

# Recent Criminal Decisions of the United States Supreme Court: The 2004-2005 Term

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The 2004-2005 Term of the Supreme Court offered no blockbuster rulings. Nonetheless, in what turned out to be the final year for the Rehnquist Court, there were rulings of note on topics ranging from securities fraud to sentencing guidelines. In one case, the Court looked to foreign law as a model for determining whether to prohibit the death penalty as a sentence for juvenile criminal offenders. It will be interesting to see, with changes in the Court's membership, whether this trend to look toward foreign law in constitutional or other criminal cases continues. In this article, I will review the Court's criminal-law decisions from the past term. In the next issue of *Court Review*, I will review the Court's civil decisions.

## FOURTH AMENDMENT

In *Devenpeck v. Alford*,<sup>1</sup> Justice Scalia, writing for all the justices except Chief Justice Rehnquist, who took no part in the decision, held that there is no additional limitation on the Fourth Amendment's probable cause requirement that the offense giving rise to probable cause be "closely related" to the offense to which the officer refers at the time of arrest. Using wig-wag headlights, respondent stopped to assist a disabled vehicle, and left quickly as a Washington state patroller pulled up. When questioned, the occupants of the disabled vehicle informed the patrolman that they thought respondent was a police officer. The patrolman pursued respondent and was later joined by his supervisor. The patrolmen discovered wig-wag lights on respondent's car, that he was listening to a Kitsap County Sheriff's Office on a special radio, and that he had handcuffs and a hand-held police scanner in his car. The patrolmen also noticed that respondent was recording the conversation. They arrested respondent for violation of the Washington Privacy Act despite respondent's claim that he could by law record his conversation with the officers.

The patrolmen, after speaking with a state prosecutor, charged respondent with violating the Act and issued a ticket to respondent for his flashing lights. Under the law, "respondent could be detained on the latter offense only for the period of time 'reasonably necessary' to issue a citation." The state trial court dismissed both charges and respondent then filed a cause of action under 42 U.S.C. section 1983 "and a state cause of action for unlawful arrest and imprisonment, both claims resting upon the allegation that petitioners arrested him without probable cause in violation of the Fourth and Fourteenth Amendments." A divided panel for the Court of Appeals for the Ninth Circuit determined that the patrolmen "could not

have had probable cause to arrest because they cited only the Privacy Act charge" and tape recording the conversation was not a crime. It rejected petitioner's claim that probable cause existed because respondent was impersonating a police officer or obstructing law enforcement on the grounds that "those offenses were not 'closely related' to the offense invoked by Devenpeck as he took respondent into custody."

The Court began its opinion by reciting the basic principles of Fourth Amendment jurisprudence: "The Fourth Amendment protects 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" A warrantless arrest is considered reasonable if "there is probable cause to believe that a criminal offense has been or is being committed." Probable cause is measured by "the reasonable conclusion[s] . . . drawn from the facts known to the arresting officer at the time of arrest." The Court has made clear in prior decisions that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." It has repeatedly explained that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." The Court concluded "the rule that the offense establishing probable cause must be 'closely related' to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent." This rule "makes the lawfulness of an arrest turn upon the motivation of the arresting officer—eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest."

Otherwise, the constitutionality of the arrest will "vary from place to place and from time to time." An arrest by a "veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not."

Justice Stevens, writing for a 6-2 Court, held in *Illinois v. Caballes*<sup>2</sup> that a dog sniff during a routine traffic stop does not violate the Fourth Amendment because it does not prolong the stop, and does not implicate any legitimate privacy interest a driver carrying contraband may have. Chief Justice Rehnquist took no part in the decision.

Respondent was stopped by an Illinois state trooper for traveling at 71 m.p.h. in a 65 m.p.h. zone. While the first state trooper was in the process of issuing a warning ticket, a second trooper arrived and walked his narcotics-detection dog around

## Footnotes

1. 543 U.S. 146 (2004).

2. 125 S.Ct. 834 (2005).

respondent's car even though the first trooper had not reported suspicion of drugs. The dog alerted the troopers and marijuana was discovered in the trunk of respondent's car. The entire episode took less than ten minutes. Respondent was arrested and convicted of a narcotics offense after the trial judge denied his motion to suppress the marijuana. The appellate court affirmed, but the Illinois Supreme Court reversed, concluding that "because the canine sniff was performed without any 'specific and articulable facts' to suggest drug activity, the use of the dog 'unjustifiably enlarge[ed] the scope of a routine traffic stop into a drug investigation.'"

The Supreme Court reversed and based its opinion on the following assumptions: (1) respondent was stopped solely for a traffic violation and there was no suspicion that he possessed marijuana; (2) the traffic stop, or initial seizure of respondent, was based on probable cause and legitimate; and (3) even though the initial stop was legitimate, the stop "can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." The Court also recognized the legitimacy of a prior Illinois Supreme Court ruling that a search would be illegal where a routine traffic stop was prolonged beyond a reasonable time because of a dog sniff. However, it finds that the stop in this case did not exceed ten minutes, a time "justified by the traffic offense and the ordinary inquiries incident to such a stop." The Court indicated that the Illinois Supreme Court's decision was erroneous in this case because it determined that the state trooper unconstitutionally turned a lawful traffic stop into a drug investigation without reasonable suspicion that respondent possessed any drugs. The Fourth Amendment, however, is violated only when a search compromises a legitimate privacy interest. The Court has previously determined that an individual does not have any legitimate privacy interest in possessing contraband. In keeping with this reasoning, the Court held in *United States v. Place*,<sup>3</sup> that "a 'canine sniff' by a well-trained narcotics-detection dog" is "*sui generis*," in a class all its own because it "discloses only the presence or absence of narcotics, a contraband item." The Court concluded that a narcotics-detection dog that only reveals the existence of contraband, and "does not expose noncontraband items that otherwise would remain hidden from public view," during a lawful traffic stop, generally does not implicate legitimate privacy interests."

Chief Justice Rehnquist delivered the opinion of the Court in *Muehler v. Mena*,<sup>4</sup> which held that the use of handcuffs to detain an individual during the execution of a search warrant for weapons and gang-affiliation paraphernalia is not an unreasonable use of force. No justices dissented, but Justice Stevens filed an opinion concurring in the judgment.

During an investigation into a gang-related drive-by shooting, police obtained a search warrant. They used a Special Weapons and Tactics (SWAT) team for the search because they believed there was a "high degree of risk involved in searching a house" given the gang affiliations. While the police executed the warrant, respondent, among others, was placed and

remained in handcuffs at gunpoint in a converted garage during the entire search. The police had also informed the Immigration and Naturalization Service (INS), and during the search, an INS agent asked each occupant of the house for their name, date and place of birth, and immigration status.

The search yielded various weapons, some marijuana, and gang paraphernalia.

Respondent filed an action under 42 U.S.C. section 1983 against the officers, claiming that "she was detained 'for an unreasonable time and in an unreasonable manner' in violation of the Fourth Amendment." A jury determined that the officers had violated Mena's Fourth Amendment right "by detaining her both with force greater than that which was reasonable and for a longer period than that which was reasonable." The court of appeals affirmed the judgment on two grounds: (1) that the officers were not entitled to qualified immunity because "it was objectively unreasonable to confine her in the converted garage and keep her in handcuffs during the [entire] search"; and (2) the questioning of Mena regarding her immigration status was a separate Fourth Amendment violation. The Supreme Court disagreed.

The Court began by citing to *Michigan v. Summers*,<sup>5</sup> in which it held "that officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.'" The Court found these detentions "appropriate . . . because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial." Applying *Summers* to this scenario, the Court concluded that Mena's detention for the duration of the search was "plainly permissible." The Court stated that "[i]nherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." The Court recognized that the use of handcuffs was more of an intrusion than was recognized in *Summers*, but believed that it was justified as "this was no ordinary search" but an "inherently dangerous situation[.]" since the police were searching for weapons and believed that gang members were present on the property. The Court further concluded that the amount of time Mena was in handcuffs was not unreasonable given the danger of the search.

Finally, the Court also believed Mena's rights were not violated by the INS agent's questioning while she was detained. The Court disagreed with the lower court's premise that the police "were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event." It stated: "We have 'held repeatedly that

**The Fourth Amendment . . . is violated only when a search compromises a legitimate privacy interest.**

3. 462 U.S. 696 (1983).

4. 125 S.Ct. 1465 (2005).

5. 452 U.S. 692 (1981).

**[A] trial court's mid-trial dismissal of a charge . . . for lack of evidence is final and cannot be reconsidered unless there is a law in place that allows for such reconsideration.**

mere police questioning does not constitute a seizure.”

**FIFTH AMENDMENT**

A 5-4 Court, in *Smith v. Massachusetts*,<sup>6</sup> held that under the Double Jeopardy Clause of the Fifth Amendment, a trial court's midtrial dismissal of a charge against a defendant for lack of evi-

dence is final and cannot be reconsidered unless there is a law in place that allows for such reconsideration. Petitioner Melvin Smith was tried before a jury on three counts. At the conclusion of the prosecution's case, the court, on a motion filed by petitioner, dismissed the third count on the grounds that “there was ‘not a scintilla of evidence’” to prove one element of the crime. After the close of defendant's case but prior to closing argument, the prosecution asked the judge to reevaluate her decision dismissing the third count on the grounds that a prior Massachusetts court decision had held that the evidence he presented was sufficient. The judge agreed and reversed her decision. Petitioner was convicted on all three counts.

Under the common law, “double jeopardy . . . applied only to charges on which a jury had rendered a verdict.” However, the Court has long since held that the Double Jeopardy Clause “prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict.” The Court has recognized only a “single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury.” This exception occurs when “a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal.” In that case, the prosecution can appeal to reinstate the jury verdict. However, “if the prosecution has not yet obtained a conviction, further proceedings to secure one are impermissible.”

The Court believed that when the judge in this case dismissed the third count, the judge's dismissal of the count was in fact “a judgment of acquittal,” since no jury verdict had been returned and further “factfinding proceedings going to guilt or innocence” were prohibited. The Court rejected the prosecution's argument that double jeopardy did not attach because the court's decision was “purely a legal determination” and that the “factfinding function” was reserved to the jury. The Court previously rejected similar reasoning in *United States v. Martin Linen Supply Co.*<sup>7</sup> In *Martin Linen*, the Court determined that an acquittal under Federal Rule of Criminal Procedure 29 “is a substantive determination that the prosecution has failed to carry its burden[]” and thus, “even when the jury is the *primary* factfinder, the trial judge still resolves ele-

ments of the offense in granting a Rule 29 motion in the absence of a jury verdict.”

The Court next addressed “whether the Double Jeopardy Clause permitted [the judge] to reconsider that acquittal once petitioner and his codefendant had rested their cases.” The Court stated “that the facts of this case gave petitioner no reason to doubt the finality of the state court's ruling.” The Court recognized that “as a general matter state law may prescribe that a judge's midtrial determination of the sufficiency of the State's proof can be reconsidered.” However, it found no such law in Massachusetts. The Court determined that “[i]t may suffice for an appellate court to announce the state-law rule that midtrial acquittals are tentative in a case where reconsideration of the acquittal occurred at a stage in the trial where the defendant's justifiable ignorance of the rule could not possibly have caused him prejudice.” That was not the case here, however, because “the possibility of prejudice” arose. The defendant *could* have presented evidence to rebut the element, but he ran the risk of bolstering the prosecution's case.

A 7-2 Court, in an opinion written by Justice Breyer, determined that the Fifth and Fourteenth Amendments forbid the use of visible shackles during the penalty phase of a capital murder trial unless the use is justified by an essential state interest. The petitioner in *Deck v. Missouri*<sup>8</sup> was tried and convicted in state court for robbing and killing an elderly couple. He was sentenced to death but the Missouri Supreme Court set aside the sentence. During the new sentencing proceeding, “Deck was shackled with leg irons, handcuffs, and a belly chain.” His numerous objections to the shackles were overruled and the jury was aware that Deck was shackled during the entire proceeding. Deck was again sentenced to death and appealed again, claiming “that his shackling violated both Missouri law and the Federal Constitution.” The Missouri Supreme Court affirmed the sentence.

Under common law, “[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of special need.” The Court stated that more recently, it “has suggested that a version of this rule forms part of the Fifth and Fourteenth Amendments' due process guarantee.” The Court took this opportunity to state with certainty that this rule identifies “a basic element of the ‘due process of law’ protected by the Federal Constitution.” The Court recognized, however, that the penalty phase of a trial might dictate a different rule because “the reasons that motivate the guilt-phase constitutional rule . . . [may not] apply with similar force in this context.” The Court recognized “[j]udicial hostility to shackling may once primarily have reflected concern for the suffering—the ‘tortures’ and ‘torments’—that ‘very painful’ chains could cause.” More recently, the Court has “emphasized the importance of giving effect to three fundamental legal principles”: (1) the presumption of innocence; (2) the right to counsel and a meaningful defense; and (3) the maintenance of a dignified judicial process sought by judges.

6. 125 S.Ct. 1129 (2005).

7. 430 U.S. 564 (1977).

8. 125 S.Ct. 2007 (2005).

The Court reasoned that the “considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases.” While the innocence phase of the trial is concluded, and therefore the use of shackles has no bearing on this consideration, “shackles at the penalty phase threaten related concerns.” The jury is “deciding between life and death,” which is a decision that has the same “severity” and “finality” as guilt. According to the Court, a defendant in shackles conveys to the jury “that court authorities consider the offender a danger to the community[,]” and “inevitably affects adversely the jury’s perception of the character of the defendant.”

#### **SIXTH AMENDMENT: COUNSEL**

In *Florida v. Nixon*,<sup>9</sup> the Court held that conceding guilt during the first phase of a capital trial is not tantamount to entering a guilty plea on behalf of the accused; therefore, counsel’s failure to obtain defendant’s express consent to such a strategy does not automatically render counsel’s performance deficient. Justice Ginsburg delivered the opinion of the Court, in which all the justices joined, except Chief Justice Rehnquist who took no part in the decision of the case.

Respondent Joe Elton Nixon was indicted for the brutal murder of Jeanne Bickner. Assistant Public Defender Michael Corin was assigned to Nixon and filed a plea of not guilty. Corin deposed all the State’s witnesses and determined that “Nixon’s guilt was not ‘subject to any reasonable dispute.’” Corin commenced plea negotiations, which were unsuccessful, and then decided to focus on the penalty phase of the trial, “believing that the only way to save Nixon’s life would be to present extensive mitigation evidence centering on Nixon’s mental instability.” As an experienced attorney, Corin believed that contesting Nixon’s guilt in the first phase of the trial would compromise his ability to persuade the jury that Nixon’s actions were a product of the mental illness. Corin attempted to explain the situation to Nixon on three occasions. Nixon generally was unresponsive and never approved or protested the attorney’s strategy. In fact, Nixon showed little interest in the trial and “intelligently and voluntarily waived his right to be present at trial.” During the trial, Corin admitted Nixon’s guilt and asked the jury to focus on the penalty phase of the trial. He only questioned the State’s witnesses to the extent he wanted to clarify their statements but did not present a defense. During the penalty phase, Corin argued that Nixon was mentally ill. The jury, however, recommended that Nixon be given the death penalty.

After a direct appeal, Nixon sought state postconviction relief arguing that Corin provided ineffective assistance of counsel because he conceded “Nixon’s guilt without obtaining Nixon’s express consent.” Relying on *United States v. Cronin*,<sup>10</sup> Nixon argued that Corin’s actions were “presumed prejudicial because it left the prosecution’s case unexposed to ‘meaningful adversarial testing.’” The Court did not agree. It recognized the

basic principle that “[a]n attorney . . . has a duty to consult with the client regarding ‘important decisions,’ including questions of overarching defense strategy.” However, this obligation “does not require counsel to obtain the defendant’s consent to ‘every tactical decision.’” Some decisions that affect basic rights cannot be

waived through a surrogate; for instance, the basic right to a trial. By pleading guilty, “a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one’s accusers.” Therefore, while it may be tactically advantageous, an attorney may not make a guilty plea on behalf of a client, and “a defendant’s tacit acquiescence in the decision to plead is insufficient to render the plea valid.”

The Court determined that Corin’s concession of guilt was not a “guilty plea” and did not “waive” Nixon’s rights in a criminal trial. Therefore, Corin did not need explicit approval. The Court rested its decision on the following facts. First, the prosecution was still required to prove its case. Second, Corin still could cross-examine witnesses and move to exclude prejudicial evidence, which he did. The Court also noted that, as required, Corin did attempt to discuss his strategy with Nixon on several occasions. The Court concluded “[g]iven Nixon’s constant resistance to answering inquiries put to him by counsel and court . . . Corin was not additionally required to gain express consent before conceding Nixon’s guilt.” According to the Court, Corin fulfilled his duties. The Court recognized that in a more standard trial, the decision might be closer. However, in a death penalty case, counsel faces very different decisions, “not least because the defendant’s guilt is often clear.” The Court deemed it reasonable for counsel, therefore, “to focus on the trial’s penalty phase, at which time counsel’s mission is to persuade the trier that his client’s life should be spared.” When defendant is “unresponsive” to counsel’s strategic discussions, “counsel’s strategic choice is not impeded by any blanket rule demanding the defendant’s explicit consent.”

A 5-4 Court, in *Rompilla v. Beard*,<sup>11</sup> held that counsel provided ineffective assistance when it failed to review the files the prosecutor stated it would use as evidence to prove aggravating factors in the sentencing phase of a capital trial, despite the fact that defendant and his family indicated that no mitigating evidence existed. Justice Souter wrote the opinion of the Court, while Justice Kennedy dissented.

Petitioner Ronald Rompilla was found guilty of murder. In the penalty phase of the proceedings, “the prosecutor sought to prove three aggravating factors to justify a death sentence.” Prior to trial, the prosecutor indicated that he would use the

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9. 543 U.S. 175 (2004).  
10. 466 U.S. 648 (1984).

11. 125 S.Ct. 2456 (2005).

**A 6-3 Court . . . held that an indigent defendant who has pleaded guilty or nolo contendere is entitled to the appointment of appellate counsel when seeking access to a direct appeal.**

files from Rompilla's prior convictions as evidence. Despite that warning, defense counsel did not obtain a copy of the files and, instead, merely questioned Rompilla and his family about possible mitigating evidence. Rompilla and his family members indicated that there was none. In reality, if defense counsel had looked at the file "they would have found a range of mitigation leads that no other source had

opened up." The file included records of Rompilla's childhood and mental-health history, including test results that pointed to schizophrenia and other disorders. The defense's mitigating evidence merely consisted of relatively brief testimony of Rompilla's family members, who argued in effect for residual doubt and beseeched the jury for mercy, and three mental-health officials, who were consulted prior to trial. Rompilla was sentenced to death.

After denial of relief in his state postconviction proceedings, Rompilla sought a federal writ of habeas corpus. The District Court, applying the necessary standard under 28 U.S.C. section 2255, determined "that the State Supreme Court had unreasonably applied *Strickland v. Washington*<sup>12</sup> as to the penalty phase of the trial, and granted relief for ineffective assistance of counsel." A divided panel for the Court of Appeals for the Third Circuit reversed.

The Supreme Court recognized that the standard of reasonableness in this scenario has "few hard-edged rules, and the merits of a number of counsel's choices in this case are subject to fair debate." While the Court recognized that defense counsel need not "scour the globe on the off-chance something will turn up," it also believed that there are certain lines of inquiry which must be followed. It believed it is "clear and dispositive" that counsel was "deficient in failing to examine the court file on Rompilla's prior conviction." The Court gave the "obvious reason" as "[c]ounsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence." It is clear from the record that counsel did not review the transcripts from Rompilla's prior convictions and that failure to examine them seriously compromised the opportunity to respond to a case for aggravation.

The Court believed that it did not, as the dissent argued, create a "rigid, *per se*" rule that requires defense counsel to do a complete review of the file on any prior conviction introduced." It only requires counsel "to make reasonable efforts to review the prior conviction file" if it knows that the prosecution intends to introduce it and will quote damaging testimony from the victim. The Court stated: "Other situations, where a

defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way, might well warrant a different assessment." The Court also concluded, examining the matter *de novo*, that counsel's deficient performance was prejudicial in this instance under the standard that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

In *Halbert v. Michigan*,<sup>13</sup> the Court considered the constitutionality of Michigan's amendment to its Constitution: "In every criminal prosecution, the accused shall have the right . . . to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Under this amendment, "[a] defendant convicted by plea who seeks review in the Michigan Court of Appeals must now file an application for leave to appeal." Further, a defendant who pleads guilty or nolo contendere is not entitled to court-appointed appellate counsel except by leave of court, grant of application for leave to appeal, or in certain specific instances. Petitioner pleaded nolo contendere to two counts of second-degree criminal sexual conduct. The day after he was sentenced, "Halbert submitted a handwritten motion to withdraw his plea." The court denied it stating "that Halbert's 'proper remedy is to appeal to the Michigan Court of Appeals.'" Petitioner requested the aid of counsel twice but the requests were denied. Petitioner then filed a pro se application for leave to appeal, claiming a sentencing error and ineffective assistance of counsel. The Court of Appeals denied the application "for lack of merit in the grounds presented." The Michigan Supreme Court, in a divided panel, "denied Halbert's application for leave to appeal to that court."

A 6-3 Court, in an opinion written by Justice Ginsburg, held that an indigent defendant who has pleaded guilty or nolo contendere is entitled to the appointment of appellate counsel when seeking access to a direct appeal. "The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions." However, once the State has provided such an avenue it "may not 'bolt the door to equal justice' to indigent defendants." The Court believed this case must be aligned with one of its two prior cases: *Douglas v. California*<sup>14</sup> or *Ross v. Moffitt*.<sup>15</sup> In *Douglas*, the Court held that "in first appeals as of right, States must appoint counsel to represent indigent defendants." In *Ross*, the Court held "a State need not appoint counsel to aid a poor person in discretionary appeals to the State's highest court, or in petitioning for review in this Court." The Supreme Court stated that two considerations were key to its holding in *Douglas*, which did not exist in *Ross*: (1) "such an appeal entails an adjudication on the 'merits'"; and (2) "first-tier review differs from subsequent appellate stages 'at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court.'" As to the latter consideration, in second-tier discretionary appeals:

[A] defendant who had already benefited from counsel's aid in a first-tier appeal as of right would have, "at

12.466 U.S. 668 (1984).  
13.125 S.Ct. 2582 (2005).

14.372 U.S. 353 (1963).  
15.417 U.S. 600 (1974).

the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case.”

In the end, the Court believed “that *Douglas* provide[d] the controlling instruction” because of “[t]wo aspects of the Michigan Court of Appeals’ process following plea-based convictions”: (1) “in determining how to dispose of an application for leave to appeal, Michigan’s intermediate appellate court looks to the merits of the claims made in the application”; and (2) “indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves.” The Court believed “[o]f critical importance” is the fact that “the tribunal to which he addresses his application, the Michigan Court of Appeals” sits to correct errors in individual cases. The court of appeals can respond to an application in various ways, “[b]ut the court’s response to the leave application by any of the specified alternatives—including denial of leave—necessarily entails some evaluation of the merits of the applicant’s claims.” The Court also focused on Halbert’s specific situation to support its conclusion. The Court believed that “[n]avigating the appellate process without a lawyer’s assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments.” The Court recognized Michigan’s legitimate interest in “reducing the workload of its judiciary,” but believed providing “counsel will yield applications [for leave to appeal] easier to comprehend.”

#### **SIXTH AMENDMENT: JURY TRIAL**

In *United States v. Booker*,<sup>16</sup> the Court held that the Federal Sentencing Guidelines are subject to the jury requirement of the Sixth Amendment. The Court also invalidated the provisions of the Guidelines that make them mandatory (18 U.S.C. section 3553(b)(1)), and the accompanying appellate review standard (18 U.S.C. section 3742(e)), stating that instead courts should treat them as advisory. Justice Stevens delivered the opinion of the Court as to the first holding and Justice Breyer delivered the opinion as to the second. Based on the Court’s prior decision in *Blakely v. Washington*,<sup>17</sup> the lower courts, in the companion cases of *United States v. Booker* and *United States v. Fanfan*, rejected application of the Guidelines “because the proposed sentences were based on additional facts that the sentencing judge found by a preponderance of the evidence.” The judge sentenced respondent Booker to 30 years, instead of the 21 years and 10 months that it could have sentenced Booker, solely based on the findings by the jury. The Court of Appeals for the Seventh Circuit reversed based on the Court’s decision in *Blakely*. With regard to respondent Fanfan, the trial judge determined at a sentencing hearing that additional facts existed that authorized a sentence of 188 to 235 months. However, based on the Court’s decision in *Blakely*, the trial judge sentenced Fanfan solely on the facts reflected in the

jury verdict. The Government appealed.

The Court began its opinion by restating the following basic principles: (1) “the Constitution protects every criminal defendant ‘against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged’”; and (2) a defendant has a “right to demand that a jury find him guilty of all the elements of the crime.” In *Apprendi v. New Jersey*,<sup>18</sup> the Court held “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The Court’s opinion was reaffirmed in *Ring v. Arizona*,<sup>19</sup> where it held that it was “impermissible for ‘the trial judge, sitting alone’ to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty.” And most recently, the Court, in *Blakely*, held that a trial judge could not increase a sentence beyond the statutory “standard” based on his finding of “deliberate cruelty,” even if Washington law authorized the increased sentence for that type of felony and the time to which the defendant was sentenced was still below the statutory “maximum.” The Court determined that the “statutory maximum” for the purposes of *Apprendi* is the maximum the judge can impose “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” According to the Court, the Guidelines, by their own terms, are mandatory and “impose binding requirements on all sentencing judges.” It concluded, therefore, that it runs afoul of the Sixth Amendment since many of the factors that mandate an increased sentence are not determined by the jury.

In the second part of its opinion, the Court found that there are provisions within the Guidelines that make them “mandatory” and, therefore, incompatible with the Court’s holding today. The Court believed, however, that instead of reading a jury requirement into the Guidelines, it should instead strike the provisions of the Guidelines making them mandatory (18 U.S.C. sections 3553(b)(1) and 3742(e)), leaving the Guidelines “effectively advisory.” The Court supported its decision by looking at the legislative history and concluded that if its constitutional holding was “added onto the Sentencing Act as currently written, the requirement would so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand.” Second, the Court recognized that “Congress’ basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine . . . the *real conduct* that underlies the crime of conviction.” According to the Court, it appeared that Congress would have intended that this system continue and to allow the jury a role

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16. 125 S.Ct. 738 (2005).  
17. 542 U.S. 296 (2004).

18. 530 U.S. 466 (2000).  
19. 536 U.S. 584 (2002).

**[A] prosecutor's inconsistent arguments at a co-defendant's trial about who was the triggerman . . . did not render a defendant's guilty plea unknowing, involuntary, or unintelligent.**

in this “system” would “destroy” Congress’s intent. Finally, the Court stated that if the Guidelines were read to include the Sixth Amendment requirement, it “would create a system far more complex than Congress would have intended.”

Justices Stevens, Scalia, and Thomas agreed that the Guidelines are subject to the Sixth Amendment, but disagreed with the Court’s decision to excise only portions of the Guidelines and make

them discretionary. Justice Stevens would “simply allow the Government to continue doing what it has done since this Court handed down *Blakely*—prove any fact that is *required* to increase a defendant’s sentence . . . to a jury beyond a reasonable doubt.” Justice Scalia believed that the Court essentially has created a scheme that existed prior to the Guidelines enactment. He criticized the Court, however, for establishing an “unreasonableness” standard for appellate review. Justice Thomas agreed with Justice Stevens’ “proposed remedy and much of his analysis,” but wrote separately because he disagreed with “[Justice Stevens’] restatement of the severability principles and reliance on legislative history.”

Justice Breyer dissented from part of the Court’s opinion. He wrote: “I find nothing in the Sixth Amendment that forbids a sentencing judge to determine (as judges at sentencing have traditionally determined) the *manner* or *way* in which the offender carried out the crime of which he was convicted.” He distinguished “sentencing facts” from facts that prove the “*element* of the crime” and believed that history does not “support a ‘right to jury trial’” for the former.

In *Johnson v. California*,<sup>20</sup> a second case this term concerning *Batson v. Kentucky*,<sup>21</sup> an 8-1 Court invalidated a California law requiring a defendant to make a prima facie showing that it was “more likely than not” the prosecutor used discriminatory reasons to exercise a peremptory challenge, finding that this test does not fall within the framework set forth in *Batson*. Petitioner Jay Shawn Johnson, a black male, was convicted of second-degree murder and assault resulting in death. The prosecutor used three of his twelve preemptory challenges to remove all the remaining black prospective jurors, leaving a jury that was entirely white. Petitioner objected twice during the process, but both objections were overruled by the trial court without asking the prosecutor to offer a reason. Instead, the trial judge found that “petitioner had failed to establish a prima facie case under the governing state precedent.”

In an opinion written by Justice Stevens, the Court determined that California’s test, as set forth in *Wheeler*, does not fit within the framework of *Batson*. The Court enumerated three steps in *Batson* “which together guide trial courts’ constitu-

tional review of peremptory strikes”: (1) “the defendant must make out a prima facie case ‘by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose’”; (2) once a prima facie showing is made, the State must “‘explain adequately the racial exclusion’ by offering permissible race-neutral justifications for the strikes”; and (3) finally, “the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.” In this case, the question is “whether *Batson* permits California to require at step one that ‘the objector must show that it is more likely than not the other party’s peremptory challenges, if unexplained, were based on impermissible group bias.’”

The Court began with *Batson* and concluded that *Batson* itself does not support California’s rule. In *Batson*, the Court held “that a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives ‘rise to an inference of discriminatory purpose.’” The Court stated that “in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances . . . before deciding whether it was more likely than not that the challenge was improperly motivated.” The Court:

did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination.

The first step of *Batson* only requires a defendant to produce “sufficient” evidence “to permit the trial judge to draw an inference that discrimination has occurred.”

Justice Thomas, the lone dissenter, argued that in *Batson*, the Court said that states “have flexibility in formulating appropriate procedures to comply.” He criticized the Court for now telling “California how to comply with ‘the prima facie inquiry mandated by *Batson*.’”

In an opinion written by Justice O’Connor, a unanimous Court held in *Bradshaw v. Stumpf*<sup>22</sup> that a prosecutor’s inconsistent arguments at a co-defendant’s trial about who was the triggerman in an aggravated murder charge did not render a defendant’s guilty plea unknowing, involuntary, or unintelligent. As part of a plea agreement for respondent’s participation in the robbery, murder, and attempted murder of a husband and wife, respondent agreed to plead guilty to aggravated murder and attempted aggravated murder. The State, in return, agreed to drop most of the other charges. With respect to the aggravated murder charge, respondent agreed to plead guilty to “one of the three capital specifications, with the State dropping the other two.” This meant that respondent was still eligible for the death penalty. At the penalty hearing, respondent’s primary argument, however, “was that he had participated in the plot only at the urging and under the influence of Wesley [his co-conspirator], that it was Wesley who had fired the fatal shots . . . and that Stumpf’s assertedly minor role in the murder counseled against

20.125 S.Ct. 2410 (2005).  
21.476 U.S. 79 (1986).

22.125 S.Ct. 2398 (2005).

the death sentence.” The State argued that Stumpf was the principal offender and he was sentenced to death.

At Wesley’s trial, the prosecutor introduced the testimony of Wesley’s cellmate, who testified that Wesley had admitted to firing the shots that killed Mary Jane Stout. Wesley took the stand in his own defense and “testified that Stumpf had shot Mrs. Stout.” Wesley was sentenced “to life imprisonment with the possibility of parole after 20 years.” After Wesley’s trial, “Stumpf, whose direct appeal was still pending in the Ohio Court of Appeals, returned to the Court of Common Pleas with a motion to withdraw his guilty plea or vacate his death sentence.” He argued that the prosecutor’s argument and evidence that Wesley shot Mrs. Stout “cast doubt on Stumpf’s conviction and sentence.” The prosecutor claimed that the cellmate’s testimony “was belied by certain other evidence (ballistics evidence and Wesley’s testimony in his own defense) confirming Stumpf to have been the primary shooter.” These arguments were in direct conflict with his arguments at Wesley’s trial. After Stumpf exhausted his state remedies, he filed a federal petition for a writ of habeas corpus, raising the same claim. The Sixth Circuit reversed on two grounds: (1) “Stumpf’s guilty plea was invalid because it had not been entered knowingly and intelligently” because “Stumpf had pleaded guilty to aggravated murder without understanding that specific intent to cause death was a necessary element of the charge under Ohio law”; and (2) “Stumpf’s due process rights were violated by the state’s deliberate action in securing convictions of both Stumpf and Wesley for the same crime, using inconsistent theories.”

The Court disagreed. Precedent has established that “[a] guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, ‘with sufficient awareness of the relevant circumstances and likely consequences.’” However, the record reflects that Stumpf’s attorneys “represented . . . that they had explained to their client the elements of the aggravated murder charge; Stumpf himself then confirmed that this representation was true.” The Court has never held that the trial court must explain the elements on the record. The Court also rejected Stumpf’s arguments that it was clear he did not understand the specific intent element of the crime because he maintained throughout “his denial of having shot the victim.” Ohio law does not require that Stumpf himself shoot Mrs. Stout because “aiders and abettors [are] equally in violation of the aggravated murder statute, so long as the aiding and abetting is done with the specific intent to cause death.” According to the Court, “Stumpf has never provided an explanation of how the prosecution’s post-plea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea.” The Court did recognize that “[t]he prosecutor’s use of allegedly inconsistent theories may have a more direct effect on Stumpf’s sentence . . . for it is at least arguable that the sentencing panel’s conclusion about Stumpf’s principal role in the offense was material to its sentencing determination.” However, it is not clear if

the lower court “would have concluded that Stumpf was entitled to resentencing had the court not also considered the conviction invalid.” Therefore, the Court expressed no opinion as to this matter and remanded the case.

#### EIGHTH AMENDMENT

In a 5-4 opinion in *Roper v. Simmons*,<sup>23</sup> the Court held that the Eighth and Fourteenth Amendments forbid the death penalty for offenders who were under the age of 18 when they committed the crime. Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas dissented.

Respondent Christopher Simmons committed murder at the age of 17, and was tried after he had turned 18. There “is little doubt” that Simmons committed the murder. He was tried as an adult because he was 17 and outside the criminal jurisdiction of Missouri’s juvenile court system. During the sentencing phase of the trial, the jury was instructed they could use age as a mitigating factor to the death penalty. However, Simmons was sentenced to death. After this case had run its course in the state court system, the Court decided *Atkins v. Virginia*,<sup>24</sup> which held that the Eighth and Fourteenth Amendments prohibit the execution of mentally disabled persons. Simmons then filed a new petition for state postconviction relief, “arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.” The Missouri Supreme Court agreed and set aside Simmons’ death sentence. The Supreme Court granted certiorari.

To reach its decision, the Court followed a line of its precedent. In *Thompson v. Oklahoma*,<sup>25</sup> a plurality of the Court determined that “our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime.” The plurality stressed that “the reasons why juveniles are not trusted with the privileges and responsibility of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.” The following year, in *Stanford v. Kentucky*,<sup>26</sup> the Court “concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18.” The Court believed that “there was no national consensus ‘sufficient to label a particular punishment cruel and unusual.’” That same day, the Court also decided *Penry v. Lynaugh*,<sup>27</sup> and held that there was no “categorical exemption from the death penalty for the mentally retarded.” Three years ago, the Court reconsidered its *Penry* decision in *Atkins*. It held that “standards of decency

**In a 5-4 opinion . . . the Court held that the Eighth and Fourteenth Amendments forbid the death penalty for offenders who were under . . . 18 when they committed the crime.**

23.125 S.Ct. 1183 (2005).  
24.536 U.S. 304 (2002).  
25.487 U.S. 815 (1988).

26.492 U.S. 361 (1989).  
27.492 U.S. 302 (1989).

**Justice Scalia . . . criticized the Court for proclaiming “itself sole arbiter of our Nation’s moral standards . . . .”**

Constitution contemplates that in the end . . . [the Court’s] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” In this case, the Court reconsidered the decision in *Stanford* and wrote that to do so it will apply the following factors: (1) state consensus and practice and (2) its own independent judgment.

The Court stated that the evidence of the “national consensus” for the death penalty for juveniles is similar to that for mentally disabled. Essentially, its prohibition among the States is increasing and its use is decreasing. The Court concluded that the majority of States have prohibited the imposition of the death penalty for juveniles under the age of 18, “and . . . now holds this is required by the Eighth Amendment.” There are “[t]hree general differences between juveniles under 18 and adults . . . [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders”: (1) there is “a lack of maturity and an underdeveloped sense of responsibility.”; (2) juveniles are more susceptible to “negative influences and outside pressures, including peer pressure”; and (3) “the character of a juvenile is not as well formed as that of an adult.” These differences “render suspect any conclusion that a juvenile falls among the worst offenders.” The Court also stated that “[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty [retribution and deterrence] apply to them with lesser force than to adults.” The Court did not overlook “the brutal crimes too many juvenile offenders have committed[,]” and recognized that in some cases a juvenile might have sufficient psychological maturity to merit the sentence of death. However, the Court believed that “a line must be drawn” somewhere.

In the last part of its opinion, the Court reinforced its decision based upon its views and its “task of interpreting the Eighth Amendment.” Citing numerous facts, the Court concluded “that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” The Court believed it “proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.”

Justices O’Connor and Scalia wrote dissenting opinions. Justice O’Connor found no evidence of a “national consensus” to categorically exclude the execution of individuals under the age of 18, “no matter how deliberate, wanton, or cruel the offense.” Justice Scalia wrote separately about “the mockery” today’s decision has on the traditional role of the judiciary by

have evolved . . . and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment.” The *Atkins* Court “returned to the rule, established in decisions predating *Stanford*, that ‘the

“announcing the Court’s conclusion that the meaning of our Constitution has changed over the past 15 years.” He also criticized the Court for proclaiming “itself sole arbiter of our Nation’s moral standards.” Finally, in reference to the Court’s reliance on international law, he wrote, “Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.”

**FOURTEENTH AMENDMENT**

Justice O’Connor delivered the opinion of a 5-3 Court in *Johnson v. California*,<sup>28</sup> in which the Court held that the proper standard of review for the California Department of Correction’s (CDC) policy separating new or newly transferred inmates by race is strict scrutiny. The CDC houses all new inmates and inmates transferred from other state facilities in “reception centers” for up to 60 days. Double-cell assignments in the reception centers are predominantly based on race. The CDC justifies its actions on the grounds “that it is necessary to prevent violence caused by racial gangs.” The rest of the facility’s areas are fully integrated. Petitioner Garrison Johnson is an African-American inmate who has been incarcerated since 1987 and has been in many prison facilities. Each time he is transferred, he is held at a reception center and double-celled with another African-American. He filed a pro se complaint in the district court “alleging that the CDC’s reception-center housing policy violated his right to equal protection under the Fourteenth Amendment by assigning him cellmates on the basis of race.”

The Court began its analysis with its holding in *Adarand Constructors, Inc. v. Peña*,<sup>29</sup> in which it held that “all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.” Under this standard, “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’” The purpose behind this policy is that “[r]acial classifications raise special fears that they are motivated by an invidious purpose.” The CDC argued “that its policy should be exempt . . . because it is ‘neutral’—that is, it ‘neither benefits nor burdens one group or individual more than any other group or individual.’” The Court stated that it rejected a similar argument—that separate could be equal—in *Brown v. Board of Education*.<sup>30</sup> It refused to change its opinion today.

The Court believed the need for strict scrutiny is as important here as in its other cases despite the argument that the policy is necessary to control racial violence: “racial classifications ‘threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.’” The Court stated that “[v]irtually all other States and the Federal Government manage their prison systems without reliance on racial segregation.” The CDC has not made it clear why it, like the Federal Bureau of Prisons, cannot address prison security issues on individual bases. The Court continued by stating that “[i]n the prison context, when the government’s power is at its

28.125 S.Ct. 1141 (2005).  
29.515 U.S. 200 (1995).

30.347 U.S. 483 (1954).

apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination.” The Court rejected the CDC’s argument that “[d]eference to the particular expertise of prison officials in the difficult task of managing daily prison operations’ requires a more relaxed standard of review.” It hasn’t seen the need in other circumstances and won’t here. The Court concluded its opinion by stating that its decision does not necessarily preclude a policy that is based on race, rejecting the argument that “[s]trict scrutiny is . . . ‘strict in theory, but fatal in fact.’” Prison officials still have the opportunity to show a compelling interest and a narrowly tailored policy to reach that end. It remanded the case for a determination of whether the CDC policy survives strict scrutiny.

Justice Kennedy delivered the opinion of a unanimous Court in *Wilkinson v. Austin*,<sup>31</sup> which held that the procedures set forth in Ohio’s New Policy are sufficient to protect an inmate’s procedural due-process rights when he is being considered for placement in Ohio’s Supermax security prison (OSP). Supermax prisons are the highest security prisons. In OSP, inmates are confined for 23 hours a day, their cells are lit at all times though sometimes dimmed, there is no contact between inmates in different cells, and meals are solitary. According to the Court, “[i]t is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.” The New Policy was implemented in 2002 to provide “more guidance . . . [and] more procedural protection against erroneous placement in OSP.” The procedures are summarized as follows: (1) a prison official completes a three-page form called a “Security Designation Long Form”; (2) “[a] three-member Classification Committee (Committee) convenes to review the proposed classification and to hold a hearing”; (3) at least 48 hours prior to the hearing, the inmate is provided with written notice detailing the charges and can also request a copy of the Long Form; and (4) the inmate may attend the hearing and defend himself or provide a written statement but cannot call witnesses. If the committee determines that the inmate should not be put in OSP, the inquiry ends. If it decides otherwise, it documents its decision and sends the report to the warden of the prison in which the inmate is being held. If the warden disagrees with the classification, the matter is ended. If he agrees, “he indicates his approval” and forwards the annotated report to the Bureau of Classification (Bureau). The inmate also receives a copy and has 15 days to file his objection with the Bureau. The Bureau reviews the report and makes a final determination. If it agrees with the recommendation, the inmate is transferred and the report is annotated again with the Bureau’s reasons. The inmate receives another automatic review of his file by an OSP staff member within 30 days of his transfer. His file is reviewed yearly.

Prior to the implementation of the New Policy, a group of OSP inmates brought suit against various prison officials under 42 U.S.C. section 1983, alleging “that Ohio’s Old Policy . . . violated due process. . . . On the eve of trial Ohio promulgated

its New Policy.” Both the district court and the court of appeals “evaluated the adequacy of the New Policy.” The district court issued a detailed remedial order based on its determination that “the inmates have a liberty interest in avoiding assignment to OSP.” The Court of Appeals for the Sixth Circuit

affirmed this finding and the district court’s “procedural modifications” of the New Policy. However, “it set aside the [d]istrict [c]ourt’s far-reaching substantive modifications, concluding they exceeded the scope of the [court’s] authority.”

The Supreme Court agreed with the lower courts that inmates have a liberty interest in avoiding assignment to OSP. The Due Process Clause of the Fourteenth Amendment “protects persons against deprivations of life, liberty, or property.” A “liberty interest may arise from the Constitution itself . . . or it may arise from an expectation or interest created by state laws or policies.” The Court has already held that “the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement.” However, the Court has also held that this liberty interest “may arise from state policies or regulations, subject to the important limitations set forth in *Sandin v. Conner*.”<sup>32</sup> In *Sandin*, the Court “abrogated the methodology of parsing the language of particular regulations[]” to identify state-created liberty interests and returned to the “real concerns undergirding the liberty protected by the Due Process Clause.” Thus, “the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of the regulations regarding those conditions but the nature of those conditions themselves ‘in relation to the ordinary incidents of prison life.’” The Court has not, and stated that it will not, identify “the baseline from which to measure what is atypical and significant in any particular prison’s system[]” because it is clear that “under any plausible baseline[,]” assignment in OSP imposes an atypical and significant hardship.

The Court next turned to the question of what process then is due to the inmates to protect their liberty interest. “Because the requirements of due process are ‘flexible and call for such procedural protections as the particular situation demands,’ we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures.” The Court referred to *Mathews v. Eldridge*,<sup>33</sup> where it identified three distinct factors for consideration: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedures safeguards”; and (3) “the Government’s interest, including the

**The Supreme Court agreed with the lower courts that inmates have a liberty interest in avoiding assignment to [Ohio’s supermax security prison].**

31. 125 S.Ct. 2384 (2005).  
32. 515 U.S. 472 (1995).

33. 424 U.S. 319 (1976).

**In a 5-3 decision . . . , the Court held that the word “any” as used in the statute does not include foreign courts.**

function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” The Court believed that although inmates have an interest in avoiding confinement in OSP, the “procedural protections to which they are entitled are more limited than in cases

where the right at stake is the right to be free from confinement at all.” The Court concluded that the procedures in place are sufficient to protect against erroneous deprivation of the inmates’ liberty interest. Inmates are entitled to “notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal[]” in two instances during the entire process. Further, if at any point “one reviewer declines to recommend OSP placement, the process terminates.”

### CRIMINAL STATUTORY INTERPRETATION

In *Whitfield v. United States*,<sup>34</sup> the Court interpreted 18 U.S.C. section 1985(h) of the federal money-laundering statute, which provides: “Any person who conspires to commit any offense defined in [§ 1956] or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.” A unanimous Court, in an opinion written by Justice O’Connor, held that conviction for conspiracy to commit money laundering under section 1956(h) does not require proof of an overt act in furtherance of the conspiracy. Petitioner and other co-defendants were charged under section 1985(h) in connection with a fraudulent investment scheme. The indictment only described in “general terms” the “manner and means” used to accomplish the objects of the conspiracy and “did not charge the defendants with the commission of any overt act in furtherance thereof.” Petitioners asked the trial court to instruct the jury that it must find “beyond a reasonable doubt that at least one of the co-conspirators had committed an overt act in furtherance of the money laundering conspiracy.” The court denied the request. Petitioners were found guilty and appealed. The Court of Appeals for the Eleventh Circuit upheld the conviction. It determined that the jury instructions were proper “because § 1956(h) does not require proof of an overt act.” The Supreme Court granted certiorari to resolve a split among the Circuits.

According to the Court, the language of the statute shows that Congress did not intend that proof of an overt act was necessary for a conviction. Its interpretation relied primarily on *United States v. Shabani*,<sup>35</sup> a case in which it interpreted similar language in a drug-conspiracy statute. In *Shabani*, the Court relied on its previous decisions in *Nash v. United States*<sup>36</sup> and *Stinger v. United States*,<sup>37</sup> and held the statute did not require proof of any further act: “where Congress had omitted from the

relevant conspiracy provision any language expressly requiring an overt act, the Court would not read such a requirement into the statute.” Basic principles of statutory interpretation dictate that “absent contrary indications, Congress intends to adopt the common law definition of statutory terms.” The Court has continually stated that the common-law understanding of conspiracy “does not make the doing of any act other than the act of conspiring a condition of liability.”

The Court interpreted the use of the word “any” in two different statutes this term. In *Small v. United States*,<sup>38</sup> the Court interpreted “any” as it is used in the federal unlawful gun-possession statute, 18 U.S.C. section 922 (g)(1). Section 922(g)(1) makes it “unlawful for any person . . . who has been convicted in any court . . . to . . . possess . . . any firearm.” Petitioner Gary Small was convicted in a Japanese court for having tried to smuggle firearms and ammunition into Japan. When Small returned to the United States, he purchased a firearm. The federal government charged Small for “unlawful gun possession” under section 922(g)(1). Small pled guilty to the charge but reserved his right to challenge his conviction based on the fact that his prior conviction fell outside the scope of the statute because it was a foreign conviction. The District Court and the United States Court of Appeals for the Third Circuit both rejected Small’s argument that “any” court did not refer to foreign courts.

In a 5-3 decision, written by Justice Breyer, the Court held that the word “any” as used in the statute does not include foreign courts. The Court began by stating that “[t]he word ‘any’ considered alone cannot answer this question” because “[i]n ordinary life, a speaker who says, ‘I’ll see any film,’ may or may not mean to include films shown in another city.” Similarly, “[i]n law, a legislature that uses the statutory phrase ‘any person’ may or may not mean to include a ‘persons’ outside ‘the jurisdiction of the state.’” Instead, the Court must draw the meaning of “any” from the legislative use of the word. The Court first recognized that there is a “commonsense notion that Congress generally legislates with domestic concerns in mind.” Therefore, the Court has adopted “the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application.” This presumption would result in prohibiting unlawful gun possession domestically, not internationally. The Court believed a “similar assumption is appropriate when we consider the scope of the phrase ‘convicted in any court.’”

To support the application of this presumption, the Court stated that “as a group, foreign convictions differ from domestic convictions in important ways”: (1) “foreign convictions . . . may include a conviction for conduct that domestic laws would permit.”; (2) they might “include a conviction from a legal system that is inconsistent with an American understanding of fairness”; and (3) “they would include a conviction for conduct that domestic law punishes far less severely.” Therefore, the Court believed that “the key statutory phrase ‘convicted in any court . . .’ somewhat less reliably identifies

34.543 U.S. 209 (2005).  
35.513 U.S. 10 (1994).  
36.229 U.S. 373 (1913).

37.323 U.S. 338 (1945).  
38.125 S.Ct. 1752 (2005).

dangerous individuals for the purposes of U.S. law where foreign convictions, rather than domestic convictions, are at issue.” The Court also believed that “it is difficult to read the statute as asking judges or prosecutors to refine its definitional distinctions where foreign convictions are at issue.” The statute does not require courts or prosecutors to “weed out” inappropriate foreign convictions, nor does the Court believe courts and prosecutors are capable of doing this. Finally, the Court concluded the language of the statute “does not suggest any intent to reach beyond domestic convictions.” In fact, the Court believed that if the statute applied to foreign conviction, “the statute’s language creates anomalies.” It gave five examples drawn specifically from the express language of the statute. For instance, the statute specifically provides an exception if a person has been convicted of federal or state antitrust or regulatory offenses. It does not provide an exception, however, if a person has been convicted of a foreign antitrust or regulatory offense.

Justice Thomas, writing a dissenting opinion, conceded that the phrase “any court,” like all other statutory language, must be read in context.” However, he does not believe section 922(g)(1) suggests a “geographic limit on the scope of ‘any court,’” whereas, in contrast, “other parts of the firearms-control law” do. Justice Thomas concluded his dissent by stating: “The Court never convincingly explains its departure from the natural meaning of § 922 (g)(1).” He found that instead, the Court “institutes the troubling rule that ‘any’ does not really mean ‘any,’ but may mean ‘some subset of ‘any,’” even if nothing in the context so indicates.”

In *Pasquantino v. United States*,<sup>39</sup> the Court interpreted the word “any” as used in the federal wire-fraud statute, 18 U.S.C. section 1343. In a 5-4 decision written by Justice Thomas, the Court held that a scheme to defraud a foreign government of tax revenues qualifies as “any scheme” under the federal wire-fraud statute. Petitioners were “indicted for and convicted of federal wire fraud for carrying out a scheme to smuggle large quantities of liquor into Canada from the United States.” Petitioners ordered liquor from a discount store over the telephone and drove it into Canada without declaring it. The purpose was to avoid Canadian taxes, which were almost double the liquor’s purchase price. Prior to trial, petitioners moved to have the charges against them dropped on the grounds “that it stated no wire fraud offense.” Section 1343 “prohibits the use of interstate wires to effect ‘any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.’” Petitioners claimed “that the Government lacked sufficient interest in enforcing the revenue laws of Canada, and therefore that they had not committed wire fraud.” The district court rejected the petitioners’ argument and the Court of Appeals for the Fourth Circuit, on a rehearing en banc, affirmed.

The Court stated that two elements of the crime are in dispute: (1) whether petitioners engaged in any “scheme or artifice to defraud”; and (2) whether “the ‘object of the fraud . . . be [‘money or] property’ in the victim’s hands.” In its opinion,

39.125 S.Ct. 1766 (2005).

the Court addressed the second element first and stated that “Canada’s right to uncollected excise taxes on the liquor petitioners imported into Canada is ‘property’ in its hands.” As to the second element, the debate focused on petitioners’ “revenue rule argument,” which briefly stands for the proposition that domestic courts are prohibited from enforcing the collection of tax obligations of foreign nations. Petitioners argued that “to avoid reading § 1343 to derogate from the common-law revenue rule, we should construe the otherwise-applicable language of the wire fraud statute to except frauds directed at evading foreign taxes.” The Court wrote that at the time the wire-fraud statute was enacted, there was no “well-established revenue rule principle” at common law. Instead, courts “treated the common-law revenue rule as a corollary of the rule that . . . [t]he Courts of no country execute the penal laws of another.” It stated: “The basis for inferring the revenue rule from the rule against foreign penal enforcement was an analogy between foreign revenue laws and penal laws.” Various courts first drew this inference “in a line of cases prohibiting the enforcement of tax liabilities of one sovereign in the courts of another sovereign.”

The Court believed that “[t]he revenue rule’s grounding in these cases shows that, at its core, it prohibited the collection of tax obligations of foreign nations.” The Court recognized that this case is unlike the “classic examples of actions traditionally barred by the revenue rule[]” and believed that the revenue rule jurisprudence is not a clear bar to this prosecution. The Court stated: “A prohibition on the enforcement of *foreign* penal law does not plainly prevent the Government from enforcing a *domestic* criminal law.” Further, petitioners did not cite to any case that “barred an action that had as its primary object the deterrence and punishment of fraudulent conduct—a substantial domestic regulatory interest entirely independent of foreign tax enforcement.” The Court believed that “the wire fraud statute advances the Federal Government’s independent interest in punishing fraudulent domestic criminal conduct, a significant feature absent from all of petitioners’ revenue rule cases.” The Court recognized that enforcement of the criminal statute will “in an attenuated sense” enforce the Canadian revenue law. However, the revenue rule has “never proscribed all enforcement of foreign revenue law.”

In a per curiam opinion, the Court, in *Medellin v. Dretke*,<sup>40</sup> after a proclamation issued by the president that the United States would “discharge its international obligations” under the Vienna Convention, dismissed the writ of certiorari as improvidently granted, stating that petitioner must pursue his rights via state court. Jose Ernesto Medellin, a Mexican national, “confessed to participating in the gang rape and murder of two

40.125 S.Ct. 2088 (2005).

**In a 5-4 decision . . . , the Court held that a scheme to defraud a foreign government of tax revenues qualifies as “any scheme” under the federal wire-fraud statute.**

**The Court concluded that “[o]nly persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuade.’”**

girls in 1993.” He was convicted and sentenced to death in a Texas state court. Medellin filed a state habeas petition, “claiming for the first time that Texas failed to notify him of his right to consular access as required by the Vienna Convention.” The state court rejected this argument and the Texas Court of Criminal Appeals

*constitutional right. . . .* [And] [f]ifth, Medellin can seek federal habeas relief only on claims that have been exhausted in state court.

affirmed. Subsequently, Medellin filed a federal habeas petition. The District Court denied the petition. While the petition was pending before the Court of Appeals for the Fifth Circuit, the International Court of Justice (ICJ) “issued its decision in *Case Concerning Avena and other Mexican Nationals* . . . in which the Republic of Mexico had alleged violations of the Vienna Convention with respect to Medellin and other Mexican nationals facing the death penalty in the United States.” The ICJ “determined that the Vienna Convention guaranteed individually enforceable rights, that the United States had violated those rights, and that the United States must ‘provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals . . . .’” The Fifth Circuit “denied Medellin’s application for a certificate of appealability[,]” based on “its prior holdings that the Vienna Convention did not create an individually enforceable right.” The Supreme Court granted certiorari. While the writ of certiorari was pending, President George W. Bush “issued a memorandum that stated the United States would discharge its international obligations under the *Avena* judgment.” Medellin relied on this memorandum as “separate bases for relief that were not available at the time of his first state habeas action . . . [and filed a] successive state application for a writ of habeas corpus just four days before oral argument [here].” The Court stated that “[t]his new development, as well as the factors discussed below, leads us to dismiss the writ of certiorari as improvidently granted.”

The Court offered additional reasons for its holding:

First . . . [i]n *Reed v. Farley*,<sup>41</sup> this Court recognized that a violation of federal statutory rights ranked among the “nonconstitutional lapses we have held not cognizable in a postconviction proceeding” unless they meet the “fundamental defect” test announced in our decision in *Hill v. United States*. . . .<sup>42</sup> Second, with respect to any claim the state court “adjudicated on the merits,” habeas relief in federal court is available only if such adjudication “was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. . . .” Third, a habeas corpus petitioner cannot enforce a “new rule” of law. . . . Fourth, Medellin requires a certificate of appealability in order to pursue the merits of his claim . . . which may be granted only where there is “a substantial showing of the denial of a

Chief Justice Rehnquist, writing for a unanimous Court in *Arthur Andersen LLP v. United States*,<sup>43</sup> held that “corrupt persuasion,” as used in 18 U.S.C. section 1512(b)(2)(A), requires consciousness of wrongdoing. This case stemmed from the Securities Exchange Commission’s investigation of Enron’s activities during the 1990s and through 2001. At that time, petitioner Arthur Andersen LLP “audited Enron’s publicly filed financial statements and provided internal audit and consulting services.” In August 2001, the SEC opened an informal investigation into Enron’s accounting activities. The SEC did not open a formal investigation until October 30, 2001, and did not serve subpoenas on Arthur Andersen until November 9. Until that time, various meetings were held between the top people at Arthur Andersen and memoranda were sent among the “Enron engagement team” urging “everyone to comply with the firm’s document retention policy[,]” even if it meant destroying documents that would clearly be relevant to any SEC investigation and any potential litigation. In fact, the document destruction didn’t stop until November 9, when the head of the engagement team sent a memorandum to the team stating “No more shredding . . . . We have been officially served for our documents.” Arthur Andersen then was indicted for corruptly persuading another to withhold documents in the investigation:

In March 2002, petitioner was indicted in the Southern District of Texas on one count of violating 18 U.S.C. §§ 1512(b)(2)(A) and (B). These sections make it a crime to “knowingly use intimidation or physical force, threaten, or corruptly persuade another person . . . with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.”

The District Court relied on a Fifth Circuit Pattern Jury Instruction to define “corruptly,” which defined it as “‘knowingly and dishonestly, with the specific intent to subvert or undermine the integrity’ of a proceeding.” However, complying with the Government’s request, the District Court changed the word “dishonestly” to “impede.” The jury eventually returned a guilty verdict and the Court of Appeals for the Fifth Circuit affirmed.

In its opinion, the Court focused on “what it means to ‘knowingly . . . corruptly persuade.’” The Court believed that the word “knowingly” is as important as the word “corruptly” because the statute “punishes not just ‘corruptly persuading’ another, but ‘knowingly . . . corruptly persuading’ another.” The Court wrote that “the natural meaning of these terms provides a clear answer[.]” to interpretation of the statute: (1) “‘Knowledge’ and ‘knowingly’ are normally associated with awareness, understanding, or consciousness”; (2) “[c]orrupt’ and ‘corruptly’ are normally associated with wrongful, immoral, depraved, or evil”; and (3) “[j]oining these meanings together here makes sense both linguistically and in the statu-

41.512 U.S. 339 (1994).  
42.368 U.S. 424 (1962).

43.125 S.Ct. 2129 (2005).

tory scheme.” The Court concluded that “[o]nly persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuade.’” The Court believed that “[t]he outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing.” As modified, “[n]o longer was any type of ‘dishonesty’ necessary to a finding of guilt, and it was enough for petitioner to have simply ‘impeded’ the Government’s factfinding ability.” The instructions were also wrong because “[t]hey led the jury to believe that it did not have to find *any* nexus between the ‘persuasion’ to destroy documents and any particular proceeding.”

### CRIMINAL APPELLATE PROCEDURE

In *Bell v. Thompson*,<sup>44</sup> the Court held that even if Federal Rule of Appellate Procedure 41(b) authorized a stay of mandate by the circuit court following the denial of a writ of certiorari and even if an appellate court could stay the mandate without entering an order, a delay of five months is an abuse of discretion. In 1985, respondent Gregory Thompson was sentenced to death for the abduction and murder of a woman. After exhausting his state remedies, Thompson raised a claim of ineffective assistance of counsel in a federal habeas petition. He presented evidence from a psychologist, Dr. Faye Sultan, who examined him 13 years after the offense and who “contended that Thompson’s symptoms indicated he was ‘suffering serious mental illnesses at the time of the 1985 offense.’” The District Court dismissed the petition. While appeal was pending in the Court of Appeals for the Sixth Circuit, Thompson “filed a motion in the District Court under Federal Rule of Civil Procedure 60(b) requesting that the court supplement the record with Sultan’s expert report and deposition[,]” which he claimed was erroneously omitted. He also filed a motion with the Sixth Circuit to hold the appeal in abeyance. Both the District Court and the Sixth Circuit denied his motions. The Sixth Circuit affirmed the dismissal of the petition. The Supreme Court denied certiorari. Thompson then filed a motion with the Sixth Circuit “seeking to extend the stay of mandate pending disposition of his petition for rehearing.” in the Supreme Court. The Sixth Circuit granted the motion.

The Supreme Court denied rehearing; however, the Sixth Circuit did not issue its mandate pursuant to Rule 41(b). Meanwhile, the Tennessee Supreme Court set the execution. “From February to June 2004, there were proceedings in both state and federal courts related to Thompson’s present competency to be executed.” On June 23, 2004, the Sixth Circuit “issued an amended opinion in Thompson’s initial federal habeas case[,]” which vacated the district court’s dismissal and “remanded the case for an evidentiary hearing on Thompson’s ineffective-assistance-of-counsel claim.” The Sixth Circuit “relied on its equitable powers to supplement the record on appeal with Dr. Sultan’s 1999 deposition after finding that it was ‘apparently negligently omitted’ and ‘probative of Thompson’s mental state at the time of the crime.’” The court “explained its authority to issue an amended opinion five months after this

Court denied a petition for rehearing: “We rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case.”

A 5-4 Court, in an opinion written by Justice Kennedy, reversed. According to Rule 41(b), once a petition for writ of certiorari is denied, “[t]he court of appeals must issue the mandate immediately.” The Court did not answer whether the Rule “authorizes a stay of the mandate following the denial of certiorari.” with or without an order. Instead it finds that even if it could issue such a stay, “the Court of Appeals abused its discretion in doing so” by waiting five months. A court speaks through its judgments and orders. “Without a formal docket entry neither the parties nor this Court had, or have, any way to know whether the court had stayed the mandate or simply made a clerical mistake.” It states that in *Calderon v. Thompson*,<sup>45</sup> it “held that federalism concerns, arising from the unique character of federal habeas review of state-court judgments, and the policies embodied in the Antiterrorism and Effective Death Penalty Act of 1996 required an additional presumption against recalling the mandate.” These “finality and comity concerns” are implicated in this case regardless of whether “a dedicated judge discovered what he believed to have been an error.”

Justice Breyer dissented, claiming that this case presented a set of unusual “circumstances of a kind that I have previously experienced in the 25 years I have served on the federal bench.” He focused on the fact that a judge discovered an error and sought to correct that error because it “could affect the outcome of what is, and has always been, the major issue in the case.” He believed it is not an abuse of discretion to “correct a decision that it perceived to have been mistaken.” He believed this case presents three questions: (1) a legal question—whether the court of appeals abused its discretion; (2) an epistemological question—“[h]ow, in respect to matters involving the legal impact of the Sultan report and deposition, can the Court replace the panel’s judgment with its own”[;] and (3) a question about basic jurisprudence—even though the “legal system is based on rules; it also seeks justice in the individual case.”



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