CRIMINAL PROCEDURE DECISIONS IN THE OCTOBER 2005 TERM

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In the October 2005 Term, the Supreme Court decided only sixty-nine cases, and of those, almost half involved criminal law, criminal procedure, or the treatment of prisoners. Clearly, the Court devotes a disproportionate share of its attention to the criminal law and procedure area. The cases I will discuss, focusing mostly on the Fourth Amendment,[1] the Sixth Amendment,[2] and the death penalty,[3]

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[1] U.S. CONST. amend. IV provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Supreme Court decided five cases interpreting the Fourth Amendment this past Term. *See* Samson v. California, 126 S. Ct. 2193 (2006); Hudson v. Michigan, 126 S. Ct. 2159 (2006); Brigham City v. Stuart, 126 S. Ct. 1943 (2006); Georgia v. Randolph, 126 S. Ct. 1515 (2006); United States v. Grubbs, 126 S. Ct. 1494 (2006).

[2] U.S. CONST. amend. VI provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

Sixth Amendment cases of the 2005 Term included United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006); Washington v. Recuenco, 126 S. Ct. 2546 (2006); Davis v. Washington, 126 S. Ct. 2266 (2006).

[3] *See* Kansas v. Marsh, 126 S. Ct. 2516 (2006); House v. Bell, 126 S. Ct. 2064 (2006); Holmes v. South Carolina, 126 S. Ct. 1727 (2006); Oregon v. Guzek, 126 S. Ct. 1226

offer some explanations for this phenomenon.

There are a few recurrent themes illustrated in the criminal law and criminal procedure cases decided by the Supreme Court during the 2005 Term. First, as in many recent years, in approximately ninety percent of cases, the government won, whether it was the state or federal government. The current Court almost always rules against criminal defendants. A second feature evident in a number of cases is that the Supreme Court devotes a considerable portion of its resources to hearing cases originating from the highest courts of the states, and usually cases in which the state is appealing an unfavorable ruling by its own courts. As Justice Stevens observed in one case, it seems likely that as soon as those cases are remanded the state courts will reinstate their earlier rulings in favor of the defendant, based on their state constitutions.[4] One might wonder why the Supreme Court bothers to prioritize these cases. It seems as if the Court is trying to force the states to make decisions based on their own constitutions instead of the federal Constitution. During the 2005 Term, all the Fourth Amendment cases except one were state cases;[5] all but one of the Sixth Amendment cases were state cases;[6] and every death penalty case[7] came from a state court.

Finally, another feature of cases in the criminal justice area is their tendency to proceduralize. In both prisoners' rights and habeas corpus cases, so many decisions are just painfully arcane in their

(2006); Brown v. Sanders, 126 S. Ct. 884 (2006).

[4] *See Stuart*, 126 S. Ct. at 1950 (Steven, J., concurring).

[5] Only *Grubbs* was a federal case.

[6] Only *Gonzalez-Lopez* was a federal Sixth Amendment case.

[7] *See supra* note 3.

insistence on rigid compliance with an increasingly elaborate complex of procedural obstacles. Congress and the Court seem to be working in unison to keep muscling these cases out of court. It is more difficult for the Court to avoid confronting the merits of constitutional or statutory arguments in direct criminal appeals; in the prisoners' rights and habeas corpus cases, it is far easier for the Court to eject plaintiffs and petitioners for failure to successfully navigate the procedural obstacle course.

I. FOURTH AMENDMENT DECISIONS

The Fourth Amendment protects against unreasonable searches and seizures. Since September 11th, the Court has decided nineteen Fourth Amendment cases and in seventeen of those nineteen cases, the Court has ruled in favor of the government's power to search and seize.[8] More searches and seizures than ever before are being deemed constitutionally "reasonable."

A. Georgia v. Randolph

The first case I will discuss, *Georgia v. Randolph*,[9] is the sole

[8] In addition to the five cases decided in the 2005 Term, *see supra* note 1, these cases were: Muehler v. Mena, 544 U.S. 93 (2005); Illinois v. Caballes, 543 U.S. 405 (2005); Devenpeck v. Alford, 543 U.S. 146 (2004); Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177 (2004); Thornton v. United States, 541 U.S. 615 (2004); United States v. Flores-Montano, 541 U.S. 149 (2004); Illinois v. Lidster, 540 U.S. 419 (2004); Maryland v. Pringle, 540 U.S. 366 (2003); United States v. Banks, 540 U.S. 31 (2003); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002); United States v. Drayton, 536 U.S. 194 (2002); United States v. Arvizu, 534 U.S. 266 (2002); United States v. Knights, 534 U.S. 112 (2001). The only exception to this one-sided series of rulings before the 2005 Term was Groh v. Ramirez, 540 U.S. 551 (2004), where the Court found that execution of a search warrant requires adequate notice of the scope of the search.

[9] *Randolph*, 126 S. Ct. 1515.

counterexample from the 2005 Term, a surprising case where a defendant actually prevailed in a narrowly divided Supreme Court on a new Fourth Amendment question. The case did not yield a five-four decision. Samuel Alito did not participate, so the case was decided five-three with the fifth vote for the majority being Anthony Kennedy, the new swing vote in town.[10]

Here is what happened in the *Randolph* case. Mr. and Mrs. Randolph, Janet and Scott, were not getting along at all. Mrs. Randolph left, taking their son with her, but eventually returned to the home where she had been living with Scott. It was not clear whether she was moving back in or whether she had just come back to get her stuff, but it was clear that she and Scott could not agree about anything. While the child was in the marital home, Scott decided to take him to a neighbor's home because, he later said, he feared that Janet would run off with the child and he would never see his son again. Janet complained to the police that Scott had taken the child. This family was having major problems.

The police came to the home, where Janet and Scott Randolph argued over who had what rights to the child, who was likely to run off with the child, and who was not being fair. Janet then escalated the battle by informing the police that Scott used cocaine and had some in the house. In response, Scott explained that the child was at a neighbor's house because of his concerns about his wife, and contended that Janet was the one who was a drug and alcohol abuser.

When Janet told the police that Scott had cocaine in the

[10] *Id.* at 1528.

house, the police asked whether the Randolphs minded if they searched the residence. Scott declared that he did mind, and would not give permission for the search. What did Janet say? The contrary, of course—she gave permission for the search. This situation was reminiscent of a mathematical puzzle: If you add one positive and one negative number, what do you get? If police seeking consent to search get one yes and one no, does it add up to yes or does it add up to no? The Supreme Court decided that it adds up to no—a negative number.

Obviously, the police found drugs when they searched the house—this would not be a criminal case otherwise. After entering the house, they found a drinking straw that had cocaine on it. They confiscated the straw, showed it to the Randolphs, and then told the Randolphs that they would continue searching the house. Mrs. Randolph then changed her mind and withdrew her permission for the search. As a result, the police officers ended the search, but they already had the straw with the cocaine on it.

Justice Souter, writing an opinion on behalf of five members of the Court, deemed the consent ineffective.[11] His carefully hedged holding said that a warrantless search of a shared dwelling for evidence, over the express refusal by an owner who is physically present, does not constitute a waiver of the Fourth Amendment.[12] The holding imposes numerous conditions on the arithmetic of adding a yes and a no. First, the non-consenting person must express

[11] *Id*. at 1518-19.
[12] *Id*. at 1528.

refusal. Second, the person refusing must be physically present. Here, Mr. Randolph, who was present at the scene at the time of the request, expressly told the police officers they could not search his home. Third, the search must be one for evidence, as it was in this case.

One problem that Justice Souter had in reaching this result was that the Supreme Court had previously decided two different cases where the police had been held to enter premises legally when they had the consent of someone other than the person who ended up being the defendant: *United States v. Matlock*[13] and *Illinois v. Rodriguez*.[14] In *Matlock*, Mr. Matlock was outside in the car when a third party authorized a search of his house. It's pretty clear that Mr. Matlock would not have agreed—but he was in the car and evidently was not consulted. In *Rodriguez*, the police officers searched a home based on the consent of a woman who appeared to live there when, in reality, she did not. The Supreme Court said that was all right because the police reasonably believed that she had authority over the home.[15] But where was Mr. Rodriguez at the time the third party invited the police to search? He was upstairs asleep in the house. Would he have refused consent? Probably. In *Randolph*, Justice Souter explained that the Court was not overruling those two cases, but merely distinguishing them in a situation where someone is

[13] 415 U.S. 164 (1974); *see Randolph*, 126 S. Ct. at 1518, 1527 (citing *Matlock*, 415 U.S. 164).

[14] 497 U.S. 177 (1990); *see Randolph*, 126 S. Ct. at 1518, 1527 (citing *Rodriguez*, 497 U.S. 177).

[15] *Randolph*, 126 S. Ct. at 1521 (citing *Rodriguez*, 497 U.S. at 181-82).

physically present and expressly refuses to permit a search.[16] If no one actually present objects to the search and someone present does consent, as happened in both *Matlock* and *Rodriguez*, then the police may enter.[17] This formulation prevents the prospective defendant from leaving a note saying you can never search my house, because presence is a prerequisite to effective refusal. So the Court prevents defendants from taking too much advantage of the hedged holding. On the other side of the balance, the Court has not checked the ability of police to maneuver around its holding. There is nothing in the opinion that appears to stop the police from getting the prospective defendant out of the house first before requesting consent, replicating the facts of *Matlock* or *Rodriguez* rather than the situation that led to a split decision in *Randolph*.

The other controversial aspect of Justice Souter's opinion was his assessment of social custom. Justice Souter contended that, as a social matter, if you go to somebody's home and ask to come in, and if one person says yes and the other person says no, you would not enter.[18] What do you think? Do you agree? Would you not go in? Chief Justice Roberts disagreed, treating the agreement of one person

[16] *Id*. at 1526-28 (discussing both *Rodriguez* and *Matlock*).

[17] *Randolph*, 126 S. Ct. at 1521-22 ("[An enforcement officer] understand[s] that any one of [the members of a privately shared domestic dwelling] may admit visitors, with the consequences that a guest obnoxious to one may nevertheless be admitted in his absence by another.").

[18] *Id*. at 1522-23. The Court reasoned that:

> [I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions.

Id.

as a sufficient invitation.[19] Justice Souter relied quite heavily on a vision of social expectations in which we do not expect to yield all of our privacy rights because we share a dwelling with someone else. The Supreme Court has not always been solicitous of the privacy expectations of those who share their homes, their property, or their thoughts.

Randolph highlights one of the tensions in current Fourth Amendment jurisprudence—Supreme Court cases operate on two entirely different tracks which do not always coincide. In some cases, the Court focuses on the reasonable expectations of privacy of the person.[20] The foundational question in Fourth Amendment cases is: does this activity constitute a search? The answer to that question, according to *Katz v. United States*,[21] depends on whether the individual reasonably expects privacy in the situation presented. Did Mr. Randolph reasonably expect privacy in his home? Sure. Yet, in a second line of cases the Court takes a different approach. Under this second line of cases one might conclude that Mr. Rodriguez did reasonably expect privacy in his home even though he was asleep in it, but his expectation would be considered irrelevant because the police acted reasonably from their point of view.[22]

[19] *Id.* at 1532 (Roberts, C.J. & Scalia, J., dissenting) ("A guest who came to celebrate an occupant's birthday, or one who had traveled some distance for a particular reason, might not readily turn away simply because of a roommate's objection.").

[20] *Id.* at 1522 (majority opinion) (explaining that "overnight houseguests have a legitimate expectation of privacy").

[21] 389 U.S. 347 (1967).

[22] *See Rodriguez*, 497 U.S. at 185 (quoting Maryland v. Garrison, 480 U.S. 79, 88 (1987)). "[T]he validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was." *Id.*

Whose point of view are we going to look at? The majority decided to protect Scott Randolph's reasonable expectation of privacy, evaluating the situation from his point of view, consistently with the *Katz* line of cases. Chief Justice Roberts argued that to be consistent with those other two cases, *Matlock* and *Rodriguez*, courts should be looking at the police officer's point of view—a search of a home should be considered acceptable if the officer did not act unreasonably because he had one person's consent.[23] Chief Justice Roberts lost this battle, but not necessarily the war over whose perspective should control.

The second point Chief Justice Roberts articulated, which is an interesting point, was that if you say that the police cannot enter a home because one person objects, a real problem arises in domestic violence cases.[24] What if a woman calls the police and says my husband is abusing me, the police respond and ask to enter the home, but the husband refuses? Can the husband prevent the wife from getting help? Justice Souter explained that the Court's holding was sufficiently hedged to avoid creating this problem.[25] Among its other limitations, the holding only applied to a search for evidence.[26] In the Roberts domestic violence scenario, the police entry would not be a

[23] *See Randolph*, 126 S. Ct. at 1531 (Roberts, C.J. & Scalia, J., dissenting).

[24] *See id*. at 1537 ("Perhaps the most serious consequence of the majority's rule is its operation in domestic abuse situations . . . .").

[25] *See id*. at 1525 (majority opinion) ("Nor should this established policy of Fourth Amendment law be undermined by the principal dissent's claim that it shields spousal abusers and other violent co-tenants who will refuse to allow the police to enter a dwelling when their victims ask the police for help.").

[26] *Id*. at 1518-19. Justice Souter framed the issue as "whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent." *Id.*

search for evidence, but instead would be an entry for the purpose of protection. The police may enter, Souter agreed, if they are not trying to find evidence for a criminal prosecution, but to protect somebody.[27]

B. Brigham City v. Stuart

Two months later, in a case called *Brigham City v. Stuart*,[28] Chief Justice Roberts wrote a unanimous opinion confirming the agreement that he and Justice Souter had reached in *Randolph* about the proper treatment of domestic violence situations. The facts of *Stuart* are as follows. At 3:00 a.m. in Brigham City, Utah, Stuart was having a loud party and someone called the police. The police looked into a doorway where they could see into the home, and they observed a juvenile hitting an adult, who then spat blood into the sink. The police became concerned that there was under-aged drinking going on. Or perhaps, since this was Utah, they were concerned about drinking altogether. In any event, the officers explained that they entered the home because they thought juveniles were drinking, and once inside they arrested Mr. Stuart for contributing to the delinquency of a minor and other related charges. The entry in this knock and announce case did not involve any effective announcement by the police because it was a very noisy party. The officers knocked on the door, no one heard them, and they

[27] *Id.* at 1525 (explaining that there is no question that the police have the authority "to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists.").

[28] *Stuart*, 126 S. Ct. 1943.

walked in anyway. The question was whether this unexpected entry violated Mr. Stuart's Fourth Amendment rights.

The Supreme Court explained that there is an emergency aid doctrine that is an exception to the Fourth Amendment. When someone in a building is in need of help, the police do not have to knock and announce themselves any more than they need consent from everyone present.[29] If someone in a home needs protection, that is sufficient justification for the entry. Well, what about the fact that the police said at the hearing on the motion to suppress that they did not actually go into the house because they were trying to protect anyone, but entered because they were trying to catch minors who were drinking and adults who were allowing them to do so? The Supreme Court said that their actual motivation did not matter.[30] It does not matter what the police officers' subjective reasons were as long as a reasonable officer could have entered in order to provide protection.[31] If the circumstances were such that a reasonable officer could have entered, then that is sufficient.[32]

In *Stuart*, Justice Stevens wrote a separate opinion in which he called the case "an odd flyspeck of a case."[33] He explained that when the case went back to the Utah Supreme Court on remand, that court was likely to reinstate its own pro-defendant ruling on the basis of the Utah Constitution. Stevens questioned whether the Supreme

[29] *Id.* at 1947.
[30] *Id.* at 1948.
[31] *See id.* at 1949.
[32] *See id.* ("[T]he officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning.").
[33] *Stuart*, 126 S. Ct. at 1949 (Stevens, J., concurring).

Court was wasting its time and resources on generating a result that was likely to prove ephemeral,[34] a theme he also raised in several other cases during this Term.

C. United States v. Grubbs and Hudson v. Michigan

There were two more cases that the Court decided involving searches of homes. One was an "anticipatory search warrant" case, *United States v. Grubbs*.[35] Mr. Grubbs was one of those hapless criminal defendants who visited a pornography site that was actually run by an undercover postal inspector, so the government agents investigating him knew exactly what he had ordered. The police got a search warrant and wanted to search his house once the pornographic material he had ordered was delivered, on the theory that because they knew that there was contraband in the package, there would be probable cause for a search as soon as the package was delivered. The Supreme Court, in a unanimous opinion by Justice Scalia, found this reasoning acceptable.[36] The decision was unanimous, so the Court evidently did not find it difficult to decide that anticipatory warrants are constitutional.

The more difficult case, splitting the Court five-four, also about the search of a home, was *Hudson v. Michigan*.[37] This was one of the most interesting and significant criminal procedure cases of

[34] *Id.* at 1950 ("The Utah Supreme Court, however, has made clear that the Utah Constitution provides greater protection to the privacy of the home than does the Fourth Amendment . . . . Utah . . . would probably adopt the same rule as a matter of state constitutional law that we reject today . . . .").

[35] *Grubbs*, 126 S. Ct. 1494.

[36] *See id.* at 1501.

[37] *Hudson*, 126 S. Ct. 2159.

this past Term. This case concerns the knock and announce rule, which the Supreme Court only quite recently decided is a necessary requirement to render a search reasonable under the Fourth Amendment.[38]

In *Hudson*, the Michigan officer who entered the home to execute a warrant for a drug offense testified that he had knocked on the door and waited approximately three to five seconds. Why three to five seconds? The police officer explained that three to five seconds was about how long it took him to get through the door. In other words, he did not wait. He knocked and barged right into the home. The State of Michigan, interestingly enough, conceded that this was a Fourth Amendment violation. So the question for the Court became a question of remedy. What would happen to the evidence seized after the police illegally entered the home? We know that, since *Mapp v. Ohio*[39] in 1961, the Supreme Court has said that the exclusionary rule is the required remedy for Fourth Amendment violations, in part because of the lack of any effective alternative remedies.[40] One of the major points in Justice Scalia's opinion for the Court in *Hudson* was his decision that a sufficiently effective alternative remedy did exist in this case: civil actions brought under § 1983.[41]

The methodology that the Court used in *Hudson* was the cost-benefit analysis it has used a few times in situations concerning

[38] *Id.* at 2162 (citing Wilson v. Arkansas, 514 U.S. 927 (1995)).

[39] 367 U.S. 643 (1961).

[40] *Id.* at 656.

[41] *See Hudson*, 126 S. Ct. at 2167 (citing 42 U.S.C. § 1983 (2000) as providing meaningful relief as an alternative to the exclusionary rule).

exceptions to the application of the exclusionary rule.[42] The question is whether the benefits of applying the exclusionary rule as a remedy for a Fourth Amendment violation will outweigh the costs.[43] What are the costs? The chief cost, of course, is letting a guilty person go free, because Mr. Hudson did possess drugs. On the other hand, the majority posited that there are not really any benefits to applying the exclusionary rule in a case like this because the knock and announce rule can be enforced some other way.[44]

The four dissenters in *Hudson*, in an opinion by Justice Breyer, contended that there is no other effective remedy because, just as *Mapp* concluded, without the exclusionary rule, there would be no reason in the world for officers to comply with the knock and announce rule.[45] The difference between the majority and the dissent about whether alternative remedies are sufficiently effective may actually depend on a difference in the Justices' opinions of how serious knock and announce violations actually are. *United States v. Banks*,[46] one of the Court's recent knock and announce cases, involved a man who evidently had been in the shower when the police came and knocked on his door. The police knocked, waited fifteen seconds, and then entered to find Banks wearing a towel, dripping, in the middle of the living room. The question was whether they waited long enough? The Court obviously viewed the question of whether Mr. Banks was apprehended while wearing a towel as

[42] *Id.* at 2163.
[43] *Id.*
[44] *Id.* at 2165-66.
[45] *Id.* at 2174 (Breyer, Stevens, Souter, & Ginsburg, JJ., dissenting).
[46] *Banks*, 540 U.S. at 31.

trivial as well as laughable.[47] However, you may also recall that there had been an incident in New York City not long before where a Harlem grandmother named Alberta Spruill had a heart attack and died because the police mistakenly broke into her home.[48] They just barged right into her home, intending to execute a search warrant that was really for someplace else. The majority in *Banks* did not portray the harms suffered by those who experience a violation of the knock and announce rule as significant, making it easier to settle for a remedy that might be less potent than the exclusionary rule. Justice Breyer, more impressed with the seriousness of the potential harm of a failure to knock and announce, was concerned that the Court in *Hudson* had really left no remedies at all.

The *Hudson* Court ducked several questions about how to theorize the case. The United States wrote a brief arguing that the discovery of the evidence in the case was not caused by the knock and announce violation, but was due to the search warrant. Under this theory, this evidence was not really the fruit of an illegal search at all. The government also argued that the evidence would inevitably have been discovered.[49] The Supreme Court did not adopt either of these government theories, using a cost-benefit balancing instead.[50]

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[47] *See id.* at 38.

[48] *See* Rocco Parascandola, *Cops Using Stun Device Sparingly*, NEWSDAY, May 15, 2006, at A12 (explaining that the case settled for $1.6 million). *See also* BRADLEY BALKO, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 1 (2006), http://www.cato.org/pubs/wtpapers/balko_whitepaper_2006.pdf (providing a more detailed account of mistaken raids).

[49] *See* Nix v. Williams, 467 U.S. 431 (1984) (recognizing an inevitable discovery exception to the exclusionary rule).

[50] *Hudson*, 126 S. Ct. at 2163 (remarking that the exclusionary rule only applies if the benefits of deterrence are not outweighed by the substantial social courts).

More broadly, Justice Scalia's majority opinion showed a marked disdain for the exclusionary rule. Instead of portraying the exclusionary rule as the default rule *Mapp* had declared it to be, Justice Scalia asserted that the exclusionary rule is only to be used as "a last resort."[51] Justice Scalia does not presently have five votes in agreement on this point because of that new swing vote on the Court, Justice Anthony Kennedy. Justice Kennedy wrote a separate concurring opinion expressing his view, first, that knock and announce violations are quite serious.[52] In addition, Justice Kennedy declared that if any pattern of police abuse of the knock and announce rule were to be shown to have developed because it turns out that there are no alternative disincentives as effective as the exclusionary rule, then the need would arise to reconsider the holding of *Hudson*.[53] Furthermore, Justice Kennedy announced, the exclusionary rule should be left alone.[54]

Let me comment on one more interesting aspect of *Hudson*. I participated in a moot court of the lawyer who argued the case for the petitioner. After the original argument, which was held in early January while Justice O'Connor was still on the Court, the lawyer sent me an e-mail to say he thought his argument had gone very well—he thought that Justice O'Connor clearly agreed with his position and possibly Justice Kennedy too. He thought that six members of the Court would vote in his favor. Then, Justice

[51] *Id.*
[52] *Id*. at 2170 (Kennedy, J., concurring).
[53] *Id*. at 2171.
[54] *Id*. at 2170-71.

O'Connor left the Court—interestingly, she seemed to leave the Court without thinking that she was needed to decide this case. The lawyer then received a nightmarish telephone call from the Supreme Court Clerk's Office saying the Court wanted to hold a re-argument in *Hudson*. The re-argument was held in May and, after this second round with a substitution of Justices, the attorney lost his case. He was quite convinced that he had actually won the case after the first oral argument, but the new composition of the Court destroyed his chances. His opinion is, of course, speculative. There are many stories surrounding the change of composition of the Court and although there are some instances where the differences between the Rehnquist and Roberts Courts can be measured, there are many respects in which we will never really know how much of a difference Justice O'Connor's departure has made and will continue to make.

D. Samson v. California

The final Fourth Amendment case of the 2005 Term was *Samson v. California*,[55] which concerned a California law requiring anyone on parole to sign an agreement that they could be searched at any time by any police officer. The Supreme Court held in a six-three opinion, written by Justice Thomas, that this law was reasonable and constitutional.[56] The statute did not require individualized suspicion, and could not be considered a special needs

[55] *Samson*, 126 S. Ct. 2193.
[56] *Id*. at 2196.

search because the statute permitted a search by any police officer for evidence of any crime whatsoever, not just a special needs search by a parole officer.[57] Consequently, this decision expands police authority in many respects—a common theme in the recent Fourth Amendment cases. It remains to be seen whether the methodology of substituting a general balancing test to decide when police conduct is "reasonable" rather than analyzing cases under the more rule-oriented frameworks established by earlier cases will spread to other areas of Fourth Amendment litigation.

II. SIXTH AMENDMENT DECISIONS

There are a few important Sixth Amendment cases that the Court decided this past Term. In recent years, the Supreme Court has extensively renovated several Sixth Amendment rights: the Confrontation Clause in *Crawford v. Washington*[58] and the role of the jury in trial and sentencing in *Apprendi v. New Jersey*[59] and subsequent cases.[60] This Sixth Amendment revolution is due, in part, to Justice Scalia's fondness for these components of the Sixth Amendment, as he has been the critical fifth vote and often the author of groundbreaking opinions in these cases.

[57] *See id*. at 2196, 2200-01.

[58] 541 U.S. 36 (2004).

[59] 530 U.S. 466 (2000).

[60] Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 126 S. Ct. 1329 (2006).

A. United States v. Gonzalez-Lopez

The first Sixth Amendment case I will discuss is *United States v. Gonzalez-Lopez*,[61] one of the very few cases in which a criminal defendant prevailed in the Supreme Court this Term. This was a five-four opinion with Justice Scalia writing the majority opinion in favor of the defendant.[62]

Gonzalez-Lopez, who was being tried in federal court in the Eastern District of Missouri, decided to hire a lawyer from California. The district judge denied the attorney's motion to be admitted in Missouri *pro hac vice*, refusing to permit the attorney to represent Gonzalez-Lopez. The judge thought the attorney had violated ethical standards by trying to steal this client away from another lawyer in violation of a local law related to legal representation.[63] Subsequent litigation established that the judge's interpretation of the local law was incorrect. In fact, the United States conceded on appeal that the district judge had incorrectly denied the lawyer permission to appear *pro hac vice* because of his misinterpretation of the local law. Justice Scalia's central points were 1) that the defendant had chosen this lawyer and 2) that the Sixth Amendment right to counsel includes a right to counsel of your choice.[64] Those two points were sufficient for the defendant to win reversal of his conviction.

If there is an erroneous deprivation of the right to counsel of one's choice, according to Justice Scalia, there is no need for the

[61] *Gonzalez-Lopez*, 126 S. Ct. 2557.
[62] *Id.* at 2559-60.
[63] *Id.* at 2560.
[64] *See id.* at 2562.

defendant to show any prejudice.[65] The Constitution does not care if the defendant had a perfectly good lawyer, who might even have done a better job than the lawyer the defendant preferred. Furthermore, said Justice Scalia, preventing a defendant from representation by the counsel of his choice is a structural error, and cannot be treated as a harmless error.[66] That is all there is to it—if the court made a mistake in denying permission to appear *pro hac vice*, the defendant's conviction will be reversed.

The exact scope of this newly exalted Sixth Amendment right is a more difficult question, under Scalia's formulation. Scalia did not believe that the principle of choice is without limit. If an indigent defendant is assigned a lawyer, for example, that defendant does not get to pick who that lawyer will be.[67] The right to counsel of one's choice may also be subject to the numerous local rules which govern admission *pro hac vice*.[68] But if the trial court erroneously violates the local rules by denying a defendant's chosen lawyer permission to appear, then that is a violation of the Sixth Amendment.[69]

The holding in *Gonzalez-Lopez* seems quite tenuous. If a local jurisdiction has very generous *pro hac vice* rules, permitting almost anyone to come to Missouri from California and appear, and then a judge denies permission to a particular lawyer, that is a constitutional violation. Yet, if the jurisdiction has extremely restrictive *pro hac vice* rules, then a judge does not violate the rules

[65] *Id.* at 2563.
[66] *Gonzalez-Lopez*, 126 S. Ct. at 2564.
[67] *Id.* at 2565.
[68] *Id.*
[69] *Id.* at 2566.

by denying the designated lawyer permission to appear. Some future case will have to address the implications of a jurisdiction utilizing unusually restrictive *pro hac vice* rules. If the right to counsel of one's choice is to mean anything, it cannot be hostage to the vagaries of local rules, no matter how restrictive they might be. Justice Scalia must know this, and I would think that he would like to renovate the right to counsel of one's choice in the same way that he has been renovating some of the other Sixth Amendment guarantees. The *Gonzalez-Lopez* Court dissenters believed that a defendant should have to show that he was harmed in some concrete way before winning a reversal of his conviction.[70] Justice Scalia thought that the relational harm rather than demonstrable prejudice to the defense effort was the relevant factor. Extending this holding to all cases where this relational harm is inflicted would have profound implications.

B. Davis v. Washington

Justice Scalia has had an enormous impact in another important area of the Sixth Amendment; the Confrontation Clause. I am sure many of you know that just a couple of years ago the Supreme Court completely remodeled the Sixth Amendment Confrontation Clause in the blockbuster *Crawford* case.[71] In *Crawford*, the Supreme Court held that you cannot use a testimonial statement of any witness who does not appear at trial, unless that

[70] *See id.* at 2571 (Alito, J., dissenting).
[71] *Crawford*, 541 U.S. at 68-69.

witness is unavailable and the defendant had a prior opportunity to cross examine the witness.[72] Before *Crawford*, the Supreme Court used to look at how reliable the witness's testimony was, but it does not do that any more.[73] *Crawford* placed a lot of weight on the meaning of "testimonial." Hence, post-*Crawford* trial attorneys must constantly question what "testimonial" means. While lawyers and lower courts all over the country were scratching their heads over this question, the Supreme Court granted certiorari in two different cases to address the problem of defining "testimonial." Interestingly enough, both cases were domestic violence cases.

Davis v. Washington[74] involved Mr. Davis's former girlfriend, who had called 911 to report that she was being threatened by her boyfriend and suffered abuse. She did not testify at Davis's trial for assaulting her, but the prosecutor introduced the 911 tape of her report into evidence. *Hammon v. Indiana*,[75] the companion case, also involved a woman who claimed she was being abused by her husband. She called to report this, but when the police responded and came to her home, she told them that the situation was resolved. Nevertheless, the police entered and talked to the woman and, after some discussion, she agreed to sign a statement asserting that she had been subjected to battery by her husband, Mr. Hammon. She did not testify at his trial for abusing her, but the statement that she gave in

[72] *See id.* at 68 (holding "[w]here testimonial evidence is at issue . . . the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination.").

[73] *See id.* at 67-69.

[74] *Davis*, 126 S. Ct. 2266.

[75] *Hammon*, 126 S. Ct. 2266. This case was consolidated with *Davis*.

the kitchen was admitted as evidence against him.

Is there any difference between *Davis* and *Hammon*? The Supreme Court asserted that the 911 tape differed from the statement in the kitchen in all critical respects.[76] Justice Scalia explained that the purpose of the 911 taped conversation was not to get evidence, but to procure protection.[77] The 911 operator asked Mr. Davis's girlfriend questions, not in order to obtain evidence for a criminal prosecution, but to try to figure out what the caller needed in terms of police protection. In the *Hammon* case, on the other hand, Mrs. Hammon said that she was not in any danger, and so when the police questioned her in the kitchen and took her statement, the Court explained, it was for the purpose of gathering evidence.[78] What then does testimonial mean? The meaning of testimonial depends on what the purpose of obtaining the statement was: the purpose of providing protection versus the purpose of acquiring evidence.[79]

The Court discussed several factors it considered relevant in deciding what is testimonial and what is not, although they said that none of these factors are really essential.[80] First of all, the Court explained that it matters whether the interrogation is taking place during the threatening events, as was the case with the 911 call, as opposed to after the fact, when investigation seems only to be about evidence.[81] In addition to questioning whether an interaction was

[76] *Id.* at 2276-78.
[77] *See id.* at 2277.
[78] *See id.* at 2278.
[79] *See id.* at 2277.
[80] *Davis*, 126 S. Ct. at 2273.
[81] *Id.* at 2276.

necessary for the police to protect someone, a reviewing court should also consider whether the exchange was informal or whether it resembled an interrogation.[82]

Because this issue comes up so often, another case which the Court has agreed to hear next year is going to be quite significant. The case is called *Whorton v. Bockting*[83] and it raises the question of whether or not *Crawford* should be applied retroactively, which obviously could impact many, perhaps thousands of cases. That will be next Term.

C. Washington v. Recuenco

The final Sixth Amendment area I will mention, briefly, concerns sentencing. In *Washington v. Recuenco*[84] the Supreme Court answered one more previously open question about the Sixth Amendment claims that can be raised in connection with sentencing—claims based on a defendant's right to have the trial jury rather than the sentencing judge decide the facts on which the defendant's sentence will be based. What the Court decided in *Recuenco* was that, unlike *Gonzalez-Lopez*, a violation of the Sixth Amendment during a sentencing proceeding can be considered to be harmless error.[85]

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[82] *See id.* at 2276-77.

[83] 126 S. Ct. 2017 (2006).

[84] *Recuenco*, 126 S. Ct. 2546.

[85] *See id.* at 2553; *see also* Burton v. Waddington, 126 S. Ct. 2352 (2006) (granting certiorari to consider the retroactivity of the recent Court's Sixth Amendment sentencing case law).

III. DEATH PENALTY DECISIONS

Another important area to discuss is this past Term's death penalty cases. For death penalty cases, like abortion cases, the change in composition of the Court really empowers the states to go back and attempt to revisit previously decided issues to see if the Court is now willing to overturn those results. You may recall that a few years ago the Supreme Court decided, in a case called *Roper v. Simmons*[86] that it was cruel and unusual punishment[87] to execute juveniles. The *Roper* decision was only two years old and, although decided by a divided Court, yielded a clear and detailed opinion. Yet, after the change in the Court's composition, an attorney general filed a certiorari petition from a capital case involving a juvenile where the question really was, do we still have to follow *Roper*, or are you going to change your minds?[88] In addition to the proliferation of increasingly restrictive abortion statutes around the country, I think we are going to see many more statutes in the death penalty area purporting to allow increasingly prosecution-friendly procedures the Supreme Court had previously prohibited. The question for the Supreme Court will be, is it still true that states cannot do that?

A. Holmes v. South Carolina

There was one capital case raising a question that did not

[86] 543 U.S. 551 (2005).

[87] U.S. CONST. amend. VIII provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[88] Linda Greenhouse, *911 Call Is Held as Evidence If Victim Cannot Testify The New York Times June 20, 2006 Tuesday Correction Appended*, N.Y. TIMES, June 20, 2006, at A14.

specifically involve capital punishment issues, *Holmes v. South Carolina*,[89] which got some play in the press because it was the first opinion written by Justice Samuel Alito.[90] The case concerned a South Carolina rule of evidence, which provided that if the prosecution presents a great deal of evidence, particularly forensic evidence of a defendant's guilt, then the defendant is not allowed to introduce evidence that a third party committed the crime (what some in the trade call the "SODDI" defense: "Some Other Dude Did It"). You can imagine reasons why the legislature might have thought this was a good means of preventing perjury and limiting juror confusion. But is such a severe prohibition permissible?

The Supreme Court unanimously, eight to nothing, held that South Carolina could not do that.[91] The evidentiary rule denied the defendant a " 'meaningful opportunity to present a complete defense' " by prohibiting the presentation of evidence suggesting to the jury that another individual committed the crime.[92]

It is a tradition of the Court to give a new Justice a unanimous opinion for the first time out. I thought it was also interesting that Chief Justice Roberts, who by tradition would have assigned the opinion because he voted with the majority, decided to assign this case to Justice Alito, given the fact that criminal justice and questions about capital punishment had played such a major role in the Alito confirmation hearings. To me, the assignment had a certain element

[89] *Holmes*, 126 S. Ct. 1727.
[90] *Id.* at 1729.
[91] *Id.* at 1735.
[92] *Id.* (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

of, see, he can rule for a defendant—although it remains to be seen if this will be the only time that happens.

B. Kansas v. Marsh

Kansas v. Marsh[93] was probably the most significant capital case decided by the Court this past Term. *Marsh* was a five-four decision, with an opinion written by Justice Clarence Thomas.[94] Both Chief Justice Roberts and Justice Alito joined the majority. Now, describing the issue in this case takes us back a little bit in time and in capital punishment jurisprudence. You may remember that many years ago, I'm sure many of you covered this in law school, the Supreme Court, in a case called *Furman v. Georgia*,[95] held that the death penalty was cruel and unusual because it was like "being struck by lightning"—it was arbitrary and irrational.[96] In a slightly later case, *Gregg v. Georgia*,[97] the Court held that if a state can rationalize its capital punishment law, substituting for absolute discretion a preordained scheme requiring consideration of specified aggravating and mitigating circumstances, then the imposition of the death penalty would not be considered cruel and unusual punishment.[98] Many states adopted this option and created elaborate statutory schemes detailing aggravating and mitigating factors. In Kansas, a statute was passed that required the jury to consider aggravating

[93] *Marsh*, 126 S. Ct. 2516.
[94] *Id.* at 2519-20.
[95] 408 U.S. 238 (1972).
[96] *Id.* at 309 (Stewart, J., concurring).
[97] 428 U.S. 153 (1976).
[98] *See id.* at 206-07.

factors like whether the crime was committed in an especially horrible way, and mitigating factors like whether the defendant had a terrible childhood. After considering all of those prescribed factors, if the jury cannot decide which prevail, whether the aggravating or mitigating factors dominate, the Kansas statute says that the balance should be presumed to tip in the direction of the death penalty. The defendant argued that equipoise should not lead to death. The Supreme Court in a five-four opinion held that the Kansas statute did not violate the Eighth Amendment.[99] The Court held that the statute did not concern the defendant's sentencing rights because it involved only the manner in which the sentence was imposed, and not the sentence itself.[100]

The dissenters discussed some new studies about the unreliability of capital punishment decisions, the tenet that "death is different" (the notion that led an earlier Court to be particularly solicitous of the claims of defendants in capital cases), and the number of innocent people believed to have been on death row.[101] Notably, the majority, the five-Justice majority, expressed no concern about any of those issues.

C. House v. Bell

There are a number of Justices who obviously do not think

[99] *Marsh*, 126 S. Ct. at 2525-26 (explaining that as long as the system rationally and narrowly defines the "class of death-eligible defendants" and permits a jury to render a reasonable and individualized sentencing determination, a State has a range of discretion in imposing the death penalty).

[100] *See id.* at 2527-28.

[101] *Id.* at 2544-45 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

death is that different. The Court did, however, reach the opposite result from *Marsh* in a capital case based on circumstantial evidence—*House v. Bell*.[102] In *House*, the defendant was convicted of killing his neighbor's wife. Much of the prosecution's theory of the case was dependent on semen that was found on the victim's clothing. The prosecutor told the jury that the semen belonged to the defendant. Even though the defendant was not being charged with rape, the prosecutor's argument was that he had intercourse or raped or sexually abused the victim, and then ended up killing her. The prosecution claimed to have established the killer's identity by establishing that it was his semen on the victim's clothing. The second big piece of circumstantial evidence presented by the prosecution was blood that was found on the defendant's clothing, which was said to be the victim's blood.

After the conviction in *House*, the defense attorney discovered a couple of very interesting things. He first discovered that DNA testing on the semen revealed that the semen did not belong to the defendant after all; it belonged to the victim's husband. Therefore, because the semen clearly was not the defendant's, the prosecution's theory connecting the defendant with the crime was seriously undermined. The defense attorney then discovered that numerous irregularities existed in the manner in which the blood samples had been handled. Thus, the prosecution's second foundational argument, that the victim's blood was on the defendant's clothing, also lost a lot of credibility. The blood had

[102] *House*, 126 S. Ct. 2064.

degraded. The victim's blood, in vials, might have accidentally spilled over. If this was not enough to cast doubt on the defendant's guilt, a witness testified that the victim's husband had privately confessed to committing the murder. Although the husband later denied that he had made any such confession, there was considerable reason to suspect that a third party and not the defendant had committed the crime.

Fortunately, the Supreme Court decided, by a five Justice majority, with Justice Kennedy as the fifth vote, that the evidence presented was enough to cast doubt onto the conviction and therefore allowed the defendant to continue with his habeas corpus petition on the theory that he had provided a sufficient showing of actual innocence.[103] But three Justices (Chief Justice Roberts joined by Justices Scalia and Thomas; Justice Alito did not participate in this case) argued that the defendant's showing was simply insufficient to support a claim of actual innocence and that therefore habeas corpus should not lie and the death penalty should stand.[104] The Court performed a balancing act in *House*, as in many capital habeas cases, balancing finality against fairness, and concern about fairness prevailed here, by a frighteningly slim margin. It's very troubling to me that there are so many Supreme Court Justices who are not sufficiently troubled by the prospect of an unfair conviction and execution in a case like this to overcome their allegiance to the notion of finality. Habeas corpus, which functions as a second chance for

[103] *Id.* at 2068, 2087.
[104] *Id.* at 2087, 2096 (Roberts, C.J., Scalia, & Thomas, JJ., dissenting).

the convicted, should not become so restrictive as to ignore defendants who have substantial claims of innocence or unfairness and who want a second chance to live.

D. Oregon v. Guzek

The final death penalty case necessary to mention; another essentially unanimous decision by the Supreme Court, is *Oregon v. Guzek*,[105] a case having to do with "residual doubt." At his trial Guzek presented evidence of an alibi, but the jury, evidently disbelieving the alibi, convicted him. At the sentencing phase, Guzek offered a new alibi witness, his mother, to testify to the jury in support of his alibi. His mother, for whatever reason, had not testified at the conviction phase. Oregon had a rule which provided that a defendant could not offer such evidence to the jury because alibi evidence does not relate to what a defendant's sentence should be. Alibi evidence relates to whether or not a defendant is guilty, something already decided during the conviction phase. The Court unanimously decided, in an opinion by Justice Breyer, that Oregon's rule was constitutional.[106] The defendant could be prohibited from making a last ditch argument to the sentencing jury that he was not actually guilty because, as the dissenters in *House* thought, the value of respecting a decision previously made can outweigh concerns about convicting and executing the innocent.

[105] *Guzek*, 126 S. Ct. 1226.
[106] *Id.* at 1233.

IV. AN INSANITY DEFENSE DECISION: CLARK V. ARIZONA

The last criminal case to be discussed is *Clark v. Arizona*.[107] *Clark* involved a state's limiting treatment of the insanity defense. Mr. Clark was a paranoid schizophrenic who shot a police officer because he believed, and this was uncontroverted, that police officers were extraterrestrial aliens who were trying to kill him. So was he insane? Not under the definition in Arizona. Do you remember from criminal law the two-part test developed in the English decision of *M'Naghten's Case*?[108] That classic test questions whether the individual could differentiate right from wrong and whether he or she appreciates the wrongfulness of his or her conduct.[109] Jurors probably would have agreed that Mr. Clark did not appreciate the wrongfulness of what he was doing, but Arizona had not included that as part of the test. Clark argued that he did not have the intent to kill a police officer, because he did not know that he was killing a police officer—he thought he was defending himself against an alien who was trying to kill him. Arizona also said that a defendant cannot use any psychiatric evidence or evidence of any mental condition to rebut mens rea. [110] Arizona provides an insanity defense that is only an affirmative defense where the defendant must persuade the jury, under the limited *M'Naghten* test, that he could not tell right from wrong.[111] The five votes to uphold this procrustean insanity defense

[107] 126 S. Ct. 2709 (2006).
[108] *Id.* at 2719 (citing M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843)).
[109] *See id*.
[110] *Id.* at 2724.
[111] *See id.* at 2717.

included Justice Souter, who wrote the opinion. The dissent included Justices Stevens and Ginsburg, and the erstwhile swing vote, Justice Anthony Kennedy—who was very upset about his inability to swing the vote toward the defendant in this case.[112] This major criminal law decision did not receive much critical attention because it was overshadowed by the Court's decision in *Hamdan v. Rumsfeld*,[113] evaluating the constitutionality of military tribunal procedures, which was issued the same day.

The Court also decided a couple of timely and interesting cases about the Vienna Convention:[114] *Sanchez-Llamas v. Oregon*[115] and *Medellin v. Dretke*.[116] Under the Vienna Convention, when a person from another country is being prosecuted for a crime, that individual has a right to have his or her consulate notified.[117] The Supreme Court ducked the question of whether there is any private right of action under the Vienna Convention, but it did hold that, during that period of detention, if a person makes a statement or evidence is acquired in some other manner, the exclusionary rule will not apply.[118] These rulings pick up the anti-exclusionary rule theme surfacing in *Hudson*,[119] discussed above,[120] as well as the theme of private rights of action under treaties, an issue the Court ducked in

[112] *Clark*, 126 S. Ct. at 2736 (Kennedy, Stevens, & Ginsburg, JJ., dissenting).
[113] 126 S. Ct. 2749 (2006).
[114] Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T 77, 596 U.N.T.S. 261.
[115] 126 S. Ct. 2669, 2674-75 (2006).
[116] 544 U.S. 660 (2005).
[117] *Sanchez-Llamas*, 126 S. Ct. at 2675.
[118] *Id*. at 2682, 2687.
[119] *Hudson*, 126 S. Ct. 2159.
[120] *See supra* Part I.C.

the *Hamdan* case with respect to the Geneva Conventions.

All in all, it was an interesting year where many longstanding issues were resolved, but many other questions—about the exclusionary rule, the Fourth Amendment, the Sixth Amendment, private rights of action, etc.—were left open for another term.