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Criminal Justice and the U.S. Supreme Court's 2008-2009

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CRIMINAL JUSTICE AND THE U.S. SUPREME COURT'S 2008-2009 TERM

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I. INTRODUCTION

The U.S. Supreme Court's 2008-2009 term marked the end of a brief "natural court"[1] period in which the Court's specific composition had remained intact for less than four complete terms. The retirement of Justice David Souter at the conclusion of the Court's term and his replacement by Justice Sonia Sotomayor raises significant and interesting questions about the how the Court will decide cases during its next "natural court" period.[2] While most commentators are forward-looking in their speculation about the implications of changes in the Court's composition,[3] there are still strong reasons to examine the Court's recent past, including the most recent term, because the past provides clues about developments that may shape the future.[4] There are always important questions about the motives and actions of a particular set of justices is interacting with each other in attempting to shape case outcomes and the written opinions that will guide lower court judges in future cases.[5] On the Roberts Court, such questions include the Chief Justice's success (or lack thereof) in advancing his self-

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1. A "natural court" represents a time period in which the same set of justices or judges work together on an appellate court without any departures or newcomers. Christopher Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 262 (1992).

2. *See, e.g.*, Adam Liptak, *Sotomayor Cast First Vote on Court*, N.Y. TIMES, August 19, 2009, at A13, ("But the alignment of the justices in the Getsy case gave a preliminary indication that, as expected, the ideological fault line at the court was not changed by Justice Sotomayor's succeeding Justice David H. Souter, who often voted with Justices Stevens, Ginsburg, and Breyer").

3. *See, e.g.*, Mark Sherman, *Sotomayor to Change Supreme Court Dynamic*, S. FLA. SUN-SENTINEL, Oct. 4, 2009, at 6A ("But other disputes loom and, to cite just one area, Sotomayor will be watched closely to see whether her past as a prosecutor makes her more sympathetic to law enforcement in criminal cases.").

4. *See, e.g.*, Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A1 ("Chief Justice John Roberts emerged as a canny strategist at the Supreme Court this term, laying the groundwork for bold changes that could take the court to the right even as the recent elections moved the nation to the left.").

5. *See, e.g.*, Adam Liptak, *To Nudge, Shift or Shove the Supreme Court Left*, N.Y. TIMES, Feb. 1, 2009, at WK1 ("These days, Professor Stone said: 'The right side [of the Court] is very bold and conservative. The liberal side is not bold. They are incrementalists. They don't set the agenda. The old-school liberal justices were simply more ambitious than Justices Breyer and Ginsburg.").

professed goal of fostering greater consensus among the justices.[6] In addition, there are questions about the impact, influence, and voting behavior of Justice Anthony Kennedy as the "middle justice" whose vote often determines outcomes when the justices are deeply-divided on particular issue.[7] And, as always, there are issues about the reasoning and arguments put forth in the opinions of individual justices as they attempt to shape both current and future developments in constitutional law and statutory interpretation.[8]

Examinations of the Supreme Court's criminal justice decisions often illuminate the divisions with the Court as well as contexts in which unusual majority coalitions emerge.[9] Criminal justices cases constitute a substantial portion of the docket every term[10] and typically do not force justices to confront unfamiliar issues of first impression.[11] Criminal justice cases may raise controversial issues, such as the exclusionary rule,[12] that have historically divided jurists and commentators who adopt "liberal" or "conservative" perspectives on the definition and scope of rights for criminal suspects, defendants, and convicted offenders.[13] However, criminal justice cases may also illustrate issues in which specific justices possess a clear viewpoint on a constitutional provision that is contrary to their usual predominant patterns of support for preservation, expansion, or diminution of constitutional rights.[14] Similarly, in the area of statutory interpretation,

6. *Chief Justice Roberts Says His Goal Is More Consensus on Court*, N.Y.TIMES, May 22, 2006, at A16.

7. *See* Liptak, *supra* note 4 ("Justice Kennedy was in the majority 92 percent of the time and in all but 5 of 23 decisions in which the justices split 5-to-4.").

8. *See id.* ("The current chief justice clerked for Chief Justice William H. Rehnquist, a famous strategist, and he seems to have learned some tactics from his old boss. . ..Instead of addressing the broad issue, Chief Justice Roberts wrote a narrow decision. . ..He all but invited a further challenge.").

9. *See* Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161, 173 (2003).

10. For example, during the 2003-2004 term, the Supreme Court decided 33 criminal justice-related cases out of 73 cases for which the Court gave complete hearings and issued opinions. Christopher E. Smith, Michael McCall & Madhavi McCall, *Criminal Justice and the 2003-2004 United States Supreme Court Term*, 35 N.M. L. REV. 123, 124 (2005).

11. During the 2007-2008 term, for example, except for the Court's extraordinary examination of the Second Amendment in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), other issues were familiar matters, such as right to counsel, search and seizure, habeas corpus, and capital punishment, that have been examined in many prior terms. Michael A. McCall, Christopher E. Smith, & Madhavi M. McCall, *Criminal Justice and the 2007-2008 United States Supreme Court Term*, 36 S.U. L. REV. 33, 38-39 (2008).

12. *See* Liptak, *supra* note 4 ("What accounted for the incrementalism? A likely explanation is that the chief justice did not yet have Justice Kennedy's unqualified support and was biding his time until he did. Something similar seemed to be going on in *Herring v. United States*[, 129 S. Ct. 1692 (2009)], which cut back on but did not eliminate the exclusionary rule. The rule requires the suppression of some evidence obtained by police misconduct.").

13. The terms "liberal" and "conservative" in this article characterize Supreme Court decisions in the manner used in the Supreme Court Judicial Database in which "[l]ilberal decisions in the area of civil liberties are pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American] and anti-government in due process and privacy." Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 103 (1989).

14. Lipak, *supra* note 4 ("Justices Scalia and Thomas are apt to follow what they understand to be the original meaning of the Constitution, even when the consequences might not align with their

criminal justice cases provide illuminating examples of Supreme Court justices' approaches to understanding legislative enactments and advancing legislative intent.[15]

This article examines the Court's criminal justice decisions in the fourth term of the Roberts Court era through both empirical analysis (Section II) and case analysis (Section III). These analytical approaches reveal both typical and unexpected dynamics in the decision making of the Roberts Court's justices.

II. EMPIRICAL MEASURES OF THE SUPREME COURT'S DECISION MAKING

Table 1 summarizes the outcomes of the Supreme Court's 2008-2009 criminal justice decisions according to the direction of the Court's decisions and the extent of disagreement among the justices. The terms "liberal" and "conservative refer to support for individuals' claims (liberal) or support for the government's side in a criminal case (conservative) respectively.[16] While the percentage of cases with conservative outcomes (60.6%) was higher than that for criminal justice cases in the prior term (50%),[17] it was consistent with patterns for recent terms in which the Court trends toward a majority of conservative outcomes in such cases.[18] In the preceding year's term, liberal outcomes predominated in divided decisions with two or more dissenters (11 liberal outcomes v. 7 conservative outcomes),[19] while the most recent term's conservative orientation (12 conservative outcomes v. 7 liberal outcomes) was more consistent with the patterns in other recent terms.[20] Presumably these patterns of outcomes reflect the particular mix of criminal justice issues addressed by the Court rather than any notable differences in approaches to decision making by specific justices.[21]

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policy preferences. In *Melendez-Diaz v. Massachusetts*[, 129 S. Ct. 2527 (2009)], for instance, Justices Scalia and Thomas joined three members of the court's liberal wing to say that Constitution's confrontation clause requires crime laboratory analysts to appear at trial rather than submit written reports.").

15. For example, James v. United States, 550 U.S. 192 (2007), was a statutory interpretation decision that illustrated how conclusions about the meaning of statutory language can divide the Court in ways that differ from typical depictions of the divisions between the Court's liberal and conservative wings. *See* Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2006-2007 United States Supreme Court Term*, 76 UMKC L. REV. 993, 1032-33 (2008).

16. Segal & Spaeth, *supra* note 13, at 103.

17. McCall, McCall & Smith, *supra* note 11, at 38.

18. In the 2006-2007 term, for example, there were conservative outcomes in 64% of criminal justice cases, McCall, McCall & Smith, *supra* note 15, at 994-95, and in the 2005-2006 term, the figure was 57%. Christopher E. Smith, Michael A. McCall & Madhavi M. McCall, *Criminal Justice and the 2005-2006 United States Supreme Court Term*, 25 QUINNIPIAC L. REV. 495, 499 (2007).

19. McCall, McCall & Smith, *supra* note 11, at 38.

20. In the 2006-2007 term, the Court produced 7 conservative outcomes and five liberal outcomes, McCall, McCall & Smith, *supra* note 15, at 995-96, while producing 11 conservative outcomes and 5 liberal outcomes in such divided cases in the 2005-2006 term. Smith, McCall & McCall, *supra* note 18, at 499.

21. *See* Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986-1991 Terms*, 48 POL. RES. Q. 837, 839 (1995) ("[s]ignificant change [in Supreme Court voting patterns]. . .may be due. . .to changing issues before the Court.").

TABLE 1:
CASE DISTRIBUTION BY VOTE AND LIBERAL/CONSERVATIVE OUTCOME IN U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2008-2009 TERM

Vote	Liberal	Conservative	Total
9-0	4	8	12 (36.4%)
8-1	2	0	2 (6.1%)
7-2	1	6	7 (21.2%)
6-3	2	1	3 (9.1%)
5-4	4	5	9 (27.3%)
Total	13 (39.4%)	20 (60.6%)	33 (100%)

In the prior term, there appeared to be a reduction in the number of deep-divided 5-to-4 decisions, with such cases constituting only 18% of the criminal justice cases.[22] This development led to speculation by observers that changes were occurring in the justices' interactions and decision-making.[23] As indicated by Table 1, such divided decisions constituted 27% of the criminal justice decisions, a figure that did not match the Court's most divisive moment—45% in 2006-2007,[24] but was closer to the Court's more typical performance in recent terms.[25] Such patterns seem to indicate that the particular mix of cases accepted by the Court during a specific term determine the nature and extent of the justices disunity rather than any discernible new trend in decision making under the leadership of Chief Justice John Roberts.

Table 2 shows that the Court's criminal justice decisions were divided between constitutional and other kinds of issues. Consistent with the immediately preceding terms, fewer than half of criminal justice cases involved constitutional issues.[26] The particular categories of constitutional cases reflect familiar subjects for the justices, such as search and seizure, right to counsel, and double jeopardy. However, within such familiar categories the Court inevitably is called upon to clarify the application of the law to new issues, such as prisoners' entitlement to test DNA evidence[27] and forensic scientists' obligation to submit to cross-examination concerning their laboratory reports.[28]

22. McCall, McCall & Smith, *supra* note 11, at 38.

23. Linda Greenhouse, *At Supreme Court, 5-to-4 Rulings Fade, But Why?*, N.Y. TIMES, May 23, 2008, at A1.

24. McCall, McCall & Smith, *supra* note 15, at 996.

25. For example, in 2004-2005, 26% of the Court's criminal justice cases were 5-to-4 votes, Christopher E. Smith, Michael McCall & Madhavi McCall, *Criminal Justice and the 2004-2005 United States Supreme Court Term*, 36 U. MEM. L. REV. 951, 957 (2006), and in 2003-2004, 33% of such cases were 5-to-4 decisions. Smith, McCall & McCall, *supra* note 10, at 127.

26. McCall, McCall & Smith, *supra* note 11, at 38-40; McCall, McCall & Smith, *supra* note 15, at 996-97.

27. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009).

28. Melendez Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).

TABLE 2:
ISSUES IN CRIMINAL JUSTICE CASES IN THE SUPREME COURT'S 2008-2009 TERM

Constitutional Issues—15 cases (45%)	
Search and Seizure:	*Arizona v. Gant*[29]
	Arizona v. Johnson[30]
	Herring v. United States[31]
	Safford Unified School District v. Redding[32]
Double Jeopardy:	*Bobby v. Bies*[33]
	Yeager v. United States[34]
Due Process:	*Cone v. Bell*[35]
	District Attorney's Office v. Osborne[36]
	Rivera v. Illinois[37]
Right to Counsel:	*Kansas v. Ventris*[38]
	Knowles v. Mirzayance[39]
	Montejo v. Louisiana[40]
Confrontation Clause:	*Melendez-Diaz v. Massachusetts*[41]
Trial by Jury:	*Oregon v. Ice*[42]
Speedy Trial:	*Vermont v. Brillon*[43]
Statutory and Other Issues—18 cases (55%)	
Criminal Law Statute:	*Abuelhawa v. United States*[44]
	Boyle v. United States[45]
	Chambers v. United States[46]
	Dean v. United States[47]
	Flores-Figueroa v. United States[48]
	Nijhawan v. Holder[49]
	United States v. Hayes[50]
Statutory Criminal Procedure:	*Corley v. United States*[51]
	Puckett v. United States[52]

29. 129 S. Ct. 1710 (2009).
30. 129 S. Ct. 781 (2009).
31. 129 S. Ct. 695 (2009).
32. 129 S. Ct. 2633 (2009).
33. 129 S. Ct. 2145 (2009).
34. 129 S. Ct. 2360 (2009).
35. 129 S. Ct. 1769 (2009).
36. 129 S. Ct. 2308 (2009).
37. 129 S. Ct. 1446 (2009).
38. 129 S. Ct. 1841 (2009).
39. 129 S. Ct. 1411 (2009).
40. 129 S. Ct. 2079 (2009).
41. 129 S. Ct. 2527 (2009).
42. 129 S. Ct. 711 (2009).
43. 129 S. Ct. 1283 (2009).
44. 129 S. Ct. 2102 (2009).
45. 129 S. Ct. 2237 (2009).
46. 129 S. Ct. 687 (2009).
47. 129 S. Ct. 1849 (2009).
48. 129 S. Ct. 1886 (2009).
49. 129 S. Ct. 2294 (2009).
50. 129 S. Ct. 1079 (2009).
51. 129 S. Ct. 1558 (2009).
52. 129 S. Ct. 1423 (2009).

Crime-Related Immigration:	*Negusie v. Holder*[53]
Habeas Corpus:	*Harbison v. Bell*[54]
	Jimenez v. Quarterman[55]
	Waddington v. Sarausad[56]
Lawsuit Liability/Immunity:	*Ashcroft v. Iqbal*[57]
	Pearson v. Callahan[58]
	Republic of Iraq v. Beaty[59]
	Van De Kamp v. Goldstein[60]
Military Justice:	*United States v. Denedo*[61]

Table 3 shows the liberal/conservative voting patterns of the individual justices in criminal justice cases during the 2008-2009 term as well as their participation in majority votes and authorship of opinions for the Court. As was true in the preceding term,[62] Justices Alito and Thomas are the justices least likely to support individuals' claims in criminal justice cases. Justice Stevens stands out as the justice most likely to support individuals in such cases, thus occupying the same "most liberal" position on the Court that he has occupied for most terms over the past two decades.[63]

Other critical elements that are illuminated by Table 3, as well as Table 4, which accentuates divisions within the Court by presenting only non-unanimous decisions, concern each justice's membership in decision majorities and the authorship of majority opinions. Justice Kennedy's key role in the Court is evident in his membership within the majority for more than 90 percent of non-unanimous criminal justice cases. The justices next most frequently in the majority were Roberts and Ginsburg, whose frequency of appearance in majorities was nearly twenty percentage points below that of Kennedy. As has been true in the prior terms during the Roberts Court era, since the retirement of Justice O'Connor, "who for years shared a place at the [C]ourt's center[,]FalseJustice Kennedy [is] standing in the middle, all alone [,so that] [n]ot only the lawyers, but also the justices themselves, are now in the business of courting him."[64] As in the Court's prior term, Kennedy was so frequently in the majority and so often the potential

53. 129 S. Ct. 1159 (2009).

54. 129 S. Ct. 1481 (2009).

55. 129 S. Ct. 681 (2009).

56. 129 S. Ct. 823 (2009).

57. 129 S. Ct. 1937 (2009).

58. 129 S. Ct. 808 (2009).

59. 129 S. Ct. 2183 (2009).

60. 129 S. Ct. 855 (2009).

61. 129 S. Ct. 2213 (2009).

62. McCall, McCall & Smith, *supra* note 11, at 42.

63. *See, e.g.*, Christopher E. Smith, *Criminal Justice and the 1995-96 U.S. Supreme Court Term*, 74 U. DET. MERCY L. REV. 1, 6 (1996); Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2002-2003 United States Supreme Court Term*, 32 CAP. U. L. REV. 859, 869 (2004) (examples of selected prior years in which Stevens was the most consistently liberal justice in criminal justice cases).

64. Linda Greenhouse, *Clues to the New Dynamic on the Supreme Court*, N.Y. TIMES, July 3, 2007, at A11.

TABLE 3:
INDIVIDUAL JUSTICES' VOTING BY DIRECTION & PARTICIPATION IN MAJORITY OPINIONS, CRIMINAL JUSTICE DECISIONS, 2008-2009 TERM

Justice	Liberal (% of Votes)	Conservative (% of Votes)	In the Majority (% of Votes)	# of Majority Opinions Authored
Alito	18.2%	81.8%	78.8%	2
Thomas	24.2%	75.8%	78.8%	3
Scalia	30.3%	69.7%	78.8%	4
Roberts	33.3%	66.7%	81.8%	3
Kennedy	33.3%	66.7%	93.9%	3
Breyer	54.5%	45.5%	72.7%	4
Ginsburg	57.6%	42.4%	81.8%	6
Souter	60.6%	39.4%	78.8%	4
Stevens	69.7%	30.3%	69.7%	4

Data regard 33 criminal justice decisions (13 liberal, 20 conservative).

TABLE 4:
INDIVIDUAL JUSTICES' VOTING BY DIRECTION & PARTICIPATION IN MAJORITY OPINIONS, NON-UNANIMOUS CRIMINAL JUSTICE DECISIONS, 2008-2009 TERM

Justice	Liberal (% of Votes)	Conservative (% of Votes)	In the Majority (% of Votes)	# of Majority Opinions Authored
Alito	9.5%	90.5%	66.7%	1
Thomas	19.0%	81.0%	66.7%	1
Scalia	28.6%	71.4%	66.7%	4
Roberts	33.3%	66.7%	71.4%	3
Kennedy	33.3%	66.7%	90.5%	3
Breyer	66.7%	33.3%	57.1%	0
Ginsburg	71.4%	28.6%	71.4%	3
Souter	76.2%	23.8%	66.7%	2
Stevens	90.5%	9.5%	52.4%	4

Data regard 21 non-unanimous criminal justice decisions (9 liberal, 12 conservative).

deciding vote, that one might still assert that "[i]t was, once again, Justice Kennedy's court."[65]

65. Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. TIMES, June 29, 2008, A1.

With respect to majority opinions, Chief Justice Roberts and Justice Stevens, the primary assigners of majority opinions,[66] effectively distributed writing responsibilities in a mostly-even fashion, although Justice Ginsburg wrote two more and Justice Alito wrote one fewer than the three to four opinion range of the other justices. Although Ginsburg's voting record in criminal justice cases favors individuals' claims more frequently than government interests, all six of her majority opinion assignments came in cases with conservative outcomes, and two of those assignments were made by Justice Stevens when Chief Justice Roberts supported the arguments of individual claimants.[67] Less surprising was Chief Justice Roberts's decision to assign to himself the majority opinions in two controversial, divisive decisions rejecting a prisoner's claimed due process right to administer DNA tests to preserved evidence[68] and limiting the application of the exclusionary rule.[69] In the latter case, observers worried that lower court judges might regard the Chief Justice's reasoning "as a green light to ignore police negligence all over the place."[70] More importantly, there was speculation from both the Chief Justice's admirers and critics that the decision may reflect his first strategic step toward achieving a goal he expressed as a young attorney in the Reagan administration, namely a "campaign to amend or abolish the exclusionary rule."[71]

In the case of Justice Stevens, he assigned to himself the majority opinion in a divisive case that refined search and seizure rules to limit the ability of police to search an entire vehicle incident to the arrest of an individual outside of the vehicle.[72] Interestingly, the other majority opinions by Stevens were assigned to him by Chief Justice Roberts, not self-assignments in liberal decisions in which Roberts dissented.[73]

Tables 5 and 6 show the inter-agreement percentages for individual justices in criminal justice cases. Such calculations are used to identify possible voting blocs[74]—groups of justices who support the same outcomes in

66. When the Chief Justice is in the majority, the Chief Justice assigns the majority opinion. When the Chief Justice is a dissenter, then the senior justice in the majority makes the opinion-writing assignment. LAWRENCE BAUM, THE SUPREME COURT 133 (7th ed. 1992). When Chief Justice Roberts dissents, Justice Stevens, with thirty-four years of service on the Court, typically is the senior justice in the majority.

67. The two opinions assigned to Ginsburg by Stevens came in Oregon v. Ice, 129 S. Ct. 711 (2009), a 5-to-4 decision concerning judges' authority to impose consecutive sentences, and United States v. Hayes, 129 S. Ct. 1079 (2009), an interpretation of a criminal statute. The opinions assigned by Roberts came in three unanimous decisions, Arizona v. Johnson, 129 S. Ct. 781 (2009), Bobby v. Bies, 129 S. Ct. 2145 (2009), and Rivera v. Illinois, 129 S. Ct. 1446 (2009), as well as Vermont v. Brillon, 129 S. Ct. 1283 (2009), a 7 to-2 decision.

68. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009).

69. Herring v. United States, 129 S. Ct. 695 (2009).

70. Adam Liptak, *Supreme Court Eases Limits on Evidence*, N.Y.TIMES, Jan. 15, 2009, at A17.

71. Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1.

72. Arizona v. Gant, 129 S. Ct. 1710 (2009).

73. Yeager v. United States. 129 S. Ct. 2360 (2009); Cone v. Bell, 129 S. Ct. 1769 (2009); Harbison v. Bell, 129 S. Ct. 1481 (2009).

74. Voting blocs are determined according to the "Sprague Criterion." The Sprague Criterion is calculated by subtracting the average agreement score for the entire Court from 100. The resulting

a high percentage of cases.[75] No specific voting blocs are listed under either Table 5 or 6 because, in the Court's most recent term, there were no three-member or four-member voting blocs as there had been in several prior terms with high inter-agreement rates between small groups of justices.[76] The rates of agreement between individual paired justices were lower this year as, for example, Roberts and Alito agreed in 76 percent of non-unanimous cases, a high level of agreement, but one that was much lower than their 90 percent level in the immediately preceding term.[77] Similarly, Ginsburg and Souter's agreement rate of nearly 86 percent in such cases was higher than that of any other pair of justices, but still markedly lower than their 100 percent rate in the preceding term.[78] Most notably, a solid four-member voting bloc of justices (Alito, Roberts, Scalia, and Thomas) agreed with each other with an average inter-agreement rate of 82 percent in 2007-2008,[79] yet the inter-agreement rate for this foursome in 2008-2009 was merely 75 percent,[80] two percentage points below the Sprague Criterion[81] for identifying a voting bloc. Presumably, the inter-agreement rates were affected by the specific issues decided during the term that happened to divide justices who usually vote together in criminal justice cases. For example, the 5-to-4 decision limiting police authority to search automobiles incident to arrests created an unusual five-member majority, composed of liberals Stevens, Ginsburg, and Souter along with conservatives Scalia and Thomas squared off against an unusual dissenting foursome in which usually-liberal Breyer joined conservative colleagues Alito, Roberts, and Kennedy.[82]

number is divided by two and added to the Court average in order to establish the threshold level for defining a voting bloc. JOHN D. SPRAUGE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT 51-61(1968). High levels of inter-agreement between justices do not mean that these justices seek to vote together. Instead, the justices may possess the same values and policy preferences concerning specific issues. As some scholars have argued, policy preferences are likely to be a primary guide for a justice's decisions. FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 19 (2000).

75. For example, Chief Justice Rehnquist and Justices O'Connor and Kennedy voted together with sufficient consistency in criminal justice cases during the 1997-1998 term to meet the definition of a voting bloc. Christopher E. Smith, *Criminal Justice and the 1997-98 U.S. Supreme Court Term,* 23 S. ILL. U. L.J. 443, 450-51 (1999).

76. McCall, McCall & Smith, *supra* note 11, at 45.

77. *Id.*

78. *Id.*

79. *Id.*

80. This figure was calculated from the inter-agreement percentages in Table 6.

81. *See supra* note 74 and accompanying text.

82. Arizona v. Gant, 129 S. Ct. 1710 (2009).

TABLE 5:
INTER-AGREEMENT PERCENTAGES FOR PAIRED JUSTICES
IN U.S. SUPREME COURT CRIMINAL JUSTICE
DECISIONS, 2008-2009 TERM

	Alito	Thomas	Scalia	Kennedy	Breyer	Souter	Ginsburg	Stevens
Roberts	84.8	78.8	84.8	87.9	66.7	66.7	63.6	51.5
Alito		81.8	87.9	84.8	63.6	57.6	60.6	48.5
Thomas			87.9	72.7	51.5	63.6	60.6	48.5
Scalia				72.7	51.5	63.6	60.6	48.5
Kennedy					78.8	72.7	75.8	63.6
Breyer						75.8	78.8	84.8
Souter							90.9	84.8
Ginsburg								87.9

Court Mean: 70.7
Sprague Criterion: 85.4

TABLE 6:
INTER-AGREEMENT PERCENTAGES FOR PAIRED JUSTICES IN
U.S. SUPREME COURT CRIMINAL JUSTICE NON-
UNANIMOUS DECISIONS, 2008-2009 TERM

	Alito	Thomas	Scalia	Kennedy	Breyer	Souter	Ginsburg	Stevens
Roberts	76.2	66.7	76.2	81.0	47.6	47.6	42.9	23.8
Alito		71.4	81.0	76.2	42.9	33.3	38.1	19.0
Thomas			81.0	57.1	23.8	42.9	38.1	19.0
Scalia				57.1	23.8	42.9	38.1	19.0
Kennedy					66.7	57.1	61.9	42.9
Breyer						61.9	66.7	76.2
Souter							85.7	76.2
Ginsburg								81.0

Court Mean: 54.0
Sprague Criterion: 77.0

III. CASE DECISIONS

A. Unanimous Decisions[83]

There were no dissenting votes in more than a third of criminal justice cases decided during the 2008-2009 U.S. Supreme Court term. Specifically, Court members were unanimous in 12 of the 33 cases analyzed here, and twice as likely to make a conservative, unanimous ruling (eight) than a liberal one (four). We begin with a discussion of the conservative, unanimous decisions.

83. Although *Hedgpeth v. Pulido,* raised criminal justice issues, this case resulted in per curiam decisions and therefore is not included in this analysis. 129 S. Ct. 530 (2008).

Michael Bies was charged and convicted in 1992 for the kidnapping, rape, and murder of a 10 year-old boy.[84] After being instructed to consider Bies's mild mental retardation in mitigation against aggravating circumstances, the jury concluded that the death penalty was appropriate in this case.[85] Following the United States Supreme Court ruling in *Atkins v. Virginia*[86] that bars states from executing mentally retarded offenders under provisions of the Eighth Amendment, an Ohio trial court ordered Bies receive new sentencing.[87] The federal district court, later affirmed by the Sixth Circuit Court of Appeals, held that Ohio had determined in prior hearings that Bies suffered from mental retardation and, therefore, a rehearing to determine his mental capacity was barred under the Double Jeopardy Clause of the Fifth Amendment.[88] Under *Atkins*, the federal court vacated Bies's death sentence and ordered life imprisonment instead.[89] Ohio appealed and the Supreme Court reversed, finding that the Double Jeopardy Clause did not attach because the original jury had recommended the death penalty.[90] Writing for the Court, Justice Ginsburg held that Ohio had not had the opportunity to question and challenge thoroughly Bies's mental status because the legal issues surrounding the use of mental retardation as a mitigating factor differ from those when considering if mental status eliminates the death penalty option[91] under *Atkins*. A finding of mitigation does not need to be accepted by the state as qualifying for an *Atkins* exception. The case is *Bobby v. Bies*.[92]

In *Knowles v. Mirzayance*,[93] the Court found that Alexandra Mirzayance's ineffective assistance of counsel claim failed to meet the *Strickland v. Washington*[94] standard for relief in a unanimous decision written by Justice Thomas.[95] Mirzayance had entered both a not guilty and a not guilty by reason of insanity plea for murdering his cousin when he was charged with first-degree murder for the offense.[96] Mirzayance confessed to repeatedly stabbing (9 times) and shooting (4 times) the victim.[97] When pleas of not guilty and not guilty by reason of insanity are entered, California requires a two-stage trial process whereby determination is first made as to the defendant's guilt and then the validity of the insanity defense is assessed.[98] Mirzayance's attorney presented medical evidence attesting to

84. Bobby v. Bies, 129 S. Ct. 2145, 2148 (2009).
85. *Id.* at 2148-49.
86. 536 U.S. 304 (2002).
87. *Bobby*, 129 S. Ct. at 2149.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 2153-54.
92. 129 S. Ct. 2145 (2009).
93. 129 S. Ct. 1411 (2009).
94. 466 U.S.668, 687 (1984) (requiring a defendant to show both that his attorney's performance was deficient and that those deficiencies prejudiced the outcome of the case).
95. *Knowles*, 129 S. Ct. at 1415.
96. *Id.*
97. *Id.*
98. *Id.* (Citing Cal. Penal Code Ann. § 1026(a) (West 1985)).

Mirzayance's insanity during the guilt stage.[99] The testimony cast doubt on Mirzayance's ability to form the required premeditation to sustain a first-degree murder charge, and could have swayed the jury to convict on second-degree rather than first-degree murder.[100] Instead, the jury discounted the medical testimony and instead returned with a verdict of first-degree murder.[101] Mirzayance's lawyer, after conferring with Mirzayance, decided to drop the insanity defense, because the jury effectively had rejected the diminished capacity argument by returning a first-degree murder conviction.[102] Mirzayance, on appeal, sought habeas relief from the federal courts, asserting that failure to pursue the insanity defense constituted ineffective assistance of counsel in violation of the standards established in *Strickland v. Washington*.[103]

Writing for the Court, Justice Thomas rejected Mirzayance's argument. Thomas first found that under the Anti-Terrorism and Effective Death Penalty Act, habeas relief in federal court may not be granted unless the defendant can show that the procedures used to convict violated clearly established federal law.[104] Here, the Court did not see the procedures as violating clear federal law and, therefore, held that the state court was correct in refusing relief.[105] The federal appeals court had concluded that while the ineffective assistance of counsel claim was unlikely to prevail, counsel at least should have attempted to argue the insanity plea since the defendant had "nothing to lose."[106] Thomas found that the "nothing to lose" argument was not a legal rule established by the Supreme Court and, therefore, was not a point on which federal habeas relief could be granted to a state court defendant.[107]

Further, Thomas found that Mirzayance's claim failed under *Strickland*. *Strickland* requires a defendant to show both that his attorney's performance was deficient and that those deficiencies prejudiced the outcome of the case.[108] Here, Mirzayance's attorney had presented his client with a cogent argument on the difficulties of convincing a jury that had already rejected the insanity defense to now accept the insanity claim on nearly the same evidence.[109] The decision was thoughtfully made, and represented a strategic choice that does not meet the *Strickland* standard of ineffective performance.[110] Finally, even had the insanity plea been pursued,

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. 466 U.S.668 (1984).
104. *Knowles*, 129 S. Ct. at 1418 (citing 28 U.S.C. § 2254 (2006)).
105. *Id.* at 1419.
106. *Id.*
107. Justices Scalia, Souter and Ginsburg did not join Thomas's analysis of the Anti-Terrorism and Effective Death Penalty Act.
108. *Id.* at 1420 (citing *Strickland*, 466 U.S. at 687).
109. *Id.* at 1420-21.
110. *Id.* at 1421.

Mirzayance failed to show that his trial was prejudiced by the error.[111] To show prejudice, Mirzayance had to demonstrate that the outcome of the trial reasonably may have differed but for the performance of counsel. He could not accomplish this because the jury already had heard and discounted the argument regarding his sanity.[112] Consequently, Thomas found that neither prong of the Strickland standard had been met and that Mirzayance was not entitled to relief.

The Court also held in *Nijhawan v. Holder*[113] that the definition of "aggravated felony," for the purposes of determining whether alien residents are eligible for deportation, could include a general category of offenses rather than a finding of which specific actions qualify for the aggravated felony characterization.[114] Nijhawan was convicted of mail fraud, although the jury did not find that his behavior had resulted in any specific dollar loss to the victims.[115] Aggravated felonies for the purposes of deportation require a $10,000 loss by the victim.[116] During sentencing, Nijhawan admitted that his actions cost his victims millions of dollars.[117] When the government started deportation hearings, Nijhawan argued that his stipulation of losses was not related to a specific criminal action and, consequently, that he could not be deported for a non-particularized finding of loss.[118] The High Court, in an opinion by Justice Breyer, disagreed, and held that a method of defining loss, without clarifying a specific dollar amount, was proper.[119]

The Court clarified the "consent-once-removed" doctrine allowing unwarranted searches under the Fourth Amendment and the limits on the ability of individuals to sue for civil liberties violations stemming from the unwarranted searches in the conservative, unanimous ruling in *Pearson v. Callahan*.[120] Utah officials sent informant Brian Bartholomew to buy narcotics from Afton Callahan.[121] Callahan allowed the informant into his home where Bartholomew saw illegal drugs.[122] Bartholomew left the premises, allegedly to get money for the purchase.[123] Bartholomew then informed Utah law enforcement of the transaction, was wired, and was provided marked funds to purchase the drugs.[124] He was allowed entrance

111. *Id.* at 1422.
112. *Id.*
113. 129 S. Ct. 2294.
114. *Id.* at 2298.
115. *Id.* at 2298.
116. *Id.*
117. *Id.*
118. *Id.* at 2299-2300.
119. *Id.* at 2303.
120. 129 S. Ct. 808, 823 (2009).
121. *Id.* at 813.
122. *Id.*
123. *Id.*
124. *Id.*

into Callahan's residence where, after the transaction was complete, officers entered and conducted a protective search, recovered the drugs, drug paraphernalia, and the marked currency.[125]

The search was eventually deemed unconstitutional by the Utah Appeals Court, at which point Callahan brought charges against the officials claiming they violated his Fourth Amendment right to be free from illegal searches and seizures.[126] Callahan argued that under the United States Supreme Court's ruling in *Saucier v. Katz*[127] officials were not entitled to qualified immunity.[128] *Saucier* mandates the immunity claims are litigated by resolving two questions: 1) was a constitutional right violated and 2) whether the right was 'clearly established' at the time of the infraction.[129] The officers in this case asserted that they were entitled to qualified immunity because they were following the consent-once-removed doctrine that allows police to conduct a warrantless search of a residence once consent is given to an undercover officer.[130] The High Court granted certiorari to determine if the consent-once-removed doctrine permitted the search, if the officials were liable for damages under *Saucier v. Katz*, and if *Saucier* should be reconsidered.[131]

The federal circuit court hearing this case held that the consent doctrine applied to undercover police officers, but that court was unwilling to extend the right to search if initial entry into the property had been obtained by a police informant.[132] Because police should have known that the consent doctrine did not cover warrantless searches when only an informant had gained access to a residence, they were not entitled to qualified immunity under *Saucier*.[133] Writing for the majority, Justice Alito rejected that logic.[134] Alito first noted that *Saucier* should be viewed as providing guidelines for resolving qualified immunity cases, and should no longer be considered as mandating procedure, although he recognized that in many cases, adhering to the protocol is beneficial.[135] Alito then held that the conduct of the officers did not violate the second prong of *Saucier* because they did not violate a "clearly established" constitutional right.[136] Rather, Alito noted that five lower courts had upheld the consent-once-removed doctrine and one of those courts upheld its use when initial entry was gained by a private citizen acting as an informant and not a member of

125. *Id.* at 813-14.
126. *Id.* at 814.
127. 533 U. S. 194 (2001).
128. *Pearson*, 129 S. Ct. at 814.
129. *Id.* at 816 (citing *Saucer*, 533 U.S. at 201).
130. *Id.* at 814.
131. *Id.* at 815-18.
132. *Id.* at 814.
133. *Id.* at 814-15.
134. *Id.* at 823.
135. *Id.* at 818.
136. *Id.* at 822.

law enforcement.[137] Because of these rulings, officers could have reasonably believed they were not infringing upon Callahan's established constitutional rights and, as a result, were entitled to qualified immunity.[138]

Justice Ginsburg's conservative holding in *Rivera v. Illinois*[139] determined that a trial court's error in failing to grant a defendant's peremptory challenge does not require an automatic reversal of a defendant's conviction, assuming all jurors are qualified and unbiased to serve.[140] Michael Rivera, a Hispanic male, was convicted of the first-degree murder on an African American teenager in a jury trial in which the judge mistakenly disallowed one of Rivera's peremptory challenges.[141] By that point, Rivera had used preemptory challenges to dismiss two other women and one other African American.[142] Concerned that Rivera was using his peremptory challenges in a discriminatory manner, the trial court judge eventually seated the challenged juror.[143] Rivera was convicted and appealed.[144]

Ginsburg's opinion for a unanimous Court first noted that the jurors were deemed qualified and unbiased, and thus the good-faith mistake by the trial judge in disallowing a peremptory challenge did not deprive Rivera of a fair trial.[145] Specifically, Ginsburg reasoned that because state law regulates peremptory challenges, states could choose to suspend use of those challenges entirely without implicating due process concerns.[146] Peremptory challenges are not mandated by the federal Constitution; failure to provide them does not equal failure to provide a fair trial.[147] Second, because peremptory challenges are provided by state statute, failure to properly accept a challenge does not, by itself, raise federal constitutional issues.[148] Here, Rivera received a fair trial by an impartial jury (just not one of his choosing), as mandated by the U.S. Constitution.[149] Although there may have been a violation of state law, the good-faith violation of state peremptory challenge statutes does not require reversal under the Fourteenth Amendment's due process clause.[150] As such, the automatic reversal of Rivera's conviction is not necessary.[151]

The Court also made suing prosecutors for their activities that lead to unlawful convictions more difficult through its unanimous ruling in *Van De Kamp v. Goldstein*.[152] Thomas Goldstein's conviction for murder in 1980

137. *Id.* at 822-23.
138. *Id.* at 823.
139. 129 S. Ct. 1446 (2009).
140. *Id.* at 1456.
141. *Id.* at 1450-51.
142. *Id.* at 1451.
143. *Id.*
144. *Id.*
145. *Id.* at 1454.
146. *Id.*
147. *Id.* at 1453.
148. *Id.* at 1454.
149. *Id.* at 1456.
150. *Id.* at 1453-54.
151. *Id.*
152. 129 S. Ct. 855 (2009).

was predicated in part on prejudicial mistakes by prosecutors.[153] Goldstein alleged, among other charges, that the prosecutors had jailhouse testimony from an unreliable source and failed to turn over impeachment evidence.[154] After obtaining habeas relief based on those claims from the federal district court, Goldstein was released from prison and filed suit against prosecutors for failing to properly communicate certain facets of the case to his attorney, and for failing to train others properly so as to guard against mistakes.[155] Although prosecutors requested absolute immunity from their official activities, Goldstein claimed that because he was not suing prosecutors for their prosecutorial duties but rather for their administrative duties, immunity did not apply.[156]

Justice Breyer delivered the unanimous opinion for the Court, holding that prosecutors have absolute immunity regarding administrative duties if those duties are intimately related to the trial process.[157] While the Court did not assert that all administrative duties performed by prosecutors (e.g., hiring, payroll administration) are covered by absolute immunity, those that are related to the trial are covered, as are the reasons for the alleged misconduct resulting in the unconstitutional trial proceedings in this case.[158] The Court also rejected Goldstein's claim that prosecutors are liable for failing to devise a system in which information could be transmitted better, thereby making civil claims following tainted trials more difficult.[159]

The Court determined in *Arizona v. Johnson*[160] that the "stop and frisk" exception to the Fourth Amendment established in *Terry v. Ohio*[161] applied to the pat down of passengers of a car if the officer had a reasonable concern for officer safety.[162] Lemon Johnson was the passenger in a car stopped for vehicle registration violations.[163] Based on Johnson's suspicious behavior, one of the officers asked him to leave the car for further questioning.[164] Before questioning Johnson, the officer frisked Johnson, asserting that his behavior had caused concern that he might be armed.[165] The frisk revealed a gun and Johnson was charged with a firearms' violation.[166] He moved to suppress the gun as resulting from an unlawful search, but the trial court did not suppress the evidence and Johnson was convicted.[167] The Arizona Court of Appeals reversed, holding that the officers did not have cause to conduct a pat down because they had no cause

153. *Id.* at 859.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 861-62.
158. *Id.* at 862.
159. *Id.* at 864-65.
160. 129 S. Ct. 781, (2009).
161. Terry v. Ohio, 392 U. S. 1 (1968).
162. *Johnson*, 129 S. Ct. at 784 (2009).
163. *Id.*
164. *Id.* at 784-85.
165. *Id.* at 785.
166. *Id.*
167. *Id.*

to believe Johnson was involved in criminal activity.[168] The Arizona Supreme Court denied review and the United States Supreme Court, in an opinion by Justice Ginsburg, reversed. Ginsburg argued that officer safety trumped Johnson's Fourth Amendment protections in this case, allowing the frisk as long as the officer could reasonably argue that concern for personal safety triggered the pat down.[169]

The Court also held in *Republic of Iraq v. Beaty* that American citizens could not file suit against Iraq for cruel treatment.[170] The Court's ruling, written by Justice Scalia, determined that Iraq is not subject to lawsuits filed in United States federal courts due to legislation passed by Congress.[171]

In the first of four unanimous, liberal rulings this term, the Court held in *Abuelhawa v. United States*[172] that the use of the word 'facilitate' in the Controlled Substance Act does not extend to an individual whose phone is used to make a misdemeanor drug purchase from a dealer whose distribution of the drugs constituted a felony.[173] Justice Souter wrote the opinion.[174]

In another case dealing with statutory interpretation, the Court determined the meaning of the work 'knowingly' as related to identity theft and sentence enhancement in *Flores-Figueroa v. United States*.[175] In an opinion by Justice Breyer, the Court held that the government must show that individuals accused of identity theft did so knowingly.[176] Moreover, a person knowingly engages in identity theft if that person is aware that the documents being used belong to another person, but not if they believe those documents to be fake (a random group numbers on a social security card that do not necessarily belong to another person).[177] Justice Scalia filed an opinion concurring in part and in judgment that was signed by Justice Thomas.[178] Justice Alito also filed an opinion concurring in part and in judgment.[179]

Justice Thomas's decision for the majority in *Jimenez v. Quarterman*[180] held that the one-year statute of limitations for filing a federal habeas petition under the Antiterrorism and Effective Death Penalty Act does not expire until one year after an out-of-time direct appeal is concluded.[181] The Court's liberal ruling allows state court defendants more time to file

168. *Id.* at 785.
169. *Id.* at 786-87.
170. 129 S.Ct. 2183, 2195 (2009).
171. *Id.* at 2194-95.
172. 129 S.Ct. 2102 (2009).
173. *Id.* at 2105.
174. *Id.* at 2104.
175. 129 S.Ct. 1886 (2009).
176. *Id.* at 1888.
177. *Id.* at 1893-94.
178. *Id.* at 1894.
179. *Id.* at 1895.
180. 129 S.Ct. 681 (2009).
181. *Id.* at 683, 688-87.

habeas petitions if their time for direct appeals to state courts has been extended.[182] The Court held in this case that because the state court decision was not final, the habeas clock did not start until after the conclusion of the out-of-time direct appeal.[183]

A unanimous liberal decision in *Chambers v. United States*[184] partially clarified the meaning of 'violent felony' under the Armed Career Criminal Act by holding that failure to report for a weekend confinement does not constitute a violent felony and cannot be classified as one for the purposes of enhancing sentences.[185] Justice Breyer wrote the Court's decision. Justice Alito filed an opinion concurring in judgment that was joined by Justice Thomas.

B. Eight-to-One Decisions

Like in most recent terms, few U.S. Supreme Court decisions in criminal justice cases this term ended with a single dissenter.[186] Specifically, only two criminal justice cases were decided 8-to-1 during the 2008-2009 term, both ended in a liberal outcome and in both Justice Thomas cast the sole dissenting vote.

In one of the most anticipated rulings of this term, the Court held in an 8-to-1 vote that school officials acted in an unconstitutional manner when they stripped searched a 13 year-old honor student in search of drugs based on little more than an uncorroborated tip from a fellow student in *Safford v. Redding*.[187] Savana Redding was a student at Safford Middle School in 2003.[188] Redding was in math class when the school's assistant principal, Kerry Wilson, asked Redding to follow him to his office.[189] Wilson had received word from another Safford student that Redding was planning to bring prescription strength ibuprofen to school.[190] Upon arriving at the office, Wilson showed Redding a day planner containing knives, lighters, and a marker.[191] Savana admitted the planner—which she claimed to have lent to her friend Marissa Glines—was hers, but denied ownership of any of the other items.[192] Wilson then showed Savana five pills used for pain and informed Redding that another student indicated that Redding had

182. *Id.* at 686-87.
183. *Id.*
184. 129 S.Ct. 687 (2009).
185. *Id.* at 691.
186. For example, of 361 criminal justice cases analyzed from the 1995 through the 2007 terms, only 36 ended with a single dissenter. All other sizes of majorities were more common during this period. *See* CHRISTOPHER E. SMITH, MADHAVI MCCALL, & CYNTHIA PEREZ MCCLUSKEY, LAW & CRIMINAL JUSTICE: EMERGING ISSUES IN THE TWENTY-FIRST CENTURY 26 (2005); McCall, Smith, & McCall, *supra* note 11, at 38; McCall, McCall, & Smith, *supra* note 15, at 995; Smith, McCall, & McCall, *supra* note 18, at 499; Smith, McCall, & McCall, *supra* note 25, at 957; and Smith, McCall, & McCall, *supra* note 10, at 127.
187. 129 S.Ct. 2633 (2009).
188. *Id.* at 2638.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*

provided the pills to other students.[193] Redding denied the accusations and agreed to let Wilson search her belongings.[194] When nothing was found in Redding's backpack, she was taken to the nurse's office for a search of her clothing.[195]

Once at the nurse's office, Redding was asked to undress to see if see was concealing any pills on her person.[196] Redding was asked

> [T]o remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.[197]

During this search, school officials did not contact Redding's mother, who eventually filed a lawsuit against the school for violating Savana's Fourth Amendment right against illegal searches and seizures.[198] The school claimed Savana's rights were not violated and school officials were entitled to qualified immunity.[199] The Ninth Circuit Court of Appeals agreed with the Reddings' position, finding that the search was illegal under the United States Supreme's Court's ruling in *New Jersey* v. *T.L.O*[200] and, because Redding's rights were clearly established at the time of the search, the assistant principal was not entitled to qualified immunity.[201]

193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. 469 U. S. 325 (1985).
201. *Redding*, 129 S.Ct. at 2638. The Supreme Court granted certiorari and appeared poised, at least according to observers in the courtroom during oral arguments, to overturn the Ninth Circuit and rule against Redding. David G. Savage, *Hearing on Strip Seach Justices Voice Concern on Banning Such Searches on Students at School*, Pitts. Post-Gazette, April 24, 2009, at A4. During oral arguments, several justices appeared to lean heavily toward allowing the strip search, fearful that ruling against the search would too strongly hinder school officials from dealing with the drugs in school. Justice Stephen Breyer noted that, "[W]hen I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day. We changed for gym, Okay.? . . . I'm trying to work out why is this a major thing to say, 'Strip down to your underclothes,' which children do when they change for gym." Transcript of Oral Argument at 45, 58, Safford v. Redding, 129 S. Ct. 2633 (No. 08-479). David Souter, typically a more reliably liberal vote on Fourth Amendment issues than Justice Breyer, nonetheless noted, "My thought process is, I would rather have the kid embarrassed by a strip search, if we can't find anything short of that, than to have some other kids dead because the stuff is distributed at lunchtime and things go awry." *Id.* at 48. During the oral augments, only Justice Ginsburg strongly questioned the legality of the search. In an interview and before the ruling was rendered, Justice Ginsburg lamented that her male colleagues may not understand the impact the search had on Redding: "They have never been a 13-year-old girl . . . . It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood." Dahlia Lithwick, *White Men Can't Judge? Why Sonia Sotomayor might really believe that Latina women make better judges*, SLATE, July 13, 2009, http://www.slate.com/id/2220225/. (quoting interview by Joan Biskupic of USA Today with Justice Ginsburg, in Washington, D.C. (May 1, 2009)). When the ruling in Redding was delivered, many court observers were surprised that Savana Redding had won the case. She not only prevailed, she prevailed 8-to-1, with only Justice Clarence Thomas

The Supreme Court upheld the core holding regarding the illegality of the search under the Fourth Amendment, but reversed the qualified immunity ruling, finding Wilson was entitled to immunity.

Writing for the majority, Justice Souter noted that in *T.L.O.*, the court recognized that standard tests for reasonableness under the Fourth Amendment may not apply in school settings, and established that searches on school property were permissible in scope if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[202] Using that standard, Souter found that the facts of the case supported Wilson's reasonable belief that Redding was involved in drug distribution and that there was ample reason to justify the search of Redding's backpack and her outer clothing.[203] However, while Wilson may have had reason to search Redding's belongings, sufficient cause or suspicion to justify the strip search did not exist.[204] Rather, intrusive searches like the one conducted here require that specific suspicions justifying the search be evident. Schools must have a reasonable basis for holding that a strip search will yield results before subjecting a student to that humiliation.[205] Because the concepts on which the Court based its Fourth Amendment finding were not clearly established at the time of the search, Souter further found that Wilson was entitled to qualified immunity.[206]

Justices Ginsburg and Stevens both filed opinions concurring in part and dissenting in part. Justice Stevens, whose opinion was joined by Justice Ginsburg, concurred in the Court's ruling that Redding's Fourth Amendment right against an illegal search and seizure was violated, but held that *T.L.O.* established clear guidelines for searches in schools that Wilson should have known.[207] Applying *T.L.O.*'s framework, Stevens noted that the strip search was not justified at its inception, nor, he added, does it take a constitutional scholar to understand that strip-searching a child is impermissible.[208] As such, Stevens argued that Wilson should not have been granted qualified immunity for his actions authorizing the search.[209] Justice Ginsburg also filed an opinion concurring with the Court's Fourth Amendment holding but, like Justice Stevens, found Wilson's actions unprotected.[210] Ginsburg strongly held that, "Wilson's treatment of Redding

siding with the school district. What influence Ginsburg had in the outcome of *Safford v. Redding* is unclear because observers are not privy to internal Court debates. However, the tone of the oral arguments and the eventual outcome suggest that Ginsburg may have played a pivotal role in the Court's finding of the search to be unreasonable.

202. *Redding*, 129 S.Ct. at 2639 (quoting *T.L.O.*, 469 U.S. at 342).

203. 129 S.Ct. at 2641.

204. *Id.* at 2641-42.

205. *Id.* at 2643.

206. *Id.* at 2644.

207. *Id.* (Stevens, J., concurring in part & dissenting in part).

208. *Id.* (Stevens, J., concurring in part & dissenting in part).

209. *Id.* at 2645 (Ginsburg, J., concurring in part & dissenting in part).

210. *Id.* (Ginsburg, J., concurring in part & dissenting in part).

was abusive and it was not reasonable for him to believe that the law permitted it."[211] The lone dissenter from the Court's core Fourth Amendment holding in this case was Justice Thomas, who also filed an opinion concurring in part and dissenting in part. Thomas, however, concurred with the Court's decision to provide Wilson with qualified immunity and dissented from its holding that the strip search violated Redding's constitutional rights.[212]

The Court's liberal ruling in *Negusie v. Holder*[213] eventually might make it easier for individuals to gain political asylum in the United States. Federal law mandates that those seeking asylum from persecution cannot themselves have been involved in the persecution of others (called the persecutor bar). Daniel Negusie, a dual citizen of Eritrea and Ethiopia, was incarcerated by the Eritrean government for refusing to fight in a war against Ethiopia.[214] After two years, he was released from prison, but for the next four years was forced to work as a prison guard himself and was thus involved in the persecution of others.[215] Negusie escaped and arrived to the United States in a cargo container and applied for asylum.[216] Although the immigration judge found Negusie credible, Negusie was denied asylum on the grounds that he had persecuted others.[217]

In an opinion by Justice Kennedy, and joined by Chief Justice Roberts and Justices Scalia, Souter, Ginsburg and Alito, the Court held that the immigrations courts should determine if the statute applies to those seeking asylum who themselves were forced to participate in acts of persecution.[218] The majority held that prior court decisions do not necessitate the reading that those committing involuntary acts of persecution are barred from asylum, but rather that the statute must be reinterpreted by the Board of Immigrations without reliance on a faulty interpretation of Supreme Court precedent.[219] Justice Scalia, joined by Justice Alito, filed a concurring opinion.[220] Justice Stevens, joined by Justice Breyer, filed an opinion concurring in part and dissenting in part.[221] Although Justice Stevens agreed with the majority that prior court precedent had been misapplied, he argued that the Supreme Court should resolve the issue, rather than leaving it to the Board of Immigration, and should find a duress exception to the persecutor bar.[222] Justice Thomas dissented, finding no reason to reconsider Negusie's asylum request.[223]

211. *Id.* at 2646 (Ginsburg, J., concurring in part & dissenting in part).
212. *Id.* at 2646 (Thomas, J., concurring in the judgment in part & dissenting in part).
213. 129 S.Ct. 1159 (2009).
214. *Id.* at 1162.
215. *Id.*
216. *Id.* at 1163.
217. *Id.*
218. *Id.* at 1162, 1167-68.
219. *Id.* at 1166-68.
220. *Id.* at 1168 (Scalia, J., concurring).
221. *Id.* at 1170 (Stevens, J., concurring in part & dissenting in part).
222. *Id.* at 1170-71 (Stevens, J., concurring in part & dissenting in part).
223. *Id.* at 1176-77 (Thomas, J., dissenting).

C. Seven-to-Two Decisions

The High Court decided an unusually large number of criminal justice cases during the 2008-2009 term by a 7-to-2 vote.[224] For the most recent term, all but one of the 7-to-2 decisions produced a conservative outcome. Perhaps unsurprisingly, Justice Stevens—often cast as a stalwart liberal willing to disagree with the majority[225]—dissented in all but one[226] of the seven conservative decisions and authored the Court's only 7-to-2 liberal decision this term.

In that sole, liberal 7-to-2 decision, the Court extended the use of federally appointed counsel for use in state clemency hearings in *Harbison v. Bell*.[227] After the federal courts denied Tennessee death row inmate Edward Harbison's federal habeas petition, he requested state appointed counsel to represent him at a state clemency hearing.[228] The Tennessee Supreme Court denied the request and Harbison's federal counsel requested that she be able to represent Harbison at his state proceedings.[229] The lower federal courts denied the motion and the United States Supreme Court reversed.[230] Writing for the majority, Justice Stevens found that Harbison did not need a certificate of appealability to pursue the motion, that federal counsel could continue to represent Harbison in a state clemency hearing, and that said counsel could receive compensation for those efforts.[231] Chief Justice Roberts and Justice Thomas both filed opinions concurring in judgment while Justice Scalia filed a decision (concurring in part and dissenting in part) that was joined by Justice Alito.[232] Scalia agreed that a certificate of appealability was not needed, but disagreed to the central point that federally-funded counsel could be used in state clemency proceedings.[233]

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224. It will be interesting to see if a potential pattern continues to emerge in the Court's criminal justice decisions. During the 2007-2008 and 2008-2009 terms, seven-member majorities produced 26% of the Court's criminal justice decisions (16 of 61). Over the course of the four preceding terms, the proportion of 7-to-2 decisions was only 9% (11 of 119). *See* McCall, Smith, & McCall, *supra* note 11, at 38; McCall, McCall, & Smith, *supra* note 15, at 995; Smith, McCall, & McCall, *supra* note 18, at 499; Smith, McCall, & McCall, *supra* note 25, at 957; and Smith, McCall, & McCall, *supra* note 10, at 127.

225. *See, e.g.*, 5 LEONARD ORLAND, *John Paul Stevens*, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978, 158 (Leon Friedman & Fred Israel, eds., 1980) ("Stevens, in a number of cases, in a variety of contexts, has been the only Justice to perceive constitutional infirmity on the record before him." Soon after coming onto the Bench, Stevens established his willingness to dissent, often as a sole dissenter. *Id.* Later, Stevens often found himself in the minority as the Court drifted more conservative. WARD FARNSORTH, REALISM, PRAGMATISM, AND JOHN PAUL STEVENS IN REHNQUIST JUSTICE 157(Earl Maltz, ed.) (2003) ("[S]tevens turned out to be an ideal foil for the Rehnquist Court's conservative majorities, being nearly their opposite in both substance and method.").

226. *See* discussion *infra* p._ (discussing an unusual coalition of judges constituting a 'conservative majority' in *U.S. v. Hayes*, 129 S. Ct. 1079 (2009)).

227. 129 S. Ct. 1481 (2009).

228. *Id.* at 1484.

229. *Id.*

230. *Id.* at 1484, 1491.

231. *Id.* at 1485.

232. *Id.* at 1491-98

233. *Id.* at 1494-95 (Scalia, J., concurring in part & dissenting in part).

Shifting to the Court's conservative 7-to-2 decisions, Justice Alito wrote for the majority that jury instructions in a federal Racketeer Influenced and Corrupt Organizations Act (RICO) case sufficiently explained to the jury the necessary conditions for a RICO conviction.[234] Edmund Boyle was part of a group of individuals who robbed a series of banks in four states.[235] The group consisted of core members, although others were recruited when necessary.[236] The robbers met to discuss their targets, distributed tools for various jobs, and split the proceeds.[237] The district court judge presiding over trial instructed the jury that to find a RICO enterprise violation, the jury had to agree that a group, with or without a formal structural hierarchy, existed for the purpose of engaging in illegal activity.[238] Boyle wanted a more specific instruction, contending that the jury had to find an 'ascertainable structural hierarchy' in order to convict on RICO charges.[239]

The Court's majority found the district court's jury instruction on RICO sufficient, holding that Boyle's version adds requirements to the RICO statute that are not necessary.[240] Justice Stevens filed a dissenting opinion, joined by Justice Breyer, asserting that Congressional intent when passing the RICO statute was to sanction businesses and similar groups for engaging in corruption.[241] Boyle and his associates did not constitute a group with any discernable structure or with business-like characteristics and, therefore, were not an 'organization' under RICO.[242] The trial court's jury instructions were in error and violated Congressional intent, according to the dissenting opinion in *Boyle v. United States*.[243]

The Court's decision in *Kansas v. Ventris*[244] held that informant testimony obtained in violation of the Sixth Amendment's right to counsel guarantee can be used in court for the purpose of impeaching the defendant's testimony. During a home robbery, Ernest Hicks was shot and killed either by Donnie Ray Ventris or Rhonda Theel, or by both.[245] Both Ventris and Theel were charged with multiple crimes, including robbery and murder, although the murder charges against Theel were dropped in exchange for her testimony that Ventris pulled the trigger.[246] Before Ventris's trial started, police planted an informant in his cell and the informant

234. Boyle v. United States, 129 S.Ct. 2237, 2241(2009).
235. Id.
236. Id.
237. Id.
238. *Id.* at 2442.
239. *Id.*
240. *Id.* at 2245.
241. *Id.* at 2247-48 (Stevens, J., dissenting).
242. *Id.* at 2251 (Stevens, J., dissenting).
243. *Id.* at 2247-51 (Stevens, J., dissenting).
244. 129 S. Ct. 1841 (2009).
245. *Id.* at 1844.
246. *Id.*

claimed to have heard Ventris confess to the shooting.[247] Ventris then testified at trial that Theel was responsible for the robbery and shooting, at which point the state introduced the informant's testimony to impeach Ventris's statements.[248] Ventris objected, citing that the information had been obtained in violation of the Sixth Amendment right to counsel, but the trial judge allowed the testimony and Ventris was convicted of aggravated burglary and aggravated robbery, although he was acquitted of the felony murder charge.[249] The Kansas Supreme Court granted Ventris's Sixth Amendment claim and the United States Supreme Court reversed.[250]

Writing for the majority of Chief Justice Roberts and Justices Kennedy, Thomas, Souter, Breyer, and Alito, Justice Scalia found that the testimony by the informant could be used for the purposes of impeaching Ventris's credibility because, "[o]nce the defendant testifies in a way that contradicts prior statements, denying the prosecution use of 'the traditional truth-testing devices of the adversary process,' is a high price to pay for vindication of the right to counsel at the prior stage."[251] Moreover, Scalia wrote that the purpose of the exclusionary rule is to deter future bad behavior by police, but disallowing impeachment testimony is unlikely to further that end.[252] Because police are aware that properly obtained testimony can be used at any stage of the trial, they are likely to ensure that evidence is properly obtained.[253] Additionally, the use of impeachment testimony requires the defendant to take the stand and make inconsistent statements, something that the police cannot foresee.[254] Thus, exclusion is unlikely to act as a deterrent in these circumstances. Finally, Scalia noted that other types of illegally obtained evidence could be used for the purposes of impeachment.[255]

Justice Stevens, joined by Justice Ginsburg, filed a dissenting opinion. Stevens argued that because the evidence was obtained in violation of the Sixth Amendment, as acknowledge by the State, the State should not benefit from its unconstitutional behavior.[256] Moreover, Stevens objected to the majority's characterization of pretrial counsel rights as merely 'prophylactic' in nature, as something less than or auxiliary to the actual right to counsel at trial.[257] Rather, Stevens contended, "[w]e have never endorsed the notion that the pretrial right to counsel stands at the periphery of the Sixth Amendment . . . . Placing the prophylactic label on a core Sixth Amendment right mischaracterizes the sweep of the constitutional guarantee.[258]"

247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 1844, 1847.
251. *Id.* at 1846 (quoting Harris v. New York, 401 U.S. 222, 225 (1971) (internal citation omitted)).
252. *Id.* at 1847.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* (Stevens, J., dissenting).
257. *Id.* at 1848 (Stevens, J., dissenting).
258. *Id.* (Stevens, J., dissenting).

In a strong statement of disagreement, Stevens concluded that, "[T]oday's decision is lamentable not only because of its flawed underpinnings, but also because it is another occasion in which the Court has privileged the prosecution at the expense of the Constitution. Permitting the State to cut corners in criminal proceedings taxes the legitimacy of the entire criminal process."[259]

Justice Scalia wrote another conservative ruling for a seven-member majority in *Puckett v. United States*,[260] holding that the plain-error standard of the Federal Rules of Criminal Procedure applies to forfeited claims. The government refused to enforce a plea agreement reducing a sentence with James Puckett when Puckett was involved in additional criminal activity after the plea was negotiated but before sentencing.[261] During sentencing, when the government challenged the sentencing reduction agreement, Puckett's lawyer did not object to the district court judge's eventual decision to allow the government to forgo the agreement and give Puckett a higher sentence.[262] Puckett did object to the government's violation of the plea agreement on appeal, but the Fifth Circuit Court of Appeals held that Puckett had forfeited his claim by failing to raise the claim at trial.[263] The appeals court then applied the plain-error standard and found that although error had occurred, Puckett did not show that the error had caused prejudice.[264] The High Court affirmed, holding that Puckett had forfeited his claim, that use of the plain-error standard was appropriate, and that Puckett had failed to meet this standard.[265] Justice Souter, joined by Justice Stevens, dissented.[266]

In a challenge to the speedy trial guarantee of the Sixth Amendment, a 7-to-2 conservative ruling found delays to trial caused by appointed counsel, as opposed to privately retained counsel, are not the responsibility of the state, and therefore do not meet criteria necessary to claim a speedy trial violation.[267] Rather, the Court held although states appoint counsel to provide legal services to indigent offenders, these attorneys act as agents of their clients, not the state. Delays to the trial process caused by appointed counsel are not the state's responsibility, and the state is not required to ensure a speedy trial when the reason for delay stems from the actions of defendant's appointed lawyer.[268] The ruling in *Vermont v. Brillon* was written by Justice Ginsburg and joined by Chief Justice Roberts and Justices

259. *Id.* at 1849 (Stevens, J., dissenting).
260. 129 S. Ct. 1423 (2009).
261. *Id.* at 1427.
262. *Id.*
263. *Id.* at 1427-28.
264. *Id.* at 1428.
265. *Id.* at 1433.
266. *Id.* at 1434 (Souter, J., dissenting).
267. Vermont v. Brillon, 129 S.Ct. 1283, 1287 (2009).
268. *Id.* at 1291-92.

Scalia, Kennedy, Souter, Thomas and Alito. Justice Breyer, joined by Justice Stevens, filed a dissenting opinion holding that the case should be dismissed as improvidently granted.[269]

The Court also held in *Dean v. United States* that the federal government only needs to show that a firearm was discharged, and not that the defendant intended to discharge the firearm, to enhance sentencing. [270] Christopher Michael Dean was arrested for his participation in a bank robbery.[271] During the robbery, his gun was discharged, although witness accounts appear to confirm that the gun went off accidently.[272] Dean was sentenced to a mandatory 10-year prison term on the weapons count because the gun was discharged.[273] Had he only possessed the gun, the sentence would have been five years and he would have received seven years had he brought and brandished the weapon.[274] Dean argued that the government must show that the gun was fired intentionally, and that accidental discharge did not qualify for the enhanced sentence.[275] The Supreme Court, in an opinion written by Chief Justice Roberts, disagreed, holding that an 'accidents happen' position was not a sufficient defense, and that intent was not a required element of the sentence.[276] Justices Stevens[277] and Breyer[278] filed dissenting opinions, both noting that the proper interpretation of the statute is one based on a defendant's intentional, not accidental, actions.

Another 7-to-2 conservative ruling, and one reflecting an interesting alignment of justices, clarified the meaning of the words 'misdemeanor crime of domestic violence' as included in an extension of the federal Gun Control Act of 1968.[279] Randy Hayes was convicted of "three counts of possessing a fire arm after having been convicted of misdemeanor crime of domestic violence."[280] Hayes argued that his 1994 conviction for battery of his wife did not constitute a predicate offense because he was charged under a general battery law and not under a specific domestic violence statute.[281] The Court, in an opinion by Justice Ginsburg and joined by Justices Stevens, Kennedy, Souter, Breyer and Alito, and in all but Part III by Justice Thomas, held that the Gun Control Act did not necessitate individuals be charged under laws specifically focused on domestic violence, but rather only that the domestic relationship be established beyond a reasonable

269. *Id.* at 1287 (Bryer, J., dissenting).
270. 129 S. Ct. 1849 (2009).
271. *Id.* at 1852.
272. *Id.*
273. *Id.*
274. *Id.* at 1853.
275. *Id.* at 1853-54.
276. *Id.* at 1855-56.
277. *Id.* at 1856-57 (Stevens, J., dissenting).
278. *Id.* at 1860 (Breyer, J., dissenting).
279. United States v. Hayes, 129 S. Ct. 1079 (2009).
280. *Id.* at 1083.
281. *Id.*

doubt.[282] Chief Justice Roberts, joined by Justice Scalia, held in dissent that the law had been read incorrectly and that a correct textual analysis of the statute reveals that predicate crimes must be related directly to domestic violence statutes.[283] The case is *United States v. Hayes*.[284]

D. Six-to-Three Decisions

Of the Court's three decisions handed down this term by a six-member majority, two are characterized as being liberal rulings. In the single, conservative 6-to-3 decision, *Waddington v. Sarausad*, the Court found that the federal courts cannot provide habeas relief unless the state court engaged in an unreasonable application of federal law.[285] Cesar Sarausad was the driver of a car involved in a drive-by, gang-related fatal shooting.[286] Sarausad was convicted as an accomplice to the murder, but argued that he was unaware that the gunman intended to fire, and instead thought that he was only going to participate in a fistfight.[287] The prosecutor argued otherwise, and used her closing statements to argue that Sarausad was "in for a dime, you're in for a dollar."[288] Sarausad was convicted and argued on appeal that the prosecutor had not shown the he had intent to kill, that the jury instructions were framed in such a manner as to confuse the jury and allowed them to convict even if the state had not met its burden of showing that he was aware of the specific crime in question, and, consequently, that his conviction as an accomplice was wrongful.[289] The Washington appellate court affirmed the conviction, holding that an accomplice must have a general knowledge that a crime was imminent but that knowledge of the specifics of a crime was unnecessary.[290] The Washington Supreme Court refused to review, although in later cases that court did clarify that "in for a dime, in for a dollar" was not the best description of accomplice criminal liability because accomplices must have knowledge of 'the' crime under indictment, not just of any crime that might take place.[291] The state supreme court nonetheless held that jury instructions used in Sarausad's case to describe accomplice liability were correct.[292]

Sarausad eventually applied for relief in federal court, and the Ninth Circuit Court of Appeals affirmed the district court's grant of relief, holding that jury instructions were confusing and that the state court, by denying relief in spite of the confusing jury instructions, had unreasonably applied federal law as established in the United States Supreme Court's

282. *Id.* at 1087.
283. *Id.* at 1089-91.
284. 129 S.Ct. 1079 (2009).
285. 129 S. Ct. 823 at 827 (2009).
286. *Id.* at 826.
287. *Id.* at 827-28.
288. *Id.* at 828 (quoting J.A. 123-24, May 23, 2008).
289. *Id.* at 829.
290. *Id.*
291. *Id.*
292. *Id.* at 830-31.

ruling in,[293] among other cases, *Estelle* v. *McGuire*.[294] Writing for the Court, Justice Thomas's majority opinion ruled against Sarausad, and held that the Antiterrorism and Effect Death Penalty Act (AEDPA) of 1996 permits federal courts to grant relief only if the state court ruling is shown to be both wrong and an unreasonable application of federal law.[295] That rule placed a heavy burden on Sarausad to show that the jury instruction was interpreted by the jury in a manner that relieved the state's burden of proving each element of the crime beyond a reasonable doubt.[296] Here, Thomas held that Washington appellate courts were reasonable in ruling that the instructions, which mirrored the state statute, were, in fact, not ambiguous.[297] However, even if the instructions were ambiguous, they did not taint the trial to the point of generating due process concerns according to the majority.[298] Rather, the jury had been convinced beyond a reasonable doubt that Sarausad was more involved in the commission of the crime, not just any crime, than he admitted, satisfying due process mandates.[299] Thomas's decision was joined by Chief Justice Roberts and Associate Justices Scalia, Kennedy, Breyer, and Alito.[300] Justice Souter filed a dissenting opinion that was joined by Justices Ginsburg and Stevens.[301]

Justice Stevens authored both of the Supreme Court's liberal, 6-to-3 decisions this term. In the first, the Court examined the conditions under which individuals acquitted for some counts of an indictment but where the jury hung on other courts could be retried for those elements on which the jury could not reach a verdict.[302] F. Scott Yeager was indicted following Enron's failure for six counts of fraud and several counts of insider trading.[303] The fraud indictments collectively charged Yeager of engaging in activity intended to mislead the public about the strength of Enron's business model while the insider trading indictments argued that Yeager used his knowledge of the company's poor prospective to sell stock while the company stock prices were still elevated, netting him almost $20 million in personal profits.[304] The jury acquitted Yeager on the fraud charged but failed to reach consensus on the insider trading charges and the government, with some modifications, re-charged Yeager for insider trading.[305] Yeager appealed, arguing that the acquittals on the fraud charges indicated

293. *Id.* at 831.
294. 502 U.S. 62 (1991).
295. 129 S. Ct. 823 at 831-32.
296. *Id.* at 831.
297. *Id.* at 832.
298. *Id.* at 833.
299. *Id.* at 833-34.
300. *Id.* at 826.
301. *Id.* at 835 (Souter, J., dissenting).
302. Yeager v. United States, 129 S. Ct. 2360 (2009).
303. *Id.* at 2363-64.
304. *Id.*
305. *Id.* at 2364.

that the jury had already found that he did not have the requisite knowledge necessary to sustain an insider trading indictment and, therefore, the Double Jeopardy Clause of the Fifth Amendment barred his retrial.[306]

Stevens' majority opinion, for Chief Justice Roberts and Justices Kennedy, Breyer, Souter, and Ginsburg, agreed with Yeager's position. The majority held that respect for the jury's initial finding that Yeager did not posses insider information necessary to convict him on fraud charges requires that the jury's finding on fraud be used to conclude that the insider trading charges could not be sustained.[307] The issue of Yeager's possession of insider knowledge to commit fraud had already been litigated in Yeager's favor; that fact could not be re-litigated under a different indictment.[308] Justice Kennedy filed an opinion concurring in part and in judgment, while Justices Scalia and Alito both filed dissenting opinions. Justices Alito and Thomas joined Scalia's dissent, and Justices Scalia and Thomas joined Alito's dissent. The case is *Yeager v. United States*.[309]

In *Cone v. Bell*, a majority of justices decided that Gary Cone's constitutional right to a fair trial had been violated when the state suppressed evidence that might have led a jury to consider a shorter sentence.[310] Justice Kennedy joined the four liberals and cast the deciding vote to determine further the contours of the due process clause, although Chief Justice Roberts did file an opinion concurring in judgment. Gary Cone contended he was mentally ill in 1982 when he killed two individuals.[311] The jury found him guilty and sentenced him to death.[312] A decade later, Cone discovered that the state had suppressed evidence that would have helped confirm his mental illness,[313] in violation of the Supreme Court's ruling in *Brady v. Maryland*,[314] and petitioned the state courts for post-conviction relief based on the new evidence.[315] The state denied Cone's claim, holding that his *Brady* claim had been previously litigated.[316] Cone applied for federal relief, but was denied because the district court found no federal basis for Cone's claim, holding instead that the state court decision denying a *Brady* hearing was based on independent and adequate state grounds.[317]

The Supreme Court granted certiorari and in an opinion written by Justice Stevens, and joined by Justices Souter, Ginsburg, Kennedy and Breyer, held that the federal courts could hear Cone's case because the state appellate court decision was not based strictly on state law.[318] Having

306. *Id.*
307. *Id.* at 2368.
308. *Id.*
309. 129 S. Ct. 2360 (2009).
310. 129 S. Ct. 1769, 1772 (2009).
311. *Id.* at 1772.
312. *Id.* at 1175.
313. *Id.* at 1772-73.
314. 373 U. S. 83 (1963).
315. *Cone*, 129 S. Ct. at 1172.
316. *Id.*
317. *Id.*
318. *Id.* at 1772-73.

determined that the federal courts did have jurisdiction in this case, Stevens proceeded to evaluate the merits of Cone's *Brady* claim. Stevens found that although the suppression of the evidence would not have altered a jury's determination of Cone's guilt or innocence—that the suppression of evidence did not affect his conviction—it was possible that jurors might have suggested a different sentence had they been aware of the evidence.[319] Accordingly, the lower courts failed to adequately consider if the evidence corroborating Cone's mentally illness would have had an impact on the jury's sentencing recommendations.[320] Based on this, the majority deemed that the case should be remanded back to the lower courts to determine if the suppressed evidence had a prejudicial effect during sentencing.[321]

Justice Roberts filed an opinion concurring in judgment[322] while Justice Alito filed an opinion concurring in part and dissenting in part.[323] Alito agreed with the majority that the federal courts had jurisdiction to evaluate the case, but disagreed with its central holding that Cone was entitled to a full review of his *Brady* claim as it related to sentencing.[324] Justice Thomas, joined by Justice Scalia, dissented.[325] Thomas argued that if the suppressed evidence was not sufficient to have changed Cone's conviction, it is not sufficient to change sentencing and that review was unwarranted.[326] Moreover, Thomas disagreed with the majority and held that the Court of Appeals had adequately litigated the *Brady* claim.[327]

E. Five-to-Four Decisions

In the most narrowly decided cases—those with a five-member majority—the Supreme Court, during the 2008-2009 term, again produced a nearly even number of conservative and liberal decisions.[328] While five of these split decisions held in favor of government (conservative), four decisions favored the criminally accused (liberal). We begin our discussion with the conservative criminal justice cases decided by the narrowest of margins.

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319. *Id.* at 1785-86.

320. *Id.* at 1786.

321. *Id.*

322. *Id.* at 1186 (Roberts, J., concurring in judgment).

323. *Id.* at 1787 (Alito, J., concurring in part & dissenting in part).

324. *Id.* at 1788 (Alito, J., concurring in part & dissenting in part).

325. *Id.* at 1792 (Thomas, J., dissenting).

326. *Id.* at 1792-93 (Thomas, J., dissenting).

327. *Id.* at 1793 (Thomas, J., dissenting).

328. During several recent terms, the number of criminal justice cases ending in a five-member majority often has been more evenly split between conservative and liberal outcomes than those cases ending with a majority of six or more justices. For example, from 2003-2007 the Court handed down a nearly equal number of liberal (23) and conservative (22) decisions in criminal justice cases with five-member majorities. In cases decided by larger majorities during that same time, the Court generated far more conservative (59) than liberal (43) decisions. McCall, Smith, & McCall, *supra* note 11, at 38; McCall, McCall, & Smith, *supra* note 15, at 995-96; Smith, McCall, & McCall, *supra* note 18, at 499; Smith, McCall, & McCall, *supra* note 25, at 957; and Smith, McCall, & McCall, *supra* note 10, at 127.

Another atypical lineup of justices in *Oregon v. Ice*[329] limited the reach of *Apprendi v. New Jersey*[330] by ruling that judges, without a jury finding, can decide under state law to run sentences consecutively rather than concurrently if the judge found additional defendant culpability.[331] Thomas Ice twice entered an apartment and sexually assaulted an 11 year-old girl, touching the girl's vagina and breasts on both occasions.[332] The jury found Ice guilty of two counts of first-degree burglary with intent to commit sexual assault and four counts of sexual assault.[333] At sentencing, the judge found that the two burglaries were separate incidents, allowing for consecutive sentences.[334] Further, the judge found that Ice showed a willingness to commit more than one criminal action during each burglary, allowing him to add consecutive sentences for two of the sexual assault charges.[335] Consequently, Ice was sentenced to 340 months.[336]

Ice challenged his sentence based on the Court's holding in *Apprendi v. New Jersey.* In *Apprendi*, the Court held that any factor that enhances a defendant's sentence must be found by a jury beyond a reasonable doubt.[337] Ice argued that, in this case, the judge determined the factual elements allowing for consecutive (rather than concurrent) sentences.[338] Ice claimed that because the jury did not make such a determination, the sentencing violated the principles established in *Apprendi.*[339] Writing for Justices Kennedy, Breyer, Alito and Stevens, Justice Ginsburg refused to extend the reach of *Apprendi* to prohibit this type of sentencing scheme.[340] Ginsburg noted that states historically have had authority over their criminal justice systems and have trusted judges to determine if sentences should run consecutively or concurrently.[341] Oregon, while entrusting judges with that discretion, have also taken steps to safeguard that judges will use that discretion appropriately by asking them to attach their decision with a finding of facts to justify a consecutive sentence over a concurrent one.[342] Ginsburg found that the decision to impose consecutive or concurrent sentences generally has not been within the purview of juries, but rather has been determined by state legislatures.[343] If state legislatures want to vest that power in its judges, respect for state sovereignty demands that the Court allow them that prerogative by not extending *Apprendi.*[344]

329. 129 S. Ct. 711 (2009).
330. Apprendi v. New Jersey, 530 U.S. 466 (2000).
331. *Oregon*, 129 S. Ct. at 714.
332. *Id.* at 715.
333. *Id.*
334. *Id.* at 715-16.
335. *Id.* at 716.
336. *Id.*
337. *Id.* at 717.
338. *Id.* at 716.
339. *Id.*
340. *Id.* at 719.
341. *Id.* at 717.
342. *Id.* at 719.
343. *Id.* at 717.
344. *Id.*

Justice Scalia filed a dissenting opinion that was joined by Chief Justice Roberts and Associate Justices Thomas and Souter.[345] Scalia argued that the ruling in *Apprendi* is clear: any factor that extends sentencing must be found by a jury.[346] The decision to run sentences consecutively enhances sentences and, thus according to Scalia, the factors leading to that decision should also be found by a jury and determined to exist beyond a reasonable doubt.[347] From this perspective, failing to do so violates the Sixth Amendment right to a trial by jury. Scalia found no difference between the circumstances in *Ice* and those in other cases in the *Apprendi* line of reasoning that do extend Sixth Amendment jury protections.[348] He also found the majority's position that judges have historically made the decision of how to run sentences to be unconvincing.[349] Scalia asserted that the Sixth Amendment was violated by Oregon's sentencing scheme because a judge, without a finding of fact by a jury, could double or even triple a defendant's sentence that, according to Scalia, is precisely the type of activity *Apprendi* was intended to prevent.[350]

The Court's conservative decision in *District Attorney's Office v. Osborne*[351] held that defendants do not have a freestanding constitutional right to obtain state held DNA evidence for private testing.[352] The case originated from a violent, sexual assault and attempted murder of a prostitute in Alaska.[353] Police eventually, based on testimony from a co-participant in the crime, focused attention on William Osborne, an African American male, as the prime suspect in the crime.[354] The state performed DNA testing on sperm found in a condom at the scene of the rape, and was able to exclude 80% of the black population as suspects.[355] However, because the DNA testing procedures were not more exacting, the testing found only that Osborne, along with another 20% of the African American population, could not be excluded as sources of the sperm.[356] Based on that, and other evidence, Osborne was convicted of kidnapping, assault and sexual assault.[357] Among other lines of appeals, Osborne filed for relief in federal court, holding that he had a due process right allowing access to the state's biological evidence in order to conduct more exacting DNA testing at his own expense.[358] The Supreme Court granted certiorari to determine

345. *Id.* at 720 (Scalia, J., dissenting).
346. *Id.* at 720 (Scalia, J., dissenting).
347. *Id.* (Scalia, J., dissenting).
348. *See. Id.* at 720-22 (Scalia, J., dissenting).
349. *Id.* at 721 (Scalia, J., dissenting).
350. *Id.* at 723 (Scalia, J., dissenting).
351. 129 S. Ct. 2308 (2009).
352. *Id.* at 2312.
353. *Id.* at 2312-13.
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at 2314.
358. *Id.* at 2314.

if defendants had a post-conviction federal right to access evidence for private DNA testing.[359]

Writing for Justices Scalia, Kennedy, Alito and Thomas, Chief Justice Roberts noted that the task of determining access to state evidence falls to state legislatures and that forty-six States and the federal government (although Alaska was not one of those states) had already addressed the question of defendant access to biological evidence.[360] Roberts continued by writing that those statutes often place limits on access to evidence and formalize procedures necessary to obtain such evidence.[361] Therefore, Roberts concluded that the issue of access to state evidence is best resolved by the state, not through a federal mandate.[362] Roberts noted that if the federal courts granted relief,

> This approach would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue in this way.[363]

Furthermore, Roberts held that while Osborne may have a 'liberty' interest proving his innocence using evidence in the state's possession under Alaska's laws, those state-created rights do not implicate the federal Due Process Clause.[364] States, within the confines of their laws and state constitutions, have flexibility in determining necessary post-conviction relief procedures.[365] State post-conviction relief can be challenged in federal court only if the state procedures are fundamentally inadequate by federal substantive due process standards.[366] Here, Roberts found that Osborne's right to liberty was not violated through the use of Alaska's post-conviction relief procedures.[367] As such, Roberts asserted that exercising appropriate judicial restraint required that the debate over the proper handling of DNA evidence continue to be waged in the elected arenas and not be short-circuited by the federal courts.[368] Justice Alito, joined by Justices Kennedy and Thomas,[369] found additional faults with Osborne's arguments in a concurring opinion.[370]

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359. *Id.* at 2316.
360. *Id.* at 2316-17.
361. *Id.* at 2317.
362. *Id.* at 2320.
363. *Id.* at 2312.
364. *Id.* at 2319-20.
365. *Id.* at 2320.
366. *Id.*
367. *Id.* at 2320-21.
368. *Id.* at 2322.
369. Thomas joined only as to Part II.
370. *Id.* at 2323 (Alito, J., concurring)

Justice Stevens—joined by Justices Ginsburg and Breyer in full, and in part by Justice Souter—dissented. Stevens argued that Osborne does have a substantive due process right to access the evidence.[371] Stevens found considerable fault with Alaska's post-conviction relief practices used in this case[372] and asserted that Osborne adequately attempted to have his claims heard in state court but was "rebuffed at every turn."[373] Indeed, Stevens contended that, "The manner in which the Alaska courts applied state law in this case leaves me in grave doubt about the adequacy of the procedural protections afforded to litigants . . . ,"[374] thus making federal intervention necessary.

Beyond the faults Stevens found with the state's treatment of this case, he also asserted that Osborne has a more general right to access the evidence under the Due Process Clause of the Fourteenth Amendment.[375] Stevens wrote:

> [A]n individual's interest in his physical liberty is one of constitutional significance. That interest would be vindicated by providing post-conviction access to DNA evidence, as would the State's interest in ensuring that it punishes the true perpetrator of a crime. In this case, the State has suggested no countervailing interest that justifies its refusal to allow Osborne to test the evidence in its possession and has not provided any other nonarbitrary explanation for its conduct. Consequently, I am left to conclude that the State's failure to provide Osborne access to the evidence constitutes arbitrary action that offends basic principles of due process.[376]

Justice Souter also dissented. Souter agreed with Stevens that Alaska's post-conviction relief procedures used in this case were unconstitutional but would not, through this case, advance to state prisoners a federal constitutional right to access DNA evidence.[377]

In *Ashcroft v. Iqbal*,[378] a divided Court determined the merit of racial profiling claims stemming from the September 11, 2001, (9/11) terrorist attacks. Javaid Iqbal, a Pakistani citizen, was questioned and detained by the Federal Bureau of Investigation immediately following the 9/11 terrorist attacks on suspicion of having links to terrorism.[379] Iqbal was further

371. *Id.* at 2331 (Stevens, J., dissenting).
372. *Id.* at 2332 (Stevens, J., dissenting).
373. *Id.* at 2333 (Stevens, J., dissenting).
374. *Id.* at 2333-34 (Stevens, J., dissenting).
375. *Id.* at 2334 (Stevens, J., dissenting).
376. *Id.* at 2338 (Stevens, J., dissenting).
377. *Id.* at 2340 (Souter, J. dissenting).
378. 129 S. Ct. 1937 (2009).
379. *Id.* at 1943.

determined to be an individual of 'high interest' and therefore was detained in very restrictive conditions including 23 hours of daily confinement.[380] Iqbal served a prison term, was deported back to Pakistan,[381] and preceded to sue agents of the FBI for the treatment he received as prisoner of the United States government and for engaging in policies that interrogated individuals based solely their race, religion, or national origin.[382] Iqbal sued government officials, including Attorney General John Ashcroft and FBI Director Robert Muller, by filing a *Bivens*'[383] claim. Iqbal argued that under governmental policies, only individuals of Arab decent were designated as persons of interest and initially investigated and, once detained, that Arab men were subjected to especially harsh conditions because of their race, religion or national interest rather than for any legitimate penological purpose.[384]

Writing for Chief Justice Roberts and Justices Alito, Scalia, and Thomas, Justice Kennedy first determined that federal appeals courts had jurisdiction over the case.[385] Kennedy then turned to the merits of Iqbal's claim and found that Iqbal had failed to show sufficient facts to justify a claim of discrimination under *Bivens*.[386] In order to survive review, Iqbal had to show not only that the policies were discriminatory, but also that they were adopted with discriminatory intent and that showing was not evident in this case.[387] Rather, because the '9/11 attacks' were carried out by 19 individuals of Arab decent, Kennedy noted that, "It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims."[388] Justice Souter filed a dissenting opinion that was joined by Justices Stevens, Ginsburg and Breyer.[389]

The Court also heard arguments regarding the 'good faith' exception to the exclusionary rule in *Herring v. United States*.[390] In 2004, Bennie Herring was arrested on what both parties agreed was police error.[391] Because the police department had not updated its system, officers arrested Herring based on a warrant that actually had been recalled several months earlier.[392] During a search incident to the arrest, narcotics and a gun were

380. *Id.*
381. *Id.*
382. *Id.* at 1944.
383. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388 (1971).
384. *Iqba,* 129 S. Ct. 1937, 1944.
385. *Id.* at 1945-46.
386. *Id.* at 1952.
387. *Id.* at 1954.
388. *Id.* at 1951.
389. *Id.* at 1954 (Souter, J., dissenting).
390. 129 S. Ct. 695 (2009).
391. *Id.* at 698.
392. *Id.*

found on Herring's person.[393] Within a few minutes of the arrest and search, the officers became aware of the error with the original arrest warrant.[394] However, the state continued its prosecution for narcotics and gun charges, despite the fact that both of those charges arose from evidence obtained during an unconstitutional search.[395] Herring moved to suppress the evidence at trial, but the judge allowed the evidence, finding that the police had acted in a good faith belief that the arrest warrant was valid.[396] The Supreme Court granted certiorari and similarly held that the exclusionary rule did not apply in this case.[397]

Writing for the majority, Chief Justice Roberts noted that the purpose of the exclusionary rule is to deter illegal police activity during criminal prosecutions, and further wrote that this safeguard is not constitutionally mandated, but rather is judicially constructed.[398] In determining the appropriateness of the exclusionary rule, Roberts clarified that the exclusion serves not as an individual right for specific defendants, but rather is intended to deter future police misconduct.[399] If the actions in question were the result of a mistake, then deterrence is unlikely and the value of excluding evidence is limited.[400] If the police acted in 'good faith'—believing that their actions were constitutional—then excluding evidence may be unnecessary, assuming the police acted in an objectively reasonable manner.[401] Previously, the Court applied this good faith exception to an officer basing an arrest on faulty information obtained from a court database[402] because the officer lacked culpability when relying on information provided by *court* employees.[403] Here, while the mistake did arise from police failure to update their database, the error was not reckless or grossly negligent.[404] Therefore, the exclusionary rule does not apply.[405] Roberts's opinion was joined by Justices Kennedy, Scalia, Alito, and Thomas.

Justice Ginsburg wrote a dissenting opinion that was joined by Justices Breyer, Stevens, and Souter.[406] Ginsburg noted that there was not disagreement among the parties that Herring's arrest and subsequent search were unconstitutional.[407] The arrest occurred because of faulty and careless maintenance of a police database.[408] The only way to deter careless

393. *Id.*
394. *Id.*
395. *Id.* at 699.
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.* at 700.
400. *Id.*
401. *Id.* at 699-700.
402. *See* Arizona v. Evans, 514 U.S. 1 (1995).
403. *Herring*, 129 S. Ct. at 701. (emphasis added)
404. *Id.* at 704.
405. *Id.*
406. *Id.* (Ginsburg, J., dissenting).
407. *Id.* at 705 (Ginsburg, J., dissenting).
408. *See id.* (Ginsburg, J., dissenting).

police behavior, according to Ginsburg, is to exclude faulty police work.[409] The dissenting opinion asserted that in this case the exclusionary rule should apply and that the narcotics and gun seized in the search incident to the faulty arrest should be excluded.[410] Ginsburg warned that the majority had underestimated the potential problem of faulty recordkeeping, and wrote that without the exclusionary rule there is no incentive for police departments to invest time and other resources to properly maintain their electronic records.[411] Consequently, suppressing such evidence would deter police departments from failing to update their records, justifying the use of the exclusionary rule.[412] Justice Breyer also filed a dissenting opinion, joined by Justice Souter, and added that the mistake here was due to police misconduct, and therefore, the Court's ruling that mistakes by court personnel do not trigger the exclusionary rule, does not apply.[413]

The Court further restricted the rights of defendants against police action in *Montejo v. Louisiana*.[414] Jesse Montejo was arrested in 2002 on suspicion of his connection to a robbery and murder that had occurred the previous day.[415] Montejo waived his *Miranda*[416] rights,[417] and the ensuing police interrogation eventually led to his confession that he had shot and killed the victim after a failed robbery attempt.[418] Montejo was then provided a preliminary hearing and assigned counsel at state expense.[419] Before Montejo met with this court-appointed attorney, police again questioned Montejo.[420] Montejo waived *Miranda* a second time and agreed to help police locate the murder weapon.[421] During the trip, Montejo wrote a letter of apology to the victim's family[422] and only upon returning to police headquarters did he finally meet with his attorney.[423] At trial for first-degree murder, the prosecution introduced Montejo's letter of apology.[424] Defense objected to this, arguing the letter was obtained as a result of police questioning that was initiated after Montejo was represented by an attorney, and contrary to the procedures established by the Supreme Court in *Michigan* v. *Jackson*[425] forbidding police-initiated questioning of a suspect once the suspect has requested counsel during a court proceeding.[426] The letter was introduced, and the Louisiana Supreme Court upheld the

409. *See id.* at 708 (Ginsburg, J., dissenting).
410. *Id.* at 705, 710 (Ginsburg, J., dissenting).
411. *Id.* at 708-09 (Ginsburg, J., dissenting).
412. *Id.* at 709-10 (Ginsburg, J., dissenting).
413. *Id.* at 710-11 (Breyer, J., dissenting).
414. 129 S. Ct. 2079 (2009).
415. *Id.* at 2082.
416. Miranda v. Arizona, 384 U.S. 436 (1966).
417. *Montejo*, 129 S. Ct. at 2082.
418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.*
425. 475 U.S. 625 (1986).
426. *Montejo*, 129 S. Ct. at 2082-83.

use of the letter because Montejo had been assigned counsel but had not affirmatively requested counsel, or otherwise directly asserted his Sixth Amendment rights.[427]

Writing for Chief Justice Roberts and Justices Alito, Thomas, and Kennedy, Justice Scalia's majority opinion found fault with arguments presented by both the state and Montejo.[428] Scalia asserted that Louisiana's reading of *Jackson* as requiring that defendants request or accept counsel as unworkable.[429] However, he also held that Montejo's assertion that once counsel has been appointed, the police may not initiate any further contact with the defendant as unreasonable.[430] Scalia noted that defendants are initially protected through the use of *Miranda* warnings, but that defendants may waive those warnings.[431] However, to protect defendants who had asserted their *Miranda* rights from being hounded by police into waiving them and then confessing, the Court adopted a rule in *Edwards* v. *Arizona*[432] that once a defendant has asserted *Miranda*, police may not initiate questioning.[433] That Fifth Amendment protection was applied to the Sixth Amendment right to counsel in *Jackson*, with the Court holding that any confessions made through police-initiated interrogations after counsel is appointed are made because of an unconstitutionally obtained wavier by the defendant of Sixth Amendment rights.[434] In other words, as Scalia explained, the point of *Jackson* is to, "[p]resume such waivers involuntary 'based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily'"[435] in subsequent interactions with police. However, Scalia noted that the purpose of *Jackson* was to protect against police badgering, not to assure that defendants are represented by counsel at each stage of the interrogation.[436] If *Jackson* is intended to protect against police badgering, than Montejo's argument that police may not initiate contact with a defendant once represented by counsel fails because defendants are within their rights to waive their right to be represented at any specific stage of the criminal proceedings.[437]

The narrow majority held that defendants, while entitled to representation by counsel, are also entitled to speak with police without the benefit of counsel if they choose.[438] Moreover, while one might assume that a waiver of rights by a defendant who actually requested counsel was obtained through police misconduct, that same assumption cannot be made

427. *Id.* at 2083.
428. *Id.* 2083, 2085.
429. *Id.* at 2083-84.
430. *Id.* at 2085, 2087.
431. *Id.* at 2085.
432. 451 U. S. 477 (1981).
433. *Montejo*, 129 S. Ct. at 2085.
434. *Id.* at 2086.
435. *Id.* (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)).
436. *Id.*
437. *See id.* at 2086-87.
438. *Id.*

for defendants who did not request counsel but were merely appointed counsel by the state.[439] Waivers by those individuals who did not assert Sixth Amendment rights initially well might be voluntary.[440] Thus, Scalia wrote, interpreting *Jackson* to assume that those waivers are coerced is incorrect.[441] The majority overturned *Jackson*, citing not only that it is unworkable,[442] but also that it is unnecessary because the right to counsel is protected under both *Miranda* and *Edwards*.[443] In other words, the protections afforded defendants through Fifth Amendment rulings are sufficient to protect a Sixth Amendment right.

Justice Alito, joined by Justice Kennedy, filed a concurring opinion criticizing the minority[444] for placing value on the concept of *stare decisis* in this case while earlier in the term, the same justices voted to overturn Court precedents with a longer history than *Jackson*.[445]

Justice Stevens, joined by Justices Ginsburg, Breyer and Souter, dissented and argued that the majority had misread the rationale behind *Jackson* and had placed too little value on precedent.[446] Stevens contended that *Jackson* was intended to ensure that individuals obtain their Sixth Amendment right to counsel and stated, "If a defendant is entitled to protection from police-initiated interrogation under the Sixth Amendment when he merely *requests* a lawyer, he is even more obviously entitled to such protection when he has *secured* a lawyer."[447] The notion of preventing police badgering once a defendant has requested counsel is not mentioned in *Jackson* as a rationale for the ruling, which instead is wholly predicated on protecting Sixth Amendment rights generally.[448] Stevens sharply contended that once the proper purpose behind *Jackson*, as a Sixth Amendment protection rather than an anti-badgering measure, is understood, the majority's logic in overturning Jackson begins to "crumble."[449] Finally, Stevens argued that even without the protections of the *Jackson* decision, Montejo's Sixth Amendment rights were violated and that the decision of the Louisiana Supreme Court should be reversed.[450] As Stevens concluded:

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439. *Id.* at 2086.

440. *Id.* at 2086-87.

441. *Id.* at 2086, 2088.

442. *Id.* at 2088.

443. *Id.* at 2089-90.

444. *Id.* at 2092-93 (Alito, J., concurring).

445. *Id.* at 2093 (Alito, J., concurring). Alito noted, "The dissent, finally, invokes *Jackson*'s antiquity, stating that "the 23-year existence of a simple bright-line rule" should weigh in favor of its retention. But in *Gant*, the Court had no compunction about casting aside a 28-year-old bright-line rule. I can only assume that the dissent thinks that our constitutional precedents are like certain wines, which are most treasured when they are neither too young nor too old, and that *Jackson*, at 23, is in its prime, whereas *Belton*, at 28, had turned brownish and vinegary." *Montejo*, 129 S. Ct. at 2093; *see* Arizona v. Gant, 129 S. Ct. 1710 (2009), discussed *infra* with other 5-to-4 liberal decision.

446. *Montejo*, 129 S. Ct. at 2094 (Stevens, J., dissenting).

447. *Id.* at 2095 (Stevens, J., dissenting).

448. *Id.* at 2096 (Stevens, J., dissenting).

449. *Id.* at 2097 (Stevens, J., dissenting).

450. *Id.* at 2199 (Stevens, J., dissenting).

> The Court's decision to overrule *Jackson* is unwarranted. Not only does it rest on a flawed doctrinal premise, but also the dubious benefits it hopes to achieve are far outweighed by the damage it does to the rule of law and the integrity of the Sixth Amendment right to counsel. Moreover, even apart from the protections afforded by *Jackson*, the police interrogation in this case violated Jesse Montejo's Sixth Amendment right to counsel.[451]

Turning to the Court's liberal, split decisions, a slim majority held that United States military courts have jurisdiction to issue writs of *coram nobis* in *United States v. Denedo*.[452] Jacob Denedo, a native of Nigeria, pled guilty of fraud under the Uniform Code of Military Justice in 1998.[453] In 2006, based on his guilty plea, the Department of Homeland Security sought to deport Denedo.[454] Denedo then requested the military court that had accepted his plea to issue a writ of *coram nobis* under the justification that Denedo had been provided ineffective assistance of counsel in that his counsel had guaranteed that a guilty plea would not lead to deportation.[455] The only questions at issue in this case dealt with jurisdiction: does the United States Supreme Court have jurisdiction to hear the complaint[456] and do military courts have jurisdiction to issue writs of *coram nobis* regarding a challenge to a previous, final decision.[457] Justice Kennedy's majority opinion for Justices Stevens, Ginsburg, Souter and Breyer found both courts have jurisdiction, allowing the case to proceed on the merits of Denedo's ineffective assistance of counsel claim.[458] Chief Justice Roberts' filed a dissenting opinion that was joined by Justices Scalia, Thomas and Alito contending that while the Supreme Court did have jurisdiction to review the action of military courts, the military courts do not have jurisdiction to issue writs of *coram nobis*.[459]

Justice Kennedy's views were again a key factor in the Court's ruling in *Corley v. United States*.[460] The Court ruled in *Corley* that voluntary confessions could be suppressed if more than six hours have passed between the arrest and confession and if the defendant has not yet appeared before a magistrate.[461] Decades ago in *McNabb* v. *United States*,[462] and *Mallory* v.

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451. *Id.* at 2101 (Stevens, J., dissenting).

452. 129 S. Ct. 2213 (2009) (defining "The writ of *coram nobis* [a]s an ancient common-law remedy designed 'to correct errors of fact.'").

453. *Id.* at 2218.

454. *Id.*

455. *Id.*

456. *Id.* at 2219.

457. *Id.* at 2218.

458. *Id.* at 2223-24.

459. *Id.* at 2225 (Roberts, C.J., dissenting).

460. 129 S. Ct. 1558 (2009).

461. *Id.* at 1566, 1571.

462. 318 U. S. 332 (1943).

United States,[463] the Court ruled to suppress otherwise voluntary confessions obtained following unreasonable delays in bringing a defendant before a magistrate. Then in 1968, Congress passed a federal statute that held in part that voluntary confessions are admissible even if certain due process protections are not in place (e.g., reading of *Miranda* rights)[464] and,

> [a] confession made . . . by . . . a defendant therein, while such person was under arrest . . . , shall not be inadmissible solely because of delay in bringing such person before a magistrate judge . . . if such confession is found by the trial judge to have been made voluntarily . . . and if such confession was made . . . within six hours [of arrest].[465]

The question left open, and the one addressed by the Court in this case, is if congressional statute superseded the Court's mandate in *McNabb* and *Mallory* and allowed all voluntary confessions, or if the statute simply narrowed the reach of the ruling so that voluntary confessions obtained prior to the six-hour mandate could be admitted.[466]

The case facts indicate that Johnnie Corley was arrested at 8 a.m., held until about 11:45 a.m. when he was taken to the hospital to treat minor cuts, and was then taken to an FBI office at 3:30 p.m. where agents began to question him.[467] At 5:27 p.m. Corley began to confess but later requested a break at 6:30 p.m.[468] He was held overnight and questioning resumed the next morning.[469] Corley confessed in writing and finally was taken to see at magistrate at 1:30 p.m.—29.5 hours after he was initially arrested.[470] The Court of Appeals affirmed that Corley's confession could be used, holding that it was bound by congressional statute, which the appellate court determined had replaced the Supreme Court's rulings in *McNabb* and *Mallory*.[471] The Court of Appeals held that confessions could be admitted if those confessions were voluntary.[472]

Writing for the majority, Justice Souter found fault with the appellate court's decision, holding instead that voluntary confessions within six hours of arrest are permissible, but those obtained after the six-hour threshold might be suppressed consistent with the Court's *McNabb* and *Mallory* precedents.[473] Souter's opinion was joined by Justices Breyer, Stevens, Ginsburg and Kennedy. Justice Alito, joined by Chief Justice Roberts and

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463. 354 U. S. 449 (1957).
464. *Corley*, 129 S. Ct. at 1563 (citing 18 U.S.C. §§ 3501, 3501(a) (2006)).
465. *Corley*, 129 S. Ct. at 1564 (quoting 18 U.S.C. §3501(c)).
466. *Id.*
467. *Id.* at 1565.
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.*
473. *Id.* at 1571.

Justices Scalia and Thomas, dissented.[474] Alito argued that the meaning of the congressional statute was clear,[475]—regardless of whether or not it was intended to replace the Court's *McNabb* and *Mallory* mandates—and allows for all voluntary confessions to be admissible in a court of law.[476]

The Court ruled in *Melendez-Diaz v. Massachusetts*[477] that the state's practice of merely introducing scientific reports into evidence without allowing defendants the ability to cross-examine the experts producing those reports violated the Sixth Amendment's Confrontation Clause. Luis Melendez-Diaz was arrested during a narcotics sale.[478] Along with two others, Melendez-Diaz was driven to the police station in a police cruiser, and during the ride he was seen fidgeting in the cruiser's back seat.[479] Police searched the back seat and found 19 small bags between a partition separating the front and back seats.[480] Police then sent those bags for testing to determine the contents.[481] At trial, prosecutors introduced the lab test indicating the substance in the police car was cocaine.[482] Melendez-Diaz objected to the introduction of the reports because the analysts producing the reports were not present to testify.[483] Melendez-Diaz was found guilty and he appealed, eventually reaching the Supreme Court on the claim that his Sixth Amendment right to confront witnesses against him had been violated by the introduction of the reports written by analysts that he was unable to cross-examine.[484]

Writing for Justices Stevens, Souter, Thomas and Ginsburg, Justice Scalia agreed a Sixth Amendment violation had taken place.[485] Scalia noted that the Court determined in *Crawford* v. *Washington*[486] that defendants have a right to cross examine witnesses against them and if that condition is not met, the testimony of the witness is inadmissible, unless the witness is unavailable.[487] Scalia further found that the reports indicating that the substance was cocaine were testimonial in nature and, consequently, the analysts were witnesses.[488] Failure to produce them was a Sixth Amendment violation.[489]

Justice Kennedy, joined by Chief Justice Roberts and Justices Breyer and Alito, dissented.[490] Kennedy argued that the Court failed to give due

474. *Id.* at 1571 (Alito, J., dissenting).
475. *Id.* at 1572 (Alito, J., dissenting).
476. *Id.* at 1575 (Alito, J., dissenting).
477. 129 S. Ct. 2527 (2009).
478. *Id.* at 2530.
479. *Id.*
480. *Id.*
481. *Id.*
482. *Id.* at 2531.
483. *Id.*
484. *Id.*
485. *Id.* at 2532.
486. 541 U.S. 36 (2004).
487. *Melendez-Diaz*, 129 S. Ct. at 2531.
488. *Id.* at 2532.
489. *Id.*
490. *Id.* at 2543 (Kennedy, J., dissenting).

weight to precedent and common practice because for over 90 years reports have been introduced as evidence without also producing the analysts as witnesses.[491] Kennedy noted that precedent cited by the Court, namely *Crawford*, was established recently (2004) and did not address forensic technicians.[492] Therefore, reliance on that ruling to overturn a century of jurisprudence was misguided.[493] Kennedy protested, "It is remarkable that the Court so confidently disregards a century of jurisprudence. We learn now that we have misinterpreted the Confrontation Clause—hardly an arcane or seldom-used provision of the Constitution—for the first 218 years of its existence."[494] Kennedy maintained that there is a difference between 'conventional witnesses' for whom confrontation is required and lab technicians and others who are not directly involved in the events leading to the defendant's conviction.[495] Kennedy argued that there is no clear definition of analyst, making the ruling impossible to apply.[496] He also asserted that the majority failed to clarify if all personnel performing the most minuscule of duties that may have contributed to the result were also required to testify, or just the final individual responsible for putting all the evidence together in the form of a report.[497] The Court's ruling, Kennedy argued, greatly damages the workings of the criminal justice system.[498] Because of its far-reaching practical impact, *Melendez Diaz v. Massachusetts* is likely to be one of the most controversial criminal justices cases of the year.

Arizona v. Gant[499] provided another unusual clustering of justices as Justices Scalia and Thomas joined Justices Stevens, Ginsburg and Souter in providing greater protections to the criminally accused while Justice Breyer broke with his usual liberal allies to join Chief Justice Roberts and Justices Alito and Kennedy in dissent. The case addressed the permissibility of police searches conducted of cars during an arrest when officers have already secured the defendant.[500] Rodney Gant was arrested for driving with a suspended license.[501] The police handcuffed Gant and placed him in the back of a police cruiser and, incident to the arrest, started searching Gant's car, in which they found cocaine.[502] Gant was arrested for drug possession charges, including paraphernalia.[503] Gant moved to suppress the cocaine as illegally obtained but the trial court allowed search as incident to a valid arrest.[504]

491. *Id.* (Kennedy, J., dissenting).
492. *Id.* at 2543-44 (Kennedy, J., dissenting).
493. *Id.* (Kennedy, J., dissenting).
494. *Id.* at 2543 (Kennedy, J., dissenting).
495. *Id.* at 2543, 2548-49 (Kennedy, J., dissenting).
496. *Id.* at 2544 (Kennedy, J., dissenting).
497. *Id.* (Kennedy, J., dissenting).
498. *Id.* at 2546 (Kennedy, J., dissenting).
499. 129 S. Ct. 1710 (2009).
500. *Id.* at 1716.
501. *Id.* at 1714.
502. *Id.*
503. *Id.* at 1715.
504. *Id.*

The Court authorized searches incident to an arrest as valid exceptions to the Fourth Amendment's warrant requirement in *Chimel* v. *California*[505] to protect officer safety and ensure defendants could not dispose of evidence, and were extended to car searches by the High Court in *New York* v. *Belton*.[506] Searches incident to an arrest are limited in scope; for example, they are only permissible in areas where the defendant might be able to obtain access.[507] Because Gant was not able remove items from his car while handcuffed and in a police car, the Arizona Supreme Court held the search to be unconstitutional[508] and the Supreme Court granted certiorari.

Writing for the majority, Justice Stevens found merit in Gant's argument. Stevens noted that while *Belton* authorized car searches incident to arrest, it did not address if officers could search subsequent to an arrest if the crime scene had been secured and the defendant did not pose a danger to officer.[509] Finding that the underlying rationale for the original decision in *Chimel* was to protect officers by removing from a defendant's immediate surroundings any material which could be used as a weapon or destroyed as evidence, Stevens held that warrantless searches incident to arrests are not legitimate if there is no danger to officers and if there is no chance a defendant can destroy evidence.[510] Further, the extension of *Chimel's* logic to car searches in *Belton* also was largely predicated on the goal of protecting officers.[511] *Belton* concerned the search of a car by a lone police officer while four unsecured car occupants stood nearby.[512] Stevens noted the Court's decision allowing searches of the car's compartments was to ensure that hidden weapons could not be accessed by one of the four arrestees.[513] While *Belton* had been generally interpreted as authorizing the search of an entire car incident to an arrest, Stevens' majority opinion declared that the Court was using *Gant* to clarify the scope of permissible searches under *Belton*.[514]

Stevens held that rather than permit the search of an entire car, the principles underlying both *Chimel* and *Belton* must be respected in future car searches.[515] Car searches are permissible incident to an arrest if the officer has a reasonable belief that a search is necessary to secure officer safety or evidence.[516] It was an inaccurate reading of *Belton*, the majority

505. 395 U.S. 752 (1969).

506. 453 U.S. 454 (1981)

507. *See Gant*, 129 S. Ct. at 1716-17.

508. *Id.* at 1715.

509. *Id.* at 1719.

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.* at 1716, 1719; *see also id.* at 1725 (Scalia, J., concurring) (describing the opinion as "artificial narrowing").

515. *Id.* at 1719.

516. *Id.*

held, to assert that precedent authorized searches absent any safety or evidentiary justification.[517] As Stevens noted, "Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[518] Further, Stevens warned that searches of cars absent *Chimel* justifications are not permissible simply to support a law enforcement interest in creating a bright-line rule to follow over a defendant's limited privacy interest regarding the contents of a car.[519] Finally, Stevens charged that principles of *stare decisis* should not be used to permit the continuance of unconstitutional police practices simply because those practices have been allowed in the past.[520] Justice Scalia filed a concurring opinion.[521]

Justice Breyer dissented, arguing that the Court should not upset almost three decades of police practice and should respect the precedent established in *Belton*.[522] Justice Alito also filed a dissenting opinion that was joined by Chief Justice Roberts and Justice Kennedy in full and in part by Justice Breyer.[523] Justice Alito argued that *Belton* was well established and should be respected, and that the Court's decision here undermines police investigations and endangers police officers' lives.[524] Alito noted that while those in the majority do not admit it,[525] they have overturned *Belton*, and have not simply clarified or modified the ruling.[526] Alito concluded that the Court overturned a long-standing precedent without adequate justification or cause.[527]

IV. CONCLUSION

This examination of the Supreme Court's criminal justice decisions from the 2008-2009 term revealed a typical pattern of decision making with respect to the liberal-conservative voting patterns of individual justices on the Roberts Court. Although the specific mix of issues apparently reduced the rates of inter-agreement among the justices, there were no major surprises with respect to the predominance of conservative outcomes and the number of cases that produced 5-to-4 decisions in a Court that is divided between well-defined conservative and liberal wings.

In looking at the Court's decisions, it is difficult to conclude that any of the recent term's decisions will have a dramatic impact on criminal justice

517. *Id.*
518. *Id.*
519. *Id.* at 1720-21.
520. *Id.* at 1722.
521. *Id.* at 1724 (Scalia, J., concurring).
522. *Id.* at 1726 (Bryer, J., dissenting).
523. *Id.* (Alito, J., dissenting).
524. *Id.* (Alito, J., dissenting).
525. *Id.* (Alito, J., dissenting).
526. *Id.* at 1727 (Alito, J., dissenting).
527. *Id.* at 1727-31 (Alito, J., dissenting).

processes. The Court modestly reduced police authority to search automobiles in one 5-to-4 case,[528] but in another case a five-member majority modestly expanded the authority of police to question detained suspects outside of the presence of their appointed counsel.[529] The Court's narrow and controversial rejection of a prisoner's asserted due process right to test preserved DNA evidence merely maintained the current state of the law[530] and the protection of students against strip searches in schools presumably affects relatively few schools and students that had actually experienced such practices.[531]

The justices' opinions in the most recent term may be most important in providing ammunition for debates that will occur in future cases. For example, will Chief Justice Roberts's minimization of the exclusionary rule's impact and importance provide a basis for further reductions in the rule's coverage in future cases?[532] Will the strong federalism arguments put forward by Chief Justice Roberts to oppose a due process right to DNA testing[533] either affect his decision or the arguments used by other justices when the Court considers whether the limited Second Amendment federal right to keep a handgun in one's home[534] should be applied to gun control laws of states and cities?[535] Will the back-and-forth debate about *stare decisis* between Justice Stevens[536] and Justice Alito that emerged in 2009 continue or be joined by other justices in the next term's cases?[537]

An additional important question concerns the changes that will result from Justice Souter's retirement. Will Justice Sotomayor, a former prosecutor, adopt a different approach than that of her predecessor? For example, will her arrival at the Court alter any future reexamination of the cases in which Souter was a member of five-member majorities that strengthened the right to confrontation,[538] expanded protections against automobile searches,[539] and preserved the exclusion of incriminating statements by federal detainees who were not promptly brought to court for their initial appearances?[540] Moreover, Professor Douglas Berman speculates that the prosecutorial backgrounds of the Court's two newest members, Sotomayor and Alito, may contribute to the increase in the Court's acceptance of criminal justice cases for its 2009-2010 docket.[541] According to Berman, these

528. Arizona v. Gant, 129 S. Ct. 1710 (2009).
529. Montejo v. Louisiana, 129 S. Ct. 2079 (2009).
530. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009).
531. Safford v. Redding, 129 S. Ct. 2633 (2009)
532. Herring v. United States, 129 S. Ct. 695 (2009).
533. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009).
534. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).
535. McDonald v. City of Chicago, 130 S. Ct. 48 (2009).
536. Montejo v. Louisiana, 129 S. Ct. 2079, 2099 n.5 (2009) (Stevens, J. dissenting).
537. *Id.* at 2092-93 (2009) (Alito, J., concurring).
538. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).
539. Arizona v. Gant, 129 S. Ct. 1710 (2009).
540. Corley v. United States, 129 S. Ct. 1558 (2009).
541. Douglas Berman, *Should we thank new Justices Alito and Sotomayor for all of the big criminal law SCOTUS action?*, SENTENCING POLICY AND LAW BLOG, Oct. 13, 2009, http://sentencing.typepad.com

justices "are likely to find a range of criminal law topics inherently more interesting than their colleagues, and they also likely understand more fully how important clarity and certainty is to the work of all criminal justice practitioners."[542] Berman's observation implicitly reiterates the question of whether Sotomayor's decision making in criminal justice cases will differ from that of Justice Souter. However, the fact that former prosecutor Alito was the justice least likely to be given a majority-opinion writing assignment in criminal justice cases (see Table 2) may indicate that other justices are not necessarily inclined to regard prior professional experience as indicative of special expertise. Of course, it remains to be seen how Sotomayor will vote in criminal justice cases and whether she will be given more than her share of opinion-writing assignments.

542. *Id.*