

**The Criminal Justice Section  
of the  
American Bar Association**

**2011 Annual Meeting  
Toronto, Canada**

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

Summaries of all Opinions (including Concurrences and Dissents)  
as well as an Overview of the Term,  
regarding the  
Criminal Law (and related) Opinions of the  
United States Supreme Court  
October Term 2010 (Oct. 2010-July 2011)

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**CRIMINAL LAW (and related) DECISIONS  
of the U.S. Supreme Court  
October 2010 Term  
(Prepared August 2011)**

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**ABA Panel Presenting the Criminal Law (and Related) Opinions  
of the  
United States Supreme Court  
Issued During the October 2010 Term**

**2011 Annual Meeting Panelists  
(Toronto (Ontario), Canada – August 5, 2011)**

The Honorable John R. Tunheim  
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**Explanatory Notes for these Materials**

In the pages that follow, summaries of all of the U.S. Supreme Court’s decisions during the past year are grouped by subject matter. Some decisions address more than one subject, and the author has placed them in the topic group that, in his view, best fits. Within subject categories, the cases are presented in chronological order, which can help demonstrate how doctrine developed within particular areas as the Term progressed. The goal of these summaries is to be broadly inclusive for the criminal law practitioner. Thus, civil cases that relate to criminal law topics or facts are also included. We also continue to include immigration law cases that so often relate to criminal issues. This became particularly so after the 2010 decision in *Padilla v. Kentucky*, holding that it can violate the Sixth Amendment’s effective assistance of counsel requirement if reasonable advice regarding immigration consequences is not given.

To aid quick assimilation of the Term’s work, the Table of Contents (preceding pages) lists all the cases with a brief description of their holdings. Then below, following these explanatory notes and a brief Overview of the Term, each decision is summarized in greater detail.

Each summary presents the case name, current citation, and citation to the lower court’s opinion. Then follow summaries of the case’s facts, majority opinion(s), and any separate opinions. The name of the majority writing Justice is **bolded**; other writing Justices are underlined. Providing an accurate and somewhat comprehensive representation of each opinion’s content has been the goal, rather than “soundbite” brevity. All separate opinions are summarized. But to aid quick “skim” reading, each summary also **bolds the central holding(s)**. In order to provide the most representative flavor of opinions, quotations have been used whenever possible. Comments that appear in [brackets] are the authors’ own thoughts, not the Court’s.

Following the Summaries of Opinions, I include some interesting dissents or concurrences regarding Orders this Term, including dissents from denials of certiorari. Then a list of the issues

presented in criminal cases in which certiorari has already been granted for next Term (OT 2010). Finally, a chart showing what Justices wrote what opinions (including concurrences and dissents), in criminal and related cases, is included.

These materials are the product of Professor Little and his research assistant, Michael Gawley (Hastings Class of 2013). They, and not the ABA or its panelists, bear full responsibility for errors and any opinions expressed. Moreover, these are merely summaries, and interested readers should of course review the actual opinions in full and arrive at their own interpretations, rather than rely on the authors'. Minor changes from the Court's original slip opinions may have been made for ease of reading or understanding -- for example, emphasis in quotations may sometimes be added or omitted without indication; footnotes and citations may be omitted; and changes in capitalization and punctuation or other non-substantive changes may have been made. Please send any comments, suggestions or corrections to Professor Little at his contact points below. The materials are copyrighted and are available for purchase from the ABA. Please do not reproduce without permission.

### **Brief Overview of the 2010-11 Term, Criminal Cases**

This year's Panel was entitled "Just Another Ho-Hum Term? Not!" Although the media's chosen "blockbusters" were mainly civil cases, the Court actually produced a number of very significant Criminal law decisions this Term. For example, **Davis** portends some very important changes in exclusionary "rule" doctrine, **J.D.B.** signals renewed vigor in *Miranda* doctrine, and **Michigan v. Bryant** and **Bullcoming** demonstrate that the Court remains deeply divided about the application of *Crawford* (2004) and that the new *Crawford* majority is itself divided as to what that opinion means. Federal sentencing issues received a huge amount of attention, producing seven full decisions, more than any other category. That is, unless you count "Habeas" as a unitary category, in which case the Court continued its doctrinal effort to limit the reach of federal court's into state-law criminal cases, while at the same time working to protect criminal defendants against perceived injustices.

In fact, and as usual, well over one-third of the Court's argued cases docket was devoted to criminal law and related issues. The public generally seems unaware of the Court's sustained role in the development of criminal law doctrine for the nation.

The Fourth Amendment received more attention than it has in recent Terms, generating three substantive (and deeply divided) opinions, and two more cases that were argued but then dismissed, also demonstrating division among the Justices. In particular, Justice Kagan's unexplained join in the **Davis** majority, rather than siding with the three "liberal" Justices in dissent, raises questions about her views in this area. And the **Al-Kidd** "material witness" decision produces an odd 4-4 split, where Justice Kennedy says that he joins the majority opinion but then writes a concurrence that plainly, and severely, limits the reach of Justice Scalia's majority.

On a more personalized level, this Term was the first without Justice Stevens in decades, and Justice Ginsburg appears to have consciously taken on the role of the "Senior Liberal Justice" in criminal cases. Whereas Justice Ginsburg has in the past written the fewest number of opinions in criminal cases, this Term she took on a large number, writing fifteen separate criminal law-related opinions! Six of these were dissents, in some of the biggest cases of the Term (*e.g.*, **Connick, King**,

and **Bryant**) – and as the Senior Liberal Justice, she is usually the one assigning. This is a strong departure from Justice Ginsberg’s past in this area – in fact, this is the most opinions in criminal cases that Justice Ginsburg has ever written in a Term, and is also the largest number of criminal law opinions written by any Justice this Term (a sobriquet previously borne each Term by Justice Stevens). From Justice Brennan, to Blackmun, to Stevens, and now to Ginsburg, the “mantle” of Senior Liberal Justice appears to truly carry with it a sense of historical responsibility.

Meanwhile, moving in the opposite direction is Chief Justice Roberts, who wrote only one majority, and two opinions total, in the criminal law area. Clearly this is not his major area of interest, and he is happy (as often the assigning Justice) to leave criminal law matters to, for example, Justice Alito, who is a former U.S. Attorney from New Jersey. I would note, however, the Chief Justice’s silent but very interesting join in Justice Sotomayor’s majority opinion in **Pepper**.

Justice Kagan was also not an active writer in this Term’s criminal cases (two majorities and one dissent), but that is explained at least in part by her obligatory recusals from cases in which she had participated as Solicitor General. Her next Term (first really full one) will be a better indicator.

The Term was only the second for Justice Sotomayor. But while the media has focused on Justice Kagan this Term, my own view is that Justice Sotomayor has quite speedily asserted herself as a significant and independent voice in criminal matters. (This is perhaps unsurprising given her background as a prosecutor, and then trial judge, in the Southern District of New York.) Beginning with her vigorous dissent in last Term’s *Skilling* decision, Justice Sotomayor strongly voiced her independent views this Term in cases like **Michigan v. Bryant** (where she was the victim of Justice Scalia’s scathing dissent) and **Bullcoming** (where she joined Justice Scalia in the majority but wrote her own, clearly limiting, concurrence). And her opinion for the Court in the **J.D.B.** case on *Miranda* represents a powerful major victory for her (and Justice Kennedy). Finally, the fact that she wrote five separate concurrences demonstrates Justice Sotomayor’s fearless independence (and perhaps her desire to be collegial and concur if possible, rather than dissent). It seems clear that we will be hearing from Justice Sotomayor in strong and insightful ways when criminal law issues are on the docket in the future.

Justices Breyer and Scalia also continued their very different approaches to legal issues before the Court. One of the most interesting, if unrecognized, cases of the Term, was the witness-tampering case of **Fowler**, in which arcane issues of criminal intent were examined in detail. Justice Breyer continued his holistic examination of statutes – text, context, history and legislative purpose – while Justice Scalia criticized his opinion as “hopelessly indeterminate” and concurred only in the judgment. (This difference also reflects the Justices’ continuing disagreement about *Apprendi* (2000) and the application of the “beyond a reasonable doubt” standard to facts that are not (or are they?) “elements” of the crime itself.)

By my generous count, 31 decisions after argument involved criminal law and related issues, out of 75 total opinions. That’s over 40% of the docket. When you add in additional opinions issued without argument (including summary reversals) and dissents from Orders, it is no exaggeration to say that criminal law issues drive at least half of the Court’s docket. And the cert grants already on the docket for next Term indicate that this trend will continue: 18 of the 43 already-granted cases involve criminal law and related issues.

I would also point you to my “Editor’s Note” at the end of the **Jackson v. Felkner** summary (page \_\_\_), regarding the Ninth Circuit. The Ninth did not fare well in criminal case this Term, with a high reversal rate (some say 100% on criminal cases, depending how you count). Notably, 7 of the 10 reversals in habeas cases were of Ninth Circuit decisions. However, I want to point out that the Ninth Circuit handles the largest number of cases of any Circuit by a factor of 2 or 3, with the highest per judge caseload of any Circuit. Now, in baseball, you don’t examine batting average by just the number of hits a player gets when he is on national TV. No, every single time at bat counts, even when out of the spotlight. Similarly, if you count every time the Ninth Circuit comes up to bat each year, it has the lowest reversal rate of any Circuit in the country. (I’ll look forward to getting pushback from readers on this opinionated point.)

No doubt this year’s panelists will make fascinating points not mentioned here and (one hopes) perhaps contest some of what I’ve said. A review of the Supreme Court’s Term is no fun if it isn’t opinionated. So I hope you will forgive the many “Editor’s Notes” injected into the Summaries below, which I try to always indicate by [brackets] and **[Ed. Note:]**.

Finally, if you’d like to see early Summaries of next Term’s opinions, which I try to write within a day of issuance and which are then emailed to Criminal Justice Section members, please join the ABA’s Criminal Justice Section. The Summaries also appear on the website at some point, and we are working to make them more easily findable and accessible to all of you.

I look forward to sharing more fascinating and significant rulings with you next summer. Meanwhile, remember to “Do Justice” in whatever you do.

Best wishes until next year,

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**DETAILED SUMMARIES** of the COURT'S  
CRIMINAL LAW (and related) OT 2010 OPINIONS

**I. CONSTITUTIONAL DECISIONS**

**A. FOURTH AMENDMENT – Merits Decisions**

**Kentucky v. King**, No. 09-1272, 131 S.Ct. 1849 (May 16, 2011), reversing 302 S.W.3d 649 (Ky. 2009).

**Holding** (8-1), Alito; Ginsburg dissenting: The Fourth Amendment's "**exigent circumstances**" exception can apply even where officers "**create**" the exigency by knocking on suspected drug dealer's front door and then hear sounds leading them to believe that evidence is being destroyed, so long as they did not violate or threaten to violate the Fourth Amendment if there was no answer to their knock.

**Facts:** Police officers set up a "controlled buy" of crack cocaine outside an apartment complex in Lexington, Kentucky. After the deal, police followed a suspect into the breezeway of an apartment building, heard a door shut, and smelled the "strong odor of burnt marijuana," but they did not see which of two apartments the suspect had entered. Because they smelled marijuana coming from the apartment on the left, they approached the door of that apartment, banged on the door "as loud as [they] could," and announced police presence. They then heard noises leading them to believe that evidence was being destroyed. So they kicked in the door and entered. Although they did not find the suspected drug dealer, they found King and two others inside, and found marijuana and cocaine in plain view when they did a "protective sweep," as well as other drug evidence. The initial suspect was eventually found in the other apartment.

King's motion to suppress evidence and fruits, claiming that the warrantless entry was unconstitutional, was denied. King then entered a conditional guilty plea and was sentenced to 11 years' imprisonment. The Kentucky appellate court affirmed but the Kentucky Supreme Court reversed, holding that exigent circumstances could not justify the search because they had been "created" by the police, who could have paused to get a warrant and who could "reasonably foresee" that the apartment occupants would move to destroy evidence when they knocked.

Alito, joined by all but Ginsburg: Under the Fourth Amendment, searches must be "reasonable." We have also held that warrantless searches are "presumptively unreasonable," but "this presumption may be overcome" and is "subject to certain reasonable exceptions." "Several exigencies may justify a warrantless search of a home," including "imminent destruction of evidence." Disallowing this "well established" exigency exception simply because the exigency was "caused" by lawful police conduct would "unreasonably shrink" it, because in some sense, exigencies are often "caused" by lawful police conduct, since criminals are unlikely to destroy "valuable drugs ... unless they fear imminent discovery by the police."

The fact that police could have sought a warrant does not make their decision not to do so unreasonable. Police are always allowed to seek consent to enter (particularly since it is "simpler, faster, and less burdensome than applying for a warrant"), so knocking is neither unreasonable nor unlawful. A duty for police to always seek a warrant when they can "is nowhere to be found in the Constitution." Even if police have the intent (or "bad faith") to avoid seeking a warrant, we generally eschew examining the subjective intent of officers. "Reasonable foreseeability" has also been rejected, in the plain view context (*Horton*, 1990), and is also too unpredictable, particularly for officers who are "often forced to make split-second judgments." Finally, a "nebulous and impractical

test” such as when police conduct would cause a “reasonable person to fear imminent entry” is simply not required by the Fourth Amendment.

“When the conduct of the police preceding the exigency is reasonable,” then relying on resulting exigent circumstances is also reasonable and does not violate the Fourth Amendment. Occupants who respond to police presence by attempting to destroy evidence “have only themselves to blame.” [Ed. Note: this appears to assume that only the guilty will be subject to the Court’s exception, which seems empirically unlikely.] **“Where, as here, the police did not create the exigency by engaging in or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”** Here “we see no evidence” that the officers violated the Fourth Amendment or threatened to do so. There was no evidence of a “demand” that the occupants open the door – officers simply banged and “awaited a response.” But the Kentucky courts can examine on remand whether, in fact, an exigency existed under our standard.

Ginsburg, dissenting: “In lieu of presenting their evidence to a neutral magistrate, **police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant.** I dissent from the Court’s reduction of the Fourth Amendment’s force.” Where the police “could pause to gain the approval of a neutral magistrate,” they should not be permitted to “dispense with the need to get a warrant by themselves creating exigent circumstances.” For the exigent circumstances exception to apply, “[t]he urgency must exist . . . when the police come on the scene, not subsequent to their arrival, prompted by their own conduct.” In this case, “[t]here was little risk that drug-related evidence would have been destroyed had the police delayed the search pending a magistrate’s authorization.” Meanwhile, home intrusions are the “chief evil against which . . . the Fourth Amendment is directed. . . . **How ‘secure’ do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?**” [Ed. Note: As written in a Criminal Procedure casebook co-authored by the ABA Criminal Justice Section’s own Stephen] Salzburg, “wasting a clear opportunity to obtain a warrant . . . disentitles the officer from relying on subsequent exigent circumstances.” “I would not allow an expedient knock to override the warrant requirement.”

**Ashcroft v. Al-Kidd**, No. 10-98, 131 S.Ct. \_\_\_\_ (May 31, 2011), reversing 580 F.3d 949 (9<sup>th</sup> Cir. 2009).

**Holding** (8 [4 to 4[3-1]] to 0, Kagan recused), Scalia; Kennedy concurring; Ginsburg concurring in the judgment; Sotomayor concurring in the judgment: In a 4-4 split regarding the breath of the holding, producing four separate opinions, the Court rules that **a valid “material witness” warrant based upon “individualized” factors does not violate the Fourth Amendment** because the Court will not look into allegations of wrongful “purpose” in its Fourth Amendment analysis. Justice Kennedy for four Justices (Justice Kagan being recused) – thus creating an evenly-divided Court -- writes that he “joins the opinion of the Court in full” but also that **“[t]he Court’s holding is limited to the arguments presented by the parties and leaves unresolved whether the Government’s use of the Material Witness Statute in this case was unlawful.”** The Court also rules, **unanimously, that qualified immunity should have been granted** because any violation was not “clearly established” law.

**Facts**: [Ed. Note: Interestingly, none of the four opinions begins with a straightforward account of the facts, so they have to be drawn from the various opinions.] Al-Kidd was arrested on a “material witness” warrant in 2003 as he was about to board a flight for Saudi Arabia. Agents had obtained a warrant after alleging that Al-Kidd’s testimony was “crucial” to a pending terrorist

prosecution and that the testimony would be lost if Al-Kidd were not arrested. The statute, which has been around for many years, permits judges to authorize arrests of persons whose testimony “is material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena.” Al-Kidd was imprisoned for 16 days in high-security conditions, and held on supervised relief for 14 months (until the pending prosecution was over). He was never called as a witness in that trial.

Al-Kidd sued the Attorney General and others, alleging Fourth Amendment violations. He alleged that the Attorney General had instituted a policy of using the Material Witness statute to arrest suspected terrorists, without ever intending to call them as witnesses in any trial – a “pretextual detention policy.” The Ninth Circuit ruled, 2-1, that the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing (thus distinguishing *Whren*); and that no good-faith immunity was available because this principle was “clearly established” under general Fourth Amendment principles.

Al Kidd also alleged (although not recited in the majority opinion) that there were Fourth Amendment *Franks* (1978)-type violations, because the government failed to inform the magistrate that the government in fact did not intend to use Al-Kidd as a witness, and failed to mention other facts showing that, in fact, obtaining Al-Kidd’s presence at trial would not be difficult, and falsely said that Al-Kidd was about to board a one-way flight to Saudia Arabia on a \$5,000 ticket when in fact he had a round trip ticket costing \$1,700. Al-Kidd also alleged that his conditions of imprisonment (strip searches, 24-hour lighted high security cells, body cavity searches, and handcuffs and leg irons) were unconstitutional. Justice Scalia’s opinion finds these facts to be irrelevant to the legal question presented; Justice Kennedy’s opinion says they remain open on remand.

**Scalia (Opinion for the Court) for 5:** First, on qualified immunity (although the opinion ultimately reviews this issue second, after the merits): “Courts should think carefully before expending scarce judicial resources” on “difficult and novel” legal issues where the law seems clearly to not be clearly established. The Ninth Circuit’s analysis “needs correction” on “both steps” of the analysis here. “We have repeatedly told courts – and the Ninth Circuit in particular -- not to define clearly established law at a high level of generality.” “Not a single opinion” had held that “pretext” arrests under the Fourth Amendment are unconstitutional (there was an unsupported footnote dictum in on SDNY district court opinion), and we have generally rejected a focus on “purpose” under the Fourth amendment (*Whren*, 1996). Qualified immunity for the Attorney General should have been granted based on the theory presented.

On the Fourth Amendment merits, Al-Kidd does not allege that all arrests under the Material Witness statute are unconstitutional, and it can be argued that “probable cause to believe that the individual named in the warrant [is] a material witness” is all that is required. The Fourth Amendment’s “reasonableness” requirement is “predominantly an objective inquiry” (*Edmond*), and “the subjective intent motivating the relevant officials” is thus generally irrelevant. The “special needs” exception to this idea, making “purpose” relevant, and the exception for “checkpoints” lacking “individualized suspicion,” are inapposite here. Here, the judicial warrant was “properly issued” by a magistrate and focused on individualized allegations about Al-Kidd. **We decline to “probe the motives behind seizures supported by probable cause”** (and we reject Justice Ginsburg’s idea that probable cause is limited to suspicion of “wrongdoing”). **Because Al-Kidd “takes the validity of the warrant as a given” [Justices Ginsburg and Sotomayor strongly dispute this premise], “we find no Fourth Amendment violation.”** (Footnote 3: Al-Kidd’s “separate Fourth Amendment and statutory claims against the FBI agents who sought the material witness warrant, which are the focus of both concurrences, are not before us.”)

**Kennedy concurring, joined by Ginsburg, Breyer and Sotomayor in Part I:** “The Court’s holding is limited ... and leaves unresolved whether the Government’s use of the Material Witness Statute in this case was lawful.” Because the remaining legal issues are “difficult,” “the Court is correct” not to address “when material witness arrests might be consistent with statutory and constitutional [“reasonableness”] requirements.” (This Part I is joined by Four Justices.)

**Part II, for Kennedy only:** “National officeholders ... entrusted with urgent responsibilities” “should be given some deference for qualified immunity purposes,” because they may face diverse lower court decisions but must set national policy. “A national officeholder ... need not abide by the most stringent standard adopted anywhere in the United States.” The Ninth Circuit erred in relying on a single federal district court decision from New York to find “clearly established” law.

**Ginsburg concurring, in the judgment, with Breyer and Sotomayor:** I agree that the Attorney General should have qualified immunity here. But on the merits, the Court is wrong to “assume” a “validly issued” warrant, given Al-Kidd’s allegations of falsities and omissions. I also dispute whether “individualized suspicion” can encompass suspicion that is not of “criminal wrongdoing.” I also agree that “serious questions” such as those identified by Justice Kennedy remain open, and should be addressed, on remand.

**Sotomayor concurring, in the judgment, with Ginsburg and Breyer:** I agree with the qualified immunity holding, but not regarding “whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention.” None of our prior decisions address whether a “prolonged detention” can be permitted on a pretext, even if the initial seizure might be, “without probable cause to believe he ha[s] committed any criminal offense.” The Court “assumes away the[] factual difficulties” and “artificiality” permeates its analysis. And as Justice Kennedy suggests, “nothing in the majority’s opinion today should be read as placing this Court’s imprimatur on actions taken by the government against Al-Kidd.”

**Davis v. United States**, No. 09-11328, 131 S.Ct. \_\_\_ (June 16, 2011), affirming 598 F.3d 1259 (11<sup>th</sup> Cir. 2010).

**Holding** (7 [6-1] to 2) -- **Alito**; **Sotomayor** concurring in the judgment; **Breyer** dissenting with **Ginsburg**: **The Fourth Amendment’s exclusionary “rule” does not apply to a search “conducted in objectively reasonable reliance on binding appellate precedent,”** even when that precedent is subsequently overruled such that the search would be held to violate the Fourth Amendment today.

**Facts:** In 2007, police arrested two persons in a car. Davis was the passenger and was arrested for giving a false name. After handcuffing the two and placing them in separate patrol cars, police searched the car’s passenger compartment and found a gun in Davis’s jacket. Davis was subsequently convicted on a felon in possession charge after a motion to suppress the gun was denied because the search was clearly valid under *New York v. Belton* (1981). However, while Davis’s appeal was pending, the Supreme Court overruled *Belton* in *Arizona v. Gant* (2008), limiting the search “incident to arrest” authority over a car to (1) when “the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest.” Based on *Gant*, the Eleventh Circuit found the car search here unconstitutional. But because exclusion of the evidence would do nothing to “deter wrongful police conduct” where the police followed binding Supreme Court authority when they acted, the Circuit declined to order exclusion.

Alito (for 6, including Justice Kagan) [Ed. Note: Justice Alito begins with a description of the Fourth Amendment’s exclusionary rule that relies heavily on the recent decisions of *Hudson* (2006) and *Herring* (2009) and endorses much that has previously been vigorously disputed by Justices relying on Warren Court concepts of the rule. **Perhaps the most interesting point is that the most recent Democratic appointee, Justice Kagan, joins this opinion in full.**]: “The [Fourth] Amendment says nothing about suppressing evidence” and the exclusionary rule is a “prudential doctrine ... created by this Court.” “The rule’s sole purpose ... is to deter future Fourth Amendment violations.” “Real deterrent value is a necessary ... but not sufficient” condition for exclusion, because exclusion of reliable evidence exacts “substantial social costs.” **“Its bottom line effect, in many cases, is to suppress the truth and set the criminal loose on the community without punishment.”** [Ed. Note: some would say that there is empirical evidence to dispute the assertion that this is the result in “many cases.”] “Society must swallow this bitter pill when necessary, but only as a last resort.”

We have “abandoned the old reflexive application of the doctrine” and “recalibrated” our analysis “to focus the inquiry on the flagrancy of the police misconduct.” [Ed. Note: What follows is a quiet adoption of a change in the standard for suppression, turning what some believed was a case-specific rationale in *Herring* into a solid and generalized holding of the Court:] When police act with “an objectively reasonable good-faith belief ... or when their conduct involves only simple, isolated negligence (*Herring*),” we won’t suppress. **Exclusion is now warranted only when police “exhibit deliberate, reckless or grossly negligent disregard for Fourth Amendment rights”** (or, a few pages later, possibly where there is “recurring, systemic negligence”). [Ed. Note: These remarks of the Court, while obviously considered and significant, are unnecessary to the result here, since affirmance would seem to follow directly from the Court’s decision long ago in *Illinois v. Krull* (1978) (no suppression where police search in compliance with a statute that is later stricken as unconstitutional) – indeed, the majority itself notes (n.11) that the dissenting arguments today were also presented, and rejected, 33 years earlier in *Krull*. The Court seems plainly to be using this case to state broad, new principles for the exclusionary doctrine.]

In light of these principles, affirmance of the Eleventh Circuit here obviously follows. The police here followed binding appellate precedent “to the letter” and their search was “not culpable in any way.” Following precedent to enforce the law is “conscientious police work,” not blameworthy or something we want to deter.

We reject the dissent’s view that this is really a retroactivity problem. That view “conflates what are two distinct doctrines,” that of whether a new decision should be retroactively available to pending or final cases, versus what the appropriate remedy should be in cases where the new rule is available. Davis is permitted to invoke the new rule of *Gant* here, because his case was not yet final. But he is not entitled to the remedy of exclusion on these facts.

We also reject the view that applying the good-faith exception as we do here will eliminate any incentive for defendants to seek the overruling of precedents. First, it is not a purpose of the exclusionary rule to encourage the challenge of precedents. Second, we will still review all intermediate appellate decisions, and defendants will have great incentive to seek reversals of their convictions in those courts. There will be no “ossification” of Fourth Amendment law. And finally on this point, since the exclusionary doctrine is judicially created, we might decide in future cases to grant, or not grant, the remedy to a defendant who successfully persuades us to overrule a precedent (like Mr. Gant himself). But Davis is not in position to make that argument here.

In closing, **“It is one thing for the criminal to go free because the constable has blundered. It is quite another to set the criminal free because the constable has scrupulously adhered to governing law.”**

**Sotomayor, concurring in the judgment:** Today’s decision is limited to cases where the binding appellate precedent is “unequivocal” and clear, not where the law is “unsettled” or not specifically authorizing. I don’t agree with the dissent that today’s opinion extends that far; and “in my view” “culpability” is not dispositive. The ultimate question is deterrence, to which police culpability is only one relevant factor.

**Breyer dissenting with Ginsburg:** Gant got the remedy of exclusion, but not Davis. That is not fair, and is “incompatible” with our retroactivity decisions, which says that all cases not yet final are governed by a newly announced precedent. The Court has today created a “new” good faith exception. It is “highly artificial” to separate the remedy from retroactivity. The Court’s ruling will encourage future “complex legal argument and police force confusion,” as litigants attempt to avoid “clearly binding precedent” and police try to follow it. Also, “fairness” suffers, by treating Gant differently than Davis, which was precisely what Justice Harlan pointed out as a major flaw in our since-abandoned case-specific retroactivity doctrine.

Aside from this, the Court’s opinion abandons the principles that have long animated our exclusionary doctrine. “Good faith” has previously been applied “only a handful of times and in limited, atypical circumstances.” That is because, in some sense, police often act “in good faith” even though they violate the Fourth Amendment. But we have usually suppressed in such cases, in order to advance Fourth Amendment principles. **“If the Court means what it now says” – that officer culpability is the key – “then the good faith exception will swallow the exclusionary rule.”** In fact, the “broad dicta” in *Herring* is already “misleading” lower courts. The result is a “watered-down Fourth Amendment” which will “no longer protect ordinary Americans from ‘unreasonable searches and seizures.’” In fact, it is suppression here that would affect only “an exceedingly small set of cases,” while the Court’s refusal to suppress will affect “many thousands” of cases each year. Today’s ruling “undermine[s] the exclusionary rule.”

## **B. FOURTH AMENDMENT – CASES DISMISSED After Argument**

**Tolentino v. New York**, No. 10-775, 131 S.Ct. 1387 (March 29, 2011), leaving in place 926 N.E.2d 1212 (N.Y. 2010).

**Holding** (9-0, *Per Curiam*): The Court dismissed the writ of certiorari as improvidently granted. As such, **they do not decide whether pre-existing identity-related governmental documents, when discovered as a result of a Fourth Amendment violation, are subject to the exclusionary rule.**

**Facts:** Jose Tolentino was driving a car in New York City, and the police stopped him for playing music too loudly, learned his name, and ran a computer check of DMV files to look up his driving record. When this check revealed that defendant's license was suspended with at least 10 suspensions imposed on at least 10 different dates, he was arrested and charged with one count of aggravated unlicensed operation of a motor vehicle in the first degree. Tolentino challenged the lawfulness of his traffic stop, and sought to suppress his driving record and any statements made after arrest as “fruits” a Fourth Amendment violation. Tolentino argued that “[b]ut for defendant's unlawful seizure by the police, his DMV records would not have been obtained and he would not have been arrested.” The trial judge held that “[a]n individual does not possess a legitimate expectation of privacy in files maintained by the [DMV] and such records do not constitute evidence which is subject to suppression under a fruit of the poisonous tree analysis.” Tolentino pled guilty and appealed. The Appellate Division unanimously affirmed the trial court’s ruling and the N.Y. Court of

Appeals also affirmed. The Supreme Court granted certiorari to address splits of authority, and heard oral arguments on March 21, 2011.

**Per Curiam** (9-0): In a one sentence Order, the court denies the writ of certiorari as improvidently granted. While no reason is given, at oral argument Justices Scalia and Alito elicited the facts that (1) the trial court had not ruled on whether the identification of the driver was the “fruit,” as opposed to the DMV records, and (2) that the trial court had not ruled on whether, in fact, the initial stop had been unlawful.

**Camreta v. Greene**, No. 09-1454 & 1478, 131 S.Ct. \_\_\_\_ (May 26, 2011), vacating 588 F.3d 1101 (9<sup>th</sup> Cir. 2010).

**Holding** (7 [4-1-2] -2) -- **Kagan**; **Scalia** concurring; **Sotomayor** concurring with Breyer in judgment only; **Kennedy** dissenting with Thomas): **First, government officials who prevail on grounds of qualified immunity may still seek review** of the underlying merits ruling. But **second, this particular case is moot “because the child has grown up and moved across the country,” so we vacate the Ninth Circuit’s ruling that a warrant was required.**

**Facts:** In 2003, a child protective services officer and a deputy sheriff went to S.G.’s school to interview her regarding allegations that her father may have molested her. They did not have a warrant, nor exigent circumstances, nor parental consent. The minor initially denied the allegations but later indicated that she had been abused; however, the charges against her father were later dismissed after a jury failed to reach a verdict. S.G.’s mother sued the CPS officer and the deputy sheriff, alleging Fourth Amendment violations and damages. Both the district court and the Ninth Circuit granted judgment for the defendants on grounds of qualified immunity. However, the Circuit court first ruled that the officers had violated the Fourth Amendment by “seizing and interrogating” S.G. without a warrant or parental consent. The Court explained that CPS officers needed guidance in this not-uncommon situation, and that allegations of child molestation do not constitute a “special needs” exception to the Fourth Amendment. The mother did not appeal the judgment against her. But the officers sought certiorari on the Fourth Amendment question.

**Kagan (in a complicated 7-2 split, with Sotomayor and Breyer concurring only in the judgment, Kennedy and Thomas dissenting, and Scalia only reluctantly concurring to provide a fifth vote):**

1. **Standing to seek Certiorari.** Ordinarily, a party that has prevailed below is not permitted to appeal a judgment in its favor. But we have permitted it twice before (*Roper* (1980) and *Electrical Fittings* (1939), where the minimum constitutional standing requirements (injury, causation, and redressibility) exist. “Article III is not what poses the bar”; the rule against prevailing parties appealing is prudential in nature. In the good faith immunity context, the Article III requirements will often be met, even if defendants prevail, because a substantive ruling against them, before granting immunity, sets behavioral requirements for their actions in the future.

*Pearson* (2009) and *Saucier* (2001) grant district judges discretion to reach the substantive merits of a claim against government officials, before deciding whether they have qualified immunity, in order to not “leave standards of official conduct permanently in limbo.” However, we today urge district courts to “think hard, and then think hard again,” before so doing. Still, **where a court has determined that it should decide substantive questions in order to “provide guidance” for the future, then even defendants who ultimately prevail on qualified immunity grounds on appeal have standing to seek certiorari from the judgment**, because the merits ruling will bind their future conduct and thus provide “injury” if wrong, and a different ruling by us will “redress” the injury

caused by the [allegedly erroneous] merits ruling. We note two limitations: first, we are ruling today only on petitions for certiorari to this Court, and are not deciding whether a similar standing rule should apply in the courts of appeal; and second, this describes only what we may review, not that we necessarily will review such rulings. Finally (n. 8), we reject Justice Sotomayor’s view that because we hold the case to be moot, we may not answer the standing question. We think our initial reviewability ruling is “critical to the ultimate disposition of this suit.”

2. Mootness. Because she is just months away from her 18<sup>th</sup> birthday, and has moved across the country (out of the Ninth Circuit), S.G. “is no longer in need of any protection from the challenged practice.” Thus this case is moot. (And this case involves allegations of individual violations, not municipal “policy and practice” claims, which may remain pending.) So, in fairness, we vacate the Ninth Circuit’s underlying ruling on the Fourth Amendment merits. See *Munsingwear* (1950). (If the defendants were not allowed to appeal at all, then we might not vacate, but here the defendant’s right to appeal (see part I) is frustrated by the “vagaries” of time and distance).

Scalia, concurring: “I join the Court’s opinion” because it “reasonably applies our precedents, strange though they may be.” However, if the question that Justice Kennedy presents in his dissent were presented (should we end our practice under *Saucier* and *Pearson* of allowing courts to decide underlying merits when there is qualified immunity?), “I would be willing to consider it.”

Sotomayor, concurring in the judgment, with Breyer: Because I agree that the case is moot, we ought not reach the question of whether prevailing parties can seek certiorari here. Instead, the Court is correct to simply vacate “that portion of the Ninth Circuit’s opinion [that] *Camreta* sought to challenge” (citing a 2009 *per curiam* disposition, *Indiana State Police Pension Trust*).

Kennedy, dissenting with Thomas: The court correctly notes the “troubling consequences” that have emerged from our recent qualified immunity cases. However, I think we ought not override our normal jurisdictional limits, so I issue “this respectful dissent.” [Ed. Note: I would speculate that Justice Kagan’s “rookie” status this Term garners the slightly unusual deferential approaches exhibited in Justice Kennedy’s, as well as Justice Scalia’s, opinions in this case.] “This Court reviews judgments, not statements in opinions.” *Rooney* (1987); accord, *McClung* (1821). “Our power is to correct wrong judgments, not to revise opinions.” *Herb v. Pitcarin* (1945). “Parties who have obtained all requested relief may not seek review here.

I also think it is “unprecedented” for us to vacate only a “part” of an opinion that we think is wrong. Our “almost invariable rule” against allowing parties that have prevailed to still seek review should be followed, and the two cases the Court musters to support a different result are distinguishable. Only one case (a 2004 dissent from denial of certiorari by Justice Scalia) has ever suggested that we should review merits rulings “locked inside” a favorable qualified immunity judgment. The Ninth Circuit’s merits ruling was merely “dictum,” given its qualified immunity ruling, and we should treat it as such.

Meanwhile, the Court’s ruling on reviewability has troubling implications for the general doctrine of “standing to appeal.” [Ed. Note: Unspoken here is the obvious impact the Court’s statements might have on that issue as presented in the California “same sex marriage” Prop 8 case, currently pending in the Ninth Circuit. Justices Kagan and Kennedy both repeatedly cite *Arizonans for Official English* (1997), a central case on that question.] Rather than suggest that an appellate dictum can now constitute a reviewable judgment, we ought to “at least explore refinements to our qualified immunity jurisprudence,” as I have suggested in the past (*Siegert*, 1991, suggesting that

normal “constitutional avoidance” rules should apply before reaching constitutional merits in qualified immunity cases). We should simply dismiss this case as moot, without rendering any other ruling.

### C. FIFTH AMENDMENT

**Connick v. Thompson**, No. 09-571, 131 S.Ct. \_\_\_\_ (March 29, 2011), reversing 757 F.3d 293 (equally-divided *en banc* 5<sup>th</sup> Cir. 2009).

**Holding** (5 [3-2] to 4), **Thomas**; Scalia concurring with Alito; Ginsburg dissenting with Breyer, Sotomayor and Kagan: Because a “pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference” for “failure to train” § 1983 liability, **a single *Brady* violation, no matter how egregious, cannot support such liability for a district attorney’s office.** [Ed. Note: The Court is deeply divided not so much about the narrow legal question presented, but really about the fact that the New Orleans district attorney’s office here escapes civil liability for a specific set of overall egregious facts which the dissenters lay out at length but which the majority finds to be largely irrelevant to the precise legal question. (We also see a clear “conservative-to-liberal” 5-4 split here, with Ginsburg’s dissent joined by Breyer, Sotomayor and Kagan, and feel the loss of Justice Stevens who was long a champion of *Brady* rights.)

Meanwhile, Justice Scalia (with Alito) questions whether there was any *Brady* violation at all (although the district attorney’s office conceded it), and if so, whether the office (as opposed to the intentional bad act of a rogue prosecutor) “caused” Thompson’s damages.

**Facts:** In this civil § 1983 case seeking damages, the District Attorney’s office in New Orleans conceded that its prosecutors committed a *Brady* violation. (Justice Scalia, concurring, challenges this concession). The prosecution did not disclose to Thompson that it had a swath of clothing from a robbery victim that had the blood of the assailant on it, and did not disclose that the blood tested as type B. In 1985, the office strategically convicted Thompson of the robbery first, and then took him to trial for a contemporaneous murder, predicting (correctly) that the robbery conviction would keep Thompson from testifying. Thompson was convicted of murder and sentenced to death, the robbery being an aggravating circumstance.

After 14 years in prison and one month before his execution, Thompson’s lawyers discovered the undisclosed evidence. Thompson’s blood type is O, and the Louisiana courts found the nondisclosure of the earlier blood sample and test result to be a *Brady* violation. Both of Thompson’s convictions were reversed, and after acquittal on retrial for the murder four years later, he was released.

(An outrageous fact -- but legally irrelevant says the majority -- is that once the blood evidence was discovered, a former assistant DA revealed that five years earlier one of Thompson’s prosecutors, who was on his deathbed, had confessed that he had “intentionally suppressed” the blood evidence. Records revealed that the suppressing prosecutor, then only a year out of law school, had checked the evidence out and never checked it back in. That prosecutor was now dead; the prosecutor who did not reveal his confession was later reprimanded on state Bar charges.)

Thompson then sued the New Orleans DA office for damages (the prosecutors themselves having absolute immunity), on a theory of “failure to train” on *Brady* practices (as well as a theory of unconstitutional office policies on *Brady*). Prior to trial, the district court ruled that a single *Brady* violation could prove the “deliberate indifference” required for “failure to train” liability when the need for training is “obvious.” The jury rejected the “office policy” theory but awarded Thompson \$14 million in damages on the “failure to train” claim. A panel of the Fifth circuit affirmed, and on rehearing the *en banc* Fifth Circuit divided evenly, thereby affirming as well.

**Thomas (for five Justices):** A local government can be liable under § 1983, not under “vicarious liability” for its employees, but only when its own acts demonstrate “practices so persistent and widespread as to practically have the force of law” (*Monell*, 1978). Even for the “tenuous” claim of “failure to train” liability, the plaintiff must show the government’s “deliberate indifference” to the “known or obvious” unconstitutional consequences of its policies or decisions (*Bryan County v. Brown*, 1997). Although a “pattern of similar violations is ordinarily necessary” to demonstrate “deliberate” constitutional indifference, the Court has hypothesized a “possibility, however rare,” that a single constitutional violation might suffice where the need for training is “obvious” and a lack of training can cause “highly predictable consequences” of constitutional violations. *Canton*, 1989.

We don’t entirely foreclose the “single incident” theory today. However, **“failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*’s hypothesized single incident liability.”** First, we note that Thompson did not argue a “pattern” of *Brady* violations -- and even if he had, the four *Brady* conviction reversals coming from this DA’s office in 10 years did not involve “failure to disclose blood evidence ... or scientific evidence of any kind, so they are not “similar.” As for the failure to train, “the obvious need for specific training ... is absent here.” Unlike other government employees, prosecutors arrive already trained in the law. They are also required to take continuing education [although as the dissent points out, not in Louisiana at the time of this incident]. They also “train on the job” and they know they are subject to heightened ethical requirements. “Attorneys, unlike police officers, are equipped with the tools to find, interpret and apply legal principles.” The fact that “*Brady* has gray areas and some *Brady* decisions are difficult” does not prove that failing to train on *Brady* constitutes “deliberate indifference” to the possible consequences. **“A district attorney is entitled to rely on prosecutors’ professional training and ethical obligations, in the absence of specific reasons, such as a pattern of violations, to believe that those tools are insufficient.”**

In addition, “the nuance of the allegedly necessary training” forecloses liability here. The prosecutors here were undisputedly familiar with *Brady* requirements in general, and specific training on the issue here might not be offered or required. “Proving that an injury ... could have been avoided if an employee had had better or more training ... will not suffice.” **We will not “micromanage local governments throughout the United States.”**

Thompson also now argues that Connick the DA created a “culture of indifference” in his office toward *Brady*. But this is essentially an “unconstitutional policy or custom” argument, which the jury here rejected. Here the individual prosecutors undoubtedly “failed to carry out” their responsibility “to see that justice is done.” But this “single incident” is not sufficient to prove governmental deliberate indifference, and the “the district court should have granted Connick judgment as a matter of law on the failure to train claim.”

**Justice Scalia concurring joined by Alito:** “The dissent’s lengthy excavation of the trial record is a puzzling exertion.” On the narrow legal question presented, governmental liability cannot be premised simply on “the Law of Large Numbers,” and the fact that prosecutors will often confront difficult *Brady* issues is insufficient for single-incident liability. The dissent’s showing that there may have been a “culture of indifference here” is irrelevant and was rejected by the jury. Federal courts cannot be “second-guessing municipal employee training programs.” Meanwhile, Thompson’s injuries were caused not by a failure to train, but “by [a] miscreant prosecutor[’s] willful suppression of evidence.” The dissent fails to confront the causation problem. Finally, although the *Brady* violation was conceded, our precedents do not support it. A prosecutor would not know that the blood sample or testing was “exculpatory” absent knowledge of Thompson’s own different blood type. “Failure to preserve potentially useful evidence does not constitute a denial of due process of law” absent bad faith (*Youngblood*, 1988). **[Ed. Note: Justice Scalia does not discuss how the facts here**

could possibly show an absence of bad faith; perhaps he means good faith of the office as a whole, although again, that is undiscussed and seems highly arguable.] “There was probably no *Brady* violation at all – except for Deegan’s [the dead prosecutor].” And his error, because it was a deliberate willful one, “could not possibly be attributed to failure of training.”

**Ginsburg dissenting** joined by Breyer, Sotomayor and Kagan: [It is hard to do justice to Justice Ginsburg’s 33-page dissent in a short summary.] “The Court’s opinion obscures” the fact that **the trial record here showed “no single incident of a lone officer,” but rather that “inattention to *Brady* was standard operating procedure” and “pervasive” in the office, making the office “deliberately indifferent” to the consequences** and Thompson’s terrible injuries (18 years in prison, 14 on death row). The record reveals a large number of prosecutorial lapses in Thompson’s prosecutions. Thompson’s trial attorney was told that the prosecution “didn’t have any blood evidence.” But in light of the undisclosed blood evidence Thompson was actually innocent of the robbery charge, and using it to strategically secure his murder conviction and death sentence was “fundamentally unfair.”

The record shows that Connick the DA was deliberately responsible for his prosecutors’ lax attitude toward *Brady*. Among other things, Connick terminated a grand jury into his office’s conduct after the blood evidence was found; “in protest the prosecutor [running the grand jury] tendered his resignation.” His trial testimony showed that he and his deputies misunderstood *Brady* to this very day. Connick retried Thompson for the murder but with the addition of “ten exhibits the prosecution had not disclosed when Thompson was first tried” (a relevant pattern of *Brady* failures), the jury acquitted after 35 minutes. Connick’s office manual contained only four sentences on *Brady* and did not mention even *Giglio*. Connick, the “sole office policymaker,” testified that he “stopped reading law books ... and looking at opinions” when he was first elected DA. These prosecutors were clearly untrained in *Brady* and indifferent to the consequences (and criminal procedure is not required by most law schools and was not by these prosecutors’ alma maters). The majority “blinks reality” by suggesting that lawyers are already well-trained on *Brady*. **[Ed. Note:** This former prosecutor and current criminal procedure professor has to agree.] In such a fundamental and important area, “a District Attorney ... bears responsibility for ensuring that on-the-job training takes place.”

The jury was properly instructed on Thompson’s theories and their verdict should be affirmed. “The jury could draw a direct causal connection.” “This case, I am convinced, belongs in the category *Canton* marked out,” for “obvious” failure to train liability. **“Unless municipal agencies bear responsibility for adequately conveying what *Brady* requires and for monitoring staff compliance,” these sort of violations and damages are “bound to be repeated.”**

**J.D.B. v. North Carolina**, No. 09-11121, 131 S.Ct. 2394 (June 16, 2011), reversing 686 S.E.2d 135 (N.C. 2009).

**Holding** (5-4). **Sotomayor;** Alito dissenting: To determine **whether a minor suspect is in *Miranda* “custody,” so that warnings are required, the age of the minor should be considered**, “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.”

**Facts:** A 13-year-old seventh grader, J.D.B., was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police juvenile investigator and an assistant principal, for at least 30 minutes, about several neighborhood break-ins. No one contacted J.D.B.’s grandmother-guardian prior to questioning. J.D.B. was not given *Miranda* warnings or an opportunity to speak to his grandmother, and he was not told that he was free to leave

the room. Instead, after some small talk, the investigator confronted J.D.B. with some of the stolen property and told J.D.B. that “this thing is going to court” which could lead to “juvenile detention.” The principal urged JDB to “do the right thing.” J.D.B. then confessed that he and a friend were responsible for the break-ins. Only after the confession did the investigator tell JDB that he could refuse to answer the questions and that he was free to leave. J.D.B. said that he understood, and he eventually wrote an incriminating statement at the investigator’s request. The trial court denied JDB’s motion to suppress his statements its fruits, finding that JDB was not in custody at the time of the questioning and that his statements were voluntary. JDB then admitted the charges while reserving his right to appeal. A divided appellate panel affirmed, and the North Carolina Supreme Court affirmed, over two dissents. The Court ruled that JDB was not in custody when he confessed and it “decline[d] to extend the test for custody to include consideration of the age . . . of an individual subjected to questioning.”

**Sotomayor, joined by Kennedy, Breyer, Ginsburg, and Kagan:** As we held in *Miranda*, “custodial police interrogation entails ‘inherently compelling pressures,’” and “it can induce a frighteningly high percentage of people to confess” falsely (*Corley*, 2009). *Miranda* was adopted in an effort to reduce these pressures and “safeguard the constitutional guarantee against self-incrimination.” But the warnings need be given only to suspects in “custody,” and an “objective custody analysis” is required -- “how a reasonable person in the suspect’s position would understand his freedom to terminate questioning and leave.”

“[T]he physical and psychological isolation of custodial interrogation” “is all the more troubling . . . and . . . acute . . . when the subject of custodial interrogation is a juvenile.” “It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” “Courts can account for that reality without doing any damage to the objective nature of the custody analysis,” because the fact of age is “objective.” Thus “a child’s age properly informs the *Miranda* custody analysis” (just as being blind would inform it, a point conceded by the State at oral argument.) We think that the effects of being a child “are self-evident to anyone who was a child once himself, including any police officer or judge.” Our statements in other contexts recognize the mitigating effects of a minor’s age, and simply “restate what ‘any parent knows’ – indeed, what any person knows – about children generally.” *Roper* (2005) [note Sotomayor’s strategic citation to this controversial Kennedy opinion]. Indeed, “the law has historically reflected” that “children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.” Thus “the common law has reflected the reality that children are not adults.” In these regards, “a child’s age differs from other personal characteristics” that might reflect on the objective custody test (and the dissent is therefore wrong to suggest that we are expanding *Miranda* to “a suspect’s every personal characteristic.”)

Indeed, it would be “nonsensical” to ask how a reasonable adult would understand his situation after being removed from his seventh grade social studies class. “The effect of the schoolhouse setting cannot be disentangled from the identity of . . . [a] student whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action.” Prior contrary suggestions by us in the deferential habeas context do not bar our *de novo* conclusion today.

We do not think our decision reduces “clarity.” Rather, ignoring a juvenile’s age would “make the inquiry more artificial” and “add confusion.” Moreover, we have always accepted *Miranda*’s relatively unclear “custody” test over a more clear – but less protective – “formal arrest” test, for example. Finally, the fact that age may be considered as part of the “voluntariness” test for waiver is not relevant to the initial “custody” question, because it is the initial protective force of *Miranda* warnings that is the best protection for the constitutional right. To hold that a child’s age is never relevant “would be to deny children the full scope of the procedural safeguards that *Miranda*

guarantees to adults.” We remand for consideration under “all of the relevant circumstances, including the suspect’s age” as we announce today.

Alito dissenting, joined by Roberts, Scalia, and Thomas: Although the majority’s ruling may at first seem “modest and sensible,” it is in fact neither, and “is **fundamentally inconsistent with one of the main justifications for the *Miranda* rule: the perceived need for a clear rule that can be easily applied in all cases.**” Furthermore, “the holding is not needed to protect the constitutional rights of minors who are questioned by the police,” because consideration of the “objective factors of the interrogation,” including the schoolhouse setting, are sufficient to protect minors questioned at school. Before *Miranda*, our prior “totality” “voluntariness” test for admission of confessions considered a multitude of individualized factors, including age. But we abandoned that test, as insufficiently protective and vague, in favor of *Miranda*’s more “rigid standards” that are objective and clear. “*Miranda*’s central premise” was to adopt “inflexible prophylactic requirements” not based on individual variations in personal characteristics, including, expressly, “age” (quoting from *Miranda*). In fact, *Miranda* often “require[s] courts to ignore personal characteristics that m[ight] be highly relevant to a particular suspect’s actual susceptibility to police pressure.” Up to now, the *Miranda* custody analysis has always “focused solely on the ‘objective circumstances of the interrogation,’ not the personal characteristics of the interrogated.” “But see *Schneckloth* (1973).” Today’s ruling will necessarily place great pressure, and confusion, on lower courts, to see what other “personal characteristic[s] . . . may correlate with pliability. . . . such as intelligence, education, occupation, or prior experience with law enforcement.” Not just defense attorneys, but also prosecutors, will use today’s ruling to try to individualize the “custody” inquiry, and thereby rob *Miranda* of its objective clarity and ease of application by police who must make on-the-spot decisions. Yet the Court’s “opinion contains not a word of actual guidance as to how judges are supposed to” implement this new holding. While of course “I do not dispute” that “many suspects . . . under 18” (but perhaps every 16½ year-old) are more susceptible to police pressure than the reasonable adult, this is not a sufficient justification for the “extreme makeover of *Miranda*.” “It has always been the case under *Miranda* that the unusually meek or compliant are subject to the same fixed rules.” Why is an IQ score, or recent immigrant status from repressive regimes, or educational grade-level, different from chronological age?

There are “at least” three reasons why today’s “fundamental transformation of the *Miranda* custody test” is unnecessary. First, a “one-size-fits-all *Miranda* custody rule provides a roughly reasonable fit” for “[m]ost juveniles who are subjected to police interrogation” because they are “nearing the age of maturity.” Second, “[t]he *Miranda* custody rule has always taken into account the setting in which questioning occurs,” and, since most questioning of minors can be assumed to take place at school, the custody rule already takes into account the “unique circumstances present when the police conduct interrogations at school.” Third, courts can take “special care to ensure that incriminating statements were not obtained through coercion” where the suspect is “especially young.”

The majority says courts ought not to “blind” themselves to age, but in fact *Miranda* has long been criticized as requiring “judges to blind themselves to the reality that many un-Mirandized custodial confessions are by no means involuntary,” yet are suppressed. Meanwhile, if the Court continues down the path of making exceptions to the objective custody analysis, “**bit by bit, *Miranda* will lose the clarity and ease of application that has long been viewed as one of its chief justifications.**”

**Turner v. Rogers**, No. 10-10, 131 S.Ct. \_\_\_\_ (June 20, 2011), vacating 691 S.E.2d 470 (S.C. 2010).

**Holding** (5-4[2-2]), **Breyer; Thomas** dissenting: While we do not impose a “categorical rule” that civil contempt defendants who are indigent must receive appointed counsel if the case can result in their imprisonment, it may be required in some cases and the State “must have in place alternative procedures that ensure a fundamentally fair determination of the critical incarceration-related question.” Turner did not receive such procedures, so **his incarceration violated the Due Process Clause.**

**Facts:** Turner was repeatedly in default of his State-imposed obligation to pay child support. South Carolina enforces child support orders by allowing civil contempt actions, that can result in incarceration if the defendant is able to comply with the payment order but fails to do so. Turner was held in civil contempt five times prior to this one, and ultimately paid his support four times, twice without being jailed, and twice after spending only a few days in custody. The fifth time he did not pay but completed a six-month incarceration sentence for the contempt. This time, Turner appeared at his civil contempt proceeding representing himself, and his ex appeared also without counsel. Turner simply said that “dope had a hold to me” and “I know ... I should have been paying.” The judge found Turner in “willful contempt” and sentenced him to twelve months unless he paid his \$5,728 obligation. The judge did not expressly find that Turner had the ability to pay, and the form which allowed him to so find was not filled out. Turner appealed, with a pro bono lawyer, but finished serving his 12-month sentence while his appeals were pending. The South Carolina Supreme Court ultimately rejected Turner’s Due Process right-to-counsel claim, and other State courts have reached various results on the Sixth Amendment question whether an indigent civil contempt facing incarceration is entitled to appointed counsel.

**Breyer, joined by Kennedy, Ginsburg, Sotomayor and Kagan** [Note that as the senior Justice in the majority, Justice Kennedy assigned this case to Breyer]: First, the case is not moot, because it is “capable of repetition while evading review.” Turner himself is likely to be subjected to the same type of civil contempt enforcement proceeding again. **[The Court is unanimous in rejecting mootness, see Thomas dissent footnote 1.]**

On the merits, **we reject a categorical rule like the one that requires counsel in criminal cases that result in “even one day” of incarceration.** The Sixth Amendment governs criminal cases, but not civil, and the Due Process Clause require only “fundamental fairness,” which “allows a State to provide fewer procedural protections than in a criminal case.” Although we have previously suggested that any civil proceeding in which a person “may be deprived of physical liberty” requires counsel (*Lassiter*, 1981), other cases have rejected that suggestion (e.g. *Gagnon*, 1973). Meanwhile, the general *Mathews v. Eldridge* (1976) Due Process balancing test “argue[s] strongly against” requiring States to provide counsel in every civil contempt hearing to enforce child support (even if using incarceration to encourage payment is viewed as bad policy by some). First, where “ability to pay” is the key factor in whether to incarcerate, objective procedures can often make that determination, which is the same as indigency, in advance of the hearing. Second, the opposing party here is often also without counsel, unlike many governmental proceedings, so there would be an “asymmetry of representation.” Third, alternative procedural safeguards are often present: (1) advance notice of the important issue (ability to pay) and use of an objective form to determine it pre-hearing; (2) an opportunity to present and to dispute evidence; and (3) a requirement of court findings on the key issue. **And finally, a “categorical right to counsel” can also “carry with it disadvantages (in the form of unfairness and delay”).** [Ed. Note: Perhaps the most notable point in *Turner* is this express lack of faith in the overall beneficial effect of counsel, unlike the Warren Court’s sometimes naïve faith in the provision of lawyers as the solution to all evils.] This is not a case in which the State is the prosecuting party represented by counsel. Neither is it an “unusually complex case” that might require counsel (see *Gideon*).

However, **because** the record reveals that **Turner did not receive the alternative protections that we describe today (fair notice, an indigency form, and a court finding that he had the ability to pay), we believe his “incarceration violated the Due Process Clause,”** and we remand for further proceedings “not inconsistent with” our opinion.

**Thomas dissenting**, joined by Scalia in full and by Roberts and Alito in only Parts 1-B and II: “The Due Process Clause ... does not provide a right to appointed counsel for indigent defendants facing incarceration in civil contempt proceedings.” That should be the end of our decision today. The parties never raised the “alternative procedural safeguards” argument – only the SG as amicus did – and we ought not reach it.

**Part I-A [Ed. Note:** Not joined by Roberts or Alito, which is interesting because this Part says that appointment of counsel is not part of the Sixth Amendment’s “original understanding” even for criminal cases. So Justices Roberts and Alito appear to be rejecting that view.] Neither the Sixth Amendment nor the Due Process Clause can support a constitutional “right” to appointed counsel, and there is concededly “no historical support” for Turner’s argument.

**Parts I-B and II:** “Even under the Court’s modern interpretation” there is no support for a “categorical right” for appointed counsel in any civil cases. We have never held for such a right in any category of civil cases. In fact, if the Due Process Clause embodied such a rule for incarceration cases, then the Sixth Amendment would be superfluous. “The Due Process Clause says nothing about counsel.” And for good reasons, we ought not go on to consider the “adequate procedural safeguards” argument not raised by Turner himself and presented in only an *amicus* brief, especially when we are reviewing a state judicial matter and “triply so” when it presents a new constitutional question.

**Part III [also joined in only by Scalia]:** The *Matthews v. Eldridge* balancing test does not apply well here, because it fails to take into account “the interests of the child and custodial parent.” [Justice Thomas writes vigorously against “deadbeat” dads and “when fathers fail in their duty to provide child support.”] States have found that the threat of incarceration is a “highly effective tool” for collecting child support “when nothing else works.” And indeed, it worked four previous times against Turner, who paid only after being incarcerated for a few days. Because this is state policy, and the issue of what “alternative safeguards” might or should or did exist has not been briefed by the parties or examined by the State, “I do not pass on the wisdom of the majority’s preferred procedures.”

#### **D. SIXTH AMENDMENT -- Confrontation Clause, *Crawford* follow-ups**

**Michigan v. Bryant**, No. 09-150, 131 S.Ct. \_\_\_\_ (February 28, 2011), reversing 768 N.W.2d 65 (Mich. 2009).

**Holding** (6 [5-1] to 2, Kagan recused), **Sotomayor**; **Thomas** concurring; **Scalia** dissenting, **Ginsburg** dissenting: In analyzing the admission of statements made by a dying shooting victim to first-responder officers, the Court rules that **where the “primary purpose” of interrogation of a crime victim is “to meet an ongoing emergency,” the resulting statements are likely “nontestimonial”** and thus not prohibited from admission despite the victim’s unavailability.

**Facts:** Detroit police responded at 3:25 am to a radio dispatch that a man had been shot. In a gas station parking lot, the police found the victim lying on the ground with a serious gunshot wound in the stomach. Five responding officers asked the victim what had happened, who had shot him, and where it had occurred. The victim said “Rick” had shot him through a door and that he had driven himself to the gas station lot. Questioning stopped after 5-10 minutes when medical personnel arrived; the victim died a few hours later. Based on the victim’s statements, the police identified Bryant as the

shooter and eventually tried and convicted Bryant for second-degree murder and firearms charges. The victim's statements were admitted at trial via the police witnesses who heard his statements. The deceased victim was obviously unavailable for trial and not subjected to cross-examination.

A divided Michigan Supreme Court ultimately reversed Bryant's convictions, finding that because the purpose of questioning the victim was "to establish the facts of an event that had *already* occurred," it was not an "ongoing emergency" as appeared to be required under *Davis* (2006) for an exception to *Crawford* (2004). Thus admission of the victim's statements violated the Sixth Amendment's Confrontation Clause. (The Michigan Court also ruled that the prosecution had waived reliance on the "dying declaration" exception to the hearsay rule, so that argument was not available.)

**Sotomayor** (for 5 Justices): Applying *Crawford*'s Confrontation Clause analysis to statements made by a dying shooting victim to first-responder officers, the Court rules that **where the "primary purpose" of interrogation of a crime victim is "to meet an ongoing emergency," the resulting statements are likely "nontestimonial"** and thus not prohibited from admission. The *Crawford* analysis requires an objective, "highly context-dependent" analysis, including "looking to the contents of both the questions and the answers." Where first-responding officers confront a mortally wounded gunshot victim and the shooter's identity, purposes, and whereabouts are unknown, an "ongoing emergency" is reasonably present even though the immediate shooting is over.

*Crawford* overruled prior precedents regarding hearsay evidence, and ruled that under the Sixth Amendment, "testimonial" evidence from "witnesses" who do not testify at trial is barred unless the witness was "unavailable" and there was a prior opportunity for cross-examination. "Interrogations by law enforcement officers" normally produce such testimonial evidence, but **"not all those questioned by the police are witnesses."** Thus not all interrogation responses are barred by the Confrontation Clause. In *Davis* (2006) the Court ruled that "statements are nontestimonial when ... the primary purpose ... is ... to meet an ongoing emergency." Thus in *Davis* a 911 call was held nontestimonial -- while in a companion case (*Hammon*, 2006) a police interview of a victim after a domestic violence dispute was held to be "testimonial" and thus admissible.

**The Michigan Court overread *Davis* and *Hammon* to say that all police interviews are "testimonial." We now clarify that this is not so.** First, an "objective" inquiry is required, and the court must analyze the content and purpose of both the police questions and the declarant's responses. It is a "context-dependent inquiry," and includes the type of weapon (guns more dangerous than fists), the extent of a victim's injuries, and the relative "informality" of the interview. **"The dissent criticizes the complexity of our approach, but we, at least, are unwilling to sacrifice accuracy for simplicity."** Here (after a detailed review of the facts, and quoting from the U.S. *amicus* brief), **"[a]n emergency posed by an unknown shooter who remains at large does not automatically abate just because the police can provide security to his first victim."** The "evolutionary potential of a situation" must be considered. "This situation is more similar ... to the informal, harried 911 call in *Davis* than to the structured, station-house interview in *Crawford*."

Moreover, the existence of an ongoing emergency "is not the touchstone of the testimonial inquiry; rather ... the primary purpose" of the interrogation must be examined. Finally, "[t]he Confrontation Clause is not the only bar to admission of hearsay statements at trial." The case is remanded for Michigan to consider its other, non-constitutional, evidentiary rules.

(Justice Sotomayor responds calmly to Justice Scalia's harsh rhetoric criticizing the Court's ruling, characterizing it as an "excited suggestion," and at various points disputes the dissent's factual contentions (drolly noting "the dissent's apparent ability to read [the victim's] mind") as well as its characterization of the extreme consequences of the ruling.)

**Justice Thomas, concurring in the judgment:** I've previously made clear, in *Davis*, that I don't agree with the "primary purpose" inquiry, due to "the uncertainty it creates for law enforcement and the lower courts." Instead, **this interview "lacked sufficient formality and solemnity to be considered 'testimonial.'"** Because it did not "resemble[] those historical practices that the Confrontation Clause addressed," its admission did not violate the constitution.

**Justice Scalia dissenting:** [Ed. Note: Arguably providing the archetype for "sore loser," Justice Scalia writes a blisteringly critical solo dissent. **He calls the Court's analysis "so transparently false that professing to believe it demeans this institution."** So much for building bridges with Justice Sotomayor (the majority author). After this harsh accusation, Justice Scalia (the author of *Crawford*) writes at great length to express his disagreement with the Court's conclusion and approach.] The Court's complicated approach is not only wrong and illogical, it **makes the Court "the obfuscator of last resort."** Among other things, analysis should focus solely on the understanding and "purpose" of the declarant, not the police. Thus considered, this is "an absurdly easy case," because the victim "knew" [hence the majority's mind-reading comment] that the threatening situation had ended, and was speaking not to address an emergency. Meanwhile, the police were obviously trying to identify "who did this, period" (quoting one officer), and the Court's unrealistic view of the situation as presenting an ongoing emergency, as well as the police having purpose to address such emergency, is "utter nonsense."

In addition, whether a statement is reliable or not "tells us nothing about whether a statement is testimonial." **"The Court's distorted view creates an expansive exception to the Confrontation Clause for violent crimes,"** and represents "a hollow constitutional guarantee" that the Framers would not recognize. The majority's "revisionist narrative" is not faithful to *Crawford* or the history it surveyed -- it is actually **a return to the "discredited logic" of our pre-Crawford hearsay cases.** But [says Justice Scalia in an apparent dig against the Chief Justice,] "honestly overruling *Crawford* would destroy the illusion of judicial minimalism and restraint."

Finally, the Court's amorphous, fact-dependent analysis "is no better than the nine-factor balancing test" we rejected in *Crawford*. "Today's opinion falls far short of living up to [our] judicial obligations," "short on the facts and short on the law." Even if Bryant is getting "his just deserts," it is not what "our Constitution requires. And [shades of Justice Brennan's rhetoric here], what has been taken away from him has been taken away from us all."

**Justice Ginsburg dissenting:** I agree with Justice Scalia [although, notably, Justice Ginsburg does not join his opinion – nor does he join hers.] But I would add that there is an "historic exception" for dying declarations, and were that issue preserved here, I would take it up. But it was "abandoned" as a matter of state law, so I can't.

**Bullcoming v. New Mexico**, No. 09-10876, 131 S.Ct. 2705 (June 23, 2011), reversing 226 P.3d 1 (N.M. 2010).

**Holding** (5[2-2-1] to 4), **Ginsburg**; Sotomayor concurring, not in Part IV; Thomas and Kagan concurring (without opinions, just not joining Part IV of the opinion, as well as footnote 6 for Thomas); Kennedy dissenting): **When the prosecution introduces a "forensic laboratory report containing a testimonial certification"** [here a blood alcohol report in a DWI trial], **the defendant has the Sixth Amendment right "to be confronted with the analyst who made the certification"** (unless unavailable and the defendant had an earlier opportunity to cross-examine him). **"Surrogate testimony" by another analyst "who did not sign the certification or perform or observe the test ... does not meet the constitutional requirement."**

**Facts:** Bullcoming was arrested for driving while under the influence (“DWI”), after rear-ending someone and then leaving the scene. Bullcoming refused to take a breath test, so the police obtained a blood sample for analysis. The analyst assigned to Bullcoming’s sample (Curtis Caylor) signed a report certifying that the sample was intact, that he had performed a particular test on the sample and followed proper protocols, and that the machinery showed that Bullcoming’s BAC was 0.21. (The form also noted the involvement of at least three others in the process: the arresting officer, a nurse who drew the blood, and a lab “intake employee” (not Caylor) who received the sample at the lab.) Bullcoming’s case was tried before a jury in 2005. On the day of trial, the government surprisingly announced that it would not be calling Caylor as a witness because he had been placed on unpaid leave. Instead, the state offered Mr. Razatos, another analyst in the lab, who could testify about the lab’s procedures and the certification form, but who had not seen Caylor perform the test and had not certified the form himself. In fact, Razatos admitted that he did not know why Caylor had been placed on unpaid leave. The trial court allowed this testimony and admitted the certified lab report as a “business record.” **[Ed. Note:** The trial judge noted, somewhat humorously, that when he had been practicing, “there were no breath tests or blood tests. They just brought in the cop and the cop said ‘Yeah, he was drunk.’”] The jury convicted Bullcoming and the New Mexico courts affirmed. *Melendez-Diaz* was then decided by the US Supreme Court in 2009 (holding that forensic lab reports are “testimonial” under *Crawford* (2004)), but the New Mexico Supreme Court ruled that this did not change the result, because Caylor “was a mere scrivener,” who “simply transcribed the results generated by the gas chromatograph machine,” and Razatos “qualified as an expert witness with respect to the gas chromatograph machine.”

**Ginsburg, joined fully only by Scalia; Thomas, Sotomayor, and Kagan all concur only in part:** **[Ed. Note:** Note that with Justice Roberts in dissent, Justice Scalia is the assigning majority Justice.] The “pathmarking 2004 decision” of *Crawford v. Washington* held that “fidelity to the Confrontation Clause permitted admission of ‘[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.’” The lab report at issue here—“an analyst’s certification prepared in connection with a criminal investigation or prosecution”—is plainly “testimonial” and therefore subject to *Crawford*’s Sixth Amendment jurisprudence. **[Ed. note:** Justice Thomas, who dissented in *Melendez-Diaz*, does not join the Court’s footnote 6, which states that “business and public records ‘are generally admissible absent confrontation . . . because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.’”] “Because the New Mexico Supreme Court permitted the testimonial statement of one witness, i.e., Caylor, to enter into evidence through the in-court testimony of a second person, i.e., Razatos, we reverse that court’s judgment.” “Our precedent cannot sensibly be read any other way.”

Caylor was not a “mere scrivener” for machine-generated results. He certified various “representations . . . relating to past events and human actions not revealed in raw, machine-produced data” and which are meet [meat?] for cross-examination.” “[S]urrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned.” As such, Caylor’s testimony is more than just “a hollow formality,” as the dissent argues. “With Caylor on the stand, Bullcoming’s counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor’s removal from his work station.”

We recently ruled in another Sixth Amendment context (the right to retain counsel of one’s own choice, *Gonzalez-Lopez* (2006), also written by Justice Scalia) that mere provision of some other lawyer who is not ineffective does not satisfy the constitutional right. “If representation by substitute

counsel does not satisfy the Sixth Amendment, neither does the opportunity to confront a substitute witness.”

Finally **[Ed. Note: this Part IV of the opinion is joined only by Justice Scalia]**, any argument regarding “undue burden” on the government “largely repeats a refrain rehearsed and rejected in *Melendez-Diaz*.” Most such cases do not go to trial, and the prosecution can retest samples in the rare case where the original analyst is unavailable. States can (and some have) enact “notice-and-demand statutes. And the “sky has not fallen” in those states where analysts are required to testify in person. **[Ed. Note: This two-Justice part of the opinion repeatedly places unusual weight on an *amicus* brief filed by the Public Defender Service in Washington DC – unusual in determining arguments that the prosecution puts forth. Could there be a former Ginsburg clerk involved there?]**

**Sotomayor, concurring in part:** **[Ed. Note: Justice Sotomayor wrote the Court’s 2011 *Michigan v. Bryant* opinion, on *Crawford*’s implications, earlier this Term – in which Justice Scalia vigorously dissented. See above. Thus Justice Kennedy correctly writes in his dissent here, that “Today’s majority is not committed in equal shares to a common set of principles in applying ... *Crawford*.”]**

“I write separately first to highlight why I view the report at issue to be testimonial ... and second **to emphasize the limited reach of the Court’s opinion.**” First, I apply my test from *Bryant*: “when the ‘primary purpose’ of a statement is ‘not to create a record for trial,’” then it is not a Sixth Amendment “testimonial” statement subject to *Crawford* (*Bryant* slip op. at 12). Thus business records (such as a BAC report produced, for example, to secure medical treatment) can be admissible under state-regulated evidence rules. But here, the “primary purpose” is plainly to create a trial evidentiary exhibit, and it does not matter that it is not a sworn affidavit, since the certification procedure is nevertheless formalized. “I am compelled to conclude” that the report is testimonial under our precedents.

But today’s opinion is “limited.” First, the Court does not hold that “every person noted on the BAC report must testify.” **[Ed. Note: However, the Justices quite obviously do not say who need not testify. Lower courts are sure to continue struggling with this vagueness – for example, in this case at least four people were involved in the process. Must they all testify unless the defendant waives the *Crawford* right?]** In addition, “this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence,” and “this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph.”

**Kennedy, dissenting, joined by Roberts, Breyer, and Alito:** We’ve previously written our reasons for disagreeing with *Crawford* and *Melendez-Diaz*. The Court’s further “missteps” have produced “an interpretation of the word ‘witness’ at odds with its meaning elsewhere in the Constitution, ... and at odds with the sound administration of justice. It is time to return to solid ground” and we should start by decline to extend *Melendez-Diaz* to “reliable, commonsense evidentiary” rules developed by state courts for forensic lab reports. “Here a knowledgeable representative of the laboratory was present to testify and to explain the lab’s processes and the details of the report.” Only the “test result from a machine” was not printed out by that witness -- that should not make a constitutional difference. Some DNA testing “can involve the combined efforts of up to 40 analysts” – must they all now be subpoenaed for trial? Where forensic results are machine-generated and an expert is available to be cross-examined about the process, compelling the state to call “the technician who filled out a form” is “a hollow formality.” Also, *Michigan v. Bryant* earlier this Term emphasized “reliability” of a statement; today we reject reliability in favor of “formality.” Today’s ruling makes *Crawford*’s rule “less clear than it first appeared” (or “too strict to be followed”). **“The**

**persistent ambiguities in the Court’s approach are symptomatic of a rule not amenable to sensible applications.”** In addition, “there is an ongoing, continued, and systemic displacement of the States and dislocation of the federal structure,” and States are now forced to enact complicated legislation to address the “the disruptive, long-term structural consequences” of decisions like today’s.

## **E. EIGHTH AMENDMENT**

**Brown v. Plata**, No. 09-1233, 131 S.Ct. \_\_\_\_ (May 23, 2011), affirming multiple orders of the three-judge court (9<sup>th</sup> Cir. 2009-10, available on Lexis and Westlaw).

**Holding** (5 to 4[2-2]), **Kennedy**; **Scalia** dissenting with Thomas; **Alito** dissenting with Roberts: In a sprawling decades-long litigation challenging unconstitutional mental health and medical treatment conditions due to overcrowding in the California State prisons, a three-judge district Court issued a lengthy remedial order that included **an injunction requiring prisoner population reduction. That injunction is affirmed under the Prison Litigation Reform Act of 1995 (“PLRA”).**

**Facts:** [This long-running litigation is too complex to adequately summarize here. The Court’s opinions run to about 90 pages.] Highlights include the fact that after many hearings and preliminary orders in two separate district court cases (one challenging mental health treatment, the other challenging medical treatment), the judges concluded that many of the problems could be traced to overcrowding in the state prison system (which itself is a function of under-funding), and that the conditions violated the Eighth Amendment prohibition on cruel and unusual punishment. **[Ed. Note:** The majority opinion takes the unusual step of printing photos of the overcrowded conditions as an appendix, including “holding cells” that are the size of a phone booth.] Repeated orders to correct the conditions were unfulfilled, and ultimately the judges announced they would consider a population reduction order. The PLRA requires that such a remedy cannot be ordered by a single federal judge, so the Ninth Circuit convened a special three-judge court under the PLRA, comprised of the two district judges and a Ninth Circuit judge (who just happened to be Judge Stephen Reinhardt, an unrepentant liberal and frequent target of USSCt attention). The resulting remedial injunction did indeed order population reduction (to about 137 % of design capacity, that is, still crowded).

**Kennedy**, joined by Ginsburg, Breyer, Sotomayor and Kagan: The injunction was concededly “of unprecedented sweep and extent.” “Yet so too is the continuing injury.” [Justice Kennedy provides great detail about the prison conditions and injuries.] There is no doubt that prisoners have unnecessarily died due to overcrowding and resultant denial of care, and that the state authorities are aware of this yet have not corrected the conditions. “An inmate in one of California’s prisons needlessly dies every six to seven days” on average. The prison system “would hire any doctor who had a license, a pulse and a pair of shoes,” yet still could not meet the needs. As the law requires, “the overcrowding is the ‘primary cause of the violation of a Federal right’ [quoting the PLRA], specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.” Thus **the population reduction order (which need not be fulfilled by actual release but rather could be achieved by lowering admissions over two years) is “necessary to remedy the violation of prisoners’ constitutional rights” and “must be affirmed.”**

Even though they are lawbreakers, “prisoners are dependent on the state” for their living conditions and “retain the essence of human dignity inherent in all persons” [classic Kennedy, not to mention Brennan and Marshall]. Thus they are protected by the Eighth Amendment. We defer to district courts for their factual findings, and the PLRA permits prison population limits upon certain legal findings, which were made here. The PLRA was properly followed. There is no doubt that

overcrowding is the “primary cause” of the constitutional violations here (violations the state does not even contest) – it need be only the “foremost, chief, or principal” cause, not the sole cause. And the fact that some of the data is old is an unavoidable result of the slow pace of complex class-action litigation and judicial management of the matters. As for remedy, “simple, straightforward solutions” are not possible, and “only a multifaceted approach” can work. While population caps may be a “remedy of last resort,” they are not totally prohibited by the PLRA (which would “raise serious constitutional concerns”). The district court did not err in concluding that no other alternative besides prison population limits could work, as it had ordered other remedies in the past which had failed. “The Court cannot ignore the political and fiscal reality behind this case,” in that the State cannot and has not financially supported other remedies.

The PLRA’s requirement to consider “public safety” was not ignored here; rather it was expressly considered. Some evidence suggests that reducing overcrowding can actually improve public safety, and we review these difficult and complex predictive issues as deferential factual determinations. The order does not require actual release of prisoners, and the state remains free to undertake other remedial efforts so long as overcrowding and unconstitutional conditions are ameliorated. And the state can move for modification if it believes relevant changes in conditions have occurred. But on this record, “the Constitution does not permit th[ese] wrong[s].” Federal courts have substantial flexibility in fashioning equitable remedial orders. The relatively high population limit set, and the two year period to achieve it (which the state did not challenge below and which does not begin until we issue our judgment), was not error on this record. Moreover, it “must remain open to appropriate modification.” But ultimately, **“the relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay.”**

**Scalia dissenting with Thomas:** This is “perhaps the most radical injunction issued by a court in our Nation’s history,” requiring the “release” of “46,000 convicted criminals.” **“The proceedings that led to this result were a judicial travesty” and the result that is affirmed is “absurd.”** [Ed. Note: Gee, don’t hold back, tell us how you really feel!] It “ignores bedrock limitations on the power of Article III judges and takes federal courts wildly beyond their institutional capacity.” I disagree with our “evolving standards of decency” Eighth Amendment analysis. But even if I didn’t, this Order is overbroad, unsupported, and wrong. First, relief should run only to prisoners denied medical care, not all prisoners because they “might” be so denied. I don’t think a court can order a prisoner released unless the court finds that that prisoner has suffered constitutional injury and that no other relief can remedy it. By going further than that, the Court orders relief in violation of the PLRA. Here, the 46,000 prisoners released will likely not be members of the injured class; rather, “many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.” [Ed. Note: Justice Scalia is apparently unaware that many prisons have eliminated weightlifting due to security risks. Without suggesting hostility, I wonder if Justice Scalia has ever actually toured a maximum security prison?]

Moreover, I don’t agree that federal courts have the constitutional or institutional power to issue “structural injunctions.” And the judges’ “factual findings” here are really, and inevitably, “policy judgments,” which judges generally are “incompetent” and “unqualified” to make. Instead, they were “spoon-fed to them by expert witnesses.” Ironically, we have reversed the Ninth Circuit four times already this term for ordering the individual release of state prisoners on habeas actions; yet we affirm today that Court’s similarly wrong order to release 46,000 convicted criminals. “The Court’s respect for state sovereignty has vanished.”

Finally, the Court’s “bizarre coda” noting that the injunction must remain open to modification is really a warning that it should be – but that would be “intellectual bankruptcy,” to say that before anyone has asked for it. This is “no more than a ceremonial washing of the hands.”

**Alito dissenting with Roberts:** “The Constitution does not give federal judges the authority to run state penal systems,” and the PLRA was “enacted to prevent” orders like this one. Release will not improve public safety and to suggest otherwise defies “commonsense and experience.” And other remedies should have been tried (more) first, particularly since more recent evidence is available but was blocked by the district court. For example, one finding of violation is 14 years old. Others address a facility that has now been closed. Only an “up-to-date assessment” should support an order of this magnitude. Meanwhile, overcrowding may “contribute” to the medical violations, but reducing it is not the best or only way to address it. “Increasing salaries, improving working conditions, and providing better training and monitoring” could all work. **[Ed. Note:** Really, as a Californian, I have to note that the State’s budget and political realities will never support this vision, and the district courts tried measures like these in the past with no sign of improvement.] Congress knew the impact of previous prisoner release orders when it wrote the PLRA to restrict the issuance of such orders. For example, a Philadelphia release order led [although this is disputed] to dramatic numbers of crimes committed by the released inmates. Meanwhile, the “sharp increase” in California prison population has been accompanied by “an equally sharp decrease in violent crime.” **[Ed. Note:** This point is undeniable, although many dispute any causal relationship.] “I fear that” today’s decision “will lead to a grim roster of victims” although “I hope that I am wrong.” We should reverse and remand to ensure that “every reasonable precaution” is taken before affirming such a remedy.

## F. TENTH AMENDMENT

**Bond v. United States**, No. 09-1227, 131 S.Ct. \_\_\_\_ (June 16, 2011), reversing 581 F.3d 128 (3<sup>rd</sup> Cir. 2010).

**Holding** (9[7-2] to 0), **Kennedy**; Ginsburg concurring with Breyer: An indicted federal defendant has “standing” to challenge the validity of the statute she is charged with violating on the basis that Congress exceeded its powers under the Tenth Amendment in enacting the law.

**Facts:** In a “bitter personal dispute,” Bond discovered that her close friend was pregnant by Bond’s husband. She sought revenge through harassment initially, and was convicted on a minor state charge. Bond then placed caustic chemicals on things her (ex-)friend was likely to touch (car door handle, front door knob, mailbox), which caused minor burns. The victim contacted federal investigators, and when they identified Bond as the perpetrator, she was indicted under 18 U.S.C. §229, part of the Chemical Weapons Convention Implementation Act of 1998, forbidding possession of chemicals that can harm persons or animals if not intended for a “peaceful purpose.” Bond moved to dismiss the charge, arguing that the statute was invalid because it exceeded Congress’s powers. That motion was denied and Bond was convicted and sentenced to six years. On appeal, the Third Circuit ruled that Bond lacked “standing” to raise this argument. (The government presented that argument in the Third Circuit, but on certiorari the SG conceded error, and the Court appointed Stephen McAllister as amicus to defend the Third Circuit’s position.)

**Kennedy for a unanimous Court:** Bond clearly has Article III standing (injury, causation, and redressibility) to challenge a criminal statute under which she is charged and convicted. “A single sentence” from *Tennessee Electric* (1939) that misused the word and which we have “long ago

disapproved” cannot support a contrary view. Upon careful consideration, that decision is “neither controlling nor instructive.”

As for “prudential standing,” we think Bond clearly meets those requirements as well, although admittedly the distinction between having “standing” and having a valid “cause of action” has been confusing in some cases in the past. Whether Bond has a valid “cause of action” or claim is not before us today. But Bond clearly satisfies “the prudential rule” that she have a “personal stake” in the matter and assert her own rights, not those of a third party. Although the States plainly have an interest in affirming the Tenth Amendment’s division of powers, so too do individual persons. “Federalism serves the freedom of the individual” and “the individual liberty secured by federalism is not simply derivative of the rights of the States.” **“An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States, when the enforcement of those laws causes injury that it is concrete, particular, and redressable.”** (Although individuals do not have “standing to complain simply that their government is violating the law.”) The government has a “misconception” in arguing for a narrow construction of the Tenth Amendment argument that a defendant may make. She is entitled to make a broad “interference-with-sovereignty” argument, such as her argument that the conduct with which she is charged is “local” in nature and not properly an object of federal attention. “There is no basis to support for the government’s proposed distinction” between types of federalism arguments under prudential standing analysis. As for the merits of Bond’s argument, that is left for remand.

**Ginsburg concurring with Breyer:** I simply make the observation that “Bond, like any other defendant, has a right not to be convicted under a constitutionally invalid law.” “An offense created by an unconstitutional law ... is not a crime” (*Siebold*, 1880). [Ed. Note: Justice Ginsburg invokes equal protection discrimination precedents here, which were her specialty as a lawyer.] There is no “‘prudential’ license to decline to consider” such an argument, and it “must be considered and decided on the merits.”

## II. FEDERAL STATUTES

### A. Federal Sentencing:

**Abbott v. United States**, No. 09-479, together with **Gould v. United States**, No. 09-7073, 131 S.Ct. \_\_\_\_ (Nov. 15, 2010), affirming 574 F.3d 203 (3<sup>rd</sup> Cir. 2009) and 329 Fed. Appx. 569 (5<sup>th</sup> Cir. 2009, *per curiam*).

**Holding** (8-0, Ginsburg (Kagan not participating): **A consecutive minimum term of imprisonment for a § 924(c) violations is required even if a longer minimum term is already required for another conviction in the case.**

**Facts:** Both Abbott and Gould were convicted of multiple drug and firearms counts (Abbott by jury trial, Gould by guilty plea), including a violation of § 924(c). Section 924(c) requires a mandatory consecutive term of imprisonment of five years if a firearm is used, carried or possessed during and in relation to a drug crime; or seven years if the gun is “brandished”; or 10 years if the gun is “discharged.” The statute, however, was amended in 1998 to contain an “except” clause: The consecutive mandatory minimum must be imposed “[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law” (emphasis supplied). The question presented here was whether the longer mandatory minimum term required for other counts of conviction in

Abbott and Gould's cases (requiring 15 and 10 years minimum, respectively), invoked the "except" clause, so that an additional five-year consecutive term should not be applied for their § 924(c) convictions. The majority of federal Circuits had ruled against the defendants' position (and let me be quick to note, the Ninth Circuit had not yet considered it).

**Ginsburg (for a unanimous 8-member Court):** Everyone agrees that the 924(c) term is not obviated "simply because a higher mandatory minimum sentence exists in the United States Code." Therefore, the except clause must have "some referent" to make sense. We think the "key question" is, "otherwise provided *for what?*" And we think the answer is: otherwise provided for the same conduct that § 924(c) criminalizes. Quoting from the United States' Brief, the Court says: "if another provision of the U.S. Code mandates a punishment for using, carrying or possessing a firearm in connection with a drug trafficking crime ..., and that minimum sentence is longer ..., then the longer sentence applies."

It is true the Court has said in the past that the statutory word "any" is "expansive." But "the grammatical possibility of a defendant's interpretation" does not require it, even under the "rule" of lenity (p. 18 n.9). It is clear that Congress intended to harshen, not alleviate, sentences when it reformulated the statute in 1998. The defendants' views would result in "anomalies" and "oddities" in various circumstances, actually yielding lower imprisonment terms for more culpable, multiple-count offenders, and often imposing no penalty at all for the 924(c) criminal violation. After consulting all available materials, we do not see an ambiguity here. The government's view is clearly the more sensible and required one.

[I note that the ABA filed an amicus brief in this case, in support of the petitioners and against the position now adopted by the Court. The ABA Brief argued that "petitioners' construction of the "except" clause would avoid [harsh] sentences that, as a result of stacking mandatory minimum sentences, are greater than necessary to achieve society's goals." The Court's response appears to be the following sentence (p.13): "We do not gainsay that Abbott and Gould project a rational, less harsh, mode of sentencing. But we do not think it was the mode Congress ordered."]

**Pepper v. United States**, No. 09-6822, 131 U.S. \_\_\_\_ (March 2, 2011), vacating 570 F.3d 958 (8<sup>th</sup> Cir. 2009).

**Holding** (7 (5-1-1) to 1, Kagan recused) -- **Sotomayor**; Breyer concurring; Alito concurring; Thomas dissenting: After *Booker* (2005), **a federal sentencing judge has discretion to consider post-sentencing rehabilitation, when resentencing after a remand**, and the statutory subsection stating to the contrary (§ 3742(g)(2)) is invalid under *Booker*.

**Facts:** [Ed. Note: This case involves a very harsh sentencing result repeatedly required after four trips to the Eighth Circuit. And sadly, although the Court reverses the Circuit here, presumably the harsh result might still be imposed after this remand. So the Mr. Pepper's saga may still not be over.]

Pepper, then 24, was arrested in 2003 and pled guilty to conspiracy to distribute 500 grams of methamphetamine. Then-Chief U.S. District Judge Bennett (of Iowa) sentenced him to a 24-month prison term, a substantial downward departure, pre-*Booker* (2005). Pepper's guidelines were 97-121 months, and the government had recommended only a 15% downward departure (to about 82 months) for substantial assistance. The government appealed, and CA8 remanded in light of the then-new *Booker* decision, which made the Guidelines "advisory." Pepper completed his 24-month sentence three days after this remand order.

In 2006, Judge Bennett again sentenced Pepper to the 24-month term, thus leaving him out of prison because Pepper had already completed the 24-month sentence. New evidence showed that since his release, Pepper was a full-time straight-A student at a junior college, and was also working part-time. Pepper's father testified as to how positive Pepper's progress was. And Pepper's probation officer testified that he believed the 24-month term was reasonable and that Pepper presented a low recidivism risk. Judge Bennett noted that he was granting a 40% downward departure for substantial assistance, and another 59% downward departure based on Pepper's post-sentencing rehabilitative conduct. "It would not advance any purpose of federal sentencing policy ... to send this defendant back to prison."

But on the government's appeal, the Eight Circuit again reversed, finding error primarily in considering the rehabilitative conduct, because it was not present at the original sentencing and consideration now would create "unwarranted sentencing disparities and inject blatant inequities into the sentencing process." Saying that "the district court expressed a reluctance to resentence Pepper again should this case be remanded," **the Eighth Circuit directed that the resentencing be assigned to a different district judge.**

On cert, the USSCt vacated and remanded for consideration under *Gall* (2007). The Eight Circuit reaffirmed its views and remanded again. The new district judge, now Chief Judge Reade, then took new evidence, which simply showed that Pepper's rehabilitative progress had continued: he was still a student, was named "associate of the year" by his employer, and had recently married and was supporting his wife and daughter. Nevertheless, Judge Reade imposed a new 65-month sentence, and **ordered Pepper back to prison.** Judge Reade granted only a 20% departure for his "in no way extraordinary" substantial assistance, and denied any departure for rehabilitative conduct. The Eighth Circuit affirmed. In July 2010, after the Supreme Court granted cert, the district court granted Pepper's motion for release, having served apparently another year. Interestingly, in the Supreme Court the Solicitor General confessed error. Consequently, the Court appointed a former Justice Alito clerk to defend the Eighth Circuit's [losing] position.

**Sotomayor joined by Roberts, Kennedy, Scalia and Ginsburg**: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study...." *Koon* (1996); *Williams* (1949). Similarly, in 1970 Congress enacted 18 U.S.C. § 3661 which provides that "no limitation shall be placed on information ... which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Although the federal Sentencing Guidelines and certain portions of the 2004 PROTECT Act restricted federal judges' sentencing discretion, these prior principles remain in place. And after *Booker*, and *Kimbrough* (2007), district judges retain discretion to sentence individually, and even disagree with positions stated by the Sentencing Commission, so long as they sentence "reasonably.

The § 3661 "no limitation" statute would allow consideration of rehabilitative conduct; such conduct is also "highly relevant to several of the § 3553(a) factors that Congress has expressly instructed district courts to consider." **And it is the court's "duty ... to sentence the defendant as he stands before the court on the day of sentencing" (quoting a CA2 case). So considering new evidence after a remand does not create any disparity that is "unwarranted."** Section 3742(g)(2), which limits a sentencing court on remand to reasons present at the original sentencing, should have been struck down in *Booker* as violating the "non-mandatory" remedy (as Justice Stevens suggested in dissent in *Dillon*, 2010). We declare it invalid today, as the Solicitor General has conceded. There is no "general" congressional policy to prevent consideration of rehabilitative conduct. We reject as "unconvincing" the Sentencing Commission's policy statement to the contrary

(§5K2.19). And the Eighth Circuit is internally illogical, as it would continue to allow consideration on remand of post-sentencing aggravating conduct.

Incidentally, the “law of the case” doctrine does not require the resentencing judge to follow decisions made by a prior sentencing judge. So the case is remanded for resentencing [for a fourth time!].

**Breyer concurring in part and in the judgment:** I agree with the Court “to the extent that it is consistent with this concurrence.” A federal court is not “free to disregard the Guidelines at will,” but “only where it is ‘reasonable’ ... to do so.” And the broad language in *Williams* (1949) used by the majority was disavowed by Congress in enacting the 1984 Sentencing Reform Act. A sentencing judge is still required to “consult” the Guidelines and “take them into account.” I would (and do) go further than today’s majority and write more about the *Kimbrough* approach to “reasonableness.”

**Alito concurring in part and in the judgment in part, and dissenting in part:** “Although amicus’ [my former law clerk’s] argument is ingenious,” § 3742(g) “can[not] survive in the post-*Booker* world.” I do think Justice Breyer’s less discretionary approach is “more consistent with *Kimbrough*” [in which Justice Alito dissented] and “would at least prevent us from sliding all the way down the slippery slope that leads back to ... entirely discretionary” sentencing. There is “irony” in the Court approvingly citing *Williams*, as by 1984 this case had “fallen into widespread disrepute” due to the “shameful disparity” in sentences around the country. The Court’s “paean to that old regime” could lead to reexamination of “the entire *Booker* line of cases.”

**Thomas dissenting:** As a consistent dissenter, in *Booker* and *Kimbrough*, I would uphold Pepper’s sentence “unless doing so would actually violate the Sixth Amendment.” Because the facts admitted in Pepper’s guilty plea would permit a sentence much longer, there is no Sixth Amendment problem here, “although this outcome would not represent my own policy choice.” “I am constrained to apply” the statutes of Congress and the policy statements of the Sentencing Commission, even though in light of Pepper’s progress in “becoming a productive member of society, I do not see what purpose further incarceration would serve.”

**McNeill v. United States**, No. 10-5258, 131 S.Ct. \_\_\_\_ (June 6, 2011), affirming 598 F.3d 161 (4<sup>th</sup> Cir. 2010).

**Holding** (9-0), **Thomas:** In determining the “maximum term of imprisonment” for a prior state criminal conviction, to apply the enhancements of the Armed Career Criminal Act (“ACCA”), **the federal sentencing court should use “the maximum sentence applicable to his offense when he was convicted of it,” even if the state has subsequently reduced the possible maximum** for that crime.

**Facts:** McNeill pled guilty to a federal “felon in possession” violation, and the district court determined that he qualified for “Armed Career Criminal” enhancements because his six prior state drug convictions were “serious drug offense[s]” under 18 U.S.C. § 924(e)(2)(A)(iii) which defines such offenses as those carrying “a maximum term of imprisonment of ten years or more.” But McNeill argued that they did not qualify, because North Carolina had subsequently reduced the maximum term available for such cocaine sale offenses to 38 or 30 months. The district court ruled, however, that the maximum term in effect when McNeill was convicted was the proper referent, applied the ACCA enhancement, and then departed upward even from that, to 300 months, in light of McNeill’s “long and unrelenting history of serious criminal conduct” and “near certain likelihood of recidivism.” The Fourth Circuit affirmed (on a slightly different theory, that even in North Carolina, the statutory reductions were not retroactive and so did not apply to McNeill’s earlier offenses).

**Thomas for a unanimous Court:** “The plain text of ACCA” requires that the maximum term in effect when a defendant was convicted must be used. The use of the present tense (“maximum term ... is prescribed by law”) does not change the clear meaning, and we have always turned to the law in effect at the time of conviction when applying the ACCA. Otherwise, “absurd results” would follow; “changes in state law can[not] erase an earlier conviction for ACCA purposes.” [Ed. Question: Would this be true even if the law making the conduct a crime at all were repealed by a state?] However (footnote \*), we do not address a situation where a state lowers the penalty for a crime and expressly makes that reduction available to defendants previously sentenced under the prior version.

**DePierre v. United States**, No. 09-1533, 131 S.Ct. \_\_\_\_ (June 9, 2011), affirming 599 F.3d 25 (1<sup>st</sup> Cir. 2010).

**Holding** (9[8-1] to 0), **Sotomayor**; **Scalia** concurring in part: In the federal narcotics laws, “cocaine base” refers to cocaine in any “chemically base form,” and not “exclusively to” crack cocaine.

**Facts:** This case involves a very technical application of scientific chemistry principles to the narcotics laws. Chemically, pure cocaine is an alkaloid, which is a “base,” meaning that it can be combined with an acid to form a salt. However, powder cocaine is not a “base” – through chemical reactions it is a salt. But when powder cocaine is combined with water and a “base” such as baking soda, it becomes a “base” again, and that is what is commonly called “crack” cocaine. Freebase cocaine is also a “base” form. The federal narcotics laws have, since 1986, distinguished between cocaine and cocaine “base” for sentencing purposes, with equivalent amounts of cocaine “base” being sentenced more harshly. 21 U.S.C. §841(b)(1)(A). But the Sentencing Commission (presumably seeking to lessen the harsh effect of the cocaine base statute) wrote a rule in 1993 saying that for sentencing purposes, “cocaine base” would be restricted to “crack” cocaine, with “other forms of cocaine base” being treated simply as cocaine.

In 2005, DePierre was charged federally for selling cocaine base to an undercover agent. At trial, he asked for a jury instruction specifically telling the jury that it must find that the drug was “crack” cocaine. Trial testimony indicated that sodium bicarbonate, normally found in “crack,” was not present in what DiPierre sold. But the judge instructed the jury that the statute refers to “cocaine base” and that is all they need find, although “crack cocaine is a form of cocaine base.” The jury convicted DiPierre of selling “cocaine base” and he was sentenced to the 10-year mandatory minimum for that offense. The First Circuit affirmed, ruling that “cocaine base” in the statute “refers to all forms of cocaine base, including but not limited to crack cocaine.”

**Sotomayor, joined by all Justices, except Justice Scalia who does not join Part III-A and concurs in part:** We think the plain terms of the statute mean that “cocaine base” refers to all forms of cocaine base, and not just crack. Congress wanted to distinguish it from powder cocaine, which is not a base. But we agree that common uses of the term “cocaine” without noting its specific chemical status makes things “confusing.” Still, our result is “also consistent with [the statute’s] somewhat confounding structure.” [Here the Court delves into an arcane structure that only the most dedicated lawyer, academic or chemist will want to penetrate.] In Part II-A [not joined by Justice Scalia], we find that legislative history supports our conclusion. We reject the argument that “absurd” results will necessarily follow, as well as the idea that the Sentencing Commission’s definition can alter the meaning of the statute. And finally, the “rule of lenity” does not apply because we do not find any unsolvable ambiguity here.

**Scalia concurring in part and in the judgment:** The Court’s statutory conclusion here is “obvious,” and “everything in-between could and should have been omitted.” The unnecessary discussion of legislative history “conveys the mistaken impression that legislative history could modify the text of a criminal statute as clear as this.” That is simply wrong.

**Sykes v. United States**, No. 09-11311, 131 S.Ct. \_\_\_\_ (June 9, 2011), affirming 598 F.3d 334 (7<sup>th</sup> Cir. 2010).

**Holding** (6[5-1] to 3 [1-2]), **Kennedy**; Thomas concurring in the judgment; Scalia dissenting, Kagan dissenting with Ginsburg: **Intentional felony vehicle flight as defined by Indiana qualifies as an ACCA violent felony.**

**Facts:** Sykes pled guilty to the federal offense of felon in possession of a firearm. The Armed Career Criminal Act (ACCA) required that if Sykes had three prior convictions for “violent felonies” he would receive a mandatory minimum 15-year term. He had two prior armed robbery convictions, which easily qualified, but his third conviction was for the Indiana state offense of using a vehicle to flee from a law enforcement officer. The district court concluded that this offense also qualified as a violent felony within the definition of the ACCA, and the Seventh Circuit affirmed. The question arises because the ACCA’s definition of “violent felony” includes a specified list (burglary, arson, etc.), but also any felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” Application of this “residual clause” of the ACCA has divided the Court on three prior occasions.

**Kennedy for 5 Justices:** We use a “categorical” approach, meaning we examine the elements of the felony crime, not the individual facts of the case. So it doesn’t matter that the actual facts of Sykes’s offense were violent. But we think that in the ordinary case of this crime, “the determination to elude capture makes a lack of concern for the safety [of others] an inherent part of the offense.” The offender “creates the possibility” [**Ed. Note:** but the Statute requires “serious potential risk”?] that the police will “use force,” a “violent – even lethal – potential for others.” Because violent “may sometimes” be used [summarizing a paragraph or two at slip page 7], **“risk of violence is inherent to vehicle flight.”** This is confirmed by available statistics showing a significant percentage of injuries, crashes, and even deaths in fleeing vehicle chases (although “statistics are not dispositive”). The potential for injury seems to be statistically higher than two of the specific offense listed in the ACCA (burglary and arson), and the fact that Congress listed them as “violent felonies” informs our decision.

Although we used the phrase “purposeful, violent and aggressive” in prior opinions (*Begay* and *Chambers*), it “overreads” our opinions to say this is the only test -- we did not intend the phrase as dispositive. (And even if it were, Indiana requires violators to act “knowingly or intentionally” which we think is enough.) We think that “risk level” is sufficient for the ACCA. It also does not matter that Indiana has another statute that Sykes was not convicted under, that criminalizes vehicle flight which “creates a substantial risk of bodily injury.” **We think that the ACCA “states an intelligible principle” and that Congress need not list qualifying felonies in “encyclopedic terms,” even if it is “more difficult for courts to implement.”**

**Thomas concurring in the judgment:** The “purposeful, violent and aggressive” test in *Begay*, which does not appear in the text of the ACCA, is not appropriate. Both Justices Scalia and Kagan are correct that the majority’s “retreat” from that test “further muddies ACCA’s residual clause.” But under the statute as written, the bottom line is that using a vehicle to flee from law enforcement is far riskier than burglary, and “presents a “serious potential risk of physical injury,” which is all that the statute requires. **“In the real world, everyone .... knows that vehicular flight is**

**dangerous.”** [Justice Thomas goes on at some length to support his point and give counterpoints to Justice Kagan’s dissent.]

**Scalia dissenting: Our confused and inconsistent four cases applying the ACCA’s residual clause show that it is unconstitutionally vague.** I would stop trying to save this poorly drafted statute – Congress can fix it if it wants to. [Ed. Note: There are many great and typically Scalian rhetorical lines in this opinion.] “Today’s tutti-frutti opinion;” “untested judicial factfinding masquerading as statutory interpretation;” “repetition of constitutional error does not produce constitutional truth.” **“We will be doing ad hoc application of [the] ACCA ... until the cows come home.”** An increasingly statute-producing Congress increasingly produces vague statutes. “In the field of criminal law, at least, it is time to call a halt. ...Because the majority prefers to let vagueness reign, I respectfully dissent.”

**Kagan dissenting with Ginsburg:** Carefully analyzing Indiana law, it is clear that the statute to which Sykes pled guilty is distinguished as not requiring a serious risk of violence. Indiana expressly has a separate felony that requires “substantial risk of bodily injury.” Thus we can infer that the felony charged here is not a “violent felony” under the ACCA. [Justice Kagan demonstrates this at some length, and chastises the majority for not “attending to” the distinctions in Indiana law.] In fact, Indiana’s law is pretty unique, and Indiana has subsequently changed its law, so the majority’s opinion is extremely narrow. **Justice Scalia is right that under the majority’s approach, we will be doing narrow ACCA applications “until the cows come home.”**

**Tapia v. United States**, No. 10-5400, 131 S.Ct. \_\_\_\_ (June 16, 2011), reversing 376 Fed. Appx 707 (9<sup>th</sup> Cir. unpub. 2010).

**Holding** (9[7-2] to 0) – **Kagan; Sotomayor** concurring while joining in full, with Alito: The Sentencing Reform Act of 1984 **prohibits considering rehabilitative programs to lengthen a defendant’s term.**

**Facts:** Tapia was convicted of smuggling aliens. A mandatory minimum 36 months imprisonment was required, and her federal Guidelines range was 41-51 months. When sentencing her to 51 months, the district judge gave two reasons: one, “so she is in long enough to get the 500 Hour Drug Program” (“RDAP”), and two “to deter her.” Tapia did not object at the time [a point that is left for the Ninth Circuit to address on remand now], but on appeal she argued that 18 U.S.C. §3582(c) prohibited lengthening her imprisonment sentence to facilitate a rehabilitative drug program. §3582(c) provides that

“The court, in determining whether to impose a term of imprisonment and, if a term of imprisonment is imposed, determining the length of the term, shall consider the factors listed in § 3553(a) ..., recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”

The Ninth Circuit found that this statute distinguishes between the decision to impose a term of imprisonment at all, versus determining its length once imprisonment has been chosen, and found that the “not for rehabilitation” proviso applied only to the former and not to the latter. Thus it affirmed Tapia’s sentence. [Ed. Note: On cert, the Solicitor General determined that it agreed with Tapia’s position, so the Court appointed Professor Stephanos Bibos as its amicus to defend the judgment below. Justice Kagan’s opinion then skewers the amicus position, while noting that appointed counsel “ably discharged his responsibilities.”]

**Kagan for the Court** (concurring Justice Sotomayor also joins this opinion in full): The statutory “text, context and history” all support the conclusion that **§3582(c) prohibits considering rehabilitative programs to lengthen a defendant’s term**. (We don’t address whether a court may consider rehabilitation to shorten an imprisonment term; the SG suggests that it may.) First, it is well known that the federal Sentencing Reform Act of 1984 rejected the “rehabilitative model” of criminal imprisonment, and it was familiar with, inter alia, in-prison rehab programs like RDAP. We think the statute is clear: it directs sentencing courts not to consider rehabilitation as a reason for choosing imprisonment or as a reason for lengthening an imprisonment term. It is not just a “loosey-goosey caution” to courts -- it means “do not think about prison as a way to rehabilitate an offender.” Congress might have used more direct “thou shalt not” language, but we think the meaning is clear. The Ninth Circuit’s distinction also doesn’t make sense, as choosing to imprison someone longer is, in effect, a decision to choose imprisonment over release at an earlier time. “Equally illuminating” is the fact that Congress did not give sentencing courts the power to require rehab programming or placements for imprisoned offenders.

We add that the district judge here was not wrong to suggest that Tapia could benefit from drug rehab programs, and to recommend that to the Bureau of Prisons. But his remarks suggest he may have done something more, and actually chosen a longer term of imprisonment for this purpose, which is forbidden by §3582(c). So we remand. (The Ninth Circuit can address what effect Tapia’s failure to object contemporaneously may have.)

**Sotomayor concurring with Alito:** I join the Court’s opinion in full, and agree with its legal conclusion. But I have “skepticism” that the “thoughtful district judge” actually violated §3582(c). He actually said that Tapia’s criminal history and criminal conduct while on bail “is “something that motivates imposing a sentence ... at the high end of the guideline range.” But because his remarks were not perfectly clear, I agree with the Court’s disposition.

**Freeman v. United States**, No. 09-10245, 131 S.Ct. \_\_\_ (June 23, 2011), reversing 355 Fed. Appx. 1 (6<sup>th</sup> Cir. Unpub. 2009).

**Holding** (5[4-1] to 4), **Kennedy**; Sotomayor concurring in the judgment; Roberts dissenting with Scalia, Thomas and Alito: A defendant may seek the benefit of a retroactive downward Sentencing Guidelines adjustment, even though his original sentence was the result of an agreed-upon plea bargain under Rule 11(C)(1)(c), so long as (Sotomayor, limiting concurrence and necessary fifth vote) the plea agreement specifically references the Guidelines.

**Facts:** Freeman plead guilty to possessing crack cocaine with intent to distribute. His plea agreement was of the Rule 11(C)(1)(c) variety, which binds the sentencing court to the specific sentence agreed upon by the parties unless the court rejects the entire plea agreement. His plea agreement expressly stated that he “agree[s] to have his sentence determined pursuant to the Sentencing Guidelines” and that it would be 106 months. That number was plainly chosen because it was the product of the lowest point in the applicable Guideline range plus a mandatory 60 months for a separate § 924(c) violation. The 106 month sentence was imposed. But three years later the Sentencing Commission reduced the Guideline ranges for cocaine-base offenses, and made this reduction retroactive. Freeman sought resentencing under the retroactive, lower Guideline range, under 18 U.S.C. § 3582(c), which permits a district court to reduce a sentence “in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission” (emphasis added). But the district court denied the reduction (and the Sixth Circuit affirmed), saying that the statute does not apply to fixed-term plea agreements made under Rule 11(C)(1)(c), absent a miscarriage of justice or mutual mistake.

**Kennedy joined by Ginsburg, Breyer and Kagan:** The question in this case is whether a term of imprisonment imposed under a binding Rule 11(c)(1)(c) plea agreement is “based on” the agreement, or on the Guidelines that underlie the agreement. The majority agrees that if it is “based on” the Guidelines, then § 3582(c) permits the reduction. **Justice Kennedy’s plurality takes the position that all Rule 11(c)(1)(c) agreements are ultimately “based on” the Guidelines,** since Guidelines policy statements make it clear that a court may not accept a Rule 11(c)(1)(c) agreement unless it is consistent with the Guidelines. Thus even “binding” Rule 11(c)(1)(c) agreed-upon sentences are eligible for the § 3582(c) reduction. The reduction is discretionary, not mandatory, and will be rare. Nor is the reduction an “unjustified windfall.” Rather it is consistent with the overall goal of the Guidelines to reduce “unwarranted disparity” in sentencing, since the Commission found that the prior cocaine-base Guidelines were actually creating such disparities. Justice Sotomayor’s “only sometimes” rule is “erroneous.” It will permit some continued disparities, and it is not consistent with the text of the statute, which “calls for an inquiry into the reasons for a judge’s sentence, not the reasons that motivated or informed the parties.” Our “straightforward analysis would avoid making arbitrary distinctions between similar defendants based on the terms of their plea agreements.”

**Sotomayor concurring in the judgment:** I agree with the dissent that when a term of imprisonment is imposed under a Rule 11(c)(1)(c) agreement between the government and the defendant, that term of imprisonment is “based on” the agreement, not the Guidelines. However, **when the plea agreement “expressly uses a Guidelines sentencing range to establish the terms of imprisonment,” then the sentence is eligible for the § 3582(c) reduction.** Thus I “reject” any “categorical rule” for Rule 11(c)(1)(c) plea agreements. Virtually all of the Courts of Appeal have used my analysis. The result honors the parties’ agreement, since they chose to expressly incorporate the Guidelines. And the government can always try to “negotiate a waiver” of any § 3582(c) reduction, “just as it often does with respect to a defendant’s right to appeal and collaterally attack the conviction and sentence. [Ed. Note: Ugh! Justice Sotomayor is apparently unaware of the substantial controversy surrounding such plea agreement waivers, and has unconsciously endorsed – albeit in clear dictum -- a position that the ABA (not to mention most criminal defense organizations] does not favor.] Here, Freeman’s agreement plainly used the Guidelines to establish his term of imprisonment, so he is entitled to a remand for the district court to consider whether he should receive the discretionary § 3582(c) reduction.

**Roberts dissenting with Scalia, Thomas and Alito:** Justice Sotomayor is correct that a Rule 11(c)(1)(c) term of imprisonment is “based on” the agreement, and not the Guidelines. Thus no Rule 11(c)(1)(c) term of imprisonment should be eligible for a § 3582(c) reduction. Justice Sotomayor’s contrary “O. Henry twist” will produce “arbitrary and unworkable” results. “The reality is that whenever the parties choose a fixed term, there is no way of knowing what that sentence was ‘based on.’ The prosecutor and the defendant could well have had quite different reasons for concluding that 106 months was a good deal.” Many questions “abound” under justice Sotomayor’s “head-scratching distinction,” and it will “foster confusion in an area in need of clarity.”

#### B. Speedy Trial Act:

**United States v. Tinklenberg**, No. 09-1498, 131 S.Ct. \_\_\_\_ (May 26, 2011), affirming on other grounds 579 F.3d 589 (6<sup>th</sup> Cir. 2010).

**Facts:** The Speedy Trial Act of 1974 requires the exclusion, from the statutory (and seldom achieved) 70-day trial deadline, any “delay resulting from any pretrial motion, from the filing of the motion through the ... prompt disposition of such motion” (emphasis added). The Sixth Circuit reversed Tinklenberg’s conviction because it found that nine days during which three different pretrial motions had been pending did not “actually cause” a delay (or the “expectation of a delay of trial”).

**Holding** (8[5-3] to 0, Kagan recused) -- **Breyer**; **Scalia** concurring in the judgment; **Alito** dissenting with Ginsburg: [**Ed. Note:** This case seems exceedingly simple, and the Sixth Circuit’s decision surprisingly wrong.] The statute automatically excludes period of “delay” resulting from pretrial motions, and “**delay**” can mean any period of time between the filing of the motion and its disposition (which “always delays the expiration of the 70-day Speedy Trial deadline” – **Ed. Note:** But doesn’t this actually beg the question?). The Sixth Circuit was wrong to conclude that “resulting from” necessarily means “caused by;” and in any case “delay” need not mean “actual delay,” as opposed to “periods of delay” that Congress intended to be automatically excludable in a “close to definitional way.” While the Sixth Circuit’s reading may be linguistically plausible, no other Circuit has read the Act that way in 37 years. The structure of the statute, its purposes, its legislative history, and our own precedent, all support our reading. So too does the “administrative complexity” that would result otherwise.

However, the Solicitor General appears to concede that the Sixth Circuit erred in another way: by excluding weekends and holidays related to a mental competency exam, which the statute does not expressly exclude. This takes Tinklenburg’s trial outside the 70-day period. Since he has already served his sentence, we choose to exercise our discretion to affirm the Sixth Circuit’s dismissal of the indictment with prejudice.

**Justice Scalia, concurring in part and in the judgment, with Roberts and Thomas:** The Court’s conclusion is “entirely clear from the text” of the Statute, and there is “no need to look beyond the text.” So we don’t join that part of Justice Breyer’s majority opinion.

### C. Witness Tampering:

**Fowler v. United States**, No. 10-5443, 131 S.Ct. \_\_\_\_ (May 26, 2011), vacating 603 F.3d 883 (11<sup>th</sup> Cir. 2011).

**Facts:** Fowler and a group were busy preparing for an armed bank robbery when a local police officer stumbled upon them. When the officer identified one member of the group by name, Fowler said “Now we can’t walk away from this thing,” and shot and killed the officer. He was charged with the federal offense of killing a person with “intent to ... prevent the communication by any person to a law enforcement officer ... of the United States of information relating to the commission of a Federal offense....” The emphasized phrase is the subject of this decision. Fowler argued that the evidence to convict him was insufficient. The 11<sup>th</sup> Circuit ruled that only a showing of “possible or potential communication to federal authorities was required. Further muddying the waters is the fact that a different section of the federal witness tampering statute directs that “no state of mind need be proved with respect to the circumstance ... that the law enforcement officer is an officer ... of the federal government.”

**Holding** (7[6-1] to 2), **Breyer**; **Scalia** concurring in the judgment; **Alito** dissenting with Ginsburg: Where the defendant “did not think specifically about any particular ... recipient” of a communication about a crime that could be charged federally, “**the Government must show a reasonable likelihood that ... at least one communication would have been made to a federal law enforcement officer.**” [**Ed. Note:** This is a middle ground between Justice Scalia’s proposed “beyond a reasonable doubt” standard, and Justice Alito’s lesser “possible” standard.] Although no Circuit has ever adopted Justice Scalia’s view, we do conclude that “the Government must show more

than the broad indefinite intent ... to prevent communications to law enforcement officers in general,” because (1) the word “prevent” implies that the act to be prevented must at least be possible, and (2) we do not think it was Congress’s intention to bring within the scope of the federal witness tampering statute “purely state investigations and proceedings.” For this latter reason, more than just a “reasonable possibility” must be required, because “communication with federal law enforcement officials is almost always a *possibility*.” Our standard of “reasonable likelihood” does not mean that a federal communication must be proven by “even ... [a] more likely than not” standard. But it must be proven to have been “more than remote, outlandish, or simply hypothetical.” “We leave it to the lower courts to determine whether, and how, the standard applies in this particular case.”

**Scalia concurring in the judgment:** The majority’s standard “has no basis in the statutory text” and is also “hopelessly indeterminate.” “I doubt that any jury can grasp the distinction” between “reasonably likely” and “reasonably possible.” Meanwhile, factual elements of crimes normally must be proved beyond reasonable doubt. Moreover, Congress would want the statute to be limited to cases where “federal” communications are clearly at issue. And finally, the majority’s own struggle with the meaning of the statute shows that it is ambiguous, so that the rule of lenity should apply. Instead, the Court applies a “rule of harshness.”

Meanwhile, the dissent’s standard would render the “to a federal officer” statutory phrase superfluous, a result we do not ordinarily permit. Moreover, it would “federalize crimes that have no connection to any federal investigation. “Thus the dissent adds to the Court’s rule of harshness a rule of antifederalism.”

**Alito dissenting with Ginsburg:** “The Court has effectively amended the statute by adding a new element” (and then not applying the normal “beyond a reasonable doubt” standard to that element). The statute says that “no state of mind need be proved” with regard to the identity of the recipient of a communication, and we should enforce that meaning. So we think that the result below was most consistent with the statute’s plain language. Justice Scalia is wrong to say that the “federal officer” identity remains part of the *actus reus*, even if not the *mens rea*. Thus the jury need find only that there was some reasonable possibility of communication to federal officers. This was the standard employed below, so we should affirm.

#### D. Civil Rights:

**Skinner v. Switzer**, No. 09-9000, 131 S.Ct. \_\_\_\_ (March 7, 2011), reversing 363 Fed. Appx. 302 (unpublished) (5<sup>th</sup> Cir. 2009).

**Holding** (6-3), **Ginsburg;** Thomas dissenting with Kennedy and Alito: **A post-conviction claim challenging the denial of DNA testing can be filed as a civil rights claim under 42 U.S.C. § 1983**, since it does not seek relief that would directly alter a conviction or sentence – but the claim is “severely limit[ed]” to a claim that the state has denied “procedural due process,” because in *Osborne* (2009) we ruled that no substantive due process challenge lies.

**Facts:** Skinner was convicted in Texas state court of multiple bloody murders. Skinner claimed a relative of one victim was the killer. Some DNA testing implicated Skinner, but some other evidence did not. Much evidence was not DNA-tested. (Skinner’s lawyer said at one point that he did not request more testing because he feared “the DNA would turn out to be Skinner’s” – the Texas courts found this to be “reasonably trial strategy”).

Six years after Skinner's convictions, Texas enacted a DNA-testing law. Texas's highest court twice denied Skinner's requests for more testing under this statute because Skinner failed to meet the statute's requirements: he did not demonstrate a "reasonable probability ... that he would not have been ... convicted if the DNA test results were exculpatory," and he did not show that the lack of prior testing was "through no fault" of his own.

Having exhausted his state remedies, Skinner filed this § 1983 lawsuit, seeking DNA testing of the untested evidence and alleging that the Texas statute denied him constitutional due process. The Fifth Circuit found the lawsuit jurisdictionally barred, ruling that a claim for post-conviction DNA testing relevant to a criminal case must be filed in habeas, not § 1983.

**Ginsburg** (6-3) (interesting that Justice Scalia silently joins the majority – apparently depends on his concurrence in *Dotson*): The question of whether a post-conviction DNA testing claim can be filed under § 1983 was left open in *Osborne* (2009), and that jurisdictional question is all that we decide now. Success in this lawsuit would not "necessarily imply the invalidity of [Skinner's] conviction" – if it did, it could only be heard in habeas. In fact, DNA "results might prove inconclusive or they might further incriminate Skinner." We think fears of a flood of § 1983 DNA testing litigation are "unwarranted;" a number of Circuits already permit such lawsuits, yet there has been no "litigation flood or even rainfall." There are many constraints on prisoner lawsuits to "prevent sportive filings." Nor do we think today's ruling will "spill over" to encompass § 1983 suits claiming *Brady* violations, since *Brady* claims are by definition favorable evidence challenging a conviction, unlike the DNA testing claim here. Although Skinner's claim may fail on its merits on remand, the current jurisdictional challenge is rejected.

**Thomas, dissenting with Kennedy and Alito:** Since *Preiser* in 1973, it has been clear that "a state prisoner may not use § 1983 to challenge his underlying conviction and sentence." I think that "challenges to all state procedures for reviewing the validity of a conviction should be treated the same." A DNA testing statute is part of a state's statutory process for testing criminal convictions. [Ed. Note: this is the key to Thomas's dissent; the majority disagrees that DNA testing "necessarily" has anything to do with postconviction challenge procedures.] "Concerns for federal-state comity" should "strictly limit" our rulings in this area. Any rational prisoner will now "avail himself of this additional bite at the apple," and will use the "roadmap" that the majority provides to cast challenges to state collateral, and even trial, procedures, into § 1983 actions. This is unlike challenges to parole procedures (*Dotson*, 2005), which do not challenge the underlying state conviction.

**Los Angeles v. Humphries**, No. 09-350, 131 S.Ct. \_\_\_\_ (Oct. 5, 2010), reversing attorneys' fee orders flowing from 554 F.3d 1170 (9<sup>th</sup> Cir. 2009).

**Holding** (9-0), **Breyer:** **The limiting rule of *Monell* (1978)** – that §1983 liability cannot lie against a municipal entity unless the injury is proved to have been caused by the municipality's "policy or custom" – **applies to claims for prospective (injunctive and declaratory) relief as well as damages actions.**

**Facts:** The plaintiffs here were once accused of child abuse but they were exonerated. Nevertheless, state law required that a report of the allegations be kept in a statewide "Child Abuse Central Index" for ten years, unless it "subsequently proves to be unfounded." The plaintiffs asked the Los Angeles sheriff's department to remove their report as unfounded, and sued them for not having a mechanism to accomplish that as a violation of their constitutional right to due process. The district court dismissed, but the Ninth Circuit reversed, holding that they had a constitutional right to some kind of notice and hearing, given their liberty interest in their reputations. The Ninth Circuit then awarded attorneys fees. But Los Angeles County (a municipal entity) said they were not liable,

because there was no proof of county “custom or policy” – instead, it was state law that caused the problem. The Ninth Circuit reject this because, in part, it ruled that *Monell’s* “custom or policy” limitation does not apply to prospective relief, as opposed to actions for damages like the one at issue in *Monell*.

**Breyer, for a unanimous Court:** Nothing in the statute (§1983) suggests a distinction between types of relief requested. And *Monell* itself expressly referred to “declaratory or injunctive relief.” Finally, the “logic” of the decision denies any such distinction. “A holding ... can extend through its logic beyond the specific facts of the particular case” and “it does so here.” Perhaps our holding today will have limited practical effect, but **the “custom or policy” requirement of *Monell* must be satisfied even in actions for injunctive or declaratory relief.**

**Ortiz v. Jordan**, No. 09-737, 131 S.Ct. \_\_\_\_ (Nov. 1, 2010), reversing 316 Fed. Appx. 449 (6<sup>th</sup> Cir. uppub. 2009).

**Holding** (9[6-3] to 0), Ginsburg; Thomas concurring with Scalia and Kennedy: **A party may not appeal the denial of a pretrial qualified-immunity summary judgment motion after the case has gone to trial and the jury has rendered a verdict against the defendants.** The qualified immunity claim “does not vanish” but it “must be evaluated in light of the character and quality of the [trial] evidence.”

**Facts:** Ortiz alleged that while serving a state imprisonment sentence, she was sexually assaulted by a guard one day, and although she reported promptly to officials and identified the assailant, they took no steps to protect her and she was again sexually assaulted by the same guard. She further alleged that she was then placed, shackled, in solitary, as retaliation for her reports. She sued the officials she had reported to. Prior to trial they moved for summary judgment on qualified immunity grounds, but the district court noted that Ortiz’s account created many material factual disputes so summary judgment was denied. The case went to trial, and the jury ruled for Ortiz and awarded damages. The defendants sought a judgment as a matter of law post trial, but failed to renew the motion, or move for a new trial, as Civil Rules 50(b) and 59(a) require. The district court entered judgment for Ortiz, but on appeal the Sixth Circuit reversed, 2-1, saying that qualified immunity should have been granted on summary judgment (although the Circuit also referred to evidence that was offered only at trial).

**Ginsburg for the Court:** [Ed. Note: Although the facts revolve around abuse in a prison setting, the law in this decision is entirely civil procedure, and somewhat arcane at that.] Because material factual disputes existed, defendants were not permitted an interlocutory appeal of their qualified immunity summary judgment denial (*Johnson*, 1995). Moreover, their failure to make a “judgment as a matter of law” motion under Rule 50(b) rendered the appellate court “powerless” to review the sufficiency of evidence after trial (*Unitherm*, 2006). Instead, the defendants argued that the verdict was “against the weight of the evidence.” But that can garner a defendant only a new trial, “but never a final judgment in that party’s favor” (*Duncan*, 1940). And these defendants never moved for a new trial under Rule 59. The argument that defendants now present are simply not “purely legal;” they involve many deep factual disputes. Thus the Circuit “had no warrant to upset the jury’s decision on the officials’ liability,” as the district court affirmed.

**Thomas, concurring in the judgment, with Scalia and Kennedy:** I agree that a party cannot ordinarily appeal a summary judgment denial, after a trial on the merits. But that is the only question we granted cert on – the Rule 50(b) issue should be left for remand. It raises “difficult and far-

reaching questions of civil procedure” and we ought not decide them without full briefing by the parties on the questions, with notice.

#### E. Qui Tam (False Claims Act) and FOIA

**Schindler Elevator Corp v. U.S. ex rel. Kirk**, No. 10-188, 131 S.Ct. \_\_\_\_ (May 16, 2011), reversing 601 F.3d 94 (2d Cir. 2010).

**Facts:** In this *qui tam* case under the federal False Claims Act (“FCA”), the relator based his claims of fraud on documents that his wife had obtained from the U.S. Department of Labor about Schindler (his former employer and a government contractor) in response to her Freedom of Information Act (“FOIA”) requests. The federal *qui tam* statute bars suits that are “based upon the public disclosure of allegations or transactions ... in a[n] ... administrative [governmental] ... report ... or investigation.” The district court found that this “public disclosure bar” required dismissal of Kirk’s lawsuit, but the Second Circuit reversed, ruling that a FOIA response is neither a governmental “report” nor an “investigation.”

**Holding** (5-3, Kagan recused), **Thomas**; Ginsburg dissenting with Breyer and Sotomayor: **Responses to FOIA requests are “reports” that can bar a *qui tam* lawsuit.** This fits the “ordinary meaning” of the word, and other arguments do not persuade us to that a different conclusion is warranted. The petitioner and the government “have provided no principled way to define ‘report’ to exclude FOIA responses without excluding other documents that are indisputedly reports. [Ed. Note: Your Editor has decided to spare you the further intricacies of *qui tam*, and FOIA, law.] Whether or not Kirk’s claims are actually “based on” these reports is for remand.

**Ginsburg dissenting with Breyer and Sotomayor:** “I would affirm the Second Circuit’s [“carefully developed, highly persuasive”] judgment as faithful to the text, context, purpose, and history of the FCA’s public disclosure bar.” [Again, your Editor is omitting the details.] By excluding simple requests for documents as “reports,” the Court “weakens the force of the FCA as a weapon against fraud [by] government contractors.” Congress would not want that, and today’s opinion “is worthy of Congress’ attention.”

#### HABEAS CASES

**Harrington v. Richter**, No. 09-587, 131 S.Ct. \_\_\_\_ (January 19, 2011), reversing 578 F.3d 944 (9<sup>th</sup> Cir. 2009) (*en banc*).

**Holding** (8-0) **Kennedy**; Ginsburg concurring, Kagan recused): **The Ninth Circuit’s failure to defer to the state court rulings exhibited “judicial disregard for the sound and established principles that inform [the] proper issuance” of habeas corpus.** On the merits, trial counsel’s decision not to engage separate blood experts was neither ineffective assistance nor prejudicial when viewed in context.

**Facts:** Richter was indisputedly present at the scene of a bloody shooting and murder in 1994. Richter told shifting stories, and corroborating evidence was found in his apartment. At trial, apparently in response to the defense opening statement, the prosecution developed blood type and “spatter” expert evidence. Defense counsel effectively cross-examined the prosecution’s witnesses, but did not call his own experts or present rebuttal expert evidence. Richter was convicted and

sentenced to life without parole. His direct appeals were unsuccessful and his conviction became final. His later habeas petition, alleging ineffective assistance, was denied by the California Supreme Court in a one sentence summary order, and Richter did not seek certiorari. The district court denied federal habeas relief and a three judge CA9 panel affirmed, but the Ninth Circuit re-heard the case *en banc* and reversed, over a four-Judge dissent authored by Judge Bybee.

**Kennedy (8-0** (Kagan recused); Justice Ginsburg concurs on the prejudice prong but not as to no ineffective assistance): The Ninth Circuit’s opinion evinces a “judicial disregard for the sound and established principles that inform [the] proper issuance” of habeas corpus.

First, the limited scope of review permitted federal courts on habeas review of state convictions, established in **28 U.S.C. § 2254(d)**, **applies even if the State court gives no reasons for denying relief.** “There is no text in the statute requiring a statement of reasons” and a habeas petitioner must still carry the burden of “showing there was no reasonable basis for the state court to deny relief.”

Richter cannot meet this standard on the merits. The Ninth Circuit erred by mis-applying the “unreasonable application of federal law” standard of § 2554(d). “[S]o long as ‘fair-minded jurists could disagree’ on the correctness of the state court’s decision,” federal habeas relief must be denied. *Yarborough* (2004). “If this standard is difficult to meet, that is because it was meant to be.” Congress “stop[ped] short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings,” and federal courts must honor this Congressional intent. “State courts are the principal forum for asserting constitutional challenges to state convictions.”

On the merits, **the question is not whether counsel’s performance “deviated from best practices or most common custom,” but simply whether it was “incompetence under professional norms.”** Here it is “at least arguable” that “a reasonable attorney could decide to forego inquiry into the blood evidence in the circumstances here.” [A lengthy review of “the circumstances here” followed.] In context, counsel followed an arguably reasonable strategy, and the state court could make a “reasonable judicial determination” to that effect. Indeed, further blood evidence might well have confirmed the prosecution’s theory, and “it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates.” “In many instances cross-examination will be sufficient....” “*Strickland* does not guarantee perfect representation.”

Moreover, the state court reasonably could have concluded that no prejudice was proven. Richter must prove “[t]he likelihood of a different result that is substantial, not just conceivable.” [Editor’s Note: This standard of “substantial likelihood” of a different result seems like a new, stricter standard that simply a “reasonable probability.” But this point draws no attention in the Court’s opinions.] “There was ample evidence for the California Supreme Court to think that any real possibility of Richter’s being acquitted was eclipsed by the remaining evidence pointing to guilt,” and no guarantee that further expert evidence would have proven innocence.

**Ginsburg, concurring in the judgment:** “In failing even to consult blood experts” Richter’s counsel “was not functioning as the counsel” that the Sixth Amendment guarantees. However, “the strong force of the prosecution’s case was not significantly reduced” by Richter’s now-proffered counter-evidence. So I concur in the judgment.

**Premo v. Moore**, No. 09-658, 131 S.Ct. \_\_\_\_ (January 19, 2011), reversing 534 F.3d 1138 (9<sup>th</sup> Cir. Cir. 2009) and 574 F.3d 1162 (six CA9 judges dissent from denial of rehearing *en banc*).

**Holding** (8-0, Ginsburg concurring, Kagan recused): The case is companion to *Harrington*, above. **The Ninth Circuit was insufficiently deferential to the Oregon state court’s affirmance of**

**Moore’s convictions, and the latter court was not unreasonable in determining that trial counsel’s advice to accept a guilty plea was not constitutionally ineffective,** even without first moving to suppress a possibly unlawful confession.

**Facts:** Moore and two confederates beat and kidnapped the victim, and Moore later shot the victim in the temple, killing him. There was “intense and serious abuse to the victim” before he was killed. Moore admitted the underlying felonies and his shooting the victim (“the gun discharged”) to two acquaintances. He was then arrested and told the same thing to the police. Before charges were filed, experienced trial counsel advised Moore to plead guilty to felony murder in exchange for a 300 month sentence (the minimum statutory sentence for that crime). This plea avoided a capital or LWOP prosecution. Moore did so plead, but later filed a state habeas petition arguing ineffective assistance because his lawyer had not moved to suppress his police confession. The Oregon court denied relief, ruling that a motion to suppress “would have been fruitless” because of Moore’s identical confessions to his two acquaintances, and Moore’s lawyer had explained this strategic decision at an evidentiary hearing. On federal habeas, the district court denied relief but a divided panel reversed (Reinhardt; Berzon concurring; Bybee dissenting) reversed. Six judges later dissented from the denial of rehearing *en banc*.

**Kennedy** (8-0, Kagan recused); Justice Ginsburg concurs in the judgment: As in *Harrington* (decided today), the state court’s determination was not an “unreasonable” application of the *Strickland* standards, particularly in the guilty plea context. There are significant “differences” between an ineffective assistance claim in the guilty plea context, and that after a trial. “Hindsight and second guesses are inappropriate” and the “stability and certainty” that “the plea process brings to the criminal justice system” “must not be undermined.” The guilty plea context places a “most substantial burden” on the defendant to show that “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial” (*Hill v. Lockhart*, 1985).

Here, the Court of Appeals was “wrong to accord scant deference to counsel’s judgment, and doubly wrong” to find that the Oregon court was “unreasonable” in its finding that effective assistance was provided. The plea process is full of unknowns and defense attorney’s knowledge of facts and practices that are not in the record. The “distortion” of a “hindsight perspective” can make accurate review very difficult, while upsetting pleas years later “may bring instability to the ... process” that would be damaging to defendants as well as the criminal justice system.

Here, it was quite likely that Moore’s confession to others would have made his police confession superfluous; and meanwhile, pleading early to avoid a capital prosecution without filing motions was a not unreasonable strategy. Moore was advised of the options and made a “reasonable choice.” **[Editor’s Note:** Here’s an interesting sentence from the Court’s opinion, to which my initial reaction is, “Really?”: “Many defendants reasonably enter plea agreements even though there is a significant probability [could the Court mean “possibility”] – much more than a reasonable doubt – that they would be acquitted if they proceeded to trial.”]

The court of appeals also mis-applied *Fulminante* (1991) – a confession case that did not involve a claim of ineffective assistance – and that “novelty alone” is reason to reject the Ninth Circuit’s reasoning under § 2254(d)’s “clearly established” federal law limitation.

Finally, we reject [without analysis] Judge Berzon’s concurring suggestion that the standard for prejudice in the guilty plea context should be “a reasonable possibility that he would have obtained **a better plea agreement** but for his counsel’s errors.” The standard established in *Hill* (1985), that the defendant “would not have pleaded guilty” controls. **[Editor’s Note:** Judge Berzon’s standard seems more realistic, under *Strickland*’s “outcome would have been different” standard, and would be in line with the standard for ineffective assistance at sentencing: a “different sentence.” The Court’s

impatience with the Circuit appears to have pretermitted its analysis here. There might be an argument that Judge Berzon's suggested standard is not "clearly established" federal law, but that argument is not presented in the Court's opinion.]

**Ginsburg, concurring in the judgment:** Moore admits that he has never declared that he would not have pleaded guilty, so under *Lockhart*'s prejudice standard, I concur.

**Walker v. Martin**, No. 09-996, 131 S.Ct. \_\_\_\_ (February 23, 2011), reversing 357 Fed. Appx 793 (9<sup>th</sup> Cir. 2009, unpublished).

**Holding** (9-0), **Ginsburg:** California's judicially-crafted rule that state habeas petitions must be filed "as promptly as the circumstances allow" is "firmly established" and "regularly followed" such that it serves as an adequate and independent state procedural bar to federal habeas, when applied (absent showings of unfairness, surprise, or discrimination).

**Facts:** In 2002, Charles Martin filed state habeas claims alleging ineffective assistance of counsel from his 1997 LWOP sentence and conviction. (He had filed an earlier state habeas not mentioning these claims, and then a federal habeas that was stayed so that he could return to state court and exhaust). Martin "gave no reason for his failure to assert the additional claims until nearly five years after his sentence and conviction became final." His 2002 state habeas was summarily denied by the California Supreme Court, citing cases that clearly indicate the dismissal was because Martin's state habeas was untimely. The district court then dismissed Martin's federal habeas as procedurally barred by the adequate state ground of untimeliness. But CA9 reversed, ruling that California's discretionary timing standard of "as promptly as the circumstances allow" was not adequate, because it is neither "firmly defined" nor "consistently applied."

**Justice Ginsburg** (9-0): **California's timing standard, while not mathematically precise and thus to some extent "discretionary," is "firmly established and regularly followed." Thus we find it to be an "adequate" state procedural ground, which bars federal habeas relief** under *Wainwright v. Sykes* (1977). "Application of [discretionary] rules in particular circumstances ... can supply the requisite clarity." "A discretionary rule ought not be disregarded automatically [in federal court] upon a showing of seeming inconsistencies," particularly where the results can be seen as rational and non-arbitrary upon closer analysis of the facts. There is no contention here that the California court "exercised its discretion in a surprising or unfair manner," and "we have no cause to discourage" discretionary standards that can be applied to avoid harsh results in some cases. Neither is there any basis for believing that California courts apply their standard to discriminate against the assertion of federal rights in habeas claims. Reversed.

**Wall v. Kholi**, No. 09-868, 131 S.Ct. \_\_\_\_ (March 7, 2011), affirming 582 F.3d (1<sup>st</sup> Cir. 2009).

**Holding** (9 (8-1) to 0), **Alito; Scalia** concurring in all but footnote 3: **a state post-conviction "motion to reduce sentence" that is not part of the state's "direct review" of the conviction is an application for "collateral review" that tolls the federal habeas limitation period** under 28 U.S.C. § 2244(d)(2).

**Facts:** Kholi was convicted in Rhode Island on 10 counts of first-degree sexual assault and sentenced to consecutive terms of life imprisonment. After his conviction and sentence were affirmed by the Rhode Island Supreme Court, Kholi filed a "motion to reduce sentence" under Rule 35 (similar

to the old, discretionary, federal Rule 35), asking that his life terms be made concurrent. If that motion is an “application ... for collateral review,” then Kholi’s subsequently filed federal habeas petition is timely within the statutory 1-year limit. The district court ruled that the motion to reduce sentence was not for “collateral review,” but the First Circuit reversed (and is now affirmed).

**Justice Alito (9 (8-1) to 0): An application for “collateral review” encompasses any application for “judicial review of a judgment in a proceeding that is not part of direct review.”** We think this result is required by the plain language, and we have also previously referred to a Rule 35 motion as “collateral” (*Robinson*, 1960). Rhode Island suggests various distinctions, such as only “legal” challenges, but this would “greatly complicate the work of federal habeas courts,” in addition to not being textual. The style of the “caption” of the case does not matter. (By the way, n.7, we don’t resolve whether federal § 2255 proceedings are civil or criminal in nature). Although, in n. 3, “we can imagine” an argument that a Rhode Island Rule 35 motion is actually part of “direct review,” based on an oddity of state law, this wasn’t briefed or argued and it would not change the result here, so we express no opinion about it.

**Justice Scalia, concurring in all but the just-mentioned footnote 3:** Because we are holding that Rhode Island’s Rule 35 proceeding is “collateral review,” I can’t join a footnote that suggests it might possibly be part of “direct” review.

**Cullen v. Pinholster**, No. 09-1088, 131 S.Ct. \_\_\_\_ (April 4, 2011), reversing 590 F.3d 651 (*en banc* 9<sup>th</sup> Cir. 2009).

**Holding** (7[5-1-1] to 2) -- **Thomas; Alito concurring in part and concurring in the judgment; Breyer concurring in part and dissenting in part; Sotomayor dissenting**: An intricate but important federal habeas corpus opinion. A severely split Court (four opinions, various Justices joining only various parts of each) decides that the **review of a federal court for granting habeas relief regarding a state court judgment** under 28 U.S.C. § 2254(d)((1) – reviewing for whether the state court decision “involved an unreasonable application of” federal law – **“is limited to the record that was before the state court that adjudicated the claim on the merits,”** even if new evidence to support the claim is later discovered.

Justice Sotomayor issued an exhaustive 42-page dissent.

**Facts:** Pinholster was sentenced to death in California state court. The California courts then twice denied him habeas relief, on his claim that his counsel had been ineffective for failing to develop available mitigating evidence. On federal habeas, the district court granted Pinholster an evidentiary hearing, which developed new evidence from two new doctors that much more psychological and neurological mitigating evidence was available. The district court then granted Pinholster habeas relief as to sentence. A panel of the Ninth Circuit reversed that ruling, 2-1, but on rehearing *en banc* the Circuit affirmed the grant of habeas relief.

At Pinholster’s original 1984 trial, defense counsel put on only Pinholster’s mother, who basically said Pinholster had been a bit troubled but that his family and upbringing had been pretty normal. This later proved to be “false” (Justice Sotomayor’s word in dissent) – Pinholster had been severely abused and had neurological damage. At the time, Pinholster’s counsel had said that he was “not presently prepared to offer anything by way of mitigation.” Counsel had a no-notice argument regarding the State, but then they decided to go forward anyway. The majority says the strategic decision was to try to put on a “family sympathy” defense, that the death penalty would be hurtful to Pinholster’s mother. The jury voted for death after 2½ days of deliberation.

**Thomas for five Justices:** When a state court has “adjudicated” a habeas claim “on the merits,” 28 U.S.C. § 2254(d) states that relief “shall not be granted” unless the state decision was “an unreasonable application” of federal law. We think **this plainly means that review of the state decision must be “limited to the record that was before the state court,”** so it was error for CA9 to grant relief based on evidence not before the state courts. “It would be strange” (p. 10 & n. 3) to ask federal courts to analyze whether a state court was “unreasonable” based “on facts not before the state court,” evidence “it did not even know existed.” Bluntly put (n. 10), “even if the evidence adduced in the District Court additionally supports his claim, ... we are precluded from considering it.”

Our ruling is consistent with “Congress’ intent to channel prisoners’ claims first to the state courts.” The Ninth Circuit “wrongly interpreted” our precedents to the contrary. As we held in *Schiro v. Landrigen* (2007), if § 2254(d)(1) precludes relief, then the federal court should not even hold an evidentiary hearing. The fact that §(d)(2) adds the phrase “in light of the evidence presented in state court” does not mean that the omission of that phrase in §(d)(1) means the concept does not apply. The phrase in §(d)(2) just adds “additional clarity.” And finally on the statutory question, the fact that a separate section, § 2254(e)(2), provides a limitation on federal courts taking new evidence in evidentiary hearings, does not mean that §(d)(1) does not embody the concept. Section (e)(2) “still restricts the discretion of federal courts to consider new evidence” when the claims presented are not already barred by §(d)(1). We don’t decide whether the decision to hold an evidentiary hearing here violated §(e)(2), because §(d)(1) precludes us from considering the evidence in any case.

When considering only the state court evidentiary record, the Court of Appeals erred in granting relief. On *Strickland*’s first prong, “fair-minded jurists could disagree” about whether counsel’s performance here was “reasonable.” If that is true, then a federal court may not grant habeas relief. The strategy of trying to get the State’s case dismissed for lack of notice about the aggravators, and then to put on the mother to ask for sympathy for her, can reasonably be viewed as not unreasonable. AEDPA’s “doubly deferential” standard is satisfied here. “The current infatuation with ‘humanizing’ the defendant” [quoting Chief Judge Kozinski’s dissent below] was not the only reasonable strategy in Los Angeles in 1984.

And second, it would not be “clearly unreasonable” to conclude that the “prejudice” standard of *Strickland* was not satisfied here, in light of all the aggravating evidence against Pinholster. “There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury’s verdict.” This case is not like *Terry Williams* (2000) or *Romilla v. Beard* (2005), which did not apply the deferential standards of AEDPA.

**Justice Alito concurring in part and in the judgment:** I agree with Justice Sotomayor’s dissent that “when an evidentiary hearing is properly held in federal court, review under (d)(1) must take into account evidence admitted at that hearing.” Otherwise §(e)(2) is given “an implausibly narrow scope.” **But I would hold that there should have been no federal evidentiary hearing here,** because Pinholster “did not diligently present” his new evidence in the state courts. In addition, on the record before the state courts, their decision to reject Pinholster’s claim “represented a reasonable application of clearly established Supreme Court precedent.”

**Justice Breyer concurring in part and dissenting in part:** I agree with the majority’s legal rulings, but I would remand to the Court of Appeals to apply the legal standards that the Court now announces, to the record that was before the state courts. As for Pinholster’s new evidence, “he can always return to state court presenting new evidence not previously presented,” and if denied, he “might” be able to return to federal court, “subject to ADEPA’s limitations on successive petitions.”

[**Ed. Note:** this seemingly unrealistic option is not further explained by Justice Breyer, who says “I am not trying to predict the future course of these proceedings.”]

**Justice Sotomayor dissenting, joined by Justices Ginsburg and Kagan in part II only:** “Some state habeas petitioners are unable to develop the factual basis for their claims in state court through no fault of their own.” For this reason, Congress wrote §(e)(2) which permits, in limited circumstances, the introduction of new evidence in a federal habeas evidentiary hearing. **Congress plainly intended (e)(2) to govern the introduction of new evidence, and it makes no sense to read a complete prohibition of new evidence into (d)(1) – particularly where (d)(2) did in fact express such a prohibition.** My view (which I think is Congress’s) “makes eminent sense” – it ensures “that petitioners who diligently developed the factual basis of their claims in state court, discovered new evidence after the state court proceeding, and cannot return to state court [**Ed. Note:** cf. Justice Breyer’s “can always return” concurrence], retain the ability to access the Great Writ.” “Reading (d)(1) to do the work of (e)(2)” is an “unnaturally cramped reading,” as Justice Alito also recognizes.

[**Ed. Note:** in a fascinating “inside baseball” note, Justice Sotomayor relies (n. 5) on the transcript of an OT 2008 oral argument – before she was even on the Court – to assert that the majority cannot mean to bar consideration of new evidence when the failure to develop it “was the fault of the state court itself.” I can’t recall previously seeing published reliance on merely an oral argument transcript for a factual assertion. Of course, these transcripts haven’t been publically available for that long.]

The Court misreads its own precedents, including *Landrigan* which Justice Thomas (today’s author) wrote, where we assumed that (e)(2) and not (d)(1) governed evidentiary hearings in federal habeas.

Finally, in an exhaustive 25-page review of the record, I conclude that even on the state court record alone, Pinholster proved his case and the California courts’ contrary decisions were “clearly unreasonable.” The mother’s testimony was simply false, and lots of indicators made the decision not to investigate the mitigation case further completely unprofessional. (Note that one of Pinholster’s lawyers is now dead and the other has been disbarred.) There is no reasonable argument to the contrary. A claimed “tactical” decision made without competent investigation violates *Strickland*, as we said in that decision and have repeatedly held since. (Note: Justice S. relies on the ABA’s Criminal Justice Standards at page 28 of her dissent.) And to say that the extensive new evidence of Pinholster’s background and psychological damage would not have made a difference belies the 2½ days of jury deliberations on the penalty. As the state’s own expert testified at the federal hearing, the new background evidence “would speak volumes” regarding mitigation. “I respectfully dissent.”

## IMMIGRATION LAW

**Chamber of Commerce v. Whiting**, No. 09-115, 131 S.Ct. 1968 (May 26, 2011), affirming 558 F.3d 856 (9<sup>th</sup> Cir. 2009).

**Holding** (5[4-1] to 3, Kagan recused); Breyer dissenting with Ginsburg; Sotomayor dissenting: **Because the Arizona law sanctioning employers who hire unauthorized aliens by denying business licenses “falls squarely within the federal statute’s savings clause [for ‘licensing and similar laws’] and ... does not otherwise conflict with federal law,” it is valid and not preempted.**

**Facts:** The Immigration Reform and Control Act (IRCA) makes it “unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.” Violators may suffer both civil and criminal sanctions; repeat offenders can receive up to six months in jail. The Act expressly preempts “any State or local

law imposing civil or criminal sanctions (**other than through licensing and similar laws**) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens” (emphasis added – referred to as the “savings clause”).

In 2007, Arizona (and other states) enacted a state law that requires employers to use the federal “E-Verify” (an internet system that checks employees’ work-authorization status), and threatens to suspend or revoke employers’ business licenses if they knowingly employ an unauthorized alien. The Arizona law provides that a court “shall consider only the federal government’s determination” in deciding “whether an employee is an unauthorized alien.” The Chamber of Commerce and various business and civil rights organizations filed a pre-enforcement challenge to the Arizona law, but the District Court held that Arizona’s law was not preempted and the Ninth Circuit affirmed.

Roberts, joined by Scalia, Kennedy, and Alito in full, Thomas in part: The ICRA’s prohibition against States imposing sanctions on employers of unauthorized aliens **has an express savings clause: “other than through licensing and similar laws.” Because the Arizona law “on its face purports to impose sanctions through licensing laws,” it is not preempted.** A detailed investigation into the meaning of the word “license”—Webster’s, Arizona statutes, Congressional codification—reveals that the Arizona statute falls “comfortably within [IRCA’s] savings clause.” The savings clause is not limited to laws that merely grant licenses. And no “narrow interpretation is needed, or possible -- **“Congress expressly preserved the ability of the States to impose their own sanctions through licensing.”** And since we have “concluded that Arizona’s law falls within the plain text of IRCA’s savings clause,” we need not analyze the legislative history.

Part II-B, not joined by Thomas and thus only a plurality: There is also no “implied preemption.” Arizona’s law relies on federal law for its implementation, it does not “conflict” with it. “Tensions” with federal enforcement are not sufficient for implied preemption. And “[r]egulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern.” Employers need not “discriminate” against latinos as the dissent fears: only repeated and egregious violations result in revocation of a business license, and “[a]n employer acting in good faith need have no fear of the sanctions.”

Finally, the State’s use of the E-Verify system “does not conflict with the federal scheme;” it implements it. (And -- Part III-B, again not joined by Thomas so a plurality -- policy concerns about the E-Verify system are unpersuasive.)

Breyer, dissenting joined by Ginsburg: Because Arizona law construes “license” far more broadly than the common usage definition, I do not believe the state law falls within the narrow federal savings clause. “Context tells a driver that he cannot produce a partnership certificate when a policeman stops the car and asks for a license. . . . And context, which includes statutory purposes, language, and history, tells us that the federal statute’s ‘licensing’ language does not embrace Arizona’s overly broad definition of that term.” I would limit the scope of the exception to Federal preemption in this case to “involve *employment-related* licensing systems.” In addition, the Court’s ruling **“will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens— without counterbalancing protection against unlawful discrimination.”** Finally, the Arizona law conflicts with federal law regarding E-Verify, because Arizona requires use of E-Verify while the federal statute clearly makes it voluntary. “Arizona’s plan would undermine that federal objective.”

Sotomayor, dissenting: “Congress could not plausibly have intended for the saving clause to operate in the way the majority reads it to do.” The Arizona law is preempted because it “creates a

separate state mechanism for Arizona state courts to determine whether a person has employed an unauthorized alien,” which “cannot be reconciled with the rest of IRCA’s comprehensive [federal] scheme.” First, “the savings clause is hardly a paragon of textual clarity” – it does not define “licensing,” nor is the word used anywhere else in the statute. “IRCA’s saving clause provides no hint as to which type or types of licensing laws Congress had in mind.” But when the entire statute is examined, it is clear that **“Congress made explicit its intent that IRCA be enforced uniformly”—by displacing state laws, centralizing enforcement, providing for appeals in Federal court, and creating the E-Verify system.** Similarly, regarding E-Verify, “Congress created no mechanism for States to access information regarding an alien’s work authorization status for purposes of enforcing state prohibitions on the employment of unauthorized aliens” and clearly did not intend it. “I do not mean to suggest that the mere existence of a comprehensive federal scheme necessarily reveals a congressional intent to oust state remedies.” But here, “the only interpretation of that clause that is consistent with the rest of the statute is that it preserves the States’ authority to impose licensing sanctions after a final federal determination that a person has violated IRCA’s prohibition on the knowing employment of unauthorized aliens.” I agree with Justice Breyer regarding E-Verify, and would only add that (1) “the Arizona Act directly regulates the relationship between the Federal Government and private parties by mandating use of a federally created and administered resource,” and (2) that the annual cost of a mandatory nationwide program would be \$11.7 *billion*, as compared to the \$11 *million* annual cost of the voluntary program.

## INTERESTING MISCELLANEOUS

**Leal-Garcia v. Texas**, No. 11-5001, 131 S.Ct. \_\_\_\_ (July 7, 2010), denying stay of execution.

**Facts:** Leal, a Mexican national who has lived in the US since he was 2, raped and killed a young girl when he was in his early 20s, and was sentenced to death in Texas in 1995. The US had a treaty obligation to notify the Mexican consulate when one of its nationals was arrested, but this was concededly not done. In 2004, the International Court of Justice ordered that the US was obligated under its treaties to provide a hearing for Leal and others like him. President Bush asked Texas to do so, but Texas declined, and in *Medellin* (2008) the Court ruled that neither the treaty nor the Presidential order constituted law that Texas had to follow, absent implementing legislation enacted by Congress.

With Leal’s execution (the first such since *Medellin*’s) imminent, Senator Leahy introduced such implementing legislation in June 2011 and expressed his intention to hold speedy hearings. The Solicitor General, together with Leal, now requests a stay of the July 7 execution to preserve Leal’s opportunity to file a cert petition if the legislation is enacted.

**Per Curiam** [likely written by Justice Scalia, the Circuit Justice to whom the stay request was initially presented. Plus, it sounds like his writing]: There is no plausible constitutional claim here, as the due process clause does not prohibit an execution just because legislation might someday be enacted. Nor do we endorse the Solicitor General’s position. **We “doubt[] that it is ever appropriate to stay a lower court judgment in light of unenacted legislation.”** The Court has never before done so. *Medellin* asked for a stay on the same grounds, and we denied it. As for the Solicitor General’s assertion of “grave international consequences,” “Congress evidently did not find these consequences sufficiently grave to” enact the legislation even 8 years after the ICJ ruling and three years after our decision in *Medellin*. And finally, there is not even a suggestion of likely success on the merits, as the United States “studiously refuses” to argue that the failure to notify the Mexican

consulate would have made any difference, and in fact the district court below ruled that the failure was “harmless.” Stay denied. [Leal was executed the night of July 7 after this opinion was issued.]

**Breyer dissenting with Ginsburg, Sotomayor and Kagan:** The Court should not deny a brief summer stay until we can discuss the matter in Conference in September, particularly where four Justices request the stay [**Ed. Note:** This seems like a particularly personalized “poke” at the majority – the death penalty continues to deeply divide the Court as it has for four decades], the President informs us of “grave consequences” in his special bailiwick of foreign affairs, and implementing Congressional legislation that we said was needed in *Medellin* is “reasonably likely” (we should rely on the SG for that assessment rather than make it on our own.) Whether that hearing would produce relief is clearly not the issue before us now; undoubtedly the legislation would provide relief of an interim kind. The State does have an interest in carrying out its judgment, but the balance is in Leal’s favor given the factors on his side versus a brief stay, until September, in a case that has been pending 16 years.

-- E N D of 2009-10 Supreme Court Decisions After Argument --

**Opinions without Argument (Including Summary Reversals)**

**Wilson v. Corcoran**, No. 10-91, 131 S.Ct. \_\_\_\_ (Nov. 8, 2010) (*per curiam*), reversing 593 F.3d 547 (7<sup>th</sup> Cir. 2010).

**Holding** (9-0, *per curiam*): **A federal court may not grant habeas relief to a state prisoner without finding a violation of federal law.**

**Facts:** Without belaboring the lengthy procedural history here, Corcoran was sentenced to death under Indiana’s capital punishment structure for killing four people. After a few trips up and down the federal habeas line, including a vacation and remand by the U.S. Supreme Court, the Seventh Circuit ruled that Corcoran was entitled to a new sentencing hearing, because it was not satisfied that the state trial court had relied only on aggravating factors authorized by Indiana law. The Circuit explained that its order was necessary “to prevent noncompliance with Indiana law.” (The State had previously argued that habeas relief on this ground was unpermitted because the claim “fails to establish any [federal] constitutional deficiency.”)

**Per Curiam** (9-0): **“It is only noncompliance with federal law that renders a State’s criminal judgment susceptible to collateral attack in the federal courts.”** Even if the federal court finds an “unreasonable determination of the facts” by the state courts, that “does not repeal the command of § 2254(d) that habeas relief may be afforded to a state prisoner only [if] his custody violates federal law.” And a prisoner’s claim that a state ruling violates his federal constitutional rights is insufficient; “unless the federal court agrees with that assertion, it may not grant relief.” **The federal court must “articulate what federal right was allegedly infringed.”** The Seventh Circuit did not do this here, so its decision granting relief is vacated and the case is remanded “for further proceedings consistent with this opinion.”

**Swarthout v. Cooke**, No. 10-333, 131 S.Ct. \_\_\_\_ (January 24, 2011), summarily reversing 606 F.3d 1206 (9<sup>th</sup> Cir. Cir. 2010).

**Holding** (9(8-1)-0, *per curiam*; Ginsburg concurring): **There is no federal habeas jurisdiction to correct errors of state law**, and the alleged failure of a California court to reasonably apply its state law standard for denying parole – whether there is “some evidence” to support the denial – is merely an error of state law (if at all), not a federal constitutional claim.

**Facts:** Damon Cooke was convicted of attempted first-degree murder and sentenced to 7 years to life in prison. After 11 years, he was denied parole, and a California court denied habeas relief, finding there was “some evidence” in the record to support the parole board’s decision. But the Ninth Circuit subsequently reversed a district court denial of Cooke’s federal habeas petition, ruling that California’s parole system created a constitutionally-protected “liberty interest” in parole, and that the “some evidence” standard was part of that interest, so that an “unreasonable determination” under that standard stated a federal habeas claim. [This summary does not describe a second case decided here, *Cate v. Clay*, because it is legally the same.]

**Per Curiam** (9-0; Ginsburg concurs): There is no federal right to parole; at most, only “minimal” fair procedures set forth in *Greenholtz* (1979) are required by the Due Process Clause. A “some evidence” rule is not part of the federal right here, so “it is no federal concern ... whether California’s ‘some evidence’ rule ... was correctly applied.” The Ninth Circuit’s substantive finding was “questionable,” but “the short of the matter is that [the question] ... is no part of the Ninth Circuit’s business.” So reversed.

**Ginsburg, concurring (only in the judgment?):** In *Superintendent v. Hill* (1985) we held that “some evidence” was required for revocation of good time credits. But the Ninth Circuit has ruled that only the *Greenholtz* (1979) procedures apply to California’s parole system. “Given that determination, I agree that today’s summary disposition is in order.”

**Felkner v. Jackson**, No. 10-797, 131 S.Ct. \_\_\_\_ (March 21, 2011), reversing 389 Fed. Appx. 640 (9<sup>th</sup> Cir. unpublished 2010).

**Holding** (9-0, *Per Curiam*): **The Ninth Circuit reversed a state jury conviction under *Batson* without explanation – we simply won’t allow that.**

**Facts:** Jackson was convicted by jury trial of sexual offenses arising out of his attack on a 72-year-old woman. The prosecutor struck two black jurors; a third served on the jury. [Ed. Note: The opinion does not say but I assume Jackson is black.] When challenged, the prosecutor offered race-neutral reasons for his strikes: the first juror had expressed the opinion that he had been stopped by police numerous times by police based on his race, and the prosecutor did not want to “roll the dice” on whether the juror still harbored animosity; and the second juror had a master’s degree in social work and had worked in a jail and the prosecutor did not “like to keep social workers.” The trial court denied the *Batson* motion. On appeal, the California court of appeals examined the record with specificity, found that a proffered “comparative juror analysis” was distinguishable, and found that the trial judge’s decision was not “clear error” and that the prosecutor’s reasons were rational and race-neutral. The California Supreme Court denied review without opinion.

On federal habeas, the district court denied relief, holding that the state court’s factual findings were not “unreasonable” as the federal habeas statute requires, and that the law applied was correct. On appeal, while citing the proper statutory standard, the Ninth Circuit reversed with a “one-sentence conclusory explanation” that the race-neutral reasons did not overcome the fact that two black jurors had been struck, and that “different treatment of comparably situated jurors” had been shown.

**Per Curiam:** The Ninth Circuit’s three-paragraph unpublished reversal, granting relief to a state criminal defendant claiming race-based juror strikes in violation of *Batson*, is summarily and unanimously reversed. **The Circuit’s opinion was “inexplicable ... unexplained” and “dismissive.”** “The California Court of Appeal carefully reviewed the record at some length” and

“was plainly not unreasonable.” “[T]he [Circuit] court did not discuss any specific facts or mention the reasoning of the other three courts that had rejected Jackson’s claim.” “There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner.”

[Lengthy Editor’s Note: I do not know whether the Ninth Circuit was right or wrong in this case. But for the Supreme Court to itself be so “dismissive” of the Circuit’s work is a bit uncharitable.

Unlike the Supreme Court, which decides 70-80 cases a year, the Ninth Circuit decides roughly 6,000 cases a year, from a pool of over 12,000 cases filed each year. It does this with 28 or less active judges – you do the math. The Court does not offer any suggestions as to how the Ninth Circuit should manage that huge caseload. Some Circuits, with far fewer cases, have gone to a practice of deciding many appeals with one word (reversed or affirmed) and no explanation. By contrast, the Ninth Circuit has adhered to the view that “every litigant is entitled to some explanation for our decision” [I’m paraphrasing here.] Thus the Ninth Circuit issues a large pool of “unpublished” memorandum dispositions each year, giving the parties some explanation, albeit brief. There is no doubt that there is less “quality control” regarding these “memdispo’s” (as they are called). But no one has offered a better solution other than to offer no explanations at all for a large number of cases.

Perhaps the practice of one-word appellate decisions is better than unpublished short opinions of uneven quality. But the Supreme Court gives no indication that it has even considered the reality of the crushing workload of the Circuit Courts, and its dismissive tone here suggests that it has no sympathy for the Ninth Circuit, if it has any consciousness of the situation at all.

A baseball player’s batting average is determined by looking at EVERY time the player comes to bat – not just how he does when he’s on national TV. By this measure, the Ninth Circuit has the best batting average of any court in the country. The real issue is a crushingly large workload, and how best to deal with it. Writing summary reversals within an 80-case caseload may be fun for the Supreme Court, but it does not begin to address the very difficult issues that federal Circuit Courts are confronting in this area.]

**United States v. Juvenile Male**, No. 09-940, 131 S.Ct. \_\_\_\_ (June 27, 2011), vacating and dismissing as moot 581 F.3d 977 (9<sup>th</sup> Cir. 2009), amended at 590 F.3d 924 (9<sup>th</sup> Cir. 2010).

*Per Curiam* (5-3, Kagan recused); Ginsburg, Breyer and Sotomayor dissenting in one sentence: A juvenile was sentenced for a sex offense before 2006. But then, after the federal Sex Offender Registration and Notification Act of 2006 became law, the juvenile’s original term of supervision was revoked and the district court imposed a condition that the juvenile register under the 2006 Act. The juvenile appealed that new condition of his sentence under the *ex post facto* clause, and in 2009, the Ninth Circuit held that application of to offenders whose sex offenses were final prior to enactment of the Act, violated the Constitutional *ex post facto* clause (Art. I, §9, cl.3). The Ninth Circuit struck the registration condition on the merits, without noting that the juvenile had turned 21 so that his supervision sentence had expired.

Last Term, in reaction to the Solicitor General’s certiorari petition, the Supreme Court *per curiam* certified a question to the Montana Supreme Court, where the juvenile [or no-longer-juvenile] lives. Because the juvenile was no longer subject to the federal registration condition, the Court asked Montana whether the juvenile had an independent obligation to register as a sex offender under state law, or would invalidation of the juvenile’s federal condition thereby relieve him of the state law obligation?

Montana affirmed that the juvenile’s state law registration obligation was independent of his federal registration. So the Court now **vacates the Ninth Circuit’s original ruling on the merits and dismisses the cert petition**. There is no justiciable controversy to pursue the case, where the juvenile

no longer has any “collateral consequences” flowing from the temporary, and now fulfilled, federal registration requirement. **Although a favorable *ex post facto* decision might “serve as a useful precedent” for the juvenile to challenge his state law registration requirement, “this possible indirect benefit in a future lawsuit cannot save this case from mootness.”**

Justices Ginsburg, Breyer and Sotomayor dissent with one sentence: they would remand the case to the Ninth Circuit for the initial consideration of mootness.

**Bobby v. Mitts**, No. 10-1000, 131 S.Ct. 762 (May 2, 2011), summarily reversing 620 F.3d 650 (6<sup>th</sup> Cir. 2010).

**Holding (9-0), Per Curiam:** So-called “**acquittal-first**” jury instructions in capital murder cases are not inconsistent with *Beck* so long as they do not force the jury to decide only between the death penalty and acquittal.

**Facts:** An Ohio jury convicted Harry Mitts on two counts of aggravated murder and two counts of attempted murder. The jury instructions given during the penalty phase of Mitts’s trial included an “acquittal-first” direction, which stated that the jury must first decide whether Mitts was guilty of capital murder and, if not, then consider “which of two possible life imprisonment sentences” were appropriate. Mitts was sentenced to death. The Sixth Circuit Court of Appeals found these instructions invalid under *Beck*.

**Per Curiam (9-0):** Under *Beck*, a “death penalty may not be imposed ‘when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict.’” The Sixth Circuit held that “acquittal first” jury instructions are “contrary to *Beck* because they interposed before the jury the same false choice that ... *Beck* prohibits” -- specifically, choosing between guilt of a capital offense or acquittal. The jury may be inclined to convict a defendant of a capital offense if the only other option is acquittal. According to the Sixth Circuit, the jury instructions at the penalty phase of the Mitts trial asked the jury to first decide whether to “acquit” Mitts of capital murder, then consider “some form of life imprisonment.” However, the central concern in *Beck* is wrongful conviction. **The jury instructions here are “not invalid” under *Beck* because there is no possibility of finding the defendant “innocent of any wrongdoing.”** Additionally, “[t]he question [in *Mitts*] concerns the penalty phase, not the guilt phase, and we have already concluded that the logic of *Beck* is not directly applicable to penalty phase proceedings. . . . The jurors in *Mitts*’s case could not have plausibly thought that if they declined to recommend the death penalty *Mitts* would ‘escape all penalties for his alleged participation in the crime.’” So we reverse the Sixth Circuit’s reversal here.

**Beer v. United States**, No. 09-1395, 131 S.Ct. 2865 (June 28, 2011), vacating 361 Fed.Appx. 150 (Fed. Cir. 2010).

**Holding:** The judgment is vacated and the case is remanded to the United States Court of Appeals for the Federal Circuit for consideration of the question of preclusion raised by the Acting Solicitor General in his brief for the United States.

**Facts:** Current and former federal judges brought an action seeking back pay and declaratory relief, alleging that their failure to receive cost-of-living salary adjustments pursuant to the Ethics Reform Act was an unconstitutional diminution of judicial compensation. The United States Court of Federal Claims granted government’s motion to dismiss. Judges appealed and filed petition for hearing *en banc*, or in the alternative, motion for summary affirmance. The Court of Appeals denied judges’ petition for hearing *en banc* and referred judges’ alternative motion to motions panel. The Supreme Court denied the judges’ certiorari petition on June 28, 2011, stating that “[f]urther

proceedings after decision of the preclusion question are for the Court of Appeals to determine in the first instance.”

**Breyer dissenting from summary reversal:** Without further explanation, the denial Order noted that Justice Breyer would grant the petition for certiorari and set the case for argument.

**Scalia, dissenting from denial of certiorari:** **“It has been my consistent view, not always shared by the Court, that ‘we have no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered.’”** This case is similar to *Youngblood v. West Virginia*, 126 S.Ct. 2188 (2006), where the lower courts ruling was vacated “without first identifying error.” As such, “I would grant the petition and set case for argument.”

### **Dissents from, and concurrences with, Orders**

**Kiyemba v. Obama**, No. 10-775, 131 S.Ct. 1631 (April 18, 2011), 9-0, concurrence in denial of certiorari from 605 F.3d 1046 (D.C. Cir. 2010).

One of the many decisions resulting from the federal detention of persons in Guantanamo Bay. Here, petitioners have been held for several years, they sought a judicial order that they be released into the United States because no country would accept them for deportation. In 2008, the D.C. District Court concluded that petitioners were entitled to a release order, but the D.C. Circuit reversed. The Supreme Court granted *certiorari*, but then learned that the remaining petitioners had actually received and rejected at least two offers of resettlement in countries deemed “appropriate.” The Court then remanded the case for lower courts to “determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments.” The Circuit concluded that no further proceedings were necessary and reinstated its prior opinion, slightly modified to address the point that petitioners now have offers of acceptance from the agreeing countries (including Palau), and so are not entitled to release into the United States. Petitioners filed another writ of *certiorari* from that decision.

**Breyer, respecting denial of certiorari, joined by Kennedy, Ginsburg, and Sotomayor:** The admittedly appropriate resettlement offers and “the Government's uncontested commitment to continue to work to resettle petitioners, transform petitioners’ claim.” Given the current state of the case, **“I see no Government-imposed obstacle to petitioners' timely release and appropriate resettlement.”** So “I join in the Court's denial of *certiorari*” since the [petitioner’s demand for release into the U.S. is no longer the only remedy available. “Should circumstances materially change, however, petitioners may of course raise their original issue (or related issues) again in the lower courts and in this Court.”

**Derby; Johnson; Schmidt; and Turner, v. United States** (four cases), 8-1, Justice Scalia dissenting from denial of certiorari (June 27, 2011).

On June 9, 2011, in *Sykes v. United States*, the Court ruled 6-3 that a state felony of intentional use of a vehicle to flee law enforcement qualifies as a “violent felony” under the Armed Career Criminal Act (“ACCA”), making the defendant eligible for certain mandatory minimum penalties on a subsequent conviction under 18 U.S.C. § 924(e). In these four cases, the defendants sought *certiorari* from judgments that their prior convictions similarly constituted “violent felonies” under the ACCA’s “residual” provision, which extends the statute to any felony not listed but which “otherwise involves conduct that presents a serious potential risk of physical injury to another” (emphasis added). The

Court here denied *cert* in four cases in which the underlying crimes were, respectively, burglary (even of a vehicle or phone booth); “rioting at a correctional institution” including “passive disobedience”; theft of a firearm from a licensed dealer; and “larceny from the person” including pickpocketing.

In his solo **dissent** (flowing from his solo dissent in *Sykes* – Justices Kagan and Ginsburg dissented there on very different grounds), **Justice Scalia** opines that “How we would resolve these [four] cases if we granted *certiorari* would be a fine subject for a law office betting pool. .... [G]iven our track record of adding a new animal to our bestiary of ACCA” felonies on four previous occasions, “who knows what new beasties our fifth, sixth, seventh and eighth tries would produce?” Justice Scalia’s point is that the statute is irremediably vague – “our lower-court colleagues ... will simply throw the opinions into the air in frustration and give free rein to their own feelings....” **Because the statute and its interpretive precedents are “incomprehensible to judges,” let alone the reasonable person, “I would declare ACCA’s residual provision to be unconstitutionally vague and ring down the curtain on the ACCA farce playing in federal courts throughout the Nation.”**

**Alderman v. United States**, No. 09-1555, 131 S.Ct. 700 (January 20, 2011), 7-2, dissent from denial of certiorari, leaving in place 601 F.3d 949 (9<sup>th</sup> Cir. 2009).

**Facts:** Cedrick Alderman entered a conditional guilty plea to possessing a bulletproof vest, under 18 U.S.C. §931(a) which makes it “unlawful for a person to purchase, own, or possess body armor, if that person has been convicted of a felony that is . . . a crime of violence.” The vest had been sold in interstate commerce three years earlier when the California manufacturer sold it to a distributor in Washington State. Alderman argued on appeal that §931(a) exceeded Congress’ power under the Commerce Clause. A 2-1 Ninth Circuit panel found §931(a) constitutional, and the Circuit denied rehearing *en banc* with four judges dissenting.

**Thomas**, dissenting from denial of certiorari, joined by Scalia except for footnote 2: Tension in our Commerce Clause jurisprudence exists between *Scarborough* (1977) and *Lopez* (1995). *Scarborough* held that the “statutorily required nexus between the possession of a firearm by a convicted felon and commerce” was satisfied if the gun had ever previously traveled in interstate commerce. But this does not seem to fit the three categories of activity that Congress can regulate under their commerce power, identified in *Lopez*: channels of interstate commerce, instrumentalities of interstate commerce, and “activities that substantially affect interstate commerce. **“Scarborough, as the lower courts have read it, cannot be reconciled with Lopez because it reduces the constitutional analysis to the mere identification of a jurisdictional hook.”** The Ninth Circuit’s dissent wrote that the court had “effectively render[ed] the Supreme Court’s three-part Commerce Clause [in *Lopez*] analysis superfluous” and that “felon-possession of body armor does not have a substantial effect on interstate commerce.” This confusion and disagreement, Thomas argues, makes it “difficult to imagine a better case for certiorari.” “The lower courts’ reading of *Scarborough*, by trumping the *Lopez* framework, could very well remove any limit on the commerce power.”

“The Government actually conceded at oral argument in the Ninth Circuit that Congress could ban possession of french fries that have been offered for sale in interstate commerce.” However, “such an expansion of federal authority would trespass on traditional state police powers.” “If the *Lopez* framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent that does not squarely address the constitutional issue.”

Justice Scalia did not join Justice Thomas’s footnote 2, which states “I adhere to my previously stated views on the proper scope of the Commerce Clause” in *Lopez*, *Morrison*, and *Raich*. Because Justice Scalia did not agree with Justice Thomas in *Raich*, he presumably could not join this footnote.

**Allen v. Lawhorn**, No. 10-24,131 S.Ct. 562 (December 13, 2010), 6-3, dissent from denial of certiorari, leaving in place 519 F.3d 127 (11<sup>th</sup> Cir. 2008).

**Facts:** James Lawhorn was convicted of capital murder in Alabama state court. In the sentencing phase, Lawhorn’s attorney waived any closing argument. Lawhorn was sentenced to death, which was affirmed by Alabama’s intermediate appellate and Supreme courts. However, on federal habeas the District Court set aside both the conviction and the sentence, and the Eleventh Circuit affirmed regarding vacating the sentence (not the conviction). The federal courts found that counsel’s failure to give a closing argument was ineffective assistance and not a reasonable strategic decision. Alabama’s cert petition here argued only that there was no constitutional prejudice, i.e., a “reasonable probability that the outcome would have been different had counsel not been ineffective.”

**Scalia, dissenting from denial of certiorari, joined by Thomas and Alito:** Lawhorn’s case fails the federal habeas “clearly established” federal law requirement, because **“none of our cases has ever considered whether the failure to give a closing argument can be considered prejudicial under *Strickland*.”** “[T]he outcome imposed upon the Alabama courts by the Eleventh Circuit is not remotely required by clearly established Supreme Court precedent.”

In addition, constitutional prejudice cannot be shown. “Counsel’s closing statement is rhetorical argument, not evidence. Reconstructing what that argument might have been, and how the jury might have reacted to it—a jury that had already heard opening argument and a procession of mitigation witnesses—is an exercise in guesswork.”

**Gamache v. California**, No. 10-5196, 131 S.Ct. 591 (November 29, 2010), 9-0, conurrence respecting denial of certiorari, leaving in place 227 P.3d 342 (Cal. 2010).

**Facts:** Richard Gamache was convicted of first-degree murder and sentenced to death. After the verdict, it was learned that during deliberations, court personnel had inadvertently given the jury a videotape that had not been admitted into evidence, and the jury watched it three times. The video showed a police interview in which Gamache confessed to the crime in graphic terms, and also said that he would also have shot police officers “if I had any idea I was about to be arrested.” The California Supreme Court held that the jury’s access to the tape was indisputably error, but that the error was “trial error” subject to harmless error review and not the result of juror misconduct that would carry a presumption of prejudice. Although Chapman places the burden to prove harmless error on the prosecution, at one point the California Supreme Court wrote that “the burden remains with the *defendant* to demonstrate prejudice” (emphasis added). Nevertheless, the Court concluded that, under any burden allocation, the trial error was harmless because “there is no reasonable possibility the outcome would have been different absent the error.” **[Ed. Note:** Pretty amazing, given the content of the videotape – the rest of the evidence must have been truly overwhelming.]

**Sotomayor, respecting denial of certiorari, joined by Ginsburg, Breyer, and Kagan:** “I do not disagree with the denial of certiorari” because “the [lower] court found that the error at issue was harmless, regardless of the burden allocation.” However, “[i]t is not clear what the [California Supreme] court intended in allocating the burden to the defendant to demonstrate prejudice,” and “if it meant to convey that the defendant bore the burden of persuasion, that would contravene *Chapman*.” **“With all that is at stake in capital cases, . . . in future cases the California courts should take care to ensure that their burden allocation conforms to the commands of *Chapman*.”**

**Huber v. New Jersey Department of Environmental Protection**, No. 10-388, 131 S.Ct. 1308 (March 21, 2010), 9-0, concurrency respecting denial of certiorari, leaving in place 2010 WL 173533 (N. J., App. Div. 2010).

**Facts:** Because Robert Huber’s residential property included wetlands protected by a New Jersey environmental statute, a New Jersey appellate court upheld a warrantless search by a state environmental official of Huber’s backyard. An appellate court affirmed, and Huber’s petition for review was denied by the New Jersey Supreme Court was denied without opinion.

Alito, respecting denial of certiorari, joined by Roberts, Scalia, and Thomas: **“This Court has not suggested that a State, by imposing heavy regulations on the use of privately owned residential property, may escape the Fourth Amendment’s warrant requirement.”** The Court should be concerned that an environmental statute was used to justify a warrantless search of a residence. It is true that a limited exception to the warrant requirement is for searches of “closely regulated industries.” Although Huber’s backyard was not a commercial premise, the New Jersey appellate court held that “the presence of these wetlands brought the Hubers’ yard ‘directly under the regulatory arm’ of the State ‘just as much’ as if the yard had been involved in a ‘regulated industry.’” This gives cause for Fourth Amendment concern. However, “because this case comes to [the Supreme Court] on review of a decision by a state intermediate appellate court,” granting certiorari is “inappropriate.”

**Pitre v. Cain**, No. 09-9515, 131 S.Ct. 8 (October 18, 2010), 8-1, dissent denial of certiorari, thereby leaving in place *Pitre v. Cain*, 354 Fed.Appx. 142 (5<sup>th</sup> Cir. 2009).

**Facts:** Anthony Pitre, a Louisiana state prisoner, stopped taking his HIV medication in a protest of his transfer to a prison facility. He alleged that prison officials punished him for this decision by subjecting him to hard labor in 100-degree heat, and that prison officials repeatedly denied his requests for lighter duty more appropriate to his medical condition, even though officials twice thought his condition sufficiently serious to rush him to an emergency room. The warden (Cain) allegedly acknowledged in a letter that Pitre was “dealing with unnecessary pain and suffering, as well as cruel and unusual punishment,” but he accused Pitre of “bringing it on himself” by refusing to take his medication. Pitre sued under the eighth Amendment, alleging that as a result of respondents’ actions, his medical condition worsened. A Magistrate Judge wrote that Pitre had been “hoist by his own petard,” and recommended dismissing the complaint as “frivolous.” The District Court adopted this recommendation, and the Fifth Circuit summarily affirmed, concluding that “Mr. Pitre has been given medical care, but he refuses to take medication which results at times in physical problems. Evidence of conscious indifference is not presented.”

Sotomayor, dissenting from denial of certiorari: “The [lower] courts appear to have misunderstood the nature of Pitre’s Eighth Amendment claim,” because Pitre “allege[s] not that respondents denied him medical care but that they punished him for refusing to take medication, or attempted to coerce him to take medication, by subjecting him to hard labor that they knew exceeded his medical limitations.” The Court has yet to consider “whether prison officials may require inmates with HIV to take medication, such that the refusal to do so might justify the imposition of sanctions by such officials.” **Even if the prison officials had a “legitimate penological interest” in Pitre’s medical treatment for HIV, that interest does not justify coercion for Pitre to take medication “by subjecting him to hard labor that they knew posed ‘a substantial risk of serious harm.’”** Although Pitre’s refusal to take his medication may have been “foolish,” his complaint sufficiently alleges deliberate indifference by prison officials in violation of the Eighth Amendment.

**Williams v. Hobbs**, No. 10-7909, 131 S.Ct. 1677 (March 21, 2011), 7-2, dissent from denial of certiorari, leaving in place 612 F.3d 914 (8<sup>th</sup> Cir. 2010).

**Facts:** Marcel Williams was charged with capital murder, kidnapping, rape, and aggravated robbery. In a strategic decision to establish credibility with the jury, his attorneys conceded guilt in their opening statement, so as to focus on sentencing. However, Williams' attorneys called only one witness at the penalty phase, an inmate who had no personal relationship with Williams and who testified from his own experience that life was more pleasant on death row than in the general prison population. Williams was sentenced to death, and the Arkansas Supreme Court affirmed. On federal habeas alleging ineffective assistance, testimony at an evidentiary hearing in district court "established that Williams had been 'subject to every category of traumatic experience that is generally used to describe childhood trauma': sexual abuse by multiple perpetrators; physical and psychological abuse by his mother and step-father; gross medical, nutritional, and educational neglect; exposure to violence in the childhood home and neighborhood; and a violent gang-rape while in prison as an adolescent." The District Court granted habeas relief, but the Eighth Circuit reversed, finding that Williams was not entitled to a federal evidentiary hearing and, as such, failed to prove prejudice based on the factual record that had been before the state court. Although the District Court had ruled that the State had not objected to the evidentiary hearing, the Eighth Circuit found that the state had objected, and even if it had not, the Eighth Circuit ruled that it would review the error to allow a hearing under §2254(e)(2) even without a contemporaneous objection.

**[Ed. Note:** note that this case involves two of this Term's merits decisions: **Pinholster**, in which the Court ruled that federal habeas must be based on the record before the State court, but did not resolve debates about when to allow a federal evidentiary hearing; and **Pepper**, in which the Court reversed an exceptionally harsh sentencing ruling by the Eighth Circuit.

**Sotomayor, dissenting from denial of certiorari, joined by Ginsburg:** First, "the Eighth Circuit's conclusion that the State objected ... to the evidentiary hearing is patently wrong." On the contrary, "the record indicates that the State affirmatively consented to the hearing and sought to use the hearing to its own strategic advantage."

Second, the alternative contention by the Court of Appeals—that it had discretion to review the District court's compliance with §2254(e)(2)—is a serious misapplication of Supreme Court precedents. Even assuming that the Court of Appeals had the discretion under *Day v. McDonough*, the Eighth Circuit misapplied and ignored *Day's* requirements. **"The interests of justice are poorly served by a rule that allows a State to object to an evidentiary hearing only after the hearing has been completed and the State has lost."** "When the State voluntarily participates in a federal evidentiary hearing—without objection, with an apparent intent of supplementing the record for its own purposes, and at a significant cost and expenditure of judicial resources—," then we should review its decision.

**Wong v. Smith**, No. 09-1031, 131 S.Ct. 10 (November 1, 2010), 6-3, dissent from denial of certiorari, leaving in place 580 F.3d 1071 (9<sup>th</sup> Cir. 2009).

**Facts:** This case involves the extent to which a trial judge may "comment on the evidence" in a criminal jury trial. Smith and a co-defendant (Hinex) broke into a home and robbed Mr. and Mrs. S. at gunpoint. One of the defendants (the question is, which one?) put a gun to Mrs. S's head and forced her to perform oral copulation. Smith and Hinex were charged with residential burglary and robbery; Smith alone was charged with forcible oral copulation. The jury deliberated for a little over two days and convicted both defendants of burglary and robbery. But on the oral copulation count against Smith, the evidence was somewhat equivocal. Semen at the scene matched Smith's DNA, but Mrs. S. had initially identified Hinex as her attacker. After several days of fruitless deliberation on this count,

the judge decided to exercise his authority, as recognized by the State Constitution, to “comment on the evidence.” The judge reminded the jurors that they were the “exclusive judges of the facts.” He explained that his comments were not intended “to impose [his] will” on the jury, but only to review “certain evidence” that they “may not have considered.” The judge then pointed out that Smith had told police that both he and Hinex entered the house. Smith admitted that he had found Mrs. S in a back bedroom, that Smith was armed at the time, and that she gave Smith a \$100 bill. The judge noted that Hinex denied that he had gone into the house, but said (as did Smith) that “Smith went to the back of the house . . . and closed the door.” The judge then played the tapes of both defendants’ statements for the jury, and told them to consider the statements during further deliberations. The judge repeated that his “comments [were] advisory only” and that the jurors remained “the exclusive judges” of the facts. A short time later, the jury returned a guilty verdict against Smith on the oral copulation count.

A California intermediate appellate court rejected the claim that the judge’s comments “coerced” the verdict, and the California Supreme Court denied review. However, on federal habeas the district court granted Smith’s claim for a new trial, and a 2-1 panel of the Ninth Circuit affirmed.

Alito, dissenting from denial of certiorari, joined by Roberts and Scalia: “The Ninth Circuit’s opinion . . . suggests that, when a jury is ‘deadlocked,’ the judge may provide only ‘appropriate encouragement . . . to deliberate,’ and must refrain from providing the ‘judge’s selective view of the evidence.’ None of our constitutional cases establish such a rule.” Therefore, “[n]either the trial judge’s decision to employ the practice [of commenting on the evidence] nor the state appellate court’s approval of the instruction ran afoul of clearly established federal law.” Our previous decisions “set no clearly established constitutional limits;” the only guidance is “that coercive instructions are unconstitutional, coerciveness must be judged on the totality of the circumstances, and the facts of *Lowenfield* (polling a deadlocked jury and reading a slightly modified *Allen* charge) were not unconstitutionally coercive.” This “gives state courts wide latitude for reasonable decisionmaking under AEDPA” since “no constitutional decision of this Court has ever explained how the general rule against ‘coercion’ applies to the traditional practice of judicial comment on the evidence.” Meanwhile, a review of the common law demonstrates that “[f]or centuries, trial judges have enjoyed authority to comment on the evidence.” “The California appellate court’s decision . . . ‘was clearly *not unreasonable*’ under the general *Lowenfield* standard.”

**Weise v. Casper**, No. 10-67, 131 S.Ct. 7 (October 12, 2010), 7-2, dissent from denial of certiorari, leaving in place 593 F.3d 1163 (10<sup>th</sup> Cir. 2010).

**Facts:** Weise obtained tickets to a White House speech by President George W. Bush, and drove through security with a “No More Blood For Oil” bumper sticker. But then a White House volunteer working told Weise that she needed to wait for the Secret Service to speak with her. Casper (presumably with the Secret Service) spoke with Weise and initially decided to admit her with a warning against any “funny stuff,” but then was (allegedly) instructed by others to remove Weise and her companion from the event. In a first amendment lawsuit, the Tenth Circuit affirmed the district court’s grant of qualified immunity, finding that the constitutional right to display a political bumper sticker and also attend a controversial White house event was not “clearly established.”

Ginsburg, dissenting from denial of certiorari, joined by Sotomayor: “**I cannot see how reasonable public officials, or any staff or volunteers under their direction, could have viewed the bumper sticker as a permissible reason for depriving Weise and Young of access to the event.**” “For at least a [half]-century, this Court has made clear that . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.” *Perry v. Sinderman* (1972). Because Weise was a “silent attendee,” ejecting her was obviously “a reprisal for

the expression conveyed by the bumper sticker.” This “offends the Constitution” under *Hartman v. Moore* (2006). However, it is possible that the dismissed defendants today were only volunteers, and that “[s]uits against the officials responsible for Weise’s and Young’s ouster remain pending and may offer this Court an opportunity to take up the issue avoided today.”

**Harper v. Maverick Recording Company**, No. 10-94, 131 S.Ct. 590 (November 29, 2010), 8-1, dissent from denial of certiorari, leaving in place 598 F.3d 193 (5<sup>th</sup> Cir. 2010).

**Facts:** A 16-year-old was sued for copyright infringement for downloading digital music files using peer-to-peer technology. The District Court denied dismissal, ruling that there were genuine issues of fact on whether she qualified as an innocent infringer under 17 U.S.C. 504(c)(1). But the Court of Appeals reversed, concluding that another provision, 17 U.S.C. § 402(d), foreclosed the innocent-infringer defense as a matter of law. Section 17 U.S.C. 402(d) provides that if a prescribed notice of copyright “appears on the published phonorecord or phonorecords to which a defendant . . . had access, then no weight shall be given to . . . a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages.”

**Alito, dissenting from denial of certiorari:** “There is a strong argument that § 402(d) does not apply in a case involving the downloading of digital music files” because the “provision was adopted in 1988, well before digital music files became available on the Internet.” The statute actually defines “phonorecord” as “material object.” Since “a person who downloads a digital music file generally does not see any material object bearing a copyright notice,” there is an issue of material fact “whether the infringer ‘was ... aware and had ... reason to believe’ (quoting § 504(c)(2)) that the downloading was illegal.” Although there is no split among the Circuits, “the question presented, in my judgment, is important enough to warrant review.”

### **Criminal Law Certiorari Grants for the Oct. ’11 Term**

1. *Lafler v. Cooper*; *Missouri v. Frye*, Nos. 10-209 & 444, from 376 Fed.Appx. 563 (6<sup>th</sup> Cir. 2010) and 311 S.W.3d 350 (Mo. App. 2010), set for oral argument on Oct. 31, 2011: May a state criminal defendant claim ineffective assistance where his counsel fails to inform him of a plea offer, or deficiently advises him to reject a favorable plea offer, and the defendant is later convicted and sentenced pursuant to a plea or fair trial? If so, what remedy should be provided?

2. *Howes v. Field*, No. 10-680, from 617 F.3d 813 (6<sup>th</sup> Cir. 2010), set for argument on Oct. 4, 2011: Is a person already in prison always “in custody” for purposes of *Miranda*, when authorities remove the prisoner from the general prison population and question him about conduct occurring outside the prison?

3. *Reynolds v. United States*, No. 10-6549 from 380 Fed.Appx. 125 (3<sup>rd</sup> Cir. 2009), set for argument on Oct. 3, 2011: Does the Sex Offender Registration and Notification Act (SORNA) apply “retroactively” to persons who committed their underlying sex offense prior to its enactment, such that the Attorney General’s implementing regulations so stating are unnecessary and this defendant has no “standing” to challenge his conviction based on their alleged invalidity?

4. *Maples v. Thomas*, No. 10-63 from 586 F.3d 879 (11<sup>th</sup> Cir. 2009), set for argument on Oct. 4, 2011: Where a capital defendant missed the federal habeas filing deadline because letters notifying

him of the state court's denial were sent to his "pro bono" lawyers and then returned to the court marked "return to sender – left firm," and the court clerk made no further effort to notify defendant, was the Eleventh Circuit correct to find that the defendant had nevertheless not shown "cause" for his default?

5. *Rehberg v. Paulk*, No. 10-788 from 611 F.3d 828 (11<sup>th</sup> Cir. 2010), not yet scheduled: Are government officials who act as "complaining witnesses" and present perjured testimony to a grand jury against an innocent citizen to a grand jury entitled to absolute immunity from a Section 1983 claim for civil damages, as are government witnesses at a criminal trial?

6. *Green v. Fisher*, No. 10-637 from 606 F.3d 85 (3<sup>rd</sup> Cir. 2010), set for argument on Oct. 11, 2011: Is law "clearly established" for purposes of federal habeas law when an applicable U.S. Supreme Court decision is issued after the trial court conviction but while the defendant's case is still pending before the state Supreme Court on direct review?

7. *Florence v. Board of Chosen Freeholders of the County of Burlington*, No. 10-945 from 621 F.3d 296 (3<sup>rd</sup> Cir. 2010), set for argument on Oct. 12, 2011: Does the Fourth Amendment permit a jail to conduct a suspicionless strip search of every arrested individual who will be imprisoned, even for a short time on a minor offense, without regard to any other circumstances?

8. *Judulang v. Holder*, No. 10-694 from 249 Fed. Appx 499 (9<sup>th</sup> Cir. 2007), set for argument on Oct. 12, 2011: Is a permanent resident who was convicted by guilty plea of an offense that renders him deportable, but who did not depart and reenter the United States between his conviction and the commencement of removal proceedings, categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA?

9. *Kawashima v. Holder*, No. 10-577 from 615 F.3d 1043 (9<sup>th</sup> Cir. 2010), not yet scheduled: Can petitioner be deported for convictions of filing, and aiding and abetting filing, a false statement on a corporate tax return?

10. *Perry v. New Hampshire*, No. 10-8974 from NHSC 2009-0590 App1 (N.H. 2010), not yet scheduled: Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, or only when the suggestive circumstances were orchestrated by the police?

11. *Martinez v. Ryan*, No. 10-1001 from 623 F.3d 731 (9<sup>th</sup> Cir. 2010), set for argument on October 4, 2011: Does a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance, but who has a state-law right to raise such a claim in a first post-conviction petition, have a federal constitutional right to effective assistance of counsel on that first post-conviction petition with respect to a ineffective-assistance-of-trial-counsel claim (since that is the first time he could by right raise the claim)?

12. *Setser v. United States*, No. 10-7387 from 607 F.3d 128 (5<sup>th</sup> Cir. 2010), not yet scheduled: Can a district court order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence?

13. *Gonzalez v. Thaler*, No. 10-895 from 623 F.3d 222 (5<sup>th</sup> Cir. 2010), not yet scheduled: The time for defendant to file for review in Texas's highest court expired on August 11, but the lower state

appellate court did not issue its mandate until September 26. The question is whether the one-year limit for filing a federal habeas petition begins to run on the date on which the judgment becomes final by the conclusion of direct review, or the [in this case, earlier] expiration of the time to seeking final review? (The case may also present the question whether the “expiration time” also includes the 90 days allowable to file a cert petition, even though the defendant did not seek review in Texas’s highest court.)

14. *Smith v. Louisiana*, No. 10-8145 from 45 So.3d 1065 (La. 2010), not yet scheduled: In what appears to be a follow-on to this Term’s *Connick v. Thompson*, the Louisiana District Attorney’s office is taken to task here for what are alleged to be serious *Brady* and *Giglio* failure to disclose exculpatory evidence issues; and apparently no level of court including the state trial court gave any specific reasons for denying the claims. The papers are relatively amateurish, which makes the cert grant interesting. Technically, the Questions granted on are: “Is there a reasonable probability that, given the cumulative effect of the *Brady* and *Napue/Giglio* violations in Smith’s case, the outcome of the trial would have been different? Did the Louisiana state courts ignore fundamental principles of due process in rejecting Smith’s *Brady* and *Napue/Giglio* claims?”

15. *Martel v. Clair*, No. 10-1265 from 403 Fed.Appx. 276 (9<sup>th</sup> Cir. 2010), not yet scheduled: Is a condemned state prisoner in federal habeas corpus proceedings entitled to replace his court appointed counsel with another court appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence?

16. *United States v. Jones*, No. 10-1259 from 615 F.3d 544 (D.C. Cir. 2010), not yet scheduled: Does the warrantless use of a tracking device on respondent’s vehicle to monitor its movements on public streets violate the Fourth Amendment? Additionally, did the government violate respondent’s Fourth Amendment rights by installing the GPS tracking device without a valid warrant and without his consent?

17. *Messerschmidt v. Millender*, No. 10-704 from 620 F.3d 1016 (9<sup>th</sup> Cir. 2010), not yet scheduled: Are officers entitled to qualified immunity whre they obtained a facially valid warrant to search for firearms and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a district attorney approved the application, no factually on point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search? Should *United States v. Leon*, 468 U.S. 897 (1984), and *Malley v. Briggs*, 475 U.S. 335 (1986) be reconsidered or clarified?

18. *Williams v. Illinois*, No. 10-8505 from 939 N.E.2d 268 (Ill. 2010), not yet scheduled: Does a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violate the Confrontation Clause?

-- E N D as of August 2010 --

## Who Wrote What in OT 2009-2010

Majority opinions are in bold,

Concurrences are in italics,

Dissents are underlined.

### ROBERTS

**Whiting**

**Freeman**

### SCALIA

**Al-Kidd**

*Tinklenberg*

*Camreta*

*Connick*

*DiPierre*

*Wall*

*Fowler*

Bryant

Brown

Sykes

Jefferson

### KENNEDY

**Bond**

**Sykes**

**Freeman**

**Harrington**

**Premo**

**Brown**

*Al-Kidd*

Camreta

Bullcoming

### THOMAS

**Connick**

**Bryant**

**McNeill**

**Pinholster**

**Schindler Elevator**

*Sykes*

*Ortiz*

Turner

Pepper

Skinner

### GINSBURG

**Bullcoming**

**Abbott**

**Walker**

**Skinner**

**Ortiz**

*Swarthout*

*Al-Kidd*

*Bond*

*Premo*

King

Connick

Bryant

Harrington

Juvenile Male

Schindler Elevator

### BREYER

**Turner**

**Fowler**

**Tinklenberg**

**Humphries**

*Pinholster*

*Pepper*

Davis

Whiting

Leal-Garcia

### ALITO

**King**

**Davis**

**Wall**

*Pepper*

*Pinholster*

J.D.B.

Tinklenberg

Fowler

### SOTOMAYOR

**J.D.B.**

**Bryant**

**Pepper**

**DiPierre**

*Comreta*

*Al-Kidd*

*Bullcoming*

*Tapia*

*Freeman*

Pinholster

Whiting

### KAGAN

**Camreta**

**Tapia**

Sykes

### Per Curiam Opinions (including Summary Reversals (“SR”))

Tolentino

Leal-Garcia

Wilson (SR)

Swarthout (SR)

Felkner (SR)

Juvenile Male (SR)

Bobby v. Mitts (SR)