PROSECUTION NOTES

CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

The Center on the Administration of Criminal Law is pleased to present Prosecution Notes. *This edition recounts some of the Center's successes since its founding, introduces the Center's personnel, offers analysis and reform proposals by expert practitioners of recent developments in the area of prosecutorial misconduct, and summarizes all criminal law decisions from the 2008–09 Supreme Court Term.*

In this Issue:

NEWS FROM THE CENTER

By Anthony S. Barkow, Executive Director

Since its founding in June 2008, the Center has been successfully advancing its mission through three main arenas of activity: academia, the courts, and public policy debates. Some of those successes are discussed here. All of the Center's work is discussed on its Web site, www.prosecutioncenter.org.

REGULATION BY PROSECUTORS

The Center's largest project to date has been "Regulation By Prosecutors." This project provides an example of the Center achieving a long-term ultimate goal of using its academic work, including sponsoring events, to influence public policy regarding important issues in criminal law.

The Center held its first major annual conference, "Regulation By Prosecutors," on May 8, 2009. The conference focused on the regulation of private industry by state and federal criminal prosecutors, including demands by prosecutors that companies engage in particular affirmative acts to avoid prosecution, the use of deferred prosecution agreements and nonprosecution agreements, and the selection and use of monitors appointed as a result of such agreements. The use of the threat of prosecution or such agreements to regulate industry raises significant issues: criminal prosecutors are not subject to the same oversight and procedural requirements as civil regulatory agencies, and the lack of these checks raises questions about whether prosecutors are in a position to produce sound substantive regulations of private industry.

Panelists Kate Stith, Samuel W. Buell, Brandon L. Garrett, Mark K. Schonfeld, and Theodore V. Well, Jr., discuss regulation by prosecutors.

The conference brought together a stellar panel of scholars, prosecutors, defense lawyers, and industry leaders to identify the costs and benefits of this practice and to propose solutions to the leading problems associated with it. James B. Comey, the former Deputy Attorney General of the United States, delivered the keynote address. Two current United States Representatives who have introduced pending legislation and who have presided over Congressional hearings on the subject matter of the conference spoke at the event. Other participating practitioners included former United States Attorneys, top regulators, current and former top officials in the Office of the State Atorney General of New York, a federal judge, and prominent defense lawyers and scholars.

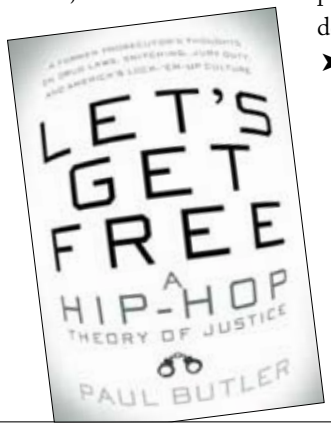
The Center will publish a book out of the conference, tentatively entitled *Prosecutors In The Boardroom: Using Criminal Law to Regulate Corporate Conduct* (NYU Press 2011). The book will be comprised of papers contributed by scholars who participated in the conference.

Finally, the Center has influenced public policy as a direct outgrowth of the conference. On November 19, 2009, Executive Director Anthony S. Barkow testified before the United States House of Representatives Subcommittee on Commercial and Administrative Law regarding proposed legislation that would prohibit former federal prosecutors from serving as or working for corporate monitors in matters that they investigated or prosecuted when in government service. Reflecting the conference's centrality to the national policy debate on the surrounding issues, three of the four witnesses at the hearing had participated in the Center's conference. On July 8, 2009, Faculty Director Rachel E. Barkow testified before the House Subcommittee on Commerce, Trade, and Consumer Protection regarding the proposed Consumer Financial Protection Agency and discussed, among other things, the value of including state attorney general enforcement as a counterweight to the possibility of agency capture, which is a subject discussed in her contribution to *Prosecutors In The Boardroom*.

James B. Comey, the former Deputy Attorney General of the United States

BOOK TALK BY PROFESSOR PAUL BUTLER

On October 28, 2009, the Center hosted a book talk by Professor Paul Butler of George Washington University Law School. Professor Butler discussed his recent book, *Let's Get Free: A Hip-Hop Theory of Justice* and, in particular, a chapter entitled, "Should Good People Be Prosecutors?" Professor Butler teaches in the areas of criminal law, civil rights, and jurisprudence, and publishes on and is expert in a wide range of subjects including criminal law generally, race and racism in U.S. law, civil rights, and jury nullification. During the book talk, Professor Butler argued that the criminal justice system perpetuates racism and overincarcerates, especially nonviolent drug offenders of color. The Center's Executive Director commented on Professor Butler's presentation and started a discussion about what "good people" can and do accomplish as prosecutors.



PUBLIC ADDRESS ON WHITE COLLAR CRIME BY PREET BHARARA, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK

On November 19, 2009, the Center sponsored a public address on white collar crime by Preet Bharara, the newly-appointed United States Attorney for the Southern District of New York. Bharara discussed his views on white collar crime, his office's priorities in the area, and the creative and novel investigative and prosecution strategies he and his office would employ in white collar cases.

SCHOLARSHIP

Since its founding, the Center has published several major works of scholarship in leading law publications. Faculty Director Rachel Barkow published:

- *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stanford Law Review 869 (2009), which considers how administrative law scholarship on institutional design can be employed to improve the structure and decisionmaking of federal prosecutors' offices. The article examines the internal design of prosecutors' offices to identify a viable corrective for prosecutorial overreaching. In particular, by heeding lessons of institutional design from administrative law, she proposes separating investigative from adjudicative decisionmaking within prosecutors' offices.
- *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 Federal Sentencing Reporter 153 (2009), which discusses how to improve the country's various clemency structures to make them politically viable in a tough-on-crime era of politics.
- *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Michigan Law Review 1145 (2009), which analyzes the variation between

capital and non-capital sentencing law to identify how each area could be improved. This research consisted of an exhaustive review of the Supreme Court's capital sentencing case law and an analysis of how it compares to the Court's jurisprudence in non-capital cases.

Additionally, Professor Barkow was nominated for the Exemplary Legal Writing Award of 2008 in *The Green Bag* for her article, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332 (2008).

LITIGATION

The Center's litigation practice has been active and successful. The Center has filed 14 *amicus* briefs in 12 different cases. These briefs have been submitted in federal and state courts across the country. The briefs have been prepared in partnership with some of the nation's leading law firms. A few examples are outlined below.

➤ ***Abuelhawa v. United States*, Supreme Court of the United States (see related article)**

- The Center filed two *amicus* briefs in support of the defendant, one in support of a petition for writ of *certiorari*, which was granted, and one on the merits. The case involved whether a prosecutor should charge a defendant with a felony for using a cell phone to buy drugs solely for personal use under a statute targeting the use of a "communications device" to "facilitat[e]" a narcotics distribution.
- The brief was prepared in partnership with the law firm Davis, Polk, & Wardwell.
- On May 26, 2009, in a unanimous opinion, the Court agreed with the Center that the defendant should prevail, and rested its decision in part on statutory history and Justice Department charging policy, both subjects of the Center's brief.

➤ ***Carachuri-Rosendo v. Holder*, Supreme Court of the United States**

- The Center filed an *amicus* brief in support of a petition for writ of *certiorari*. The case involves a circuit split where some federal circuit courts permit immigration courts to treat second or subsequent misdemeanor convictions as recidivist felonies despite a state prosecutor's choice to decline felony charges and the fact that the individual was not actually convicted as a recidivist.
- The Center' s brief argued that these circuits' decisions improperly interfere with the basic exercise of prosecutorial discretion, undermine state interests in the proper and equitable administration of criminal justice, and can lead to a violation of the right to a jury trial.
- The brief was prepared in partnership with the law firm Debevoise & Plimpton.
- The petition for *certiorari* was granted on December 14, 2009.

➤ ***Colon v. New York*, New York Court of Appeals**

- The Center filed an *amicus* brief on behalf of the defendants-appellants proposing a new, clearer test for determining when a tacit agreement exists between a prosecutor and a cooperating witness to provide benefits to the witness in exchange for testifying against a defendant, which could trigger a *Brady* disclosure obligation by the prosecutor.
- The brief was prepared in partnership with the law firm Weil, Gotshal, & Manges.
- On November 19, 2009, the Court sided with the Center in a unanimous opinion.

➤ ***Thompson v. Connick*, United States Court of Appeals for the Fifth Circuit, en banc**

- The Center filed an *amicus* brief in support of John Thompson, who was exonerated just weeks before his scheduled execution after 18 years of wrongful imprisonment. Thompson won a jury verdict in a federal section 1983 action for violation of his civil rights due to the New Orleans District Attorney's Office's deliberately indifferent failure to train, monitor, and supervise the prosecutors in that office. That verdict was reversed on appeal.
- The Center's brief highlighted the importance of training prosecutors on their constitutional obligations pursuant to *Brady* v. *Maryland*.
- The brief was prepared in partnership with the Law Offices of Martin J. Siegel.
- On August 10, 2009, in a *per curiam* opinion, the Fifth Circuit agreed with the Center, vacated the panel opinion, and reinstated the jury's judgment for Thompson.

PUBLIC POLICY AND MEDIA GOALS AND ACCOMPLISHMENTS

The Center advanced criminal justice policy through targeted efforts to get its research read by policymakers and covered by the media. In addition to the Congressional testimony arising out of "Regulation By Prosecutors," Faculty Director Rachel E. Barkow also testified before the United States Sentencing Commission on July 9, 2009, and made recommendations for reforming the federal sentencing system. Professor Barkow recommended that the Commission keep the current advisory Guidelines framework, reconsider the use of acquitted conduct to increase sentences, reevaluate its decision to set drug trafficking guideline ranges around the mandatory minimums set by Congress, and prioritize its empirical research and data analysis in setting the agenda for itself and Congress, particularly by engaging in fiscal-cost and racial-impact forecasting of changes in sentencing law, evidence-based research about what works and what does not in fighting crime and curbing recidivism, and studying the relationship between prosecutorial practices and federal sentencing outcomes.

Additionally, Executive Director Anthony Barkow and Faculty Director Rachel Barkow both served as advisors to the Department of Justice Transition Team for President-elect Barack Obama.

Finally, the Center has become a regular media presence. The Center published 8 opinion pieces in media locations including *The Washington Post*, CNN.com, *The Boston Herald*, *The New York Daily News*, the Sentencing Law and Policy blog, and the American Constitution Society blog. Moreover, the Center has regularly—almost 100 times since its founding—served as a source of expertise on important criminal law issues for various major media including NBC Nightly News with Brian Williams, the BBC, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, Bloomberg News Television, and NPR.

PROSECUTORIAL MISCONDUCT: AN INCREASING PROBLEM OR OVERBLOWN HYSTERIA?

Michael L. Volkov, Esq., and Allyson Miller, Esq.[1] Dickinson Wright[2]

Prosecutors occupy a unique and powerful position in the American criminal justice system. They decide what charges to bring, what plea bargain to offer, what evidence to present at trial, and what sentence to request. In making these decisions, prosecutors must strike the difficult balance between zealously pursuing the conviction of the guilty while remaining objective so as not to overlook evidence of innocence or mitigation. As an advocate and minister of justice, "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[3] Justice, whether that be the conviction or acquittal of the accused, is the prosecutor's only objective.

Judging from recent newspaper headlines, though, it seems that all too often justice takes a back seat to the prosecutor's desire to convict, even if that means rules are bent or broken.

The Supreme Court recently heard oral arguments in *Pottawattamie County v. McGhee*, in which it will decide whether prosecutors may be sued for damages for wrongful conviction and incarceration when the prosecutors allegedly procured false testimony during the criminal investigation and introduced that same testimony against the defendants at trial.[4] Since it is well established that prosecutors are absolutely immune from suit for any actions taken at trial, including knowingly submitting false evidence, the question is whether that immunity extends to prosecutors' pretrial conduct as well.

The underlying facts of that case are startling. Curtis McGhee and Terry Harrington were convicted of murdering a retired police officer in Pottawattamie County, Iowa, in 1978 and sentenced to life in prison. More than 25 years later, the release of police records in the cases revealed that the two prosecutors had improperly coached a key witness and failed to disclose to the defense evidence about another lead suspect who had been positively identified by an eyewitness and failed a polygraph. Apparently, when first interviewed by police and prosecutors, the key witness misidentified the murder weapon, gave conflicting accounts, and fingered two other men before naming McGhee and Harrington. Police and prosecutors then allegedly removed anything from his statement that could be proven false and supplied him with details about the murder so that his story would match the evidence, without disclosing any of this to the defense or at trial. The Iowa Supreme Court threw out Harrington's conviction in 2003, and McGhee pleaded guilty to a lesser offense for time already served in prison.

Just last April, the Department of Justice took the unusual step of moving to dismiss all charges against former Alaska Senator Ted Stevens after he had been convicted on seven felony counts of ethics violations. The decision came after three newly assigned prosecutors to

the case discovered that notes of an interview with the government's chief witness, Bill Allen, had never been turned over to the defense for use at trial, despite the fact that the notes revealed Allen had made certain statements helpful to Stevens's defense. This was not the only instance of prosecutorial misconduct. Throughout trial, disclosures raised questions about the way prosecutors handled the case. And post-trial, an FBI agent who had worked on the investigation bolstered these suspicions by accusing the prosecution team of willfully concealing exculpatory evidence and conspiring to make a witness who may have been helpful to the defense unavailable to testify at trial. He also accused a fellow agent of maintaining an inappropriate relationship with star witness Allen.

And who can forget when, in 2006, three members of the Duke University lacrosse team were indicted on charges of rape, sexual assault, and kidnapping by district attorney Michael Nifong? In the first week of his investigation, Nifong made inflammatory remarks to the press, claiming he was certain a rape had occurred and calling the lacrosse players "hooligans" who were hiding behind a "wall of silence." When he discovered that evidence didn't quite match up, Nifong deliberately withheld exculpatory DNA evidence from the defense and misled the court as to its existence, at a time when he was up for reelection in a hotly contested race. Fifteen months later the students were exonerated and Nifong was removed from his post and disbarred for his misconduct.

These are just a few examples.[5] Some argue that such intentional prosecutorial misconduct is the exception and not the rule. While this may be true, recent studies show that prosecutorial misconduct is a systemic reality, at least at the state and local levels of the criminal justice system. In 2003, a study conducted by the Center for Public Integrity on the conduct of local prosecutors found that, beginning in 1970, prosecutorial misconduct was cited as a factor for dismissed charges, reversed convictions, or reduced sentences in at least 2,012 cases.[6] In 513 additional cases, appellate judges offered opinions—either dissents or concurrences—in which they found the prosecutorial misconduct serious enough to merit additional discussion. In thousands more, judges labeled prosecutorial behavior inappropriate but permitted the trial to continue or upheld convictions as "harmless error."

And those numbers do not even begin to scratch the surface. They do not account for prosecutorial misconduct in cases not subject to appellate review, such as the vast majority of cases referred by police, which end in guilty pleas and never reach a jury, or where trial judges dismiss cases or declare mistrials. Nor do they account for any number of cases in which prosecutors may have committed undiscovered "*Brady* violations" by failing to turn over possibly exculpatory information to the defense.

Despite the undeniable prevalence of prosecutorial misconduct, states have consistently failed to seriously investigate and sanction prosecutors for even the most blatant of ethical violations. North Carolina's disbarment of Nifong for his mishandling of the Duke lacrosse case is the rare exception. Ignoring the problem only serves to jeopardize the integrity of the criminal justice system. Steps must be taken to increase transparency and improve accountability.

Prosecutors occupy a unique and powerful position in the American criminal justice system. They decide what charges to bring, what plea bargain to offer, what evidence to present at trial, and what sentence to request.

The cases mentioned provide examples of what can be done to achieve those goals. Had it not been settled out of court before it was decided, the Supreme Court's *Pottawattamie* case could have opened up prosecutors to civil liability for pretrial misconduct that violates a defendant's constitutional rights. At oral argument, Justice Sotomayor, a former prosecutor, noted that "neither of the two prosecutors in this case were sanctioned in any way for their conduct" and that studies showed professional discipline or other punishment for prosecutorial misconduct was rare. She seemed to indicate that civil lawsuits might have a role to play in addressing such misconduct.

Adopting and enforcing clearly defined official policies and procedures and requiring prosecutors to participate in training and continuing education programs is another way to prevent misconduct. Attorney General Eric Holder responded to the mishandling of the Stevens case by launching an investigation of the prosecutors involved in the misconduct and announcing enhanced training for all prosecutors on their discovery obligations in criminal cases.[7] This should go a long way toward sensitizing prosecutors to this important issue and cultivating a culture in which success is measured not only by whether one wins or loses but also by whether justice was served.

But training on discovery obligations alone may not be enough to prevent abuses where discovery rules themselves give prosecutors too much discretion over what evidence must be turned over to the defense. Rule 16 of the Federal Rules of Criminal Procedure, for example, following the mandate of the Supreme Court in *Brady v. Maryland*, only requires prosecutors to provide *material* exculpatory evidence to the defense. The problem with this rule is that it allows prosecutors to subjectively determine what is material and what is not. And prosecutors must make this determination without knowing the defense theory of the case. Amending discovery rules to require the disclosure of *all* exculpatory evidence would eliminate much of the prosecutors' discretion, preventing honest mistakes, and deterring rule manipulation.

Judge Emmet Sullivan of the U.S. District Court for the District of Columbia, who presided over the Stevens trial and witnessed federal prosecutors' repeated *Brady* violations, wrote a letter to the Judicial Conference recommending such an amendment to Rule 16. He said the Stevens case "dramatically" convinced him of the need for a uniform approach to discovery disclosures: "Whether, when, and how much exculpatory evidence the defendant receives should not depend on the prosecutor, the judge, the court or any other circumstances."[8] The Department of Justice, however, opposes eliminating the materiality requirement, contending that disclosure of all exculpatory evidence "seriously comes into conflict" with victim rights, witness security, and, in some cases, national security. But it is hard to see how the "materiality" requirement changes the equation so dramatically with regard to those concerns, which may be implicated in the disclosure of material exculpatory evidence as well.

Allowing the defense to examine and challenge all information—and not just information that prosecutors might deem materially exculpable—creates a more just system with less opportunity for abuse of power.

Discovery rules in some jurisdictions, such as North Carolina, go one step further to require pretrial open-file discovery in criminal cases, eliminating all prosecutorial discretion over what evidence to provide to the defense. Prosecutors must disclose all relevant information concerning a criminal investigation, including police reports, witness names, and witness statements. Allowing the defense to examine and challenge all information—and not just information that prosecutors might deem materially exculpable—creates a more just system with less opportunity for abuse of power.

Finally, state and local bar associations must assume a more active role in holding prosecutors accountable for misconduct. Until prosecutors face a real threat of discipline, such as fines, suspension, or disbarment, some will continue to bend or break the rules to win, no matter the cost to justice.

1 Michael Volkov is a partner and Allyson Miller is an associate at Dickinson Wright. Volkov is the head of the white collar defense and internal investigation department. Miller specializes in white collar defense and litigation.

2 The views expressed herein are solely those of the authors and not necessarily those of the Center on the Administration of Criminal Law.

3 *Berger v. United States*, 295 U.S. 78, 88 (1935).

4 *Pottawattamie County v. McGhee*, S. Ct. Docket No. 08–1065, cert. granted (April 20, 2009), oral arguments heard (Nov. 6, 2009). [Editor's Note: The Center on the Administration of Criminal Law filed an amicus brief in this case in support of the respondents/criminal defendants.]

5 For others, see John Farmer, "Prosecutors Gone Wild," *The New York Times*, April 3, 2009.

6 The Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors*, Main Findings, www.projects.publicintegrity.org/pm/ (last accessed Nov. 8, 2009).

7 Press Release, Department of Justice, Office of Public Affairs, "Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases," April 14, 2009.

8 Mike Scarcella, "DOJ Outlines Changes After Backlash Over Handling of Stevens Case," *The National Law Journal*, Oct. 19, 2009.

ABUELHAWA V. UNITED STATES DECIDED MAY 26, 2009

By David B. Edwards '08

In *Abuelhawa*, the Supreme Court addressed whether a prosecutor should charge a defendant with a felony for using a cell phone to buy drugs solely for personal use under 21 U. S. C. § 843(b), a statute that targets the use of a "communications device" to "facilitate" a narcotics distribution. The Center on the Administration of Criminal Law, in partnership with law firm Davis Polk & Wardwell, filed amicus briefs on behalf of the defendant in support of the petition for writ of certiorari as well as on the merits. In a unanimous decision written by Justice Souter, the Court agreed with the Center that the defendant should prevail, and it reversed. The Court rested its decision in part on statutory history and Justice Department charging policy—both subjects of the Center's brief.

Defendant Salman Khade Abuelhawa arranged to buy cocaine from a dealer in two separate transactions, each time a single gram. Abuelhawa's two purchases were misdemeanors under the Controlled Substances Act, while the dealer's two sales were felonies. On the theory, however, that the transactions were arranged through six phone calls between Abuelhawa and the dealer, the government charged Abuelhawa with six felonies in violation of §843(b), a statute that makes it a felony "to use any communication facility in…facilitating" felony distribution and other drug crimes. Abuelhawa moved for acquittal as a matter of law, arguing that his efforts to purchase cocaine could not be treated as facilitating the dealer's felonies. The trial court denied the defendant's motion, and the jury convicted on all six felony counts. The U.S. Court of Appeals for the Fourth Circuit affirmed, reasoning that "for purposes of §843(b), 'facilitate' should be given its 'common meaning—to make easier or less difficult, or to assist or aid.'" 523 F. 3d 415, 420 (2008).

In a unanimous decision the Supreme Court agreed with the Center and rested its decision in part on statutory history and Justice Department charging policy—both subjects of the Center's brief.

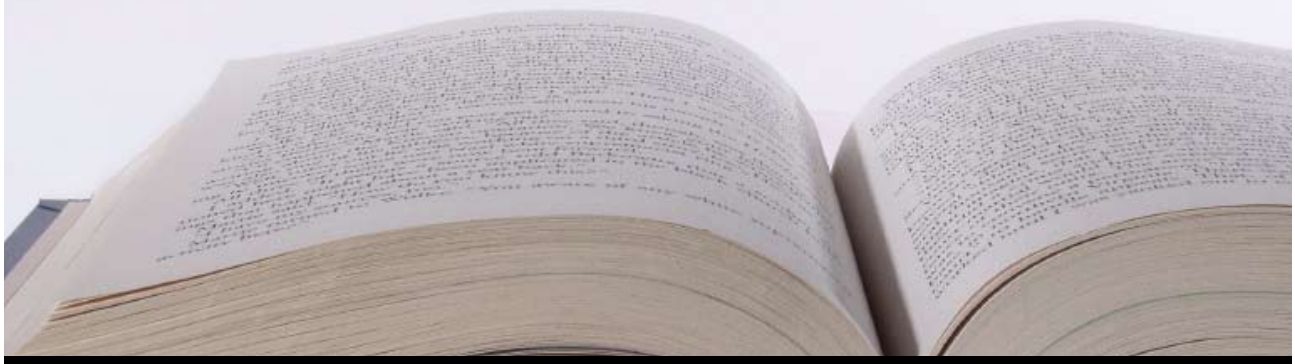
The Center's amicus briefs to the Court argued that the language and context of Section 843(b) provide compelling evidence that the provision does not—and was never intended to—reach purchasers of drugs for personal use. As the Center explained, Section 843(b) was intended solely to aid in the apprehension and prosecution of large-scale narcotics traffickers and distributors, whose clandestine use of telephones enabled them to evade the law by avoiding visible contact with the final buyer. The Center noted that by improperly subjecting personal-use purchasers to harsh penalties reserved for

drug traffickers and distributors, the lower courts' rulings had fundamentally undermined the critical distinction between drug distribution, a felony subject to harsh penalties, and personal use of controlled substances, a misdemeanor for which Congress encouraged treatment and rehabilitation rather than retributive punishment. Additionally, the Center argued that reading Section 843(b) to reach people purchasing drugs solely for personal use would have wide-ranging adverse consequences for enforcement of the federal drug laws. Because personal communication devices are so pervasive and because Department of Justice guidelines direct prosecutors to charge the "most serious" offense applicable to a given case, the lower courts' reading would transform almost every purchase of drugs for personal use into a felony subject to severe punishment.

The Court unanimously reversed the Court of Appeals for the Fourth Circuit and remanded for further proceedings, relying in part on statutory history and Justice Department charging policy, both of which were prominently featured in the Center's brief. Specifically, the Court explained that Congress had intended to treat purchasing drugs for personal use more leniently than the felony of distributing drugs and had similarly intended to narrow the scope of the communications provision to cover only those who facilitate a drug felony. The Court also relied on analogous bilateral transactions, such as the illegal sale of alcohol, where one party to the transaction is treated more leniently and cannot be given additional punishment for facilitating the other party's crime without upsetting the "calibration of punishment set by the legislature." Ultimately, the Court held that the government's position—that Congress intended mere purchasers to be held accountable as facilitators of their dealer's felony simply because they completed the transaction by using a telephone—was "just too unlikely."

Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct

The Center is proud to announce that it will publish a book, tentatively entitled ***Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct***, comprised of papers contributed by scholars who participated in the Center's Inaugural Annual Conference, "Regulation By Prosecutors." The book will be published by New York University Press.



www.law.nyu.edu/centers/adminofcriminallaw/scholarship/prosecutorsintheboardroom

CENTER TAKES CENTRAL ROLE IN SUPREME COURT CASE INVOLVING INTERPRETATION OF RICO

By Julia Fong Sheketoff '10 and Mark Savingnac (Harvard '11)

The Center on the Administration of Criminal Law took a central role in the advocacy and legal strategy of *Boyle v. United States*, No. 07-1309 (June 8, 2009), a case heard and decided by the Supreme Court last term. *Boyle*, a case examining the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO), presented an opportunity for the Center to advance its mission to improve government practices.

In order to more effectively combat organized crime, RICO allows the federal government to prosecute local crimes that would otherwise lie exclusively within the enforcement power of states. RICO makes it a federal offense for "any person…associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate…in the conduct of such enterprise's affairs through a pattern of racketeering activity." In *Boyle*, federal prosecutors inappropriately stretched RICO beyond its intended scope and charged petitioner Edmond Boyle under RICO for participating in sporadic robberies with a loosely affiliated circle of friends. Lacking structure and hierarchy, Boyle's group of friends was not the kind of criminal organization RICO was designed to target.

In order to convict under RICO, the government must prove (among other things) that the defendant was associated with an enterprise and that the enterprise engaged in a pattern of racketeering activity. In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court differentiated between these two elements: while "the enterprise is an *entity*," it said, "[t]he pattern of racketeering activity is…a series of criminal *acts*."

RICO defines a pattern of racketeering activity as two or more violations of a slate of state and federal provisions. Boyle was charged with more than two robberies and did not dispute the government's contention that those robberies constituted a pattern of racketeering activity. Instead, he argued that whether he was appropriately within the reach of RICO hinged upon a determination that he and his friends constituted an association-in-fact enterprise as contemplated by RICO.

Counsel for Boyle described the Center's moot as "invaluable" and "[o]ne of the very most helpful things that I did." He added, "[T]he Supreme Court argument was easy by comparison."

The *Turkette* Court held that an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." Relying on *Turkette*, as well as Eighth Circuit precedent, Boyle argued that an enterprise must "ha[ve] an ongoing organization, a core membership that function[s] as a continuing unit," and, most important for Boyle's purposes, an "ascertainable

structural hierarchy distinct from the charged predicate acts," that is, the pattern of racketeering activity.

Over Boyle's objections, the trial court instructed the jury that in order to establish the existence of an enterprise, the government merely had to prove that "(1) There [was] an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose." The trial court further instructed that the jury could "find an enterprise where an association of individuals, *without structural hierarchy*, [was] form[ed] solely for the purpose of carrying out a pattern of racketeering acts." Boyle was convicted and sentenced to 151 months in prison.

The Center on the Administration of Criminal Law became involved in Boyle's case when the Supreme Court granted certiorari to consider whether proving an enterprise required proof of an ascertainable structure beyond the pattern of racketeering activity itself. The Center filed an amicus brief and provided comprehensive litigation support for Boyle.

The Center mooted Marc Fernich, counsel for the petitioner.

During the course of the Supreme Court litigation, the Center worked closely with Marc Fernich, counsel for Boyle. Center Executive Director Anthony Barkow and Professor Rachel Barkow, the Center's faculty director, lent their expertise to strengthen Fernich's reply brief to the Court. The Center also hosted a lengthy moot oral argument for Fernich—which he called "[o]ne of the very most helpful things that I did"—and assisted him with refining his arguments to meet potential objections. The moot helped him reconceptualize and tighten some of his central arguments, Fernich said, and "boil [them] down to what was the best of what I had," adding that the moot "really helped me with case presentation" and "was invaluable." More specifically, he added, "[the moot] helped me take a broader view as to the sorts of policy rationales behind the structure-enterprise requirement and to focus on structure as a guarantor of the separateness between pattern and enterprise."

Fernich credited the Center's moot argument with helping him anticipate both the government's arguments and the types of questions the Court would ask him at oral argument. "The moot also helped me distill my ideas into a core theory.… The insight that the people at the Center had into the Court—because a lot had experience as practitioners or clerks at the Supreme Court—was very valuable to me. "Frankly," Fernich added, "the Supreme Court argument was easy by comparison."

Following its own moot argument, the Center assisted Fernich in arranging for one with the Moot Court Program at Georgetown University Law Center. Finally, in the days leading up to the Supreme Court argument, Anthony Barkow worked with Fernich as he finalized his opening statement.

The Center, with pro bono assistance from the law firm Kellogg, Huber, Hansen, Todd, Evans & Figel, also submitted an amicus brief in *Boyle*. That brief argued that the trial court's failure to instruct the jury that it must find an ascertainable structure in order to find an enterprise in effect conflated the elements of enterprise and pattern of racketeering activity. The brief asserted that the Second Circuit's affirmation of the trial court's instructions expanded RICO beyond its intended focus on organized crime and threatened to disturb the traditional federal-state balance in crime control. Fernich identified the Center's brief as "the most helpful of all the amicus briefs," particularly because of its careful discussion of federalism.

In an opinion written by Justice Alito, the Court agreed with the petitioner that a RICO enterprise must have a "structure" but disagreed that the jury instructions in a RICO case must include specific language to that effect. The Court concluded that the requisite structure needed to have three features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Because this trio of features could be proven solely by evidence of a pattern of racketeering activity, the Court held that the government was not required to show any structure beyond that inherent to the pattern. The Court did not address the question of whether jury instructions requiring the finding of an ascertainable structure would prevent the jury from

improperly merging the enterprise and pattern elements; the Court held that the district court's instructions were proper.

Justice Stevens, joined by Justice Breyer, dissented. Justice Stevens focused on Congress's legislative intent in passing RICO, arguing that "Congress intended the term 'enterprise'…to refer only to business-like entities that have an existence apart from the predicate acts committed by their employees or associates." He argued that "[b]y permitting the Government to prove both elements with the same evidence, the Court render[ed] the enterprise requirement essentially meaningless in association-in-fact cases."

From the Center's perspective, the Court's decision in *Boyle* expanded RICO's scope beyond the federal interest it was originally intended to serve: "eradicating *organized* crime from the social fabric." This expansion upsets the traditional federal-state balance in criminal law enforcement by extending federal jurisdiction to include traditional state-law offenses such as murder or robbery as long as there are two offenses. For instance, *Boyle* would allow a federal prosecutor to obtain a RICO conviction "against two individuals who come together within a single [state] for the sole purpose of committing two or more state crimes"—a far cry from the type of complex criminal organizations RICO was enacted to combat. Because RICO sentences are often much more severe than state sentences for the same predicate acts, RICO prosecutions for state crimes undermine the states' policy judgments in determining sentencing. Furthermore, because voters have difficulty discerning which sovereign is responsible for the sentencing of state crimes, an expanded RICO blurs the lines of democratic accountability.

The Center on the Administration of Criminal Law took a central role in the advocacy and legal strategy of *Boyle v. United States*.

As the Center's brief argued, not only does *Boyle* upset the traditional federal-state allocation of authority over criminal law enforcement, but it also puts that balance in the hands of federal prosecutors. In so doing, *Boyle* allows for important decisions affecting the balance to be made case-by-case by actors who exercise largely unfettered discretion and lack political accountability.

The Court has previously acknowledged that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Unfortunately, the majority's decision in *Boyle* ignored its own warning. *Boyle* underscores the Court's lack of concern with RICO's—and therefore the federal government's—now expansive scope over criminal law.

SCOTUS

Summaries of all 27 criminal law decisions from the Supreme Court's 2008-09 Term.

FOURTH AMENDMENT

HERRING V. UNITED STATES

129 S. Ct. 695 | Decided January 14, 2009
By Thomas Ferriss (Harvard '11)

Writing for a 5-4 majority, Justice Roberts, joined by Justices Alito, Kennedy, Scalia, and Thomas, affirmed the Eleventh Circuit's decision, holding that the exclusionary rule is not triggered by negligent errors made by law enforcement when that negligence is attenuated from the search and is not systematic. Herring was found with drugs and a gun after a police officer searched his home based on a warrant that he believed to be valid, but due to a different county's police clerk's negligence had mistakenly remained in a database despite being recalled as invalid. In affirming the Eleventh Circuit's decision, the Court extended its previous holding in *Arizona v. Evans*, in which it found that the exclusionary rule did not apply to evidence gathered upon police reliance on erroneous information negligently provided by judicial employees. Here, the majority reasoned that whether a defendant's Fourth Amendment right against unreasonable search and seizure has been violated is a separate question from whether evidence collected must be suppressed at trial. Where the exclusionary rule's justification is its deterrent effect on police misconduct, police behavior that is less blameworthy (for example, negligence that is "attenuated" from the search, as in this case) will not trigger the exclusionary rule.

The exclusionary rule is not triggered by negligent errors made by law enforcement when that negligence is attenuated from a search and is not systematic.

Justice Ginsburg, joined by Justices Breyer, Stevens, and Souter, dissented, arguing that to admit illegally gathered evidence would be to undermine the exclusionary rule's role in avoiding judicial complicity with official wrongdoing and in preserving public trust that the government will not profit from its own misconduct. The dissent also reasoned that the exclusionary rule is frequently the only way to redress violations of a citizen's Fourth Amendment rights.

Justice Breyer, joined by Justice Souter, wrote a separate dissent arguing for a bright-line rule whereby any unlawful search resulting from police negligence—as opposed to judicial negligence—would lead to automatic exclusion.

PEARSON V. CALLAHAN

129 S. Ct. 808 | Decided January 21, 2009
By Thomas Ferriss (Harvard '11)

In a unanimous opinion written by Justice Alito, the Court reversed the Tenth Circuit's decision, which held that in this case, police officers did have qualified immunity from prosecution for entering and searching Callahan's home without a warrant. The officers relied on consent to enter and conduct a search that was given by Callahan to an undercover informant. Reasoning that the rigid procedural assessments mandated by the Court in *Saucier v. Katz* were no longer practicable, the

Court abandoned *Saucier*'s two-step requirement and left to the judgment of lower courts whether and in which order to apply the two considerations set forth by the case: namely, (1) whether a constitutional right had been violated by a law enforcement agent, and (2) whether the violation was clearly proscribed by established law at the time it transpired. The Court acknowledged that *Saucier* encourages the development of precedent by requiring the determination of constitutionality in the first step, but it reasoned that often, those difficult questions are not necessary for the disposition of the case and thus constitute a waste of judicial resources. Furthermore, the Court held, *Saucier*'s two-step analysis "departs from the general rule of constitutional avoidance." In abandoning *Saucier*, the Court did not reach the question of the validity of the consent-once-removed doctrine, the rule accepted in some jurisdictions that police can search without a warrant when an undercover, nonpolice operative has been admitted by consent to the premises and has contacted the police.

ARIZONA V. JOHNSON

129 S. Ct. 781 | Decided January 26, 2009
By Mark Savignac (Harvard '11)

This case clarifies police officers' authority to "stop and frisk" passengers of cars they have pulled over and builds on the doctrine announced in *Terry v. Ohio*. *Terry* held that "stop and frisk" searches are constitutionally permissible under the Fourth Amendment where two conditions are met. First, the stop must be lawful; *Terry* explained that a stop is lawful when an officer reasonably suspects the person stopped of having committed a criminal offense. Second, the officer must reasonably suspect that the person stopped is armed and dangerous before frisking him or her. *Arizona v. Johnson* clarifies the first condition, explaining that the *Terry* test is satisfied whenever the detention of a vehicle by police is lawful, including for inquiry into a vehicular violation in the absence of any suspicion of criminal activity. The second prong of *Terry*—reasonable suspicion that the person stopped is armed and dangerous—must also be met.

Terry is satisfied whenever detention of a vehicle by police is lawful.

In *Arizona v. Johnson*, Officer Maria Trevizo, a member of an Arizona gang task force patrol, stopped a car for a civil vehicular infraction. Trevizo began questioning one of the passengers, Johnson, and, upon suspecting he might have information about gang activity in the area, asked him to step outside the car to speak in private. Their conversation led Trevizo to believe Johnson might be armed, and when she patted him down, she found a gun. At trial for possession of a firearm by a prohibited possessor, Johnson moved to suppress the evidence as the product of an unlawful search under the Fourth Amendment; the trial court overruled the objection and Johnson was convicted. But the Arizona Court of Appeals held that the search was unconstitutional and reversed the lower court. The Supreme Court reversed and remanded. Writing for a unanimous Court, Justice Ginsburg explained that passengers of a vehicle remain lawfully seized under *Terry* for the duration of a stop such that the first prong of *Terry* was fulfilled here. The case was remanded for consideration of the second prong: namely, whether Trevizo reasonably suspected that Johnson was armed and dangerous.

ARIZONA V. GANT

129 S. Ct. 1710 | Decided April 21, 2009
By Thomas Ferriss (Harvard '11)

In considering whether police may search an arrestee's vehicle without a warrant under *New York v. Belton*, the Court rejected a broad reading of *Belton*, instead ruling that police officers may conduct a warrantless search of a car only when they reasonably believe the arrestee could access the vehicle or that the vehicle contains evidence of the offense giving rise to the arrest. Here, the defendant, Gant, was pulled over for driving with a suspended license; he was arrested, handcuffed, and locked in a squad car before the officers undertook their search of his vehicle, a search that led them to a bag of cocaine. Writing for a 5-4 majority, Justice Stevens, joined by Justices Ginsburg, Scalia, Souter, and Thomas, rejected the contention that *Belton* created a bright-line, easy-to-follow rule, finding instead that the case had created extensive confusion on the part of law enforcement as well as courts. The majority reasoned that warrantless searches of automobiles are *per se* unreasonable, except under well-established exceptions such as those established to ensure officer safety and the preservation of relevant evidence. Such exceptions, however, are limited to instances where the arrestee might reasonably be able to access the vehicle during the course of the arrest to harm the arresting officer by, for example,

grabbing a weapon or destroying evidence related to his arrest. Distinguishing *Gant* from *Belton* and other cases like it wherein arresting officers were in fact in danger and the underlying arrest was related to the contemporaneous search of the vehicle, the Court refused to extend *Belton* so broadly as to enable courts to apply it to cases like the instant one where Gant was both outnumbered by police, already handcuffed before the car search began, and the search was entirely unrelated to his arrest for a suspended license. Finally, the majority found that *stare decisis* did not compel the perpetuation of an overly broad reading of *Belton* because the 28 years since *Belton* was handed down have proved the rationale for such a broad reading to be unfounded and unnecessarily dangerous to important Fourth Amendment protections.

Justices Breyer and Alito filed dissents; Justice Alito's dissent was joined by Chief Justice Roberts and Justices Breyer and Kennedy, in part. The dissenters argued that the principle of *stare decisis* creates too large of an obstacle for those who wish to depart from the established precedent laid down in *Belton*. Additionally, Justices Alito and Breyer maintained what they view to be the bright-line rule established by *Belton*: that an officer may *always* search a vehicle when making an arrest because to change the rule would lead to confusion on the part of law enforcement and unnecessary suppression of useful evidence.

SAFFORD UNIFIED SCHOOL DISTRICT # 1, ET AL. V. REDDING

129 S. Ct. 2633 | Decided June 25, 2009

By Kathiana Aurelien '10

Upon reasonable suspicion that she was distributing prescription painkillers to her schoolmates, 13-year-old Savana Redding was subjected to a strip search at the hands of the school nurse and at the direction of the school's principal. The female nurse, in the presence of the principal's female administrative assistant, searched Redding's jacket, socks, and shoes, then had her pull her bra and underwear away from her body to see if she was hiding any contraband in her undergarments. Redding's mother brought suit against the school district, the principal, the administrative assistant, and the nurse, arguing that her daughter's Fourth Amendment rights had been violated. The school district moved for summary judgment, arguing qualified immunity; the District Court ruled for the school, finding no Fourth Amendment violation. The Ninth Circuit affirmed. The circuit, sitting en banc, reversed. It found that Redding's constitutional rights were violated by the search and that because the law was clearly established at the time of the violation, the school and its administrators were not immune from prosecution.

Justice Souter, writing for the majority, held that while the school officials' suspicion was sufficient to justify a search of Redding's backpack and outer clothing, the search beneath her undergarments exceeded the scope of the suspicion, especially in light of "the nature and limited threat of the specific drug [the officials] were searching for." Citing *New Jersey v. T.L.O.*, the majority reaffirmed that the scope of a school search must be

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"[T]he Commission must pay greater attention to the fiscal and racial impact of changes in sentencing law, to evidence-based research about what works and what does not in fighting crime and curbing recidivism, and to the relationship between prosecutorial practices and federal sentencing outcomes."

Rachel Barkow, Faculty Director, before the United States Sentencing Commission, making recommendations for reforming federal sentencing policy.
www.ussc.gov/AGENDAS/20090709/Barkow_testimony.pdf

reasonable in relation to the circumstances justifying the initial interference and that the permissible scope is one that is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." While affirming the circuit's finding that a Fourth Amendment violation occurred, the majority reversed the circuit's holding that qualified immunity did not extend to the school officials. Pointing to well-reasoned and divergent opinions among the lower courts, the majority held that the law was not sufficiently clear to deny qualified immunity to the school officials. With respect to the liability of the school district itself, however, the majority remanded for further consideration.

Justices Stevens and Ginsburg concurred with the majority's finding that Redding's Fourth Amendment rights were violated but dissented from the Court's holding on the question of qualified immunity; they would have affirmed in full the Ninth Circuit's decision and would have found that qualified immunity did not extend to the school board or its administrators. Justice Thomas filed a separate opinion, concurring with the Court's determination that qualified immunity extended to the school officials but dissenting from its holding that a Fourth Amendment violation took place. Justice Thomas reasoned that the majority's opinion "imposes a vague and amorphous standard on school administrators" and that it imprudently and unlawfully "grants judges sweeping authority to second-guess" school officials who are charged with maintaining discipline and ensuring the health and safety of students. According to Justice Thomas, under the standard set forth in *T.L.O.*, because pills could have been hidden in her undergarments, the scope of the search was reasonable. He would, he said, have the Court return to the common-law doctrine of *in loco parentis* under which the authority of the parent was extended to the school. Under this doctrine, the judiciary was reluctant to interfere in routine school administration but instead left it to schools and teachers to enforce rules and maintain order.

FIFTH AMENDMENT

PUCKETT V. UNITED STATES

129 S. Ct. 1423 | Decided March 25, 2009

By Kathiana Aurelien '10

Puckett was convicted of one count of armed bank robbery and one count of using a firearm during a crime of violence. In exchange for a guilty plea, the government agreed to request a three-level departure and a sentence on the lower end of the guidelines range. Due to an illness of Puckett's, sentencing did not take place for almost three years. In the interim, the defendant assisted in a scheme to defraud the U.S. Postal Service, a crime he confessed to his probation officer. At sentencing, the officer added an addendum to the government's motion, and the government reneged on its end of Puckett's plea bargain agreement. Puckett's lawyer did not contemporaneously object to the government's opposition to any reduction in Puckett's offense level. On appeal, the defendant for the first time claimed the government had breached its agreement. The Fifth Circuit found that Puckett had forfeited any such claim by failing to raise it below. After applying the plain-error standard as delineated by Federal Rule of Criminal Procedure 52(b), the circuit concluded that although the error had occurred and was obvious, Puckett did not satisfy the rule's third requirement by showing that his sentence was affected by the error, in particular because the district judge noted that even if he had the discretion to grant the reduction, he would not.

Justice Scalia, writing for a 7-2 majority joined by Justices Alito, Breyer, Ginsburg, Kennedy, Roberts, and Thomas, held that Rule 52(b) does apply to a forfeited claim that the government breached its end of a plea agreement. The Court rejected Puckett's argument that a government breach automatically and retroactively renders a defendant's guilty plea unknowing or involuntary and therefore void. Indeed, the Court reasoned that a valid plea agreement is the predicate for any claim of a government breach and, thus, Puckett cannot at once be asserting that the contract-like plea was retroactively void and that the government was obligated to uphold its promise under the plea. The Court likewise rejected Puckett's contention that "no purpose would be served" by applying Rule 52(b), as all plea breaches will necessarily satisfy all four prongs of the rule, thereby rendering any application of the rule

superfluous. Justice Scalia determined that the application of Rule 52(b) serves several important policy ends: first, it prevents defendants from "gaming" the system by delaying their objections until they can see whether the mandated sentence is favorable to them; second, the fact of a government breach will not always be conceded by the government; third, many breaches can be cured upon timely objection; and finally, the district court is in the best position to, when appropriate, grant immediate remedy, thereby avoiding the delay and cost of an appeal.

The dissent, written by Justice Souter and joined by Justice Stevens, would have held that because Puckett did not get "just what he bargained for anyway from the sentencing court," his substantial rights were violated and his claim therefore satisfied the third prong of the plain-error standard as articulated by Rule 52(b). The dissent did not contest the majority's finding that Rule 52(b) is applicable in the instant case, and disagreed with the majority's determination that the substantial right in question under prong three was the length of Puckett's incarceration. The dissent would have held that the criminal conviction itself—as opposed to the length of the sentence—was at stake in the prong-three determination. Reasoning that the Fifth Amendment's due process guarantee requires either a fair trial or a plea agreement "honored by the Government" before a defendant may be convicted, the dissent would have held that where the government, as it did in Puckett's case, breaches its agreement, the defendant is entitled to relief under Rule 52(b).

BOBBY V. BIES

129 S. Ct. 2145 | Decided June 1, 2009

By Kathiana Aurelien '10

In 1992, respondent Bies was convicted of aggravated murder, kidnapping, and attempted rape of a 10-year-old boy. Under then-current federal and state laws, the jury was instructed to weigh evidence of Bies's "mild to borderline retardation" as a mitigating factor against several aggravating factors during the sentencing phase of his trial. The jury imposed a death sentence; the sentence was upheld by Ohio's higher courts. Bies sought federal habeas relief. In 2002, the Supreme Court in *Atkins v. Virginia* held that it was in violation of the Eighth Amendment to execute mentally retarded offenders. Based on this decision, the federal district court stayed Bies's federal hearing, pending a determination in state court of his mental capacity. The state court ordered a full rehearing on the issue, but Bies returned to federal court, arguing that double jeopardy precluded the government from re-litigating the question of his retardation. The district court found for Bies, and the Sixth Circuit affirmed.

In a unanimous opinion written by Justice Ginsburg, the Court reversed and remanded the lower courts' decisions, holding that double jeopardy was no bar in the instant case because the Ohio Supreme Court had in fact never determined under the prevailing *Atkins* standard the question of the respondent's mental retardation. The Court reasoned that "mental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues." The Court found that the previous state courts' *recognition* of Bies's mental capacity as a mitigating

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"Sotomayor's experience in a big-city prosecution office would likely make a difference on a bench that deals with crime every day but has very little real-world exposure to it."

Anthony Barkow, Executive Director, regarding how Justice Sonia Sotomayor's experience as a local prosecutor would bring to the Supreme Court a perspective on criminal law that other Justices lack.
www.cnn.com/2009/POLITICS/07/16/barkow.sotomayor.prosecutor

factor was hardly essential to the imposition of a death sentence. Because re-litigation of a particular finding is only precluded when a judgment is dependent upon that determination, the Court concluded that here, the state court was not precluded from holding a full hearing on the issue of Bies's mental capacity.

YEAGER V. UNITED STATES

129 S. Ct. 2360 | Decided June 18, 2009
By Jason A. Richman '11

Petitioner Yeager was indicted for securities and wire fraud, conspiracy, insider trading, and money laundering. He was acquitted on the fraud counts, and the jury failed to reach verdict on the insider trading counts following trial in the U.S. District Court for the Southern District of Texas. After being reindicted on some of the hung counts, Yeager moved for dismissal on double jeopardy grounds. His petition was denied by the district court; its decision was affirmed by the Court of Appeals for the Fifth Circuit.

After the first verdict, the government had obtained a new indictment recharging the petitioner with some, but not all, of the insider trading counts. Petitioner moved to dismiss the new indictment, arguing that the jury's acquittals in the first case had necessarily decided that he did not possess the material, nonpublic information that was the "critical fact" in the new indictment. The Fifth Circuit, in reviewing the district court's decision to deny the motion for dismissal, found that the jury must have "found…that [he] did not have any insider information" but still affirmed the conviction because of the hung counts—reasoning that these counts made it impossible to determine with certainty what the jury had found.

The Supreme Court granted certiorari to consider whether the jury's inability to reach a verdict on the insider trading counts affected the preclusive force of the concurrent acquittals. Justice Stevens, joined by Chief Justice Roberts and Justices Breyer, Ginsburg, and Souter, and in parts by Justice Kennedy, wrote for the majority.

In reaching his decision, Justice Stevens pointed to the two "vitally important interests" that the double jeopardy clause of the Fifth Amendment protects: an individual's right to be free from repeated attempts by the government to convict him for the same offense and the preservation of the finality of a jury's finding. In this case, Justice Stevens found that the ruling hinged on the second interest; namely, whether "the insider trading charges should be treated as the 'same offense' as the fraud charges" and, thus, whether the government must be precluded from reindicting on these offenses. Citing *Ashe v. Swenson* as binding on the instant case, Justice Stevens reaffirmed that any issue "necessarily decided" by a jury's acquittal in a prior trial cannot be re-litigated in a trial for a separate offense. *Ashe*'s holding that a hung count is not a relevant part of the proceeding to be considered when determining whether an issue has been necessarily decided was likewise applicable to Yeager. Justice Stevens said that, because there is no way to decipher what a hung count represents, it should have no place in any issue-preclusion analysis. Justice Stevens avoided the factual question of what was necessarily decided by the jury's verdict by remanding the case back to the Fifth Circuit and inviting the circuit to revisit its factual analysis if it so chooses.

Justice Kennedy, concurring in part and in the judgment, would have required the circuit to revisit its factual analysis.

Justice Scalia, writing in dissent along with Justices Thomas and Alito, argued that the majority's opinion illogically extended *Ashe* because retrial after a hung jury is not a new trial but part of the same proceeding. Finally, Justice Alito, joined by Justices Scalia and Thomas, wrote a separate dissent to emphasize that if the majority's new rule is to be implemented, the doctrine of issue preclusion must be applied with the type of rigor prescribed by *Ashe*.

SIXTH AMENDMENT

OREGON V. ICE

129 S. Ct. 711 | Decided January 14, 2009
By Thomas Ferriss (Harvard '11)

In *Oregon v. Ice*, the Court held that a sentencing judge does not violate the Sixth Amendment right to a jury trial, as interpreted by *Apprendi v. New Jersey* and *Blakely v. Washington*, when the judge, as opposed to the jury, finds facts required for the imposition of consecutive, rather than concurrent, sentences. Defendant Ice twice entered an 11-year-old girl's bedroom and sexually assaulted her; the jury found him guilty of burglary and two counts of sexual assault, one for each incident. Satisfying the requirements of the applicable Oregon sentencing statute, the trial judge determined that the burglaries were separate incidents, thus imposing consecutive sentences,

but found that the sexual assaults were part of the same incident for each burglary and accordingly imposed concurrent sentences for those crimes. Ice challenged the constitutionality of the Oregon procedure, arguing that under *Apprendi*, the jury, not the judge, must find any facts that increase the maximum punishment for a particular crime. Under *Apprendi*, judges cannot enhance sentences beyond their statutory maximum based on facts not found by a jury beyond a reasonable doubt.

A sentencing judge does not violate the Sixth Amendment right to a jury trial when the judge, as opposed to the jury, finds facts required for the imposition of consecutive, rather than concurrent, sentences.

Justice Ginsburg, writing for a 5-4 majority and joined by Justices Alito, Breyer, Kennedy, and Stevens, upheld Ice's conviction and sentencing as well as the Oregon State law, finding that, historically, juries played no role in determining whether sentences would run consecutively as opposed to concurrently. The majority also reasoned that "respect for state sovereignty" justified the Court's decision to limit *Apprendi* to sentences for discrete crimes.

Justice Scalia, joined by Justices Souter and Thomas, and Chief Justice Roberts, dissented. The dissent reasoned that *Apprendi* did not provide for distinguishing between sentences for an individual crime and the total sentence a defendant receives. Arguing that consecutive sentences are greater than concurrent sentences, Justice Scalia said nothing in the reasoning of *Apprendi* supports the distinction delineated by the majority.

VERMONT V. BRILLON

129 S. Ct. 1283 | Decided March 9, 2009

By Mark Savignac (Harvard '11)

This case held that state-appointed attorneys are representatives of the defendant and not agents of the state for purposes of Sixth Amendment speedy-trial analysis. Brillon was arrested in 2001, and his case took nearly three years to get to trial. Brillon asserted that the three-year lag violated his right to a speedy trial under the Sixth Amendment. The state supreme court, applying *Barker v. Wingo*, agreed and vacated Brillon's conviction.

The Supreme Court reversed. Justice Ginsburg, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Thomas, and Alito, wrote the majority opinion, holding that the state supreme court's *Barker* analysis was erroneous because it attributed the three-year delay to the actions of Brillon's series of state-appointed attorneys and thereby considered the length of the delay in its assessment. Because state-appointed attorneys, just like privately retained attorneys, are bound to serve a defendant and because delays are frequently due to the acts of the defendant himself, such lags should be attributed to the defendant, not to the state. Accordingly, the majority reasoned, the state did not violate Brillon's Sixth Amendment right to a speedy trial because it was not responsible for the three-year lapse.

Justice Breyer, joined by Justice Stevens, dissented. The dissent would have dismissed the writ of certiorari as improvidently granted on the grounds that it did not clearly present the question that the Court purported to decide. Justice Breyer reasoned that the Court had improperly construed certain ambiguities in the Vermont

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"It's important to keep in mind that prosecutors today in the criminal justice system, particularly the federal system, have a great deal of what would ordinarily be viewed as regulatory power. ... When we look at regulatory activity, we are concerned about the appearance of self-dealing [and] ... the revolving door."

Anthony Barkow, Executive Director, before the House Subcommittee on Commercial and Administrative Law regarding proposed legislation that would prohibit former prosecutors from serving as or working for corporate monitors in the same matters they investigated or prosecuted while in government service.
http://judiciary.house.gov/hearings/pdf/Barkow091119.pdf

Supreme Court's opinion as indicative of constitutional errors and that the state supreme court's substantial authority to oversee public defenders also militated in favor of deference to its decision.

KNOWLES V. MIRZAYANCE

129 S. Ct. 1411 | Decided March 24, 2009
By Mark Savignac (Harvard '11)

Respondent Mirzayance pleaded not guilty and not guilty by reason of insanity (NGI) at his California murder trial but was convicted of first-degree murder. Before the NGI phase, his counsel recommended he abandon the insanity plea, reasoning that it would be ineffective because the jury had already heard the relevant evidence and its conviction precluded success at the NGI phase. After accepting his attorney's advice, Mirzayance subsequently alleged ineffective assistance of counsel based on *Strickland v. Washington*. After failing in state courts, Mirzayance petitioned for a writ of habeas corpus. At length, the federal courts determined that the counsel's assistance was indeed ineffective because counsel had failed to go forward with the NGI argument even though Mirzayance had nothing to lose by its assertion.

The Supreme Court, in an opinion written by Justice Thomas, reversed unanimously on the grounds that no federal standard requires counsel to make doomed arguments and that this particular omission by counsel was almost certainly not prejudicial to Mirzayance; instead, the jury would almost certainly not have changed its mind after the NGI hearing.

CONE V. BELL

129 S. Ct. 1769 | Decided April 28, 2009
By Mark Savignac (Harvard '11)

Petitioner Cone was convicted of murder and sentenced to death in Tennessee State Court. After his conviction, he filed a direct appeal to the state supreme court as well as appeals for post-conviction relief, all of which failed. In a second petition for post-conviction relief, Cone argued that the state had suppressed witness statements and police reports that might have bolstered his insanity defense and thereby helped his claim for mitigation of the death penalty; Cone argued that by suppressing the witness statements, the state violated *Brady v. Maryland*. The Tennessee courts denied Cone's request for a hearing, reasoning that his *Brady* claim had been determined by the earlier proceedings. On petition for a writ of habeas corpus, the district court found Cone's claim procedurally barred because he had failed to present it in state court; the Sixth Circuit considered itself barred because of the state court determination that the claim was previously determined under state law.

With Justice Stevens writing for a majority that included Justices Kennedy, Souter, Ginsburg, and Breyer, the Supreme Court reversed, holding that the state court's refusal to hear the claim did not constitute an independent and adequate state ground for denying Cone's habeas petition. The Court also held that the lower courts had been incorrect in their determination that Cone's claim would fail on the merits regardless, because they had not given sufficient consideration to whether the withheld documents were material to Cone's *sentencing*, despite the fact that they were correct in holding that the documents were not material to the jury's determination of *guilt*. The case was remanded to the district court for fuller consideration of whether the suppressed evidence was material to Cone's death sentence. Chief Justice Roberts concurred in the judgment.

Justice Alito concurred in part and dissented in part, disputing the Court's determination that "Cone properly preserved and exhausted his *Brady* claim in the state court" and its unexplained decision to remand directly to the district court rather than the Sixth Circuit. Justice Thomas, joined by Justice Scalia, dissented. He argued that Cone had failed to demonstrate that the suppressed evidence was material to the imposition of the death sentence and that the Sixth Circuit's decision should accordingly have been affirmed.

KANSAS V. VENTRIS

129 S. Ct. 1841 | Decided April 29, 2009
By Jason A. Richman ('11)

Respondent Ventris was convicted of aggravated robbery and aggravated burglary in the District Court of Montgomery County, Kansas. The Supreme Court granted certiorari to determine whether the defendant's admission of guilt to a government informant who solicited Ventris's statements, admittedly in violation of the Sixth Amendment, should have been admissible to impeach his inconsistent testimony on the stand. Justice Scalia, writing for a seven-person majority, reversed the decision of the Supreme Court of Kansas, instead agreeing with the district court and court of

appeals that the confession should have been admitted to impeach Ventris's inconsistent testimony. Justice Scalia reasoned that in cases such as this, the Sixth Amendment violation occurs at the time of the illicit solicitation by an informant acting as an agent of the government and not when the testimony is admitted at trial. Based on this rationale, Justice Scalia utilized the exclusionary-rule balancing test, measuring the value of the right to counsel that was violated by the informant's solicitation against what he deemed a valid goal on the part of the criminal justice system to cure itself of perjured testimony. Emphasizing the need to prevent (or cure) such perjury, Justice Scalia held that the evidence should have been admissible once Ventris took the stand and gave testimony in his own defense that contradicted the statements he made to the government informant.

The defendant's admission of guilt to a government informant who solicited the defendant's statements, admittedly in violation of the Sixth Amendment, should have been admissible to impeach his inconsistent testimony on the stand.

Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the majority's treatment of the Sixth Amendment guarantee as a purely prophylactic right was incorrect. According to the dissent, the majority gave insufficient weight to the actual *introduction* of the testimony, which in the dissenters' opinion was in and of itself a violation of the Sixth Amendment and thus impermissible.

MONTEJO V. LOUISIANA
129 S. Ct. 2079 | Decided May 26, 2009
By Mark Savignac (Harvard '11)

This case overruled the Court's earlier decision in *Michigan v. Jackson*, which created a Sixth Amendment rule prohibiting law enforcement from initiating interrogation of a defendant once that defendant has asked for counsel (the so-called invocation requirement). Petitioner Montejo was arrested and charged with first-degree murder, and counsel was appointed. Before meeting his court-appointed attorney, however, Montejo agreed to accompany police to locate the murder weapon. During the trip, he wrote a letter of apology to the victim's widow; this letter was admitted as evidence at trial, and Montejo was convicted and sentenced to death. He argued that the evidence should have been suppressed because it was obtained in violation of *Jackson*, but the state supreme court held that *Jackson* was not triggered in this case because Montejo never actually *requested* counsel; he said nothing as counsel was appointed at the preliminary hearing.

The Supreme Court vacated and remanded. Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, and Alito, wrote the opinion for the Court. Justice Scalia reasoned that both the state supreme court's and Montejo's interpretations of *Jackson* were problematic, that *Jackson* had been found wanting, and that, accordingly, it should be overruled. The state supreme court's requirement of *actual invocation* would create a problematic discontinuity between those states that require indigent defendants to formally request counsel and those, like Louisiana, that lack such a

THE CENTER IN THE NEWS

"'Equal justice under the law' is a phrase that graces the walls of courtrooms across America. Unfortunately, it has become all too common in recent decades for lawyers to place too much attention on superficial equality without paying similar heed to the need to do justice."

Anthony Barkow, Executive Director, and Jason Richman '11, Fellow, regarding a judge's criticism of the Boston United States Attorney's decision not to prosecute public intellectual Andrew Sullivan, and arguing that prosecutors should consider collateral consequences when making charging decisions.
http://sentencing.typepad.com/sentencing_law_and_policy/2009/10/a-thoughtful-defense-of-prosecutorial-declination-in-the-andrew-sullivan-pot-case.html

requirement. On the other hand, the Court reasoned, Montejo's theory that the invocation requirement should be abandoned in its entirety, such that *Jackson* would plainly require interrogations to cease once a defendant is represented by counsel, would expand that rule too far, at the cost of valid law enforcement objectives. Because, in their view, the rule had proved unworkable, the majority overruled *Jackson*, reasoning that other rules preventing police misconduct in interrogation (i.e., *Miranda*, *Edwards*, and *Minnick*) would be sufficient to protect defendants.

In his dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, criticized the majority for violating stare decisis and overruling a case that, in the dissent's opinion, had successfully served to protect defendants' constitutional interests. Justice Alito, joined by Justice Kennedy, wrote a separate concurrence with the majority opinion in which he referred to the Court's recent reversal of *New York v. Belton*, in *Arizona v. Gant* (with majority opinion by Justice Stevens, joined by Justices Scalia, Souter, Thomas, and Ginsburg; see summary in this newsletter above). According to Justice Alito, who dissented in *Gant*, the Court's abandonment of stare decisis in that case justified its similar treatment of precedent in *Montejo*.

MELENDEZ-DIAZ V. UNITED STATES

129 S. Ct. 2527 | Decided June 25, 2009
By Thomas Ferriss (Harvard '11)

Elaborating on the scope of the Confrontation Clause as interpreted by the Court in *Crawford v. Washington*, the majority held in a 5-4 decision that Melendez-Diaz's Sixth Amendment rights were violated when he was denied the opportunity to confront in person a forensic analyst whose lab report had been used as testimonial evidence against him after a substance seized from his house was analyzed in a lab. The government submitted certificates from the state laboratory analysts, sworn before a notary public and submitted as prima facie evidence, that the substance was some specified amount of cocaine. Melendez-Diaz argued that he had a Sixth Amendment right to have the analysts testify in person; the Massachusetts courts disagreed.

Writing for the Court, Justice Scalia, joined by Justices Ginsburg, Stevens, Souter, and Thomas, reasoned that, under *Crawford*, a witness' testimony is inadmissible unless the witness appears at trial or the defense had a prior opportunity to cross-examine the witness. Here, the majority held, the certificates issued by the analysts were affidavits—one of the most fundamental forms of testimony that is covered by the confrontation clause. Furthermore, argued Justice Scalia, the affidavits were prepared under circumstances that would lead an objective witness reasonably to believe that the contents would be available for use at a later trial, just as *Crawford* requires. Finally, the majority rejected the government's contention that the affiants need not be confronted because the defendant could, instead, simply subpoena them, reasoning that substituting a subpoena power for the constitutional right to confront would be an outrageous burden shifting from prosecutor to defendant.

Justice Kennedy, joined by Justices Alito and Breyer as well as Chief Justice Roberts, wrote a lengthy dissent, arguing that the majority's holding departed from 90 years of established precedent that allowed scientific evidence to be admitted without testimony from an analyst responsible for it. The dissent would have held that lab analysts who conduct routine scientific tests are not the kind of witnesses to which the confrontation clause was intended to extend.

DUE PROCESS

RIVERA V. ILLINOIS

129 S. Ct. 1446 | Decided March 31, 2009
By Jason A. Richman '11

Petitioner Rivera was convicted of first-degree murder in Cook County, Illinois. The Appellate Court of Illinois and Supreme Court of Illinois both affirmed over the defendant's objections based on the trial court's denial of one of his peremptory challenges. The state supreme court held that the denial of the peremptory challenge was harmless error, even though it disagreed with the trial court's decision.

The Supreme Court granted certiorari to consider whether the trial judge's good-faith error in denying one of Rivera's peremptory challenges deprived the petitioner of his right to a fair trial before an impartial jury. Writing for a unanimous court, Justice Ginsburg affirmed both the conviction and the reasoning of the Supreme Court of Illinois, holding that peremptory challenges are not federal constitutional concerns but matters for the state to address under its own laws. Justice Ginsburg reasoned that because there is no "freestanding

constitutional right to peremptory challenges," such challenges could be withheld by states altogether and, thus, the mistaken denial of a challenge does not, on its own, make a constitutional violation. Following the precedent established in *Ross v. Oklahoma* and *United States v. Martinez-Salazar*, Justice Ginsburg asserted that the Sixth Amendment only guarantees a jury that is free from members who are removable for cause. Further, Justice Ginsburg affirmed the dicta delineated in *Martinez-Salazar* that an error requires automatic reversal only when it renders a criminal trial fundamentally unfair (for example, when a *Batson* violation occurs). Because the denial of Rivera's peremptory challenge did not render his trial fundamentally unfair, the Court affirmed his conviction.

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DIST. V. OSBORNE

129 S. Ct. 2308 | Decided June 18, 2009

By Sarah M. Nissel '08

In 1994, Osborne was convicted in Alaska state court of assault, sexual assault, and kidnapping after he and a co-defendant forced a prostitute to perform sexual acts, then shot her when she attempted to flee. After his conviction and sentence were affirmed, Osborne sought state post-conviction relief, arguing that his lawyer did not provide him with constitutionally effective assistance because she failed to request a more advanced type of DNA testing on biological evidence found at the crime scene. The state court denied his relief. Osborne next filed suit in federal district court under 42 U.S.C. § 1983, claiming he had a due process right to access the evidence used against him in order to conduct, at his own expense, a yet more advanced form of DNA testing that was not available at the time of his trial. The District Court for the District of Alaska found for Osborne and ordered the district attorney's office to turn over the evidence for testing; the state court of appeals affirmed. The Ninth Circuit, citing *Brady v. Maryland,* also affirmed, holding that the constitutional right to due process includes access to DNA evidence.

The Supreme Court granted certiorari to decide whether a convicted felon has a constitutional right to access evidence for DNA testing. In a 5-4 opinion written by Chief Justice Roberts, the Court reversed the Ninth Circuit's decision, holding that the Constitution does not provide a substantive due process right to DNA evidence and finding further that Alaska's procedures for accessing such evidence are not fundamentally inadequate and thus withstand Osborne's due process challenge. Rejecting the Ninth Circuit's importation of *Brady* to the post-conviction context, the Supreme Court found that a convicted felon's liberty interests are not coextensive with those of a criminal defendant who, unlike the felon, has yet to be found guilty beyond a reasonable doubt.

The Constitution does not provide a substantive due process right to DNA evidence.

Justice Roberts rejected Osborne's invitation to create a "freestanding right to DNA evidence," reasoning that the legislature, as opposed to the judiciary, is the appropriate body to be charged with implementing any rules and procedures governing access to evidence for DNA testing.

In Justice Alito's concurrence, joined by Justice Kennedy and in part by Justice Thomas, he asserted that Osborne's federal claim under 42 U.S.C. § 1983 was improper and that because his request for evidence was ultimately aimed at attacking his conviction, he was required to file a writ of habeas corpus instead. Pointing to the multiplicity of burdens upon the state created by post-conviction testing, Justice Alito would have also held that once a criminal defendant forgoes the opportunity to perform DNA testing at trial, he is barred from seeking such testing after his conviction.

Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, dissented. Justice Stevens would have found that although the relevant Alaskan statutes may not be unfair on their face, in practice they are fundamentally inadequate.

Justice Souter filed a separate dissent asserting that Alaska's procedural unfairness—as opposed to any substantive unfairness—violates the requirements of due process.

FEDERAL REVIEW

HEDGPETH V. PULIDO

129 S. Ct. 530 | Decided December 2, 2008

By Thomas Ferriss (Harvard '11)

In a per curiam opinion, the Supreme Court considered whether the Ninth Circuit erred in granting habeas relief and setting aside Pulido's conviction for felony murder based on a finding that the state court's jury instructions constituted a structural error without undertaking a harmless error analysis. The jury instructions in Pulido's original trial contained multiple theories of culpability, including an erroneous charge that Pulido could be found guilty of felony murder even if he only obtained the requisite intent to aid and abet *after* the murder had already been committed. The California Supreme Court agreed with Pulido that the instruction was erroneous but found that Pulido had not been prejudiced by the error. The district court reversed the state supreme court's finding, holding that the invalid instruction had a substantial and injurious effect or influence in determining the jury's verdict. The Ninth Circuit affirmed the district court's determination but found that because the erroneous instructions constituted a structural error on the part of the trial court, it was not required to undertake a harmless error analysis; instead, Pulido was entitled to an automatic reversal. Rejecting the Ninth Circuit's reasoning, the Supreme Court held that the faulty jury instructions did not constitute a structural error but an instructional error and, as such, called for a review for harmless error. The Court remanded to the Ninth Circuit to assess whether the faulty jury instructions substantially and injuriously affected or influenced the jury's verdict.

Faulty jury instructions regarding the intent element of felony murder do not constitute structural error and are reviewed for harmlessness.

Justice Stevens, joined by Justices Ginsburg and Souter, dissented in part, arguing that because both the district court and the Ninth Circuit had effectively engaged in a harmless error analysis when ruling for Pulido, to require the Ninth Circuit to conduct the analysis for a third time would constitute judicial waste. The dissent would simply have affirmed the appellate court's decision.

WADDINGTON V. SARAUSAD

129 S. Ct. 823 | Decided January 21, 2009

By Thomas Ferriss (Harvard '11)

Reversing the Ninth Circuit's opinion affirming the lower court's decision to grant federal habeas review, the Court held that federal courts were limited in their ability to review, in a habeas appeal, state court determinations regarding jury instructions in accomplice liability cases. Defendant Sarausad was convicted of second-degree murder for driving the car in a drive-by shooting. The state trial court allowed "in for a dime, in for a dollar" jury instructions; Sarausad argued that this instruction may have allowed the jury to convict him for murder even though the government did not prove he had the requisite *mens rea* for anything more than assault. After exhausting his remedies in the state appeals courts, Sarausad was granted habeas review in federal court under 28 U.S.C. § 2254. The district court ruled for Sarausad, overturning his conviction; the Ninth Circuit affirmed and the Supreme Court reversed, reinstating Sarausad's conviction for second-degree murder and related crimes.

Writing for a 6-3 majority, Justice Thomas, joined by Justices Alito, Breyer, Kennedy, and Scalia, plus Chief Justice Roberts, reasoned that in order to warrant federal review, a state court's decision must be not only erroneous but also objectively unreasonable; the jury instruction must contaminate the trial so much that the conviction violates due process. Moreover, federal review is permissible only when a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law. In the instant case, the majority held that because the instructions more or less parroted the very wording of the state statute that criminalized the defendant's conduct, the state court's finding that the jury instructions as to Sarausad were unambiguous was not objectively unreasonable. Therefore, the majority held, the federal court should not have granted habeas relief. Moreover, Justice Thomas reasoned, even if the instructions had been ambiguous, they were not sufficiently ambiguous to create a constitutional violation that warranted federal habeas relief. The court could have reasonably concluded that the jury convicted Sarausad because the jury disbelieved his assertion that he was unaware that his passenger intended to shoot the victims given the strength of the evidence, not because the jury instructions were faulty.

Justice Souter, joined by Justices Stevens and Ginsburg, dissented. Justice Souter argued that even

if jury instructions parrot statutory language, the instructions may nevertheless be ambiguous because the statute itself is ambiguous. He pointed to the conflicting interpretations in Washington State courts of this particular statute as further evidence of his conclusion.

UNITED STATES V. DENEDO

129 S. Ct. 2213 | Decided June 8, 2009
By Kathiana Aurelien '10

Denedo became a lawful permanent resident after enlisting in the U.S. Navy. In 2000, he was convicted of conspiracy, larceny, and forgery and was discharged from the Navy. Based on this conviction, in 2006, the Department of Homeland Security commenced removal proceedings. In response, Denedo filed a petition for a writ of *coram nobis* in the Navy-Marine Corps Court of Criminal Appeals (NMCCA) arguing that because his guilty plea had been the result of ineffective assistance of counsel, his conviction should be vacated. The NMCCA held that it had proper jurisdiction to grant the writ but denied Denedo's petition. Denedo appealed the decision to the U.S. Court of Appeals for the Armed Forces (CAAF). The CAAF agreed that the NMCCA had jurisdiction but remanded for further proceedings on the merits. The government appealed the NMCCA's jurisdictional finding, arguing that a writ of *coram nobis* directed to a final judgment of conviction is outside the jurisdiction of the military courts.

Writing for a 5-4 majority, Justice Kennedy, joined by Justices Breyer, Ginsburg, Souter, and Stevens, affirmed the holding of the CAAF. Rejecting first Denedo's contention that the Supreme Court lacked jurisdiction to hear the appeal because "remand" does not constitute "relief" for jurisdictional purposes, the majority held that "relief" in this jurisdictional context means any redress or benefit granted by the court—not just ultimate or complete relief. As such, the majority found that it had proper jurisdiction to review the CAAF's decision. The majority also rejected the government's core argument, concluding that because Denedo's petition for a writ of *coram nobis* was merely another step in his criminal appeal, the NMCCA had jurisdiction derived "from the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review."

Chief Justice Roberts, joined by Justices Alito, Scalia, and Thomas, concurred in part and dissented in part. They agreed that the Supreme Court had jurisdiction to hear the case but disagreed with the majority's holding that the NMCCA had proper jurisdiction to consider Denedo's petition for a writ of *coram nobis*. Reasoning that Article I courts have limited jurisdiction—far more limited than Article III courts, in particular—the concurrence would have held that military courts do not have jurisdiction to issue writs of *coram nobis*.

STATUTORY INTERPRETATION

CHAMBERS V. UNITED STATES

129 S. Ct. 687 | Decided January 13, 2009
By Thomas Ferriss (Harvard '11)

The Court unanimously held that failure to report to prison is not a "violent felony" for the purposes of the Armed Career Criminal Act (ACCA). Chambers pleaded guilty to being a felon in possession of a firearm; the government sought a 15-year sentence, arguing that because Chambers had previously been convicted of three violent felonies, the ACCA's mandatory sentence applied to him. Chambers disputed the categorization of one of his previous felonies—failure to report for weekend confinement—as a violent crime and argued that, therefore, the statute was inapplicable. The district court disagreed with Chambers; it found that failure to report was the same as the crime of escape for the purposes of the statute and held that, like the crime of escape, failure to report also triggers the ACCA's mandatory 15-year sentence. The Seventh Circuit affirmed.

Justice Breyer, writing for the Court, differentiated the underlying behavior of failure to report from the crime of escape: whereas escape is a crime of aggression and frequently leads to violent consequences, failure to report is a kind of inaction and thus does not present a serious potential risk of physical injury to another. Furthermore, reasoned Justice Breyer, the statutory phrasing seems to distinguish between the two crimes. The Court also cited a report issued by the U.S. Sentencing Commission documenting the fact that zero out of 160 cases of failure to report tracked over a two-year period had resulted in violence.

Justice Alito, joined by Justice Thomas, concurred in the judgment because of the precedential force of previous decisions regarding the statutory interpretation of the disputed text and the categorical approach to determining if a crime is violent. In his concurrence,

however, Justice Alito called on Congress to "rescue the federal courts" from uncertainty by enumerating exactly which crimes should count for the purposes of the ACCA.

JIMENEZ V. QUARTERMAN

129 S. Ct. 681 | Decided January 13, 2009
By Thomas Ferriss (Harvard '11)

In a unanimous opinion, the Court held that when a state court grants a criminal defendant leave to file an appeal that would otherwise be time-barred and does so before that defendant has filed for habeas relief, the deadline for filing for habeas relief is extended until a year after the state appeal is finally settled. Petitioner Jimenez was convicted of burglary and was serving a 43-year enhanced sentence after a prison conviction for aggravated assault with a deadly weapon. Jimenez filed for federal habeas review at a time that would have generally been too late—unless the fact that the state court had granted him an extension to file his state appeal affected the relevant statute of limitations. Section (d)(1)(A) of 28 U.S.C. § 2244 states that a one-year limitations period begins on "the date on which the judgment [becomes] final by the conclusion of direct review or the expiration of the time for seeking such review." The district court ruled that the limitations period began running when Jimenez's conviction first became final. The petitioner argued that the limitations period does not run while a properly filed post-conviction review is pending. The court of appeals denied a certificate of appealability.

Writing for the Court, Justice Thomas reversed and remanded the case, holding that the plain meaning of the statute clearly delineated that a conviction is no longer final for the purposes of 28 U.S.C. § 2244(d)(1)(A) until a post-conviction appeal is resolved, even if it is an out-of-time appeal. The Court emphasized that its ruling was narrow, limited by the specific procedural circumstances present by this case.

UNITED STATES V. HAYES

129 S. Ct. 1079 | Decided February 24, 2009
By Thomas Ferriss (Harvard '11)

Justice Ginsburg, writing a 7-2 majority, held that a domestic relationship need not be a defining element for the predicate offense under 18 U.S.C. § 922(g)(9). Section (g)(9) extends the prohibition of firearm possession for convicted felons to also include persons "convicted of a misdemeanor crime of domestic violence." Defendant Hayes was charged under the statute when police responded to a domestic violence 911 call and found Hayes's rifle in the house. The predicate offense was Hayes's battery of his then-wife two years earlier. However, because West Virginia's battery law was generic and did not identify a domestic relationship as a specific element of the crime, Hayes sought to dismiss the 18 U.S.C. § 922(g)(9) charge. The Fourth Circuit agreed with Hayes that the predicate crime must have a domestic relationship as an element in order to render 18 U.S.C. § 922(g)(9) applicable.

The majority reversed, holding that although the existence of a domestic relationship in the predicate crime must be established beyond a reasonable doubt such that it can be properly considered to be domestic violence, the existence of the domestic relationship need not be an explicit element of the predicate crime. According to the majority, 18 U.S.C. § 922 (g)(9) only requires two elements: (1) that the crime is violent, and (2) that the defendant has a domestic relationship with the victim. It does not require that the codification of the predicate offense include a domestic relationship as an element. Not only do several canons of statutory interpretation support its conclusion, reasoned the majority, but practical considerations, too, support the finding that the statutory text does not require that the predicate offense contain the domestic relationship element. First, at the time of Hayes's battery offense, only about one-third of states specifically criminalized domestic violence; in the majority of states, however, such offenses were prosecuted under generic violence prohibitions. Additionally, Congressional intent in passing 18 U.S.C. § 922(g)(9) was centered upon keeping firearms out of the hands of criminals just like Hayes: those who had committed acts of violence against someone with whom they had a domestic relationship.

Chief Justice Roberts, joined by Justice Scalia, dissented. He argued that the text is at the very least

ambiguous as to whether a domestic relationship needs be an element of the predicate offense. Therefore, in accordance with the rule of lenity, he would have found that the statute should be interpreted in the defendant's favor.

CORLEY V. UNITED STATES

129 S. Ct. 1558 | Decided April 6, 2009
By Jason A. Richman '11

Petitioner Corley was convicted in U.S. District Court for the Eastern District of Pennsylvania of armed robbery and conspiracy. The Third Circuit affirmed in part and vacated in part. The Supreme Court granted certiorari to consider the question of whether, in enacting 18 U.S.C. § 3501, Congress intended merely to narrow or entirely to eliminate the rule established in *McNabb v. United States* and *Mallory v. United States* that a defendant's confession is inadmissible if obtained after an unreasonable delay in bringing him before a judge for presentment.

Writing for a 5-4 majority, Justice Souter overturned the Third Circuit and remanded the case for reconsideration. Justice Souter first considered the case law surrounding the admissibility of a defendant's confession. In *McNabb*, the Court held that waiting days to interrogate a suspect before presenting him was contrary to the federal statutes codifying the "presentment rule." In *Upshaw v. United States*, the Court further clarified that even voluntary confessions are inadmissible if obtained after an unreasonable delay in presentment. Finally, *Mallory* solidified that a delay aimed at providing law enforcement with the opportunity to interrogate constitutes such an unreasonable delay.

In 1968, Congress enacted 18 U.S.C. § 3501. Subsection (a) of the statute states that any voluntary confession is admissible; subsection (c) states that a confession is not inadmissible solely because of delay in presentment, but it can be admitted if it is both voluntary and made *within six hours* of arrest (or longer if the delay is "reasonable considering the means of transportation and distance to be traveled to the nearest available [magistrate]"). The question presented in this case was whether Congress intended for 18 U.S.C. § 3501 entirely to abrogate the rules created by *McNabb* and *Mallory* (and thereby allow for the admission of a voluntary confession no matter the delay) or if the statute was simply intended to allow for the admission of voluntary confessions given within six hours of a suspect's arrest. Justice Souter held that § 3501 "modified *McNabb–Mallory* without supplanting it" and that voluntary confessions made within six hours (or reasonably longer, given constraints on presentment) shall be admissible so long as they were obtained without violating any other rules of evidence.

Justice Souter rejected the government's reading of the statute, reasoning that it would render subsection (c) superfluous. If, as the government contended, subsection (a) stands for the proposition that *any* voluntary confession is admissible, then Congress would not have needed to include subsection (c), delineating the six-hour rule. By contrast, petitioner Corley's reading of the statute gives effect to both subsections (a) and (c). Justice Souter also pointed to the legislative history of the statute as further evidence that the government's reading is erroneous.

The dissent, written by Justice Alito and joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, would have affirmed the holding of the Third Circuit. Reasoning that there is "nothing ambiguous about the language of § 3501(a)," the dissent would have admitted the confessions of the defendant as voluntary. Further, the dissent argued that the majority's invocation of "the antisuperfluousness canon" is inapplicable because here, the statute in question is plainly clear. Finally, even if the antisuperfluousness canon were to be applicable, the dissent would have accepted the government's interpretation of subsection (c); namely, that subsection (c) *adds* that confessions given within six hours are presumptively admissible. The dissent questioned the need for the *McNabb–Mallory* rule altogether given the protections granted to suspects by *Miranda v. Arizona*.

DEAN V. UNITED STATES

129 S. Ct. 1849 | Decided April 29, 2009
By Jason A. Richman '11

Petitioner Dean was convicted of discharging a firearm during an armed robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(iii), and sentenced to the mandatory minimum of 10 years imprisonment. Dean was convicted under one of the enhanced sentencing provisions in the statute because he had discharged his weapon during the commission of this crime despite the fact that the discharge was accidental (if not discharged, the mandatory minimum would have been five years). On appeal, Dean argued that *intent to discharge* was required to trigger this enhancement, but the Eleventh Circuit affirmed his conviction.

The Supreme Court granted certiorari and affirmed the conviction. Chief Justice Roberts, writing for a seven-person majority, first pointed to the fact that the language of the statute is silent on intent or purpose. He next turned to the structure of the statute: while the statute defines "brandishing"—the other available enhancement—as requiring intent, it is silent on the question of intent with regard to the discharge enhancement. Justice Roberts rejected Dean's assertion that the intent requirement simply extends from the opening paragraph of the statute. Similarly, Justice Roberts rejected Dean's argument that a showing of intent is presumptively required in all criminal prohibitions. He reasoned that this presumption does not lend itself to the statute at hand because "unintended consequences of unlawful acts" are often punished absent a showing of intent (as in the case of felony murder, for example). Finally, the opinion rejected the rule of lenity as inapplicable, finding that Dean's arguments are insufficient to "render the statute grievously ambiguous" and thus do not meet the threshold requirements to trigger the rule of lenity.

In his dissent, Justice Stevens, writing for himself, reasoned that Congressional intent, as evidenced both by the statute itself and by legislative history, was to provide escalated sentences for increasingly culpable conduct. This intent, according to Justice Stevens, demands a showing of intentional discharge and the presumption of a *mens rea* requirement. Justice Stevens pointed to the intent requirement built into the "main" portion of the statute and the intent attached to the other enhancement delineated by the statute (brandishing only if the intent was to intimidate). Finally, Justice Stevens discussed a long line of precedent to conclude that "absent a clear indication" otherwise, proof of intent should be presumed. Justice Breyer filed a separate dissent, agreeing with "many of the reasons" put forth by Justice Stevens, but also emphasizing that in cases where mandatory minimums are involved, it is imperative to apply the rule of lenity in order to provide discretion to sentencing judges.

FLORES-FIGUEROA V. UNITED STATES

129 S. Ct. 1886 | Decided May 4, 2009

By Jason A. Richman '11

Petitioner Flores-Figueroa was convicted in the U.S. District Court for the Southern District of Iowa for aggravated identity theft. The Eighth Circuit affirmed this conviction over Flores-Figueroa's argument that the government had failed to establish that he had the requisite knowledge that the identification he used belonged to another person.

Justice Breyer, writing for the majority, reversed, holding that in order to convict a defendant of aggravated identity theft, the government *did* have to prove that the accused had knowledge that the identification belonged to another person. Section 1028A(a)(1) of 18 U.S.C. imposes a consecutive two-year prison term on individuals convicted of certain crimes if the offender "*knowingly* transfers, possesses, or uses, without lawful authority, a means of identification *of another person*" during the commission of said crimes. In his reasoning, Justice Breyer evaluated the plain language of the statute, finding that a natural reading of the text must lead to the application of "knowingly" to all the elements of the crime, including "of another person." Dismissing the government's argument that "knowingly" extends to all but these last three words of the section, Justice Breyer analogized to several other examples of the grammatical rule at play and further determined that courts ordinarily read a phrase in a criminal statute that is introduced by the word "knowingly" to carry the word to all elements that follow. Finally, Justice Breyer dismissed the government's reliance on the statute's intent as inconclusive based on the legislative history and statutory language. He also rejected as unpersuasive in the face of the ordinary meaning of the statute the government's position that there should be no intent requirement for the last part of the section because it would be too difficult to prove.

In order to convict a defendant of aggravated identity theft, the government has to prove that the accused had knowledge that the identification he used belonged to another person.

In his concurrence, joined by Justice Thomas, Justice Scalia argued that the Court should have been "content to stop at the statute's text;." Thus, he did not join in the majority's discussion of legislative history or general rules of grammar that extended beyond the plain language. Justice Alito, writing for himself and also concurring in the judgment, would have found that a general presumption of *mens rea* does apply to all elements of a criminal offense—*but* that the government may rebut this presumption based on context. Here, Justice Alito concurred, the government's arguments

failed. In particular, he pointed to the absurd result that the government's reading would produce: two defendants with no intent to use another person's identification would receive disparate sentences based on the sheer coincidence of whether the fabricated identification information actually belonged to another person or not.

NIJHAWAN V. HOLDER

129 S. Ct. 2294 | Decided June 15, 2009
By Kathiana Aurelien '10

Petitioner Nijhawan, a non-citizen, sought review of the Third Circuit's ruling upholding a deportation order premised upon 8 U.S.C. § 1227(a)(2)(A)(iii), which provides that any "alien who is convicted of an aggravated felony at any time is deportable." Section 1101(a)(43)(M)(i), a related statute, enumerates a set of offenses that fall under the aggravated felony umbrella; it includes any offense that "involves fraud or deceit *in which the loss to the victim or victims exceeds $10,000.*"

In 2002, a jury found the petitioner guilty of conspiring to commit mail fraud, wire fraud, bank fraud, and money laundering. Because none of the statutes under which the petitioner was convicted requires a finding of specific monetary loss, the jury made no such finding at trial. At sentencing, however, the petitioner stipulated that the loss amount exceeded $100 million. In 2005, the government initiated deportation proceedings based on a claim that Nijhawan had been convicted of an aggravated felony as defined by § 1101(a)(43)(M)(i).

Rejecting the petitioner's claim that § 1101(a)(43)(M)(i) calls for a "categorical approach," under which the court must assess whether the monetary loss was *an element* of the fraud or deceit, the Third Circuit held that "an inquiry into the underlying facts of the case" was appropriate when determining the amount of loss for deportation purposes. In a unanimous opinion written by Justice Breyer, the Supreme Court agreed, holding that "[t]he language of the provision is consistent with a circumstance-specific approach." The Court reasoned that because no widely applicable federal fraud statute contained a monetary loss threshold, § 1101(a)(43)(M)(i) could not have intended for monetary loss to be an element of the underlying crime. The Court also pointed to the plain language of the statutory text wherein Congress delineated a specific, circumstance-based exception to its list as further evidence that a fact-based approach was required.

Personnel

ANTHONY S. BARKOW, EXECUTIVE DIRECTOR

Anthony S. Barkow was a federal prosecutor for 12 years. From 2002 through 2008, he was an Assistant U.S. Attorney in the U.S. Attorney's Office for the Southern District of New York, where he prosecuted some of the most significant terrorism and white collar criminal cases in the United States. In 2005, Barkow was given the Attorney General's Award for Exceptional Service, the highest award bestowed in the U.S. Department of Justice. From 1998 through 2002, he was an Assistant United States Attorney in the U.S. Attorney's Office for the District of Columbia, where he prosecuted local and federal cases involving homicides and other serious violent crimes, domestic violence assaults and sexual abuse, international narcotics trafficking, and drug and gun street crimes. For two years before that, Barkow was a trial attorney in the Attorney General's Honors Program in the Office of Consumer Litigation in the U.S. Department of Justice, where he prosecuted white collar criminal and civil cases under various federal consumer protection statutes. During his tenure in the government, Barkow tried more than 40 cases and briefed and argued more than 10 cases on appeal. He previously served as adjunct clinical professor of law at New York University School of Law. Barkow is a frequent writer and commentator on criminal law issues, especially those involving prosecutors, and has appeared on various news channels and been quoted in a variety of print media. In 2009, he testified before Congress regarding proposed legislation that would prohibit former prosecutors from serving as or working for corporate monitors in matters on which they worked while in government service. In 2008, he was a human rights observer of the military commission hearings in Guantánamo Bay, Cuba.

After graduating summa cum laude from the University of Michigan (A.B.'91) and teaching history at Saint Ann's School in Brooklyn Heights, New York, Barkow graduated cum laude from Harvard Law School (J.D.'95), where he was Notes Office co-chair and supervising editor of the *Harvard Law Review*. He served as law clerk to the Honorable Thomas P. Griesa when he was Chief Judge of the U.S. District Court for the Southern District of New York.

RACHEL E. BARKOW, FACULTY DIRECTOR

Rachel E. Barkow is professor of law at New York University School of Law. Her scholarship focuses on administrative and criminal law, and she is especially interested in applying the lessons and theory of administrative law to the administration of criminal justice.

In a piece published in the *Stanford Law Review* in 2009, "Institutional Design and the Policing of Prosecutors," for example, she draws from administrative law and institutional design to offer suggestions to control prosecutorial abuses of power. In "The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity," published in 2009 in the *Michigan Law Review*, Barkow argues for abandonment of the Supreme Court's two-track approach to reviewing capital sentences robustly while engaging in virtually no oversight of noncapital sentences. In "The Politics of Forgiveness: Reconceptualizing Clemency," published in the *Federal Sentencing Reporter* in 2009, she makes the case for rejuvenation of the executive clemency system. A recent essay in the *Harvard Law Review*, "The Ascent of the Administrative State and the Demise of Mercy," explores the relationship between administrative law's dominance and the increasing reluctance of scholars and experts to accept pockets of unreviewable discretion in criminal law. In "Separation of Powers and the Criminal Law," published in 2006 in the *Stanford Law Review*, Barkow contrasts constitutional questions of separation of powers in the administration of criminal law with separation of powers issues in administrative

contexts. In "Administering Crime," published by the *UCLA Law Review* in 2005, she uses administrative law, political science, and a detailed review of sentencing commissions to determine what institutional model works for designing agencies that regulate criminal punishment. In "Federalism and the Politics of Sentencing," published in 2005 by the *Columbia Law Review*, she draws on insights from cost-benefit and risk-tradeoff analyses to determine how the politics of sentencing might vary at state and federal levels. Barkow explores the relationship between separation of powers theory, sentencing, and the historical role of the jury in her article "Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing," which appeared in the *University of Pennsylvania Law Review* in 2003. She is also the author of "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy," "Delegating Punitive Power: The Politics and Economics of Sentencing Commission and Guideline Formation" (with Kathleen O'Neill), and numerous other articles and works.

Barkow has been invited to present her work in various settings. Last summer, she testified before the House Subcommittee on Commerce, Trade, and Consumer Protection regarding the proposed Consumer Financial Protection Agency and before the U.S. Sentencing Commission to make recommendations for reforming the federal sentencing system. In the summer of 2004, she testified before the Senate Judiciary Committee at a hearing on the future of the federal sentencing guidelines. She has also presented her work on sentencing to the National Association of Sentencing Commissions conference, the Federal Judicial Center's National Sentencing Policy Institute, and the Judicial Conference of the Courts of Appeals for the First and Seventh Circuits. In addition, she has presented papers at numerous law schools.

After graduating from Northwestern University (B.A. '93), Barkow attended Harvard Law School (J.D. '96), where she won the Sears Prize, awarded annually to the two students with the top overall grade averages in the first-year class. She served as a law clerk to Judge Laurence H. Silberman on the U.S. Court of Appeals for the District of Columbia Circuit and Justice Antonin Scalia on the Supreme Court of the United States. She was an associate at Kellogg, Huber, Hansen, Todd & Evans in Washington, D.C., from 1998 to 2002, where she focused on telecommunications and administrative law issues in proceedings before the FCC, state regulatory agencies, and federal and state courts. Barkow took a leave from the firm in 2001 to serve as the John M. Olin Fellow in Law at Georgetown University Law Center.

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PROFESSOR DOUGLAS A. BERMAN Berman is the William B. Saxbe Designated Professor of Law at Moritz College of Law at Ohio State University. One of the leading experts on sentencing in the country, he is co-author of the *Sentencing Law and Policy: Cases, Statutes and Guidelines* casebook (second edition, 2008), has authored publications on a wide variety of criminal law and sentencing topics, and is the creator and sole author of the widely read and cited blog *Sentencing Law and Policy*.

PAUL D. CLEMENT Clement is a partner in the Washington, D.C., office of King & Spalding and heads the firm's national appellate practice. He served as the 43rd Solicitor General of the United States from June 2005 until June 2008 and spent nearly eight years in various leadership positions in the office. Clement also serves as an adjunct professor of law at both NYU and Georgetown. He has argued more than 50 cases before the Supreme Court and many of the government's most important cases in lower courts.

KATHERINE A. LEMIRE Lemire is counsel to Raymond W. Kelly, the police commissioner of the City of New York. She previously was an Assistant U.S. Attorney in the U.S. Attorney's Office for the Southern District of New York, where she primarily prosecuted public corruption offenses, campaign finance fraud, and violent gang cases involving racketeering, murder, and narcotics trafficking. She also previously was an assistant district attorney in the Manhattan District Attorney's Office.

JORGE MONTES Montes is chairman of the Prisoner Review Board of the State of Illinois. He has been chairman since 2004 and a member of the board since 1994. He also co-chairs the American Bar Association's

Parole and Probation Committee of the Criminal Justice Section. Previously, Montes was a supervising litigation attorney for the Cook County State's Attorney's Office and a spokesperson for the Office of the Illinois Attorney General. He also has been a member of the Illinois Department of Corrections Board of Education.

PROFESSOR ANTHONY C. THOMPSON Professor of clinical law at New York University School of Law, Thompson teaches criminal law and civil litigation courses. His scholarship focuses on race, offender reentry, and criminal justice issues. Thompson wrote *Releasing Prisoners, Redeeming Communities* (2008) and designed and developed the first course in the country focusing on offender reentry. He worked in private practice and served for nine years as a deputy public defender in Contra Costa County, California.

ERIN MURPHY, SCHOLAR-IN-RESIDENCE, 2009–10

The Center's scholar-in-residence for academic year 2009-10 is Professor Erin Murphy, who is an assistant professor of law at Berkeley Law School and was a visiting professor at New York University School of Law in Fall 2009. She joined the faculty at Berkeley from the Public Defender Service (PDS) for the District of Columbia, where she spent three years in the trial division and two years in the appellate division. While at PDS, Murphy represented clients in felony and misdemeanor cases in jury and bench trials, and she argued before the U.S. Court of Appeals for the District of Columbia Circuit. She also led a widely watched constitutional challenge to the District of Columbia's firearms laws and acquired particular expertise in the scientific and legal issues surrounding the admissibility of various types of forensic evidence. Murphy is a graduate of Harvard Law School, where she served as a notes editor for the *Harvard Law Review* and an oralist for the champion team in the Ames Moot Court competition. She clerked for Judge Merrick B. Garland of the U.S. Court of Appeals for the D.C. Circuit.

Murphy's research focuses on questions related to new technologies and the relationship between the individual and the state in the criminal justice context. Her particular interests include forensic DNA typing, biometric scanning, electronic tracking, and functional MRI imaging. The *Duke Law Journal* published her recent article, "Paradigms of Restraint," which won the AALS Criminal Justice Section Award for best paper by a junior scholar. Other representative works include "The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence" in the *California Law Review* and "Inferences and Arguments in Second Generation Forensic Evidence" in the *Hastings Law Journal*. Murphy teaches courses related to criminal law, criminal procedure and evidence.

DAVID B. EDWARDS, ATTORNEY-IN-RESIDENCE

David B. Edwards is attorney-in-residence at the Center. He is recipient of a yearlong public interest fellowship from the law firm Simpson Thacher & Bartlett. Prior to arriving at the Center, Edwards was an associate at Simpson Thacher, where he focused on commercial litigation and arbitration as well as pro bono criminal matters.

After graduating from the University of Washington (B.A. '03), he attended New York University School of Law ('08), where he was an executive articles editor of the *New York University Annual Survey of American Law*. Upon graduation, Edwards was awarded the Vanderbilt Medal for outstanding contributions to the School of Law. For his Note "Out of the Mouth of States: Deference to State Action Finding Effect in Federal Law," 63 *New York University Annual Survey of American Law* 429 (2008), he was awarded the Seymour A. Levy Award for the most outstanding note published in the survey by a graduating student.

SARAH M. NISSEL, ATTORNEY

Sarah M. Nissel is an attorney at the Center. After graduating from Yale University (B.A. '03), she attended New York University School of Law ('08). Prior to joining the Center, she worked as an associate at the law firm Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, where she focused on white collar criminal litigation. She also previously worked as an intern at The Innocence Project.

FELLOWS

Much of the Center's work is done by New York University School of Law students who are Center fellows chosen after a competitive application process.

The Center's current fellows are:

CLASS OF 2010: Kathiana Aurelien, Beth George, and Julia Fong Sheketoff

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CLASS OF 2012: Philip T. Kovoor

ALUMNI: Joshua J. Libling ('09) was a member of the first group of Center fellows, and Mark Savignac (Harvard '11) and Tom Ferriss (Harvard '11) were summer fellows at the Center in 2009.

EDWARD SHUTTLEWORTH, ADMINISTRATIVE ASSISTANT

Edward Shuttleworth is the administrative assistant for the Center on the Administration of Criminal Law.

Editor, Sarah M. Nissel '08

Copyeditors, Beth George '10 and Laura Arandes '11

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