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Supreme Court Update

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UPDATE OF SUPREME COURT CASES FROM CURRENT TERM OF COURT (OCTOBER 2008 UNTIL PRESENT)

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, 2009 WL 1045962 (2009)

Issue

When can an officers 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, 2009 WL 901513

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.

Pending Cases

Kansas v. Ventris, cert. granted at 129 S.Ct. 29 (2008)

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

Montejo v. Louisiana, cert. granted at 129 S.Ct. 30 (2008)

When an indigent defendant's right to counsel has attached and he has been appointed counsel, is he required to take some affirmative steps to accept the appointment in order for Sixth Amendment protections to apply and in order that police initiated interrogation without the presence of counsel will be barred?

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?

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.

X. 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?

X. 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)?

XI. Cases Specific to Federal Practice

(summaries by Tim Crooks for Dallas CJA and Federal Bar Association Seminar, April 2009).

Burgess v. United States, 128 S.Ct. 1572 (2008). "A state drug offense punishable by more than one year [ ] qualifies as a 'felony drug offense' [for purposes of 21 U.S.C. § 841], even if state law classifies the offense as a misdemeanor"; the Court refused to read into the term of art "felony drug offense," defined at 21 U.S.C. § 802(44), the separate definition of the term "felony" found in 21 U.S.C. § 802(13) (namely, any "offense classified by applicable Federal or State law as a felony"); as a result, the petitioner's prior South Carolina drug conviction, which was punishable by up to two years' imprisonment but which was classified as a "misdemeanor" by South Carolina, qualified as a "felony drug offense" for purposes of sentence enhancement under 21 U.S.C. § 841(b)(1)(A).

Begay v. United States, 128 S.Ct. 1581 (2008). Felony driving while intoxicated ("'DWI") under New Mexico law is not a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"), even assuming that DWI "presents a serious potential risk of physical injury to another"; 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; in contrast, DWI is, or is most comparable to, a strict liability crime, in respect to which the offender need not have had any criminal intent at all. (Justice Scalia filed an opinion concurring in the judgment; Justice Alito filed a dissenting opinion in which he was joined by Justices Souter and Thomas.)

United States v. Rodriquez, 128 S.Ct. 1783 (2008). Defendant's Washington state drug-trafficking offense, for which state law authorized a ten-year sentence only because the defendant was a recidivist (otherwise, the maximum sentence was only five years), qualified as a "serious drug offense" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e); for purposes of the definition of "serious drug offense" in 18 U.S.C. § 924(e)(2)(A)(ii) – defining a "serious drug offense" as a narcotics offense for which "a maximum term of imprisonment of ten years or more is prescribed by law" – includes statutory recidivist enhancements (although the Court did suggest that, where it was not obvious from the sentence that the defendant had been subject to the prior recidivist enhancement, this fact must be proved up by evidence of the type approved in *Taylor v. United States*, 495 U.S. 575 (1990), and Shepard v. United States, 544 U.S. 13 (2005)); 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 applicable to defendant. (Justice Souter filed a dissenting opinion in which he was joined by Justices Stevens and Ginsburg.)

Irizarry v. United States, 128 S.Ct. 2198 (2008). Fed. R. Crim. P. 32(h) applies only to Guidelines-based "departures," and not to "variances" resulting in non-Guidelines sentences; hence, a sentencing court is not obliged, under Rule 32(h), to give notice that it is contemplating imposing a variance sentence, even where the basis for the variance is not identified as such in either the presentence report or in a party's presentencing submission. (Justice Thomas filed a concurring opinion. Justice Breyer filed a dissenting opinion in which he was joined by Justices Kennedy, Souter, and Ginsburg.)

Moore v. United States, 129 S.Ct. 4 (2008) (per curiam). Where district court clearly expressed its belief that it did 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 – a view later repudiated by *Kimbrough v. United States*, 128 S.Ct. 558 (2007) – the Eighth Circuit erred in affirming the defendant's sentence; instead the Eighth Circuit should have remanded the case to the district court for resentencing under Kimbrough; accordingly, the Supreme Court reversed the Eighth Circuit's judgment and remanded for further proceedings.

Chambers v. United States, 129 S.Ct. 687 (2009). Defendant's Illinois 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); conceptually speaking, the crime amounts to a form of inaction, 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; moreover, what little empirical information existed on the question (primarily a recent study done by the United States Sentencing Commission) cut against the government, because it strongly supported the intuitive belief that failure to report does not involve a serious potential risk of physical injury. (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). Where district court categorically disagreed with the 100-to-1 ratio inherent in the Guidelines for "crack" cocaine offenses, and instead assessed defendant's sentence on the basis of a 20-to-1 ratio, the Eighth Circuit erred in reversing that sentence; under *Kimbrough v. United States*, 128 S.Ct. 558 (2007), "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines"; if district judges are entitled to disagree with the crack Guidelines, then a sentence based on that disagreement does not become unreasonable simply because the judge chose to specify his disagreement, and the degree of his disagreement, with the 100-to-1 ratio by specifically employing a different ratio; accordingly, the Court granted certiorari and summarily reversed the Eighth Circuit's judgment reversing the sentence. (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.)

Nelson v. United States, 129 S.Ct. 890 (2009) (per curiam). The Fourth Circuit erred in affirming defendant's sentence because the district court impermissibly presumed that a Guideline sentence was reasonable, in violation of *Rita v. United States*, 127 S.Ct. 2456, 2458 (2007), and *Gall v. United States*, 128 S.Ct. 586, 596-97 (2007); "[t]he Guidelines are not only notmandatory 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.

Greenlaw v. United States, 128 S.Ct. 2559 (2008). 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; thus, where the government did not cross-appeal, the Eighth Circuit erred in ordering, in connection with the defendant's appeal, the district court to increase defendant's sentence by 15 years to correct a plain error that the district court had committed in sentencing defendant (namely, imposing "only" 10 years for a conviction under 18 U.S.C. § 924(c), rather than the 25 years required for a second or subsequent conviction under that statute). (Justice Alito filed a dissenting opinion in which he was joined in full by Justice Stevens and joined in part by Justice Breyer.)

Bell v. Kelly, 129 S.Ct. 393 (2008) (per curiam). The Supreme Court had granted certiorari to decide whether the Fourth Circuit erred when – in conflict with decisions of the Ninth and Tenth Circuits – it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing; however, after argument, the Supreme Court dismissed the writ of certiorari as improvidently granted.

Jimenez v. Quarterman, 129 S.Ct. 681 (2009). Where the Texas Court of Criminal Appeals granted petitioner an out-of-time direct appeal, the judgment did not become "final" on direct review for purposes of the 1-year AEDPA limitations period, see 28 U.S.C. § 2244(d)(1)(A), until the entirety of the (reinstated) state direct appellate review process was completed, on January 6, 2004; based on that date, petitioner's federal habeas petition was timely; for these reasons, the Fifth Circuit erred in refusing to grant petitioner a certificate of

appealability ("COA") to challenge the district court's finding of untimeliness; accordingly, the Supreme Court reversed the Fifth Circuit's order denying a COA and remanded for the Fifth Circuit to consider whether petitioner was entitled to a COA on the merits of his federal constitutional claims.

Pending Cases

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?

Bobby v. Bies, cert. granted, 129 S.Ct. 988 (2009). (1) Did the Sixth Circuit violate the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") when, in overruling an Ohio post-conviction court on double jeopardy grounds, it crafted a new definition of "acquittal" that conflicts with this Court's decisions? (2) Do the Double Jeopardy Clause's protections apply to a state post-conviction hearing on the question of a death-sentenced inmate's mental retardation under Atkins v. Virginia, 536 U.S. 304 (2002), that does not expose the inmate to the risk of any additional punishment? (3) Did the Sixth Circuit violate AEDPA when it applied the Double Jeopardy Clause's collateral estoppel component to enjoin an Ohio post-conviction court from deciding the issue of a death-sentenced inmate's mental retardation under Atkins even though the Ohio Supreme Court did not actually and necessarily decide the issue on direct review?

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?

Flores-Figueroa v. United States, cert. granted, 129 S.Ct. 457 (2008). 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?

Abuelwaha v. United States, cert. granted, 129 S.Ct. 593 (2008). Does the use of a telephone to buy drugs for personal use "facilitate" the commission of a drug "felony," in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller's distribution of the drugs to him (a felony)?

Dean v. United States, cert. granted, 129 S.Ct. 593 (2008). Does 18 U.S.C. § 924(c)(1)(A)(iii) – establishing a ten-year mandatory minimum sentence for a defendant who "discharge[s]" a firearm during a crime of violence – require proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary?