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 2009–10 Supreme Court Term.*

In This Edition:

NEWS FROM THE CENTER

By Anthony S. Barkow, Executive Director

Since the publication of the last edition of *Prosecution Notes*, the Center has been continuing successfully to advance its mission through its three main areas 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 website, www.prosecutioncenter.org.

LITIGATION

The Center's litigation practice has continued to be active and successful. The Center has filed *amicus* briefs in the Supreme Court of the United States and in other courts around the country, both in support of defendants and in support of the government. A few recent examples of successful results achieved in matters in which the Center filed briefs are outlined below:

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Carachuri-Rosendo v. Holder,

SUPREME COURT OF THE UNITED STATES

This case addressed whether immigration courts can 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 filed an *amicus* brief in support of the petitioner arguing that circuit court decisions allowing such treatment 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 Center previously had filed an *amicus* brief in support of the successful petition for writ of *certiorari*.

These *amicus* briefs were filed in partnership with the law firm Debevoise & Plimpton LLP.

On June 14, 2010, in a unanimous opinion, the Court sided with the Center. The Court rested its decision in part on Justice Department charging policy, a subject first raised and most extensively discussed in the case in the Center's brief.

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Graham v. Florida,

SUPREME COURT OF THE UNITED STATES

The Center filed an *amicus* brief in support of the petitioner, who was serving a life sentence without the possibility of parole for a nonhomicide offense committed as a juvenile. The Center's brief argued that the text and history of the Eighth Amendment indicate that the Cruel and Unusual Punishments Clause prohibits disproportionate criminal sentences, that such proportionality review is necessary in light of the expansion of criminal laws and sentences and the concentration of unreviewable discretionary power in the hands of prosecutors, and that the Supreme Court's practice of applying a robust proportionality review in the capital context while virtually eliminating proportionality review in the noncapital context is unjustified.

This *amicus* brief was filed in partnership with the law firm Steptoe & Johnson.

On May 17, 2010, the Court sided with the Center and ruled for Graham. Moreover, the Graham dissent cited Faculty Director Rachel E. Barkow's article "The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity," 107 *Mich. L. Rev.* 1145 (2009), for the limited proposition that the Court's decision in *Solem v. Helm* is an outlier within the Court's jurisprudence.

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United States v. Arizona

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

The Center filed an *amicus* brief in support of the United States in its lawsuit against the State of Arizona challenging the constitutionality of the state's newly enacted anti-immigration statute. The Center's brief argued that the Arizona law threatens public safety by undermining law enforcement efforts to maintain positive relationships and open lines of communication with the communities they serve.

This *amicus* brief was filed in partnership with the law firm Friedman, Kaplan, Seiler & Adelman LLP.

On July 28, 2010, the district court sided with the Center and enjoined the most controversial aspects of the legislation.

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United States v. O'Brien,

SUPREME COURT OF THE UNITED STATES

The Center filed an *amicus* brief in support of the defendant, arguing that the logic of the Supreme Court's decision in *United States v. Booker* made clear that *Harris v. United States*—in which Justice Breyer was the crucial swing vote in the majority—is no longer good law, and therefore facts that trigger mandatory minimum sentences must be treated as offense elements.

This *amicus* brief was filed in partnership with the law firm Jenner & Block.

On May 24, 2010, the Court issued a unanimous opinion siding with the Center. At oral argument, Justice Breyer noted that he had switched the view he had taken in *Harris* and now embraces the argument advocated in the Center's brief that *Harris* should be overruled. In his concurrence, Justice Stevens pointed out Justice Breyer's change of opinion.

SAVE THE DATE

THIRD ANNUAL MAJOR CONFERENCE

"Policing, Regulating, and Prosecuting Corruption"

(co-hosted with the *NYU Annual Survey of American Law* Spring 2011 Symposium)

Keynote speakers:

ANNE MILGRAM ('96), the former Attorney General of the State of New Jersey and current senior fellow at the Center

NEIL M. BAROFSKY ('95), the Special Inspector General of the Troubled Asset Relief Program

Greenberg Lounge, Vanderbilt Hall
40 Washington Square South
Invitations to follow

MARCH 25, 2011

PUBLIC POLICY AND MEDIA

The Center also continued to advance criminal justice policy through targeted efforts aimed at policymakers, the media, and the public. A few recent examples include:

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Faculty Director Rachel E. Barkow was appointed to the Manhattan District Attorney's Office's Conviction Integrity Policy Advisory Panel, a group of leading criminal justice experts that advises the Office on national best practices and evolving issues in the area of wrongful convictions.

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Faculty Director Rachel E. Barkow testified before the United States House of Representatives Subcommittee on Commerce, Trade, and Consumer Protection regarding the proposed Consumer Financial Protection Agency. Professor Barkow discussed, among other things, the value of including state attorney general enforcement as a counterweight to the possibility of agency capture. Senior Fellow Anne Milgram and Faculty Director Rachel E. Barkow also published an opinion editorial in Politico.com that argued in favor of a role for state attorneys general in policing fraud in the mortgage and banking industries, and against federal preemption of state regulation in this area.

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Executive Director Anthony S. Barkow submitted testimony to the Pennsylvania House of Representatives Judiciary Committee in support of legislation that would prohibit life without parole sentences for juvenile offenders.

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Faculty Director Rachel E. Barkow and Attorney-in-Residence David B. Edwards ('08) published an opinion editorial in Forbes.com that argued that the recently enacted health-care legislation will reduce crime and save money by making substance abuse and mental health treatment standard services.

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Executive Director Anthony S. Barkow published an opinion editorial in *Newsday* that argued that Major League Baseball is equally at fault as former pitcher Roger Clemens for the sport reaching the point that Clemens was indicted for lying to Congress.

PUBLIC EVENTS

The Center hosted three major events in 2010.

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"Allocating Prosecutorial Power: How Prosecutors Compete, Cooperate, and Clash" was held on April 23, 2010, and addressed inter- and intra-jurisdictional competition and cooperation among prosecutors. Patrick J. Fitzgerald, the United States Attorney for the Northern District of Illinois, was the keynote speaker. (See related article on page 8.) "Federal Sentencing at a Crossroads: A Call for Leadership" was held on May 24, 2010. The event (co-sponsored by the Federal Bar Council) was moderated by Judge John Gleeson, and panelists included Congressman John Conyers Jr., and Chief Judge William K. Sessions, Chair of the United States Sentencing Commission. (See related article on page 10.) On October 25, 2010, Cory A. Booker (below), Mayor of the City of Newark, New Jersey, spoke and answered questions at a "Conversation on Urban Crime."

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On November 18, 2010, Raymond A. Kelly (LL.M. '74), the Commissioner of the New York City Police Department will be the featured speaker at another "Conversation on Urban Crime."

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The Center's third annual major conference (co-hosted by the *NYU Annual Survey of American Law* Spring 2011 Symposium) will be held on Friday, March 25, 2011. The keynote speakers will be Anne Milgram ('96), the former Attorney General of the State of New Jersey who joined the Center in April 2010 as a senior fellow, and Neil M. Barofsky ('95), the Special Inspector General of the Troubled Asset Relief Program.

BUCKING CONVENTIONAL WISDOM: DISCLOSING DEFENSE ARGUMENTS TO THE GOVERNMENT BEFORE TRIAL

Elkan Abramowitz ('64)[1]
Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.[2]

Between 2006 and 2008, federal prosecutors reportedly dismissed indictments against 42 defendants charged with securities fraud—more than twice as many dismissals as in the prior three years.[3] The question for criminal defense attorneys is how to achieve this result in a complex case in which counsel believes that a client was wrongly indicted.

Conventionally, defense attorneys representing individuals under investigation or indictment do not disclose to the government their clients' defense strategies or theories. Rather, criminal defense attorneys generally share as little information as possible with the government. The ability to withhold information from the prosecution until the defense theory is certain—which often is only after the government has presented its case at trial—is one of the few advantages enjoyed by criminal defendants in a process that favors the government. This strategy is appropriate in many straightforward criminal cases. However, because the concepts of "mail fraud" and "conspiracy" are expansive, an increasing number of white-collar criminal charges are premised on debatable esoteric legal and accounting principles. In some cases, prosecutors' lack of expertise with the complex accounting and other issues faced by some industries results in individuals who are not culpable being charged with crimes. In those cases, educating the prosecution often can result in the best result for a client—a dismissal.

In January 2009, the U.S. Attorney's Office for the Southern District of New York dismissed a fraud indictment against David Stockman, a former Congressman and Director of the Office of Management and Budget under President Ronald Reagan.[4] The same day, the government issued a statement saying that "[a]fter a renewed assessment of the evidence…including evidence and information obtained after the filing of the Indictment, the Government has concluded that further prosecution of this case would not be in the interests of justice."

The government's "renewed assessment" likely was prompted by the presentation by Mr. Stockman's attorneys in October 2008 of an extremely detailed 221-page submission, which presented documentary evidence establishing Mr. Stockman's innocence.

In July 2008, the U.S. Attorney's Office for the Southern District of New York dismissed charges against David Pinkerton, a former AIG executive, 31 months after he was indicted for his alleged involvement in a plot to bribe foreign officials in connection with an oil deal in Azerbaijan. Mr. Pinkerton's attorneys reportedly engaged in discussions with the government for nearly a year before the government dropped the charges.[5]

Mr. Stockman's and Mr. Pinkerton's victories illustrate that when a defense attorney believes that the conduct for which a defendant was indicted does not actually constitute a crime, the attorney should undertake the risk of educating the prosecution about the defense to obtain a dismissal. There are factors, however, that attorneys should consider before making such disclosures.

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[1] Elkan Abramowitz ('64) is a member of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C. He is a former chief of the criminal division of the U.S. Attorney's Office for the Southern District of New York. Kefira Wilderman, an attorney, assisted in the preparation of this article.

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

[3] David Glovin, "Reputations Don't Return When Prosecutors Drop Charges," BLOOMBERG, June 23, 2010.

[4] The author of this article represented Mr. Stockman in connection with the criminal case.

[5] Glovin, *supra* note 3.

Can the defect in the government's case be corrected? If the government can correct a legal defect in its case, defense counsel should not educate the government about the defect in advance of trial. The same is true if the government can simply adjust the charges to account for a defendant's version of the facts. But if the defense can account for the worst possible facts that cooperators could disclose to the government, it may be advantageous to present the defense to the government before trial.

Is the defendant's account of the facts likely to change? In a case where the government does not have access to the defendant's account of the facts, a defendant may avoid telling his story to the government because it is tactically advantageous to have the government attempt to prove its case without knowing the defendant's account. However, if a defendant has proffered, or has testified in a civil deposition, before a grand jury, or before the SEC or another regulator, not only is the defendant's account of the facts unlikely to change, but also the defendant is not bestowing an advantage upon the government by offering his account and explaining why those facts do not constitute a crime.

Will the essence of the defense be disclosed in advance of trial? Many defendants make motions in advance of trial, such as motions to dismiss, discovery motions, and motions to exclude witnesses and evidence. In complex cases, such as financial and accounting fraud cases, defendants also often retain expert witnesses who will submit detailed reports in advance of trial. Because pretrial motions and expert reports will educate the government about the defense, the defendant has little to lose by attempting to convince the government of his innocence before trial.

Does defense counsel have access to the government's documentary evidence and to cooperators' statements? A defendant who has access to the documents upon which the government relies and information about cooperators' and other witnesses' statements is far better positioned to explain to the government why that evidence does not prove his guilt. Knowing what cooperators and other witnesses are reporting to the government allows a defendant to address the information that likely is driving the prosecution and explain why his actions did not constitute a crime. Where there are parallel civil proceedings, a defendant should attempt to obtain transcripts of witnesses' deposition testimony and documents through civil discovery. And although a defendant is unlikely to obtain assistance from attorneys for cooperators, defense counsel should approach the attorneys for other witnesses to obtain information about those witnesses' statements to the government. Without knowing what witnesses are saying to the government and

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

The Center is proud to announce that it will publish a book entitled *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct,* comprising papers contributed by scholars who participated in the Center's inaugural annual conference, "Regulation by Prosecutors." The book will be published in the spring of 2011 by New York University Press.

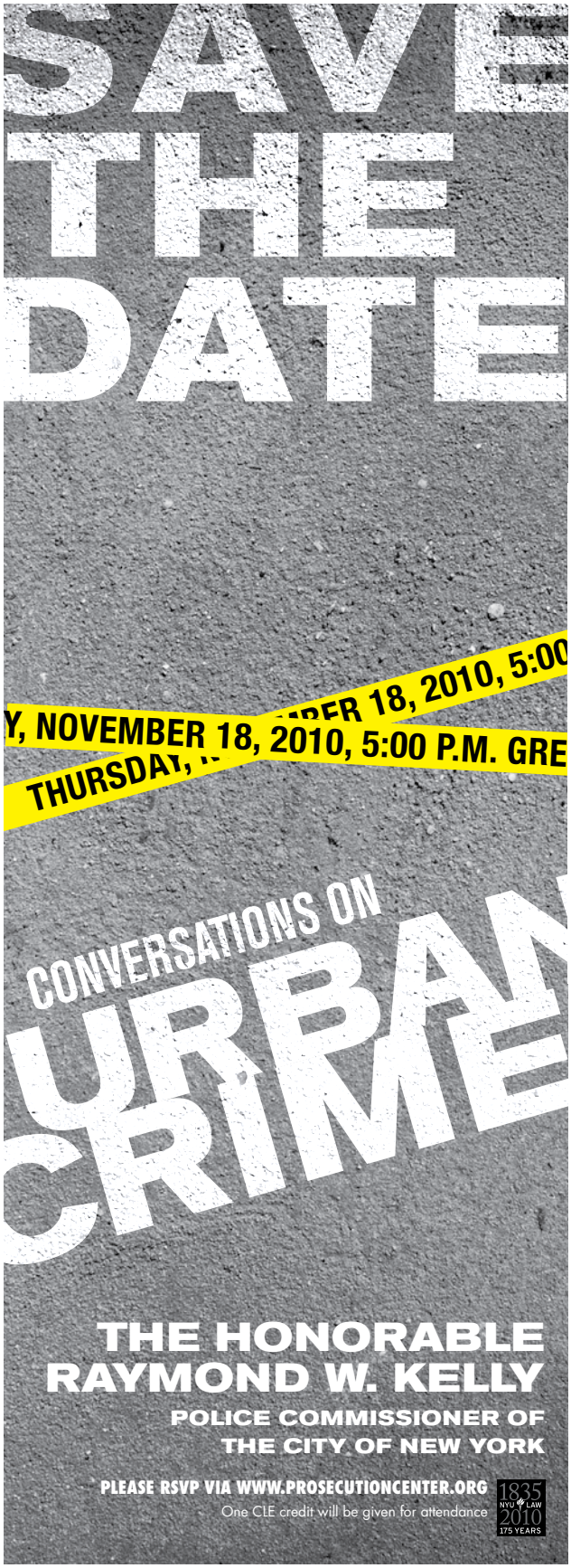
www.law.nyu.edu/centers/adminofcriminallaw/scholarship/prosecutorsintheboardroom

what evidence is in the documentary record, a defendant cannot refute problematic facts.

What is the defendant's tolerance for risk? Educating the government about the defense is a gamble that requires that the defendant have a high tolerance for risk. Even where the client insists on explaining his side of the story to the government, counsel must impress upon the client that although a positive outcome is possible, it is more probable that it still will be necessary to present the defense to a jury. And by presenting the case to the government before trial, the defendant may sacrifice some of the advantage of surprise.

Assuming an attorney and client decide to make pretrial disclosures in an effort to convince the government not to proceed to trial, how is the defendant's account best presented to the government? Often, defense counsel first will meet with the prosecutors to give an "attorney's proffer," during which defense counsel will report the defendant's version of the facts and explain why the defendant's conduct was not a crime or why the government cannot prove its case. If the government is receptive, defense counsel may invite the government to interview the defendant. Such proffers often are conducted pursuant to "Queen for a Day" letters, which protect witnesses from having their own statements used against them at trial in the government's case. Sometimes, it is preferable to have a defendant speak to the prosecutor without a "Queen for a Day" letter because it supports the defendant's claim of innocence and because counsel can argue to the jury that the client was interviewed voluntarily with no protection. If defense counsel is not concerned that a defendant's statements may be introduced at trial by the government—because, for example, the defendant will likely testify—it may also be advantageous to offer to allow the government to interview the defendant on the record. This is so unusual that the government may react positively to the defendant's claim of innocence.

No two criminal cases can be treated alike and there is no certain way—even when a defense attorney is convinced of a client's innocence or that the government cannot prove its case—to ensure that the government will dismiss an indictment in advance of trial. However, when criminal defense attorneys think creatively, the results often are better for their clients.



ALLOCATING PROSECUTORIAL POWER: HOW PROSECUTORS COMPETE, COOPERATE, AND CLASH

By David B. Edwards ('08)

The Center held its second annual major conference, "Allocating Prosecutorial Power: How Prosecutors Compete, Cooperate, and Clash," on April 23, 2010. The conference brought together current and former prosecutors, the defense bar, and noted scholars to address inter- and intra-jurisdictional cooperation and competition among criminal prosecutors.

Patrick J. Fitzgerald, the United States Attorney for the Northern District of Illinois, began the conference by delivering the keynote address, focusing on the relationship between United States Attorneys' Offices (the "tribe of the field") and Main Justice (the "tribe of the Potomac"). At the center of Fitzgerald's address was the argument that personal and office egos should be left out of the determination of who should take the lead on any particular case. "Look at it from a citizen's point of view," Fitzgerald said. "What we ought to be doing is a careful analysis of what value is added by the field versus Main Justice and setting the levers so that the component that adds the most value" is in charge. According to Fitzgerald, experience level on a particular criminal topic, local versus national impact, stewardship issues, geographical scope of the crime, and intelligence (access to and development of relevant information) are the key areas to focus on in making such a determination.

Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, delivered the keynote address at the Center's second annual major conference.

The conference then turned to the three panels for the day. The first panel, "The Feds, Our Federalism, and Local Prosecutors" featured fast-paced Socratic questioning from moderator Ronald Goldstock on a hypothetical that gave dozens of New York law enforcement agencies jurisdiction over a single crime. With views from current and former members of the SDNY, EDNY, Manhattan District Attorney's Office, NYPD, Main Justice, and the Special Narcotics Prosecutor for the City of New York, it quickly became clear that "turf" is a uniquely difficult concept in New York City. While the panel agreed that cooperation is generally the goal between the numerous New York law enforcement agencies, it is not always the rule. The Honorable Sterling Johnson Jr., United States District Judge, Eastern District of New York, summed up the discussion when he responded to a question from Goldstock on how his experience would inform his decision on a jurisdictional dispute: "I would reminisce about the wars that I was involved in both as a state prosecutor and as a federal prosecutor. How I was screwed as a state prosecutor. How I screwed as a federal prosecutor. And I would sit back and I would smile."

The second panel, "Competition and Cooperation Within the State," injected a little more cooperation into the day as it discussed not only the question of federalism, but also prosecutorial hierarchy within the state itself. Featuring two current and two former state Attorneys General, the panel agreed that the jurisdictional situation in New York was "bizarre." Oregon Attorney General John Kroger and Colorado Attorney General John W. Suthers noted that cooperation is much simpler in states where scarce resources require cooperation to ensure that all cases are covered in order to protect the public and where most disagreements can be settled at monthly meetings among a much smaller group of law enforcement officials. As Anne Milgram, former New

Jersey Attorney General and current Senior Fellow at the Center, explained, "On issues that we cared deeply about, particularly violence, we would all sit in a room together and we would simply divide up the cases and it sounds a little bit unusual, but…everybody would be at the table—the head of the FBI, the head of the DEA, the head of the ATF, or their designates, and the State AG and the local prosecutor—and we would say, 'This neighborhood is a problem. The DEA is the furthest along in a case; let's give them the case.'"

The third and final panel, "Centralization and Cooperation: Is Strong Central Authority Necessary or Effective?" addressed the issue previewed by keynote speaker Fitzgerald: the relationship between Main Justice and the United States Attorneys' Offices. The panel debated the pros and cons of disparity, standardization, supervision, control, and specialization, seldom coming to an agreement on when either centralized or local control is preferred or necessary. For example, while defense attorney Elkan Abramowitz championed "a consistent national policy" in fraud cases, Daniel Richman, professor of law at Columbia Law School, was wary of centralization because "it is just going to naturally skew against zeal." Ultimately, it was generally agreed that prosecutors on the ground rarely appreciate supervision but that in some cases it was warranted (in particular with death penalty and terrorism cases), and that Main Justice could serve as a useful resource for those districts that did not often see a particular type of case. However, standardization may be unachievable. "I think [disparity between districts] is just the reality of it," noted Roscoe C. Howard Jr., former United States Attorney for the District of Columbia. "I think it is the nature of the beast they have created. Main Justice is there; I looked at them as a resource, but if you are going to put me in a place like the District of Columbia to enforce the laws, let me enforce the laws."

Further information, the program, and videos from the conference can be found at http://www.law.nyu.edu/centers/adminofcriminallaw/events/allocatingprosecutorialpower/index.htm.

1 Patrick J. Fitzgerald, the United States Attorney for the Northern District of Illinois

2 Michael A. Battle, partner, Fulbright & Jaworski LLP; former Director, Executive Office for United States Attorneys, United States Department of Justice, United States Attorney for the Western District of New York, and Federal Public Defender

3 Barbara D. Underwood, Solicitor General of the State of New York; former Acting Solicitor General and Principal Deputy Solicitor General of the United States, Counsel to the United States Attorney and Chief Assistant, United States Attorney's Office, Eastern District of New York, executive official and attorney in the Queens, Brooklyn, and Manhattan District Attorneys' Offices, Professor of Law, Yale Law School

4 Rachel E. Barkow, Professor of Law, NYU School of Law, and Faculty Director, Center on the Administration of Criminal Law

5 Tracey L. Meares, Deputy Dean and Professor of Law, Yale Law School

6 Roscoe C. Howard Jr., Partner, Andrews Kurth LLP; former United States Attorney for the District of Columbia, Assistant United States Attorney in the United States Attorney's Office for the District of Columbia and for the Eastern District of Virginia, and Associate Independent Counsel

7 The Honorable Sterling Johnson Jr., United States District Judge, Eastern District of New York; former Special Narcotics Prosecutor for the City of New York

8 John Kroger, Attorney General of the State of Oregon; former Assistant United States Attorney, United States Attorney's Office, Eastern District of New York

9 John W. Suthers, Attorney General of the State of Colorado; former United States Attorney, District of Colorado, and District Attorney, Colorado Springs, Colorado

FEDERAL SENTENCING AT A CROSSROADS: A CALL FOR LEADERSHIP

By David B. Edwards ('08)

The Center joined with the Federal Bar Council to co-sponsor a panel, "Federal Sentencing at a Crossroads: A Call for Leadership," to discuss various questions on the future of federal sentencing policy.

The Honorable John Gleeson, United States District Judge, Eastern District of New York, moderated the panel. While acknowledging the numerous sentencing debates of the day, he asked the panel to focus on the "excessively punitive sentencing policy for non-violent drug offenders" that has become a "national crisis in dire need of intervention." The discussion that followed highlighted the tumultuous relationship between Congress and the United States Sentencing Commission, the role politics has played in the Sentencing Guidelines, and the impact these relationships have had on defendants.

From left: Rachel E. Barkow; the Honorable John Conyers Jr., United States Representative, 14th District, Michigan, and Chairman, Committee on the Judiciary, United States House of Representatives; Anthony Ricco; the Honorable William K. Sessions; Alan Vinegrad; Jonathan J. Wroblewski

The Honorable John Conyers Jr., United States Representative, 14th District, Michigan, and Chairman, Committee on the Judiciary, candidly discussed "the highly emotional, political connotations that are attached toward even discussion of" sentencing issues and the practical difficulties associated with reform. In particular, he discussed the commandeering of the Sentencing Commission by Congress through statutory orders to set specific guidelines for the sake of headlines showing them to be tough on crime. Anthony Ricco, a criminal defense attorney, noted a question that appears to have been lost in this morass of politics: what sentence is sufficient but not greater than necessary? "There is an education process that needs to go on in our country about what we're doing to people when we're reconciling the harm that is done to a victim against a measure of punishment that is necessary in order to bring about the lauded goals of Congress," Ricco said.

The Honorable William K. Sessions, Chief Judge, United States District Court for the District of Vermont, and Chair, United States Sentencing Commission, disputed the impression that the Commission was a body responsive only to Congress. While recognizing the reality of and frustration with directives from Congress, he defended the general autonomy, dedication, and utility of the Commission. Judge Sessions noted that the Commission attempts to represent and respond to a range of actors by listening to judges, practitioners, victims, and law enforcement and by reviewing offender characteristics. In particular, Judge Sessions highlighted the Commission's upcoming work, including the inclusion of drug treatment programs in sentencing and the publication of studies on offender characteristics and how they could be taken into account in sentencing.

SCOTUS

Read summaries of all 26 decisions from the 2009-10 Supreme Court Term in the area of criminal law; these rulings decided questions relating to the First, Fifth, and Sixth Amendments as well as Statutory Interpretation, Federal Review, Sentencing, and Due Process.

1. FIRST AMENDMENT

UNITED STATES V. STEVENS

130 S. Ct. 1577 | Decided April 20, 2010

By Jake Tracer ('12)

Stevens, who sold videos of illegal dogfighting, was convicted under 18 U.S.C. § 48, a statute criminalizing the creation, sale, or possession of various depictions of animal cruelty. The statute was enacted to curb the proliferation of "crush videos" in which women crush household animals to death, often while wearing high-heeled shoes to appeal to a specific sexual fetish. Because only the women's feet are visible in the videos, the legislation was targeted at deterring the crime by outlawing its depiction. The Court, in an 8-1 decision written by Chief Justice Roberts, struck down § 48 as overbroad and invalid under the First Amendment.

A statute criminalizing the creation, sale, or possession of various depictions of animal cruelty is unconstitutionally overbroad.

Affirming the Third Circuit, the Court characterized § 48 as an explicit regulation of expression based on content, thereby finding the statute presumptively invalid. Under a First Amendment challenge, a statute can be overturned as overbroad if a substantial number of its uses would be unconstitutional; the Court analyzed § 48 in this context. The majority determined that the statute had many unconstitutional applications. The text did not require the depiction in question to be cruel; instead, it applied to a list of depictions that included wounding or killing an animal, a list that could apply to perfectly legal hunting or commercial slaughtering activities. Further, reasoned the majority, while the statute also required that the action in question be illegal, it did not stipulate that it must be illegal for a specific reason, thus encompassing state hunting and livestock regulations that are not at all connected to animal cruelty concerns. Reading the statute's exceptions clause narrowly, the Court thus found that a substantial number of constitutional depictions of animal wounding and killing would be criminalized by § 48, making it unconstitutionally overbroad. The majority declined to consider whether a more exactly worded statute explicitly outlawing only depictions of animal cruelty would likewise be unconstitutional.

Justice Alito dissented, interpreting § 48 only to apply to depictions of animal cruelty without encompassing the general applications the majority feared. He also found the core of § 48 to be constitutionally valid as a content-based restriction of speech under the reasoning the Court used to find child pornography outside the scope of the First Amendment in *New York v. Ferber*. Just as the Court treated child pornography in *Ferber*, Justice Alito found restrictions on depictions of crush videos and dogfighting to be valid because (1) creating the depiction involves committing a crime that (2) cannot effectively be deterred without targeting the distribution of the depictions, and (3) the value of the speech in the depictions is low. Justice Alito would thus read § 48 to allow these constitutional restrictions.

2. FIFTH AMENDMENT

BERGHUIS V. THOMPKINS

130 S. Ct. 2250 | Decided January 20, 2010
By Rebecca A. Welsh ('12)

Reversing the Sixth Circuit opinion below, the court, in a 5-4 decision, held that a suspect must affirmatively invoke his right to silence during or before questioning and that such a right to remain silent is not invoked when the suspect merely remains silent or does not cooperate. Justice Kennedy, writing for the majority, reasoned that if a suspect answers a question, even with a one-word response and even after hours of interrogation, that response constitutes a waiver of the right to remain silent and is admissible as evidence.

In the instant case, Thompkins had been given his *Miranda* warnings and was questioned by the police for nearly three hours, during which time he was almost completely nonresponsive. Near the end of the interrogation, an officer asked Thompkins if he prayed to God to forgive him "for shooting that little boy down." Thompkins said yes, but refused to confess in writing. This response was used to convict Thompkins at trial.

A suspect must affirmatively invoke his right to silence during or before questioning, and such a right to remain silent is not invoked when the suspect merely remains silent or does not cooperate.

Citing *Davis v. U.S.*, a 1994 Supreme Court case holding that a suspect must unambiguously invoke his right to counsel, the majority found no reason to treat the invocation of the rights to counsel and to silence differently. Such a ruling, asserted Justice Kennedy, would minimize the need for law enforcement to determine a suspect's true intentions and would thereby decrease police confusion. The Court found it determinative that "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police." The Court also held that the police are not required to obtain an explicit waiver of the right to remain silent, but that the suspect need only be informed of and understand his rights. Justice Kennedy concluded that Thompkins had understood his rights and had made choices that culminated in a confession.

In a dissent joined by Justices Stevens, Ginsburg, and Breyer, Justice Sotomayor expressed concern over what she viewed to be a sweeping opinion that did away with decades of *Miranda* precedent and placed a burden on prosecutors to prove that a suspect had waived his right to remain silent. The dissent also attacked what it categorized as the "magic words" suspects would now be forced to use in order to invoke their rights and pointed to the potential for abuse by police.

FLORIDA V. POWELL

130 S. Ct. 1195 | Decided February 23, 2010
By Rebecca A. Welsh ('12)

By a vote of 7 to 2, the Supreme Court overturned the Florida State Court's opinion, holding that the *Miranda* warnings given to Kevin Powell were adequate despite the fact that they did not explicitly inform him of his right to have an attorney present during questioning. Writing for the majority, Justice Ginsburg first rejected Powell's argument that the Court did not have jurisdiction to hear the case, finding that the Florida Supreme Court's opinion rested primarily on federal constitutional precedent. The majority held that *Miranda* requires only that law enforcement clearly inform suspects of their rights. Although in the instant case, reasoned Justice Ginsburg, the Tampa Police Department's written warnings—informing a suspect that he has the right to an attorney before questioning and a right to consult a lawyer at any time—may have been less than ideal, they nevertheless reasonably informed Powell of his right to have an attorney present.

In a dissenting opinion, Justice Stevens first accepted Powell's argument that under the adequate and independent state grounds doctrine, the Court did not have jurisdiction to overturn the Florida Supreme Court's opinion. In part II of his dissent, joined by Justice Breyer, Justice Stevens stated that he would have found the *Miranda* warnings in this case to be inadequate because they led the suspect to believe that he could only have an attorney present before, and not during, questioning.

MARYLAND V. SHATZER

130 S. Ct. 1213 | Decided February 24, 2010
By Jake Tracer ('12)

In a majority opinion written by Justice Scalia, the Court established new limits to the protections offered by *Edwards v. Arizona*, a 1981 case that created a presumption that *Miranda* waivers obtained after a suspect requests

an attorney are invalid because of the risk the waiver was produced by coercion. Once the suspect has been released from police custody, according to the Court's new ruling, a 14-day limit on the *Edwards* presumption begins, after which the police are free to re-interrogate.

While in prison for an unrelated offense, Shatzer was questioned in 2003 for sexual child abuse, but the investigation was closed shortly after he requested an attorney. He was released back into the general prison population but was questioned again two and a half years later, at which point he signed a *Miranda* waiver, made inculpatory statements, and was prosecuted. The Maryland Court of Appeals reversed Shatzer's conviction, holding that Shatzer's confession should be dismissed because *Edwards* protected it, and that even if *Edwards* contained an exception for breaks in custody, Shatzer's release into prison did not constitute such a break.

In an opinion written by Justice Scalia, the majority applied a cost-benefit analysis to determine the boundaries of the *Edwards* presumption; as a judicial rule—as opposed to a constitutional right—*Edwards* only applies when its benefits outweigh its costs. The *Edwards* presumption, reasoned the majority, conserves judicial resources and preserves the integrity of a suspect's choice, but, most important, it prevents police from using the isolation of interrogation practices to intimidate a suspect. The Court found that allowing the *Edwards* presumption to carry too far beyond the release of custody would prevent the use of legitimate, voluntary confessions and would deter police from trying to obtain them, at which point the policy's costs would outweigh its benefits. Deciding that law enforcement officials need a bright-line rule around which to organize their investigations, the Court assigned a 14-day window for which *Edwards* will apply after a suspect is released from custody. According to the Court, two weeks is "plenty of time" for a suspect to return to normal life, consult with friends and counsel, and for the coercive effects of police custody to wear off.

The Court next considered whether Shatzer's release into the general prison population constituted a break in custody that would begin his 14-day *Edwards* window. Because Shatzer was not alone with his accusers, because his daily routine consisted of his life in prison, and because his detention was not related to his invocation of his *Miranda* rights, the majority found Shatzer's release back into prison population to be a break in custody. As such, found the Court, *Edwards* no longer applied and his inculpatory statements could be used at trial.

Miranda waivers obtained 14 or more days after a suspect requests an attorney are presumptively valid and police are then free to re-interrogate.

Justice Thomas concurred in the judgment, but argued that the 14-day time limit was both arbitrary and unnecessary; he would not have found the *Edwards* presumption to extend even 14 days after custodial release.

Justice Stevens also filed a concurrence objecting to the majority's 14-day rule, but on different grounds. Concerned that the majority's holding will allow police to re-interrogate suspects without providing them with requested lawyers simply by waiting two weeks, Justice Stevens advocated for setting the end of a suspect's *Edwards* protection at the moment police provide the promised counsel. Additionally, Justice Stevens argued that suspects in prison are unlikely to be able to take advantage of the two-week window because their lives are scheduled and guards, whom many prisoners associate with the police, can intimidate them.

THE CENTER IN THE NEWS

The new health care legislation "will reduce crime while simultaneously saving money" by "requir[ing] basic benefit insurance packages to cover substance abuse and mental health treatment, effectively making treatment a standard service."

Faculty Director Rachel E. Barkow and Attorney-in-Residence David B. Edwards ('08) in Forbes.com.
http://www.forbes.com/2010/06/22/health-care-crime-drugs-opinions-contributors-rachel-barkow-david-edwards.html

RENICO V. LETT
130 S. Ct. 1855 | Decided May 3, 2010
By Jake Tracer ('12)

Holding that the Michigan Supreme Court had reasonably applied federal law in denying respondent Lett's double jeopardy claim, the Court rejected Lett's request for a federal writ of habeas corpus. In a 6-3 majority opinion written by Chief Justice Roberts, the Court concluded that the Sixth Circuit had "misapplied" the standard of review on federal habeas writs as delineated by the Antiterrorism and Effective Death Penalty Act of 1996, which allows a federal court to grant a writ of habeas corpus only when the state court's decision amounts to "an unreasonable application of… clearly established Federal law." The Court found that the Act's deferential standard of review as applied to Lett's claim precluded a federal court from questioning the state trial judge's declaration of a mistrial.

Lett's original trial for first-degree murder lasted just nine hours. After the jury spent about four hours deliberating without reaching a verdict, the judge declared a mistrial and scheduled a new trial date. Lett's second trial resulted in a conviction for second-degree murder. Lett appealed, arguing that because the trial judge erroneously declared a mistrial without "manifest necessity" as required by *United States v. Perez*, his second trial was in violation of the Double Jeopardy Clause. The Michigan Court of Appeals reversed Lett's conviction, but the Michigan Supreme Court found the trial judge had exercised appropriate discretion.

Lett then filed his federal habeas claim. Both the district court and the Sixth Circuit found for Lett. The Supreme Court reversed, holding that the Michigan Supreme Court had correctly applied federal law. The majority reasoned that under *Arizona v. Washington*, the "manifest necessity" standard created by *Perez* requires that an appellate court grant great deference to the trial judge who is in the best position to determine whether a jury is truly deadlocked. Because trial judges do not have to explain such decisions, it was reasonable for the Michigan Supreme Court to conclude that in this case, the trial judge exercised sound discretion.

Justice Stevens, joined by Justices Breyer and Sotomayor, dissented, arguing that the trial judge made several errors in determining that the jury was deadlocked that reflected her failure to exercise the requisite "sound discretion." Because his first trial was terminated without "adequate justification," reasoned the dissent, Lett's second trial violated his constitutional rights under the Double Jeopardy Clause.

3. SIXTH AMENDMENT

BERGHUIS V. SMITH
130 S. Ct. 1382 | Decided March 30, 2010
By Jake Tracer ('12)

In a unanimous opinion written by Justice Ginsburg, the Court reversed the Sixth Circuit Court of Appeals, concluding that it had erred when it held that Smith's convicting jury did not represent a fair cross section of his community. Smith had filed a federal habeas petition after the Michigan Supreme Court found that his evidence did not show that African Americans were systematically excluded from juries in Kent County, Michigan. Under the Antiterrorism and Effective Death Penalty Act of

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"When any industry, company, or entity fails to police itself, it risks forfeiting control to outside authorities. Here, by abdicating this responsibility, baseball created a void that was filled first by Congress and now by criminal prosecutors."

Executive Director Anthony S. Barkow arguing in *Newsday* that Major League Baseball is equally at fault as former pitcher Roger Clemens for the sport reaching the point that Clemens was indicted for lying to Congress.
http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website__news__media/documents/documents/ecm_pro_066823.pdf.

1996, habeas relief could only be sustained if the Michigan Supreme Court had issued an opinion contrary to "clearly established Federal law."

Smith, an African American convicted by an all-white jury of second-degree murder, objected to the method by which jury members were assigned in Kent County. At the time of Smith's trial, the County assigned prospective jurors to district courts first; the remaining people were then sent to the countywide Circuit Court where felony cases were tried.

Under *Duren v. Missouri*, Smith had to show that a "distinctive" group was underrepresented in jury venires and that the underrepresentation was caused by "systematic exclusion" in the jury-selection process. The Michigan Supreme Court considered three tests for determining underrepresentation, but the Sixth Circuit held that the comparative disparity test—the test finding that African Americans in Kent County were 18 percent less likely to be on the jury-service list—should always be used to measure underrepresentation when the group is a small fraction of the population. The Sixth Circuit also reversed the Michigan Supreme Court's determination that the underrepresentation was not caused by the order by which jurors were assigned to courts.

The Court found the Sixth Circuit to have erred because *Duren* did not require the use of a single test to determine underrepresentation and because Smith did not prove that the assignment order had a significant effect on the number of African Americans in his jury pool. Thus, the Michigan Supreme Court's opinion was not contrary to any "clearly established" law previously created by the Supreme Court.

PADILLA V. KENTUCKY

130 S. Ct. 1473 | Decided March 31, 2010
By Rebecca A. Welsh ('12)

Writing for the majority, Justice Stevens, joined by Justices Breyer, Kennedy, Ginsburg, and Sotomayor, reversed the Kentucky Supreme Court's decision and held that the Sixth Amendment's effective-assistance-of-counsel guarantee requires a defendant's lawyer to inform him of the risks of deportation involved in a plea and, thus, that petitioner Jose Padilla had sufficiently alleged his claim. The Court did not reach the issue of whether Padilla is entitled to relief, but remanded the case to state court to determine if the petitioner has been prejudiced as a result of ineffective counsel.

Padilla had been living in the United States for 40 years prior to pleading guilty to transporting a large quantity of marijuana. Padilla maintained that his counsel failed to inform him of the deportation risks associated with the plea and in fact had assured him that because of the duration of his residence in the United States, he would not be deported. Padilla claimed that had he known of the risks, he would have chosen to go to trial. Denying relief, the Kentucky Supreme Court held that the Sixth Amendment right to effective counsel does not include protection against erroneous deportation advice that is merely a "collateral" result of the conviction.

The Sixth Amendment's effective-assistance-of-counsel guarantee requires a defendant's lawyer to inform him of the risks of deportation involved in a plea.

Justice Stevens reasoned that changes in immigration law, such as the inevitability of deportation for a "vast number" of convicted immigrants, as well as the decreasing discretion of judges in this arena, necessitate viewing the risk of deportation as a central aspect of the penalty for noncitizens convicted of crimes. In finding for Padilla, Justice Stevens applied *Strickland v. Washington*. He reasoned that Strickland's guarantee of "reasonable professional assistance" does not rest on a distinction between direct and collateral consequences. Moreover, he found that because deportation's unique tie to the criminal process blurs the line between direct and collateral consequences, the appropriateness of such a distinction need not be decided in Padilla's case.

Pointing to evidence of professional norms in favor of counseling clients about the risk of deportation, the clarity of the deportation risk associated with a guilty plea in Padilla's case, and the plainly erroneous nature of counsel's advice, Justice Stevens found that Padilla's claim satisfied the first prong of the *Strickland* test and that his counsel's assistance fell "below an objective standard of reasonableness." Justice Stevens remanded the case to state court for a determination as to *Strickland*'s second prong: whether there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Concurring in the decision, Justice Alito, joined by Chief Justice Roberts, agreed that providing incorrect

advice or misleading a client constitutes ineffective assistance of counsel under *Strickland*. However, the concurrence would have held that counsel's duty extends only so far as not to provide misinformation and to inform the client of possible adverse immigration consequences. Justice Alito further argued that to require counsel to advise about specific possible adverse immigration effects only in cases where such immigration consequences are clear would create uncertainty and would lead to unnecessary litigation.

Justice Scalia, joined by Justice Thomas, dissented. Justice Scalia, like Justice Alito, argued the impracticality of requiring defense attorneys to provide immigration advice. Furthermore, the dissent argued that the Sixth Amendment's guarantee of effective assistance of counsel extends only to the defense against criminal prosecution; it does not go so far as to demand that attorneys inform their clients of the adverse collateral effects of convictions—a guarantee best left to statutory provisions.

SMITH V. SPISAK

130 S. Ct. 676 | Decided January 12, 2010

By Jake Tracer ('12)

In a majority opinion written by Justice Breyer, the Court rejected two federal habeas claims, reversing the Sixth Circuit and reinstating Spisak's capital sentence. Respondent Spisak argued that two constitutional errors prevented him from receiving life imprisonment for the three murders and two attempted murders he was convicted of committing. First, he claimed the jury instructions during the penalty phase of his trial erroneously directed jurors to consider factors in mitigation only if they unanimously approved of them. Second, he claimed that his counsel's closing argument during the penalty phase was inadequate.

The Court evaluated Spisak's first claim based on the standard set out in *Mills v. Maryland* that held that each juror must have the opportunity to consider each mitigating circumstance in a capital case. The jury instructions found faulty in *Mills* required the jury to decide on each mitigating circumstance unanimously and then only to consider those mitigating factors when comparing them to the aggravating factors for sentencing purposes. However, the Court noted that the jury instructions in Spisak's trial only required unanimity in the decision that the aggravating factors outweigh the mitigating factors. The instructions offered no guidance as to how to determine which mitigating factors to consider, leaving open the possibility that they need not be unanimous. As such, according to the Court, the instructions in Spisak's trial did not suffer from the same constitutional error as those in *Mills*.

The Court assessed Spisak's second claim—that his counsel's closing argument during the penalty phase of his trial was so inadequate that it violated the Sixth Amendment—under *Strickland v. Washington,* which required Spisak to show both that his lawyer was objectively unreasonable and that the outcome would have been different had a reasonable closing argument been made. The Court only considered the second prong of the test, finding that even if there was an error, it did not affect the outcome of the jury's decision for three reasons. First, the sentencing phase of the trial took place immediately after the guilt phase, making the details of Spisak's crimes fresh in the jurors' minds. Second, testimony of Spisak's mental illness was also fresh in the jurors' minds, thereby minimizing the damage incurred when Spisak's counsel did not bring it up in his closing. Third, Spisak's attorney did attempt to appeal to the jurors' mercy and humanity.

Justice Stevens filed an opinion concurring in part and in the judgment. He argued that both of the errors that Spisak alleged did occur but that neither swung the jury, thus making them harmless.

WOOD V. ALLEN

130 S. Ct. 841 | Decided January 20, 2010

By Rebecca A. Welsh ('12)

Writing for a 7-2 majority, Justice Sotomayor held that counsel's decision not to introduce evidence of petitioner Wood's mental impairments did not amount to ineffective assistance of counsel. The Court denied habeas relief to Wood, who was sentenced to death in Alabama for the murder of his ex-girlfriend, but left unanswered the question of how to interpret the two provisions of the Antiterrorism and Effective Death Penalty Act ("the Act") that govern challenges to state court findings.

The first relevant subsection of the Act provides that a federal court may grant relief if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The second provision states

that "a determination of a factual issue made by a state court shall be presumed to be correct" unless the habeas petitioner can, by clear and convincing evidence, rebut such a presumption. Justice Sotomayor did not address which provision would govern or how the two provisions should be reconciled. The majority held that Wood's claim would fail under any construction of the statute; even if the first provision alone would apply, the state court's determination that Wood's attorneys' decision had been strategic rather than ineffective was not "unreasonable."

Justice Stevens, joined by Justice Kennedy, dissented, arguing that the attorneys' decision in this case was not strategic in the real sense of the word. The decision, they asserted, was clumsy and neglectful, as opposed to "a conscious choice between two legitimate and rational alternatives."

4. STATUTORY INTERPRETATION

BARBER V. THOMAS
130 S. Ct. 2499 | Decided June 7, 2010
By Rebecca A. Welsh ('12)

In a 6-to-3 decision, the Court upheld the Bureau of Prisons' method for calculating good time credit. Justice Breyer, writing for a majority joined by Chief Justice Roberts, Justices Alito, Scalia, Sotomayor and Thomas, denied Barber's argument that the Bureau of Prisons should have calculated his good time credit on the basis of the sentence imposed rather than on the time actually served in prison. The majority, affirming the Ninth Circuit's decision below, reasoned that the Bureau's method for calculating good time credit reflected both the purpose and the language of the statute. Justice Breyer held that the Bureau's reading of "term of imprisonment" to mean time served gives the statute its most natural reading. Justice Breyer found that to accept petitioner's interpretation would contravene Congress's explicit goal of awarding good beh avior at the end of each year for that year's behavior. Such an interpretation, reasoned Justice Breyer, would also contradict the Sentencing Reform Act, whose stated intention was to reward inmates' good behavior exhibited during the time actually served.

Justice Kennedy, joined by Justices Ginsburg and Stevens, dissented. The dissent would have accepted neither the petitioner's interpretation nor the Bureau's. Instead, it would have read "term of imprisonment" to mean "the span of time that a prisoner must account for in order to obtain release." Effectively, such a reading would lead to the same result as accepting petitioner's interpretation. Good time credits would be awarded annually to shorten the *next year* of a prisoner's sentence. Justice Kennedy asserted that such a reading could be applied uniformly throughout the statute and added that the majority's approach would inflict "tens of thousands of years of additional prison time on federal prisoners according to a mathematical formula they will be unable to understand."

THE CENTER IN THE NEWS

"[L]ife without parole sentences fail to accomplish two of the core purposes of criminal punishment: they neither deter nor do they allow for the possibility of rehabilitation. Moreover, life without parole sentences for juveniles fail to account for the fact that offenders typically commit fewer crimes as they age. Thus, life without parole sentences for juveniles can be extremely costly, but without achieving commensurate benefits."

Executive Director Anthony S. Barkow's testimony submitted to the Pennsylvania House of Representatives Judiciary Committee in support of legislation that would prohibit life without parole sentences for juvenile offenders.
http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__centers__center_on_administration_of_criminal_law/documents/documents/ecm_pro_066627.pdf

BLOATE V. UNITED STATES
130 S. Ct. 1345 | Decided March 8, 2010
By Rebecca A. Welsh ('12)

In an opinion written by Justice Thomas, the majority held that time granted to prepare pretrial motions is not automatically excludable from time calculated for purposes of the Speedy Trial Act. Under the Act, a defendant's trial must begin within 70 days of his arraignment or indictment, whichever occurs later. Applying traditional canons of statutory interpretation, the Court held that time may only be excluded from the Speedy Trial Act calculation if, upon review, a district court grants a continuance and determines that the time taken to prepare the pretrial motions is in the interest of justice. The Act states that delay resulting from proceedings concerning the defendant from the "filing of the motion to the conclusion of the hearing upon, or other prompt disposition of, such motion" is automatically excludable. The majority reasoned that according to the text of the Act, time taken to prepare pretrial motions—as in the case with Bloate—is not automatically excludable.

Justice Ginsburg concurred in the judgment. Justice Alito, joined by Justice Breyer, filed a dissent. The dissent argued that the decision ran contrary to the text and legislative history of the statute and might lead to a dismissal for Bloate based only upon the fact that his attorney had successfully petitioned a judge to grant him more time to prepare pretrial motions. Furthermore, Justice Alito reasoned, it was pointless to require district court judges to make an "ends of justice" finding, since they will always exclude from Speedy Trial calculations delay resulting from defendants' own motions.

CARACHURI-ROSENDO V. HOLDER; ESCOBAR V. HOLDER
130 S. Ct. 2577 | Decided June 14, 2010
By Rebecca A. Welsh ('12)

Carachuri-Rosendo, a lawful permanent resident, was convicted of a second drug offense in Texas for possessing a single tablet of Xanax, an anti-anxiety medication, without a prescription. Carachuri-Rosendo's first offense had been for possession of less than two ounces of marijuana. Although the second offense was a misdemeanor under Texas law, federal authorities argued in removal proceedings that it was an aggravated felony under federal law and thus that Carachuri-Rosendo faced mandatory deportation. Justice Stevens, writing for the majority, held that Carachuri-Rosendo's second offense was a minor one that does not fall within the normally understood meaning of "aggravated felony." Moreover, reasoned the majority, the text of the Immigration and Nationality Act makes it clear that the starting point of any deportation under the Act is the conviction for an aggravated felony; Carachuri-Rosendo was never in fact convicted of such a felony. Justice Stevens also pointed to the importance of following federal courts' procedural requirements that provide defendants with the opportunity to challenge a prior conviction before being sentenced based on a recidivist enhancement. Finally, the court argued that it was extremely unlikely that, in practice, Carachuri-Rosendo would ever have been charged with a felony for his offense in federal court. Justice Stevens held that aliens facing mandatory removal under similar circumstances may now seek cancellation of removal proceedings, a relief mechanism within the discretion of the attorney general.

THE CENTER IN THE NEWS

"When crime goes up, so should the number of cops on the beat. The police know it. Politicians know it. Even criminals know it. Yet, in the middle of the worst financial crisis since the Great Depression, the Senate is debating whether to put fewer cops on the beat to police fraud in the mortgage and banking industry."

Senior Fellow Anne Milgram ('96) and Faculty Director Rachel E. Barkow arguing in *Politico* in favor of a role for state attorneys general in policing fraud in the mortgage and banking industries, and against federal preemption of state regulation in this area.
http://www.politico.com/news/stories/0510/37148.html

Justices Scalia and Thomas filed separate concurring opinions. Justice Scalia argued that although recidivism can be used as a factor in sentencing, a conviction for a state misdemeanor is not the equivalent of a conviction for an aggravated felony simply because recidivism could have been used to extend the initial sentence. In his dissent, Justice Thomas laid out two factors that must be satisfied in order for an alien to face mandatory deportation for a drug crime: not only must the offense be "capable of punishment under the Controlled Substances Act," but it must also be a felony. The second requirement, according to Justice Thomas, was not satisfied in this case.

CARR V. UNITED STATES

130 S. Ct. 2229 | Decided June 1, 2010

By Rebecca A. Welsh ('12)

Reversing the Seventh Circuit Court of Appeals, the Supreme Court held that the Sex Offender Registration and Notification Act (SORNA), which mandates punishment for sex offenders who travel "in interstate or foreign commerce" and "knowingly" fail to register or update their registration as offenders only applies to travel that postdates its enactment. Petitioner Carr challenged his conviction for violating SORNA, arguing that the Act did not apply to him because the travel at issue took place before the passage of the Act. Justice Sotomayor, writing for a majority joined by Justices Stevens, Breyer, Kennedy, and Chief Justice Roberts, rejected the government's argument that SORNA applies so long as the failure to register, as opposed to the act of traveling, occurred after the passage of the Act. In order for the Act to be applicable, reasoned the majority, the offender must first be legally obligated to register under SORNA; since no sex offender was required to register before the Act was passed, travel that occurred before its enactment cannot subject an offender to liability. Relying on the text of the Act—and, in particular, on the word "travels"—the Court found that the "undeviating use of the present tense [was] a striking indicator of its prospective orientation." In determining that the provision of SORNA at issue only applies to post-enactment travel, the Court determined that the overarching goals of the Act would not be frustrated.

Justice Scalia filed a concurring opinion disagreeing with the majority's use of legislative history. Justice Alito, joined by Justices Ginsburg and Thomas, dissented from the opinion arguing that it would treat sex offenders who traveled before the passage of the Act—and whose very travel motivated the passage of SORNA in the first place—differently from those who travel post-enactment. The dissent also found the majority's reliance on the use of the present tense to be unpersuasive.

DOLAN V. UNITED STATES

130 S. Ct. 2533 | Decided June 14, 2010

By Rebecca A. Welsh ('12)

After pleading guilty to assault, Brian Russell Dolan was ordered by a New Mexico district court to pay his victim $250 per month. Because the court determined the amount of restitution outside of the ninety-day deadline specified by the Mandatory Victims Restitution Act of 1996 ("MVRA"), petitioner Dolan argued that it had exceeded its authority. In a 5-4 decision written by Justice Breyer, the Court upheld the lower court's order, reasoning that the court had acted within its authority because it had determined within the deadline that it would order some restitution and all that remained to be determined after the ninety-day period had passed was the specific dollar amount.

Justice Breyer, joined by Justices Alito, Ginsburg, Sotomayor and Thomas, found that the type of deadline specified by the MVRA is neither a "jurisdictional" restriction (a rule that forbids a specific action after the deadline has passed) nor a "claims processing" rule (a limitation that specifies when motions or claims can be filed). Reasoning that the statute was intended to benefit victims and pointing to the fact that it specified no sanction for missing the deadline, the Court held that the ninety-day restitution deadline is a "time-related directive" that permits judges to take action outside of the mandated deadline. The Court left open the question of whether an award of restitution with an undetermined amount was a final decision for the purposes of an appeal.

Chief Justice Roberts dissented, joined by Justices Kennedy, Scalia, and Stevens, arguing that the MVRA was only a small exception to the overarching rule that an imposed sentence is final. When a judge acts outside of the narrow exception specified by the Act, the dissent reasoned, the court has exceeded its authority.

HOLDER V. HUMANITARIAN LAW PROJECT

130 S. Ct. 2705 | Decided June 21, 2010

By Rebecca A. Welsh ('12)

Writing for a six-Justice majority, Chief Justice Roberts rejected plaintiffs' claim that the federal material support statute, 18 U.S.C. § 2339B, prohibiting the provision of material support to designated foreign terrorist organizations, was unconstitutionally vague under the Fifth Amendment and impinged upon First Amendment rights of free speech and association. Chief Justice Roberts, joined by Justices Alito, Kennedy, Scalia, Stevens, and Thomas, held that the government may ban speech and other types of advocacy for an officially designated terrorist organization, even if the advocacy was directed toward the group's peaceable or humanitarian actions. All nine Justices agreed that the statute was not unconstitutionally vague.

The plaintiffs sought to provide support to groups designated as terrorist organizations by the U.S. government, claiming that their support was directed only toward the groups' nonviolent and humanitarian activities, such as training members to use the law for dispute resolution and to appeal to government entities for aid. On remand, the district court granted partial summary judgment for the plaintiffs on vagueness grounds; the Ninth Circuit affirmed.

As applied, the federal statute prohibiting the provision of material support to designated foreign terrorist organizations is not unconstitutionally vague and does not impinge upon First Amendment rights of free speech and association.

The majority held that the statute did not contravene the First Amendment's protection of free speech and association as applied to the plaintiffs, reasoning that the statute does not prohibit independent advocacy or punish mere association, and that the government had a sufficient interest in banning seemingly harmless support because it can be used to further a group's terrorist activities.

Chief Justice Roberts stressed the opinion's narrow holding, emphasizing that independent advocacy is still permissible and thus "any activities not directed to, coordinated with, or controlled by foreign terrorist groups" will not be subject to criminal prosecution. Similarly, Chief Justice Roberts explained, speech cannot be punished under the law unless it falls into "a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations." Finally, the majority reasoned that because the executive and legislative branches are best positioned to make determinations as to what is needed to protect the country from terrorism and what constitutes conduct that furthers terrorist aims, courts should defer to their findings.

Justice Breyer, joined by Justices Ginsburg and Sotomayor, filed a strong dissent that he read from the bench. Though agreeing that the statute was not unconstitutionally vague, Justice Breyer argued that the majority's holding was far from narrow and that by finding prosecutable any conduct done "in coordination with" a terrorist group, the majority created a slippery slope. He also criticized the Court's acceptance of the government's argument that the conduct at issue furthers these groups' violent aims and asserted that the government had not met its burden of proof of demonstrating that the statute served a compelling government interest.

JOHNSON V. UNITED STATES

130 S. Ct. 1265 | Decided March 2, 2010

By Rebecca A. Welsh ('12)

Johnson was convicted in Florida State Court of possession of ammunition by a convicted felon and was sentenced under the Armed Career Criminal Act (ACCA). On appeal, Johnson argued that his prior battery conviction did not constitute a violent felony according to a Florida Supreme Court ruling. The Eleventh Circuit rejected Johnson's argument and held that the state law's definition of battery that included "touching or striking" satisfied the element of force required for a crime to be a violent felony under the ACCA.

Writing for the majority, Justice Scalia first found that the definition of "violent felony" under the ACCA was a question of federal law and that therefore the Court was not bound by the Florida court's interpretation of its state statute. Justice Scalia agreed that according to the Florida court, the state's battery statute did not constitute a "violent felony" under the ACCA. Pointing to the dictionary definitions of the word "force" as well as to the context of the ACCA, the Court held that the state offense of battery, interpreted by the Florida court to be satisfied by touching, "no matter how slight," does not necessarily rise to the level of violent, physical force required by the ACCA.

Justice Alito, joined by Justice Thomas, filed a dissenting opinion arguing that the definition of battery fits well within the meaning of "violent felony" under the ACCA and that the Court's holding would limit the effectiveness and applicability of the ACCA. Justice Alito reasoned that the absence of any language in the text of the Act limiting the word "force" demonstrates that Congress intended the ACCA to apply to Florida's felony battery statute. Further, reasoned the dissent, because felonies not generally considered to be violent can nonetheless result in violence, the term "violent felony" should be given a broader meaning under the Act.

MAGWOOD V. PATTERSON

130 S. Ct. 2788 | Decided June 24, 2010
By Rebecca A. Welsh ('12)

Petitioner Magwood was convicted of murder and sentenced to death by an Alabama court. In response to a habeas claim, the district court instructed the trial court to consider mitigating evidence when resentencing. After being sentenced again to death, Magwood filed a second habeas petition. The Court limited its review of Magwood's claim to the following question: when a defendant is resentenced after having obtained habeas relief from a prior sentence, is a subsequent habeas petition challenging the new sentencing judgment barred as a "second successive" application under 28 U.S.C. § 2244?

Writing for a majority joined in full by Justice Scalia and in large part by Justices Breyer, Sotomayor and Stevens, Justice Thomas found that Magwood's subsequent claim was not so barred. The majority held that once a prisoner obtains habeas relief and receives a new sentence, the filing of a subsequent habeas petition challenging the new sentence is not a "successive claim" even if that challenge could have been raised in response to the first judgment. Looking to the text of the Antiterrorism and Effective Death Penalty Act, the Court determined that the phrase "second or successive" applied only to the (original) judgment challenged. Thus, a claim challenging a subsequent judgment was not barred under 28 U.S.C. § 2244.

Justice Breyer, joined by Justices Sotomayor and Stevens, concurred in the judgment. Justice Breyer distinguished the *Magwood* holding from the Court's holding in *Panetti v. Quarterman* that involved an already challenged state court judgment. *Magwood*, he reasoned, concerned a subsequent state court judgment that had not yet been subject to a habeas challenge. Justice Kennedy, joined by Justices Alito, Ginsburg and Chief Justice Roberts, filed a dissent arguing that a claim should be barred when the petitioner had the opportunity to raise the same challenge in response to a prior judgment and failed to do so.

UNITED STATES V. COMSTOCK

130 S. Ct. 1949 | Decided May 17, 2010
By Rebecca A. Welsh ('12)

Reversing the lower courts' decisions, Justice Breyer, writing for a seven-Justice majority, held that under the Necessary and Proper Clause of Article I of the Constitution, Congress was authorized to enact 18 U.S.C. § 4248—a federal civil-commitment statute granting the Department of Justice power to detain indefinitely a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released.

In upholding the constitutionality of the statute, the majority applied a five-factor test. It reasoned that the Necessary and Proper Clause confers upon Congress the power to enact such a statute. Relying on the broad authority granted by the Clause, Justice Breyer explained that such an act is "rationally related" to Congressional power to create and enforce criminal statutes that further its enumerated powers. For example, Congress can take steps to protect citizens who might be affected by a federal prisoner's release, such as those living in the communities around federal prisons. Furthermore, Congress has long been charged with overseeing mental health care provided to prisoners, reasoned Justice Breyer, and § 4248 mirrors an earlier statute similarly authorizing civil commitment for former inmates deemed to be mentally ill who continue to pose a threat to society.

The Necessary and Proper Clause authorizes Congress to grant the Department of Justice the power to detain indefinitely a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released.

Justice Breyer also found that the statute does not violate the Tenth Amendment. He reasoned that the statute does not infringe upon states' sovereignty because (1) powers granted to Congress by the Necessary and Proper Clause are not reserved to the states, (2) the statute enables states to take control of former inmates'

care through the Attorney General, and (3) the statute is limited in scope, applicable only to a narrow group of prisoners. The majority left open the question of whether the statute violates the Due Process Clause or any other constitutional rights.

Justices Kennedy and Alito wrote separate concurrences. Justice Kennedy was unpersuaded by the Court's broad construction of the Necessary and Proper Clause and urged a more stringent reading of the "rational relationship" at issue in this case as compared to the "rational basis" test used in the due process context. Both Justices Kennedy and Alito agreed that in the instant case, the Necessary and Proper Clause did grant Congress the authority to pass an act sufficiently related to its enumerated powers.

In a dissent joined in part by Justice Scalia, Justice Thomas criticized the majority's five-factor test as arbitrary and argued that the enactment of the statute exceeded Congressional power under the Necessary and Proper Clause.

5. APPEALS AND COLLATERAL ATTACKS

BEARD V. KINDLER

130 S. Ct. 612 | Decided December 8, 2009
By Jake Tracer ('12)

In a unanimous opinion written by Chief Justice Roberts, the Court held that discretionary state procedural rules are not automatically inadequate under the adequate state law doctrine prohibiting a federal court from considering a writ of habeas corpus. Under *Coleman v. Thompson*, the adequate state law doctrine requires federal courts to reject a habeas claim rejected by state courts when the state court's decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." The Court found that no inherent factors in discretionary rules make them conflict with the principles of *Coleman*.

Respondent Kindler was convicted of first-degree murder in 1984 and the jury recommended capital punishment. Kindler filed postverdict motions, but before the court could consider them, he escaped and fled to Canada. The court dismissed the motions, and when Kindler was caught and extradited back to the United States in 1991, a new trial court refused to consider the motions' merits. Kindler appealed, and the Pennsylvania Supreme Court affirmed finding that dismissing the motions under the state's fugitive forfeiture rule did not amount to an abuse of discretion. Kindler filed a federal habeas claim and the Third Circuit considered the merits of his complaints, holding that a state procedural rule must be "consistently applied" in order to be an adequate state ground and that Pennsylvania's discretionary rule thus did not qualify.

The Court disagreed, in large part because such a holding would put states in an impossible bind wherein they would have to choose between preserving either the flexibility or finality of their judgments. Chief Justice Roberts argued that most states would choose finality to avoid the additional costs of federal review thereby limiting the valuable discretion of trial judges. Just as federal judges have broad discretion, reasoned the Court, so too should their state counterparts.

Because the question presented was limited to the issue of discretionary state procedures, the Court did not go further in its ruling. However, Justice Kennedy filed a separate concurring opinion joined by Justice Thomas expanding on the policy implications involved in the case. Justice Kennedy argued that new state procedures could be exempted from the adequate state law doctrine to allow for good-faith efforts to comply, but such a policy did not affect Kindler's claim; in no way does escaping and fleeing the country reflect a good-faith effort to comply with anything. Instead, Kindler's case reflects the need to allow state procedural rules to develop as case law does, so that clear cases can be decided correctly even if the applicable rule is not yet explicitly articulated.

HOLLAND V. FLORIDA

130 S. Ct. 2549 | Decided June 14, 2010
By Jake Tracer ('12)

In a 7-2 decision written by Justice Breyer, the Court held that the one-year statute of limitations in the federal habeas corpus statute is subject to equitable tolling and that the Eleventh Circuit's *per se* standard for determining when attorney misconduct can trigger such tolling was "too rigid."

To receive equitable tolling of a statute of limitations, a petitioner must show that he exercised due diligence in pursuing his rights and that extraordinary circumstances prevented him from meeting the deadline. Reasoning that courts of equity must remain flexible in considering the facts of a specific case, the majority rejected the Eleventh Circuit's general rule as too rigid and sided

with other district courts around the country that have found unprofessional attorney conduct to be extraordinary circumstances even when not negligent. Also finding that the district court erred in holding that Holland was insufficiently diligent, the Court remanded the case so the Eleventh Circuit could reconsider whether Holland's attorney created the requisite extraordinary circumstances.

Justice Alito filed a concurring opinion arguing for a clearer standard by which attorney misconduct can be considered extraordinary circumstances. He would hold that negligence alone should not be enough, nor should gross negligence since the line between them is difficult to draw. The test, according to Justice Alito, should be whether the attorney's misconduct can be attributable to the client; in this case, since Holland's lawyer did not follow his specific requests, Justice Alito found their agency relationship to be broken.

Justice Scalia filed a dissent, arguing that federal habeas law should not allow equitable tolling of its statute of limitations because Congress already set out specific tolling provisions and did not mention equitable tolling. Further, according to Justice Scalia, Holland should not be eligible for equitable tolling even if it were allowed; since there is no constitutional right to counsel for habeas proceedings and Holland's lawyer's actions could be characterized as simple negligence, Justice Scalia would have held that the lawyer's actions could be attributable to Holland. Justice Thomas joined Justice Scalia on this point only.

UNITED STATES V. MARCUS

130 S. Ct. 2159 | Decided May 24, 2010
By Jake Tracer ('12)

Respondent Marcus was convicted for acts of forced labor and sex trafficking committed between January 1999 and October 2001. The statute that criminalized his conduct, however—the Trafficking Victims Protection Act of 2000—did not take effect until October 2000. Marcus did not raise the issue during his trial but did so on appeal to the Second Circuit. Under Federal Rule of Criminal Procedure 52(b), an appeals court can consider an issue not raised at trial only if there was "plain error" affecting the defendant's "substantial rights." The Second Circuit reversed Marcus' conviction on this ground, finding that because there was a "possibility" that the jury found Marcus guilty solely for conduct that was not yet criminal, the conviction was unconstitutional.

The Court disagreed. In a majority opinion written by Justice Breyer and joined by Chief Justice Roberts and Justices Alito, Ginsburg, Kennedy, Scalia, and Thomas, the Court held that the Second Circuit's test violated two tenets of plain error review. First, the Court interpreted "substantial rights" to require there to be a reasonable probability the error affected the trial's outcome, a standard with which the Court found the Second Circuit's "possibility" standard cannot be reconciled. Second, the Court noted that while plain errors that affect a trial's fairness could be considered on appeal, errors that do not affect the jury's outcome do not cast doubt on a trial's fairness. Because the Second Circuit's "possibility" standard conflicts with this reasonable probability standard, the Court remanded Marcus' case to be reconsidered under the correct plain error standard of review.

Justice Stevens dissented, arguing primarily that the doctrine of substantial rights within plain error review has become needlessly complicated. While he disagreed with some of the Second Circuit's reasoning, he would have affirmed its judgment because the error allowed Marcus' jury to convict him based on an incorrect belief that lawful activity was in fact illegal. Justice Stevens reasoned that "it does not take an elaborate formula to see" that error affected a substantial right.

MCDANIEL V. BROWN

130 S. Ct. 665 | Decided January 11, 2010
By Jake Tracer ('12)

In a per curiam decision, the Court reversed the Ninth Circuit's grant of a writ of habeas corpus because the circuit court had misinterpreted and misapplied *Jackson v. Virginia*—a case that entitles a state prisoner to federal habeas relief if "no rational trier of fact" would have found the defendant guilty considering the evidence presented at trial. More than a decade after his conviction for sexual assault, Brown commissioned a report that questioned the prosecution's use of DNA evidence in his trial. Responding to his federal habeas petition, the district court excluded the state's DNA evidence and then applied *Jackson* in order to overturn Brown's conviction. The Ninth Circuit affirmed the district court's ruling.

Brown's expert report noted two errors in the prosecution's use of DNA evidence during trial. First, the state's expert witness committed the "prosecutor's fallacy" by equating the probability of a random DNA match between two people with the probability that the

defendant was not the source of the DNA sample. Second, the expert dramatically underestimated the likelihood that Brown's DNA matched that of his brother, who also could have committed the crime.

Reversing the Ninth Circuit's decision, the Court reasoned that any *Jackson* analysis must evaluate all the evidence that was before the trial court, not whether improper evidence was admitted. Thus under *Jackson*, argued the Court, Brown's conviction would be affirmed regardless of the existence of the new DNA report. Furthermore, found the Court, even if the Ninth Circuit had been allowed to consider the DNA report, Brown's conviction should still be affirmed because the report acknowledged that the DNA sample found at the crime scene matches Brown's, thus providing powerful inculpatory evidence that a jury could have properly used to convict. Additionally, argued the Court, while *Jackson* requires a reviewing court to consider all evidence "in the light most favorable to the prosecution," the Ninth Circuit failed to do so.

Justice Thomas filed a concurring opinion joined by Justice Scalia criticizing the Court's evaluation of the case under the assumption that the DNA report had been properly considered. Justice Thomas would have found that *Jackson* claims consider all the trial evidence and would have ended his analysis there.

6. SENTENCING

DILLON V. UNITED STATES

130 S. Ct. 2683 | Decided June 17, 2010
By Rebecca A. Welsh ('12)

Writing for a 7-1 majority, Justice Sotomayor held that retroactive changes to the U.S. Sentencing Guidelines are binding in sentence modification proceedings. She reasoned that the statute's text and narrow scope compel rejection of petitioner Dillon's argument that such proceedings are similar in nature to other sentencing proceedings and therefore deserve the same treatment under *United States v. Booker*. Instead, Justice Sotomayor found that § 3582(c)(2) permits only a narrow adjustment to a final sentence and thus the Commission's guidelines are mandatory in this setting. The majority further held that Congress explicitly gave the Commission full authority to determine the scope of sentence reductions, a fact made clear by the language of the statute that states that a court can only reduce sentences consistent with the Commission's relevant policy statements.

Percy Dillon was sentenced to 262 months in prison stemming from convictions relating to crack and powder cocaine. His sentence was the minimum amount required by the Sentencing Commission Guidelines then in place. The Commission subsequently reduced the sentences stipulated for the relevant offenses and Dillon moved under 18 U.S.C. § 3582(c)(2) for a sentence reduction according to the amended guidelines that were intended to have retroactive effect. Dillon moved not only for the two-level reduction allowed under the amended Guidelines, however, but also for an additional reduction based on good behavior in prison, contending that *Booker*'s holding that the Commission's Guidelines are not mandatory in normal sentencing proceedings permitted such discretionary re-sentencing. Holding that *Booker* does not apply to sentence modification proceedings under 18 U.S.C. § 3582(c)(2), the district court granted only the two-level reduction authorized under the amended Guidelines. The Third Circuit affirmed and the Supreme Court agreed.

In upholding the lower court's decision, Justice Sotomayor held that because Congress delegated to the Commission full authority to oversee resentencing proceedings—a conclusion supported by the Sentencing Reform Act in which Congress gave the Commission power to decide whether to amend the Guidelines and whether the amendments should have retroactive effect—*Booker*'s constitutional holding did not apply to proceedings under § 3582(c)(2). The Court found that whereas in *Booker* the Sixth Amendment right to a jury trial was directly implicated, in the instant case, the sentence modification proceedings in question are not compelled by the Constitution and do not implicate any constitutional rights. The Court likewise refused to extend *Booker*'s remedial finding that the Guidelines are advisory to the context of resentencing proceedings that are inherently more constrained and differ from the general sentencing provisions at issue in *Booker*.

In his dissent, Justice Stevens argued that the court should have extended *Booker*'s remedial holding to sentence modification proceedings. He reasoned that although Dillon did not have a constitutional right to such proceedings, because *Booker* did away with a "fixed, determinate sentencing regime based on mandatory Guidelines," its holding should be applicable to § 3582(c)(2) proceedings. Justice Stevens also argued that by vesting such absolute authority in the Sentencing Commission, the Court violated separation of powers and unlawfully delegated legislative power.

GRAHAM V. FLORIDA

130 S. Ct. 2011 | Decided May 17, 2010
By Rebecca A. Welsh ('12)

Writing for the majority, Justice Kennedy, joined by Justices Breyer, Ginsburg, Sotomayor, and Stevens, held that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits a juvenile from being sentenced to life in prison without parole (LWOP) for a nonhomicide crime. Petitioner Terrance Jamar Graham was sentenced by a Florida trial court to LWOP at the age of 17 after the court revoked his probation for an armed robbery he had committed at the age of 16. Because Florida had abolished its parole system, Graham's only chance for release was executive clemency. The Court of Appeals of Florida, First District, affirmed.

Applying the "categorical approach"—used in cases such as *Roper v. Simmons* (finding the death penalty unconstitutional for defendants sentenced for crimes committed before the age of 18) where characteristics, as opposed to crime types, are common among defendants—to its analysis of the Eighth Amendment, the majority first looked to societal standards as expressed in legislative enactments and state practice to determine whether a consensus had emerged against the sentencing scheme. The Court next applied its own "independent judgment" to determine whether application of a particular sentence to a categorical class of offenders violates the Eighth Amendment.

Juvenile life without parole sentences for nonhomicide offenses violate the Eight Amendment's Cruel and Unusual Punishments Clause.

Based on his survey of legislation and actual sentencing practices, Justice Kennedy found a national consensus against juvenile LWOP sentences for nonhomicide crimes. Further, he concluded that because juveniles are less culpable than adults, because such defendants' crimes are less morally reprehensible than homicide, and because none of the goals of penal law—i.e., retribution, deterrence, incapacitation, and rehabilitation—is furthered by the imposition of a life sentence for these defendants, juvenile LWOP sentences are disproportionate to the offense without legitimate purpose and therefore violate the Eighth Amendment's ban on cruel and unusual punishment. The majority did not guarantee release for this class of defendants; rather, it held that there must be "some meaningful opportunity" for juveniles sentenced to life for nonhomicides to obtain release before the end of their life terms.

Justice Thomas, joined by Justice Scalia and joined in part by Justice Alito, dissented on the grounds that the Court's categorical approach should be reserved exclusively for cases involving capital punishment. Pointing to the fact that federal law permits the practice, Justice Thomas argued that a national consensus against the imposition of LWOP sentences for juveniles does not exist.

Justice Alito, writing for himself, added a short dissent to note that the Court's opinion does not preclude the possibility of term-of-years sentences without parole for juvenile defendants who did not commit murder, so long as those sentences are not for life.

Chief Justice Roberts filed a separate concurrence. He would have avoided the creation of a new constitutional mandate. Instead, he would have relied on the Court's "narrow proportionality" framework for noncapital cases and its opinion in *Roper v. Simmons* to find that a defendant's juvenile status should play a central role in the sentencing analysis. According to Chief Justice Roberts, although Graham's sentence was unconstitutional, a sentence of LWOP should be a possibility for other juveniles who commit more atrocious, nonhomicide crimes.

UNITED STATES V. O'BRIEN

130 S. Ct. 2169 | Decided May 24, 2010
By Jake Tracer ('12)

In light of Congress's 1998 amendment to 18 U.S.C. § 924(c) prohibiting the use of a firearm while committing a violent or drug trafficking crime, the Court reconsidered whether the classification of the firearm as a machine gun constitutes an element of the offense to be decided by a jury beyond a reasonable doubt or a sentencing factor to be decided by a judge using a preponderance of the evidence standard. In 2000, the Court decided the question in *Castillo v. United States*, holding that the machine-gun provision was an element of the offense, but that case was decided under the statute before Congress amended it.

Both the District Court and the First Circuit held that the new statutory language did not explicitly establish the machine-gun provision as a sentencing factor and that under *Castillo*, it should still be considered an element of the offense. In a majority opinion written by Justice Kennedy, the Supreme Court agreed. Justice Kennedy's

opinion reconsidered the five factors the Court relied on when determining congressional intent in *Castillo*: (1) the language and structure of the statute, (2) legal tradition, (3) the risk of unfairness to the defendant, (4) the severity of the sentence involved, and (5) the legislative history.

As in *Castillo*, three of the factors clearly point toward considering the machine-gun provision as an element of the offense. First, legal tradition suggests that sentencing factors typically describe the offender, while elements of the offense typically describe the action taken; the use of a machine gun during a crime indicates the latter more than the former. Second, the Court in *Castillo* found a risk of unfairness if the provision were read as a sentencing factor because it could lead to conflict between a judge and jury, and changes to the statute's language do not affect that potential dynamic. Third, the Court found that the large sentencing disparity between brandishing a firearm (not less than seven years) and a machine gun (not less than thirty years) suggests the provision is more likely to be an element of the offense. Finally, in the instant case, as in *Castillo*, the legislative history does not speak on point. But while the Court found this factor to be neutral in *Castillo*, here it determined the silence to suggest that Congress did not intend to implicitly reclassify the provision.

The Court also considered the three main changes Congress made to the statute's text. First, mandatory sentences became mandatory minimums, a fact the Court found to favor viewing the provision as an element of the offense. Second, the statute is now triggered by mere possession of a firearm, a change that the Court found to have no impact on the question at hand because it was an explicit response aimed at overturning the Court's decision in another case, *Bailey v. United States*. Third, the statute now includes the machine-gun provision in a separate subsection than the firearm offense; the Court found this change to be largely cosmetic. Finding no explicit evidence of Congress's intent to reclassify the provision, the Court affirmed the holding in *Castillo*.

While the majority opinion was unanimous, two justices filed concurring opinions. Justice Stevens argued that just as a jury is necessary to raise the ceiling on a possible sentence, it should also be required to set the permissible floor. He would have overturned the precedent that allows judicial fact-finding to impose a sentence greater than what is otherwise legally permitted. Justice Thomas would have decided the case on constitutional grounds rather than statutory; he advocated for the use of a jury whenever either the floor or ceiling of a defendant's sentence is raised.

7. DUE PROCESS

MCDONALD V. CITY OF CHICAGO

130 S. Ct. 3020 | Decided June 28, 2010

By Rebecca A. Welsh ('12)

In a decision written by Justice Alito, the Court held that the Second Amendment right to bear arms in self-defense is incorporated and applicable to the states via the Due Process Clause of the Fourteenth Amendment. The Court previously recognized such a right in *District of Columbia v. Heller,* where the majority struck down a ban on handguns and found that the Second Amendment right to bear arms for self-defense in the home was a fundamental one. Justice Alito reasoned that certain rights, those that are "fundamental to the Nation's scheme of ordered liberty" or that are "deeply rooted in this Nation's history and tradition," apply to the states through the Due Process Clause of the Fourteenth Amendment. In reaching his decision, Justice Alito pointed to the fundamental nature of the right to self-defense. He rejected Justice Thomas's claim in concurrence that rights are incorporated not through the Due Process Clause but instead via the Privileges or Immunities Clause of the Fourteenth Amendment.

In a dissent joined by Justices Ginsburg and Sotomayor, Justice Breyer attacked the majority's characterization of the Second Amendment right as a fundamental one, asserting that nothing in the Amendment's "text, history, or underlying rationale" supports the conclusion that it is a crucial right that should be incorporated through the Fourteenth Amendment. Furthermore, Justice Breyer argued that the majority's view created various uncertainties for lower courts that will be called upon to interpret the extent of permissible gun regulation.

Justice Stevens also dissented, asserting that the right to bear arms was not a "liberty" interest of the type protected by the Due Process Clause. Justice Stevens would have left to the states the "right to experiment" so as to find the best solutions to the problems of gun violence. Justice Scalia filed a separate concurrence disagreeing with Justice Stevens' contentions.

Personnel

ANTHONY S. BARKOW, EXECUTIVE DIRECTOR

Anthony S. Barkow was a federal prosecutor for 12 years. From 2002 through 2008, he was an assistant United States attorney in the United States 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 United States 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, and in 2010 he submitted testimony to the Pennsylvania House of Representatives recommending that the state end juvenile life without parole sentences. 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 criminal law, and she is especially interested in applying the lessons and theory of administrative and constitutional law to the administration of criminal justice. She has written more than 20 articles that span a range of topics. She has written several articles on sentencing, including the relationship between modern sentencing laws and the constitutional role of the criminal jury; federalism and the politics of sentencing; the role of cost-benefit and risk-tradeoff analysis in sentencing policy; what institutional model works for designing agencies that regulate criminal punishment; the political factors that lead to guideline and commission formation; and the flawed bifurcation between capital and noncapital constitutional sentencing jurisprudence. Professor Barkow has also explored in numerous articles the role of prosecutors in the criminal justice system. For example, she has analyzed how the lessons of institutional design from administrative law could improve the way prosecutors' offices are structured; she has looked to organizational guidelines and compliance programs as a model for prosecutorial oversight; and she has considered the increasing role of prosecutors as regulators through the conditions they place on corporations. Professor Barkow has also explored larger structural questions of how criminal

justice is administered in the United States. In a series of major articles, she has explored the relationship between separation of powers and the criminal law and the relationship between federalism and the criminal law. Barkow has also considered the role of mercy and clemency in criminal justice, paying particular attention to the relationship between administrative law's dominance and the increasing reluctance of scholars and experts to accept pockets of unreviewable discretion in criminal law.

Barkow has been invited to present her work in various settings. She has testified before the House Subcommittee on Commerce, Trade, and Consumer Protection regarding the proposed Consumer Financial Protection Agency; before the U.S. Sentencing Commission to make recommendations for reforming the federal sentencing system; and 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 United States 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 & Figel LLP 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.

ANNE MILGRAM ('96), SENIOR FELLOW

Anne Milgram ('96) is a Senior Fellow at the Center. Prior to joining NYU, Milgram served as New Jersey's Attorney General from June 2007 to January 2010, where she headed the 9,000-person Department of Law and Public Safety. Milgram became Attorney General after serving from February 2006 to June 2007 as First Assistant Attorney General. As Attorney General, Milgram supervised eight divisions and multiple commissions and boards, including the Division of Criminal Justice, the Division of Law, the Division of Consumer Affairs, the Bureau of Securities, the Division of Civil Rights, the Juvenile Justice Commission, the Division of Gaming Enforcement, the Division of Highway Traffic Safety, the Racing Commission, and the Division of Alcoholic Beverage Control. Milgram also supervised the Division of the New Jersey State Police and its 3,000 sworn members, and the Camden Police Department.

Milgram served as the state's chief law enforcement officer, overseeing and directing the 21 New Jersey county prosecutors and the approximately 30,000 state and local law enforcement officers. She spearheaded investigations into street gangs, public corruption, gun violence and trafficking, securities fraud, and mortgage fraud. She also implemented a statewide program to improve public safety through prevention of crime, criminal justice and law enforcement reform, and re-entry programs and services. As Attorney General, Milgram oversaw affirmative and defensive civil litigation for the state, providing legal representation to all state departments and agencies in approximately 25,000 civil matters each year. She also served as a member of the U.S. Attorney General's Executive Working Group on Criminal Justice and as a co-chair of the National Association of Attorneys General Criminal Law Committee.

From May 2005 to January 2006, Milgram served as counsel to United States Senator Jon S. Corzine, briefing and advising the senator on issues of judicial nominations, criminal justice, homeland security, technology, law enforcement, and civil rights.

From January 2001 until May 2005, Milgram served as a federal prosecutor in the Criminal Section of the United States Department of Justice's Civil Rights Division, prosecuting complex international sex trafficking, forced

labor, and domestic servitude human trafficking cases. She also prosecuted hate crimes and official misconduct cases nationwide. In 2004, Milgram was promoted to become the lead federal prosecutor in the country for human trafficking crimes. Milgram was awarded the U.S. Department of Justice Special Commendation for Outstanding Service in December 2004 and the U.S. Department of Justice Director's Award in September 2006.

Milgram began her prosecution career as an assistant district attorney in the Manhattan District Attorney's office, where she served from September 1997 until January 2001. As an assistant district attorney, Milgram prosecuted felony and misdemeanor cases from investigation through indictment and trial. She handled violent crime, domestic violence, child abuse, narcotics, illegal gun possession, and white-collar cases.

Milgram graduated summa cum laude from Rutgers College in 1992 with a degree in English and political science, and received a master's of philosophy degree in social and political theory in 1993 from the University of Cambridge in England. She received her law degree from New York University School of Law in 1996 and clerked for United States District Court Judge Anne E. Thompson in Trenton, New Jersey, from 1996 to 1997.

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PAUL D. 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.

JAMES FORMAN JR. is professor of law at Georgetown University Law Center. He teaches and writes in the areas of criminal procedure and education law. He previously worked at the Public Defender Service in Washington, D.C., where he represented juveniles and adults in serious felony cases, and served as training director for new attorneys. He co-founded the Maya Angelou Public Charter School, which combines education, job training, counseling, mental health services, life skills, and dormitory living for school dropouts and youth who have previously been incarcerated.

KATHERINE A. LEMIRE is counsel to Raymond W. Kelly, the Police Commissioner of the City of New York. She previously was an assistant United States attorney in the United States 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 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.

CRISTINA RODRÍGUEZ is professor of law at New York University School of Law. She teaches and writes in the areas of constitutional law, immigration law, citizenship theory, and language rights and language policy. Her recent works include "Constraint Through Delegation" (2010), "The President and Immigration Law" (2009) (with Adam Cox), and "The Significance of the Local in Immigration Regulations" (2008). She is a nonresident fellow of the Migration Policy Institute, a term member of the Council on Foreign Relations, and a former clerk to Justice Sandra Day O'Connor.

MAXIMO LANGER, SCHOLAR-IN-RESIDENCE, 2010-11

The Center's scholar-in-residence for academic year 2010-11 is Maximo Langer. Langer is professor of law at UCLA School of Law. He is a visiting professor of law at New York University School of Law during the 2010-11 academic year. He writes and teaches on domestic, comparative and international criminal law and procedure. He received his LL.B. from the University of Buenos Aires Law School (1995), where he was editor of the *University of Buenos Aires Law Review*, was awarded the Fundación Universitaria del Rio de la Plata Fellowship, and graduated in the top 1% of his class. He entered the LL.M. program at Harvard Law School in 1998 and then switched to the S.J.D. program. At Harvard, he was awarded several fellowships, including the Edmond J. Safra Graduate Fellowship in Ethics from the Harvard University Center for Ethics and the Professions, a Fellowship of the Center for Studies and Research in International Law and International Relations from The Hague Academy of International Law, and the Fulbright Fellowship.

While at the University of Buenos Aires, Professor Langer served as a legal clerk in Argentinean Federal District Court No. 2 and, after graduation, worked in criminal defense as an associate (1994-97) and a partner (1998) with Gottheil & Asociados in Buenos Aires. Before leaving Argentina for Harvard, he also served as director of the Non-Conventional Offenses Program at the Institute for Comparative Studies in Criminal and Social Sciences (1997-98) and worked as legal advisor to the Commissions of Justice and Criminal Law under Argentinean Congressman Jose Cafferata Nores (1998). His teaching career began at the University of Buenos Aires, where he served as a graduate teaching fellow, and continued at Harvard, where he was a Teaching Fellow under Professor Carol Steiker and a Byse-Rockefeller Center Fellow.

Langer has published articles and book chapters in English and Spanish on criminal law and procedure, and his work has been translated to Chinese and Spanish. He has given many presentations and seminars on various aspects of criminal law and procedure in the United States, Asia, Europe, and Latin America. His article "The Rise of Managerial Judging in International Criminal Law" was selected for the 2006 Stanford/Yale Junior Faculty Forum in the Public International Law Category, and he won the 2007 Hessel Yntema Prize by the American Society of Comparative Law for "Most Outstanding Article Published by a Scholar Under 40" in a recent volume of the *American Journal of Comparative Law*. His article "Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery" was awarded the 2007 Margaret Popkin Award by the Latin American Studies Association (LASA) for "Best Paper on the Law" presented at the XXVII LASA International Congress.

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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 (J.D. '08), where she was a Dean's Scholar. 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.

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