Significant U.S. Supreme Court Criminal Cases 2010-11

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Contents:

Criminal Procedure

Double Jeopardy

Renico v. Lett, 130 S. Ct. 1855 (May 3, 2010). The Michigan Supreme Court's decision concluding that the defendant's double jeopardy rights were not violated by a second prosecution after a mistrial on grounds of jury deadlock was not an unreasonable application of federal law. The state high court had elaborated on the standard for manifest necessity and noted the broad deference to be given to trial court judges; it had found no abuse of discretion in light of the length of the deliberations after a short and uncomplicated trial, a jury note suggesting heated discussion, and the foreperson's statement that the jury would be unable to reach a verdict. In light of these circumstances, it was reasonable for that court to determine that the trial judge had exercised sound discretion.

Jury Selection

Berghuis v. Smith, 130 S. Ct. 1382 (Mar. 30, 2010). The state supreme court did not unreasonably apply clearly established federal law with respect to the defendant's claim that the method of jury selection violated his sixth amendment right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the community. The state supreme court assumed that African-Americans were underrepresented in venires from which juries were selected but went on to conclude that the defendant had not shown the third prong of the *Duren* prima facie case for fair cross section claims: that the underrepresentation was due to systemic exclusion of the group in the jury-selection process. The Court expressly declined to address the methods or methods by which underrepresentation is appropriately measured. For a more detailed discussion of this case, see the blog post at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1175

Thaler v. Haynes, 130 S. Ct. 1171 (Feb. 22, 2010). When an explanation for a peremptory challenge is based on a prospective juror's demeanor, the trial judge should consider, among other things, any observations the judge made of the prospective juror's demeanor during the voir dire. However, no previous decisions of the Court have held that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the prospective juror's demeanor.

Skilling v. United States, 130 S. Ct. 2896 (June 24, 2010). The defendant was tried for various federal crimes in connection with the collapse of Enron. The Court held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated when the federal district court denied the defendant's motion to change venue because of pretrial publicity. The Court distinguished the case at hand from previous decisions and concluded that given the community's population (Houston, Texas), the nature of the news stories about the defendant, the lapse in time between Enron's collapse and the trial, and the fact that the jury acquitted the defendant of a number of counts, a presumption of juror prejudice was not

warranted. The Court went on to conclude that actual prejudice did not infect the jury, given the voir dire process.

Sentencing

Graham v. Florida, 130 S. Ct. 2011 (May 17, 2010). The Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime. For a more detailed discussion of this case, see http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1285

Civil Commitment

United States v. Comstock, 130 S Ct. 1949 (May 17, 2010). The Court upheld the federal government's power to civilly commit a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released from prison. For a more detailed discussion of this case, see http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1283

Evidence

Michigan v. Bryant, 131 S. Ct. 1143 (Feb. 28, 2011). Justice Sotomayor, writing for the Court, held that a mortally wounded shooting victim's statements to first-responding officers were non-testimonial under *Crawford*. In the early morning, Detroit police officers responded to a radio dispatch that a man had been shot. When they arrived at the scene, the victim was lying on the ground at a gas station. He had a gunshot wound to his abdomen, appeared to be in great pain, and had difficulty speaking. The officers asked the victim what happened, who had shot him, and where the shooting occurred. The victim said that the defendant shot him about 25 minutes earlier at the defendant's house. The officers' 5-10 minute conversation with the victim ended when emergency medical personnel arrived. The victim died within hours. At trial, the victim's statements to the responding officers were admitted and the defendant was found guilty of, among other things, murder.

The Court held that because the statements were non-testimonial, no violation of confrontation rights occurred. The Court noted that unlike its previous decisions in *Davis* and *Hammon*, the present case involved a non-domestic dispute, a victim found in a public location suffering from a fatal gunshot wound, and a situation where the perpetrator's location was unknown. Thus, it indicated, "we confront for the first time circumstances in which the 'ongoing emergency' . . . extends beyond an initial victim to a potential threat to the responding police and the public at large." Slip Op. at 12. This new scenario, the Court noted, "requires us to provide additional clarification . . . to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" *Id.* It concluded that when determining whether this is the primary purpose of an interrogation, a court must objectively evaluate the circumstances in which the encounter occurs and the parties' statements and actions. *Id.* It explained that the existence of an ongoing emergency "is among the most important circumstances informing the 'primary purpose' of an interrogation." *Id.* at 14. As to the statements and actions of those involved, the Court concluded that the inquiry must focus on both the declarant and the interrogator.

Applying this analysis to the case at hand, the Court began by examining the circumstances of the interrogation to determine if an ongoing emergency existed. Relying on the fact that the victim said nothing to indicate that the shooting was purely a private dispute or that the threat from the shooter had ended, the Court found that the emergency was broader than those at issue in *Davis* and *Hammon*, encompassing a threat to the police and the public. *Id.* at 27. The Court also found it significant that a gun was involved. *Id.* "At bottom," it concluded, "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." *Id.*

The Court continued, determining that given the circumstances of the emergency, it could not say that a person in the victim's situation would have had the primary purpose of establishing past facts relevant to a criminal prosecution. *Id.* at 29. As to the motivations of the police, the Court concluded that they solicited information from the victim to meet the ongoing emergency. *Id.* at 30. Finally, it found that the informality of the situation and interrogation further supported the conclusion that the victim's statements were non-testimonial.

Justice Thomas concurred in the judgment, agreeing that the statements were non-testimonial but resting his conclusion on the lack of formality that attended them. Justices Scalia and Ginsburg dissented. Justice Kagan took no part in the consideration or decision of the case.

Bullcoming v. New Mexico, 131 S. Ct. 2705 (June 23, 2011). In a straightforward application of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (June 25, 2009) (holding that forensic laboratory reports are testimonial and thus subject to *Crawford*), the Court held that substitute analyst testimony in an impaired driving case violated *Crawford*. The defendant was arrested on charges of driving while intoxicated (DWI). Evidence against him included a forensic laboratory report certifying that his blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on the defendant's blood sample. The New Mexico Supreme Court determined that, although the blood-alcohol analysis was "testimonial," the Confrontation Clause did not require the certifying analyst's in-court testimony. Instead, New Mexico's high court held, live testimony of another analyst satisfied the constitutional requirements. The Court reversed, holding that "surrogate testimony of that order does not meet the constitutional requirement."

Briscoe v. Virginia, 130 S. Ct. 1316 (Jan. 25, 2010). Certiorari was granted in this case four days after the Court decided *Melendez-Diaz.* The case presented the following question: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause by providing that the accused has a right to call the analyst as his or her own witness? The Court's two-sentence per curiam decision vacated and remanded for "further proceedings not inconsistent with the opinion in *Melendez-Diaz."*

Arrest, Search, and Investigation

Pretext

Ashcroft v. al-Kidd, 131 S. Ct. 2074 (May 31, 2011). In the context of a qualified immunity analysis, the Court reversed the Ninth Circuit and held, in relevant part, that an objectively reasonable arrest and detention pursuant to a validly obtained material witness arrest warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive. The complaint had alleged that in the aftermath of the September 11th terrorist attacks, then-Attorney General John Ashcroft authorized federal prosecutors and law enforcement officials to use the material-witness statute to detain individuals with suspected ties to terrorist organizations, that federal officials had no intention of calling most of these individuals as witnesses, and that they were detained, at Ashcroft's direction, because officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime.

Exclusionary Rule

Davis v. United States, 131 S. Ct. 2419 (June 16, 2011). The exclusionary rule (a deterrent sanction baring the prosecution from introducing evidence obtained by way of a Fourth Amendment violation) does not apply when the police conduct a search in compliance with binding precedent that is later

overruled. Alabama officers conducted a routine traffic stop that eventually resulted in the arrests of driver Stella Owens for driving while intoxicated and passenger Willie Davis for giving a false name to police. The police handcuffed both individuals and placed them in the back of separate patrol cars. The police then searched the passenger compartment of Owens's vehicle and found a revolver inside Davis's jacket pocket. The search was done in reliance on precedent in the jurisdiction that had interpreted *New York v. Belton*, 453 U.S. 454 (1981), to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee was within reaching distance of the vehicle at the time of the search. Davis was indicted on a weapons charge and unsuccessfully moved to suppress the revolver. He was convicted. While Davis's case was on appeal, the Court decided *Arizona v. Gant*, 556 U.S. 332 (2009), adopting a new, two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest. Analyzing whether to apply the exclusionary rule to the search at issue, the Court determined that "[the] acknowledged absence of police culpability dooms Davis's claim." Slip Op. at 10. It stated: "Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Slip Op. at 1.

Exigent Circumstances

Kentucky v. King, 131 S. Ct. 1849 (May 16, 2011). The Court reversed and remanded a decision of the Kentucky Supreme Court and held that the exigent circumstances rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. Police officers set up a controlled buy of crack cocaine outside an apartment complex. After an undercover officer watched the deal occur, he radioed uniformed officers to move in, telling them that the suspect was moving quickly toward the breezeway of an apartment building and urging them to hurry before the suspect entered an apartment. As the uniformed officers ran into the breezeway, they heard a door shut and detected a strong odor of burnt marijuana. At the end of the breezeway they saw two apartments, one on the left and one on the right; they did not know which apartment the suspect had entered. Because they smelled marijuana coming from the apartment on the left, they approached that door, banged on it as loudly as they could and announced their presence as the police. They heard people and things moving inside, leading them to believe that drug related evidence was about to be destroyed. The officers then announced that they were going to enter, kicked in the door, and went in. They found three people inside: the defendant, his girlfriend, and a guest who was smoking marijuana. During a protective sweep, the officers saw marijuana and powder cocaine in plain view. In a subsequent search, they found crack cocaine, cash, and drug paraphernalia. The police eventually entered the apartment on the right, where they found the suspected drug dealer who was the initial target of their investigation. On these facts, the state supreme court determined that the exigent circumstances rule did not apply because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. The U.S. Supreme Court rejected this interpretation stating, "the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable." It concluded: "Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." The Court did not rule on whether exigent circumstances existed in this case.

Miranda

Florida v. Powell, 130 S. Ct. 1195 (Feb. 23, 2010). Advice by law enforcement officers that the defendant had "the right to talk to a lawyer before answering any of [the law enforcement officers'] questions" and that he could invoke this right "at any time . . . during th[e] interview," satisfied *Miranda*'s requirement

that the defendant be informed of the right to consult with a lawyer and have the lawyer present during the interrogation. Although the warnings were not as clear as they could have been, they were sufficiently comprehensive and comprehensible when given a commonsense reading. The Court cited the standard warnings used by the FBI as "exemplary," but declined to require that precise formulation to meet *Miranda*'s requirements.

J.D.B. v. North Carolina, 131 S. Ct. 2394 (June 16, 2011). In this North Carolina case, the Court held, in a five-to-four decision, that the age of a child subjected to police questioning is relevant to the *Miranda* custody analysis. J.D.B. was a 13-year-old, seventh-grade middle school student when he was removed from his classroom by a uniformed police officer, brought to a conference room, and questioned by police. This was the second time that police questioned J.D.B. in a week. Five days earlier, two home break-ins occurred, and items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police spoke to J.D.B.'s grandmother—his legal guardian—and his aunt. Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s school and in his possession. Investigator DiCostanzo went to the school to question J.D.B. A uniformed school resource officer removed J.D.B. from his classroom and escorted him to a conference room, where J.D.B. was met by DiCostanzo, the assistant principal, and an administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for 30-45 minutes. Before the questioning began, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave. J.D.B. eventually confessed to the break-ins. Juvenile petitions were filed against J.D.B. and at trial, J.D.B.'s lawyer moved to suppress his statements, arguing that J.D.B. had been subjected to a custodial police interrogation without *Miranda* warnings. The trial court denied the motion and J.D.B. was adjudicated delinquent. The N.C. Court of Appeals affirmed. The N.C. Supreme Court held that J.D.B. was not in custody, declining to extend the test for custody to include consideration of the age of the individual questioned. The U.S. Supreme Court reversed, holding that the *Miranda* custody analysis includes consideration of a juvenile suspect's age and concluding, in part: "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis." Slip Op. at 8. The Court distinguished a child's age "from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action." Slip Op. at 11. It held: "[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." Slip Op. at 14. However, the Court cautioned: "This is not to say that a child's age will be a determinative, or even a significant, factor in every case." *Id.* The Court remanded for the North Carolina courts to determine whether J.D.B. was in custody when the police interrogated him, "this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age." Slip Op. at 18.

Maryland v. Shatzer, 130 S. Ct. 1213 (Feb. 24, 2010). The Court held that a 2½ year break in custody ended the presumption of involuntariness established in *Edwards v. Arizona*, 451 U.S. 477 (1981) (when a defendant invokes the right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing that the defendant responded to further police-initiated custodial interrogation even if the defendant has been advised of his *Miranda* rights; the defendant is not subject to further interrogation until counsel has been provided or the defendant initiates further communications with the police). The defendant was initially interrogated about a sexual assault while in prison serving time for an unrelated crime. After *Miranda* rights were given, he declined to be interviewed without counsel, the interview ended, and the defendant was released back into the prison's general population. 2½ years later another officer interviewed the defendant in prison about the same sexual assault. After the officer read the defendant his *Miranda* rights, the defendant waived those rights

in writing and made incriminating statements. At trial, the defendant unsuccessfully tried to suppress his statements pursuant to *Edwards.* The Court concluded: "The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects." The Court went on to set a 14-day break in custody as the bright line rule for when the *Edwards* protection terminates. It also concluded that the defendant's release back into the general prison population to continue serving a sentence for an unrelated conviction constituted a break in *Miranda* custody.

Berghuis v. Thompkins, 130 S. Ct. 2250 (June 1, 2010). The defendant was arrested in connection with a shooting that left one victim dead and another injured. At the start of their interrogation of the defendant, officers presented him with a written notification of his constitutional rights, which contained *Miranda* warnings. During the three-hour interrogation, the defendant never said that he wanted to remain silent, did not want to talk with the police, or he wanted a lawyer. Although he was largely silent, he gave a limited number of verbal answers, such as "yeah," "no," and "I don't know," and on occasion he responded by nodding his head. After two hours and forty-five minutes, the defendant was asked whether he believed in God and whether he prayed to God. When he answered in the affirmative, he was asked, "Do you pray to God to forgive you for shooting that boy down?" The defendant answered "yes," and the interrogation ended shortly thereafter. The Court rejected the defendant's argument that his answers to the officers' questions were inadmissible because he had invoked his privilege to remain silent by not saying anything for a sufficient period of time such that the interrogation should have ceased before he made his inculpatory statements. Noting that in order to invoke the *Miranda* right to counsel, a defendant must do so unambiguously, the Court determined that there is no reason to adopt a different standard for determining when an accused has invoked the *Miranda* right to remain silent. It held that in the case before it, the defendant's silence did not constitute an invocation of the right to remain silent. The Court went on to hold that the defendant knowingly and voluntarily waived his right to remain silent when he answered the officers' questions. The Court clarified that a waiver may be implied through the defendant's silence, coupled with an understanding of rights, and a course of conduct indicating waiver. In this case, the Court concluded that there was no basis to find that the defendant did not understand his rights, his answer to the question about praying to God for forgiveness for the shooting was a course of conduct indicating waiver, and there was no evidence that his statement was coerced. Finally, the Court rejected the defendant's argument that the police were not allowed to question him until they first obtained a waiver as inconsistent with the rule that a waiver can be inferred from the actions and words of the person interrogated.

Searches

City of Ontario v. Quon, 130 S. Ct. 2619 (June 17, 2010). Because a search of a government employee's text messages sent and received on a government-issued pager was reasonable, there was no violation of Fourth Amendment rights.

Criminal Offenses

United States v. Stevens, 130 S. Ct. 1577 (April 20, 2010). Federal statute enacted to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty was substantially overbroad and violated the First Amendment.

Snyder v. Phelps, 131 S. Ct. 1207 (Mar. 2, 2011). The First Amendment shields members of a church from tort liability for picketing near a soldier's funeral. A jury held members of the Westboro Baptist

Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The picketing occurred in Maryland. Although that state now has a criminal statute in effect restricting picketing at funerals, the statute was not in effect at the time the conduct at issue arose. Noting that statute and that other jurisdictions have enacted similar provisions, the Court stated: "To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional." Slip Op. at 11.

McDonald v. City of Chicago, 130 S. Ct. 3020 (June 28, 2010). The Second Amendment right to keep and bear arms applies to the states. For a more detailed discussion of this case see this blog post: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1386

Post-Conviction

DNA Testing

Skinner v. Switzer, 131 S. Ct. 1289 (Mar. 7, 2011). In a 6-to-3 decision, the Court held that a convicted state prisoner seeking DNA testing of crime-scene evidence may assert a claim under 42 U.S.C. § 1983. However, the Court noted that *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308 (2009), severely limits the federal action a state prisoner may bring for DNA testing. It stated: "*Osborne* rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process." Slip Op. at 2 (citation omitted).

Ineffective Assistance of Counsel

Padilla v. Kentucky, 130 S. Ct. 1473 (Mar. 31, 2010). After pleading guilty to a charge of transportation of a large amount of marijuana, the defendant, a lawful permanent resident of the United States for more than 40 years, faced deportation. He challenged his plea, arguing that his counsel rendered ineffective assistance by failing to inform him that the plea would result in mandatory deportation and by incorrectly informing him that he did not have to worry about his immigration status because he had been in the country so long. The Court concluded that when, as in the present case, "the deportation consequence [of a plea] is truly clear," counsel must correctly inform the defendant of this consequence. However, the Court continued, where deportation consequences of a plea are "unclear or uncertain[] [t]he duty of the private practitioner . . . is more limited." It continued: "When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." The Court declined to rule whether the defendant was prejudiced by his lawyer's deficient conduct.

Smith v. Spisak, 130 S. Ct. 676 (Jan. 12, 2010). Even if counsel's closing argument at the sentencing phase of a capital trial fell below an objective standard of reasonableness, the defendant could not show that he was prejudiced by this conduct.

Wood v. Allen, 130 S. Ct. 841 (Jan. 20, 2010). The state court's conclusion that the defendant's counsel made a strategic decision not to pursue or present evidence of his mental deficiencies was not an unreasonable determination of the facts. The Court did not reach the question of whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland.*

Sears v. Upton, 130 S. Ct. 3259 (June 29, 2010) (per curiam). After the defendant was sentenced to death in state court, a state post-conviction court found that the defendant's lawyer conducted a constitutionally inadequate penalty phase investigation that failed to uncover evidence of the defendant's significant

mental and psychological impairments. However, the state court found itself unable to assess whether counsel's conduct prejudiced the defendant; because counsel presented some mitigating evidence, the state court concluded that it could not speculate as to the effect of the new evidence. It thus denied the defendant's claim of ineffective assistance. The United State Supreme Court held that although the state court articulated the correct prejudice standard (whether there was a reasonable likelihood that the outcome of the trial would have been different if counsel had done more investigation), it failed to properly apply that standard. First, the state court put undue reliance on the assumed reasonableness of counsel's mitigation theory, given that counsel conducted a constitutionally unreasonable mitigation investigation and that the defendant still might have been prejudiced by counsel's failures even if his theory was reasonable. More fundamentally, the Court continued, in assessing prejudice, the state court failed to consider the totality of mitigation evidence (both that adduced at trial and the newly uncovered evidence). The prejudice inquiry, the Court explained, requires the state court to speculate as to the effect of the new evidence. A proper prejudice inquiry, it explained, requires the court to consider the newly discovered evidence along with that introduced at trial and assess whether there is a significant probability that the defendant would have received a different sentence after a constitutionally sufficient mitigation investigation.

Harrington v. Richter, 131 S. Ct. 770 (Jan. 19, 2011). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that his counsel was deficient by failing to present expert testimony on serology, pathology, and blood spatter patterns; the defendant had asserted that this testimony would have confirmed his version of how the events in question occurred. The Court concluded that it was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence under the circumstances, which included, among other things, the fact that counsel had reason to question the truth of the defendant's version of the events. The Court also rejected the Ninth Circuit's conclusion that counsel was deficient because he had not expected the prosecution to offer expert testimony and therefore was unable to offer expert testimony of his own in response. The Court concluded that although counsel was mistaken in thinking the prosecution would not present forensic testimony, the prosecution itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial. For this reason alone, the Court concluded, it is at least debatable whether counsel's error was so fundamental as to call the fairness of the trial into doubt. Finally, the Court concluded that it would not have been unreasonable for the state court to conclude that the defendant failed to establish prejudice. Justice Kagan did not participate in the consideration or decision of the case.

Premo v. Moore, 131 S. Ct. 733 (Jan. 19, 2011). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that counsel was ineffective by failing to file a motion to suppress the defendant's confession to police before advising him to accept a plea offer. Counsel had explained that he discussed the plea bargain with the defendant without first challenging the confession to the police because suppression would serve little purpose given that the defendant had made full and admissible confessions to two other private individuals, both of whom could testify. The state court would not have been unreasonable to accept this explanation. Furthermore, the Court held, the state court reasonably could have determined that the defendant would have accepted the plea agreement even if his confession had been ruled inadmissible. Justice Kagan did not participate in the consideration or decision of the case.

Cullen v. Pinholster, 131 S. Ct. 1388 (April 4, 2011). In a capital case, the Ninth Circuit Court of Appeals improperly granted the defendant habeas relief on his claim of penalty-phase ineffective assistance of counsel. The defendant and two accomplices broke into a house at night, killing two men who interrupted the burglary. A jury convicted the defendant of first-degree murder, and he was sentenced to death. After the California Supreme Court twice denied the defendant habeas relief, a federal district court held an evidentiary hearing and granted the defendant relief under 28 U.S.C. § 2254 on grounds of "inadequacy

of counsel by failure to investigate and present mitigation evidence at the penalty hearing." Sitting en banc, the Ninth Circuit affirmed, holding that the California Supreme Court unreasonably applied *Strickland* v. *Washington*, 466 U. S. 668 (1984), in denying the defendant's claim of penalty-phase ineffective assistance of counsel. The U.S. Supreme Court reversed, concluding that the defendant failed to show that the state court unreasonably concluded that defense counsel's penalty phase "family sympathy" strategy (that consisted principally of the testimony of the defendant's mother) was appropriate. Likewise, the defendant failed to show that the state court unreasonably concluded and that even if counsel's conduct was deficient, no prejudice occurred, given that the new evidence largely duplicated the mitigation evidence presented at trial and the extensive aggravating evidence.

§ 1983 Liability

Connick v. Thompson, 131 S. Ct. 1350 (Mar. 29, 2011). A district attorney's office may not be held liable under 42 U.S.C. § 1983 for failure to train based on a single *Brady* violation. The Orleans Parish District Attorney's Office conceded that, in prosecuting the defendant for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over under *Brady*. The defendant was convicted. Because of that conviction, the defendant chose not to testify in his own defense in his later murder trial. He was again convicted and spent 18 years in prison. Shortly before his scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory and both convictions were vacated. The defendant then sued the district attorney's office for damages under § 1983, alleging that the district attorney failed to train prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure at issue. The jury awarded the defendant $14 million, and Fifth Circuit affirmed. Reversing, the Court, in an opinion authored by Justice Thomas, clarified that the failure-to-train claim required the defendant to prove both that (1) the district attorney, the policymaker for the district attorney's office, was deliberately indifferent to the need to train prosecutors about their *Brady* disclosure obligation with respect to the type of evidence at issue and (2) the lack of training actually caused the *Brady* violation at issue. The Court determined that the defendant failed to prove that the district attorney was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. The Court noted that a pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. Here, however, no such pattern existed; the Court declined to adopt a theory of "single-incident liability." Justice Scalia concurred, joined by Justice Alito, writing separately only to address several issues raised by the dissent. Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. For another discussion of this opinion, see the blog post here: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2087

Jails and Corrections

Brown v. California, 131 S. Ct. 1910 (May 23, 2011). In a 5-to-4 decision, the Court affirmed a remedial order issued by a three-judge court directing California to remedy ongoing constitutional violations involving prisoners with serious mental disorders and medical conditions primarily caused by prison overcrowding. The order below leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—California will be required to release some number of prisoners before their full sentences have been served. The Court held that the Prison Litigation Reform Act of 1995 authorizes the relief afforded and that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights.

Wilkins v. Gaddy, 130 S. Ct. 1175 (Feb. 22, 2010). The trial court erred by dismissing the prisoner's excessive force claim on grounds that his injuries were de minimis. In an excessive force claim, the core

inquiry is not whether a certain quantum of injury was sustained but rather whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Judicial Administration

Presley v. Georgia, 130 S. Ct. 721 (Jan. 19, 2010). The Sixth Amendment right to a public trial extends to the voir dire of prospective jurors. Trial courts are required to consider alternatives to closure even when they are not offered by the parties.