ACLU SUMMARY

of the

2006 SUPREME COURT TERM

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Major Civil Liberties Decisions

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CASES

FIRST AMENDMENT

A. Freedom of Speech and Association

In *Davenport v. Washington Education Ass'n,* 127 S.Ct. 2372 (June 14, 2007)(9-0), the Court unanimously upheld the constitutionality of a state law prohibiting public sector unions from spending the agency fees collected from non-members for political purposes without affirmative consent. Writing for the majority, Justice Scalia held that the First Amendment does not bar the state from adopting an opt-in rather than an opt-out procedure.

In *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy,* 127 S.Ct. 2489 (June 21, 2007)(9-0), the Court unanimously held that a rule barring high school coaches from recruiting middle school athletes did not violate the First Amendment. All nine members of the Court agreed that the rule was a reasonable one and that Brentwood Academy was not entitled to heightened scrutiny because it had voluntarily chosen to join the athletic association and thus agreed, at least implicitly, to abide by its reasonable regulations. Justices Stevens, Souter, Ginsburg and Breyer also concluded that the rule should be upheld because it "strikes nowhere near the heart of the First Amendment," *id.* at 2493, analogizing to the ban on in-person solicitation by lawyers upheld in *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978). The other five members of the Court, however, expressly rejected that analogy and strongly suggested that the no-solicitation rule might well be unconstitutional if it had not been accepted by Brentwood Academy when it voluntarily joined the athletic association. As Justice Kennedy wrote in a concurring opinion: "To allow free-standing state regulation of speech by representatives of non-member schools would be a dramatic expansion of *Ohralik* to a whole new field of endeavor." *Id.* at 2499. On a second issue in the case, all nine Justices again agreed that any due process deficiency in the disciplinary proceedings brought against Brentwood Academy was harmless error because Brentwood was unable to demonstrate how its defense strategy was affected by the hearing board's consideration of *ex parte* evidence that did not, in fact, contain any information that Brentwood "did not already know." *Id.* at 2498.

In *Morse v. Frederick,* 127 S.Ct. 2618 (June 25, 2007)(5-4), the Court upheld the suspension of a high school student who held up a banner with the words "Bong Hits 4 Jesus" as the Olympic Torch Relay passed by his high school in Juneau, Alaska. Although there was no evidence that the sign disrupted school activities, Chief Justice Roberts concluded that school officials had reasonably concluded that the sign conveyed a pro-drug message (an interpretation that the student speaker consistently denied), and could suppress it on that basis alone. The Court offered no explanation for its departure from the disruption standard that has governed student free speech cases since *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969), other than to repeat its oft-stated concern about student drug use, an issue that was not directly involved in this case. At the same time, both the majority opinion by Chief Justice Roberts and a concurring opinion joined by Justices Alito and Kennedy tried to limit the reach of the Court's ruling by stressing that it did not empower school officials to censor political or religious speech merely because the speech was deemed "offensive" or inconsistent with the school's educational mission. Justice Thomas also concurred but on the theory that students have no First Amendment rights and *Tinker* should be overruled. The ACLU represented the student plaintiff.

In *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (June 25, 2007)(5-4), the Court ruled that corporations and unions cannot be barred from using general treasury funds to broadcast radio and TV ads that mention the name of a federal candidate in the 30 days before a primary or 60 days before a general election – despite the absolute ban adopted by Congress in § 203 of the Bipartisan Campaign Reform Act (BCRA) of 2002 -- unless the ads are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. The BCRA's ban, which applies both to for-profit corporations and non-profit corporations, like the ACLU, had been upheld as facially valid in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003). Justices Scalia, Thomas, and Kennedy voted to overrule that portion of *McConnell* in a concurring opinion. Chief Justice Roberts and Justice Alito found it unnecessary to go that far but their decision in favor of the as-applied challenge in this case significantly undermines the Court's rationale in *McConnell.* While *McConnell* focused on the influence of corporate money and so-called "sham" issue ads, Chief Justice Roberts took a very different approach, observing: "Discussion of issues cannot be suppressed simply because the issues may also be pertinent to an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.* at 2669. The ACLU submitted an *amicus* brief arguing that the BCRA could not constitutionally be applied to ads by the ACLU, which has never endorsed or opposed an electoral candidate in its 87 year history.

B. Establishment Clause

In *Hein v. Freedom from Religion Foundation, Inc.*, 127 S.Ct. 2553 (June 25, 2007)(5-4), the Court placed new limits on the ability of taxpayers to challenge government programs that support religion. In an opinion by Justice Alito, the Court held that taxpayers may challenge such programs if they have been authorized by Congress but not if they have been developed and paid for by the executive branch using discretionary funds. Based on that distinction, the Court dismissed the challenge in this case to various expenditures by the White House Office of Faith-Based Initiatives, which had been created by executive order and funded by general appropriations. Although Justice Alito's opinion was harshly critical of *Flast v. Cohen*, 392 U.S. 83 (1968), which first recognized taxpayer standing in Establishment Clause cases nearly forty years ago, it did not overrule it, a step that Justices Scalia and Thomas urged in a separate concurring opinion. The ACLU submitted an *amicus* brief supporting the principle of taxpayer standing under the Establishment Clause.

FOURTH AMENDMENT

In *Scott v. Harris*, 127 S.Ct. 1769 (April 30, 2007)(8-1), the Court ruled that the police did not violate the Fourth Amendment when they "stopp[ed] a fleeing motorist from continuing his public-endangering flight by ramming a motorist's car from behind," *id.* at 1772, forcing the motorist off the road and leaving him a quadriplegic. Both lower courts had held there was a factual dispute about whether the motorist's conduct placed either the police or innocent bystanders at imminent risk, and therefore remanded for a trial on whether the police had used excessive force under the circumstances. After reviewing a videotape of the incident, however, Justice Scalia concluded for the majority that no reasonable jury could have disputed the existence of an imminent risk, and that the question of whether the police response was reasonable presented a matter of law that the Court could decide. In evaluating the reasonableness of the police action, moreover, Justice Scalia wrote that in "weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person," it is appropriate "to take into account not only

the number of lives at risk, but also their relative culpability." *Id.* at 1778. The opinion thus comes very close to a *per se* rule justifying the use of deadly force in high speech chases, although Justice Ginsburg argued in her concurrence that no such rule had been announced. Justice Stevens, the lone dissenter, accused the majority of usurping the role of the jury. The ACLU submitted an *amicus* brief arguing that the police officer's interlocutory appeal should have been dismissed because of the factual disputes (an issue that the Court did not address).

In *Los Angeles County v. Rettele*, 127 S.Ct. 1989 (May 21, 2007)(8-0), the Court summarily ruled, in a *per curiam* opinion, that the police did not violate the Fourth Amendment when they ordered the white occupants of a home out of their bed naked while seeking evidence of crime by four black suspects named in a search warrant. Reversing the Ninth Circuit, the Court noted that the police did not know that the house had recently been sold to new owners and that their decision to secure the premises while continuing the search was brief and reasonable under all the circumstances. Having found no constitutional violation, the Court found it unnecessary to consider whether defendants were entitled to qualified immunity. Justice Stevens and Ginsburg agreed with the result but would have decided the question of qualified immunity without reaching the constitutional issues, continuing a long-running debate within the Court. Justice Souter did not join either opinion; rather, he voted to deny the petition for *certiorari.*

In *Brendlin v. California*, 127 S.Ct. 2400 (June 18, 2007)(9-0), the Court ruled unanimously that passengers have Fourth Amendment standing to object to an unconstitutional car stop. Writing for the Court, Justice Souter began with the observation that a reasonable passenger in a car that has been stopped by the police does not feel free to leave the scene without police permission. He then noted that a holding by the Court that passengers lack standing to raise a Fourth Amendment claim "would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal." *Id.* at 2410. Echoing that latter point, the ACLU submitted an *amicus* brief highlighting the heightened risk of racial profiling if standing had been denied in this case.

SIXTH AMENDMENT

A. Confrontation Clause

In *Whorton v. Bockting*, 127 S.Ct. 1173 (Feb. 28, 2007)(9-0), the Court unanimously held that its reinterpretation of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004), represented a "new rule" and therefore did not apply retroactively to cases that were already final on direct review. Writing for the Court, Justice Alito distinguished the holding in *Crawford* from the holding in *Gideon* (requiring the appointment of counsel for indigent defendants), which is the only case that the Court has so far described as a "watershed rul[e] of criminal procedure implicating the fairness and accuracy of the criminal proceeding." *Id.* at 1181 (citations and internal quotations omitted).

B. Jury Trial

In *Cunningham v. California*, 127 S.Ct. 856 (Jan. 22, 2007)(6-3), the Court ruled that California's Determinate Sentencing Law is unconstitutional insofar as it subjects defendants to a harsher sentence than the jury verdict would otherwise permit based on additional facts found by the judge after trial by a preponderance of the evidence. As explained by the Court, California law imposes three alternative sentences for most crimes. The judge is instructed to impose the middle sentence unless, at sentencing, the judge determines that "mitigating circumstances" justify the lower sentence or "aggravating circumstances" justify the higher sentence. In this case, the judge found "aggravating circumstances" and accordingly increased the defendant's sentence from 12 years in prison to 16 years. Writing for the majority, Justice Ginsburg concluded that this sentencing scheme deprived the defendant of his right to trial by jury, and thus suffered from the same fundamental flaw that led the Court to declare the then-mandatory (and now advisory) federal Sentencing Guidelines unconstitutional in *United States v. Booker*, 543 U.S. 220 (2005). Chief Justice Roberts joined the majority and Justice Alito wrote his first significant dissent (joined by Justices Kennedy and Breyer).

Cary v. Musladin, 127 S.Ct. 649 (Dec. 11, 2006) – *see* summary on p.8.

DEATH PENALTY

In *Ayers v. Belmontes*, 127 S.Ct. 469 (Nov. 13, 2006)(5-4), the Court rejected for the third time a challenge to the constitutionality of California's so-called "catch-all" instruction on mitigation. The current instruction, amended by the legislature in 2005, directs jurors to consider "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence other than death, whether or not related to the offense for which he is on trial." At the time that petitioner was sentenced in 1982, however, the instruction directed jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Petitioner argued that this earlier formulation was likely to mislead a reasonable juror into believing that mitigating evidence could only be considered if it "extenuate[d] the gravity of the crime," and thus there was a reasonable likelihood that the jury in his case did not consider evidence that he had previously been a model prisoner and could again make valuable contributions in prison if spared the death sentence. Writing for the majority, Justice Kennedy agreed that predictions about petitioner's post-conviction behavior were relevant to sentencing, but disagreed that they were foreclosed by the instruction given the jury. The dissent written by Justice Stevens, on the other hand, pointed to excerpts from the record suggesting the judge, jury, and prosecution were all confused about the meaning and scope of the catch-all instruction.

In *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (April 25, 2007)(5-4), the Court reversed yet another Texas death sentence. In an opinion written by Justice Stevens, the Court held that the failure of the state courts to clearly instruct the jury that it could consider *any* mitigating evidence presented by the defendant in deciding whether to impose the death penalty violated clearly established federal law in effect at the time, and thus entitled Abdul-Kabir to a writ of habeas corpus even under the stringent review standards of the Antiterrorism and Effective Death Penalty Act (AEDPA). Justice Kennedy joined the majority. In the principal dissent, Chief Justice Roberts accused the majority of "revisionist" history by finding clearly established law when in his view there was none and thereby improperly expanding the role of federal judicial review under AEDPA.

In *Brewer v. Quarterman*, 127 S.Ct. 1706 (April 25, 2007)(5-4), a companion case to *Abdul-Kabir,* the same majority again ruled that the Texas courts had misapplied the rule on mitigating evidence and again reversed the Fifth Circuit's refusal to grant a writ of habeas corpus under AEDPA. As Justice Stevens explained, the law requires that mitigating evidence be given "full effect" not merely "sufficient effect," the standard erroneously applied by the Firth Circuit below.

In *Smith v. Texas,* 127 S.Ct. 1686 (April 25, 2007)(5-4), the Court held that the death row inmate in this case had properly preserved his constitutional objection to the mitigation instructions given at his trial and was entitled to a writ of habeas corpus because those instructions were constitutionally deficient. Justice Kennedy wrote the majority opinion; Justice Alito wrote the principal dissent.

In *Uttecht v. Brown*, 127 S.Ct. 2218 (June 4, 2007)(5-4), the Court held that a prospective juror in a capital case had properly been excluded for cause based on his statement, during voir dire, that he would be willing to impose the death penalty if persuaded that the defendant might kill again. Because life without parole is the only alternative to a death sentence under Washington law, the prosecution argued that the juror's focus on future dangerousness meant that he would not impose the death penalty in this case regardless of the evidence presented. The trial judge agreed, ruling that the juror's views on the death penalty substantially impaired his ability to follow the court's instructions, even though the juror expressly stated otherwise on four separate occasions. Writing for the majority, Justice Kennedy held that the trial court's ruling was entitled to deference. In dissent, Justice Stevens argued that prospective jurors should not be subject to automatic disqualification in capital cases because they believe "that a life sentence without the possibility of parole is the severest sentence that should be imposed in all be the most heinous cases." *Id.* at 2239. The ACLU submitted an *amicus* brief supporting the capital defendant in this case.

In *Panetti v. Quarterman,* 127 S.Ct. 2842 (June 28, 2007)(5-4), the Court held that the Eighth Amendment bars execution of a defendant who does not understand the reason why he is being executed, even if he knows that he was convicted of murder and was found competent to stand trial. Citing *Ford v. Wainwright,* 477 U.S. 399 (1986), Justice Kennedy wrote for the majority that "[p]rior findings of competence do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition." *Id.* at 2848. The majority also held it was not required to defer to the conclusion of the Texas state courts that Panetti was competent to be executed because the state courts had not provided him with an adequate opportunity to challenge that conclusion.

Lawrence v. Florida, 127 S.Ct. 1079 (Feb. 20, 2007)(5-4) – *see* summary on p.9.

REPRODUCTIVE RIGHTS

In *Gonzales v. Carhart*, 127 S.Ct. 1610 (April 18, 2005)(5-4), the Court, for the first time since *Roe,* upheld a federal law banning certain abortions. Seven years ago, a similar state ban on so-called "partial birth abortions" was declared unconstitutional by an equally narrow 5-4 majority in *Stenberg v. Carhart*, 530 U.S. 914 (2000). Justice O'Connor provided the critical fifth vote in *Stenberg,* with Justice Kennedy dissenting. This time, Justice Kennedy wrote the majority opinion supported by Justice Alito, who had replaced Justice O'Connor in the interim.

In the first part of the opinion, Justice Kennedy concluded that the federal law was not vague because Congress had defined the banned procedure with more precision than Nebraska. In the second and more important part of the opinion, Justice Kennedy essentially rewrote thirty years of Supreme Court abortion jurisprudence by ruling that the federal law was not facially unconstitutional despite the absence of a health exception because Congress was entitled to prescribe medical standards for doctors in the face of "medical uncertainty," and could do so on the basis of moral and ethical concerns. By contrast, *Stenberg* had held that politicians could not ban a medical procedure that a "significant body" of medical opinion thought was safer for women. Justice Kennedy's opinion also casts doubt on the continuing validity of the "undue burden" standard and the continuing relevance of viability in determining the legitimate scope of abortion regulation. Finally, Justice Kennedy observed that "these facial challenges should never have been entertained in the first instance," *id.* at 1638, relegating women who face a health risk to an "as-applied challenge in a discrete case." *Id.* at 1639. In a strongly worded dissent, Justice Ginsburg described the majority opinion as "alarming," *id.* at 1641, and said: "In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court -- and with increasing comprehension of its centrality to women's lives." *Id.* at 1653. The ACLU was counsel in one of the three lower court challenges to the federal law, and participated in the Supreme Court as *amicus curiae.*

DUE PROCESS

In *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (Feb. 20, 2007)(5-4), the Court held that the due process clause permits a jury to consider harm caused to third parties in assessing the "reprehensibility" of a defendant's conduct but not "for the purpose of punishing a defendant for harming others." *Id.* at 1063. "This nuance eludes me," Justice Stevens wrote in dissent. *Id.* at 1067. The Court's line-up was interesting and unusual. Justice Breyer wrote the majority opinion, joined by Chief Justice Roberts, Justices Kennedy, Souter and Alito. In addition to Justice Stevens, the dissenters were Justices Scalia, Thomas and Ginsburg.

Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S.Ct. 2489 (June 21, 2007)(9-0) – *see* summary on p.1.

EQUAL PROTECTION

In *Parents Involved in Community Schools v. Seattle School District*, 127 S.Ct. 2738 (June 28, 2007)(5-4), the Court struck down voluntary school integration plans in Seattle, Washington and Louisville, Kentucky. Writing for five members of the Court, Chief Justice Roberts held that the challenged plans were not narrowly tailored. Significantly, however, his view that local school districts do not have a compelling interest in racial diversity at the K-12 level was supported by only four votes. In a crucial concurring opinion, Justice Kennedy agreed with the dissent that racial diversity is a compelling interest and that school districts may use race-conscious means to achieve it. He nonetheless faulted the Louisville plan because it did not sufficiently explain why and how race was used in student assignments, and the Seattle plan because it defined diversity solely in terms of black and white students. In total, five opinions were written that revealed deep divisions on the Court about the meaning of *Brown v. Board of Education*¸ 347 U.S. 483 (1954*)*, but a universal desire to claim its mantle. The ACLU submitted an *amicus* brief defending the Seattle and Louisville plans, and documenting that the use of magnet schools and socio-economic statistics have not been sufficient to achieve meaningful integration.

SECTION 1983

In *Wallace v. Kato,* 127 S.Ct. 1091 (Feb. 21, 2007)(7-2), the Court ruled that the statute of limitations on a Fourth Amendment claim for damages based on false arrest begins to run once the arrestee is formally charged because the core of a false arrest claim is detention without legal process. Thus, the Court held, plaintiff's Fourth Amendment claim in this case was time barred since he did not file until his subsequent conviction was overturned, nine years after his initial arrest. In an opinion written by Justice Scalia, the Court rejected plaintiff's claim that an earlier filing would have been barred by the rule in *Heck v. Humphrey*, 512 U.S. 477 (1994), which provides that any legal claim by a prisoner that would undermine the validity of his conviction or sentence must be raised in a habeas corpus proceeding. The claim in this case was not a challenge to the plaintiff's conviction or sentence, the Court reasoned, but rather to his pre-indictment arrest and detention.

BIVENS

In *Wilkie v. Robbins,* 127 S.Ct. 2588 (June 25, 2007)(7-2), the Court ruled that a Wyoming rancher did not have a right to sue under *Bivens* for retaliation in a long-running land dispute with the Bureau of Land Management. Writing for the majority, Justice Souter emphasized that plaintiff had other available remedies and that his constitutional claim was ill-defined. More broadly, he noted that *Bivens* "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a Bivens remedy unjustified." *Id.* at 2597.

STATUTORY CIVIL RIGHTS CLAIMS

A. Title VII

In *Ledbetter v. Goodyear Tire & Rubber, Inc.,* 127 S.Ct. 2162 (May 29, 2007)(5-4), the Court rejected the claim that a discriminatory salary decision has continuing effect and can therefore be challenged within 180 days of any paycheck that perpetuates the initial act of discrimination. Writing for the majority, Justice Alito instead held that a disparate treatment claim under Title VII requires proof of discriminatory intent, which exists when the discriminatory pay scale is first established but not when it is reinforced by subsequent pay decisions resting on neutral criteria – e.g., an annual percentage raise. Thus, the 180-day statute of limitations under Title VII begins to run from the initial discriminatory act, even though pay discrimination is often hard to uncover if salaries are not published or discussed. Justice Ginsburg's dissent criticized the majority for adopting "a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose." *Id.* at 2188. The ACLU supported the employee's Title VII claim in an *amicus* brief filed with many other civil rights groups.

B. Fair Labor Standards Act

In *Long Island Care at Home, Ltd. v. Coke,* 127 S.Ct. 2339 (June 11, 2007)(9-0), the Court unanimously upheld a regulation issued by the Department of Labor that excludes "domestic service employees" from the minimum wage and overtime provisions of the FLSA, regardless of whether they are employed directly by the person receiving care or by an outside

agency. The Second Circuit had ruled that the statutory exception was only meant to apply in the former situation. In reversing that ruling, Justice Breyer's opinion for the Court rested heavily on the principle of administrative deference. The ACLU submitted an *amicus* brief, along with numerous other civil rights groups, supporting the Second Circuit's view of the law.

C. Voting Rights Act

In *Purcell v. Gonzalez*, 127 S.Ct. 5 (Oct. 20, 2006)(9-0), the Court unanimously vacated a preliminary injunction issued by the Ninth Circuit under Section 5 of the Voting Rights Act that barred Arizona from implementing a new voter ID law during the November 2006 elections. The Court began its opinion by noting that "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Id.* at 7. However, as the Court also observed, "[c]ountering the state's compelling interest in voter fraud is the plaintiff's strong interest in exercising the 'fundamental political right' to vote." *Id.* The Court refrained from expressing any view on the ultimate merits of the law. It nevertheless criticized the Ninth Circuit, "as a procedural matter," for reversing the district court without any factual findings. The ACLU was co-counsel for the plaintiffs with other civil rights organizations.

D. Individuals with Disabilities Education Act

In *Winkelman v. Parma*, 127 S.Ct. 1994 (May 21, 2007)(9-0), the Court unanimously ruled that parents, as well as children, have enforceable rights under the IDEA and can therefore represent themselves *pro se* in any federal lawsuit under the IDEA challenging an adverse administrative ruling. In an opinion written by Justice Kennedy, the majority defined the parents' rights broadly to include a challenge to the appropriateness of the educational plan approved for their child by the school district. Justices Scalia and Thomas, in a partial dissent, argued that the right to an appropriate education under the IDEA belonged solely to the child, and that parents could appear *pro se* only to vindicate their own rights to reimbursement and procedural fairness.

ELECTIONS

In *Lance v. Coffman*, 127 S.Ct. 1194 (March 5, 2007)(9-0), the Court unanimously ruled that voters did not have standing to bring an Elections Clause challenge in federal court to an earlier decision by the Colorado Supreme Court that the state constitution allowed only a single redistricting during each decennial census. The *per curiam* opinion stressed that the plaintiff voters had alleged only a generalized grievance common to all voters and thus insufficient to confer standing under Article III.

HABEAS CORPUS

In *Cary v. Musladin*, 127 S.Ct. 649 (Dec. 11, 2006)(9-0), the Court unanimously held that a rule barring spectators from wearing buttons with the victim's picture was not "clearly established" at the time of petitioner's murder conviction, and thus the Ninth Circuit erred in granting a writ of habeas corpus under the standards set forth in AEDPA. Writing for six members of the Court, Justice Thomas emphasized that the Court's prior holdings on prejudicial courtroom behavior had all involved prosecutorial decisions (*e.g.*, requiring the defendant to

appear at trial in prison garb), and that no previous decision had dealt with spectator actions. Justices Souter and Stevens disagreed with that distinction in their concurring opinions, but agreed that the prejudicial effect of the particular conduct in this case was sufficiently ambiguous that the state trial verdict should stand.

In *Burton v. Stewart,* 127 S.Ct. 793 (Jan. 9, 2007)(9-0), the Court unanimously ruled, in a *per curiam* opinion, that respondent had not met the "gatekeeping requirements" for filing a second habeas petition, and thus declined to consider whether the sentencing rules announced in *Blakely v. Washington,* 547 U.S. ___ (2006), apply retroactively, as respondent claimed and the Ninth Circuit held.

In *Lawrence v. Florida*, 127 S.Ct. 1079 (Feb. 20, 2007)(5-4), the Court held that the provision of AEDPA tolling the one-year statute of limitations for filing a federal habeas petition while "an application for State post-conviction or other collateral review" is "pending" does not include a subsequent petition for certiorari. Writing for the majority, Justice Thomas also rejected various arguments in favor of equitable tolling, including the argument that Florida should not benefit from the failure of counsel provided by the state to file a timely habeas petition. The ACLU submitted an *amicus* brief supporting Lawrence that focused on this last point. (The dissent did not address the question of equitable tolling.)

In *Fry v. Pliler,* 127 S.Ct. 2321 (June 11, 2007)(9-0), the Court again drew a sharp distinction between the harmless error standard that applies on direct appeal and the standard that applies in habeas proceedings. Under *Chapman v. California,* 386 U.S. 18 (1967), the question on direct appeal is whether a constitutional error is "harmless beyond a reasonable doubt." Under *Brecht v. Abrahamson,* 507 U.S. 619 (1993), the question in habeas proceedings is whether the constitutional error "had substantial or injurious effect or influence in determining the jury's verdict." Writing for a unanimous Court, Justice Scalia held that the *Brecht* standard applies in habeas proceedings even if the state court did not apply the *Chapman* standard on direct appeal. Four justices dissented in part on the ground that the habeas petitioner in this case was entitled to relief even under *Brecht,* an issue that Justice Scalia did not reach for the majority.

FEDERAL CRIMINAL LAW

In *United States v. Resendiz-Ponce,* 127 S.Ct. 782 (Jan. 9, 2007)(8-1), the Court granted certiorari to decide whether omission of an element of the offense from an indictment can ever be harmless error, but ultimately declined to reach that question after concluding that the indictment in this case adequately alleged the elements of the charged offense.

Burton v. Stewart, 127 S.Ct. 793 (Jan. 9, 2007)(9-0) – *see* summary on p.9.

FEDERAL SENTENCING

In *Rita v. United States,* 127 S.Ct. 2456 (June 21, 2007)(8-1), the Court held that a trial judge's decision to impose a sentence within the federal Sentencing Guidelines may be treated as "presumptively reasonable" on appeal. Writing for six members of the Court, Justice Breyer provided a strong defense of the Sentencing Guidelines and their goal of ensuring both uniformity and proportionality in criminal sentences. In his view, applying a reasonableness standard to appellate review of Guideline sentences merely reflects the fact that the Sentencing

Commission and the trial judge have each already determined that the Guideline sentence is appropriate. At the same time, he emphasized that the presumption of reasonableness is not binding even on appellate courts, and does not apply at all to the sentencing judge who must first determine whether to follow the Sentencing Guidelines after *United States v. Booker*, 543 U.S. 220 (2005). Justices Scalia and Thomas agreed that the sentence in this case was lawful, but did not agree that sentences should be subject to substantive review on appeal. Concerned that a presumption of reasonableness created its own Sixth Amendment problems by encouraging judicial factfinding, they argued in a concurring opinion that sentences should only be subject to procedural review on appeal. Justice Souter was the lone dissenter. His opinion began with this comment: "Applying the Sixth Amendment to current sentencing law has gotten complicated, and someone coming cold to this case might wonder how we reached this point." *Id.* at 2484.

PRISON LITIGATION

In *Jones v. Bock*, 127 S.Ct. 910 (Jan. 22, 2007)(9-0), the Court unanimously invalidated three procedural rules that the Sixth Circuit had imposed under the Prison Litigation Reform Act (PLRA), ostensibly to enforce the Act's exhaustion rule. Specifically, the Court held that exhaustion is an affirmative defense not a pleading requirement, that inmates are not limited to suing only those defendants that are individually named in their administrative grievance, and that a PLRA complaint should not be dismissed in its entirety merely because it contains some unexhausted claims. The opinion by Chief Justice Roberts stressed that it is the role of Congress to weigh the policy arguments underlying the Sixth Circuit's rules, and not the role of the courts to adopt new rules in the absence of clear statutory authorization. The ACLU submitted an *amicus* brief, cited by the Chief Justice, arguing that the Sixth Circuit's rules should be struck down.

FEDERAL CIVIL PROCEDURE

In *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (May 21, 2007)(7-2), a potential landmark case involving pleading rules, the Court reviewed a complaint alleging a conspiracy in restraint of trade in violation of § 1 of the Sherman Act. Writing for the majority, Justice Souter held that the complaint was properly dismissed under Rule 12(b)(6) because its allegations of conscious parallel conduct did not establish a conspiracy, even if true, and its assertion of an agreement among the defendants was based on inferences rather than independent facts. Expressly rejecting the 50-year old rule that a complaint should not be dismissed "unless it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S 41, 45-46 (1957), the Court instead held that the complaint in this case was legally insufficient because the facts alleged did not "plausibly suggest" the existence of a conspiracy. Stressing the enormous cost associated with discovery in antitrust litigation, Justice Souter held that the conclusory assertion of a conspiracy does not set forth the grounds for relief, as required by Rule 8(a) of the Federal Rules of Civil Procedure, even if the conspiracy claim is consistent with the pattern of parallel conduct alleged in great detail. "Factual allegations must be enough to raise a right to relief above the speculative level," he wrote. *Id.* at 1965. In dissent, Justice Stevens disputed the majority's claim that it was not imposing a heightened pleading standard that the Court had previously rejected in *Leatherman v. Tarrant County*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). He also questioned whether the Court's holding would be limited to antitrust cases or apply more broadly to other civil litigation.

In *Erickson v. Pardus*, 127 S.Ct. 2197 (June 4, 2007)(7-2), the Court summarily reversed a Tenth Circuit decision affirming the dismissal of this *pro se* prisoner complaint alleging inadequate medical care. The Tenth Circuit had held that the prisoner's "conclusory allegations" were inadequate to survive a motion to dismiss. The Court disagreed in a *per curiam* opinion. With only a passing reference to its decision in *Bell Atlantic*, issued only two weeks earlier, the Court observed that Rule 8(a) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim," and that "[s]pecific facts are not necessary."

In *Watson v. Philip Morris Co.*, 127 S.Ct. 2301 (June 11, 2007)(9-0), a unanimous Court held that a private company sued in state court for activity that is subject to federal regulation (in this case, the testing of cigarettes for tar and nicotine levels), may not remove the suit to federal court by claiming that it was "acting under" a federal officer and thus within the terms of the federal removal statute, 28 U.S.C. § 1442(a)(1). As Justice Breyer explained, a private litigant seeking to invoke the removal statute must show more than mere compliance with federal law.

In *Tellabs, Inc. v. Makor Issues & Rights*, 127 S.Ct. 2499 (June 21, 2007)(8-1), the Court held that plaintiffs suing for securities fraud must do more than allege that defendants acted with intent to defraud. Rather, Justice Ginsburg wrote for the majority, the complaint must contain facts that make a finding of scienter at least as plausible as other, competing inferences. The heightened pleading requirement imposed by the Court rested on an interpretation of the Private Securities Litigation Reform Act of 1995, which provides that a complaint alleging securities fraud must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 18 U.S.C. § 78u-4(b)(2). Like the Court's earlier discussion of pleading requirements in *Bell Atlantic Corp. v. Twombly*, an antitrust case, the majority opinion in this case reflected obvious concern with the substantial costs imposed by large commercial litigation.

FEDERAL TORT CLAIMS

In *Osborn v. Haley*, 127 S.Ct. 881 (Jan.22, 2007), the Court considered the meaning and operation of the Westfall Act, which permits the federal government to substitute itself as a defendant when federal employees are sued for common-law torts occurring within the scope of their employment and, furthermore, to remove such suits to federal court if they were originally filed in state court. By an 8-1 vote (Justice Breyer dissenting), the Court held that Westfall Act substitution is proper under either of two circumstances: if the government certifies that the employee was acting within the scope of her employment *or* if the government denies that the allegedly tortious conduct occurred at all. By a 7-2 vote (Justices Scalia and Thomas dissenting), the Court ruled that a decision remanding a tort action from federal court to state court because the government's Westfall Act certification is deemed improper can be appealed by the government despite the general rule against appellate review of remand orders.

IMMIGRATION LAW

In *Lopez v. Gonzales*, 127 S.Ct. 625 (Dec. 5, 2006)(8-1), the Court held that a conviction for drug possession, which is treated as a felony under state law but would be a misdemeanor under the federal law, cannot be treated as an aggravated felony for immigration purposes. The decision is an important one because the aggravated felony designation has significant consequences for aliens facing removal: it deprives them of the right to seek cancellation of removal or apply for asylum. Justice Souter wrote the majority opinion and only Justice Thomas

dissented. The ACLU submitted an *amicus* brief urging the interpretation that the Court ultimately adopted.

JURISDICTION & STANDING

In *Massachusetts v. EPA*, 127 S.Ct 1438 (April 2, 2007)(5-4), the Court directed the EPA to regulate greenhouse gas emissions unless it determines (contrary to the scientific evidence) that such emissions do not contribute to global warming. As a threshold matter, however, the Court held that a state's standing to sue as *parens patriae* on behalf of its citizens is entitled to "special solicitude." *Id.* at 1455. Writing for the majority, Justice Stevens also held that the state's injury was actual and imminent, even though the effects of global warming were not unique to Massachusetts, and federal regulation of greenhouse gas emissions would, at best, solve only part of the problem. Chief Justice Roberts wrote a lengthy dissent focused entirely on standing.

In *Bowles v. Russell*, 127 S.Ct. 2360 (June 14, 2007)(5-4), the Court ruled that the time for filing a notice of appeal is jurisdictional. In this case, a federal district court judge had erroneously calculated the filing deadline in a written order and the defendant, in reliance on that judicial order, had filed his notice of appeal two days late. Writing for the majority, Justice Thomas concluded that the equities were irrelevant because the filing deadline is mandatory. Justice Souter began his dissent by noting: "It is intolerable for the judicial system to treat people this way . . . ." *Id.* at 2367.

In *Powerex Corp. v. Reliant Energy Services*, 127 S.Ct. 2411 (June 18, 2007)(7-2), the Court strictly construed the language of 28 U.S.C. § 1447(d) to bar appellate jurisdiction of a remand order based on lack of subject matter jurisdiction even if the case was properly removed to federal court in the first instance and in contrast to its decision earlier this year in *Osborn v. Haley*.

Lance v. Coffman, 127 S.Ct. 1194 (March 5, 2007)(9-0) – *see* summary on p.8.

Osborn v. Haley, 127 S.Ct. 881 (Jan.22, 2007)(7-2) – *see* summary on p.11.

ATTORNEYS' FEES

In *Sole v. Wyner*, 127 S.Ct. 2188 (June 4, 2007)(9-0), the Court unanimously ruled that plaintiffs are not entitled to attorneys' fees based on a preliminary injunction that is "reversed, dissolved, or otherwise undone by the final decision on the merits in the same case." *Id.* at 2195. Plaintiffs had initially obtained a preliminary injunction allowing them to go forward with a nude, antiwar protest at a local beach. Following the demonstration, plaintiffs sought permanent relief striking down the underlying regulations, which was denied. In their request for attorneys' fees, plaintiffs characterized the request for a preliminary injunction as an as-applied challenge and the request for permanent injunction as a facial challenge. Justice Ginsburg's opinion disagreed with plaintiffs' factual characterization but did not significantly change existing attorneys' fee law. Moreover, the Court specifically noted that it was "express[ing] no view" on whether success in obtaining a preliminary injunction "may sometimes warrant" attorneys' fees in the absence of a final decision on the merits. *Id.* at 2196. The ACLU represented plaintiffs.