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SUPREME COURT UPDATE

CRIMINAL CASES DECIDED OR SCHEDULED FOR REVIEW DURING 2010-11
THRU MAY 18, 2011

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I. RIGHT TO COUNSEL AND CONFESSIONS

A. *Miranda*.

1. *Miranda*'s Application to Minors Questioned at School. *J.D.B. v. North Carolina*, 131 S. Ct. ___ (cert. granted Nov. 1, 2010); decision below at 686 S.E. 2d 135 (N.C. 2009). Two homes were burglarized. A thirteen-year old child seen nearby was questioned and let go. Later police learned that the child, J.D.B., had been seen in possession of a camera taken from one of the homes. A police investigator assigned to the burglary investigations went to J.D.B.'s school to speak with him. J.D.B was enrolled in seventh grade special education classes. J.D.B. was escorted from his class and into a conference room. Present in the room were the police investigator, an assistant principal, a school resource officer and an intern. The door was closed, but not locked. No *Miranda* warnings were administered and the student was not offered the opportunity to speak to a parent or guardian prior to the commencement of questioning. Additionally, no parent or guardian was contacted prior to the student's removal from class. J.D.B. agreed to answer questions about recent break-ins, stating he had been in the neighborhood looking for work mowing lawns and initially denied any criminal activity. The assistant principal then encouraged him to "do the right thing" and tell the truth. The investigator questioned him further and confronted him with the fact that the camera had been found. When J.D.B. inquired if he would still be in trouble if he gave the items back, the investigator responded that it would be helpful, but that the matter was still going to court and that he may have to seek a secure custody order. J.D.B. then confessed. A trial court denied his motion to suppress. The Supreme Court of North Carolina held that a thirteen-year old special education student being questioned at school about a breaking and entering

and larceny in a subdivision was not in custody and was not entitled to Miranda protections. The Supreme Court granted cert to determine: Whether a court may consider a juvenile's age in a *Miranda* custody analysis in evaluating the totality of the circumstances and determining whether a reasonable person in the juvenile's position would have felt he or she was not free to terminate police questioning and leave?

2. ***Miranda*'s Application to Prisoners.** *Howes v. Fields*, 131 S. Ct. ___ (cert. granted Jan. 24, 2011); decision below at 617 F.3d 813 (6th Cir. 2010). Fields was serving a 45-day sentence for disorderly conduct, when a sheriff's deputy received a complaint that he had engaged in unrelated sexual conduct with a minor. The deputy went to the Sheriffs Department where Fields was being held to investigate the accusation. Fields was escorted from his cell in the holding area to a conference room in the administrative area of the Sheriffs Department. He was neither shackled nor handcuffed. The door to the conference room was not locked and was left open during part of the interview. Fields was not given *Miranda* warnings, but was told that, "I could leave whenever I wanted to." The deputy informed Fields that he was investigating a criminal sexual conduct case involving the victim. Fields, who holds a bachelor's degree in psychology and a master's degree in counseling, indicated that the victim visited his house frequently and that he was like a father-figure to him. The first several hours of the interview involved a general discussion about Fields and the victim, but halfway through the interview, the deputy confronted Fields with the allegations. Fields denied the accusations and attempted to present a timeline of events. According to the deputy, at one point Fields got out of his chair and began yelling at him. The deputy told Fields that he could return to his cell because he was not going to tolerate being talked to that way. Fields confirmed this incident, though he claimed the deputy told him to "sit my f---ing ass down" and that "if I didn't want to cooperate, I could leave." Fields did not ask to return to his cell, but instead sat back down and continued the interview. Fields acknowledged that he believed a jailer would have taken him back to his cell if he had asked. After several hours, Fields admitted to engaging in oral sex with the victim and manually masturbating the victim. State court decisions in Michigan determined that *Miranda* warnings were not necessary after considering the circumstances surrounding the questioning. The Sixth Circuit rejected the un-*Mirandized* statements and granted habeas relief, establishing a "bright-line" test for questioning prisoners under *Miranda*: Whenever a suspect who is incarcerated is questioned away from the general prison population about conduct that occurred outside the prison, *Miranda* warnings must be given regardless of the surrounding circumstances or whether the coercive pressures that *Miranda* was crafted to protect against are present. This is not a new rule, the Sixth Circuit held, but instead follows clearly established law, the Supreme Court's 42-year-old decision in *United States v. Mathis*, 391 U.S. 1 (1968). Question Presented: Whether the Supreme Court's clearly established precedent under 28

U.S.C. § 2254 holds that a prisoner is always "in custody" for purposes of *Miranda* any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison regardless of the surrounding circumstances?

3. **Silence Cannot Invoke Right to Silence.** *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010). After advising Thompkins of his *Miranda* rights police interrogated him about a shooting death. He acknowledged his rights, but neither waived nor invoked them. At no point did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. He was largely silent during the 3-hour interrogation, but near the end, he answered "yes" when asked if he prayed to God to forgive him for the shooting. He moved to suppress his statements, claiming that he had invoked his Fifth Amendment right to remain silent, that he had not waived that right, and that his inculpatory statements were involuntary. The trial court denied the motion. At his first degree murder trial, the prosecution called Eric Purifoy, who drove the van in which Thompkins and a third accomplice were riding at the time of the shooting, and who had been convicted of firearm offenses but acquitted of murder and assault. Thompkins' defense was that Purifoy was the shooter. Purifoy testified that he did not see who fired the shots. During closing arguments, the prosecution suggested that Purifoy lied about not seeing the shooter and pondered whether Purifoy's jury had made the right decision. Defense counsel did not ask the court to instruct the jury that it could consider evidence of the outcome of Purifoy's trial only to assess his credibility, not to establish Thompkins' guilt. The jury found Thompkins guilty, and he was sentenced to life in prison without parole. In denying his motion for new trial, the trial court rejected as nonprejudicial his ineffective-assistance-of-counsel claim for failure to request a limiting instruction about the outcome of Purifoy's trial. The Michigan Court of Appeals rejected both Thompkins' *Miranda* and ineffective-assistance claims. The federal district court denied habeas relief, reasoning that Thompkins did not invoke his right to remain silent, was not coerced into making statements during the interrogation, and that it was not unreasonable (under AEDPA) for the state court of appeals to determine that he had waived his right to remain silent. The Sixth Circuit reversed, holding that the state court was unreasonable in finding an implied waiver of Thompkins' right to remain silent and in rejecting his ineffective-assistance-of-counsel claim. In a 5-4 decision authored by Justice Kennedy, the Supreme Court held that the state court's decision rejecting Thompkins' *Miranda* claim was correct under *de novo* review and therefore necessarily reasonable under AEDPA's more deferential standard of review. In reaching this conclusion, the majority dramatically limited *Miranda*'s plain language by ruling that Thompkins' silence during the interrogation did not invoke his right to remain silent. Just as a suspect's *Miranda* right to counsel must be invoked "unambiguously," *Davis v. United States,* so too must the right to silence be invoked. If the accused makes an "ambiguous or

equivocal" statement or no statement, the police are not required to end the interrogation or ask questions to clarify the accused's intent. The Court concluded that there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel. Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked. The unambiguous invocation requirement results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity. Had Thompkins said that he wanted to remain silent or that he did not want to talk, he would have invoked his right to end the questioning. He did neither. The Court found that Thompkins waived his right to remain silent when he knowingly and voluntarily made a statement to police. Although a waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception" and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, such a waiver may be "implied" through a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." *North Carolina v. Butler*. If the State establishes that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver. Here, Thompkins waived his right to remain silent. First, the lack of any contention that he did not understand his rights indicates that he knew what he gave up when he spoke. Second, his answer to the question about God is a "course of conduct indicating waiver" of that right. Had he wanted to remain silent, he could have said nothing in response or unambiguously invoked his *Miranda* rights, ending the interrogation. That he made a statement nearly three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Third, there is no evidence that his statement was coerced: He does not claim that police threatened or injured him or that he was fearful; interrogation took place in a standard-sized room in the middle of the day; and there is no authority for the proposition that a 3-hour interrogation is inherently coercive. The fact that the question referred to religious beliefs also does not render his statement involuntary. The Court rejected the defendant's construction of the waiver rule – that even if his answer could constitute a waiver of his right to remain silent, the police were not allowed to question him until they first obtained a waiver – because a rule requiring a waiver at the outset would be inconsistent with the Court's previous holding that courts can infer a waiver "from the actions and words of the person interrogated." Any waiver, express or implied, may be contradicted by an invocation at any time, terminating further interrogation. When the suspect knows that *Miranda* rights can be invoked at any time, he or she can reassess his or her immediate and long-term interests as the interrogation progresses. After giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived *Miranda* rights. Thus, the police were not required to obtain a waiver of

Thompkins' *Miranda* rights before interrogating him. Finally, the Supreme Court rejected Thompkins' complaint of ineffective assistance of counsel because he could not establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland v. Washington*, considering "the totality of the evidence before the judge or jury" *Id.* Here, the Sixth Circuit did not account for the other evidence presented against Thompkins. Whether considered under a deferential standard or *de novo* review, Thompkins cannot demonstrate prejudice from his lawyer's failure to request a limiting instruction. Four justices dissented, led to by Justice Sotomayor (joined by Stevens, Ginsburg & Breyer), who wrote an impassioned dissenting opinion that contends the majority holding stands *Miranda* on its head.

B. Right to Counsel in Civil Proceedings Leading to Jail. *Turner v. Rogers*, 131 S. Ct. ___ (cert. granted Nov. 1, 2010); decision below 691 S.E.2d 470 (S.C. 2010). "Absent a knowing and intelligent waiver, no person may be imprisoned for any offense ... unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Moreover, the Due Process Clause has been held to require that in proceedings that may result in incarceration, "the [defendant] has a right to appointed counsel even though those proceedings may be styled 'civil' and not 'criminal.'" *Lassiter v. Department of Soc. Servs*., 452 U.S. 18, 25 (1981). In this case, petitioner Michael Turner, who is indigent, was incarcerated for twelve months after a family court judge found him in civil contempt of an order to pay child support for respondent Rebecca Price's minor child. Turner had no lawyer at the contempt hearing, and the family court never advised him of his right to counsel. On appeal, Turner challenged his incarceration under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Turner argued that, as an indigent defendant, he had a constitutional right to appointed counsel in civil contempt proceedings that result in incarceration. The Supreme Court of South Carolina rejected that argument on the ground that the right to counsel applies only in criminal contempt proceedings. Turner petitioned for cert, arguing that holding is in direct conflict with the decisions of twenty-two federal courts of appeals and state courts of last resort. Moreover, he argues, it is irreconcilable with the Court's holding in *Lassiter* that the Constitution requires appointment of counsel in any proceeding that may result in the defendant's incarceration, regardless whether the proceeding is civil or criminal. Question presented: Whether an indigent defendant has a constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration? In addition, the Supreme Court directed the parties to brief and argue: "Does the Supreme Court have jurisdiction to review the decision of the South Carolina Supreme Court?"

II. SEARCH & SEIZURE

A. Good Faith Exception to Exclusionary Rule. *Davis v. United States*, 131 S. Ct. ___ (cert. granted Nov. 1, 2010); decision below at 598 F.3d 1259 (11th Cir. 2010). Willie Gene Davis was stopped during a "routine traffic stop" in 2007. He was arrested for giving

a false name to the police officer. He was handcuffed and placed in the back of the police car. Davis had taken off his jacket and left it in the car. The police searched the car and his jacket, finding a revolver in one of the jacket pockets. Under the Eleventh Circuit's precedent interpreting *New York v. Belton*, the search of the vehicle incident to the arrest was at that time valid. Nevertheless, Davis moved to suppress the gun based on the Supreme Court's cert grant in *Arizona v. Gant*, 552 U.S. 1230 (2008), hoping to preserve its eventual holding in *Gant* that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." His motion to suppress was denied in the district court. After his conviction and sentence to 220 months in prison, Davis appealed, seeking to apply the *Gant* ruling to his pre-Gant search. Joining the Fifth and Tenth Circuits, the Eleventh Circuit upheld the district court's denial of the motion to suppress and held that "suppressing evidence obtained from an unlawful search is inappropriate when the offending officer reasonably relied on well-settled precedent." The Ninth Circuit has come to a contrary conclusion. Question presented: In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court created a good-faith exception to the exclusionary rule of the Fourth Amendment. The Court has expanded the good-faith exception over time, most recently in *Herring v. United States*, __ U.S.__, 129 S. Ct. 695 (2009). There has developed a deepening split in the lower courts over whether the good-faith exception applies to changing interpretations of law. Does the good-faith exception to the exclusionary rule apply to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional.

B. **Search of Dwelling – Police-Created Exigent Circumstances.** *Kentucky v. King*, 131 S. Ct. ___ (May 16, 2011). Police were conducting a buy-bust operation with a CI. Officers entered an apartment building in hot pursuit of a person who sold crack cocaine to the informant. They heard a door slam, but were not certain into which of two apartments the dealer fled. A strong odor of marijuana emanated from one of the doors, which prompted the officers to believe the dealer had fled into that apartment. The officers knocked on the door. They then heard noises which indicated that physical evidence was being destroyed. The officers entered the apartment and found large quantities of drugs. It was the wrong apartment; instead of finding a crack-selling drug dealer, they found a few pot-smokers sitting on the couch. The Kentucky Supreme Court held that this evidence should have been suppressed, ruling that (1) the exigent circumstances exception to the warrant requirement did not apply because the officers created the exigency by knocking on the door, and (2) the hot pursuit exception to the warrant requirement did not apply because the suspect was not aware he was being pursued. The Supreme Court reversed, 8-1, in a decision authored by Justice Alito. The Court held that the exigent circumstances exception to the Fourth Amendment warrant requirement applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. In ruling, the Court clarified the proper test for determining police-created exigent circumstances, overruling the test applied by Kentucky and various other tests

applied in the federal circuits. A warrantless entry based on exigent circumstances, the Court held, is reasonable when the police did not create the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment. This rule follows the principle that warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. The Court remanded to the Kentucky Supreme Court to determine whether an exigency existed under this test. Assuming an exigency did exist, the officers' conduct – banging on the door and announcing their presence – was entirely consistent with the Fourth Amendment. Justice Ginsburg was the sole dissenter, warning, "The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant."

C. Government Records.

1. Electronic Privacy. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). Quon, a SWAT officer, sued his employer in a federal civil rights action and for violations of the federal Stored Communications Act, after being disciplined because an audit of his city-owned pager revealed an inordinate amount of personal text messages. He claimed that persons who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer. The Supreme Court disagreed, holding that even if Quon had a reasonable expectation of privacy in his text messages, the city did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a general matter, warrantless searches "are per se unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule. The Court has earlier held that the "'special needs'" of the workplace justify one such exception. Under this precedent, when conducted for a "noninvestigatory, work-related purpos[e]"or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is "'justified at its inception'" and if "'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of'" the circumstances giving rise to the search. Here, the search that turned up Quon's excessive personal text messages was an audit of city-owned pagers designed to determine if the city's prepaid contract was insufficient for the volume of characters and messages legitimately used by its employees. The Supreme Court found that he search here satisfied the special needs standard and was reasonable under that approach.

2. Application of Exclusionary Rule to DMV Records. *Tolentino v. New York*, 131 S. Ct. ___ (cert. granted Nov. 15, 2010); decision below at 14 N.Y.3d 382 (2010), (**cert dismissed as improvidently granted, Mar. 29, 2011**). Jose

Tolentino was driving in Manhattan at 7:40 p.m. on New Year's Day 2005. Several New York City police officers stopped his vehicle because they believed he was playing his music too loudly. During the stop, they ascertained his identity and ran a computer check of his New York State Department of Motor Vehicles ("DMV") records. That check revealed that Tolentino's license had been suspended, and that he had received at least ten suspensions on at least ten different dates for failure to answer a summons or pay a fine. He was charged with one count of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree. Tolentino moved to suppress the DMV records, arguing that his vehicle was stopped by the police for no apparent reason, and that the police exploited this illegality to perform a DMV record search that resulted in the discovery that his driver's license had been suspended and had not been reinstated. The motion to suppress was denied because the New York courts found that DMV records are a type of identity-related evidence, and as such, are not subject to suppression. In support of this decision, the court cited the Supreme Court's Court's decision in *Immigration and Naturalization Service (INS) v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). In his petition for cert, Tolentino contends that this finding is based on a misreading of the *Lopez-Mendoza* case, and he notes a 4-3 circuit split among the federal circuits regarding the applicability of the exclusionary rule to pre-existing identity-related government records accessed through police action violative of the Fourth Amendment. Question presented by petitioner: Whether pre-existing identity-related governmental documents, such as motor vehicle records, obtained as the direct result of police action violative of the Fourth Amendment, are subject to the exclusionary rule? Question as rephrased by state: Whether the exclusionary rule applies to preexisting government records obtained after an allegedly unlawful traffic stop, where the only link between the two is that the police learned the petitioner's identity as a result of the stop? Post briefing and oral argument, the Supreme Court dismissed the cert as improvidently granted.

D. Pretext Material Witness Warrant to Detain and Investigate Terrorism Suspect. *Ashcroft v. Al-Kidd*, 131 S. Ct. ___ (cert. granted Oct. 18, 2010) (Justice Kagan recused); decision below at 580 F.3d 949 (9th Cir. 2010). Al-Kidd was arrested on a material witness warrant issued by a federal magistrate judge under 18 U.S.C. § 3144 in connection with a pending prosecution. He later filed a *Bivens* action against the former Attorney General of the United States, seeking damages for his arrest. Al-Kidd alleged that his arrest resulted from a policy implemented by the former Attorney General of using the material witness statute as a "pretext" to investigate and preventively detain terrorism suspects. In addition, respondent alleged that the affidavit submitted in support of the warrant for his arrest contained false statements. Ashcroft was denied absolute or qualified immunity in the lower court and petitioned for certiorari. The Supreme Court granted certiorari on two questions presented: (1) Whether the court of appeals erred in denying petitioner absolute immunity from the pretext claim; and, (2)Whether the court of appeals erred in denying petitioner qualified immunity from the pretext claim based on the

conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventively detaining the subject; and (b) this Fourth Amendment rule was clearly established at the time of respondent's arrest. The Supreme Court declined to grant review of the third question presented: Whether the former Attorney General may be held liable for the alleged false statements in the affidavit supporting the material witness warrant, even though the complaint does not allege that he either participated in the preparation of the affidavit or implemented any policy encouraging such alleged misconduct.

E. **Warrantless Interrogation of Child.** *Camreta v. Greene* and *Alford v. Greene*, 131 S. Ct. ___ (cert. granted Oct. 12, 2010); decision below at 588 F.3d 1011 (9th Cir. 2009). Child protective services and a local law enforcement agency received a report that a nine-year old girl was being sexually abused by her father. Based upon this report, a child protective services caseworker and a deputy sheriff interviewed the girl at her public school without first obtaining a warrant or parental consent. Splitting with the Fifth Circuit, which had held under similar circumstances that the traditional warrant/warrant exception analysis sets too high a threshold when investigating allegations of child abuse, the Ninth Circuit held the interview violated the girl's Fourth Amendment right to be free from "unreasonable" seizures absent a warrant, court order, exigent circumstances, or parental consent. The Ninth Circuit's holding relied on the Supreme Court's decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and concluded the balancing tests of *Terry v. Ohio* and *New Jersey v. T.L.O.* do not apply to in-school seizures conducted with law enforcement. The panel reasoned that *Ferguson* barred the application of the *Terry/T.L.O.* standard where "law enforcement personnel or purposes" are too deeply involved in a seizure. Thus, it held "the general law of search warrants applies to child abuse investigations" where law enforcement is involved and, absent a warrant or court order, exigent circumstances, or parental consent, S.G.'s interview was unconstitutional. Both the deputy sheriff and caseworker petitioned for cert. **Question presented by the deputy sheriff:** Does the Fourth Amendment require a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father? **Questions presented by the caseworker:** (1) To assess the constitutionality of the child's interview, the Ninth Circuit applied the traditional warrant/warrant-exception requirements that apply to seizures of suspected criminals. Should the Ninth Circuit, as other circuits have done, instead have applied the balancing standard that this Court has identified as the appropriate standard when a witness is temporarily detained? (2) The Ninth Circuit addressed the constitutionality of the interview in order to provide "guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment[,]" and it thus articulated a rule that will apply to all future child-abuse investigations. Is the Ninth Circuit's constitutional ruling reviewable, notwithstanding that it ruled in petitioner's favor on qualified immunity grounds?

III. CRIMES

A. Second Amendment Right to Bear Arms. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020 (2010). The Fourteenth Amendment incorporates the Second Amendment right of citizens to keep and bear arms for self-defense. The right recognized in *District of Columbia v. Heller* thus applies to the states, limiting laws that regulate gun possession.

1. Invitation to Challenge Constitutionality of Federal Body Armor Prohibition. *Alderman v. United States*, 131 S. Ct. ___ (**cert. denied** Jan 10, 2011). Justices Thomas and Scalia dissented from the denial of certiorari in a case that challenged the constitutionality of 18 U.S.C. § 11009(e)(2)(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." Justice Thomas' dissent, joined by Justice Scalia, argues that the court of appeals' "implic[it] assump[tion]" of the federal law's constitutionality, based on the 33-year-old case of *Scarborough v. United States*, 431 U.S. 563 (1977), effectively nullifies the Supreme Court's later sea-change decisions limiting Congress' police power under the Commerce Clause. *See Lopez v. United States*, 541 U.S. 549 (1995); *United States v. Morrison*, 529 S. Ct. 598 (2000). *Lopez* requires that a federal law is authorized under the Commerce Clause only if it regulates: (1) use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; or (3) "activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce." *Lopez* rejects a general federal police power under the Commerce Clause. The dissent contends that "*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 . . ." Such a law, according to the dissenting justices, trespasses on the states' rights and traditional state police powers. They caution that, "[i]f the Lopez framework is to have any continuing vitality, it is up to the Court to prevent it from being undermined by a 1977 precedent that does not squarely address the constitutional issue." This dissent is an obvious invitation for counsel to raise anew Commerce Clause challenges to this statute, and other felon-in-possession laws.

B. Tenth Amendment Limitations on Criminal Law – Standing. *Bond v. United States*, 131 S. Ct. ___ (cert. granted Oct. 12, 2010); decision below at 581 F.3d 128 (3d Cir. 2010). Petitioner admitted that she tried to injure her husband's paramour by spreading toxic chemicals on the woman's car and mailbox. Instead of allowing local officials to handle this domestic dispute, the federal prosecutor indicted petitioner under a federal law, 18 U.S.C. § 229(a), enacted by Congress to implement the United States' obligations under a 1993 treaty addressing the proliferation of chemical and biological weapons. Facing a sentence of six years in prison, petitioner challenged the statute as exceeding the federal government's enumerated powers and impermissible under the Tenth Amendment. After losing that argument in the district court, she pleaded guilty, reserving the right to

appeal her pretrial motions. Declining to reach petitioner's constitutional arguments, and in acknowledged conflict with decisions from other courts of appeals, the Third Circuit held that, when the state and its officers are not party to the proceedings, a private party has no standing to challenge the federal statute under which she is convicted as in excess of Congress's enumerated powers and in violation of the Tenth Amendment. In reaching this conclusion, the Third Circuit observed that the "courts of appeals are split on whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." The court of appeals recognized that the Seventh and Eleventh Circuits, relying on *New York v. United States*, 505 U.S. 144 (1992), have held that the "Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals," and so individuals have standing to raise Tenth Amendment objections. (quoting *Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999)). Nonetheless, the Third Circuit joined other circuits in deeming itself bound by the Supreme Court's decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939). In the Third Circuit's view, the "holding of Tennessee Electric" directly applies to the facts of Ms. Bond's case and is therefore "binding irrespective" of the Court's more recent precedents. Accordingly, recognizing that only the Supreme Court enjoys the prerogative of overruling its own precedents, the Third Circuit held that a private party lacks standing to pursue a Tenth Amendment challenge to a federal statute, "absent the involvement of a state or its officers as a party or parties" to the litigation. The Third Circuit deemed it significant that the state was "notably absent" from Ms. Bond's challenge and that Ms. Bond had not argued that her interests were aligned with those of the state. Bond petitioned for cert. In response to Bond's cert petition, the Solicitor General agreed that Bond had standing and that the decision of the court of appeals should be summarily reversed and remanded. Rather than simply GVR the case, the Supreme Court granted cert and set it for plenary argument. The question presented is: Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

C. Mail Fraud Law– Honest Services Prosecutions

1. Enron Fraud. *Skilling v. United States*, 130 S. Ct. 2896 (2010). In a decision written by Justice Ginsburg, the Court affirmed in part, reversed in part, and remanded, the conviction of Enron executive Jeff Skilling, who was convicted of, inter alia, mail fraud under an honest services theory. Rather than have an unconstitutionally vague mail fraud law, Justice Ginsburg's majority opinion limited the reach of the honest services prong of mail fraud statute to cases involving bribery and kickback schemes, Although the Court was unanimous on the honest services question, three Justices (Scalia, Thomas, and Kennedy) would have gone further, ruling that the honest services portion of the mail fraud law is unconstitutional. The Court rejected a challenge to fairness of the jury, which was exposed to extreme pretrial publicity. The actual holdings are: (1) Pre-trial

publicity and community prejudice did not prevent Skilling from having a fair trial. (2) The "honest services" statue covers only bribery and kickback schemes. Part of the opinion vacates the Fifth Circuit's ruling on Skilling's conspiracy conviction. In a dissent on the jury holding, Justice Sotomayor (joined by Stevens and Breyer) disagreed with the Court's conclusion that Skilling had a fair trial before an impartial jury.

2. **Conrad Black is Jeff Skilling's Beneficiary.** *Black v. United States*, 130 S. Ct. 2963 (2010). Following its ruling in *Skilling*, the Court unanimously vacated and remanded Conrad Black's conviction, again in an opinion by Justice Ginsburg, holding that *Skilling*'s limitation on the scope of honest services prosecutions renders incorrect the jury instructions given in this case. on The Court also held that "a criminal defendant [] need not request special interrogatories, nor need he acquiesce in the Government's request for discrete findings by the jury, in order to preserve in full a timely raised objection to jury instructions on an alternative theory of guilt." Justice Scalia concurred in part and in the judgment (joined by Justice Thomas). Justice Kennedy separately concurred in part and in the judgment

3. **Proof of Duty Owed by Public Official.** *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010). This case was simply GVR'd based on *Skilling*. It had presented an issue, which was left undecided: Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law?

D. **Aiding Terrorist Organization**. *Holder v. Humanitarian Law Project*. 130 S. Ct. 2705 (2010). Congress prohibited the provision of "material support or resources" to certain foreign organizations that engage in terrorist activity. 18 U.S.C. § 2339B(a)(1). That prohibition is based on a finding that the specified organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §301(a)(7), 110 Stat. 1247, note following 18 U. S. C. §2339B (Findings and Purpose). Plaintiffs sought pre-enforcement review of this criminal statute to permit them to provide support to two specified organizations, claiming that plaintiffs seek to facilitate only the lawful, nonviolent purposes of those organizations, and to prevent them from doing so violates the Constitution. "Plaintiffs challenge §2339B's prohibition on four types of material support—'training,' 'expert advice or assistance,' 'service,' and 'personnel.'" As to these activities, plaintiffs made three constitutional claims: (1) §2339B violates the Due Process Clause of the Fifth Amendment because these four statutory terms are impermissibly vague; (2) §2339B violates their freedom of speech under the First Amendment; (3) §2339B violates their First Amendment freedom of association. The Supreme Court

rejected plaintiff's claims 6-3, with Chief Justice Roberts writing for the majority, concluding that the material-support statute is constitutional as applied to the particular activities plaintiffs argued they wanted to pursue, to wit: providing support for the humanitarian and political activities of two of organizations in the form of monetary contributions, other tangible aid, legal training, and political advocacy. The Court did not address the resolution of more difficult cases that may arise under the statute in the future. Justice Breyer dissented (Ginsburg and Sotomayor joined). He agreed that the statute is not unconstitutionally vague, but disagreed on enforcement of the criminal sanction, "I cannot agree with the Court's conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations' lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government's compelling interest in combating terrorism. And I would interpret the statute as normally placing activity of this kind outside its scope."

E. Sufficiency of Federal Nexus in Federal Murder Conviction. *Fowler v. United States*, 131 S. Ct. ___ (cert. granted Nov. 15, 2010); decision below at 603 F.3d 883 (11th Cir. 2010). Fowler was convicted of murdering a Haines City Police officer with intent to prevent a him from communicating information about a federal offense to a federal law enforcement officer or judge of the United States, in violation of 18 U.S.C. § 1512(a)(1)(C). Fowler and others, including Gamble, had robbed a Holiday Inn and planned to rob a NationsBank the next day. They gathered in a vehicle at a cemetery, dressed in black. The vehicle contained masks, guns, and gloves. The police officer stumbled upon their vehicle and called in to his dispatcher that he was going to investigate a suspicious vehicle. He ordered the occupants from it, and he seemed to recognize one of the occupants. They eventually disarmed him and the officer was eventually found dead. Gamble cooperated and implicated Fowler in the killing. Fowler questions whether a defendant may be convicted of murder under §1512(a)(1)(C) without proof that information regarding a possible federal crime would have been transferred from the victim to federal law enforcement officers or judges.. The Eleventh Circuit affirmed Fowler's conviction even though there was no evidence that information allegedly obtained by the deceased officer on the date of his death would have been transferred to a federal law enforcement officer or judge. In the Eleventh Circuit's opinion, the "possible or potential communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C). Here, the federal nexus requirement was clearly satisfied . . . .These [the offenses which Fowler, Gamble, and others allegedly were perpetrating on the morning of the officer's killing] were all federal crimes and could have led to a federal investigation and prosecution. These facts adequately support Fowler's conviction for violating §1512(a)(1)(C)." This conflicts with the Second Circuit's holding in *United States v. Lopez*, 372 F.3d 86 (2d Cir. 2004), that the mere existence of a federal crime is not enough to convict a defendant under Section 1512(a)(1)(C). Question presented: Whether a defendant may be convicted of murder under 18 U.S.C.§ 1512(a)(1)(C)

without proof that information regarding a possible federal crime would have been transferred from the victim to federal law enforcement officers or judges.

F. Application of SORNA to Pre-Enactment Travel. *Carr v. United States*, 130 S. Ct. 2229 (2010). The Sex Offender Registration and Notification Act ("SORNA") was signed into law on July 27, 2006. Pub. L. 109-248 §§ 101-55, 120 Stat. 587. SORNA requires persons who are convicted of certain offenses to register with state and federal databases. *See* 42 U.S.C. § 16913(a). The law imposes criminal penalties of up to ten years of imprisonment on anyone who "is required to register * * * travels in interstate or foreign commerce * * * and knowingly fails to register or update a registration." 18 U.S.C. § 2250(a). On February 28, 2007, the Attorney General retroactively applied SORNA's registration requirements to persons who were convicted before July 27, 2006. 72 Fed. Reg. 8896, codified at 28 C.F.R. § 72.3. The two questions presented to the Court were: (1) Whether a person may be criminally prosecuted under § 2250(a) for failure to register when the defendant's underlying offense and travel in interstate commerce both predated SORNA's enactment. (2) Whether the *Ex Post Facto* Clause precludes prosecution under § 2250(a) of a person whose underlying offense and travel in interstate commerce both predated SORNA's enactment. Sidestepping the *Ex Post Facto* question, the Court ruled as a matter of statutory construction that section 2250 does not apply to sex offenders whose interstate travel occurred before SORNA's effective date. Writing for the majority, Justice Sotomayor found that the statute's words are written in the present tense, not the past or present perfect tense. Justice Scalia concurred, while Justice Alito dissented (joined by Thomas & Ginsburg).

IV. TRIAL

A. Speedy Trial – Tolling Time For Motions. *United States v. Tinklenberg*, 130 S. Ct. ___ (cert. granted Sept. 28, 2010) (Justice Kagan recused); decision below at 579 F.3d 589 (6th Cir. 2009). The Sixth Circuit held that the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(D), only excludes the time in which pretrial motions are filed and pending if they could possibly cause any delay of trial. The Supreme Court granted the government's petition for cert to decide: Whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, or is instead excluded only if the motion actually causes a postponement, or the expectation of a postponement, of the trial?

B. Confrontation

1. Victim's Statement Near Violent Crime Scene Not Testimonial Hearsay. *Michigan v. Bryant*, 131 S. Ct. ___ (Feb. 28, 2011) (Justice Kagan recused). Officers responding to a radio run that someone had been shot found Anthony Covington lying in a gas station outside his car–grabbing his sides in considerable pain, and blood oozing out of his stomach. When a police officer asked "what

happened," Covington responded that he had been shot, that somebody named "Rick" had shot him through a door, and he provided a description of his attacker. Officers described the victim as nervous and in obvious pain, constantly grabbing his side, and talking in a halting manner. After waiting with the victim for five or ten minutes until an ambulance arrived, an officer moved from the victim's location to the place identified as the scene of the shooting to attempt to locate and apprehend the shooter. Bryant was located there. The victim died several hours later. Covington's statements were admitted at Bryant's trial and he was convicted of second degree murder. On appeal, the Supreme Court of Michigan held that the Sixth Amendment's Confrontation Clause, as construed in *Crawford v. Washington*, 541 U. S. 36 (2004), and *Davis v. Washington*, 547 U. S. 813 (2006), rendered Covington's statements inadmissible testimonial hearsay, and the state court reversed Bryant's conviction. In a 5-1-2 decision authored by Justice Sotomayor, the Supreme Court reversed, holding that the circumstances of the interaction between Covington and the police objectively indicate that the "primary purpose of the interrogation" was "to enable police assistance to meet an ongoing emergency." *Davis*, 547 U. S., at 822. Therefore, Covington's identification and description of the shooter and the location of the shooting were not testimonial statements, and their admission at Bryant's trial did not violate the Confrontation Clause. In reaching this conclusion, the majority declared that the "primary purpose" inquiry required an objective evaluation of the circumstances and the parties' intent. Here, the setting for the statements was at or near a crime scene, not at a police station. The existence of an "ongoing emergency" encompasses not just the threat to the first victim, but to the public and to the first responders, and can depend on whether a gun is involved. In addition, the informality of the encounter is a factor that can distinguish it from a formal station house interrogation. The motives of a victim in speaking to police must be viewed objectively, by taking into consideration the actions of the police as first responders. The shooting victim's primary motives were not to establish past events potentially relevant to later criminal prosecution. Justice Thomas concurred in the result, but would have ruled based upon his view that the police questioning lacked sufficient formality and solemnity for the answers to be considered testimonial. Justice Scalia filed a blistering dissent, contending that the Court majority distorted the meaning of existing Confrontation Clause jurisprudence, leaving it in a shambles, and making the Court the "obfuscator of last resort." He found the police officers' explanation of an ongoing emergency implausible, rather the facts showed it was five officers conducting successive interrogations of a dying man and preserving his testimony regarding his killer. He sees the majority's decision as a dramatic curtailment of rights under the Confrontation Clause. Justice Ginsburg joined Justice Scalia's dissent, adding that she would have been prepared to decide the continuing viability of the dying declaration exception to the Confrontation Clause, post-*Crawford*, an exception that may have applied here except that prosecutors expressly abandoned the issue in this case.

2. **Blood Alcohol Report of Gas Chromatograph.** *Bullcoming v. New Mexico*, 130 S. Ct. ___ (cert. granted Sept. 28, 2010); decision below at 226 P.3d 1 (N.M. 2010). Acknowledging the Supreme Court's holding in *Melendez-Diaz v. Massachusetts*, the New Mexico Supreme Court held that a blood alcohol report was testimonial, but nevertheless concluded that its admission in a drunk-driving case did not violate the Confrontation Clause, because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine. Therefore, it held that the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation. The Supreme Court granted cert to decide: Whether it violates the Constitution's right to confront witnesses against the accused for a trial judge to admit the testimony of a crime lab supervisor to discuss a forensic test that the supervisor did not personally conduct or observe.

C. **Brady Violations.** *Connick v. Thompson*, 131 S. Ct. __ (Mar. 29, 2011). Prosecutors in the Orleans Parish District Attorney's Office hid exculpatory evidence, violating John Thompson's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Despite no history of similar violations, the office was found liable under § 1983 for failing to train prosecutors under a theory that inadequate training may give rise to municipal liability if it shows "deliberate indifference" and actually causes a violation. *See City of Canton v. Harris*, 489 U.S. 658, 389-91 (1978); *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-07 (1997). A pattern of violations is usually necessary to show culpability and causation, but, Thompson argued, in rare cases one violation may suffice. *Bryan County*, 520 U.S. at 409. The Supreme Court rejected this theory of liability and reversed in a 5-4 decision authored by Justice Thomas, holding that a district attorney's office may not be held liable under §1983 for failure to train its prosecutors based on a single *Brady* violation. The fact that prosecutors have gone to law school, learn ethics, are subject to bar sanctions for ethical breaches, and practice with other prosecutors who are skilled in ethical obligations is plenty enough for a prosecutor's office to escape civil liability for a single *Brady* breach. "In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law. *Bryan Cty*., 520 U. S., at 409. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain." The majority's naive understanding of criminal trial practice was rebutted in no uncertain terms by the dissenters (Justice Ginsburg, joined by Breyer, Sotomayor & Kagan), who challenged the unreal world view of the majority opinion, and recounted the deliberate indifference of the DA and his staff to a proper understanding of *Brady* obligations. To the dissenters, a single Brady violation, coupled with deliberate indifference to the obligation, is actionable under *City of Canton*. Justice Scalia concurred with the majority (joined by Alito) because prosecutors make mistakes and he cannot imagine what training might have prevented the *Brady* violation – mistake – in this case.

V. SENTENCING

A. ACCA Predicates

1. **Fleeing Police in a Vehicle.** *Sykes v. United States*, 130 S. Ct. ___ (cert. granted Sept. 28, 2010); decision below at 598 F.3d 334 (7th Cir. 2010). The Seventh Circuit held that "fleeing police in a vehicle in violation of Ind. Code § 35-44-3-3(b)(1)(A) is sufficiently similar to ACCA's enumerated crimes in kind, as well as the degree of risk posed, and counts as a violent felony under ACCA." The Supreme Court granted cert on the issue: Whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

2. **The Meaning of "Is."** *McNeill v. United States,* 131 S. Ct. ___ (cert. granted Jan. 7, 2011); decision below at 598 F.3d 161 (4th Cir. 2011). The Armed Career Criminal Act (ACCA) applies to a person who "violates section 922(g)" and "has three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). A "serious drug offense" is defined in relevant part as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more ***is prescribed by law***." § 924(e)(2)(A)(ii). The Fourth Circuit affirmed the district court's classification of McNeil's North Carolina drug offenses as "serious drug offenses" under ACCA, even though at the time of his federal sentencing, North Carolina's current sentencing law did not prescribe a maximum term of imprisonment of at least ten years for those state drug offenses. The Fourth Circuit held that since North Carolina did not apply its current sentencing law retroactively, the fact that McNeil's drug offenses were punishable by imprisonment for at least ten years under the version of the law in effect at the time he committed these offenses qualified them as "serious drug offenses" under ACCA. Question presented: Whether the plain meaning of "is prescribed by law" which ACCA uses to define a predicate "serious drug offense" requires a federal sentencing court to look to the maximum penalty prescribed by current state law for a drug offense at the time of the instant federal offense, regardless of whether the state has made that current sentencing law retroactive.

B. Mandatory Minimum Sentences.

1. **Consecutive Mandatory Minimums Under § 924(c).** *Abbott v. United States*, 131 S. Ct. ___ (Nov. 15, 2010) (Justice Kagan recused). A defendant is subject to a mandatory, consecutive sentence for a 924(c) conviction, and is not spared from that sentence by virtue of receiving a higher mandatory minimum on a different count of conviction. This decision resulted from the consolidated cert

petitions in *Abbott* and *Gould v. United States*. Abbott was convicted by jury on a 924(c) count and three others: two predicate trafficking counts, 21 U.S.C. §§ 841, 846, and being a felon in possession of a firearm, 18 U.S.C. § 922(g). Under ACCA, he was subject to a 15-year mandatory minimum sentence for his felon in possession conviction. The court sentenced him to 20 years, stacking the 15-year ACCA mandatory with the 924(c) 5-year mandatory. Gould pleaded guilty to one 924(c) offense and conspiracy to possess with intent to distribute cocaine base, which carried a 10-year mandatory minimum sentence under § 841(b)(1)(A). The district court sentenced him to 11 years and 5 months on the drug count and added the 924(c) 5-year mandatory to that for a total of 16 years and 5 months. Both argued that the additional 5-year mandatory in § 924(c) should not apply because of the language in the statute specifying that the 5-year mandatory shall be imposed as a consecutive sentence "[e]xcept to the extent that a greater minimum sentence is otherwise provided by [924(c) itself] or by *any other provision of law*." Justice Ginsburg's opinion for the unanimous 8-member Court disagreed, concluding that the "except" clause applies only to §924(c) and – according to a footnote without citation to any provision other than 18 U.S.C. § 3559(c) – that it "will" apply to other provisions imposing "a greater mandatory minimum for an offense that embodies all of the elements of a §924(c) offense." The Court reasoned that the "except" clause, added in 1998, was part of a bill dubbed "An Act [t]o throttle criminal use of guns." The bill's "primary objective" was "to expand § 924(c)'s coverage to reach firearm possession," following the Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995). The Court also reasoned that the interpretations of the clause offered by Abbott and Gould "would result in sentencing anomalies." Responding to Abbott and Gould's contention that the then-mandatory Guidelines would have resolved any disparities, the Court commented: "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." The Court also pointed to "syntax" and "strong contextual support" as reasons for its decision. Applying the rule of lenity was rejected in a footnote at the very end of the opinion. [Summary prepared by Laura Mate, Sentencing Resource Counsel].

2. **Cocaine Base vs. Powder.** *DePierre v. United States*, 131 S. Ct. ___ (cert. granted Oct. 12, 2010); decision below at 599 F.3d 25 (1st Cir. 2010). Title 21 U.S.C. § 841(b)(1)(A) requires the imposition of a ten-year mandatory minimum sentence upon persons who engage in a drug-related offense involving either (a) five kilograms or more of "coca leaves" or "cocaine," or (b) fifty grams (.05 kilograms) or more of those substances, or of a mixture of those substances, "which contain[] cocaine base." The question presented is whether the term "cocaine base" encompasses every form of cocaine that is classified chemically as a base–which would mean that the ten-year mandatory minimum applies to an offense involving 50 grams or more of raw coca leaves or of the paste derived

from coca leaves, but that 5000 grams of cocaine powder would be required to trigger the same ten-year minimum—or whether the term "cocaine base" is limited to "crack" cocaine. There is presently a circuit split on the question. The Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits have interpreted "cocaine base" to mean only crack, and, perhaps, other smokeable types of cocaine base. The First, Second, Third, Fourth, Fifth, and Tenth Circuits have held that "cocaine base" includes any form of cocaine qualifying chemically as a base.

C. Rehabilitation As a Permissible Sentencing Factor.

1. Post-Sentencing Good Behavior A Permissible Sentencing Factor at Resentencing. *Pepper v. United States*, 131 S. Ct. ___ (Mar. 2, 2011) (Justice Kagan recused). In 2003, Pepper pled guilty to conspiracy to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 846. With the benefit of the safety valve, Pepper's sentencing guidelines range was 97–121 months. The government moved for a 15% downward departure for substantial assistance. The district court went lower, however, sentencing Pepper to 24-months in prison, followed by 5 years supervised release, a 75% downward departure from the low end of the Guidelines range. The Government appealed and the Eighth Circuit reversed, in light of the intervening Supreme Court decision in *Booker*. Pepper completed his 24-month sentence three days after Pepper I was issued and began serving his term of supervised release. In 2006, the district court conducted a resentencing hearing at which Pepper presented evidence that he was no longer a drug addict, having completed a 500-hour drug treatment program while in prison; that he was enrolled in community college and had achieved very good grades; and that he was working part time. Pepper's father testified that he and his son were no longer estranged, and Pepper's probation officer testified that a 24-month sentence would be reasonable in light of Pepper's substantial assistance, postsentencing rehabilitation, and demonstrated low recidivism risk. The district court again sentenced Pepper to 24 months, granting a 40 percent downward departure based on Pepper's substantial assistance, and a further downward variance based on Pepper's rehabilitation since his initial sentencing. In Pepper II, the Eighth Circuit again reversed and remanded for resentencing, concluding that his postsentencing rehabilitation could not be considered as a factor supporting a downward variance, and directing that the case be assigned to a different district judge. The Supreme Court vacated Pepper II in light of the intervening Supreme Court decision in *Gall v. United States*. In Pepper III, the Eighth Circuit reversed and remanded again. At the second resentencing hearing, Pepper informed the new district judge that he was still in school, was about to be promoted at his job, and had married and was supporting his new family. Noting the nearly identical remand language of Pepper II and Pepper III, the court observed that it was not bound to reduce Pepper's range by 40 percent for substantial assistance. Instead, it found him entitled to a 20 percent reduction and refused to grant a further

downward variance for postsentencing rehabilitation. It imposed a 65-month prison term and 12 months of supervised release. In Pepper IV, the Eighth Circuit once again rejected Pepper's postsentencing rehabilitation argument. It also rejected his claim that the law of the case from Pepper II and Pepper III required the District Court to reduce the applicable Guidelines range by at least 40 percent. Finally, here, the Supreme Court reversed the Eighth Circuit, holding that when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now advisory federal sentencing guidelines range. Writing for a 7-1 (or 5-2-1) majority, Justice Sotomayor held that 18 U.S.C. § 3742(g)(2)–which by its terms prevents reliance on non-departure grounds at resentencing, thus necessarily rejecting consideration of post-sentence rehabilitation–is unconstitutional as a result of the Court's holding in *Booker*. Separately, the Supreme Court affirmed the Court of Appeals' ruling that the law of the case doctrine did not require the district court in this case to apply the same percentage departure from the Guidelines range for substantial assistance that had been applied at petitioner's prior sentencing. Justice Breyer concurred, coming close to dissent, in an opinion in which he expressed his disappointment about how really advisory guidelines now are and cautioning that, in his opinion, district judges cannot disregard the guidelines "at will." Justice Alito concurred with a similar theme, that although the guidelines are not binding, district courts must still give them significant weight. Justice Thomas dissented, contending that *Booker*'s advisory sentencing scheme went further than constitutionally necessary, and he therefore concluded that the sentencing statute should be followed as written. Despite the reservations of the concurrences and dissent, Justice Sotomayor's majority opinion includes five solid votes reiterating an advisory sentencing guidelines process.

2. Lengthening Initial Sentence to Improve Prospects of Rehabilitation. *Tapia v. United States,* 130 S. Ct. ___ (cert. granted Dec. 9, 2010); decision below at 376 Fed. App'x. 707 (9th Cir. 2010). Tapia was sentenced to 51 months imprisonment following her jury-trial conviction for bringing in an illegal alien for financial gain, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii), bringing in an illegal alien without presentation, in violation of 8 U.S.C. § 1324(a)(2)(B)(iii), aiding and abetting, in violation of 18 U.S.C. § 2, and bail jumping, in violation of 18 U.S.C. § 3146. In sentencing her, the district court stated that it was imposing a 51-month sentence, instead of the mandatory minimum 3 year sentence, to ensure Tapia would get the benefit of BOP's 500 Hour Drug Program. Tapia appealed, contending that the district court committed plain error by basing her 51- month sentence on speculation about whether and when Tapia could enter and complete the Bureau of Prison's 500-hour drug abuse treatment program. She relied upon the plain language of 18 U.S.C. § 3582(a), which provides: "The court in

determining whether to impose a term of imprisonment . . . shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that *imprisonment is not an appropriate means of promoting correction and rehabilitation*." The Ninth Circuit rejected her argument and affirmed, even though there is a circuit split on this question. *Compare United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007); *In re: Sealed Case*, 573 F.3d 844 (D.C. Cir. 2009), *with United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994); *United States v. Hawk Wing*, 433 F.3d 622, 629-30 (8th Cir. 2006); *United States v. Jimenez*, 605 F.3d 415, 424 (6th Cir. 2010). The Solicitor General agreed with Tapia's interpretation, but argued against a cert grant because (1) the issue was raised on plain error review and (2) the SG was in the process of advising courts of appeals about the correct application of 3582(a). The Supreme Court granted cert to determine "[w]hether 18 U.S.C. 3582(a) precludes a district court at an initial sentencing from considering a defendant's rehabilitative needs in setting the length of a term of imprisonment."

D. Timeliness of Order of Restitution. *Dolan v. United States*, 130 S. Ct. 2533 (2010). The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, provides that federal courts shall order restitution as part of the sentence in specified criminal cases. Section 3663A(d) further provides that an order of restitution "shall be issued and enforced in accordance with section 3664." Section 3664 in turn provides that if the victim's losses cannot be obtained prior to sentencing, "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. §3664(d)(5). This case presented the question: Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5). In a 5-4 decision, with Justice Breyer writing for the majority, the Supreme Court held that in some circumstances, a sentencing court that has missed the 90-day deadline for entering an order of restitution under the MVRA may nevertheless order restitution. The majority held that the deadline for ordering restitution under the Act is not jurisdictional and not a "claims processing" rule, but one that creates a time-related directive that is legally enforceable but does not necessarily deprive the judge of authority to act even when the deadline is missed. In this case, the sentencing court made clear its intent to order restitution before the expiration of the deadline, but did not have enough information to determine the amount. As a result, the fact that the judge "filled in the blank" on the actual amount of restitution three months after the deadline had passed did not violate the statute. In response to the defendant's concern about the appealability of a judgment that does not yet include the amount of restitution, the majority advises defendants to ask the district court to order restitution in a timely manner or seek mandamus if it does not. Chief Justice Roberts, joined by Justices Stevens, Scalia, and Kennedy dissented. They would hold that restitution must be ordered at the time of sentencing, if at all. With an actual exclamation point, Justice Roberts writes "[w]hat an odd procedure the Court contemplates!" to put the defendant in the position of having to ask the district court to impose a harsher sentence or to seek the drastic remedy of mandamus if he is worried about the finality of his judgment for

purposes of appeal. He also notes that this decision does not answer the question of the validity of a restitution order that is entered after the deadline where the district court had not expressed its intent to order restitution. [Summary supplemented by Jennifer Coffin].

E. Resentencing Pursuant to § 3582(c)

1. Retroactive Application. *Dillon v. United States*, 130 S. Ct. 2683 (2010). Proceedings under 18 U.S.C. § 3582(c)(2) (motions for sentence reduction base on retroactive Sentencing Guidelines amendments) are very limited and authorize only a limited adjustment in an otherwise final sentence. As a result, in a 7-1 decision, written by Justice Sotomayor, the Supreme Court held that neither *Booker*'s constitutional nor remedial holdings apply to proceedings under 18 U.S.C. § 3582(c). As such, the Sentencing Guidelines and its policy statements cannot be treated as advisory in § 3582(c)(2) proceedings. Thus, a district court must follow the mandate contained in U.S.S.G, § 1B1.10 that it impose a sentence within the amended Guidelines range unless the district court had initially imposed a sentence below the applicable Guidelines range. Finally, in light of the limited authority granted under § 3582(c)(2), a district court is not to seek to correct any other aspects of the sentence not affected by the retroactive amendment. Justice Stevens was the lone dissenter. Couched loosely in a separation-of-powers framework, he stated his view that the Commission's now mandatory policy statement at §1B1.10 "is unfaithful to Booker. It is also on dubious constitutional footing, as it permits the Commission to exercise a barely constrained form of lawmaking authority. And it is manifestly unjust." Justice Stevens also recognizes that the Commission may have exceeded its statutorily delegated authority by promulgating a binding policy statement in 2008. In some pointed criticisms of the Commission, he said that "[t]here can be no question that the purpose of the Commission's amendments to its policy statement in §1B1.10 was to circumvent the Booker remedy," and noted the Commission's "subtle threat" to discontinue making amendments retroactive if *Booker* applies to proceedings under 3582(c). After setting forth the facts of the case, including the heartbreaking fact that Percy Dillon's modified crack sentence is still 17-1/2 years longer than the district court thought would serve the purposes of sentencing, Justice Stevens writes: "Given the circumstances of his case, I can scarcely think of a greater waste of this Nation's precious resources. *Cf. Barber v. Thomas, ante*, at ___ (2010) (slip op., at 1) (KENNEDY, J., dissenting) ('And if the only way to call attention to the human implications of this case is to speak in terms of economics, then it should be noted that the Court's interpretation comes at a cost to the taxpayers of untold millions of dollars'). Dillon's continued imprisonment is a truly sad example of what I have come to view as an exceptionally, and often mindlessly harsh, punishment scheme." It should be noted that the majority said that it did not address Justice Stevens' separation-of-powers argument because it was "not fairly encompassed within the questions presented and was not briefed by the parties." [Adapted from

summary prepared by Jennifer Coffin].

2. **Impact of Binding Plea Agreement on Applicability of § 3582(c)**. *Freeman v. United States*, 130 S. Ct. ___ (cert. granted Sept. 28, 2010); decision below at 355 Fed. Appx. 1 (6th Cir. 2009). Freeman and another defendant, Goins, entered guilty pleas in a crack case with a binding plea agreement approved under Fed. R. Crim. P. 11(c)(1)(C). Following the 2007 amendment of the crack guidelines, they sought the retroactive benefit of that change under the authority of 18 U.S.C. § 3582(c)(2). The Sixth Circuit held that § 3582(c) relief is inapplicable here, following its binding precedent in *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004). The defendants, it held, were not entitled to relief under § 3582(c)(2) because the original sentence was imposed pursuant to a binding plea agreement under Rule 11(c)(1)(C) and resentencing was not necessary to "prevent a miscarriage of justice." The Supreme Court granted cert to decide the question: Whether a criminal defendant convicted of a crack cocaine offense is eligible for a reduced sentence under 18 U.S.C. § 3582(c) based on retroactive amendments to the crack Guidelines where the defendant entered into a plea agreement that included a specific agreed-upon sentence that exceeded both the initial advisory sentencing range and the amended advisory sentencing range?

F. Good Time Credit. *Barber v. Thomas*, 130 S. Ct. 2499 (2010). The federal good time credit (GTC) statute 18 U.S.C. § 3624(b)(1), provides for credits "up to 54 days at the end of each year of the prisoner's term of imprisonment." Throughout federal sentencing statutes, and elsewhere in the same sentence, "term of imprisonment" means the sentence imposed. However, the Bureau of Prisons (BOP) interprets "term of imprisonment" as unambiguously meaning time served. For each year of a sentence imposed, the BOP interpretation results in seven fewer days of available credits. The Supreme Court rejected a challenge by federal prisoners to the method used by the Bureau of Prisons to calculate such "good time" sentence reductions. The majority decision (Breyer, Sotomayor, Roberts, Scalia, Thomas & Alito sided with the BOP calculation, finding it best fit the "natural reading" of the law. The dissenters (Kennedy, Stevens and Ginsburg), would have rejected the BOP calculations and adopted a modified version of the calculation proposed by the prisoners.

VI. CIVIL COMMITMENT

A. Standing to Posit Tenth Amendment Challenge to SORNA. *Reynolds v. United States*, 131 S. Ct. ___ (cert. granted Jan. 24, 2011); decision below at 380 Fed. App'x. 125 (3d Cir. 2010). Reynolds was convicted of violating a 2006 federal sex offender law. In an interim rule, the Attorney General thereafter applied SORNA, 18 U.S.C. § 2250, to those convicted before passage of SORNA. Reynolds pleaded guilty to one count of knowingly failing to register and update a registration, in violation of SORNA, but reserved challenges to the constitutionality of SORNA and the legality of the Attorney General's

Interim Rule implementing that law. The Third Circuit rejected his Tenth Amendment challenge to the interim rule, claiming he lacked standing to raise it. The Supreme Court granted cert on that question: Does Reynolds have standing under the plain reading of the SORNA statute to raise claims concerning the Attorney General's interim rule and is review by this court is needed to resolve the circuit conflict on this question.

VII. IMMIGRATION CONSEQUENCES

A. Federal Misdemeanor as an Aggravated Felony. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). In this context, the Supreme Court held that an alien's second state simple drug possession conviction did not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43) where the state conviction was not based on the fact of a prior conviction. The Court rejected the government's position that conduct punishable as a felony should be treated as the equivalent of a felony conviction when the underlying conduct could have been a felony under federal law. Here, state law, like federal law, allowed for a second simple possession to be prosecuted as a felony under a recidivist enhancement. However, the state case was prosecuted as a simple possession without any reference to the prior conviction. The Court stressed that the actual conviction was the focus of the analysis and not what might have or could have been charged. Although this is an immigration case, the decision is applicable to sentencing illegal reentry cases under U.S.S.G. § 2L1.2, which contains an 8-level increase where the defendant was deported after "a conviction for an aggravated felony," and the section defines aggravated felony based on "the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)." *See* U.S.S.G. § 2L1.2, comment. n.3(A).

B. Impermissible Gender Discrimination. *Flores-Villar v. United States*, 130 S. Ct. 2428 (cert. granted Mar. 22, 2010) (Justice Kagan recused); decision below at 536 F.3d 990 (9th Cir. 2008). Petitioner was arrested by border patrol in San Diego as he was waiting for a bus. Although Petitioner was born in Tijuana, Mexico, his father, Ruben Trinidad Flores-Villar, is a United States citizen and has been since birth. Petitioner's father also resided in the United States for at least ten years prior to Petitioner's birth. However, at the time Petitioner was born, his father was only sixteen years old. When Petitioner was only two months old, his father and his paternal grandmother (who is also a United States citizen since birth) brought him to the United States in order to receive medical treatment at University Hospital in San Diego. Shortly thereafter, University Hospital sent a letter to the border authorities requesting a permit for Petitioner to enter the United States. The letter was written on behalf of Petitioner's father. At the time of his release from the hospital, Petitioner's biological mother signed a form authorizing him to be released to his paternal grandmother for adoption planning. Petitioner grew up in the San Diego area with his father and his paternal grandmother and attended San Diego area schools. In fact,

Petitioner had almost no contact with his biological mother. Although Ruben Trinidad Flores-Villar is not listed on Petitioner's birth certificate, he formally recognized him as his son by filing an acknowledgment of paternity with the civil registry in Tijuana, Mexico in 1985, when Petitioner was eleven years old. Petitioner's father also claimed Petitioner as his son on his income taxes. In 2006, Petitioner filed an N-600 application seeking a Certificate of Citizenship, but it was denied because his father was only 16 at Petitioner's birth, so he could not meet the requirement that he resided in the U.S. for five years after the age of 14. The district judge in the criminal case granted the government's motion *in limine*, preventing Petitioner from proving derivative citizenship, to which Petitioner objected on Equal Protection grounds. Petitioner argued that the former versions of 8 U.S.C. §§ 1401 and 1409 violated the guarantee of Equal Protection contained in the Due Process Clause of the Fifth Amendment because they imposed substantial residence burdens on the fathers of out-of-wedlock children born abroad as prerequisites to passing U.S. citizenship to the child while at the same time imposing only a minimal burden on similarly situated women. The prerequisites for men are so severe that it was impossible for Petitioner's father to qualify, yet Petitioner would be a citizen if his mother, not his father, had been a U.S. citizen. Petitioner was eventually convicted (on stipulated facts) of the section 1326 charge, and the court of appeals affirmed, relying primarily on the Supreme Court's decision in *Nguyen v. INS*, but that case approved distinctions that were biologically based: by delivering a child, a woman necessarily had strong evidence of parentage and at least an opportunity to form a relationship with the child. By requiring the father to take a formal act prior to the child's 18th birthday, the statutory scheme provided the evidence and opportunity that biology had guaranteed the mother. The residence requirements posed by the instant scheme have no biological basis: there is no reason to believe that mothers are more adept at forming ties to the United States than are fathers. Question presented: Whether the Court's decision in *Nguyen v. Immigration and Naturalization Service* (2001) permits gender discrimination that has no biological basis?

VIII. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2241, 2254 AND 2255

A. Timeliness of Filing Federal Petition.

1. Successful Habeas Does Not Count. *Magwood v. Patterson*, 130 S. Ct. 2788 (2010). When a criminal defendant succeeds in having his original sentence overturned, a later habeas petition challenging his new sentence should be treated as a first petition (not as a "second or successive" petition), even if it raises grounds that could have (but were not) made against the original sentence. Justice Thomas wrote on behalf of the majority (joined by Justices Stevens, Scalia, Breyer, and Sotomayor), explaining that under the text of the federal habeas statute, when a prisoner is resentenced and appeals the new sentence, he is challenging a different judgment than was challenged in his prior habeas petition. Justice Kennedy dissented (joined by the Chief Justice and Justices Ginsburg and Alito).

2. **Equitable Tolling of AEDPA Limitation Period Due to Misconduct of Counsel.** *Holland v. Florida*, 130 S. Ct. 2549 (2010). In a 7-2 vote, with Justice Breyer writing for the majority, the Court reversed the Eleventh Circuit's decision that the petitioner's case did not constitute "extraordinary circumstances" for purposes of equitable tolling under the AEDPA. This was not a claim of "garden variety" attorney negligence, but attorney misconduct. In this case, the attorney missed the filing deadline and failed to communicate, to put it briefly. The majority rejected the district court's finding that the petitioner had not acted diligently, as the record showed that he had diligently pursued his rights by writing his attorney, providing research, repeatedly asking that the attorney be removed from his case, and finally filing his own federal habeas petition on the day he found out the filing period had expired. It also rejected the Eleventh Circuit's rigid per se rule for "extraordinary circumstances," which it found to be difficult to reconcile with general equitable principles and because it fails to recognize that sometimes an attorneys unprofessional conduct can be so egregious that it constitutes extraordinary circumstances warranting equitable tolling. Because the Eleventh Circuit had relied on an erroneous test, the Court remanded the case for further proceedings. Justice Alito filed an opinion concurring in part and concurring in the judgment. Justices Scalia filed a dissenting opinion, joined by Justice Thomas except Part I. [Summary by Jennifer Coffin].

3. **Tolling AEDPA Time with Sentence-Reduction Motion.** *Wall v. Kholi*, 131 S. Ct. ___ (Mar. 7, 2011). Kholi was convicted in 1993 of ten counts of sexual assault for molesting his stepdaughters. He was sentenced to six concurrent life sentences, consecutive to four concurrent life sentences. The Rhode Island Supreme Court affirmed his conviction in 1996. Rather than seek review on rehearing or a cert petition to the Supreme Court, Kholi filed a motion to reduce his sentence in the state trial court, as permitted by a state rule of criminal procedure. The trial court denied the motion in 1996 and the denial was affirmed by the state supreme court in 1998. Between the time he filed the motion for sentence reduction and the time it was finally ruled upon by the state supreme court, in 1997 Kholi filed a state motion for postconviction relief; it was denied by the trial court in 2003 and affirmed by the state supreme court in 2006. Nearly nine months later, in 2007, Kholi filed a federal habeas corpus petition. The Supreme Court held unanimously that Kholi's federal habeas petition was timely because his motion in state court to reduce his sentence tolled the federal statute of limitations period. Although his motion to reduce sentence was not a motion for conviction relief, and was essentially a plea for clemency, it qualified as "collateral review" for purposes of tolling AEDPA's one-year statute of limitations for federal habeas petitions. The Court relied, inter alia, on its own use of the words "collateral" and "review" in prior court opinions. The Court held that "the phrase 'collateral review' in §2244(d)(2) means judicial review of a judgment in a

proceeding that is not part of direct review."

4. **Indeterminate Time Limit Can Be A State Procedural Bar.** *Walker v. Martin*, 131 S. Ct. ___ (Feb. 28, 2011). California does not have a specific time limit for collaterally attacking a conviction. Under California state law, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition. The Ninth Circuit held that California's undefined standard of "substantial delay" – used to evaluate the timeliness of a non-capital habeas corpus petition – is so vague that it is inevitably applied in a fundamentally inconsistent manner and is therefore inadequate to serve as a procedural bar to federal review, and that the state failed to prove a consistent application of the rule in other cases. The Supreme Court reversed 9-0. Writing for the unanimous Court, Justice Ginsburg found California's indeterminate timeliness requirement does qualify as an independent state ground adequate to bar habeas corpus relief in federal court. On this record, the Court found no basis to conclude that California's rule operates to the particular disadvantage of federal habeas petitioners. Despite its holding, the Court cautioned that the ruling leaves unaltered the Court's repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights.

B. Cause and Prejudice to Excuse Procedural Default. *Maples v. Thomas*, 131 S. Ct. ___ (cert granted Mar. 21, 2011); decision below at 586 F.3d 879 (11th Cir. 2009). Convicted of murder and sentenced to death, Maples lost his direct appeal in Alabama state court. He filed a state collateral attack arguing ineffective assistance of trial counsel. He was represented pro bono on this motion by a large New York law firm. The motion was denied, and a copy of the decision was sent to the attorneys, but was returned by a law firm mail clerk because the pro bono lawyers had left the firm. No timely appeal was filed. Maples then filed a federal 2254 petition, raising ineffective assistance of trial counsel. The Eleventh Circuit held, in a split 2-1 decision, that the failure to file timely appeal was a procedural default of the ineffectiveness claim, thus precluding federal review. A claim that is procedurally defaulted in state court may still be heard in federal habeas review by a showing of "cause" and "prejudice," *see generally*, *Murray v. Carrier*, 477 U.S. 478, 485-86 (1986). But the court of appeals held that since Maples was represented by counsel, he could properly be held accountable for their default. In effect, the Eleventh Circuit's decision held that Alabama may execute a state inmate without any federal court review of the merits of serious constitutional claims because of a missed filing deadline that indisputably occurred through no fault of petitioner and after the State failed to take any action when court orders mailed to petitioner's lead attorneys of record were returned to a court clerk unopened with "Return to Sender--Left Firm" written on an envelope. The Supreme Court granted cert on the second of two questions presented: Whether the Eleventh Circuit properly held–in conflict with the decisions of the Supreme Court and other courts–that there was no "cause" to excuse any procedural default where

petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default. The first question–on which cert was not granted– raised the adequacy of the state procedural bar in these circumstances.

C. Deference to State Court Determinations

1. State Parole Decisions. *Swarthout v. Cooke*, 131 S. Ct. ___ (Jan 24, 2011) (per curiam). A state's decision to create a system of parole is a *state* liberty interest. There is no federal constitutional right to be released before a state sentence is fully served and states have no duty to offer parole to their prisoners. The federal Constitution only requires that any created parole procedures are fair – providing an opportunity to be heard and a statement of reasons for parole denial. Moreover, no decision of the Supreme Court converts the California procedure – requiring "some evidence" to support a denial of parole – into a substantive federal requirement allowing habeas relief.

2. Too Much Deference. *Jefferson v. Upton*, 130 S. Ct. 2217 (2010) (per curiam). Jefferson, who had been sentenced to death, claimed in both state and federal courts that his lawyers were constitutionally inadequate because they failed to investigate a traumatic head injury that he suffered as a child. The state court rejected that claim after making a finding that the attorneys were advised by an expert that such investigation was unnecessary. Under the governing federal statute, that factual finding is presumed correct unless any one of eight exceptions applies. 28 U.S.C. §§ 2254(d)(1)–(8) (1994). But the Eleventh Circuit considered only one of those exceptions (specifically §2254(d)(8)). And on that basis, it considered itself "duty-bound" to accept the state court's finding, and rejected Jefferson's claim. The Supreme Court vacated that ruling and remanded for reconsideration because the Eleventh Circuit's decision did not fully consider several remaining potentially applicable exceptions.

D. What is "Clearly Established Federal Law."

Greene v. Fisher, 131 S. Ct ___ (cert. granted Apr. 4, 2011); decision below at 606 F.3d 85 (3d Cir. 2010). For purposes of adjudicating a state prisoner's petition for federal habeas relief, what is the temporal cutoff for whether a decision from the Supreme Court qualifies as "clearly established Federal law" under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996? This case presents the question reserved last Term in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010): Whether a decision from the Supreme Court announced before a state prisoner's conviction became final but after his last state-court decision on the merits constitutes "clearly established Federal law" for purposes of AEDPA. The Third Circuit, acknowledging that it was creating a circuit split, held here that it does not.

E. Ineffectiveness of Counsel.

1. Remedy, If Any, For IOC In Plea Negotiations Followed By Fair Trial or Guilty Plea.

a. Subsequent Fair Trial. *Lafler v. Cooper*, 131 S. Ct. ___ (cert. granted Jan. 7, 2011); decision below at 376 Fed. App'x 563 (6th Cir. 2010). Cooper faced assault with intent to murder charges. His counsel advised him to reject a plea offer based on a misunderstanding of Michigan law. Cooper rejected the offer, and he was convicted as charged. Cooper does not assert that any error occurred at the trial. On habeas review, the Sixth Circuit found that because there is a reasonable probability that Cooper would have accepted the plea offer had he been adequately advised, his Sixth Amendment rights were violated. The writ was conditioned on Michigan re-offering the plea agreement. The question presented is: (1) Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial. A second question was added by the Court when cert was granted:(2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

b. Subsequent Less-Favorable Plea. *Missouri v. Frye*, 131 S. Ct. ___ (cert. granted Jan. 7, 2011); decision below at 311 S.W.3d 350 (Mo. Ct. App. 2010). Questions presented (1) Contrary to the holding in *Hill v. Lockhart*, 474 U.S. 52 (985)– which held that a defendant must allege that, but for counsel's error, the defendant would have gone to trial–can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms? Again, the Supreme Court added a second question: (2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

2. Erroneously Narrow Application of Prejudice Prong.

Sears v. Upton, 130 S. Ct. 3259 (2010) (per curiam). Georgia courts misapplied the "prejudice" prong of an ineffective assistance of counsel claim when they reasoned that because counsel presented "some" mitigation evidence at the penalty phase of Sears' trial, they could not speculate as to how additional evidence, later uncovered, regarding Sears' upbringing and mental handicaps, would have changed the outcome. The

Court remanded the case to allow the Georgia courts to reweigh the new evidence.

3. **Failure to Investigate Blood Evidence; Deference Due to Summary State Court Rulings.** *Harrington v. Richter*, 131 S. Ct. ___ (Jan. 19, 2011). (Justice Kagan recused). AEDPA deference applies to a state court's summary disposition of a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Nothing in the text of §2254(d)(1) – which refers to a "decision" resulting from an adjudication" – requires a statement of reasons. Where the state court decision has no explanation, the habeas petitioner must still show there was no reasonable basis for that state court to deny relief.

4. **Failure to File Suppression Motion; Standards for Granting Habeas.** *Premo v. Moore*, 131 S. Ct. ___ (Jan. 19, 2011) (Justice Kagan recused); Randy Moore and two others assaulted Kenneth Rogers, bound him with duct tape, forced him into the trunk of a car, drove him to a remote location and killed him with a single shot to the head. Before being charged, Moore confessed to his brother and friend, then to police, but he claimed the shooting was accidental. In addition, he consistently admitted to his attorney that he shot Rogers during a kidnaping and assault. Moore was charged with felony murder, kidnaping and assault, but his defense counsel negotiated a no contest plea to an information charging one count of murder with a firearm. He was sentenced to the mandatory minimum 300-month sentence with lifetime supervised release. In collateral review, Moore alleged that his counsel had been ineffective for failing to move to suppress his confession to police. In response, defense counsel told the state court that he did not move to suppress that confession because the state still had two other confessions to prove its case. Oregon courts denied Moore's claims. On federal habeas, the district court ruled that Moore's confession was involuntary, but that his counsel's inaction was reasonable; moreover, Moore was not prejudiced because he would have pleaded no contest regardless. The Ninth Circuit reversed, ruling that Moore's counsel acted unreasonably and that Moore was prejudiced by ineffective counsel. In so ruling, the Ninth Circuit held that *Arizona v. Fulminante* is the "clearly established" federal law to review IAC claims based on failure to move to suppress a confession. The Supreme Court reversed 8-0. Writing for the unanimous Court, Justice Kennedy found that the state court's decision was not an unreasonable application of the *Strickland* rule and that *Fulminante* does not alter that result. *Fulminante*, Justice Kennedy reminded, was about an established Fifth Amendment violation – admitting an involuntary confession – but it says nothing about the *Strickland* standard of effectiveness of counsel. "The *Fulminante* prejudice inquiry presumes a constitutional violation, whereas *Strickland* seeks to define one." Here, even if the confession was suppressed, there was still significant other evidence to support a conviction. As a result, it was not unreasonable for the state court to find that counsel's

recommendation of a pleas negotiation was an acceptable strategic choice.

5. **Failure to Present Ineffectiveness of Counsel Issue to State Court.** *Cullen v. Pinholster*, 131 S. Ct. ___ (Apr. 4, 2011). A federal habeas court may not overturn as "unreasonable" a state court determination that trial counsel was effective by relying on evidence that was never presented to the state court. A divided Supreme Court held that federal court review of state court decisions is limited by AEDPA to the evidence that was presented to the state court that first heard the claim. Federal courts must not consider new evidence first presented in federal court, and instead may grant habeas relief pursuant to § 2254(d)(1) only if the state court decision was unreasonable in light of the evidence it had before it at the time of a petitioner's claim. Justice Alito concurred in the judgment, disagreeing with the broad rule, but finding that in this case petitioner had not properly presented the evidence instate court. Justice Breyer concurred in part and dissented in part. Justices Sotomayor, Ginsburg and Kagan dissented.

F. DNA in Habeas and 1983 Proceedings

1. **Getting Access to DNA in § 1983 Proceedings.** *Skinner v. Switzer*, 131 S. Ct. ___ (Mar. 7, 2011). For ten years, Skinner has sought access to DNA testing that could prove him innocent of the murders that landed him on Death Row. After the Texas courts arbitrarily turned back his diligent attempts to take advantage of state statutes affording such relief, he sued in federal court under 42 U.S.C. § 1983 to vindicate his due process right to "'fundamental fairness in [the] operation'" of Texas's scheme. The district court dismissed Skinner's § 1983 suit solely on the ground that his claim sounded only in habeas corpus, and the Fifth Circuit summarily affirmed. The Supreme Court reversed, 6-3, holding that "a postconviction claim for DNA testing is properly pursued in a § 1983 action."

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