# Supreme Court Cases of Interest

BY CAROL GARFIEL FREEMAN

In the final three months of the 2008 term the Court decided 16 cases directly related to criminal justice and three civil cases of interest. In the most significant cases, the Court rejected a postconviction due process claim to disclosure of evidence for DNA testing (District Attorney's Office v. Osborne), held that a strip search of a 13-year-old girl by school officials requires "reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing" (Safford Unified School Dist. #1 v. Redding), clarified the conditions under which an automobile can be searched without a warrant (Arizona v. Gant), and held that the Sixth Amendment prohibits the introduction of chemists' affidavits describing the results of tests on suspected drugs (Melendez-Diaz v. Massachusetts). During the summer, the Court transferred a petition for habeas corpus to a district court for a hearing on the death row petitioner's claim of actual innocence (In re Davis), and Justice Breyer, acting as circuit justice, refused to stay an order granting habeas corpus and directing a prisoner's immediate release. (O'Brien v. O'Laughlin.) There are 18 cases of interest to criminal justice practitioners on the Court's docket for next term. Among the newly listed cases are two challenging the imposition of life without parole sentences on minors convicted of nonhomicide offenses (Graham v. Florida and Sullivan v. Florida) and a case questioning whether the federal government can hold "sexually dangerous persons" after they have served their sentences or who have been found mentally incompetent to stand trial (United States v. Comstock).

## CERTIORARI GRANTED

***Note:*** *Questions presented are quoted as drafted by the parties or, in some instances, by the Court.*

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### Crimes and Offenses

***Black v. United States***, *cert. granted*, 129 S. Ct. 2379 (May 18, 2009) (No. 08-876), decision below at 530 F.3d 596 (7th Cir. 2008), *reh'g denied*, Aug. 13, 2008.

This Court held in McNally v. United States, 483 U.S. 350 (1987), a public corruption case, that the mail fraud statute could not be used to prosecute schemes to deprive the citizenry of the intangible right to good government. Congress responded in 1988 by enacting 18 U.S.C. § 1346, which expands the definition of a "scheme or artifice to defraud" under the mail and wire fraud statutes to encompass schemes that "deprive another of the intangible right of honest services."

Twenty years later, the courts of appeal are hopelessly divided on the application of Section 1346 to purely private conduct. In this case, the Seventh Circuit disagreed with at least five other circuits and held that Section 1346 may be applied in a purely private setting irrespective of whether the defendant's conduct risked any foreseeable economic harm to the putative victim. In the alternative, the Seventh Circuit ruled that the defendants forfeited their objection to the improper instructions by opposing the government's bid to have the jury return a "special verdict," a procedure not contemplated by the criminal rules and universally disfavored by other circuits as prejudicial to a defendant's Sixth Amendment rights.

1. Whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed.

2. Whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.

***United States v. Stevens***, *cert. granted*, 129 S. Ct. 1984 (April 20, 2009) (No. 08-769), decision below at 533 F.3d 218 (3d Cir. 2008).

Section 48 of Title 18 of the United States

Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value.

The question presented is whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.

***Weyhrauch v. United States**, cert. granted limited to question phrased by the Court*, 129 S. Ct. 2863 (June 29, 2009) (No. 08-1196), decision below at 548 F.3d 1237 (9th Cir. 2008), *reh'g denied*, Jan. 7, 2009.

Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

## Due Process

***United States v. Comstock**, cert. granted*, 129 S. Ct. 2828 (June 22, 2009) (No. 08-1224), decision below at 551 F.3d 274 (4th Cir. 2009), *reh'g denied*, March 10, 2009.

Whether Congress had the constitutional authority to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous persons" who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

## Eighth Amendment

***Graham v. Florida**, cert. granted*, 129 S. Ct. 2157 (May 4, 2009) (No. 08-7412), decision below at 982 So. 2d 43 (Dist. Ct. App. Fla. 2008), *reh'g denied*, May 16, 2008, *discretionary court review denied* Aug. 22, 2008.

Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

***Sullivan v. Florida**, cert. granted*, 129 S. Ct. 2157 (May 4, 2009) (No. 08-7621), decision below unreported (Dist. Ct. App. Fla. 2008, No. 1D07-6433), *reh'g denied*, Aug. 6, 2008.

Joe Sullivan is serving a sentence of life imprisonment without the possibility of parole for a non-homicide offense committed when he was thirteen years old. Nationwide, only one other thirteen-year-old child has received a life-without-parole sentence for a non-homicide. The questions presented are:

1. Does imposition of a life-without-parole sentence on a thirteen-year-old for a non-homicide violate the prohibition on cruel and unusual punishments under the Eighth and Fourteenth Amendments, where the freakishly rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children?

2. Given the extreme rarity of a life imprisonment without parole sentence imposed on a 13-year-old child for a non-homicide and the unavailability of substantive review in any other federal court, should this Court grant review of a recently evolved Eighth Amendment claim where the state court has refused to do so?

## Habeas Corpus

***Beard v. Kindler**, cert. granted*, 129 S. Ct. 2381 (May 18, 2009) (No. 08-992), decision below at 542 F.3d 70 (3d Cir. 2008). (Justice Alito took no part.)

After murdering a witness against him and receiving a sentence of death, respondent broke out of prison, twice. Prior to his recapture in Canada years later, the trial court exercised its discretion under state forfeiture law to dismiss respondent's post-verdict motions, resulting in default of most appellate claims. On federal habeas corpus review, the court of appeals refused to honor the state court's procedural bar, ruling that, because "the state court . . . had discretion" in applying the rule, it was not "firmly established" and was therefore "inadequate."

Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine—and therefore unenforceable on federal habeas corpus review—because the state rule is discretionary rather than mandatory?

***Wood v. Allen**, cert. granted limited to questions 1 and 2 presented by the petition,* 129 S. Ct. 2389 (May 18, 2009) (No. 08-9156), decision below at 542 F.3d 1281 (11th Cir. 2008), *reh'g denied*, Nov. 12, 2008.

1. Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise?
2. Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the Antiterrorism and Effective Death Penalty Act [28 U.S.C. §§ 2254(d)(2), (e)(1)] by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings?

## Immigration

***Kucana v. Holder**, cert. granted*, 129 S. Ct. 2075 (April 27, 2009) (No. 08-911), decision below at 533 F.3d 534 (7th Cir. 2008).

What is the scope of the jurisdictional stripping provision of 8 U.S.C. Section 1252(a)(2)(B)(ii) and whether the statute removes jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals?

## Sixth Amendment

***Briscoe v. Virginia,** cert. granted*, 129 S. Ct. 2858 (June 29, 2009) (No. 07-11191), decision below at 657 S.E.2d 113 (Virginia 2008).

If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

***Florida v. Powell**, cert. granted*, 129 S. Ct. 2827 (June 22, 2009) (No. 08-1175), decision below at 998 So. 2d 531 (Fla. 2008), *reh'g denied*, Dec. 23, 2008.

I. Whether the decision of the Florida Supreme Court holding that a suspect must be expressly advised of his right to counsel during custodial interrogation conflicts with Miranda v. Arizona [384 U.S. 436 (1966)] and decisions of federal and state appellate courts.

II. And if so, does the failure to provide express advice of the right to the presence of counsel during questioning vitiate Miranda warnings which advise of both (A) the right to talk to a lawyer "before questioning" and (B) the "right to use" the right to consult a lawyer "at any time" during questioning?

## Speedy Trial

***Bloate v. United States**, cert. granted*, 129 S. Ct. 1984 (April 20, 2009) (No. 08-728), decision below at 534 F.3d 893 (8th Cir. 2008), *reh'g denied*, Sept. 5, 2008.

The Speedy Trial Act, 18 U.S.C. § 3161 et seq., requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes "delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) delay resulting from any pretrial motion, from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition,* of such motion" (emphasis added). The question presented here is:

Whether time granted to *prepare* pretrial motions is excludable under § 3161(h)(1). As the Eighth Circuit explicitly acknowledged below, this question has divided the courts of

appeals. The Fourth and Sixth Circuits have answered it in the negative; the Eighth Circuit and seven other circuits have answered it in the affirmative.

## DECIDED CASES

### Crimes and Offenses

***Abuelhawa v. United States***, 129 S. Ct. 2102 (May 26, 2009) (No. 08-192). The Court, in an opinion by Justice Souter, held unanimously that use of a telephone to make a misdemeanor drug purchase does not turn the misdemeanor into a felony in violation of the Controlled Substances Act, 21 U.S.C. § 843(b), by "facilitating" the felony drug distribution by the seller. The common usage of the word "facilitate," as well as legislative history (Congress had reduced simple possession from a felony to a misdemeanor), points to the conclusion that Congress did not intend to treat the purchase of drugs for personal use, even if arranged by telephone, as a felony.

***Flores-Figueroa v. United States***, 129 S. Ct. 1886 (May 4, 2009) (No. 08-108). The Court held that to convict a defendant of aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1), which imposes an additional prison sentence on a person convicted of certain crimes who "knowingly . . . uses, without lawful authority, a means of identification of another person," the government must prove that the defendant knew that the means of identification in question belonged to another person, i.e., that the identification numbers had been assigned to someone else. Justice Breyer, in an opinion joined by Chief Justice Roberts, and Justices Stevens, Kennedy, Souter, and Ginsburg, observed that the word "knowingly" commonly would be understood to cover the entire phrase to which it relates, that is, to "a means of identification of another person" rather than simply to the beginning of the phrase ("a means of identification"). Justice Scalia, in an opinion joined by Justice Thomas, concurred. Justice Alito concurred separately.

***Boyle v. United States***, 129 S. Ct. 2237 (June 8, 2009) (No. 07-1309). Based on his participation with others in a series of bank thefts, Boyle was charged with being "associated with [an] enterprise" that conducted its activities "through a pattern of racketeering activity" in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c). The group, whose membership varied from time to time, was loosely organized, and apparently had no leader and no formal plan. The Court rejected Boyle's contention that the government must prove that the enterprise had "an ascertainable structural hierarchy distinct from the charged predicate acts." In a RICO case, the government must prove the existence of an enterprise that has a purpose, that participants in the enterprise have relationships with each other, and that the enterprise continued for long enough to allow the members to pursue the purpose of the enterprise. However, no formal hierarchy need be shown and a pattern of racketeering activity itself may be sufficient to prove the existence of the enterprise. Opinion by Justice Alito, in which Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg joined. Justice Stevens filed a dissenting opinion, in which Justice Breyer joined.

### Fifth Amendment—Double Jeopardy

***Bobby v. Bies*****,** 129 S. Ct. 2145 (June 1, 2009) (No. 08-598). Bies was convicted of murder and other offenses and, despite evidence of his mild to moderate mental retardation, was sentenced to death. On direct appeal, the Ohio court affirmed, holding that the aggravating factors outweighed the mitigating factor of his mental status. After the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment bars execution of a mentally retarded person, the state court ordered a full hearing on Bies's postconviction *Atkins* claim. Rather, Bies pursued a habeas petition in federal court, arguing that the double jeopardy clause barred relitigation of the mental retardation issue. The district court agreed and granted the writ. The Sixth Circuit affirmed, concluding that the issue of Bies's mental retardation had been considered on the direct appeal under the same standard that had been developed by the state after *Atkins.* In an opinion for a unanimous Court, Justice Ginsburg reversed and remanded. Litigation of whether Bies falls within *Atkins* is not barred by traditional double jeopardy, since Bies is not being subjected to a second trial. The issue on direct appeal of Bies's mental retardation as a mitigating factor was a different issue from whether his mental capacity is such as to preclude his execution, and thus the latter question was not actually litigated and determined at trial or on the direct appeal. The state court is the proper venue for consideration, in the first instance, of whether Bies falls within the rule of *Atkins v. Virginia.*

***Yeager v. United States,*** 129 S. Ct. 2360 (June 18, 2009) (No. 08-67). Yeager was acquitted of fraud in connection with statements about a telecommunications system offered by his employer, but the jury hung on counts of insider trading and money laundering. He moved to dismiss the latter counts, arguing that the jury must necessarily have decided he did not possess material, nonpublic information; the district court's denial of this motion was affirmed by the court of appeals. The Supreme Court reversed, holding that the significant question for double jeopardy purposes is which facts were necessarily determined by the prior verdict. On remand, the circuit court is free to reconsider the government's contention that the acquittal did not necessarily resolve the question whether Yeager had nonpublic insider information. Opinion by Justice Stevens, joined by Chief Justice Roberts and Justices Souter, Ginsburg, and Breyer, and in part by Justice Kennedy. Justice Kennedy filed a concurring opinion. Justice Scalia filed a dissenting opinion in which Justices Thomas and Alito joined. Justice Alito filed a dissenting opinion in which Justices Scalia and Thomas joined.

## Fifth Amendment—Due Process

***District Attorney's Office v. Osborne***, 129 S. Ct. 2308 (June 18, 2009) (No. 08-6). In a civil suit against an Alaskan prosecutor, rather than a postconviction proceeding, Osborne sought access to DNA evidence in order to perform, at his expense, tests that were not available at the time of his trial, with a view toward establishing his innocence. In a 5-4 decision, the Court rejected Osborne's claim that he has a due process right to access to such evidence. The right to disclosure of exculpatory evidence established in *Brady v. Maryland,* 373 U.S. 83 (1963), applies only to pretrial disclosure. Forty-six states and the federal government have enacted statutes dealing specifically with access to evidence for DNA testing under specific conditions; Alaska and other states are addressing the issue through judicial decision. The recognition of a freestanding due process right to postconviction DNA testing would inappropriately require the federal courts to develop rules and procedures that are better left to state courts and legislatures. State law gives Osborne a liberty interest in using new evidence to demonstrate his innocence, but he must pursue this claim under state postconviction procedures that, the majority holds, are facially adequate. Opinion by Chief Justice Roberts, with whom Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Alito filed a concurring opinion in which Justice Kennedy joined and Justice Thomas joined in part. Justice Stevens filed a dissent in which Justices Ginsburg and Breyer joined and Justice Souter joined in part. Justice Souter filed a dissent.

## Fourth Amendment

***Arizona v. Gant***, 129 S. Ct. 1710 (April 21, 2009) (No. 07-542). In this important Fourth Amendment case, the Court limited the scope of *New York v. Belton*, 453 U.S. 454 (1981), by holding that a warrantless search of a vehicle incident to arrest is valid only when either the arrestee may still obtain access to the car or the car may contain evidence relating to the charge of arrest. If the arrestee is not secured, then the warrantless search can be justified on the ground that it is necessary for protection of the officer. If the arrestee is in custody then the search can be justified in order to preserve evidence of the charged offense. In this case, Gant was arrested for driving on a suspended license, an offense for which no evidence could be obtained from the car, and he had been handcuffed and locked in a patrol car before the car was searched. The subsequent warrantless search of the car violated the Fourth Amendment. Opinion by Justice Stevens, with whom Justices Scalia, Souter, Thomas, and Ginsburg joined. Justice Scalia concurred and Justice Breyer dissented in separate opinions. Justice Alito filed a dissenting opinion in which Chief Justice Roberts and Justice Kennedy joined, and Justice Breyer joined in part.

***Safford Unified School Dist. #1 v. Redding***, 129 S. Ct. 2633 (June 25, 2009) (No. 08-479). In an opinion by Justice Souter, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito, the Court held that a strip search of a 13-year-old girl on suspicion of possessing contraband pills in school violated the Fourth Amendment but that the school officials who directed and participated in the search were entitled to qualified immunity. Expanding on the decision in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court noted that although there was reasonable suspicion sufficient to justify a search of Redding's backpack and outer clothes, the facts did not justify a suspicion that she had contraband hidden in her underwear; the search therefore was unreasonable. However, because lower courts had reached different conclusions as to how *T.L.O.* applies to such searches, the

individual school officers were entitled to qualified immunity. The case was remanded for consideration of the liability of the school district. Justices Stevens and Ginsburg joined the opinion on the search issue but dissented from the portion granting the officials immunity; Justices Stevens and Ginsburg wrote concurring opinions expanding on their decision. Justice Thomas concurred in the decision to grant immunity but dissented from the portion of the majority opinion that held the strip search illegal.

## Habeas Corpus

***Cone v. Bell***, 129 S. Ct. 1769 (April 28, 2009) (No. 07-1114). In this capital case, the Court concluded that the state court's denial of Cone's postconviction petition did not rest on an adequate state ground because, factually, his *Brady* claim, (Brady v. Maryland, 373 U.S. 83 (1963)), had not been decided on direct review nor had it been waived. Review of the withheld documents indicates that they would have been unlikely to persuade the jury to accept his insanity defense. However, because the information might have been material to the jury's decision on punishment the case was remanded for a full review of the evidence and its effect on the sentencing verdict. Opinion by Justice Stevens, in which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Chief Justice Roberts filed an opinion concurring in the judgment. Justice Alito filed an opinion concurring in part and dissenting in part. Justice Thomas filed a dissenting opinion in which Justice Scalia joined.

***In re Davis***, 2009 WL 2486475 (Aug. 17, 2009) (No. 08-1443). Troy Davis, who has been sentenced to death in Georgia and whose state and federal postconviction writs have been denied, filed a petition for habeas corpus as an original case in the Supreme Court. The Court transferred the petition to a district court in Georgia "for hearing and determination," directing that court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes [Davis'] innocence." Justice Scalia, with whom Justice Thomas joined, dissented, arguing that the district court could grant no relief, essentially because federal law prohibits the granting of a writ as to a claim decided on the merits in a state court unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." (28 U.S.C. § 2254(d)(1).) Since the Court has never held that the Constitution precludes execution of a person who was convicted after a fair trial but who later persuades a court that he is "actually" innocent, the statute prevents the granting of the writ based on Davis's evidence, most of which has already been rejected. Justice Stevens, with whom Justices Ginsburg and Breyer joined, wrote a concurrence addressing Justice Scalia's objections and observing that the "Court correctly refuses to endorse . . . reasoning" that would allow a person to be executed despite "new evidence [that] conclusively and definitely prov[es], beyond any scintilla of doubt, that he is an innocent man." Justice Sotomayor took no part in the decision.

***O'Brien v. O'Laughlin***, 2009 WL 2831420 (Aug. 26, 2009) (No. 09A194). The Commonwealth of Massachusetts moved to stay the mandate of the court of appeals granting a habeas petition and ordering petitioner's immediate and unconditional release, or, alternatively, to set bail conditions. The respondent (habeas petitioner) opposed the stay but, as to the conditions of release, objected only to the monetary amount of the bail requested. Justice Breyer, sitting as circuit justice, denied the motion for a stay but ordered imposition of bail and conditions to be determined by the district court, the amount of the bail to be "a practicable amount that [petitioner] can reasonably be expected to raise." When habeas has been granted, there is a presumption in favor of release. A stay may be granted when there is a strong likelihood that cert will be granted and a "fair prospect" that the decision below will be reversed. Although the cert petition had not been filed, from the record before him Justice Breyer concluded that it is not "reasonably likely" that cert will be granted nor is there a "fair prospect" that the decision below will be reversed.

## Immigration

***Nken v. Holder,*** 129 S. Ct. 1749 (April 22, 2009) (No. 08-681). Nken, an alien, requested an order staying his removal pending review of a Board of Immigration Appeals order that denied his motion to reopen removal proceedings. The Court held that such a request should be considered in light of the traditional criteria governing stays, that is, the likelihood of success on the merits, the possibility of irreparable injury, and the harm to the government and the public if the stay is granted.

A provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) prohibits a court from enjoining the removal of an alien unless there is "clear and convincing evidence" that the removal is prohibited as a matter of law. (8 U.S.C. § 1252(f)(2).) The Court distinguished the IIRIRA provision, which addresses an order affirmatively directing the government to act or refrain from acting, from a stay of a court order, which merely temporarily sets the order aside pending review. Opinion by Chief Justice Roberts, with whom Justices Stevens, Scalia, Kennedy, Souter, Ginsburg, and Breyer joined. Justice Kennedy filed a concurring opinion in which Justice Scalia joined. Justice Alito filed a dissent in which Justice Thomas joined.

***Nijhawan v. Holder***, 129 S. Ct. 2294 (June 15, 2009) (No. 08-495). An alien is deportable if convicted of an "aggravated felony," which includes a fraud or deceit offense "in which the loss to the . . . victims exceeds $10,000." (8 U.S.C. § 1101(a)(43)(M)(i).) The Court held unanimously that the immigration court can consider the underlying facts of the fraud, whether or not the amount of the monetary loss was an element of the felony. Opinion by Justice Breyer for a unanimous Court.

## Military Courts

***United States v. Denedo***, 129 S. Ct. 2213 (June 8, 2009) (No. 08-267). An Article I military court has jurisdiction to issue a writ of coram nobis to review a conviction that is alleged to have been fundamentally flawed. In this case, the former service member alleged that he had pleaded guilty based on inaccurate (and constitutionally ineffective) advice from his counsel that his conviction would not expose him to deportation. Opinion by Justice Kennedy in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Chief Justice Roberts filed an opinion concurring in part and dissenting in part, in which Justices Scalia, Thomas, and Alito joined.

## Sentencing

***Dean v. United States***, 129 S. Ct. 1849 (April 29, 2009) (No. 08-5274). A person convicted of carrying a firearm during a violent crime is subject to a mandatory minimum sentence of 10 years if the firearm discharges during the event, even if the discharge is accidental rather than intentional. (18 U.S.C. § 924(c)(1)(A)(ii), (iii).) Opinion for the Court by Chief Justice Roberts, with whom Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Alito joined. Justices Stevens and Breyer filed dissenting opinions.

## Sixth Amendment

***Kansas v. Ventris***, 129 S. Ct. 1841 (April 29, 2009) (No. 07-1356). Testimony of an informant placed in the defendant's cell as to inculpatory admissions of the defendant, admittedly in violation of Ventris's Sixth Amendment right to counsel, (Massiah v. United States, 366 U.S. 201 (1964)), is admissible to impeach his testimony at trial. Opinion by Justice Scalia, with whom Chief Justice Roberts, and Justices Kennedy, Souter, Thomas, Breyer, and Alito joined. Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined.

***Melendez-Diaz v. Massachusetts***, 129 S. Ct. 2527 (June 25, 2009) (No. 07-591). Affidavits by state laboratory chemists asserting that a substance seized from defendant was cocaine of a certain quantity were testimonial and therefore inadmissible because in violation of the confrontation clause, (Crawford v. Washington, 541 U.S. 36 (2004)). The affidavits were not traditional business or official records and were inadmissible whether or not made at about the same time as the analyses themselves. Opinion by Justice Scalia, in which Justices Stevens, Souter, Thomas, and Ginsburg joined. Justice Thomas filed a concurring opinion. Justice Kennedy filed a dissent in which Chief Justice Roberts and Justices Breyer and Alito joined.

***Montejo v. Louisiana***, 129 S. Ct. 2079 (May 26, 2009) (No. 07-1529). The Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), which had held that a defendant who has been formally charged and requested counsel at arraignment cannot be questioned by the police without a lawyer present unless he or she initiates the contact. The Court deemed this decision unworkable and concluded that sufficient support for the Fifth Amendment privilege against self-incrimination and against "badgering" by the police is provided by *Miranda v. Arizona*, 384 U. S. 436 (1966), which require advice as to the right to counsel before questioning, and *Edwards v. Arizona*, 451 U.S. 477 (1981), which prohibits police-initiated interrogation after a defendant has invoked his or her right to counsel. The case was remanded to permit Montejo to argue that *Edwards* requires suppression of an incriminating letter he wrote af-

ter counsel had been appointed, and to raise any argument he might have as to voluntariness of his waiver of counsel. Opinion by Justice Scalia, with whom Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined. Justice Alito filed a concurrence in which Justice Kennedy joined. Justice Stevens filed a dissent in which Justices Souter and Ginsburg joined, and which Justice Breyer joined except for a footnote relating to stare decisis. Justice Breyer filed a separate dissent asserting that stare decisis should bind the Court in this case.

## Relevant Civil Cases

***Ashcroft v. Iqbal***, 129 S. Ct. 1937 (May 18, 2009) (No. 07-1015). This case builds upon the 2007 decision in *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007), an antitrust case, which reinterpreted Rule 8 of the Federal Rules of Civil Procedure to require significantly more detailed factual allegations than have previously been held sufficient to withstand a motion to dismiss. Iqbal filed an action against former Attorney General Ashcroft, FBI Director Mueller, and other federal officials including jailors, alleging that his detention as a "high interest" detainee following the 9/11 attacks, and his harsh treatment during detention, were discriminatory in violation of his First and Fifth Amendment rights. (Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).) The district court denied defendants Ashcroft's and Mueller's motion to dismiss based on qualified immunity. On their interlocutory appeal, the court of appeals held the complaint sufficient under the *Twombly* "flexible plausibility" standard. In a 5-4 decision, the Court reversed and remanded the case to the court of appeals to decide whether to remand further to allow Iqbal to attempt to amend his complaint. There is no vicarious liability under *Bivens* and knowledge of a subordinate's discriminatory purpose would not suffice to render the supervisor responsible for a constitutional violation. Iqbal's allegations were conclusory, including statements that these defendants had agreed to subject him to harsh conditions for a discriminatory reason and that Ashcroft was the "principal architect" of the policy that was carried out by Mueller and his agents. Since the 9/11 attacks had been carried out by Arabs and Muslims, it was not surprising that Arabs and Muslims would be subject to arrest and detention; allegations that Iqbal was Arab and Muslim do not show that his detention was based on discriminatory factors. Opinion by Justice Kennedy, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined, addressing both the question whether supervisors can be liable when they are deliberately indifferent to discrimination, and the sufficiency of the allegations of the complaint. Justice Breyer filed a dissent.

***Caperton v . A.T. Massey Coal Co.***, 129 S. Ct. 2252 (June 8, 2009) (No. 08-22). The principal officer of defendant Massey contributed $3 million to the campaign of Brent Benjamin, who was seeking election to the West Virginia Supreme Court. This amount exceeded the total of all other contributions to Benjamin's campaign. At the time Massey's appeal from a $50 million judgment against it in favor of Caperton was pending. Benjamin was elected, defeating the incumbent, but refused to recuse himself both before his court's decision reversing the jury verdict and again on rehearing. The Court held that in the circumstances, due process requires reversal of the state supreme court's decision. Earlier cases had established that recusal is required when a judge has a "direct, personal, substantial, pecuniary interest" in a case, and also when the likelihood of actual bias is "too high to be constitutionally tolerable." Due process requires objective standards that do not rely on proof of actual bias. In this case, a person with a direct interest in a pending case had a "significant and disproportionate influence in placing the judge on the case" by his financial contributions to a judge seeking election to the court that would review the final judgment in that case. The risk of actual bias was too great to allow the decision to stand, consistent with due process. The Court predicted that the effect of its decision should be limited because although many jurisdictions conduct judicial elections the circumstances of this case "are extreme by any measure." Moreover, state judicial codes of conduct may have more stringent recusal standards than due process requires. Opinion by Justice Kennedy, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Chief Justice Roberts filed a dissenting opinion in which Justices Scalia, Thomas, and Alito joined. Justice Scalia filed a dissent.

***Haywood v. Drown***, 129 S. Ct. 2108 (May 26, 2009) (No. 07-10374). The Supremacy Clause, U.S. Constitution Article VI, prohibits a state from withdrawing from its courts jurisdiction over Civil Rights Act claims against correctional officers (42 U.S.C. § 1983) and requiring those claims to be filed against the state itself (which is not a "person" under the Civil Rights Act) in a court of limited jurisdiction. Opinion by Justice Stevens, in which Justices Kennedy, Souter,

Ginsburg, and Breyer joined. Justice Thomas filed a dissenting opinion in which Chief Justice Roberts and Justices Scalia and Alito joined as to Part III.

## ARGUMENTS SCHEDULED

### October 5, 2009:

***Maryland v. Shatzer***, 129 S. Ct. 1043 (No. 08-680), *Cert Alert*, 24:1 CRIM. JUST. at 54 (Spring 2009) (Interrogation of a suspect who has invoked his right to counsel after break in custody or a multi-year lapse before further interrogation).

### October 6, 2009:

***United States v. Stevens***, 129 S. Ct. 1984 (No. 08-769), *supra.*

***Johnson v. United States,*** 129 S. Ct. 1315 (No. 08-6925), *Cert Alert*, 24:2 CRIM. JUST. at 48 (Summer 2009) (Interpretation of "violent felony" in Armed Career Criminal Act).

***Bloate v. United States,*** 129 S. Ct. 1984 (No. 08-728), *supra.*

### October 13:

***Padilla v. Kentucky***, 129 S. Ct. 1317 (No. 08-651), *Cert Alert*, 24:2 CRIM. JUST. at 49 (Summer 2009) (Is mandatory deportation after a plea a "collateral consequence," relieving counsel of any duty to investigate and advise, and if so is counsel's gross misadvice grounds for setting aside guilty plea.)

***Smith v. Spisak***, 129 S. Ct. 1319 (No. 08-724), *Cert Alert*, 24:2 CRIM. JUST. at 49 (Summer 2009).

### October 14:

***Alvarez v. Smith***, 129 S. Ct. 1401 (No. 08-351), *Cert Alert*, 24:2 CRIM. JUST. at 48 (Summer 2009) (Conditions for postseizure probable cause hearing prior to judicial forfeiture).

### November 2:

***Beard v. Kindler***, 129 S. Ct. 2381 (No. 08-992), *supra.*

### November 4:

***Wood v. Allen***, 129 S. Ct. 2389 (No. 08-9156), *supra.*

### November 9:

***Graham v. Florida***, 129 S. Ct. 2157 (No. 08-7412), *supra.*

***Sullivan v. Florida,*** 129 S. Ct. 2157 (No. 08-7621), *supra.*

### November 10:

***Kucana v. Holder***, 129 S Ct. 2075 (No. 08-911), *supra.* ■