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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2009 PREVIEW

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SECTION I: OVERVIEW

Introduction

Since it returned from its summer recess, the Supreme Court has issued three orders granting certiorari in a total of 16 additional cases. The Court now has 61 cases on its merits docket, which likely will take the Court through its February argument session.

Fully half of the new grants of certiorari review – eight in all – come in criminal cases. The Court also agreed to review its first employment discrimination case of the Term, *Lewis v. City of Chicago* (08-974), which involves the statute of limitations for Title VII disparate impact claims. Other federal statutes new to this Term's docket are the Foreign Sovereign Immunities Act, at issue in *Samantar v. Bashe Abdi Yousuf* (08-1555), and the Federal Tort Claims Act, at issue in *Migliaccio v. Castaneda* and *Henneford v. Castaneda* (08-1529 and 08-1547).

This latest round of certiorari grants suggests a heightened interest on the part of the Justices in certain areas. For instance, the Court granted certiorari in yet a third case arising under the "honest services" provision of the federal mail and wire fraud statute, surprising some observers who expected the Court to "hold" the latest petition for resolution of the first two cases, as urged by the government.[1] The new case is *Skilling v. United States* (08-1394), and one reason the Court may have granted rather than held the petition is that it raises not only an "honest services" issue – whether a defendant can be guilty of honest services fraud if his conduct is not designed to enrich him personally – but also questions about presuming jury prejudice in light of the massive publicity and community passion surrounding the Houston trial of former Enron CEO Jeffrey Skilling. *Skilling* also may present an especially attractive vehicle for reaching constitutional concerns about the "honest services" statute, as it is the only one of the granted cases to raise the vagueness issue expressly in a Question Presented.

The Court also granted certiorari in a third *Miranda* case for the Term, an unusually high number for recent years. In all three of the cases, the state is the petitioner before the Court, seeking reversal of a lower-court decision in favor of the defendant. The latest case, *Berghuis v. Thompkins* (08-1470), involves the doctrine of implied waiver of *Miranda* rights.[2] Finally, the Court is now slated to hear three cases, again at the urging of the state, testing the Sixth Circuit's application of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) on habeas review. In all three, the state argues that the Sixth Circuit has not been sufficiently deferential to state-court rulings in granting habeas relief to defendants, and in two cases arising from Michigan, the state

[1] The Court earlier granted certiorari in *Black v. United States* (08-786) and *Weyhrauch v.United States* (08-1196), both presenting potential limits on "honest services" criminal prosecutions.

[2] The other two *Miranda* cases on the Court's docket are *Maryland v. Shatzer* (08-680), on the duration of the *Edwards* bar on reinterrogation after an invocation of the right to counsel; and *Florida v. Powell* (08-1175), on the precise content of the required *Miranda* warnings.

charges that the Sixth Circuit has engaged in a "clearly identifiable pattern" of failing to follow the dictates of AEDPA.[3]

Additional Term Highlights

In *McDonald v. City of Chicago* (08-1521), the Court will decide whether the Second Amendment right to bear arms applies to state and local gun-control measures. Last Term in *District of Columbia v. Heller*, the Court held for the first time that the Second Amendment protects an individual right to bear arms, as opposed to a purely militia-related right. But because the District of Columbia is a federal enclave and not a state, *Heller* expressly left open the question of whether the Second Amendment would apply to the states, as well. The Court has ruled that most but not all of the Bill of Rights protections do apply to the states, by way of "incorporation" through the Fourteenth Amendment Due Process Clause. In *McDonald*, it also is being urged to consider an alternative to the sometimes controversial incorporation doctrine, and hold that the Fourteenth Amendment Privileges or Immunities Clause independently prohibits state infringement of Second Amendment rights. Any holding in *McDonald* that the Second Amendment applies to the states, whether under the Due Process or Privileges or Immunities Clause, will have significant practical implications, subjecting not only federal but also state and local gun-control efforts to Second Amendment scrutiny. That said, the ultimate effect of *Heller* and *McDonald* will turn not only on whether Second Amendment rights apply to the states, but also on how broadly or narrowly those rights are defined by the courts – whether they call into question only broad bans on gun possession, like the one at issue in *Heller* (and now *McDonald*), or whether they also implicate more targeted restrictions on, for instance, assault weapons or the carrying of concealed weapons.

For the first time since the start of the Obama Administration, the Court will address the government's anti-terrorism efforts, in two cases granted this fall. In 2008, the Supreme Court held in *Boumediene v. Bush*, 128 S. Ct. 2229, that federal courts have habeas corpus jurisdiction over challenges by Guantanamo Bay detainees to their confinement. In this Term's *Kiyemba v. Obama* (08-1234), the Court will consider what relief detainees may obtain from that process, and in particular, whether a federal habeas court may order an unlawfully detained prisoner released into the United States. Recognizing that entry into the country is normally the prerogative of the political branches, a federal habeas court nevertheless ordered several Chinese Muslims, or Uighurs, released into the United States after seven years of detention at Guantanamo Bay under the "exceptional" circumstances presented: Release was clearly warranted – the government had determined that the men were not in fact subject to detention as enemy combatants – but the men could not return to China for fear of religious persecution, and no other country had agreed to accept all of the detainees. The D.C.

[3] The Court previously granted certiorari in *Smith v. Spisak* (08-724), from Ohio, in which the Sixth Circuit granted habeas relief on a claim of ineffective assistance of counsel and improper jury instructions at the penalty phase of a capital case. The two cases from Michigan in which the Sixth Circuit granted relief under AEDPA are *Berghius v. Thompkins* (08-1470), a *Miranda* case, and *Berghius v. Smith* (08-1402), on the Sixth Amendment right to a jury drawn from a fair cross-section of the community.

Circuit reversed, holding that an order allowing entry into the country outside the framework of the immigration laws, distinct from an order of "simple release," exceeds the authority of a habeas court. It may be possible for the government to "moot" *Kiyemba* before the Court takes action, as it has done in similar cases, by resettling the remaining Uighurs. But the same issue has arisen in other cases, and it is likely that the Court eventually will have to decide whether the habeas rights it recognized in *Boumediene* may in some circumstances require and justify the remedy of entry into the United States.

The second terrorism-related case involves the federal "material support" statute, which makes it a crime to provide "material support" to groups designated "foreign terrorist organizations" by the government. In the two cases now consolidated before the Court, *Holder v. Humanitarian Law Project* (08-1498) and *Humanitarian Law Project v. Holder* (09-89), the government brought charges against defendants who sought to assist only the nonviolent and lawful activities of a Kurdish political party and a Tamil group designated as foreign terrorist organizations, by training the organizations in peaceful methods of dispute resolution and engaging in political advocacy on their behalf. The Ninth Circuit held that the criminal prohibition on providing certain forms of material support – "training," "service," and, in part, "expert advice or assistance" – is unconstitutionally vague, because the statutory terms fail to provide clear notice as to what is prohibited and could be read to criminalize protected speech and expression. The Supreme Court will now decide whether those terms are indeed impermissibly vague, and, on a cross-petition by defendants, whether prohibitions on additional forms of support are constitutional as applied to speech that furthers only the lawful and nonviolent activities of proscribed organizations. The government, which has charged approximately 120 defendants under the material support statute and convicted about 60, warns in its petition for certiorari that affirming the Ninth Circuit would badly undermine its efforts to fight international terrorism. The defendants disagree, arguing that the government can effectuate the core purposes of the statute by prosecuting those forms of material support that do not consist of speech on behalf of lawful and nonviolent ends.

SECTION II: CASE SUMMARIES

Constitutional Law

Government Powers

***Kiyemba, et al. v. Obama* (08-1234)**

Question Presented:

Whether a federal court exercising its habeas jurisdiction as confirmed by *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008), has no power to order the release of prisoners held by the Executive for seven years, where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.

Summary:

At issue in this case is the authority of federal habeas courts to order prisoners detained at Guantanamo released into the United States, when the government has determined that the prisoners are not in fact "enemy combatants" and there is no other country to which they may be released. The detainees are a group of Chinese Muslims, known as Uighurs, who have been detained for seven years. Though the government no longer contends that they are subject to detention as enemy combatants, it has not released them; the men cannot return to China for fear of religious persecution, and thus far, the government has been able to find homes in other countries for only a handful. When a federal habeas judge ordered the men released into the United States, the government appealed, and the D.C. Circuit agreed with the government that given the exclusive authority of the political branches over who may enter the country, a federal judge lacks the authority to order the entry of an alien contrary to the immigration laws. The Supreme Court granted certiorari over the objections of the government, which had notified the Court of its continuing efforts to resettle the remaining Uighar detainees in other countries. If the government succeeds in that effort before the Court acts on the case, then the Court may dismiss the case as moot and avoid the issue – though probably only temporarily, given the pendency of similar cases in the lower courts. Otherwise, the Court appears poised to reenter the debate, most recently joined in 2008 in *Boumediene v. Bush*, over detention of persons captured in connection with anti-terrorism efforts, and the authority of the federal courts to hear challenges to those detentions and to grant appropriate relief.

Decision Below: 555 F.3d 1022 (D.C. Cir. 2009)

Petitioner's Counsel of Record:

Sabin Willett, Bingham McCutcheon LLP

Respondent's Counselof Record:

Elena Kagan, Solicitor General, United States Department of Justice

First Amendment

Holder v. Humanitarian Law Project; Humanitarian Law Project v. Holder **(09-1498; 09-89)**

Questions Presented:

1. Petitioners: Whether 18 U.S.C. 2339B(a)(1), which prohibits the knowing provision of "any * * * service, * * * training, [or] expert advice or assistance," 18 U.S.C. 2339A(b)(1), to a designated foreign terrorist organization, is unconstitutionally vague.
2. Cross-Petitioners: Whether the criminal prohibitions in 18 U.S.C. 2339B(a)(1) on provision of "expert advice or assistance" "derived from scientific [or] technical … knowledge" and "personnel" are unconstitutional with respect to speech that furthers only lawful, nonviolent activities of prescribed organizations.

Summary:

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and Intelligence Reform and Terrorism Prevention Act (IRTPA) (which amended and clarified AEDPA) criminalize the knowing provision of "material support" to "foreign terrorist organization[s]." The United States has used the "material support" provision to charge 120 defendants and convicted sixty, and asserts it is a "vital part of the Nation's effort to fight international terrorism."

The Kurdistan Workers Party in Turkey and the Tamil Tigers in Sri Lanka are two designated "foreign terrorist organization[s]." Challengers of the statute are individuals who wish to contribute financial and other support to the nonviolent, lawful activities performed by these organizations, in part by engaging in political advocacy on their behalf. The Ninth Circuit held that three statutory terms defining "material support" – the provision of "training," "service," and, in part, "expert advice or assistance" – are unconstitutionally vague, because they fail to provide reasonable notice of what conduct is prohibited and may reach constitutionally protected speech activity. The government argues that the terms have established meanings and are limited by the statute's scienter requirement, and that the statute does not violate the First Amendment because it regulates conduct rather than speech. In their cross-petition, the challengers object on vagueness grounds to additional statutory terms, and argue directly that the statute is unconstitutional as applied to speech in furtherance of the lawful activities of covered organizations.

Decision Below: 552 F.3d 916 (9th Cir. 2009)

Petitioner's Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

Respondent's/Cross-Petitioner's Counsel of Record:

David D. Cole, Georgetown University Law Center

Second Amendment

McDonald v. City of Chicago (08-1521)

Question Presented:

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

Summary:

This case follows on last Term's *District of Columbia v. Heller*, in which the Court held that the Second Amendment protects an individual right to gun-ownership and invalidated a District of Columbia gun-control regulation. Because the District of Columbia is a federal enclave, the Court in *Heller* left open the question now presented by *McDonald*: Whether the Second Amendment applies to the states by way of "incorporation" under the Fourteenth Amendment. The Court has held that most, but not all, of the individual protections of the Bill of Rights are

incorporated against the states by way of the Fourteenth Amendment's Due Process Clause. In this case, petitioner is urging the Court to consider as well the Fourteenth Amendment's Privileges or Immunities Clause as an alternative route to incorporation, which would revive a method of constitutional interpretation out of use since the Supreme Court decided the Slaughterhouse Cases in 1873.

Decision Below: Nos. 08-4241, 08-4243 & 08-4244 (7th Cir. June 2, 2009)

Petitioner's Counsel of Record:

Alan Gura, Gura & Possessky PLLC

Respondent's Counsel of Record:

Benna Ruth Solomon, Deputy Corporation Counsel, City of Chicago

Preemption

Health Care Service v. Pollitt **(09-38)**

Questions Presented:

1. Whether the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-14, completely preempts – and therefore makes removable to federal court – a state court suit challenging enrollment and health benefits determinations that are subject to the exclusively federal remedial scheme established in FEHBA.
2. Whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which authorizes federal removal jurisdiction over state court suits brought against persons "acting under" a federal officer when sued for actions "under color of [federal] . . . office," encompasses a suit against a government contractor administering a FEHBA plan, where the contractor is sued for actions taken pursuant to the government contract.

Summary:

Petitioner Health Care Service Corporation (HCSC) is a government contractor administering a health benefits plan governed by the Federal Employees Health Benefits Act (FEHBA). Respondent Pollitt sued HCSC in state court for millions of dollars on tort theories after HCSC terminated her son's enrollment in the plan and sought recovery of payments made to healthcare providers on the son's behalf. HCSC removed the case to federal district court under federal question jurisdiction, so the court did not reach the question of whether the federal officer removal statute applied. The district court then dismissed Pollitt's complaint, holding that her state law claims were preempted by FEHBA. The Seventh Circuit vacated the judgment and remanded, holding that the case should not have been removed to federal court in the first place because FEHBA does not completely preempt the field of federal employee health insurance. However, the court of appeals also held that the case could be properly removed under the federal officer removal statute if the district court found that HCSC was "doing nothing but following the [Department of Labor's] orders." HCSC petitioned for certiorari before remand to challenge both holdings. According to HCSC, the Seventh Circuit

incorrectly held that FEHBA did not completely preempt the state tort action, and applied too stringent a standard under the federal officer removal statute by permitting removal in cases involving government contractors only "if the government had specifically ordered each act about which Respondents complained."

Decision Below: 558 F.3d 615 (7th Cir. 2009)

Petitioner's Counsel of Record:

Anthony F. Shelley, Miller & Chevalier Chartered

Pro Se Respondents:

Juli A. Pollitt and Michael A. Nash

Remedies

***Migliaccio v. Castaneda*; *Henneford v. Castaneda et al.* (08-1529; 08-1547)**

Questions Presented:

1. Does 42 U.S.C. § 233(a) make the Federal Tort Claims Act the exclusive remedy for claims arising from medical care and related functions provided by Public Health Service personnel, thus barring *Bivens* actions? [Miggliacco, 08-1529]

2. Does 42 U.S.C. § 233(a) make an action against the United States under the Federal Tort Claims Act the exclusive remedy for damage claims arising out of medical and related care provided by United States Public Health Service officers and employees in the course and scope of their federal employment, precluding the cause of action recognized in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)? The Second Circuit Court of Appeals in Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000), answered "yes," while the Ninth Circuit Court of Appeals in this action, Castaneda v. United States, 546 F.3d 682 (9th Cir. 2008), answered "no." [Henneford, 08-1547]

Summary:

This case involves the immunity of federal medical personnel for alleged violations of constitutional rights. Respondent Castaneda was an immigration detainee when he was denied a biopsy for a lesion on his penis despite several doctors' recommendations; he was diagnosed with cancer shortly after his release, his penis was amputated, and he later died of cancer. Castaneda and his estate sued Public Health Service officials for violations of his Fifth and Eighth Amendment rights under *Bivens* and for medical malpractice under the Federal Tort Claims Act (FTCA). Respondent's rights under the FTCA are more limited than under *Bivens*: Unlike a *Bivens* action, the FTCA does not provide for damages against individuals, punitive damages, or jury trials. The named officials moved for dismissal of the *Bivens* claim under § 233(a) of the FTCA, which makes the FTCA remedy for "personal injury, including death, resulting from the performance of medical [] functions" by Public Health Service personnel "exclusive of any other civil action or proceeding by reason of the same subject matter." The Ninth Circuit held that § 223(a) does not

preempt respondent's *Bivens* action, reading the section as applying only to common-law malpractice and negligence actions, and noting that it was passed before the Supreme Court decided *Bivens* and thus could not have reflected any congressional intent to preempt *Bivens* actions. The court went on to find that the FTCA remedy, given its limitations, was not "equally effective" as a *Bivens* remedy, as required for *Bivens* preemption under *Carlson v. Green*, 446 U.S. 14 (1980).

Decision Below: 546 F.3d 682 (9th Cir. 2008)

Petitioners' Counsel of Record:

Matthew S. Freedus, Feldesman Tucker Leifer Fidell LLP (Petitioner Migliacchio)

John K. Rubiner Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C. (Petitioner Henneford)

Respondent's Counsel of Record:

Adele P. Kimmel, Public Justice PC

Business Law

Labor and Employment

***Lewis v. City of Chicago* (08-974)**

Question Presented:

Under Title VII, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred. Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file a charge within 300 days after the employer's use of the discriminatory practice?

Summary:

In an echo of last Term's *Ricci v. Destefano*, the New Haven firefighters case, this case involves a written test administered as part of the hiring process for firefighters. Here, it is African-American test-takers who are suing, claiming that the test has an impermissible disparate impact under Title VII, and here, the question is a more technical, but still very significant, one: Whether the Title VII statute of limitations, which expires 300 days after the "alleged unlawful employment practice occurred," began to run when Chicago announced the results of the test, or only later, when it made hiring decisions based on those test scores.

The Seventh Circuit held that the act of discrimination triggering the statute of limitations was complete when petitioners learned of the test results; the hiring decisions were the "automatic consequence" of the test results, not "fresh act[s] of discrimination." Petitioners argue that under Title VII, a suit is timely if filed within 300 days of *either* the initial announcement of a practice with a disparate impact *or* any subsequent use

of that practice with an adverse employment affect on the charging party. Otherwise, they urge, an unlawful employment practice that was not challenged within 300 days of announcement would become effectively unreviewable, even as it continued to be used against new job applicants or employees. The United States, appearing as amicus, supports petitioners' position that the Seventh Circuit erred and that a disparate impact claim accrues both when tests results are announced and again when they are used in hiring decisions.

Decision Below: 528 F.3d 488 (7th Cir. 2008)

Petitioner's Counsel of Record:

Matthew Colangelo, NAACP Legal Defense & Educational Fund, Inc.

Respondent's Counsel of Record:

Nadine Jean Wichern, Assistant Corporation Counsel, City of Chicago

Foreign Sovereign Immunities Act

***Samantar v. Bashe Abdi Yousuf* (08-1555)**

Questions Presented:

1. Whether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604, extends to an individual acting in his official capacity on behalf of a foreign state.
2. Whether an individual who is no longer an official of a foreign state at the time suit is filed retains immunity for acts taken in the individual's former capacity as an official acting on behalf of a foreign state.

Summary:

Respondents, natives of Somalia, brought suit under the Alien Tort Statute and the Torture Victim Protection Act, alleging torture and other violations of international law committed by government agents commanded by petitioner Samantar, then a high-ranking government official in Somalia. The district court dismissed the suit for lack of subject matter jurisdiction, holding that Samantar is immune from suit under the Foreign Sovereign Immunities Act (FSIA) for actions taken in his official capacity. The Fourth Circuit reversed, holding that the FSIA does not provide immunity for individuals, and that even if it did, it would extend only to defendants who are government agents at the time of suit and not to former government agents like petitioner.

The FSIA grants immunity to any "foreign state," defined to include an "agency or instrumentality of a foreign state." The court of appeals acknowledged that the majority of courts have held that an individual officer acting in his or her official capacity constitutes a "foreign state" under the FSIA. Nevertheless, the court concluded that the language and structure of the statute dictate that only political divisions and corporate entities, and not individual officers, qualify as "foreign states." Petitioners read the statute differently, and also argue that because former government officials generally continue their relationship with their states, stripping them of immunity would undermine the comity the

FSIA is designed to protect.

Decision Below: 552 F.3d 371 (4th Cir. 2009)

Petitioner's Counsel of Record:

Michael A. Carvin, Jones Day

Respondent's Counsel of Record:

Robert R. Vieth, Cooley Godward Kronish LLP

Federal Practice and Procedure

Health Care Services v. Pollitt **(09-38) (see Constitutional Law: Preemption)**

Criminal Law

Fifth Amendment

Berghuis v. Thompkins **(08-1470)**

Questions Presented:

1. Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them.
2. Whether the Court of Appeals failed to afford the State court the deference it was entitled to under 28 U.S.C. §2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkin's [sic] guilt allowed the State court to reasonably reject the claim.

Summary:

This case raises questions under both *Miranda* and AEDPA. Following his arrest on murder charges, Thompkins was read his *Miranda* warnings, verbally acknowledged that he understood them, but refused to sign a waiver form. The police continued to interrogate Thompkins for two hours and forty-five minutes, during which time Thompkins remained nearly silent. Finally, in response to a question about his belief in God and prayers for forgiveness, Thompkins made an inculpatory statement. On habeas review, the Sixth Circuit held that Thompkin's statement was taken in violation of *Miranda* because Thompkins had not waived his *Miranda* rights. The court recognized that an express waiver is not required, but held – quoting *Miranda* verbatim – that a "heavy burden rests on the government" to show waiver, and that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was eventually obtained." The Sixth Circuit also granted relief on Thompkins' ineffective assistance of counsel claim, ruling that counsel's failure to seek a limiting instruction regarding witness testimony was prejudicial under *Strickland v. Washington*.

On the merits, the state argues that Thompkins' eventual statement to the police, combined with his acknowledgment of his *Miranda* warnings and failure to invoke his rights, constituted a valid implied waiver. According to the state, *Miranda* does not prohibit the police from attempting to persuade a suspect to waive his rights after the suspect has been read the *Miranda* warnings but has neither invoked nor waived his rights. The state also contends that the Sixth Circuit improperly applied AEDPA's deferential standard of review, which allows for relief only when a state-court ruling is contrary to well-established Supreme Court law: Here, the state argues, the Sixth Circuit held the state to a standard that had not previously been announced by the Supreme Court. With respect to the ineffective assistance claim, the state relies almost entirely on AEDPA, arguing again that the court below overstepped its authority under AEDPA by failing to defer to the state-court holding that counsel's failure to seek a limiting instruction was not prejudicial. Indeed, the state asserts that this case is part of a "clearly identifiable pattern" of the Sixth Circuit's "failure to follow AEDPA," and the Court has now granted certiorari in three Sixth Circuit cases decided under that statute.

Decision Below: 547 F.3d 572 (6th Cir. 2008)

Petitioner's Counsel of Record:

Michael A. Cox, Attorney General for the State of Michigan

Respondent's Counsel of Record:

Elizabeth Jacobs

Habeas and AEDPA Review

***Berghuis v. Smith* (08-1402)**

Question Presented:

In Duren v. Missouri, this Court established a three-prong standard for determining whether a defendant was able to demonstrate a prima facie violation of the Sixth Amendment right to have a jury drawn from a fair cross section of the community. The circuits have split on the issue about the proper test for determining what constitutes a fair and reasonable representation of a distinct group from the community within the venires (jury pool) under the second prong of Duren. The Michigan Supreme Court ultimately concluded that the small disparities at issue here for African Americans (7.28% in the community as against 6% in the venires during the time period measured) did not give rise to a constitutional violation. The question presented is:

Whether the U.S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under Duren where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which this Court has never applied and which

four circuits have specifically rejected.

Summary:

This is one of three cases this Term in which the Court will consider whether the Sixth Circuit is properly applying the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which mandates substantial deference to state-court rulings on federal habeas review and allows for habeas relief only when a state ruling is contrary to clearly established Supreme Court precedent. Respondent claims that he was denied his Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community because African Americans were systematically excluded from the jury pool. In denying relief, the state courts relied on the same "absolute disparity" measure for evaluating underrepresentation as did the Supreme Court in *Duren v. Missouri*, 439 U.S. 362 (1979), comparing the percentage of jury-eligible African Americans in the general population with the percentage in the jury pool, and finding that a disparity of 1.28 percent is not constitutionally significant. The Sixth Circuit, reasoning that *Duren* had not mandated the use of any particular statistical method, held that "comparative disparity," or the diminished likelihood that members of a minority group will be called for jury duty, is the more meaningful measure of underrepresentation when the minority group is small, and found a comparative disparity of between 18 and 34 percent in this case. The Sixth Circuit went on to hold that the diversion of African American jurors away from the state jury pool to the federal district court constituted impermissible "systematic exclusion" under *Duren*, and that the Michigan Supreme Court's contrary conclusion was unreasonable under AEDPA. The state now argues both that the Sixth Circuit exceeded its authority under AEDPA in applying a "comparative disparity" standard that has never been recognized by the Supreme Court, and that in any event the Michigan Supreme Court was correct on the merits when it denied respondent's claim.

Decision Below: 543 F.3d 326 (6th Cir. 2008)

Petitioner's Counsel of Record:

B. Eric Restuccia, Solicitor General, Michigan Attorney General's Office

Respondent's Counsel of Record:

James Sterling Lawrence

***Holland v. Florida* (09-5327)**

Question Presented:

In determining that Petitioner was not entitled to equitable tolling to excuse the late filing of his habeas petition, the Eleventh Circuit determined that the reason for the late filing was the "gross negligence" on part of Petitioner's state-appointed collateral attorney's failure to file the petition in a timely fashion despite repeated instructions from the Petitioner to do so. However, under the new test announced by the Eleventh Circuit in Petitioner's case, *no* allegation of attorney negligence

or failure to meet a lawyer's standard of care, in the absence of bad faith, dishonesty, divided loyalty, or mental impairment, could *ever* qualify as an exceptional circumstance warranting equitable tolling.

This Court should grant *certiorari* to the Eleventh Circuit to determine whether "gross negligence" by collateral counsel, which directly results in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling, or whether, in conflict with other circuits, the Eleventh Circuit was proper in determining that factors beyond "gross negligence" must be established before an extraordinary circumstance can be found that would warrant equitable tolling.

Summary:

Petitioner Holland was convicted in state court of first-degree premeditated murder in 1994 and sentenced to death. AEDPA's one year statute of limitations for the filing of a federal habeas petition, 28 U.S.C. § 2244(d), had almost expired by the time Holland, represented by appointed counsel Bradley Collins, filed a motion for state post-conviction relief, which tolled the running of the limitations period. After exhausting his state habeas remedies, Holland filed a federal habeas petition 38 days after the limitations period had expired because, as the state concedes, despite Holland's repeated urgings to file, counsel Collins miscalculated the deadline. The Eleventh Circuit found that Collins was "grossly negligent" but held that Holland was not entitled to equitable tolling, which applies only when some extraordinary circumstance prevents the timely filing of a petition under AEDPA. The court determined that lawyer negligence can only rise to a level warranting tolling if there is "bad faith, dishonesty, divided loyalty, mental impairment, or so forth on the lawyer's part." Holland claims that this is all but an impossible test to meet, and that it conflicts with other circuit rules relating to equitable tolling. The state, on the other hand, asserts that equitable tolling requires some affirmative misconduct, and that this attorney's conduct was merely "ordinary attorney negligence."

Decision Below: 539 F.3d 1334 (11th Cir. 2008)

Petitioner's Counsel of Record:

Todd G. Scher, Law Office of Todd G. Scher PL

Respondent's Counsel of Record:

Lisa-Marie Lerner, Assistant Attorney General, State of Florida

Berghuis v. Thompkins **(08-1470) (see Criminal Law: Fifth Amendment)**

Mail and Wire Fraud – Deprivation of Honest Services

Skilling v. United States **(08-1394)**

Questions Presented:

1. Whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was

intended to achieve "private gain" rather than to advance the employer's interest, and, if not, whether § 1346 is unconstitutionally vague.
2. When a presumption of jury prejudice arises because of the widespread community impact of the defendant's alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.

Summary:

Petitioner Skilling is challenging his convictions for conspiracy to commit securities fraud, wire fraud, and honest services fraud in connection with the bankruptcy of Enron. Skilling claims that the conviction for conspiracy to commit honest services fraud was flawed because the prosecution failed to show that Skilling's actions were intended to promote his "private gain" at Enron's expense. The Fifth Circuit disagreed, holding that "private gain" is not an essential element of honest services fraud and that the government need only prove "a material breach of a fiduciary duty imposed under state law . . . that results in a detriment to the employer." Skilling argues alternatively that if the Fifth Circuit is correct, it follows that the law is unconstitutionally vague.

The Court also agreed to review Skilling's claim that the district court's refusal to change venue due to the inflammatory media coverage and "extraordinary community passion" in the Houston area was reversible error. The Fifth Circuit agreed with Skilling that the district court should have ruled that there was a presumption of jury prejudice, but held that the government had rebutted that presumption by showing that the jury was actually impartial. Skilling argues that a presumption of jury prejudice cannot be rebutted and therefore requires the judge to change venue. Skilling claims alternatively that, if the presumption is rebuttable, the government should be required to prove beyond a reasonable doubt that no juror was actually affected by the community bias.

Decision Below: 554 F.3d 529 (5th Cir. 2009)

Petitioner's Counsel of Record:

Daniel M. Petrocelli, O'Melveny & Myers LLP

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

Sentencing

***United States v. O'Brien and Burgess* (08-1569)**

Question Presented:

Section 924(c)(1) of Title 18 of the United States Code provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (viz., using or carrying a firearm during and in relation to an underlying offense, or possessing the firearm in furtherance of that offense) is carried out. The question presented is whether the sentence enhancement to a 30-year minimum when the

firearm is a machinegun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence.

Summary:

Respondents were convicted under 18 U.S.C. § 924(c), which makes it a crime for an individual to "use or carry a firearm" during the commission of certain federal crimes. The statute also provides for longer sentences when the firearm has certain dangerous characteristics (e.g. a machinegun) or is used in certain ways (e.g. "brandished" or "discharged"). Specifically, § 924(c)(1)(B)(ii) dictates a 30-year mandatory minimum sentence if the firearm is a machinegun. The First Circuit held that this "characteristics of the firearm" provision constitutes an element of the offense to be proved to a jury, rather than a sentencing provision that can be decided by a judge. The First Circuit relied on *Castillo v. United States*, in which the Supreme Court considered an earlier version of the same statute and reached the same conclusion. The United States argues that the current version of the statute is materially different, and that its new text and structure signal congressional intent to treat firearm characteristics as sentencing factors. The United States relies also on *Harris v. United States*, interpreting a "parallel provision" of the current § 924(c) as listing sentencing factors, not elements of the criminal offense. Respondent O'Brien asserts that § 924(c) has not been meaningfully altered since *Castillo* and thus *Castillo* is controlling. Respondent Burgess contends that the Court should look beyond the text and structure of the statute to the historical treatment of the fact at issue and the impact on sentencing, both of which indicate that the firearm characteristics ought to be criminal elements, rather than sentencing factors.

Decision Below: 542 F.3d 921 (1st Cir. 2008)

Petitioner's Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

Respondents' Counsel of Record:

Timothy P. O'Connell (Respondent O'Brien), Leslie Feldman-Rumpler (Respondent Burgess)

Ex Post Facto Clause

***Carr v. United States* (08-1301)**

Questions Presented:

The President signed the Sex Offender Registration and Notification Act ("SORNA") into law on July 27, 2006. Pub. L. 109-248 §§101-55, 120 Stat. 587. SORNA requires persons who are convicted of certain offenses to register with state and federal databases. See 42 U.S.C. § 16913(a). The law imposes criminal penalties of up to ten years of imprisonment on anyone who "is required to register * * * travels in interstate or foreign commerce * * * and knowingly fails to register or update a registration." 18 U.S.C. § 2250(a). On February 28, 2007, the Attorney General

retroactively applied SORNA's registration requirements to persons who were convicted before July 27, 2006. 72 Fed. Reg. 8896, codified at 28 C.F.R. § 72.3. The two questions presented are:

1. Whether a person may be criminally prosecuted under § 2250(a) for failure to register when the defendant's underlying offense and travel in interstate commerce both predated SORNA's enactment.
2. Whether the Ex Post Facto Clause precludes prosecution under § 2250(a) of a person whose underlying offense and travel in interstate commerce both predated SORNA's enactment.

Summary:

The Sex Offender Registration and Notification Act (SORNA) imposes new criminal penalties on anyone who "is required to register . . . travels in interstate or foreign commerce . . . and knowingly fails to register or update a registration" as a sex offender. At issue is whether SORNA may be applied retroactively to persons whose interstate travel preceded SORNA's enactment. The Seventh Circuit construed the statute to reach pre-enactment travel, holding that the travel requirement is jurisdictional hook rather than a "temporal requirement" and that the statutory purpose – preventing the evasion of registration requirements by crossing state lines – would be frustrated if pre-enactment travel rendered SORNA inapplicable. Petitioner argues that the Seventh Circuit disregarded the plain language of the statute, which speaks of travel only in the present tense, as well as statutory construction presumptions against retroactivity without a clear statement from Congress and in favor of avoidance of constitutional issues and lenity. In addition to defending the Seventh Circuit's statutory interpretation, respondent United States argues that the issue is not properly before the Court because petitioner failed to raise it below; the Seventh Circuit reached the statutory construction question only because it was raised by a different appellant in consolidated cases.

The Seventh Circuit also held that retroactive application of SORNA to pre-enactment travel would not violate the Ex Post Facto Clause, because the actual crime at issue is not complete until an offender fails to register within a reasonable time after SORNA's enactment. Petitioner takes issue with the Seventh Circuit's understanding of a SORNA violation as a "continuing offense," and argues that SORNA, as construed by the Seventh Circuit, in fact increases the penalties imposed for an offense completed before the Act's passage.

Decision Below: 551 F.3d 578 (7th Cir. 2008)

Petitioner's Counsel of Record:

Charles A. Rothfeld, Mayer Brown LLP

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

United States v. Marcus **(08-1341)**

Question Presented:

Whether the court of appeals departed from this Court's interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain-error review of an asserted ex post facto violation whether "there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct."

Summary:

Respondent Marcus was convicted under the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), enacted on October 28, 2000, for charged conduct that occurred between January 1999 and October 2001. Although respondent did not raise an ex post facto objection until appeal, the Second Circuit vacated his conviction and remanded for further proceedings, stating that the Rule 52(b) plain-error standard of review for forfeited claims requires a retrial "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." The government argues that under the *Olano* test and the Court's recent decision in *Puckett v. United States*, 129 S. Ct. 1423 (2009), a court of appeals may reverse under the plain-error standard only when an error affects the defendant's substantial rights and seriously affects the "fairness, integrity, and public reputation of the judicial process." Here, in the government's view, that standard is not satisfied because there was no reasonable probability that the error resulted in any prejudice to respondent. Respondent counters that the jury could have convicted him solely on the basis of pre-enactment conduct in clear violation of the Ex Post Facto Clause, and that the error did affect the fairness, integrity, and public reputation of the judicial process. Then-Judge Sotomayor filed a concurring opinion because, in her view, the relevant Second Circuit precedent did not "fully align with the principles inhering in the Supreme Court's recent applications of plain-error review." Justice Sotomayor took no part in the consideration or decision to grant certiorari and presumably will recuse herself from the rest of the proceeding as well.

Decision Below: 538 F.3d 97 (2d Cir. 2008)

Petitioner's Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

Respondent's Counsel of Record:

Herald Price Fahringer, Fahringer & Dubno

Other Public Law Cases

Attorneys' Fees

Astrue v. Ratliff **(08-1322)**

Question Presented:

Whether an "award of fees and other expenses" under the Equal Access to Justice Act, 28 U.S.C. 2412(d), is payable to the "prevailing party" rather than to the prevailing party's attorney, and therefore is subject to an offset for a pre-existing debt owed by the prevailing party to the United States.

Summary:

Respondent Ratliff is an attorney who successfully represented two claimants seeking benefits from the Social Security Administration and was awarded fees under the Equal Access to Justice Act (EAJA), which provides that "a court may award reasonable fees and expenses of attorneys . . . to the prevailing party." When the government reduced respondent's fee award due to government debts owed by her clients, respondent brought suit. The Eighth Circuit held that awards under the EAJA are to the prevailing parties' *attorneys* and thus cannot be used to offset the *parties'* debts to the government, relying on circuit precedent holding that a party's judgment creditors cannot recover EAJA fees. The United States seeks reversal, arguing that under the plain language of the EAJA, it is the party and not her attorney who is the intended recipient of the fees. Respondent counters that while the statute specifies that it is the party who may seek fees, it is not explicit about "whose property the fees become once awarded, or to whom the fees thus awarded are payable." Respondent also argues that reading the statute to allow off-sets for debts owed by a party would frustrate its purpose, by making it more difficult to secure attorneys to take on small Social Security claims on behalf of indigent clients.

Decision Below: 540 F.3d 800 (8th Cir. 2008)

Petitioner's Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

Respondent's Counsel of Record:

James D. Leach

Carmack Amendment

Kawasaki Kisen Kaisha v. Regal-Beloit Corp./ Union Pacific Railroad Company v. Regal-Beloit Corp. **(08-1553/08-1554)**

Questions Presented:

1. Whether the Carmack Amendment to the Interstate Commerce Act of 1887, which governs certain rail and motor transportation by common carriers within the United States, 49 U.S.C. §§ 11706 (rail carriers) & 14706 (motor carriers), applies to the inland rail leg of an intermodal shipment from overseas where the shipment was made under a "through"

bill of lading issued by an ocean carrier that extended the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Note, to the inland leg, there was no domestic bill of lading for rail transportation, and the ocean carrier privately subcontracted for rail transportation. [Kawasaki Kisen Kaisha]

2. Most imports to or exports from the United States are transported in containers that are carried both by sea on ships and by land on trains or trucks. Such "intermodal" or "multimodal" transportation of goods now accounts for more than $1 trillion each year in U.S. trade. The Carriage of Goods by Sea Act, 46 U.S.C. § 30701 (Notes) ("COGSA"), governs the rights and liabilities of parties to an international maritime bill of lading. COGSA allows parties to such maritime contracts to extend COGSA liability terms by contract for the entire carriage—including any inland leg of the journey. 46 U.S.C. § 30701 (Notes Secs. 7, 13). The Carmack Amendment to the Interstate Commerce Act ("ICA"), now codified at 49 U.S.C. § 11706 (rail carriers) and 49 U.S.C. § 14706 (motor carriers), supplies the default liability regime for rail and motor carrier transportation within the United States. Other provisions of the ICA authorize carriers to contract out of Carmack's default rules. *See* 49 U.S.C. § 10709. The question presented is:

Whether the Ninth Circuit must be reversed because it erroneously held, in conflict with four other circuits, that the Carmack Amendment applies to the inland leg of an international, multimodal shipment under a "through" bill of lading, and also erred by holding that carriers providing exempt transportation cannot contract out of Carmack under 49 U.S.C. § 10709 or by offering Carmack-compliant terms to the rail carriers own direct customer? [Union Pacific]

Summary:

Transportation of goods by rail or motor common carrier is governed by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §§ 11706, 14706, while transportation by ocean carrier is governed by the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 (Note). No single federal law governs transportation by ocean and land. Petitioner Kawasaki Kisen Kaisha (K-Line) contracted with respondent Regal-Beloit to deliver goods from China to Indianapolis by sea and rail, and subcontracted out the rail leg of the transport to petitioner Union Pacific. The contractual terms were all contained in a single bill of lading, called a "through" bill of lading. The goods were damaged when Union Pacific's train derailed, and Regal-Beloit brought suit in the United States. Petitioners claim that the forum selection clause of the bill of lading only permits suit to be brought in Tokyo. Regal-Beloit, however, argues that the forum selection clause is inoperable because the Carmack Amendment, which bars forum selection clauses, applies to the inland leg of the transport. The Court granted certiorari on a similar issue in the 2007 case of *Altadis USA, Inc. v. Sea Star Line, LLC*, but the parties settled and the issue was not decided.

Decision Below: 557 F.3d 985 (9th Cir. 2009)

Petitioner Kawasaki Kisen Kaisha's Counsel of Record:

Kathleen M. Sullivan, Quinn Emanuel Urquhart Oliver & Hedges LLP

Petitioner Union Pacific's Counsel of Record:

Maureen E. Mahoney, Latham & Watkins LLP

Respondent's Counsel of Record:

Dennis A. Cammarano, Cammarano & Sirna LLP