Carol Garfiel Freeman

Supreme Court Review: Final Months of 2006 Term

In the final months of the 2006 Term, the Court added seven cases of interest to criminal practitioners to the five cases in which certiorari had been granted previously for argument during the 2007 Term. These 12 cases are just over 40 percent of the cases already set for argument next term, a slightly higher percentage than at this point in the 2006 Term. Dates of oral argument will be available on the Supreme Court's web site at www.supremecourtus.gov.

Of particular note is the Court's reversal of its April 2, 2007, denial of cert in *Boumediene v. Bush* and *Al Odah v. United States*, 127 S. Ct. 1478 (Nos. 06-1195, 06-1196) (April 2, 2007), petitions for certiorari filed on behalf of certain prisoners held at Guantanamo Bay. On the last day of the Term, June 29, 2007, the Court granted petitioners' petitions for rehearing of the denial, vacated the orders denying the petitions for cert, and granted those petitions, consolidating the cases for a total of one hour for oral argument. Interestingly, the order further provided that "[a]s it would be of material assistance to consult any decision in *Bismullah, et al., v. Gates*, No. 06-1197, and *Parhat, et al., v. Gates*, No. 06-1397, currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon the issuance of any decision in those cases." Justices Stevens and Kennedy had concurred in the initial denial of cert based on "traditional rules governing our decision of constitutional questions . . . and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." Under certain circumstances, however, they observed, the courts might be required to take appropriate action consistent with Justice Kennedy's concurrence in *Padilla v. Hanft*, 547 U.S. 1062-1064 (2006). Justices Souter, Ginsburg, and Breyer would have granted certiorari originally and expedited consideration of the issues raised. Reversal of an order denying cert requires the votes of five justices and, under the Court's rules, requires the petitioner to show "intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented." (Sup. Ct. R. 44.2.) Observers of the Court have noted that this appears to be the first case in 60 years in which the Court reversed a denial of certiorari.

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Note: Questions presented below are quoted directly as drafted by parties.

CERTIORARI GRANTED

Capital Case—*Batson*

Snyder v. Louisiana, *cert. granted*, 2007 WL 843815 (June 25, 2007) (No. 06-10119), decision below at 942 So. 2d 484 (La 2006): Petitioner 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.

This Court directed the court below 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 prose-

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cutor'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 fact finder [would] necessarily conclude the prosecutor lied' about the reasons for his strikes. Three justices, including the author of the original opinion, dissented, finding the prosecutor's reference to the O.J. Simpson case in argument to an all-white jury, made 'against a backdrop of the issues of race and prejudice,' supported the conclusion that the State improperly exercised peremptory strikes in a racially discriminatory fashion. The Louisiana Supreme Court's consideration of Mr. Snyder's Batson claims on remand from this Court raises the following important questions:

1. Did the majority below ignore the plain import of Miller-El by failing to consider highly probative evidence of discriminatory intent, including the prosecutor's repeated comparisons of this case to the O.J. Simpson case, the prosecutor's use of peremptory challenges to purge all African Americans from the jury, the prosecutor's disparate questioning of white and black prospective jurors, and documented evidence of a pattern of practice by the prosecutor's office to dilute minority presence in petit juries?
2. Did the majority err when, in order to shore up its holding that Mr. Snyder had failed to prove discriminatory intent, it imported into a direct appeal case the standard of review this Court applied in Rice v. Collins, an AEDPA habeas case?
3. Did the majority err in refusing to consider the prosecutor's first two suspicious strikes on the ground that defense counsel's failure to object could not constitute ineffective assistance of counsel because Batson error does not render the trial unfair or the verdict suspect—i.e., that failure to raise a Batson objection can never result in prejudice under Strickland v. Washington, 466 U.S. 668 (1984)—a holding directly conflicting with decisions from inter alia the Third Circuit Court of Appeals and the Alabama and Mississippi Supreme Courts?"

Procedure

Danforth v. Minnesota, *cert. granted limited to Question 1 presented by the petition*, 127 S. Ct. 2427 (May 21, 2007) (No. 06-8273), decision below at 718 N.W.2d 451 (Minn. 2006): 1. Are state supreme courts 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, or may a state court 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?

Sentencing

Gall v. United States, *cert. granted***,** 2007 WL 1660978 (June 11, 2007) (No. 06-7949), decision below at 446 F.3d 884 (8th Cir. 2006): Whether, when determining the 'reasonableness' of a district court sentence under United States v. Booker, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.

Kimbrough v. United States, *cert. granted*, 2007 WL 1660977 (June 11, 2007) (No. 05-4554), decision below at 174 Fed. Appx. 798 (4th Cir. 2006): In United States v. Booker, 543 U.S. 220 (2005), this Court held that mandatory application of the U.S. Sentencing Guidelines violates a criminal defendant's right under the Sixth Amendment to have facts that increase his or her sentence determined by a jury beyond a reasonable doubt. The Court further held that to avoid the Sixth Amendment violation, the Guidelines are to be applied as advisory only, and as one of a number of factors both that a sentencing court must consider pursuant to 18 U.S.C. § 3553(a) in exercising its discretion in selecting a sentence and that a court of appeals must consider when reviewing the sentence for reasonableness. In light of the Court's holdings, the following questions are presented.

(1) In carrying out the mandate of § 3553(a) to impose a sentence that is 'sufficient but not greater than necessary' on a defendant, may a district court consider either the impact of the so-called '100:1 crack/powder ratio' implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio?

(2) In carrying out the mandate of § 3553(a) to impose a sentence that is 'sufficient but not greater than necessary' on a defendant, how is a district court to consider and balance the various factors spelled out in the statute, and in particular, subsection (a)(6), which

addresses 'the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct'?

War on Terror

Boumediene v. Bush, *cert. granted,* 2007 WL 1854132 (June 29, 2007) (No. 06-1195), decision below at 476 F.3d 981 (D.C. Cir. Feb. 20, 2007): 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.

Al Odah v. United States, *cert. granted,* 2007 WL 1582961 (June 29, 2007) (No. 06-1196), decision below at 476 F.3d 981 (D.C. Cir. Feb. 20, 2007): 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?

Relevant Civil Case

Ali v. Federal Bureau of Prisons, *cert. granted*, 2007 WL 278844 (May 29. 2007) (No. 06-9130), decision below at 204 Fed. Appx. 778 (11th Cir. 2006): Under 28 U.S.C. § 2680(c), the Federal Tort Claims Act's waiver of sovereign immunity does not extend to '[a]ny claim arising in respect of *** the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.' The question presented, over which ten circuits are divided six–to–four is: Whether the term 'other law enforcement officer' is limited to officers acting in a tax, excise, or customs capacity.

Relevant cases previously set for argument in the 2007 Term

Medellin v. Texas, 127 S. Ct. 2129 (No. 06-984), *Cert Alert*, 22:2 CRIM. JUST. at 52 (Summer 2007) (executive authority and supremacy clause; treaty obligations)

Logan v. Texas, 127 S. Ct. 1251 (No. 06-6911), *Cert Alert*, 22:2 CRIM. JUST. at 53 (Summer 2007) (application of Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), when the prior conviction did not result in deprivation of civil rights)

United States v. Santos, 127 S. Ct. 2098 (No. 06-1005), *Cert Alert*, 22:2 CRIM. JUST at 53 (Summer 2007) (interpretation of "proceeds" in federal money laundering statute, 18 U.S.C. § 1956(a)(1))

United States v. Williams, 2007 WL 879579 (No. 06-694), *Cert Alert*, 22:2 CRIM. JUST. at 53 (Summer 2007) (constitutionality of statute relating to distribution of illegal child pornography)

Watson v. United States, 127 S. Ct. 1371 (No. 06-571), *Cert Alert*, 22:2 CRIM. JUST. at 53 (Summer 2007) (whether receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm under 18 U.S.C. § 924(c)(a)(A))

DECIDED CASES

Death Penalty

Panetti v. Quarterman, 2007 WL 1836653 (June 28, 2007) (No. 06-6407). Petitioner had been found guilty of capital murder and sentenced to death, the jury and appellate courts rejecting his claim of insanity. His first petition for habeas corpus, challenging the conviction and death sentence, was denied. After the death warrant was signed counsel

filed on Panetti's behalf a second petition for habeas corpus alleging for the first time that he was incompetent to be executed. (*See Ford v. Wainwright*, 477 U.S. 399 (1986).) After proceedings on remand to the state court, the district court denied the petition and the court of appeals for the 5th Circuit affirmed. The Supreme Court reversed, holding (1) the second petition for habeas corpus was not barred as a successive petition under AEDPA (Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, 28 U.S.C. § 2244(b)(2)) because the facts on which it was based (showing incompetency to be executed) could not have been raised at the time of the first petition; (2) the state court's determination that petitioner is competent to be executed was not entitled to the usual deference (28 U.S.C. § 2254(d)(1)) because after petitioner made a substantial showing of incompetency the court failed to provide the procedures to which he is entitled under *Ford*—i.e., a fair hearing including the opportunity to present his own expert psychiatric evidence—and in fact may have violated state law; and (3) the Eighth Amendment forbids the execution of a person who may understand that he committed the crimes and that the state says that it proposes to execute him because of those crimes, but who because of mental illness believes that there is a different purpose behind the execution: "Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." The case was remanded for further proceedings to provide a record in light of the Court's holding on the standard for incompetency under *Ford*.

Opinion for the Court by Justice Kennedy, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice Thomas dissented in an opinion joined by Chief Justice Roberts and Justices Scalia and Alito, stating that the Court lacked jurisdiction under AEDPA to consider Panetti's habeas petition and that the state court's decision was a reasonable interpretation of federal law. The dissent also rejected the majority's approach to the substantive question of the standard for competency, although it declined to consider the issue on the merits.

Roper v. Weaver, 127 S. Ct. 2022 (May 21, 2007). The court of appeals for the Eighth Circuit had set aside Weaver's death sentence on the ground that the prosecutor's closing argument was "unfairly inflammatory." Certiorari had been granted to consider whether the circuit court had properly applied the standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, 28 U.S.C. § 2244. The Court, per curiam, dismissed the writ as improvidently granted. Federal habeas relief had been granted to two prisoners in whose cases the same closing argument had been made, but who filed their habeas petitions before the effective date of AEDPA. The Court concluded that it was "appropriate to exercise [its] discretion to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner, simply because the District Court erroneously dismissed respondent's pre-AEDPA petition." Chief Justice Roberts concurred in the result. Justice Scalia wrote a dissenting opinion in which Justices Thomas and Alito joined.

Schriro v. Landrigan, 127 S. Ct. 1933 (May 14, 2007) (No. 05-1575). At his capital sentencing hearing Landrigan refused to allow his counsel to present testimony from his ex-wife and his birth mother, and told the judge that there were no other mitigating circumstances "as far as [he was] concerned." After further efforts by counsel to explain Landrigan's prior convictions, the judge imposed the death sentence. A post-conviction petition (filed by new counsel) arguing that trial counsel was constitutionally ineffective for failing to investigate the biological component of Landrigan's behavior was denied without a hearing; state appellate review was denied. On federal habeas the district court concluded that even with an expanded record Landrigan could not establish that counsel was constitutionally ineffective; the petition was denied without a hearing. The court of appeals affirmed but then, en banc, reversed and remanded for an evidentiary hearing, concluding that counsel's performance fell below the standard required by *Strickland v. Washington*, 466 U.S. 688 (1984). The Supreme Court reversed, concluding that the state court's denial of relief was not an unreasonable application of clearly established federal law or an unreasonable determination of the facts. (Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), (2).) Landrigan had told his counsel not to present any mitigating evidence, not simply the testimony of his ex-wife and birth mother. The district court could reasonably conclude that Landrigan would have refused to permit counsel to introduce any other evidence counsel might have discovered during an investigation,

and thus that he could not demonstrate prejudice under *Strickland*. The majority opinion rejected the argument that because counsel had failed to conduct a sufficient investigation Landrigan did not make a knowing and informed decision to waive introduction of mitigating evidence, stating that the Court has never held that such a decision must be so informed, and in any event this argument was not developed in the state courts. Finally, the proposed mitigating evidence would not have changed the final result.

Opinion for the Court by Justice Thomas, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined, observing that trial counsel was grossly ineffective by failing to conduct an appropriate investigation into possible mitigating factors, including a psychological study that revealed an organic brain disorder. Because counsel failed to uncover this evidence, Landrigan's decisions regarding the presentation of mitigating evidence were not made knowingly, with full information as to what evidence might be available. Landrigan did not believe he had waived his right to present such mitigating evidence, evidence of which he was not aware because counsel had not developed it. In any event, there has never been a hearing on whether Landrigan instructed counsel not to investigate mitigating evidence other than that of his ex-wife and birth mother.

Uttecht v. Brown, 127 S. Ct. 2218 (June 4, 2007) (No. 06-413). The Court reversed a decision of the court of appeals holding that a Washington State judge had erred in granting the state's motion to excuse a juror in a capital case. Under *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S.412 (1985), a jury in a capital case should not be tilted in favor of capital punishment, jurors should be able to apply capital punishment in accordance with state law, only a juror who is "substantially impaired" in his ability to impose the death penalty can be excused for cause, and the trial judge can base his judgment on the juror's ability on observation of the juror's demeanor. In this case, following a lengthy voir dire, which appears in an appendix to the Court's opinion, the trial judge excused Juror Z. The Court, in an opinion by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, concluded that the juror was properly excused for cause. This opinion relies in part on a statement by defense counsel that he had "no objection," made after the prosecutor asserted his objections to the juror. Justice Stevens, in a dissent joined by Justices Souter, Ginsburg, and Breyer, concluded that the juror was not "substantially impaired" in his ability to impose the death penalty, and interpreted the defense counsel's statement on which the majority relied as being a response to the trial judge's inquiry whether he had an objection to the juror, rather than an acquiescence in the state's request to excuse the juror. Justice Breyer, in an opinion joined by Justice Souter, wrote separately to observe that under state law the failure to object to exclusion of a juror does not preclude raising the issue on appeal, the statement "no objection" should not be interpreted as evidencing courtroom "atmospherics" to support the trial judge's ruling, and that on the written record, especially Juror Z's responses, he should not have been excused.

Fourth Amendment

Brendlin v. California, 127 S. Ct. 2400 (June 18, 2007) (No. 06-8120). A passenger in a motor vehicle is seized for purposes of the Fourth Amendment when the police make a traffic stop, because a reasonable person would believe that the police officer is exercising control over all persons in the car and therefore that he/she is not free to leave without the officer's permission. Thus the passenger may challenge the stop and seek suppression of evidence seized from him/her during that stop. The state court had denied Brendlin's motion to suppress drug material on the ground that he had not been seized at the time the car was stopped. The case was remanded for further consideration of the motion to suppress. Opinion for a unanimous court by Justice Souter.

Habeas Corpus

Fry v. Pliler, 127 S. Ct. 2321 (June 11, 2007) (No. 06-5247). In petitioner's murder trial he offered testimony suggesting that another person was the perpetrator. The trial court excluded testimony from an additional witness, Maples, as cumulative. On appeal, petitioner argued that this ruling violated *Chambers v. Mississippi*, 410 U.S. 284 (1973). The California appellate court affirmed, concluding that exclusion of the evidence was discretionary under state evidence rules and stating that "no possible prejudice" could have ensued from the exclusion of Maples' testimony, which was "merely cumulative." The court did not specify the standard it applied in concluding that the exclu-

sion was harmless. On federal habeas, the magistrate judge (and the district court) found that the exclusion violated *Chambers* and that the conclusion that there was "no possible prejudice" was wrong, but concluded that petitioner had not met the showing of prejudice required on collateral review. In an opinion by Justice Scalia, unanimous in part, the Court held that whether or not the state court recognizes a constitutional error and reviews it under the beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967), on federal habeas the error will be considered harmless unless it is shown to have had a "substantial and injurious effect or influence in determining the jury's verdict." (*Brecht v. Abrahamson,* 507 U.S. 619, 631 (1993).) In *Chapman*, the Court held that on direct review of a state court conviction a federal constitutional error will be harmless only if it is found harmless beyond a reasonable doubt. On the other hand, *Brecht* held that on collateral review the error will be analyzed under the standard applied to non-constitutional errors on appeals from federal convictions. (*Kotteakos v. United States*, 328 U.S. 750 (1946).) This standard applies regardless of the basis of the state court's decision. Opinion by Justice Scalia for a unanimous Court with respect to all except footnote 1 and Part II-B. In footnote 1, the Court assumed that the state court's ruling upholding the exclusion of Maples' testimony was an unreasonable application of *Chambers*, and also that the state court failed to determine whether that error was harmless under the *Chapman* standard. In Part II-B the Court declined to address the question whether the exclusion of Maples' testimony met the "substantial and injurious effect" standard of *Brecht*. Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined the opinion in full. Justices Stevens, Souter, and Ginsburg joined the opinion in all but Part II-B. Justice Breyer joined all but footnote 1 and Part II-B. Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justices Souter and Ginsburg joined and Justice Breyer joined in part. These justices would have found the constitutional error not harmless under the *Brecht* standard because the excluded testimony was that of the only disinterested witness to inculpate the third party and after two hung juries the jury that convicted Fry had deliberated for five weeks before reaching its verdict. Justice Breyer filed an opinion concurring in part and dissenting in part, agreeing that the *Brecht* standard should apply and agreeing with Justice Stevens that the Court should consider application of the standard and that a *Chambers* error would be prejudicial; he would remand to the court of appeals for further consideration of the *Chambers* argument.

Prison Conditions

Erickson v. Pardus, 127 S. Ct. 2197 (June 4, 2007) (No. 06-7317). Petitioner, pro se, filed a complaint under 42 U.S.C. § 1983 against Colorado prison officials alleging violation of his Eighth and Fourteenth Amendment right against cruel and unusual punishment because prison officials had terminated him from a program to treat his hepatitis C. The complaint and other documents alleged, inter alia, that the dismissal had endangered petitioner's life. The district court had dismissed the complaint on the ground that it did not allege that the actions had caused him "substantial harm." The court of appeals affirmed, holding that petitioner had made "only conclusory allegations" that he had suffered a cognizable harm. The Supreme Court, per curiam, granted certiorari, vacated the judgment of the appellate court, and remanded for further proceedings, observing that the complaint met the requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Moreover, the Court emphasized, pro se complaints are held to less stringent standards than complaints drafted by lawyers. Justice Scalia would have denied the petition for certiorari. Justice Thomas dissented, reiterating his opinion that the Eighth Amendment applies only to injuries relating to a criminal sentence.

Procedure

Bowles v. Russell, 127 S. Ct. 2360 (June 14, 2007) (No. 06-5306). The time for filing an appeal from a district court judgment in a civil case may be extended for 14 days under certain circumstances. (28 U.S.C. § 2107(c), Fed. R. App. P. 4(a)(6).) Petitioner sought an extension of time in which to file an appeal from an order denying his petition for habeas corpus. The district judge granted the motion in an order inexplicably giving him 17 days. The appeal was noted on the sixteenth day. The Court held that the 14-day limit on the extension of time is jurisdictional and therefore the court of appeals lacked jurisdiction over the appeal, although the petitioner had relied on the district judge's order in filing on the six-

teenth day. Certain cases that had provided flexibility in "unique circumstances" (*Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215) (1962) and *Thompson v. INS*, 375 U.S. 384 (1964)) were overruled. Opinion for the Court by Justice Thomas, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined. Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined. The dissent distinguished between statutes that define the cases that the courts have the power to hear (subject matter jurisdiction) and persons over whom the courts may exercise authority (personal jurisdiction), which are properly described as jurisdictional, and statutes that are more "claim processing rules" and are subject to equitable considerations. Because the statute in question in this case is in the latter category, the litigant's reliance on a trial judge's erroneous information as to the time for appeal should excuse the untimely filing.

Sentencing

Claiborne v. United States, 127 S. Ct. 2245 (June 4, 2007) (No. 06-5618). Petitioner having died on May 30, 2007, the judgment of the Eighth Circuit was vacated as moot.

Rita v. United States**,** 2007 WL 1772146 (June 21, 2007) (No. 06-5754). The Court held that on appeal from a sentence imposed in a criminal case the court of appeals should consider a sentence within the range provided in the sentencing guidelines presumptively reasonable. In writing the guidelines the commission considered the factors specified by Congress in 18 U.S.C. § 3553(a), *see* 28 U.S.C. § 991(b). In imposing a sentence within those guidelines the district court will have considered arguments by both prosecution and defense as to whether a guidelines sentence is appropriate. Thus by the time the appellate court considers a sentence within the guidelines both the trial judge and the Sentencing Commission will have considered the relevant factors and concluded that the sentence is reasonable. Use of the presumption of reasonableness is not precluded by the Sixth Amendment since the trial court could ignore the guidelines and still impose a sentence higher than the statutory minimum or the lowest guidelines sentence without finding additional facts that, under the guidelines, would support the higher sentence. Moreover, the courts cannot impose a presumption that every variation from the guidelines is *unreasonable.* In this case, as required, the trial judge set out the reasons for the sentence he imposed; although brief, the statement was sufficient for the appellate court to conclude that the judge had considered the parties' arguments and that he had a reasoned basis for his decision. In this case the court of appeals was justified in concluding that the sentence imposed was not unreasonable.

Opinion for the Court by Justice Breyer, in which Chief Justice Roberts and Justices Stevens, Kennedy, Ginsburg, and Alito joined and Justices Scalia and Thomas joined as to Part III. Justice Scalia filed an opinion concurring in part and concurring in the judgment, in which Justice Thomas joined. Justice Stevens filed a concurring opinion in which Justice Ginsburg joined as to all except Part II, emphasizing that sentences should take into account the individual characteristics of the offender, some of which are not taken into consideration in the guidelines; that review should be for abuse of discretion/reasonableness and that the presumption of reasonableness is rebuttable; and that although he might have imposed a lower sentence, the sentence imposed on Rita was not an abuse of discretion, particularly because it was within the guidelines. In Part II (which Justice Ginsburg did not join), Justice Stevens stated that there was a serious flaw in the sentencing because the district judge did not mention Rita's significant military service, which is not taken into consideration in the guidelines. Nevertheless, he joined the Court's opinion and judgment because of the respect due to the discretion of the judge imposing sentence. Justice Souter filed a dissenting opinion, arguing that the presumption of reasonableness is inconsistent with the Sixth Amendment requirement that facts that enhance a sentence must be found by a jury or admitted by the defendant.

Relevant Civil Cases

Morse v. Frederick, 2007 WL 1804317 (June 25, 2007) (No. 06-278). The banner "Bong Hits 4 Jesus" reasonably was viewed as promoting illegal drug use, thus justifying a school principal's disciplinary action against a student who displayed the banner at a parade across the street from the school during school hours. Students' First Amendment rights may be restricted in connection with school events where the subject is illegal drug use, because drug usage by students is a matter of serious concern. Opinion for the

Court by Chief Justice Roberts, in which Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Thomas filed a concurring opinion expressing his view that "the First Amendment, as originally understood, does not protect student speech in public schools." Justice Alito filed a concurring opinion in which Justice Kennedy joined, observing that they joined in the majority opinion on the understanding that it is limited to speech relating to drug usage and "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." Justice Breyer filed an opinion concurring in the judgment and dissenting in part, on the ground that the defendants in this Civil Rights Act case (42 U.S.C. § 1983) were entitled to qualified immunity because the principal's action did not violate the student's "clearly established" constitutional right and therefore the Court need not reach the question of the student's First Amendment rights. Justice Stevens filed a dissenting opinion in which Justices Souter and Ginsburg joined, rejecting liability for the principal on the ground of qualified immunity but describing the banner as a "nonsense" banner intended only to attract the attention of nationwide television crews rather than to advocate use of marijuana, and arguing that the First Amendment protects student speech, even related to drug usage, unless it advocates illegal conduct harmful to students.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 2007 WL 1773208 (June 21, 2007). In an action under the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, 15 U.S.C. § 78u-(4)(b)(1), (2), a plaintiff must allege that the defendant acted with the intention "to deceive, manipulate, or defraud" and must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." The Court, in an opinion by Justice Ginsburg joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, and Breyer, held that to comply with the requirement that the complaint allege a "strong inference"of scienter, the complaint must allege facts that, taken as a whole, would permit a reasonable person to conclude that the inference of a guilty state of mind is "cogent and at least as compelling as any opposing inference of nonfraudulent intent." Justices Scalia and Alito filed opinions concurring in the judgment. Justice Scalia concluded that an inference that is at least as likely as a plausible opposing inference could not be considered a "strong inference." Rather, the test should be whether the inference of guilty knowledge is more plausible than the innocent explanation. Justice Alito agreed with Justice Scalia that the inference of scienter must be more likely, rather than merely as compelling, and added that in his opinion only the facts alleged "with particularity" should be considered on the issue. Justice Stevens filed a dissenting opinion, suggesting that the probable cause standard (without weighing competing inferences from the facts alleged) would effect the intention of Congress and be easier to apply.

***Wilkie v. Robbins*,** 2007 WL 1804315 (June 25, 2007). A Wyoming landowner sued employees of the U.S. Bureau of Land Management based on their efforts to have him regrant an easement over his land to connect to federal land. The Court held that he did not have a private right of action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) because he had administrative and ultimately judicial remedies for the actions underlying his claims, and even weighed in their totality the acts of the government agents were within their authority in attempting to obtain the easement for the government. Plaintiff's RICO claim (Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq*.) was based on the predicate act of an alleged violation of the Hobbs Act (18 U.S.C. § 1951), which the Court held could not be applied to acts of government employees in attempting to obtain property solely for the benefit of the government.

Opinion for the Court by Justice Souter, in which Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito joined, and in which Justices Stevens and Ginsburg joined as to Part III (the RICO discussion). Justice Thomas filed a concurring opinion in which Justice Scalia joined, stating that the *Bivens* cases should be confined to the facts on which they were based. Justice Ginsburg filed an opinion concurring in part and dissenting in part, in which Justice Stevens joined. Based on the many years' campaign of harassment to induce plaintiff to regrant an easement that the land agents had failed to record, Justices Ginsburg and Stevens would find that plaintiff sufficiently alleged facts to comprise a *Bivens* action. ■