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Congress Lacks Constitutional Authority To Reach Drug Crimes in Foreign Waters

Congress exceeded its constitutional authority to ''define and punish . . . Offences against the Law of Nations'' when it directed the Department of Justice to prosecute drug offenses committed in other countries' territorial waters, the U.S. Court of Appeals for the Eleventh Circuit held Nov. 6. (*United States v. Bellaizac-Hurtado,* 11th Cir., No. 11-14049, 11/6/12)

''Because drug trafficking is not a violation of customary international law, we hold that Congress exceeded its power, under the Offences Clause, when it proscribed the defendants' conduct in the territorial waters of Panama. And the United States has not offered us any alternative ground upon which the Act could be sustained as constitutional,'' the court concluded in an opinion by Judge William H. Pryor Jr.

The defendants in this case were convicted under the Maritime Drug Law Enforcement Act, 46 U.S.C. app. § 1901 et seq., after they were apprehended in Panamanian waters in a wooden fishing boat loaded with cocaine. Authorities in Panama turned over the defendants to the United States and consented to their prosecution here.

In response to the defendant's constitutional challenges to the MDLEA, the government asserted that Congress's authority to extend U.S. law to drug crimes committed in other countries' waters resides in Art. I, § 8, which provides in relevant part: ''The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.''

The Eleventh Circuit and its sister courts have previously rejected challenges to application of MDLEA and other U.S. criminal statutes to drug offenses committed on the high seas. See, e.g., *United States v. Saac,* 632 F.3d 1203, 88 CrL 595 (11th Cir. 2011) (discussing High Seas Clause).

Because the offense in this case was committed in another country's territorial waters rather than on the high seas, the Eleventh Circuit found these prior decisions inapposite and focused on whether drug crimes qualify as ''Offences against the Law of Nations.''

Customary International Law. The power to define and punish ''Offences against the Law of Nations'' confers a power to reach only that conduct that is condemned by ''customary international law,'' the court explained.

The Framers used the term ''define'' to enable Congress to provide notice to the people through codification of what conduct could be prosecuted, and ''it did not authorize Congress to create offences that were not already recognized by the law of nations,'' the court said. This limit on the Offences Clause is evident in the writings and statutes of the time as well as in the principle that Congress may exercise only those powers granted to it by the Constitution, it observed.

''If Congress could define any conduct as 'piracy' or a 'felony' or an 'offence against the law of nations,' its power would be limitless and contrary to our constitutional structure,'' the court said.

In the context of approving U.S. prosecutions for crimes committed on the high seas, the *Saac* court and others have concluded that drug offenses are ''universally condemned'' by other nations. This does not mean, however, that the prohibition of drug crimes qualifies as ''customary international law'' for purposes of the Offences Clause, the court made clear.

''Drug trafficking was not a violation of customary international law at the time of the Founding, and drug trafficking is not a violation of customary international law today.''

JUDGE WILLIAM H. PRYOR JR.

The Eleventh Circuit agreed with the Sixth Circuit that the meaning of ''customary international law'' has two parts:

> First, there must be a general and consistent practice of states. This does not mean that the practice must be universally followed; rather it should reflect wide acceptance among the states particularly involved in the relevant activity. Second, there must be a sense of legal obligation, or *opinio juris sive necessitatis*. In other words, a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law; rather, there must be a sense of legal obligation. States must follow the practice because they believe it is required by international law, not merely because . . . they think it is a good idea, or politically useful, or otherwise desirable.

Drug Laws Aren't 'Customary International Law.' Courts disagree as to whether the Offences Clause limits the power of Congress to define and punish only those violations of customary international law that were established when the Constitution was ratified or whether the power granted by the clause varies with the changes in customary international law.

The Eleventh Circuit decided that it did not need to resolve this issue. ''Drug trafficking was not a violation of customary international law at the time of the Founding, and drug trafficking is not a violation of customary international law today,'' it said.

Looking at the history of drug laws, the court pointed out that the international community ''did not even begin its efforts to limit the drug trade until the turn of the twentieth century.''

The government argued that the passage of the 1988 United Nations Convention Against Illicit Traffic in

Narcotic Drugs and Psychotropic Substances demonstrates that drug trafficking violates contemporary ''customary international law.''

The Eleventh Circuit, however, decided that the U.N. convention does not treat drug trafficking as a violation of customary international law. Unlike an international ban on genocide, which sets up international tribunals to prosecute violations, the drug-trafficking convention ''relied on domestic enforcement mechanisms to combat drug trafficking and prohibited States Parties from interfering in the domestic enforcement efforts of other States Parties,'' the court noted.

It agreed with a Second Circuit opinion that said treaties may constitute sufficient proof of a norm of customary international law only ''if an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles.''

The 1988 convention and other international drug laws fall short of this ''uniformly and consistently'' standard, the Eleventh Circuit decided. The governments of Burma, Venezuela, Afghanistan, and other countries are so corrupted by the drug trade that they ''are not simply unable to prosecute drug traffickers, but are often unwilling to do so because their economies are dependent upon the drug trade,'' it pointed out.

''The persistent failure of these specially affected States to comply with their treaty obligations suggests that they view the curtailment of drug trafficking as an aspirational goal, not a matter of mutual legal obligation under customary international law,'' the court said. It also reported that scholars agree that drug trafficking is not a violation of contemporary customary international law.

In a concurring opinion, Judge Rosemary Barkett would have gone further and held that there are other constitutional obstacles to applying MDLEA to drug offenses committed in other countries' waters.

Tracy Michele Dreispul, of the Federal Public Defender's Office, Miami, argued for the defendants. Jonathan Colan, of the U.S. Attorney's Office, Miami, argued for the government.

BY HUGH B. KAPLAN

Full text at http://pub.bna.com/cl/1114049.pdf

Sentencing

Due Process Principles Don't Allow Judge To Rely on Prosecutor's Summary of Priors

The Washington Constitution's Due Process Clause does not permit a sentencing court to enhance a sentence on the basis of a prior conviction whose existence is established only through a prosecutor's unsworn summary of the defendant's record, the Washington Supreme Court decided Nov. 1. A legislative scheme intended to allow sentencing judges to rely on unsworn summaries of criminal histories when the defendants do not object is unconstitutional, the court held. (*State v. Hunley,* Wash., No. 86135-8, 11/1/12)

The state statutory scheme that existed before 2008 allowed a sentencing judge to rely on information in a presentence report when the defendant did not object to it. However, in a series of decisions including *State v. Ford,* 973 P.2d 452, 65 CrL 14 (Wash. 1999), and *State v. Mendoza,* 205 P.3d 113, 85 CrL 183 (Wash. 2009), the state high court condemned the practice of having prosecutors establish the existence of prior convictions with informal statements or unsworn written summaries of defendants' criminal records, so long as the defendant did not object. The court decided that a prior conviction must be established by ''evidence'' and that a prosecutor's oral assertions do not qualify. It held that a defendant must make some affirmative acknowledgment of a prior before it can be deemed conceded.

''It violates due process to base a criminal defendant's sentence on the prosecutor's bare assertions or allegations of prior convictions. And it violates due process to treat the defendant's failure to object to such assertions or allegations as an acknowledgment of the criminal history.''

JUSTICE MARY E. FAIRHURST

In 2008, state legislators moved to overturn this line of caselaw and make it easier for prosecutors to establish prior convictions when defendants did not object. The legislature amended Wash. Rev. Code § 9.94A.500(1) to provide: ''A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.'' The legislature also amended Section 9.94A.530(2) to state: ''Acknowledgment includes . . . not objecting to criminal history presented at the time of sentencing.''

Relying on the new scheme, a sentencing judge enhanced a defendant's offender score under the state sentencing guidelines on the basis of a prosecutor's unsworn written summary of the defendant's prior convictions.

The summary was not accompanied by any documentation of the alleged offenses, and the defendant's sentencing pleadings did not mention the priors.

New Laws Are Unconstitutional. The court made clear that one of the bases for its decisions in *Ford*, *Mendoza*, and the other cases was the protections of the state constitution's Due Process Clause. In an opinion by Justice Mary E. Fairhurst, the court said:

> The 2008 SRA amendments improperly modify our judicial interpretation of the constitution in *Ford* and its progeny. The burden to prove prior convictions at sentencing rests firmly with the State. While the burden is not overly difficult to meet, constitutional due process requires at least some evidence of the alleged convictions. A prosecutor's bare allegations are not evidence, whether asserted orally or in a written document. The State in this case could have established Hunley's prior convictions through certified copies of the judgment and sentences or other comparable documents. Our constitution does not allow us to relieve the State of its failure to do so simply because Hunley failed to object.

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''In other words, it violates due process to base a criminal defendant's sentence on the prosecutor's bare assertions or allegations of prior convictions,'' the court made clear. ''And it violates due process to treat the defendant's failure to object to such assertions or allegations as an acknowledgment of the criminal history,'' it added.

More specifically, the court concluded that the amendment to Section 9.94A.500(1) is unconstitutional as applied in cases in which prosecutors present only an unsupported criminal history summary. And Section 9.94A.530(2), which makes the defendant's failure to object to a criminal history summary an acknowledgment, ''is unconstitutional on its face,'' the court said. It explained that its prior cases ''have made clear the State must meet its burden to prove prior convictions by presenting at least some evidence. That burden is relieved only if the defendant *affirmatively* acknowledges the alleged criminal history.''

In further guidance to legislators, the court acknowledged that it had not previously addressed the constitutional sufficiency of a presentence report as evidence of prior convictions; however, it stressed that ''there are important differences between a DOC's presentence report and a prosecutor's summary statement.'' For example, the Department of Corrections ''is a neutral third party with no individual stake in the outcome of the sentencing,'' whereas ''the prosecuting authority 'often has a motive to demand a severe sentence,' underscoring the necessity for constitutional protection,' '' it said.

Pamela Beth Loginsky, of the Washington Association of Prosecuting Attorneys, Olympia, Wash., and James Garnet Baker and Gerald R. Fuller, of the Grays Harbor County Prosecutor's Office, Montesano, Wash., represented the state. Manek R. Mistry and Jodi R. Backlund, Olympia, represented the defendant.

BY HUGH B. KAPLAN

Full text at http://pub.bna.com/cl/861358.pdf

Confrontation

Defendant Had Right to Impeach Officer With Adverse Credibility Ruling in Other Case

A trial judge should not have precluded a defendant from cross-examining a witness about a judge's ruling in an unrelated case that the witness's testimony was not to be believed, the U.S. Court of Appeals for the Tenth Circuit held Nov. 9. (*United States v. Woodard,* 10th Cir., No. 11-2244, 11/9/12)

The judge's ruling violated not only the rules of evidence but also the defendant's Sixth Amendment right to confrontation, the court decided.

The defendant was a long-haul trucker who was carrying an unsecured load of packaging cartons from Arizona. When he passed through a port of entry in New Mexico, an inspector with the state Motor Transportation Division searched the truck and found duffel bags of marijuana among the pallets of cartons.

The defendant claimed at trial that he did not supervise the loading of the pallets and that he was unaware of the duffel bags and the marijuana. The MTD inspector testified, however, that the odor of raw marijuana emanating from the bags was strong, that the defendant had joked around with him inappropriately during the inspection, and that the defendant was nervous when he complied with the inspector's request to open the trailer doors.

''Here, had Defendant been permitted to cross-examine the inspector about the credibility determination, a reasonable jury might have had a significantly different impression of the inspector's credibility.''

JUDGE MONROE G. MCKAY

The defendant cross-examined the inspector with an audio recording of the inspection that showed that both the inspector and the defendant were joking around during the inspection. The defendant also brought out the fact that the inspector's report did not mention the defendant's nervousness.

The trial judge, however, precluded the defendant from cross-examining the inspector about the fact that another district court that was ruling on a suppression motion in an unrelated case determined that the inspector's testimony about smelling raw marijuana was not to be believed. The trial judge concluded that allowing the defendant to question the inspector about the credibility determination in the other case would likely confuse the jury, create a trial within a trial, and unfairly prejudice the government.

Rule 608(b). Answering a question of first impression in the circuit, the court agreed with the defendant that evidence of adverse credibility determinations are admissible under Fed. R. Evid. 608(b).

The court characterized the government's argument to the contrary as being based on a distinction between a finding of perjury, which would be admissible under Rule 608(b), and a mere credibility determination, which would not be admissible under Rule 608(b).

The Tenth Circuit quoted *United States v. White,* 692 F.3d 235, 249 (2d Cir. 2012), in which the Second Circuit observed, ''A finding that a witness is not credible is not fundamentally different from a finding that the witness lied. It often just reflects a fact finder's desire to use more gentle language.'' Accord, *United States v. Dawson,* 434 F.3d 956, 78 CrL 503 (7th Cir. 2006).

The court also adopted a list of factors compiled by the Second Circuit in *United States v. Cedeño*, 644 F.3d 79 (2d Cir. 2011), for judges to consult when exercising their discretion to allow cross-examination regarding prior adverse credibility determinations:

- ''whether the prior judicial finding addressed the witness's veracity in that specific case or generally'';
- ''whether the two sets of testimony involved similar subject matter'';
- ''whether the lie was under oath in a judicial proceeding or was made in a less formal context'';

■ ''whether the lie was about a matter that was significant'';

■ ''how much time had elapsed since the lie was told and whether there had been any intervening credibility determination regarding the witness'';

■ ''the apparent motive for the lie and whether a similar motive existed in the current proceeding''; and

■ ''whether the witness offered an explanation for the lie and, if so, whether the explanation was plausible.''

Applying these factors to the circumstances in the case before it, the Tenth Circuit decided that the adverse credibility determination at issue in this case was ''highly relevant and probative.''

Although the district court in the other case did not rule on the inspector's credibility in general, all the other factors support a conclusion that the cross-examination should have been allowed, the court concluded in an opinion by Judge Monroe G. McKay.

Rule 403. The government also argued that, even if the questioning about the adverse credibility ruling was admissible under Rule 608(b), the trial judge did not abuse her discretion by excluding the evidence under Fed. R. 403 as more prejudicial than probative.

Rejecting that argument, the appeals court said questions about the adverse credibility determination in the other case would have been no more confusing and no more likely to lead to a trial within a trial than the defendant's other impeachment evidence. Its main disagreement with the trial judge, however, was a difference in how it viewed the probative value of the cross-examination.

Right to Confrontation. The probative value of evidence is also an important consideration for courts' determination whether a limit on cross-examination was not just an evidentiary error but also violated the Sixth Amendment's Confrontation Clause.

The Tenth Circuit has previously described the line between an evidentiary error and a confrontation violation as existing at the place where the prohibition on cross-examination ''precludes [the defendant] from eliciting information from which jurors could draw vital inferences in his favor'' or ''precludes an entire relevant area of cross-examination.''

In *Delaware v. Van Arsdall,* 475 U.S. 673 (1986), the U.S. Supreme Court said a violation occurs when a ''reasonable jury might have received a significantly different impression of [the witness's] credibility had [the defendant] been permitted to pursue his proposed line of cross-examination.''

''Here, had Defendant been permitted to cross-examine the inspector about the credibility determination, a reasonable jury might have had a significantly different impression of the inspector's credibility; the jury could have reasonably concluded the inspector was willing to exaggerate, or even fabricate, the existence of a strong odor of marijuana when necessary to support a conviction,'' the Tenth Circuit decided.

Whether a restriction on cross-examination violated the Confrontation Clause does not depend on whether the person on the stand was the prosecution's ''star witness'' or whether the cross-examination was ''central'' to the defendant's defense and the jury's verdict, it made clear.

The court quoted *Van Arsdall*: ''It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of that right would not have affected the jury's verdict.''

The court went on to reverse the defendant's conviction after determining the constitutional violation was not harmless error.

Margaret A. Katze, of the Federal Public Defender's Office, Albuquerque, N.M., argued for the defendant. David N. Williams, of the U.S. Attorney's Office, Albuquerque, argued for the government.

BY HUGH B. KAPLAN

Full text at http://pub.bna.com/cl/112244.pdf

Search and Seizure

Motorist's Consent to Search for Drugs Allowed Officer to Open Gift-Wrapped Box

A police officer who obtained a motorist's consent to search a vehicle for drugs did not violate the Fourth Amendment by cutting the adhesive tape sealing a gift-wrapped package that was in the car and tearing open the box inside, the Nebraska Supreme Court held Oct. 26. (*State v. Howell,* Neb., No. S-12-115, 10/26/12)

The issue of how destructive a search can be before it exceeds the scope of a suspect's consent is unsettled. The Nebraska court pointed out that the officer's search in this case caused ''only minimal, cosmetic damage.''

''Because (1) the object of the search was clearly disclosed, (2) the container was not equivalent to a locked container and was not destroyed, and (3) the consent was not withdrawn after the officer's interest in the container was communicated to its owner, the search did not exceed the scope of the consent,'' the court reasoned in an opinion by Justice William B. Cassel.

A state trooper stopped the defendant for speeding and obtained his consent to search his car for drugs and weapons. The trooper placed the defendant in the police vehicle and turned his attention to the defendant's car.

The trooper found luggage and a gift-wrapped box in the cargo area of the defendant's car. He asked the defendant about the box, and the defendant replied that it was a present from his aunt to his brother.

The trooper returned to the rear of the defendant's car, which the defendant could not see from inside the trooper's car. The trooper then used a knife to slice through the tape on the giftwrap. He unwrapped one side and opened the box. As he did so, he tore the box. The trooper could then see that there was marijuana inside the box.

Reasonable Person Standard. Under the Fourth Amendment as interpreted in *Florida v. Jimeno,* 500 U.S. 248 (1991), a court determining the scope of a suspect's consent to search must ask, ''What would the typical reasonable person have understood by the exchange between the officer and the suspect?''

In *Jimeno,* the U.S. Supreme Court held that a paper bag whose top was rolled closed could be searched pursuant to a consent to search a car for drugs. The court

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explained that a reasonable person would know that drugs are not kept strewn about openly in vehicles and thus the consent necessarily included permission to look inside closed containers in the vehicle. In contrast, ''it is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk,'' the *Jimeno* court suggested.

Some courts have relied on the briefcase example in *Jimeno* to conclude that a general consent to search an area does not extend to the contents of a container in the area that would have to be destroyed in the course of the search. For example, in *United States v. Osage,* 235 F.3d 518, 68 CrL 281 (10th Cir. 2000), the U.S. Court of Appeals for the Tenth Circuit held that an officer exceeded a railroad traveler's general consent to search his luggage by opening cans of tamales. Similarly, the Eighth Circuit has held that police officers exceeded the scope of a consent to search for drugs when they sliced into a spare tire and cut into wax candles.

On the other hand, the Tenth Circuit has also held that drilling holes in a suspected hidden compartment on a vehicle was not so destructive that it exceeded the scope of a motorist's consent to search for drugs. *United States v. Gregoire,* 425 F.3d 872, 78 CrL 59 (10th Cir. 2005). Similarly, in *United States v. Mendoza-Gonzalez,* 318 F.3d 663, 72 CrL 332 (5th Cir. 2003), the Fifth Circuit held that Border Patrol agents at an immigration checkpoint who obtained a defendant's unqualified consent to ''take a look in the back'' of a commercial truck did not exceed the scope of the consent by slicing open the adhesive tape that closed a small cardboard box the agents saw inside.

Destructive Searches. The Nebraska court emphasized that the identified object of the trooper's search was drugs and that ''one would reasonably expect drugs to be hidden in a closed container such as the gift-wrapped box.''

The court relied upon *Osage* for the principle that a search exceeds the scope of a consent when it destroys a container to the extent that it is ''useless'' and ''incapable of performing its intended function.'' Although the trooper cut the tape and tore the box, ''the box and gift wrap were not rendered useless by the search,'' the court stressed. The tape and the tear in the ''generic cardboard box'' could be fixed with more pieces of tape, it explained.

Moreover, even after the trooper expressed an interest in the package, ''Howell did not revoke or limit his consent to search,'' the court pointed out. Again citing Tenth Circuit caselaw, the court said, ''The general rule is that when a suspect does not limit the scope of a search, and does not object when the search exceeds what he later claims was a more limited consent, an officer is justified in searching the entire vehicle.''

''Under the circumstances, we conclude that the search of the box was within the scope of Howell's consent,'' the court said.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, Grand Island, Neb., represented the defendant. Kimberly A. Klein, of the Nebraska Attorney General's Office, Lincoln, Neb., represented the state.

BY HUGH B. KAPLAN

Full text at http://pub.bna.com/cl/s12115.pdf

Sex Offenders

Itinerant Sex Offender Didn't Violate Duty to Register Change of 'Residence'

The Kansas Supreme Court Oct. 26 reversed the conviction of a sex offender for failing to register a change of ''residence'' during a time he had no fixed address. (*State v. LeClair,* Kan., No. 101,201, 10/26/12)

How to handle homeless sex offenders' registration obligation has sent courts in other states in different directions. The Kansas court adopted a narrower understanding of the term ''residence'' than the one used in some other states, but the legislature has recently amended the statutory scheme to address the issue.

The Kansas sex offender registration scheme provides: ''If any person required to register as provided in this act changes the address of the person's residence, the offender, within 10 days, shall inform in writing the law enforcement agency where such offender last registered and the Kansas bureau of investigation of the new address.''

The evidence presented at the defendant's trial showed that he left his residence in Saline County with a plan to eventually end up in Las Vegas. He notified authorities in Saline County that he was leaving and not coming back.

The defendant spent the next three weeks hitchhiking across the Southwest, sleeping in the ''bush'' along roadsides, not staying in any one city for more than three or four days. When he arrived in Las Vegas, he rented an apartment and, within 10 days of doing so, notified Kansas authorities of his new address.

''It is difficult to imagine how . . . an offender should inform law enforcement of his 'new [residential] address' as a 'park bench in Albuquerque.' And it is equally difficult to imagine how that park bench for one night establishes a 'change [in] the address of the person's residence.' ''

CHIEF JUSTICE LAWTON R. NUSS

Prosecutors subsequently defended his conviction by asserting that the defendant could have apprised the Saline County Sheriff of his stops in the cities along the way to Las Vegas. The prosecutors argued that this interpretation of the statute is the one most consistent with the legislature's broad intent to protect the public from sex offenders.

Different Approaches. The problem of homeless sex offenders often comes up as a result not only of the undesirability of sex offenders as tenants or cohabitants but also of local restrictions imposed on where sex offenders may reside. Courts have struggled with apply-

ing the concepts of ''address'' and ''residence'' to homeless sex offenders.

Some courts have found constitutional vagueness problems with application of registration obligations to homeless offenders. See, e.g., *Santos v. State,* 668 S.E.2d 676, 84 CrL 168 (Ga. 2008). Other courts have taken different approaches.

For example, in *Commonwealth v. Wilgus,* 40 A.3d 1201, 91 CrL 75 (Pa. 2012), the Pennsylvania Supreme Court upheld a conviction of a homeless sex offender for failing to register a change of residence under a statutory scheme that defined ''residence'' as the ''location'' where an offender ''resides or is domiciled or intends to be domiciled for 30 consecutive days or more during a calendar year.''

In *People v. Dowdy,* 802 N.W.2d 239, 89 CrL 669 (Mich. 2011), the Michigan Supreme Court decided, ''Even if a homeless sex offender with transient sleeping arrangements cannot establish a 'residence' . . . the offender is still capable of reporting sufficient information regarding where the offender lives for purposes of identifying a 'domicile.' . . . Difficulties in verifying an offender's information do not excuse the offender from complying with [registration] requirements.''

In contrast, in *Twine v. State,* 910 A.2d 1132, 80 CrL 282 (Md. 2006), the Maryland Court of Appeals overturned a conviction on the ground that the defendant's eviction and subsequent homelessness did not constitute a change in ''residence'' for purposes of a registration obligation.

General Statutory Definition. In 2011, the Kansas legislature enacted a statutory amendment that requires a transient sex offender to ''report in person to the registering law enforcement agency of such county or location of jurisdiction in which the offender is physically present within 3 business days of arrival in the county or location of jurisdiction.'' This statute, however, was not in effect when the defendant in this case traveled in 2007 from Kansas to Las Vegas.

The Kansas court, therefore, waded into the question that has divided the other courts. Prosecutors contended that an approach like the one taken in *Dowdy* is most consistent with the legislature's goal of protecting the public.

The court, however, hewed close to the general statutory definition of ''residence.'' The code defines the term as ''the place which is adopted by a person as the person's place of habitation and to which, whenever the person is absent, the person has the intention of returning. When a person eats at one place and sleeps at another, the place where the person sleeps shall be considered the person's residence.''

In an opinion by Chief Justice Lawton R. Nuss, the supreme court emphasized that courts are required to apply statutory definitions unless ''the construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute.'' Defining ''residence'' as ''an actual place of habitation and where the absent person intends to return'' is ''clearly . . . not inconsistent with the manifest intent of the legislature,'' it decided.

''There is no inconsistency or repugnancy because the statute distinctly requires that once the offender 'changes the *address* of the person's residence,' the offender must register within 10 days of obtaining 'the *new address*' of residence,'' the court explained. Rejecting the *Dowdy* approach, it said:

> It is difficult to imagine how . . . an offender should inform law enforcement of his ''new [residential] address'' as a ''park bench in Albuquerque.'' And it is equally difficult to imagine how that park bench for one night establishes a ''change [in] the address of the person's residence.'' Consequently, we conclude that under K.S.A. 22-4904(b), an offender does not change the address of residence until obtaining a new place of habitation where the person intends to remain.

The ''essentially unrefuted'' evidence in this case established that, during the time between the defendant's departure from Kansas and his arrival in Las Vegas, he ''never adopted a 'place of habitation,' to which, whenever he was absent, he had 'the intention of returning,' '' the court decided. ''Accordingly, during that time period he did not 'change the address of his residence' to a 'new address.' . . . So he was not required to register under [Kan. Stat. Ann. §] 22-4904(b),'' it held.

Meryl Carver-Allmond, of the Kansas Capitol Appellate Defender Office, Topeka, Kan., argued for the defendant. Christina Trocheck, of the Saline County Attorney's Office, Salina, Kan., argued for the state.

BY HUGH B. KAPLAN

Full text at http://pub.bna.com/cl/101201.pdf

Appeals

Window For Filing Appeal Did Not Close Where Judgment Not Listed on Public Docket

A conviction that was not recorded on the docket in a publicly accessible manner was not officially ''entered on the criminal docket'' for purposes of starting the clock on a convicted defendant's 14-day window to file notice of an appeal, the U.S. Court of Appeals for the Tenth Circuit ruled Nov. 7. (*United States v. Mendoza,* 10th Cir., No. 10-4165, 11/7/12)

A judgment is not entered on the criminal docket for purposes of Fed. R. App. P. 4(b)(6) unless judgment is officially noted in a publicly accessible manner, the court said in an opinion by Judge Carlos F. Lucero.

''This does not mean that a court must provide access to the judgment itself, but the public docket must reflect the date judgment was entered,'' it noted.

Sealed Judgment. The defendant pleaded guilty to conspiring to distribute methamphetamine and was sentenced to 135 months' imprisonment. The trial court filed a sealed judgment in a document titled ''Criminal Docket . . . Internal Use Only'' that was not noted or otherwise referenced on the docket sheet available to the public.

A little more than a year later, the defendant filed a pro se notice of appeal, claiming that the prosecution breached the terms of the plea deal by not following through on its promise to recommend a sentence at the low end of the U.S. Sentencing Guidelines range.

In his notice, the defendant complained that he was forced to request a docket sheet from the district court because—after unsuccessfully trying to contact his lawyer—he noticed that the publicly accessible docket indicated ''no activity . . . after his sentencing.''

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The government moved to dismiss, arguing that the notice of appeal was untimely because it failed to meet the requirement in Rule 4(b)(1)(A)(i) that says a notice of appeal must be filed within 14 days after ''the entry of either the judgment or the order being appealed.'' It contended that the judgment in this case was ''entered on the criminal docket'' when the court filed a sealed judgment.

The defendant maintained that the notice of appeal was timely because the judgment was never officially entered under Rule 4(b). The publicly available docket sheet contained no indication that a judgment was issued, he pointed out. The court of appeals agreed with the defendant and ruled that the appeal was not time-barred.

A lower court need not necessarily provide public access to the judgment itself, it added. However, the public docket must reflect the date that the judgment was entered, the court said.

'Entry' Means 'Public Entry.' Because the federal rules do not define the phrase ''entered on the criminal docket,'' the court looked to the ordinary meaning of those words to conclude that a docket is ''a formal register kept by a court in which proceedings and filings are recorded.''

''Although contemporary dictionary definitions do not expressly require that a docket be publicly accessible, numerous sources indicate that 'docket,' as that term is ordinarily used, refers to a public document,'' it concluded.

The court found support for this conclusion in an unpublished decision that held that the Rule 4(b) clock for filing a 28 U.S.C. § 2255 petition did not start running until the entry of judgment appeared on the publicly accessible district court docket.

The Tenth Circuit likened this result to the decision it reached in a bankruptcy case seven years earlier, where it ruled that the deadline for entering an appeal after ''entry of a judgment or order in a docket'' was not measured from the date the judge signed the order of judgment, because that was not an entry on a publicly accessible docket.

It also reasoned that interpreting the phrase ''entered on the criminal docket'' to mean entry of judgment in a public manner comports with the purpose of the rule, which was enacted to fix the precise time at which a judgment is entered.

''A publicly available entry ensures this purpose will be satisfied,'' whereas fixing the date based on entries visible only to court staff will only sow confusion, the court decided. Indeed, this case exemplifies that problem because both sides were puzzled about the precise dates involved, it said. The defendant's appellate counsel indicated in the docketing statement uncertainty about the date, and the government cited this confusion as cause justifying its late filing of a motion to dismiss.

Due Process Concerns. Although neither side mentioned the constitutional implications of this issue, the court pointed out that the government's position also raises serious due process concerns. An essential principle of due process is that a deprivation of life, liberty, or property must be preceded by notice, it said.

The court further noted that its decision is consistent with public policy favoring openness and transparency. The assumption that dockets are community records open for public inspection ''has a long pedigree'' dating back to the English common law, it noted.

The ruling did not help the defendant in the long run, however, because the court ruled against him on the merits. It concluded that he could not show a reasonable probability that he would have received a lesser sentence absent the government's breach.

Jill M. Wichlens and Raymond P. Moore, of the Federal Public Defender's Office, Denver, represented the defendant. Elizabethanne C. Stevens and Carlie Christensen, of the U.S. Attorney's Office, Salt Lake City, Utah, represented the government.

BY LANCE J. ROGERS

Full text at http://pub.bna.com/cl/104165.pdf

Civil Commitment

Teleconferenced Civil Commitment Hearing Didn't Violate Offender's Due Process Rights

A convicted sex offender's right to due process was not violated when a court used video conferencing technology at a hearing to decide whether the offender—who had already served his criminal sentence—should remain civilly committed under a state sexually violent predator law, the Virginia Supreme Court ruled Nov. 1. (*Shellman v. Commonwealth*, Va., No. 120261, 11/1/12)

In an opinion by Justice Lawrence L. Koontz Jr., the court stressed that, unlike at a criminal trial, in-person confrontation and observation of witnesses is not a major concern in a commitment hearing because the court is primarily basing its decision on experts' qualifications and the substance of their opinions.

Although the right to confer privately with counsel in the midst of a proceeding may be important, there was no evidence that the offender here sought such a consultation or that the court would have refused to grant it had he asked, the court noted.

Sexually Violent Predator. After the offender had served an eight-year prison term for aggravated sexual battery, he was remanded to the state Department of Behavioral Health and Development Services for secure inpatient treatment pursuant to Virginia's Sexually Violent Predator Act, Va. Code § 37.2-900 et seq.

A year later, the court held its annual assessment hearing to gauge whether the offender should remain civilly committed as a sexually violent predator. The court indicated it would conduct the hearing using the ''two-way electronic video and audio communication system'' approved in Section 37.2-910(A), which dictates that this procedure shall be used ''whenever practicable.''

The offender objected to the video conferencing process and filed a motion asking to be allowed to attend the hearing in person. He argued that the teleconferencing option would stifle his ability to communicate with his lawyer, interfere with his right to challenge and present evidence, and violate his right to due process.

The court denied his motion and conducted the hearing by video and audio feed. At the conclusion of the hearing, it found the offender was still a sexually violent predator and ruled that he should remain in secure inpatient treatment.

The Virginia Supreme Court found no constitutional flaw in the statute or the teleconferencing procedure and affirmed the offender's continued commitment.

Right to Be Heard and to Give Evidence. The court acknowledged that involuntary civil commitment entails a significant deprivation of liberty that triggers federal and state procedural due process safeguards. Chief among these protections is the right to be heard, to present evidence, and to be represented by counsel, it said. However, these rights were amply protected in this case because in-person attendance was not crucial given the limited goals of the proceeding, it added.

The process here appropriately balanced the rights of the individual against the interests of the state in conducting the proceeding in an efficient and effective manner, the court decided.

It likened the use of video conferencing in this context to its use in a prisoner's competency commitment hearing, which has been approved by the U.S. Court of Appeals for the Fourth Circuit. In a criminal trial, observation of the demeanor of the offender and the various fact witnesses will likely play a big role in the trier of fact's conclusions, the state court noted. By contrast, the SVP commitment hearing is designed to gauge whether an offender is still a sexually violent predator, it said. This determination is based primarily on the testimony of experts, whose opinions will differ only in their theoretical premises, not factually, it noted.

As a result, courts evaluating which experts' opinions are more persuasive do not focus on the experts' demeanor but instead concentrate on their qualifications and the substance and thoroughness of their opinions, the court explained.

Accordingly, the statutory authority for conducting annual assessment hearings by video conference is not constitutional facially or as applied in this case, it concluded.

Right to Counsel Not Impinged. The court also rejected the offender's claim that the video conferencing interfered with his right to receive the effective assistance of his attorney. Although there were some minor technical glitches involving parties not speaking close enough to the microphones, and the video feed failed at one point, these malfunctions were immediately remedied and did not hinder the overall presentation of evidence, the court stressed.

''The record in this case amply demonstrates that Shellman and his counsel were able to participate fully in the proceedings, including the ability to see and hear the judge, opposing counsel, and the witnesses and to cross-examine Dr. Dennis,'' it concluded.

Addressing the offender's claim that he was precluded from consulting privately with his lawyer, the court pointed out that there was no evidence that he or his attorney ever sought to communicate privately or that such a request would not have been honored by the lower court.

James C. Martin, Martin & Martin, Danville, Va., represented the offender. John H. McLees, Kenneth T. Cuccinelli II, Wesley G. Russell Jr., and Jill M. Ryan, of the Virginia Attorney General's Office, Richmond, Va., represented the state.

BY LANCE J. ROGERS

Full text at http://pub.bna.com/cl/120261.pdf

Civil Liability

911 Operator's Assurance Needn't Be False To Support Liability for Negligent Fulfillment

The Washington Supreme Court Nov. 1 shot down the idea that only false assurances can trigger the public-duty doctrine's ''special relationship'' exception, which creates an obligation on the part of government actors to protect someone who has detrimentally relied on their specific promises of action. (*Munich v. Skagit Emergency Communications Center*, Wash., No. 85984-1, 11/1/12)

The plaintiffs' decedent was shot and killed approximately 18 minutes after he placed his first 911 call. He told the dispatcher that his neighbor has just shot at him and missed. The dispatcher assured him that a deputy was en route to him as they spoke, and they agreed he would wait where he was.

The dispatcher classified the call as a priority two weapons offense rather than a priority one emergency call. This classification caused the dispatched deputy to travel more slowly to the scene than he would have otherwise. Two minutes before the deputy got there, the decedent was fatally shot.

The plaintiffs sued under state law, claiming that the county negligently responded to the incident. The county sought summary judgment, arguing it was not liable under the public-duty doctrine. Many states' negligence laws require a plaintiff suing a governmental entity to show that it owed a duty of care to the plaintiff beyond the obligation owed to the public at large. A similar doctrine was recognized by the U.S. Supreme Court for due process claims in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

The county took the position that, because the county did not provide any inaccurate or false information to the decedent that he relied upon, the special-relationship exception to the public-duty doctrine did not apply.

Under Washington law, a special relationship between a municipality's agents and a plaintiff will exist and thereby give rise to an actionable duty if three elements are established: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the public official; and (3) justifiable reliance on the assurance by the plaintiff.

Falsity Not Required. In an opinion by Justice Mary E. Fairhurst, the state supreme court held that the express assurances need not be false or inaccurate to give rise to a special relationship so long as the assurance promises some action.

''The assurances may be superficially correct but negligently fulfilled,'' the court pointed out. ''The accuracy, or lack thereof, of an assurance has no bearing on the issue of whether an actionable duty was established.''

The court acknowledged that some of its cases have considered the falsity or inaccuracy of an express assurance, but it said, ''That consideration has never been a necessary element, nor should it be, when the government is promising action.''

A case the county relied upon involved the very different scenario of a plaintiff who relied on the issuance

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of a building permit to build a sawmill that turned out to be barred by noise ordinances, the court pointed out. That case held that no special relationship was established because the sawmill operator did not make any specific inquiry or receive any false information about existing noise regulations. The inaccuracy requirement is inherent to that scenario, because if the plaintiff had been induced to build his sawmill with accurate assurances regarding the law, he would have suffered no loss, the court said.

''In 911 cases, the plaintiff relies not only on the information contained in the assurance, but also on the fulfillment of the action promised in the assurance.''

JUSTICE MARY E. FAIRHURST

The crucial difference is between assurances regarding information and assurances regarding action, the court explained. ''In 911 cases, the plaintiff relies not only on the information contained in the assurance, but also on the fulfillment of the action promised in the assurance,'' it said. ''It is possible for a 911 caller to detrimentally rely on a statement that is technically true but negligently fulfilled.''

The court illustrated this principle with a hypothetical in which a 911 caller relies on assurances that an ambulance is on the way and waits rather than taking alternate transportation to the hospital. The ambulance is on the way, but the paramedics take a detour to get coffee, thereby negligently carrying out the promised action.

Under the county's view, the defendants would not be liable for the detrimental reliance because the statement that an ambulance was on the way was technically true, the court noted. But to assert that the county would have no duty ''because it 'truthfully' assured the caller help was 'on the way' rings hollow. It is readily apparent that promised action requires more than superficially accurate words,'' the court said.

''We hold that here, where the alleged express assurance involves a promise of action, the plaintiff is not required to show that the assurance was false or inaccurate in order to satisfy the special relationship exception,'' the court said. ''In a 911 case like this, the express assurance element is satisfied when the operator assures the caller law enforcement officers are on their way or will be sent to the caller's location.

In this sort of case, the truth or falsity of the assurances may be relevant, but only in relation to the issue of a breach, not to the establishment of a duty, the court added.

Justice Tom Chambers, concurring and joined by Justices Charles W. Johnson, Debra L. Stephens, Charles K. Wiggins, and Steven C. Gonzalez, wrote separately to explain that the only governmental duties to which the court has applied the public-duty doctrine are those imposed by a statute, ordinance, or regulation, not by the common law.

Justice James M. Johnson, dissenting, said it is impossible to detrimentally rely on a true and accurate statement of fact.

Paul W. Whelan, Kevin Coluccio, and Ray W. Kahler, of Stritmatter Kessler Whelan Coluccio, Seattle, represented the plaintiffs. Mark R. Bucklin and Shannon M. Ragonesi, of Keating, Bucklin & McCormack Inc. P.S., Seattle, represented the defendants.

BY ALISA A. JOHNSON

Full text at http://pub.bna.com/cl/85984-1.pdf

In Brief

Plain-Error Prejudice Isn't *Strickland* Prejudice

The showing of prejudice required by the plain-error rule is different from the showing of prejudice required to overturn a conviction on the basis of ineffective assistance of counsel, the Colorado Supreme Court made clear Nov. 5. (*Hagos v. People,* Colo., No. 10SC424, 11/5/12)

The defendant's direct appeal and motion for post-conviction relief were both based on the trial judge's giving of a particular jury instruction to which the defendant did not object. On direct appeal, Colorado courts employ a plain-error standard for unpreserved error that mirrors the standard used by the federal courts, and the Court of Appeals held that, although the jury instruction was indeed erroneous, the defendant was unable to demonstrate that it cast serious doubt on the accuracy of the outcome of the proceedings.

In his motion for post-conviction review, the defendant claimed that his trial counsel provided ineffective assistance by failing to object to the erroneous instruction. Under *Strickland v. Washington,* 466 U.S. 668 (1984), a defendant making a Sixth Amendment claim of ineffective assistance of counsel must establish that there is a ''reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'' A ''reasonable probability'' was defined in *Strickland* as ''a probability sufficient to undermine confidence in the outcome.''

The Colorado Court of Appeals has previously relied upon *Gordon v. United States,* 518 F.3d 1291, 82 CrL 624 (11th Cir. 2008), to equate the plain-error prejudice standard with the *Strickland* prejudice standard. Accordingly, it held that the defendant in this case could not, as a matter of law, establish the prejudice required by *Strickland* because he failed to establish plain-error prejudice on direct review.

In an opinion by Justice Nancy E. Rice, the state high court explained that the *Strickland* standard does not require as strong a showing of prejudice as the plain-error standard. Looking at prior articulations of the two standards, it pointed out that an error that casts serious doubt on the reliability of a verdict is worse than an error that undermines confidence in the verdict.

The court also emphasized that the two standards serve different purposes—one protects defendants from mistakes by trial judges, while the other protects them from mistakes by their attorneys. Each standard requires its own fact–specific analysis in light of the right it was designed to protect, the court said.

In an opinion concurring only in the decision to deny post-conviction relief, Justice Allison H. Eid argued that there is no functional difference between the two standards. Justice Nathan B. Coats did not participate in the case. (*Full text at http://pub.bna.com/cl/10sc424.pdf*)

Kansas Wiretap Law Ruled 'Too Permissive'

Communications that were intercepted under the authority of a state wiretap law that is more permissive than its federal counterpart must be suppressed, the Kansas Supreme Court ruled Nov. 2. (*State v. Bruce,* Kan., No. 105,884, 11/2/12)

The Kansas scheme allows the state attorney general to delegate the power to apply for a wiretap order to an assistant attorney general. This violates a central tenet of the federal statutory scheme, which specifies that ''only the attorney general'' is authorized to make the application, the court said in an opinion by Justice Carol A. Beier.

When Congress enacted the federal wiretap statute, 18 U.S.C. § 2515 et seq., it intended to preempt the field of electronic surveillance regulation by making it clear that no state could authorize the interception of wire, oral, or electronic communications with less justification than is required by federal law, the court explained.

The court acknowledged there are ''conflicting decisions'' from other jurisdictions on the question of whether a principal prosecuting attorney's power to apply for a wiretap order may be delegated to others. However, it rejected those approaches by looking to the plain meaning of the federal law, which makes clear that the power to apply for a wiretap order lies exclusively with the principal prosecuting attorney of the state.

The good-faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897 (1984), does not salvage the search, the court added. That is a court-created exception to a court-created remedy designed to deter law violations of constitutional rights, whereas the exclusionary remedy applicable here is provided for in both the federal and state statutory schemes, it pointed out. (*Full text at http://pub.bna.com/cl/105884.pdf*)

State Can Retain DNA After Suspect Is Acquitted

A defendant who was acquitted of a crime still lacks standing to raise a Fourth Amendment objection to the state's retention of his DNA profile or its use in a subsequent criminal investigation, the Ohio Supreme Court decided Nov. 1. (*State v. Emerson,* Ohio, No. 2011-0486, 11/1/12)

In 2005, police officers investigating a rape obtained a search warrant authorizing them to seize a sample of the defendant's DNA. The defendant was subsequently acquitted of the rape. His DNA profile, however, remained in the state's database. Years later, officers investigating a murder consulted the database and matched the defendant's profile to that of DNA found at their crime scene.

In an opinion by Justice Robert R. Cupp, the court distinguished between the defendant's privacy in his DNA sample and his privacy in the DNA profile created by the police. An expectation of privacy in the work product of rape investigators is not one that qualifies as being ''reasonable'' under the Fourth Amendment, the court decided.

''Because a search warrant was executed to obtain the DNA sample, the Fourth Amendment was satisfied,'' the court said. ''Thus, the true focus of appellant's argument is on the DNA profile that the sample yielded. But, as discussed above, it is the *profile* for which there is not a reasonable expectation of privacy,'' it stressed.

The court also held that ''retention by the state of a DNA profile for possible future comparison with profiles obtained from unknown samples taken from a victim or a crime scene does not differ from the retention by the state of fingerprints for use in subsequent investigations.''

Courts in some other states have reached the same conclusions. See, e.g., *Herman v. State,* 128 P.3d 469, 78 CrL 666 (Nev. 2006). (*Full text at http://pub.bna.com/cl/2011-0486.pdf*)

Shooting Justified Warrantless Entry Two Hours Later

A heavy police presence and the passage of a couple of hours did not keep a shooting from providing exigent circumstances sufficient to justify an officer's warrantless entry of a nearby backyard, the U.S. Court of Appeals for the Seventh Circuit held Nov. 6. (*United States v. Schmidt,* 7th Cir., No. 12-1738, 11/6/12)

An officer noticed bullet holes in the defendant's duplex and in a car parked next to it, and he saw shell casings nearby and in the shared backyard. The yard was enclosed by a chain-link fence bearing ''No Trespassing'' signs. The officer entered the backyard and found a rifle used to convict the defendant of being a felon in possession of a firearm.

The parties agreed that—after the U.S. Supreme Court's recent decision in the GPS tracker case *United States v. Jones,* 90 CrL 537 (U.S. 2012)—the trespass onto curtilage was a ''search'' for Fourth Amendment purposes regardless of whether the defendant had a reasonable expectation of privacy in the backyard.

In an opinion by Judge Ann Claire Williams, the Seventh Circuit emphasized that ''the prime exigency in this case was the potential for wounded victims, not necessarily the threat of further shooting.'' Notwithstanding the heavy police presence and the passage of time, ''if a victim had been shot in the yard, as a reasonable officer could have suspected, that victim would not have become any less wounded after two hours had passed; to the contrary, he would need immediate aid,'' the court reasoned.

''It would not have made sense for an officer to wait for a warrant when a shooting victim could have been dying in the yard, and the officer also did not need to know that someone had actually been shot in order to go into the yard,'' the court concluded. (*Full text at http://pub.bna.com/cl/121738.pdf*)

Use of P2P Network Was 'Distribution' of Porn

A defendant's use of a peer-to-peer file-sharing program on his computer to collect pornography will support a federal sentence enhancement for distribution of child pornography even in the absence of evidence that the defendant knew that the program would allow others to share his files, the U.S. Court of Appeals for the Tenth Circuit held Nov. 6. (*United States v. Ray,* 10th Cir., No. 11-3383, 11/6/12)

Section 2G2.2(b)(3)(F) of the U.S. Sentencing Guidelines provides an enhancement for child pornography offenses that involve ''distribution.'' The Tenth Circuit has joined other circuits that have applied the enhancement on the basis of defendants' use of peer-to-peer file-sharing programs after noting evidence that the de-

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fendants were aware that other members of the P2P network could access the files on the defendants' computers. See, e.g., *United States v. Bolton,* 669 F.3d 780, 90 CrL 625 (6th Cir. 2012).

The Tenth Circuit decided to go a step further and agreed with courts that have approved application of the guideline in the absence of evidence of knowledge. See, e.g., *United States v. Carani*, 492 F.3d 867, 81 CrL 531 (7th Cir. 2007).

The court acknowledged the common law principle discouraging strict liability and courts' traditional addition of mens rea elements when statutes are silent. In addition, it has previously held that use of a P2P program satisfied the ''distribution'' element of the statutory offense where the defendant admitted he was aware that other program users had downloaded child porn from him. *United States v. Shaffer,* 472 F.3d 1219, 80 CrL 342 (10th Cir. 2007).

But the court emphasized that the common-law principle does not apply to constructions of the sentencing guidelines because there is no concern about criminalizing apparently innocent conduct. In an opinion by Judge Harris L. Hartz, it said, ''We have repeatedly held that when the plain language of a guideline, in contrast to a criminal statute, does not include a mens rea element, we should not interpret the guideline as containing such an element.'' (*Full text at http://pub.bna.com/cl/113383.pdf*)

Double Standard on Sequestration Is Constitutional

A provision exempting victims from the rules on witness sequestration did not violate equal protection principles to the extent it allowed a murder victim's mother, but not the accused killer's father, to remain in the courtroom while other witnesses gave testimony, the Georgia Supreme Court ruled Oct. 29. (*Nicely v. State,* Ga., No. S12A0876, 10/29/12)

The defendant argued on appeal that his father was denied equal protection because both his father and the victim's mother were witnesses who had comparable familial interests in the trial. He contended that his father received different treatment, however, when he was excluded from attending portions of the trial under the court's sequestration order whereas the mother was allowed to stay.

The trial judge had ruled that the victim's mother was exempted under the state's Crime Victims' Bill of Rights, which provides that victims of a criminal offense are excepted from the provisions on sequestration in Ga. Code § 24-9-61. The mother qualified as a ''victim'' for purposes of this statutory exemption because the defendant was charged with murdering her child, the judge concluded.

In an opinion by Justice Keith R. Blackwell, the state high court rejected the defendant's claim and affirmed his conviction. First, no fundamental right was impacted, it noted. Courts addressing the issue have repeatedly held that the rule of sequestration does not even implicate the right to public trial, much less infringe upon it, it pointed out.

Because no fundamental interest was at stake, the differential treatment was constitutional if the distinction is rationally related to a legitimate state interest. The court decided that it is because the rule of sequestration promotes legitimate state interests in, among other things, restraining witnesses from dishonestly tailoring their testimony.

Likewise, the statutory exemption to the sequestration rules promotes the state's legitimate interest in according to crime victims the same constitutional right to be present enjoyed by the accused, the court decided. (*Full text at http://pub.bna.com/cl/S12A0876.pdf*)

Uncharged Prior Sex Abuse Wrongly Admitted

Evidence that a child-sex-abuse defendant had previously molested the complainant and had also molested another very young girl in the complainant's presence was not admitted for any permissible purpose, the Oregon Supreme Court held Oct. 18. (*State v. Pitt,* Or., No. S058996, 10/18/12)

In general, evidence of the defendant's other bad acts is not admissible to show that he has a bad character and acted in conformance with it. However, there are exceptions to the rule. The trial court relied on three of those exceptions, reasoning that the evidence was relevant to prove intent, absence of mistake or accident, and identity.

The defendant challenged the evidence in a motion in limine, so the trial judge decided prior to trial to admit the evidence. This circumstance was important to the Supreme Court's reasoning.

In an opinion by Justice Robert D. Durham, the court noted that the trial judge reasoned that evidence can be admitted to prove identity if it is relevant to bolster a witness's identification. The court saw this as no more than allowing an impermissible character inference in a different guise. In this case, the complainant and the defendant knew each other, so there was little chance of mistaken identity. Against that backdrop, evidence that the complainant observed the defendant molesting another child merely suggested that he acted consistently with a character to abuse young girls, the court said.

For other bad acts to be properly admitted to prove intent and absence of mistake or accident, it must first be established that the defendant committed the charged act. Here, the trial judge decided before trial to admit the other crimes, and the defendant maintained before and throughout the trial that he did not commit the charged act. The evidence might have become relevant if certain conditions had been met, such as a finding beyond a reasonable doubt that the defendant had touched the complainant as charged, the court noted. In that scenario, the judge would have had to instruct the jury that it could not consider the other crimes for any purpose unless it first found that the defendant touched the complainant, it said. The trial court's unconditional admission of the evidence was error, the court concluded. (*Full text at http://pub.bna.com/cl/s058996.pdf*)

Government Can Raise Appeal's Tardiness in Its Brief

The government does not waive its right to assert the untimeliness of an appeal when it waits until filing its brief to raise the issue, the U.S. Court of Appeals for the Third Circuit held in an opinion published Oct. 17. (*United States v. Muhammud,* 3d Cir., No. 10-3138, 9/28/12, published 10/17/12)

When the defendant sought to appeal his conviction, the government filed a motion seeking to enforce the defendant's appellate waiver but failed to mention that the appeal was untimely. It was only in its brief that the government argued the appeal was untimely.

The Eighth, Tenth, Eleventh, and District of Columbia circuits have held that the government can object to the timeliness of an appeal at any point up to and including in its merits brief.

In an opinion by Judge Maryanne Trump Barry, the Third Circuit agreed. It cautioned, however, that it is better for the government to file a motion to dismiss a criminal appeal as untimely before the filing of the defendant's brief. Both parties are saved time and money when they are able to avoid unnecessary transcript preparation, motions for extensions of time, and the preparation of and filing of full briefs, it explained. (*Full text at http://pub.bna.com/cl/10-3138.pdf*)

Victim's Killing of Co-Perpetrator Isn't Felony-Murder

When the intended victim of a crime kills one of the perpetrators, the other perpetrators cannot be held responsible for that death under a state felony-murder statute, the West Virginia Supreme Court of Appeals held Nov. 8. (*Davis v. Fox,* W.Va., No. 12-0603, 11/8/12)

Under W. Va. Code § 61-2-1 (2010), the offense of first-degree murder includes murders committed ''in the commission of, or attempt to commit'' certain enumerated crimes, including burglary. The defendant and another man attempted a burglary during which the intended victim killed the co-perpetrator. The state argued that, because the statute does not limit the felony-murder to the killing of victims, it encompasses the killing of a co-perpetrator by an intended victim.

The majority of states to have considered the issue hold that felony-murder does not encompass the killing of a co-felon by a victim. Similarly, the Kansas Supreme Court has held that a defendant may not be convicted of felony-murder on the basis of the lawful killing of a fleeing co-felon by a law enforcement officer. *State v. Sophophone*, 19 P.3d 70, 68 CrL 527 (Kan. 2001). On the other hand, Oklahoma's felony-murder statute is drafted broadly enough to encompass the situation in this case.

West Virginia's highest court, in an opinion by Justice Thomas H. McHugh, agreed with the majority of other courts and held that when a co-perpetrator is killed by the intended victim of a burglary during the commission of the crime, the surviving co-perpetrator cannot be charged under the state's felony-murder statute.

Although the statute is not explicit, the traditional concept of felony-murder is clear, the court pointed out. The common law and the court's caselaw indicate that the offense of felony-murder has always involved the death of a victim of the felony or a police officer—in other words, an innocent person. (*Full text at http://pub.bna.com/cl/12-0603.pdf*)

Felon 'Possessed' Same Gun Multiple Times

A defendant who possessed the same gun on three separate occasions was properly convicted on three distinct counts of being a convicted felon in possession of a firearm, the Virginia Supreme Court ruled Nov. 1. (*Baker v. Commonwealth,* Va., No. 120252, 11/1/12)

In an opinion by Justice Leroy F. Millette Jr., the court rejected the defendant's claim that he was guilty, at most, of one continuous possession that lasted a couple of weeks. When the legislature enacted Va. Code § 18.2-308.2(A), it intended to punish separately each independent act of possessing a firearm—even if it involved the same weapon—because each discrete act places the public at a heightened risk of danger, the court concluded.

Here, the prosecution proved three distinct incidents, it said. The first conviction for unlawful possession was based on the defendant's theft of the firearm. The second conviction related to his possession of the same weapon several weeks later when he displayed it while negotiating its sale. The third conviction grew out of the defendant's conduct the following day, when he hand-delivered the weapon to the buyer. Each of these incidents constituted a distinct act of possession that posed an enhanced danger to the public, the court reasoned.

The statute includes specific prohibitions against transporting a firearm and carrying a concealed weapon, the court stressed. ''If the statute was meant to restrict the offense only to the receipt, initial possession, or even extended possession of the weapon, such a specific reference to the transporting or carrying of that weapon would be a frivolous and unnecessary addition to the statutory language,'' it pointed out.

In dissent, Justice Cleo E. Powell argued that because the statute is ambiguous when it comes to defining when one possession offense ends and the next begins, the court should have applied the rule of lenity and construed it in the defendant's favor. (*Full text at http://pub.bna.com/cl/120252.pdf*)

Abortion Protester Gets Fees, Supreme Court Says

An abortion protester who obtained an injunction against local police to stop them from interfering with his group's plans to stand on a busy street corner holding pictures of aborted fetuses was a ''prevailing party'' entitled to an award of attorneys' fees under 42 U.S.C. § 1988, the U.S. Supreme Court held Nov. 5. Even though the protester did not obtain any monetary damages, he still got what he wanted—the ability to stand on local streets holding the pictures without interference from the police, who had previously threatened to arrest him if he did so, the court said in a per curiam opinion. (*Lefemine v. Wideman,* U.S., No. 12-168, 11/5/12)

The Fourth Circuit held that the injunction prohibited only ''unlawful, but not legitimate, conduct'' by the defendants and merely ''ordered Defendants to comply with the law and safeguard Plaintiff's constitutional right in the future. No other damages were awarded.'' But the Supreme Court said the plaintiff was successful because he removed the threat of sanctions and materially altered the relationship between the parties. The district court's order to the police to ''comply with the law'' was therefore sufficient to support an award of fees, the high court ruled.

The case was sent back to the lower courts, however, for a determination of whether the police have other grounds to contest their liability for the fees. (*Full text at http://pub.bna.com/lw/12168.pdf*)

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BNA Insights

PROSECUTORS

No Word From DOJ When An Investigation Ends: A Proposal for Change

By David Deitch

In most cases, the return of an indictment for a white-collar crime is preceded by a lengthy investigation. In investigating many matters, the government faces few if any deadlines: The statute of limitations is often far off, and there is no other source of urgency for investigators. Taken together with the complexity of some investigations, the result is sometimes an investigation that can continue for years.

In many cases, a client who is the target of that investigation is aware that it is taking place—because agents have executed search warrants on homes and places of business or because investigating agents have spoken to the target or to witnesses who inform the target of those contacts. And in many cases, the client is scared and anxious. How could it be otherwise for someone against whom the government of the United States is bringing to bear its immense power and resources?

The chance that the client will face huge fines and/or a lengthy prison sentence hangs like a dark cloud over everything the client does while the investigation is pending. In some ways, the client cannot go on with his or her life until after the investigation ends without the filing of any charges.

David Deitch, the practice leader for Washington, D.C.-based Ifrah PLLC's Financial Services group, is a former state and federal prosecutor who now represents individuals and companies in criminal investigations and prosecutions, civil enforcement actions by the SEC and other government agencies, and civil litigation over business disputes.

The problem is that many investigations never seem to end. It is exceedingly common for months or years to pass during which a targeted client—having learned of an investigation—hears absolutely nothing further. Given the secrecy of grand juries and the need to avoid publicizing aspects of some inquiries, it is certainly the case that this silence sometimes does not reflect lack of activity in an investigation. But there are also many cases in which the government determines that an investigation will not result in any charges but provides no notice of this decision either publicly or directly to the targeted client.

In a small portion of investigations the existence of which are publicly known, the government makes an announcement when the investigation ends. For example, the government made a public announcement several months ago when it determined that its investigation into the death of certain detainees in Afghanistan would not result in criminal charges—an investigation that had already received enormous media attention.[1] Likewise, in August, the Department of Justice publicly disclosed that it had determined that it would not bring charges against Goldman Sachs for its conduct during the 2008 financial crisis. Commentators on this statement noted that it was unusual for the government to make such an announcement and that the government's decision to make this public disclosure was the result of pressure by attorneys for the financial services giant.[2]

But for clients who do not have the political clout of a company like Goldman Sachs or whose case does not have the attention of the public and the Congress, it is far more likely that there will be no disclosure about the end of the investigation, whether directly to the client or in a public announcement. For these clients, the only publicly available information may be the buzz on the internet that resulted from the initial disclosure of the investigation—information that remains available and easily accessible for years regardless of whether the investigation determined that there was any wrongdoing.

While there are valid bases for the confidentiality of how the government handles its investigations, the general practice of failing (or declining) to disclose the closing of an investigation without the filing of any charges has long-lasting and far-reaching conse-

[1] See http://abcnews.go.com/Blotter/doj-charges-cia-detainee-death-investigations/story?id=17119715#.UGsHqmPya4M.

[2] See, e.g., http://dealbook.nytimes.com/2012/08/10/justice-department-closes-investigation-of-goldman/.

quences for those who are targeted by federal criminal investigations.

Investigations That Simply Don't End

Two years ago, the principal of one of my clients was interviewed by a federal prosecutor and an agent from the FBI about criminal conduct in which his company was suspected of participating. At the end of the debriefing, the agent and the prosecutor warned of dire consequences if he did not admit he was lying and confess to the criminal conduct that was the focus of the investigation. In the two years that have elapsed, the only development is that the prosecutor has left DOJ and the lawyer with current responsibility for the matter has no apparent interest in pursuing the matter. Indeed, when counsel for another company involved in the investigation spoke with the departed prosecutor, he was told that there was nothing to worry about but that, as a rule, his former office did not notify targets of investigations when a decision has been made to decline to prosecute.

This is not uncommon. Most practitioners with experience in dealing with federal white collar criminal investigations can relate similar stories about a client who has learned—sometimes in a very unpleasant and very public way—that he or she is under investigation but never hears from the government whether and/or when the investigation terminated with a decision not to bring any criminal charges.

What Can Counsel Do?

The obvious question—and one that clients routinely ask in these circumstances—is what defense counsel can do to force the government to give notice if it has reached the point at which it has either declined to prosecute or simply has no intention to proceed further with the investigation. The short answer is ''not much.'' The government is necessarily entrusted with broad discretion in how it conducts criminal investigations, and the courts are reluctant to intrude on the exercise of that discretion in the absence of flagrant abuses.

As things now stand, the only recourse may be to try to persuade federal prosecutors that it is the right thing to do. The United States Attorneys' Manual specifically addresses the policy of DOJ regarding notices provided to targets of investigations and the extent to which federal prosecutors should and/or may disclose information about pending investigations. In Title 9, Chapter 11, the USAM states: ''The United States Attorney has the discretion to notify an individual, who has been the target of an grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office.''[3]

Notwithstanding that grant of discretion, the USAM notes that ''discontinuation of target status may be appropriate'' under certain specified circumstances:

- the target previously has been notified by the government that he or she was a target of the investigation; and
- the criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.[4]

The USAM notes that there may be other circumstances when notice is appropriate and offers as an example the situation in which ''government action has resulted in public knowledge of the investigation.''[5]

On the other hand, the USAM makes clear that federal prosecutors have virtually unfettered discretion to give no such notice, even in response to a request from counsel. The manual notes that the U.S. Attorney may decline to do so ''if the notification would adversely affect the integrity of the investigation or the grand jury process''—a perfectly reasonable justification. But the USAM also permits a refusal to give notice ''for other appropriate reasons'' without giving any further definition of what other reasons would be ''appropriate.'' And to top it off, the manual states unequivocally that ''no explanation need be provided for declining such a request.''[6]

These guidelines provide a rule-based framework that supports the historical practice by federal prosecutors of declining to give notice to targets or by public announcement when the government has determined that it will not pursue criminal charges based on a pending investigation. Thus, while U.S. Attorney's Offices are permitted to issue press releases that provide for wide publication of allegations against criminal defendants, those same offices have no obligation to make clear when they have determined that a person whose criminal liability was suggested by the existence of an investigation has not, in fact, committed any provable crime.

In circumstances in which the client is neither a large, powerful corporation nor part of a highly publicized investigation, the only basis on which counsel may persuade prosecutors to disclose the closing of an investigation may be an appeal to fairness. The challenge here is that many prosecutors have never dealt with individual clients—particularly those lawyers who have not worked in private practice or whose private practice experience is limited to big firms where they represented mostly large companies. Counsel need to find creative ways to communicate to prosecutors the harms suffered by someone who is publicly identified as the target of an investigation when the investigation ends without any disclosure that the individual will not be charged with any crime.

Of course, while options are somewhat limited in cases in which the government has made a decision not to pursue charges, an even harder circumstance is the one in which the government asserts that it has not terminated its investigation. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations provides some guidance, stating that ''[g]eneral crimes investigations . . . shall be terminated when all logical leads have been exhausted and no legitimate law en-

[3] See United States Attorneys' Manual 9-11.155, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm#9-11.155.

[4] Id.
[5] Id.
[6] Id.

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forcement interest justifies their continuance.''[7] Nevertheless, the government enjoys a great deal of discretion as to when to terminate an investigation, and targets of investigations are unlikely to persuade a court to override the stated judgment of government prosecutors that there is still a basis on which to continue an investigation.

In addition, if the government has not terminated its investigation, that means that there is still a risk for the client that the investigation may yield criminal charges. It is not uncommon for clients to ask me to contact a prosecutor to determine the status of the investigation. In almost all cases, like many other attorneys, I suggest to the client that it is better to ''let a sleeping dog lie.'' If I call the prosecutor about the client's case, will that prompt the prosecutor to take action on a matter that has fallen through the cracks? If so, hasn't that call been counterproductive? Yet, without my call, the client remains in the dark as to the status and expected result of the investigation.

[7] See http://www.justice.gov/ag/readingroom/generalcrimea.htm#general.

A Proposal for Change

One solution to this quandary would be a change in DOJ's policies and procedures relating to investigations. In a previously disclosed investigation as to which a prosecutor no longer has a good-faith basis to believe there will be further investigative efforts, the government should be required to inform the targets of that investigation (either directly or through a public announcement) that the investigation has been terminated. In a case in which an investigation ends without the filing of any charges, it is difficult to imagine any threat to law enforcement interests that would result from such a disclosure (and a rule could certainly be written to accommodate a very narrow exception for that purpose). Such a rule would bring closure to a client who is the focus of a now-terminated investigation, and it would allow the mix of information available on the internet to reflect the result of an investigation that may have begun with substantial buzz about the presumed guilt of the person under investigation.

It is often said that a public prosecutor's goal should be the discovery of the truth. Perhaps this proposal would allow that truth to be more effectively disseminated in cases in which investigations do not result in any criminal charges.

Supreme Court

Supreme Court News

Search and Seizure

Justices Agree To Address Whether Police May Routinely Collect DNA From Arrestees

The U.S. Supreme Court Nov. 9 granted certiorari to settle the issue of whether a state may routinely collect DNA samples from those arrested, but not yet convicted, of serious crimes if the arrestee's true identity is not in doubt. (*Maryland v. King,* U.S., No. 12-207, review granted 11/9/12)

Although there is an overwhelming consensus that convicted criminals, incarcerated prisoners, parolees, and probationers may be compelled to give up DNA samples without a warrant, courts are divided on the constitutionality of requiring mere arrestees to submit to the suspicionless collection of a DNA sample. Compare *In re Welfare of C.T.L.*, 722 N.W.2d 484, 80 CrL 145 (Minn. Ct. App. 2006) (unconstitutional), with *Haskell v. Harris*, 669 F.3d 1049, 90 CrL 714 (9th Cir. 2012) (constitutional).

For a discussion of the issue, see Michael T. Risher, *Warrantless Collection of DNA From People Merely Accused of Crime Raises Not Only Privacy Concerns But Also Questions About Efficacy*, 88 CrL 320.

'Genetic Treasure Map.' The defendant in this case was arrested for assault in 2009. The police took a DNA sample from him and entered the results into the state database pursuant to Md. Code Pub. Safety § 2-504(3) (allowing samples to be taken for those arrested for crimes of violence and burglaries). The entry matched DNA taken from an unsolved 2003 sexual assault, and the defendant was ultimately convicted of rape and sentenced to life in prison without parole.

On appeal, the defendant persuaded the Maryland Court of Appeals to reverse his conviction on the ground that the testing flunked a Fourth Amendment totality-of-the-circumstances balancing test. The state's purported interest in identifying arrestees accurately in this scenario does not offset a defendant's ''weighty and reasonable expectation'' that he will not be subjected to a warrantless, suspicionless search, the state's highest court said.

The court rejected the state's assertion that swabbing a suspect's mouth is no more intrusive than taking his fingerprints. Whereas a fingerprint reveals only the physical characteristics of a person's fingers, a DNA sample contains a ''vast genetic treasure map'' that implicates other privacy concerns, the court reasoned. See *King v. State*, 42 A.3d 549, 91 CrL 159 (Md. 2012).

Important Law Enforcement Practice. In August, Chief Justice John G. Roberts Jr. stayed the Maryland court's ruling and issued an in-chambers opinion in which he stated that it was ''reasonably probable'' that he and his colleagues would grant certiorari to resolve a split of authority on the question, which ''implicates an important feature of day-to-day law enforcement practice in approximately half the States and the Federal Government.'' *Maryland v. King*, stay issued, 91 CrL 615 (U.S. Aug. 1, 2012).

In its petition for certiorari, the state argued that the Maryland court erred by focusing on arrestees' overall interest in genetic privacy, emphasizing that the state does not analyze any genetically meaningful information. There are both regulatory and statutory barriers to the misuse of DNA information, and the law only allows collection and storage of DNA information to identify individuals, it stressed.

The state further contended that an arrestee has, at most, a minimal interest in concealing his identity. Law enforcement, on the other hand, has a compelling interest in accurately identifying people taken into custody and in solving crimes, it said.

In response to the state's petition, the defendant pointed out that he had already been accurately identified by the time his DNA sample was analyzed several months following his arrest. The only state interest served by the collection of his DNA was the state's desire to solve so-called ''cold cases,'' he contended. A warrantless, suspicionless search cannot be justified by the state's broad interest in solving crimes, the defendant argued.

Court Will Also Hear Ex Post Facto Case. The Supreme Court also granted certiorari Nov. 9 to consider whether a sentencing judge violates the Constitution's Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than those in effect at the time of the offense when the newer guidelines create a significant risk that the defendant will receive a longer sentence. (*Peugh v. United States,* U.S., No. 12-62, review granted 11/9/12)

The Seventh Circuit rebuffed the defendant's ex post facto claim, ruling that the advisory nature of the guidelines vitiated his retroactivity objection. See *United States v. Peugh*, 675 F.3d 736, 91 CrL 69 (7th Cir. 2012).

BY LANCE J. ROGERS

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Summary of Orders

Nov. 9, 13, 2012 Sessions

At its session on Nov. 9, 2012, the U.S. Supreme Court granted review in two cases. At its session on Nov. 13, the court denied review in nine Appellate Docket cases. The summaries below are of the cases on the appellate docket in which the court denied review.

Review Granted

12-62 Peugh v. United States

Sentencing—Ex post facto laws—Application of federal guidelines in effect at time of sentencing.

Ruling below (7th Cir., 675 F.3d 736):

This court has previously held that sentencing a defendant according to the U.S. Sentencing Guidelines in effect at the time of sentencing rather than the time of the offense does not violate the Ex Post Facto Clause because the guidelines are merely advisory.

Question(s) Presented: Does a sentencing court violate the Constitution's Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than those in effect at the time of the offense if the newer guidelines create a significant risk that the defendant will receive a longer sentence?

12-207 Maryland v. King

Search and seizure—Routine collection of DNA from arrestees.

Ruling below (Md., 42 A.3d 549, 91 CrL 159):

Police may not routinely collect DNA samples from those arrested, but not yet convicted, of violent crimes or burglaries unless there is a legitimate need to establish the arrestee's true identity.

Question(s) Presented: Does the Fourth Amendment allow the states to collect and analyze DNA from people arrested and charged with serious crimes?

Review Denied

11-1395 Fry v. United States

Military prosecutions—Jurisdiction over defendant subject to conservatorship order.

Ruling below (C.A.A.F., 70 M.J. 465):

Jurisdiction existed to try the defendant in a court-martial despite a state court order that established a limited conservatorship over him. In assessing whether the defendant met the mental competency requirements for military-court jurisdiction, the military judge was not bound by the state court order.

12-44 Shaygan v. United States

Prosecutors—Hyde Amendment sanctions for prosecutorial misconduct.

Ruling below (11th Cir., 652 F.3d 1297, 89 CrL 804):

Even if the government's decision to launch a questionable witness-tampering investigation and secure a superseding indictment was motivated by a prosecutor's apparent ill will against the defendant and his lawyers, this did not justify the district court's decision to impose monetary sanctions under the Hyde Amendment where the decision to prosecute was objectively reasonable on its face. The district court's award of more than $600,000 in attorneys' fees and costs is vacated.

12-308 Thomas v. Madison

Habeas corpus—Jury trials—Discriminatory use of peremptory challenges.

Ruling below (11th Cir., 677 F.3d 1333):

The state court that denied relief to the federal habeas corpus petitioner on his claim of discriminatory use of peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), unreasonably applied clearly established law when, in determining that the petitioner failed to establish a prima facie case of discrimination, it found that he did not establish ''purposeful racial discrimination.'' The case is remanded for the district court to complete the Batson analysis.

12-343 Frluckaj v. Long

Habeas corpus—Ineffective assistance of counsel.

Ruling below (9th Cir., 4/13/12):

The unsuccessful habeas corpus petitioner's application for a certificate of appealability is denied.

12-403 Maple v. Harlow

Habeas corpus—Right of self-representation.

Ruling below (3d Cir., 5/9/12):

The unsuccessful habeas corpus petitioner's application for a certificate of appealability is denied because jurists of reason would not debate the district court's conclusion that he failed to establish a constitutional violation.

12-440 Martinez v. United States

Habeas corpus—Ineffective assistance of counsel—Sentencing.

Ruling below (5th Cir., 2/21/12):

The unsuccessful habeas corpus petitioner's application for a certificate of appealability is denied for failure to make a substantial showing of the denial of a constitutional right.

12-455 Hosseini v. United States

Appeals—Evidence—Sufficiency.

Ruling below (7th Cir., 679 F.3d 544):

Under the law of this circuit, when a defendant moves for a judgment of acquittal under Fed. R. Crim. P. 29 on the basis of insufficiency of the evidence and raises specific arguments, any arguments omitted are thereby forfeited.

12-460 Spadoni v. United States

Self-incrimination—Evidence—Proffer agreements.

Ruling below (2d Cir., 7/9/12, unpublished):

Assuming the defendant's Fifth Amendment rights were violated when the government filed in this court statements the defendant made in a proffer session at trial, in response to the defendant's petition to recall the mandate following his prior appeal, any error was harmless.

12-472 Rendon v. United States

Habeas corpus—Certificate of appealability.

Ruling below (11th Cir., 7/13/12):

The unsuccessful habeas corpus petitioner's application for a certificate of appealability is denied for failure to show that reasonable jurists would find the district court's denial of relief to be debatable or wrong.

Journal of Proceedings

Reprinted below are excerpts from the Supreme Court's Journal of Proceedings covering all criminal matters acted upon by the court on the dates indicated.

November 6, 2012

Certiorari Denied

12-7006 (12A443) Garry v. Trammell, Warden. The application for stay of execution of sentence of death presented to Justice Sotomayor and by her referred to the Court is denied. The petition for a writ of certiorari is denied.

November 8, 2012

Order in Pending Case

12A474 Wetzel, Sec., PA DOC v. Michael. The application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Third Circuit on November 8, 2012, presented to Justice Sotomayor and by her referred to the Court is denied.

Justice Alito took no part in the consideration or decision of this application.

November 9, 2012

Certiorari Granted

12-62 Peugh v. United States. The petition for a writ of certiorari is granted.

12-207 Maryland v. King. The petition for a writ of certiorari is granted.

November 12, 2012

Certiorari Denied

12-6969 (12A437) Hartman v. Robinson, Warden. The application for stay of execution of sentence of death presented to Justice Kagan and by her referred to the Court is denied. The petition for a writ of certiorari is denied.

12-7050 (12A454) Hartman v. Walsh. The application for stay of execution of sentence of death presented to Justice Kagan and by her referred to the Court is denied. The petition for a writ of certiorari is denied.

12-7163 (12A476) Hartman v. Robinson, Warden. The application for stay of execution of sentence of death presented to Justice Kagan and by her referred to the Court is denied. The petition for a writ of certiorari is denied.

November 13, 2012

Haynes v. Thaler, Dir., TX DCJ, No. 12-6760 (12A369)

ON APPLICATION FOR STAY

Statement of JUSTICE SOTOMAYOR, with whom JUSTICE GINSUBURG joins, respecting the grant of stay of execution.

In this case, a divided Fifth Circuit panel rejected Anthony Haynes' application for a certificate of appealability on the ground that this Court's decision in *Martinez* v. *Ryan*, 566 U.S. ___ (2012), ''does not apply to Texas capital habeas petitioners.'' No. 12–70030, 2012 WL 4858204, *2 (Oct. 15, 2012). We recently granted certiorari to address precisely the question whether *Martinez* applies to habeas cases arising from Texas courts. See *Trevino* v. *Thaler*, 568 U.S. ___ (2012).

The dissent observes that on federal habeas review in this case, the District Court, after first concluding that Haynes had procedurally defaulted his claim that his trial counsel was constitutionally ineffective, ruled in the alternative that the claim failed on the merits. *Post,* at 2–3. But the Court of Appeals has never addressed the District Court's merits ruling, and has instead relied solely on procedural default. See 2012 WL 4858204, *2; *Haynes* v. *Quarterman*, 526 F. 3d 189, 194–195 (CA5 2008). The only appellate judge to consider the merits of Haynes' claim would have granted Haynes a certificate of appealability in his current case and stated that it was ''difficult to conclude that Hayne[s] has not made a sufficient showing for a *Strickland* [v. *Washington*, 466 U.S. 668 (1984),] violation as to his trial counsel.'' 2012 WL 4858204, *4 (Dennis, J., dissenting). Under these circumstances, rather than assume the correctness of the District Court's unreviewed merits decision, I believe a stay of execution is warranted to allow Haynes to pursue his claim on remand if this Court in *Trevino* rejects the single ground relied upon by the Fifth Circuit for denying Haynes' application for a certificate of appealability.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting from the grant of stay of execution.

I dissent from the Court's order of October 18, 2012, granting the application of Anthony Haynes for stay of execution of sentence of death. Petitioner Haynes, who had committed a series of armed robberies, was approached by off-duty Houston Police Department Officer Kent Kincaid after a bullet from Haynes's truck had cracked Kincaid's windshield. Kincaid, who thought the

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missile had been a rock, identified himself as a police officer and asked for Haynes's driving license. Haynes lifted a pistol and shot the officer in the head. Haynes was apprehended and confessed to the killing. He was tried for the capital murder of a peace officer ''acting in the lawful discharge of an official duty,'' Tex. Penal Code Ann. § 19.03(a)(1) (West Cum. Supp. 2012). A Texas jury found him guilty and sentenced him to death.

It has been more than 14 years since Haynes killed Officer Kincaid, 10 years since we denied Haynes's first petition for certiorari, see *Haynes* v. *Texas*, 535 U.S. 999 (2002), and six months since we denied his second, see *Haynes* v. *Thaler*, 566 U.S. ___ (2012). Haynes is now back before us a third time, arguing that he received ineffective assistance from his trial counsel and that his procedural default of this claim is excused by our decision seven months ago in *Martinez* v. *Ryan*, 566 U.S. ___ (2012), which he asserts entitles him to a reopening of his habeas proceedings under Federal Rule of Civil Procedure 60(b)(6).

The Fifth Circuit determined that Haynes did not qualify for relief under *Martinez*, which carved out a ''limited'' exception to our longstanding rule that attorney error on state collateral review does not constitute cause to excuse procedural default of an ineffective-assistance-of-counsel claim, see *Coleman* v. *Thompson*, 501 U.S. 722 (1991). According to the Fifth Circuit, Texas inmates fall outside the scope of *Martinez*, which applies only ''where the State barred the defendant from raising the claims on direct appeal,'' 566 U.S., at ___ (slip op., at 14). See *Ibarra* v. *Thaler*, 687 F. 3d 222, 225–227 (2012). Haynes points to the practical difficulties in Texas of successfully raising an ineffective-assistance claim on direct appeal or by motion for new trial.

Even if the Fifth Circuit is incorrect and *Martinez* does implicate Texas's system of postconviction review, a stay is unwarranted here because Haynes presents no plausible claim for relief. His complaint is that his trial counsel was ineffective at sentencing. The absolute most to which he would be entitled under *Martinez* is excuse of his procedural default of this claim, enabling a federal district court to adjudicate the claim on the merits. But that is precisely what the District Court already did on federal habeas review. See *Haynes* v. *Quarterman*, Civ. No. H–05–3424, 2007 WL 268374 (SD Tex., Jan. 25, 2007). In addition to finding the majority of Haynes's ineffective-assistance claims procedurally defaulted, the court rejected all of them on the merits. It concluded that Haynes's argument was '' 'not that counsel's performance should have been *better*, rather, his argument is that counsel should have investigated and presented evidence at the punishment phase in a completely *different manner*.' '' *Id.*, at *9. It rejected that argument because it concluded that his lawyers' decisions represented simply ''the exercise of [a] strategy'' different from what Haynes would now prefer. *Ibid.* It said that even ''[i]f the constraints of federal review did not command that Haynes first give the state courts an opportunity to adjudicate his claims of error, this court would still not issue a habeas writ.'' *Ibid.* Thus, when the District Court denied Haynes's Rule 60(b)(6) motion, it correctly concluded that *Martinez* (which would do no more than excuse Haynes's procedural default) was beside the point, since the court had ''already granted Haynes the relief he now requests: The court considered the merits of his barred claims.'' *Haynes* v. *Thaler*, 2012 WL 4739541, *5 (Oct. 3, 2012).

This stay cannot, therefore, be justified even as preserving an opportunity to challenge the sentence under *Martinez*. And because I see no reason to believe that the District Court was wrong about the merits of Haynes's claims, I also do not consider a stay warranted in order to plumb the record and correct any alleged factbound error of the District Court.

Haynes has already outlived the policeman whom he shot in the head by 14 years. I cannot join the Court's further postponement of the State's execution of its lawful judgment.

Certiorari — Summary Disposition

12-5017 Barba v. California. The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of *Williams* v. *Illinois*, 567 U.S. ___ [91 CrL 357] (2012).

Orders in Pending Cases

12M43 Turner v. Thaler, Dir., TX DCJ. The motion[ ] to direct the Clerk to file [a petition for writ] of certiorari out of time [is] denied.

11-10473 Book v. CT Resources Recovery. The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

12-6120 Smith v. Florida. The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until December 4, 2012, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

12-6682 Turpin v. United States. The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until December 4, 2012, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. Justice Kagan took no part in the consideration or decision of this motion.

Certiorari Denied

11-1395 Fry v. United States
11-10202 Jackson v. United States
11-10220 Bailey v. Suhar
11-10354 Tamayo v. Thaler, Dir., TX DCJ
11-11155 Cox v. Howerton, Warden
12-343 Frluckaj v. Long, Warden
12-403 Maple v. Harlow, Supt., Albion
12-440 Martinez v. United States
12-455 Hosseini v. United States
12-472 Rendon v. United States
12-5036 Kelley v. United States
12-5093 Chandia v. United States
12-5234 Raupp v. United States
12-5264 Herrera-Montes v. United States
12-5333 Clay v. United States
12-5380 Smart v. California
12-5594 Lotches v. Oregon
12-5692 Magana v. United States
12-5735 Lemons v. United States
12-5749 Hunt v. Thomas, Comm'r, AL DOC
12-5883 Kennedy v. Kemna, Supt., Crossroads

12-6105 Houghton v. Cain, Warden
12-6106 Chesteen v. Thaler, Dir., TX DCJ
12-6109 Hurd v. Texas
12-6110 Glasser v. Colorado
12-6112 Fields v. Clarke, Dir., VA DOC
12-6115 Hite v. Evans, Warden
12-6116 Hoskins v. North Carolina
12-6118 Gather v. Okarng
12-6124 Jones v. Lopez
12-6126 Griffin v. McGrady, Supt., Retreat
12-6127 Garcia v. California
12-6131 Burke v. McCollum, Warden
12-6137 Benson v. Luttrell, Sheriff
12-6143 Campbell v. Perley
12-6147 Hart v. Texas
12-6150 Hall v. Hoke
12-6153 Freeman v. California
12-6154 Hernandez v. Evans, Warden
12-6158 Johnson v. Lopez, Warden
12-6167 Byrd v. Thaler, Dir., TX DCJ
12-6189 Banks v. Thaler, Dir., TX DCJ
12-6191 Davenport v. McLaughlin, Warden
12-6198 McKinney v. Illinois
12-6203 Sledge v. Grounds, Warden
12-6204 Robinson v. SC DOC
12-6206 McDonald v. Brunsman, Warden
12-6211 Beltran v. Florida
12-6214 Ashford v. Wenerowicz, Supt., Graterford
12-6215 Anderson v. Riverside, CA
12-6216 Jackson v. Rapelje, Warden
12-6224 Trammell v. Smart
12-6226 Kurtz v. United States
12-6227 Alvarado v. Texas
12-6233 Jones v. MO DOC
12-6234 Williams v. Nevada
12-6235 Whitmore v. Parker, Warden
12-6240 Davis v. McLaughlin, Warden
12-6241 Verdun v. Cain, Warden
12-6242 Sadlowski v. Michalsky
12-6244 Sadlowski v. Town of Middlefield
12-6249 Ramirez v. Herndon, Warden
12-6252 Ramirez-Garcia v. Scutt, Warden
12-6259 Treglia v. California
12-6260 Baptista v. Clark, Warden
12-6288 White v. Missouri
12-6338 Morris v. Cross
12-6363 Hernandez v. Colorado
12-6375 Kelly v. Tennessee
12-6424 Brewster v. Easterling, Warden
12-6501 Moore v. Wenerowicz, Supt., Graterford
12-6598 Williams v. Sheahan, Supt., Five Points
12-6637 Serfass v. United States
12-6638 Santiago v. United States
12-6645 Smith v. Wisconsin
12-6653 Barren v. United States
12-6655 Bui v. United States
12-6659 Villa-Madrigal v. United States
12-6662 Ramirez v. United States
12-6667 Kelly v. United States
12-6668 Sherley v. United States
12-6669 Mack v. United States
12-6674 Carnahan v. United States
12-6686 Chanthachack v. United States
12-6690 Yoshimoto v. United States
12-6699 Westbrook v. United States
12-6701 Williams v. United States
12-6702 Tripp v. United States
12-6705 Barnes v. United States
12-6707 Williams v. United States
12-6710 Casanova v. United States
12-6711 Crawley v. United States
12-6718 Taylor v. United States
12-6723 Aidoo v. United States
12-6725 Adams v. United States
12-6728 Johnson v. United States
12-6729 Richards v. United States
12-6730 Ramirez-Salazar v. USDC ED CA
12-6734 Cook v. United States
12-6735 Cotton v. United States
12-6736 Brown v. United States
12-6737 Amster v. United States
12-6738 Almedina v. United States
12-6739 Burkhardt v. United States
12-6743 Pope v. United States
12-6744 Turner v. United States
12-6748 Kirby v. United States
12-6750 Knittel v. United States
12-6751 Osorio v. United States
12-6752 Reyes-Pedroza v. United States
12-6753 Dodakian v. United States
12-6755 Downs v. United States
12-6763 Winfield v. United States
12-6764 Thomas v. United States
12-6775 Harper v. United States
12-6779 Gonzalez v. United States
12-6780 Hill v. United States
12-6781 Graff v. United States
12-6783 Glassgow v. United States
12-6784 Gonzalez v. United States
12-6786 Ferranti v. United States
12-6788 Gonzalez-Bello v. United States
12-6789 McKeighan v. United States

The petitions for writs of certiorari are denied.

12-44 Shaygan v. United States. The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

12-308 Thomas, Comm'r, AL DOC v. Madison. The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

12-460 Spadoni v. United States. The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

12-6135 Book v. Kimberly Parks. The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

12-6236 Young v. Madison, Counselor. The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*). Justice Sotomayor and Justice Kagan took no part in the consideration or decision of this motion and this petition.

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Mandamus Denied

12-6138 In re Porter
12-6196 In re Shell
12-6700 In re Williams
12-6759 In re Mack

The petitions for writs of mandamus are denied.

Rehearings Denied

11-1328 Cunningham v. McCluskey
11-10174 Coulter v. USDC SC
11-10244 Adkins v. Armstrong
11-10451 Rodriguez v. Peters, Dir., OR DOC
11-10776 Yang v. Shakopee, MN
11-10788 Yang v. Hanson
11-10910 Bak v. Donahoe, Postmaster Gen.
12-5322 Vickerman v. Bixler
12-5482 Abram v. Gerry, Warden
12-5517 Evans v. United States

The petitions for rehearing are denied.

11-10607 Rutledge v. Oakland, CA. The petition for rehearing is denied. Justice Breyer took no part in the consideration or decision of this petition.

12-5357 Rutledge v. Allen. The petition for rehearing is denied. Justice Breyer took no part in the consideration or decision of this petition.

Oral Argument

Conspiracy

Supreme Court Looks at Burden of Proof On Timing of Withdrawal From Conspiracy

A defendant who claims that his role in a drug conspiracy ended outside the statute of limitations period urged the U.S. Supreme Court Nov. 6 to treat the matter of an accused's continuing participation in a conspiracy as an offense element that the government must prove beyond a reasonable doubt. The circuit courts have long been divided over whether, instead, withdrawal from a conspiracy is an affirmative defense that the accused bears the burden of proving by a preponderance of the evidence. (*Smith v. United States*, U.S., No. 11-8976, argued 11/6/12)

A.J. Kramer, of the Federal Public Defender's Office, Washington, D.C., argued that because conspiracy is a continuing crime, it is the defendant's withdrawal that starts the limitations clock with regard to him. Withdrawal is not a defense but the expiration of the limitations period is, Kramer asserted.

Justice Antonin Scalia said that, because withdrawal must be raised by the defendant, it cannot be an element of the crime of conspiracy.

Kramer responded that absence of withdrawal is a fact necessary for conviction, which means it must be proved by the government beyond a reasonable doubt. The court has never referred to the limitations period as an affirmative defense that must be proven by the defendant, he added.

Justice Ruth Bader Ginsburg pointed out to Kramer that the government can prove conspiracy if the limitations period is never raised.

Multiple Limitations Periods? Chief Justice John G. Roberts Jr. said Kramer's argument seemed to be that, when it comes to a limitations period, conspirators should be treated as individuals rather than as members of the conspiracy.

When Kramer agreed, Roberts noted that this is not the case with respect to other aspects of the conspiracy. If members of the conspiracy commit a murder and it was foreseeable, a member who had nothing to do with the killing other than being a part of the conspiracy is nonetheless liable, he noted. Why should there be a special rule for statutes of limitations? Roberts wanted to know.

Kramer replied that, if the defendant withdrew before the murder, he would not be liable.

Roberts said it makes sense to him that the government can prove the statute of limitations with respect to the conspiracy, not with respect to each individual.

Kramer said it's actually the opposite. He referred the court to *Grunewald v. United States*, 353 U.S. 391 (1957), in which it said it was ''incumbent on the government to prove that the conspiracy . . . was still in existence . . . and that at least one overt act in furtherance of the conspiracy was performed'' within the limitations period.

Justice Anthony M. Kennedy suggested to Kramer that if the court accepts his view, there will be a different limitations period for each member of a conspiracy. He found that to be ''puzzling.''

Kramer said that happened in this case anyway, because different conspirators were indicted at different times.

Ginsburg asked Kramer whether he wanted the court to require the government to prove the defendant's guilt twice. Kramer said the government's burden is not that great; the prosectuor can argue merely that the defendant's claim of withdrawal is not persuasive and does not create a reasonable doubt.

''In many cases there would be no way the government can carry this burden of proof.''

CHIEF JUSTICE JOHN G. ROBERTS JR.

Proof of Withdrawal. Ginsburg asked Kramer what a defendant must do to satisfy his burden of production.

Kramer characterized the burden as ''quite high'' and said in most cases the defendant would have to testify and thereby expose himself to extensive cross-examination on everything. Specifically, he would have to produce evidence that he carried out some affirmative act to disavow the conspiracy, Kramer said.

Roberts said that is why it is very difficult to put the burden on the government. If the government has the burden of proving the defendant did not withdraw, it would have to call co-conspirators as witnesses, and those people will likely invoke their privilege against self-incrimination and refuse to testify, he noted. ''In many cases there would be no way the government can carry this burden of proof,'' Roberts said.

But that cuts both ways, Kramer responded. If the defendant can't call a witness to support his defense, he said, the government could just say, ''Well, you didn't hear any testimony from that person supporting the defense. That's enough right there to meet our burden.''

Roberts was not convinced this would constitute meeting a burden to prove the absence of withdrawal beyond a reasonable doubt.

Kramer said the burden is to prove not the absence of withdrawal but membership in the conspiracy at the relevant time.

Later, however, when Sarah E. Harrington, of the U.S. Solicitor General's Office, took her turn, Roberts said the government indicted an individual, not a conspiracy. He said he was not sure why prosecutors should not have to show that this individual's conduct fell within the limitations period, at least once the accused has met his burden of production with evidence suggesting the opposite.

It's because the government can prove that someone is liable for a conspiracy by proving that he joined the conspiracy at some point and that the conspiracy existed during the limitations period, Harrington answered. It would make no sense to require it to disprove withdrawal, she contended.

Scalia told Kramer the evidence of withdrawal in this case—the defendant was incarcerated for much of the relevant time period and he had a falling-out with the ringleader—is not terribly persuasive and does not amount to an affirmative act of withdrawal.

Kramer said that is not an issue in this case, noting it was the government that asked the district court to give the withdrawal instruction.

Maybe not, but it may mean the court is wasting its time on this case, Scalia suggested.

Roberts asked Kramer whether, if the defendant testifies he told the ringleader he was withdrawing, an attack on the defendant's credibility is sufficient to prove the absence of withdrawal beyond a reasonable doubt.

Kramer replied that it is. It happens all the time that the government relies on a witness's unreliability and the results of cross-examination to say it proved its case beyond a reasonable doubt, he said.

Justice Sonia M. Sotomayor told Kramer she thought his stronger argument is that if the defendant was not willingly participating in the conspiracy at the relevant time, then he did not commit the actual crime.

Kramer said that is the heart of his argument: The defendant's withdrawal negates the element of membership in the conspiracy within the statutory period, which is what the government must prove.

Scalia commented that the government does not have to prove membership within the statutory period. It's up to the defendant to raise the defense that he withdrew, and if he does not, it is waived, Scalia said.

Kramer said the court has never said a defendant waives the defense by not raising it.

What's the Real Issue? Justice Stephen G. Breyer, speaking to Harrington, said the statute of limitations would be more of an issue if the parties agreed that the defendant withdrew, with the only dispute being when the withdrawal happened. Here, by contrast, the issue is whether the defendant was a member of the conspiracy during the time period charged in the indictment, he pointed out.

Harrington said it is a statute of limitations question in the sense that the government proved that the conspiracy did exist within the limitations period.

Breyer asked whether the government must prove the defendant was a member of the conspiracy.

The government must prove each defendant intentionally agreed to join the conspiracy, Harrington answered.

Justice Elena Kagan suggested the crux of the dispute is that the government says the element at issue is membership in the conspiracy at some point regardless of whether it's within the limitations period, whereas the defendant says the element is membership in a conspiracy during the limitations period.

Harrington said the timing of the defendant's membership is not an element. That is because it need not be charged in the indictment, it need not be proved in every case, and the defendant can waive it, she said.

Breyer said one can look at the issue either way. If a defendant admits to the act in question but says it occurred so long ago the limitations period has expired, that is in the statute of limitations area, he said. On the other hand, when the government charges that the conspiracy took place within a certain period of time, which seems like the usual situation, then one could look at it as a question of membership in that conspiracy, he said. In that case it's a question of the elements, he said. Doubt as to whether the time the defendant withdrew was inside or outside the limitations period is a statute of limitations question, he added.

Sotomayor asked Harrington about a situation in which the government charges that a crime happened on a specific date and the defendant raises an affirmative defense that it is time-barred. Who bears the burden of proving it is not? she asked. Harrington said the government bears the burden.

Sotomayor then wondered whether the government continues to bear the burden when the crime is conspiracy, and Harrington said it does.

Harrington added that the government need not prove that the agreement happened within the limitations period or that any particular defendant did something to ''re-agree'' within the limitations period. This is clear from *Hyde v. United States*, 225 U.S. 347 (1912), which established that withdrawal from a conspiracy requires the performance of an affirmative act to disavow or defeat the purpose of the conspiracy, she said. In *Hyde*, a defendant who raised a limitations defense had not done anything related to the conspiracy within the limitations period, she pointed out.

''What we have to prove is that the crime was committed within the limitations period,'' Harrington said. ''We proved that the crime was committed within the limitations period because the conspiracy existed in the limitations period. By operation of law, anyone who has willingly joined the conspiracy at some point remains a member of the conspiracy unless or until he takes an affirmative step to withdraw.''

Justice Samuel A. Alito Jr. wondered whether the real issue in this case has less to do with the statute of limitations than the nature of conspiracy.

Congressional Intent. Harrington characterized the defendant's position as being grounded in due process concerns. Due process is not implicated because lack of withdrawal is not an element of the crime of conspiracy, she said.

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At this point, the question becomes how would Congress have allocated the burdens when it enacted the conspiracy statutes, Harrington contended. ''There is no reason to think Congress would have thought the burden of persuasion to be anywhere other than on the defendant,'' she asserted.

Harrington acknowledged that by proving that a crime actually happened beyond a reasonable doubt, the prosecution also proves when the crime actually happened. Even so, she added, there are four policy reasons Congress would have refrained from allocating a burden of persuasion to the government with regard to the issue of withdrawal:

- the defendant will almost always be in a better position to have the information about whether he withdrew, except in cases where the withdrawal took the form of going to authorities;
- the government is hamstrung in its efforts to rebut an assertion of withdrawal when it cannot compel the testimony of either the defendant or his co-conspirators;
- a defendant can spring a claim of withdrawal on prosecutors that gives them no time to try to rebut it; and
- the defendant's rule would encourage spurious assertions of withdrawal by allowing defendants to require the government to prove something extra.

Roberts commented that the final point seems spurious itself, given that a defendant could claim withdrawal only after conceding membership in the conspiracy. In the absence of a good withdrawal defense, a defendant would be unlikely to raise it, the chief justice noted.

BY ALISA A. JOHNSON

Transcript of oral argument at http://pub.bna.com/cl/11-8976.pdf

Cases Docketed

Cases Recently Filed

12-380 Steele v. McNeil

Habeas corpus—Certificate of appealability.

Ruling below (11th Cir., 2/27/12):

The unsuccessful habeas corpus petitioner's application for a certificate of appealability is denied.

Question(s) Presented: Is the habeas corpus petitioner entitled to further review of his claims?

12-390 Smith v. Colson

Habeas corpus—Ineffective assistance of counsel—Discovery.

Ruling below (6th Cir., 4/11/12):

Assuming that the decision in *Martinez v. Ryan*, 80 U.S.L.W. 4216, 90 CrL 805 (U.S. 2012), extends to a procedurally defaulted claim under *Brady v. Maryland*, 373 U.S. 83 (1963), and further assuming the habeas corpus petitioner presented a properly supported claim of ineffective assistance of state habeas counsel, he is still not entitled to relief.

Question(s) Presented: (1) Did the U.S. Court of Appeals for the Sixth Circuit misunderstand the import of the U.S. Supreme Court's order that it reconsider its prior judgment in light of *Martinez v. Ryan*, 80 U.S.L.W. 4216, 90 CrL 805 (U.S. 2012)? (2) Should the Supreme Court grant certiorari to resolve confusion about the scope of the rule of *Martinez* or, alternatively, hold this case pending decision in *Balentine v. Thaler*, No. 12–5906, petition for certiorari filed 8/21/12?

12-428 Chebssi v. United States

Sentencing—Federal guidelines—Relevant conduct.

Ruling below (*United States v. Tobin*, 11th Cir., 676 F.3d 1264):

Case precedent authorizes a sentencing judge to consider relevant acquitted conduct that has been proven by a preponderance of the evidence. This does not violate a defendant's right to have facts be proven beyond a reasonable doubt. The defendant's sentence is affirmed.

Question(s) Presented: Were the defendant's Fifth and Sixth amendment rights violated when the district court increased her sentence solely on the basis of the judge's disagreement with a jury verdict acquitting her of a more serious charge?

12-450 Mulero v. Thompson

Habeas corpus—Ineffective assistance of counsel.

Ruling below (7th Cir., 668 F.3d 529):

The habeas corpus petitioner failed to preserve her claim that trial counsel rendered ineffective assistance by counseling her to enter a blind guilty plea to capital murder. Her other claims of ineffective assistance fail on the merits in the absence of any reasonable likelihood that any further investigation would have altered the outcome of the trial.

Question(s) Presented: (1) Can a defense attorney in a death penalty case be found to be ineffective for advising his or her client, in the absence of any investigation, to plead guilty without negotiating a settlement with the prosecution or getting any assurance the defendant would not receive the death penalty? (2) Can a defense counsel in a capital case be found ineffective for failing to investigate and discover that the sole eyewitness could not have seen the crime occur, failing to obtain psychological evidence to support an argument that the petitioner's confession was involuntary, and failing to investigate and discover that the only other prosecution witness who could implicate the petitioner had made inconsistent statements and had a motive to lie?

12-474 Scott v. United States

Sentencing—Federal guidelines—Pattern of exploitation of a minor.

Ruling below (11th Cir., 476 F. App'x 845):

This court has previously rejected the argument that Section 2G2.2(b)(5) of the U.S. Sentencing Guidelines, which provides a five-level enhancement for those who engage in a ''pattern of activity involving the sexual abuse or exploitation of a minor,'' is inherently flawed. The defendant's reliance on *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), is therefore misplaced, as the prior binding precedent of this circuit binds the panel until it is overruled by this court sitting en banc or by the U.S. Supreme Court. The sentence imposed by the district court is affirmed.

Question(s) Presented: Is Section 2G2.2 of the U.S. Sentencing Guidelines substantively unreasonable?

12-476 Martino v. United States

Habeas corpus—Coram nobis—Audita querela—Certificate of Appealability.

Ruling below (2d Cir., 3/28/12):

The unsuccessful habeas corpus petitioner's application for a certificate of appealability is denied for failure to make a substantial showing of the denial of a constitutional right. There is no legal or factual basis for an appeal from the district court's denial of coram nobis and audita querela relief.

Question(s) Presented: (1) Was the petitioner's guilty plea supported by a factual basis? (2) Did counsel render ineffective assistance by advising the petitioner to plead guilty and to agree to forfeiture? (3) Did application of the Civil Asset Forfeiture Reform Act violate the Ex Post Facto Clause and deny the petitioner due process?

12-480 Mann v. United States

Evidence—Sufficiency—Conspiracy to obstruct official proceeding.

Ruling below (8th Cir., 685 F.3d 714):

The evidence presented at trial could have reasonably led the jury to find that the defendant and her husband corruptly conspired to impede an investigation into the husband by, among other things, removing potentially relevant evidence, and that she corruptly intended to impair the availability of documents to an ongoing grand jury investigation.

Question(s) Presented: Did the U.S. Court of Appeals for the Eighth Circuit misapply the decisions in *United States v. Aguilar*, 515 U.S. 593 (1995), and *Arthur Andersen LLP v. United States,* 544 U.S. 696 (2005)?

12-483 Waters v. United States

Sentencing—Federal guidelines—Terrorism enhancement.

Ruling below (6th Cir., 7/16/12, unpublished):

The district court did not abuse its discretion by applying the terrorism enhancement to the defendant's sentence under the U.S. Sentencing Guidelines when the crime of conviction, misprision of a felony, involved assisting others in concealing an arson that was intended to influence and affect the conduct of government through intimidation and coercion.

Question(s) Presented: Did the district court err by applying the terrorism enhancement to the petitioner's sentence under the U.S. Sentencing Guidelines?

12-490 Willis v. United States

Habeas corpus—Certificate of appealability.

Ruling below (4th Cir., 472 F. App'x 183):

The unsuccessful habeas corpus petitioner's application for a certificate of appealability is denied for failure to make a substantial showing of the denial of a constitutional right.

Question(s) Presented: (1) Does Congress have the authority to enact general criminal statutes? (2) Does Congress have the authority to change the mode of grand jury proceedings? (3) Should the federal courts consider the weight of missing conversations in criminal cases where the objective is to ''build'' a criminal case against a potential defendant? (4) Is the petitioner entitled to know who actually authored the rulings issued in his case?

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