ACLU SUMMARY

of the

2004 SUPREME COURT TERM

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Major Civil Liberties Decisions

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FIRST AMENDMENT

A. Freedom of Speech and Association

In *City of San Diego v. Roe,* 73 U.S.L.W. 3334 (Dec. 6, 2004)(9-0), the Court's *per curiam* opinion unanimously rejected the First Amendment claim of a police officer who was fired for selling an erotic video over the Internet in which he was initially pictured wearing a police uniform. Summarily reversing the Ninth Circuit, the Court rejected the proposition that plaintiff's speech was entitled to full First Amendment protection because it occurred off-duty and did not relate to his employment. Instead, the Court held, plaintiff was appropriately disciplined because his speech did not involve a matter of public concern and was detrimental to the police department's mission. In reaching this latter conclusion, the Court emphasized that plaintiff's speech "was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image." *Id.* at 3335.

In *Johanns v. Livestock Marketing Association*, 73 U.S.L.W. 4350 (May 23, 2005)(6-3), the Court ruled that a federal statute requiring beef producers to fund a federally supervised program of generic advertising to promote beef consumption does not violate the First Amendment. Although this is the third time in the last eight years that the Court has considered a similar program, it is the first time that the Court has held that the challenged advertising program represents a form of government speech. Building from that premise, Justice Scalia's majority opinion rejected the argument that beef producers could not be required to subsidize speech that they did not endorse. That doctrine, Justice Scalia wrote, applies only to the compelled subsidy of private speech, not the compelled subsidy of government speech. He likewise rejected the notion that the beef advertising scheme represented a prohibited type of compelled expression because, in his view, individual beef producers were not required to directly express any message at all. Justice Steven's dissent focused on the risk or erroneous attribution absent any acknowledgement by the government that the speech was its own.

In *Clingman v. Beaver*, 73 U.S.L.W. 4359 (May 23, 2005)(6-3), the Court upheld an Oklahoma law that prohibits political parties from opening their primaries to anyone other than registered party members and independents. Rejecting a challenge brought by the Libertarian Party, as well as registered Democratic and Republican voters, Justice Thomas concluded for the majority that the burden on associational rights from the challenged statute was not severe enough to warrant strict scrutiny. Applying a more flexible standard of review, he then concluded that the state's asserted interests in preserving the political parties as identifiable interest groups and preventing party raiding were substantial enough to justify its semi-closed primary system. In dissent, Justice Stevens focused on the right to vote rather than the right of association and ended his opinion by observing that "the Court's holding today has little to support it other than a naked interest in protecting the two major parties…" *Id.* at 4370.

In *Tory v. Cochran*, 73 U.S.L.W. 4404 (May 31, 2005)(7-2), the Court held that Johnnie Cochran's death after the case was argued did not render the case moot but did eliminate the asserted rationale for the broad injunction issued by the state trial court in this defamation action brought by Cochran against a disgruntled former client. Writing for the majority, Justice Breyer therefore vacated the injunction without addressing the more general question of whether

injunctions are ever permissible in defamation actions. Justices Thomas and Scalia would have dismissed the writ of *certiorari* as improvidently granted.

In *Metro-Goldwyn Mayer Studios, Inc. v. Grokster,* 73 U.S.L.W. 4675 (June 27, 2005) (9-0), the Court unanimously held that developers of peer-to-peer file sharing software can be held liable for inducing copyright infringement by the software's users if the software was distributed by its developers "with the object of promoting its use to infringe copyright." *Id.* at 4676. The majority opinion by Justice Souter cautioned that the absence of a filtering program to prevent infringing uses is not sufficient, by itself, to establish an intent to promote copyright infringement. At the same time, he noted, it is a factor to be weighed in the balance if there is other evidence of improper intent. Two concurring opinions, one written by Justice Ginsburg and one written by Justice Breyer, debated how to determine whether a particular product has substantial non-infringing uses under an alternative theory of copyright liability announced in *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417 (1984). Although that debate was not ultimately dispositive of the outcome in this case, Justice Ginsburg interpreted *Sony* to require more evidence of non-infringing uses than Justice Breyer. The ACLU submitted an *amicus* brief arguing that imposing copyright liability on software developers will stifle innovation on the Internet.

In *National Cable Telecommunications Association v. Brand X Internet Services,* 73 U.S.L.W. 4659 (June 27, 2005)(6-3), the Court ruled that the FCC had acted within its statutory authority when it concluded that cable companies that provide broadband Internet access are not required to make that access available to all Internet Service Providers. According to the FCC, cable companies providing broadband access are more properly characterized as a "telecommunications service" than as a common carrier (such as a telephone company). Writing for the majority, Justice Thomas then held that the FCC's interpretation of an ambiguous statute was entitled to deference under the *Chevron* doctrine. The ACLU submitted an *amicus* brief agreeing with Justice Scalia's dissent that a cable company's provision of broadband Internet access is analytically distinct from its delivery of cable content, and that allowing cable companies to serve as gatekeepers to the Internet will severely limit the range of choices available to Internet users.

B. Establishment Clause

In *Cutter v. Wilkinson*, 73 U.S.L.W. 4397 (May 31, 2005)(9-0), the Court unanimously upheld the constitutionality of § 3 of the Religious Land Use and Institutionalized Persons Act, which requires strict judicial scrutiny of any government action that places a "substantial burden" on the free exercise rights of institutionalized persons – in this case, prisoners. Although other constitutional claims are not subject to strict scrutiny review in the prison context, Justice Ginsberg concluded that the statute did not unconstitutionally favor religion. Rather, she explained, the statute represents a permissible accommodation of religion that is "compatible with the Establishment Clause because it alleviates exceptional government – created burdens on private religious exercise." *Id.* at 4400. The ACLU submitted an *amicus* brief supporting the constitutionality of RLUIPA for similar reasons.

In *McCreary County v. ACLU of Kentucky,* 73 U.S.L.W. 4639 (June 27, 2005)(5-4), the Court upheld a preliminary injunction barring the display of the Ten Commandments in two

Kentucky courthouses. The majority opinion, written by Justice Souter, reaffirmed the principle that a government purpose to promote religion violates the Establishment Clause. Resolving a dispute that had divided the lower courts, the majority also made clear that the Establishment Clause forbids the government from acting with a predominantly religious purpose, even if it is not the government's exclusive purpose. On this record, the majority had little difficulty concluding that this standard had been met. Furthermore, the Court held that changes in the Ten Commandments display during the course of the litigation did not alter the religious message that would be apparent to any reasonable observer. In a separate concurring opinion, Justice O'Connor wrote: "By enforcing the [Religion] Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish." *Id.* at 4650. The ACLU brought the legal challenge and also served as counsel in the case.

In *Van Orden v. Perry,* 73 U.S.L.W. 4690 (June 27, 2005)(5-4), the Court rejected a challenge to a large granite monument depicting the Ten Commandments that has stood on the grounds of the Texas State Capitol for forty years. The plurality opinion, written by Chief Justice Rehnquist, suggested that "passive" displays of the Ten Commandments do not violate the Establishment Clause outside the school setting. However, Justice Breyer's concurring opinion, which provided the crucial fifth vote, expressly disagreed with the majority's analysis. Concluding that none of the Court's Establishment Clause tests resolved the issue for him, Justice Breyer voted to uphold the monument based on a factual judgment that the history and context of this particular display suggested that its message was more secular than religious. In particular, he emphasized that the display had stood for forty years without apparent objection and inferred from this that "the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage." *Id.* at 4697.

FOURTH AMENDMENT

In *Devenpeck v. Alford,* 73 U.S.L.W. 4038 (Dec. 13, 2004)(8-0), the Court unanimously ruled that an arrest is lawful under the Fourth Amendment – and thus cannot give rise to a subsequent claim for damages - if the facts known at the time of arrest establish probable cause to believe that a crime has been committed even if, as here, the police officer charges the wrong crime. Citing *Whren v. United States,* 517 U.S. 806 (1996), Justice Scalia's majority opinion emphasized again that the arresting officer's subjective state of mind is irrelevant to the probable cause determination. The Court also rejected the Ninth Circuit's rule that the lawfulness of the arrest depends on whether the crime established by the facts and the crime charged by the officer are "closely related."

In *Brousseau v. Haugen,* 73 U.S.L.W. 3350 (Dec. 13, 2004)(8-1), the Court summarily reversed a Ninth Circuit decision denying qualified immunity to a police officer in this excessive force case. The majority, *per curiam* opinion assumed that the plaintiff's constitutional rights had been violated but concluded that the Ninth Circuit erred in holding that a reasonable officer under the circumstances would have known that her decision to shoot and wound a fleeing felon

was constitutionally unreasonable. While agreeing that the general rules governing the use of deadly force are well established, the majority emphasized the importance of applying those rules in context. On these facts, the majority held, it was sufficiently unclear whether the plaintiff's action posed a threat to others to entitle the officer to qualified immunity. In a separate concurring opinion, Justices Breyer, Scalia and Ginsburg expressed their disagreement with the inflexible requirement that courts first ascertain whether a right has been violated before addressing whether the defendant's actions were reasonable in all qualified immunity cases. According to Justice Breyer, this approach often requires courts to needlessly address complex constitutional questions.

In *Illinois v. Caballes,* 73 U.S.L.W. 4111 (Jan. 24, 2005)(6-2), the Court held that the police do not need individualized suspicion to have a drug sniffing dog examine a car that has been lawfully stopped for a traffic infraction. Justice Stevens, who wrote the majority opinion, characterized it as narrow. First, he emphasized that the traffic stop in this case was not unreasonably extended because of the dog's presence. Second, he relied on the Court's prior decision in *United States v. Place,* 462 U.S. 696 (1983), to hold that use of a trained dog to sniff the outside of a car looking for drugs does not disturb any legitimate expectations of privacy and thus is not a search for Fourth Amendment purposes. Justice Ginsburg dissented on the ground that the use of a drug sniffing dog expands the scope of the initial seizure, even if not its duration. Justice Souter also dissented, stressing that even trained dogs have a high rate of false alerts that are then used as a basis for a full-scale search of the car. The ACLU submitted an *amicus* brief arguing the positions ultimately articulated by Justices Ginsburg and Souter in dissent, and urging the Court to declare the suspicionless use of drug-sniffing dogs unconstitutional.

In *Muehler v Mena*, 73 U.S.L.W. 4211 (Mar. 22, 2005)(9-0), the Court ruled that the police did not violate the Fourth Amendment when they detained respondent for three hours in handcuffs after they found her in a house they were searching as part of an investigation into a gang shooting, and then questioned her about her immigration status. Although conceding that the police had quickly cleared respondent of any involvement in gang activity, Chief Justice Rehnquist held that the initial detention was lawful under *Michigan v. Summers*, 452 U.S. 692 (1981), that the use of handcuffs for the duration of the search was objectively reasonable given the violent crime that was being investigated, and that the immigration questioning did not constitute a separate Fourth Amendment violation because it took place while respondent was properly seized on other grounds. In a concurring opinion (joined by the three others), Justice Stevens agreed that the Ninth Circuit had applied the wrong legal standard but expressed strong doubt about the need to keep respondent in handcuffs for such a prolonged period. In a separate concurrence, Justice Kennedy also limited the Court's holding to these particular facts. The ACLU submitted an *amicus* brief urging the Court to uphold the jury verdict in respondent's favor.

FIFTH AMENDMENT

A. Takings Clause

In *Lingle v. Chevron*, 73 U.S.L.W. 4343 (May 23, 2005)(9-0), the Court unanimously concluded that the critical inquiry in a Takings Clause case is whether the challenged regulation

substantially burdens the property owner's rights and not whether the challenged regulation substantially advances a legitimate state interest. Writing for the Court, Justice O'Conner acknowledged that the "substantially advances" framework reflected language in earlier decisions but, she now concluded, was more appropriate to a Due Process clause claim than a Takings Clause claim. Otherwise, she noted, the Takings Clause "would require courts to scrutinize the efficacy of a vast array of state and federal regulations – a task for which courts are not well suited." *Id.* at 4348. Because the lower courts in this instance had applied the wrong Takings Clause test in assessing the validity of a Hawaii state law that capped the rent that oil companies could charge to gas station lessees, the case was remanded for further proceedings.

In *Kelo v. City of New London,* 73 U.S.L.W. 4552 (June 23, 2005)(5-4), the Court held that a city could use its eminent domain powers to implement a broad economic redevelopment plan without violating the Takings Clause, even though some of the condemned land would then be made available to private developers. Writing for the majority, Justice Stevens ruled that the reference to a "public use" in the Takings Clause was satisfied by a government project that served a public purpose, and that the judiciary should be deferential to the legislature's judgment about whether a public purpose was in fact being served. In a concurring opinion that provided the crucial fifth vote, Justice Kennedy emphasized several features of this particular development plan that he regarded as crucial. First, the plan was comprehensive in scope. Second, the public benefits were not insignificant. And third, the private beneficiaries of the plan were not known at the time the plan was developed.

B. Double Jeopardy

In *Smith v. Maryland,* 73 U.S.L.W. 4125 (Feb. 22, 2005)(5-4), the Court held that a trial judge's order granting a motion for acquittal at the close of the prosecution's case is a final judgment for Double Jeopardy purposes and bars later reconsideration of that decision (even while the trial is still proceeding on other counts) unless state law clearly describes such mid-trial rulings as non-final. Writing for the majority, Justice Scalia explained that "the Double Jeopardy Clause's guarantee cannot be allowed to become a potential snare for those who reasonably rely on it," *id.* at 4128. Such reliance may occur, for example, if the defendant's acquittal on one charge alters his defense on other, still pending charges. That example, however, is illustrative only. Justice Scalia's opinion establishes a general rule and does not require proof of actual prejudice in particular cases.

SIXTH AMENDMENT

A. Right to Counsel

Halbert v. Michigan, 73 U.S.L.W. 4600 (June 23, 2005)(6-3) – *see* summary on p. 9.

Kowalski v. Tesmer, 73 U.S.L.W. 4033 (Dec. 13, 2004)(6-3) – *see* summary on p. 15.

B. Ineffective Assistance of Counsel

In *Rompilla v. Beard,* 73 U.S.L.W. 4522 (June 20, 2005)(5-4), the Court held that trial counsel in this capital case failed to provide the defendant with effective representation when they did not look at a prior case file even after the prosecutor had announced that he was relying on a transcript in that file to help establish a statutory aggravating factor. The majority opinion, written by Justice Souter, is carefully limited to the specific facts and stops short of announcing a *per se* rule that defense counsel must always examine prior cases files or even that defense counsel must always examine prior case files when a prior conviction is used as an aggravating factor. Based on these specific facts, however, the majority concluded that the state courts had been objectively unreasonable in failing to recognize the ineffective assistance claim, and thus federal habeas relief was appropriate.

Florida v. Nixon, 73 U.S.L.W. 4047 (Dec. 13, 2004)(8-0) – *see* summary on p. 7.

C. Trial by Jury

In *United States v. Booker,* 73 U.S.L.W. 4056 (Jan. 11, 2005)(5-4), the Court ruled in a "merits" opinion written by Justice Stevens that the Federal Sentencing Guidelines are unconstitutional to the extent that they permit trial judges to impose sentences longer than the maximum sentence that would be allowed under the Guidelines based on facts found by the jury beyond a reasonable doubt or admitted by the defendant. This as-applied holding rested heavily on the Court's prior decisions in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Blakely v. Washington,* 542 U.S. 296 (2004). In a dissenting opinion on the merits, Justice Breyer argued that *Apprendi* and *Blakely* should not apply, both because they were wrong and because the Federal Sentencing Guidelines are not legislative enactments but administrative rules. On the question of remedy, Justice Ginsburg shifted sides, allowing Justice Breyer to write the majority opinion rather than Justice Stevens. On behalf of this remedial majority, Justice Breyer concluded that the Guidelines should now be treated as advisory rather than mandatory in all cases, and that instead of exercising *de novo* review appellate courts should review sentencing decisions to ensure that they are "reasonable." In defending the propriety of this new regime, Justice Breyer repeatedly stressed the importance of preserving the ability of judges to sentence defendants based on their "real conduct," even if that conduct is not reflected in jury's verdict. By contrast, Justice Stevens' remedial dissent argued that the principle of mandatory guidelines should be preserved in the vast majority of cases where they present no constitutional issue, and that in those cases that do present a constitutional issue the critical facts necessary for a sentencing enhancement must be presented to a jury for its determination beyond a reasonable doubt. In a separate dissent, Justice Scalia asserted that Justice Breyer's remedy was designed to reinstate the guidelines through the rubric of "voluntary" compliance but, in practice, was more likely to lead to sentencing disparities than sentencing uniformity. All nine Justices, however, agreed with Justice Breyer's observation that "[t]he ball now lies in Congress' court." *Id.* at 4070

Shepard v. United States, 73 U.S.L.W. 4186 (Mar. 7, 2005)(5-3) – *see* summary on p. 13.

Jay Shawn Johnson v. California, 73 U.S.L.W. 4460 (June 13, 2005)(8-1) – *see* summary on p. 9.

Miller-El v. Dretke, 73 U.S.L.W. 4479 (June 13, 2005)(6-3) – *see* summary on p. 9.

DEATH PENALTY

In *Smith v. Texas,* 73 U.S.L.W. 3294 (Nov. 15, 2004)(7-2), the Court summarily reversed yet another death sentence from Texas in a *per curiam* opinion that criticized the Texas Court of Criminal Appeals for approving jury instructions on the consideration of mitigating evidence that were inconsistent with prior Supreme Court decisions.

In *Florida v. Nixon,* 73 U.S.L.W. 4047 (Dec. 13, 2004)(8-0), the Court held that a defense counsel's decision to concede guilt and argue that the jury should spare his client's life in the penalty phase is not *per se* ineffective assistance of counsel and does not require automatic reversal, even if the client expressed neither agreement or disagreement when the lawyer's proposed strategy was explained to him. Instead, the Court ruled, the adequacy of the lawyer's representation should be judged according to the *Strickland* standard of reasonableness and prejudice.

In *Roper v. Simmons*, 73 U.S.L.W. 4153 (Mar. 1, 2005)(5-4), the Court ruled that the Eighth Amendment prohibits the execution of juveniles who were under the age of 18 when they committed murder. Writing for the majority, Justice Kennedy concluded that the "evolving standards of decency" that govern Eighth Amendment analysis had changed since the Court upheld the execution of 16 and 17 year olds in *Stanford v. Kentucky*, 492 U.S. 361 (1989). He noted that juveniles could not be put to death in 30 states, and that only 3 states had executed juveniles in the last 10 years. He further noted that juveniles were impulsive, subject to peer pressure, and still developing mentally, emotionally and socially. All those factors combined, he concluded, to undermine the traditional rationales of retribution and deterrence. Finally, he explained that the U.S. was now the only country in the world that officially condoned juvenile executions, and that international law and practice were relevant in construing the Eighth Amendment ban on cruel and unusual punishment. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented on all grounds. Justice O'Connor also dissented, although she strongly disagreed with Justice Scalia's view that international law and practice are never relevant in interpreting the Constitution. The ACLU submitted an *amicus* brief urging the Court to strike down the juvenile death penalty.

In *Brown v. Payton*, 73 U.S.L.W. 4223 (Mar. 22, 2005)(6-3), the Court upheld the death sentence in the habeas proceeding despite the state's admission that the prosecutor had mischaracterized the law when he told the jury during his closing argument at the penalty phase that the defendant's post-crime activities – including an alleged religious conversion in prison – could not be considered as mitigating evidence. Writing for the majority, Justice Kennedy, was unwilling to say that the California state courts had correctly applied existing Supreme Court precedent on mitigation. Nevertheless, he concluded that the state court rulings were not "unreasonably" wrong and thus the death sentence must be affirmed under AEDPA.

In *Bradshaw v. Stumpf,* 73 U.S.L.W. 4463 (June 13, 2005)(9-0), the Court remanded this death penalty case for further consideration of whether the due process clause bars the state from

describing two defendants as the triggerman for the same crime in successive death penalty prosecutions, without expressing an ultimate view on the merits.

Deck v. Missouri, 73 U.S.L.W. 4370 (May 23, 2005)(7-2) – *see* summary on p. 10.

Miller-El v. Dretke, 73 U.S.L.W. 4479 (June 13, 2005)(6-3) – *see* summary on p. 9.

Rompilla v. Beard, 73 U.S.L.W. 4522 (June 20, 2005)(5-4) – *see* summary on p. 6.

COMMERCE CLAUSE

In *Granholm v. Heald*, 73 U.S.L.W. 4321 (May 16, 2005)(5-4), the Court struck down state laws in Michigan and New York that prohibited or severely burdened the ability of out-of-state wineries to ship directly to consumers as a violation of the dormant Commerce Clause. Writing for the majority, Justice Kennedy rejected the states' claim that their discriminatory schemes were permissible under the Twenty-first Amendment, despite some expansive language in earlier decisions. Instead, Justice Kennedy embraced a contrary body of precedent holding that "state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment." *Id.* at 4328. Finally, Justice Kennedy concluded that the states' legitimate interest in preserving its tax revenues and limiting the sale of wine to underage minors could be achieved through nondiscriminatory means. Justice Thomas wrote a long dissent.

In *Gonzales v. Raich,* 73 U.S.L.W. 4407 (June 6, 2005)(6-3), the Court held that Congress could validly prohibit the local cultivation and use of medical marijuana under its Commerce Clause powers, even if the marijuana in question never crossed state lines. Writing for the majority, Justice Stevens cited *Wickard v. Filburn,* 317 U.S. 111 (1942), for the proposition that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate the class of activity would undercut the regulation of the interstate market in that commodity." *Id*. at 4412. Notably, the majority also distinguished the Court's more limited construction of congressional powers under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act), and *United States v. Morrison,* 529 U.S. 598 (2000) (striking down a portion of the Violence Against Women Act.).

EQUAL PROTECTION

In *Garrison Johnson v. California,* 73 U.S.L.W. 4137 (Feb. 23, 2005)(5-3), the Court held that California's unique policy of racially segregating all new or newly transferred inmates for sixty days must be subject to strict scrutiny rather than evaluated under the more relaxed *Turner* standard that applies to many other prison regulations. Writing for the majority, Justice O'Connor reiterated her familiar view that *all* racial classifications are subject to strict scrutiny regardless of their purpose and noted that the use of racial classifications in prison can in fact exacerbate racial tensions rather than relieve them. Although her opinion strongly suggested that California's policy could not be justified, she remanded the case for reconsideration under the proper standard rather than declare it unconstitutional Justices Ginsburg, Souter, and Breyer

concurred but wrote separately to emphasize their view that racial classifications intended to ameliorate the effects of past discrimination – unlike the racial discrimination here – should be judged by a more lenient test. Justice Stevens also wrote separately to assert that California's policy of racial segregation should be declared unconstitutional without the necessity of a remand because it was indefensible under either strict scrutiny or *Turner*. Finally, Justice Thomas wrote a dissent, joined by Justice Scalia, arguing that *Turner* provided the appropriate legal standard for this case, and that California's policy of racial segregation served a legitimate penological purpose that satisfied *Turner*. The ACLU submitted an *amicus* brief urging that California's policy be struck down under strict scrutiny.

In *Miller-El v. Dretke,* 73 U.S.L.W. 4479 (June 13, 2005)(6-3), the Court revisited the issue of jury discrimination that it had first addressed two years ago in this death penalty case, and held that the prosecution had engaged in a racially discriminatory pattern of peremptory challenges in violation of the Equal Protection Clause. Even applying AEDPA's high threshold standard, the Court concluded that the Fifth Circuit's rejection of the *Batson* claim in this habeas proceeding represented an "unreasonable determination of the facts in light of the evidence presented in the State Court proceedings." Writing for the majority, Justice Souter stressed the high percentage of black jurors who were subject to peremptory challenges by the prosecution, the pretextual nature of the prosecution's proffered race-neutral explanations, and the history of racially discriminatory jury selection practices in this particular prosecution office. Justice Breyer wrote a separate concurring opinion suggesting that it might be time to reevaluate the peremptory challenge system itself.

In *Jay Shawn Johnson v. California*, 73 U.S.L.W. 4460 (June 13, 2005)(8-1), the Court rejected a California state rule requiring a defendant who raised a *Batson* claim to prove at the outset that a prosecutor's use of peremptory challenges was "more likely than not" the result of racial discrimination before the prosecutor was required to offer a race-neutral explanation. Writing for the majority, Justice Stevens explained at that purpose of the *Batson* was to determine if racial discrimination had occurred and, thus, it was appropriate to require a race-neutral explanation from the prosecutor whenever the defendant had established an inference of discrimination. The ACLU submitted an *amicus* brief urging the Court to reject California's higher standard.

In *Halbert v. Michigan,* 73 U.S.L.W. 4600 (June 23, 2005)(6-3), the Court ruled that Michigan cannot deny indigent defendants appointed counsel on a first appeal from a guilty plea, citing both equal protection and due process concerns. Although criminal defendants in Michigan must seek leave to appeal under these circumstances, Justice Ginsburg's majority opinion noted that the decision on whether to grant leave necessarily involves a review of the merits, which increases the importance of legal representation. Moreover, she noted, a defendant pursuing a first appeal does not have the benefit of prior appellate briefs, unlike a defendant pursuing a second or third appeal. Finally, she held that the defendant in this case had not knowingly waived his right to counsel by pleading guilty and suggested, more broadly, that a system that only required indigent defendants to waive their right to counsel on appeal would be constitutionally suspect. The ACLU was counsel for the defendant in this case.

DUE PROCESS

In *Deck v. Missouri*, 73 U.S.L.W. 4370 (May 23, 2005)(7-2), the Court held that due process principles prohibit the state from shackling a defendant during the penalty phase of a capital trial absent a judicial finding that "the use of physical restraints visible to the jury…(is] justified by a state interest specific to a particular trial." *Id*. at 4372-73. The majority opinion, written by Justice Breyer, thus extended a rule that had long been applied pre-conviction.

In *Wilkinson v. Austin,* 73 U.S.L.W. 4473 (June 13, 2005)(9-0), the Court unanimously ruled that an inmate facing transfer to Ohio's supermax prison is entitled to some procedural safeguards under the Due Process Clause. Finding that conditions at the supermax prison impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 4477, quoting *Sandin v. O'Connor,* 515 U.S. 472, 484 (1995), the Court rejected the position of the United States government, as *amicus,* that no liberty interest is at stake. However, the Court also ruled that the procedures put in place by Ohio during the pendency of the litigation are sufficient, on their face, to meet the applicable due process standards. At the same time, the Court left open the possibility of future as-applied challenges. The ACLU was co-counsel for the plaintiff class along with the Center for Constitutional Rights, which served as lead counsel.

In *Town of Castle Rock v. Gonzales,* 73 U.S.L.W. 4611 (June 27, 2005)(7-2), the Court held that a woman whose estranged husband killed their three children after the police repeatedly refused to enforce a protective order without explanation could not pursue a procedural due process claim against the police. Writing for the majority, Justice Scalia concluded that Colorado law did not impose a mandatory duty on the police to enforce the protective order, notwithstanding the fact that the protective order contained a "Notice to Law Enforcement" on its reverse side that began by stating, in all capitals: "YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER . . ." Having decided that this mandatory language created only a discretionary duty, the majority then held that discretionary duties do not give rise to a property interest under the Due Process Clause. The ACLU submitted an amicus brief supporting the due process claim of the plaintiff in this case.

Halbert v. Michigan, 73 U.S.L.W. 4600 (June 23, 2005)(6-3) – *see* summary on p. 9.

SECTION 1983

In *Wilkinson v. Dotson,* 73 U.S.L.W. 4204 (Mar. 7, 2005)(8-1), the Court ruled that Section 1983 is a proper vehicle for a prisoner's *ex post facto* challenge to the use of parole guidelines that were adopted after his conviction. Writing for the majority, Justice Breyer explained that the prisoner's claim need not be brought in a habeas corpus proceeding because success on the prisoner's claim will neither invalidate his conviction nor necessarily shorten his ultimate period of confinement.

In City of *Rancho Palos Verdes v. Abrams*, 73 U.S.L.W. 4217 (Mar. 22, 2005)(9-0), the Court unanimously held that Congress had created a comprehensive remedial scheme to challenge local zoning decisions when it enacted the Telecommunications Act of 1996, and the

existence of this comprehensive remedial scheme foreclosed a separate enforcement action under § 1983. Significantly, however, the Court refused to adopt a *per se rule* that § 1983 is never available to enforce statutory rights if the statute itself contains a private right of action.

STATUTORY CIVIL RIGHTS CLAIMS

A. Americans with Disabilities Act

In *Spector v. Norwegian Cruise Line,* 73 U.S.L.W. 4429 (June 6, 2005)(6-3), the Court ruled, in a splintered decision, that Title III of the ADA, which prohibits discrimination against people with disabilities in places of public accommodations, applies to foreign-flag cruise ships in United States waters, with one exception. According to Justice Kennedy's plurality opinion, the Act does not require structural changes intended to remove physical barriers, either because they are not "readily achievable" within the meaning of the Act or, alternatively, because they fall outside the statute under a canon of statutory construction that requires a clear statement from Congress when the internal order of a ship is at issue.

B. Title IX

In *Jackson v. Birmingham Board of Education,* 73 U.S.L.W. 4233 (Mar. 29, 2005)(5-4), the Court upheld the right to bring a retaliation suit under Title IX, even if the person claiming retaliation is not the victim of the original discrimination. In this case, the plaintiff was a high school basketball coach who complained about the lack of funding, equipment and facilities for the girls' team. Writing for the majority, Justice O'Connor explained that "retaliation is discrimination 'on the basis of sex,' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.* at 4235. She also stressed that civil rights enforcement would be severely impaired if individuals reporting discrimination are not protected against retaliation, especially under a statutory scheme like Title IX where a school district's liability is often dependent on notice. The ACLU submitted an *amicus* brief urging the recognition of retaliation claims under Title IX.

C. Age Discrimination in Employment Act

In *Smith v. City of Jackson,* 73 U.S.L.W. 4251 (Mar. 30, 2005)(5-3), the Court ruled that the ADEA permits disparate impact claims as well as disparate treatment claims. (The latter require proof of intentional discrimination, the former do not.) However, to prevail on a disparate impact claim under the ADEA, plaintiffs must identify the specific employment practice responsible for any statistical disparities between younger and older workers. In addition, the statute grants employers a defense if they can show that the challenged practice is based on a "reasonable factor other than age." Applying that test to these facts, the Court unanimously rejected plaintiffs' salary discrimination claim on the merits.

HABEAS CORPUS

In *Rhines v. Weber,* 73 U.S.L.W. 4263 (Mar. 30, 2005)(9-0), the Court considered how to handle federal habeas petitions that contain both exhausted and unexhausted claims. As Justice O'Connor explained, a rule dismissing such petitions until all claims have been exhausted in state court can effectively bar relief on even the exhausted claims because of AEDPA's one-year filing deadline. On the other hand, a rule automatically staying the federal petition until the unexhausted claims can be heard in state court seems inconsistent with AEDPA's goal of streamlining federal habeas proceedings. She therefore proposed two solutions to this problem. First, the district court can stay proceedings on a federal petition raising both exhausted and unexhausted claims (and thereby eliminate any statute of limitations issue), if the habeas petitioner demonstrates good cause for not having previously pursued the unexhausted claims in state court. Second, the habeas petitioner can dismiss the unexhausted claims and proceed in federal court only on the claims that have been exhausted.

In *Robert Johnson v. United States,* 73 U.S.L.W. 4270 (April 4, 2005)(9-0), the Court unanimously ruled that the one year statute of limitations under AEDPA does not begin to run for a federal habeas petitioner whose challenge to a federal sentencing enhancement rests on a state court order vacating a predicate state conviction until the state court order is actually entered. However, by a 5-4 majority, the Court also held that this tolling provision does not apply if the federal habeas petitioner did not exercise due diligence in his efforts to have the state conviction vacated. In this case, the majority concluded that the habeas petitioner had not met the due diligence test by waiting three years after his federal sentencing enhancement to attack the predicate state conviction in state court.

In *Pace v. DiGuglielmo,* 73 U.S.L.W. 4304 (April 27, 2005)(5-4), the Court held that the one-year statute of limitations for filing a federal habeas petition under AEDPA is not tolled by the filing of an untimely state post-conviction petition. Writing for the Court, Chief Justice Rehnquist suggested that a prisoner who is unsure whether his state post-conviction petition will be deemed timely can always safeguard against the running of the federal limitations period by filing a "protective" petition in federal court, which can then be stayed pending resolution of the state law issue. In his dissenting opinion, Justice Stevens argued that this result would lead to more filings in federal court and more piecemeal litigation, contrary to the purpose of AEDPA.

In *Dodd v. United States,* 73 U.S.L.W. 4516 (June 20, 2005)(5-4), the Court held that one year statute of limitations that applies to federal habeas petitions under 28 U.S.C. § 2255(3) runs from the date the Court announces a new rule and not from the date when it is determined that the new rule applies retroactively. Justice O'Connor acknowledged that this reading of the text could produce harsh results in particular cases but concluded that it was compelled by the plain language of the statute. Justice Stevens, in dissent, argued that Congress could not have intended to extinguish a cause of action before it accrued.

In *Mayle v. Felix,* 73 U.S.L.W. 4590 (June 23, 2005)(7-2), the Court held that AEDPA bars an amendment to an existing habeas petition after the one-year limitations period has elapsed unless the amendment is based on the same operative facts and relates to the same legal claim. According to Justice Ginsburg's majority opinion, it is not sufficient for the amended claim to arise from the same trial, conviction, or sentence. Thus, in this case, she rejected the

habeas petitioner's effort to add a new coerced confession claim to a pre-existing Confrontation Clause claim.

In *Gonzalez v. Crosby,* 73 U.S.L.W. 4568 (June 23, 2005)(7-2), the Court held that a Rule 60(b) motion seeking to reopen a habeas judgment should not be treated as a successive habeas petition if the motion does not challenge the validity of the underlying state conviction but rather, as here, challenges the federal court's failure to reach the underlying claim because of some misapplication of federal law. Petitioner thus avoided the need to comply with the strict rules governing successive habeas petitions. His claim to reopen the habeas proceedings was nonetheless denied because the Court concluded that he had failed to meet even the less stringent standards applicable to a Rule 60(b) motion.

Wilkinson v. Dotson, 73 U.S.L.W. 4204 (Mar. 7, 2005)(8-1) – *see* summary on p. 10.

Brown v. Payton, 73 U.S.L.W. 4223 (Mar. 22, 2005)(6-3) – *see* summary on p. 7.

Rompilla v. Beard, 73 U.S.L.W. 4522 (June 20, 2005)(5-4) – *see* summary on p. 6.

FEDERAL CRIMINAL LAW

In *Whitfield v. United States,* 73 U.S.L.W. 4053 (Jan. 11, 2005)(9-0), the Court held unanimously that the money laundering conspiracy statute, 18 U.S.C. § 1956(h), does not require proof of an overt act and, more broadly, that conspiracy law does not require proof of an overt act unless Congress has specifically included that requirement as it did, for example, in the general federal conspiracy law, 18 U.S.C. § 371.

In *Shepard v. United States*, 73 U.S.L.W. 4186 (Mar. 7, 2005)(5-3), the Court continued its reexamination of criminal sentencing schemes by holding that a federal defendant can only be subject to an enhanced sentence based on three prior guilty pleas for violent crimes under the Armed Career Criminal Act (ACCA) if it is clear from either the plea colloquy or plea agreement that the prior convictions in fact meet ACCA's definition of a violent crime. Writing for the majority, Justice Souter rejected the notion that the sentencing court could rely on such non-judicial evidence as police reports to trigger ACCA's enhanced sentencing scheme. He rested his decision on an interpretation of ACCA's language, but also made clear that a contrary ruling would raise serious Sixth Amendment issues under *Apprendi*. Justice Thomas went further in his concurring opinion and said that a contrary ruling would plainly violate *Apprendi*. In her dissent, Justice O'Connor warned that the majority's reasoning might ultimately hurt defendants if it encourages prosecutors to put evidence of prior violent crimes before the jury.

In *Arthur Anderson v. United States*, 73 U.S.L.W. 4393 (May 31,2005)(7-2), the Court unanimously held that a conviction under 18 U.S.C. § 15(b)(2)(A) and (B) for "knowingly … corruptly persuad(ing]" a person to withhold testimony or evidence – part of the federal witness tampering statute – requires proof that the defendant acted with a "consciousness of wrongdoing." Writing for the Court, Chief Justice Rehnquist therefore reversed the conviction of Arthur Anderson, the accounting firm, for ordering the destruction of documents in connection with the Enron scandal.

United States v. Booker, 73 U.S.L.W. 4056 (Jan. 11, 2005)(5-4) – *see* summary on p. 6.

IMMIGRATION LAW

In *Leocal v. Ashcroft,* 73 U.S.L.W. 4001 (Nov. 9, 2004)(9-0), the Court unanimously ruled that a drunk driving conviction under Florida law is not a "crime of violence" under federal law and thus does not trigger mandatory deportation. Federal law defines a "crime of violence" as one that involves the use, attempted use, or threatened use of force. Writing for the Court, Chief Justice Rehnquist explained that the word "use" normally implies intent or, at least, recklessness. He then concluded that Florida's drunk driving law does not meet that definition because it does not require either intent or recklessness. The ACLU submitted an *amicus* brief urging the Court to reject the characterization of Florida's drunk driving law as a deportable "crime of violence."

In *Clark v. Martinez,* 73 U.S.L.W. 4100 (Jan. 11, 2005)(7-2), the Court ruled that its holding in *Zadvydas v. Davis,* 533 U.S. 678 (2001), applies to all aliens regardless of whether they entered the country legally or illegally, like the Mariel Cubans in this case. Under *Zadvydas,* an alien is presumptively entitled to release if the government has been unable to effectuate his removal within six months after the entry of a removal order. The *Zadvydas* Court adopted this rule to avoid the constitutional problems that would be created by indefinitely detaining aliens who had entered the country legally. While acknowledging that those same constitutional issues may not be present for aliens who entered the country illegally, Justice Scalia explained that the principle of constitutional avoidance is a canon of statutory construction and that, once construed, a statute must be applied consistently to all persons covered by its provisions. The ACLU submitted an *amicus* brief in the companion case of *Benitez v. Rozos* urging the interpretation that the Court ultimately adopted.

In *Jama v. INS,* 73 U.S.L.W. 4090 (Jan. 11, 2005)(5-4), the Court held that the government is not precluded by the relevant provision of the immigration law, 8 U.S.C. § 1231(b)(2) from sending an alien subject to removal to his country of birth even if that country has not formally indicated a willingness to accept him. In this case, that ruling means that petitioner can be sent back to Somalia, even though that country currently lacks a functioning government.

INTERNATIONAL LAW

In *Medellin v. Dretke*, 73 U.S.L.W. 4381 (May 23,2005)(5-4), the Court dismissed the writ of *certiorari* as improvidently granted in this *habeas corpus* action challenging the validity of a death sentence imposed by the State of Texas despite its failure to comply with the Vienna Convention on Consular Relations, which requires consular notification whenever a foreign national is arrested. In a separate proceeding brought by Mexico, the International Court of Justice had ordered the United States to rectify the error in a total of 51 cases, including this one. Shortly before oral argument, the President responded to the ICJ decision by announcing that the U.S. would comply with the ICJ ruling as a matter of comity, although continuing to deny its

binding effect. Medellin, in turn, filed a new state court proceeding in light of the President's announcement. These developments persuaded the majority to dismiss the case in a *per curiam* opinion. In the majority's view, the state proceedings might resolve the legal issues and, if not, the Court could take them up later. The dissent, by contrast, argued that the case should be remanded to the Fifth Circuit because it had improperly dismissed the serious treaty claim that Medellin had raised in his federal habeas proceedings.

ADMINISTRATIVE LAW

In *Ballard v. Commissioner of Internal Revenue,* 73 U.S.L.W. 4194 (Mar. 7, 2005)(7-2), the Court held that the Tax Court's practice of neither sharing the findings of special trial judges with the parties nor including it as part of the record on appeal violates the Tax Court's own rules. As Judge Ginsburg wrote for the majority, "[t]he Tax Court, like all other decisionmaking tribunals, is obliged to follow its own Rules." *Id*. at 4199. The ACLU submitted an *amicus* brief arguing that the Tax Court's practice was unlawful.

ATTORNEYS' FEES

In *CIR v. Banks,* 73 U.S.L.W. 4117 (Jan. 24, 2005)(9-0), the Court unanimously held that, as a general rule, the money paid by a client to a lawyer as part of a contingent fee arrangement must be reported as income by the client (as well as the lawyer). Writing for the Court, however, Justice Kennedy noted that the prospective impact of this holding is minimal because any contingent fee payment is now deductible from the client's adjusted gross income under the American Jobs Creation Act of 2004, which functionally means that it will not be treated as taxable. The Court also expressly declined to address whether the same tax rules apply to statutory fees.

STANDING

In *Kowalski v. Tesmer,* 73 U.S.L.W. 4033 (December 13, 2004)(6-3), the Court ruled that the lawyer plaintiffs in this case lacked prudential standing on behalf of future clients to challenge Michigan's practice of denying appointed counsel on a first appeal to indigent defendants who plead guilty. The majority opinion, written by Chief Justice Rehnquist, declined to express any opinion on the constitutionality of the underlying practice. The ACLU represented the lawyers challenging Michigan's rule.

JURISDICTION

In *Tenet v. Doe,* 73 U.S.L.W. 4182 (Mar. 2, 2005)(9-0), the Court unanimously held that *Totten v. United States,* 92 U.S. 105 (1876), bars any suit against the government by an alleged spy, whether framed as a breach of contract (as in *Totten)* or a due process claim (as here). As Chief Justice Rehnquist explained for the Court: "No matter the clothing in which alleged spies dress their claims, *Totten* precludes judicial review in cases such as respondents' where success

depends upon the existence of their secret espionage relationship with the Government." *Id*. at 4184.

In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.,* 73 U.S.L.W. 4266 (Mar. 30, 2005) (9-0), the Court held that the *Rooker-Feldman* doctrine, which deprives federal district courts of jurisdiction to review state court judgments absent a congressional statute granting such jurisdiction (as in habeas corpus), only applies to a narrow class of "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id*. at 4267. Justice O'Connor's opinion also emphasized, however, that the normal preclusion rules apply in any federal court proceeding following a state court proceeding, even if *Rooker-Feldman* does not.

In *Exxon Mobil Corp. v. Allapattah Services, Inc.,* 73 U.S.L.W. 4574 (June 23, 2005) (5-4), the Court ruled that the federal courts in a diversity action may assert supplemental jurisdiction over claims that do not meet the minimum amount in controversy so long as there is at least one plaintiff who does and there is complete diversity among the parties.