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## **UNITED STATES SUPREME COURT UPDATE**

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## **Eighth Amendment: Sentencing**

***Brown v. Sanders***, 546 U.S. 212 (2006).

**Issue:** Whether the Eighth Amendment was violated when the jury assessed the death penalty after finding a valid aggravating circumstance when the sentencing scheme included invalid aggravating circumstances.

**Facts:** Defendant was convicted of murder and sentenced to death. In convicting defendant, the jury found four “special circumstances,” or aggravating circumstances. The State Supreme Court invalidated two of the special circumstances considered by the jury but upheld the sentence. Defendant petitioned for federal habeas corpus relief, which the district court denied. The Ninth Circuit held that the sentence had been affected by the invalid aggravating circumstances and affirmed in part, reversed in part, and remanded with instructions.

**Held:** Justice Scalia wrote an opinion reversing the Ninth Circuit’s judgment. Justice Stevens filed a dissent joined by Justice Souter. Justice Breyer filed a dissent joined by Justice Ginsburg.

The Court rejected the previous weighing/non-weighing distinction for States, *i.e.*, in a “weighing” State, the jury can consider only specified eligibility factors as aggravating circumstances; while in a “non-weighing” State, the jury can consider aggravating circumstances separate and apart from eligibility factors. Rather than apply this distinction, the Court held that an invalid aggravating or special circumstance renders a death sentence unconstitutional if it affected the jury’s weighing process, “*unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts or circumstances.” Because in this case two of the valid sentencing factors enabled the jury to give aggravating weight to the same facts or circumstances, the Court held that the sentence did not violate the Eighth Amendment.

***Kansas v. Marsh***, 126 S. Ct. 2516 (2007).

### **Issues:**

- Whether the Court has jurisdiction to review the Kansas Supreme Court’s determination that the Kansas death penalty statute violates Eighth Amendment.
- Whether the Kansas Supreme Court’s determination that the Kansas death penalty statute violates the Eighth Amendment is supported by adequate and independent state grounds.
- Whether the Kansas death penalty statute violates the Eighth Amendment.

**Facts:** Defendant was convicted of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary, and sentenced to death. The Kansas Supreme Court reversed the conviction and death sentence on the ground that the Kansas death penalty statute was unconstitutional because it required the assessment of the death penalty when aggravating circumstances and mitigating circumstances are equal in distribution, or “*equipoise*,” as the Court terms.

**Held:** Justice Thomas reversed the Kansas Supreme Court’s judgment. Justice Scalia filed a concurring opinion. Justice Stevens filed a dissenting opinion. Justice Souter filed a dissenting opinion, in which Justices Stevens, Ginsburg, and Breyer joined.

The Court held that it had jurisdiction to review the Kansas Supreme Court’s judgment regarding the constitutionality of the Kansas death penalty statute. Even though defendant would be retried, the Kansas Supreme Court’s holding with regard to the statute’s constitutionality was “final” for purposes of review.

The Court held that the Kansas Supreme Court’s judgment was not supported by adequate and independent state law grounds. The case cited by the Kansas Supreme Court as an adequate and independent state law ground was based on federal law.

Finally, the Court held that the Kansas death penalty statute’s requirement of the death penalty in cases where aggravating circumstances equal mitigating circumstances does not violate the Eighth Amendment. The Court reasoned that the Kansas death penalty statute satisfied the requirement previously articulated by the Court—that a system must rationally narrow the class of death-eligible defendants and must permit a jury to render a reasonable, individualized sentencing determination. The Court also validated the Kansas death penalty statute pursuant to its previous holding that a death penalty statute may constitutionally give the defendant the burden to prove that mitigating circumstances outweigh aggravating circumstances.

*Oregon v. Guzek*, 546 U.S. 517 (2006).

**Issue:** Whether a State’s limitation on innocence-related evidence that a defendant can introduce at a sentencing proceeding to the evidence introduced at the original trial violates the Eighth and Fourteenth Amendments.

**Facts:** Defendant was found guilty of capital murder and sentenced to death. The Oregon Supreme Court twice vacated defendant’s sentence and remanded for new sentencing. For the third time, defendant was sentenced to death. The Oregon Supreme Court again vacated the sentence and also considered defendant’s complaint that he had a constitutional right to introduce alibi testimony at his sentencing proceeding.

**Held:** Justice Breyer vacated the Oregon Supreme Court’s judgment. Justice Scalia filed a concurring opinion, in which Justice Thomas joined. Justice Alito did not participate.

The Court held that neither the Eighth nor Fourteenth Amendments guarantees a capital murder defendant the right to present alibi evidence at re-sentencing that was inconsistent with his prior conviction. Specifically, the Court reasoned that sentencing concerns the issue of *how*, not *whether*, a defendant committed a crime. Conversely, alibi evidence concerns only *whether*, not *how*, a defendant committed a crime. The Court emphasized that *whether* the defendant committed the crime had already been established. Notably, the Court left it to the Oregon courts to determine whether to permit defendant to introduce new alibi testimony to *impeach* the testimony introduced by the State at resentencing.

*Alyers v. Belmontes*, 127 S. Ct. 469 (2006).

**Issue:** Whether a sentencing factor and jury instructions barred the jury from considering defendant's forward-looking mitigation evidence in violation of the Eighth Amendment right to present all mitigating evidence in capital sentencing proceedings.

**Facts:** Defendant was convicted of first-degree murder. During the sentencing phase of the trial, he introduced mitigating evidence that he would lead a constructive life if incarcerated rather than executed. The trial court gave the jury an instruction known as "factor K" under California's then-applicable statutory scheme, which instructed the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Defendant was sentenced to death. Defendant appealed on the ground that factor K and the court's other instructions to the jury barred the jury from considering his mitigating evidence. The district court affirmed the sentence, but the Ninth Circuit granted defendant's habeas petition and invalidated his sentence.

**Held:** Justice Kennedy delivered the opinion of the Court reversing the judgment of the Ninth Circuit. Justice Scalia filed a concurring opinion, in which Justice Thomas joined. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined.

The Court held that factor K did not violate the Eighth Amendment. The Court reviewed its prior holdings regarding factor K, including *Boyd v. California*, 494 U.S. 370 (holding that factor K did not preclude consideration of mitigating evidence regarding precrime background and character), and *Brown v. Payton*, 544 U.S. 133 (holding that factor K did not preclude consideration of mitigating evidence regarding postcrime rehabilitation).

The Court reasoned that under *Boyd* and *Payton*, the touchstone inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." The Court characterized defendant's evidence as "forward-looking mitigation" evidence, and held that in light of *Payton* and the trial court's instruction to consider *all* of the evidence, factor K did not violate the Eighth Amendment.

### **Admission/Exclusion of Evidence**

*Holmes v. South Carolina*, 547 U.S. 319 (2006).

**Issue:** Whether a rule of evidence that excludes defendant's evidence regarding a third party's fault where there is strong evidence of defendant's guilt violates defendant's constitutional right to have a meaningful opportunity to present a complete defense.

**Facts:** Defendant was convicted of murder, first-degree criminal sexual assault, first-degree burglary, and robbery, and was sentenced to death. Defendant appealed his conviction on the ground that the trial court erred in excluding evidence that another individual had either acknowledged defendant's innocence or confessed to committing the crimes himself. The trial court excluded the evidence pursuant to South Carolina precedent holding that such evidence is admissible if it raises a reasonable inference as to the defendant's innocence, but inadmissible if it only creates

a bare suspicion or a conjectural inference as to another's guilt. The Supreme Court of South Carolina affirmed the conviction.

**Held:** Justice Alito delivered the unanimous opinion of the Court reversing the judgment of the South Carolina Supreme Court. This was Justice Alito's first opinion as a Supreme Court Justice.

The Court held that the South Carolina rule excluding evidence of third-party guilt if the State has introduced forensic evidence that strongly supports a guilty verdict violated the Sixth and Fourteenth Amendments. The Court reasoned that the South Carolina rule of evidence was arbitrary because it evaluated the strength of only the State's evidence and "excluded important defense evidence but that did not serve any legitimate interests." The Court concluded that the logic of the evidentiary rule "depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence."

*Davis v. Washington*, 126 S. Ct. 2266 (2006).

**Issues:**

- Whether a recording of a 911 conversation reporting an assault is testimonial evidence such that a defendant is entitled to cross-examination under the Sixth Amendment.
- Whether a battery affidavit taken from the alleged victim at the scene is testimonial evidence such that a defendant is entitled to cross-examination under the Sixth Amendment.

**Facts:** This case addresses two different scenarios and holdings regarding the right to cross-examination under the Sixth Amendment. In *Davis*, a 911 operator received a call from an alleged victim stating that she had just been assaulted by her former boyfriend. The boyfriend was charged with felony violation of a domestic no-contact order. The victim did not testify at the trial. The State introduced the 911 call identifying the defendant as the assailant. The defendant objected to the 911 call on the ground that he was entitled to cross-examine the victim under the Sixth Amendment. The trial court overruled the objection, and the defendant was convicted. The state appellate and supreme court affirmed the conviction.

In *Hammon*, police responded to a domestic disturbance report at the Hammon residence. The wife told the police that nothing was wrong; however, after police entered the home to confirm her statement, she completed and signed a battery affidavit. Her husband was charged with domestic battery, and he objected at trial to the admission of the affidavit on the ground that he was entitled to cross-examine his wife under the Sixth Amendment. The trial court overruled the objection, and the husband was convicted. Both the state court of appeals and supreme court affirmed the conviction, in part on the ground that while the affidavit was objectionable, the trial court's error was harmless.

**Held:** Justice Scalia delivered the opinion of the Court affirming the supreme court's judgment in *Davis* and reversing the supreme court's judgment in *Hammon*. Justice Thomas concurred in part and dissented in part. The Court held that the Confrontation Clause of the Sixth Amendment applies only to testimonial evidence. The Court then distinguished between testimonial evidence (when the

primary purpose is to establish or prove past events) and non-testimonial evidence (when the primary purpose is to help the police with an on-going emergency).

The Court held that in *Davis*, the 911 call was not testimonial because the victim had called the police in the midst of the emergency and was speaking of events that were happening. Conversely, the Court held that the affidavit in *Hammon* was testimonial because (1) there was no on-going emergency situation when the wife signed the affidavit, and (2) the affidavit served only to describe past criminal conduct. Accordingly, the defendant in *Hammond* was deprived of his Sixth Amendment right of confrontation, and the Court remanded the case to the state court to determine whether the defendant had waived his Sixth Amendment right by wrongfully obtaining his wife's absence from the trial.

***Whorton v. Bockting***, 127 S. Ct. 1173 (2007).

**Issue:** Whether the Court's holding overruling prior confrontation clause law applies retroactively to cases already final on direct review.

**Facts:** Defendant was charged with sexually assaulting his six-year-old step-daughter. During the trial, the trial court concluded that the victim was too distressed to testify and permitted the defendant's wife and police officer to give hearsay testimony regarding the victim's statements relating to the assaults. Defendant objected to the hearsay statements on the ground that they violated the confrontation clause, and the trial court overruled his objection. Defendant was convicted and appealed to the state supreme court, which affirmed the conviction under *Ohio v. Roberts*, 448 U.S. 56 (holding that confrontation clause permits admission of hearsay statements made by unavailable declarant if there is sufficient evidence of reliability).

Defendant then petitioned for habeas relief on the same ground, and while his petition was pending before the Ninth Circuit, the United States Supreme Court reversed *Ohio v. Roberts*. The case overruling *Ohio v. Roberts* held that the confrontation clause permits admission of hearsay statements made by an unavailable declarant if the defendant had had a previous opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36. Defendant accordingly argued that the *Crawford* standard should have been applied in his case and that the hearsay statements would have been inadmissible. The Ninth Circuit agreed and reversed the conviction.

**Held:** Justice Alito delivered the unanimous opinion of the Court reversing the Ninth Circuit's judgment.

The Court began by reviewing the *Teague* analysis, which determines whether a new rule applies retroactively in a habeas, *i.e.*, collateral, proceeding. A new rule applies retroactively if (1) it is substantive, or (2) it is a "watershed rule," meaning it implicates the fundamental fairness and accuracy of the criminal proceeding. The Court concluded that the *Crawford* rule was new, but procedural in nature rather than substantive.

The Court also held that the *Crawford* rule was not a watershed rule implicating the fundamental fairness and accuracy of the criminal proceeding. The Court reasoned that the "watershed" exception to retroactive application is a narrow one, and applies only where there is an impermissibly large risk of an inaccurate conviction. By illustration, the Court cited *Gideon v.*



*Wainwright*, in which the Court held that counsel must be appointed to an indigent defendant because in the absence of counsel, the risk of an unreliable verdict is intolerably high. The Court concluded that the *Crawford* rule was not comparable to the *Gideon* rule.

### **Speedy Trial**

***Zedner v. United States***, 126 S.Ct. 1976 (2006).

**Issue:** Whether a defendant can prospectively waive the right to speedy trial.

**Facts:** Defendant was charged with attempting to defraud a financial institution and knowingly possessing counterfeit obligations of the United States. Pursuant to the Speedy Trial Act of 1974 (the “Act”)—which requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an appearance—defendant requested, and the trial court granted, two “ends-of-justice” continuances. When defendant requested a third continuance, the trial court suggested that defendant sign a waiver of the Act’s application “for all time.” Defendant signed the waiver; four years later he moved to dismiss the indictment for failure to comply with the Act. Citing defendant’s waiver, the trial court denied the motion to dismiss. Defendant was convicted, and the Second Circuit affirmed the conviction.

**Held:** Justice Alito delivered the unanimous opinion of the Court reversing judgment of the Second Circuit. Justice Scalia filed a concurring opinion.

The Court held that a defendant may not prospectively waive the application of the Act. The Court reasoned that the Act itself does not exclude periods of delay during which the defendant waives the application of the Act, but instead requires that continuance requests fit within one of the specific exclusions set out in the Act. The Court also emphasized that the Act does not exist solely for the interests of the defendant, but also the public interest, which in some cases would not served by the defendant’s unilateral waiver.

The State also contended that defendant should be estopped from challenging the lack of findings required under the Act. The Court reasoned that there were three possible positions of defendant’s that the State sought to enforce via estoppel: (1) defendant’s promise not to move for dismissal; (2) defendant’s position that the waiver was enforceable; and (3) defendant’s request for additional time to research the authenticity of the allegedly counterfeit bonds. The Court held that defendant was not estopped from challenging the lack of findings per his promise not to move for dismissal because it would be counter to the no-waiver holding. The Court also emphasized that defendant did not persuade the district court to accept a prospective waiver, but vice versa. Finally, the Court refused to find estoppel under the State’s third position because defendant’s request was clearly a case-management question that was a matter of the district court’s discretion. Because the district court’s failure to make an express finding regarding the continuance request was not harmless error, the Court reversed the Second Circuit’s judgment.

## **Physician Assisted Suicide**

***Gonzales v. Oregon***, 546 U.S. 243 (2006).

**Issue:** Whether the Controlled Substances Act (the “CSA”) authorizes the prohibition of doctors from prescribing lethal doses of controlled substances to critically ill patients.

**Facts:** The State of Oregon passed the Oregon Death with Dignity Act, or “ODWDA,” exempting from criminal or civil liability doctors who prescribe lethal doses of controlled substances to critically ill patients. Subsequently, the United States Attorney General promulgated an Interpretive Rule stating that physician assisted suicide violated the Controlled Substances Act. The State of Oregon brought an action for injunctive and declaratory relief, and the district court enjoined the Interpretive Rule’s enforcement. The Ninth Circuit invalidated the Interpretive Rule.

**Held:** Justice Kennedy affirmed the judgment. Justice Scalia filed a dissenting opinion, in which Chief Justice Roberts and Justice Thomas joined. Justice Thomas filed a dissenting opinion.

The Court held that the Attorney General’s Interpretive Rule was not entitled to deference because it (1) simply restates the terms of the CSA and does not reflect experience and expertise in interpreting the CSA, and (2) does not relate to registration and control of the dispensing of controlled substances, which are the only areas in which Congress gave the Attorney General authority to promulgate rules.

Further, the Court re-emphasized that the CSA’s purpose is to combat illicit drug dealing and trafficking, which are not related to issue of physician-assisted suicide. The Court also reasoned that the CSA manifests no intent to regulate the practice of medicine generally, and that the Attorney General’s Interpretive Rule was contrary to the CSA’s structural and procedural reliance upon a functioning medical profession regulated by the States.

## **Batson**

***Rice v. Collins***, 546 U.S. 333 (2006).

**Issue:** Whether questions regarding the State’s credibility in offering race-neutral justifications for exercising a peremptory strike on an African-American venire-person entitled petitioner to federal habeas relief.

**Facts:** Petitioner was convicted of possession of a controlled substance. During the trial, petitioner raised a *Batson* challenge to the State’s peremptory challenge to venire-person 16, a young African-American woman. In response to petitioner’s challenge, the State responded that it struck venire-person 16 because she (1) she rolled her eyes in response to a question from the trial court, (2) was young and might be too tolerant of drug related crime, (3) was female, and (4) was single and lack ties to the community. The trial court noted on the record that it had not observed venire-person 16 rolling her eyes, but it overruled the *Batson* challenge on the ground that the State had stricken her for youth.

Petitioner filed for federal habeas relief, and the Ninth Circuit reversed the conviction on the ground that under the Antiterrorism and Effective Death Penalty Act of 1996, the State Court of Appeals failed to make a reasonable factual determination in light of the record.

**Held:** Justice Kennedy writing for a unanimous Court reversed the Ninth Circuit's judgment. Justice Breyer filed a concurring opinion, in which Justice Souter joined.

The Court held that petitioner was not entitled to habeas relief because the State Court of Appeals' conclusion was not "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Specifically, the Court held that the Ninth Circuit's inferences relating to credibility of the State's proffered race-neutral justifications were not supported by the record. That the State had described another venire-person as young when she was actually a grandmother could have been attributed to a mistake. That the State referred to venire-person 16's gender did not somehow invalidate the other valid justifications for exercising the strike. The Court reasoned that at most, the trial court had reason to question the State's credibility, which did not entitle petitioner to habeas relief.

### **Search & Seizure**

*United States v. Grubbs*, 547 U.S. 90 (2006).

#### **Issues:**

- Whether anticipatory search warrants are unconstitutional.
- Whether the Fourth Amendment requires that a triggering condition for an anticipatory search warrant be set forth in the warrant itself.

**Facts:** Defendant was arrested for possession of child pornography after police served an anticipatory warrant at his residence and seized a video tape depicting child pornography. The warrant was "anticipatory" because it was conditioned upon defendant's receipt of the video through the mail. Defendant moved to suppress the evidence of the search on the grounds that (1) anticipatory warrants violate the Fourth Amendment, and (2) the search at issue violated the Fourth Amendment because the officers serving the warrant failed to inform defendant of the triggering condition for the warrant. The Ninth Circuit held that the search violated the Fourth Amendment on the ground that the police had to show the triggering events for an anticipatory warrant to the person being searched.

**Held:** Justice Scalia reversed the judgment of the Ninth Circuit. Justice Souter filed an opinion concurring in part and concurring in the judgment, in which Justices Stevens and Ginsburg joined. Justice Alito did not participate.

The Court held that anticipatory search warrants are not categorically unconstitutional so long as there is probable cause (established by affidavit) at the time the warrant is issued to believe that contraband will be at the place described. The Court further held that the police's failure to show the triggering events for the anticipatory warrant to defendant did not violate the Fourth Amendment. The Court reasoned that the Fourth Amendment specifies only two things that a

warrant must describe: (1) the place to be searched, and (2) the persons or things to be seized. Therefore, a warrant does not need to include the triggering event for an anticipatory search warrant to pass constitutional muster.

***Georgia v. Randolph***, 547 U.S. 103 (2006).

**Issue:** Whether a physically present co-inhabitant's refusal to consent to search renders a warrantless search unreasonable under the Fourth Amendment.

**Facts:** Defendant was charged with possession of cocaine after police discovered cocaine during a warrantless search of his residence. Defendant moved to suppress the cocaine on the ground that he expressly refused to consent to the warrantless search. The district court denied the motion to suppress because the police had obtained the consent of defendant's estranged wife to search the residence. The state court of appeals reversed the trial court's ruling, and the state supreme court affirmed the court of appeals' ruling.

**Held:** Justice Souter affirmed the Georgia Supreme Court's judgment. Justice Stevens filed a concurring opinion. Justice Breyer filed a concurring opinion. Chief Justice Roberts filed a dissenting opinion, in which Justice Scalia joined. Justice Scalia filed a dissenting opinion. Justice Thomas filed a dissenting opinion. Justice Alito did not participate.

The Court held that a physically present co-inhabitant's refusal to consent to search renders a warrantless search unreasonable under the Fourth Amendment. The Court emphasized its prior holding that overnight houseguests have a legitimate expectation of privacy in their temporary quarters. By that same token, the Court reasoned that a co-inhabitant should have at least as much of an expectation of privacy.

The Court acknowledged that its holding brings into question the significance of prior cases, *i.e.*, *United States v. Matlock*, 415 U.S. 164, and *Illinois v. Rodriguez*, 497 U.S. 177. The Court recalled that in *Matlock*, where the search was held to be constitutional, the defendant was not present with an opportunity to object to the search. However, he was in a police car not far away. In *Rodriguez*, the defendant was asleep in the residence, and the police might have awakened him and requested consent before they entered with only the consent of the co-inhabitant. Accordingly, the Court drew what it admitted to be a thin line: "[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."

***Hudson v. Michigan***, 126 S. Ct. 2159 (2006).

**Issue:** Whether a violation of the knock-and-announce rule requires suppression of all evidence found in the search.

**Facts:** Defendant was charged with drug possession after police executed a search warrant at his home and discovered drugs. Defendant moved to suppress the drugs on the ground that the police violated the Fourth Amendment's knock-and-announce rule, which requires police to wait 20-30 seconds after knocking and announcing their presence before entering the home. The trial court

granted defendant's motion, but the state court of appeals reversed the trial court's ruling on interlocutory appeal. The Michigan Supreme Court declined review.

**Held:** Justice Scalia affirmed the state appellate court's judgment. Justice Kennedy filed an opinion concurring in part and concurring in the judgment. Justice Breyer filed a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined.

The Court first noted that the State did not dispute the violation of the knock-and-announce rule. The Court then reviewed the public policy considerations underlying the knock-and-announce rule: (1) an unannounced entry may provoke violence from the surprised resident; (2) an unannounced entry might result in the destruction of the door, whereas the resident would most often open the door upon the knock and announce; and (3) "those elements of privacy and dignity that can be destroyed by sudden entrance." Because the interests that were violated as a result of the failure to knock and announce had nothing to do with the seizure of the evidence, the Court declined to apply the exclusionary rule.

In holding that the violation of the rule did not require suppression, the Court emphasized that the exclusionary rule is applied only "where its deterrence benefits outweigh its substantial social costs." Notably, the Court held that suppression of the evidence was not necessary to deter the police from violating the knock-and-announce rule. Instead, the Court noted that sufficient deterrence already exists in the form of civil rights suits and internal police discipline.

*Samson v. California*, 126 S. Ct. 2193 (2006).

**Issue:** Whether a suspicion-less search of a California parolee violated the Fourth Amendment.

**Facts:** Defendant-parolee was charged with drug possession after a police officer detained and searched him. The search was warrantless, and the officer conceded that he stopped and searched defendant only because he knew he was a parolee. Defendant moved to suppress the drugs under the Fourth Amendment, and the trial court denied the motion. Defendant was ultimately convicted, and the state court of appeals affirmed the judgment. The State Supreme Court declined to review the case.

**Held:** Justice Thomas affirmed the state court of appeals' judgment. Justice Stevens filed a dissenting opinion, in which Justices Souter and Breyer joined.

The Court began by noting that the defendant had signed an agreement to be subject to search and seizure without or without a warrant or probable cause as a condition of his parole. The Court also emphasized that a parolee has "severely diminished" privacy expectations because the parolee is still completing the terms of his sentence, only he is doing so out of physical custody. The Court also acknowledged the State's "overwhelming interest" in supervising parolees because of the likelihood that they will commit future crimes. In holding that the search at issue did not violate the Fourth Amendment, the Court acknowledged that some states and the federal government require an individualized level of suspicion separate and apart from the Fourth Amendment before searching a parolee.

## **Habeas**

*House v. Bell*, 126 S. Ct. 2064 (2006).

**Issue:** Whether petitioner satisfied the showing necessary to overcome the procedural default bar to a federal habeas petition.

**Facts:** Petitioner was convicted of murder and sentenced to death. The State's evidence included forensic evidence in the form of petitioner's semen on the victim's clothing and the victim's blood on petitioner's jeans. Petitioner appealed, and the State Supreme Court affirmed the conviction. Petitioner then petitioned for federal habeas relief, which the district court denied because petitioner did not satisfy the "actual innocence" standard necessary to overcome his procedurally defaulted claims. The Sixth Circuit affirmed the district court's judgment.

**Held:** Justice Kennedy reversed the judgment of the Sixth Circuit. Chief Justice Roberts filed an opinion dissenting in part and concurring in part, in which Justices Scalia and Thomas joined. Justice Alito did not participate.

The Court held that petitioner was asserting his innocence and therefore had to establish that "it is more likely than not that no reasonable juror could have found petitioner guilty beyond a reasonable doubt." The Court noted that petitioner had to present new reliable evidence, and that the district court had to then analyze the likely impact of all of the evidence on the jury. The Court also emphasized that petitioner was not required to prove his innocence absolutely and distinguished this habeas standard from insufficiency of the evidence standards.

Then Court then reviewed petitioner's new evidence, which included the following:

- new DNA testing indicated that the semen found on the victim's clothing came from her husband, not petitioner;
- testimony from a medical examiner that the blood stains on petitioner's jeans came from autopsy samples spilled in transit; and
- testimony from witnesses indicating that the victim's husband committed the crime, including a confession.

In light of this evidence, the Court held that this was the rare case in which had the jury heard all of the evidence, it is more likely than not that no reasonable juror would lack reasonable doubt.

*Hill v. McDonough*, 126 S.Ct. 2096 (2006).

**Issue:** Whether defendant's § 1983 action challenging the manner of the execution rather than the execution itself should be deemed a habeas action.

**Facts:** Defendant brought an action under 42 U.S.C. § 1983 challenging Florida's three-drug combination for executions as a violation of the Eighth Amendment's ban on cruel and unusual punishment. Specifically, defendant contended that Florida's procedure resulted in a foreseeable risk of unnecessary and gratuitous pain. The district court noted that defendant had previously

petitioned for habeas relief and held that defendant's § 1983 action was barred as a successive habeas petition. The Eleventh Circuit affirmed the district court's judgment.

**Held:** Justice Kennedy delivered the opinion for a unanimous court reversing the Eleventh Circuit's judgment.

Relying on *Nelson v. Campbell*, 541 U.S. 637 (holding that § 1983 Eight Amendment challenge seeking to enjoin use of legal injection is not challenge to death sentence), the Court held that defendant's § 1983 action was not the equivalent of a habeas petition because he was not challenging the execution itself, but the manner thereof. The Court emphasized that defendant had specifically conceded that some forms of execution would be constitutional. Also, the Court noted that Florida law did not require the use of the three-drug combination for executions.

The Court specifically rejected two of the State's arguments. First, the State contended that to avoid the successive habeas petition bar, the defendant must suggest an alternative form of execution. The Court held that the pleading requirements under § 1983 are governed by the rules of federal procedure, and do not require a defendant to plead an alternative form of execution. Second, the State urged the Court to adopt the bright-line rule that any challenge that would frustrate an execution as a practical matter must be deemed a habeas action. The Court declined to adopt such a rule, reasoning that to do so would ignore the touchstone of *Nelson*—whether granting relief would necessarily bar the defendant's execution.

### **Due Process**

*Dixon v. United States*, 126 S. Ct. 2437 (2006).

**Issue:** Whether the Due Process Clause prohibits jury instructions from placing the burden to prove the defense of duress upon the defendant.

**Facts:** The defendant was charged with receiving a firearm while under indictment and making false statements in acquiring a firearm. At trial the defendant contended that while she knew she was committing a crime by engaging in the conduct at issue, she was acting under duress because her boyfriend had threatened to harm her or her daughters if she did not purchase the firearms for him. The trial court denied her request for a jury instruction requiring the State to disprove her duress defense, instead placing upon the defendant the burden to prove duress. Defendant was convicted, and the Fifth Circuit affirmed the conviction.

**Held:** Justice Stevens delivered the opinion of the Court affirming the Fifth Circuit's judgment. Justice Kennedy filed a concurring opinion. Justice Alito filed a concurring opinion, in which Justice Scalia joined. Justice Breyer filed a dissenting opinion, in which Justice Souter joined.

The Court focused on the fact that the defendant had admitted committing the crimes at issue and that she knew she was committing the crimes when she did so. In holding that the Due Process Clause does not prohibit jury instructions from placing the burden of proof for duress upon the defendant, the Court reasoned that her defense of duress did not go to the *mens rea* necessary to establish the commission of the offenses and did not controvert any elements of the charged offenses. The Court acknowledged *Davis v. United States*, 160 U.S. 469, in which the Court held

that the State had the burden to prove a defendant's sanity beyond a reasonable doubt. However, the Court distinguished between duress—which does not go to *mens rea*—and the effect of insanity on *mens rea* for murder, which was at issue in *Davis*. The Court also noted that Congress had overruled *Davis* by statute, and that defendants now have the burden to prove insanity.

### **Sixth Amendment: Counsel of Choice**

*United States v. Gonzales-Lopez*, 126 S. Ct. 2557 (2006).

**Issue:** Whether a trial court's undisputed error in disqualifying a defendant's counsel of choice violates the Sixth Amendment, and if so, whether that violation is subject to harmless error analysis.

**Facts:** Defendant was charged with conspiring to distribute marijuana. Defendant hired an attorney to represent him in the trial, but the district court denied the attorney's application for admission *pro hac vice* on the ground that he had violated a rule of professional conduct. Defendant was convicted, and the Eighth Circuit vacated the judgment and remanded the cause on the ground that defendant had been deprived of his Sixth Amendment right to counsel of his choice.

**Held:** Justice Scalia delivered the opinion of the Court affirming the Eighth Circuit's judgment. Justice Alito filed a dissenting opinion in which Chief Justice Roberts and Justices Kennedy and Thomas joined.

The Court first emphasized that the State conceded that the trial court was mistaken with regard to the attorney's violation of the rule of professional conduct. That said, the Court held that the trial court's error deprived the defendant of his Sixth Amendment right to counsel of his choice. The Court refused to adopt the State's contention that defendant had to satisfy the *Strickland* standard on the ground that *Strickland* addresses a defendant's right to a fair trial, while the issue in the present case was the defendant's right to counsel of his choice, a separate guarantee under the Sixth Amendment.

Importantly, the Court also held that the trial court's error was not subject to harmless error review because the error was "structural." Specifically, the Court reasoned that choice of counsel affects the entire framework of the trial rather than an error in the trial process. The Court also noted that it did not intend to place any qualification on trial courts' authority to establish criteria for admitting lawyers *pro hac vice*.

### **Sixth Amendment: Blakely**

*Washington v. Recuenco*, 126 S. Ct. 2546 (2006).

**Issue:** Whether the trial court's enhancement of defendant's punishment without a requisite jury finding, which violates the Sixth Amendment, is subject to harmless error analysis.

**Facts:** Defendant was charged with and convicted of second degree assault, interfering with domestic violence reporting, and malicious mischief. The jury found that defendant had assaulted his wife "with a deadly weapon." The jury was not asked to find that the deadly weapon in question was a firearm.



The State enhancement statutes provided a one-year deadly weapon enhancement and a three-year firearm enhancement. Even though the jury's finding was limited to assault with a deadly weapon, rather than a firearm, the trial court enhanced defendant's punishment pursuant to the three-year enhancement based on its own finding that defendant committed assault with a firearm. In light of the Supreme Court's holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (holding that jury, not court, must find facts necessary to increase penalty beyond statutory maximum), and *Blakely v. Washington*, 542 U.S. 296 (holding that statutory maximum is maximum sentence court may impose solely on basis of facts reflected in jury's verdict), the State conceded that the trial court had committed a Sixth Amendment *Blakely* violation but argued that the error was harmless. The state court of appeals affirmed the trial court's judgment, but the state supreme court reversed the judgment.

**Held:** Justice Thomas delivered the opinion of the Court reversing the state supreme court's judgment. Justice Kennedy filed a concurring opinion. Justice Stevens filed a dissenting opinion. Justice Ginsburg filed a dissenting opinion, in which Justice Stevens joined.

The Court first held that adequate and independent state law grounds did not deprive the Court of jurisdiction to review the state supreme court's judgment. The Court then held that failure to submit a sentencing enhancement factor to the jury is not structural error. The Court noted its previous holding that failure to submit an element of an offense to the jury was subject to harmless error review. The Court concluded that in light of the lack of an historical distinction between elements and sentencing factors, the trial court's error in the present case was subject to a harmless error analysis.

*Cunningham v. California*, 127 S. Ct. 856 (2007).

**Issue:** Whether a determinate sentencing law (DSL) that provides for enhancement of punishment upon specified trial court findings violates the Sixth Amendment requirement that a jury, not the trial court, must find facts necessary to enhance punishment.

**Facts:** Habeas petitioner was convicted of sexual assault of a child under the age of 14. Under the state DSL, petitioner's sentence was six years, twelve years (the default sentence), or sixteen years, depending on whether the trial court found aggravating circumstances. The trial court found several aggravating circumstances and one mitigating factor; because the aggravating circumstances outweighed the mitigating factor, the trial court sentenced petitioner to sixteen years. The state court of appeal affirmed the conviction, and the state supreme court denied review. However, the state supreme court issued a separate decision holding that the state DSL was not prohibited by the Sixth Amendment.

**Held:** Justice Ginsburg delivered the opinion of the Court reversing the state supreme court's judgment. Justice Kennedy filed a dissenting opinion, in which Justice Breyer joined. Justice Alito filed a dissenting opinion, in which Justices Kennedy and Breyer joined.

The Court held that the state DSL violated the Sixth Amendment. Citing *Apprendi v. New Jersey*, the Court restated that any fact—other than a prior conviction—that results in a sentence in excess of the statutory maximum must be found by a jury. The Court compared the sentencing system in the DSL to the sentencing systems in two other cases (*Blakely v. Washington*, 542 U.S. 296, and

*United States v. Booker*, 543 U.S. 220) and concluded that the middle sentence of twelve years was the “statutory maximum.” Accordingly, to the extent the DSL authorized enhancement of that sentence based on trial court findings, it violated the Sixth Amendment. The Court also specified that the holding of *Apprendi* was intended to establish a bright-line Sixth Amendment rule and discounted the state supreme court’s reasoning that the DSL survived constitutional scrutiny because it did not appear to shift the proof of facts from elements of the crime to sentencing factors. The Court concluded by recognizing two constitutionally valid types of state reaction to *Apprendi*: (1) having juries find any facts relevant to enhancement, and (2) permitting judges broad discretion within a statutory range.

### **First Amendment**

***Beard v. Banks***, 126 S. Ct. 2572 (2006).

**Issue:** Whether a prison policy restricting access to newspapers, magazines, and photographs for inmates with serious behavior problems violates the First Amendment.

**Facts:** An inmate in the most restrictive level of a state long term segregation unit (“LTSU”) filed suit against the Secretary of the Department of Corrections challenging a policy prohibiting certain inmates from access to newspapers, magazines, and photographs. The parties filed cross-motions for summary judgment, and the trial court granted the Secretary’s motion. The inmate appealed the summary judgment on the ground that the prison policy violated the First Amendment, and the Third Circuit reversed the judgment.

**Held:** Justice Breyer delivered the opinion of the Court reversing the Third Circuit’s judgment. Justice Thomas filed a concurring opinion, in which Justice Scalia joined. Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined. Justice Ginsburg filed a dissenting opinion. Justice Alito did not participate.

The Court held that the Secretary had articulated adequate legal support for the prison policy. The Court re-stated prior holdings that the Constitution permits greater restriction of constitutional rights in prison. The Court also cited precedent for the holding that the judgment of prison administrators is entitled to deference. Specifically, prison regulations are constitutional if they are reasonably related to legitimate penological interests. Because the Secretary articulated a reasonable justification for the prison regulation at issue, *i.e.*, to motivate better behavior, the regulation did not violate the First Amendment. The Court emphasized that the policy was limited to prisoners with serious behavior problems. Justice Thomas’s concurrence noted that the holding was supported under an historical approach to constitutional interpretation.

## Vienna Convention on Consular Relations (“VCCR”)

*Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

### Issues:

- Whether failure to advise a foreign national of the right under the VCCR to have the foreign national’s consulate advised of his or her detention requires suppression of incriminating evidence resulting from the detention.
- An ancillary issue is whether a habeas petition based on failure to comply with the VCCR’s requirement to inform the foreign national of the right to contact and advise the consulate of his or her detention is subject to procedural default for failure to raise the issue below.

**Facts:** This case addresses issues raised in two separate proceedings.

In *Sanchez-Limas*, a Mexican national was arrested after a gun battle with police. At trial, the State moved to introduce incriminating statements defendant made during his interrogation. Defendant moved to suppress the statements on the ground that the police had not advised him of his rights under Article 36(1)(b) of the VCCR. Article 36(1)(b) provides that the police must inform a person detained by a foreign country of his or her right to have the police contact and advise the consulate for that foreign country of the detainee’s arrest. In a nutshell, because defendant was a Mexican national detained in the United States, he contended that the police had to advise him of his right under Article 36(1)(b) to have the Mexican Consulate contacted and advised of his arrest and detention. The trial court denied his motion to suppress, and defendant was convicted. The state court of appeals and supreme court affirmed the conviction.

In *Bustillo*, a Honduran national defendant was charged with murder. After his conviction, the defendant petitioned for habeas relief on the ground that he had not been advised of his rights under Article 36(1)(b). The trial court found that the petition was procedurally barred and dismissed it accordingly. The court of appeals affirmed the dismissal.

### **Held:**

Chief Justice Roberts wrote for the majority affirming the lower court judgment. Justice Ginsburg concurred in part and dissented in part. Justice Breyer dissented, joined by Justice Stevens and Justice Souter and in part by Justice Ginsburg.

With regard to *Sanchez-Limas*, the Court held that the failure to advise defendant under Article 36(2) did not require suppression of his statements resulting from interrogation. The Court noted that the VCCR does not provide for such a remedy for failure to advise. Defendant argued alternatively that Article 36(2) of the VCCR provides that the rights under Article 36(1)(b) should be exercised in conformity with the laws of the detaining foreign country. The Court responded that under United States law, suppression is not a remedy imposed lightly, and certainly not in the present case where no constitutional interests are threatened by failure to advise under Article 36(1)(b).

With regard to *Bustillo*, the Court held that petitioner's habeas petition based on VCCR Article 36 was subject to procedural default because petitioner failed to raise Article 36 in the state courts.

### **Insanity Defense**

*Clark v. Arizona*, 126 S. Ct. 2709 (2006).

**Issue:** Whether a state can limit its definition of legal insanity and in so doing limit the use of evidence bearing on insanity to an affirmative defense rather than to negate *mens rea*.

**Facts:** Defendant was charged with first-degree murder for killing a police officer in the line of duty. At his bench trial, it was undisputed that defendant suffered from paranoid schizophrenia. It was also undisputed that defendant killed the officer. Defendant introduced evidence of his mental illness for two purposes: (1) to establish the affirmative defense of insanity, and (2) to negate *mens rea*.

Defendant introduced evidence from a psychiatrist that he was suffering from paranoid schizophrenia and was incapable of distinguishing right from wrong at the time of the murder. The State's psychiatrist testified that defendant's mental illness did not keep him from understanding the difference between right and wrong at the time of the shooting. The trial court ruled that defendant had not met his burden of establishing that he was incapable of distinguishing between right and wrong at the time of the shooting. Under Arizona state court precedent, the trial court ruled that defendant therefore could not rely on evidence of his mental illness to negate *mens rea*.

Clark was convicted, and he moved to vacate the judgment on the ground that the state insanity test and rule that a defendant cannot introduce evidence short of insanity to dispute *mens rea* violated due process. The state court of appeals affirmed the conviction.

**Held:** Justice Souter delivered the opinion of the Court affirming the state appellate court's judgment. Justice Breyer filed an opinion concurring in part and dissenting in part. Justice Kennedy filed a dissenting opinion, in which Justices Stevens and Ginsburg joined.

The Court held that limiting the insanity test to whether a defendant has the capacity to distinguish *right from wrong* (as opposed to simply being unaware of what he or she was *doing*) did not violate due process. The Court acknowledged that English common law included as one definition of insanity the defendant's unawareness of what he or she was doing, but it concluded that it did not rise to the level of a fundamental principal. The Court also emphasized long-held recognition of the states' capacity to define crimes and defenses.

The Court also held that the state's rule limiting the use of mental illness evidence to prove the affirmative defense of insanity did not violate due process. The Court distinguished between three types of *mens rea* evidence—observation evidence, mental disease evidence, and capacity evidence—and concluded that the state rule being challenged applied only to the latter two types of evidence. The Court then analyzed the use of presumptions of innocence and sanity and concluded that states can use sanity presumptions to assign burdens of proof and persuasion.

The Court acknowledged that evidence indicating that a defendant is mentally impaired and lacks capacity to form *mens rea* is relevant to rebut the State's evidence that the defendant had the requisite *mens rea*. The Court reasoned, however, that relevant evidence can be excluded in certain instances, including unfair prejudice, confusion of the issues, or potential to mislead the jury. The Court concluded that the state's limitation on the use of mental illness evidence served to avoid confusion and misunderstanding on the part of jurors because of the wide-reaching differences in psychiatric and psychological opinions. The Court ultimately held that due process did not prohibit a state from channeling evidence on mental disease and capacity to minimize such confusion.

### **Controlled Substances Act ("CSA")/Immigration and Naturalization Service ("INS")**

*Lopez v. Gonzales*, 127 S. Ct. 625 (2006).

**Issue:** Whether conduct considered a felony under state law but a misdemeanor under the CSA can be considered an aggravated felony under the Immigration and Nationalization Act ("INA") such that the Attorney General is precluded from canceling an alien defendant's removal.

**Facts:** Defendant pleaded guilty in state court to the state felony offense of aiding and abetting the possession of cocaine. The state treated aiding and abetting the possession of cocaine as the equivalent of possession itself. In light of defendant's conviction, the INS began removal proceedings on the ground that defendant had been convicted of an aggravated felony under the Controlled Substances Act ("CSA"). The characterization of the offense as an aggravated felony was relevant because it precluded the Attorney General from canceling defendant's removal.

The trial court held that even though the CSA treats aiding and abetting possession as a misdemeanor, defendant was still guilty of an aggravated felony under the Immigration and Nationality Act ("INA") because the offense was a felony under state law. Defendant appealed the court's ruling, and the Board of Immigration Appeals affirmed. The Eighth Circuit affirmed as well.

**Held:** Justice Souter delivered the opinion of the Court reversing the judgment of the Eighth Circuit. Justice Thomas filed a dissenting opinion.

The Court held that conduct that is considered a felony under state law and a misdemeanor under the CSA is not an aggravated felony under the INA. The Court reasoned that the key term in the analysis is "trafficking," as it is referenced as an aggravated felony under the INA, but not defined. The INA in turn references another federal statute for a definition of "trafficking." That statute defines "drug trafficking crime" to include any felony under the CSA.

### **Indictments**

*United States v. Resendez-Ponce*, 127 S. Ct. 782 (2007).

**Issue:** Whether an indictment that alleges an attempt to commit an offense and specifies a time and place of the attempt is defective for failure to allege a specific overt act.

**Facts:** A Mexican citizen was charged with attempting to reenter the United States after being deported. The defendant moved to dismiss the indictment for failure to allege a specific overt act constituting his attempt to reenter the United States. The district denied his motion to dismiss, and the Ninth Circuit reversed the judgment on the ground that the failure to allege a specific overt act was fatal to the indictment.

**Held:** Justice Stevens delivered the opinion of the Court reversing the judgment of the Ninth Circuit. Justice Scalia filed a dissenting opinion.

The Court held that the indictment was valid because it referenced the relevant statute and alleged that the defendant “attempted” to reenter the United States. The Court emphasized that the term “attempted” implied an overt action, and that the term encompassed both overt act and intent elements. The Court concluded that the two constitutional requirements for an indictment—(1) it must contain the elements of the offense charged and fairly inform the defendant of the offense charged, and (2) it must enable the defendant to plead an acquittal or conviction as a bar to future prosecutions for the same offense—were satisfied because the indictment alleged that defendant “attempted” to reenter the United States, and it specified the time and place of the attempt.

### **Detainee Treatment Act (“DTA”)/Uniform Code of Military Justice (“UCMJ”)**

*Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

#### **Issues:**

- Whether the Court has jurisdiction to review the D.C. Circuit’s judgment.
- Whether the Court should abstain from reviewing the D.C. Circuit’s judgment.
- Whether the military commission that tried defendant had the authority to do so under any congressional act, the UCMJ, or the Geneva Conventions.

**Facts:** Defendant was captured by militia forces during the United States invasion of Afghanistan following the September 11, 2001 terrorist attacks. Defendant was turned over to the U.S. Military and ultimately transported to Guantanamo Bay. Over two years later, defendant was charged with conspiracy to commit offenses triable by military commission. Defendant filed mandamus and habeas petitions challenging the military commission’s authority to try him for conspiracy, partly because the procedures used by the commission deprived him of his right to see and hear the evidence against him. The district court granted defendant’s habeas petition. The D.C. Circuit reversed the trial court’s judgment.

**Held:** Justice Stevens delivered the opinion of the Court reversing the D.C. Circuit’s judgment. Justice Breyer filed a concurring opinion, joined by Justices Kennedy, Souter, and Ginsburg. Justice Kennedy filed a concurring opinion, in which Justices Souter, Ginsburg, and Breyer joined. Justice Scalia filed a dissenting opinion, in which Justice Alito joined. Justice Alito filed a dissenting opinion, in which Justices Scalia and Thomas joined. Chief Justice Roberts did not participate.

The Court held that the DTA did not deprive it of jurisdiction to review the D.C. Circuit's judgment. The Court reasoned that the legislative history of the DTA reflected that the legislature specifically rejected language that would have deprived the Court of jurisdiction.

The Court also held that abstention was not merited in the present case. The Court emphasized that defendant is not a service member, so that general abstention principals in courts-martial against service members did not apply. The Court concluded that abstention was not appropriate here in light of (1) the public importance of the questions raised; (2) the Court's duty, in both peace and war, to preserve the constitutional safeguards of civil liberty; and (3) the public interest in a decision on those questions without delay.

The Court held that the DTA does not authorize the military commission that tried defendant. The Court reasoned that taken together, the applicable statutes and resolutions at most authorize the President to convene military commissions where they are justified under the Constitution and laws, including the law of war.

The Court noted that the military commission's procedures provided that (1) defendant could be excluded from the proceedings and precluded from learning what evidence was presented in the proceedings; (2) *any* evidence that would have probative value is admissible; and (3) defendant could be denied access to evidence if the commission concludes that its admission without defendant's knowledge would not result in the denial of a full and fair trial. After rejecting the Government's contention that the Court's review should be delayed until a final decision by the military commission, the Court held that the military commission's procedures are illegal under the Constitution and the law of war, as it includes the Geneva Conventions.

Justice Stevens wrote a separate opinion which held that defendant had not been charged with an offense that could be tried by a military commission. Justice Stevens reasoned that conspiracy is not a recognized violation of the law of war, and that defendant had not been charged with any overt act.