2009

Selected Criminal Law Cases in the United States Supreme Court in the 2008-2009 Term, and a Look Ahead

Charles D. Weisselberg
University of California - Berkeley

Selected Criminal Law Cases in the United States Supreme Court in the 2008-2009 Term, and a Look Ahead

Charles D. Weisselberg

The U.S. Supreme Court's October 2008 Term gave us a number of very important criminal law and procedure cases. The Court overruled long-standing precedents on automobile searches and post-arraignment interrogation. The justices also addressed whether the use of a forensic chemist's report violates the Confrontation Clause. These three decisions affect routine police and courtroom practices; undoubtedly, there will be periods of adjustment for judges, lawyers, and police. The Term was also marked by other Fourth Amendment holdings, including one that either transforms the exclusionary rule or merely draws it closer to the rule's underlying purpose, depending on one's point of view. This article reviews some of the most significant criminal-law-related opinions of the Supreme Court's 2008-2009 Term, with an emphasis on the decisions that have the greatest impact upon the states. The article concludes with a brief preview of the current Term.

FOURTH AMENDMENT

During the 2007-2008 Term, the Court issued only one Fourth Amendment decision. Last year, the justices made up for lost time. Some of the Court's most far-reaching rulings were on Fourth Amendment issues.

Vehicle Searches

In *Arizona v. Gant*,[1] the Supreme Court revisited the scope of a vehicle search incident to an arrest. There may have been decisions by the Court last Term of broader importance, but this ruling impacts the way officers do their job every day.

The respondent in *Gant* was arrested on an outstanding warrant for driving on a suspended license. Officers saw Gant pull into his driveway. They called to him after he got out of his car, and Gant met the officers about 10-12 feet from the vehicle. He was handcuffed and eventually placed in the back of a patrol car. Afterwards, officers searched the car and found a bag of cocaine in the pocket of a jacket on the back seat. The trial court determined that the officers did not have probable cause to search the car but that the narcotics were found pursuant to a permissible search incident to an arrest. The Arizona Supreme Court reversed, saying that there was no justification for the search of the car after Gant was handcuffed and secured. The U.S. Supreme Court split 5-4, but agreed.

Writing for the majority, Justice Stevens noted the twin rationales for a search incident to an arrest set forth in *Chimel v. California*[2]—officer safety and preservation of contraband. In *New York v. Belton*,[3] the Court upheld the search of an automobile incident to an arrest where an officer had stopped a car, smelled marijuana, and observed an envelope on the floor that appeared to be associated with marijuana. The occupants of the car were not all handcuffed. Applying *Chimel*, the Court accepted the State's argument that it was reasonable for the officer to believe the arrestees could have accessed the vehicle and its contents. Nevertheless, as Justice Stevens wrote, *Belton* has subsequently been "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search."[4] The majority in *Gant* rejected this broad reading of *Belton*, though they also went further than *Chimel* in one respect—the justices determined that officers could search a car if they believed that evidence relating to the offense of arrest was inside. *Gant* thus provides that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest."[5] Justice Scalia concurred. He would have held that a vehicle search incident to arrest is reasonable only when the object of the search is evidence of crime (as opposed to officer safety) but voted with the majority so that there would be an opinion commanding five votes. The dissenting justices criticized the majority for (in their view) overruling *Belton* and *Thornton v. United States*.[6] Justice Alito wrote the primary dissent, arguing that the circumstances did not justify abandoning the general understanding of *Belton*.

In the first six months after the April 2009 decision in *Gant*, the decision was cited in over 250 reported cases.[7] A pattern has not yet emerged. Courts are applying the *Gant* criteria (officer safety and the belief that the vehicle may contain

Footnotes

1. 129 S.Ct. 1710 (2009).
2. 395 U.S. 752 (1969).
3. 453 U.S. 454 (1981).
4. *Gant*, 129 S.Ct. at 1718.
5. *Id.* at 1723.
6. 541 U.S. 615 (2004).
7. As shown in a Lexis search conducted on October 18, 2009.

evidence of the crime of arrest) to uphold vehicle searches incident to arrest[8] as well as to invalidate them,[9] depending on the relevant facts. *Gant* did not undermine the other bases for warrantless searches of automobiles, and courts have thus often considered whether evidence no longer admissible post-*Gant* may nevertheless be admitted because of a different lawful basis for the search (though some appellate courts may not be free to consider grounds to uphold a search not argued below).[10] One interesting question, which I address below after discussing *Herring v. United States* (the exclusionary rule case), is whether the good-faith exception to the exclusionary rule saves evidence seized in violation of *Gant* but obtained in reliance on *Belton*.

Another Fourth Amendment decision, *Arizona v. Johnson*,[11] may also be of interest, though it is much less momentous than *Gant*. There, the justices addressed whether officers may frisk a passenger in a car that is stopped for a traffic violation. Arizona police stopped a vehicle for a traffic infraction. The car had three occupants. Based on their observations and their conversation with a back-seat passenger, Johnson, officers suspected that Johnson had a weapon. He was asked to get out of the car and was patted down, and a gun was found.

It has been clear for some time that once a vehicle has been detained for a traffic violation, police may order the driver to get out of the automobile and may frisk him if the officer reasonably believes the driver is armed and dangerous. The Court had also previously determined that passengers may be ordered out of the vehicle following a traffic stop. In *Johnson*, the justices unanimously held that a passenger as well as a driver may be frisked if the officer reasonably suspects that the passenger is armed and dangerous.

School Searches

One of the most closely followed cases of the Term was *Safford Unified School District #1 v. Redding*,[12] which dealt with whether school officials violated the Fourth Amendment by partially strip-searching a student for drugs. School officials had found a day planner in which there were several knives, lighters, a cigarette, and several pills (four prescription-strength ibuprofens and one over-the-counter pill for pain and inflammation). The planner belonged to a 13-year old middle school student, Savana Redding. Redding told the assistant principal that the planner was hers, but that she had loaned it several days earlier to another student. She denied that any of the items in the planner belonged to her. School officials searched Redding's backpack, finding nothing. The assistant principal instructed a female administrative assistant to take Redding to the nurse's office. The assistant and the nurse told Redding to pull out her bra and the elastic on her undergarments. No pills were found. Redding's mother filed a civil-rights suit against the school district and individuals. The district court found no Fourth Amendment violation. The court of appeals reversed.

In the first six months after the April 2009 decision in *Gant*, the decision was cited in over 250 reported cases. A pattern has not yet emerged.

By a vote of 8-1, the Supreme Court ruled that school officials violated Redding's Fourth Amendment rights by conducting a strip-search. The Court did not question the ability of the school district to promulgate a rule banning all drugs, no matter how benign, without advance permission. School officials had sufficient suspicion to search the student's backpack and outer clothing. But there was insufficient evidence to support the much more intrusive additional search.[13] The opinion by Justice Souter acknowledges that, as previously held in *New Jersey v. T.L.O.*,[14] school officials do not need probable cause to conduct a search. The standard is reasonable suspicion, but the search must be reasonably related to its objectives and must not be excessively intrusive in light of the age and gender of the student and the type of infraction under investigation. In this case, there was no indication of danger to students from the power of the drugs or their quantity, nor was there any reason to believe that Redding was carrying pills in her underwear. Thus, "the content of the suspicion failed to match the degree of intrusion."[15] Further, there must be support for a reasonable suspicion of danger to the students or of resort to hiding evidence in underwear "before a search can reasonably make a quantum leap from outer clothes and backpacks to exposure of intimate parts."[16]

Although the majority found a constitutional violation,

8. *See*, *e.g.*, *United States v. Davis*, 569 F.3d 813 (8th Cir. 2009); *United States v. Grice*, 2009 U.S. App. LEXIS 14431 (11th Cir. 2009); *People v. Osborne*, 175 Cal. App. 4th 1052 (Cal. Ct. App. 2009); *McCloud v. Commonwealth*, 286 S.W.3d 780 (Ky. 2009).
9. *See*, *e.g.*, *People v. Estrada*, 2009 Ill. App. LEXIS 819 (Ill. App. Ct. 2009); *State v. Henning*, 209 P.3d 711 (Kan. 2009) (invalidating a state statute post-*Gant*); *State v. Keaton*, 2009 Kan. App. Unpub. LEXIS 761 (Kan. Ct. App. 2009); *State v. Carter*, 682 S.E.2d 416 (N.C. Ct. App. 2009); *State v. McCormick*, 2009 Wash. App. LEXIS 2240 (Wash. Ct. App. 2009).
10. *See*, *e.g.*, *United States v. Kellam*, 568 F.3d 125 (3d Cir. 2009); *United States v. Martinez-Cortes*, 566 F.3d 767 (8th Cir. 2009); *United States v. Morillo*, 2009 U.S. Dist. LEXIS 94396 (E.D.N.Y. 2009); *United States v. Gilbert*, 2009 U.S. Dist. LEXIS (W.D. Pa. 2009); *United States v. Arriaza*, 2009 U.S. Dist. LEXIS 59299 (E.D. Va. 2009); *Meister v. State*, 912 N.E.2d 412 (Ind. 2009); *State v. Canter*, 2009 Ohio App. LEXIS 4076 (Ohio Ct. App. 2009).
11. 129 S.Ct. 781 (2009).
12. 129. S.Ct. 2633 (2009).
13. While the opinion gave other reasons for this conclusion, one astute commentator (a former assistant to the solicitor general) noted: "Right off the bat, I'm suspicious of the school administrators here, because as a socially aware person who is knowledgeable about the younger generation from watching the WB, I'm fairly confident that no teenaged girl today owns a piece of clothing anywhere near big enough to conceal such a large tablet." John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term 2008*, 12 GREEN BAG 2d 429, 440 (2009).
14. 469 U.S. 325 (1985).
15. *Safford*, 129 S.Ct. at 2642.
16. *Id.* at 2643.

Another of the Court's decisions, *Herring v. United States*, may have a much wider influence.

seven justices determined that school officials were entitled to qualified immunity, particularly in light of lower-court rulings applying *T.L.O.* Justices Stevens and Ginsburg dissented from this part of the majority opinion. They would have found the law sufficiently clear to hold the school officials liable. Justice Thomas agreed with the majority's judgment on qualified immunity but dissented from the Fourth Amendment holding. He would have found no constitutional violation and would have ruled instead that judges should not second-guess the measures taken by school officials to maintain discipline and to ensure the health and safety of the students in their charge.

The Exclusionary Rule

While *Gant* and *Redding* affect day-to-day policing, their impact appears limited to certain types of searches. Another of the Court's decisions, *Herring v. United States*,[17] may have a much wider influence.

In *Herring*, a warrant clerk called the sheriff's office in a neighboring county to determine if the defendant (who was retrieving items from an impounded truck) had an outstanding warrant. The neighboring county's computer database erroneously indicated that there was an outstanding arrest warrant for failure to appear on a felony charge. Relying upon this information, an officer arrested the defendant and found drugs and a weapon in his possession. The question for the Supreme Court was whether evidence is inadmissible under the Fourth Amendment's exclusionary rule when an officer conducts an unconstitutional search but acts on information negligently maintained by law enforcement in a database.

By a 5-4 vote, the Court held that the evidence should not be suppressed. In his opinion for the majority, Chief Justice Roberts pointed to *United States v. Leon*[18] and other cases, and he noted that the purpose of the exclusionary rule is deterrence. He wrote that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[19] Exclusion is not automatic. When police errors "are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'"[20] Justice Ginsburg wrote the primary dissent, arguing that the exclusionary rule is not as narrowly focused as presented by the majority (it has "a more majestic conception"[21]) and that the rule is essential to command respect for the Fourth Amendment. She also pointed out that the majority's suggestion of only marginal deterrence when the misconduct is merely careless runs counter to the premise of tort law: liability for negligence creates an incentive to act with greater care. Exclusion here would encourage those who maintain databases to act more carefully.[22] Justice Breyer also dissented to note that a previous case forgiving a recordkeeping error (*Arizona v. Evans*[23]) addressed an error by a court clerk, not a mistake by police.

The case is significant in a number of respects and leaves several questions unanswered. First, by holding that exclusion is not automatic and that the exclusionary rule only applies when deterrence outweighs harm to the justice system, *Herring* invites courts to consider whether exclusion is justified in a broad range of circumstances in which it may be claimed that officers acted without bad intent or recklessness, or where there was not some other sort of systemic error. While the *Herring* Court cited to *Leon*, *Herring* broadened the good-faith exception beyond instances in which officers relied in good faith on judges (as in *Leon*), court clerks or other non-law-enforcement actors. Second, though the majority wrote that "[t]he pertinent analysis of deterrence and culpability is objective" rather than subjective,[24] one may expect substantial litigation and uncertainty over these issues. Third, if exclusion is only "triggered" when there is a need for deterrence or the other requisite elements are in place, is it the defendant's burden to prove that exclusion is required, or is it the State's burden of showing that it meets a good-faith exception to the exclusionary rule?[25]

In the first ten months since *Herring* was announced, the decision has been cited in many reported cases. While there are a number of rulings applying *Herring* and finding officers' conduct sufficiently or insufficiently culpable as to require exclusion,[26] it is too early to discern trends. It is also not yet clear whether the tendency will be for courts to make the deterrence and culpability determinations case-by-case on an infinite variety of facts, or whether more categorical approaches will emerge (such as in *Hudson v. Michigan*,[27]

17. 129 S.Ct. 695 (2009).
18. 468 U.S. 897 (1984).
19. 129 S.Ct. at 702.
20. *Id.* at 704 (citation omitted).
21. *Id.* at 707 (Ginsburg, J., dissenting; citation omitted).
22. *Id.* at 707-708.
23. 514 U.S. 1 (1995).
24. 129 S.Ct. at 703.
25. *See id.* at 705 (Ginsburg, J., dissenting) ("even when deliberate or reckless conduct is afoot . . . [h]ow is an impecunious defendant to make the required showing?")
26. Conduct insufficiently culpable to support exclusion: *E.g.*, *United States v. Groves*, 559 F.3d 637 (7th Cir. 2009) (police dispatcher's mistake); *United States v. Stabile*, 2009 U.S. Dist. LEXIS 4263 (D.N.J. 2009) (at most negligent errors in coordinating among multiple agencies); *United States v. Davis*, 2009 U.S. Dist. LEXIS 83864 (D. Md. 2009) (error in retaining profile in DNA database); *Delker v. State*, 2009 Miss. App. LEXIS 597 (Miss. Ct. App. 2009) (mistaken belief that officer was still within his jurisdiction).
Conduct sufficiently culpable to support exclusion: *E.g.*, *United States v. Ryan*, 2009 U.S. Dist. LEXIS 53644 (D. Vt. 2009) (use of facially invalid warrant); *United States v. Parson*, 599 F. Supp. 2d 592 (W.D. Pa. 2009) (tactics in attempting to obtain consent to search); *United States v. Moore*, 2009 U.S. Dist. LEXIS 81547 (E.D. Tenn. 2009) (intentional conduct in searching without reasonable suspicion); *People v. Morgan*, 901 N.E.2d 1049 (Ill. App. Ct. 2009) (use of old warrant list, and failure to verify existence of warrant).
27. 547 U.S. 586 (2006).

where the justices took "knock and announce" violations out of the scope of the exclusionary rule). Some judges have, however, indicated that the burden is on the State to establish that officers acted in good faith.[28]

Finally, *Herring* has had an interesting impact on the implementation of *Gant*. A question that has already split the federal courts is whether evidence seized in violation of *Gant* should nevertheless be admitted if officers reasonably relied on *Belton* and its progeny, the law prior to *Gant*. Citing *Herring*, some courts have ruled that the evidence should not be excluded because, under these circumstances, there would not be a significant deterrent effect and the officers were not sufficiently culpable.[29] Other courts have held that the evidence must be excluded because newly announced Supreme Court decisions apply to cases then pending on direct appeal under well-established principles of retroactivity.[30] The Supreme Court recently denied a petition for writ of certiorari raising this issue.[31]

SIXTH AMENDMENT

Last Term saw very important rulings on the rights to counsel, a jury trial, a speedy trial, the Sixth Amendment exclusionary rule, and the Confrontation Clause.

Right to Counsel

In *Montejo v. Louisiana*,[32] the Court overturned *Michigan v. Jackson*,[33] which forbade police from initiating questioning of a defendant who requested counsel at an arraignment or other similar judicial proceeding. Jesse Montejo was arrested for robbery and murder. He was brought before a judge for a "72-hour hearing," a preliminary proceeding at which counsel is customarily appointed. A minute order showed that counsel was appointed, but the order did not indicate whether the defendant affirmatively asked for a lawyer or whether counsel was simply appointed as a matter of routine (as is common in a number of jurisdictions). After the proceeding, police initiated further questioning. Montejo waived his *Miranda* rights and, among other things, wrote an incriminating letter of apology to the victim's widow. The letter was introduced at trial, and Montejo was convicted and sentenced to death. On appeal, the Louisiana Supreme Court affirmed the decision, finding no *Jackson* error because the record did not indicate that the defendant actually requested a lawyer or otherwise affirmatively invoked his Sixth Amendment right to counsel at the "72-hour hearing."

The U.S. Supreme Court took the case to decide whether after the Sixth Amendment right to counsel has attached, a defendant must affirmatively ask for counsel or take steps to "accept" a lawyer to trigger *Jackson*'s protections. Montejo argued that because the appointment practices of jurisdictions vary so much, such a rule would be unworkable. After oral argument the justices called for supplemental briefing on whether *Jackson* should be overruled. By a vote of 5-4, the justices set *Jackson* aside.

Montejo represents a significant change in interrogation law and may well spur new police practices.

In an opinion written by Justice Scalia, the majority characterized *Jackson* as importing the rule of *Edwards v. Arizona*[34] into the Sixth Amendment, stating that the only way to make sense of *Jackson* is as protection from police badgering. But the majority noted that a defendant who has had counsel appointed has other protections against badgering. A waiver of the right to counsel must be voluntary, and a defendant who does not want to speak to the police without a lawyer "need only say as much when he is first approached and given the *Miranda* warnings,"[35] which will trigger the protections of *Edwards*. The majority thought that the additional protections of *Jackson* were not worth the costs and that the principles of *stare decisis* were insufficient to require *Jackson* to be retained. The primary dissent was written by Justice Stevens. The dissenters contended that the majority misrepresented *Jackson*'s underlying rationale and the constitutional interests the decision sought to protect. *Jackson*, the dissenters wrote, is not about police badgering. Rather, "it is a rule designed to safeguard a defendant's right to rely on the assistance of counsel."[36]

Montejo represents a significant change in interrogation law and may well spur new police practices. While *Montejo* does not undermine the old rule in *Massiah v. United States*[37]—*undercover* officers or informants still cannot elicit information from a defendant after the right to counsel has attached—there is no longer a bright-line rule prohibiting known officers from initiating an interrogation and seeking a waiver of the right to counsel. *Massiah* aside, the main legal issues for post-arraignment interrogations will now be the same as for interrogations prior to arraignment: compliance with *Miranda* and voluntariness.[38]

Last Term, the Court also addressed the scope of the Sixth Amendment exclusionary rule when there is a violation of the right to counsel. The defendant in *Kansas v. Ventris*[39] was in

28. *See Morgan*, 901 N.E.2d at 1060 ("the State failed to meet its burden of proof that the good-faith exception should apply, and exclusion was the proper remedy"); *People v. Pearl*, 92 Cal. Rptr. 3d 85, 88 (Cal. App. 2009) (in *Herring*, the Court "further defined the good faith exception, but did not alter the prosecution's burden of proof in the trial court.")
29. *See United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *United States v. Owens*, 2009 U.S. Dist. LEXIS 81378 (N.D. Fla. 2009).
30. *See United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009); *United States v. Buford*, 623 F. Supp. 2d 923 (M.D. Tenn. 2009).
31. *McCane v. United States*, No. 09-402 (U.S., cert. denied Mar. 1, 2010).
32. 129 S.Ct. 2079 (2009).
33. 475 U.S. 625 (1986).
34. 451 U.S. 477 (1981).
35. *Montejo*, 129 S.Ct. at 2090.
36. *Id.* at 2097 (Stevens, J., dissenting).
37. 377 U.S. 201 (1964).
38. Because a *Miranda* waiver also generally suffices as a waiver of the Sixth Amendment right to counsel (*see Patterson v. Illinois*, 487 U.S. 285 (1988)), the defendant's *Miranda* and Sixth Amendment claims will likely stand or fall together.
39. 129 S.Ct. 1841 (2009).

The majority opinion, written by Justice Scalia, placed the analysts' sworn certificates squarely within the "core class of testimonial statements" covered by the Confrontation Clause as described in *Crawford*.

the hoosegow, charged with murder and aggravated robbery. Officers planted an informant in his cell. Following a conversation with the informant, Ventris made incriminating statements, which the State conceded were the product of a violation of the right to counsel (a *Massiah* violation). These statements were excluded from the prosecution's case-in-chief but were admitted to impeach Ventris's testimony at trial. In a 7-2 decision, the Supreme Court ruled that the statement was properly admitted for impeachment. Writing for the majority, Justice Scalia determined that the constitutional violation occurred in the jail cell, and the informant spoke to the defendant without counsel. Comparing the Sixth Amendment exclusionary rule with that of the Fourth Amendment (and echoing the holding earlier in *Herring*), the majority stated that exclusion is not automatic but instead depends upon a balancing of relevant factors. In this case, the Court wrote, "the game of excluding tainted evidence for impeachment purposes is not worth the candle."[40] The interests safeguarded by exclusion are outweighed by the need to prevent perjury and assure the integrity of the trial. Justices Stevens and Ginsburg dissented. They argued that while the constitutional breach began during the questioning by the informant, the use of that evidence at trial compounded the violation. In their view, "[t]he use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process—the fairness of which the Sixth Amendment was designed to protect."[41]

Confrontation

Melendez-Diaz v. Massachusetts[42] is the most recent Confrontation Clause decision in the *Crawford*[43] line of cases. The defendant in *Melendez-Diaz* was charged with drug distribution offenses. Seized evidence was sent to a state laboratory. At trial, the State introduced the seized evidence as well as sworn "certificates of analysis" prepared by lab analysts. The certificates gave the weight of the substances and stated that they contained cocaine. In a 5-4 ruling, the Court held that the introduction of the chemist's notarized certificates violated the Sixth Amendment where the analysts were not called at trial.

The majority opinion, written by Justice Scalia, placed the analysts' sworn certificates squarely within the "core class of testimonial statements" covered by the Confrontation Clause as described in *Crawford*.[44] *Crawford* referred to materials such as affidavits or similar pretrial statements that prosecutors would reasonably expect to be used at a later trial,[45] and sworn "certificates" are plainly affidavits. The remainder of the lengthy majority opinion was devoted to rebutting reasons for removing affidavits about forensic evidence from the holding in *Crawford*. The Court rejected claimed differences between testimony recounting historical events and affidavits relating to "neutral, scientific testing." The majority saw this as an argument for a return to the pre-*Crawford* practice of permitting the admission of evidence bearing "particularized guarantees of trustworthiness" notwithstanding the Confrontation Clause. The justices also challenged the claims that the admission of forensic evidence through affidavits had a long pedigree, that these affidavits were akin to business records, and that requiring live testimony would unduly interfere with the criminal justice system. Finally, the majority was not persuaded by the fact that defendants could subpoena the chemists. As the opinion states, "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."[46] The dissenting justices, led by Justice Kennedy, contested virtually every aspect of the majority opinion. The dissenters forcefully argued that requiring these forensic experts to appear at trial would have negligible benefits, threaten to disrupt forensic investigations across the country, and put prosecutions at risk.

The decision in *Melendez-Diaz* will have a substantial impact. Although the majority opinion notes that a number of states already require testimony by forensic experts, there are many jurisdictions that employ practices akin to that of Massachusetts. The majority addressed one way to lessen the impact of the decision. The Court noted that a number of jurisdictions have adopted procedures through which the prosecution gives notice of its intent to use a forensic analyst's report, and the defendant is then required to object and demand the presence of the analyst at trial.

Melendez-Diaz has thus far been cited to find Confrontation Clause violations due to the introduction of a physician's report evaluating a molestation victim,[47] a report of blood-alcohol content,[48] an autopsy report,[49] a report with results of DNA analysis,[50] a ballistics certificate,[51] and govern-

40. *Ventris*, 129 S.Ct. at 1846.
41. *Id.* at 1848 (Stevens, J., dissenting).
42. 129 S.Ct. 2527 (2009).
43. *Crawford v. Washington*, 541 U.S. 36 (2004).
44. 129 S.Ct. at 2532.
45. *Id.* at 2531 (citing *Crawford*, 541 U.S. at 51-52).
46. *Id.* at 2540.
47. *Gov't of the Virgin Islands v. Vicars*, 2009 U.S. App. LEXIS 17633 (3d Cir. 2009).
48. *People v. Lopez*, 177 Cal. App. 4th 202 (Ct. App. 2009); *Grant v. Commonwealth*, 682 S.E.2d 84 (Va. Ct. App. 2009).
49. *People v. Dungo*, 176 Cal. App. 4th 1388 (Ct. App. 2009); *State v. Locklear*, 681 S.E.2d 293 (N.C. 2009).
50. *People v. Payne*, 2009 Mich. App. LEXIS 1592 (Mich. App. 2009); *Cuadros-Fernandez v. State*, 2009 Tex. App. LEXIS 6896 (Tx. Ct. App. 2009); *but see Hamilton v. State*, 2009 Tex. App. LEXIS 6923 (Tex. Ct. App. 2009).
51. *Commonwealth v. Brown*, 2009 Mass. App. LEXIS 1209 (Mass. Ct. App. 2009).

ment certificates showing the lack of a contractor's license[52] or a motor vehicle operator's permit,[53] though these errors have sometimes been found to be harmless.

A sequel to *Melendez-Diaz* was on the docket for the Court's current Term. The Court granted certiorari in *Briscoe v. Virginia* to decide whether a prosecutor may introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, if the state provides a statutory mechanism for the accused to call the analyst at the State's expense. The justices heard argument but then simply vacated the decision and remanded for further consideration in light of *Melendez-Diaz*.[54]

Speedy Trial

Vermont v. Brillon[55] presented the question of whether delays on the part of court-appointed counsel could be attributed to the State and thus support a dismissal for violation of the right to a speedy trial. Michael Brillon faced trial for felony domestic assault. During the almost three years that the case awaited trial, he was represented by six different lawyers. They were discharged for different reasons. The first lawyer was relieved after his motion to continue the trial was denied and the defendant fired him. One lawyer was threatened by the defendant. Others were relieved because of difficulties with their contracts with the State. But it was also clear that much of the delay was due to the inability or unwillingness of assigned counsel to move the case forward. For this reason, Vermont's Supreme Court found that the delay violated the defendant's Sixth Amendment rights.

The U.S. Supreme Court reversed. In a 7-2 decision authored by Justice Ginsburg, the Court ruled that appointed counsel are not generally state actors for the purposes of a speedy-trial claim. Thus, most of the delay caused by the lawyers must therefore be attributed to the defendant, rather than to the State. Claims of speedy-trial violations are assessed under the balancing test of *Barker v. Wingo*,[56] which includes the length and reasons for the delay, the defendant's assertion of his rights, and prejudice. With the lawyers' delays now attributed to Brillon and not the State, Brillon's claim failed. The Court did note, however, that the general rule attributing to the defendant delays caused by appointed counsel is not absolute. The State might be charged with delay if, for example, there is a systemic breakdown in the public defender system, though the record did not suggest such an institutional problem in the case at bench.

Justices Breyer and Stevens dissented, pointing out (among other things) substantial periods where it appeared that Brillon had no counsel or where it was clear that assigned counsel took no action at all and then withdrew; they also observed that the state court had substantial authority to supervise the appointment of public defenders.

Right to a Jury Trial/Sentencing

Vermont v. Brillon presented the question of whether delays on the part of court-appointed counsel could be attributed to the State and thus support a dismissal for violation of the right to a speedy trial.

Last Term also produced *Oregon v. Ice*,[57] yet another in the *Apprendi*[58] line of cases. Thomas Ice was convicted of six sexual offenses following a jury trial. At sentencing, the judge made a series of factual findings, including that Ice's conduct caused different harms to the victim, which then permitted the court to impose consecutive sentences. The issue was whether the Sixth Amendment required a jury determination of these facts. A closely divided Supreme Court found that judges may decide whether to impose consecutive sentences.

Writing for the five-justice majority, Justice Ginsburg stressed that each offense involved its own discrete sentence and that, historically, the jury played no part in assessing whether sentences were consecutive as opposed to concurrent. The Court also noted that the previous *Apprendi* cases all involved sentencing for a discrete crime and not, as in *Ice*, sentencing for multiple offenses different in character or committed at different points in time. Historical practice and respect for state sovereignty both counseled against applying *Apprendi* to the imposition of sentences for separate crimes. Justice Scalia authored the dissent. He found no room to distinguish the earlier *Apprendi* cases since the facts found by the judge were necessary to commit the defendant to a longer prison term. He argued that all of the considerations relied upon by the majority were in fact rejected in the prior decisions. He concluded that the majority's opinion "muddies the waters, and gives cause to doubt whether Court is willing to stand by *Apprendi*'s interpretation of the Sixth Amendment jury-trial guarantee."[59]

DOUBLE JEOPARDY

Last Term saw two decisions on the collateral estoppel principles relevant to the Fifth Amendment's Double Jeopardy Clause. In the more important of the two, *Yeager v. United States*,[60] the defendant was tried on a variety of offenses relating to his employment as an officer of Enron Broadband Services, including fraud and insider trading. The jury acquitted Yeager of the fraud counts but hung on the insider-trading counts. After a mistrial was declared on the latter counts, the government obtained a new indictment recharging him with some—but not all—of the insider-trading counts on which the jury had earlier hung. Yeager claimed that his reprosecu-

52. *Washington v. State*, 2009 Fla. App. LEXIS 14939 (Fla. Ct. App. 2009).
53. *Tabaka v. State*, 976 A.2d 173 (D.C. 2009).
54. No. 07-11191 (Jan. 25, 2010).
55. 129 S.Ct. 1283 (2009).
56. 407 U.S. 514 (1972).
57. 129 S.Ct. 711 (2009).
58. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
59. *Ice*, 129 S.Ct. 711, 723 (2009) (Scalia, J., dissenting).
60. 129 S.Ct. 2360 (2009).

[T]he decision last Term in *Rivera v. Illinois* made clear that some jury-selection errors implicate only state law.

tion violated the Double Jeopardy Clause. The lower federal courts turned the claim aside, but the Supreme Court reversed.

Justice Stevens wrote the opinion for the six-justice majority. The Court first addressed the question whether the government should be permitted to retry Yeager on the insider-trading counts simply because the jury had not reached a verdict on them (and thus he could not twice be placed in jeopardy). The majority determined that that approach would not sufficiently protect the interest in preserving the finality of the jury's judgment on the fraud counts, including the jury's alleged finding (as part of that judgment) that Yeager did not possess insider information. Thus, the Court turned to *Ashe v. Swenson*[61] and its holding that the Double Jeopardy Clause precludes the government from relitigating an issue that was necessarily decided by an acquittal in a prior trial. The majority found that *Ashe* applied even though the acquittal and the failure to reach a verdict occurred during the same trial. Although the jury hung on the insider-trading counts, if the possession of insider information was critical in all of the charges against Yeager, a jury verdict that necessarily decided that issue in his favor would protect him from prosecution for any charge for which that was an essential element. The Court remanded for the court of appeals to determine what the jury necessarily determined as part of its acquittal.[62] Justice Scalia (joined by Justices Thomas and Alito) dissented, criticizing *Ashe* as departing from the original meaning of the Double Jeopardy Clause. They would have held that jeopardy is commenced and terminated charge by charge, not issue by issue, and that having never once been convicted of insider trading, Yeager could not be placed twice in jeopardy on these charges. Nor would these justices extend *Ashe* to these circumstances.

The other case, *Bobby v. Bies*,[63] addressed whether the lower federal courts erred in preventing the state courts from considering Bies' mental capacity. Bies was convicted and sentenced to death. On direct review, the Ohio Supreme Court considered the balance of aggravating circumstances and mitigating factors and affirmed, but it observed that Bies' mild to borderline retardation was entitled to some weight. The U.S. Supreme Court later decided *Atkins v. Virginia*,[64] which barred the execution of mentally retarded offenders. An Ohio court then set a hearing on the question of Bies' mental capacity. The federal courts, however, intervened, determining that the Ohio Supreme Court had definitively established Bies' mental retardation and that relitigation would violate the Double Jeopardy Clause. In a unanimous decision, the U.S. Supreme Court reversed. As Justice Ginsburg wrote for the Court, Bies was not twice put in jeopardy of a death sentence. Nor did the opinion of the Ohio Supreme Court provide a basis for preclusion under *Ashe*. Bies' appeal in the Ohio Supreme Court did not involve a determination of an issue of ultimate fact in his favor in the way contemplated in *Ashe*; determining his mental capacity was not necessary to the Ohio court's affirmation of the sentence. Moreover, mental retardation as a mitigator and mental retardation for the purposes of *Atkins* present discrete issues.

DUE PROCESS AND JURY SELECTION

While there are, of course, many constitutional dimensions to the jury process, the decision last Term in *Rivera v. Illinois*[65] made clear that some jury selection errors implicate only state law. The defendant in *Rivera* was on trial for murder. His lawyers sought to exercise a peremptory challenge. The trial judge disallowed it, raising a concern under *Batson v. Kentucky*.[66] The challenged juror eventually served as foreperson. The Illinois Supreme Court found that the trial court should have allowed the peremptory challenge but that the error was harmless.

The U.S. Supreme Court unanimously agreed. In an opinion by Justice Ginsburg, the Court noted that the Constitution does not require states to provide peremptory challenges. These challenges can be withheld altogether without infringing the constitutional right to an impartial jury and a fair trial. Denying a defendant a state-law right to a peremptory challenge is not structural error. The juror was not challenged for cause, nor was there any claim that the individual juror was biased. The Court took care to point out, and it is important to note here, that this was not a case of an erroneous denial of a for-cause challenge (which would deprive the defendant of an impartial jury). Nor was this an erroneous *denial* of a *Batson* objection (which would violate the Equal Protection Clause) or an instance of a dismissal of an otherwise death-eligible juror in violation of *Witherspoon v. Illinois*.[67] Nevertheless, *Rivera* established that erroneously *granting* a *Batson* objection does not implicate federal law. A state might provide for automatic reversal under such circumstances as a matter of its own law, but no federal principle requires it to do so.

CAPITAL PUNISHMENT

In *Harbison v. Bell*,[68] the Supreme Court resolved a federal statutory question that has important implications for the way that both state and federal prisoners are represented toward the end of capital litigation. At issue was a federal statute, 18 U.S.C. § 3559, which provides for the appointment of counsel for both state and federal capital defendants who bring federal habeas corpus proceedings. The statute also provides that

61. 397 U.S. 436 (1970).
62. On remand, the Fifth Circuit decided that the jury had made a finding that precluded further prosecution. *United States v. Yeager*, 2009 U.S. App. LEXIS 22958 (5th Cir. 2009).
63. 129 S.Ct. 2145 (2009).
64. 536 U.S. 304 (2002).
65. 129 S.Ct. 1446 (2009).
66. 476 U.S. 79 (1986).
67. 391 U.S. 510 (1968).
68. 129 S.Ct. 1481 (2009).

unless the appointed lawyer is replaced, the attorney shall represent the defendant through every subsequent stage of available judicial proceedings "and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."[69] The question was whether Harbison, who was sentenced to death by a Tennessee state court, was entitled to have his federal habeas corpus counsel continue to represent him in state clemency proceedings at federal expense. The government argued that the statute only covered compensation for federal clemency proceedings, which are available only to federal and not state defendants.

In a 7-2 decision, the Court ruled that the appointment continues through state clemency proceedings. The opinion for the Court, written by Justice Stevens, relies on the plain language of the statute for this conclusion. The majority noted that the statute refers to clemency proceedings that "may be available" and that only state clemency proceedings are available to defendants convicted in a state court. Moreover, the reference to "executive or other clemency" indicates that Congress meant to include state proceedings, since some states but not the federal government provide forms of clemency that are other than executive. The majority turned aside the claim that this construction of the statute might also require federally appointed counsel to continue to represent clients in later state habeas petitions or retrials, determining that these are not subsequent stages of the federal habeas corpus proceedings. Chief Justice Roberts and Justice Thomas concurred, but each provided somewhat different reasoning. Justices Scalia and Alito dissented, contending that the federal statute provides federally funded counsel for federal proceedings only. The dissenters also rejected the majority's attempt to distinguish subsequent state habeas corpus litigation.

This is a significant ruling for courts and counsel that handle capital post-conviction proceedings. It ensures continuity in representation and enables the federal post-conviction lawyers to pursue clemency. Since clemency is typically sought near the end of the process, after federal habeas corpus litigation has concluded, these lawyers have likely been representing the petitioner for a number of years and at this point probably know the case and client best. Even in states that otherwise provide their own funding for capital clemency proceedings, it may be best for federal habeas counsel to make the case for clemency, rather than appoint new lawyers so late in the day.

FEDERAL CRIMINAL LAW

The Supreme Court decided a number of federal criminal cases last Term. Here are several that may be of particular interest.

Federal statutes have long prohibited felons from possessing firearms. Congress later extended this prohibition to people convicted of "a misdemeanor crime of domestic violence."[70] The question in *United States v. Hayes*[71] was whether a misdemeanor battery conviction counts as a "crime of domestic violence" when the victim was the offender's spouse, but the predicate offense statute did not require a domestic relationship as an element of the offense. In a 7-2 decision that looked closely at the language of the statute, the majority ruled that the government must prove beyond a reasonable doubt that the victim of the predicate offense was the accused's current or former spouse or related to the defendant in another specified way. That relationship, though it must be established as a matter of fact, need not be denominated an element of the predicate offense. Dissenting, Justices Roberts and Scalia would require domestic violence to be an element in the predicate offense. They found the text of the statute ambiguous and would have applied the rule of lenity. The holding may be of broad interest as it makes clear some of the consequences of a conviction for even a misdemeanor offense where the facts involve acts of domestic violence.

In a 7-2 decision, the Court ruled that the appointment [of habeas counsel in capital cases] continues throgh state clemency proceedings.

Corley v. United States[72] afforded the Court the opportunity to determine whether the rule in *McNabb v. United States*[73] and *Mallory v. United States*[74] had been abrogated by statute. The *McNabb-Mallory* rule generally makes inadmissible confessions obtained during periods of detention that do not comply with Federal Rule of Criminal Procedure 5(a); Rule 5(a) requires an officer who arrests a suspect on a federal charge to bring the defendant before a judicial officer without unnecessary delay, though there are some exceptions. The *McNabb-Mallory* rule was based on the Court's supervisory power. In 1968, Congress enacted 18 U.S.C. § 3501. Section 3501(a) provides that a confession is admissible if voluntarily given, and § 3501(b) describes the factors that relate to voluntariness. Section 3501(c) provides that a confession is not inadmissible because of delay if it is voluntary and made within six hours of arrest; the subsection provides exceptions for reasonable delay. Did 18 U.S.C. § 3501(a), with its seemingly unequivocal command that voluntary confessions be admitted, displace *McNabb-Mallory*? In a 5-4 decision, the Court said no.

Writing for the majority, Justice Souter examined the whole statute. He noted that §§ 3501(a) and (b) were a (failed) legislative attempt to eliminate *Miranda* for federal criminal prosecutions,[75] while § 3501(c) had an altogether different purpose. The government's argument, which placed full weight on subsection (a), would render subsection (c) superfluous. Taking the statute as a whole, the Court concluded that § 3501 narrowed *McNabb-Mallory* but did not displace it. Thus, a district court with a suppression claim must determine

69. 18 U.S.C. § 3559(e).
70. 18 U.S.C. § 922(g)(9).
71. 129 S.Ct. 1079 (2009).
72. 129 S.Ct. 1558 (2009).
73. 318 U.S. 332 (1943).
74. 354 U.S. 332 (1957).
75. *See Dickerson v. United States*, 530 U.S. 428 (2000) (declining to

The majority opinion contains one provocative suggestion. [T]he Court said there was no need to "confront today the question whether Santobello's automatic-reversal rule has survived our recent elaboration of harmless-error principles" in other cases.

whether the defendant confessed within six hours of arrest, unless a longer delay was reasonable. If the confession was made during that time, it would be admissible (subject to other rules), so long as it was voluntary. If the confession occurred before the defendant was brought before a judicial officer and beyond six hours, the trial court must determine whether the delay was unreasonable or unnecessary under the *McNabb-Mallory* rule. Justice Alito authored the dissent. The dissenting justices would have applied § 3501 to displace *McNabb-Mallory* even though it would have made part (c) superfluous. One other point of the dissent is worth mentioning. The four dissenters noted that the Court has never held that the prompt presentment requirements are backed by an automatic exclusionary sanction. They also suggested that there was little need for *McNabb-Mallory* given *Miranda*'s protections, a refrain that recalls the holding in *Montejo*.

Puckett v. United States[76] addressed whether a forfeited claim that the government violated the terms of a plea agreement is subject to review on appeal as plain error. Puckett pled guilty and agreed to be truthful about his criminal activities. At the time of the plea, the government agreed to recommend a reduction in his offense level under the Federal Sentencing Guidelines for acceptance of responsibility. Puckett was sentenced several years later. In the meantime, he had helped another person defraud the government. The probation officer recommended that Puckett not receive any reduction for acceptance of responsibility, and the prosecutor then decided to oppose any such reduction. Defense counsel failed to object to the prosecutor's changed position, and Puckett did not receive the reduction. The question on appeal was whether the legal issue was forfeited or whether it could be raised as plain error despite the failure to object.

In a 7-2 decision, the Supreme Court found that the plain-error test of Federal Rule of Criminal Procedure 52(b) did not apply and that the issue could not be raised. The majority opinion, written by Justice Scalia, points out the reasons for requiring a contemporaneous objection: including avoiding sandbagging and giving the judge and the parties an opportunity to resolve the mistake. The Court rejected a number of arguments raised by the defendant, including that a failure to require the government to abide by the deal made the guilty plea involuntary and that the government's failure amounted to structural error, affecting the framework within which the proceeding operated. Justices Souter and Stevens dissented. While they did not find Puckett particularly sympathetic, they argued that the prejudice to him was not the higher sentence he ultimately received, but the loss of his right to a trial that he waived as part of the agreement. Even if the sentence would have been the same, the government's failure to live up to its word branded Puckett a criminal without a trial because he entered a guilty plea induced by a promise that the government refused to honor. This was plain error, said the dissenters.

The majority opinion contains one provocative suggestion. While acknowledging that *Santobello v. New York*[77] held that automatic reversal is warranted when there is a timely objection and the prosecution has breached a plea agreement, the Court said there was no need to "confront today the question whether *Santobello*'s automatic-reversal rule has survived our recent elaboration of harmless-error principles" in other cases.[78]

FEDERAL HABEAS CORPUS

Ineffective Assistance of Counsel

Knowles v. Mirzayance[79] raised the question whether a federal habeas corpus petitioner was entitled to relief when his counsel advised him to withdraw his insanity defense. Mirzayance pled not guilty and not guilty by reason of insanity. California, where he was tried, adjudicates such cases in bifurcated proceedings. Mirzayance was convicted of first-degree murder in the guilt phase. His lawyer advised Mirzayance to withdraw the insanity defense prior to the insanity phase. Counsel concluded that the defense would fail. The Ninth Circuit granted relief, finding that failure to pursue the insanity defense was deficient performance since there was no tactical advantage in withdrawing the plea—in essence, counsel had "nothing to lose" by presenting the defense.

The Supreme Court unanimously reversed. Justice Thomas wrote for the Court that the state court's rejection of the ineffective-assistance-of-counsel claim was consistent with *Strickland*.[80] Counsel is not required to have a tactical reason for dropping a weak claim, above and beyond a reasonable appraisal of the claim's prospects for success. Nor is counsel required to raise every non-frivolous defense. And under these circumstances, Mirzayance could not show prejudice. There was no reasonable probability that he would have prevailed on the insanity defense had he pursued it. In addition, in a part of the opinion that commanded six votes, the Court also ruled that Mirzayance could not show that the state-court decision was contrary to or involved an unreasonable application of "clearly established Federal law, as determined by the Supreme Court," which is the showing mandated by the Anti-Terrorism and Effective Death Penalty Act (AEDPA).[81] No U.S. Supreme Court decision had previously

find that the statute overruled *Miranda*).

76. 129 S.Ct. 1423 (2009).

77. 404 U.S. 257 (1971).

78. *Puckett*, 129 S.Ct. at 1432 n.3 (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991) & *Neder v. United States*, 527 U.S. 1 (1999)).

79. 129 S.Ct. 1411 (2009).

80. *Strickland v. Washington*, 466 U.S. 668 (1984).

81. 18 U.S.C. § 2244(d)(1).

established a "nothing to lose" standard. Under the "doubly deferential" standard that applies to *Strickland* allegations evaluated under AEDPA, Mirzayance could not prevail with a generalized *Strickland* claim.[82]

Jury Instructions

The issue in *Hedgpeth v. Pulido*[83] was whether a particular instructional error is structural or whether it is subject to harmless-error analysis. Pulido was charged with felony murder. The jury was instructed on alternative theories of guilt, one of which was invalid, and may have relied on the invalid theory to convict (though that was not certain, as the jury returned a general verdict). The district court granted Pulido's federal habeas corpus petition, finding that the flawed instruction had a "substantial and injurious effect" or influence on the verdict, the standard set forth in *Brecht v. Abrahamson*.[84] The State appealed. The Ninth Circuit affirmed but rather than apply *Brecht*, the court of appeals determined that the error was structural and not subject to harmless-error review.

The Supreme Court reversed in a 6-3 per curiam decision. The majority distinguished several earlier rulings[85] that supported Pulido because those cases were decided before the Supreme Court determined in *Chapman v. California*[86] that constitutional errors can be harmless. The Court was more persuaded by recent holdings that other forms of instructional error are subject to harmless-error review. The matter was remanded for the court of appeals to assess whether the error was harmless under *Brecht*; the majority declined to apply *Brecht* in the first instance. Justices Stevens, Souter, and Ginsburg dissented, contending that the court of appeals' analysis and the record clearly show that the error was not harmless under *Brecht*.

Timeliness/Default

In *Jimenez v. Quarterman*,[87] the Court addressed a not uncommon question: whether a federal habeas corpus petition was timely filed under AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d)(1). Section 2244 provides that the year begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Jimenez's state appellate lawyer filed an *Anders*[88] brief, which he left for Jimenez at the county jail. Unfortunately, Jimenez was no longer at the jail, and so he received neither the brief nor the subsequent order of dismissal. When he later learned of the error, he filed a state habeas corpus petition and asked the Texas Court of Criminal Appeals for leave to file an out-of-time appeal. That court granted him leave. The appeal was filed, and the conviction was affirmed. Jimenez later filed a federal habeas corpus petition within a year of the conclusion of his reopened avenue of appeal. The lower federal courts, however, considered the one-year period to begin to run from the conclusion of the initial appeal, not Jimenez's reopened path of review.

The majority distinguished several earlier rulings that supported Pulido because those cases were decided before the Supreme Court determined in *Chapman v. California* that constitutional errors can be harmless.

The Supreme Court reversed in a unanimous opinion written by Justice Thomas. The Court held that direct review does not conclude until the availability of direct appeal to the state courts and to the U.S. Supreme Court has been exhausted. Once the Texas Court of Criminal Appeals reopened the direct review of the conviction, the petitioner's conviction was no longer final for purposes of the federal habeas corpus statute. This construction furthered AEDPA's goal of promoting comity, finality, and federalism since it permitted the state court the first opportunity to review the claim and to address any constitutional errors.

Cone v. Bell[89] dealt with an issue of procedural default. Cone raised an insanity defense in his murder trial but was convicted and sentenced to death. His defense was based in part upon his drug use, which the prosecution discredited at trial. Years afterwards, Cone learned that the State had suppressed evidence of his drug use, and he then asserted a violation of *Brady v. Maryland*.[90] The case had a complicated procedural history, but the bottom line was that due to the late disclosure of this evidence and the way the case was litigated, the state courts never considered the merits of the *Brady* claim in light of this newly disclosed evidence (and in fact the state courts had found that the claim was waived or otherwise defaulted). The State reasserted its arguments of default in federal court.

In a 6-3 decision, the Supreme Court ruled that the claim was not barred. In federal habeas corpus litigation, the adequacy of state procedural bars is itself a federal question. The majority determined that the state courts had not passed on the merits of the claim, and that the state courts had erred in finding that the *Brady* claim was defaulted or waived. The majority went on to consider the merits of the claim. The Court decided that the likelihood was remote that the suppressed evidence would have affected the jury's verdict on the issue of insanity but that the evidence may have been material to the jury's assessment of the proper punishment. The majority remanded to the district court to consider the merits of the claim with respect to the sentence. Justices Thomas and Scalia dissented. While they agreed that the claim was

82. 129 S.Ct. at 1420.
83. 129 S.Ct. 530 (2008).
84. 507 U.S. 619 (1993).
85. *Stromberg v. California*, 283 U.S. 359 (1931) and *Yates v. United States*, 354 U.S. 298 (1957).
86. 386 U.S. 18 (1967).
87. 129 S.Ct. 681 (2009).
88. *Anders v. California*, 386 U.S. 738 (1967).
89. 129 S.Ct. 1769 (2009).
90. 373 U.S. 83 (1963).

Four civil-rights cases from last Term may also be of interest to criminal-court judges and practitioners.

not defaulted, they would have rejected the entire *Brady* claim on the merits. Justice Alito would have remanded for further proceedings, including a question of whether the *Brady* claim was fully exhausted or barred.

CIVIL RIGHTS

Four civil-rights cases from last Term may also be of interest to criminal-court judges and practitioners. Three of the rulings underscore some of the difficulties for federal civil-rights plaintiffs in suing prosecutors and law-enforcement officers. The fourth case addresses whether § 1983 may be used to obtain DNA evidence and also contains important holdings about *Brady*, the Due Process Clause, and claims of actual innocence.

The trio of civil-rights cases are *Van de Kamp v. Goldstein*,[91] *Pearson v. Callahan*,[92] and *Ashcroft v. Iqbal*.[93] *Van de Kamp* was a suit against a county district attorney and a supervising prosecutor alleging that the defendants failed to train prosecutors, supervise them, or establish a system so that exculpatory information relating to jailhouse informants would be disclosed to defense counsel. A unanimous Court determined that the prosecutors were absolutely immune from liability, turning aside an argument that the defendants should not receive absolute immunity as these alleged failures were administrative and not prosecutorial conduct.

Pearson overruled *Saucier v. Katz*,[94] which had instructed federal courts to follow a two-step process in determining whether government officials were entitled to qualified immunity: first, whether there was a constitutional violation, and second, whether the unconstitutionality of the officers' conduct was clearly established. *Pearson* now gives judges the discretion to determine which prong should be addressed first (and thus a case may be dismissed on qualified-immunity grounds by going to the second prong without deciding whether there was a constitutional violation at all). The *Pearson* Court thus determined that officers were entitled to immunity without deciding an interesting Fourth Amendment question about the constitutionality of a warrantless entry into a home when consent to enter was given to an undercover informant (sometimes called "consent-once-removed").

Iqbal, which may be the most significant of the trio, involved allegations that the plaintiff was selected for pretrial detention in a federal maximum security unit and subjected to beatings and other abuses on the basis of his race, religion, and national origin. He alleged that Attorney General Ashcroft and FBI Director Mueller knew about and condoned this discriminatory treatment and may even have been instrumental in adopting and executing the discriminatory policy. A closely divided Court found that there can be no supervisory liability for knowledge of and mere acquiescence in an unconstitutional action by a subordinate. Next, the majority decided that the allegations against the two officials were insufficiently detailed to meet ordinary pleading requirements, that of presenting plausible (and not merely conceivable) claims of invidious discrimination. *Iqbal* has enormous importance with respect to civil-pleading standards and, of course, the principles of supervisory liability.

The final case, *District Attorney's Office for the Third Judicial District v. Osborne*,[95] was the government's appeal from a ruling in a § 1983 civil-rights action granting a former defendant access to evidence for DNA testing. Osborne was convicted of a violent sexual assault in a state court in Alaska. Before his trial, the State tested a sperm sample found at the crime scene using a somewhat nondiscriminating test. In postconviction proceedings, Osborne sought access to better and more discriminating DNA testing, but access was denied. The lower federal courts, however, found that he had a potentially viable claim of actual innocence and that he had a right of access to evidence to perform DNA testing. The Supreme Court reversed.

In a 5-4 decision authored by Chief Justice Roberts, the Court emphasized that the dilemma of figuring out how to harness DNA's power to prove innocence without unnecessarily interfering with the criminal justice system belongs primarily to the legislatures of the various states. The majority noted that Osborne had a state-created liberty interest in demonstrating his innocence (since Alaska law provides that those who use newly discovered evidence to establish innocence may vacate their conviction or sentence) but that Alaska's procedures were adequate under the Due Process Clause. The justices underscored the differences between the process due an individual before conviction and after conviction and noted that *Brady* did not apply. Several justices concurred to emphasize a few additional concerns, such as the use of civil-rights actions to bring claims that potentially might be brought on habeas corpus, as well as the burdens that postconviction DNA testing imposes upon federal and state governments. Justice Stevens wrote the main dissent. Four justices would have found that the State's procedures did not comport with the Due Process Clause. Three of the dissenting justices would also have found a substantive due-process right of access to evidence for purposes of previously unavailable DNA testing.

A LOOK AHEAD

The October 2009 Term also promises to be quite significant. As the Term opens, the justices plan to revisit some issues that have commanded a fair amount of attention in recent years; cases involving the Second Amendment, *Apprendi,* and the Confrontation Clause are again on the docket. The Court also will address several aspects of *Miranda*, as well as an assortment of other matters. Here are some of the most interesting cases.

91. 129 S.Ct. 855 (2009).
92. 129 S.Ct. 808 (2009).
93. 129 S.Ct. 1937 (2009).
94. 533 U.S. 194 (2001).
95. 129 S. Ct. 2308 (2009).

The blockbuster case of two Terms ago was *District of Columbia v. Heller*,[96] where the justices ruled that the Second Amendment protects an individual's right to keep and bear arms. Now the Court has granted review in *McDonald v. Chicago*[97] to determine whether this right is incorporated as against the states through the Privileges and Immunities or Due Process clauses.

The Court will take on yet another *Apprendi* issue, deciding in *United States v. O'Brien*[98] whether the fact that a firearm is a machine gun must be charged and proved to a jury beyond a reasonable doubt before a defendant may be given a 30-year mandatory minimum sentence.

Miranda is front-and-center. *Maryland v. Shatzer*,[99] a closely watched case, concerns how long the *Edwards v. Arizona* prohibition against reinterrogation may last. While in prison on one charge, Shatzer invoked his right to counsel during an investigation of a different sexual abuse charge. Still in prison more than 2-1/2 years later, he was re-interrogated by a different detective. The Maryland Court of Appeals ruled that the *Edwards* prohibition remained effective and that there had been no break in custody. The state court determined that it would apply *Edwards* absent further guidance from the Supreme Court. Another *Miranda* issue is presented in *Florida v. Powell*,[100] which addresses whether *Miranda* warnings are defective if they fail to include advice of the right to talk to a lawyer during questioning (as opposed to *before* questioning). The ruling may have broad implications because the social science literature has reported a remarkable variation in the form, language, and understandability of warnings used by law-enforcement agencies.[101]

But perhaps the most important of the three *Miranda* cases is *Berghuis v. Thompkins*,[102] where officers continued to question a suspect who remained largely silent for the first two hours and 45 minutes of his interrogation. The case has great practical and theoretical implications. With a number of law-enforcement agencies regularly seeking implied and not express waivers of *Miranda*,[103] the case should help clarify the role of officers when a suspect simply does what the warnings promise him he may do: remain silent. The case may provide an opportunity to determine whether the *Davis v. United States*[104] "clear invocation" rule should be extended to the right to remain silent as well as the right to counsel, and whether the rule should also be extended to the initial waiver stage (as opposed to coming into play only to determine whether a defendant who initially waived his rights has changed his mind and is now invoking them). The matter is before the Court on a habeas corpus petition, however, and the resolution of these questions may be complicated by the standard of review under AEDPA.

[T]he justices will decide if a lawyer who gives erroneous advice about the immigration consequences of a conviction is constitutionally ineffective.

Other issues about the federal habeas corpus statute post-AEDPA will also occupy the Court. Among the cases this Term are *McDaniel v. Brown*,[105] which addresses how a federal habeas corpus court can adjudicate a "sufficiency-of-the-evidence" claim under AEDPA, and *Berguis v. Smith*,[106] which concerns the review of an alleged violation of the Sixth Amendment's fair cross-section requirement post-AEDPA. Also on the docket is *Holland v. Florida*,[107] which relates to the circumstances in which a petitioner may be entitled to equitable tolling to excuse the late filing of a petition.

Two other much anticipated cases are *Graham v. Florida*[108] and *Sullivan v. Florida*.[109] They deal with whether the Eighth Amendment's ban on cruel and unusual punishments forbids imposing life without parole sentences on juveniles who are not convicted of homicide offenses.

Another case that may be of wide interest is *Padilla v. Kentucky*,[110] where the justices will decide if a lawyer who gives erroneous advice about the immigration consequences of a conviction is constitutionally ineffective. The Court might additionally consider whether a lawyer representing a non-citizen has a duty to give advice about those immigration consequences.

The Court also plans to decide the constitutionality of several federal statutes. *United States v. Stevens*[111] asks whether a federal law criminalizing the creation, sale, and possession of "depiction[s] of animal cruelty" is facially invalid under the Free Speech Clause of the First Amendment. The Third Circuit overturned the conviction of the defendant, a filmmaker, and the government sought Supreme Court review. *Carr v. United States*[112] asks whether a federal law that imposes registration requirements on sex offenders can be applied to individuals whose predicate offenses and proscribed travel took place before the statute was passed.

96. 128 S.Ct. 2783 (2008).
97. No. 08-1521.
98. No. 08-1569.
99. No. 08-680.
100. 08-1175.
101. *See* Richard Rogers, Kimberly S. Harrison, Daniel W. Shuman, Kenneth W. Sewell, Lisa L. Hazelwood, *An Analysis of* Miranda *Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177 (2007); Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Kimberly S. Harrison & Daniel W. Shuman, *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124 (2008).
102. No. 08-1470.
103. *See* Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1577-90 (2008).
104. 512 U.S. 452 (1994).
105. No. 08-559.
106. No. 08-1402.
107. No. 09-5327.
108. No. 08-7412.
109. No. 08-7621.
110. No. 08-651.
111. No. 08-769.
112. No. 08-1301.

Finally, white-collar-crime aficionados might note the bevy of mail-fraud questions that are on the docket. *Black v. United States*[113] concerns whether a person may be convicted under the federal mail-fraud statute for depriving another of "the intangible right of honest services," even if there is no finding that the defendant contemplated economic harm to the party to whom "honest services" were owed. The Court also granted review in *Weyhrauch v. United States*,[114] another case interpreting the same statute. There the question is whether a state official may be convicted of depriving the public of the defendant's honest services for allegedly failing to disclose conflicts of interest without proof of a separate duty of disclosure imposed by state law. And the conviction of former Enron executive Jeffrey Skilling is before the Court in a case that raises an issue of the meaning of honest-services fraud as well as how the prosecution may rebut a presumption of jury prejudice that may arise from massive pretrial publicity.[115]

The present Term will be quite interesting to watch.

Charles D. Weisselberg is the Shannon Cecil Turner Professor of Law at the University of California, Berkeley, where he has taught since 1998. He taught at the University of Southern California School of Law from 1987 to 1998, and he was previously in public and private practice. Weisselberg served as the founding director of Berkeley Law's in-house clinical program, the Center for Clinical Education. He teaches criminal procedure, criminal law, and related courses. Weisselberg received his B.A. from The Johns Hopkins University in 1979 and his J.D. from the University of Chicago in 1982. *Professor Weisselberg gratefully acknowledges the research assistance of Alisa Givental.*

113. No. 08-876.
114. No. 08-1196.
115. *Skilling v. United States*, No. 08-1394.

Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is received by the 2,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

Articles: Articles should be submitted in double-spaced text with footnotes, preferably in Word format (although WordPerfect format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better-state-bar-association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review*'s editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, email address: sleben@ix.netcom.com; or Professor Alan Tomkins, 215 Centennial Mall South, Suite 401, PO Box 880228, Lincoln, Nebraska 68588-0228, email address: atomkins@nebraska.edu. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.