instructions at the guilt phase. "The concern addressed in *Beck* was 'the risk of an unwarranted *conviction*' created when the jury is forced to choose between finding the defendant guilty of a capital offense and declaring him innocent of any wrongdoing."[54] The jurors already had convicted Mitts on two counts of aggravated murder and two counts of attempted murder. They were instructed that if they did not find the aggravating circumstances out-

44. *Id.* at 1168 (Scalia, J., dissenting).
45. *Id.* at 1173.
46. *Id.* at 1176.
47. 131 S.Ct. 2705 (2011).
48. 129 S.Ct. 2527 (2009).
49. *Bullcoming*, 131 S.Ct. at 2715.
50. *Id.* at 2724 (Kennedy, J., dissenting).
51. 131 S.Ct. 1910 (2011).
52. 131 S.Ct. 1762 (2011) (per curiam).
53. 447 U.S. 625 (1980).
54. *Mitts*, 131 S.Ct. at 1764 (quoting *Beck*, 447 U.S. at 637).

weighed the mitigating factors, they would choose from two life-sentence options. "There is accordingly no reason to believe that the jurors in this case, unlike the jurors in *Beck*, could have been improperly influenced by a fear that a decision short of death would have resulted in Mitts walking free."[55]

TENTH AMENDMENT

The Supreme Court does not decide a whole lot of criminal law cases with Tenth Amendment issues. *Bond v. United States*[56] is worth a look-see.

The defendant in *Bond* was convicted of violating 18 U.S.C. § 229, a federal statute that prohibits the possession or use of a chemical that can cause death, incapacitation, or permanent harm to humans or animals, where not intended for a "peaceful purpose." Bond contended that Congress had no authority to enact the statute, arguing that under the Tenth Amendment the power to criminalize this conduct was reserved to the States. The court of appeals found that Bonds lacked standing to raise this claim. The Supreme Court reversed in a unanimous opinion authored by Justice Kennedy.

The Court first concluded that Bond had standing for purposes of Article III's case-or-controversy requirement. She was challenging her conviction and sentence, her incarceration was a concrete injury caused by the conviction, and it would be redressable by invalidating the statute and the conviction. The Court then decided that her challenge should not be disallowed under the prudential rule that parties generally must assert their own legal rights and interests, not rest their claims for relief on the legal rights or interests of third parties. The justices rejected the argument that Bond merely was seeking to assert an interest of the State. Rather, she sought to vindicate her own constitutional interests. "It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another."[57] But it does more. "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions."[58] It is appropriate for an individual to "challenge a law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the vicarious assertion of a State's constitutional interests," even if the State's interests are also implicated.[59] Justices Ginsburg and Breyer concurred but observed that a court could not decline to consider Bond's constitutional argument on prudential grounds. The defendant has a personal right not to be convicted under a constitutionally invalid law.

FOURTEENTH AMENDMENT—DUE PROCESS

The Term also produced interesting due process cases involving civil contempt and parole.

Turner v. Rogers,[60] the civil contempt case, raised the question of whether an individual imprisoned for civil contempt is entitled to a lawyer or other protections. The petitioner, Turner, repeatedly failed to pay child support and was held in contempt on five occasions. After completing a six-month sentence, he received a new order to show cause why he was not in contempt because he was still in arrears. There was a brief hearing in which Turner was not represented by counsel. The clerk told Turner that he was behind in his payments, and the judge asked him if he wanted to say anything. After a statement by Turner, the judge found him in contempt and sentenced him to 12 months in detention. While Turner could purge the contempt by paying all of the amount owed, the trial court made no findings as to whether Turner had an ability to pay. Turner appealed, arguing that he was deprived of his right to counsel under the Due Process Clause. The Court vacated the finding of contempt, though on different grounds than Turner had raised.

***Turner v. Rogers* . . . raised the question of whether an individual imprisoned for civil contempt is entitled to a lawyer.**

Writing for the majority, Justice Breyer explained that because this was civil rather than criminal contempt, Turner had no right to counsel under the Sixth Amendment. The Court also declined to find a right to counsel under the Due Process Clause in civil-contempt proceedings, even when an indigent person is ordered confined to custody. Applying the *Mathews v. Eldridge*[61] balancing test, the justices decided that although the interest at stake was important, there were other opposing considerations, and there were substitute procedural safeguards that could help protect the individual's interests. The opposing considerations include that the other party is often the other parent, who also may be unrepresented by counsel. Providing an attorney to the non-paying parent "could create an asymmetry of representation" that would significantly alter the proceeding.[62] Moreover, a set of substitute procedural safeguards can significantly reduce the risk of erroneous deprivation of liberty. They include providing notice to the defendant that ability to pay is a critical issue in the proceeding, using a form or other procedure to elicit financial information, and providing an opportunity for the defendant to respond to statements about his financial status. The majority concluded that because Turner received neither counsel nor the benefit of alternative procedures, his incarceration violated the Due Process Clause.

Justice Thomas dissented. Joined by Justices Scalia, Alito, and Chief Justice Roberts, he argued that neither the Sixth Amendment nor the Due Process Clause provided a right to counsel. If the Due Process Clause created a right to appointed counsel in all proceedings in which detention was ordered, the right under the Sixth Amendment would be superfluous. In a part of the dissent joined only by Justice Scalia, Justice Thomas

55. *Id.* at 1765.
56. 131 S.Ct. 2355 (2011).
57. *Id.* at 2364.
58. *Id.*
59. *Id.* at 2365.
60. 131 S.Ct. 2507 (2011).
61. 424 U.S. 319 (1976).
62. *Turner*, 131 S.Ct. at 2519.

[A] court should not be required to ignore positive facts about a defendant just because those facts arose after the initial sentencing.

also contended that there was no basis for concluding that due process secured a right to counsel in this circumstance under an original understanding of the Constitution. And, he argued, the majority's analytical framework did not fully account for the interests that children and mothers have in effective and flexible methods to secure payment.

In *Swarthout v. Cooke*,[63] two state prisoners with life sentences in California filed federal habeas corpus petitions to challenge decisions denying their release on parole. Under California law, the State's parole authority—the Board of Prison Terms—"shall" set a release date for a life-sentenced inmate "unless" the Board determines that a lengthier time in custody is required for public safety reasons. The California Supreme Court has held that when an inmate seeks judicial review of a parole denial, the standard of review is whether "some evidence" supports the Board's decision. Applying *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*[64] and *Board of Pardons v. Allen*,[65] the federal court of appeals found that the statutory "shall/unless" language creates a liberty interest protected by the Due Process Clause and that a federal court may examine whether "some evidence" supports the denial of parole.[66] The Supreme Court disagreed and summarily reversed in a per curiam decision.

The Court held that the "some evidence" rule is not a component of the constitutionally protected liberty interest. Rather, "[w]hen . . . a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures. In the context of parole, we have held that the procedures required are minimal."[67] In *Greenholtz*, the Court previously found that a prisoner seeking parole "received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied."[68] No more is required here. The two inmates were allowed to speak at their hearings and to contest the evidence against them, they were given access to records in advance, and they were notified as to the reasons why parole was denied.[69]

FEDERAL CRIMINAL LAW

Most of the Term's federal criminal law cases are likely to interest only those involved in federal criminal prosecutions. But two cases relating to rehabilitation, *Pepper v. United States*[70] and *Tapia v. United States*,[71] may have broader appeal. They contain fascinating discussions about sentencing traditions and reveal some sharp disagreements among the justices.

The defendant in *Pepper* was sentenced several times for a federal drug offense. The court of appeals determined that the district court could not take into account post-sentence rehabilitation in resentencing an offender. The Supreme Court reversed in an opinion by Justice Sotomayor.

The Court began by enunciating the "federal judicial tradition" that sentencing judges consider defendants as individuals. Pointing to *Williams v. New York*,[72] the majority observed that both before and after the colonies became a nation, "courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used" to determine the kind and extent of punishment.[73] Further, "[p]ermitting sentencing courts to consider the widest possible breadth of information about a defendant 'ensures that the punishment will suit not merely the offense but the individual defendant.'"[74] The Court interpreted a federal statute, 18 U.S.C. § 3661, as consistent with that tradition and held that a court should not be required to ignore positive facts about a defendant just because those facts arose after the initial sentencing. The majority also rejected a claim that a policy statement issued by the Sentencing Commission should lead to a different result, especially "where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."[75] Justice Breyer, who had served as a member of the U.S. Sentencing Commission, concurred but did not find the majority's reference to *Williams* and a sentencing "tradition" helpful. He pointed out that a primary purpose of the guidelines was to bring about greater uniformity in sentencing.

Justice Alito dissented, contending that district court judges are required to give significant weight to the Commission's policy determinations. And, he wrote, "[a]nyone familiar with the history of criminal sentencing in this country cannot fail to see the irony in the Court's praise for the sentencing scheme exemplified by *Williams*" and the statute.[76] That scheme had fallen into disrepute by the time Congress sought to revamp federal sentencing in 1984. Some language in the Court's opinion "reads like a paean to that old regime," and Justice Alito expressed his fear that the opinion could be interpreted as approving a move back toward that system.[77]

The defendant in *Tapia* was sentenced to 51 months for alien smuggling. At sentencing, the judge indicated that the defendant should serve a prison term long enough to allow her

63. 131 S.Ct. 859 (2011) (per curiam).
64. 442 U.S. 1 (1979).
65. 482 U.S. 369 (1987).
66. *Swarthout*, 131 S.Ct. at 860-61.
67. *Id.* at 862.
68. *Id.*
69. *Id.*
70. 131 S.Ct. 1229 (2011).
71. 131 S.Ct. 2382 (2011).
72. 337 U.S. 241 (1949).
73. *Pepper*, 131 S.Ct. at 1240 (quoting *Williams*, 337 U.S. at 246).
74. *Id.* (quoting *Wasman v. United States*, 468 U.S. 559, 564 (1984)).
75. *Id.* at 1247.
76. *Id.* at 1256 (Alito, J., concurring in part and dissenting in part).
77. *Id.* at 1257. Justice Thomas also dissented, arguing that the guidelines should be applied as written unless they actually violate the Sixth Amendment. Justice Kagan took no part in the case.

to qualify for and complete a 500-hour residential drug abuse program operated by the Federal Bureau of Prisons. The question on appeal was whether federal sentencing statutes allow a sentencing judge to impose or lengthen a prison term in order to foster the defendant's rehabilitation. In a unanimous opinion written by Justice Kagan, the Court said no. *Tapia*—like *Pepper*—is a primer on the move from a federal indeterminate sentencing regime, in which rehabilitated offenders might be released on parole, to the current system of guidelines and determinate sentences. Under the federal sentencing statutes, the Court held, a sentencing court may consider rehabilitation in determining whether a sanction other than imprisonment is appropriate, but the statutes leave no room to consider rehabilitation in setting the length of a custodial sentence. Justices Sotomayor and Alito agreed with the Court's conclusion but concurred to express their skepticism that the district court judge in this case actually had lengthened Tapia's sentence to promote rehabilitation. But because the record was not entirely clear, these justices joined in the Court's order and remanded the case.

FEDERAL HABEAS CORPUS

As in many years, the Court had a substantial docket of habeas corpus cases. But this Term's decisions seem enormously significant with respect to the deference afforded state courts under the Antiterrorism and Effective Death Penalty Act (AEDPA). Two opinions, *Harrington v. Richter*[78] and *Cullen v. Pinholster*,[79] may well become landmarks. For federal habeas corpus review of state court convictions, this may prove to be a watershed Term.

Harrington v. Richter contains two important holdings. Richter was convicted of murder in a California prosecution. The prosecution argued that the decedent was killed as he lay on a couch. Richter's theory was that the shooting was in self-defense and that the decedent was killed in a crossfire as he stood in a doorway. There was a pool of blood in the doorway, but it was never tested to determine its source, and another person was wounded at the scene of the shooting. After Richter's conviction was affirmed on direct appeal, he filed a petition for a writ of habeas corpus in the California Supreme Court with affidavits from forensic experts to support his theory that the decedent was shot in the doorway and the blood came from him. The California Supreme Court denied the petition in a one-sentence summary order. The district court denied Richter's federal habeas corpus petition, but the court of appeals found that he was entitled to relief. In an 8-0 decision written by Justice Kennedy, the Supreme Court reversed.

First, the Court ruled that the state court's summary denial was an adjudication that is due deference under AEDPA. Pursuant to 28 U.S.C. § 2254(d), federal habeas corpus relief cannot be granted with respect to a claim adjudicated on the merits in state court unless the decision was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts. The justices held that determining whether a state court's decision was the result of an unreasonable legal or factual conclusion does not require an opinion from the state court explaining its reasoning. Richter also argued that the California Supreme Court decision did not indicate that it was on the merits. The Court ruled that when a federal claim has been presented to a state court and relief is denied, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary,"[80] and Richter did not make a sufficient showing to overcome that presumption. The state courts or legislature are of course free to alter state practice or elaborate more fully on the meaning of a summary denial.

For federal habeas corpus review of state court convictions, this may prove to be a watershed Term.

Second, the Court held that the California Supreme Court's decision was not unreasonable. The justices emphasized that "[u]nder § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."[81] While "§ 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings," if the AEDPA standard "is difficult to meet, that is because it was meant to be."[82] Under the "doubly" deferential standards of *Strickland v. Washington*[83] and AEDPA, there was a reasonable justification for the state court's decision. Justice Ginsburg concurred. She thought that trial counsel's performance was unreasonable under *Strickland* but that the affidavits did not establish prejudice. Justice Kagan took no part in the case.

Another case decided the same day applied *Richter* to a claim that counsel was ineffective for failing to move to suppress the defendant's confession before recommending a guilty plea. In *Premo v. Moore*,[84] another 8-0 ruling, Justice Kennedy emphasized that the court of appeals "was wrong to accord scant deference to counsel's judgment, and doubly wrong to conclude it would have been unreasonable to find that the defense attorney qualified as counsel for Sixth Amendment purposes."[85] The court of appeals erred in finding the state court's decision to be contrary to *Arizona v. Fulminante*,[86] since *Fulminante* was a case involving the admission of an involuntary confession and not the *Strickland* standard of effective-

78. 131 S.Ct. 770 (2011). Disclosure: I co-authored an amicus curiae brief in this case. As with many of my efforts, it was not in support of the side that prevailed.
79. 131 S.Ct. 1388 (2011).
80. *Harrington*, 131 S.Ct. at 784-85.
81. *Id.* at 786.
82. *Id.*
83. 466 U.S. 668 (1984).
84. 131 S.Ct. 733 (2011).
85. *Id.* at 740.
86. 499 U.S. 279 (1991).

"[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."

ness. Justice Ginsburg again concurred, finding an inadequate showing of prejudice; the defendant never said that had he been better informed, he would have turned down the plea offer. Justice Kagan again took no part in the case.

Cullen v. Pinholster is the other potential landmark AEDPA case of the Term with important implications for fact-development procedures and the duties of counsel in a capital case. Pinholster was convicted of murder, and prosecutors sought the death penalty. Before the penalty phase began, defense counsel moved to exclude aggravating evidence on the grounds that the prosecution did not provide notice of the evidence it sought to introduce. The motion was denied. The prosecution called a series of witnesses, and defense counsel called the defendant's mother but no mental health experts or other witnesses. Pinholster was sentenced to death. His conviction was affirmed by the California Supreme Court, which also summarily denied (without opinion) two habeas corpus petitions. The state petitions alleged, among other things, ineffective assistance of counsel based on the failure to conduct a full penalty phase investigation and failure to present mitigating evidence, including evidence of mental disorders. Although no hearing was held in state court on the habeas petitions, the federal district court conducted an evidentiary hearing. The district court granted relief, and the court of appeals affirmed. The Supreme Court reversed.

Justice Thomas wrote for the Court. One question was whether the federal court had properly reviewed the state court's determinations of law under 28 U.S.C. § 2254(d)(1). That provision provides that a federal court cannot grant relief with respect to a claim due to an error of law unless the adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[87] In *Pinholster*, the court of appeals had considered the evidence adduced during the federal evidentiary hearing in deciding that the state court had unreasonably applied *Strickland*. In a part of the opinion that garnered seven votes, the Court found that this was error: "We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."[88] "Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so."[89]

In another part of the opinion, five justices found that the court of appeals erred in concluding that the state court had unreasonably applied clearly established federal law to Pinholster's ineffective-assistance-of-counsel claim. Under *Richter*, the petitioner can satisfy the "unreasonable application" part of § 2254(d)(1) "only by showing that 'there was no reasonable basis' for the California Supreme Court's decision."[90] Pinholster could not meet this demanding standard. The majority characterized trial counsel's actions as a strategic effort to exclude the prosecution's witnesses for lack of notice and, if that failed, to put on the defendant's mother. But more pointedly, the Court criticized the court of appeals for deriving from prior Supreme Court decisions such as *Williams v. Taylor*,[91] *Wiggins v. Smith*,[92] and *Rompilla v. Beard*,[93] a "constitutional duty to investigate," saying that this overlooked the wide latitude given to defense counsel in making tactical decisions and that "[b]eyond the general requirement of reasonableness, 'specific guidelines are not appropriate.'"[94]

Justice Alito concurred in the judgment but disagreed with the majority's construction of § 2254(d)(1), finding that a federal court must take into account the new evidence admitted in a federal evidentiary hearing. Justice Alito also noted, however, that under AEDPA such hearings should be rare.

Justice Sotomayor wrote a lengthy and sharp dissent. Along with Justice Alito, she would have construed § 2254(d)(1) to permit a federal court to consider new evidence presented at an evidentiary hearing. The problem with the majority's approach, she wrote, "is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court."[95] As an example, she gave the case of a petitioner who diligently attempted in state court to develop the factual basis of the claim that prosecutors withheld exculpatory evidence. If the petitioner uncovered evidence after the state court denied relief but before filing in federal court, there may be no adequate mechanism for the individual to develop his claim and obtain a ruling on it, especially if state law does not permit successive petitions. In a part of the dissent joined by Justices Ginsburg and Kagan, Justice Sotomayor argued that as *Wiggins*, *Williams* and other cases "make clear, the prevailing professional norms at the time of Pinholster's trial required his attorneys to 'conduct a thorough investigation of the defendant's background,' . . . or 'to make a reasonable decision that makes particular investigations unnecessary.'"[96] "*Wiggins*," she wrote, "is illustrative of the competence we have required of counsel in a capital case" and "[t]his case is remarkably similar to *Wiggins*."[97]

Justice Breyer joined in the majority's construction of § 2254(d)(1) but would have sent the case back to the court of appeals to apply the legal standards to the facts. He also wrote separately to explain the situations in which, in his view, a petitioner might still obtain a federal evidentiary hearing.

In the wake of *Pinholster*, a number of lower federal courts

87. 28 U.S.C. § 2254(d)(1).
88. *Pinholster*, 131 S.Ct. at 1398.
89. *Id.* at 1401.
90. *Id.* at 1402 (quoting *Richter*, 131 S.Ct. at 784).
91. 529 U.S. 362 (2000).
92. 539 U.S. 510 (2003).
93. 545 U.S. 374 (2005).
94. *Pinholster*, 131 S.Ct. at 1406 (quoting *Strickland*, 466 U.S. at 688).
95. *Id.* at 1417 (Sotomayor, J., dissenting).
96. *Id.* at 1427-28 (citations omitted).
97. *Id.* at 1428.

have found that petitioners were not entitled to evidentiary hearings,[98] though some courts have permitted hearings to go forward in limited circumstances, such as to establish actual innocence or when a state court made no factual findings but unreasonably applied *Strickland* and denied relief based on the petitioner's allegations alone.[99] It remains to be seen whether courts will view *Pinholster* as a substantial revision of defense counsel's duties with respect to mitigating evidence.

Two other habeas cases are worth noting. In *Walker v. Martin*,[100] the Court gave further guidance about state procedural decisions that may bar later federal habeas corpus review. Martin filed a habeas corpus petition in the California Supreme Court nearly five years after his conviction became final. California requires a prisoner to seek habeas relief without substantial delay. Many petitions are denied summarily without explanation (as in *Richter*), but courts also often cite cases indicating that a petition was dismissed for procedural grounds. While the California Supreme Court had discretion to reach the merits of Martin's petition despite any delay in filing, that court denied his petition with a citation to two cases, indicating that the petition was untimely. In a unanimous decision authored by Justice Ginsburg, the Court found that this was sufficient to foreclose federal review. A discretionary state procedural rule "can serve as an adequate ground to bar federal habeas review" if it is firmly established and regularly followed.[101] California's time rule, although discretionary, instructs habeas petitioners to allege with specificity the absence of delay, good cause for it, or eligibility for one of several exceptions to the time bar. The time rule was thus firmly established and not too vague; nor did it impose new and unforeseeable requirements or operate to the particular disadvantage of inmates asserting federal rights.

The other case, *Wall v. Kholi*,[102] resolved an issue that had split the lower federal courts: whether a motion to reduce a state sentence tolls the AEDPA limitations period for filing a federal habeas corpus petition. Under 28 U.S.C. § 2244(d)(2), a petitioner has one year to file a federal petition, though the time period is tolled during the pendency of "a properly filed application for State post-conviction or other collateral review."[103] The Court in *Kholi* defined "collateral review" as "a form of review that is not part of the direct appeal process."[104] Kholi's motion was filed under a state rule that functionally provides for a plea for leniency apart from the direct review process and thus was seeking "collateral review" under this definition.

A discretionary state procedural rule "can serve as an adequate ground to bar federal habeas review" if it is firmly established and regularly followed.

CIVIL RIGHTS

The Term's most significant civil rights case was *Brown v. Plata*, which affirmed a three-judge panel's order with respect to medical care and prison overcrowding in California. I also will discuss two other civil rights cases, *Skinner v. Switzer*[105] and *Connick v. Thompson*;[106] they contain important holdings about the availability of civil rights remedies for exonerated defendants and those who merely nurse the hope that they someday may be exonerated.

Two decades-old class-action prison-conditions cases were consolidated in *Plata*. One, *Coleman v. Brown*, involved prisoners with serious mental illnesses. The second, *Plata*, was brought on behalf of inmates with serious medical conditions. After years of litigation, which included the appointment of a special master in *Coleman* and a receiver in *Plata*, the plaintiffs moved to empanel a three-judge court empowered under the Prison Litigation Reform Act (PLRA)[107] to order reductions in the prison population. Following a trial, the three-judge court issued a lengthy opinion with detailed findings of fact and ordered the State to reduce its prison population to 137.5% of the prisons' design capacity within two years, though the order did not require California to achieve this reduction in any particular manner. The State appealed. The Supreme Court affirmed, 5-4.

Writing for the majority, Justice Kennedy rejected the claim that California should have been given more time to implement other remedial measures before ordering a reduction in population. The Court noted how long the federal courts already had sought to remedy the violations. The majority upheld the factual findings by the three-judge court, its determination that "overcrowding was the primary cause in the

98. *See*, *e.g.*, Jackson v. Kelly, 650 F.3d 477, 492 (4th Cir. 2011) (citing *Pinholster* and finding that "the [district] court's reliance on material developed at the federal evidentiary hearing was at odds with AEDPA's placement of 'primary responsibility [for habeas review] with the state courts.'"); Parrish v. Simpson, 2011 WL 1594789, at *3, 2011 U.S. Dist. LEXIS 45551, at *9 (W.D. Ky. Apr. 27, 2011) (citing *Pinholster* and finding that "it would be futile to allow discovery and to conduct an evidentiary hearing because the Court would not be able to consider anything beyond the state-court record.")
99. *See*, *e.g.*, United States ex rel. Brady v. Hardy, 2011 WL 1575662, at *3, 2011 U.S. Dist. LEXIS 44570, at *8-9 (N.D. Ill. Apr. 25, 2011) (declining to vacate order for evidentiary hearing to determine whether petitioner can overcome a procedural default by showing actual innocence); Hale v. Davis, 2011 WL 3163375, at *17-18, 2011 U.S. Dist. LEXIS 82173, at *22, 44-46 (E.D. Mich. July 27, 2011) (finding that hearing was properly held and that district court could consider the new evidence, as the state court apparently assumed that the petitioner's claims were true and then unreasonably determined that, if they were true, he would not be entitled to relief); *see also* Pao Lo v. Kane, 2011 WL 2462932, at *32, 2011 U.S. Dist. LEXIS 64620, at *84-87 (E.D. Cal. June 17, 2011) (state court unreasonably applied Supreme Court precedent in denying petitioner a complete voir dire transcript so that he could fully raise a *Batson* claim).
100. 131 S.Ct. 1120 (2011).
101. *Id.* at 1128 (quoting Beard v. Kindler, 130 S.Ct. 612, 618 (2009)).
102. 131 S.Ct. 1278 (2011). Justice Scalia joined all but a footnote of the Court's opinion.
103. 28 U.S.C. § 2244 (d)(2).
104. *Id.* at 1284.
105. 131 S.Ct. 1289 (2011).
106. 131 S.Ct. 1350 (2011).
107. 18 U.S.C. § 3626.

Justice Scalia . . . alleged that "[t]oday the Court affirms what is perhaps the most radical injunction issued by a court in our Nation's history."

sense of being the foremost cause of the violation," and the finding by clear and convincing evidence that no other relief will remedy the violation of the federal right.[108] The justices concluded that the remedial order was narrowly drawn, extended no further than necessary to correct the violation of federal rights, and there were means of reducing overcrowding that would have little or no impact on public safety.

The four dissenting justices pulled no punches. Justice Scalia, joined by Justice Thomas, alleged that "[t]oday the Court affirms what is perhaps the most radical injunction issued by a court in our Nation's history."[109] That was followed with perhaps an even more remarkable statement: "There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa."[110] These justices disagreed with many aspects of the majority's decision, particularly the issuance of a "structural injunction," arguing that the decision "vastly expands its use, by holding that an entire system is unconstitutional because it *may produce* constitutional violations."[111] In a separate dissent, Justice Alito, joined by Chief Justice Roberts, contended that this case was a perfect example of what the PLRA was supposed to prevent. They took issue with the three-judge court's factual findings, called the order to release inmates a "radical and dangerous step," and accused the majority of "gambling with the safety of the people of California."[112]

The other two civil rights decisions are important, though they contain fewer fireworks. *Skinner* is the "hope to be exonerated" case. It presents a question left unresolved two years ago in *District Attorney's Office for Third Judicial District v. Osborne*[113] of whether a state prisoner seeking DNA testing of crime-scene evidence may raise that claim in a civil rights action under 42 U.S.C. § 1983. Skinner was convicted of several counts of murder and sentenced to death in Texas. He admitted that he was present in the house when the killings took place but argued that he was too incapacitated to have committed the murders, and he identified another person as the likely perpetrator. The State tested some evidence found at the crime scene, but other evidence (including the murder weapon) was untested. Texas has enacted a statute to allow prisoners to gain post-conviction DNA testing in certain circumstances. Skinner twice moved in state court for the yet untested biological evidence, but his motions were denied. He subsequently filed a federal civil rights action seeking access to the biological evidence. The lower courts dismissed his suit, finding that an action seeking DNA testing is not cognizable under § 1983 but instead must be brought as a petition for writ of habeas corpus. In a 6-3 decision written by Justice Ginsburg, the Court reversed.

The majority first observed that the question was not whether Skinner ultimately would win but rather whether his complaint was cognizable under the federal civil rights statute. The gist of his legal claim was that the Texas post-conviction DNA statute, as construed by the Texas courts, denied him due process because it would appear to foreclose new testing for any prisoner who could have sought DNA testing before trial but did not. The Court noted the basic test that a claim should be raised on habeas corpus if a favorable judgment would necessarily imply the invalidity of the conviction or sentence. In this case, success in Skinner's suit for DNA testing "would not 'necessarily imply' the invalidity of his conviction. While test results might prove exculpatory, that outcome is hardly inevitable; . . . results might prove inconclusive or they might further incriminate Skinner."[114] As such, the case was properly filed as a civil rights action. The majority also turned aside arguments that such a ruling would lead to a proliferation of federal civil rights actions seeking post-conviction discovery of evidence.

Justice Thomas, joined by Justices Kennedy and Alito, dissented. He contended that "[c]hallenges to all state procedures for reviewing the validity of a conviction should be treated the same as challenges to state trial procedures, which we have already recognized may not be brought under § 1983."[115] The dissenters particularly feared that the decision would spill over to claims under *Brady v. Maryland*,[116] and they argued that "[i]n truth, the majority provides a roadmap for any unsuccessful state habeas petitioner to relitigate his claim under § 1983."[117]

If the three dissenting justices in *Skinner* were especially concerned about inmates or exonerated defendants raising *Brady* claims under § 1983, *Connick v. Thompson*—decided just three weeks after *Skinner*—gave these justices a formidable vehicle to assuage at least some of their fears.

The respondent in *Thompson* was convicted in Orleans Parish of two offenses. First, he was convicted of an armed robbery. Then, a few weeks later, he was prosecuted for murder. Because of the armed-robbery conviction, Thompson did not testify at the murder trial. He was convicted and sentenced to death. Years later, just before Thompson was scheduled to be executed, an investigator made a startling discovery of a crime lab report that never had been provided to defense counsel. It turns out that in the robbery case, prosecutors in Orleans Parish did not disclose that they had a swatch of fabric stained with the blood of the robber and that the robber had blood type B. Thompson had blood type O. When this evidence was presented to the district attorney's office, it moved to stay the execution and vacate the armed-robbery conviction. A state court also reversed the murder conviction (based on the vacatur of

108. *Plata*, 131 S.Ct. at 1936-39.
109. *Id.* at 1950 (Scalia, J., dissenting).
110. *Id.*
111. *Id.* at 1953.
112. *Id.* at 1963, 1967 (Alito, J., dissenting).
113. 129 S.Ct. 2308 (2009).
114. *Skinner*, 131 S.Ct. at 1298.
115. *Id.* at 1302 (Thomas, J., dissenting).
116. 373 U.S. 83 (1963).
117. *Skinner*, 131 S.Ct. at 1303.

the armed-robbery conviction). Thompson was retried for the murder and was acquitted. He then brought a § 1983 action against the district attorney's office, District Attorney Connick, and others alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. It was conceded at trial that a *Brady* violation was committed by one or more of the individual prosecutors involved in the armed-robbery case. The jury, however, found that the district attorney and his office were also liable and awarded Thompson damages. In a 5-4 decision, the Supreme Court reversed the damage award, holding that, on the facts of the case, the district attorney's office could not be liable for failure to train prosecutors about their *Brady* obligations. This time, Justice Thomas' s opinion was for the Court.

The majority found that under a failure-to-train theory, Thompson bore the burden of proving both "(1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case."[118] Connick prevailed as a matter of law because Thompson did not prove that the district attorney was on actual or constructive notice of a need for more or different *Brady* training, and thus he was not deliberately indifferent to such a need. Although Thompson pointed out that during the 10 years before his armed robbery trial, Louisiana courts overturned four convictions because of *Brady* violations by prosecutors in Orleans Parish, these could not have put the district attorney on notice. "None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind."[119] Nor could Thompson win by arguing that the violation in his case was the obvious consequence of failure to provide specific *Brady* training. "In light of [the] regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law."[120] Justices Scalia and Alito concurred. They emphasized that "failure-to-train" liability is available only in limited circumstances and that a pattern of violations is usually necessary to establish municipal culpability and causation.

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. They argued that "the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish," which amounts to persistent, deliberately indifferent conduct for which the district attorney's office bears responsibility under § 1983.[121] The dissenting justices pointed to a number of facts: the prosecutor who suppressed the evidence confessed to a former Orleans Parish prosecutor that he had done so, and the former prosecutor kept the confession to himself for five years; the prosecution did not disclose 10 other reports or items of evidence when Thompson was first tried; and the district attorney himself and other leaders of the office misunderstood their obligations under *Brady*. Based on the evidence, the dissenters argued, "the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's office."[122]

All in all, 2010-2011 was a significant though perhaps not momentous Term, apart from the federal habeas corpus rulings.

A LOOK AHEAD

All in all, 2010-2011 was a significant though perhaps not momentous Term, apart from the federal habeas corpus rulings. What will the current year bring? It is still early, but a number of important matters appear headed for decision including Fourth Amendment challenges to the warrantless use of GPS tracking devices[123] and to suspicionless strip searches in jails.[124] The justices are addressing yet another *Brady* violation from the New Orleans District Attorney's Office. [insert fn. Smith v. Cain, No. 10-8145]. As Smith was argued early in the Term, it is perhaps merely an hors d'oevre for the Court. Other more substantial cases ask whether allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts violates the Confrontation Clause,[125] whether the Double Jeopardy Clause bars reprosecution for a greater offense when a jury deadlocked on a lesser offense announces that it has voted against guilt on the greater offense,[126] whether a prisoner is always in custody for *Miranda* purposes when he is isolated from general population and questioned,[127] and whether failures by state post-conviction lawyers can be attributed to a capital defendant and thus bar federal habeas review.[128] Stay tuned.

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118. *Thompson*, 131 S.Ct. at 1358.
119. *Id.* at 1360.
120. *Id.* at 1363 (citation omitted).
121. *Id.* at 1370 (Ginsburg, J., dissenting).
122. Id. at 1384.
123. United States v. Jones, No. 10-1259.
124. Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington, No. 10-945.
125. Williams v. Illinois, No. 10-8505.
126. Blueford v. Arkansas, No. 10-1320.
127. Howes v. Fields, No. 10-680.
128. Maples v. Thomas, No. 10-63.