"SUPREME COURT UPDATE"

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CHAPTER 6

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I. Search and Seizure

***Herring v. United States*, 129 S.Ct. 695 (2009)**

Issue

When officers make an arrest based on erroneous information concerning whether a warrant is active does the Fourth Amendment require suppression of evidence obtained pursuant to the arrest?

Facts

Officers in a Florida county arrested Herring based on a warrant found in a neighboring county's database. A search incident to arrest yielded drugs and a gun. In fact, the warrant had been recalled months earlier, though this information was never entered into the database. Lower courts found that the exclusionary rule did not apply based on arresting officers being innocent of wrongdoing and that the failure to update the records was a result of mere negligence.

Holding

Supreme Court, in an opinion by Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas and Alito held that when police mistakes leading to an unlawful search are the result of isolated negligence, attenuated from the search, rather than systemic errors or reckless disregard of constitutional requirements, the exclusionary rule does not apply. The fact that a search or arrest is unreasonable does not necessarily mean that the exclusionary rule applies. The rule is not an individual right and applies only where it's deterrent effect outweighs the substantial cost of letting guilty and possibly dangerous defendants go free. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.

Dissenting opinion by Justice Ginsburg joined by Justices Stevens, Souter and Breyer, argued "that the exclusionary remedy was warranted, even for negligent record keeping errors, given the paramount importance of accurate record keeping in law enforcement" and the likely deterrent effect of applying the exclusionary rules to such errors. Justice Breyer filed a dissenting opinion, which was jointed by Justice Souter, in which he stated that he would apply the exclusionary rule when police personally, as opposed to court personnel, are responsible for the record keeping error.

Significance of Decision

This decision appears to extend the good faith exception to ordinary negligent police conduct.

***Arizona v. Johnson*, 129 S.Ct. 781 (2009)**

Issue

Can an officer pat down a passenger of a vehicle during a traffic stop in the absence of reasonable suspicion that the passenger is engaged in criminal activity?

Facts

Officers patrolling area with known gang activity. Vehicle stopped for traffic violation only. Officer questions passenger, Johnson, and learns he had been to prison. Additionally, the clothing and behavior of Johnson raises questions concerning gang affiliation. Officer suspected Johnson was armed and patted him down for safety when she had him exit the vehicle. Officer felt the butt of a gun. Johnson charged with illegal possession of a firearm.

Holding

Justice Ginsburg delivered opinion for unanimous court. The court held that law enforcement officers conducting traffic stops do not violate the Fourth Amendment by frisking passengers in the absence of reasonable suspicion that passengers are engaged in criminal activity. According to the Court, the relevant inquiry is whether they are lawfully seized at the time and whether there is any reason to believe they are armed and dangerous.

Secondary Issue

Are officers allowed to question occupants of a vehicle during a traffic stop concerning matters unrelated to the stop?

Holding

The court stated, "An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquires do not measurably extend the duration of

the stop."

***Arizona v. Gant*, 129 S.Ct. 1710 (2009)**

Issue

When can an officer conduct a warrantless vehicle search incident to arrest?

Facts

Gant was arrested for driving with a suspended license, handcuffed and locked in a patrol car the officers then searched his car and found cocaine.

Holding

The Supreme Court in an opinion by Justice Stevens, joined by Justices Ginsburg, Souter, Thomas and Scalia, ruled that police may conduct a warrantless vehicle search incident to an arrest only if the arrestee is within reaching distance of the vehicle or the officers have reasonable belief that "evidence of the offense of arrest might be found in the vehicle."

The decision limits the rule established in *New York v. Belton*, 453 U.S. 454 (1981), in which the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to that arrest, search the passenger compartment." The Supreme Court agreed with the Arizona Supreme Court's finding that Gant could not have reached his car during the search and posed no safety threat to the officers, making a vehicle search unreasonable under the "reaching-distance rule" of *Chimel v. California*, 395 U.S. 752 (1969), as applied to *Belton*.

Justice Stevens's opinion held that *stare decisis* cannot justify unconstitutional police practice, especially in a case - such as this one - that can clearly be distinguished on its facts from *Belton* and its progeny.

In a concurring opinion, Justice Scalia disparaged the *Belton* line of cases as "badly reasoned" with a "fanciful reliance" upon the officer safety rule. Justice Scalia was clearly the swing vote in the case, explaining that a "4-to-1-to-4 opinion that leaves the governing rule uncertain" would be "unacceptable." In his view, the "charade of officer safety" in *Belton*, *Chimel*, and *Thornton v. United States*, 541 U.S. 615 (2004) (extending *Belton* to all "recent occupants" of a vehicle) should be abandoned in favor of the rule that the majority ultimately adopts in its opinion.

By contrast, the dissenting justices - Justice Breyer, who wrote his own dissenting opinion, and Justice Alito, whose dissent was joined by the Chief Justice and Justice Kennedy and was joined in part by Justice Breyer - would have adhered rigorously to *stare decisis* principles to maintain *Belton*'s "bright-line rule." The dissenters predicted that the Court's decision will lead to the unnecessary suppression of evidence and confusion by law enforcement officers.

Significant Decision

This is a significant decision that may limit vehicle searches under a theory of search incident to arrest.

II. Police Interrogation/Defendant Statements

***Corley v. United States*, 129 S.Ct. 1558 (2009)**

Issue

Whether confessions to a federal crime can be suppressed based on federal agents waiting too long to take a suspect to court to be advised of his rights.

Facts

Corley was arrested for assaulting a federal officer at about 8:00 a.m. He was not taken before a magistrate for 29.5 hours after his arrest. In the interim, he signed a written confession to the offense.

Holding

In *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957), the court required suppression of a confession obtained in violation of the requirement that an arrested defendant be promptly presented to a judge. Congress enacted 18 U.S.C. §3501 in an attempt to eliminate the reach of these holdings and *Miranda v. Arizona*, 384 U.S. 436 (1966). §3501 states that a confession made by a suspect in custody shall not be inadmissible solely because of delay in bringing the person before a magistrate if such confession is found to have been made voluntarily and within 6 hours of arrest.

In an opinion by Justice Souter, joined by Justices Stevens, Kennedy, Ginsburg and Breyer, the court held that §3501 did not completely eliminate the *McNabb*/*Mallory* rule and that if the confession came within the 6 hour period, it is admissible if it was voluntarily given. However, if the confession occurred

prior to taking the defendant before a magistrate and beyond 6 hours, the court must decide whether the delay was unreasonable or unnecessary, and if it was, the confession should be suppressed, even if it was voluntary.

Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas dissented arguing that a voluntary confession is admissible regardless of the length of delay in taking the defendant before a magistrate.

***Kansas v. Ventris*, 129 S.Ct. 1841 (2009)**

Issue

Is a defendant's voluntary statement in the absence of a knowing and voluntary waiver of the Sixth Amendment right to counsel admissible for impeachment purposes?

Facts

Police placed an informant in the cell with Ventris and he asked Ventris what was "weighing on his mind." According to the informant, Ventris admitted being the shooter in the murder. The state conceded that this violated Ventris' Sixth Amendment rights since the police informant questioned him without counsel. However, the state contended the statements were admissible for impeachment.

Holding

In an opinion by Justice Scalia, the Court held that evidence obtained in violation of the Sixth Amendment right to counsel is admissible for purposes of impeachment, even though it would not be admissible if offered as part of the prosecution's case in chief. Scalia said that because the constitutional violation at issue involves pretrial conduct rather than a trial right, admissibility is determined by "an exclusionary-rule balancing test," which compares the gains from deterring police misconduct against the costs of excluding potentially truthful and relevant evidence. Applying this test, the Court held that any benefits from exclusion in these circumstances are greatly outweighed by its costs. The costs of exclusion are substantial, as it would offer a shield to defendants who take the stand at trial and then commit perjury. The marginal deterrence achieved through exclusion, on the other hand, would be small, since the prosecution is already significantly deterred when these uncounseled statements are barred from its case in chief.

Justice Stevens dissented, jointed by Justice Ginsburg. Stevens would find a Sixth Amendment violation as soon as the state elicits an uncounseled statement and he would also find the violation "compounded" by an additional "constitutional harm" when this evidence is later admitted at trial. If counsel is not present during an interrogation and cannot observe the conditions under which that interrogation takes place, "she may be unable to effectively counter the potentially devastating, and potentially false, evidence subsequently introduced at trial." Because the admission of these uncounseled statements "does damage to the adversarial process - the fairness of which the Sixth Amendment was designed to protect," Stevens would eschew the Court's balancing test and instead hold "that such shabby tactics are intolerable in all cases."

***Montejo v. Louisiana*, 2009 WL 1443049**

Issue

Should *Michigan v. Jackson*, 475 U.S. 625, which forbids police to initiate interrogation once suspect has invoked his right to counsel at an arraignment or similar proceeding, be overruled.

Facts

At a preliminary hearing required by Louisiana law, petitioner Montejo was charged with first-degree murder, and the court ordered the appointment of counsel. Later that day, the police read Montejo his rights under *Miranda v. Arizona*, 384 U.S. 436, and he agreed to go along on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim's widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death. Affirming, the State Supreme Court rejected his claim that the letter should have been suppressed under the rule of *Michigan v. Jackson*, 475 U.S. 625, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding. The court reasoned that *Jackson*'s prophylactic protection is not triggered unless the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel; and that, since Montejo stood mute at his hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

Holding

In a 5-4 decision, the Court overruled *Jackson*, Justice Scalia's majority opinion reasoned as follows: *Jackson* is difficult to apply in the two dozen or so states, including Louisiana, in which counsel is appointed as a matter of course, without a specific request by the defendant. Has a defendant in an automatic-appointment state asserted his right to counsel by "accepting" appointment, given that he has no choice about it? Must he do something further, such as thank the court for the appointment? Or must he jump in with an explicit request for counsel, even though no request is necessary to secure representation? Questions like these led the majority to conclude that *Jackson* has proved unworkable. Further, the majority determined that *Jackson* has resulted in unjustified discrepancies between states, since defendants in states where a request for counsel is a necessary precursor to appointment almost automatically fall within *Jackson*, while defendants in states where no request is necessary normally do not.

Next, the majority rejected the defendant's proposed solution to the problems described above: a rule that once a defendant is represented by counsel, whether by request or automatic appointment, police may not initiate further interrogation. The majority viewed such a position as inspired by legal ethics - specifically, by the rule that an attorney may not communicate directly with a represented party - not by the Constitution. It observed that the right to counsel is waiveable, and may be waived in the absence of counsel. Thus, the rule suggested by the defendant would be a prophylactic rule - justifiable, if at all, to prevent police from badgering defendants to waive their right to counsel. The majority viewed such a prophylactic rule to be unnecessary, as defendants are already protected from coercive interrogation by the requirement that waivers be voluntary, by *Miranda*, and by other safeguards.

Thus, the majority concluded, *Jackson* as decided, is unworkable, and the defendant's suggested expansion of *Jackson* is unjustifiable, leaving the reversal of *Jackson* the logical path. *Stare decisis* does not prevent the overruling of *Jackson*, the majority held, because the decision was poorly reasoned, "is only two decades old," and has not resulted in substantial reliance.

Justice Stevens dissented, joined by Justice Souter, Breyer and Ginsburg. in his dissent, Justice Stevens stated:

> Today the Court properly concludes that the Louisiana Supreme Court's parsimonious reading of our decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), is indefensible. Yet, the Court does not reverse. Rather, on its own initiative and without any evidence that the longstanding Sixth Amendment protections established in *Jackson* have caused any harm to the workings of the criminal justice system, the Court rejects *Jackson* outright on the ground that it is "untenable as a theoretical and doctrinal matter." Ante, at 6. That conclusion rests on a misinterpretation of Jackson's rationale and a gross undervaluation of the rule of stare decisis. The police interrogation in this case clearly violated petitioner's Sixth Amendment right to counsel.

Pending Case

***Maryland v. Shatzer*, cert. granted at 129 S.Ct. 1043 (2009)**

Is the prohibition against interrogation of a suspect who has invoked the Sixth Amendment right to counsel under *Edwards v. Arizona*, 451 U.S. 477 (1981) inapplicable, if after the suspect requested counsel, there is a break in custody or a lapse in time of a substantial period (like years) before the officers begin to reinterrogate the suspect?

III. Double Jeopardy/Collateral Estoppel

Pending Case

***Yeager v. United States*, cert. granted at 129 S.Ct. 593 (2008)**

A jury acquitted the defendant on multiple counts of a federal indictment. The jury failed to reach a verdict on other counts that share a common element with the acquitted counts. If, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittal is that an essential element of the hung counts was determined in the defendant's favor, does collateral estoppel bar a retrial on the hung counts?

***Bobby v. Bies*, 2009 WL 1506681**

Issue

Does Double Jeopardy Clause bar Ohio courts from conducting a full hearing on Bies mental capacity when the prior trial, where the issue was addressed predated *Atkins v. Virginia*, 536 U.S. 304.

Facts

Atkins bars execution of mentally retarded offenders. A decade before *Atkins*, Bies was tried and convicted of capital murder and sentenced to death. At trial, evidence of Bies mental retardation was presented as a mitigating factor and the state did not actively contest the issue. Nevertheless, the jury voted to impose death penalty.

Result

Justice Ginsburg, writing for unanimous court, held that because the change in the law under *Atkins* substantially altered the state's incentive to contest Bies mental capacity double jeopardy does not bar a relitigation of this issue.

IV. Speedy Trial

***Vermont v. Brillon*, 129 S.Ct. 1283 (2009)**

Facts

Defendant charged with felony domestic assault. He spent nearly three years in jail, going through five appointed lawyers before a sixth ended up representing him at trial. He fired his first lawyer, the second one withdrew due to a conflict of interest, the defendant threatened his third lawyer after the court forbade the defendant from firing him. Defendant asked to fire his fourth lawyer whose contract with the state expired. The fifth lawyer withdrew. The defendant's sixth lawyer then moved to dismiss the charge for a speedy trial violation.

Holding

In an opinion by Justice Ginsburg, joined by Chief Justice Roberts, Justices Scalia, Kennedy, Souter, Thomas and Alito, the court held that delays caused by appointed defense counsel generally must be attributed to the defendant, not the state. However, the state could be charged, for speedy trial purposes, with time periods where the defendant lacked an attorney if the gaps resulted from the trial court's failure to appoint replacement counsel with dispatch. Also, the state bore responsibility if there was a breakdown in the public defender system.

Justice Breyer, joined by Justice Stevens, dissented and argued that the court should have dismissed the case as improvidently granted because the state court, in fact, did not count the delays caused by the defense counsel against the state in their decision on the speedy trial question.

V. Jury Selection

***Rivera v. Illinois*, 129 S.Ct. 1446 (2009)**

Issue

When a trial court erroneously denies a defendant's peremptory challenge to a prospective juror does the due process clause of the Fourteenth Amendment require automatic reversal?

Facts

During jury selection in Rivera's murder trial, his counsel sought to use a peremptory challenge to excuse veniremember Deloris Gomez. The trial court rejected the defense challenge out of a concern that it was racially discriminatory under *Batson v. Kentucky*, 476 U.S. 79. The Illinois Supreme Court found that the peremptory challenge should have been allowed but that this was not structural error requiring reversal.

Holding

Justice Ginsburg delivered opinion for a unanimous court and held that, provided that all seated jurors are qualified and unbiased, the Due Process Clause does not require automatic reversal of a conviction because of the trial court's good faith error in denying the defendant's peremptory challenge to a juror. The court held that, "if a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state's good faith effort is not a matter of federal constitutional concern. Rather, it is a matter for the states to address under its own laws."

VI. Confrontation

Pending Case

***Melendez-Diaz v. Massachusetts*, cert. granted 128**

S.Ct. 1647 (2008)

Is a state's forensic analyst's laboratory report, prepared for use in a criminal prosecution, testimonial evidence subject to the requirements of the Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36 (2004)?

VII. Breach of Plea Agreement

***Puckett v. United States*, 129 S.Ct. 1423 (2009)**

Issue

Government breached plea agreement but defendant fails to object in the district court. What is the standard of review?

Facts

In exchange for Puckett's guilty plea, the government agreed to request (1) a three level reduction in his offense level under the Federal Sentencing Guidelines, on the ground that he had accepted responsibility for his crimes and (2) a sentence at the low end of the applicable guideline range. Prior to sentencing, Puckett was involved in another crime and the government, at his sentencing, opposed any reduction in his offense level and the District Court denied the three level reduction. Puckett made no objection in the District Court and argued, for the first time on appeal, that the government had broken the plea agreement.

Holding

Justice Scalia wrote an opinion for the court, which was joined by Chief Justice Roberts, Justices Kennedy, Thomas, Ginsburg, Breyer and Alito. The court held that the high burden of plain error review applies. There was no plain error in this case because there was no showing that his substantial rights were violated because he did not show that the sentence would have been different. The court also held that the government's breach of the terms of a plea agreement does not retroactively cause the defendant's guilty plea, when entered, to have been unknowing or involuntary.

Justice Souter, joined by Justice Stevens, dissented. He agreed that plain error was the appropriate review standard but would hold that a defendant's substantial rights have been violated whenever the government breaches a plea agreement, unless the defendant got what he had bargained for anyway from the sentencing court.

VIII. Immigration Consequences of Criminal Conviction

Pending Case

***Padilla v. Kentucky*, cert. granted at 129 S.Ct. 1317 (2009)**

(1) Are the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the Immigration and Naturalization Act, merely a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise? (2) Even assuming that immigration consequences are "collateral," can counsel's gross misadvice as to the collateral consequence of deportation constitute a ground for setting aside a guilty plea which was induced by that faulty advice?

The Kentucky court in *Commonwealth v. Padilla*, 253 S.W.2d 482 (Ky. 2008) held, that since collateral consequences were outside the scope of the guarantee of the Sixth Amendment right to counsel, it followed that counsel's failure to advise defendant about the potential for deportation as a consequence of his guilty plea or counsel's act of advising defendant incorrectly provided no basis for vacating or setting aside defendant's sentence; in neither instance was the matter required to be addressed by counsel, and so attorney's failure in that regard could not constitute ineffectiveness.

IX. Sentencing

***Oregon v. Ice*, 129 S.Ct. 711 (2009)**

Issue

Does the Sixth Amendment allow states to assign to judges, rather than juries, the authority to make findings of fact necessary to impose consecutive rather than concurrent sentences for multiple offenses?

Facts

Ice was convicted by a jury of two counts of first-degree burglary and four counts of first-degree sexual abuse. The court sentenced him to a total of 340 months, with three of the sentences running consecutively, based on its finding that the two burglaries of which Ice was convicted constituted "separate incidents," and that Ice's conduct during the burglaries (which formed the basis for four other convictions) demonstrated a "willingness to commit

more than one offense" "caus[ing] or creat[ing] a risk of causing greater or qualitatively different loss, injury or harm to the victim." The Oregon Supreme Court reversed and remanded for resentencing, holding that the sentencing court, by imposing consecutive sentences based on its own findings and not based on jury findings, violated Ice's rights under the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004).

Holding

Justice Ginsburg writing for the court, joined by Justices Stevens, Kennedy, Breyer and Alito, held that the Sixth Amendment right to a jury trial does not prohibit a judge from determining the predicate facts necessary to impose consecutive, rather than concurrent, sentences. Justice Ginsburg stated that "twin-considerations - historical practice and respect for state sovereignty - counsel against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes." *See Apprendi* (requiring jury determination of facts that authorize sentence enhancement).

Justice Scalia, dissented, and was joined by Chief Justice Roberts and Justices Souter and Thomas. Justice Scalia argued that the majority was engaging in arbitrary line drawing and elevating form over substance in violation of *Apprendi*.

X. Ineffective Assistance of Counsel

Knowles v. Mirzayance, 129 S.Ct. 1411 (2009)

Issue

Was defense counsel ineffective in recommending that the defendant withdraw his insanity defense when the jury had already rejected medical testimony similar to that which would be presented to establish the insanity defense?

Facts

Defendant plead not guilty and not guilty by reason of insanity in murder prosecution. During guilt phase, he sought to avoid a conviction for first degree murder and obtain a second degree murder conviction by presenting evidence that he was insane at the time of the offense and therefore incapable of premeditation or deliberation. The jury convicted him of first degree murder, implicitly rejecting the argument. After the trial's not guilty by reason of insanity phase was scheduled, the defendant accepted counsel's advise to abandon the insanity plea. Counsel believe that a defense verdict on that phase was unlikely since the jury had already rejected the similar medical testimony. The Ninth Circuit found counsel ineffective because competent counsel would have pursued the insanity defense because counsel had nothing to lose by putting on the only defense available.

Holding

Justice Thomas delivered opinion for a unanimous court finding that counsel was not ineffective because the insanity defense was almost certain to fail and the defendant was not prejudiced by its abandonment. Given that the same jury had just rejected testimony about defendant's medical condition, there was no reasonable probability that he would have prevailed on an insanity defense had he pursued it.

XI. Jury Instructions

Hedgpeth v. Pulido, 129 S.Ct. 530 (2008)

Issue

Is instructing a jury on multiple theories of guilt, one which is invalid, a structural error requiring that a conviction based on a general verdict be set aside on collateral review regardless of whether the flaw in the instructions prejudiced the defendant?

Facts

Defendant was charged with murder, robbery, receiving stolen property and auto theft. When the case was tried, it was submitted to the jury on three alternative theories: that Pulido personally shot the cashier at a gas station and convenience store, that he aided and abetted in the robbery during the shooting, or that he aided in the robbery only after the shooting. During the five days of deliberation, the jury sent out numerous questions about aiding-and-abetting liability under a felony murder theory - that is, a murder committed during a felony.

The California Supreme Court ruled in the case that the third theory - aiding in the robbery after the shooting had occurred - would not support a felony murder verdict, since the homicide would have been completed. The state court, however, ruled that, because the jury had found special circumstances, that was an indication of a finding that the murder occurred while Pulido was taking part in the robbery.

Pulido then challenged his conviction in federal

habeas court, leading to a Ninth Circuit ruling that found a structural error in the erroneous jury instruction. The Ninth Circuit overturned the jury verdict, because the instructions given had left open the possibility that Pulido had been convicted on an impermissible ground.

Holding

In a *per curiam*, unsigned opinion, the court held that instructing a jury on multiple theories of guilt, one of which is invalid, is not structural error, rather it is error subject to a harmless error analysis. The court noted that under *Chapman v. California*, 386 U.S. 18 (1967) constitutional errors can be harmless. The court had recognized in *Rose v. Clark*, 478 U.S. 570 (1986) that there are some errors that are structural and to which harmless error analysis does not apply. However, in *Neder v. United States*, 527 U.S. 1 (1999), the court held that harmless error analysis applies on instruction errors.

Justice Stevens dissented and was joined by Justices Souter and Ginsburg, arguing that the Supreme Court should uphold the Ninth Circuit ruling nullifying the conviction because the Ninth Circuit had already engaged in the harmless error analysis, even though they had labeled the error as structural.

***Waddington v. Sarausad*, 129 S.Ct. 823 (2009)**

Issue

Was a jury instruction concerning accomplice liability ambiguous and did it relieve the state of its burden to prove guilt?

Facts

Sarausad was charged with murder. He was the driver in a drive-by shooting where the passenger was the shooter. He argued at trial that he was going to a fistfight and did not know that the passenger would shoot. The state argued that Sarausad was "in for a dime, in for a dollar." The following instruction on accomplice liability was given to the jury:

> "You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the *crime*." *Id*., at 16 (emphasis added).
> Instruction number 46 provided, in relevant part:
> 'A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the *crime*, he or she either:
> (1) solicits, commands, encourages, or requests another person to commit the crime or (2) aids or agrees to aid another person in planning or committing the crime.' *Id*., at 17."

Sarausad, who was tried as an accomplice, argued that he was not an accomplice to murder because he had not known the passenger's plan and had expected at most a fistfight. In her closing argument, the prosecutor stressed Sarausad's knowledge of a shooting, noting how he drove at the scene, that he knew that fighting alone could not regain respect for his gang, and that he was "in for a dime, in for a dollar." The jury received instructions that directly quoted Washington's accomplice-liability law. The jury convicted Sarausad of second-degree murder and related crimes. In affirming Sarausad's conviction, the State Court of Appeals, among other things, referred to an "in for a dime, in for a dollar" accomplice-liability theory. The State Supreme Court denied review, but has held that an accomplice must have knowledge of the crime that occurred. Sarausad sought state postconviction relief, arguing that the prosecutor's improper "in for a dime, in for a dollar" argument may have led the jury to convict him as an accomplice to murder based solely on a finding that he had anticipated that an assault would occur. The state courts found no error requiring correction. Sarausad then sought review under in federal court. The District Court granted the petition, and the Ninth Circuit affirmed, finding it unreasonable for the state court to affirm Sarausad's conviction because the jury instruction on accomplice liability was ambiguous and there was a reasonable likelihood that the jury misinterpreted the instruction in a way that relieved the State of its burden of proving Sarausad's knowledge of a shooting beyond a reasonable doubt.

Holding

The Supreme Court, in a decision by Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer and Alito, held that because the Washington courts' conclusion that the jury instruction was unambiguous was not objectively unreasonable, the Ninth Circuit should have ended its inquiry there. The instruction parroted the state statute's language, requiring the jury to find Sarausad guilty as an accomplice "in the

commission of the [murder]" if he acted "with knowledge that [his conduct would] promote or facilitate the commission of the [murder]." The Supreme Court stated that the instruction cannot be assigned any meaning different from the one given to it by the Washington courts.

The Court also held that even if the instruction were ambiguous, the Ninth Circuit still erred in finding it so ambiguous as to cause a federal constitutional violation requiring reversal under AEDPA. The Washington courts reasonably applied Supreme Court precedent when they found no "reasonable likelihood" that the prosecutor's closing argument caused the jury to apply the instruction in a way that relieved the state of its burden to prove every element of the crime beyond a reasonable doubt. The prosecutor consistently argued that Sarausad was guilty as an accomplice because he acted with knowledge that he was facilitating a driveby shooting. She never argued that the admission by Sarausad that he anticipated a fight was a concession of accomplice liability for murder. Sarausad's attorney also focused on the key question, stressing a lack of evidence showing that Sarausad knew that his assistance would promote or facilitate a premeditated murder. Every state and federal appellate court that reviewed the verdict found the evidence supporting Sarausad's knowledge of a shooting legally sufficient to convict him under Washington law. Given the strength of that evidence, it was not objectively unreasonable for the Washington courts to conclude that the jury convicted Sarausad because it believed that he had knowledge of more than just a fistfight.

Justice Souter, joined by Justices Stevens and Ginsburg dissented, arguing that the jury instruction may have led the jury to think it could find Sarausad guilty as an accomplice to murder on the theory that he assisted in what he expected would be a fistfight.

XII. Appointed Attorneys for State Clemency Petitions

Harbison v. Bell, 129 S.Ct. 1481 (2009)

Issue

Does 18 U.S.C. §3599 authorize federally appointed habeas counsel to represent their client in state clemency proceedings and entitle them to compensation for that representation?

Facts

After the Tennessee state courts rejected Harbison's challenge to his conviction and death sentence, he filed a federal habeas petition under 28 U.S.C. §2254. The petition was denied. Federally appointed counsel requested that her appointment be expanded to include representation in the state clemency proceeding.

Holding

Justice Stevens delivered the opinion of the court and was joined by Justices Kennedy, Souter, Ginsburg and Breyer. Chief Justice Roberts and Justice Thomas concurred in the judgment. The court held that 18 U.S.C. §3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation.

Justice Scalia, joined by Justice Alito dissented.

XIII. Firearm Possession After Conviction of Misdemeanor Crime of Domestic Violence

United States v. Hayes, 129 S.Ct. 1079 (2009)

Issue

For purposes of the federal prohibition on possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, is it necessary that a domestic relationship be a defining element of the predicate offense?

Facts

Following a conditional guilty plea, Hayes was convicted of possession of a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. §922(g)(9) and §924(a)(2). Section 922(g)(9) makes it a crime for any person convicted of a misdemeanor crime of domestic violence to possess a firearm. The court of appeals reversed, holding that the indictment must be dismissed because it failed to allege that Hayes' state misdemeanor battery conviction was based on an offense that has as an element a domestic relationship between the offender and the victim.

Holding

Justice Ginsburg wrote the majority opinion, joined by Justices Stevens, Kennedy, Souter, Breyer and

Alito. Justice Thomas joined the opinion in part. The court held that "the statute that makes possession of a firearm a federal crime when the possessor has previously been convicted of a 'misdemeanor crime of domestic violence,' 18 U.S.C. §922(g)(9), does not require prosecutors to prove that a domestic relationship was an element of the underlying misdemeanor offense." The court stated "We hold that the domestic relationship, although it must be established beyond a reasonable doubt in a §922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense."

Chief Justice Roberts dissented and was joined by Justice Scalia. He argued that the text of the statute prohibiting possession of a firearm following a conviction for a misdemeanor crime of domestic violence is ambiguous and, under the rule of lenity, the court should interpret the provision so as to not attach criminal liability.

IX. DNA

Pending Case

***District Attorney's Office for the Third Judicial District v. Osborne*, cert. granted at 129 S.Ct. 488 (2008)**

(1) Where defendant was convicted years before of kidnapping, sexual assault, and physical assault, and where defendant subsequently filed an action under 42 U.S.C. § 1983, seeking access to the biological evidence for purposes of new DNA testing, may defendant use § 1983 as a discovery device for obtaining postconviction access to the state's biological evidence when he has no pending substantive claim for which that evidence would be material? (2) Does defendant have a right under the Fourteenth Amendment's Due Process Clause to obtain postconviction access to the state's biological evidence when the claim he intends to assert – a freestanding claim of innocence – is not legally cognizable?

XX. Forfeiture

Pending Case

***Alvarez v. Smith*, cert. granted at 129 S.Ct. 1401 (2009)**

In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

XXI. Cases Specific to Federal Practice

a. Federal Sentencing

***Burgess v. United States*, 128 S.Ct. 1572 (2008)**

Issue

Whether a state drug offense that is classified as a misdemeanor, but is punishable by more than one year's imprisonment is a "felony drug offense" under the Controlled Substances Act?

Facts

Petitioner Burgess pleaded guilty in United States District Court for the District of South Carolina to conspiracy to possess with intent to distribute 50 grams or more of cocaine base, which typically carries a 10-year mandatory minimum sentence. Burgess had a prior South Carolina cocaine possession conviction, which carried a maximum sentence of two years but was classified as a misdemeanor under state law.

The Controlled Substances Act (CSA) doubles the mandatory minimum sentence for certain federal drug crimes if the defendant was previously convicted of a "felony drug offense." CSA at 21 U.S.C. § 841(b)(1)(A). Section 802(13) defines the unadorned term "felony" to mean any "offense classified by applicable Federal or State law as a felony," while 802(44) defines the compound term "felony drug offense" to "mea[n] an offense [involving specified drugs] that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country." The Federal Government argued that Burgess' sentence should be enhanced to 20 years under the CSA because his South Carolina conviction was punishable by more than one year's imprisonment. Burgess countered that because "felony drug offense" incorporates the term "felony," a word separately defined in § 802(13), a prior drug offense does not warrant an enhanced § 841(b)(1)(A) sentence unless it is both (1) classified as a felony under the law of the punishing jurisdiction, and (2) punishable by more than one year's imprisonment. Rejecting that argument, the District Court ruled that § 802(44) alone controls the meaning of "felony drug offense" under §841(b)(1)(A). The Fourth Circuit affirmed.

Holding

The Court, in a unanimous opinion by Justice Ginsburg, held that "A state drug offense punishable by more than one year qualifies as a 'felony drug offense,' even if state law classifies the offense as a misdemeanor" because the CSA's language and structure indicate that Congress used "felony drug offense" as a term of art defined by § 802(44) without reference to § 802(13).

Begay v. United States, 128 S.Ct. 1581 (2008)

Issue

Does a conviction for Felony driving while intoxicated (DWI) constitute a "violent felony" for purposes of the Armed Career Criminal Act?

Facts

The Armed Career Criminal Act (Act) imposes a special mandatory 15-year prison term upon a felon who unlawfully possesses a firearm and who has three or more prior convictions for committing certain drug crimes or "a violent felony." 18 U.S.C. § 924(e)(1). The Act defines "violent felony" as a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii).

After Begay pleaded guilty to felony possession of a firearm, his presentence report revealed he had 12 New Mexico convictions for driving under the influence of alcohol (DUI), which state law makes a felony (punishable by a prison term of more than one year) the fourth (or subsequent) time an individual commits it. Based on these convictions, the sentencing judge concluded that Begay had three or more "violent felony" convictions and, therefore, sentenced him to an enhanced 15-year sentence. The Tenth Circuit rejected Begay's claim that DUI is not a "violent felony" under the Act.

Holding

In an opinion by Justice Breyer, the court held that felony driving while intoxicated is not a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"). The Court found that the residual clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii) must be limited to include only offenses that are similar to the enumerated crimes in that they involve purposeful, violent, and aggressive behavior. The provision's listed examples illustrate the kinds of crimes that fall within the statute's scope. Elaborating, the Court stated that ACCA looks to an offender's criminal history, and when an individual has a history of purposeful, violent, and aggressive crimes, it can be assumed that the offender is the kind of person who might deliberately point a gun and pull the trigger. This type of criminal history is substantially different from an offender with a history of DUI, which does not involve the deliberate kind of behavior associated with violent criminal use of firearms.

Justice Scalia concurred in the judgment, but stated that the "residual clause" of the ACCA unambiguously encompasses all crimes that present a serious risk of injury to another. Yet, he went on to write that drunk driving does not clearly poses such a risk.

Justice Alito, joined by Justice Souter and Thomas dissented, finding that the risk created by frequent drunk driving incidents is surely "serious," and therefore petitioner's offenses fell squarely within the language of the statute.

United States v. Rodriquez, 128 S.Ct. 1783 (2008)

Issue

Can a state drug-trafficking offense for which state law authorized a ten-year sentence, only because the defendant was a recidivist, qualify as a "serious drug offense" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e)?

Facts

Upon respondent's federal conviction for possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1), he had three prior Washington state convictions for delivery of a controlled substance. At the time of those convictions, Washington law specified a maximum 5-year prison term for the first such offense, but a recidivist provision set a 10-year ceiling for a second or subsequent offense, and the state court sentenced respondent to concurrent 48-month sentences on each count.

The Government contended that in the federal felon-in-possession case that respondent should be sentenced under the Armed Career Criminal Act (ACCA), § 924(e), which sets a 15-year minimum sentence for offenders who violate [§ 922(g)] and have three previous convictions ... for a ... serious drug offense,"§ 924(e)(1). The statute defines a state drug-trafficking conviction as "a serious drug offense" if "a

maximum term of imprisonment of ten years or more is prescribed by law" § 924(e)(2)(A)(ii). The maximum term on at least two of respondent's Washington crimes was 10 years under the state recidivist provision, so the Government argued that these convictions had to be counted under ACCA. The District Court disagreed, holding that the "maximum term of imprisonment" for § 924(e)(2)(A)(ii) purposes is determined without reference to recidivist enhancements. The Ninth Circuit affirmed.

Holding

Justice Alito wrote the majority opinion which held that the definition of "serious drug offense" in 18 U.S.C. § 924(e)(2)(A)(ii) includes statutory recidivist enhancements because, although the state court sentenced respondent to 48 months, there is no dispute that state law permitted a sentence of up to 10 years. Additionally, the Court stated that since the ACCA is a recidivist statute, Congress must have understood that the "maximum penalty prescribed by [state] law" could be increased by state recidivism provisions.

Finally, the Court rejected the argument that the "maximum term of imprisonment . . . prescribed by law" was set by the maximum of the Washington state guideline range due to the fact that sentencing guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances. Additionally, in all of the many statutes predating ACCA and the federal Sentencing Reform Act of 1984 that used the concept of the "maximum" term prescribed by law, the concept necessarily referred to the maximum term prescribed by the relevant criminal statute, not the top of a sentencing guideline.

Justice Souter filed a dissenting opinion in which he was joined by Justices Stevens and Ginsburg stating that the text of the ACCA is ambiguous and the Court's chosen interpretation does not follow the tradition of lenity in construing perplexing criminal laws.

Irizarry v. United States, 128 S.Ct. 2198 (2008)

Issue

Whether the notice requirements from Fed. R. Crim. P. 32(h) applies to both "departures" and "variances" from the Federal Sentencing Guidelines?

Facts

Petitioner pleaded guilty to making a threatening interstate communication to his ex-wife, in violation of federal law. Although the presentence report recommended a Federal Sentencing Guidelines range of 41-to-51 months in prison, the district court imposed the statutory maximum sentence-60 months in prison and 3 years of supervised release. The court rejected petitioner's objection that he was entitled to notice that the court was contemplating an upward departure from the guidelines.

The Eleventh Circuit affirmed, reasoning that Federal Rule of Criminal Procedure 32(h), which states that "[b]efore the court may depart from the applicable sentencing range on a ground not identified ... either in the presentence report or in a party's pre-hearing submission, the court must give the parties reasonable notice that it is contemplating such a departure," did not apply because the sentence was a variance, not a Guidelines departure.

Holding

The Court, in an opinion by Justice Stevens, affirmed the Eleventh Circuit, holding Rule 32(h) is not applicable to variances from sentencing guidelines. Justice Breyer filed a dissenting opinion in which he was joined by Justices Kennedy, Souter, and Ginsberg, holding that a statutory "variance" falls "comfortably" within the definition of a statutory "departure."

Moore v. United States, 129 S.Ct. 4 (2008) (per curiam)

Issue

When a district court renders a judgment based on its clearly expressed belief that it does not have discretion to sentence on the basis of its disagreement with the powder cocaine to crack cocaine quantity ratio inherent in the Sentencing Guidelines, and that view is then repudiated by a later case, does a circuit court then have an obligation to remand the case for further proceedings?

Facts

Moore was convicted of one count of possessing cocaine base with intent to distribute, a crime which sentencing range was 151 to 188 months. At sentencing, Moore asked the District Court to impose a below-Guidelines sentence in light of the Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and the Guidelines' disparate treatment of similar amounts of crack and powder cocaine. The judge expressed the belief that he did not have the authority to diverge from the sentencing

guidelines, and sentenced Moore to 188 months of imprisonment and six years of supervised release.

Moore appealed, and the United States Court of Appeals for the Eighth Circuit affirmed his conviction and sentence. Moore then filed a petition for certiorari. While Moore's certiorari petition was pending, the Supreme Court issued its opinion in *Kimbrough v. United States*, holding that a judge "may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses" when applying [18 U.S.C.] § 3553(a).

The Supreme Court then granted Moore's petition, vacated the judgment, and remanded the case to the Eighth Circuit for further consideration in light of *Kimbrough*. On remand, without new briefing, the Eighth Circuit affirmed again.

Finally, proceeding *pro se,* Moore again petitioned for certiorari, arguing that the Eighth Circuit's new characterization of the transcript is wrong, and that it is "clear that the district court thought judges had no discre[t]ion to reject" the Guidelines ratio.

Holding

The Court held that in light of the District Court's statement that it did not think it had the discretion later upheld by *Kimbrough*, Court of Appeals should have remanded the case to the District Court for resentencing under this case.

Chambers v. United States, 129 S.Ct. 687 (2009)

Issue

Is a conviction for failure to report for confinement a crime "otherwise involv[ing] conduct that presents a serious potential risk of injury to another" such that it can be classified as a "violent felony" within the meaning of the Armed Career Criminal Act?

Facts

Defendant was convicted in the United States District Court for the Southern District of Illinois of being felon in possession of firearm, and was sentenced to 188 months' imprisonment, on theory that his prior conviction of the Illinois offense of failing to report qualified as "violent felony" for purposes of sentencing under Armed Career Criminal Act (ACCA). Defendant appealed. The Seventh Circuit Court of Appeals affirmed.

Holding

Justice Breyer wrote the court's opinion and held that the defendant's conviction for failure to report for confinement was not one for a crime "otherwise involv[ing] conduct that presents a serious potential risk of injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), and hence was not a "violent felony" within the meaning of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Failure to report for confinement amounts to a form of inaction, which is a far cry from the "purposeful, 'violent,' and 'aggressive conduct" that, the Court held in Begay v. United States, 128 S.Ct. 1581 (2008), was the hallmark of offenses qualifying as "violent felonies" under the ACCA's "otherwise" clause.

The Court rejected the Government's argument that a failure to report reveals the offender's special, strong aversion to penal custody, as irrelevant to the inquiry of whether such an offender is significantly more likely than others to attack or resist an apprehender, thereby producing a serious risk of physical injury. Additionally, the Court found that the Government provided no empirical information demonstrating that failure to report cases are often commiserate with physical violence.

Justice Alito, joined by Justice Thomas, filed an opinion concurring in the judgment, in which he lamented that "only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship and Taylor[v. United States, 495 U.S. 575 (1990),]'s 'categorical approach' have pushed us.")

Spears v. United States, 129 S.Ct. 840 (2009) (per curiam)

Issue

Under the Kimbrough case may a judge vary from the 100-to-1 ratio in the Guidelines for "crack" cocaine offense by imposing a new ratio?

Facts

Spears was convicted in the United States District Court for the Northern District of Iowa, of conspiracy to distribute cocaine base and powder cocaine. In calculating Spear's sentence, the District Court did not use the power to crack cocaine ratio of 100:0 from the Federal Sentencing guidelines, rather the court substituted its own 20:1 ratio. Defendant and the government appealed. The United States Court of Appeals for the Eighth Circuit, affirmed conviction,

reversed sentence, and remanded. Certiorari was granted, and the Supreme Court, vacated and remanded. On remand, the Court of Appeals held that the District Court impermissibly replaced 100:1 quantity ratio for crack/powder cocaine offenses with its own 20:1 ratio, and again affirmed conviction, reversed sentence and remanded for resentencing. Defendant petitioned for certiorari.

Holding

The Court held that under Kimbrough v. United States "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines," and thus a judge may accordingly choose to specify his disagreement, and the degree of his disagreement, with the 100-to-1 ratio by specifically employing a different ratio.

Justice Kennedy concurred in the granting of certiorari, but would set the case for oral argument. Justice Thomas dissented without opinion. Chief Justice Roberts filed a dissenting opinion, in which he was joined by Justice Alito holding that the Eight Circuit's decision did not constitute error "so apparent as to warrant the bitter medicine of summary reversal" because Kimbrough case did not address whether district courts that do disagree with the policy underlying the Guidelines may adopt their own categorical crack-powder ratios in place of the ratio set forth in the Guidelines.

Nelson v. United States, 129 S.Ct. 890 (2009) (per curiam)

Issue

Does a court err in sentencing a defendant with the understanding that the Federal Sentencing Guidelines are "presumptively reasonable"?

Facts

Nelson was convicted of one count of conspiracy to distribute and to possess with intent to distribute more than 50 grams of cocaine base. The District Court calculated Nelson's sentencing range under the United States Sentencing Guidelines, and imposed a sentence of 360 months in prison. During sentencing, the judge explained that under Fourth Circuit precedent, "the Guidelines are considered presumptively reasonable," so that "unless there's a good reason in the [statutory sentencing] factors ..., the Guideline sentence is the reasonable sentence." The Fourth Circuit affirmed on the same basis.

Holding

The Supreme Court held that the Fourth Circuit erred in affirming defendant's sentence because the District Court violated the holdings of Rita v. United States, 127 S.Ct. 2456, 2458 (2007), and Gall v. United States, 128 S.Ct. 586, 596-97 (2007) that "[t]he Guidelines are not only not mandatory on sentencing court; they are also not to be presumed reasonable." Accordingly, the Supreme Court summarily reversed the judgment below and remanded for further proceedings.

Justice Breyer, joined by Justice Alito concurred in the judgment stating that they vacate the judgment of the Court of Appeals, and remand for further proceedings.

Greenlaw v. United States, 128 S.Ct. 2559 (2008)

Issue

May a Circuit Court increase a criminal defendant's sentence without Government initiative?

Facts

Greenlaw was convicted in the United States District Court for the District of Minnesota for various offenses relating to drugs and firearms, and was sentenced to imprisonment for 442 months. Defendant appealed. The Court of Appeals for the Eighth Circuit determined, without Government invitation, that the applicable law plainly required a prison sentence 15 years longer than the term the trial court had imposed.

Holding

Justice Ginsburg wrote the court's opinion holding that absent a government appeal or cross-appeal, a federal court of appeals may not, on its own initiative, order an increase in a criminal defendant's sentence. The Court explained that courts must follow the principle of party presentation, and that the plain error rule did not authorize the Eighth Circuit to order the sentence enhancement *sua sponte*.

***Dean v. United States*, 129 S.Ct. 1849 (2009)**

Issue

Does 18 U.S.C. §924(c)(1)(A)(iii), establishing

a ten-year mandatory minimum sentence for a defendant who discharges a firearm during a crime of violence require proof that the discharge was volitional, and not merely accidental, unintentional or involuntary.

Facts

Dean robbed a bank, waving a gun. The gun accidentally discharged during the robbery. No one was hurt.

Holding

The court, in an opinion by Justice Roberts, held that the code provision requires no separate proof of intent and that the 10 year mandatory minimum applies if the gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident. Justices Stevens and Breyer dissented believing that the statute required proof of an intentional discharge of the firearm.

b. Post-Conviction Writs in Federal Court

Jimenez v. Quarterman, 129 S.Ct. 681 (2009)

Issue

When a petitioner has been granted an out of time appeal by a state court, and the petitioner files a federal habeas petition within the 1 year AEDPA limitations period, but the federal court finds that the appeal was not filed within time limits, does a Circuit err in refusing to issue petitioner a certificate of appealibility?

Facts

After petitioner's state conviction for burglary became final, the state appellate court held in state habeas proceedings that petitioner had been denied his right to appeal and granted him the right to file an out-of-time appeal. Petitioner filed an appeal, and his conviction was affirmed. He filed a second state habeas application, which was denied.

He then filed a federal habeas petition relying on 28 U.S.C. § 2244(d)(1)(A) to establish its timeliness. Section 2244(d)(1)(A) provides that the one-year limitations period for seeking review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) begins on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Petitioner argued that his judgment became final when time expired for seeking certiorari review of the decision in his out- of-time appeal, and that his petition was timely because the calculation of AEDPA's 1-year limitation period excludes the 355 days "during which [his] properly filed application for State post-conviction ... review ... [was] pending,"§ 2244(d)(2).

The District Court disagreed, ruling that the proper start date for calculating AEDPA's 1-year limitations period under § 2244(d)(1)(A) was when petitioner's conviction first became final. The District Court dismissed the federal habeas petition as time barred. The Fifth Circuit denied petitioner's request for a certificate of appealability.

Holding

The court's unanimous opinion written by Justice Thomas held that where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not "final" for purposes of § 2244(d)(1)(A) until the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking certiorari review of that appeal.

c. Federal Substantive Law

***Flores-Figuera v. United States*, 129 S.Ct. 1886 (2009)**

Issue

In order to prove aggravated identity theft under 18 U.S.C. §1028A(a)(1), must the government show that the defendant knew that the means of identification he used belonged to another person?

Facts

18 U.S.C. §1028A(a)(1) imposes a mandatory two year sentence on anyone who, during and in relation to certain predicate offenses, knowingly transfers, possesses or uses, without lawful authority, a means of identification of another person.

Holding

The court in an opinion by Justice Breyer unanimously agreed with Flores-Figueroa that, to obtain a conviction under §1028A(a)(1), the government must show that the defendant knew that the "means of identification" he unlawfully transferred, possessed, or used, belonged to a real person.

***Abuelwaha v. United States*, 2009 WL 1443133**

Issue

Does using a telephone to make a misdemeanor drug purchase facilitate a felony drug distribution offense in violation of the Federal Controlled Substance Act?

Facts

Abuelhawa made telephone calls to purchase cocaine. The purchases were misdemeanors but the sales were felonies. Government charged him with felonies based on 21 U.S.C. §843(b) which makes it a felony to "use any communication facility in . . . facilitating felony drug distribution."

Holding

Justice Souter, for a unanimous court, held that using a telephone to make a misdemeanor drug purchase does not facilitate felony drug distribution in violation of §843(b).

d. Pending Cases Specific to Federal Practice

Nijhawan v. Mukasey, cert. granted, 129 S.Ct. 988 (2009). Does petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualify as a conviction for conspiracy to commit an 'offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(I) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million?

Johnson v. United States, cert. granted, 129 S.Ct. 1315 (2009). When a state's highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force, is that holding binding on federal courts in determining whether that same offense qualifies as a "'violent felony" under the federal Armed Career Criminal Act, 18 U.S.C. § 924(e), which defines "violent felony" as, inter alia, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another"? (2) Should this Court should resolve a circuit split on whether a prior state conviction for simple battery is in all cases a "violent felony" – a prior offense that has as an element the use, attempted use, or threatened use of physical force against the person of another; and, further, should this court should resolve a circuit split on whether the physical force required is a de minimis touching in the sense of "Newtonian mechanics," or whether the physical force required must be in some way violent in nature – that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so?

Cone v. Bell, cert. granted, 128 S.Ct. 2961 (2008). (1) Is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts? (2) Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

McDaniel v. Brown, cert. granted, 129 S.Ct. 1038 (2009). (1) What is the standard of review for a federal habeas court for analyzing a sufficiency-of the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)? (2) Does an analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1 permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial?

Smith v. Spisak, cert. granted, 129 S.Ct. 1319 (2009). (1) Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S.Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in Mills? (2) Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

Boyle v. United States, cert. granted, 129 S.Ct. 29 (2008). Does proof of an association-in-fact enterprise under the RICO statute, 18 U.S.C. §§ 1962(c)-(d), require at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages – an exceptionally important question in the administration of federal justice, civil and criminal, that has spawned a three-way circuit split?