Chapter Three

Legal Issues

Introduction

The Commission closely monitors the sentencing decisions of the federal courts to identify areas in which guideline amendments, research, or legislative action may be needed. This chapter addresses some of the more significant sentencing-related issues decided by the United States Supreme Court and the courts of appeals during fiscal year 2009.

United States Supreme Court Cases on Sentencing Issues

Decisions

In *Chambers v. United States*,[27] the Supreme Court, in a 9-0 decision, reversed the Seventh Circuit's opinion upholding the district court's conclusion that the defendant's prior offense of failure to report for periodic incarceration qualified as a "violent felony" for purposes of the Armed Career Criminal Act. Justice Breyer authored the opinion; Justice Alito wrote a separate, concurring opinion, in which Justice Thomas joined.

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), requires a 15-year minimum term of imprisonment if an individual convicted of being a felon in possession of a firearm has "three previous convictions . . . for a violent felony or a serious drug offense, or both. . . ." The issue before the district court was whether the defendant's prior conviction for failing to report to a penal institution qualified as a "violent felony" as that term is used in the ACCA because it "otherwise involve[d] conduct that presents a serious potential risk of physical injury to another." The district court held that the failure to report was a type of escape, which qualified as a violent felony under the ACCA. The Seventh Circuit affirmed this classification, and the Supreme Court granted review in light of conflicting case law on this point among the circuits.

The Court reaffirmed the use of the categorical approach in applying the ACCA, stating that "[t]he nature of the behavior that likely underlies a statutory phrase matters in this respect." The Court referred back to its opinion in *Shepard v. United States*,[28] in which it examined a Massachusetts statute that combined various breaking and entering offenses into one section and "found that the behavior underlying, say, breaking into a building, differs so significantly from the behavior underlying, say, breaking into a vehicle, that for ACCA purposes a sentencing court must treat the two as different crimes."

The Court took a similar approach to the Illinois statute at issue, separating the "failure to report" sections of the statute from the sections involving escape from secured custody or from the physical custody of a law enforcement officer on one hand, and the failure to abide by conditions of home detention on the other. For ACCA purposes, then, the Court said, the Illinois statute involved "at least two separate crimes": escape from secured custody or physical custody of a law enforcement officer, which would qualify as a violent felony; and failure to report, which would not qualify as a violent felony. The Court further observed that the statute (1) "lists escape and failure to report separately (in its title and its body)" and (2) "places the behaviors in two different felony classes (Class Two and Class Three) of different degrees of seriousness."

As so defined, the Court held that the crime of failure to report does not qualify as a violent felony under the ACCA:

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[27] __U.S.__, 129 S. Ct. 687 (2009).

[28] 544 U.S. 13 (2005).

> Conceptually speaking, the crime amounts to a form of inaction, a far cry from the "purposeful, 'violent,' and 'aggressive' conduct" potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion. [*Begay v. United States*, 128 S. Ct. 1581, 1586 (2008)] (slip op., at 7). While an offender who fails to report must of course be doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury. Cf. *James* [*v. United States*], 550 U.S. [192], 203–204. To the contrary, an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct.

In so holding, the Court rejected the government's argument "that a failure to report reveals the offender's special, strong aversion to penal custody" and that this aversion suggests that this presents a serious potential risk of physical injury. The Court disagreed, citing a Commission report that it said "helps provide a conclusive, negative answer" to the question of whether this connection exists. The Court discussed the information provided in the report, concluding that it "strongly supports the intuitive belief that failure to report does not involve a serious potential risk of physical injury." As a result, the Court reversed the Seventh Circuit's judgment and remanded the case.

In *Oregon v. Ice*,[29] the Supreme Court held that the Sixth Amendment, as construed in *Apprendi v. New Jersey*[30]and *Blakely v. Washington*,[31] does not require that facts necessary to imposing consecutive sentences be found by the jury or admitted by the defendant. In a 5-4 decision, the Court upheld an Oregon statute that assigned to judges rather than juries the fact-finding necessary to impose consecutive sentences instead of concurrent sentences for multiple offenses. Justice Ginsburg delivered the opinion of the Court, joined by Justices Stevens, Kennedy, Breyer, and Alito. Justice Scalia filed a dissenting opinion, joined by Chief Justice Roberts, and Justices Souter and Thomas.

The majority upheld the Oregon statute at issue, which requires that judges rather than juries find facts necessary to impose consecutive sentences. In so doing, the Court held that the rule of *Apprendi* did not govern consecutive sentencing decisions, and based its holding on historical practice and state sovereignty. Specifically, it stated —

> These twin considerations — historical practice and respect for state sovereignty — counsel against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes. The decision to impose sentences consecutively is not within the jury function that "extends down centuries into the common law." Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures.

The Court discussed in detail the historical record, which "demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently." Instead, the "choice rested exclusively with the judge," and imposition of consecutive sentences was the "prevailing practice." The Court found that "[i]n light of this history, legislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted our decision in *Apprendi*." It stated, "There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused."

The Court also found that the case was not controlled by *Cunningham v. California*,[32] which held that it was within the jury's province to find the facts

[29] 129 S. Ct. 711 (2009).

[30] 530 U.S. 466 (2000).

[31] 542 U.S. 296 (2004).

[32] 549 U.S. 270 (2007).

permitting imposition of an elevated "upper term" sentence for a particular crime. It stated:

> We had no occasion to consider the appropriate inquiry when no erosion of the jury's traditional role was at stake. *Cunningham* thus does not impede our conclusion that, as *Apprendi*'s core concern is inapplicable to the issue at hand, so too is the Sixth Amendment's restriction on judge-found facts.

Regarding state sovereignty, the Court explained that "States' interest in the development of their penal systems . . . also counsel against the extension of *Apprendi* that Ice requests." It stated —

> It bears emphasis that state legislative innovations like Oregon's seek to rein in the discretion judges possessed at common law to impose consecutive sentences at will. Limiting judicial discretion to impose consecutive sentences serves the "salutary objectives" of promoting sentences proportionate to "the gravity of the offense," . . . and of reducing disparities in sentence length. All agree that a scheme making consecutive sentences the rule, and concurrent sentences the exception, encounters no Sixth Amendment shoal. To hem in States by holding that they may not equally choose to make concurrent sentences the rule, and consecutive sentences the exception, would make scant sense. Neither *Apprendi* nor our Sixth Amendment traditions compel straitjacketing the States in that manner.

In addition, the Court explained that Ice's "proposed expansion of *Apprendi*" would impact a number of other state initiatives. For example, states allow judges to make factual determinations in order to determine the length of supervised release; attendance at rehabilitation programs; terms of community service; and the imposition of fines and restitution. "Intruding *Apprendi*'s rule into these decisions on sentencing choices or accouterments surely would cut the rule loose from its moorings." It also stated that "the expansion that Ice seeks would be difficult for States to administer," requiring bifurcated or trifurcated trials.

The majority opinion concluded as follows:

> Members of this Court have warned against "wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries." The jury-trial right is best honored through a "principled rationale" that applies the rule of the *Apprendi* cases "within the central sphere of their concern." Our disposition today — upholding an Oregon statute that assigns to judges a decision that has not traditionally belonged to the jury — is faithful to that aim.

The dissent stated that the Court's ruling "directly contravenes" *Apprendi* and its progeny, and that it relies on the same arguments that were rejected in *Apprendi*. Citing *Booker* and *Blakely*, the dissent reasoned that the judge in this case had to make factual findings essential to imposing consecutive sentences, and that consecutive sentences are undoubtedly a "greater punishment" than concurrent sentences. "We have taken pains to reject artificial limitations upon the facts subject to the jury-trial guarantee."

Describing the majority's opinion as a "distinction without a difference," the dissent stated that the rule of *Apprendi* and its progeny "leaves no room for a formalistic distinction between facts bearing on the number of years of imprisonment that a defendant will serve for one count (subject to the rule of *Apprendi*) and facts bearing on how many years will be served in total (now not subject to *Apprendi*)." It addressed each of the Court's explanations, stating that each previously had been rejected by the Court in *Apprendi*. It stated —

> And as for a "principled rationale": The Court's reliance upon a distinction without a difference, and its repeated exhumation of arguments dead and buried by prior cases, seems to me the epitome of the opposite. Today's opinion muddies the waters, and gives cause to doubt

whether the Court is willing to stand by *Apprendi*'s interpretation of the Sixth Amendment's jury-trial guarantee.

In *Spears v. United States*,[33] the Supreme Court, in a 5-4 *per curiam* opinion, granted *certiorari* and summarily reversed and remanded this crack cocaine case to the Eighth Circuit Court of Appeals. Justice Kennedy disagreed with this approach, preferring to grant review and schedule the case for oral argument. Justice Thomas dissented without comment, and Chief Justice Roberts, joined by Justice Alito, wrote a dissenting opinion.

The defendant was convicted of conspiring to distribute crack and powder cocaine; in determining his sentence, the district court declined to impose a sentence within the guideline range, concluding that the 100-to-1 powder to crack drug quantity ratio inherent in that range produced too long a sentence. Instead, the district court determined what the defendant's guideline range would be if the drug guideline contained a 20-to-1 powder to crack ratio, and imposed a sentence near the middle of that range. The *en banc* Eighth Circuit, prior to the Supreme Court's opinion in *Kimbrough v. United States*,[34] held that this sentence was unreasonable because, in its view, 18 U.S.C. § 3553(a) and *United States v. Booker*[35] did not permit district courts to substitute a different ratio. The Supreme Court concluded that this decision was inconsistent with its opinion in *Kimbrough*.

Discussing *Kimbrough*, the Supreme Court explained that it "holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect." In fact, the Court said, this "was indeed the point of *Kimbrough*: a recognition of district courts' authority to vary from the crack cocaine Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." It necessarily follows from this authority, the Court held, that a district court also has authority to substitute "a different ratio which, in his judgment, corrects the disparity." The Court noted that, in this case, the election of the 20-to-1 ratio "was based upon two well-reasoned decisions by other courts, which themselves reflected the Sentencing Commission's expert judgment that a 20-to-1 ratio would be appropriate in a mine-run case."

Chief Justice Roberts, in dissent, expressed disagreement with the Court's decision to summarily reverse the Eighth Circuit's opinion, though acknowledged that the majority's holding "may well" follow from *Kimbrough*.

In *Nelson v. United States*,[36] the Supreme Court granted *certiorari* and summarily reversed and remanded the case for resentencing. In the opinion, the Court made it clear that "[t]he Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable." Chief Justice Roberts, Justices Stevens, Scalia, Kennedy, Souter, Thomas, and Ginsburg made up the majority, though the opinion was issued *per curiam*. Justices Breyer and Alito concurred in the judgment.

The defendant in *Nelson* was convicted of conspiracy to distribute and to possess with intent to distribute more than 50 grams of cocaine base. At sentencing, the district court imposed a sentence of 360 months in prison, which is at the bottom of the guideline range, stating that "'the Guidelines are considered presumptively reasonable,' so that 'unless there's a good reason in the [statutory sentencing] factors . . . , the Guideline sentence is the reasonable sentence.'" After his sentence was affirmed by the Fourth Circuit, the defendant petitioned for a writ of *certiorari*. The Supreme Court vacated and remanded the case in light of *Rita v. United States*.[37]

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[33] 129 S. Ct. 840 (2009).

[34] 552 U.S. 85 (2007).

[35] 543 U.S. 220 (2005).

[36] 129 S. Ct. 890 (2009).

[37] 551 U.S. 338 (2007).

On remand, the Fourth Circuit again affirmed the defendant's sentence, "acknowledg[ing] that under *Rita*, while courts of appeals 'may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.'" The Fourth Circuit, however, affirmed the defendant's sentence, holding that the district court "did not treat the Guidelines as 'mandatory' but rather understood that they were only advisory."

On its second trip to the Supreme Court (and with the government's agreement that the Fourth Circuit had erred), the Court granted the defendant's petition for writ of *certiorari* and summarily reversed the Fourth Circuit's decision. The Court reaffirmed its statement in *Rita* that the sentencing guidelines are not to be presumed reasonable by the sentencing court, and held that "the District Court's statements [in this case] clearly indicate that it impermissibly applied a presumption of reasonableness to [the defendant's] Guidelines range."

In *Flores-Figueroa v. United States*,[38] the Supreme Court held that a conviction for aggravated identity theft in violation of 18 U.S.C. § 1028A requires proof that the defendant knew the means of identification belonged to another person.

The defendant in this case twice had used fake identification documents to secure employment. The first time, the social security number he used was fictional and did not belong to anyone. The second time, he used documents in his own name but with a number that actually belonged to someone. Section 1028A imposes a mandatory, consecutive two-year penalty on anyone who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." At issue in this appeal was whether the *mens rea* included knowledge that the identification belonged to another person. The Court held that it did.

Writing for six justices and examining the text of the statute, Justice Breyer began, "As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." After considering a number of linguistic aspects of the statute, Justice Breyer looked at "[t]he manner in which the courts ordinarily interpret criminal statutes," concluding that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." In this context, he considered statutes dealing with the knowing transfer of food stamps and child pornography. Justice Breyer also considered statements in the legislative history, noting that this statute specifically penalized identity theft and that "the examples of theft that Congress gives in the legislative history all involve instances where the offender would know that what he has taken identifies a different real person." Finally, Justice Breyer noted that many cases would not raise proof problems and that, even if they did, proof problems had been insufficient in other contexts to justify a different construction of the statute.

Justice Scalia concurred in a separate opinion (joined by Justice Thomas) to note his agreement that as a matter of statutory construction "'[k]nowingly' is not limited to the statute's verbs." He continued, "But once it is understood to modify the object of those verbs, there is no reason to believe it does not extend to the phrase which limits that object." He disagreed with the court's decision "not . . . to stop at the statute's text," rejecting its characterization of prior case law and reliance on legislative history.

Justice Alito also wrote separately to note his concern "that the Court's opinion may be read by some as adopting an overly rigid rule of statutory construction" and "will be cited for the proposition that the *mens rea* of a federal criminal statute nearly always applies to every element of the offense." He

[38] 129 S. Ct. 1886 (2009).

continued, "I think it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may well rebut that presumption." Specifically, he cited the prohibition in 18 U.S.C. § 2423(a) against transporting minors interstate (noting that in those prosecutions "a defendant need not know the victim's age") and the prohibition in 8 U.S.C. § 1327 against knowingly aiding an inadmissible alien who had been convicted of an aggravated felony (noting that knowledge of the prior conviction was not required). These statutes, he reasoned, had "contextual features that warrant interpreting" them in this way, despite the general rule; in contrast, 18 U.S.C. § 1028A had no such features.

Petitions for *Certiorari* Granted

The Supreme Court granted *certiorari* in *Johnson v. United States*,[39] which presents two questions relating to whether a defendant's prior offense of felony battery constitutes a "violent felony" for purposes of the Armed Career Criminal Act, which enhances sentences on the basis of such offenses. The two questions are as follows:

> (1) Whether, when a state's highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force, that holding is binding on federal courts in determining whether that same offense qualifies as a "violent felony" under the federal Armed Career Criminal Act, which defines "violent felony" as, *inter alia*, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another."
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> (2) Whether this court should resolve a circuit split on whether a prior state conviction for simple battery is in all cases a "violent felony" — a prior offense that has as an element the use, attempted use, or threatened use of physical force against the person of another. Further, whether this court should resolve a circuit split on whether the physical force required is a *de minimis* touching in the sense of "Newtonian mechanics" or whether the physical force required must be in some way violent in nature — that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so.

Decisions of the United States Courts of Appeals

Many of the significant sentencing cases decided by the courts of appeals during the year involved the courts' continuing efforts to define their role in reviewing sentences for reasonableness in light of the Supreme Court's opinions in *Booker*, *Rita*, *Kimbrough*, *Gall*, and the other opinions discussed above.

A number of these cases addressed questions relating to procedural reasonableness (*i.e.*, whether the district court took the proper steps in the course of imposing the defendant's sentence). For example, appeals courts continued to require district courts to properly calculate the guideline range[40] and to meaningfully consider the statutory sentencing factors at 18 U.S.C. § 3553(a).[41] Similarly, appeals courts considered sentences procedurally unreasonable where the district court relied on an erroneous fact to support the sentence.[42]

Courts of appeals also continued to hold that if a sentence is to be affirmed, it must also be substantively reasonable (*i.e.*, it must represent a reasonable application of the relevant sentencing factors set forth at 18 U.S.C. § 3553(a)). Courts affirmed sentences both above and below the guideline range on substantive reasonableness

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[39] 129 S. Ct. 1315 (2009).

[40] *See, e.g.*, *United States v. Barner*, 572 F.3d 1239, 1247-48 (11th Cir. 2009).

[41] *See, e.g.*, *United States v. Olhovsky*, 562 F.3d 530, 547-48 (3d Cir. 2009).

[42] *See, e.g.*, *United States v. Kane*, 552 F.3d 748, 753 (8th Cir. 2009).

grounds.[43] Less frequently, courts also reversed sentences on such grounds.[44]

In addition to reasonableness questions regarding sentences outside the guideline range, courts of appeals also addressed reasonableness challenges to sentences within the guideline range.[45] Some of these cases involved questions of whether and how the Supreme Court's opinion in *Kimbrough* might be extended to account for policy disagreements with guidelines beyond the crack cocaine guidelines.[46]

Courts of appeals also continued to address appeals from crack cocaine offenders who sought sentence reductions under 18 U.S.C. § 3582(c)(2) as a result of the Commission's retroactive reduction of crack cocaine sentences, which took effect in 2008.[47] A circuit split developed during the year regarding whether a district court considering such a motion had jurisdiction to reduce the defendant's sentence below the amended guideline range. Previously, the Ninth Circuit had held that a district court could further reduce a defendant's sentence when a defendant was eligible for a sentence reduction as a result of a retroactive guideline amendment.[48] During the year, nine circuits reached the opposite conclusion.[49] Generally, these circuits held that the statute that provided jurisdiction for the sentence reduction also limited that jurisdiction to cases in which relief would be consistent with the applicable guideline.[50]

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[43] *See, e.g., United States v. Ruvalcava-Perez*, 561 F.3d 883 (8th Cir. 2009) (affirming upward variance based on district court's finding that the defendant had a history of violence against women, had a long and extensive violent history, and exhibited disregard for the law) and *United States v. Autery*, 555 F.3d 864 (9th Cir. 2009) (affirming downward variance based in part on district court's finding that the defendant had no history of substance abuse, no interpersonal instability, was motivated and intelligent, and had continuing family support).

[44] *See, e.g., United States v. Friedman*, 554 F.3d 1301, 1308 (10th Cir. 2009) (reversing a downward variance based on the sentence's failure to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, and to provide deterrence).

[45] *See, e.g., United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1057 (9th Cir. 2009) (reversing within-guideline sentence where the 16-level increase under USSG §2L1.1(b)(1)(A)(ii), though correctly applied, resulted in an unreasonably long sentence due to the time gap between the prior conviction and the instant offense).

[46] *See, e.g., United States v. Vandewege*, 561 F.3d 608, 610-11 (6th Cir. 2009) (remanding crack cocaine sentence in light of 2-level reduction, but expressing doubt about whether *Kimbrough* and *Spears* apply outside that context) (Gibbons, J., concurring).

[47] *See* USSG App. C, Amd. 706, 712 and 713.

[48] *United States v. Hicks*, 472 F.3d 1167, 1169-73 (9th Cir. 2007).

[49] *United States v. Fanfan*, 558 F.3d 105, 109 (1st Cir. 2009); *United States v. Savoy*, 567 F.3d 71, 72-73 (2d Cir. 2009); *United States v. Dillon*, 572 F.3d 146, 149 (3d Cir. 2009); *United States v. Dunphy*, 551 F.3d 247, 254 (4th Cir. 2009); *United States v. Doublin*, 572 F.3d 235, 238-39 (5th Cir. 2009) ; *United States v. Cunningham*, 554 F.3d 703, 705 (7th Cir. 2009); *United States v. Starks*, 551 F.3d 839, 842 (8th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833, 840 (10th Cir. 2008); *United States v. Melvin*, 556 F.3d 1190, 1193 (11th Cir. 2009) .

[50] *See, e.g., United States v. Rhodes*, 549 F.3d at 841 ("Section 3582(c)(2), on its face, does not directly address the scope of a district court's authority in modifying a sentence previously imposed. Instead, it authorizes a district court to reduce a previously imposed sentence only to the extent 'consistent with applicable policy statements issued by the Sentencing Commission.' 18 U.S.C. § 3582(c)(2).").

The year 2009, as used in this report, refers to the fiscal year 2009 (October 1, 2008, through September 30, 2009).