

**CRIMINAL JUSTICE AND THE 2011-2012 UNITED STATES
SUPREME COURT TERM**

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I. INTRODUCTION

The United States Supreme Court's 2011-12 Term will be most remembered for the nationwide public and media attention devoted to the Court's controversial five-to-four decision¹ upholding the health care reform legislation commonly known as "Obamacare."² The decision led to intense public discussions about the role of Chief Justice John Roberts and his ultimate place in history in light of his authorship of the majority opinion based on his decisive fifth vote favoring a statute that political conservatives reviled.³ The attention devoted to that important decision should not, however, obscure the fact that the Court decided other important issues with significant impacts on public pol-

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¹ See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

² Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES, June 28, 2012, <http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html>.

³ Adam Liptak, *After Ruling, Roberts Makes Getaway From the Scorn*, N.Y. TIMES, July 2, 2012, <http://www.nytimes.com/2012/07/03/us/politics/scorn-and-withering-scorn-for-chief-justice-roberts.html>; see Linda Greenhouse, *The Mystery of John Roberts*, N.Y. TIMES OPINIONATOR (July 11, 2012, 7:00 AM), <http://opinionator.blogs.nytimes.com/2012/07/11/the-mystery-of-john-roberts/>.

icy,⁴ including decisions affecting criminal justice.⁵ Because of the importance of criminal justice as a policy issue that affects the lives of millions of Americans⁶ as well as the prominence of criminal justice issues on the Supreme Court's annual docket,⁷ this Article provides an empirical and descriptive analysis of the most recent Term's criminal justice decisions. This Article also includes an analysis of some key issues regarding criminal justice in the context of several important immigration cases that the Court heard during the 2011-12 Term.⁸

II. EMPIRICAL MEASURES OF THE SUPREME COURT'S DECISION MAKING

Social scientists' systematic assessment of Supreme Court decision making enables analysts to observe patterns of behavior that may reveal trends or changes in the Justices' approach to issues.⁹ Empirical

⁴ See, e.g., *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (finding that landowners are permitted to challenge federal agency designation of their property as containing protected wetlands).

⁵ See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (stating that mandatory life-without-parole sentences for juveniles convicted of homicide violate the Eighth Amendment).

⁶ In New York City alone, police stopped people 2.8 million times between 2004 and 2009 to question and sometimes frisk them. Al Baker & Ray Rivera, *Study Finds Street Stops by N.Y. Police Unjustified*, N.Y. TIMES, Oct. 26, 2010, <http://www.nytimes.com/2010/10/27/nyregion/27frisk.html>.

⁷ Criminal justice-related cases can comprise more than one-third of the cases given full hearings and decisions during a Supreme Court Term. See Christopher E. Smith, Michael McCall & Madhavi McCall, *Criminal Justice and the 2003-2004 United States Supreme Court Term*, 35 N.M. L. REV. 123, 124 (2005) [hereinafter Smith et al., *2003-2004 U.S. Supreme Court Term*].

⁸ See *infra* Part III.D-E (regarding *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Kawashima v. Holder*, 132 S. Ct. 1166 (2012); and *Vartelas v. Holder*, 132 S. Ct. 1479 (2012)). The Court also ruled unanimously in two important immigration cases which posed issues less directly connected to traditional criminal justice concerns; however, these two cases are not included in this analysis. See *Holder v. Gutierrez*, 132 S. Ct. 2011 (2012) (finding it reasonable to interpret federal law as requiring that each individual must satisfy residency requirements of immigration law such that a parent's years of continuous residency do not transfer to his/her children); *Judulang v. Holder*, 132 S. Ct. 476 (2011) (holding the Bureau of Immigration Appeals' application of exclusion relief to deportation cases was arbitrary and capricious).

⁹ THOMAS R. HENSLEY, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE CHANGING SUPREME COURT: CIVIL RIGHTS AND LIBERTIES* 866 (1997).

analysis of the Court's most recent Term can contribute to developing knowledge about the Roberts Court, a Court that includes relatively new Justices, especially Sonya Sotomayor¹⁰ and Elena Kagan,¹¹ who are still defining themselves as members of the highest Court.¹² Because the replacement of Rehnquist Court Justices by newcomers since the advent of the Roberts Court era can produce differences in patterns of decision making, members of the legal community have good reason to be deeply interested in observing any consistency or change in the development of legal doctrines.¹³

Table 1 presents the outcomes of the Supreme Court's 2011-12 criminal justice decisions according to the direction of the Court's decisions. The outcomes are classified as "liberal" or "conservative," commonly used labels that are admittedly imperfect.¹⁴ This Article applies the terms "liberal" and "conservative" in the manner used by judicial scholars who utilize the Supreme Court Database.¹⁵ The Database classifies as "liberal" those "decisions in the area of civil liberties [that] are pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent . . . and anti-government in due process

¹⁰ Justice Sonya Sotomayor was appointed in 2009 upon the retirement of Justice David Souter. Charlie Savage, *Sotomayor Sworn in as Supreme Court Justice*, N.Y. TIMES, Aug. 8, 2009, <http://www.nytimes.com/2009/08/09/us/politics/09sotomayor.html>.

¹¹ Justice Elena Kagan was appointed in 2010 upon the retirement of Justice John Paul Stevens. Peter Baker, *Kagan Is Sworn in as the Fourth Woman, and 112th Justice, on the Supreme Court*, N.Y. TIMES, Aug. 7, 2010, <http://www.nytimes.com/2010/08/08/us/08kagan.html>.

¹² See HENSLEY ET AL., *supra* note 9, at 866.

¹³ For example, the departures of Rehnquist Court Justices who were key figures in the development of corrections law create possibilities for changes in precedents affecting that important subdivision of criminal justice-related law. See Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 875-88 (2011).

¹⁴ While the term "liberal" is applied to a case outcome to indicate the Court's support for an individual's claim against government, Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 103 (1989), certain issues divide the Court in opposite ways; for example, political conservatives adopt the "liberal" position on gun rights by endorsing claims of individuals while the political liberals are more supportive of governmental regulation of individuals' ownership of firearms. see *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁵ THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/> (last visited Feb. 4, 2013).

and privacy.”¹⁶ Decisions classified as “conservative” in criminal justice are those that favor the government.¹⁷

One striking characteristic of the 2011-12 Term was the relative infrequency of unanimous opinions.¹⁸ With only seven of twenty-nine cases decided without dissent, this Term posted the lowest rate of unanimous decisions in criminal justice cases in the seventeen years in which we have been closely monitoring the Supreme Court’s criminal justice decisions.¹⁹ In the prior Term, fourteen of thirty-one decisions were

¹⁶ Segal & Spaeth, *supra* note 14, at 103.

¹⁷ *See id.*

¹⁸ *See infra* text accompanying notes 20-25.

¹⁹ During the preceding ten Supreme Court Terms, the lowest percentage of criminal justice cases decided unanimously occurred during the 2007-08 Term (25.0%), while the highest percentage was in 2010-11 (45.2%). The mean percentage of unanimous decisions in criminal justice cases decided during the previous six years under Chief Justice Roberts was 34.1%. *See* Madhavi M. McCall, Michael A. McCall & Christopher E. Smith, *Criminal Justice and the 2010-2011 U.S. Supreme Court Term*, 53 S. TEX. L. REV. 307, 312-13 (2011) [hereinafter McCall et al., *2010-2011 U.S. Supreme Court Term*]; *see also* Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the U.S. Supreme Court’s 2009-2010 Term*, 41 CUMB. L. REV. 227, 230 (2010-11) [hereinafter McCall et al., *2009-2010 U.S. Supreme Court Term*]; Madhavi M. McCall, Michael A. McCall & Christopher E. Smith, *Criminal Justice and the U.S. Supreme Court’s 2008-2009 Term*, 29 MISS. C. L. REV. 1, 4 (2010) [hereinafter McCall et al., *2008-2009 U.S. Supreme Court Term*]; Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the U.S. Supreme Court’s 2007-2008 Term*, 36 S.U. L. REV. 33, 38 (2008) [hereinafter McCall et al., *2007-2008 U.S. Supreme Court Term*]; Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2006-2007 United States Supreme Court Term*, 76 UMKC L. REV. 993, 995-96 (2008) [hereinafter McCall et al., *2006-2007 U.S. Supreme Court Term*]; Christopher E. Smith, Michael A. McCall & Madhavi M. McCall, *Criminal Justice and the 2005-2006 United States Supreme Court Term*, 25 QUINNIPIAC L. REV. 495, 499 (2007) [hereinafter Smith et al., *2005-2006 U.S. Supreme Court Term*]; Christopher E. Smith, Michael A. McCall & Madhavi M. McCall, *Criminal Justice and the 2004-2005 United States Supreme Court Term*, 36 U. MEM. L. REV. 951, 957 (2006) [hereinafter Smith et al., *2004-2005 U.S. Supreme Court Term*]; Smith et al., *2003-2004 U.S. Supreme Court Term*, *supra* note 7, at 127; Christopher E. Smith & Madhavi M. McCall, *Criminal Justice and the 2002-2003 United States Supreme Court Term*, 32 CAP. U. L. REV. 859, 863-64 (2004) [hereinafter Smith & McCall, *2002-2003 U.S. Supreme Court Term*]; Christopher E. Smith & Madhavi M. McCall, *Criminal Justice and the 2001-02 United States Supreme Court Term*, 2003 MICH. ST. L. REV. 413-17 (2003) [hereinafter Smith & McCall, *2001-2002 U.S. Supreme Court Term*]; Christopher E.

unanimous.²⁰ In the 2009-10 Term, however, the unity was only slightly greater than the most recent Term, with eight of twenty-nine cases being decided unanimously.²¹ Thus the most recent Term was unusual but not remarkably so unless it represents a sign of future change in the Justices' ability to agree.²² Yet, the number of unanimous decisions each Term can be driven by the specific issues that the Court hears, rather than any changes in the philosophies of or relationships between individual Justices.²³ A social scientist would look for consistency in the low rate of agreement or further reductions in the recent low rate before concluding that the most recent Term provided evidence of a new trend showing a markedly more divided Court.²⁴

The other notable phenomenon in Table 1 is the modest number of five-to-four decisions and, more importantly, the fact that these decisions produced mostly liberal outcomes from a Court that is characterized as leaning in a conservative direction because of the numerical dominance of Republican appointees.²⁵ By contrast, in the 2001-02 Term, ten of the Court's twenty-seven criminal justice-related cases

Smith & Steven B. Dow, *Criminal Justice and the 2000-2001 U.S. Supreme Court Term*, 79 U. DET. MERCY L. REV. 189, 193 (2002); Christopher E. Smith, *Criminal Justice and the 1999-2000 U.S. Supreme Court Term*, 77 N.D. L. REV. 1, 4 (2001) [hereinafter Smith, *1999-2000 U.S. Supreme Court Term*]; Christopher E. Smith, *Criminal Justice and the 1998-99 United States Supreme Court Term*, 9 WIDENER J. PUB. L. 23, 28 (1999) [hereinafter Smith, *1998-1999 U.S. Supreme Court Term*]; Christopher E. Smith, *Criminal Justice and the 1997-98 U.S. Supreme Court Term*, 23 S. ILL. U. L.J. 443, 445 (1999) [hereinafter Smith, *1997-1998 U.S. Supreme Court Term*]; Christopher E. Smith, *Criminal Justice and the 1996-97 U.S. Supreme Court Term*, 23 U. DAYTON L. REV. 30, 33 (1997) [hereinafter Smith, *1996-1997 U.S. Supreme Court Term*]; Christopher E. Smith, *Criminal Justice and the 1995-96 U.S. Supreme Court Term*, 74 U. DET. MERCY L. REV. 1, 4 (1996) [hereinafter Smith, *1995-1996 U.S. Supreme Court Term*].

²⁰ McCall et al., *2010-2011 U.S. Supreme Court Term*, *supra* note 19, at 312.

²¹ McCall et al., *2009-2010 U.S. Supreme Court Term*, *supra* note 19, at 230.

²² See *infra* Table 1.

²³ See, e.g., Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986-1991 Terms*, 48 POL. RES. Q. 837, 849-52 (1995) (explaining that the changes in patterns of Supreme Court decisions are a function of changes in the nature of issues that the Court decided in specific Terms).

²⁴ See, e.g., *id.* at 854.

²⁵ See David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC (June 29, 2012) <http://www.theatlantic.com/politics/>

were decided by a five-to-four vote, and seven of those decisions produced conservative outcomes.²⁶ Some other Terms were like the most recent Term in having deeply split outcomes produce more liberal decisions than conservative decisions.²⁷ Despite analyses that conclude that the Roberts-era “Supreme Court May Be [the] Most Conservative in Modern History,”²⁸ the most recent Term continues to demonstrate that issues arise in the realm of criminal justice in which a member of the Court’s conservative wing will defect from usual allies in order to vindicate a right or otherwise support the claim of an individual.²⁹

TABLE 1: CASE DISTRIBUTION BY VOTE AND LIBERAL/ CONSERVATIVE OUTCOME IN U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2011-12 TERM³⁰

Vote	Liberal	Conservative	Total
9-0/8-0	3	4	7 (24.1%)
8-1	2	2	4 (13.8%)
7-2	3	0	3 (10.3%)
6-3	2	6	8 (27.6%)
5-4/5-3	5	2	7 (24.1%)
	15 (51.7%)	14 (48.3%)	29 (100%)

The data in Table 2 show the individual Justices’ voting records for criminal justice cases. The table not only highlights voting records

archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/.

²⁶ Smith & McCall, *2001-2002 U.S. Supreme Court Term*, *supra* note 19, at 417.

²⁷ *See, e.g.*, McCall et al., *2007-2008 U.S. Supreme Court Term*, *supra* note 19, at 38 (four out of five of the Court’s five-to-four decisions produced liberal outcomes).

²⁸ Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, N.Y. TIMES (Mar. 29, 2012, 8:06 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/>.

²⁹ There are numerous examples of different conservative justices providing the decisive vote for a liberal majority on specific criminal justice issues for which they happen to support a liberal outcome. *See* Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161, 173 (2003).

³⁰ *See infra* Part III.A-E.

in nonunanimous decisions for which liberal and conservative Justices are most likely to separate themselves by feeling free to disagree with each other,³¹ but also shows voting percentages for all criminal justice cases within the parentheses.³² The rankings of the Justices by conservative voting record is generally consistent with their reputations, although the 2011-12 Term marked the first time in six years that Justice Thomas voted conservatively more often in criminal justice cases than did Justice Alito.³³ Prior to Justice Alito's appointment, Justice Thomas was often the most conservative voter on the Court for criminal justice cases.³⁴

The most notable aspect of the data is Justice Kennedy's demonstration of why Court watchers often characterize him as a key, pivotal vote in Supreme Court cases.³⁵ Not only was he a member of all of the five-member majorities in the criminal justice decisions in 2011-12,³⁶ he also authored three of the five liberal opinions in cases decided by

³¹ On an en banc court, such as the U.S. Supreme Court, individual judicial officers may feel freest to express their disagreements with the majority. Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133, 134 (1990). When the decision makers split, their disagreements should genuinely reflect the nature and strength of their differences. *See id.* ("Ideological polarization among the judges might tarnish the judicial branch's popular image as a 'legal' rather than 'political' institution."); *infra* Table 2.

³² *See infra* Table 2.

³³ McCall et al., *2010-2011 U.S. Supreme Court Term*, *supra* note 19, at 313-14.

³⁴ Smith & McCall, *2002-2003 U.S. Supreme Court Term*, *supra* note 19, at 869.

³⁵ *See, e.g.*, John D. Burrow, *Anthony Kennedy: Conservatism & Independence*, in THE REHNQUIST COURT AND CRIMINAL JUSTICE 189, 203-05 (Smith, DeJong & McCall eds., 2011) (discussing the strategy of assigning the majority opinion to Justice Kennedy as the "middle justice" to solidify support for the opinion); Linda Greenhouse, *On Court that Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. TIMES, June 29, 2008, at A1, available at http://www.nytimes.com/2008/06/29/washington/29scotus.html?_r=0 (noting that Justice Kennedy so often had the potential of being the deciding vote that some referred to the Supreme Court that Term as "Justice Kennedy's Court").

³⁶ Adam Liptak, *In Supreme Court Term, Striking Unity on Major Cases*, N.Y. TIMES (June 30, 2012), <http://www.nytimes.com/2012/07/01/us/supreme-courts-recent-term-a-new-phase.html?pagewanted=all> ("Justice Kennedy himself had an unusually balanced term, voting as often with the [C]ourt's liberal wing as with its conservative one in 5-to-4 votes along ideological lines.").

the slimmest of margins.³⁷ Justice Kennedy's potential influence in criminal justice cases stems in part from his propensity to be nearly always a member of the Court's majority.³⁸ This past Term, he cast his vote with the majority in twenty-one of the twenty-two nonunanimous decisions analyzed here,³⁹ nearly matching the combined number of such votes by Justices Scalia (ten) and Ginsburg (twelve).⁴⁰ Overall, the voting percentages show a divided Court with the Justices in the liberal and conservative wings clearly differentiated.⁴¹ Thus, the opportunity exists for Justice Kennedy to serve, in the terminology of one observer, as "kingmaker" who determines the outcomes of split criminal justice decisions, even if he may not always play that role for the full range of legal issues the Court considers.⁴²

Consistent with the 2009-10 Term, the liberal voting record of Justice Sotomayor seems to put to rest the fear expressed upon her appointment in 2009 that as "a former prosecutor . . . she might have a pro-prosecution bias."⁴³ As Linda Greenhouse, the former *New York Times* reporter at the Supreme Court, observed, Justice Sotomayor's "close-up look at the criminal justice system [in her prior roles as a prosecutor and trial judge]⁴⁴ seems to have made her more aware of its failures."⁴⁵

³⁷ This includes a five-to-three decision in which Justice Kagan did not participate. *See infra* Part III.E.

³⁸ Silver, *supra* note 28.

³⁹ *See infra* Table 2. Justice Kennedy's sole dissent in a criminal justice case this Term regarded a six-to-three conservative decision that Justice Scalia authored in *Setser v. United States*, 132 S. Ct. 1463 (2012). *See infra* Part III.D.

⁴⁰ *See infra* Table 2.

⁴¹ Juliet Lapidus, *Five-Four*, N.Y. TIMES (June 18, 2012, 5:07 PM), <http://takingnote.blogs.nytimes.com/2012/06/18/five-four/>.

⁴² *Id.*

⁴³ Linda Greenhouse, *The Roberts Court, Version 4.0*, N.Y. TIMES OPINIONATOR (Oct. 2, 2010, 6:16 PM), <http://opinionator.blogs.nytimes.com/2010/10/02/the-roberts-court-version-4-0/>.

⁴⁴ *Id.*; *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., available at <http://www.supremecourt.gov/about/biographies.aspx> (last visited Feb. 4, 2013).

⁴⁵ Greenhouse, *supra* note 43.

2013]

McCall, McCall, and Smith

247

TABLE 2: VOTING RATES BY INDIVIDUAL JUSTICE, NONUNANIMOUS (AND ALL) CRIMINAL JUSTICE DECISIONS, 2011-12⁴⁶

Justice	Percent Conservative Voting	Percent with Majority	Number of Majority Opinions Authored
Thomas	90.9 (82.8)	54.5 (65.5)	1 (2)
Scalia	90.9 (82.8)	45.5 (58.6)	1 (3)
Alito	77.3 (72.4)	68.2 (75.9)	3 (4)
Roberts	63.6 (62.1)	81.8 (86.2)	3 (4)
Kennedy	40.9 (44.8)	95.5 (96.6)	6 (6)
Kagan	23.8 (29.6)	76.2 (81.5)	1 (2)
Breyer	22.7 (31.0)	77.3 (82.8)	3 (3)
Sotomayor	13.6 (24.1)	68.2 (75.9)	1 (1)
Ginsburg	9.1 (20.7)	54.5 (65.5)	3 (4)

Tables 3 and 4 show the interagreement of individual Justices for criminal justice cases in the last Term. Interagreement tables are used to identify possible voting blocs—Justices who support the same outcomes in a high percentage of cases.⁴⁷ Voting blocs are defined according to the “Sprague criterion,” which involves interagreement percentages for groups of Justices that meet a calculated threshold that is higher than the average interagreement percentage for the entire Court.⁴⁸ High levels of interagreement do not imply that Justices consciously seek to vote together, but instead likely indicate the existence

⁴⁶ The data regard twenty-two nonunanimous and twenty-nine total criminal justice cases for all members of the Court except Justice Kagan, who did not participate in two of these decisions (one unanimous and one nonunanimous). See *infra* Part III.A-E.

⁴⁷ JOHN D. SPRAGUE, *VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM, 1889-1959*, at 7 (1968). For an example of voting bloc analysis, see HENSLEY ET AL., *supra* note 9, at 84-88.

⁴⁸ The Sprague criterion is calculated by subtracting the average agreement score for the entire Court from one hundred. SPRAGUE, *supra* note 49, at 51-61. The resulting number is divided by two and added to the Court average in order to establish the threshold level for defining a voting bloc. *Id.*

of shared values and policy preferences that drive the determination of outcomes.⁴⁹

In examining these tables, one can see that although several pairs of Justices voted together frequently (e.g., Kennedy/Breyer and Sotomayor/Kagan), only one voting bloc emerged this Term involving three or more members.⁵⁰ As indicated in Tables 3 and 4, Justices Alito, Scalia, and Thomas constituted a voting bloc for all criminal justice cases and for the subset of nonunanimous decisions.⁵¹ A second group of conservatives—Chief Justice Roberts and Justices Thomas and Alito—posted an identical, overall mark of 86.2% for all criminal justice cases, but the relatively low rate of agreement between Justices Roberts and Thomas (79%) prevents labeling this second trio as a true voting bloc for 2011-12.⁵²

A large liberal bloc was not detected in part because Justice Kagan was nearly as likely to vote in agreement with Justice Kennedy as with Justice Ginsburg and—like Justice Breyer—supported half of the nonunanimous conservative decisions in criminal justice cases this Term.⁵³ One commentator regarded this development as showing that “Justice Kagan, the newest member of the [C]ourt, rose in influence” because “[i]n closely divided cases, she voted with the [C]ourt’s swing member, Justice Anthony M. Kennedy, more than any other member of the [C]ourt.”⁵⁴ If Justice Kagan turns out to be similar to Justice Kennedy by residing in the ideological center of the divided Court and thereby determining outcomes in split decisions, then the development that emerged in the last Term is potentially significant.⁵⁵ It may be all the more significant if Justice Kennedy, who was age seventy-six at the start of the Court’s 2012-13 Term,⁵⁶ leaves the Court in the foreseeable

⁴⁹ See, e.g., FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 19 (2000) (“[W]e expect a justice’s policy preferences to guide the decisions he or she makes in a case.”).

⁵⁰ See *infra* Tables 3, 4.

⁵¹ See *infra* Tables 3, 4.

⁵² See *infra* Tables 3, 4.

⁵³ See *infra* Tables 2, 3.

⁵⁴ Liptak, *supra* note 36.

⁵⁵ Silver, *supra* note 28.

⁵⁶ *Biographies of Current Justices of the Supreme Court*, *supra* note 46.

2013]

McCall, McCall, and Smith

249

future and thereby leaves Justice Kagan as the new median Justice⁵⁷ in the event that the next Justice is an Obama appointee who joins the liberal wing.⁵⁸

TABLE 3: INTERAGREEMENT PERCENTAGES FOR PAIRED JUSTICES IN U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2011-12 TERM⁵⁹

	ROB	THO	SCA	KEN	BRE	KAG	SOT	GIN
Alito	90	90	83	72	59	59	52	41
Roberts		79	72	83	69	67	62	52
Thomas			86	62	48	48	41	31
Scalia				55	41	48	41	38
Kennedy					86	81	69	69
Breyer						78	79	83
Kagan							85	81
Sotomayor								83

Court mean: 65.7

Sprague criterion: 82.9

Voting bloc: Alito-Scalia-Thomas: 86.2⁶⁰

⁵⁷ Richard Brust, *The 'Super Median': On an Ideological Court, It's All About Keeping Justice Kennedy*, A.B.A. J., July 2010, at 20, 43.

⁵⁸ If the next appointee is a conservative, thereby keeping five Justices ideologically to the right of Kagan, then she will not be the median Justice upon the departure of Kennedy. *Id.* at 20-21.

⁵⁹ See *infra* Part III.A-E. Justice Kagan participated in twenty-seven of these twenty-nine cases. *Infra* Part III.A-E.

⁶⁰ This grouping might be characterized best as a near voting bloc in that the interagreement score of one pair—Justices Scalia and Alito (82.76)—falls barely below the Sprague criterion (82.85). THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/analysis.php> (last visited Feb. 4, 2013); see HENSLEY ET AL., *supra* note 9, app. B, at 869-70 (describing how to calculate and create bloc voting analysis).

TABLE 4: INTERAGREEMENT PERCENTAGES FOR PAIRED JUSTICES IN U.S. SUPREME COURT CRIMINAL JUSTICE NONUNANIMOUS DECISIONS, 2011-12 TERM⁶¹

	ROB	THO	SCA	KEN	BRE	KAG	SOT	GIN
Alito	86	86	77	64	45	48	36	23
Roberts		73	64	77	59	57	50	36
Thomas			82	50	32	33	23	9
Scalia				41	23	33	23	18
Kennedy					82	76	59	59
Breyer						71	73	77
Kagan							81	76
Sotomayor								77

Court mean: 55.0

Sprague criterion: 77.5

Voting bloc: Alito-Scalia-Thomas: 81.8⁶²

III. CASE DECISIONS

A. *Unanimous Decisions*

There were no dissenting opinions in seven criminal justice cases that the U.S. Supreme Court decided during the 2011-12 Term, which we analyze here.⁶³ We begin with a discussion of the four

⁶¹ See *infra* Part III.B-E. Justice Kagan participated in twenty-one of these twenty-two cases. *Infra* Part III.B-E.

⁶² This grouping might be best characterized as a near voting bloc in that the interagreement score of one pair—Justices Scalia and Alito (77.27)—falls barely below the Sprague criterion (77.5). See *infra* Part II.B.E; see also HENSLEY ET AL., *supra* note 9, app. B, at 869-70.

⁶³ The Court’s eight per curiam decisions in criminal justice cases during this Term are not included in this analysis. See *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (per curiam); *Coleman v. Johnson*, 132 S. Ct. 2060 (2012) (per curiam); *Vasquez v. United States*, 132 S. Ct. 1532 (2012) (per curiam, dismissed as improvidently granted); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (per curiam); *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (per curiam); *Hardy v. Cross*, 132 S. Ct. 490 (2011) (per curiam); *Bobby v. Dixon*, 132 S. Ct. 26 (2011) (per curiam); *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (per curiam).

conservative, unanimous decisions.⁶⁴

Chief Justice Roberts's opinion in the unanimous conservative decision in *Filarsky v. Delia* extended qualified immunity to temporary government workers.⁶⁵ In this case, the plaintiff sued the City and its employees for violating his Fourth Amendment right against illegal search and seizure.⁶⁶ The lower court had granted qualified immunity to all state employees except the lawyer that the State had hired to assist in the case.⁶⁷ In his decision, Chief Justice Roberts held that such immunity covers all individuals working for the State, including those whose employment status is only temporary.⁶⁸

Justice Scalia wrote the Court's conservative unanimous ruling in *Greene v. Fisher*; the decision holds that retroactive application of Court precedents is not necessary to determine if a state court ruling properly followed clearly established federal laws for the purpose of granting a federal habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).⁶⁹ In this case, federal law changed three months after a state's highest court used previously established federal precedents to deny Eric Greene's appeal.⁷⁰ Greene argued for federal habeas relief on the grounds that the state court had violated clearly established federal law, necessary under the AEDPA for a federal habeas petition.⁷¹ The Supreme Court ruled that because the state court had properly used federal precedent as it existed at the time of the appeal, it had not violated federal law, and Greene was not entitled to federal relief.⁷²

In Justice Thomas's unanimous decision, the Court held in *Reichle v. Howards* by a vote of eight-to-zero (Justice Kagan did not

⁶⁴ See *Reichle v. Howards*, 132 S. Ct. 2088 (2012); *Filarsky v. Delia*, 132 S. Ct. 1657 (2012); *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012); *Greene v. Fisher*, 132 S. Ct. 38 (2012).

⁶⁵ *Filarsky*, 132 S. Ct. at 1670.

⁶⁶ *Id.* at 1661.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1667-68.

⁶⁹ *Greene v. Fisher*, 132 S. Ct. 38, 41-42 (2011).

⁷⁰ *Id.* at 43.

⁷¹ *Id.* at 43-44.

⁷² *Id.* at 45.

participate) that Secret Service agents protecting then Vice President Cheney were entitled to immunity from charges that they arrested an individual as retaliation for the individual's negative comments against the vice president.⁷³ Steven Howards made negative and inflammatory comments against Vice President Cheney during Cheney's appearance at a shopping mall.⁷⁴ Agents eventually arrested Howards for harassment, but those charges were dropped. Howards filed a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁷⁵ arguing that his arrest was in violation of the Fourth Amendment and was retaliatory for comments he made that the First Amendment protects.⁷⁶ The Supreme Court ruled against Howards, holding that it was not clear at the time of the arrest that an arrest supported by probable cause could give rise to a First Amendment claim.⁷⁷ In other words, individuals cannot sue law enforcement for violating rights that the courts do not recognize at the time of the law enforcement's actions.⁷⁸ Justice Ginsburg wrote an opinion concurring in judgment, which Justice Breyer joined.⁷⁹

In Justice Alito's unanimous decision in *Rehberg v. Paulk*, the Court also held that witnesses at grand jury hearings are entitled to the same level of immunity protection as witnesses at trial.⁸⁰ This outcome is characterized as conservative in that it makes it more difficult for a plaintiff to file a civil suit against a law enforcement officer or other individual who provided false testimony at a grand jury hearing.⁸¹

Turning to the first of three liberal, unanimous decisions made in criminal justice cases this Term, Justice Kagan's decision in *Martel v. Clair* provided a much easier standard to replace counsel during habeas petitions than the standard that states supported for defendants

⁷³ *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

⁷⁴ *Id.* at 2091.

⁷⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁷⁶ *Reichle*, 132 S. Ct. at 2092.

⁷⁷ *Id.* at 2093.

⁷⁸ *Id.*

⁷⁹ *Id.* at 2090.

⁸⁰ *Rehberg v. Paulk*, 132 S. Ct. 1497, 1498 (2012).

⁸¹ *Id.*

facing the death penalty.⁸² However, Justice Kagan and the Court also concluded that the federal courts had properly denied the individual in this case his request for substitution.⁸³ The Court held that the federal courts should use the “interest of justice” standard when evaluating petitions for substitution.⁸⁴ Using this standard in Kenneth Clair’s case, Justice Kagan found that the federal courts properly denied Clair substitution and that the federal courts had not abused their discretion.⁸⁵ The case then resulted in a liberal ruling in that the standard adopted for this type of evaluation is more favorable to defendants than the approach states had supported, even though Clair lost his request for replacement.⁸⁶

Justice Ginsburg’s liberal ruling in *Wood v. Milyard* held that while lower appellate courts may question, on their own initiative, the timeliness of federal habeas petitions, they may not dismiss a case for lateness when the State previously recognized the lack of timeliness but failed to argue that lateness warranted dismissal.⁸⁷ Justice Thomas filed an opinion concurring in judgment, which Justice Scalia joined.⁸⁸

In an important case dealing with the definition of a search under the Fourth Amendment in the face of new technologies, the Court held in *United States v. Jones* that attaching a Global Positioning System (GPS) device to a car without a warrant and using that device to track the vehicle’s whereabouts is an unconstitutional search.⁸⁹ Law enforcement, through surveillance, thought Antoine Jones was involved in illegal narcotics activity.⁹⁰ Although officers obtained a warrant to place a GPS tracking device on Jones’s car, the warrant had expired by the time agents attached the device.⁹¹ After further surveillance, including nearly a month’s worth of GPS tracking data, the government ob-

⁸² *Martel v. Clair*, 132 S. Ct. 1276, 1286-87 (2012).

⁸³ *Id.* at 1281.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1289.

⁸⁶ *Id.* at 1284-89.

⁸⁷ *Wood v. Milyard*, 132 S. Ct. 1826, 1834-35 (2012).

⁸⁸ *Id.* at 1835.

⁸⁹ *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

⁹⁰ *Id.* at 948.

⁹¹ *Id.*

tained several indictments.⁹² Jones argued for suppression of the GPS data before trial.⁹³ While the court suppressed the data from the times the car was parked in a private garage, the court allowed other data because the court determined that one did not have an expectation of privacy to one's travel on the public roads.⁹⁴ Although Jones's first trial ended in a mistrial, at a trial in which GPS data were used, the court eventually found Jones guilty.⁹⁵ Jones appealed, and the Supreme Court granted certiorari.⁹⁶

Writing for the Court, Justice Scalia held that attaching a GPS device to a car did constitute a search under the Fourth Amendment and, therefore, a valid search warrant was necessary before placing such a device on a person's car.⁹⁷ As Scalia notes:

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.⁹⁸

Justice Sotomayor wrote a concurring opinion.⁹⁹ Justice Alito filed an opinion concurring in judgment that Justices Ginsburg, Breyer, and Kagan joined.¹⁰⁰ Justice Alito argued that the question at hand was simply if Jones had a "legitimate expectation of privacy" that his long-term movements would not fall under this type of surveillance absent a warrant¹⁰¹ using the precedent created in *Katz v. United States*.¹⁰² In *Katz*, the Court held that warrants were necessary under the Fourth Amendment under conditions in which individuals had a reasonable ex-

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 948-49.

⁹⁶ *Id.* at 949.

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 954.

¹⁰⁰ *Id.* at 957.

¹⁰¹ *See id.* at 960.

¹⁰² *Katz v. United States*, 389 U.S. 347 (1967).

pectation of privacy.¹⁰³ Justice Alito asserted that courts should use this approach to evaluate the outcome of this case, finding that long-term monitoring did constitute a search, although short-term surveillance may be permissible.¹⁰⁴

B. Eight-to-One Decisions

During the 2011-12 Term, the Court issued four criminal justice decisions in which only a single Justice dissented.¹⁰⁵ We start the discussion of these cases with the two conservative rulings.¹⁰⁶

Justice Ginsburg wrote the Court's conservative outcome in *Perry v. New Hampshire*.¹⁰⁷ In this case, the Court held that parties can introduce out-of-court eyewitness testimonies at trial if the circumstances that led to the identification were not overly suggestive and were not arranged by law enforcement.¹⁰⁸ Further, Justice Ginsburg ruled that due process does not require the trial court judge to hear preliminary arguments regarding the reliability of such eyewitness identification.¹⁰⁹ Justice Sotomayor was the lone dissenter in this case.¹¹⁰

The Court ruled in *Minnecci v. Pollard* that federal prisoners held in privately run prisons may not file claims for damages under the Eighth Amendment against prison officials whose conduct is of a kind that typically falls within the scope of traditional state tort law.¹¹¹ Rather, the Court held that its prior ruling in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹¹² which allows individ-

¹⁰³ *Id.* at 353 (“The Government’s activities . . . violated the privacy upon which he justifiably relied . . . and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”).

¹⁰⁴ *Jones*, 132 S. Ct. at 964.

¹⁰⁵ *Perry v. New Hampshire*, 132 S. Ct. 716 (2012); *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012); *Smith v. Cain*, 132 S. Ct. 627 (2012); *Minnecci v. Pollard*, 132 S. Ct. 617 (2012).

¹⁰⁶ *See, e.g., Perry*, 132 S. Ct. 716; *Minnecci*, 132 S. Ct. 617.

¹⁰⁷ *Perry*, 132 S. Ct. at 720.

¹⁰⁸ *Id.* at 730.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 720.

¹¹¹ *Minnecci v. Pollard*, 132 S. Ct. 617, 626 (2012).

¹¹² *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

uals to sue federal employees for a violation of rights, does not apply to individuals working in private prisons.¹¹³ Writing for all members except Justice Ginsburg, Justice Breyer maintained that because state tort laws provide adequate remedies, federal protections using *Bivens* are unnecessary.¹¹⁴ Justice Ginsburg dissented against the Court's conservative ruling arguing that if prisoners were held in federal or state facilities, the Court would allow Eighth Amendment claims.¹¹⁵ Justice Ginsburg asserted that a federal prisoner whom the federal government placed by contract in a private facility should not be denied the same protections as federal prisoners being held in federal custody because both types of prisoners are serving federal sentences and are entitled to be free from cruel and unusual punishment while serving those sentences.¹¹⁶

The Court's liberal ruling in *Gonzalez v. Thaler* held that a federal court's failure to indicate which constitutional violation led that court to issue a certificate of appealability to a state petitioner requesting federal habeas relief under AEDPA did not deprive the federal court of jurisdiction to hear the appeal.¹¹⁷ Justice Sotomayor wrote the Court's decision, while Justice Scalia filed a dissenting opinion.¹¹⁸

The Court's liberal decision in *Smith v. Cain*, which Chief Justice Roberts wrote with only Justice Thomas in dissent, held that Juan Smith's first-degree murder conviction had to be overturned because the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*.¹¹⁹ Smith was convicted of murder based on the testimony of only one eyewitness, as the State did not present any other evidence or any other witness to the crime.¹²⁰ Smith was convicted and requested postconviction relief based in part on his discovery that the single eyewitness had provided police with conflicting testimony, including a statement that the witness "could not . . . supply a description of the

¹¹³ *Minneeci*, 132 S. Ct. at 623.

¹¹⁴ *Id.* at 624-26.

¹¹⁵ *Id.* at 626 (Ginsburg, J., dissenting).

¹¹⁶ *Id.* at 627.

¹¹⁷ *Gonzalez v. Thaler*, 132 S. Ct. 641, 646 (2012).

¹¹⁸ *Id.* at 645.

¹¹⁹ *Smith v. Cain*, 132 S. Ct. 627, 629-31 (2012) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

¹²⁰ *Id.* at 629.

perpetrators” because the witness had not seen their faces.¹²¹ Smith argued that the prosecution had violated the requirement that they turn over all evidence favorable to the defense as *Brady* mandated, but the State rejected this argument.¹²²

Chief Justice Roberts found Smith was entitled to relief, holding that the State violated *Brady*.¹²³ Chief Justice Roberts noted that the State agreed that the withheld information would have been useful to the defense, and thus the only question for the Court was whether the evidence was material to determining Smith’s guilt.¹²⁴ Chief Justice Roberts found the evidence to be material and wrote that the possibility that the jury would have rendered a different verdict was sufficiently high enough to undermine confidence in the original trial outcome.¹²⁵ In his lone dissent, Justice Thomas was not convinced that Smith had shown that a reasonable jury would have been persuaded to hand down a different verdict given the new evidence.¹²⁶

C. *Seven-to-Two Decisions*

During the 2011-12 Term, the Court returned to a relatively low frequency of criminal justice cases decided with two dissenters.¹²⁷ This proceeded four years of an unusually high percentage of cases characterized by this vote count.¹²⁸ Only three criminal justice cases in the

¹²¹ *Id.* at 629-30.

¹²² *Id.* at 630.

¹²³ *Id.* at 630-31.

¹²⁴ *Id.* at 630.

¹²⁵ *Id.*

¹²⁶ *Id.* at 631 (Thomas, J., dissenting).

¹²⁷ *See, e.g.,* *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Reynolds v. United States*, 132 S. Ct. 975 (2012); *Maples v. Thomas*, 132 S. Ct. 912 (2012); *see supra* Table 1 (listing only 10.3% of the criminal justice cases in the 2011-12 Term as decided seven-to-two).

¹²⁸ While only about ten percent of criminal justice cases in this Term were decided seven-to-two, seven-member majorities accounted for twenty-four percent of decisions in criminal justice cases (29 of 121) over the previous four Terms. *See* *McCall et al., 2010-2011 U.S. Supreme Court Term, supra* note 19, at 312; *McCall et al., 2009-2010 U.S. Supreme Court Term, supra* note 19, at 230; *McCall et al., 2008-2009 U.S. Supreme Court Term, supra* note 19, at 4; *McCall et al., 2007-2008 U.S. Supreme Court Term, supra* note 19, at 38; *supra* Table 1.

most recent Term were decided seven-to-two, and all three ended in a liberal outcome.¹²⁹

Justice Kennedy's ruling in *Martinez v. Ryan* expanded the right of federal habeas ineffective assistance of counsel review.¹³⁰ Here, the Court did not create a general constitutional right to challenge the effectiveness of counsel in collateral postconviction proceedings.¹³¹ However, Justice Kennedy did hold that if a defendant's counsel was ineffective during those proceedings, a court could consider this factor for the purpose of granting federal habeas relief when a defendant fails to correctly raise an ineffective assistance of counsel at trial claim during those postconviction proceedings.¹³² Consequently, state court defendants might be able to raise ineffective trial counsel claims during federal habeas proceedings even if the defendants had not raised those arguments elsewhere.¹³³ Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan joined Justice Kennedy.¹³⁴ Justice Scalia filed a sarcastic dissenting opinion, which Justice Thomas joined, arguing that the Court had violated principles of federalism and judicial restraint.¹³⁵

The Court rendered another liberal decision in *Maples v. Thomas*.¹³⁶ Writing for the Court, Justice Ginsburg held that Maples had cause that excused the procedural defaults in his request for postconviction relief.¹³⁷ Maples's attorneys of record left their employment and thus essentially abandoned his case without informing him that he was no longer represented effectively by counsel.¹³⁸ His attorneys' behavior caused Maples to miss filing deadlines, and the lower federal courts denied him federal habeas relief due to the procedural deficiencies in his state proceedings.¹³⁹ The Supreme Court noted that the

¹²⁹ See *supra* Table 1.

¹³⁰ *Martinez*, 132 S. Ct. 1309.

¹³¹ *Id.* at 1315.

¹³² *Id.*

¹³³ *Id.* at 1317, 1320.

¹³⁴ *Id.* at 1313.

¹³⁵ *Id.* at 1321.

¹³⁶ *Maples v. Thomas*, 132 S. Ct. 912 (2012).

¹³⁷ *Id.* at 917.

¹³⁸ *Id.* at 924-26.

¹³⁹ *Id.* at 921.

problems that Maples's attorneys' defection caused were not of his making and, as a result, Maples was entitled to federal relief.¹⁴⁰ Chief Justice Roberts and Justices Kennedy, Breyer, Alito, Sotomayor, and Kagan joined Justice Ginsburg's decision.¹⁴¹ Justice Alito filed a concurring opinion while Justice Scalia, with whom Justice Thomas joined, dissented.¹⁴²

The Court also ruled in *Reynolds v. United States* that the Federal Sex Offender Registration and Notification Act does not automatically require offenders who were convicted before the Act took effect to register with law enforcement; such pre-Act offenders are required to register only after the Attorney General creates valid rules delineating how the Act applies to pre-Act offenders.¹⁴³ Justice Breyer wrote the Court's liberal decision.¹⁴⁴ Justice Scalia filed a dissenting opinion that Justice Ginsburg joined.¹⁴⁵

D. Six-to-Three Decisions

Of the Court's eight criminal justice cases decided six-to-three during the 2011-12 Term, only two produced an outcome favorable to the criminally accused.¹⁴⁶ We begin with a discussion of those two liberal decisions.¹⁴⁷

In the widely watched case of *United States v. Alvarez*, the Court held as unconstitutional Congress's attempt to make lying about one's military accomplishments a crime.¹⁴⁸ The law in question, the Stolen Valor Act of 2005, made it a federal crime to falsely claim military honors and enhanced punishment for those falsely claiming to have

¹⁴⁰ *Id.* at 927.

¹⁴¹ *Id.* at 916.

¹⁴² *Id.*

¹⁴³ *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012).

¹⁴⁴ *Id.* at 977.

¹⁴⁵ *Id.*

¹⁴⁶ See *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Legacy Datasets*, SUP. CT. DATABASE, <http://scdb.wustl.edu/data.php?s=2> (last visited Feb. 4, 2013).

¹⁴⁷ See *infra* notes 162-92 and accompanying text.

¹⁴⁸ *Alvarez*, 132 S. Ct. at 2551.

been awarded the Medal of Honor.¹⁴⁹ Xavier Alvarez, in a public meeting, lied and asserted that he was a marine veteran who had been awarded the Congressional Medal of Honor.¹⁵⁰ Alvarez was arrested under the Stolen Valor Act and found guilty by the district court following the court's rejection of Alvarez's argument that the Act was an unconstitutional restriction on content-based speech under the First Amendment.¹⁵¹ The court of appeals reversed, and the Supreme Court granted certiorari.¹⁵²

Writing for Chief Justice Roberts and Justices Ginsburg and Sotomayor, Justice Kennedy delivered the judgment of the Court.¹⁵³ Justice Breyer, whom Justice Kagan joined, filed an opinion concurring in judgment.¹⁵⁴ Justice Kennedy noted the Act punished content-based speech and thus must pass an "exacting scrutiny" standard, and the Government must justify the Act's constitutionality.¹⁵⁵ Justice Kennedy found the Government's arguments to be unpersuasive.¹⁵⁶ He wrote that there are very few instances in which the Court has suppressed content-based speech and that the general notion of lying does not fall under such exceptions.¹⁵⁷ He stated, "This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."¹⁵⁸ Further, the fact that Alvarez lied about military service did not influence Justice Kennedy's views.¹⁵⁹ Although Justice Kennedy acknowledged that Congress was correct in its desire to protect the reputations of our military leaders,¹⁶⁰ it is also the case that "[f]undamental constitutional principles require that laws enacted to honor the brave must be consistent

¹⁴⁹ *Id.* at 2550-51.

¹⁵⁰ *Id.* at 2542.

¹⁵¹ *Id.* at 2542-43.

¹⁵² *Id.* at 2542.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2551 (Breyer, J., concurring in judgment).

¹⁵⁵ *Id.* at 2544, 2548 (plurality opinion) (citing *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)).

¹⁵⁶ *See id.* at 2548-51.

¹⁵⁷ *See id.* at 2544-48.

¹⁵⁸ *Id.* at 2544.

¹⁵⁹ *See id.* at 2549-50.

¹⁶⁰ *Id.* at 2548.

with the precepts of the Constitution for which they fought.”¹⁶¹ Kennedy concluded that the government had not provided sufficient justification to label false speech as outside First Amendment protections.¹⁶²

Justice Breyer, whom Justice Kagan joined, filed an opinion concurring in judgment arguing that although the government has a legitimate interest in protecting those who have served in the military, Congress could find less restrictive methods of achieving this end.¹⁶³ Justice Alito, whom Justices Scalia and Thomas joined, dissented.¹⁶⁴ Justice Alito’s caustic dissent starts by noting, “Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award.”¹⁶⁵ Justice Alito argues the First Amendment “does not protect false . . . statements that inflict real harm and serve no legitimate interest” and thus finds the Stolen Valor Act constitutional.¹⁶⁶

The Court also handed down a six-to-three liberal decision in *Vartelas v. Holder* determining that, in this case, the government could not retroactively apply newer rules regarding the treatment of permanent legal residents.¹⁶⁷ Prior immigration rules allowed permanent legal residents to leave the country for short periods of time without impacting their legal status.¹⁶⁸ Following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, permanent legal residents who commit a felony may not leave the country without jeopardizing their residency.¹⁶⁹ When these individuals try to reenter the United States, they may be denied.¹⁷⁰ In this case, Panagis Vartelas pleaded guilty to a felony in 1994 before the IIRIRA became law.¹⁷¹ He then visited Greece in 2003 and was determined an

¹⁶¹ *Id.* at 2543.

¹⁶² *See id.* at 2549-50.

¹⁶³ *Id.* at 2555 (Breyer, J., concurring in judgment).

¹⁶⁴ *Id.* at 2556 (Alito, J., dissenting).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2557.

¹⁶⁷ *Vartelas v. Holder*, 132 S. Ct. 1479, 1483-84 (2012).

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at 1484-85.

¹⁷⁰ *See id.* at 1485.

¹⁷¹ *Id.* at 1483.

inadmissible alien when he tried to reenter the United States; the government initiated removal proceedings.¹⁷² Justice Ginsburg's majority opinion held that the government could not apply Vartelas's 1994 conviction retroactively under the IIRIRA to deny him reentry into the country.¹⁷³ Rather, Ginsburg held that Vartelas committed the felony before the IIRIRA went into effect and because prior rules allowed Vartelas to leave the country with a felony conviction without endangering his legal status, these prior rules applied in this case.¹⁷⁴ The government could not use his felony to deny him reentry into the country following a brief trip abroad.¹⁷⁵ Justice Scalia, whom Justices Alito and Thomas joined, dissented.¹⁷⁶

In another immigration related case, *Kawashima v. Holder*, a six-member majority ruled in a conservative direction in deciding what constitutes an "aggravated felony" for the purposes of deportation hearings.¹⁷⁷ The Immigration and Naturalization Service slated Akio Kawashima for deportation based on his conviction for preparing a false tax return.¹⁷⁸ The government was also going to deport Fusako Kawashima, Akio's wife, for helping him.¹⁷⁹ Both individuals appealed to the Board of Immigration Appeals for relief.¹⁸⁰ They argued that a tax offense does not qualify as a crime of deceit and thus is not an aggravated felony that would make them eligible for deportation.¹⁸¹

Justice Thomas's decision, which Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor joined, found that tax crimes where government losses exceed \$10,000 are aggravated felonies.¹⁸² In dissent, Justice Ginsburg, whom Justices Breyer and Kagan joined, argued that tax offenses do not qualify as aggravated felonies.¹⁸³

¹⁷² *Id.* at 1485.

¹⁷³ *Id.* at 1490.

¹⁷⁴ *See id.* at 1490-92.

¹⁷⁵ *See id.* at 1484.

¹⁷⁶ *Id.* at 1492 (Scalia, J., dissenting).

¹⁷⁷ *Kawashima v. Holder*, 132 S. Ct. 1166, 1170 (2012).

¹⁷⁸ *Id.* at 1170-71.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1171.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1170.

¹⁸³ *Id.* at 1176 (Ginsburg, J., dissenting).

Justice Ginsburg noted that Congress did not specifically include these offenses in the statute and that many tax offenses are considered misdemeanors, and thus courts should not consider these offenses as aggravated felonies for the purposes of immigration.¹⁸⁴

One of the most interesting six-to-three conservative decisions this year was the Court's ruling in *Blueford v. Arkansas*.¹⁸⁵ The Court held that retrying a defendant for capital murder and first-degree murder did not violate the Double Jeopardy Clause when members of a previous jury had indicated that they unanimously agreed against both charges but could not resolve the case.¹⁸⁶ Alex Blueford was tried for capital murder and lesser charges of first-degree murder, manslaughter, and negligent homicide.¹⁸⁷ The judge instructed the jurors to consider the top count of the indictment first and, if they unanimously agreed against that count, to work their way down until they reached a verdict.¹⁸⁸ The judge also instructed the jury either to convict on one of the charges or to acquit on all charges, but the jury could not acquit on some and not others.¹⁸⁹ After several hours of deliberation, the jury failed to reach a verdict.¹⁹⁰ Jurors informed the judge that they were unanimously against the top two counts but could not reach an agreement on either the manslaughter or negligent homicide charge.¹⁹¹ The judge eventually declared a mistrial, and the State retried on all counts.¹⁹² Blueford moved to have the first two charges dismissed as violating the Double Jeopardy Clause.¹⁹³

In an opinion by Chief Justice Roberts, which Justices Scalia, Kennedy, Thomas, Breyer, and Alito joined, the Court agreed with the State.¹⁹⁴ Although Blueford argued that the jury had actually acquitted him, Chief Justice Roberts held instead that the jury report during delib-

¹⁸⁴ *Id.*

¹⁸⁵ *Blueford v. Arkansas*, 132 S. Ct. 2044, 2048 (2012).

¹⁸⁶ *Id.* at 2053.

¹⁸⁷ *Id.* at 2048.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 2049.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2047.

erations was not a final verdict and did not count as one.¹⁹⁵ Despite the instruction that the jury move on to lesser offenses only after disposing of the higher counts, Chief Justice Roberts held that the jury could have reconsidered the vote at any time.¹⁹⁶ Chief Justice Roberts also found fault with Blueford's argument that the trial court was wrong in declaring a mistrial without taking some steps to secure the jury's votes on the top-tier offenses.¹⁹⁷ Chief Justice Roberts wrote, "We reject that suggestion. We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict."¹⁹⁸ Justice Sotomayor, whom Justices Ginsburg and Kagan joined, asserted that the declaration that jurors were unanimously against the top two counts was an acquittal and, consequently, a court could not retry those counts without violating the Double Jeopardy Clause.¹⁹⁹

In the Court's conservative decision in *Howes v. Fields*, it held that Randall Fields was not in custody for the purposes of *Miranda v. Arizona*.²⁰⁰ Fields was serving a prison sentence when two deputies took him to a conference room to question him about his alleged illegal activities before his incarceration.²⁰¹ He was isolated from the prison population and questioned for five to seven hours, although he was told that he could return to his cell if he wanted, and he was free of restraints.²⁰² The deputies were armed, and the door to the conference room was sometimes shut during the interview.²⁰³ On several occasions, Fields said he no longer wanted to answer questions, but he did not ask to return to his cell.²⁰⁴ Eventually, Fields confessed to sexually

¹⁹⁵ *Id.* at 2053.

¹⁹⁶ *Id.* at 2051.

¹⁹⁷ *Id.* at 2052.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 2053.

²⁰⁰ *Howes v. Fields*, 132 S. Ct. 1181, 1194 (2012) (discussing the boundaries of the Fifth Amendment's right against self incrimination implicated in *Miranda v. Arizona*, 384 U.S. 436 (1966)).

²⁰¹ *Id.* at 1185.

²⁰² *Id.* at 1186.

²⁰³ *Id.*

²⁰⁴ *Id.*

abusing a child.²⁰⁵ At trial, Fields moved to have his confession suppressed, arguing that he was in custody when he confessed but that the deputies had not read him his rights as mandated by *Miranda*.²⁰⁶ After losing at the state level, Fields was granted federal habeas relief because the district court held that the State had erred in that Fields was in custody based on clearly established federal precedents.²⁰⁷

The Supreme Court reversed, finding that there was no state violation of clearly established law because custodial rules had not been clearly established in this context.²⁰⁸ Rather, there were no clear rules on what constitutes a custodial situation in prison and, therefore, federal habeas relief granted on the basis that the State violated federal law was not permissible.²⁰⁹ Moreover, Justice Alito, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Kagan, found that Fields was not in custody for the purposes of *Miranda* and was not entitled to federal relief on that point either.²¹⁰ Dissenting in part and joined by Justices Breyer and Sotomayor, Justice Ginsburg agreed with the Court that federal rules regarding custody in prison were not clearly established but maintained that Fields was in custody during questioning, which would have precluded the introduction of his confession at state trial if the case were on direct appeal.²¹¹

The Court also handed down a conservative ruling in *Messerschmidt v. Millender*, in which it granted qualified immunity to all police personnel in a case where the police conducted an illegal search and seizure.²¹² Writing for the majority, Chief Justice Roberts held that the police acted reasonably based on the information at hand when they asked for and received a search warrant.²¹³ Justices Scalia, Kennedy, Thomas, Breyer, and Alito joined the decision.²¹⁴ Justice Breyer also

²⁰⁵ *Id.*

²⁰⁶ *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

²⁰⁷ *Id.* at 1186-87.

²⁰⁸ *Id.* at 1187.

²⁰⁹ *Id.* at 1188.

²¹⁰ *Id.* at 1185, 1192-93.

²¹¹ *Id.* at 1194 (Ginsburg, J., concurring in part and dissenting in part).

²¹² *See Messerschmidt v. Millender*, 132 S. Ct. 1235, 1250-51 (2012).

²¹³ *See id.* at 1239-40.

²¹⁴ *Id.* at 1240.

filed a concurring opinion.²¹⁵ Justice Kagan filed an opinion concurring in part and dissenting in part, arguing that the police acted reasonably with regard to part of the warrant justification but that other parts called for unjustifiable conclusions to demonstrate probable cause.²¹⁶ Justice Sotomayor, whom Justice Ginsburg joined, dissented and held that the police actions were not reasonable and that the Court should not have granted qualified immunity.²¹⁷

The Court further held in *Setser v. United States* that the Sentencing Reform Act of 1984 provides federal courts the discretion to run a defendant's sentence consecutively, rather than concurrently, to a sentence anticipated from a state court.²¹⁸ Justice Scalia wrote the Court's conservative ruling.²¹⁹ Justice Breyer, whom Justices Kennedy and Ginsburg joined, dissented and asserted that a proper interpretation of the Sentencing Reform Act does not allow federal courts to hand down consecutive sentences when the defendant has been convicted of multiple criminal violations.²²⁰

The Court held in *Taniguchi v. Kan Pacific Saipan* that the Court Interpreters Act does not cover the cost of translating documents.²²¹ Justice Alito wrote the decision while Justice Ginsburg, whom Justices Breyer and Sotomayor joined, dissented.²²² Although this ruling specifically addresses the types of expenses that a civil court can tax as costs to the losing party,²²³ it may impact the criminal justice system significantly.²²⁴ The reasons for this impact are that the underlying law relates to both criminal and civil proceedings²²⁵ and the implementation of the law has been uneven.²²⁶ Though the full reach of the

²¹⁵ *Id.*

²¹⁶ *Id.* at 1251 (Kagan, J., concurring in part and dissenting in part).

²¹⁷ *Id.* at 1252-53 (Sotomayor, J., dissenting).

²¹⁸ *See Setser v. United States*, 132 S. Ct. 1463, 1470 (2012).

²¹⁹ *Id.* at 1466.

²²⁰ *Id.* at 1474 (Breyer, J., dissenting).

²²¹ *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2007 (2012).

²²² *Id.* at 1999.

²²³ *Id.*; *see* 28 U.S.C. § 1920(6) (2006).

²²⁴ Court Interpreters Act of 1978, 28 U.S.C. § 1827 (2006).

²²⁵ *Id.* at § 1827(j).

²²⁶ *See, e.g., Mollie M. Pawlosky, When Justice is Lost in the "Translation": Gonzalez v. United States, An "Interpretation" of the Court Interpreters Act of 1978,*

ruling is currently unclear, the *Taniguchi* decision might establish a rationale to limit the types of interpretation services that the government must provide to criminal defendants.²²⁷

E. Five-Member Majorities

A slim, five-member majority characterized seven criminal justice decisions during the 2011-12 Term.²²⁸ We begin with the five cases producing liberal outcomes. In one of the most watched cases of the Term, the Court defeated some of Arizona's attempt to regulate illegal immigration.²²⁹ The case, *Arizona v. United States*, ended in a five-to-three liberal ruling, in which Justice Kagan did not participate, and challenged the implementation of four provisions of Arizona's 2010 Support Our Law Enforcement and Safe Neighborhoods Act.²³⁰ The Court ruled that federal law preempted three of the provisions and remanded the fourth—the Act's controversial centerpiece—for further consideration.²³¹

Specifically, the federal government challenged Arizona's Act on four fronts.²³² Section 3 of the law made failure to comply with federal alien-registration rules a misdemeanor under state law.²³³ Section 5 also created a new state offense by making it a misdemeanor for

45 DEPAUL L. REV. 435 (1996) (reviewing the litigation under the Court Interpreters Act); T. Caroline Briggs-Sykes, *Lost in Translation: The Need for a Formal Court Interpreter Program in Alaska*, 22 ALASKA L. REV. 113, 115 (2005) ("The Federal Court Interpreters Act requires the use of certified language interpreters when a federal criminal defendant or witness in a federal criminal trial cannot speak or understand English. . . . Because the United States Supreme Court has not yet interpreted the Act, its implementation has varied.").

²²⁷ See *Taniguchi*, 132 S. Ct. at 2006-07.

²²⁸ See *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Dorsey v. United States*, 132 S. Ct. 2321 (2012); *Williams v. Illinois*, 132 S. Ct. 2221, 2227-28 (2012); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

²²⁹ See *Arizona v. United States*, 132 S. Ct. 2492 (2012).

²³⁰ *Id.* at 2497.

²³¹ *Id.* at 2510.

²³² *Id.* at 2497.

²³³ *Id.*

undocumented residents to seek employment.²³⁴ Section 6 allowed police to conduct warrantless arrests if they had probable cause to suspect that a person committed an offense allowing removal from the United States.²³⁵ Finally, section 2(B) held that officers conducting stops, detentions, or arrests must, in some cases, make efforts to verify a person's legal status.²³⁶ Before Arizona implemented this law, the federal district court placed an injunction on these four provisions, and the appeals court upheld the injunction, holding that the federal government would likely prevail on its argument that federal law preempted these provisions.²³⁷ Because immigration is essentially a federal issue and because Congress had clearly occupied the field of immigration reform, the government argued that the State could not enact this type of immigration legislation.²³⁸ The Supreme Court granted certiorari.²³⁹

Writing for Chief Justice Roberts and Justices Breyer, Ginsburg, and Sotomayor, Justice Kennedy delivered the majority opinion in which the Court tended to support the federal government's challenge by finding that the State had overstepped its constitutional powers.²⁴⁰ Justice Kennedy began by noting that federal authority in the field of immigration is long standing, well settled, and extensive.²⁴¹ Reciting the extent of federal authority, Justice Kennedy established the federal government's responsibility for immigration policy.²⁴² Justice Kennedy further recognized the impact federal policies have on states and the problems Arizona faced when dealing with illegal immigration.²⁴³ Despite the State's interest in immigration reform, Justice Kennedy held that federal law and federal policies preempted sections 3, 5, and 6.²⁴⁴

Regarding section 3, Justice Kennedy wrote that the federal government occupied the field of alien registration, leaving no room for

²³⁴ *Id.* at 2497-98.

²³⁵ *Id.* at 2498.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 2502.

²³⁹ *Id.* at 2498.

²⁴⁰ *Id.* at 2497.

²⁴¹ *Id.* at 2498-99.

²⁴² *Id.* at 2498-500.

²⁴³ *Id.* at 2500.

²⁴⁴ *Id.* at 2495.

state action.²⁴⁵ Although no comparable federal law exists regarding section 5, Justice Kennedy agreed with the federal government's position that the provision interfered with federal regulations regarding alien employment and, consequently, federal law also preempted this provision.²⁴⁶ The same type of concern arose regarding the implementation of section 6 with the federal government asserting that this provision impeded the removal process that Congress created.²⁴⁷ Justice Kennedy agreed and again held that federal law preempted the provision.²⁴⁸ Overall, Justice Kennedy found that the State could not enforce three of the four provisions because either Congress had occupied the field or because the provisions interfere, in some way, with the implementation of federal laws.²⁴⁹

Justice Kennedy and the majority did not immediately find fault with section 2(B) mandating police to make reasonable attempts to check immigration status during stops, detentions, and arrests under certain circumstances when they have cause to believe individuals are in the country illegally.²⁵⁰ The provision also requires that law enforcement check immigration status before releasing anyone who has been arrested.²⁵¹

The federal government argued that these mandates interfere with federal verification requirements and also expressed concern that detentions would be lengthened due to the verification process.²⁵² Kennedy was not persuaded that this element of the state law hampered federal activities and wrote that the federal government had failed to show that delays in releasing individuals would result from this provision.²⁵³ If the provision, in practice, results in delays with individuals facing prolonged detention only to verify their immigration status, federal law would likely preempt the provision.²⁵⁴

²⁴⁵ *Id.* at 2501-02.

²⁴⁶ *Id.* at 2503-05.

²⁴⁷ *Id.* at 2506-07.

²⁴⁸ *Id.* at 2507.

²⁴⁹ *See supra* notes 245-47 and accompanying text.

²⁵⁰ *See Arizona*, 132 S. Ct. at 2507-10.

²⁵¹ *Id.* at 2507.

²⁵² *Id.* at 2508-09.

²⁵³ *Id.* at 2497.

²⁵⁴ *Id.* at 2509.

However, the provision might survive preemption concerns if police are required only to verify immigration status as part of a lawful detention or following a person's release.²⁵⁵ Justice Kennedy held that until the state courts properly consider the issue and determine how the provision is actually being used, it would be premature to preempt it.²⁵⁶ Consequently, the majority allowed this provision to go into effect and left open for a later determination its ability to survive a federal challenge that it interferes with federal regulations.²⁵⁷

Justices Scalia, Thomas, and Alito filed individual arguments, all concurring in part and dissenting in part.²⁵⁸ Justice Scalia, asserting state sovereignty, argued that states have the right to determine who is allowed to live within their borders and that Arizona's law was constitutional in full.²⁵⁹ Scalia stated, "As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty."²⁶⁰ Scalia's strong position on the value of state sovereignty and his sharp disagreement with the Obama administration became apparent through his remarks from the bench when the *Arizona* decision was announced.²⁶¹ Justice Thomas also claimed that federal

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 2510.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 2511-22 (Scalia, J., concurring in part and dissenting in part); *id.* at 2522-24 (Thomas, J., concurring in part and dissenting in part); *id.* at 2524-35 (Alito, J., concurring in part and dissenting in part).

²⁵⁹ *Id.* at 2511 (Scalia, J., concurring in part and dissenting in part).

²⁶⁰ *Id.*

²⁶¹ Adam Liptak, *Blocking Parts of Arizona Law, Justices Allow Its Centerpiece*, N.Y. TIMES, June 25, 2012, <http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?pagewanted=all>.

Justice Antonin Scalia summarized his dissent from the bench, a rare move that indicated his deep disagreement. Rarer still, he criticized a policy that was not before the court: President Obama's recent announcement that his administration would not deport many illegal immigrants who came to the United States as children.

Justice Scalia's point was a narrow one—that the states should have the right to make immigration policy if the federal government is not enforcing its own policies—but it continued a charged back and forth between the conservative justices and Mr. Obama. In his 2010 State of the Union address, Mr. Obama criticized the [C]ourt's

law did not preempt the State's efforts.²⁶² Justice Alito's opinion argued that federal law only preempted section 3 and asserted that sections 5, 6, and 2(B) were constitutional.²⁶³ One of the most anticipated rulings of the Term, the decision clarified some of the contours of state immigration laws and highlighted the contentiousness often characterizing debates on state versus federal powers.²⁶⁴

The Court ruled in *Miller v. Alabama* that sentencing juvenile offenders to life without the possibility of parole as a mandatory punishment under state law violated the Eighth Amendment's prohibition against cruel and unusual punishment.²⁶⁵ Extending its rulings from *Roper v. Simmons*²⁶⁶ and *Graham v. Florida*,²⁶⁷ the Court's decision in *Miller* held that sentencing schemes involving mandatory life without the possibility of parole for juveniles committing homicides were also impermissible.²⁶⁸ Justice Kagan's opinion for Justices Kennedy, Breyer, Sotomayor, and Ginsburg reiterated the logic of both *Roper* and *Graham*, requiring states to take into account when considering punishment that juveniles committing crimes are less culpable than adults.²⁶⁹ As such, mandatory punishments of life without the possibility of parole fail to sufficiently consider the individual's age when rendering punishment.²⁷⁰ Justice Kagan wrote:

But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these cen-

Citizens United campaign finance ruling, which the [C]ourt reiterated in a separate ruling on Monday.

Id.

²⁶² *Arizona*, 132 S. Ct. at 2522 (Thomas, J., concurring in part and dissenting in part).

²⁶³ *Id.* at 2524-25 (Alito, J., concurring in part and dissenting in part).

²⁶⁴ *See generally id.* (holding parts of the Arizona immigration statute unconstitutional for infringing on areas that federal law previously preempted, which disallows states from making laws in areas that federal statutes cover).

²⁶⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

²⁶⁶ *See generally Roper v. Simmons*, 543 U.S. 551 (2005) (determining juvenile offenders could not be eligible for the death penalty).

²⁶⁷ *See generally Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding life without the possibility of parole for juvenile offenders committing nonhomicide crimes was unconstitutional).

²⁶⁸ *Miller*, 132 S. Ct. at 2465-66.

²⁶⁹ *Id.* at 2460, 2466.

²⁷⁰ *Id.*

tral considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*’s (and also *Roper*’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.²⁷¹

The ruling is consistent with the Court’s logic in both *Roper* and *Graham* and again maintains that categorical sentencing of juvenile offenders—even those who commit homicide—is inconsistent with the Eighth Amendment.²⁷² Justice Kennedy, as he had in both *Roper* and *Graham*, provided the swing vote for the liberal result.²⁷³ Justice Breyer filed a concurring opinion that Justice Sotomayor joined.²⁷⁴

Chief Justice Roberts, whom Justices Scalia, Alito, and Thomas joined, dissented.²⁷⁵ Chief Justice Roberts found nothing unusual with sentencing juveniles who commit homicide to mandatory life terms without the possibility of parole.²⁷⁶ Rather, Chief Justice Roberts argued that there is no national consensus against this type of punishment, and, consequently, the punishment cannot be considered unusual under the Eighth Amendment.²⁷⁷ Chief Justice Roberts noted that about 2000 of the approximately 2500 juveniles serving life sentences for committing homicidal offenses received those sentences as part of a mandatory sentencing scheme that a state legislature enacted.²⁷⁸ To Chief Justice

²⁷¹ *Id.* at 2466.

²⁷² *Id.* at 2468-69.

²⁷³ Tbirckhe, *U.S. Supreme Court Holds that Mandatory Life Without Parole Sentences for Juveniles Convicted of Homicide Violate the Eighth Amendment*, JUV. JUST. BLOG (June 25, 2012), <http://juvenilejusticeblog.web.unc.edu/2012/06/25/u-s-supreme-court-holds-that-life-without-parole-sentences-for-juveniles-convicted-of-homicide-violates-the-eighth-amendment/>.

²⁷⁴ *Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring).

²⁷⁵ *Id.* at 2477 (Roberts, C.J., dissenting).

²⁷⁶ *Id.* at 2478.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 2477.

Roberts, the large number of juveniles serving these terms indicated that the punishments are consistent with the Eighth Amendment.²⁷⁹ Justice Thomas, whom Justice Scalia joined, also filed a dissenting opinion, as did Justice Alito, with whom Justice Scalia joined.²⁸⁰

In *Dorsey v. United States*, the Court held that the lower mandatory minimum punishments for crack offenses created under the 2010 Fair Sentencing Act applied to individuals who committed the drug offenses before—but who were sentenced after—the Act went into effect.²⁸¹ Justice Breyer, whom Justices Kennedy, Ginsburg, Sotomayor, and Kagan joined, wrote the Court's liberal ruling.²⁸² Justice Scalia filed a dissenting opinion, which Chief Justice Roberts and Justices Thomas and Alito joined.²⁸³

Justice Kennedy wrote the decision and joined the Court's more liberal Justices (Ginsburg, Breyer, Sotomayor, and Kagan) to uphold an ineffective assistance of counsel claim in *Lafler v. Cooper*.²⁸⁴ Anthony Cooper rejected a plea bargain, on faulty advice of counsel, and instead lost at trial and was sentenced to a significantly longer prison term than had he accepted the plea.²⁸⁵ Cooper lost his state appeals and applied to the federal courts for habeas relief.²⁸⁶ The district court and the circuit court both found that Cooper had been denied his right to effective counsel using the test developed under *Strickland v. Washington*.²⁸⁷ Justice Kennedy found the State's argument that individuals should not be able to make a *Strickland* claim when they rejected a plea and faced a fair trial to be unpersuasive.²⁸⁸ The majority held that ineffective assistance of counsel when evaluating a plea violates the Sixth Amendment.²⁸⁹ Justice Scalia, whom Justice Thomas in full and Chief Justice

²⁷⁹ *Id.* at 2479-80.

²⁸⁰ *Id.* at 2482-89 (Thomas, J., dissenting); *id.* at 2487-90 (Alito, J., dissenting).

²⁸¹ *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012).

²⁸² *Id.* at 2325.

²⁸³ *Id.*

²⁸⁴ *Lafler v. Cooper*, 132 S. Ct. 1376, 1382, 1391 (2012).

²⁸⁵ *Id.* at 1383.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 1383-84 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

²⁸⁸ *Id.* at 1385.

²⁸⁹ *Id.* at 1388.

Roberts in part joined, dissented.²⁹⁰ Justice Alito also filed a dissenting opinion.²⁹¹

In a companion case to *Lafler*, the Court's decision, by the same panel of Justices and again written by Justice Kennedy, found for an ineffective assistance of counsel claim in *Missouri v. Frye*.²⁹² In this case, the defendant's attorney had failed to even inform the defendant of a formal plea offer—a failure that the Supreme Court agreed violated the *Strickland* standard.²⁹³ Justice Scalia again dissented in *Frye*, and Chief Justice Roberts and Justices Thomas and Alito joined in his dissent.²⁹⁴

We turn to the first of two cases producing a thin conservative majority.²⁹⁵ In *Williams v. Illinois*, the Court returned to a line of cases dealing with the Confrontation Clause that started with *Crawford v. Washington*.²⁹⁶ In *Crawford*, the Court held that a party could not introduce out-of-court statements at trial if the party did not place on the stand the person making the statements.²⁹⁷ The Court expanded this ruling in *Melendez-Diaz v. Massachusetts* in 2009 when a divided Court held that parties may not use expert reports at trial if the expert who created the report was not available at trial to introduce the report.²⁹⁸ The Court further held in *Bullcoming v. New Mexico* that only the expert creating the report, not a supervisor or other lab worker, must introduce the report at trial; surrogates do not satisfy the mandates of the Confrontation Clause.²⁹⁹ The decision in *Williams* adds to this line of cases but in a complicated four-to-one-to-four decision.³⁰⁰ Justice

²⁹⁰ *Id.* at 1391 (Scalia, J., dissenting).

²⁹¹ *Id.* at 1398 (Alito, J., dissenting).

²⁹² *Missouri v. Frye*, 132 S. Ct. 1399, 1403, 1411 (2012).

²⁹³ *Id.* at 1404, 1410.

²⁹⁴ *Id.* at 1412 (Scalia, J., dissenting).

²⁹⁵ *See, e.g.*, *Williams v. Illinois*, 132 S. Ct. 2221 (2012); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).

²⁹⁶ *Williams*, 132 S. Ct. at 2227-28 (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

²⁹⁷ *Crawford*, 541 U.S. at 59.

²⁹⁸ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009).

²⁹⁹ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

³⁰⁰ *Williams*, 132 S. Ct. 2221.

Thomas joined Justice Alito's plurality opinion to render a conservative outcome but disagreed with most of Justice Alito's legal rationale.³⁰¹

The case specifically addresses the issue of whether an expert can provide testimony regarding facts made known to the expert but that the expert is not competent to verify.³⁰² Here, a DNA sample was taken from a rape victim, and an outside laboratory created a DNA profile of her attacker.³⁰³ With the DNA profile, a forensic specialist for the Illinois State Police (ISP) ran the sample profile through the state DNA database and found a match to Sandy Williams's profile, whose blood sample had been extracted by the State following a different conviction.³⁰⁴ Law enforcement then placed Williams in a lineup, and the victim identified him as her attacker.³⁰⁵ At trial, the prosecution called the ISA specialist to testify that the DNA sample from the rape kit and from the defendant matched, but the prosecution did not produce the DNA profile report itself or an expert from the outside laboratory to testify as to how the laboratory created the original profile.³⁰⁶

Williams moved to have this testimony excluded, arguing that it violated the Confrontation Clause because he was unable to cross-examine anyone associated with the original DNA profile.³⁰⁷ Williams was eventually convicted, and he appealed.³⁰⁸

Writing for Chief Justice Roberts and Justices Kennedy and Breyer, Justice Alito held that the expert testimony from the ISP forensic analyst did not violate the Sixth Amendment's Confrontation Clause.³⁰⁹ Instead, Justice Alito noted that the prosecution did not introduce the results of the outside laboratory's report as truth, but rather as a basis for the ISP representative's opinion regarding a DNA match between the samples.³¹⁰ Moreover, Justice Alito noted:

³⁰¹ *Id.* at 2227; *see id.* at 2255, 2264 (Thomas, J., concurring in judgment).

³⁰² *Id.* at 2233 (plurality opinion).

³⁰³ *Id.* at 2229.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 2230.

³⁰⁷ *Id.* at 2231.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 2240.

³¹⁰ *Id.* at 2228.

[The laboratory] report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose.³¹¹

As a result of these two factors, Justice Alito found no violation of the Confrontation Clause.³¹²

Justice Thomas filed an opinion concurring in the judgment that the testimony did not violate the Confrontation Clause, but for reasons significantly different from those articulated by Justice Alito.³¹³ Justice Thomas argued that the results of the outside laboratory's DNA test were not testimonial because they "lacked the requisite 'formality and solemnity'" and, therefore, did not trigger Confrontation Clause protection.³¹⁴ Justice Thomas disagreed with Alito's view that the prosecution did not introduce the statements for the truth of the matter asserted, but only to establish the basis on which the ISP representative arrived at her conclusions.³¹⁵ Rather, Justice Thomas asserted that "there was no plausible reason" for introducing the statements "other than to establish their truth."³¹⁶ Justice Thomas then asserted that the statements were not testimonial because they were not the type of formal statements (such as depositions, affidavits, and testimony made in an official setting) that the Sixth Amendment protects.³¹⁷

Justice Kagan, with Justices Scalia, Ginsburg, and Sotomayor dissented.³¹⁸ Relying on *Crawford*, *Melendez-Diaz*, and *Bullcoming*, Justice Kagan reasoned that the outcome of this case should be clear:

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 2255 (Thomas, J., concurring in judgment).

³¹⁴ *Id.*

³¹⁵ *Id.* at 2256.

³¹⁶ *Id.*

³¹⁷ *Id.* at 2260.

³¹⁸ *Id.* at 2264 (Kagan, J., dissenting).

the court failed to provide Williams the opportunity to confront the person(s) responsible for producing the evidence used against him and, therefore, violated his Sixth Amendment rights.³¹⁹ Further, Justice Kagan noted of Justice Alito's plurality opinion that "[f]ive Justices specifically reject every aspect of its reasoning and every paragraph of its explication."³²⁰ Given Justice Thomas's vote to include the testimony, Kagan charged that the Court had the necessary five votes to deny Williams's Confrontation Clause claim "but not a single good explanation" for so doing.³²¹ This case makes important distinctions on the permissibility of future DNA evidence.³²² For comparison to DNA profiles included in state and federal databases, at trial prosecutors may use profiles that outside laboratories generated without violating the Confrontation Clause, even if experts from these outside laboratories do not testify at trial.³²³

The Court also decided, by a five-to-four vote, the ability of law enforcement to subject individuals detained for minor infractions to visual strip searches in *Florence v. Board of Chosen Freeholders*.³²⁴ Police stopped Albert Florence and his wife.³²⁵ On the basis of a faulty outstanding warrant, the police arrested Florence and took him to a detention center and later transferred him to a correctional facility.³²⁶ At both centers, police subjected Florence to a visual, invasive search.³²⁷ At the detention center, police required Florence to take a shower in the presence of a delousing agent in which the agent requested that Florence lift his genitals as part of a visual inspection.³²⁸ At the correction facility, police again required Florence to remove his clothes and participate in a visual strip search where law enforcement inspected Florence's body, including cavities.³²⁹ Florence stated that "he was required to lift his genitals, turn around, and cough in a squatting posi-

³¹⁹ *Id.* at 2265.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* at 2228 (plurality opinion).

³²³ *Id.*

³²⁴ *See* *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).

³²⁵ *Id.* at 1514.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

tion as part of the process.”³³⁰ Police conducted the visual search on all incoming individuals regardless of the type of crime alleged and without any individualized suspicion.³³¹

Florence was released from the correctional facility and all charges were dropped, but he sued claiming that the strip searches violated his Fourth and Fourteenth Amendment rights.³³² Florence contended that individuals charged with committing minor offenses should not be subjected to the invasive search unless law enforcement has reason to suspect the individuals are concealing contraband.³³³ Without this type of individualized suspicion, the searches violate the Fourth Amendment’s protection against illegal searches according to Florence.³³⁴

Writing for Chief Justice Roberts and Justices Alito, Scalia, and Thomas, Justice Kennedy delivered the Court’s opinion.³³⁵ Justice Kennedy noted that there are legitimate penological interests in ensuring incoming individuals are not bringing contraband into the facilities to protect not only law enforcement and correctional officers but also other inmates.³³⁶ Justice Kennedy also noted that Court precedents allow correctional facilities the ability to conduct random searches for contraband as long as the policies are reasonable and advance legitimate penological interests.³³⁷ Further, many correctional facilities employ some sort of strip search, and Justice Kennedy reasoned that the Court should defer to these policies unless it can be shown that officials’ reactions are exaggerated.³³⁸ Here, Justice Kennedy held that Florence had not shown that a visual strip search even for minor offenses is an exaggerated response to the problem of ensuring prison security.³³⁹ Justice Kennedy cautioned that those committing minor offenses can be dangerous and that it would be difficult and impractical to require prison

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 1514-15.

³³⁴ *Id.*

³³⁵ *Id.* at 1510.

³³⁶ *Id.* at 1515, 1518.

³³⁷ *Id.* at 1515-16.

³³⁸ *Id.* at 1517.

³³⁹ *Id.* at 1518.

officials to determine the level of danger each incoming inmate posed based on past and present crimes.³⁴⁰ Therefore, according to Justice Kennedy, the safety of all those within the system justifies the visual searches as conducted here when those being searched are to be placed in the general population.³⁴¹

Justice Alito and Chief Justice Roberts filed concurring opinions to clarify that they believed the ruling is limited to situations in which the inmate is to be placed in the general population and limited to visual searches.³⁴² Justice Alito noted:

I join the opinion of the Court but emphasize the limits of today's holding. The Court holds that jail administrators may require all arrestees *who are committed to the general population of a jail* to undergo visual strip searches not involving physical contact by corrections officers. To perform the searches, officers may direct the arrestees to disrobe, shower, and submit to a visual inspection. As part of the inspection, the arrestees may be required to manipulate their bodies.³⁴³

However, Justice Alito clarified:

[T]he Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. Most of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate. In some cases, the charges are dropped. In others, arrestees are released either on their own recognizance or on minimal bail. In the end, few are sentenced to incarceration. For these persons, admission to the general jail population, with the concomitant

³⁴⁰ *Id.* at 1520-21.

³⁴¹ *Id.* at 1522.

³⁴² *Id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524 (Alito, J., concurring).

³⁴³ *Id.* at 1524 (Alito, J., concurring).

humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible.³⁴⁴

This distinction that both Chief Justice Roberts and Justice Alito noted reduces the reach of the decision and seems to foreclose a general, physical search of individuals arrested for minor offenses who are not to be placed in the general prison population.³⁴⁵

Justice Breyer, whom Justices Ginsburg, Sotomayor, and Kagan joined, dissented.³⁴⁶ Breyer asserted that visual strip searches conducted on individuals arrested for minor offenses where drugs or violence are absent and where law enforcement authorities fail to provide reasonable suspicion justifying the searches are violations of the Fourth Amendment.³⁴⁷ Justice Breyer concluded that the type of search in question here was an “invasion of personal rights” and was being conducted without justification or sufficient need.³⁴⁸

IV. CONCLUSION

Several of the Supreme Court’s criminal justice decisions during the 2011-12 Term received national media attention, and all of these cases debated important issues of constitutional principle.³⁴⁹ However, the scale of these cases’ actual impact on the lives of people is likely to vary significantly.³⁵⁰ Because of its implications for the First Amendment freedom of speech, the news media showed special interest in *United States v. Alvarez*,³⁵¹ concerning the constitutionality of the Stolen Valor Act.³⁵² Any case raising such issues has potential for broad

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524 (Alito, J., concurring).

³⁴⁶ *Id.* at 1525 (Breyer, J., dissenting).

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 1526.

³⁴⁹ See, e.g., James Dao, *Lying About Earning War Medals is Protected Speech*, N.Y. TIMES, June 28, 2012, <http://www.nytimes.com/2012/06/29/us/justices-say-lying-about-military-honors-is-protected.html>; Adam Liptak, *Justices Bar Mandatory Life Terms for Juveniles*, N.Y. TIMES, June 25, 2012, <http://www.nytimes.com/2012/06/26/us/justices-bar-mandatory-life-sentences-for-juveniles.html>; Liptak, *supra* note 285.

³⁵⁰ See Dao, *supra* note 349; Liptak, *supra* note 349; Liptak, *supra* note 261.

³⁵¹ See *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

³⁵² Dao, *supra* note 349.

impact as it defines the expressions that legislatures may permissibly choose to prohibit, yet courts had previously strongly discouraged speech-limiting legislation so the prospects for the approval of limits on such speech seem unlikely.³⁵³ Thus the actual impact on people's lives is likely to be quite limited.³⁵⁴ The decision in *Miller v. Alabama*, concerning the imposition of mandatory life-without-parole sentences on juveniles,³⁵⁵ may profoundly affect 2000 current prisoners and dozens of juvenile offenders each year who would otherwise be subject to such sentences, but the total number of people affected annually in the future is relatively limited.³⁵⁶

By contrast, the Supreme Court's refusal to strike down the portion of Arizona's immigration law that requires police officers to inquire about people's citizenship and residency status could, depending on how it is used, have wide impacts on people, especially those whose physical characteristics make them appear to be Latino or foreign-born.³⁵⁷ Racial and ethnic profiling continues to be a significant issue as police officers use their discretion—and racial stereotypes—to determine which drivers and pedestrians the officers should stop, question, and possibly search.³⁵⁸ The Supreme Court had previously declined to limit police discretion regarding potentially pretextual and profile-based stops.³⁵⁹ Thus, it remains to be seen whether and how police officers may implement Arizona's command—and those that other states, wishing to emulate Arizona, mandate—to inquire about immigration status when officers are suspicious while making traffic stops and in other

³⁵³ See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (invalidating legislation that sought to bar highly offensive protests near military funerals).

³⁵⁴ See *id.*

³⁵⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

³⁵⁶ At the time of the Court's decisions, an estimated 2000 offenders were serving mandatory life-without-parole sentences for crimes that they committed as juveniles. Liptak, *supra* note 349.

³⁵⁷ See *supra* notes 229-52 and accompanying text.

³⁵⁸ In New York City, for example, African Americans are “nine times more likely than whites to be stopped by the police, but no more likely than whites to be arrested as a result of the stops.” Bob Herbert, *The Shame of New York*, N.Y. TIMES, Oct. 29, 2010, www.nytimes.com/2010/10/30/opinion/30herbert.html.

³⁵⁹ *Whren v. United States*, 517 U.S. 806, 818-19 (1996).

encounters with citizens.³⁶⁰ Unfortunately, the potential exists for discriminatory treatment based on perceived ethnicity.³⁶¹

One case that did not receive significant media attention also has the possibility of affecting thousands of people.³⁶² Prior to the Supreme Court's recent decision in *Florence v. Board of Chosen Freeholders*,³⁶³ the lower federal courts had widely understood that people arrested for minor offenses could not be routinely subjected to strip searches and body-cavity inspections when processed into a jail.³⁶⁴ Indeed, such intrusive searches applied to people arrested and held briefly for such minor offenses as trespassing had resulted in successful litigation costing various jails millions of dollars in liability and attorneys' fees.³⁶⁵ The Supreme Court's decision changed understandings about the permissible search authority of jail officials.³⁶⁶ Thus, it is likely to lead to thousands of additional intrusive strip searches that even Justice Alito, a former prosecutor³⁶⁷ and a Justice who only infrequently supports rights claims in nonunanimous criminal justice cases,³⁶⁸ acknowledged to be "undoubtedly humiliating and deeply offensive."³⁶⁹

Observers who are anticipating the Supreme Court's 2012-13 Term are primarily concerned with looming significant issues concerning affirmative action, voting rights, and same-sex marriage.³⁷⁰ As usual, however, there are also important criminal justice cases scheduled for hearing that will have significant impacts on police authority

³⁶⁰ Liptak, *supra* note 261.

³⁶¹ Herbert, *supra* note 358.

³⁶² See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).

³⁶³ *Id.*

³⁶⁴ See Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 LAW & CONTEMP. PROBS. 65, 67-68 (2008) ("Nearly all the cases hold that officials can perform visual body-cavity searches only if they have a 'reasonable suspicion' that the subject of the search might be hiding contraband . . .").

³⁶⁵ *Id.* at 71-72.

³⁶⁶ See generally *Florence*, 132 S. Ct. 1510 (explaining the importance of invasive searches after an arrest).

³⁶⁷ *Biographies of Current Justices of the Supreme Court*, *supra* note 44.

³⁶⁸ See *supra* notes 35-36 and accompanying text.

³⁶⁹ *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring).

³⁷⁰ Adam Liptak, *Supreme Court Faces Weighty Cases and a New Dynamic*, N.Y. TIMES, Sept. 29, 2012, http://www.nytimes.com/2012/09/30/us/supreme-court-faces-crucial-cases-in-new-session.html?pagewanted=all&_r=0.

and the treatment of people in their encounters with the police.³⁷¹ The Supreme Court will decide whether law enforcement can detain an individual in handcuffs, without yet arresting the individual, and return him to his home while the officers execute a search warrant there.³⁷² The justices will also consider whether a police officer has the authority to order that a blood test be conducted on a suspected drunk driver who refuses to consent to a blood test.³⁷³ Another case concerns whether a drug-sniffing dog at the doorway of a suspected drug house is a form of Fourth Amendment search.³⁷⁴ The Court will also decide if police can collect DNA samples from individuals who have been charged with, but not yet convicted of, crimes.³⁷⁵ The Court will also undoubtedly accept additional criminal justice cases for hearing as the new Term proceeds.³⁷⁶ Although one cannot purport to readily predict how the justices will vote on these upcoming criminal justice cases, this examination of the prior Term provides a basis for initial expectations.³⁷⁷ Of particular interest will be the role of Justice Kennedy or other justices who part company with their usual allies in order to provide a decisive vote when the Court is deeply divided.³⁷⁸

While the justices' decisions in any given Term are important, the long-term future of the Court and its impact on law and policy rest

³⁷¹ See, e.g., Richard Wolf, *Supreme Court to Delve into More Divisive Issues*, U.S.A. TODAY (Sept. 30, 2012), www.usatoday.com/story/news/nation/2012/09/30/supreme-court-new-term/1600191.

³⁷² *Bailey v. United States*, 132 S. Ct. 2710 (2012) (granting Petition for a Writ of Certiorari); *Bailey v. United States*, No. 11-770, 2011 WL 6396584 (U.S. Dec. 16, 2011) (Petition for a Writ of Certiorari).

³⁷³ *Missouri v. McNeely*, No. 11-1425, 2012 WL 1899415 (U.S. Sept. 25, 2012) (granting Petition for a Writ of Certiorari); *Missouri v. McNeely*, No. 11-1425, 2012 WL 1925958 (U.S. May 22, 2012) (Petition for a Writ of Certiorari).

³⁷⁴ *Florida v. Jardines*, 132 S. Ct. 995 (2012) (granting Petition for a Writ of Certiorari); *Florida v. Jardines*, No. 11-564, 2011 WL 5254666 (U.S. Oct. 26, 2011) (Petition for a Writ of Certiorari).

³⁷⁵ *Maryland v. King*, No. 12A48, 2012 WL 3064878 (U.S. July 30, 2012) (holding that “the judgment and mandate below are hereby stayed pending the disposition of the petition for a writ of certiorari”).

³⁷⁶ Wolf, *supra* note 371.

³⁷⁷ See *supra* Part III.

³⁷⁸ Wolf, *supra* note 371.

on changes in the Court's composition in the foreseeable future.³⁷⁹ With four septuagenarian justices,³⁸⁰ it is inevitable that some justices will depart for health reasons or that other justices may plan their retirement so that they will be replaced with a particular president's appointment.³⁸¹ Obviously, the individual justices who leave and the identities of their replacements will have the most significant impact on a divided Court that could, depending on events, move decidedly in one direction or another in future Terms.³⁸²

³⁷⁹ Sheryl Gay Stolberg, *Future of an Aging Court Raises Stakes of Presidential Vote*, N.Y. TIMES, June 27, 2012, <http://www.nytimes.com/2012/06/28/us/presidential-election-could-reshape-an-aging-supreme-court.html>.

³⁸⁰ The four septuagenarians at the start of the 2012 Term were Justice Ginsburg (age 79), Justice Scalia (age 76), Justice Kennedy (age 76), and Justice Breyer (age 74). *Id.*

³⁸¹ *Id.*

³⁸² *Id.*