GPS Monitoring and More:

Criminal Law Cases in the Supreme Court's 2011-12 Term

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The United States Supreme Court's 2011-2012 Term was *big*. The headline on the civil side of the docket was the Affordable Care Act decision.[1] The blockbuster on the criminal side was *United States v. Jones*,[2] the Global Positioning System (GPS) monitoring case. In *Jones*, the Court showed that some old things can be new again—the justices gave us "new" ways of thinking about Fourth Amendment searches. There were other key criminal-law rulings as well, including on effective assistance and plea negotiations, confrontation, juries and criminal fines, juvenile life-without-parole sentences, and double jeopardy. And as in the previous Term, the Court issued several opinions emphasizing the deference to be afforded state courts on federal habeas corpus review. This article examines some of the most notable criminal-law-related opinions of the Supreme Court's 2011 Term, focusing on those decisions that have the greatest impact upon the states. It concludes with a brief preview of the 2012-2013 Term.

FOURTH AMENDMENT

The criminal case of the year was *Jones*, the GPS-monitoring decision. *Jones* has broad implications for how we define a "search" within the meaning of the Fourth Amendment. The majority gave us a trespass-based alternative to the familiar "reasonable expectation of privacy" analysis, and even the concurring justices mustered five votes for a gloss on the reasonable-expectation-of-privacy test. In other Fourth Amendment rulings, the justices addressed jailhouse searches (rejecting a broad challenge to visual strip searches of detainees), passed on the Fourth Amendment aspects of the Arizona S.B. 1070 challenge, and, in two civil-rights matters, gave some guidance about warrants and exigent circumstances.

GPS monitoring and a "new" trespass-based approach to searches and seizures

The case began when agents suspected Antoine Jones of trafficking in narcotics. Without a valid warrant,[3] they installed a GPS tracking device on the undercarriage of a Jeep registered to Jones's wife. Agents used the device to track the vehicle's movements over the next 28 days, obtaining over 2,000 pages of locational data, which was introduced at trial. The Court unanimously found that this violated the Fourth Amendment, and it reversed Jones's conviction, though the justices were split on their reasoning.

The Court's opinion was delivered by Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor. They held that the government physically occupied private property for the purpose of obtaining information, and that "such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[4] Until the latter half of the twentieth century, "Fourth Amendment jurisprudence was tied to common-law trespass."[5] The Court deviated from that property-based approach beginning in *Katz v. United States*,[6] with the development of the "reasonable expectation of privacy" analyses. Perhaps most significantly, the *Jones* majority held that the *Katz* reasonable-expectation-of-privacy test exists alongside (and does not displace) a test grounded in the law of trespass.[7] Thus, the Court rejected the government's claim that Jones had no interest protected by the Fourth Amendment; the United States had argued that Jones lacked a reasonable expectation of privacy in the underbody of the Jeep and in the locations of the Jeep on the public roads, which, after all, were visible to all.

Four justices (joined in part by a fifth) concurred on a very different theory. They criticized the majority's property-based approach and would have found a Fourth Amendment violation applying the "reasonable expectation of privacy" test. In his concurrence for these justices, Justice Alito criticized the majority for deciding the case based upon eighteenth-century tort law, saying that "it is almost impossible to think of late-eighteenth-century situations that are analogous to what took place in this case."[8] He argued that the "reasonable expectation of privacy" analysis was meant to replace a trespass-based approach. Justice Alito wrote that the Court's approach created a number of difficulties and anomalies, including that it attached great significance to *placing* the GPS device as opposed to long-term monitoring *using* the device; it provided no protection if the device was attached prior to the car being turned over to a bailee for his use; the outcome may vary according to property laws in the states; and reliance on the law of trespass may "present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be

Footnotes

1. Nat'l Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012).
2. 132 S. Ct. 945 (2012).
3. Agents actually obtained a warrant, but it was valid for 10 days and authorized placing the device while the vehicle was in the District of Columbia. Agents installed the device on the 11th day and in Maryland.
4. *Id.* at 949.
5. *Id.*
6. 389 U.S. 347 (1967).
7. *Jones*, 132 S. Ct. at 953.
8. *Id.* at 957-58 (Alito, J., concurring). He asked, amusingly, whether it was possible to imagine a case in which a constable secreted himself in a coach and remained there for a period of time to monitor the movements of the coach's owner, saying that this "would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience." *Id.* at 958 n.3.

tracked."[9] However, the concurring justices also acknowledged that the *Katz* analysis was not without problems in cases like this. *Katz* depends upon the assumption that a hypothetical reasonable person has a stable set of expectations of privacy, and technological advances may lead to changes in those expectations and periods where expectations may be in flux. Also, though the *use* of *long-term* GPS monitoring in *most* investigations violates expectations of privacy—"society's expectation" has been that agents and others could not "secretly monitor and catalogue every single movement of an individual's car for a very long period"—the concurring justices declined to "identify with precision the point at which the tracking of [Jones's] vehicle became a search, for the line was surely crossed before the 4-week mark."[10] The concurring justices also refrained from deciding whether the same outcome would follow "in the context of investigations involving extraordinary offenses."[11]

Justice Sotomayor provided the fifth vote to make Justice Scalia's trespass-based approach the decision of the Court, but her concurrence revealed a willingness to reconsider basic aspects of privacy analysis as well as general support for the approach taken by Justice Alito. She concurred with Justice Alito in finding that "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"[12] Justice Sotomayor also underscored that records of a person's public movements provide a wealth of detail about that person's familial, political, professional, religious, and sexual associations, which the government can store and mine years in the future. Justice Sotomayor would take these into account in determining whether there is a reasonable expectation of privacy in one's public movements, and she would not find it dispositive that the government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. She would be willing to reconsider the notion that an individual has no reasonable expectation of privacy in information that they voluntarily disclose to third parties.[13] The bottom line: there were five votes for finding a Fourth Amendment violation based upon Justice Scalia's trespass theory and five votes for finding a violation based upon some form of reasonable-expectation-of-privacy analysis.

One other important point to note: contrary to many press reports, *Jones* does *not* hold that a warrant is necessarily required for GPS monitoring. The issue in the case was whether placing and using the device constituted a search or seizure within the meaning of the Fourth Amendment. The Court did not reach the question whether the search was reasonable without a warrant, as that issue was not raised below.[14]

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For those who study and write about the Fourth Amendment, *Jones* offered up a veritable feast.[15] For judges, lawyers, and officers who have to apply *Jones* in the real world, the decision raised as many questions as it answered. Some of the unresolved issues include: What acts of trespass may amount to a search? Can a property interest provide "standing" to bring a suppression motion even if the defendant does not have a reasonable expectation of privacy in the place searched or object seized?[16] Just what is "long-term" monitoring under the approach of the concurring justices?[17] What is an "extraordinary" investigation? In light of the millions of requests made to cellphone carriers for subscriber information,[18] what does *Jones* mean for users of mobile devices?[19] Does the automobile or any other exception permit the State to place a GPS device on a vehicle with probable cause but without a warrant?[20] Should evidence be suppressed when officers objectively relied upon pre-*Jones* precedent?[21] The FBI is reportedly preparing memoranda to guide agents' use of GPS and other devices post-*Jones*.[22] The FBI certainly has a lot of issues to address.

Jail searches

It was no *Jones*, but another highly anticipated Fourth Amendment case was *Florence v. Board of Chosen Freeholders of County of Burlington*,[23] which addressed intrusive searches of arrestees. The plaintiff in this civil-rights action was arrested on an outstanding warrant for failure to pay a fine, and he was held for six days in two different jails. He was subjected to a visual inspection of his entire body, including his genitals. The plaintiff alleged that a policy of strip searching, without reasonable

9. *Id.* at 962.
10. *Id.* at 964.
11. *Id.*
12. *Id.* at 954, 955 (Sotomayor, J., concurring) (quoting *id.* at 964 (Alito, J., concurring)).
13. *Id.* at 955-57.
14. *Id.* at 954 (Scalia, J).
15. *See*, *e.g.*, Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 110 Mich. L. Rev. (forthcoming 2012); Fabio Arcila, Jr., *GPS Tracking Out of Fourth Amendment Dead Ends:* United States v. Jones *and the* Katz *Conundrum*, 91 N.C. L. Rev. (forthcoming 2012).
16. *See* United States v. Luna-Santillanes, 2012 WL 1019601 (E.D. Mich. Mar. 26, 2012); United States v. Hanna, 2012 WL 279435 (S.D. Fla. Jan. 30, 2012).
17. *See* State v. Zahn, 812 N.W.2d 490, 498-99 (S.D. 2012).
18. *See* Eric Lichtblau, *More Demands on Cell Carriers in Surveillance*, N.Y. Times, July 8, 2012, *available at* http://www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html?pagewanted=all (reporting 1.3 million demands for subscriber information in 2011 alone).
19. *See* Catherine Crump, *Location Tracking After United States v. Jones: Continued Uncertainty Harms Americans' Privacy*, 91 Crim. L. Rptr. 577 (BNA July 11, 2012).
20. *See* United States v. Ortiz, 2012 WL 2951391 (E.D. Pa. July 20, 2012).
21. *See* United States v. Pineda-Moreno, 2012 WL 3156217 (9th Cir. Aug. 6, 2012).
22. *See* Ariane de Vogue, *Supreme Court Ruling Prompts FBI to Turn Off 3,000 Tracking Devices*, ABC News, Mar. 7, 2012, *available at* http://news.yahoo.com/supreme-court-ruling-prompts-fbi-turn-off-3-154046722--abc-news.html (describing comments of FBI general counsel, Andrew Weissman).
23. 132 S. Ct. 1510 (2012).

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suspicion, those arrested for minor offenses violates the Fourth Amendment. The Court disagreed, 5-4.

Writing for the majority, Justice Kennedy first stressed the difficulties of operating a detention center, though the Court acknowledged that people arrested for minor offenses may be among the detainees. There are perhaps two most notable aspects of the majority's opinion. First, the justices emphasized that "deference must be given to the officials in charge of the jail unless there is 'substantial evidence' demonstrating their response to the situation is exaggerated."[24] Second, the Court was pointedly determined to craft a bright-line rule rather than require jail officials to decide on a detainee-by-detainee basis whether a visual strip search is permitted.[25] Framed this way, the majority concluded that the search procedures at the two jails "struck a reasonable balance between inmate privacy and the needs of the institutions."[26] Justice Alito joined the Court's opinion but concurred to emphasize the limits of the holding. He especially noted that the case concerned arrestees who were committed to the *general population* of the jail and whose searches did not involve physical contact. He pointed out that the opinion does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not yet been reviewed by a judicial officer and who could be held apart from the general population.[27]

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. They underscored that a visual strip search is a serious invasion of privacy and that people arrested for minor offenses have been subjected to the humiliations of such a search. While also acknowledging that managing a jail is a difficult undertaking, the dissenting justices could find "no convincing reason indicating that, in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary . . . ."[28] The dissenters argued that these procedures were sufficient to detect injuries, diseases, or gang tattoos, and that there were no clear examples of instances in which contraband was smuggled into the general population of the jail during intake that could not have been discovered under a reasonable-suspicion standard.[29]

Investigative detentions

Arizona v. United States,[30] the S.B. 1070 decision, was a crossover hit: the Court touched on the Fourth Amendment in addition to its more important holding about the federal power over immigration. A 5-3 majority of the Court[31] found that several parts of Arizona's controversial immigration-related law (S.B. 1070) were preempted by federal law.[32] But all eight participating justices agreed that Arizona might be able to implement a statute requiring officers to make a reasonable effort to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis, provided the officers have reasonable suspicion that the person is a non-citizen and is not lawfully present in the country. The justices also declined to overturn a provision that any person arrested shall have their immigration status determined prior to release.

The plaintiffs had claimed that determining immigration status may unduly prolong a detention or delay a release, which may violate the Fourth Amendment. However, the statute was yet to be construed by the state courts or applied by officers. As Justice Kennedy wrote for the Court, if the statute is construed to require officers "to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision would likely survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives."[33] Justice Alito wrote separately to emphasize that officers already had the power to inquire about immigration status of people who are lawfully detained, and this part of the statute does not expand that power. He also noted that while the statute should not lead to federal constitutional violations, "there is no denying that enforcement . . . will multiply the occasions on which sensitive Fourth Amendment issues will crop up."[34] He suggested some ways that Arizona might mitigate that risk.

Qualified immunity, warrant searches, and exigent circumstances

Two civil-rights cases about qualified immunity gave the Court an opportunity to address aspects of warrant searches and the exigent-circumstances doctrine.

In *Messerschmidt v. Millender*,[35] a victim reported that her ex-boyfriend, a reputed gang member, had attacked her and fired a sawed-off shotgun at her car. Officers prepared arrest and search warrants. The search warrants sought, broadly, all firearms (not just the sawed-off shotgun) and evidence of gang membership. Executing the warrant, officers searched the home of the sus-

24. *Id.* at 1518 (citing Block v. Rutherford, 468 U.S. 576, 584-85 (1984)).
25. *Id.* at 1521-22.
26. *Id.* at 1523.
27. *Id.* at 1524 (Alito, J., concurring).
28. *Id.* at 1525, 1528 (Breyer, J., dissenting).
29. *Id.* at 1526-28.
30. 132 S. Ct. 2492 (2012).
31. Justice Kagan recused herself.
32. Given the federal government's broad authority over immigration, Arizona could not criminalize a non-citizen's failure to carry an alien registration document or a non-citizen's unauthorized application for employment (or the person's actual work). Nor could Arizona authorize officers to arrest without a warrant if there was probable cause to believe a person has committed a removable offense. *See* 132 S. Ct. at 2503, 2505, 2507.
33. *Id.* at 2509.
34. *Id.* at 2524, 2529 (Alito, J., concurring in part and dissenting in part). Justice Scalia concurred with the decision to uphold this part of the statute but saw no reason to address the Fourth Amendment issue. *See id.* at 2511, 2516 (Scalia, J., concurring in part and dissenting in part). Justice Thomas wrote separately on the preemption question. *See id.* at 2522 (Thomas, J., concurring in part and dissenting in part).
35. 132 S. Ct. 1235 (2012).

pect's foster mother, where they found a shotgun and ammunition. The plaintiffs alleged that the warrants were overbroad and not supported by probable cause. The Supreme Court ruled 6-3 that the officers were entitled to qualified immunity.

The majority opinion, authored by Chief Justice Roberts, notes that the same standard of objective reasonableness that applies in the context of a suppression motion under *United States v. Leon*[36] is involved in determining whether an officer should be denied qualified immunity because an affidavit is so lacking in indicia of probable cause. The threshold for meeting this standard is high. Under the circumstances of this case, an officer could conclude that there was probable cause to believe that the suspect had other weapons, and that seizing the weapons was necessary to protect the victim. Further, it would not be unreasonable for an officer to believe that evidence regarding gang membership would help in prosecuting the suspect for the attack. Without deciding whether the circumstances actually established probable cause, the Court found that the officers were entitled to qualified immunity. The majority emphasized that the officers here "sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate."[37]

Justice Sotomayor, joined by Justice Ginsburg, dissented, arguing that there was no basis to seek evidence of gang affiliation in this non-gang-related assault or reasonable basis to search for weapons other than the gun used in the assault. They also complained that the majority erred in giving weight to the fact that the officers had sent the warrant application to superiors and obtained a judge's approval.[38] Justice Kagan concurred in part and dissented in part, finding a middle ground between the majority and dissenting justices. She thought that the officers were entitled to immunity with respect to the search for weapons, but not the search for evidence of gang membership.[39]

The other case was *Ryburn v. Huff*,[40] where the Court clarified principles of qualified immunity and the exigent-circumstances doctrine. Four officers were investigating an allegation that a high-school student threatened to shoot up his school. They went to his home and knocked, but no one answered. Eventually, the student's mother came out of the home with her son and stood on the front steps. The mother declined the officers' request to interview young man inside. After she was asked if there were any guns in the home, she turned around and ran into the house. The officers followed. The family sued because of the warrantless entry. The Supreme Court granted certiorari and summarily reversed the court of appeals, determining that the officers were entitled to qualified immunity.

In a per curiam opinion, the justices first noted that "[a] reasonable police officer could read" the Court's prior decisions to mean that an officer may enter a residence without a warrant "if the officer has a reasonable basis for concluding that there is an imminent threat of violence."[41] Taking the events together rather than in isolation, reasonable officers could have come to the conclusion that there was an imminent threat to safety. The mother ran into the home immediately after being asked about the presence of weapons. While she was lawfully entitled to enter her home, "there are many circumstances in which lawful conduct may portend imminent violence."[42]

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FIFTH AMENDMENT—*MIRANDA*

The Term gave us two *Miranda* decisions, including *Howes v. Fields*,[43] which addressed *Miranda* custody and inmates. *Fields* received the most attention, but *Bobby v. Dixon*,[44] a per curiam summary reversal, may turn out to be more significant. *Dixon* has implications for situations in which a defendant makes an anticipatory invocation, and it also is the first Supreme Court decision to construe the 2004 opinions in *Missouri v. Seibert*.[45]

In the first of the two cases, Fields was serving a sentence in a county jail. Officers wanted to question him about whether he had earlier engaged in sex with a young boy. Fields was escorted from his cell to a conference room in the jail, where he was questioned without *Miranda* warnings for five to seven hours. At the outset, he was told that he was free to return to his cell and later was reminded that he could leave whenever he wanted. Fields confessed, although he allegedly said several times that he no longer wanted to speak with the deputies. The state courts found that his confession was admissible, ruling that he was not in *Miranda* custody during the questioning. On federal habeas corpus review, the court of appeals found this conclusion contrary to clearly established federal law, the standard required to grant relief under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The court of appeals determined that *Miranda* custody exists per se when an individual is imprisoned and is questioned in private about events outside of the prison. The Supreme Court unanimously reversed.

In an opinion for the Court, Justice Thomas wrote that prior decisions did not establish such a categorical rule. Thus, the state-court decisions were not contrary to clearly established federal law. Morever, even had the case been brought on direct appeal, and not judged under the deferential AEDPA standards, the court of appeals ruling was wrong. Custody is determined from the objective circumstances of the interrogation and from the point of view of a reasonable person, in light of all of the circumstances. Citing *Berkemer v. McCarty*,[46] the Court emphasized that not all restraints on the freedom of movement amount to

36. 468 U.S. 897 (1984).
37. 132 S. Ct. at 1249.
38. *Id.* at 1252, 1256-60 (Sotomayor, J., dissenting).
39. *Id.* at 1251 (Kagan, J., concurring in part and dissenting in part).
40. 132 S. Ct. 987 (2012).
41. *Id.* at 990.
42. *Id.* at 991.
43. 132 S. Ct. 1181 (2012).
44. 132 S. Ct. 26 (2011).
45. 542 U.S. 600 (2004).
46. 468 U.S. 420 (1984).

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Miranda custody. There are reasons to believe that imprisonment alone is not enough to create *Miranda* custody, including that when someone already imprisoned is questioned, the circumstances generally do not involve the shock that often accompanies an arrest. Moreover, an individual is not likely to be lured into speaking by hoping for prompt release.[47]

Justice Ginsburg (joined by Justices Breyer and Sotomayor) agreed that the law was not clearly established in Fields' favor, and thus relief could not be granted under AEDPA. But had the case been presented on direct appeal, these three justices would have found that the questioning was custodial. They pointed to the definition of custody in *Miranda* itself and stressed that Fields was questioned incommunicado in a police-dominated atmosphere, in an inherently stressful way, and that his freedom of action was significantly curtailed.[48]

In the Term's other *Miranda* case, *Bobby v. Dixon*, Dixon and a co-defendant murdered the decedent to steal and sell his car. Dixon used the victim's documents to obtain an ID card, and he forged a signature to cash the check for the sale of the car. Officers had several distinct contacts with Dixon. First, there was a chance non-custodial encounter at a police station. A detective gave Dixon *Miranda* warnings and asked him about the victim's disappearance, but Dixon would not answer questions without his lawyer, and he left. Then, five days later, after arresting Dixon for the forgery, detectives interrogated him intermittently for several hours and intentionally did not provide *Miranda* warnings. They urged him to cut a deal before his co-defendant did. Dixon made some inculpatory admissions but claimed that the decedent gave him permission to sell the car and that he did not know where the victim was. There was a third encounter later that day, after Dixon's co-defendant led police to the victim's grave. Dixon said that he had heard police found a body, that he talked to his attorney, and that he wanted to tell what happened. Officers then read Dixon his rights, obtained an express *Miranda* waiver, and Dixon gave a detailed confession. The federal court of appeals granted habeas corpus relief, finding (among other things) that officers should not have interrogated Dixon after he had previously refused to speak with them without his lawyer present. And relying upon *Seibert*, the lower court determined that Dixon's confession was the product of a deliberate question-first, warn-later strategy. The Supreme Court granted certiorari and summarily reversed.

In a unanimous per curiam opinion, the justices found that Dixon's refusal to speak without his lawyer present was not an invocation of the right to counsel, which would have prevented officers from initiating the subsequent interrogations. Dixon was not in custody during the initial encounter. Quoting *McNeil v. Wisconsin*,[49] the Court said that it has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'"[50] In addition, there was no two-step interrogation technique of the type condemned in *Seibert*. In *Seibert*, the defendant's first, unwarned interrogation left little unsaid, and after receiving midstream warnings the defendant merely repeated what she said before. By contrast, Dixon initially denied involvement in the murder, and his full, warned confession contradicted his unwarned earlier statements. Moreover, in *Seibert*, the justices were concerned that the midstream *Miranda* warnings were part of a single interrogation and could not have effectively apprised the suspect that she had a choice whether to speak. Given the separation of Dixon's interrogations, that was not a concern here.[51] The Court concluded that it was not clear that the state court erred at all, much less erred so transparently that Dixon could meet the demanding AEDPA standards.[52]

Dixon is a sleeper, but I think it is significant in two respects. First, although *Dixon* is an AEDPA case, the Court appeared comfortable in allowing officers to initiate an interrogation of a suspect who previously refused to speak without counsel after having receiving *Miranda* warnings in a non-custodial setting. While the Court in *McNeil* had indicated that invocations cannot be made anticipatorily, the holding of *McNeil* was that a request for counsel under the Sixth Amendment at an initial court appearance was not equivalent to an invocation under *Arizona v. Edwards*.[53] *Dixon* appears to expand *McNeil*, perhaps permitting officers to ignore an unambiguous invocation of the right to counsel for an out-of-custody suspect, even when officers actually give warnings. Second, *Dixon* is the first Supreme Court case to apply *Seibert*. While five justices in *Seibert* found that officers employing a "question-first" strategy had violated *Miranda*, and Seibert's second statement was inadmissible, courts have struggled to extract a workable rule from the various opinions in *Seibert*.[54] The plurality opinion focused on whether midstream warnings could function effectively as *Miranda* requires, while Justice Kennedy—who provided the fifth vote in *Seibert*—advocated a "narrower test" applicable only where the two-step technique was used in a calculated way to undermine the warnings.[55] In *Dixon*, the Court cited both opinions, but the justices appeared to apply the plurality's test.

47. *Fields*, 132 S. Ct. at 1189-91.
48. *Id.* at 1194-95 (Ginsburg, J., concurring in part and dissenting in part).
49. 501 U.S. 171, 182 n.3 (1991).
50. *Dixon*, 132 S. Ct. at 29.
51. *See id.* at 31-32.
52. *See id.* at 27.
53. *See McNeil*, 501 U.S. at 176-82. McNeil sought the greater protection of *Edwards*, 451 U.S. 477 (1981), as his Sixth Amendment right had attached for a separate offense, but an *Edwards* invocation prevents officers from reinitiating an interrogation on any offense. *McNeil*, 501 U.S. at 177. The *McNeil* Court's reference to the inability to invoke *Miranda* anticipatorily came in a footnote, where the majority disputed a claim by dissenting justices that lawyers could simply invoke the *Miranda-Edwards* right during their initial court appearances. *Id.* at 182 n.3. The *Dixon* Court also cited Montejo v. Louisiana, 556 U.S. 778 (2009), for the proposition that *Miranda* applies to custodial interrogations, but the Court made that point only to contrast the scope of protections under *Miranda-Edwards* and the Sixth Amendment.
54. *See* Charles D. Weisselberg, *Mourning* Miranda, 96 Cal. L. Rev. 1519, 1551-52 (2008); *see also* United States v. Capers, 627 F.3d 470, 476-77 (2d Cir. 2010); United States v. Williams, 435 F.3d 1148, 1157-58 (9th Cir. 2006).
55. *See Seibert*, 542 U.S. at 611-12 (plurality opinion); *id.* at 618, 622 (Kennedy, J., concurring).

SIXTH AMENDMENT

The Sixth Amendment was quite prominent this Term. In two cases, the Court found that defendants are entitled to the effective assistance of counsel in advising them whether to plead guilty or not. The justices also dealt again with forensic reports and the Confrontation Clause, addressed the application of the Double Jeopardy Clause to certain mistrials, and determined that there is a right to a jury determination of facts that determine the maximum sentence of a fine.

Effective assistance of counsel and pleas

In *Missouri v. Frye*,[56] the first of the two cases related to assistance of counsel and pleas, Frye was charged with driving with a revoked license. He had been convicted of the same offense on three earlier occasions, so this time he was charged with a felony that carried a maximum sentence of 4 years. The prosecutor wrote Frye's lawyer and offered two possible deals: one would require Frye to plead to the felony, with a recommendation for a 3-year probationary sentence with 10 days in jail; the other was a misdemeanor with a recommended sentence of 90 days. Frye's lawyer failed to advise his client of the offers, which expired. Just before his preliminary hearing, Frye was arrested again on a new charge. Frye eventually pleaded guilty to the original charge without an agreement. The prosecutor asked for, and the court imposed, a 3-year sentence without any probation. Frye later sought post-conviction relief, arguing that he would have pleaded guilty to the misdemeanor had he known about the offer. The question before the Supreme Court was whether the failure of Frye's lawyer to communicate the offer was ineffective assistance of counsel and, if so, what the remedy might be.

In a 5-4 ruling, the Court found that counsel's performance was deficient under the first prong of *Strickland v. Washington*.[57] Writing for the majority, Justice Kennedy pointed out that the Sixth Amendment guarantees the right to have counsel present at all critical stages of a criminal proceeding. Although no formal court proceedings take place when a plea offer lapses or is rejected, plea bargaining is prevalent in our justice system: 97% of federal convictions and 94% of state convictions follow guilty pleas. "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process," and these must be met to afford "the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."[58] The majority refrained from defining the responsibilities of defense counsel in plea bargaining. On the facts of this case, it was clear that counsel's performance was deficient. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea" on favorable terms and conditions.[59] The majority remanded for the state courts to determine whether Frye was prejudiced by counsel's performance. While there was a reasonable probability that Frye would have accepted the offer had it been communicated (as shown by his later plea to a felony charge), Frye must also show that the offer would have been adhered to by the prosecution and accepted by the trial court.[60]

In two cases, the Court found that defendants are entitled to the effective assistance of counsel in advising them whether to plead guilty or not.

Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, dissented. In their view, "[c]ounsel's mistake did not deprive Frye of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place."[61] Moreover, the focus of ineffective-assistance-of-counsel cases is on the fundamental fairness of the proceeding—whether the defendant was deprived of his constitutional right to a fair *trial*—and Frye's conviction (which followed a guilty plea) was untainted by his lawyer's error. The dissenters also noted that lawyers have different negotiating styles, and they faulted the majority for not "confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process."[62]

The other plea-bargaining case of the Term, *Lafler v. Cooper*,[63] explored *Strickland* prejudice when a plea offer is communicated but rejected.

Cooper was charged with 4 offenses including assault with intent to murder. The prosecutor offered to dismiss 2 of the charges and recommend a sentence of 51 to 85 months if Cooper pleaded guilty to the other offenses. His lawyer, however, recommended rejecting the plea offer, advising that the prosecution could not prove intent to kill because the victim was shot below the waist. Cooper went to trial. He was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months. On federal habeas corpus review, the State conceded that counsel's advice was deficient, and Cooper could meet the first prong of *Strickland*. But the State argued that because Cooper received a fair trial, he was not prejudiced. In a 5-4 decision, with the same lineup of justices as in *Frye*, the Court disagreed.

Writing again for the majority, Justice Kennedy emphasized that, under *Strickland*, a defendant must show that but for counsel's errors, "'the result of the proceeding would have been different.'"[64] In this case, Cooper would be required to show that but for the deficient advice, there is a reasonable probability that he would have accepted the plea, that the prosecution would not have withdrawn it, that the court would have accepted it, "and that the conviction or sentence, or both, under the offer's terms would have been less severe than [what was] in fact . . . imposed."[65] As in *Frye*, the majority held that the Sixth Amendment does more than just protect the right to a fair *trial*. Thus, the Court rejected the State's argument that "[a] fair trial

56. 132 S. Ct. 1399 (2012).
57. 466 U.S. 668 (1984).
58. *Frye*, 132 S. Ct. at 1407.
59. *Id.* at 1408.
60. *Id.* at 1409-11.
61. *Id.* at 1412 (Scalia, J., dissenting).
62. *Id.* at 1413.
63. 132 S. Ct. 1376 (2012).
64. *Id.* at 1384 (quoting *Strickland*, 466 at 694).
65. *Id.* at 1385.

The Supreme Court's most important Confrontation Clause case of the last decade—*Crawford v. Washington*—is the gift that keeps on giving.

wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[66] With respect to remedy, the majority largely left it to the trial court's discretion but noted a number of important considerations. If the harm is receiving a greater sentence, the remedy might be to give the defendant the sentence previously offered, the sentence given after trial, or something in-between. In other cases, particularly where the offer was to plead to less serious counts, the prosecution might be required to reoffer the plea. The correct remedy here was to order the State to reoffer the deal. That would leave Cooper the option of accepting it and would preserve the trial court's discretion with respect to accepting it or not.

Again taking the lead for the four dissenting justices, Justice Scalia castigated the majority for "open[ing] a whole new field of constitutionalized criminal procedure: plea-bargaining law."[67] He argued once more that the purpose of requiring effective assistance of counsel is to assure a fair *trial*, and that requiring the advice of competent counsel before rejecting a plea offer is "a judicially invented right to effective plea bargaining."[68] Justice Alito wrote an additional dissent to address the question of remedy. He pointed out that where there is deficient legal advice about a favorable plea offer, "the only logical remedy is to give the defendant the benefit of the favorable deal. But such a remedy would cause serious injustice in many instances . . . ."[69]

Confrontation and lab reports, revisited

The Supreme Court's most important Confrontation Clause decision of the past decade—*Crawford v. Washington*[70]—is the gift that keeps on giving. *Williams v. Illinois*[71] is the most recent (though certainly not the last) of the *Crawford* line of cases. In *Melendez-Diaz v. Massachusetts*[72] and *Bullcoming v. New Mexico*,[73] the justices held that the Confrontation Clause barred the introduction of laboratory reports written by non-testifying analysts. Depending upon one's perspective, *Williams* may represent either an unwarranted retreat from these cases or a partial return to sanity. But the Court was badly split and, whatever one's perspective on the outcome, *Williams* is simply a mess.

In *Williams*, a state police laboratory sent a vaginal swab containing semen to Cellmark Diagnostics Laboratories. Cellmark produced a report with a DNA profile, which was subsequently matched to a DNA profile obtained from a sample of Williams' blood. At trial, the State called an expert witness, Sandra Lambatos, who was a forensic specialist at the state lab. No one from Cellmark testified. While Lambatos did not quote the Cellmark report and the report was never offered into evidence, she replied "yes" to this question: "'Was there a computer match generated of the male DNA profile *found in semen from the vaginal swabs* of [the victim] to a male DNA profile that had been identified'" as Williams'?[74] The Confrontation Clause problem was that Lambatos "did not have personal knowledge that the male DNA profile that Cellmark said was derived from the crime victim's vaginal swab sample was in fact correctly derived from that sample. . . . Rather, she simply relied . . . upon Cellmark's report," and Williams had no opportunity to cross-examine its drafters.[75] Five justices found no violation of the Confrontation Clause. Justice Thomas provided the fifth vote and *possibly* the controlling opinion; for ease of exposition, I will address his opinion last.

In a plurality opinion by Justice Alito, four justices (all of whom had dissented in *Melendez-Diaz* and *Bullcoming*) found that Lambatos' testimony was consistent with the established rule that an expert may provide an opinion based on facts "even if the expert lacks first-hand knowledge of those facts."[76] Although Lambatos testified that Williams' profile matched the DNA profile found in semen from the vaginal swabs of the victim, these four justices concluded that this testimony was not offered for the truth of the matter asserted; rather, it was just part of the premise of the prosecutor's question to the expert.[77] These justices also found that even if the testimony had been admitted for its truth, the Cellmark report was not testimonial because it "was not prepared for the primary purpose of accusing a targeted individual."[78]

Four justices dissented in an opinion written by Justice Kagan. They disputed the suggestion that "Lambatos merely 'assumed' that Cellmark's DNA profile came from [the victim's] vaginal swabs"; rather, she affirmed without qualification that the source of the profile was semen from the victim, and she "became just like the surrogate witness in *Bullcoming*."[79] The dissenting justices also disagreed with the conclusion that the report was non-testimonial, noting that the analysis was conducted to identify the assailant and to serve as evidence in a criminal trial.

Justice Thomas provided the fifth vote to affirm. He sided with the dissenters in finding that the testimony was indeed offered for its truth, writing that "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing

66. *Id.* at 1388.
67. *Id.* at 1391 (Scalia, J., dissenting).
68. *Id.* at 1393.
69. *Id.* at 1398 (Alito, J., dissenting).
70. 541 U.S. 36 (2004).
71. 132 S. Ct. 2221 (2012).
72. 557 U.S. 305 (2009).
73. 131 S. Ct. 2705 (2011).
74. *Williams*, 132 S. Ct. at 2236 (Alito, J.).
75. *Id.* at 2244, 2245 (Breyer, J., concurring).
76. *Id.* at 2233 (Alito, J.). Chief Justice Roberts, and Justices Kennedy and Breyer, joined the plurality opinion. Justice Breyer also wrote separately to say that he would have held the case over for further briefing and reargument on how to deal with the variety of laboratory reports written by technicians. *Id.* at 2244, 2245 (Breyer, J., concurring).
77. *Id.* at 2236 (Alito, J.).
78. *Id.* at 2243.
79. *Id.* at 2264, 2270 (Kagan, J., dissenting, joined by Justices Scalia, Ginsburg, and Sotomayor).

that statement for its truth."[80] He also rejected the plurality's "primary purpose test" for determining if a statement is testimonial.[81] However, in his view, the Cellmark report was "not a statement by a 'witnes[s]' within the meaning of the Confrontation Clause. [It] lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact."[82] No other justice agreed with this formulation.[83]

Here is the bottom line: Five justices rejected the argument that the State may simply introduce a forensic report through the testimony of an expert by claiming that statements forming the basis of an expert's opinion are not asserted for their truth. Five justices also rejected the argument that the Cellmark report was non-testimonial because its "primary purpose" was to identify an unknown assailant. Justice Thomas' opinion only *arguably* provides the narrowest ground for the decision and, thus, the controlling opinion under the *Marks* rule.[84] Indeed, the dissenters cautioned that until a majority reverses or confines *Melendez-Diaz* and *Bullcoming*, they "would understand them as continuing to govern, in every particular, the admission of forensic evidence."[85] Jeffrey Fisher, a close observer, summed up the case this way: post-*Williams*, "the Confrontation Clause continues to deem *formal* forensic reports testimonial. That means that drug, blood alcohol, fingerprint, ballistics, autopsies, and related reports that typically involve testing by one person and that are incriminating on their face will continue to be inadmissible without the testimony of their authors (or some other method of satisfying the Confrontation Clause)."[86] Will we see efforts to make reports less formal? Fisher thinks not, and Justice Thomas noted that the Confrontation Clause reaches "'technically informal statements when used to evade the formalized process.'"[87] As I've said, *Williams* is a mess. Whatever it may stand for, it certainly cannot be the last word on the application of the Confrontation Clause to forensic reports.

Double jeopardy and form of verdicts

The Court's Double Jeopardy Clause case, *Blueford v. Arkansas*,[88] may have significant implications for states, depending upon how state law provides for the receipt of verdicts. The defendant in *Blueford* was charged with capital murder and three lesser-included offenses. The jury reported that it had voted unanimously against guilt on both capital and first-degree murder, but was deadlocked on manslaughter and had not voted on negligent homicide. The way in which the jury deliberated was in accordance with Arkansas law and the trial court's instructions, which required the jury to deliberate first on the most serious offense and only consider a lesser-included charge if all twelve jurors first agreed to acquit on the more serious offense. When the jury reported that it remained deadlocked, the court declared a mistrial. When the State sought to retry Blueford on all charges, he argued that double jeopardy prevented his retrial for capital and first-degree murder. In a 6-3 decision, the Supreme Court rejected Blueford's claim.

***Williams* is a mess. Whatever it may stand for, it certainly cannot be the last word on the application of the Confrontation Clause to forensic reports.**

The opinion of the Court was delivered by Chief Justice Roberts. The majority held that there was no double jeopardy bar to retrial because the jury had not finished its deliberations. While the jury had voted on the two most serious charges, no verdict was actually rendered or received. The jury was free to reconsider what could have been a tentative or early vote on the two most serious charges, and no final decision was reached. Moreover, though the foreperson reported that the jury had voted unanimously against guilt on the two most serious charges, the Court said that it had "never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict."[89]

Justice Sotomayor dissented, joined by Justices Ginsburg and Kagan. They argued that while different jurisdictions may have different procedures with respect to announcing verdicts and entering judgments, the diversity of procedures has no constitutional significance. Under Arkansas law, the jury must acquit the defendant of the greater offense before deliberating on the lesser-included offense. The forewoman's "colloquy with the judge [left] no doubt that the jury understood the instructions . . . ."[90] "There is no reason to believe that the jury's vote was anything other than a verdict in substance. . . . And when that decision was announced in open court, it became entitled

80. *Id.* at 2255, 2257 (Thomas, J., concurring).
81. *Id.* at 2261-62.
82. *Id.* at 2260. Further, while the report was produced "at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." *Id.*
83. The dissent was particularly harsh. *See id.* at 2276 (Kagan, J., dissenting) ("Justice Thomas's approach, if accepted, would turn the Confrontation Clause into a constitutional geegaw—nice for show, but of little value.").
84. Marks v. United States, 430 U.S. 188, 193 (1977). But since Justice Thomas explicitly rejected the majority's reasoning, and no other member of the Court agreed with Justice Thomas, it is difficult to conclude that there is a "lowest common denominator" or "narrowest ground" that represents the Court's holding. *See* King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) ("*Marks* is workable . . . only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment."); United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King*); *see also* Nichols v. United States, 511 U.S. 738, 745 (1994) (discussing *Marks*).
85. *Williams*, 132 S. Ct. at 2277 (Kagan, J., dissenting).
86. Jeffrey Fisher, *The Holdings and Implications of* Williams v. Illinois, *available at* http://www.scotusblog.com/?p=147095. Fisher argued *Crawford*, *Melendez-Diaz*, and *Bullcoming*.
87. *Williams*, 132 S. Ct. at 2260 n.5 (Thomas, J., dissenting) (citation omitted).
88. 132 S. Ct. 2044 (2012).
89. *Id.* at 2052.
90. *Id.* at 2053, 2054 (Sotomayor, J., dissenting).

For our purposes, what is most important is the Court's discussion of the goals of the *Apprendi* line of cases and the practical implications.

to full double jeopardy protection."[91] The dissenters would also "hold that the Double Jeopardy Clause requires a trial judge, in an acquittal-first jurisdiction, to honor a defendant's request for a partial verdict before declaring a mistrial on the ground of jury deadlock."[92]

Apprendi *and fine-only cases*

In a line of cases beginning with *Apprendi v. New Jersey*,[93] the Court held that the Sixth Amendment guarantees the right to a jury determination of any fact (other than the fact of a prior conviction) that increases a defendant's maximum potential sentence of imprisonment. In *Southern Union Co. v. United States*,[94] the Court ruled 6-3 that this principle also applies to sentences of criminal fines.

The defendant company was charged with violating federal environmental statutes by illegally storing liquid mercury. The statute provided for a fine of up to $50,000 for each day of the violation. The indictment and the jury verdict form both stated a range of dates, and the jury was not asked to specify the duration of the violation. At sentencing, the judge concluded that the jury had found a violation over the entire time period, and set the maximum potential fine at $38.1 million. This was error, said the Supreme Court.

The majority and dissenting opinions both contain lengthy dissertations on the historical role of the jury, particularly in prosecutions involving fines. For our purposes, what is most important is the Court's discussion of the goals of the *Apprendi* line of cases and the practical implications. The majority opinion, authored by Justice Sotomayor, states that *Apprendi*'s core concern is to preserve the jury's role in determining facts that warrant punishment. The jury is a "'bulwark between the State and the accused at the trial for an alleged offense,'"[95] and there is no principled basis to distinguish a sentence of a fine from a sentence of imprisonment. "Where a fine is so insubstantial that the underlying offense is considered 'petty,' the Sixth Amendment right of jury trial is not triggered and no *Apprendi* issue arises."[96] Dissenting, Justice Breyer, joined by Justices Kennedy and Alito, argued that the outcome should have been controlled by *Oregon v. Ice*,[97] where the Court found that sentencing judges could find facts that allow sentences to run consecutively as opposed to concurrently. The dissenters also contended that extending *Apprendi*'s holding to fines would straightjacket legislatures. Some "may choose to return to highly discretionary sentencing, with its related risks of nonuniformity."[98]

While several parts of the decision may be worth studying, there are two points to emphasize: first, there is no wiggle room based upon the size of the potential fine. If the offense is non-petty, and the defendant has the right to a jury trial, the rule applies. Second, the rule applies to facts that determine the maximum fine, even if the maximum fine is not imposed. In this case, the maximum fine was $38.1 million, but the amount imposed was $6 million.

EIGHTH AMENDMENT

The juvenile life-without-parole (LWOP) case, *Miller v. Alabama*,[99] was a quite significant Eighth Amendment ruling. In a 5-4 decision, the Supreme Court held that the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[100] One petitioner, Jackson, was 14 when he helped rob a video store, where a co-defendant killed the clerk. The second petitioner, Miller, was also 14 when he and a co-defendant were charged with murder during the course of arson. Both were tried as adults and, upon conviction, both received a mandatory LWOP sentence.

Writing for the majority, Justice Kagan drew on two strands of Eighth Amendment jurisprudence. First, decisions such as *Graham v. Florida*[101] address mismatches between the culpability of the class of offenders and the severity of the penalty. Thus, *Graham* prohibits an LWOP sentence for a juvenile who has committed a non-homicide offense. But *Graham* also likens LWOP for juveniles to the death penalty itself, implicating a second line of precedents, which require sentencing authorities to consider the individual characteristics of the defendant and the details of the crime before imposing a death sentence. As in prior cases, the Court noted that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[102] Here the mandatory sentencing schemes prevented "assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender."[103] Moreover, relying again upon *Graham* and precedents requiring individualized sentencing in capital cases, a mandatory LWOP sentence for juveniles impermissibly precludes consideration of the defendant's chronological age and its associated features—including immaturity and failure to appreciate risks—as well as family circumstances, the facts of the case, and the possibility of rehabilitation. The majority swept aside the State's arguments, finding (among other things) that although it is possible for juveniles to receive mandatory LWOP sentences in 29 U.S. jurisdictions, the variance in the statutory schemes does not show that the penalty has been fully and deliberately endorsed by these legislatures. Further, the discretion in some statutes dealing with transfer from juvenile to adult systems does not

91. *Id.* at 2056.
92. *Id.* at 2058.
93. 530 U.S. 466 (2000).
94. 132 S. Ct. 2344 (2012).
95. *Id.* at 2351 (quoting Oregon v. Ice, 555 U.S. 160, 168 (2009)).
96. *Id.*
97. 555 U.S. 160 (2009).
98. *Southern Union Co.*, 132 S. Ct. at 2357, 2371 (Breyer, J., dissenting).
99. 132 S. Ct. 2455 (2012).
100. *Id.* at 2469.
101. 130 S. Ct. 2011 (2010).
102. *Miller*, 132 S. Ct. at 2465 (citing *Graham* and Roper v. Simmons, 543 U.S. 551 (2005)).
103. *Id.* at 2466.

make up for the lack of discretion in the mandatory LWOP schemes.[104]

Chief Justice Roberts penned the primary dissent. Joined by Justices Scalia, Thomas, and Alito, he pointed to the nearly 2,500 inmates serving LWOP sentences for crimes committed as juveniles, and argued that it is therefore not "unusual" for a murderer to receive an LWOP sentence. He noted that in determining whether a punishment is cruel and unusual, the Court generally begins with "'objective indicia of society's standards, as expressed in legislative enactments and state practice.'"[105] Given the number of states that require and frequently impose mandatory LWOP sentences upon juveniles, "there is no objective basis" for finding a "consensus against" the practice.[106] Nor is the majority's decision supported by the prior holdings in *Roper* and *Graham*, which were expressly limited to death penalty and non-homicide prosecutions.[107] Justice Thomas, joined by Justice Scalia, contended neither strand of Eighth Amendment jurisprudence relied upon by the majority is consistent with the original understanding of the Cruel and Unusual Clause. He also argued that in *Harmelin v. Michigan*, the Court previously "declined to extend its individualized-sentencing rule beyond the death penalty context."[108] Justice Alito, joined by Justice Scalia, first questioned the concept of "evolving standards of decency,"[109] and noted that "today's decision shows . . . that our Eighth Amendment cases are no longer tied to any objective indicia of society's standards."[110]

FOURTEENTH AMENDMENT—DUE PROCESS

Two significant Due Process Clause cases were decided this past Term. In one, the Court addressed the prosecution's duty to disclose notes that could have been used to impeach a key witness. In the other, the justices turned aside a challenge to the reliability of an eyewitness identification.

Brady *obligations*

This may be an unfair observation, but it almost seems like whenever there is a Supreme Court ruling about a prosecutor's noncompliance with *Brady v. Maryland*,[111] the Orleans Parish district attorney's office has offered up the vehicle.[112] In *Smith v. Cain*,[113] the most recent of these cases, the Court ruled 8-1 that the failure to comply with *Brady* required Smith's conviction to be vacated.

Smith was convicted of murder based upon the testimony of a single witness, Boatner. In court, Boatner identified Smith as the first of three gunmen to enter the home where five people were killed. He said that he had been face-to-face with Smith at the beginning of the robbery-homicides. However, according to the notes of the lead investigator, on the night of the murders, Boatner could not describe the perpetrators other than that they were black men. Five days later, Boatner also said he could not identify anyone because he could not see their faces and he would not know them if he saw them. The prosecution did not disclose these notes to the defense.

In *Perry v. New Hampshire*, . . . the Court turned aside a Due Process Clause challenge to the admissibility of an eyewitness identification.

In his opinion for the Court, Chief Justice Roberts wrote that Boatner's statements were both exculpatory and material. There was no inculpatory physical evidence. Boatner's trial testimony was the only evidence linking Smith to the crime, and the undisclosed statements directly contradicted that testimony. While the State has offered "a reason that the jury *could* have disbelieved Boatner's undisclosed statements," it "gives us no confidence that it *would* have done so."[114] The undisclosed statements thus sufficed to undermine confidence in the conviction, and the Louisiana courts' denial of post-conviction relief was reversed. Justice Thomas, the lone dissenter, contended that Smith had not established a reasonable probability that the jury would have afforded the undisclosed statements sufficient weight to alter its verdict. He argued that the majority failed to consider the record as a whole and that the Court improperly shifted the burden of proof to the State.[115]

Reliability of eyewitness identifications

In *Perry v. New Hampshire*,[116] a closely watched case, the Court turned aside a Due Process Clause challenge to the admissibility of an eyewitness identification. A witness called police to report a person breaking into cars in a parking lot early one morning. Officers stopped the defendant, Perry, at the scene. When they went to the witness to ask for a description, she pointed to her window and said the person she saw breaking into the car was standing in the parking lot, right next to a police officer. Perry challenged the identification on due-process grounds, arguing that it was equivalent to a one-person showup that all but guaranteed he would be identified as the offender. He lost the motion and was convicted of theft. The New Hampshire Supreme Court rejected his argument, and the U.S. Supreme Court affirmed, 8-1.

104. *Id.* at 2470-75. Justice Breyer concurred to emphasize that if the State seeks a sentence of life without the possibility of parole for petitioner Jackson, there would have to be a determination that he killed or intended to kill the robbery victim. *Id.* at 2475, 2477 (Breyer, J., concurring).
105. *Id.* at 2477, 2477-78 (Roberts, C.J., dissenting) (quoting *Graham*, and citing Kennedy v. Louisiana, 554 U.S. 407, 422 (2008) and *Roper*).
106. *Id.* at 2478.
107. *Id.* at 2480-82.
108. *Id.* at 2482, 2485 (Thomas, J., dissenting) (citing *Harmelin*, 501 U.S. 957 (2003)).
109. "Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law?" *Id.* at 2487 (Alito, J., dissenting).
110. *Id.* at 2490.
111. 373 U.S. 83 (1963).
112. *See*, *e.g.*, Connick v. Thompson, 131 S. Ct. 1350 (2011); Kyles v. Whitley, 514 U.S. 419 (1995).
113. 132 S. Ct. 627 (2012).
114. *Id.* at 630.
115. *See id.* at 631, 635-40.
116. 132 S. Ct. 716 (2012).

Perry could not prevail because the police engaged in no improper conduct; the officers did not arrange the suggestive circumstances surrounding the witness's identification of Perry.

The opinion for the Court was authored by Justice Ginsburg. She first emphasized that the Constitution protects against a conviction based on unreliable evidence primarily by affording sufficient safeguards for the adversary system to function: defendants have counsel, confrontation, cross-examination, compulsory process, and other rights. The leading eyewitness identification decisions, *Neil v. Biggers*[117] and *Manson v. Brathwaite*,[118] make clear that "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary" and suppression of the resulting identification depends upon "whether improper police conduct created a 'substantial likelihood of misidentification.'"[119] But there is an important limitation. "The due process check for reliability . . . comes into play only after the defendant establishes improper police conduct."[120] Perry could not prevail because the police engaged in no improper conduct; the officers did not arrange the suggestive circumstances surrounding the witness's identification of Perry. The justices rejected Perry's argument for a broader application of the Due Process Clause, saying that "[a] primary aim of excluding identification evidence. . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place."[121] The Court also turned aside the argument that eyewitness identifications are a uniquely unreliable form of evidence in large part because "the jury, not the judge, traditionally determines the reliability of evidence."[122]

Justice Sotomayor was the lone dissenter. She argued that the Court's cases establish the clear rule that admitting "out-of-court eyewitness identifications derived from impermissibly suggestive circumstances that pose a very substantial likelihood of misidentification violates due process."[123] Nor is there any distinction between intentional and unintentional suggestion. Justice Sotomayor took issue with a number of other aspects of the majority opinion, including the Court's emphasis on a deterrence rationale for exclusion. Citing empirical evidence regarding the unreliability of eyewitness identification, she argued that the majority adopted "an artificially narrow conception of the dangers of suggestive identifications at a time when our concerns should have deepened."[124]

FIRST AMENDMENT

The Court issued two notable First Amendment cases this Term.

In *United States v. Alvarez*,[125] a much-anticipated decision, the Court struck down the Stolen Valor Act. The Act prohibits false representations of the receipt of military decorations, and the penalties are enhanced if the representations concern the Medal of Honor. Alvarez, a local official, lied at a public meeting about receiving the Medal of Honor. Six justices agreed that the Act violates the First Amendment, but split on the reasons.

A plurality held that content-based restrictions on speech are permitted only when confined to certain traditional categories, such as obscenity, defamation, and speech presenting some imminent and grave threat. Writing for four justices, Justice Kennedy rejected the government's claim that false statements have no value and hence are unprotected. They distinguished statutes criminalizing acts such as perjury and false statements to government officials; these provisions are narrower and do not establish a general rule that false statements are unprotected. Finally, even though the government asserted that the Act protects compelling interests, "[t]he First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest,"[126] which was not shown here. Justices Breyer and Kagan concurred in the outcome, but on a different theory. Even when one reads the statute narrowly as criminalizing "only false factual statements made with knowledge of their falsity and with the intent that they be taken as true," the statute lacks "any . . . limiting features" such as context or proof of injury.[127] As drafted, it "works disproportionate constitutional harm."[128] Justice Alito, joined by Justices Scalia and Thomas, dissented. In their view, the statute "reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value . . . and proscribing them does not chill any valuable speech."[129] The dissenters argued that "there are more than 100 federal criminal statutes that punish false statements made in connection with areas of federal agency concern,"[130] and the Act, like those, does not infringe the First Amendment.

Reichle v. Howards[131] was a civil-rights action brought by a plaintiff who was arrested by Secret Service agents after meeting Vice President Cheney at a public event. The plaintiff, Howards, told the Vice President that his policies in Iraq were "disgusting," and Howards touched the Vice President's shoulder. Agent Reichle stopped Howards, who denied touching the Vice President, and was arrested. The agent had probable cause to arrest Howards for making a false statement to a federal official, but Howards alleged that the arrest was in retaliation for criticizing the Vice President, in violation of the First

117. 409 U.S. 188 (1972).
118. 432 U.S. 98 (1977).
119. *Perry*, 132 S. Ct. at 724 (citing *Biggers* and *Brathwaite*).
120. *Id.* at 726.
121. *Id.* at 726.
122. *Id.* at 728. Justice Thomas concurred, arguing that the Court's eyewitness-identification cases rely upon substantive due process and are thus wrongly decided. *Id.* at 730 (Thomas, J., concurring).
123. *Id.* at 730, 731 (Sotomayor, J., dissenting).
124. *Id.* at 739.
125. 132 S. Ct. 2537 (2012).
126. *Id.* at 2549 (quoting Brown v. Entertainment Merchants Assn., 131 S. Ct. 2729, 2738 (2011)).
127. *Id.* at 2551, 2552-53, 2555 (Breyer, J., concurring).
128. *Id.* at 2556.
129. *Id.* at 2556, 2556-57 (Alito, J., dissenting).
130. *Id.* at 2562.
131. 132 S. Ct. 2088 (2012).

Amendment. The case raised two questions: whether a plaintiff may raise a First Amendment retaliatory arrest claim despite the presence of probable cause to arrest, and whether the agent was entitled to qualified immunity. The Court did not reach the first question; it determined that the agent was entitled to qualified immunity.

Justice Thomas wrote for the Court. The qualified-immunity question turned on the impact of *Hartman v. Moore*,[132] which held that a plaintiff cannot claim retaliatory *prosecution* in violation of the First Amendment if probable cause supported the charges. Reichle was entitled to qualified immunity because *Hartman*'s impact on the precedent governing retaliatory *arrests* was not clear, and a reasonable official "could have interpreted *Hartman*'s rationale to apply to retaliatory arrests."[133] Justices Ginsburg and Breyer concurred in the judgment. Secret Service agents must make swift decisions about the safety of public officials, and they may take into account words spoken to or near the person whose safety is their charge.[134]

FEDERAL HABEAS CORPUS

In last year's summary of Supreme Court decisions, I wrote that the 2010-11 Term gave us several landmark habeas corpus rulings, including *Harrington v. Richter*[135] and *Cullen v. Pinholster*.[136] This Term may be remembered as much for its pattern of summary reversals in habeas cases as for any of the individual rulings. In no fewer than six cases, the justices granted certiorari and summarily reversed decisions of courts of appeals that had granted federal habeas corpus relief to state inmates.[137]

The summary reversals came throughout the year. Setting the tone, the very first opinion of the Term was *Cavazos v. Smith*,[138] where the majority held that the court of appeals had erred in finding that the state court had unreasonably applied the "sufficiency of the evidence" standard of *Jackson v. Virginia*.[139] In *Smith*, six justices emphasized the deference due to state courts under AEDPA as well as the deference afforded to jury verdicts under *Jackson*.[140] The dissenters argued that certiorari should have been denied and that the Court was merely engaging in error correction.[141]

After leading off with *Smith*, summary reversals followed in *Bobby v. Dixon* (the *Miranda* case), *Hardy v. Cross* (under AEDPA, the state court did not unreasonably apply Confrontation Clause precedents),[142] *Wetzel v. Lambert* (habeas relief should not be granted "unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA"),[143] *Coleman v. Johnson* (the state court denied a *Jackson v. Virginia* claim "and that determination in turn is entitled to considerable deference under AEDPA"),[144] and *Parker v. Matthews* (the court of appeals decision "is a textbook example of what [AEDPA] proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts'").[145]

The Court ruled that AEDPA requires federal courts to measure state-court decisions against the Supreme Court's precedents at the time the state courts render their decisions.

In *Greene v. Fisher*,[146] an unusual case (heck, this one was actually argued), a unanimous Court sent another message about the limits of federal habeas corpus review under AEDPA. The main Supreme Court precedent case on which Greene relied was issued *after* his state post-conviction petition was decided but before it was made final. The Court ruled that AEDPA requires federal courts to measure state-court decisions against the Supreme Court's precedents at the time the state courts render their decisions.

Four cases about procedural default are also important to note, including what may turn out to be the most significant individual habeas decision of the Term, *Martinez v. Ryan*.[147] The question in *Martinez* was whether an inmate can raise ineffective assistance of counsel for the first time in federal court when the claim was not properly presented in state court due to counsel's errors. The case came from Arizona, and state law does not permit ineffective assistance of counsel to be raised on direct appeal; rather, the claim can only be brought in a state post-conviction petition. Martinez's lawyer, however, failed to do so. The court of appeals had ruled that under *Coleman v. Thompson*,[148] an attorney's errors in a post-conviction proceeding cannot amount to cause to excuse a procedural default. The Supreme Court disagreed, by a vote of 7-2.

With Justice Kennedy writing for the Court, the majority modified what many had taken as a blanket rule in *Coleman*.

132. 547 U.S. 250 (2006).
133. *Reichle*, 132 S. Ct. at 2095. Justice Kagan did not participate in the case.
134. *Id.* at 2097 (Ginsburg, J., concurring).
135. 131 S. Ct. 770 (2011).
136. 131 S. Ct. 1388 (2011).
137. For a discussion of the pattern of summary reversals, see Jonathan M. Kirshbaum, *Accelerating Pace of Supreme Court's Summary Reversals of Habeas Relief Suggests Impatience with Circuit Courts' Failure to Defer to State Tribunals*, 81 U.S.L.W. 67 (July 27, 2012).
138. 132 S. Ct. 2 (2011) (per curiam).
139. 443 U.S. 307 (1979).
140. *Smith*, 132 S. Ct. at 6.
141. *Id.* at 8, 9 (Ginsburg, J., dissenting, joined by Justices Breyer and Sotomayor).
142. 132 S. Ct. 490 (2011) (per curiam).
143. 132 S. Ct. 1195, 1199 (2012) (per curiam). Justices Breyer, Ginsburg, and Kagan dissented, arguing that the court of appeals did not overlook aspects of the decision by the Pennsylvania Supreme Court, and that the Court should not have reviewed the court of appeals fact-specific holding. *Id.* at 1199, 1199-1201 (Breyer, J., dissenting).
144. 132 S. Ct. 2060, 2065 (2012) (per curiam).
145. 132 S. Ct. 2148, 2149 (2012) (quoting Renico v. Lett, 130 S. Ct. 1855, 1866 (2010)).
146. 132 S. Ct. 38 (2011).
147. 132 S. Ct. 1309 (2012).
148. 501 U.S. 722 (1991).

When a State requires an ineffective assistance of counsel claim to be raised in a collateral state proceeding, two circumstances can provide cause to excuse a default of that claim.

The *Martinez* Court "qualifie[d] *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[149] In *Coleman*, the alleged failure of counsel was on appeal from an initial-review collateral proceeding, and the claims had been addressed by the state habeas trial court. By contrast, "[w]here, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."[150] When a State requires an ineffective-assistance-of-counsel claim to be raised in a collateral state proceeding, two circumstances can provide cause to excuse a default of that claim. One is if the state courts did not appoint counsel in the initial-review collateral proceeding for the claim of ineffective assistance of counsel. The second is where appointed counsel in the initial-review collateral proceedings is in turn ineffective under *Strickland v. Washington*.[151] Justice Scalia, joined by Justice Thomas, dissented. They denounced the majority's claim "that today's holding is no more than a 'limited qualification' to *Coleman*," calling it instead "a repudiation of the longstanding principle governing procedural default, which *Coleman* and other cases consistently applied."[152]

Maples v. Thomas,[153] another procedural-default case with the same lineup of justices, is interesting though somewhat fact specific. Maples, an inmate on death row in Alabama, missed the deadline to file an appeal from the denial of his state post-conviction petition. He had been represented in his post-conviction petition by two associates at a New York law firm, who left the firm while the case was pending. When the trial-level court denied relief, the notice of the court's order (which had been mailed to the associates) was returned unopened. After missing the deadline to appeal and losing in several efforts to bring a late appeal, Maples filed a federal habeas corpus petition. It was dismissed due to the procedural default. The Supreme Court reversed. In an opinion by Justice Ginsburg, the Court noted the general rule that when a post-conviction attorney misses a filing deadline, the petitioner is bound by the error and cannot rely upon it for cause to excuse a procedural default. But Maples' lawyers left him without notice. "Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative."[154] Justices Scalia and Thomas dissented, disagreeing with the majority's conclusion that Maples was essentially unrepresented at the critical time. They added that "if the interest of fairness justifies our excusing Maples' procedural default here, it does so whenever a defendant's procedural default is caused by his attorney. That is simply not the law—and cannot be, if the states are to have an orderly system of criminal litigation conducted by counsel."[155]

The last two procedural-default cases are worth a brief mention. In *Wood v. Milyard*,[156] the justices held that courts of appeals, like the district courts, have the authority but not the obligation to raise a forfeited timeliness defense on their own initiative. However, a court of appeals abuses its discretion by dismissing a habeas petition as untimely where that ground has been intentionally waived by the State. Finally, in *Gonzalez v. Thaler*,[157] the Court addressed an issue about the specificity of certificates of appealability but, more importantly for our purposes, clarified an aspect of AEDPA's one-year statute of limitations. Under AEDPA, the limitations period runs from the latest to occur among four dates set out by statute. [158] One of those is the date on which the state court judgment became final by the conclusion of direct review of the expiration of time for seeking review. The justices held that "with respect to a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' under [AEDPA] when the time for seeking such review expires."[159]

ODDS AND ENDS

A few other decisions are important to note.

The interrelationship of federal and state sentences

Setser v. United States[160] holds that a federal district court may order a federal sentence to run consecutively to a state sentence that has not yet been imposed. Setser pleaded guilty to a federal drug offense. He also had pending state probation-violation and drug charges. At sentencing, the federal judge ordered Setser's federal sentence to run *consecutively* to any state sentence for the probation violation but *concurrently* with any sentence imposed on the new drug charge. The state court subsequently sentenced him to 5 years for probation violation and 10 years on the new drug charge, to be served *concurrently*.[161] The majority read the applicable federal statute, 18 U.S.C. §

149. *Martinez*, 132 S. Ct. at 1315.
150. *Id.* at 1317.
151. *Id.* at 1318 (citing *Strickland*, 466 U.S. 668).
152. 132 S. Ct. at 1321, 1324 (Scalia, J., dissenting).
153. 132 S. Ct. 912 (2012).
154. *Id.* at 922-23 (citation omitted).
155. *Id.* at 929, 934 (Scalia, J., dissenting).
156. 132 S. Ct 1826 (2012). Justices Thomas and Scalia would have decided the case on different grounds. *See id.* at 1835 (Thomas, J., concurring in the judgment).
157. 132 S. Ct. 641 (2012).
158. *See* 28 U.S.C. § 2244(d)(1).
159. *Id.* at 656. Justice Scalia dissented from the holding about certificates of appealability and would have reversed for lack of jurisdiction. *See id.* at 656 (Scalia, J., dissenting).
160. *Setser*, 132 S. Ct. 1463 (2012).
161. Under state law, this meant that the state sentences were to run concurrently with each other *and* with the federal sentence. *See* Brief for Petitioner, Setser v. United States (No. 10-7387), at 7.

3584(a), as affording discretion to federal judges to specify whether a federal sentence is concurrent or consecutive to a yet-to-be-imposed state term, even though such discretion is not explicit in the statute. The Court turned aside an argument that this made Setser's sentence unreasonable in light of the state court's later decision to run the sentences concurrently.[162] Justice Breyer, joined by Justices Kennedy and Ginsburg, dissented. They read § 3584 as providing authority to specify consecutive or concurrent sentences only when a federal judge is the second sentencer. Justice Breyer (one of the original members of the U.S. Sentencing Commission) wrote that that interpretation was most consistent with the purposes of the 1984 Sentencing Reform Act, which favors concurrent sentences when the separate convictions are based upon the same relevant conduct, and this determination would ordinarily best be made by the second sentencing court.[163]

Grand jury witness immunity

In *Rehberg v. Paulk*,[164] a unanimous Court held that a grand jury witness is entitled to the same absolute immunity from federal civil rights liability as a witness who testifies at trial. The witness, Paulk, was an investigator for the local district attorney. He testified several times before a county grand jury, which returned several indictments against Rehberg. Rehberg brought an action under 42 U.S.C. § 1983, alleging that Paulk conspired to present and did present false testimony. In finding that Paulk was entitled to absolute immunity, the Court noted that just as with trial witnesses, "a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability needed" to prevent perjury.[165]

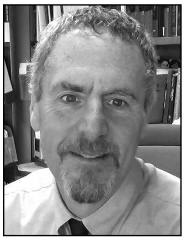
A LOOK AHEAD

As this article goes to press (prior to the Court's September and October conferences), it is still too early to handicap the upcoming Term. But a few interesting cases are already in the hopper. The justices are slated to determine whether *Padilla v. Kentucky*[166]—the landmark ruling on advice of the immigration consequences of a plea—applies to convictions that became final before its announcement.[167] The Court will also decide whether federal habeas corpus proceedings may be stayed for capital defendants who are mentally incompetent.[168]

Fourth Amendment cases are perhaps attracting the greatest amount of early interest. *Bailey v. United States*[169] asks if officers can detain a person while executing a search warrant when the person already left the immediate vicinity before the warrant is executed. Then there is the doggie duo. The issue in *Florida v. Harris*[170] is whether an alert by a narcotics-detection dog provides probable cause to search a vehicle. *Florida v. Jardines*[171] asks if a drug dog's sniff at the front door of a home amounts to a search within the meaning of the Fourth Amendment. You may or may not agree with his legal analysis, but it is hard to beat the prose of *Time* columnist Joel Stein, who opined about *Jardines*: "The outcome depends on whether the court sees a dog as a gadget like a thermal imager or as a human who can invade your privacy by smelling private smells. My take is, if you think dog sniffing isn't an invasion of privacy, then you don't have a crotch."[172]

CONCLUSION

The past Term was *big*. The Court gave us thrills,[173] chills,[174] and spills,[175] with transformative decisions about searches, effective assistance of counsel, jury trials, and juvenile life sentences. Can the next Term top it? We'll see.



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162. *Id.* at 1469-70, 1472.
163. *Id.* at 1474, 1476-79 (Breyer, J., dissenting).
164. 132 S. Ct. 1497 (2012).
165. *Id.* at 1505.
166. 130 S. Ct. 1473 (2010).
167. Chaidez v. United States, No. 11-820.
168. Ryan v. Gonzales, No. 10-930, and Tibbals v. Carter, No. 11-218.
169. No. 11-770.
170. No. 11-817.
171. No. 11-564.
172. Joel Stein, *My Day in Court. Who Do You Call When You Need to Interpret the Constitution? Me*, TIME, Feb. 27, 2012.
173. Well, *some* were thrilled. *See Thrilled and Relieved, Sick Patients Cheer Court Ruling*, *available at* http://vitals.msnbc.msn.com/_news/2012/06/28/12363291-thrilled-and-relieved-sick-patients-cheer-court-ruling?lite.
174. "Permitting the government to decree this speech to be a criminal offense . . . would endorse governmental authority to compile a list of subjects about which false statements are punishable. . . . The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit . . . ." *Alvarez*, 132 S. Ct. at 2547-48.
175. Somebody at the Court spilled the beans, or so it was reported. *See* Charles Lane, *Slimy Leaks About John Roberts at Supreme Court, available at* http://www.washingtonpost.com/blogs/post-partisan/post/slimy-leaks-about-john-roberts-at-supreme-court/2012/07/03/gJQAPq9mKW_blog.html.