
CRIMINAL PROCEDURE DECISIONS FROM THE OCTOBER 2007 TERM

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I. EIGHTH AMENDMENT CASES

There were quite a number of criminal procedure cases decided this past term, and I thought I would start with the two most important of the term to make sure that we have time to discuss them. Those are the two Eighth Amendment cases. One is about *how* the death penalty is implemented, and the other about *when* it may be imposed; both cases focused on the definition of cruel and unusual punishment.

A. *Baze v. Rees*

*Baze v. Rees*¹ was a case much in the news. I am sure you must have read about it at the time, because after the Supreme Court granted certiorari on the question of whether or not Kentucky's method of giving lethal injections was cruel and unusual, there was a

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¹ 128 S. Ct. 1520 (2008).

question about what other states should then do.² Many other states ended up staying their executions while *Baze* was pending so that they could see what the Supreme Court would say.³ As it turned out, they did not have to worry. The lethal injection method that Kentucky used, which employed three drugs in combination, was the method of execution used in thirty-six of the thirty-eight of the states that permit capital punishment.⁴ To give you a sense of the significance of this issue, since the Supreme Court put capital punishment back on track in 1976 by ruling that it was permissible,⁵ 952 executions have taken place by lethal injection; 155 by electric chair, eleven by gas chamber, three by hanging, and two by firing squad.⁶

As you may have read at the time, this three drug cocktail that Kentucky and most other jurisdictions used had become the state of the art. One argument made by the defendant in this case was that the three different drugs in the cocktail had been selected partially because one of the drugs that is given early on prevents the person being executed from showing any effects of the later drug that would actually end up killing him.⁷ Therefore, a defendant would be unable to communicate whether he or she was in terrible pain. This is some-

² Alison Nathan, *Pausing the Machinery of Death: The Supreme Court Takes Baze*, JURIST- LEGAL NEWS AND RESEARCH, Sept. 27, 2007, <http://jurist.law.pitt.edu/forumy/2007/09/pausing-machinery-of-death-supreme.php>.

³ Bill Mears, *High Court Upholds Lethal Injection Method*, CNN.com, Apr. 16, 2008, <http://www.cnn.com/2008/CRIME/04/16/scotus.injections/index.html>.

⁴ *Baze*, 128 S. Ct. at 1532.

⁵ *Gregg v. Georgia*, 428 U.S. 153, 180-81 (1976).

⁶ As of October 1, 2008, 952 executions have taken place by lethal injection, 155 by electric chair, eleven by gas chamber, three by hanging, and two by firing squad. See Clark County Prosecuting Attorney's Office, U.S. Executions Since 1976, <http://www.clarkprosecutor.org/html/death/usexecute.htm> (last visited Mar. 14, 2009).

⁷ *Baze*, 128 S. Ct. at 1530.

thing that is obviously extremely difficult to prove, whether someone on the brink of dying and who cannot communicate is in terrible pain.

The big question for the Supreme Court was what standard would be applied in evaluating the constitutional claim. The Supreme Court, in a seven-to-two decision, with the opinion written by Chief Justice Roberts, adopted a standard that is quite difficult for a person facing execution to meet.⁸ Justice Roberts said that execution is only cruel and unusual if the method that is used presents “a substantial or objectively intolerable risk of serious harm.”⁹ The refusal to adopt an alternative, allegedly less painful procedure is cruel and unusual only if it can be demonstrated that there is an alternative that is feasible, readily implemented and, in fact, significantly reduces a substantial risk of severe pain.¹⁰ I am sure that you will remember from your first year of Constitutional Law that in the land of standards, it is all about the adjectives and adverbs. So the fact that the defendant had to prove all of those things and establish that there would be a substantial risk of severe pain is quite a heavy burden, which the Court held was not met in this case.¹¹

By way of contrast, the only two dissenters, Justices Ginsburg and Souter, said that the question should have been “if the omission

⁸ *Id.* at 1531.

⁹ *Id.* at 1522.

¹⁰ *Id.* at 1532. The Court went on to say:

If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State’s refusal to change its method can be viewed as “cruel and unusual” under the Eighth Amendment.

Id.

¹¹ *Id.* at 1533.

of those safeguards posed an untoward and readily avoidable risk of inflicting severe and unnecessary pain.”¹² So that was the choice, which standard to adopt, and the Court adopted the more stringent choice, decreasing the possibility that a defendant will prevail on such a claim.

There were also two concurrences in *Baze*. One was by Justice Thomas, joined by Justice Scalia, who said that the standard that the Court actually adopted was far too liberal, and that, in fact, an execution method should only be considered to be cruel and unusual if it was used deliberately in order to inflict pain.¹³ That is interesting because it sets forth the more extreme views of Thomas and Scalia, who outflank the majority. What is also interesting to me is that this was a seven-to-two decision, where Justices Roberts and Alito did not join Thomas and Scalia.¹⁴ Instead, they joined the opinion adopting the more moderate standard, and gave defendants some opportunity, more than they would have had under the Thomas and Scalia standard, to show that a particular execution method is cruel and unusual.¹⁵

The other concurrence, which is a concurrence in the judgment, reminded me of Professor Neuborne’s observation that some of

¹² *Baze*, 128 S. Ct. at 1567 (Ginsburg, J., dissenting).

¹³ *Id.* at 1548 (Stevens, J., concurring).

[O]ur society has moved away from public and painful retribution towards ever more humane forms of punishment. State-sanctioned killing is therefore becoming more and more anachronistic. In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic.

Id.

¹⁴ *Baze*, 128 S. Ct. at 1525.

¹⁵ *Id.* at 1556 (Thomas, J., concurring).

Justice Stevens's apparently deeply held beliefs are finally coming out after all of his many years on the Court. Justice Stevens wrote a concurrence basically saying that he has had it with the death penalty and no longer thinks that the death penalty can be regarded as constitutional.¹⁶ His opinion was very reminiscent to me of Harry Blackmun, after twenty years of sitting on the Court saying, "I no longer shall tinker with the machinery of death."¹⁷ Justice Stevens was not quite that pithy. But after the decision, he was discussing the Kentucky Derby and posited that the method used to put down a horse is more humane than the method employed by Kentucky and thirty-five other states during the lethal injection process.¹⁸

At Justice Alito's confirmation hearing, Senator Feingold had asked then-Judge Alito about his views on the death penalty in a colloquy I found to be very interesting. Feingold told Alito that he has seen Justice after Justice go up to the Supreme Court and, after getting a good view of what happens in capital punishment cases around the country, becoming much more distressed about capital punishment generally (as may have happened to Justice Stevens). Feingold wondered aloud what would happen to Alito once he became a Jus-

¹⁶ *Id.* at 1551.

I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

Id. (citing *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

¹⁷ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994).

¹⁸ Monica Mercer, *Chattanooga: Stevens Addresses Lethal Injections*, CHATTANOOGA TIMES FREE PRESS, May 10, 2008, <http://www.timesfreepress.com/news/2008/may/10/chattanooga-stevens-addresses-lethal-injections/>.

tice.¹⁹

B. *Kennedy v. Louisiana*

The other blockbuster capital case last term, *Kennedy v. Louisiana*,²⁰ gave us something of a preliminary answer to that question. *Baze v. Rees* was a seven-to-two decision about the method of execution.²¹ *Kennedy* considered what is cruel and unusual punishment in terms of when somebody may be executed by any method at all. Both Justices Alito and Roberts, this time, voted with the minority in a five-to-four decision, and would have upheld imposing execution for people who commit the crime of raping a child.²²

This was the only five-to-four decision in the criminal procedure area last term. The decision was written by the eponymous Justice Kennedy.²³ Interestingly, Kennedy adopted principles that were broader than needed for this actual case. First, he announced that it would be cruel and unusual punishment to be executed for any crime committed against an individual other than homicide.²⁴ Crimes against the state, like treason, terrorism crimes, and drug kingpin crimes, were distinguished from crimes against the individual.²⁵ It is remarkable that Justice Kennedy now has mapped out all of this terri-

¹⁹ *U.S. Sen. Judiciary Comm. Holds a Hearing on the Nomination of Judge Samuel Alito to the U.S. Supreme Court*, 109th Cong. (2005) (statement of Russ Feingold, Member, Senate Judiciary Committee).

²⁰ 128 S. Ct. at 2641 (2008).

²¹ *Baze*, 128 S. Ct. at 1525.

²² *Kennedy*, 128 S. Ct. at 2645.

²³ *Id.*

²⁴ *Id.* at 2659 (“As it relates to crimes against individuals . . . the death penalty should not be expanded to instances where the victim’s life was not taken”).

²⁵ *Id.*

tory. The decision was even more extraordinary because the Court, by a bare majority, was willing to play a classic countermajoritarian role. Both presidential candidates (including now President Obama) disavowed the Court's result.²⁶ In a Quinnipiac University poll, most people responding thought that it was proper to impose the death penalty for child rape.²⁷ In addition to providing this general prescription for handling future challenges, Justice Kennedy employed three different arguments in reaching his result, each of which is quite remarkable. He started by adopting a principle of parsimony. "When the law punishes by death," he said, "it risks its own sudden descent into brutality."²⁸ Therefore he characterized the death penalty as suspect, saying that the Court should be careful not to allow its imposition any more often than necessary. He described capital punishment law concerning homicide as tremendously confused, striving for some consistency in punishment on the one hand, while on the other hand insisting on giving individual defendants the right to make their best case for not being executed.²⁹ Essentially what Justice Kennedy is saying is that capital punishment law is difficult; it is really messy, and the Court should not tolerate that same mess in additional contexts because that would not be consistent with the principle of parsimony. That is one very intriguing argument for the Justice at the center of the Court to be endorsing.

²⁶ Michael Doyle, *Kennedy has Come to Define Supreme Court's Center*, THE SACRAMENTO BEE, Jul. 6, 2009, <http://www.sacbee.com/111/story/1062867.html>.

²⁷ *Quinnipiac University Poll*, Jul. 17, 2008, <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194>.

²⁸ *Kennedy*, 128 S. Ct. at 2650.

²⁹ *Id.*

The second supporting argument he made is that the Court should follow, as it has in earlier cases, objective indicia of what society regards as cruel and unusual, and that those indicia disfavored capital punishment for child rape.³⁰ In the case of *Roper v. Simmons*, the Supreme Court had said that it is cruel and unusual to execute juveniles.³¹ And the Court had previously said, in *Atkins v. Virginia*, that it is also cruel and unusual to execute the mentally retarded.³² In both of those cases, the methods the Supreme Court had used to gauge society's views were quite controversial. First, the Court looked at what other countries do. Justice Kennedy has gotten around a lot and he knows something about what other countries do. He knows that most countries do not approve of our capital punishment practices.³³ Also, in both *Roper* and *Atkins*, the Court counted how many states in fact authorized the kind of execution at issue in order to try to get a sense of how unusual the punishment was, in addition to how cruel. In those cases, there were about thirty states that did and twenty states that did not, or thirty that did and eighteen that did not.³⁴ In this case, when Justice Kennedy counted the noses of how many state legislatures permitted capital punishment for the rape of a child, the number of pro states he came up with was six. Louisiana had enacted its statute in 1995,³⁵ and five states had followed suit by adopting statutes authorizing capital punishment for the rape of a

³⁰ *Id.*

³¹ 543 U.S. 551, 578 (2005).

³² *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

³³ *Roper*, 543 U.S. at 576.

³⁴ *Id.* at 579, app'x A.I.; *See also Kennedy*, 128 S. Ct. at 2653.

³⁵ *Kennedy*, 128 S. Ct. at 2651.

child.³⁶

Therefore, Justice Kennedy said, by subtraction, forty-four states and the federal government do not make this punishment available for this crime.³⁷ Louisiana had a couple of different arguments in response to this assessment. The first argument was based on trends. They argued that there are more state legislatures considering whether to join Louisiana by adopting such statutes.³⁸ Justice Kennedy said no, this kind of trend in progress does not count. In counting noses, the Court does not care if legislatures are considering modifying their laws; it only cares about what they have actually done.³⁹

The second argument that Louisiana made is that there is an explanation for why most states do not, in fact, have a death penalty for child rape even if they might wish to. In 1977, the Supreme Court, in the case of *Coker v. Georgia*, ruled that it is cruel and unusual punishment to execute people for rape.⁴⁰ Therefore, the state argued, all the states are doing is following what they think the Supreme Court has demanded that they do. Because the states did not feel empowered to make this decision, Louisiana argued, one must discount the fact that they have already adopted statutes making child rape a capital crime.

Justice Kennedy responded that the states should be able to

³⁶ *Id.*

³⁷ *Id.* at 2652.

³⁸ *Id.* at 2656-57.

³⁹ *Id.* at 2669.

⁴⁰ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”).

understand the distinction between adult rape and child rape, as Louisiana had.⁴¹ The Court had never said that capital punishment for child rape would be cruel and unusual punishment.⁴² This is an interesting argument too. After finding that there are only five states doing what Louisiana does, the Court concluded that this punishment is unusual, as well as cruel. Justice Kennedy also looked at actual execution practices, and reported that there has not been any execution in this country for a child rape since 1964.⁴³ The state of Louisiana argued that such executions would have been deemed unconstitutional because of *Coker*,⁴⁴ but Justice Kennedy again gave the states greater credit for legal acumen.⁴⁵

Kennedy's third argument, after talking about the principle of parsimony and objective indicia of what is cruel and unusual, was based on the principle of proportionality. Justice Kennedy acknowledged that child rape is a horrible crime, but said that it still is not the same as killing somebody. It is not irrevocable; it is not as severe. The perpetrator is not taking someone's life away.⁴⁶ Second of all, he said there would be a tremendous increase in the number of execu-

⁴¹ *Kennedy*, 128 S. Ct. at 2648-49 (“[N]oting that, while *Coker* bars the use of the death penalty as punishment for the rape of an adult woman, it left open the question which, if any, other nonhomicide crimes can be punished by death consistent with the Eighth Amendment.”). Louisiana believed that the two situations were distinguishable. Because “ ‘children are a class that need special protection,’ ” the state court reasoned, the rape of a child is unique in terms of the harm it inflicts upon the victim and our society.” *Id.*

⁴² *See id.* at 2650.

⁴³ *Id.* at 2643-44.

⁴⁴ *See id.* at 2650.

⁴⁵ *Id.* (“[T]he [*Coker*] Court held it would be unconstitutional to execute an offender who had raped an adult woman.”).

⁴⁶ *Kennedy*, 128 S. Ct. at 2654 (“Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life.”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)).

tions if the Court allowed executions for child rape as well as homicide,⁴⁷ which is obviously only a bad thing if one accepts his first principle of parsimony out of general concern about the death penalty.

And finally, Justice Kennedy said that if capital punishment were available for child rape, that would mean that very often there would be child victims testifying at a capital trial, and their testimony can be quite unreliable.⁴⁸ When you get to that part of the opinion, you begin to understand why Justice Kennedy started his opinion, even though he was going to hold that it was cruel and unusual to execute the defendant for this crime, with a detailed description of the crime itself. The details were horrific, but what had also happened in this case was that the child, Mr. Kennedy's stepdaughter, had initially told an entirely different story, identifying someone else as the rapist. After about twenty-one months, she changed her story and said that it had been her stepfather who had done it.⁴⁹ Whether or not there was any doubt about the accuracy of the verdict in this case, the malleability of the young victim's testimony seemed to Kennedy to portend a risk of executing the innocent in some case. So this principle of proportionality, encompassing concern about the reliability of the testimony on which the predicate conviction would be based, became the third basis for Justice Kennedy's decision.

There was a very interesting sequel to this story, concerning the power of the press—individual bloggers as well as the profes-

⁴⁷ *Id.* at 2672.

⁴⁸ *Id.* at 2663.

⁴⁹ *Id.* at 2647.

sional press. Somebody wrote on a blog that Justice Kennedy had actually made a mistake in his opinion, because it was not true that forty-four states and the federal government did not permit capital punishment for child rape.⁵⁰ The blog pointed out that in 2006, Congress had amended the Uniform Code of Military Justice (“UCMJ”) to permit execution for the rape of a child.⁵¹ Linda Greenhouse picked this up, published the fact in the *New York Times*, and called the lawyers involved to solicit their comments.⁵² She asked the people in Louisiana, “are you going to petition for rehearing in light of this discrepancy?” They said “Ummm.” The State did decide to petition for a rehearing.⁵³ And in terms of lawyer stories, I thought it was extremely interesting that the petition for a rehearing on the basis that the Supreme Court made a mistake in its opinion was signed by both Viet Dinh and Neil Kumar Katyal, lawyers who had been on opposing sides in many other cases concerning, for example, terrorism issues.⁵⁴

That rehearing petition is still pending. I think it is extremely unlikely that the Supreme Court will take back its decision and redo the whole case, and say never mind because of the UCMJ. Very possibly they will have to write a corrected opinion in which they leave out or modify the blanket statement about federal law. The opinion

⁵⁰ Don Cruse, *Perils of Fifty-State Surveys: Kennedy v. Louisiana, Supreme Court of Texas Blog* (July 3, 2008), <http://www.scotxblog.com/practice-notes/perils-of-fifty-state-surveys/> (last visited March 14, 2009).

⁵¹ *Id.* See 9 U.S.C.A. § 11 (West 2007).

⁵² Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1.

⁵³ See Appellant’s Petition for Rehearing, *Kennedy*, 2008 WL 4414670 (U.S. Apr. 23, 2008).

⁵⁴ *Id.*

might change, the numbers might change, but the constitutional ruling is unlikely to change.

II. FOURTH AMENDMENT

I will move on to discuss the one and only Supreme Court Fourth Amendment case this year, *Virginia v. Moore*.⁵⁵ I should admit that I wrote an amicus brief on the losing side and lost unanimously. And I thought it was a much more difficult case than the Supreme Court apparently did.

Here is what happened. The case involved some absolutely bizarre coincidences which are not mentioned in the Supreme Court's opinion. Virginia state troopers stopped a man named David Lee Moore because they believed that he was driving with a suspended license. The reason they thought this was that a dispatcher had said that a guy with the nickname Chubs was driving with a suspended license. And one of the troopers happened to know that David Lee Moore used the nickname Chubs. It turned out that he was not the same person that the dispatcher was talking about, but a different person nicknamed Chubs. Oddly enough, though, David Lee Moore was indeed driving with a suspended license.⁵⁶

So the police arrested him. The actual reason for the arrest quickly became apparent: once they arrested Moore, the troopers asked him if they could just take him back to his motel room and asked him to consent to a search of his motel room, which he did. When they got to the room, one of the officers suddenly realized that

⁵⁵ 128 S. Ct. 1598 (2008).

⁵⁶ *Id.* at 1601.

they had neglected to conduct a search incident to arrest of Moore himself (which suggested that they did not regard him as dangerous). The officer then searched him and, bottom line, they found the drugs which became the basis for the prosecution in question.⁵⁷

Moore moved to exclude the drugs. His argument was that his arrest was not legal under Virginia law.⁵⁸ There is a very clear Virginia statute stating that if an officer stops somebody for driving with a suspended license, the officer is supposed to issue him or her a citation. They are not permitted to take the person into custody.⁵⁹

One exception to the Fourth Amendment warrant requirement is that officers can perform a search incident to a lawful arrest.⁶⁰ But this arrest was not lawful. I have tried describing this case to different groups of lawyers and non-lawyers, including to a group of teachers participating in a Street Law program. They were given the relevant Supreme Court precedents to read and told the facts of this case. They overwhelmingly thought, “How can you possibly allow the evidence when the arrest never should have been made?” That is what the Virginia Supreme Court thought too, unanimously. All seven of the justices on the Virginia Supreme Court concluded that the troopers should not have arrested Moore in the first place and therefore found the evidence resulting from the search incident to that arrest to be inadmissible.⁶¹

⁵⁷ *Id.* at 1601-02.

⁵⁸ *Id.* at 1602.

⁵⁹ VA. CODE ANN. § 19.2-74 (West 2008).

⁶⁰ 3 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 210 (4th ed. 2004).

⁶¹ *Moore v. Commonwealth of Virginia*, 636 S.E.2d 395, 400 (Va. 2006) (“The officers were authorized to issue only a summons . . . the officers could not lawfully conduct a full

A couple of years later, the United States Supreme Court heard the case on appeal and reversed, also unanimously.⁶² Justice Scalia wrote the opinion of the Court, starting his analysis, of course, with common law. He went back to the eighteenth century to answer the question of whether or not an arrest in violation of a state law should in fact result in an exclusion of evidence under the federal constitution.⁶³ He found that there is no conclusive common law history, but nevertheless concluded that no one in the eighteenth century really worried about what the positive law in the statutes said. He talked, as he has in the past, about the need for national uniformity in Fourth Amendment law.⁶⁴ And we all know from recent decisions that Justice Scalia just does not like the exclusionary rule.⁶⁵ That is what this case is all about: Why should the Court allow the federal exclusionary rule to be used in a Virginia case, when Virginia itself was not willing to use the exclusionary rule for a violation of its state law?

The Virginia Supreme Court had its hands tied because Virginia law states that unless the legislature provides that evidence should be excluded, there is no exclusionary remedy.⁶⁶ The Virginia state constitution was useless.⁶⁷

field-type search.”).

⁶² *Moore*, 128 S. Ct. at 1601.

⁶³ *Id.* at 1602-04.

⁶⁴ *Id.* at 1604.

⁶⁵ *See, e.g., Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (“The exclusionary rule generates ‘substantial social costs’ which sometimes include setting the guilty free and the dangerous at large”) (citing *United States v. Leon*, 468 U.S. 897, 907 (1984)); *Pennsylvania Bd. of Probation and Parole v. Scott*, 118 S. Ct. 2014, 2021 (1998) (“The exclusionary rule frequently requires extensive litigation . . .”).

⁶⁶ *McCarter v. Commonwealth of Virginia*, 566 S.E.2d 868, 869 (Va. Ct. App. 2002).

⁶⁷ *See* VA. CONST. art. VI (the search and seizure provision does not prohibit unreasonable

The reason I wrote an amicus brief in this case, even though I predicted that the result would be what it was, was that this case was the third strike against the possibility of meaningful Fourth Amendment limitations on arbitrary and discriminatory police conduct. Justice Scalia wrote a decision in 1996 in a case called *Whren v. United States*, the first strike, where he said that if an officer decided to stop someone for a traffic offense, like driving a mile over the speed limit or turning without signaling, that stop would be reasonable as long as the officer had probable cause to believe that the driver really had committed the traffic offense⁶⁸ Under *Whren*, the Court does not look at what the officer's subjective intent was.⁶⁹ Even if the traffic stop was a pretext, it would be permissible for the officer to conduct an arrest and then to search the arrestee and his or her vehicle.⁷⁰

The second strike, *Atwater v. City of Lago Vista*, the "soccer Mom" case, said that if an officer has probable cause to believe that somebody has committed an offense, even a traffic infraction like a child not wearing a seat belt, punishable only by a maximum of a \$50 fine, that officer can conduct an arrest and a search incident to arrest.⁷¹ Arrest for minor fine-only offenses will not be considered unreasonable. I have argued in my briefs in these cases that to allow pretextual arrests for minor traffic infractions is to invite and condone racial profiling.⁷² Justice Souter, in *Atwater v. City of Lago Vista*,

searches and seizures, but provides only narrower protection).

⁶⁸ *Whren v. United States*, 517 U.S. 806 (1996).

⁶⁹ *Id.* at 813.

⁷⁰ *Id.* at 819.

⁷¹ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

⁷² See ACLU Amicus Brief in *Atwater v. City of Lago Vista*, <http://www.aclu.org/scotus/2000/223051gl20001001.html>;

asked how often it would happen that a particular officer wanted to arrest a soccer mom whose child was not wearing a seat belt.⁷³ The real answer is that officers arrest people all the time because they want to see if they have drugs in the car. If you give officers a basis and make it really easy, then you are going to have officers who engage in racial profiling; you will have officers stopping whomever they want, ostensibly for traffic infractions, in order to search them for drugs. Is there anyone in this room who has never driven a mile over the speed limit, eaten on the subway, or ridden a bicycle in downtown Orlando, Florida while failing to have a bell or gong?⁷⁴ These are all arrestable offenses which then become the predicate for full searches of one's body and one's car. The search incident to arrest doctrine is stood on its head and becomes an arrest incident to the desire to search authority. Even if the Fourth Amendment is not read to impose any subjective or objective limitations on what constitutes a "reasonable" arrest, providing that officers must, at least, comply with state-imposed limitations on the arrest power and consequently the search power (allowing searches only pursuant to a lawful arrest) would have been a last ditch means of imposing some sort of limit on what otherwise amount to general searches. Instead, the Supreme Court has now confirmed that officers have a blank check to engineer a search of virtually anyone who drives a vehicle.

Now, this ties into something I would like to say to follow up on earlier discussion about the Second Amendment. You all remem-

<http://www.aclu.org/scotus/1995/23049prs19960628.html> (describing the *Whren* amicus brief).

⁷³ *Id.* at 353 n.25.

⁷⁴ *See* Thomas v. Florida, 614 So. 2d 468 (Fla. 1993).

ber from Constitutional Law the theory of incorporation, that the Fourteenth Amendment incorporates certain Bill of Rights provisions. So if the Fourth Amendment is going to apply to the state of Virginia, it only applies to the state of Virginia because the Fourteenth Amendment came along in the nineteenth century.

There is a concurrence in *Virginia v. Moore* by Ruth Bader Ginsburg, who uses one word that I think is just fascinating. She said that this case is not as easy as the majority is making it, because the law in the “*nineteenth*” century might not clearly have allowed this form of police discretion⁷⁵ (as opposed to the *eighteenth* century law Justice Scalia consulted).

Justice Ginsburg is onto an extremely interesting question about which era originalists should consult. Between the drafting of the Fourth Amendment and the drafting of the Fourteenth Amendment (the vehicle for incorporating the Fourth Amendment’s protections to state law), there were a lot of changes in thinking about when federal constitutional authority was needed to limit what a state can do. I think the Virginia Supreme Court’s frustration in this case is a very good example of why federal power is needed to protect the rights of people in Virginia. There was not enough political will in the state of Virginia to exclude evidence resulting from an unlawful arrest. Therefore, Moore looked to federal law to protect him against the state’s failure to follow through on its declaration that his arrest was illegal. During the nineteenth century, just before the framing of the Fourteenth Amendment, search and seizure authority was being

⁷⁵ See *Moore*, 128 S. Ct. at 1609 n.1 (Ginsburg, J., concurring).

used against freed men and slaves in horrifying ways; people were picked up and arrested all the time if they did not have their freedom papers on them, for example. The Fourteenth Amendment could easily be read to interpose federal constitutional protection between the state and an individual like Moore, who was being targeted by state law enforcement personnel possibly (even if perhaps unconsciously) on the basis of his race.⁷⁶

I think there is a similar argument to be made when the Court gets to the question of incorporation of the Second Amendment. In the nineteenth century, a lot of the slave states had laws prohibiting black people from owning guns even after they were freed.⁷⁷ During the nineteenth century, there was a strong feeling among the framers of the Fourteenth Amendment that freed slaves had to have a right to own a gun, because no one else was going to defend them. Freed slaves had the Ku Klux Klan after them; they did not have the sheriffs in Mississippi coming to their defense. Thus, they needed the ability to own a gun. That opens a very interesting question about nineteenth century originalism, something the Court has given zero attention to. If the question is whether to apply a Bill of Rights provision to the states, which is more relevant, the intent of the eighteenth century framers of the Second Amendment, or the intent of the nineteenth century framers of the Due Process Clause? If you are interested in researching the possibilities of this type of argument, Akhil Amar wrote a very interesting book called *The Bill of Rights:*

⁷⁶ See generally ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 (2006).

⁷⁷ Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 159 (2001).

Creation and Reconstruction, which began to explore this subject.⁷⁸

One thing is consistent in the Fourth Amendment cases heard by the Court following September 11, 2001: the results. Of twenty-three cases decided, the Fourth Amendment lost twenty times.⁷⁹ Thus, the results have been consistent. Even though all of the cases are about drugs and guns, it seems evident that what is in the minds of the Justices is empowering law enforcement officials to find terrorists.⁸⁰

III. SIXTH AMENDMENT

By comparison, the Sixth Amendment fares much better in the Supreme Court than the Fourth Amendment. One reason for this is that Antonin Scalia is very fond of the Sixth Amendment. We know where Scalia is on the Confrontation Clause. He is on the tough side of it. You may recall that a few years back in the *Crawford* case, Scalia led the Court in a wholesale renovation of the right of confrontation.⁸¹

A. Confrontation Clause

Last year there was one new Confrontation Clause case—*Giles v. California*.⁸² When you read the description, you think, oh, I

⁷⁸ See generally AKHIL R. AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* ch. 4, at 64 (1998).

⁷⁹ As of October 29, 2008, a search conducted on Westlaw returned twenty-three Fourth Amendment cases decided by the Supreme Court since September 11, 2001. Of these cases, the Fourth Amendment lost twenty times. Search terms used were “fourth amendment” & “search and seizure” & da(aft 9/11/2001).

⁸⁰ See *Illinois v. Caballes*, 543 U.S. 405, 417 n.7 (2005) (Souter, J., dissenting).

⁸¹ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁸² 128 S. Ct. 2678 (2008).

know what the answer to that is going to be. In this case, Mr. Giles was accused of killing his former girlfriend, and during the trial the court admitted into evidence statements the victim had made implicating him in the murder, even though the statements had not been subject to cross-examination.⁸³ Under the *Crawford* rules, the statement had not been cross-examined and therefore, it should not have been admitted. The statement was certainly “testimonial” within the meaning of *Crawford*. So, the question was whether the statement would fall within an exception.⁸⁴

The potential exception in *Giles* involved what is referred to as the “forfeiture doctrine”—an exception to confrontation which has been around for a while. Under this doctrine, if a defendant kills a person in order to keep that person from testifying, the defendant cannot complain that the witness is unavailable for cross-examination—the right of confrontation has been forfeited.⁸⁵ This was the Supreme Court’s question on certiorari: whether the defendant in this case forfeited his right of confrontation on the ground that he killed the witness?⁸⁶ What do you think the Justices said? I would bet that your guess is wrong.

Justice Scalia wrote the majority opinion in this case—a six-to-three opinion—answering the question in the negative, and basing his answer on the common law. He went back to the old English law books and said no, this is not what they meant by the forfeiture doc-

⁸³ *Id.* at 2681-82.

⁸⁴ *Id.* at 2682.

⁸⁵ *Id.* at 2683.

⁸⁶ *Id.*

trine. The forfeiture doctrine was deemed to apply only if the defendant *intentionally* killed the witness *in order to* prevent his or her testimony.⁸⁷ He rooted this conclusion in a close textual analysis of those dusty cases. To me, a more persuasive explanation of the conclusion of the Court is found in Justice Souter's concurring opinion.⁸⁸ Justice Souter thought that applying the forfeiture doctrine in this case would be illogical and circular. If in a homicide prosecution the state is trying to prove that the defendant killed his former girlfriend and is allowed to use evidence only because he allegedly killed his former girlfriend, we have a problem. The proof can only be used if the result is already proved, but maybe the result cannot be proved unless the proof is admitted. In any event, it is a very interesting ruling because the defendant was so unsympathetic a figure.

I want to mention another case, *Danforth v. Minnesota*, which involved a child victim who testified in a state court trial which took place prior to the Court's decision in *Crawford*.⁸⁹ The Minnesota Supreme Court looked at a challenge to the use of that evidence, which was presumed to violate the standards set forth in *Crawford*, and pondered whether *Crawford* would be applied retroactively by the Supreme Court.⁹⁰

The Minnesota Supreme Court correctly guessed that the Supreme Court was going to decline to apply *Crawford* retroactively.⁹¹

⁸⁷ *Giles*, 128 S. Ct. at 2683-85.

⁸⁸ *Id.* at 2708 (Souter, J., concurring).

⁸⁹ 128 S. Ct. 1029, 1033 (2008) (involving a six-year old victim of sexual abuse who did not testify at trial).

⁹⁰ *Id.* at 1035.

⁹¹ *Whorton v. Bockting*, 549 U.S. 406 (2007).

So the Minnesota Court said okay, that would have to be our answer too, even though Minnesota state retroactivity law would allow us to hear this claim and give Danforth the benefit of the ruling in *Crawford*. It is a federal constitutional claim, the court reasoned, and the federal courts have all these principles governing the cognizability of constitutional claims, so the state courts should just approach the constitutional claim in the same way it would be approached in federal court.⁹²

What was very interesting about *Danforth* was the fact that, in a seven-to-two decision, a super majority, written by Justice Stevens, the Supreme Court disagreed and said that Minnesota should have followed its own law. The Court's retroactivity decisions are rooted in concerns about federal habeas corpus and federalism, and therefore Minnesota should have followed its own procedural law in considering Danforth's federal constitutional claim rather than limiting itself in the way a federal court would have been limited.⁹³

Now, I think this creates a very interesting *Erie*⁹⁴ question in criminal procedure, and is going to lead to opportunities for the state courts to make rulings about the meaning of federal constitutional rights in circumstances where it would be impossible to bring those claims into federal court. Federal habeas courts may not be able to take part in much of the development of federal constitutional law, precisely because of their unique procedural limitations. So whether there will be any federal court involvement in evolving constitutional

⁹² *Danforth*, 128 S. Ct. at 1035.

⁹³ *Id.* at 1047.

⁹⁴ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

questions will depend on how many state court decisions the Supreme Court chooses to review. This is also a remarkable result.

B. Right to Counsel

There were two cases on the right to counsel decided this past term, one of which was won by the defendant even if it was left unclear whether he would benefit from his win.

1. *Rothgery v. Gillespie County*

Rothgery v. Gillespie County involved a man who was arrested for being a felon in possession of a weapon.⁹⁵ He was then arraigned. He did not get assigned a lawyer because under Texas law, although he was indigent, he did not have the right to a lawyer until he was indicted.⁹⁶ He was locked up. About six months later when he was finally indicted, he got a lawyer. However, he had been asking all along: “Can I please have a lawyer?” But nobody paid any attention.⁹⁷

Rothgery was right to want a lawyer. The lawyer eventually assigned to represent him turned out to be quite competent. The lawyer promptly did an ounce of research and discovered that his client had not been convicted of a felony after all. Therefore, not only should Rothgery not have served time in jail (because possession of a gun was not a crime in the absence of a previous conviction), but in Texas he should have been a hero: he was carrying a gun and he was

⁹⁵ 128 S. Ct. 2578, 2581 (2008).

⁹⁶ *Id.* at 2583.

⁹⁷ *Id.* at 2582.

not a felon. There it is; he never should have been arrested, and he spent months in jail before being assigned the lawyer who quickly helped him to be exonerated and freed.⁹⁸ The question in this case, and it had been an open question, was when the right to counsel attaches under the Sixth Amendment.⁹⁹ As in *Virginia v. Moore*, although one would have thought that the answer would depend on the content of state law, the Supreme Court totally ignored Texas law. They could not have cared less what Texas provided.

Justice Souter wrote an opinion saying that the right to counsel attaches when issue is joined in a criminal case. It does not really matter whether the prosecutor is involved yet. Once the state is committed to prosecute, that is it, you have a right to a lawyer and, therefore, Rothgery should have been assigned a lawyer much earlier than had happened.¹⁰⁰ But this ruling did not mean that Rothgery won his civil rights action. The purpose of the Sixth Amendment right to counsel, the Court said, is functionally to protect the defendant during the trial because the prosecutors are lawyers and so if they take someone to trial, that person also has the right to be represented by a lawyer.¹⁰¹ The Court concluded, based on this analysis, that in order to win his claim, Rothgery would have to convince the court that he was prejudiced by the violation of his right. Ordinarily, a defendant would show prejudice by demonstrating that his trial would have come out differently had the State not infringed his right

⁹⁸ *Id.* at 2592.

⁹⁹ *Id.*

¹⁰⁰ *Rothgery*, 128 S. Ct. at 2592.

¹⁰¹ *Id.* at 2583 n.8.

to counsel—a problematic showing for Rothgery, who never went to trial. The fact that Rothgery was locked up for all that time, the Court said, is not a concern of the Sixth Amendment right to counsel and so does not count as prejudice here. The Fourth Amendment, and the Sixth Amendment right to speedy trial address periods of illegal detention; the harm Rothgery suffered in being locked up would not be pertinent to his claim that his rights were violated by the failure to assign him counsel.

The case was remanded to allow Rothgery chance to show prejudice; so it was not clear whether Rothgery himself had actually won anything. But, we now have an answer to the question of when the Sixth Amendment right to counsel attaches: any commitment to prosecution, arraignment or indictment, whichever comes first.

2. *Indiana v. Edwards*

The other right to counsel case last term, also decided by a supermajority, was *Indiana v. Edwards*.¹⁰² Mr. Edwards was somebody who seemed to be quite troubled. He got into a shoot-out over a shoplifting accusation. He was found competent to stand trial, but the state court trial judge was concerned that he was not sufficiently competent to represent himself, and so assigned counsel to represent him even though Mr. Edwards insisted that he preferred to represent himself.¹⁰³

The Supreme Court, through Justice Breyer, who tends to be a pragmatist about this kind of thing, said that the state can use a dif-

¹⁰² 128 S. Ct. 2379 (2008).

¹⁰³ *Id.* at 2382-83.

ferent standard for competence when it comes to self-representation than the standard used to determine whether an accused is competent to stand trial. Therefore, the trial judge was permitted to require representation by counsel.¹⁰⁴ The Court did not set any particular standard for deciding exactly when appointment of unwanted counsel would be unconstitutional. The Court simply ruled that it is a possibility that the state might be able to appoint a lawyer for a defendant who does not want one.¹⁰⁵

Justice Scalia, interestingly, dissented and would have found a Sixth Amendment violation. The right to self-representation is about dignity, and Mr. Edwards had a right to his dignity, said Justice Scalia.¹⁰⁶ The majority, perhaps in response, attached to its opinion a pleading that Mr. Edwards had filed. It was total gibberish and did not make any sense at all.¹⁰⁷ Justice Scalia nevertheless believed that Edwards had a right to make his own decisions.

C. Right to Jury Trial

*Snyder v. Louisiana*¹⁰⁸ is another case where a defendant won, in one of a string of what, to me, are quite remarkable jury selection cases: the *Batson* cases. I am sure that everybody here is familiar with *Batson v. Kentucky*, which said that lawyers may be prohibited from exercising a peremptory challenge against a member of a cognizable racial group unless they can present a persuasive race-neutral

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2387-88.

¹⁰⁶ *Id.* at 2393.

¹⁰⁷ *Edwards*, 128 S. Ct. at 2388 (app.).

¹⁰⁸ 128 S. Ct. 1203 (2008).

explanation.¹⁰⁹

Snyder was a capital case in state court. Not surprisingly, there was a lot of very active jury selection going on. The defendant showed that five of the thirty-six jurors who were challenged by the prosecutor were black, meeting *Batson*'s burden of making out a prima facie case of racial exclusion.¹¹⁰ The trial court found that the prosecutor then met the burden of providing adequate race neutral explanations for those challenges. *Snyder* was convicted and sentenced to death.¹¹¹ The Louisiana appellate courts upheld the conviction. The Supreme Court granted certiorari to review the challenges to two different black prospective jurors. The Court only discussed one of those individuals because it held that the peremptory challenge to that particular juror was not adequately justified. On the basis of that finding, the Court reversed *Snyder*'s capital conviction.¹¹²

Here is what happened. The juror at issue was a student. The prosecutor asked this student, "If this was a lengthy trial, might you have a problem?" And the student said, "Gee, I don't know. I'm doing student teaching, it could be a problem." The judge, upon hearing this, inquired, "Is there someone at your school whom we can call and ask?" The student said, "Sure, you can call the Dean." The Dean said, "No problem. If he is on jury duty, that's fine. I understand civic responsibility."¹¹³

When it came time for challenges, the prosecutor nevertheless

¹⁰⁹ *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

¹¹⁰ *Snyder*, 128 S. Ct. at 1207.

¹¹¹ *Id.*

¹¹² *Id.* at 1208.

¹¹³ *Id.* at 1210.

exercised a peremptory against this juror. When asked to provide a race neutral explanation, the prosecutor offered an elaborate theory about how the student would want to get back to student teaching and, therefore, would be more likely to convict the defendant of a lesser crime in order to eliminate the need for the penalty phase of the trial, thereby allowing him to return to his student teaching earlier.¹¹⁴ This theory flies in the face of what the trial judge thought had been resolved, and did not make much sense in any event. The second race neutral explanation the prosecutor offered was that the student appeared to be nervous. The trial judge allowed the peremptory challenge and excused the juror.¹¹⁵

When the case got to the Supreme Court, the Court held, seven-to-two, that the explanations given were not sufficient.¹¹⁶ On the nervousness issue, there were no findings of fact made by the trial judge; therefore, that was not regarded as an adequate race neutral explanation. The Court thought that the trial judge should have made findings of fact that that juror was really more nervous than the other jurors in order to clear the bar of *Batson*.¹¹⁷

Then the Supreme Court turned to the feeble argument about the student teaching. The Court offered several reasons for finding this explanation not to be credible, including the fact that the student's Dean had said that the student would not have a problem. In addition, the participants knew even at that time that the trial was not

¹¹⁴ *Id.* at 1210-11.

¹¹⁵ *Snyder*, 128 S. Ct. at 1212.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

going to be very long.¹¹⁸

What is notable to me is that, in addition to the fact that this was a seven-two decision in favor of a capital defendant, the opinion was written by Justice Samuel Alito and joined by Chief Justice Roberts.¹¹⁹ I think it is fascinating that both Roberts and Alito seem to be going with the *Batson* program. They both have quickly become true believers in *Batson*. On the basis of the challenge to this one juror, second-guessing the state court's factual findings about what constitutes a credible race neutral explanation, the Court reversed a capital conviction in Louisiana.

I wrote an article a number of years ago called "Why the Court Loves *Batson*," and my thesis was that Justice Lewis Powell, who invented the whole *Batson* theory, felt badly about the racism infecting the whole criminal justice system, but he was not willing to do anything direct about it.¹²⁰ He was the author of not only of *Batson* but also of the opinion in a case called *McCleskey v. Kemp*, where a study which the Court presumed to be valid conclusively showed that jurors in Georgia imposing the death penalty did so on a racist basis.¹²¹ (The bias shown by the study had to do with the race of the victim rather than the race of the defendant.) Nevertheless, the Court ruled against *McCleskey* on the theory that the jury in his particular case might not have been biased. The study only showed that many juries in Georgia were biased; not that every jury was.

¹¹⁸ *Id.* at 1210.

¹¹⁹ *Id.* at 1206.

¹²⁰ Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1821 (1993).

¹²¹ *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987).

McCleskey had no way to prove whether or not the jury in his particular case was tainted. In explaining his conclusion, Justice Powell opined that if the Court were to set aside capital verdicts by juries in Georgia, it might be entering a very slippery slope. The next thing you know, he said, the Court might be expected to look at racism in arrests, sentencing, and incarceration rates, and other aspects of the criminal justice system.¹²² Justice Brennan, in dissent, accused Powell of expressing a fear of “too much justice.”¹²³ *McCleskey* was one of the decisions about which, after retiring from the Court, Powell told audiences, “I think I got that one wrong.”¹²⁴ I would agree. The *Batson* solution, focusing on the race of decision-makers at increasingly infrequent trials, is an interesting form of representation-reinforcement, but it is no substitute for serious judicial oversight of racist decisions in the criminal justice system.

IV. THE FEDERAL SENTENCING GUIDELINES

There are two more cases I want to describe to you in the one-minute version. There were two quite important cases about the Federal Sentencing Guidelines last term: *Gall v. United States*¹²⁵ and *Kimbrough v. United States*.¹²⁶

You may recall, because we have talked about these cases in previous years, that in 2005 the Supreme Court decided a case called

¹²² *Id.* at 314-19.

¹²³ *Id.* at 339.

¹²⁴ Howard Ball, *Thurgood Marshall's Forlorn Battle Against Racial Discrimination in the Administration of the Death Penalty: The McCleskey Cases, 1987, 1991*, 27 *MISS. C. L. REV.* 335, 337 (2008).

¹²⁵ *Gall v. United States*, 128 S. Ct. 586 (2007).

¹²⁶ *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

Booker, in which a majority held that the Federal Sentencing Guidelines—which were supposed to induce uniformity in federal sentencing by providing district judges with Guidelines and by then having appellate courts review the sentences imposed to ensure that they conformed to the Guidelines—were unconstitutional because they did not give the jury enough role in deciding the facts on which the sentence would be based.¹²⁷ But in a shifting majority, Justice Breyer effected the coup of having the Court adopt the remedy not of striking down the Guidelines, but of rewriting them.¹²⁸

A different five-Justice majority from the majority finding the Guidelines unconstitutional ruled that the Guidelines would be deemed to be advisory rather than binding, and that appellate courts would henceforth only review district court sentences to see if they were “reasonable.”¹²⁹ Naturally that decision created some enormous questions, like, what does “reasonable” mean?

Gall dealt with one version of the question of what reasonable means. The circuit courts were sharply split on the issue of what standard of review to apply on appeal. The Eighth Circuit, which had reviewed *Gall*’s sentence and found it unreasonably lenient, held that if a sentencing judge wants to depart as much as the district judge had done in this case, “extraordinary circumstances” would have to be shown.¹³⁰ The Supreme Court ruled that appellate courts may not require extraordinary circumstances or impose any mathematical for-

¹²⁷ U.S. v. *Booker*, 543 U.S. 220, 243-44 (2005).

¹²⁸ *Id.* at 258.

¹²⁹ *Id.* at 268.

¹³⁰ *Gall*, 128 S. Ct. at 595.

mulas.¹³¹ The circuit courts are to review sentences, under *Booker*, based on an abuse of discretion standard. *Gall* establishes that the Court really does intend the Guidelines to be regarded as only advisory.

The second case, *Kimbrough*, like *Gall*, was a seven-to-two decision.¹³² This was a case involving a district judge who departed from the Guidelines recommendation in a crack cocaine case. I am sure that many of you are aware that the United States Sentencing Commission has been reviewing the one-hundred-to-one disparity in the sentence a defendant could get for crack cocaine as opposed to powder cocaine, in light of evidence that there is not that great a difference in the properties of the two drugs.¹³³ But there is a tremendous difference in terms of disparate impact, because most of the defendants in crack cocaine cases were black, and most of the defendants in powder cocaine cases were white.¹³⁴ The Sentencing Commission had been trying for years to get Congress to reduce this disparity in sentencing. Congress had not wanted to and so, to some extent, the Supreme Court did it for them.

The appellate court had ruled that the district judge could not go around changing a defendant's sentence just because he disagreed with the policies and Guidelines.¹³⁵ In an opinion by Justice Ginsburg, the Court reversed, ruling that it was not "unreasonable" for the sentencing judge to disagree with the Guidelines and the policy on

¹³¹ *Id.* at 595.

¹³² *Id.* at 591; *Kimbrough*, 128 S. Ct. at 563.

¹³³ *Racial Inequity and Drug Arrests*, N.Y. TIMES, May 10, 2008, at A18.

¹³⁴ *Id.*

¹³⁵ *Kimbrough*, 128 S. Ct. at 576.

which they were based in a case like this; in the ordinary mine-run case, Ginsburg said, the sentencing judge might not have as much leeway.¹³⁶

More questions will undoubtedly arise about the implementation of the Federal Sentencing Guidelines post-*Booker*, but *Gall* and *Kimbrough* resolved some of the critical questions that had been plaguing the lower federal courts.

V. *MEDELLIN V. TEXAS*

Finally, I want to introduce another important case, *Medellin v. Texas*.¹³⁷ Medellin was a Mexican citizen who was arrested in Texas. As a person who was arrested in a foreign country, he had a right under the Vienna Convention to have his consulate notified that he had been arrested.¹³⁸

I am sure you have heard the Vienna Convention mentioned in some context. For many of us, it was when American citizen Lori Berenson was arrested in Peru. Somebody in Peru was required to tell the American consulate, and so American diplomats and lawyers could come and help her defend herself in the Peruvian courts.¹³⁹

The United States is a signatory to the Vienna Convention.¹⁴⁰ When Mr. Medellin was tried, he apparently did not realize that he had rights under the Vienna Convention because nobody told him that. And by the time he managed to challenge the violation of the

¹³⁶ *Id.* at 575-76.

¹³⁷ 128 S. Ct. 1346 (2008).

¹³⁸ *Id.* at 1354.

¹³⁹ Emily Gest & Corky Siemaszko, *New Peru Terror Trial for New York Woman*, N.Y. DAILY NEWS, Aug. 29, 2008, at 2.

¹⁴⁰ *Medellin*, 128 S. Ct. at 1353.

Vienna Convention, the Texas court held that he had procedurally defaulted on that claim.¹⁴¹

In round one on this issue, the Supreme Court had said that the states are entitled to enforce their procedural default laws.¹⁴² Subsequently, the International Court of Justice [ICJ] decided a case holding that 51 named Mexican nationals, including Medellin, were entitled to review and reconsideration of their state court convictions and sentences in the United States,¹⁴³ because citizens should have enforceable rights under the Vienna Convention.¹⁴⁴ Nobody had ever told Medellin that he had the right to call his consulate, and his whole case might have gone differently if he had had people from his consulate come out to assist him. The ICJ decision was both clear and specific about Medellin's case, whereas previous decisions had been general. Mexico really went to bat for Medellin on this one. After the ICJ decided this case, quite an amazing thing happened. President Bush said that the United States was going to discharge its international obligations by having the states give effect to that decision.¹⁴⁵ I would imagine that there had been some telephone calls between Mexico and the White House. President Bush said, we recognize that we have signed the Vienna Convention; we will have the state courts respect its requirements.¹⁴⁶ There may have been pressure on him, not only from Mexico, but from people arguing (as

¹⁴¹ *Id.*

¹⁴² *Id.* at 1389.

¹⁴³ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31), see 128 S. Ct. at 1376-77.

¹⁴⁴ 128 S. Ct. at 1355 n.1.

¹⁴⁵ *Medellin*, 128 S. Ct. at 1355.

¹⁴⁶ *Id.*

members of the military argued about Guantanamo) that if we do not comply with our Vienna Treaty obligations, what will happen when Americans are arrested abroad?¹⁴⁷ But the Texas courts did not wish to comply, and the Supreme Court held in a six-to-three decision that Texas could continue to value its procedural default law above the terms of the treaty.¹⁴⁸

The Court ruled that Texas did not have to help to implement the Vienna Convention for two reasons. The first was essentially that the President does not have the power to preempt state law in the absence of congressional authorization. Even though this was a matter concerning a treaty, the Court did not view the President as having the power to require Texas to give up its state procedural default law in order to comply with the Convention. The Court ruled that only Congress would have the power to implement the treaty by preempting state law.¹⁴⁹

The second part of the holding was that the Vienna Convention is not self-executing (an argument familiar from some recent decisions concerning the Geneva Conventions).¹⁵⁰ There were also two other treaties involved in *Medellin* in addition to the Vienna Convention.¹⁵¹

Justice Breyer said in dissent that there should not have been any additional legislation necessary because this treaty operated di-

¹⁴⁷ ABC News, *Bush Overruled in Death Penalty Dispute: Supreme Court Says Bush Overstepped Authority by Intervening in Mexican Nat'l Case* (Mar. 25, 2008), <http://abcnews.go.com/TheLaw/SCOTUS/story?id=4520197>.

¹⁴⁸ *Medellin*, 128 S. Ct. at 1356.

¹⁴⁹ *Id.* at 1352-53.

¹⁵⁰ *Id.* at 1368-69.

¹⁵¹ *Id.* at 1358.

rectly on the courts.¹⁵² This analysis is reminiscent of Justice John Marshall telling the Virginia Supreme Court in the foundational case of *Martin v. Hunter's Lessee* that it was doing the wrong thing by prioritizing Virginia real estate law above the provisions of a federal treaty.¹⁵³

I thought it was interesting that the *Medellin* decision was six-to-three, that the majority opinion was written by Chief Justice Roberts, and that the Court found that President Bush's exercise of his foreign affairs power—which he evidently saw as an attempt to safeguard Americans abroad by trying to reciprocally implement the treaty that the United States had signed—was trumped by federalism. This was a rare case where Chief Justice Roberts was forced to make a Sophie's Choice between his allegiance to executive authority and his belief in federalism. It is telling that federalism prevailed.

That is my presentation of the criminal procedure cases of the 2007 term.

¹⁵² *Id.* at 1391.

¹⁵³ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).