**SEMINAR FOR FEDERAL DEFENDERS**
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# SUPREME COURT UPDATE

**CRIMINAL CASES DECIDED OR SCHEDULED FOR REVIEW DURING 2007-09**
**THRU MAY 13, 2008**


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## I. RIGHT TO COUNSEL

A. **Pre-Indictment Preliminary Hearing.** *Rothgery v. Gillespie County, TX*, 128 S. Ct. 714 (cert. granted Dec. 3, 2007); decision below at 491 F.3d 293 (5th Cir. 2007). Rothgery was arrested without a warrant and booked into jail on suspicion he was a felon in possession of a gun. Apparently unknown to the arresting officer, there was no underlying felony because that earlier charge had been dismissed after the defendant completed a diversionary program. The arresting officer filed with the magistrate an affidavit supporting probable cause (based on his misinformation about the prior felony). *See Gerstein v. Pugh*, 420 U.S. 103, 111 (1975). Rothgery claims he inquired of the magistrate about appointed counsel, and he was told that if he wanted counsel his bail and probable cause hearings would be delayed until counsel could be appointed; or, in the alternative, he could waive counsel for these hearings and the hearings would go forward. Given those options, Rothgery waived counsel temporarily. The magistrate found probable cause and held Rothgery. Later, he was released on bond. A grand jury indicted him for the felon-in-possession charge. Post-indictment, a lawyer was appointed, investigated the nonexistent prior conviction, and was able to have the erroneous charges dismissed. Rothgery filed a § 1983 action, alleging he was denied appointed counsel pre-indictment, but the Fifth Circuit held that he was not entitled to counsel at that stage because adversary criminal proceedings were not commenced by the officer's filing of an affidavit of probable cause. The Supreme Court granted cert to consider the right to counsel in proceedings before a prosecutor is involved in the case: "Whether the Fifth Circuit correctly held . . . that adversary judicial proceedings . . . had not commenced, and petitioner's Sixth Amendment rights had not attached, because no prosecutor was involved in

petitioner's arrest or appearance before the magistrate" in light of the Supreme Court's clear statements that "[t]he Sixth Amendment right to counsel attaches when 'adversary judicial proceedings have been initiated.' *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) . . . . [and] when a defendant is arrested, 'arraigned on [an arrest] warrant before a judge,' and 'committed by the court to confinement,' '[t]here can be no doubt … that judicial proceedings ha[ve] been initiated.' *Brewer v. Williams*, 430 U.S. 387, 399 (1977)."

B. **Right to No Counsel.** *Indiana v. Edwards*, 128 S. Ct. 741 (cert. granted Dec. 7, 2007); decision below at 866 N.E.2d 252 (Ind. 2007). Ahmad Edwards was tried for attempted murder, battery with a deadly weapon, criminal recklessness and theft following a shooting incident outside a store where he had shop-lifted a pair of shoes. He sought to represent himself but the trial judge found him not competent to do so. He had earlier been declared incompetent, but was later found to have his competency restored following a stay at a state mental hospital. The Indiana Supreme Court ruled he had a right to act as his own defense counsel. Indiana argues that the states should be allowed to impose a higher standard for measuring competency to represent oneself at trial than the Supreme Court has specified for measuring competency to stand trial. Under U.S. Supreme Court precedent, in *Dusky v. United States*, the Court has held that the standard for competency to stand trial is whether the accused "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him." Question presented: May States adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?

## II. SEARCH & SEIZURE

### A. Vehicles Stops

1. **Suppression Under Federal Exclusionary Rule for Violation of State Arrest Law.** *Virginia v. Moore*, 128 S. Ct. 1598 (2008). Rather than issuing the summons required by Virginia law, police arrested Moore for the misdemeanor of driving on a suspended license. A search incident to the arrest yielded crack cocaine, for which Moore was charged and tried. The trial court declined to suppress the evidence on Fourth Amendment grounds. The Virginia Supreme Court reversed, reasoning that the search violated the Fourth Amendment because the arresting officers should have issued a citation under state law, and the Fourth Amendment does not permit search incident to citation. In a unanimous decision written by Justice Scalia, the U.S. Supreme Court reversed, holding that police did not violate the Fourth Amendment when they made an arrest that was based on probable cause but prohibited by state law, or when they performed a search incident to the arrest. A unanimous Supreme Court found no historical support for the notion that the Founders intended to incorporate statutes into the Fourth Amendment; neither the common law nor statutes of the Founding era

support the defendant's contention. Where history does not provide a conclusive answer, the Court analyzes a search or seizure in light of traditional reasonableness standards "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U. S. 295, 300 (1999); see *Wilson v. Arkansas*, 514 U. S. 927, 931 (1995). Applying that methodology, the Court has previously held that when an officer has probable cause to believe a person committed even a minor crime, the arrest is constitutionally reasonable. *Atwater v. Lago Vista*, 532 U. S. 318 (2001). A State's choice of a more restrictive search-and-seizure policy does not render less restrictive ones unreasonable, and hence unconstitutional. While States are free to require their officers to engage in nuanced determinations of the need for arrest as a matter of their own law, the Fourth Amendment should reflect administrable bright-line rules. Incorporating state arrest rules into the Constitution would make Fourth Amendment protections as complex as the underlying state law, and variable from place to place and time to time. The Court sustained the search, as well as the arrest. Having arrested Moore, the officers were also entitled to search him, as in any other search incident to arrest, to ensure their safety and to safeguard evidence. Only Justice Ginsburg, who filed a separate concurrence, saw historical support for the defendant's view, but even she was persuaded that *Atwater* governs the outcome here.

2. **Search of Unoccupied Vehicle Following Arrest.** *Arizona v. Gant*, 128 S. Ct. 1443 (cert. granted Feb. 25, 2008); decision below at 162 P.3d 640 (Az. 2007). Police officers went to a house suspected of being used for narcotics activity. One officer knocked on the door, and Rodney Gant answered the officer's knock on the door. The officers asked to speak with the homeowner, but Gant told them that the owner was not at home and would not return until later that day. Gant gave the officers information about his identity. The officers left and ran a records check on Gant and discovered that his license was suspended and that he had an outstanding warrant for driving with a suspended license. The officers returned to the house that evening, finding two individuals outside the house. After investigation, they were arrested. While the officers were handcuffing the individuals and placing them in patrol cars, Gant drove up in his car and parked in the driveway. One officer summoned Gant as he got out of his car, and Gant walked approximately 8-12 feet toward the officer. The officer told Gant that he was under arrest for driving with a suspended license, handcuffed him, and placed him in a patrol car. Officers then searched the passenger compartment of Gant's car and found a handgun and a plastic baggie containing cocaine. Gant was charged with one count of possession of a narcotic drug for sale and one count of possession of drug paraphernalia. Issue: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a

warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

3. **Seizure of Passenger in Vehicle During Traffic Stop.** *Brendlin v. California*, 127 S. Ct. 2400 (2007). Brendlin was a passenger in a vehicle driven by another that was subjected to a traffic stop. The vehicle had been pulled over without reason to believe that it was being operated unlawfully, that is, without probable cause or reasonable suspicion to make the stop. A search of the passenger revealed his possession of drug paraphernalia. He moved to suppress, but the California Supreme Court held that suppression was unwarranted because no additional circumstances indicated to a reasonable passenger that he was the subject of the police investigation. On appeal of the suppression issue, the California Court of Appeal reversed, finding that defendant, as a passenger, could challenge the traffic stop, and that the traffic stop was unlawful. The California Supreme Court overruled the Court of Appeal, holding that a passenger in a vehicle stopped by police is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he was the subject of officer's investigation or show of authority. The U.S. Supreme Court granted certiorari to review the question: Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop. The Supreme Court ruled, unanimously, that a passenger in a vehicle, like the driver, has been seized within the meaning of the Fourth Amendment when the police make a traffic stop of the vehicle. The passenger may, therefore, challenge the stop's constitutionality. The Court noted that the relevant inquiry was whether a reasonable person would feel free to terminate the encounter. Here, Brendlin would not have felt free to terminate the encounter, because any reasonable passenger would have understood the officers to be exercising control to the point where no one in the car was free to depart without police permission. The Supreme Court rejected the reasoning that the police only intended to investigate the driver of the vehicle, not the passenger, noting that for Fourth Amendment analysis, subjective intent of the police is irrelevant; the relevant objective inquiry was the understanding of a reasonable passenger.

B. **Good Faith Exception to Exclusionary Rule When Arrest Based on Erroneous Information.** *Herring v. United States*, 128 S. Ct. 1221 (cert granted Feb. 19, 2008); decision below at 492 F.3d 1212 (11th Cir. 2007). Officers in one jurisdiction checked with employees of a law enforcement agency in another jurisdiction and are told that there is an outstanding warrant for an individual. Acting in good faith on that information the officers arrest the person and find contraband. It turns out the warrant had been recalled. The erroneous information that led to the arrest and search is the result of a good faith mistake by an employee of the agency in the other jurisdiction. Does the exclusionary rule require that evidence of the contraband be suppressed, or does the good faith exception to the rule permit use of the evidence?

Question presented: Whether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent.

C. **Warrantless Entry of Home Based on Previous Permission.** *Pearson v. Callahan*, 128 S. Ct. 1702 (cert. granted Mar. 24, 2008); decision below at 494 F.3d 891 (10th Cir. 2007). Questions presented: (1) Whether, for qualified immunity purposes, police officers may enter a home without a warrant on the theory that the owner consented to the entry by previously permitting an undercover informant into the home; (2) [added by the Supreme Court] "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001) [establishing a two-part inquiry into qualified immunity claims for excessive force] should be overruled?" The *Saucier* test sets forth two separate inquiries, one into the question of whether officers are entitled to qualified immunity for the use of excessive force, and a second into the merits of the excessive force claim. Four justices either concurred or dissented from *Saucier*, contending that the result was correct, but the two-part test was confusing and unnecessary. Those justices would have held that once a court determines the Fourth Amendment has been violated by the use of "'objectively unreasonable' force," no further qualified immunity inquiry is necessary. The original 5-4 majority, written by Justice Kennedy, was formed with Chief Justice Rehnquist and Justice O'Connor.

## III. CRIMES

### A. Firarms.

1. **Use of Firearm for Payment and 924(c)(1)(A).** *Watson v. United States*, 128 S. Ct. 579 (2007). Title 18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey v. United States*, 516 U.S. 137 (1995), the Supreme Court held that "use" of a firearm under § 924(c) means "active employment." *Id*. at 144. Here, the defendant received the firearm in trade for drugs. The Supreme Court held that this does not constitute use of a firearm under the plain language of § 924(c)(1)(A). The Court noted that in ordinary English, a person who trades an object to acquire another uses the object that he parts with, but not the one he acquires: when a person pays a cashier at a cafeteria one dollar for a cup of coffee, the person "uses" the dollar bill, not the cup of coffee. The Court declined to import meaning from a neighboring statute which criminalizes the mere receipt of a firearm, pointing out that the two statutes speak to different issues. The Court also rejected the argument that since it had construed § 924(c) to criminalize bartering guns for drugs, it made sense to symmetrically also punish bartering drugs for guns. The Court, however, said that it must respect the "language" of the statute, and left it to Congress to decide whether the language should be changed to effectuate more symmetrical results.

2. **Constitutionality of DC Handgun Law.** *District of Columbia, et al. v. Heller,* 128 S. Ct. 645 (cert granted Nov. 20, 2007); decision below at 478 F.3d 370 (DC Cir. 2007). Private citizens challenged DC's handgun control law, alleging it violates the Second Amendment. The Court of Appeals struck down DC's handgun control law, basing its decision on the protection of the Second Amendment. The Supreme Court granted cert to decide a single question: "Whether the following provisions, D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?"

**B. Constitutionality of PROTECT ACT.** *United States v. Williams*, 127 S. Ct. 1874 (cert. granted Mar. 26, 2007); decision below at 444 F.3d 1286 (11th Cir. 2006). Congress passed the 2003 "PROTECT Act" to try to shore up federal controls on child pornography after the Supreme Court struck down a 1996 federal law on the subject in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002). The Eleventh Circuit held the pandering provision of the law to be overbroad and vague. The Supreme Court has granted certiorari to consider that holding.

**C. Money Laundering.**

1. **What's a Proceed?** *United States v. Santos*, 127 S. Ct. 2098 (cert. granted April 23, 2007); decision below at 461 F.3d 886 (7th Cir. 2006). The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in a financial transaction using the "proceeds" of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. Question presented: Whether "proceeds" means the gross receipts from the unlawful activities or only the profits, i.e., gross receipts less expenses.

2. **Sufficiency of Evidence.** *Cuellar v. United States*, 128 S. Ct. 436 (cert. granted Oct.15, 2007); decision below at 478 F.3d 282 (5th Cir. 2007) (en banc). Cuellar was traveling south on State Highway 77 in Texas, approximately 100 miles from the Mexican border. A police officer stopped Cuellar, apparently because his car was traveling slowly and had swerved onto the shoulder. Police found a hidden compartment underneath the floorboard of the vehicle containing $83,000 wrapped in duct tape bundles inside blue Walmart sacks and marked with a Sharpie as to the amounts in each bundle. Cuellar was convicted at trial of international money laundering. He was not charged with bulk cash smuggling. He was sentenced to 78 months imprisonment and three years supervised release, eighteen months more prison time than the maximum punishment available under the bulk cash smuggling statute. Question presented: Whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction under 18 U.S.C. § 1956.

**D.** **Tax Evasion.** *Boulware v. United States*, 128 S. Ct. 1168 (2008). Boulware was charged with criminal tax evasion and filing a false income tax return for diverting funds from a closely held corporation, of which he was the president, founder, and controlling shareholder. One element of tax evasion under 26 U. S. C. §7201 is "the existence of a tax deficiency." *Sansone v. United States*, 380 U. S. 343. To support his argument that the government could not establish the tax deficiency required to convict him, Boulware sought to introduce evidence that the corporation had no earnings and profits in the relevant taxable years, so he in effect received distributions of property that were returns of capital, up to his basis in his stock, which are not taxable. *See* 26 U. S. C. §§ 301 and 316(a). Under §301(a), unless the Internal Revenue Code requires otherwise, a "distribution of property" "made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in [§301(c)]." Section 301(c) provides that the portion of the distribution that is a "dividend," as defined by §316(a), must be included in the recipient's gross income; and the portion that is not a dividend is, depending on the shareholder's basis for his stock, either a nontaxable return of capital or a taxable capital gain. Section 316(a) defines "dividend" as a "distribution" out of "earnings and profits." The District Court granted the government's *in limine* motion to bar evidence supporting Boulware's return-of-capital theory, relying on Ninth Circuit's precedent holding that a diversion of funds in a criminal tax evasion case may be deemed a return of capital only if the taxpayer or corporation demonstrates that the distributions were intended to be such a return. The court later found Boulware's proffer of evidence insufficient and declined to instruct the jury on his theory. Affirming his conviction, the Ninth Circuit held that Boulware's proffer was properly rejected because he offered no proof that the amounts diverted were intended as a return of capital when they were made. The Supreme Court reversed, holding that a distributee accused of criminal tax evasion may claim return-of-capital treatment without producing evidence that, when the distribution occurred, either he or the corporation intended a return of capital.

**E.** **Domestic Violence.** *United States v. Hayes*, 128 S. Ct. 1702 (cert granted Mar. 24, 2008); decision below at 482 F.3d 749 (4th Cir. 2007). Following a conditional guilty plea, Hayes was convicted of possession of a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). Section 922(g)(9) makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. He was sentenced to five years of probation, including six months of home detention with electronic monitoring. The court of appeals reversed, holding that the indictment must be dismissed because it failed to allege that Hayes' state misdemeanor battery conviction was based on an offense that has, as an element, a domestic relationship between the offender and the victim. Question presented: Whether, to qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A), an offense must have as an element a domestic relationship between the offender and the victim.

## IV. TRIAL

### A. *Batson* Challenges.

*Snyder v. Lousiana*, 128 S. Ct. 1203 (2008). Allen Snyder, a black man, was convicted and sentenced to death by an all-white jury in Jefferson Parish, Louisiana, for the fatal stabbing of his wife's male companion. Prior to trial, the prosecutor reported to the media that this was his "O.J. Simpson case." At trial, the prosecutor peremptorily struck all five African-Americans who had survived cause challenges and then, over objection, urged the resulting all-white jury to impose death because this case was like the O.J. Simpson case, where the defendant "got away with it." On initial review, a majority of the Louisiana Supreme Court ignored probative evidence of discriminatory intent, including the prosecutor's O.J. Simpson remarks and argument, and denied Mr. Snyder's *Batson* claims by a 5-2 vote. The U.S. Supreme Court then directed the Louisiana court to reconsider Mr. Snyder's *Batson* claims in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). *See Snyder v. Louisiana*, 545 U.S. 1137 (2005). On remand, a bare majority adhered to its prior holding, once again disregarding substantial evidence establishing discriminatory intent, including the prosecutor's references to the O.J. Simpson case, the totality of strikes against African-American jurors, and evidence showing a pattern of practice of race-based peremptory challenges by the prosecutor's office. In addition, the majority imposed a new and higher burden on Mr. Snyder, asserting that *Rice v. Collins*, 546 U.S. 333 (2006), permitted reversal only if "a reasonable factfinder [would] necessarily conclude the prosecutor lied" about the reasons for his strikes. The U.S. Supreme Court reversed, relying entirely on one *Batson* violation, never mentioning the O.J. Simpson race card played by the prosecutor. Writing for a 7-2 majority, Justice Alito reiterated the three-part process for ruling on a *Batson* objection, then refined the test by adding a clear-error standard of appellate review, and then explained how that review applies in this case. Important principles result from this decision. The three-part test remains: (1) defendant must make a *prima facie* showing that a peremptory strike was race-based; (2) if so, the prosecutor must a offer race-neutral reason for the challenge; (3) and, in light of these submissions, the trial court must determine if there was purposeful discrimination. The Court clarified that the standard of appellate review of the trial court's ruling is "clearly erroneous," but the Court also made clear that an appealing defendant wins if he can show just one race-based challenge that should have been upheld under *Batson*. In determining if the challenge should be sustained, a trial judge considers the demeanor and credibility of the prosecutor, and an appellate court looks to the record to determine if the prosecutor's excuse is supported. Here, the reasons given–the juror was a student teacher who could not miss class for the week of trial, and he acted nervous during questioning–were not supported by the record. The judge's law clerk had called the prospective juror's college dean, who said the student teaching could be satisfied even if he missed one week while serving on the jury. The record revealed that the judge made no finding on the nervousness concern. And the record revealed that the prosecutor did not strike other prospective jurors who are white, even though they expressed similar concerns about missing work due to jury service. Having found the prosecutor's proffered excuses to be implausible, in light of the record, the Court held that equates to purposeful discrimination under *Batson*.

Finally, the Court noted that it does not apply to *Batson* appeals the causation rule applicable in many other instances that once discriminatory intent is shown, the burden shifts to the defending party to show that the factor was not determinative. In this case, in particular, remand for examination of causation could not be "profitably" explored more than a decade later. As a result, the Court reversed the judgment with no opportunity for further appellate review by the state court.

B. **Waiver of Right to Article III Judge During Jury Selection.** *Gonzalez v. United States*, 128 S. Ct. ___ (May 12, 2008). Gonzalez, a Mexican citizen who does not speak English, was represented by counsel at his federal drug-trafficking trial. After appearing before a United States district judge at several pretrial conferences, he was brought before a United States magistrate judge for jury selection. At a bench conference outside of his presence and before he had the assistance of an interpreter, defense counsel orally consented to the magistrate judge's presiding over the jury selection process. Thereafter, the magistrate judge did not obtain the defendant's personal consent or even mention that his attorney had consented outside of his presence. No objection to this process was ever posited in the trial court. Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over voir dire? The Supreme Court held that such a personal and explicit waiver by the defendant is neither required by the Federal Magistrates Act, nor is it required by the Constitution. Justice Kennedy, writing for the 8-1 majority held that express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial, pursuant to the Federal Magistrates Act, 28 U. S. C. §636(b)(3)( "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."). Under *Gomez v. United States*, 490 U.S. 858, 870, 875–876 (1989) and *Peretz v. United States*, 501 U.S. 923, 933, 935–936 (1991), such "additional duties" include presiding at voir dire if the parties consent, but not if there is an objection. Although, the Court has indicated in prior cases that the waiver of certain trial rights requires the defendant's own consent, *see*, *e.g.*, *New York v. Hill*, 528 U. S. 110, 114–115 (2000), even in *Hill*, the Court held that an attorney, acting without indication of particular consent from his client, could waive his client's statutory right to a speedy trial because "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." Similar to the scheduling matter in *Hill*, Justice Kennedy found that acceptance of a magistrate judge at the jury selection phase is a tactical decision well suited for the attorney's own decision. To the extent that judges have formal and informal approaches to jury selection, these influencing factors are best known by and sorted through by counsel, who may tactically select a magistrate over the district judge. As with other tactical decisions, requiring personal, on-the-record approval from the client could necessitate a lengthy explanation that the client might not understand and that might distract from more pressing matters as the attorney seeks to prepare the best defense. The Court rejected Gonzalez's contention that the decision to have a magistrate judge for voir dire is a fundamental choice, or, at least, raises a question of constitutional significance so that the Act should be interpreted to require explicit consent. The majority noted that in this case there were not serious concerns about the Act's constitutionality and the defendant conceded that magistrate

judges are capable of competent and impartial performance when presiding over jury selection. Caveat–The Court notes that its decision does not address two similar but different cases: (1) Whether waiver occurs if counsel consents, but the client makes a timely objection to override counsel's waiver; (2) Whether waiver may be inferred by failure of a defendant or counsel to object. Justice Scalia concurred, but rejected Justice Kennedy's tactical-decision vs. fundamental-right test. Instead, he would hold that all constitutional rights are waivable by counsel, except the right to counsel itself. Justice Thomas dissented; he would overrule *Peretz* and hold that delegation of voir dire violates the Federal Magistrates Act. He would also have held that the unpreserved issue here is cognizable despite lack of a timely objection, in much the same way it was in *Nguyen v. United States*, 539 U.S. 69, 78 (2003) (reversing federal appellate decision, despite lack of objection to appellate panel consisting of a non-Article III judge). The ruling in *Gonzalez* overrules contrary Eleventh Circuit precedent, *United States v. Maragh*, 174 F.3d 1202, 1206 (11th Cir. 2007), which held that the defendant's personal and explicit consent was required.

## C. Confrontation

1. **Forfeiture by Wrongdoing**. *Giles v. California,* 128 S. Ct. 976 (cert. granted Jan. 11, 2008); decision below at 40 Cal.4th 833 (2007). Giles was charged with shooting his girlfriend to death. At trial, he defended himself on a self-defense theory, claiming that his girlfriend had lunged at him during an argument, with something in her hand. He claimed he never intended to kill. In response, the state introduced evidence that the girlfriend had reported to police, a few weeks before the killing, that Giles had held a knife to her throat and threatened to kill her. The California Supreme Court held below that the Confrontation Clause permits the hearsay statement of a witness who is unavailable for trial because the defendant killed her, even though he did not intend to silence her testimony when he killed her. Question presented: Whether a criminal defendant forfeits the Sixth Amendment right of confrontation upon a showing the defendant caused the unavailability of the witness or upon a showing the defendant's actions were undertaken specifically to prevent the witness from testifying.

2. **Lab Reports and *Crawford*.** *Melendez-Diaz v. Massachusetts*, 128 S. Ct. 1647 (cert granted Mar. 17, 2008); decision below at 870 N.E.2d 676 (Mass. 2007). In a state court prosecution for drug dealing, the prosecution submitted lab reports instead of live testimony to establish the identity and weight of the cocaine at issue. The reports were largely conclusory, containing nothing about the qualifications or experience of the analysts who conducted the testing or whether any record-keeping or storage measures had been taken to preserve the integrity of the items for testing. The reports lacked the identify of the testing method the analysts used to arrive at their conclusions or any description of the difficulties (and accompanying error rates) associated with the particular method(s) the analysts used to test for cocaine. Nor do the reports specify the percentages of cocaine allegedly present in the substances

tested or otherwise address the differences in the samples that account for why some of the bags contain white powder and others contain dark yellow solids. The reports simply provided declarations from state forensic analysts that the packages seized in connection with the defendant's arrest weighed over fourteen grams and all contained cocaine. Question presented: Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington* (2004).

# V. SENTENCING

## A. Reasonableness Post-Booker

1. **Appellate Review of Reasonableness of Within-Guidelines Sentence Post-*Booker*.** *Rita v. United States*, 127 S. Ct. 2456 (2007). A court of appeals may apply a presumption of reasonableness to a district court sentence within the Guidelines. The Court noted that the presumption was not binding, and did not reflect judicial deference to the fact-finding leeway of an expert agency. Rather, it reflected the fact that the sentencing court's analysis of the sentencing factors set forth at 18 U.S.C. § 3553(a) corresponded to the similar analysis by the Sentencing Commission. The presumption only applies on appellate review. It does not apply when a district court determines the merits of arguments that a non-Guideline sentence ought to be applied. The Court explained that the presumption would not violate the Sixth Amendment because it neither requires nor forbids a Guideline sentence. Finally, the Court held that the district court properly analyzed the factors in Rita's case. The Court stated that the brevity or length of what a district court had to say when pronouncing sentence was left to a judge's own professional judgment. The judge may say less when imposing a Guideline sentence, and normally should go further when rejecting nonfrivolous arguments for a non-Guideline sentence.

2. **Reasonableness of Below-Guidelines Sentence Post-*Booker*.** *Gall v. United States*, 128 S. Ct. 586 (2007). Gall was sentenced to probation in a drug case in which the Guidelines called for a substantial prison sentence. The Eighth Circuit reversed, holding that the extraordinary variance was not supported by extraordinary findings. The Supreme Court reversed, holding that, while the extent of the difference between a particular sentence and the recommended Guideline range is relevant, courts of appeal must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse of discretion standard. The Court specifically rejected the Eighth Circuit's view that a variance requires "extraordinary" circumstances, and its application of a proportionality formula to determine whether a Guideline-variance is justified. The Court noted that the district court committed no procedural error, because it adequately considered the § 3553(a) sentencing factors and adequately

explained its sentence. Turning to substantive "reasonableness" review, the Court found that the district court "quite reasonably attached great weight" to a number of factors in imposing a below-Guidelines sentence – Gall's withdrawal from the conspiracy, his youthful age at the time he committed the offense, and his self-motivated rehabilitation. The Court noted that it is not for courts of appeal to decide de novo whether the justification for a variance is sufficient. A district court should explain the reason for the sentence within the context of the totality of circumstances and 3553(a) factors. An appellate court may not impose a presumption of unreasonableness; the variance from the guideline is determined with due deference to the district court's weighing of 3553(a). The Eighth Circuit therefore erred when it reversed based only on its disagreement with Gall's sentence.

3. **Reasonableness of Below-Guidelines Crack Sentence Post-*Booker*.** *Kimbrough v. United States*, 128 S. Ct. 558 (2007). The crack cocaine Guidelines, like all other Guidelines, are advisory only. A district judge therefore may consider the crack/powder disparity when sentencing crack cocaine offenders, and impose a below-Guidelines sentence if a within-Guidelines sentence is "greater than necessary" to serve the objectives of sentencing set forth at 18 U.S.C. § 3553(a). The Court rejected the government's arguments that Congressional policy prohibits sentencing courts from disagreeing with the 100:1 ratio. The Court did not find support for this argument in Congress' silence on this point, and noted that its prior decision in *Neal v. United States* was consistent with the view that Congressional statutes do not necessarily foreclose a different Guideline approach. The Court also noted that Congress recently acquiesced in the 2007 Guidelines which reduced the crack/powder disparity. The Court also rejected the argument that disagreements with the 100:1 ratio would increase sentencing disparities. The Court noted some departures from uniformity were a necessary result of its *Booker* decision. The Court further noted that the Sentencing Commission itself had reported that the 100:1 ratio created disproportionately harsh sanctions, thus lending support to the view that a Guidelines-based sentence would be "greater than necessary." In the end, the Court concluded that Kimbrough's sentence, 4.5 years below the bottom of the Guidelines range, was reasonable.

4. **Notice of Sentence Outside Guidelines**. *Irizarry v. United States*, 128 S. Ct. 828 (cert. granted Jan 4, 2008); decision below at 458 F.3d 1208 (11th cir. 2006). Whether the sentencing court must give both parties reasonable notice – as contemplated under Fed. R. Crim. P. 32(h) for "departures" – in advance of the court's consideration of imposition of a variance-based sentence outside the guideline range? And, whether Rule 32(h) "has any continuing application after" *Booker*. The Eleventh Circuit Court ruled that such notice is not required as to a variance because the guidelines are advisory.

5. **Authority of Appellate Court to Increase Sentence *Sua Sponte*.** *Greenlaw v. United States,* 128 S. Ct. 829 (cert granted Jan. 4, 2008); decision below at 481 F.3d 601 (8th Cir. 2007). The defendant filed a direct appeal of his sentence; the government did not appeal the district court's failure to make two sentences under 18 U.S.C. § 924(c) – a 5-year sentence and a 25-year sentence – consecutive to each other and to other counts. The appellate court nevertheless remanded for imposition of the enhanced sentence, finding that the effect of the error was not "speculative."Question presented: Whether a federal court of appeals may increase a criminal defendant's sentence *sua sponte* and in the absence of a cross-appeal by the Government." [NOTE: In the Eleventh Circuit, under the *Levy/Ardley* doctrine, the court has routinely refused to entertain errors not raised in the appellant's initial brief regardless of the probable harm of the error. A decision permitting the *sua sponte* decision here could change the Eleventh Circuit's narrow interpretation of plain-error review under Rule 52(b). Affirmance of the Eleventh Circuit's decision below likely increases the need for counsel's caution to sentenced defendants of the potential downside of defendant-initiated sentencing appeals.

B. ***Apprendi* Implications in Consecutive Sentences.** *Oregon v. Ice*, 128 S. Ct. ___ (cert. granted Mar. 17, 2008); decision below at 170 P.3d 1049 (Or. 2007). Respondent was convicted by a jury of two counts of first-degree burglary and four counts of first-degree sexual abuse. The court sentenced him to a total of 340 months, with three of the sentences running consecutively. The Oregon Supreme Court reversed and remanded for resentencing, holding that the sentencing court–by imposing consecutive sentences based on its own findings and not based on jury findings–violated respondent's rights under the Sixth Amendment, as construed in *Apprendi* and Blakely. Question presented (as restated by the Court): Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

C. **ACCA Predicates**

1. **Misdemeanors without Loss of Civil Rights.** *Logan v. United States*, 128 S. Ct. 475 (2007). Prior convictions for which civil rights have been "restored" are exempt from being applied under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). Logan's prior state convictions for misdemeanor battery did not result in loss of civil rights, so the court below held that his rights were never "restored" within the meaning of 18 U.S.C. § 921(a)(20). As a result, they do qualify as ACCA predicates. This reading of the statute creates the anomalous situation that prior crimes for which civil rights are lost, but then restored, don't count; but priors that never result in loss of civil rights do count as ACCA predicates. The Supreme Court affirmed the decision below, holding that the plain language of the exemption only applies

where civil rights have been lost, then restored; it does not cover prior convictions in which offenders never lost their civil rights.

2. **Driving While Intoxicated.** *Begay v. United States*, 128 S. Ct. 1520 (2008). ACCA imposes a special mandatory 15-year prison term upon felons who unlawfully possess a firearm and who have three or more prior convictions for certain drug crimes or "violent felonies." Begay had 12 prior convictions for driving while intoxicated in violation of New Mexico law. The district court applied three of these convictions as a predicate for an enhanced ACCA sentence. The Supreme Court reversed, holding that felony DUI under New Mexico law is not a "violent felony" for purposes of the Armed Career Criminal Act. The Court held that the determinative question is not how the defendant may have committed the prior crimes, but rather how the statute defines it. Even if DUI involves conduct that presents serious risk of physical injury to another, it is too unlike the example crimes enumerated in ACCA – burglary, arson, extortion, and crimes involving explosives– to be included under the residual clause of ACCA. Moreover, DUI differs in an important respect from the example crimes, in that it does not involve purposeful, violent, and aggressive conduct that is the centerpiece of the example crimes. Justice Scalia's concurrence highlights that the analytical framework of this decision differs from the Court's expansively inclusive residual clause analysis last term in *James v. United States*, 550 U.S. ___ (2007) (holding attempted burglary a violent felony under ACCA's residual clause), from which he had dissented.

3. **Escape.** *Chambers v. United States*, 128 S. Ct. ___ (cert granted Apr. 21, 2008); decision below at 473 F.3d 724 (7th Cir. 2007). Chambers was convicted of escape by virtue of his failure to report to serve his sentence. This conviction was used to support an ACCA sentence enhancement. Question presented: Whether a failure to report to prison is the equivalent of escape for purposes of enhanced sentencing under the Armed Career Criminal Act? There is currently a 10-2 circuit split on this issue, although the holding of 10 circuits now appears contrary to the Court's holding in *Begay*, above, as it relates to a proper interpretation of ACCA and its residual clause. Under *Begay*, an offense that is neither similar to one of the enumerated four offenses, nor "purposeful, violent, and aggressive," should meet the statutory definition of "violent felony."

4. **Computing Predicate as Enhanced or Unenhanced.** *United States v. Rodriguez*, 128 S. Ct. 33 (cert. granted Sept. 25, 2007); decision below at 464 F.3d 1072 (9th Cir. 2007). The Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (2000 & Supp. IV 2004), provides for an enhanced sentence for felons convicted of possession of a firearm, if the defendant has three prior convictions for, inter alia, a state-law controlled substance offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(i). The question presented is: Whether a

state drug-trafficking offense, for which state law authorized a ten-year sentence because the defendant was a recidivist, qualifies as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2000 & Supp. IV 2004).

### D. Mandatory Minimum Sentences.

1. **Carrying Explosives**. *United States v. Ressam,* 128 S. Ct. 741 (cert. granted Dec. 7, 2007); decision below at 474 F.3d 597 (9th Cir. 2007). This arrest occurred in 1997 as part of the alleged Millennium bombing planned for Los Angeles International airport. Explosives were found in the defendant's vehicle, but the allegedly planned bombing was sometime in the future. The defendant was convicted of conspiracy to commit the bombing and under title 18 U.S.C. § 844(h)(2), which prescribes a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." Question presented: Whether section 844(h)(2) requires that the explosives be carried "in relation to" the underlying felony.

2. **Prior Drug Convictions.** *Burgess v. United States*, 128 S. Ct. 1572 (2008). The federal Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A), doubles the mandatory minimum sentence for certain federal drug crimes if the defendant was previously convicted of a "felony drug offense." Burgess pled guilty to a federal crack charge carrying 10-year mandatory minimum sentence, but that mandatory minimum sentence was doubled to 20 years based on a prior South Carolina misdemeanor drug conviction that carried a maximum sentence of two years. Burgess argued that "felony drug offense" has two components: it must be a felony and it must carry a sentence of in excess of one year; since South Carolina classified his prior offense as a misdemeanor, it could not qualify despite the maximum potential punishment of two years. The Supreme Court rejected this contention, holding instead that the federal statutory definition controls, and that 21 U.S.C. § 802(44) is the exclusive definition of the term "felony drug offense" in § 841(b)(1)(A); under that definition, a state drug offense punishable by more than one year qualifies as a felony drug offense, even if the state law classifies the offense as a misdemeanor.

## VI. DEATH PENALTY

### A. Ineffective Plea Negotiation by Counsel.

*Arave v. Hoffman***,** 128 S. Ct. 749 (2008) **(voluntarily dismissed based on mootness)**. Five weeks before his trial, Hoffman rejected an offer by the state to recommend a life sentence if he would plead guilty to first-degree murder. Hoffman's attorney recommended Hoffman reject the offer because the Ninth Circuit had earlier determined the Constitution required juries to find statutory aggravating factors, while in Idaho, judges made such findings. Counsel believed if Hoffman received a death sentence it would be reversed on

appeal. However, in *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court determined the Constitution permits judges to find statutory aggravating factors. Nevertheless, the Ninth Circuit determined counsel's representation was ineffective during plea negotiations because he "based his advice on incomplete research," and " recommended that his client risk much in exchange for very little." The Ninth Circuit also concluded, "Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement," but "a misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him." Questions presented by state's petition: (1) Because the Ninth Circuit did not require Hoffman to prove counsel's recommendation constituted "gross error" and mandated counsel "be prescient about the direction the law will take," did the Ninth Circuit err by rejecting this Court's prohibition regarding the use of hindsight to conclude Hoffman established deficient performance? (2) Because Hoffman failed to allege he would have accepted the state's plea offer but for counsel's advice and the Ninth Circuit determined Hoffman's decision to reject the offer was not a "principled stand," did the Ninth Circuit err by concluding Hoffman established prejudice? The Supreme Court added a third question for its consideration: (3) "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?" After cert was granted, the defendant abandoned the claim on which he had been successful below and on which cert had been granted, the ineffectiveness of his counsel during plea negotiations. Cert was then dismissed as moot.

**B.** **Constitutionality of Lethal Injection.** *Baze v. Rees*, 128 S. Ct.1520 (2008). In a fractured opinion, a plurality of the Court held that the Eighth Amendment to the United States Constitution does not prohibit the most common method of lethal injection, involving a three-drug cocktail, sodium thiopental, pancuronium bromide, and potassium chloride. Although the final tally of concurrences provided a 7-2 vote, there was no opinion that spoke for five or more justices. The Court's plurality adopted as a standard for assessing the validity of an execution method whether it poses a "substantial risk of serious harm." It rejected the death row inmate's proposal that the standard be "unnecessary risk of pain and suffering."

**C.** **Constitutionality of Death Penalty for Crime Not Involving Death.** *Kennedy v. Louisiana*, 128 S. Ct. 829 (cert. granted Jan. 4, 2008); decision below at 957 So. 2d 757 (La. 2007). Kennedy was sentenced to death following his conviction for raping his eight-year-old stepdaughter. He argued that, in the other four states with such laws, prosecutors refuse to seek the death sentence for such crimes. They contend that enforcing a death sentence for the crime of child rape contradicts the Supreme Court's 1977 decision in *Coker v. Georgia*, barring the death penalty for rape — a decision involving rape of an adult. The petition also contends that a death sentence for child rape is so rare that it is cruel and unusual punishment under the Eighth Amendment. Questions presented: (1) Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty; (2) If so, whether Louisiana's capital rape statute violates the

Eighth Amendment insofar as it fails genuinely to narrow the class of such offenders eligible for the death penalty.

**D.** **Removing Juror.** *Uttecht v. Brown*, 127 S. Ct. 2218 (2007). Ninth Circuit found that state trial judge in capital case improperly excused a juror contrary to established federal law. State petitioned for cert, presenting the following questions: (1) In *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986), the Supreme Court held that a state trial judge may, without setting forth any explicit findings or conclusions, remove a juror for cause when the judge determines the juror's views on the death penalty would substantially impair his or her ability to follow the law and perform the duties of a juror. The Court further held that a federal habeas court reviewing the decision to remove the juror must defer to the trial judge's ability to observe the juror's demeanor and credibility, and apply the statutory presumption of correctness to the judge's implicit factual determination of the juror's substantial impairment (2) Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law? The Supreme Court reversed the grant of habeas corpus, holding that the court of appeals neglected to accord the proper deference required of federal courts reviewing claims of *Witherspoon-Witt* error, and on the record it was error to find that a juror was not substantially impaired in the performance of their duties.

**E.** **Competence to be Executed: Delusions.** *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007). The petitioner argued below that he was incompetent to be executed because although he had a factual awareness of the reason for his execution, he could not appreciate the retributive nature of his sentence because of a severe mental illness that led him to harbor a delusional belief that the state was lying about why he was actually being executed. The district court denied the petition on the ground that the Fifth Circuit test for competency requires only that the defendant be aware of the fact of his impending execution and the factual predicate for that execution, *Panetti v. Dretke*, 401 F.Supp.2d 702 (W.D. Tex. 2004). The Fifth Circuit affirmed, finding that *Ford* requires only an "awareness" of the reason for the execution but not a "rational understanding" of that reason, *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006). While the cert proceeding was pending in the Supreme Court, an additional question arose whether the pending petition is barred as second-or-successive. The Supreme Court overruled the Fifth Circuit in a 5-4 decision, setting forth multiple holdings covering the procedural and substantive aspects of the case: (1) A habeas petition alleging that the petitioner is incompetent and therefore protected from execution under *Ford v. Wainwright*, 477 U.S. 399 (1986), is not barred as a "second and successive" petition under section 2244(b), even if a prior habeas petition has already been fully adjudicated, so long as the *Ford* claim is filed as soon as it becomes ripe; (2) Justice Powell's concurrence in *Ford* sets forth the minimum procedures that a state must provide to a death row inmate who claims to be incompetent. Once the petitioner makes a substantial threshold showing of insanity or incompetence, the state must provide a "fair hearing" in accord with fundamental

fairness, meaning at the least an opportunity to submit evidence and argument and to adequately respond to the evidence presented by the state or solicited by the court; (3) A state's failure to provide the minimal procedural due process required by *Ford* is an unreasonable application of clearly established Supreme Court law. Thus, under section 2254(d), a federal court can review an incompetency claim in such a case without giving deference to the state court's decision; (4) A prisoner's inability to rationally understand that he is being executed as a punishment for a crime is relevant to a determination of whether he is incompetent under *Ford*. In sum, the Supreme Court rejected the Fifth Circuit's interpretation as too restrictive and remanded to the district court for further development of the record. The Court left open the question of whether due process requires the states to provide additional procedural protections, such as the opportunity for discovery or to cross-examine witnesses. It also declined to set forth a rule governing when a prisoner's subjective perception of reality may become so distorted that he should be deemed incompetent.

## VII. CIVIL RIGHTS OF THE ACCUSED

### A. Prosecutorial Immunity for Failure to Disclose Exculpatory Evidence.

*Van de Camp v. Goldstein*, 128 S. Ct. ___ (cert. granted Mar. 14, 2008); decision below at 481 F.3d 1170 (9th Cir. 2007). Goldstein alleges in a civil rights complaint that he was convicted of murder "entirely on the perjured testimony of two witnesses suborned" by Long Beach police officers. One of those witnesses was a jailhouse informant, Edward Fink. During the course of his testimony, Fink falsely denied having received any benefit for cooperating in the prosecution of Goldstein. Goldstein acknowledges that the deputy district attorneys who prosecuted him were never informed of the benefits Fink had received.. In December, 2002 Goldstein's conviction was vacated by a California U.S. District Court, and that decision was affirmed by the Ninth Circuit. He then filed the present civil rights action, alleging, in part that, "[p]rior, during and subsequent to the prosecution of Mr. Goldstein, the Los Angeles County District Attorney's Office knew of abuses concerning jailhouse informants and of its own failure to record or disseminate that knowledge." He further alleged that the defendants were personally aware of this information, but that they "purposefully or with deliberate indifference failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and failed to train Deputy District Attorneys to disseminate information pertaining to benefits provided to jailhouse informants and other impeachment information." A federal district court refused to accord absolute immunity to the DA and supervising prosecutors, a decision that was affirmed by the Ninth Circuit, which held that the duties were administrative, not prosecutorial. Questions presented: (1) Where absolute immunity shields an individual prosecutor's decisions regarding the disclosure of informant information in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) made in the course of preparing for the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting

policy with regard to the disclosure of such informant information for all cases prosecuted by his or her agency? (2) Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning, and overseeing training and supervision of, individual prosecutors' compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)?

**B. Pleading § 1983 Claims.** *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam). A Colorado state prisoner filed a federal § 1983 suit against state prison officials, alleging violations of his Eighth and Fourteenth Amendment protections against cruel and unusual punishment, due to the prison's deliberate indifference to his serious medical needs. He alleged that a liver condition resulting from hepatitis C required a treatment program that officials had commenced but then wrongfully terminated, with life-threatening consequences. Deeming these allegations, and others to be noted, to be "conclusory," the 10th Circuit affirmed the district court's dismissal of petitioner's complaint. The Supreme court summarily reversed and remanded, because the court of appeals' ruling "departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure." The Court noted that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" In addition, the court noted, "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." The lower court's violation of pleading rules is more pronounced because Erickson is proceeding *pro se.*

## VIII. IMMIGRATION CONSEQUENCES

**A. Asylum For Involuntary Persecutors.** *Negusie v. Mukasey*, 128 S. Ct. 1695 (cert granted March 17, 2008); decision below at 231 Fed. App'x 325 (5th Cir. 2007). The Immigration and Nationality Act (INA) prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding removal of, a refugee who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A). Question presented: Whether the "persecutor exception" prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution.

**B. Removal for "Particularly Serious Crime."** *Ali v. Achim*, 128 S. Ct. 828 **(cert dismissed on motion of parties, Dec. 27, 2007).** Questions presented: (1) Whether the Seventh Circuit erred in concluding — in direct conflict with the Third Circuit

— that an offense need not be an aggravated felony to be classified as a "particularly serious crime" that bars eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3)(B); (2) Whether the Seventh Circuit erred in narrowly construing the scope of its jurisdiction to review particularly serious crime determinations of the Board of Immigration Appeals under 8 U.S.C. §§ 1252(a)(2)(B)(ii) and (a)(2)(D), by treating non-discretionary denials of asylum and withholding of removal as discretionary in nature, and by refusing to consider arguments that the agency applied an incorrect legal standard, in direct conflict with the construction of those statutes by the Third, Ninth, and Tenth Circuits. **Cert dismissed.**

C. **Tolling Time to Depart After Removal Order.** *Dada v. Keisler*, 128 S. Ct. 36 (cert granted Sept. 25, 2007); decision below at 207 Fed. App'x. 425 (5th Cir. 2006). Question presented: Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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

A. **Jurisdiction for Habeas Relief for GTMO Detainees.** *Boumediene v. Bush*, and *Al-Odah v. United States*, 127 S. Ct. 3078 (cert. granted and cases consolidated on rehearing, June 29, 2007; vacating order denying cert, Apr. 2, 2007); decisions below at 2007 WL 506581 (D.C. Cir. Feb. 20, 2007). Questions presented by Boumediene: (1) Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay; (2) Whether Petitioners. habeas corpus petitions, which establish that the United States government has imprisoned Petitioners for over five years, demonstrate unlawful confinement requiring the grant of habeas relief or, at least, a hearing on the merits. Questions presented by Al-Odah: (1) Did the D.C. Circuit err in relying again on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to dismiss these petitions and to hold that petitioners have no common law right to habeas protected by the Suspension Clause and no constitutional rights whatsoever, despite this Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), that these petitioners are in a fundamentally different position from those in *Eisentrager*, that their access to the writ is consistent with the historical reach of the writ at common law, and that they are confined within the territorial jurisdiction of the United States? (2) Given that the Court in *Rasul* concluded that the writ at common law would have extended to persons detained at Guantanamo, did the D.C. Circuit err in holding that petitioners' right to the writ was not protected by the Suspension Clause because they supposedly would not have been entitled to the writ at common law? (3) Are petitioners, who have been detained without charge or trial for more than five years in the exclusive custody of the United States at Guantanamo, a territory under the plenary and exclusive jurisdiction of the United States, entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Conventions? (4) Should section 7(b) of the Military Commissions Act of 2006, which does not explicitly mention habeas corpus, be construed to eliminate the

courts' jurisdiction over petitioners' pending habeas cases, thereby creating serious constitutional issues?

## B. Timeliness of Filing Federal Petition.

1. **Tolling Time During Untimely State Proceedings.** *Allen v. Siebert*, 128 S. Ct. 2 (2007) (per curiam). The one-year filing deadline for pursuing a federal habeas challenge to a state conviction is not interrupted while a defendant pursues an untimely challenge in state court, no matter how a state sets the time limit for such challenges. In a 7-2 decision, the Court held it makes no difference whether the specific time limit set in state law is provided as an affirmative defense for the state, or is a jurisdictional bar. A majority of the court interpreted its 2005 ruling in *Pace v . DiGuglielmo* to mean that the federal habeas deadline is not "tolled" in either event. Repeating what it had said in the *Pace* decision, the Court stated: "When a postconviction petition is untimely under state law, that is the end of the matter for purposes" of the habeas filing deadline. Justices Stevens and Ginsburg dissented.

2. **Resetting Limitation Period for Equitable Reasons.** *Jimenez v. Quarterman*, 128 S. Ct. 1646 (cert. granted Mar. 17, 2008); decision below unpublished (5th Cir. 2007). Whether the Fifth Circuit Court should have granted a chance to appeal by an inmate who was seeking to prolong the time for filing a federal habeas challenge, after he had been unable to obtain direct review in state courts. The issue on which the court granted cert is: "Whether a certificate of appealability should issue pursuant to *Slack v. McDaniel*…, on the question of whether pursuant to 28 USC 2244-d-1-A when, through no fault of the petitioner, he was unable to obtain a direct review and the highest state court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review, resetting the 1-year limitations period."

## C. Standards for Relief.

1. **Standard of Review for Belatedly Discovered Error.** *Fry v. Pliler,* 127 S. Ct. 2321 (2007). John Fry was charged with murder. After two juries failed to reach a verdict, Fry was convicted in a third trial. At the first two trials, Pamela Maples testified and implicated her cousin in the murder of which Fry was accused. In the third trial, the judge barred Maples' testimony. It took the third jury five weeks of deliberation to reach a verdict, but it eventually found Fry guilty. Although Maples' testimony was excluded erroneously, this legal mistake was never recognized in the state court, so it was not evaluated for harmless error under the applicable harmless-beyond-a-reasonable-doubt standard of *Chapman v. California*, 386 U.S. 18 (1967). The Ninth Circuit did recognize the error, but upheld the exclusion of evidence as harmless error under the less demanding "substantial and injurious effect" standard of *Brecht v. Abrahamson,* 507 U.S. 619 (1993). The Supreme Court granted cert

to determine the correct harmless error standard applicable in a 2254 habeas proceeding where the error was not apparent during state court proceedings and only becomes apparent later: the *Brecht* standard, or the more liberal standard of *Chapman v. California,* 386 U.S. 18 (1967), which would have been used in the state courts if the error was known. In a decision written by Justice Scalia, the Court held that in habeas proceedings under section 2254, the federal court must review the prejudicial impact of constitutional error for actual prejudice under the "substantial and injurious effect" standard set forth in *Brecht* regardless of whether the state appellate court ever recognized the error and reviewed it for harmlessness under *Chapman*'s more liberal "harmless beyond a reasonable doubt" standard. Justices Stevens, Souter, Ginsburg and Breyer dissented from a portion of the majority's decision, which declined to decide whether the Ninth Circuit misapplied the *Brecht* standard to the facts of the case. Justices Stevens, Souter and Ginsburg would have reversed the Ninth Circuit on the ground that the alleged *Chambers* error was harmful under *Brecht*, which, the justices wrote, "imposes a significant burden of persuasion on the State." Justice Breyer agreed that a *Chambers* error "is by nature prejudicial" under *Brecht*, but he would have remanded the case to the Ninth Circuit to determine whether the claimed error rose to the level of a *Chambers* error.

**2. Deference to State Court Determinations**.

**a. State Jury Instructions.** *Waddington v. Sarausad*, 128 S. Ct. 1650 (cert. granted Mar. 17, 2008); decision below at 479 F.3d 671 (9th Cir. 2007). Sarausad drove with fellow gang members to a high school, in order to retaliate against a rival gang. With knowledge that his front-seat passenger was armed and going to shoot, Sarausad drove toward a group of students standing outside the school. The passenger opened fire, killing one student and wounding another. A jury convicted Sarausad of second degree murder, second degree attempted murder, and second degree assault based on accomplice liability. The accomplice liability jury instructions mirrored a state statute and had been upheld by Washington state courts. A federal judge granted habeas relief and the Ninth Circuit affirmed, finding the instruction ambiguous under state law, because there is a reasonable probability that a jury would apply the instructions to relieve the prosecution of its obligation to prove all elements of the crime. Question presented: Whether, on federal habeas review, courts must accept state court determinations that jury instructions fully and correctly set out state law with regard to accomplice liability.

**b. Ineffective Assistance of Counsel Sans State Hearing.** *Bell v. Kelly*, 128 S. Ct. ___ (cert. granted May 12, 2008). Edward Bell asserted ineffective assistance of counsel at sentencing, and the district court found that he had diligently attempted to develop and

present the factual basis of this claim in state court, on habeas, but that the state court's fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth Circuit affirmed. Question presented: Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?

3. **Absence of Clear Binding Precedent**.

a. **Erroneous Jury Instruction as Structural Error.** *Chrones v. Pulido*, 128 S. Ct. 1761 (cert. granted Feb. 25, 2008); decision below at 487 F.3d 669 (9th Cir. 2007). Michael Pulido was convicted of first-degree murder for the robbery-killing of a convenience store clerk. He claimed that a murder instruction allowed the jury to convict him as an accomplice even if he had aided in the robbery only after the killing. The California Supreme Court held any instructional error to be harmless because the jury, in also returning a separate "special circumstance" verdict, explicitly found that respondent aided the robbery "during" the murder. Perceiving an ambiguity in another special-circumstance instruction, the Ninth Circuit rejected the state court's conclusion that the jury's special-circumstance finding had definitively cured the error in the murder instruction. Relying on circuit law it had derived from the U.S. Supreme Court's 1931 decision in *Stromberg v. California*, 283 U.S. 359 (1931), the Ninth Circuit deemed the murder instruction to be "structural error" because it concerned an "alternative" theory of guilt–aiding and abetting, as opposed to direct perpetration–and held reversal was required because the court was not "absolutely certain" that the jury had not relied on the erroneous theory. The state petitioned for Supreme Court review, claiming that *Stromberg* concerned an instructional error qualitatively different from the error claimed here, so it is not "clearly established law" governing this case. Instead, the state argues–as four circuits have held–a line of cases stretching from *Rose v. Clark*, 478 U.S. 570 (1986), through *Neder v. United States*, 527 U.S. 1 (1999), clearly establishes that an erroneous instruction on an element of a crime is not "structural" and may be found harmless under traditional tests for prejudice. The Ninth Circuit's reaffirmation of its "structural error" rule in this case is particularly disturbing to the state because it comes on the heels of Supreme Court's holding last Term in *Fry v. Pliler*, 127 S. Ct. 2321 (2007), that the relaxed harmless-error test of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), applies in state-prisoner habeas

corpus cases. Had it applied Brecht's test for actual prejudice instead of its own test of "absolute certainty," the state contends, the Ninth Circuit would have been constrained to deny relief. The state cert petition argues: *Stromberg v. California*, 283 U.S. 359 (1931), required the reversal of the judgment if a general verdict could have rested on an instruction that defined a constitutionally defective alternative theory of criminal liability. However, a modern line of cases, including *Neder v. United States*, 527 U.S. 1 (1999), establishes that error in instructing on an element of a charged crime is not "structural error," so as to require automatic reversal, but is instead "trial error" and, as such, may be harmless. Question presented: Did the Ninth Circuit fail to conform to "clearly established" Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be "structural error" requiring reversal because the jury might have relied on it?

**b.** **Presence of Counsel**. *Wright v. Van Patten*, 128 S. Ct. 743 (2008) (per curiam). Seventh Circuit held that Van Patten was entitled to habeas relief on his conviction for first-degree reckless homicide because his lawyer's assistance was presumptively ineffective by participating in a plea hearing by telephone. *See United States v. Cronic* (finding *per se* error where counsel is not present). This case was then remanded by the Supreme Court in light of *Carey v. Musladin*, to reconsider if there existed Supreme Court precedent clearly establishing such a right of presence. On remand, the state argued that the state court's interpretation of *United States v. Cronic* reasonably permitted presence by telephone. The Seventh Circuit again held habeas relief was appropriate. This time the Supreme Court reversed in a per curiam decision because there was no clearly established law contrary to the state court's conclusion. *Cronic*, the Court held, did not specify that counsel must be present in person, and did not address a lawyer who was only present on a speaker phone. Justice Stevens concurred in the judgment, finding that the failure of the *Cronic* opinion to specify "in person" was "an unfortunate drafting error" that occurred because the idea of telephonic conferences was foreign to the Court over twenty years ago: "The fact that in 1984, when *Cronic* was decided, neither the parties nor the Court contemplated representation by attorneys who were not present in the flesh explains the author's failure to add the words 'in open court' after the word 'present.'" This does not mean that the state's interpretation is correct, simply that no clearly established law existed prior to the decision below. But this does not mean that the Supreme Court is bound by the state's interpretation on a direct appeal, without the deferential requirements of habeas law.

4. **Application of Teague Retroactivity Rules to State Courts**. *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008). Danforth attempted to apply the Supreme Court's decision in *Crawford v. Washington* (testimonial statements of witnesses absent from a trial are admissible only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine the witness) to his state conviction, arguing that *Crawford* announced a "new rule" that a state could apply retroactively. Prior to the Supreme Court's decision in *Whorton v. Bockting* (holding *Crawford* does not apply retroactively), the Minnesota Supreme Court applied the U.S. Supreme Court's retroactivity standard in *Teague v. Lane*, and found that *Crawford* should not be retroactively applied. Danforth argued, however, that *Teague* governs only federal retroactivity; Minnesota's standard of retroactivity is different and more favorable to him. Minnesota courts disagreed, so he took cert, arguing that state supreme courts are not required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases; that they may apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*. The Supreme Court agreed, holding that *Teague* does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than *Teague* allows in federal habeas proceedings.

D. **States' Authority to Ignore International Law and Presidential Decrees.** *Medellin v. Texas*, 128 S. Ct. 1346 (2008). In the *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), I.C.J. No. 128 (judgment of Mar. 31, 2004), the International Court of Justice determined that 51 named Mexican nationals, including petitioner, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States without regard for procedural defaults. Petitioner filed a state habeas case challenging his capital conviction, claiming he was not informed of his Vienna Convention right to notify the Mexican consulate. Medellin had not timely raised and preserved the claim in state court so it was procedurally defaulted. While the applicability of *Avena* to Texas courts was pending in the U.S. Supreme Court, President George W. Bush determined that the United States would comply with its international obligation to give effect to the judgment by giving those 51 individuals review and reconsideration in the state courts. As a result, the Supreme Court case was deemed moot. Medellin filed another habeas petition in state court, relying on both *Avena* and the President's decree. In response, the Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the *Avena* judgment or the President's determination. The U.S. Supreme Court affirmed dismissal of the habeas petition, holding that neither an International Court of Justice case, nor a memorandum issued by the President of the United States constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions.

E. **Timeliness of Habeas Appeals.** *Bowles v. Russell*, 127 S. Ct. 2360 (2007). Keith Bowles, convicted of murder in state court, eventually filed a federal habeas corpus petition. When that relief was denied, he sought to appeal. Fed. R. App. P. 4(a)(1)(A) and 18 U.S.C. § 2107(a) allow such an appeal to be filed within 30 days of an adverse civil judgment, but Bowles requested an 14 additional days to file his notice of appeal, under Rule 4(a)(6) and § 2107(c). The district court inexplicably granted longer, 17 days. Bowles filed his notice in the 16th day. The Court of Appeals then granted the warden's motion to dismiss the appeal as untimely, outside the time allowed by statute. In a 5-4 decision, the Supreme Court affirmed, holding that the time limits for filing a civil appeal are set by statute and jurisdictionally limit the courts of appeals. Indeed, the appellate court lacks any power to equitably remedy an unfair result, as is apparent here. The time to appeal in a civil case is not simply a claim-processing rule, but rather it is a jurisdictional limitation on the court. CAVEAT - Although habeas appeals operate as civil matters, and this is bad news for habeas appellants, this decision does not impact traditional federal criminal appeals. Peter Goldberger has developed this analysis: The time for the defendant to appeal in a federal criminal case is not established by any statute (formerly, it was governed by 18 U.S.C. §3732, but not for many years has this been true); it is governed only by Fed. R. App. P. 4(b). Thus, *Bowles* lays the groundwork for overruling *United States v Robinson*, 262 U.S. 220, 229 (1960) (late filing of notice of appeal is jurisdictional defect). See n.2 of *Bowles*. The other interesting implication concerns government appeals in criminal cases. The time within which the government can appeal dismissals, suppression orders, and bail decisions in a criminal case is established by statute, 18 U.S.C. § 3731, which allows the notice to be filed only within 30 days of when the order was "rendered." The statute does not authorize extensions of time, nor does it suspend the deadline if a motion for reconsideration is filed. Fed. R. App. P. 4(b), on the other hand, purports to allow government appeals within 30 days after the order appealed from was "entered," which is often quite a bit later than when it was "rendered" (i.e., announced), and the Rule does purport to allow extensions. Defense counsel invoke the reasoning of *Bowles* to insist on dismissal of any government appeal in a criminal case under 3731 brought more than 30 days after the decision at issue was "rendered," with no exceptions. Note, however, that government sentencing appeals are not brought under 3731 and do not have a statutory time limit but only a Rule 4 limit, like defendants' appeals.

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