High Court to Review 19 Cases of Interest to Criminal Lawyers

BY CAROL GARFIEL FREEMAN

In the final weeks of the term, the U.S. Supreme Court decided several significant cases, including *Kennedy v. Louisiana*, which invalidated the death penalty for nonhomicide crimes against individuals; *Boumediene v. Bush*, which held that aliens detained at the U.S. military base at Guantanamo, Cuba, have the right to habeas corpus; and *District of Columbia v. Heller*, which held unconstitutional the District of Columbia's ban on personal ownership of handguns. The Court also granted cert in seven additional cases of interest to criminal justice practitioners. As of July 7, 2008, therefore, 19 cases of interest to criminal justice professionals will be argued next term; six of these have been set for argument during October. Dates of oral arguments for future months will be available on the Supreme Court's Web site at www.supremecourtus.gov/.

CERTIORARI GRANTED

Note: *Questions presented are quoted as drafted by the parties.*

Capital Cases—Habeas Corpus

Bell v. Kelly*, cert. granted limited to question 1 presented by the petition*, 128 S. Ct. 2108 (May 12, 2008) (No. 07-1223), decision below unpublished (4th Cir. No. 06-22, Jan. 4, 2008), *reh'g denied* Jan. 29, 2008.

> Petitioner 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. The [question] presented [is]:
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> 1. 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?

Cone v. Bell*, cert. granted*, 2008 U.S. LEXIS 5233 (June 23, 2008) (No. 07-1114), decision below at 492 F.3d 743 (6th Cir. June 19, 2007), *reh'g denied*, Sept. 26, 2007.

> On state post-conviction review, the Tennessee courts refused to consider petitioner's claim under Brady v. Maryland, 373 U.S. 83 (1963), on the ground that the claim had already been "previously determined" in the state system. On federal habeas, a divided panel of the Sixth Circuit held that the state courts' ruling precluded consideration of the Brady claim. The court of appeals reasoned (in conflict with decisions of five other circuits) that the claim had been "procedurally defaulted." The court of appeals further reasoned (widening an existing four-to-two circuit split) that the state courts' ruling was unreviewable. Seven judges dissented from the denial of rehearing en banc.
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> The question presented is whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of Brady v. Maryland, which encompasses two sub-questions:
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> 1. Is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts?
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> 2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

Harbison v. Bell, *cert. granted*, 2008 U.S. LEXIS 5084 (June 23, 2008) (No. 07-8521), decision below at 503 F.3d 566 (6th Cir. Sept. 27, 2007).

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Every jurisdiction that authorizes the death penalty provides for clemency, which is of vital importance in assuring that the death penalty is carried out justly. But, in this case the District Court held Mr. Harbison's federally-funded lawyers could not present, on his behalf, a clemency request to Tennessee's governor. The denial of clemency counsel contravenes basic principles of justice.[1] As Chief Justice Rehnquist noted in Herrera v. Collins:[2] "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Indeed, the clemency power exists because "the administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt."[3] Thus, executive clemency is the "fail safe" in our criminal justice system.[4] A system which includes capital punishment but does not provide a meaningful opportunity for executive clemency is "totally alien to our notions of criminal justice." [5] Yet the lower courts arbitrarily denied Mr. Harbison's federally-funded habeas counsel permission to represent him in state clemency proceedings after the State had denied him counsel for that purpose. The District Court and the Court of Appeals for the Sixth Circuit not only defied Congress' explicit directions to provide clemency counsel for the condemned, but denied Mr. Harbison a meaningful opportunity to present compelling facts mitigating his guilt and the punishment of death to the only person presently able to consider them, the Governor of the State of Tennessee. Equally troubling**,** the Sixth Circuit barred Harbison from appealing the denial of clemency counsel by refusing to grant a certificate of appealability on the issue. In order to harmonize the law of the circuits and to decide an important issue regarding the appeals court's jurisdiction, this Court should resolve the following questions: 1. Does 18 U.S.C. § 3599(a)(2) and (e) (recodifying verbatim former 21 U.S.C. § 848(q)(4)(B) and (q)(8)), permit federally-funded habeas counsel to represent a condemned inmate in state clemency proceedings when the state has denied state-funded counsel for that purpose? 2. Is a certificate of appealability required to appeal an order denying a request for federally-funded counsel under 18 U.S.C. § 3599(a)(2) and (e)?

[1] Michael Heise, Mercy by the Numbers; An Empirical Analysis of Clemency and its Structure, 89 Va. L. Rev. 239, 240-43, 252-54 (April 2003) (discussing how clemency is integral to the administration of justice and how the criminal justice system relies on clemency).

[2] 506 U.S. 390, 422-23 (1993).

[3] Ex parte Grossman, 267 U.S. 87, 120-21 (1925).

[4] Herrera, 506 U.S. at 415; Heise, Mercy by the Numbers, supra, 89 Va. L. Rev. at 252 (the need for clemency's error correction function is at its highest in the death penalty setting.").

[5] Gregg v. Georgia, 428 U.S. 153, 200 n.50 (1976)(opinion of Justices Stewart, Powell, and Stevens).

Fourth Amendment

Arizona v. Johnson*, cert. granted*, 2008 U.S. LEXIS 5208 (June 23, 2008) (No. 07-1122), decision below at 170 P.3d 667 (Ariz. Ct. App. Sept. 10, 2007), discretionary court Nov. 29, 2007.

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

Habeas Corpus

Knowles v. Mirzayance*, cert. granted*, 2008 U.S. LEXIS 5274 (June 27, 2008) (No. 07-1315), decision below unpublished (9th Cir. No. 04-57102, Nov. 8, 2007), *reh'g denied*, Jan. 17, 2008.

Concluding that defense counsel was ineffective in advising petitioner to withdraw his not-guilty-by-reason-of-insanity plea, the Ninth Circuit Court of Appeals granted habeas relief to petitioner without analyzing the state-court adjudication deferentially under "clearly established" law as required by 28 U.S.C. § 2254(d) and by supplanting the district court's factual findings and credibility determinations with its own, opposite factual findings. This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of Carey v. Musladin, 127 S. Ct. 649

(2006). On remand, the Ninth Circuit conceded that "no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense" but nonetheless concluded that its original decision was "unaffected" by Musladin and subsequent § 2254(d) decisions of this Court. The questions presented are:

1. Did the Ninth Circuit again exceed its authority under § 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was "unreasonable" under "clearly established Federal law" based on its previous conclusion that trial counsel was required to proceed with an affirmative insanity defense because it was the only defense available and despite the absence of a Supreme Court decision addressing the point?

2. May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings were "clearly erroneous"?

Relevant Civil Cases

Ashcroft v. Iqubal*, cert. granted*, 2008 U.S. LEXIS 4906 (June 16, 2008) (No. 07-1015), decision below at 490 F.3d 143 (2d Cir. June 14, 2007), *reh'g denied*, Sept. 18, 2007.

1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under Bivens [*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)].

2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

Haywood v. Drown*, cert. granted*, 2008 U.S. LEXIS 5012 (June 16, 2008) (No. 07-10374), decision below at 9 N.Y.3d 481, 881 N.E.2d 180 (2007).

Whether a state's withdrawal of jurisdiction over certain damages claims against state corrections employees—from state courts of general jurisdiction—may be constitutionally applied to exclude federal claims under Section 1983 [42 U.S.C. § 1983], especially when, as here, the state legislature withdrew jurisdiction because it concluded that permitting such lawsuits is bad policy? [Prisoner civil rights action]

DECIDED CASES

Crimes and Offenses

Cuellar v. United States, 128 S. Ct. 1994 (No. 06-1456) (June 2, 2008). In an opinion by Justice Thomas, the Court unanimously held that merely concealing money in a car while en route to Mexico does not constitute money laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i), which proscribes attempting to transport funds to another country "knowing that the . . . funds . . . represent the proceeds of . . . unlawful activity and . . . that such transportation is designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of" the money. The Court rejected petitioner's argument that the government must prove that he attempted to create "the appearance of legitimate wealth," but held that the purpose of moving the money to the place outside the United States (its "design") must be to conceal or disguise the source or ownership of the money. According to the government's witness, the money (proceeds of drug smuggling) was being transported to Mexico to be available to compensate the drug dealers, rather than to disguise the nature, location, source, etc., of the money. Justice Alito filed a concurring opinion in which Chief Justice Roberts and Justice Kennedy joined, discussing the deficiency in the government's evidence.

Ressam v. United States**,** 128 S. Ct. 1858 (No. 07-455) (May 19, 2008). Ressam was convicted of feloniously making false statements to a customs official when he entered the United States shortly before January 1, 2000. A search of his car revealed explosives and generated a second count charging him with "carr[ying] an explosive during the commission" of the first felony, on which he was also convicted. The Court upheld the conviction on the second count, concluding that the requirement that the explosives be carried "during the commission

of" a felony, as defined in 18 U.S.C. § 844(h)(2), does not mean that the explosives must be carried "in relation to" the underlying felony. Opinion for the Court by Justice Stevens, in which Chief Justice Roberts and Justices Kennedy, Souter, Ginsburg, and Alito joined. Justices Scalia and Thomas, in a brief opinion by Justice Thomas, joined Part I of the opinion, which relies on the plain language of the statute. Parts II and III of the Court's opinion rely on the legislative history of section 844(h)(2) to reach the same conclusion. Justice Breyer filed a dissenting opinion, arguing that the majority's decision would criminalize someone who carries lawful explosive material while committing an unrelated crime, and disagreeing with the Court's conclusions from the legislative history.

United States v. Santos, 128 S. Ct. 2020 (No. 06-1005) (June 2, 2008). Santos ran an illegal lottery; some of his runners took commissions from the bets placed with them, while Diaz and other runners were paid a salary. The Court held that the payments to runners, collectors, and winning gamblers from the receipts of the enterprise did not constitute the "proceeds" of criminal conduct within the meaning of the money laundering statute, 18 U.S.C. § 1956(1)(1)A)(i). Reviewing ordinary usage and the various meanings of the term "proceeds" in the several provisions of the money laundering statute, the Court concluded that the term could mean either profits or receipts. Applying the rule of lenity to this criminal statute, the Court ruled that "proceeds" within this provision applies to "profits" rather than to "receipts." Thus the lower courts' decisions on collateral review vacating Santos's conviction and Diaz's guilty plea were affirmed. Opinion by Justice Scalia in which Justices Souter and Ginsburg joined and Justice Thomas joined all but Part IV, which rejected Justice Stevens's position (concurring) that the word "proceeds" may mean "profits" in one context and "receipts" in another context. Justice Stevens filed an opinion concurring in the judgment. Justice Breyer filed a dissenting opinion and joined in a dissenting opinion filed by Justice Alito in which Chief Justice Roberts and Justice Kennedy also joined.

United States v. Williams, 128 S. Ct. 1830 (No. 06-694) (May 19, 2008). The Court held constitutional, against challenges that it violated the First Amendment and was impermissibly vague, a statute prohibiting offers to provide and requests to obtain child pornography, 18 U.S.C. § 2252A(a)(3)(B). The Court had previously held unconstitutional a statute that prohibited possession of alleged child pornography that was not restricted to items involving real children. (Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).) The current statute covers knowing actions intended to distribute what the actor believes and appears to believe is child pornography, which it defines as obscene material that depicts real or virtual children engaged in sexually explicit conduct, or any material that depicts actual children engaged in sexually explicit conduct. In addition, the actor must intend that the recipient believe he is to receive pornographic material involving actual children. A statute is invalid on its face "if it prohibits a substantial amount of protected speech." The First Amendment does not prohibit criminalization of offers to give or receive material that it is illegal to possess. Moreover, the statute does not cover a person who erroneously believes the material is child pornography (like a picture of a child in a bathtub). Opinion for the Court by Justice Scalia, in which Chief Justice Roberts and Justices Stevens, Kennedy, Thomas, Breyer, and Alito joined. Justice Stevens filed a concurring opinion in which Justice Breyer joined. Justice Souter filed a dissenting opinion in which Justice Ginsburg joined.

Habeas Corpus

Boumediene v. Bush, 128 S. Ct. 2229 (No. 06-1195) with ***Al Odah v. United States*** (No. 06-1196) (June 12, 2008). Following the decision in *Rasul v. Bush*, 542 U.S. 466, 473 (2004), which held that statutory habeas corpus (28 U.S.C. § 2241) applies to individuals detained by the U.S. military at Guantanamo Bay, Cuba, Congress passed the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, section 1005(e) of which amended section 2241 to withdraw from the courts jurisdiction over habeas actions filed by aliens at Guantanamo. That statute also gives the Court of Appeals for the District of Columbia "exclusive" jurisdiction to review decisions of the Combatant Status Review Tribunals (CSRT) established by the Department of Defense to review the cases of such detainees. In *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006), the Court held that section 1005(e) did not apply to cases already pending. Congress then passed the Military Commissions Act of 2006 (MCA), 10 U.S.C. §§ 948a *et seq*. (Supp. 2007), section 7(a) of which amended 28 U.S.C. § 2241(e) to deny jurisdiction over any case, including cases already pending, involving aliens determined to be enemy combatants and detained since September 11, 2001. In *Boumediene*, the Court held that pe-

titioners have the privilege of habeas corpus despite having been designated as enemy combatants and although they are detained at Guantanamo. The only right provided in the Constitution before adoption of the Bill of Rights is that of habeas corpus. The Suspension Clause of the Constitution, Art. I, § 9, cl. 2, provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." The history of the writ in English law and the debates surrounding adoption of the Constitution show that it is an essential tool to protect the individual from arbitrary detention. After an exhaustive review of the English and American cases and the history of the application of the Constitution and laws to newly obtained territories, the Court concluded that the writ should run to cases such as this, where alien petitioners are held in government custody at a location outside the de jure sovereignty of the United States but where the U.S. military has total military and civil control, that is, de facto sovereignty. (Compare *The Insular Cases* (DeLima v. Bidwell, 182 U.S. 1 (1901), *et seq*. *with* Reid v. Covert, 351 U.S. 487 (1956) and Johnson v. Eisentrager, 339 U.S. 763 (1950).)

The Court distinguished the case of the Guantanamo captives from that of the Germans in *Eisentrager* because (1) the Germans had been accorded a military commission trial with advice of counsel and the right to hear and present evidence against them; petitioners here, on the other hand, deny they are enemy combatants, the government's evidence is presumed valid, and their "representative" specifically is not designated as their attorney; (2) the Landsberg prison in Germany was not under the exclusive and indefinite control of the U.S. military, whereas Guantanamo is; (3) the situation in Germany was such that according the captives habeas corpus would be disruptive to the military mission there. Application of the Suspension Clause to this unique situation, in which individuals are being held for an indefinite period at a place within the exclusive control of the United States, is not barred by the absence of precedent. Further, the CSRT process provided in the DTA and the MCA does not satisfy the requirements of a substitute for habeas corpus. Rather than providing procedures essentially equivalent to those available on habeas, with habeas as an escape clause, as in *Swain v. Pressley*, 430 U.S. 372 (1977) (23 D.C. Code § 110, District of Columbia postconviction procedures) and *United States v. Hayman*, 342 U.S. 205 (1952) (28 U.S.C. § 2255, postconviction procedures for federal prisoners), Congress in the DTA and MCA specifically intended to provide a more limited procedure for the detainees and to deprive the courts of the ability to review decisions of the military commissions. Substitutes for habeas corpus require, at a minimum, that the prisoner have "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." Before the military commissions the detainees do not have counsel, are not made aware of any allegations against them based on classified information, which may be critical, and are constrained in their ability to rebut the evidence against them. Moreover, the appellate review by the Court of Appeals for the District of Columbia is not designed to correct these flaws, since at a minimum there is no procedure for admission of evidence not presented to the military commission but discovered since the CSRT hearing. Because these procedures are not an adequate substitute for habeas corpus, section 7 of the MCA, 28 U.S.C. § 2241(e) (Supp. 2007) is unconstitutional, petitioners are entitled to seek habeas corpus and need not exhaust the DTA review procedures first. The CSRT and DTA remain, however, and the military should be given a reasonable time to process detainees before habeas should issue. Opinion of the Court by Justice Kennedy, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice Souter filed a concurring opinion, in which Justices Ginsburg and Breyer joined, emphasizing that the Court's ruling should have been anticipated based on its decision in *Rasul v. Bush*, *supra*, that petitioners have been held for many years without review of their detention, and that the case does not represent the triumph of the judiciary over the executive (as the dissent suggests) but rather the judiciary's action to make habeas review "something of value both to prisoners and to the Nation."

Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia, Thomas, and Alito joined, arguing that petitioners should be required to exhaust the procedures available under the DTA, including review by the District of Columbia Circuit, and that those procedures adequately protect detainees' rights.

Justice Scalia filed a dissenting opinion in which Chief Justice Roberts and Justices Thomas and Alito joined, arguing that habeas corpus does not apply to aliens detained abroad by the U.S. military in the course of an ongoing war.

***Munaf v. Geren*,** 128 S. Ct. 2207 (No. 06-1666)

with ***Geren v. Omar*** (No. 07-394) (June 12, 2008). The Court unanimously held that the federal courts have jurisdiction over habeas corpus actions filed on behalf of American citizens held in Iraq by the United States military acting as part of the Multinational Force-Iraq who traveled voluntarily to Iraq and are alleged to have committed crimes in that country. The habeas statute, 28 U.S.C. § 2241(c)(1), applies to individuals held "in custody under or by color of the authority of the United States." Since Munaf and Omar are held "under" the authority of the United States, the habeas statute applies although their detention is "under color of the authority of" the multinational force and pending proceedings in Iraqi courts. The Court specifically noted that its opinion related only to American citizens and the statutory, as opposed to the constitutional, scope of the writ. The Court distinguished its decision in *Hirota v. MacArthur*, 338 U.S. 197 (1948) (*per curiam*), on the ground that *Hirota* involved non-U.S. citizens who sought to file petitions for habeas corpus directly in the Supreme Court, and also that the petitioners in that case were held pursuant to a tribunal that the solicitor general conceded was not under the direct control of the War Department. However, the Court also held that neither Munaf nor Omar was entitled to an injunction to prevent the military authorities from handing them over to local Iraqi authorities for prosecution under Iraqi law. Procedurally, the cases arose when the district court granted a preliminary injunction in Omar's case and denied it in Munaf's. The Court observed that a "difficult question of jurisdiction" was not a proper reason to grant such an injunction, which requires a likelihood of success on the merits. Petitioners do not seek release from unlawful executive detention, the usual remedy sought in habeas cases, since that would expose them to arrest by Iraqi authorities. Rather, they seek protection from prosecution by the sovereign nation of Iraq for crimes committed in that country, a protection to which they do not have the right, whether or not the Iraqi prosecution would comply with all rules of American criminal procedure. *Wilson v. Girard*, 354 U.S. 524, 529 (1957); *Neely v. Henkel*, 180 U.S. 109, 123 (1901). The possibility of "mistreatment in a prison facility" (as opposed to torture), raised by Munaf, is a matter for consideration by the executive in determining whether to transfer the individuals, and not for the judiciary to second-guess. Opinion for the Court by Chief Justice Roberts. Justice Souter filed a concurring opinion, in which Justices Ginsburg and Breyer joined, emphasizing that the decision did not involve allegations that the military proposed to transfer U.S. citizens to a jurisdiction where they would be subject to torture.

Immigration

Dada v. Mukasey, 128 S. Ct. 2307 (No. 06-1181) (June 16, 2008). Petitioner, a native of Nigeria, married an American citizen and overstayed his nonimmigrant visa. The immigration judge denied the wife's petition for an alien relative on her husband's behalf. When petitioner was charged with being removable, a second petition was filed. The immigration judge denied his request for a continuance until that petition was decided; petitioner's request for voluntary removal was granted. With voluntary removal, an alien must leave on his or her own within 60 days, receives various benefits, does not suffer the penalties imposed on persons who have been deported involuntarily. Two days before the expiration of the 60 days, petitioner filed a motion to reopen the removal proceedings and asked to withdraw the request for voluntary departure. The Board of Immigration Appeals denied the request to reopen on the ground that petitioner had forfeited his right to receive an adjustment of status because he had not departed within the 60-day period. Under the current regulations, once the alien has left the country a motion to reopen is deemed withdrawn. The Court held that an alien must have the opportunity to withdraw a request for voluntary departure made before the expiration of the 60 days to enable consideration of a motion to reopen the removal proceedings. Opinion for the court by Justice Kennedy, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice Scalia filed a dissenting opinion in which Chief Justice Roberts and Justice Thomas joined. Justice Alito filed a dissenting opinion agreeing with the majority that the filing of a motion to reopen does not automatically toll the period for voluntary departure, but concluding that the case should be remanded because the Board of Immigration Appeals did not address petitioner's request to withdraw his motion and thus the ground for its decision was unclear.

Procedure

Gonzalez v. United States, 128 S. Ct. 1765 (No. 06-11612) (May 12, 2008). Federal magistrate judges "may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." (28 U.S.C. § 636(b)(3).) Pursuant to

this provision, a federal magistrate judge may preside over the conduct of voir dire and jury selection with the consent of defense counsel; the defendant's personal consent is not constitutionally required. The agreement to have the magistrate judge conduct these proceedings is a matter of trial strategy in which counsel's experience is relevant; requiring personal consent by the defendant might unduly delay proceedings without significant benefit to the defendant. Opinion for the Court by Justice Kennedy, in which Chief Justice Roberts, and Justices Stevens, Souter, Ginsburg, Breyer, and Alito joined. Justice Scalia concurred in the result, observing that he would adopt a rule that all waivable constitutional rights except the right to counsel can be waived by counsel. He noted, however, that it would be prudent for a judge to be satisfied of the defendant's personal consent to such actions as entry of a guilty plea and waiver of a jury trial, noting that professional ethics codes require the attorney to accede to the client's wishes on such matters. Justice Thomas dissented.

Greenlaw v. United States, 2008 U.S. LEXIS 5259 (No. 07-330) (June 23, 2008). On a defendant's appeal from a sentence, a court of appeals may not increase the defendant's sentence unless the government has filed a cross-appeal. The long-standing rule is that an appellate court cannot modify a judgment to the favor of a party that has not filed a cross-appeal. The decision on whether to challenge a sentence as too short is left to the executive, not to the courts. In this case, the district court wrongly sentenced Greenlaw to imprisonment for 10 years on a count that carried a mandatory 25-year term, rejecting the government's argument that the longer sentence was mandatory. Greenlaw appealed, arguing that his total sentence should have been shorter. In opposition, the government observed that the sentence was, in fact, too short, but did not appeal the district court's sentence. The court of appeals rejected Greenlaw's argument but, sua sponte, found plain error in the sentence and directed the district court to increase the sentence by 15 years. In response to Greenlaw's petition for cert, the government conceded that the court of appeals had erred; amicus appointed by the Court argued on behalf of the lower court's decision. Opinion for the Court by Justice Ginsburg, with whom Chief Justice Roberts and Justices Scalia, Kennedy, Souter, and Thomas joined. Justice Breyer filed an opinion concurring in the judgment, since the court of appeals abused its discretion by sua sponte directing a sentence that would find Greenlaw released at age 77 (after 52 years' imprisonment) rather than at age 62 after 37 years' imprisonment. Justice Alito filed a dissenting opinion in which Justice Stevens joined and Justice Breyer joined as to Parts I, II, and III, arguing that the cross-appeal rule is a rule of appellate practice and does not preclude an appellate court from finding plain error against the appellant even when no cross-appeal has been taken.

RICO

Bridge v. Phoenix Bond & Indemnity Co., 128 S. Ct. 2131 (No. 07-210) (June 9, 2008). The Court held unanimously, in an opinion by Justice Thomas, that a plaintiff filing a civil RICO claim based on racketeering involving mail fraud (18 U.S.C. §§ 1961 *et seq*.) does not have to prove that it relied on the defendant's allegedly false statements. The case concerned the submission of bids at tax sales; plaintiffs claimed that defendants falsely mailed to the county and property owners notices that they had complied with a requirement that they were submitting only one bid, whereas they actually colluded with other related bidders from whom they later obtained properties that had been distributed to them with the understanding that they were not related to other bidders.

Second Amendment

District of Columbia v. Heller, 2008 U.S. LEXIS 5268 (No. 07-290) (June 26, 2008). The Second Amendment to the U.S. Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In an opinion by Justice Scalia, in which Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined, the Court held that this amendment protects an individual's right to possess a firearm without reference to service in a militia, and to use that weapon for defense within the home. Justice Scalia reviewed English and American textual and historical sources from the seventeenth century and later, including various state constitutions, legislation, and court decisions, and concluded that the amendment defines an individual right, that "arms" includes weapons not kept or used specifically for military purposes, and that to "bear" arms means to carry arms for offensive and defensive purposes. In addition, the arms that are protected are not limited to those available in the eighteenth century since rights are not so limited. For example, the Court has authorized meth-

ods of search developed since the enactment of the Fourth Amendment, and has expanded First Amendment rights to include modern methods of communication. The term "militia" applies not to organized governmental bodies, but to individual able-bodied citizens who are available to resist invasion and tyranny thus obviating the need for standing armies. The preamble clause, therefore, was intended to prevent the dissolution of the militias rather than to limit the purposes for which arms can be kept by citizens. Moreover, the right is limited to possession of those weapons commonly used by a militia for lawful purposes such as self-defense, and does not authorize the carrying of "dangerous and unusual weapons." *United States v. Miller*, 307 U.S. 174 (1939), merely held that the Second Amendment does not authorize individuals to own weapons such as sawed-off shotguns, weapons not usually possessed by law-abiding citizens for lawful purposes. The opinion observes, however, that the right to bear arms (similar to other constitutional rights) is not unlimited and does not preclude such limitations as prohibitions on firearms ownership by felons or the mentally ill, possession in "sensitive" areas such as schools and government buildings, or restrictions on the commercial sale of weapons. The Court also noted that many nineteenth century cases upheld bans on the carrying of concealed weapons against challenges based on the Second Amendment or analogous state provisions. Addressing the District of Columbia law at issue in the case, the Court concluded that its absolute ban on possession of handguns in the home violated the Second Amendment, and that its requirement that licensed guns be kept disassembled or protected by a trigger lock unconstitutionally precluded their use in self-defense. The Court did not address the licensing provisions of the District of Columbia law since Heller advised that he would be satisfied if the District of Columbia issued him a license.

Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined, arguing that the text of the amendment itself, its history, and the Court's decision in *Miller v. United States*, 307 U.S. 174 (1939) (holding that the Second Amendment does not protect the right to own a sawed-off shotgun), all support the view that the amendment does not restrict the power of Congress to regulate the nonmilitary use and ownership of weapons. Rather, the amendment was intended to insure the maintenance of militias to provide for the common defense, as opposed to standing armies that the founding fathers feared. For example, Justice Stevens pointed out that the phrase "to bear arms" is generally used in the military context, and that members of the militia were obliged to "keep" their arms in their homes, to be readily available. Had the framers intended to protect a personal right of self-defense such a provision would have been included in the amendment, as it was in the Pennsylvania and Vermont Declarations of Rights.

Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined, focusing on the position that even if the Second Amendment does provide a right to possess weapons for individual self-defense, the amendment is not absolute and that the District of Columbia regulation is a reasonable approach to the serious threat of violence by firearms in an urban setting. Historically, cities and towns have regulated the firing of weapons and the storage of gunpowder, necessary for use of colonial-era muskets and rifles. Moreover, the majority's approach fails to discuss the appropriate standard of review to be applied to provisions limiting the citizen's Second Amendment rights: Should it be the rational basis standard, the strict scrutiny standard, or, as Justice Breyer proposes, an interest-balancing standard? Turning to the specific District of Columbia statute at issue, the opinion reviews the statistics on deaths and injuries caused by firearms, which show that handguns are involved in the majority of firearm deaths and suicides, and specifically noting the numbers of minors killed by handguns (including by suicide) annually, as well as the preference of criminals for handguns. Moreover, the rate of homicide by handgun is far higher in urban areas than in rural areas. Heller and his amici have provided statistics showing that the rate of homicide has increased since the District of Columbia gun ban went into effect, statistics from Europe suggesting that a handgun ban may increase homicides, evidence that the ban does not decrease suicides or accidents, statistics showing the beneficial effect of gun possession on self-defense, and finally they argue that the gun ban results in only criminals being armed. The District of Columbia submitted studies reaching the opposite conclusions, which were contradicted by additional studies submitted by Heller and his amici. In the view of this dissent, Heller's statistical arguments may be effective to persuade a legislature not to adopt a total ban on handguns, but are not persuasive in demonstrating that the legislative decision for a total ban was unreasonable. Despite the contradictory studies, the District's statute is supported by substantial evidence, which should be sufficient. The law does not measurably interfere

DEATH PENALTY FOR CHILD RAPE

In a five-to-four decision in *Kennedy v. Louisiana*, 2008 U.S. LEXIS 5262 (No. 07-343) (April 16, 2008), the Court held that the death penalty cannot be constitutionally imposed for a crime against an individual in which the victim's life is not taken. Kennedy had been sentenced to death for a vicious rape of his eight-year-old stepdaughter. On July 21, 2008, Louisiana filed a petition for rehearing and reargument in *Kennedy*.

In 1977, in *Coker v. Georgia*, 433 U.S. 584, the Court held that the death penalty could not be imposed constitutionally for rape of an adult woman. Eighteen years later, in 1995, Louisiana enacted a provision authorizing death for rape of a child under the age of 12. Since then, five other states have enacted similar laws, although four states require (as Louisiana's law does not) that the offender have a prior conviction for rape. The fifth state makes death an option only when aggravating circumstances, including but not limited to a prior conviction, are present. The only persons who have been sentenced to death for rape since *Coker* (or indeed for any nonhomicide crime), however, are Kennedy and one other defendant in Louisiana. The Court reviewed capital punishment cases since *Furman v. Georgia*, 408 U.S. 238 (1972), including *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring death for mentally retarded defendants) and *Roper v. Simmons*, 543 U.S. 551 (2005) (barring death for juvenile defendants), and *Enmund v. Florida*, 458 U.S. 782 (1982) (barring death for a defendant who did not intend the victim's death). Although a consensus as to the propriety of death for rape of a child is not dispositive, the Court concluded that there is "a national consensus against capital punishment" for such a crime. Of the 36 states and the federal government that authorize capital punishment, in only six states is it authorized for rape of a child not resulting in homicide. [See note below.] *Coker* plainly applied only to cases of rape of an adult woman, and thus cannot be cited as the reason why more states have not enacted statutes imposing death for child rape. In five states such legislation has been pending recently, but in at least two states it has been rejected; in any event, the Court does not find "contemporary norms" based on legislation that has been proposed but not enacted. Moreover, no defendant has been executed for rape (of an adult or child) since 1964, or for any nonhomicide crime since 1963. Finally, despite the serious and long-standing effects of rape on the child victim, the Court concluded that death is not a proportional penalty for such a crime, that there is a difference "in terms of moral depravity and of the injury to the person and to the public" between an intentional homicide and a serious crime that does not result in the victim's death. The Court observed the difficulty of developing a set of rules for capital murder over the past 32 years, and that experimenting with a new set of rules for administering the death penalty for the increasing number of charges of sexual abuse of children might result in the unjust execution of some individuals. There are practical considerations also: If child rape itself were sufficient to authorize the death penalty

with the maintenance of a well-armed militia: The law does not affect ownership of rifles, and residents can practice shooting in one of the suburban jurisdictions. Any interference with hunting is the result of the urban character of the District of Columbia, not of the district's prohibition on ownership of handguns. There is some burden on the right of self-defense, in that homeowners cannot own a handgun for that purpose (rifles are permitted), but this burden is not disproportionate bearing in mind that there is no less restrictive way to accomplish the District's aim to reduce the number of handgun shootings in this urban jurisdiction.

Sentencing

Irizarry v. United States, 128 S. Ct. 2198 (No. 06-7517) (June 12, 2008). At sentencing, after hearing evidence presented by both sides, the district judge imposed the statutory maximum sentence of 60 months in prison, rather than the recommended guidelines sentence of 41 to 51 months' imprisonment. The Court rejected petitioner's argument that Fed. R. Crim. P. 32(h) required notice that the judge was contemplating such a departure. Rule 32(h) was enacted after the Court's decision in *Burns v. United States*, 501 U.S. 129 (1991), which held that the parties must be given notice and the opportunity to comment on proposed departures from the mandatory guidelines. Since the guidelines are now merely advisory (United States v. Booker, 543 U.S. 220 (2005)), the parties should not anticipate that the sentence will be within the guidelines, and should be prepared to present all relevant information at sentencing. Opinion of the Court by Justice Stevens,

the offender would be motivated to kill the child to eliminate a witness, child witnesses are often unreliable, and family members might decline to report cases of child rape to avoid being the instrument of a relative's execution. Interpretation of the Eighth Amendment is based on " 'the evolving standards of decency that mark the progress of a maturing society,' " *Trop v. Dulles*, 356 U.S. 86, 101 (1958). "Evolving standards of decency" require that the death penalty for crimes against individuals must be restricted to the worst crimes, that is, crimes in which the victim's life is taken. The Court specifically excluded from its discussion crimes against the government, such as treason, espionage, terrorism, and drug kingpin activity. Opinion of the Court by Justice Kennedy, in which Justices Stevens, Souter, Gisburg, and Breyer concurred.

Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justices Scalia and Thomas joined, arguing that *Coker* cannot be read as limited to rape of an adult, that the paucity of statutes authorizing death for child rape could be because *Coker* was deemed to prohibit death where the victim was not killed, that legislatures rejecting death for child rapists have noted the high cost of prosecuting death cases, and therefore that the majority erred in finding a consensus against imposing death for child rapists. The dissent argued that the majority has made it impossible to develop a national consensus in favor of death in these cases, that it would not be difficult to construct a statute limiting eligibility for death to certain defendants in most heinous cases, that upholding Louisiana's law would not "extend" the reach of the death penalty, and finally that it is not clear that all murderers are more morally blameworthy than all child rapists.

Editorial note: On July 21, 2008, the State of Louisiana filed a petition for rehearing and reargument, based on a 2006 amendment to Article 120 of the Uniform Code of Military Justice that specifically authorizes the death penalty for child rapists; this provision was adopted for the Rules for Courts-Martial and Manual for Courts-Martial by executive order in 2007. National Defense Authorization Act for Fiscal Year 2006, § 552(b), Pub. L.No. 109-163, 119 Stat. 3136, 3263; Executive Order 13,447, 72 Fed. Reg. 56,179 (Sept. 28, 2007). Neither the parties to *Kennedy* nor any of the amici called this provision to the attention of the Court, which came to light in a legal blog the weekend after the decision.

In the opinion of the undersigned, the provision in the UCMJ is unlikely to be sufficient to overturn the decision because of the decisive language of the majority opinion rejecting death as an appropriate punishment for nonhomicide offenses. Moreover, the 2006 amendment also continues the previous authorization of death for rape of an adult even if death does not result, and thus contains a provision held unconstitutional in *Coker*. This calls into question its precedential value. Thus it is likely that the petition for rehearing will be denied in a brief order noting that the previously unmentioned statute does not undercut the bases of the majority opinion; four justices will dissent.

— Carol Garfiel Freeman

in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Thomas filed a concurring opinion. Justice Breyer filed a dissenting opinion, in which Justices Kennedy, Souter, and Ginsburg joined.

United States v. Rodriguez, 128 S. Ct. 1783 (No. 06-1646) (May 19, 2008). Rodriguez was convicted in federal court of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), he would be subject to a 15-year minimum sentence if he had three prior convictions for "a violent felony or a serious drug offense." A state drug-trafficking offense that carries a maximum sentence of 10 years or more would qualify as "a serious drug offense." Rodriguez had two prior convictions for burglary, a "violent felony," and three Washington State drug offenses, each of which carried a maximum five-year prison term. However, Washington also provides a maximum penalty of 10 years for a second or subsequent offense. The Court held that the "maximum term of imprisonment" for Rodriguez's second and third drug convictions was 10 years, rejecting his argument that the "maximum term" should be considered without regard to the recidivist provision. Opinion of the Court by Justice Alito, in which Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Breyer joined. Justice Souter filed a dissenting opinion in which Justices Stevens and Ginsburg joined, noting, inter alia, that state recidivist schemes differ greatly, which would cause federal sentences based on prior convictions of "a

serious drug offense" to depend on which state's convictions were at issue and the intricacies of the state's habitual offender law.

Sixth Amendment Confrontation Clause

Giles v. California, 2008 U.S. LEXIS 5264 (No. 07-6053) (June 25, 2008). Clarifying its decision in *Crawford v. Washington*, 541 U.S. 36 (200), the Court held that a testimonial statement made out of court can be admitted against a defendant under a theory of forfeiture by wrongdoing only if the absence of the witness was procured by the defendant for the purpose of preventing the witness from testifying. In other circumstances, the Confrontation Clause prohibits admission of testimonial statements made out of court when there was no opportunity for cross-examination. In Giles's trial for murdering his girlfriend, to rebut his claim of self-defense the prosecution offered and the trial court admitted statements she had made several weeks earlier to a police officer who responded to a domestic violence call. The case was remanded to the state courts to consider whether Giles's intent in killing her was to prevent her from testifying at criminal proceedings resulting from that domestic violence call. Opinion for the Court (except Part II-D-2) by Justice Scalia, containing an extensive review of the pre- and post-1776 cases involving admission of such statements. Chief Justice Roberts and Justices Thomas and Alito joined the opinion in full. Justices Souter and Ginsburg joined all except Part II-D-2, which addressed part of the dissent. Justices Thomas and Alito filed concurring opinions; neither was persuaded that the victim's statements were testimonial but both agreeing with the analysis of the forfeiture doctrine and the Confrontation Clause. Justice Souter filed an opinion concurring in part, which Justice Ginsburg joined. Justice Breyer filed a dissenting opinion, in which Justices Stevens and Kennedy joined, essentially disagreeing with the majority's conclusions from the historical review.

Sixth Amendment Right to Counsel

Indiana v. Edwards, 128 S. Ct. 2379 (No. 07-208) (June 19, 2008). Mentally ill defendants who are constitutionally competent to stand trial may be denied the right to represent themselves if their mental condition is such that they are not competent to conduct their own defense. Edwards had twice been found not competent to stand trial under the standard of *Dusky v. United States*, 362 U.S. 402 (1960) (*per curiam*) and *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (having a rational and factual understanding of the proceedings and the ability to consult with his lawyer with a reasonable degree of rational understanding). Edwards eventually became competent to stand trial, but the trial judge denied his request to proceed without counsel, concluding that his mental illness was such that he was not competent to represent himself at trial. The Court held that the Constitution does not require a trial judge to allow a minimally competent defendant to represent himself at trial. *Godinez v. Moran*, 509 U.S. 389 (1993), which held that the *Dusky* standard governed competence of a mentally ill individual who desired to waive counsel and to enter a guilty plea, involved the question whether the state could allow such a waiver and specifically noted that the defendant did not propose to conduct trial proceedings. The instant case, rather, asks whether the state may deny a minimally competent defendant the right to conduct trial proceedings and set forth a defense. *Dusky* and *Drope* assumed representation by counsel. *Faretta v. California*, 422 U.S. 806 (1975), which held that a competent defendant "voluntarily and intelligently" may waive the right to representation by counsel, does not govern because there was no question of mental illness. In order to obtain a fair trial, the defendant with significant mental issues may be required to proceed to trial with counsel to avoid an unjust conviction or sentence. The Court rejected Indiana's proposed standard and declined to overrule *Faretta*. Opinion of the Court by Justice Breyer, in which Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito joined. Justice Scalia filed a dissenting opinion, in which Justice Thomas joined, arguing that the right of defendants who are competent to stand trial to control the defense in their case is paramount.

Rothgery v. Gillespie County, 2008 U.S. LEXIS 5057 (No. 07-440) (June 23, 2008). The case arose from a civil suit (42 U.S.C. § 1983) filed by Rothgery, who was wrongly arrested and charged with being a felon in possession of a firearm. He was brought before a magistrate, advised of the charge against him, a probable cause determination was made, and he was released on bond. Between that hearing and indictment, he made several requests for appointed counsel that were denied. At his arraignment on the indictment, his bail was increased and he was jailed. Assigned counsel soon developed the information necessary to persuade a prosecutor that the charge was not well founded, and Rothgery was

released. Taking no position on whether Rothgery had a valid claim based on the delay in appointing counsel, the Court held that the Sixth Amendment right to counsel attaches at a defendant's first appearance before a judicial officer, when he or she is advised of the charge and the defendant's liberty is subject to restriction. This is the point at which adversary criminal proceedings begin, whether or not a prosecutor is present or aware of this initial proceeding. The Court observed that 43 states, the federal government, and the District of Columbia provide counsel at, before, or immediately after the initial appearance before a magistrate. Prior decisions, including *Michigan v. Jackson*, 475 U.S. 625 (1986), *Brewer v. Williams*, 430 U.S. 387 (1977), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), all confirm the right to counsel at the initial appearance. Opinion of the Court by Justice Souter, in which all justices except Justice Thomas joined. Chief Justice Roberts filed a brief concurring opinion in which Justice Scalia joined. Justice Alito filed a concurring opinion in which Chief Justice Roberts and Justice Scalia joined. Justice Thomas dissented, in an opinion discussing Blackstone's understanding of the word "prosecution," the original intent of the drafters of the Sixth Amendment, and certain earlier decisions by the Court, and concluding that a "criminal prosecution" as defined in the Sixth Amendment does not include an initial appearance before a magistrate.

ARGUMENTS SCHEDULED

October 7, 2008:

Herring v. United States, 128 S. Ct. 1221 (No. 07-513), *Cert Alert*, 23:1 CRIM. JUST. at 38 (Spring 2008) (legality of search pursuant to arrest based on facially credible but erroneous information negligently provided by another law enforcement officer).

Arizona v. Gant, 128 S. Ct. 1443 (No. 07-542), *Cert Alert*, 23:2 CRIM. JUST. at 39 (Summer 2008) (legality of warrantless vehicular search incident to arrest conducted after vehicle's occupants have been arrested and secured).

October 14, 2008:

***Pearson v. Callahan*,** 128 S. Ct. 1702 (No. 07751), *Cert Alert*, 23:2 CRIM. JUST. at 39 (Summer 2008) (legality of warrantless entry to home immediately after an undercover informant buys drugs; whether officers were entitled to qualified immunity when all decisions on point upheld such warrantless entries; and, added by the Court, whether *Saucier v. Katz*, 533 U.S. 194 (2001) should be overruled).

October 15, 2008:

Waddington v. Sarausad, 128 S. Ct. 1650 (No. 07-772), *Cert Alert*, 23:2 CRIM. JUST. at 40 (Summer 2008) (federal court review of challenge to pattern jury instructions approved by state court).

Chrones v. Pulido, 128 S. Ct. 1444 (No. 07-544), *Cert Alert*, 23:2 CRIM. JUST. at 39 (Summer 2008) (whether an erroneous instruction on one of two alternative theories of guilt is "structural error" requiring reversal rather than "trial error" which may be harmless).

Oregon v. Ice, 128 S. Ct. 1657 (No. 07-901, *Cert Alert*, 23:2 CRIM. JUST. at 40 (Summer 2008) (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 facts other than prior convictions necessary to impose consecutive sentences be found by the jury or admitted by the defendant). ■