SUPREME COURT CASES ON SENTENCING ISSUES

Prepared by
the Office of General Counsel
United States Sentencing Commission

April 2009

TABLE OF CONTENTS

Page

Page

SUPREME COURT CASES ON SENTENCING ISSUES

***Mistretta v. United States*, 488 U.S. 361 (1989). Opinion by Justice Blackmun.**

The Supreme Court, in an 8-1 decision, upheld the Sentencing Reform Act of 1984, which established the United States Sentencing Commission, against claims that it violated the doctrine of separation of powers and excessively delegated Congress's legislative authority. The Court upheld Congress's placement of the Commission in the Judicial Branch of government, and with respect to the composition of the Commission, upheld the requirement that three federal judges serve on the Commission with non-judges. The Court held that the Commission was an essentially "neutral endeavor" in which judicial participation is "peculiarly appropriate." The Court also found no fault with the power of the President to appoint members of the Commission and remove them for cause, holding that neither power significantly threatened judicial independence.

***Braxton v. United States*, 500 U.S. 344 (1991). Opinion by Justice Scalia.**

The Supreme Court, in a unanimous decision, acknowledges that the initial and primary task of eliminating conflicts among the circuit courts with respect to the statutory interpretation of the guidelines lies with the Commission. According to the Supreme Court, "in charging the Commission 'periodically [to] review and revise' the guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the guidelines conflicting judicial decisions might suggest." Since the Commission has the authority to "periodically review and revise" and the "unusual explicit power" to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, Justice Scalia suggests that the court should be more "restrained and circumspect" in using its certiorari power to resolve circuit conflicts. The Supreme Court decided not to address the first issue presented in the case because the Commission had requested public comment on a change to §1B1.2 which would eliminate the conflict and because the case could be decided on other grounds.

***Burns v. United States*, 501 U.S. 129 (1991). Opinion by Justice Marshall.**

The Supreme Court, in a 5-4 decision, held that "before a district court can depart on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." In the instant case, the presentence report concluded that there were no factors warranting a departure. Although neither party objected to the presentence report, the district court judge announced at the end of the sentencing hearing that he was making an upward departure from a guideline range of 30-37 months and imposing a sentence of 60 months. The Supreme Court remanded the case for further proceedings.

***Chapman v. United States*, 500 U.S. 453 (1991). Opinion by Chief Justice Rehnquist.**

The Supreme Court, in a 7-2 decision, held that the statutory construction of 21 U.S.C. § 841(b)(1)(B)(v) requires that the carrier weight be included in determining the lengths of sentences for trafficking in LSD, and that this construction does not violate due process nor is it

unconstitutionally vague.

***Wade v. United States*, 504 U.S. 181 (1992). Opinion by Justice Souter.**

The Supreme Court, in a unanimous decision, held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." According to the Supreme Court, "a claim that the defendant merely provided substantial assistance will not entitle a defendant to a remedy or even discovery or an evidentiary hearing. Nor would additional but generalized allegations of improper motive." In the instant case, the defendant failed to show or allege that the government refused to file the motion for suspect reasons such as his race or his religion. The Court noted that it did not decide whether §5K1.1 implements and therefore supersedes 18 U.S.C. § 3553(e) or whether the two provisions pose separate obstacles. The defendant also did not claim that the government-motion requirement was itself unconstitutional, or that the requirement was superseded in this case by any plea agreement by the government to file a substantial-assistance motion. According to the Supreme Court, the government-motion requirement in both sections 5K1.1 and 3553(e) limiting the court's authority "gives the government a power, not a duty, to file a motion when a defendant has substantially assisted."

***Williams v. United States*, 503 U.S. 193 (1992). Opinion by Justice O'Connor.**

The Supreme Court, in a 7-2 decision, held that the appellate court in reviewing a departure decision based on both proper and improper factors, must conclude that the district court would have imposed the same sentence absent the erroneous factor, before it can affirm the sentence based on its independent assessment that the departure was reasonable pursuant to 18 U.S.C. § 3742(f)(2). According to the Supreme Court, the use of a departure factor which is prohibited by a policy statement can be an incorrect application of the guidelines under 18 U.S.C. § 3742(f)(1). However, a remand is not automatically required under section 3742(f)(1) in order to rectify an incorrect application of the guidelines. The majority opinion disagreed with the dissenters that the reasonableness standard of 18 U.S.C. § 3742(f)(2) was the sole provision governing appellate review of departure decisions.

***United States v. R.L.C.*, 503 U.S. 291 (1992). Opinion by Justice Souter.**

The Supreme Court, in an 8-1 decision, held that 18 U.S.C. § 5037(c)(1)(B), which limits the sentence of a juvenile to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult," refers to the maximum sentence that could be imposed if the juvenile were being sentenced after application of the sentencing guidelines. The Court's holding does not require plenary application of the guidelines to juvenile proceedings. According to the Supreme Court, "a sentencing court's concern with the guidelines goes solely to the upper limit of the proper guideline range as setting the maximum term for which a juvenile may be committed to official detention, absent circumstances that which would warrant departure under section 3553(b)." The Court rejected the government's argument that the term "authorized" in section 5037(c)(1)(B) means the maximum term of imprisonment provided for in the statute defining the offense. Justice O'Connor in the dissenting opinion, joined by Justice Blackmun, stated that the Court should have honored "Congress' clear intention to leave settled practice in juvenile sentencing undisturbed." According to the dissent, "we should wait for the Sentencing

Commission and Congress to decide whether to fashion appropriate guidelines for juveniles."

***United States v. Wilson*, 503 U.S. 329 (1992). Opinion by Justice Thomas.**

The Supreme Court, in a 7-2 decision, held that 18 U.S.C. § 3585(b) authorizes the Attorney General, rather than the district court, to calculate the credit toward the term of imprisonment for any time the defendant spent in official detention prior to the date the sentence commences. According to the majority opinion, the statutory language shows that Congress intended that the computation of the credit occur after the defendant begins his sentence. Thus, a district court judge cannot apply section 3585(b) at the sentencing hearing. Although section 3585(b) does not specifically refer to the Attorney General, the Court found that when Congress rewrote 18 U.S.C. § 3568 and changed it to its present form in section 3585(b) that it was likely "that the former reference to the Attorney General was simply lost in the shuffle."

***Stinson v. United States*, 508 U.S. 36 (1993). Opinion by Justice Kennedy.**

The Supreme Court, in a unanimous decision, held that "commentary in the *Guidelines Manual* that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Accordingly, the Eleventh Circuit erred in concluding that commentary was not binding and using that as a basis for not applying an amendment to the commentary of §4B1.2 which stated that felon-in-possession is not included in the term "crime of violence." The Supreme Court concluded that guideline commentary should be treated like an agency's interpretation of its own legislative rules. "According this measure of controlling authority to the commentary is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission. The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the *Guidelines Manual* as a whole as well as the authorizing statute." According to the Supreme Court, "Amended Commentary is binding on the federal courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation that satisfies the standard we set forth today."

***United States v. Dunnigan*, 507 U.S. 87 (1993). Opinion by Justice Kennedy.**

The Supreme Court, in a unanimous decision, held that a sentence enhancement pursuant to §3C1.1 when there has been a proper determination of perjury "is not in contravention of the privilege of an accused to testify in her own behalf." According to the Supreme Court, "the arguments made by the [Fourth Circuit] Court of Appeals to distinguish [*United States v.*] *Grayson* are wide of the mark."

***Custis v. United States*, 511 U.S. 485 (1994). Opinion by Chief Justice Rehnquist**.

The Supreme Court, in a 6-3 opinion, held that with the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing procedure does not have a right to collaterally attack the validity of previous state convictions that are used to enhance his sentence under the Armed Career Criminal Act. The defendant argued that his previous

convictions were invalid because of ineffective assistance of counsel, because his guilty plea was not knowing and intelligently made, and because he had not been adequately advised of his rights in opting for a "stipulated facts" trial. According to the Court, "None of these alleged constitutional violations rises to the level of jurisdictional defect resulting from the failure to appoint counsel at all." The Court refused to extend the right to collaterally attack a prior conviction used for sentencing enhancement beyond the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

***Nichols v. United States*, 511 U.S. 738 (1994). Opinion by Chief Justice Rehnquist**.

The Supreme Court, in a 6-3 decision, held that "consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* [*v. Illinois*, 440 U.S. 367 (1979),] because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." The case arose when the district court assessed one criminal history point against the defendant for a state misdemeanor conviction—driving under the influence (DUI) —for which the defendant was fined but not imprisoned. The majority of the Court reaffirmed that the Sixth Amendment right to counsel does not attach to criminal proceedings in which imprisonment is not imposed. The logical consequence of that holding is that if the conviction is valid, it can be relied on to enhance a subsequent sentence. According to the Court, reliance on such a conviction is consistent with traditional sentencing practices of using a lesser standard than that for proving guilt. For example, consistent with due process, the defendant could have been sentenced more severely based simply on evidence of the conduct underlying the DUI. The government would only have to prove the conduct by a preponderance of evidence. Therefore, it must be constitutional to use a prior conviction, where that conduct has been proven beyond a reasonable doubt. In deciding the case, the Court overruled *Baldesar v. Illinois*, 446 U.S. 222 (1980).

***United States v. Granderson*, 511 U.S. 39 (1994). Opinion by Justice Ginsburg.**

The Supreme Court, in a plurality decision (5-1-1-2), interpreted 18 U.S.C. § 3565(a), which provides that if a person on probation possesses illegal drugs "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." The Court held that, as that term is used in 18 U.S.C. § 3565(a), "original sentence" refers to the original potential imprisonment range under the guidelines. Accordingly, upon revocation of probation for possession of drugs, the minimum sentence is one-third of the maximum of the original guideline range, and the maximum sentence is the maximum of the original guideline range. Granderson, whose original guideline range was 0-6 months, had received a five-year term of probation. Upon revocation for possession of illegal drugs, the district court sentenced him to one-third of the five years: 20 months' incarceration. In reversing, the Eleventh Circuit invoked the rule of lenity and held that "original sentence" referred to the original range, which set the maximum term of imprisonment upon revocation at six months and the minimum at two months. The opinion of the Court of Appeals for the Eleventh Circuit was affirmed.

***Witte v. United States*, 515 U.S. 389 (1995). Opinion by Justice O'Connor**.

The Supreme Court, in an 8-1 decision, held that "because consideration of relevant

conduct in determining a petitioner's sentence within the legislatively authorized punishment range does not constitute punishment for that conduct," a second prosecution involving that conduct "does not violate the Double Jeopardy Clauses's prohibition against the imposition of multiple punishments for the same offense." The Court rejected the petitioner's claim that his indictment for cocaine offenses violated the Double Jeopardy Clause because the cocaine offenses had already been considered as relevant conduct in sentencing for an earlier marijuana offense. The majority relied on the Court's previous decision in *Williams v. Oklahoma*, 358 U.S. 576 (1959) specifically rejecting the claim that "double jeopardy principles bar a later prosecution or punishment for criminal activity where that criminal activity has been considered at sentencing for a second crime." The majority further noted that the consideration of relevant conduct punishes the offender "for the fact that the present offense was carried out in a manner that warrants increased punishment, not for a different offense (which that related conduct may or may not constitute)."

***Koon v. United States*, 518 U.S. 81 (1996).[1] Opinion by Justice Kennedy**.

The Supreme Court unanimously held that an "appellate court should not review the [district court's] departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion." In applying this standard, the court noted that "[l]ittle turns, however, on whether we label review of this particular question [of whether a factor is a permissible basis for departure] abuse of discretion or *de novo*, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction." "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." The court divided, however, in its determination of whether the district court abused its discretion in relying on the particular factors in this case. The majority of the court held that the Ninth Circuit erroneously rejected three of the five downward departure factors relied upon by the district court. The district court properly based its downward departure on (1) the victim's misconduct in provoking the defendants' excessive force, §5K2.10; (2) the defendants' susceptibility to abuse in prison; and (3) the "significant burden" of a federal conviction following a lengthy state trial which had ended in acquittal based on the same underlying conduct. However, the district court abused its discretion in relying upon the remaining two factors, low likelihood of recidivism, and the defendants' loss of their law enforcement careers, because these were already adequately considered by the Commission in USSG §§2H1.4 and 4A1.3. The judgment of the Court of Appeals for the Ninth Circuit was affirmed in part and reversed in part, and the case was remanded for further proceedings.

---

[1] The Commission addressed the effect of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act,' Public Law 108-21) on the *Koon* decision in Amendment 651, effective November 1, 2003. Various circuits have also addressed the effect of the PROTECT Act on the *Koon* decision. *SeeUnited States v. Stultz,* 356 F.3d 261 (2d Cir. 2004); *United States v. Griffith,* 344 F.3d 714 (7th Cir. 2003); *United States v. Archambault,* 344 F.3d 732 (8th Cir. 2003); *United States v. Clough,* 360 F.3d 967 (9th Cir. 2004).

***Melendez v. United States*, 518 U.S. 120 (1996). Opinion by Justice Thomas**.

The Supreme Court, in a 7-2 decision, held that the district court properly concluded that a Government motion under USSG §5K1.1 requesting a sentence below the applicable guideline range did not authorize the district court to depart below the lower statutory minimum. Justice Thomas was joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, Souter, and Ginsburg. Justices O'Connor and Breyer joined in Parts I and II of the opinion. Justice Stevens filed an opinion concurring in the judgment. The Court noted that a separate government motion pursuant to 18 U.S.C. § 3553(e) is required in order for a court to depart below a statutory minimum. The Court rejected the argument that the Sentencing Commission had created a "unitary" motion system in promulgating the §5K1.1 policy statement. The Court agreed with the Government that "the relevant parts of the statutes [18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n)] merely charge the Commission with constraining the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum. Congress did not charge the Commission with 'implementing' §3553(e)'s Government motion requirement, beyond adopting provisions constraining the district court's discretion regarding the particular sentence selected." Justice Breyer, with whom Justice O'Connor joined, filed an opinion concurring in part and dissenting in part, stating the view that "the Commission had the power to create a 'unitary motion system.'"

***Neal v. United States*, 516 U.S. 284 (1996). Opinion by Justice Kennedy.**

The Supreme Court, in a unanimous decision, rejected the defendant's argument that the Commission's revised system for calculating LSD sentences under the guidelines (.4 milligrams per dose) requires reconsideration of the method used to determine statutory minimum sentences. As a threshold matter, the Court was doubtful that the Commission intended its new methodology to displace the actual-weight method required by *Chapman v. United States*, 500 U.S. 453 (1991). According to the Court, "principles of *stare decisis* require that we adhere to our earlier decision." The Court expressed concern about overturning an earlier precedent without intervening statutory changes casting doubt on the *Chapman* interpretation of the statute. While the Commission, entrusted within its sphere to make policy judgments, can abandon one method for what it considers a better approach, the Court does not have the same latitude to forsake prior interpretations of statutes.

***United States v. Gonzales*, 520 U.S. 1 (1997). Opinion by Justice O'Connor**.

The Supreme Court, in a 7-2 decision, held that the provisions of 18 U.S.C. § 924(c) mandating an additional five-year term of imprisonment that "shall [not] . . . run concurrently with any other term of imprisonment" means any other term of imprisonment, whether it be state or federal. The Court reversed the decision of the Court of Appeals for the Tenth Circuit, which had delved into legislative history to support its conclusion that the statute must have been limited to cases involving prior federal sentences. The Tenth Circuit had split from other circuit courts of appeals which had addressed the issue. The Supreme Court held that there was no ambiguity in the text of the statute, and "no basis in the text for limiting section 924(c) to federal sentences."

***United States v. LaBonte*, 520 U.S. 751 (1997). Opinion by Justice Thomas**.

The Supreme Court, in a 6-3 decision, resolved a split among the Courts of Appeals, deciding that Amendment 506, promulgated by the Sentencing Commission, amending commentary to USSG §4B1.1, the career offender guideline, is "at odds with the plain language of [28 U.S.C.] § 994(h)." In 28 U.S.C. § 994(h), Congress directed the Commission to "assure" that prison terms for categories of offenders who commit a third felony drug offense or crime of violence be sentenced "at or near the maximum term authorized" by statute. The Supreme Court held that by the language "maximum term authorized," Congress meant the maximum term available for the offense of conviction, including any applicable statutory sentencing enhancements. The enhanced penalty, from 20 to 30 years' imprisonment, is brought before the court by the prosecutor by filing a notice under 21 U.S.C. § 851(a)(1). The amendment to §4B1.1's commentary at Application Note 2 had provided that the unenhanced statutory maximum should be used, in part because the unenhanced statutory maximum "represents the highest possible sentence applicable to all defendants in the category," because section 851(a)(1) notices are not filed in every applicable case. The Supreme Court responded that "Congress surely did not establish enhanced penalties for repeat offenders only to have the Commission render them a virtual nullity." "[T]he phrase 'at or near the maximum term authorized' is unambiguous and requires a court to sentence a career offender 'at or near' the 'maximum' prison term available once all relevant statutory sentencing enhancements are taken into account." The judgment of the First Circuit at 70 F.3d 1396 (1st Cir. 1995) is reversed. The Commission's amended commentary is at odds with the plain language of statute at 28 U.S.C. § 994(h), and "must give way." Cf. *Stinson v. United States*, 508 U.S. 36, 38 (1993) (Guidelines commentary "is authoritative unless it violates the Constitution or a federal statute").

***United States v. Watts*, 519 U.S. 148 (1997). *Per curiam*. Concurring opinions by Justices Breyer and Scalia**.

The Supreme Court ruled that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." The Court granted the Government's petition pursuant to Supreme Court Rule 12.4, and issued this *per curiam* opinion resolving a split in the Circuit Courts of Appeals by reversing the Ninth Circuit's holding in *United States v. Watts*, 67 F.3d 790 (9th Cir. 1995), and *United States v. Putra*, 78 F.3d 1386 (9th Cir. 1996). Only the Ninth Circuit had refused to permit consideration of acquitted conduct. The Court held that the guidelines did not alter the sentencing court's discretion granted by statute at 18 U.S.C. § 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Citing *Witte v. United States*, 515 U.S. 389, 402 (1995) (quoting *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.) ("very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment."). The Supreme Court noted that Guideline §1B1.4 "reflects the policy set forth in 18 U.S.C. § 3661" and that the commentary to guideline §1B1.3 also provides that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range," and that all acts and

omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction (relevant conduct) must be considered whether or not the defendant had been convicted of multiple counts. The Ninth Circuit's opinions also seemed to be based "on erroneous views of our double jeopardy jurisprudence," in asserting that a jury verdict of acquittal "rejects" facts. *See Dowling v. United States*, 493 U.S. 342, 349 (1990) ("an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof").

***Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Opinion by Justice Breyer**.

In a 5-4 decision, the Supreme Court resolved a circuit conflict, affirming the Fifth Circuit's opinion holding that 8 U.S.C. § 1326(b)(2) is a penalty provision which authorizes an enhanced penalty for a recidivist; it does not define a separate crime. The Fifth Circuit had joined the First, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits in holding that subsection (b)(2) is a penalty provision, in opposition to the Ninth Circuit's opinion that the subsection constituted a separate crime. Subsection (a) of section 1326 prohibits an alien who once was deported to return to the United States without special permission, and it authorizes a prison term of up to two years. Subsection (b)(2) authorizes a prison term of up to 20 years for a deported alien under subsection (a) whose initial deportation "was subsequent to a conviction for commission of an aggravated felony." The petitioner pleaded guilty to violating section 1326, admitting that he had unlawfully returned to the United States following deportation, and that such initial deportation was subsequent to three convictions for aggravated felonies. Inasmuch as subsection (b)(2) is a penalty provision, the Government is not required by the Constitution or the statute to charge the earlier aggravated felony convictions in the indictment.

***Edwards v. United States*, 523 U.S. 511 (1998). Opinion by Justice Breyer**.

The Supreme Court, in a unanimous decision, affirmed the Seventh Circuit's opinion that the sentencing guidelines require the sentencing judge, not the jury, to determine both the amount and kind of drugs at issue in a drug conspiracy. The defendant had been charged under 18 U.S.C. §§ 841 and 846 with conspiracy to possess with intent to distribute mixtures containing cocaine and cocaine base ("crack"), and the jury had returned a general verdict which did not specify the object of the conspiracy. The petitioners argued that the drug statutes and the Constitution required the judge to assume that the jury had convicted them of a conspiracy involving the lesser object, cocaine. The Supreme Court stated that it was of no consequence whether the conviction was based solely on cocaine, because the Guidelines instruct the sentencing judge to sentence a drug conspiracy based on the offender's relevant conduct, under USSG §1B1.3. Relevant conduct requires the sentencing court to base the sentence on not only the conduct which constitutes the offense of conviction, but also conduct that is "part of the same course of conduct or common scheme or plan as the offense of conviction." *See* USSG §1B1.3(a)(2). The Court noted that the statutory and constitutional claims were not implicated in this case, inasmuch as the sentences imposed were "within the statutory limits of a cocaine-only conspiracy."

***Jones v. United States*, 526 U.S. 227 (1999). Opinion by Justice Souter**.

In a 5-4 decision, the Supreme Court held that 18 U.S.C. § 2119, the federal carjacking statute, establishes three separate offenses, each of which must be charged in the indictment,

proven beyond a reasonable doubt, and submitted to a jury for its verdict. The Court's decision emphasizes the features of the carjacking statute that distinguish it from the illegal re-entry statute that was the focus of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). According to the Supreme Court, the structure of the statute and the legislative history indicate that Congress intended that the jury determine the facts which control the statutory sentencing range. To hold otherwise would raise serious constitutional issues.

***Apprendi v. New Jersey*, 530 U.S. 466 (2000). Opinion by Justice Stevens.**

In a 5-4 decision, the Supreme Court found unconstitutional a New Jersey statute that increased the maximum penalty of the defendant's weapon possession offense from 10 to 20 years based on the trial court's finding by a preponderance of evidence that the defendant committed a "hate crime." "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The Court noted that its opinion in *Jones* "foreshadowed" its resolution of whether constitutional protections of due process and rights to notice and jury trial entitled the defendant to have a jury, not a judge, decide bias beyond a reasonable doubt. The Court rejected the States's three primary arguments that (1) the biased purpose was a traditional sentencing factor of motive; (2) *McMillan* authorizes a court to find a traditional sentencing factor using a preponderance of evidence; and (3) under *Almendarez-Torres*, a judge may sentence beyond the maximum. Merely labeling a provision a sentencing factor is not dispositive: "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.' Recognizing that application of the statute could potentially double the defendant's sentence, the Court rejected the State's reliance on *McMillan*: "When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'" In rejecting the State's reliance on *Almendarez-Torres*, the Court distinguished the recidivist provision from the "biased purpose inquiry, [which] goes precisely to what happened in commission of the offense." The Court further asserted that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had . . . the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." The Court also noted that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested," but that revisiting that decision was not necessary to resolve the case.

In a concurring opinion, Justice Thomas, joined by Justice Scalia, asserted that "the Constitution requires a broader rule than the Court adopts. . . . If a fact is by law the basis for imposing or increasing punishment–for establishing or increasing the prosecution's entitlement–it is an element."

Justice O'Connor, joined by the Chief Justice, Justice Kennedy, and Justice Breyer dissented, finding that the majority's "increase in maximum penalty rule" is "unsupported by

history and case law" and rests on a "meaningless formalism." The dissent asserted that the majority was overruling *McMillan*, and that as a result there will be a significant impact on state and federal determinate sentencing schemes. "The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. The principle would thus apply not only to schemes . . . under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations."

***Buford v. United States*, 532 U.S. 59 (2001). Opinion by Justice Breyer.**

The Supreme Court, in a unanimous decision, held that the appellate court properly reviewed the district's court's "functional consolidation" decision deferentially in light of the fact-bound nature of the decision, the comparatively greater expertise of the district court, and the limited value of uniform Court of Appeals precedent. The Court reviewed the standard of review that applies when determining whether an offender's prior convictions are consolidated, thus "related," for the purposes of sentencing. The defendant pleaded guilty to armed bank robbery, a crime of violence, but he also had five prior state convictions, four of which were robberies. The four bank robberies were considered related because the court found that the robberies had been the subject of a single criminal indictment and the defendant had pleaded guilty to all four at the same time in the same court. The fifth conviction was for a drug crime. The defendant argued that all five priors, including the drug crime, were related because they were "functionally consolidated," without the entry of a formal order of consolidation, because the sentencing judge was the same, and all five cases were sentence at the same time in a single proceeding. The government disagreed stating that the drug offense was handled by a different judge, a different state prosecutor, and with a separate judgement. The district court ruled against the defendant and held that the drug case was unrelated to the robbery cases and had not been consolidated for sentencing, either formally or functionally. The Seventh Circuit stated that in this case "the standard of appellate review may be dispositive" and elected to review the district court's decision "deferentially" rather than "*de novo*." The appellate court affirmed and the defendant appealed.

***United States v. Cotton*, 535 U.S. 625 (2002). Opinion by Chief Justice Rehnquist.**

The Supreme Court, in a unanimous decision, held that defects in an indictment do not automatically require reversal of a conviction or sentence. The respondents were charged with conspiring to distribute and to possess with intent to distribute a "detectable" amount of powder and cocaine base. The respondents were later convicted and received a sentence based on the district court's drug quantity finding of at least 50 grams of cocaine base. The district court did not sentence the defendants under 21 U.S.C. § 841(b)(1)(C), which would have provided a statutory maximum penalty of 20 years, but instead implicated the enhanced penalties of 21 U.S.C. § 841(b) which provided a sentence up to life imprisonment. Two of the respondents were sentenced to 30 years of imprisonment, while those remaining received life imprisonment.

The respondents argued on appeal that the court was deprived of jurisdiction because the indictment was defective due to the omission of a fact that enhanced the statutory maximum. They

further argued that their sentences were invalid under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the issue of drug quantity was neither alleged in the indictment nor before the jury. The Fourth Circuit reviewed for plain error and held that the district court had no jurisdiction to sentence based on information not contained in the indictment. The Supreme Court reversed the holding of the Fourth Circuit and noted that the reasoning of the Fourth Circuit was based on *ex parte Bain*, 121 U.S. 1 (1887), a nineteenth century case that addresses the jurisdiction of the courts to interpret a revised indictment.

The Court here overruled *Bain* and held that (1) a defective indictment does not by its nature deprive a court of jurisdiction, and (2) the omission from a federal indictment of a fact that enhances the statutory maximum sentence does not justify a Court of Appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court.

***Harris v. United States*, 536 U.S. 545 (2002). Opinion by Justice Kennedy.**

The Supreme Court, in a 5-4 decision, held that as a matter of statutory construction, that "brandishing" is a sentencing factor to be determined by the judge. This case represents the Court's continued effort in distinguishing between offense elements and sentencing enhancements. In reaching its holding, the Court reiterated that the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), accords with its prior decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). In *Apprendi*, the Court stated that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. *McMillan* established that statutory provisions that subject defendants to increased mandatory minimum penalties are sentencing factors that may be determined by the sentencing judge through a preponderance of the evidence. *McMillan*, 477 U.S. at 91.

Defendant Harris was arrested for selling illegal narcotics out of his pawnshop with an unconcealed semiautomatic pistol at his side. He was charged with violating federal drug and firearm laws, including 18 U.S.C. § 924(c). In drafting the indictment, the Government proceeded on the assumption that section 924(c)(1)(A) sets forth a single crime and that brandishing is a sentencing factor, to be determined by the judge. Thus, brandishing was not charged in the indictment. *Harris*, 122 S. Ct. at 2410-11. Harris was found guilty after a bench trial. The presentence report recommended a seven-year minimum sentence because he had brandished the firearm. The district court agreed and sentenced Harris accordingly and the Fourth Circuit affirmed. *Id.*

The Supreme Court first considered the statutory construction of 18 U.S.C. § 924(c) which begins with a principal paragraph listing the basic elements of the offense of carrying or using a gun during and in relation to a violent crime or drug offense. The statute then lists subsections that explain how the defendant shall be sentenced. Finding that this structure sufficiently delineates between the offense elements and sentencing factors (which traditionally involve special features of the manner in which the basic crime was perpetrated), the Court held that Congress did not intend brandishing to be an offense element. *Id.* at 2412.

After examining several important recent decisions, the Court ultimately concluded that subjecting defendants to increased mandatory minimum penalties via preponderance of the evidence does not violate *Apprendi*. The Court noted that *Apprendi* said that "any fact that would extend a defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an aggravated crime . . . by those who framed the Bill of Rights." *Id.* at 2414. The Court concluded that facts increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum) are different in that "the jury has authorized the judge to impose the minimum with or without the [fact] finding" at sentencing. *Id.*

***United States v. Booker*, 543 U.S. 220 (2005). Opinion by Justice Stevens.**

The Supreme Court, in a 5-4 decision, held that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. "The Sixth Amendment, as construed in *Blakely*, does apply to the Sentencing Guidelines." A separate majority determined that the remedy was to excise two provisions of the Sentencing Reform Act, rendering the Federal Sentencing Guidelines advisory.

Defendant Booker was convicted of possession with intent to distribute cocaine. The defendant's criminal history and drug quantity resulted in a recommended guidelines range of 210 to 262 months. The sentencing judge later found, by a preponderance of the evidence, that the defendant possessed a greater amount than the jury found and increased the defendant's sentence. Booker appealed arguing that the sentence enhancement violated his Sixth Amendment right to a jury trial because it permitted the judge to find facts not admitted by the defendant nor found by the jury. The Seventh Circuit held that the sentence enhancement violated the Sixth Amendment because it limited Booker's right to have a jury find facts. The court affirmed the conviction but overturned the sentence and ruled that the Guidelines violated the Sixth Amendment in cases where they limit the defendant's right to a jury trial.

The Government raised two issues before the Supreme Court to determine "whether the *Apprendi* line of cases applies to the Sentencing Guidelines and, if so, what portions of the guidelines remain in effect." The Court noted that in *Apprendi* it expressly declined to consider the Guidelines because a statute, not guidelines, was considered in that case. However in *Blakely* the Court stated that "there was no distinction of the constitutional significance between the federal sentencing guidelines and the Washington procedures at issue." "The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself." The Court rejected the government's argument that there would only be a Sixth Amendment violation if the final sentence exceeded the applicable statutory maximum for the offense. The Court concluded that application of the Federal Sentencing Guidelines violated the Sixth Amendment. Having rejected that argument, the Court turned its attention to answering the question of remedy "by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C.A. § 3553(b)(1) (Supp.2004), and incompatible with today's constitutional holding."

In a separate opinion by Justice Breyer, joined by Chief Justice Rehnquist, Justice

O'Connor, Justice Kennedy, and Justice Ginsberg, the Court concluded that "the two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent." The Court concluded that 18 U.S.C.A. § 3553(b)(1) and 3742(e), which depend upon the Guidelines' mandatory nature, must be severed and excised. "So modified, the Federal Sentencing Reform Act of 1984..., makes the Guidelines effectively advisory." With this modification, the sentencing courts would be required to consider Guidelines ranges, but also be permitted to tailor the sentence in light of other statutory concerns.

Four dissenting opinions (dissenting in part) were filed. Justice Stevens dissented in part, joined by Justice Souter and Justice Scalia, who joined except for Part III and footnote 17 of the dissenting opinion. Justice Stevens addressed the Court's decision to excise and sever the two statutory provisions which made the application of the Guidelines mandatory. Justice Stevens asserted that the Court's decision to do so represented a policy choice that Congress had considered and decisively rejected. "While it is perfectly clear that Congress has ample power to repeal these two statutory provisions if it so desires, this Court should not make that choice on Congress' behalf." Justice Stevens recognized the Court's action as an "extraordinary exercise of authority" that violated "the tradition of judicial restraint that has heretofore limited our power to overturn validly enacted statutes."

Justice Scalia wrote a dissent, dissenting in part to the excision of the provision governing appellate review of sentences, 18 U.S.C. 3742(e), which had, as its sole purpose, enabling the appellate courts to enforce conformity with the Guidelines. Justice Scalia asserted that "if the Guidelines are no longer binding, one would think that the provision designed to ensure compliance with them would, in its totality, be inoperative."

Justice Thomas's dissent concluded that the presumption of severability had not been overcome in *Booker*. According to Justice Thomas, the question remains "whether the unconstitutional application of certain statutory provisions and guidelines applied to *Booker* are severable from the constitutional applications of the same provisions to other defendants."

Justice Breyer wrote a dissent, joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy, disagreeing with the Court's conclusion requiring a jury, not a judge, to find sentencing facts. Justice Breyer stated that he found "nothing in the Sixth Amendment that forbids a sentencing judge to determine (as judges at sentencing have traditionally determined) the manner or way in which the offender carried out the crime of which he was convicted." "The upshot is that the Court's Sixth Amendment decisions – *Apprendi*, *Blakely*, and today's – deprive Congress and state legislatures of authority that is constitutionally theirs."

***Rita v. United States*, 127 S. Ct. 2456 (June 21, 2007). Opinion by Justice Breyer.**

The Supreme Court, in an 8-1 decision, held that courts of appeals may apply a presumption of reasonableness when reviewing a sentence imposed within the sentencing guideline range, and affirmed the within-guidelines sentence imposed in the case. Writing for the majority, Justice Breyer, joined by Chief Justice Roberts and Justices Stevens, Kennedy, Ginsburg,

and Alito, emphasized the close relationship between the guidelines and the section 3553(a) factors.

First, the Court discussed the statutory provisions governing the promulgation of the guidelines and how those provisions mirror the factors that section 3553(a) requires sentencing courts to consider, noting that "... the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale." Second, the Court discussed the process that the Commission used to initially promulgate and subsequently amend the guidelines, concluding that the guidelines "seek to embody the § 3553(a) considerations, both in principle and in practice" and that they "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." In sum, the Court said ". . . [T]he courts of appeals' "reasonableness" presumption, rather than having independent legal effect, simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." The majority also emphasized that circuits are not *required* to employ a presumption when conducting reasonableness review, and that the presumption is applied on *appeal* and not by the sentencing judge.

Another important part of the majority opinion is its discussion of the procedural issues raised by the advisory guidelines scheme. Specifically, the Court (and in this it was joined by Justices Scalia and Thomas) examined the district court's statement at sentencing to determine whether it complied with the requirement in section 3553(c) that the judge "state in open court the reasons for its imposition of the particular sentence." The Court emphasized that the amount of detail required in such a statement would vary depending on the circumstances of the case, but that the district court "should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." Further, the Court said, when imposing a within-guidelines sentence, a brief explanation may be sufficient: "Unless a party contests the Guidelines sentence generally under §3553(a) - that is argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way - or argues for departure, the judge normally need say no more." The Court said that, where such arguments *are* made, the sentencing judge will typically explain why he has rejected them; it noted again, however, that a brief explanation may be sufficient. The Court approved the sentencing judge's very brief explanation in sentencing Mr. Rita, noting that the judge had clearly heard and considered the arguments relating to Mr. Rita's military service, his health issues, and his vulnerability in prison, but "simply found [them] insufficient to warrant a sentence" below the guideline range. On this issue, the Court concluded: "Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively."

In dissent, Justice Souter argued that it is impossible, under the current system, to "recognize such a presumption and still retain the full effect of *Apprendi* in aid of the Sixth Amendment guarantee." In his view, the proper resolution to the tension between the Sixth Amendment jury trial right and Congressional concerns about uniformity would be for Congress to

"reenact the Guidelines law to give it the same binding force it originally had, but with provision for jury, not judicial, determination of any fact necessary for a sentence within an upper Guidelines subrange." Concurring in part and concurring in the judgment, Justice Scalia (with whom Justice Thomas joined), criticized the Court because, he said, "the Court has failed to establish that every sentence which will be imposed under the advisory Guidelines scheme could equally have been imposed had the judge relied upon no facts other than those found by the jury or admitted by the defendant." In his view, "reasonableness review cannot contain a substantive component at all," but procedural reasonableness review can provide some sentencing uniformity. Applying this standard, Justices Scalia and Thomas concluded that the sentence imposed in this case was reasonable. Justice Stevens, joined by Justice Ginsburg, concurred, also concluding that the sentence was reasonable, but emphasized that the presumption was a rebuttable one and that even an outside-the-guidelines sentence would be reviewed "under traditional abuse-of-discretion principles."

***Kimbrough v. United States*, 128 S. Ct. 558 (Dec. 10, 2007). Opinion by Justice Ginsburg.**

In a 7-2 opinion, the Court held that a sentencing judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine when determining a sentencing range. Justice Ginsburg delivered the opinion in which Chief Justice Roberts, Justices Stevens, Scalia, Kennedy, Souter, and Breyer joined. Justice Scalia also filed a concurring opinion; Justices Thomas and Alito filed dissenting opinions.

The Court summarized the history of the crack/powder disparity, noting the circumstances surrounding its inclusion in the Anti-Drug Abuse Act of 1986 (the 1986 Act) and the assumptions that underlay the conclusion that crack offenders should be punished significantly more severely than powder cocaine offenders. The Court observed that, in creating the drug guidelines, the Commission varied from its usual practice of employing an "empirical approach based on data about past sentencing practices," instead adopting the "weight-driven scheme" used in the 1986 Act, and maintaining the 100-to-1 quantity ratio throughout the drug table. The Court then discussed the Commission's subsequent criticisms of the ratio, quoting from the various Commission reports to Congress on the issue, and discussed Congress's previous responses to Commission actions and recommendations. The Court finally discussed the Commission's 2007 amendments, and observed that the Commission considered them "only . . . a partial remedy" for the problems caused by the disparity.

The Court then discussed the status of the relevant guidelines in light of *Booker*, examining the government's arguments that "the Guidelines adopting the 100-to-1 ratio are an exception to the general freedom that sentencing courts have to apply the § 3553(a) factors." The Court first rejected the government's grounding of the proposition in the text of the 1986 Act, "declin[ing] to read any implicit directive into [the] congressional silence" on the appropriate length of sentences not dictated by the mandatory minima and maxima in the 1986 Act itself. The Court observed that "[d]rawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms," citing 28 U.S.C. § 994(h)'s direction regarding career offenders. Additionally, the Court looked to its earlier decision in *Neal v. United States*, 516 U.S. 284 (1996) (*infra.*, p. 6), in which it held that the Commission's method for

calculating the weight of LSD did not dictate the method used for determining the applicable statutory mandatory minium.

Next, the Court rejected the government's argument that Congress's 1995 disapproval of the Commission's implementation of the 1:1 ratio in the guidelines "made clear that the 1986 Act required the Commission (and sentencing courts) to take drug quantities into account, and to sdo so in a manner that respects the 100:1 ratio." The Court observed that "nothing in Congress' 1995 reaction to the Commission-proposed 1-to-1 ratio suggested that crack sentences must exceed powder sentences by a ratio of 100 to 1. To the contrary, Congress' 1995 action required the Commission to recommend a 'revision of the drug quantity ratio of crack cocaine to powder cocaine.'" The Court further observed that the 2007 amendments result in a crack/powder ratio that is not consistently 100-to-1, but that Congress did not disapprove the amendments.

Finally, the Court rejected the government's arguments that consideration of the 100-to-1 ratio would result in unwarranted sentencing disparities in violation of section 3553(a)(6). The two kinds of disparities considered were those arising from "cliffs" in the guideline ranges near and at the mandatory minima, and those arising from different sentencing judges' opinions regarding the proper relationship between crack offenders and powder cocaine offenders. The Court observed that both are inherent in the guidelines system, and that "advisory Guidelines combined with appellate review for reasonableness will . . . not eliminate variations between district courts, but . . . *Booker* recognized that some departures from uniformity were a necessary cost of the remedy [*Booker*] adopted." The Court finally noted that, if an unwarranted disparity arises, the district court is required to address it under section 3553(a)(6).

The Court then discussed the Commission's ongoing role in determining sentencing ranges, noting that "while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." The Court held that the crack cocaine guidelines "do not exemplify the Commission's exercise of its characteristic institutional role" and noted the Commission's opinion that the crack cocaine guidelines produce "disproportionately harsh sanctions." In light of this, "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."

Applying these principles, the Court concluded that the sentence in the instant case did not constitute an abuse of discretion, and reversed the Fourth Circuit's order vacating the sentence.

In dissent, Justice Thomas expressed his continuing disagreement with the opinion of the *Booker* remedial majority, and Justice Alito wrote that he would vacate the Fourth Circuit's decision and remand for reconsideration in light of *Booker*'s holding that a court of appeals may not "treat the Guidelines' policy decisions as binding."

***Gall v. United States*, 128 S. Ct. 586 (Dec. 10, 2007). Opinion by Justice Stevens.**

In a 7-2 decision, the Supreme Court held that the abuse of discretion standard of review applies equally to all sentences, rejecting the form of proportionality review employed by the court of appeals in the case. Justice Stevens delivered the opinion of the Court, in which Chief Justice Roberts, Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer joined. Justices Scalia and Souter filed concurring opinions, and Justices Thomas and Alito filed dissenting opinions.

The Court held that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, the court of appeals must review all sentences -- whether inside, just outside, or significantly outside the Guidelines range--under a deferential abuse of discretion standard." The Court further held that the appellate rule "requiring 'proportion' justifications for departures from the Guidelines range is not consistent with" *Booker*. The Court also stated: "Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse of discretion standard of review now applies to appellate review of sentencing decisions."

In reviewing the reasonableness of a sentence outside the range, the Court said, appellate courts "may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines." An inappropriate standard of appellate review, the Court said, is one: "that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range." The Court also disapproved "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." The Court reasoned that such an approach would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." The Court also stated that the "mathematical approach also suffers from infirmities of application" and "assumes the existence of some ascertainable method of assigning percentages to various justifications." The Court also observed that these practices "reflect a practice . . . of applying a heightened standard of review to sentences outside the Guidelines range," which, the Court said, "is inconsistent with the rule that the abuse of discretion standard of review applies to appellate review of all sentencing decisions – whether inside or outside the Guidelines range."

The Court then discussed the proper analysis for sentencing courts, beginning with proper calculation of the guideline range, followed by consideration of the section 3553(a) factors, and noting that if the court determines that a sentence outside the guideline range is appropriate, the court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." The Court went on to state: "We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one." After making this determination, the Court said, the sentencing court must adequately explain the reasons for the sentence. With respect to appellate review, the Court acknowledged that reviewing courts "will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." In so doing, the Court said, the appellate court "may consider the extent of deviation, but must give due deference to the district court's decision that the 3553(a) factors, on a whole, justify the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate

is insufficient to justify reversal of the district court."

The Court then concluded that, in the case at bar, the Eighth Circuit failed to give the proper deference to the district court's decision, and reversed the judgment.

Justice Alito, dissenting, stated that he would hold that "a district court must give the policy decisions that are embodied in the Sentencing Guidelines at least some significant weight" and would therefore affirm the Eighth Circuit's decision.

***Greenlaw v. United States*, 128 S. Ct. 2559 (June 23, 2008). Opinion by Justice Ginsburg.**

The Supreme Court, in a 7-2 opinion, held that an appeals court was not permitted to order an increase in a defendant's sentence where the government did not appeal the sentence. Justice Ginsburg wrote for the majority, in which Chief Justice Roberts and Justices Scalia, Kennedy, Souter and Thomas joined. Justice Breyer wrote separately, concurring in the judgment. Justice Alito dissented; Justice Stevens joined the dissent in full and Justice Breyer joined it in part.

The petitioner was convicted of seven counts of an eight-count indictment arising out of his participation in a crack cocaine trafficking scheme. The charges included two § 924(c) counts; the district court, in direct contravention of prior Supreme Court precedent, held over government objection that the second count was not considered a "second or subsequent conviction" because the two counts were charged in the same indictment. As a result, the district court erroneously imposed a sentence of 442 months' imprisonment, which fell below the required mandatory minimum of 622 months' imprisonment. Nevertheless, the defendant appealed the sentence; in defending the sentence, the government noted that the sentence was erroneously low, but did not file a cross-appeal of the error. The Eighth Circuit, relying on the "plain error" rule set forth in Fed. R. Crim. P. 52(b), vacated the sentence and remanded to the district court with instructions that it impose the statutorily mandated sentence. The defendant then sought rehearing and rehearing en banc, and the petitions were summarily denied.

The defendant and the United States agreed that the appeals court erred in vacating and remanding the sentence; therefore, the Court invited an *amicus* brief in support of the Eighth Circuit's position.

The majority opinion began by noting the general "principle of party presentation" that characterizes the United States' adversary system in which courts "rely on the parties to frame the issues for decision" and themselves play "the role of neutral arbiter of matters the parties present." Derived from this principle is the "cross-appeal rule," which the Court described as an "unwritten but longstanding rule" that "an appellate court may not alter a judgment to benefit a nonappealing party." The Court noted the split among the circuits regarding the question of whether this rule is "jurisdictional," and therefore not subject to exception, or a "rule of practice" to which courts may create exceptions. As in previous cases, the Court declined to resolve the circuit split, concluding that resolving the issue was not necessary to deciding the case at bar.

The Court discussed 18 U.S.C. § 3742(b), which provides that the government may not

proceed with an appeal of a criminal case "without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." The Court concluded that "[i]t would severely undermine Congress' instruction were appellate judges to 'sally forth' on their own motion . . . to take up errors adverse to the Government when the designated Department of Justice officials have not authorized an appeal from the sentence the trial court imposed." The Court said that "[t]hat measure should garner the Judiciary's full respect." The Court then addressed the relationship between Fed. R. Crim. P. 52(b) and the cross-appeal rule, concluding that no plain-error exception to the cross-appeal rule existed where the error was to the detriment of the government in a criminal appeal.

The Court then rejected the arguments of *amicus* supporting the Eighth Circuit's position. In so doing, the Court discussed at some length the argument that 18 U.S.C. § 3742, the part of the Sentencing Reform Act dealing with appellate review standards, supports the Eighth Circuit's judgment. The argument relies on a comparison of § 3742(f)(1) and (f)(2); the former sets the standard of review for "sentences imposed 'in violation of law' and Guideline application errors" and the latter sets the standard of review for "sentences 'outside the applicable Guideline range.'" For sentences outside the range, the provision specifies that remand is proper "only where a departure from the Federal Sentencing Guidelines harms the appellant;" for sentences that are "imposed 'in violation of law'" or that result from an erroneous guideline application, no limit is specified. "The inference *amicus* draws from this distinction is that Congress intended to override the cross-appeal rule for sentences controlled by § 3742(f)(1), i.e., those imposed 'in violation of law' (or incorrectly applying the Guidelines), but not for Guideline departure errors, the category covered by § 3742(f)(2)." The Court rejected this interpretation, instead concluding that, since the cross-appeal rule was well-settled at the time of the Sentencing Reform Act, "Congress was aware of the cross-appeal rule, and framed § 3742 expecting that the new provision would operate in harmony with the 'inveterate and certain' bar to enlarging judgments in favor of an appellee who filed no cross-appeal." In support of its interpretation, the Court noted that earlier crime control legislation had included a specific exception to the cross-appeal rule, which was repealed by the Sentencing Reform Act. Additionally, the Court noted that "the construction proposed by *amicus* would draw a puzzling distinction between incorrect applications of the Sentencing Guidelines . . . and erroneous departures from the Guidelines." In a footnote to this portion of its opinion, the Court noted a disagreement among members of the Court regarding the impact of *Booker* on § 3742:

> In rejecting the interpretation of §§ 3742(e) and (f) proffered by *amicus*, we take no position on the extent to which the remedial opinion in *United States v. Booker*, 543 U.S. 220 (2005), excised those provisions. Compare *Rita v. United States*, 551 U.S. ----, ---- (2007) (slip op., at 2) (STEVENS, J., concurring) (*Booker* excised only the portions of § 3742(e) that required *de novo* review by courts of appeals), with 551 U.S., at ---- (slip op., at 17) (SCALIA, J., concurring in part and concurring in judgment) (*Booker* excised all of §§ 3742(e) and (f)). See also *Kimbrough v. United States*, 552 U.S. ----, ---- (2007) (slip op., at 3) (THOMAS, J., dissenting) (the *Booker* remedial opinion, whatever it held, cannot be followed).

Finally, the Court supported its application of the cross-appeal rule by discussing what it called the "auxiliary" roles of the Federal Rules of Appellate Procedure in ensuring "fair notice and finality" to permit strategic decisions in appellate litigation.

The Court concluded by distinguishing its holding in this case from what it viewed as proper treatment of "sentencing package cases" in which a defendant successfully attacks his sentence on one or some of the multiple counts, and the appellate court vacates "the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to assure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a)." This procedure, the Court said, "is not at odds with the cross-appeal rule" and "simply ensures that the sentence 'will suit not merely the offense but the individual defendant.'"

In concurring in the judgment, Justice Breyer expressed the view that the Eighth Circuit had authority to vacate the sentence, but that its decision to do so in this case was an abuse of discretion because the decision was "based solely on the obviousness of the lower court's error," a standard which is explicitly disapproved by prior Supreme Court precedent.

In dissent, Justice Alito expressed the view that the cross-appeal rule is not jurisdictional but rather a rule of practice, and therefore subject to exceptions. Further, Justice Alito argued that application of the rule in this instance is not as important to the interests of justice as the majority believed it is, and would in fact "disserve[] . . . the interest of the Judiciary and the public in correcting grossly prejudicial errors of law that undermine confidence in our legal system." Because the parties did not brief the issue of whether, if the Eighth Circuit did have such authority, it abused its discretion in the case at bar, Justice Alito noted that he would affirm without reaching the question.

***Irizarry v. United States*, 128 S. Ct. 2198 (June 12, 2008). Opinion by Justice Stevens.**

The Supreme Court, in a 5-4 opinion, held that a district court was not required to provide advance notice to the parties when imposing a sentence that represents a variance from the guideline range. Justice Stevens delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Thomas filed a concurring opinion. Justice Breyer filed a dissent, in which Justices Kennedy, Souter, and Ginsburg joined.

Petitioner Richard Irizarry pleaded guilty to one count of making a threatening interstate communication, in violation of 18 U.S.C. § 875(c). Irizarry admitted to sending a number of e-mails threatening to kill his ex-wife and her new husband, and that his emails were intended to be true threats to kill or injure them. The PSR described the threatening emails and added that the petitioner had asked another inmate to kill his ex-wife's new husband. As possible grounds for departure, the PSR stated that Irizarry's criminal history category might not adequately reflect his past criminal conduct or the likelihood that he would commit other crimes. The government noted in its response to the PSR that it intended to call Irizarry's ex-wife as a witness at the sentencing hearing.

At the hearing, Irizarry's ex-wife testified regarding incidents of domestic violence, the

basis for the restraining order against Irizarry, and the threats he had made against her and her family. A special agent of the FBI also testified, describing documents recovered from Irizarry's car indicating that he intended to find his ex-wife and their children. And Irizarry's cellmate testified that Irizarry "was obsessed with the idea of getting rid of" his ex-wife's husband. Irizarry also testified.

After listening to the witnesses and hearing from counsel, the district court concluded "that the maximum time that [the defendant] can be incapacitated is what is best for society, and therefore the guideline range . . . is not high enough." The court varied upward from the Guidelines range, and sentenced Irizarry to the statutory maximum term of imprisonment. The court's decision was based on its determination, after hearing Irizarry's ex-wife testify at the sentencing hearing, that Irizarry "will continue . . . in this conduct regardless of what this court does and regardless of what kind of supervision he's under."

Following the court's imposition of sentence, Irizarry objected, stating that he "didn't have notice of [the court's] intent to upwardly depart." The court overruled this objection, finding that notice was not required now that the U.S. Sentencing Guidelines are advisory.

The Court of Appeals for the Eleventh Circuit affirmed, holding that Rule 32(h) did not apply in this case because the above-Guidelines sentence was a variance, not a departure. *United States v. Irizarry*, 458 F.3d 1208, 1211 (11th Cir. 2006). The Eleventh Circuit joined several other circuits in determining that "[a]fter *Booker*, parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum." *Id*. at 1212. The Supreme Court granted *certiorari* and affirmed, holding that Rule 32(h) does not apply to a variance from a recommended Guidelines range.

The holding of the Court rests on its decision in *United States v. Booker*, 543 U.S. 220 (2005), "which invalidated the mandatory features of the Guidelines." According to the Court, "[t]he due process concerns that motivated the Court to require notice in a world of mandatory Guidelines no longer provide a basis for this Court to extend the rule set forth in *Burns* either through an interpretation of Rule 32(h) itself or through Rule 32(i)(1)(c)."

In *Burns*, the Court held that the text of Rule 32 required "notice of any contemplated departure." *Id*. at 5. Justice Souter's dissent, which argued that the text itself did not require notice, discussed due process concerns. The Court in this case stated that its decision in *Burns* "applied in a narrow category of cases," namely, departures "authorized by 18 U.S.C. § 3553(b) which required 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" Such departures had to be based on "the sentencing guidelines policy statements, and official commentary of the Sentencing Commission." Further, the notice requirement set forth in *Burns* "only applied to the subcategory of those departures that were based on 'a ground not identified as a ground . . . for departure either in the presentence report or in a pre-hearing submission.'"

Because, post-*Booker*, "there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges," the Court held that Rule 32(h) does not apply to variances. The Court also voiced more practical concerns that a special notice requirement in such circumstances might "create unnecessary delay." The Court stated that the proper approach to cases in which "the factual basis for a particular sentence will come as a surprise to a defendant or the Government" is for the "district court to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial."

The dissent (written by Justice Breyer) contended that Rule 32(h) applies to § 3553(a) variances by its terms. The dissent argued that by distinguishing "departures" from "variances" in this context, the Court is "creat[ing] a legal distinction without much of a difference." According to the dissent, "[s]o-called variances fall comfortably within" the Guidelines' definition of "departure." Further, "[v]ariances are also consistent with the ordinary meaning of the term 'departure,'" and "conceptually speaking, the substantive difference between" the two terms "is nonexistent." The majority rejected this argument, stating that "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines."

The dissent also found the majority's concerns about delay to be "exaggerated," noting that in most cases in which the district court varies outside the Guidelines range, the PSR or the parties have identified the ground for the variance. In other cases, the parties might be able to address the "unconsidered" issue at the hearing without the need for a continuance. In all other cases, according to the dissent, "fairness justifies notice regardless" of "burdens and delay."

***Spears v. United States*, 129 S. Ct. 840 (Jan. 21, 2009). Per curiam.**

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 100:1 crack to powder 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 20:1 crack to powder 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*, held that this sentence was unreasonable because, in its view, 18 U.S.C. § 3553(a) and *Booker* 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 20:1 ratio "was based upon two well-reasoned decisions by other courts, which themselves reflected the Sentencing Commission's expert judgment that a 20:1 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 acknowledging that the majority's holding "may well" follow from *Kimbrough*.

OPINIONS ON RELATED SENTENCING ISSUES

18 U.S.C. § 924(c)

***Deal v. United States*, 508 U.S. 129 (1993). Opinion by Justice Scalia**.

The Supreme Court, in a 6-3 decision, upheld the defendant's sentence under 18 U.S.C. § 924(c) to a five-year prison term for his first conviction, and five 20-year sentences for five additional section 924(c) convictions, to be served consecutively (105 years total). The defendant had committed six bank robberies on six different dates, using a gun each time, but was convicted and sentenced for all of the offenses in one proceeding. The Court was not persuaded by the defendant's assertion that the language of section 924(c) requiring a 20-year sentence for a "second or subsequent conviction" was ambiguous and should be construed under the rule of lenity in his favor. The court held that the use of the word "conviction" refers to the finding of guilt that necessarily precedes the entry of a final judgment of conviction. Each subsequent conviction carried a 20-year term. This is unlike statutes that have been interpreted to impose an enhanced sentence for "subsequent offenses" only if the subsequent offense was committed after the sentence for the previous offense had become final. Nor could the rule of lenity be invoked based on the total length of the sentence, which the defendant characterized as "glaringly unjust." Whether the defendant was convicted of six counts in one proceeding, or in six separate trials, the result mandated by the statute would be a 105-year total sentence.

***Smith v. United States*, 508 U.S. 223 (1993). Opinion by Justice O'Connor**.

The Supreme Court, in a 6-3 decision, held that the exchange or barter of a gun for illegal drugs constitutes "use" of a firearm for purposes of the provisions of 18 U.S.C. § 924(c)(1) which sets penalties for offenses where a defendant "during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm." The Supreme Court agreed with the opinion of the Court of Appeals for the Eleventh Circuit that the plain language of the statute "imposes no requirement that the firearm be used as a weapon." Rather, any use of the weapon to in any way facilitate the commission of the offense is sufficient. *United States v. Smith*, 957 F.2d 835, 837 (11th Cir. 1992). In *United States v. Harris*, 959 F.2d 246, 261-62 (*per curiam*) (D.C. Cir.), *cert. denied*, 113 S. Ct. 362 (1992), the Court of Appeals for the District of Columbia Circuit so held, but the Court of Appeals for the Ninth Circuit in *United States v. Phelps*, 877 F.2d 28 (1989), held that trading the gun for drugs could not constitute "use," and the Supreme Court decided this issue to resolve the conflict among the circuits.

***Bailey v. United States*, 516 U.S. 137 (1995).[2] Opinion by Justice O'Connor.**

The Supreme Court, in a unanimous opinion, held that 18 U.S.C. § 924(c)(1) "requires

---

[2] In response to the Supreme Court's decision in *Bailey,* Congress amended 18 U.S.C. § 924(c) so that it would apply when a defendant merely "possesses" a firearm "in furtherance of" a drug trafficking crime. *See* Act of Nov. 13, 1998, Public Law 105-386, § 1(a), 112 Stat. 3469 (amending 18 U.S.C. § 924). This issue was also addressed by the Commission. *See* "Sentencing for the Possession or Use of Firearms During a Crime: Possible Commission Responses to Public Law No. 105-386 and Other Issues Pertaining to 18 U.S.C. § 924(c)" (January 6, 2000). This report may be viewed on the Commission's website at: http://www.ussc.gov/research.htm.

evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." According to the Court, the term "use" connotes more than mere possession or storage of a firearm by a person who commits a drug offense.

***United States v. Gonzales*, 520 U.S. 1 (1997). Opinion by Justice O'Connor.**

The Supreme Court, in a 7-2 decision, held that the plain language of 18 U.S.C. § 924(c) requires a federal district court to direct that the five-year sentence run consecutive with a state or federal prison term. The defendants were convicted in New Mexico state court and sentenced to prison terms on state charges arising from the use of guns by two of the defendants to hold up undercover police officers during a drug sting operation. After they began to serve their state sentences, the defendants were convicted of drug charges and of using firearms during their crimes in violation of section 924(c). The district court directed that the 60-month sentence required under section 924(c) to run consecutive to the federal and state sentence. The Tenth Circuit reversed, holding that the firearm sentences should have run concurrently with the state prison terms. The Supreme Court reversed the Tenth Circuit, holding that section 924(c)'s plain language forbids concurrent sentence. Section 924(c) states: "the sentence . . . under this subsection [shall not] run concurrently with any other term of imprisonment." The Court added that the word "any" has an expansive meaning that is not limited to federal sentences, and so must be interpreted as referring to all "terms of imprisonment," including those imposed by state courts. Thus, the firearm sentence must be consecutive to the state sentences.

***Muscarello v. United States*, 524 U.S. 125 (1998). Opinion by Justice Breyer**.

The Supreme Court, in a 5-4 decision, held that the phrase "carries a firearm" in 18 U.S.C. § 924(c) applies to a person who knowingly possesses and conveys a firearm in a vehicle—including in a locked glove compartment or in the trunk of the car—in relation to a drug trafficking offense. In affirming the decisions of the First and Fifth Circuits, the Court noted that the Federal Circuit Courts of Appeals have unanimously concluded that the word "carry" "is not limited to the carrying of weapons directly on the person but can include their carriage in a car." The Court examined the legal question of whether Congress intended to limit the scope of the word "carry" to instances in which a gun is carried "on the person," and concluded that "neither the statute's basic purpose nor its legislative history support circumscribing the scope of the word 'carry' by applying an 'on the person' limitation." The Court addressed the dissent's argument that the rule of lenity should be applied because there is ambiguity in the statute. In disagreeing with the dissent, the majority noted that for the rule of lenity to apply, a court must conclude that there is "grievous ambiguity or uncertainty" in the statute, such that the court could make "no more than a guess as to what Congress intended."

***Castillo v. United States*, 530 U.S. 120 (2000). Opinion by Justice Breyer.**

The Supreme Court, in an 8-1 decision, held that a statute prohibiting the use or carrying of a "firearm" in relation to a crime of violence that subsequently increased the penalty when the weapon used or carried was a "machinegun," used the word "machinegun" and similar words to state an element of a separate, aggravated crime. The Court stated that the statute's structure strongly favored the "new crime" interpretation. The Court further stated that the structure of the

statute seems to suggest that the difference between the act of using or carrying a "firearm" and the act of using or carrying a "machinegun" is both substantive and substantial—a conclusion that supports a "separate crime" interpretation. Finally, the Court determined that the length and severity of an added mandatory sentence that turns on the presence or absence of a "machinegun" (or any of the other listed firearm types) weighs in favor of treating such offense-related words as referring to an element. The Court noted that these considerations make this a stronger "separate crime" case than either *United States v. Jones*[3] or *United States v. Almendarez-Torres*[4]—cases in which the Court was closely divided as to Congress's likely intent. The Court concluded that Congress intended the firearm type-related words used in section 924(c)(1) to refer to an element of a separate, aggravated crime.

***Leocal v. Ashcroft*, 543 U.S. 1 (2004). Opinion by Chief Justice Rehnquist.**

In this unanimous opinion the Supreme Court reversed the Eleventh Circuit's decision in *Le v. United States Attorney General*, 196 F.3d 1352 (11th Cir. 1999) which held that a conviction under the Florida DUI statute qualified as a crime of violence. In doing so, the Court resolved a split among the circuits on the question whether state DUI offenses similar to Florida's, which either require only a showing of negligence or do not have a *mens rea* requirement, can qualify as a crime of violence. The petitioner, a Haitian citizen, was a lawful permanent resident of the United States convicted under Florida law of DUI and causing serious bodily injury. He was ordered deported after his DUI conviction was classified as a "crime of violence" under 18 U.S.C. § 16 and therefore deemed an "aggravated felony" under the Immigration and Nationality Act (INA). The Supreme Court disagreed. "Many states have enacted similar statutes, criminalizing DUI causing serious bodily injury or death without requiring proof of any mental state, or, in some states, appearing to require only proof that the person acted negligently in operating the vehicle." "The critical aspect of § 16(a) is that a crime of violence is one involving the "use... of physical force *against the person or property of another*." "The key phrase in § 16(a) – the 'use..of physical force against the person or property of another' – most naturally suggests a higher degree of intent than negligent or merely accidental conduct." The Court concluded that petitioner's DUI offense, a third-degree felony, did not require proof of any particular mental state and thus would not qualify as a "crime of violence" under § 16(a) or (b). However the Court did conclude that an underlying offense requiring proof of a reckless use of force would qualify as a crime of violence under 18 U.S.C. § 16.

***Logan v. United States*, 128 S. Ct. 475 (Dec. 4, 2007). Opinion by Justice Ginsburg.**

The Supreme Court, in a unanimous opinion, held that, under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), a violent felony offense for which the defendant's civil rights were never revoked is not excluded from qualifying as a predicate for an enhanced sentence. Such a

---

[3] 526 U.S. 227, 119 S. Ct. 1215 (1999) (provisions of carjacking statute that established higher penalties to be imposed when offense resulted in serious bodily injury or death set forth additional elements of the offense, not mere sentencing considerations).

[4] 523 U.S. 224, 118 S. Ct. 1219 (1998) (recidivism treated merely as a sentencing factor rather than as an element of the offense).

prior offense, the Court ruled, does not fall into the category of those offenses "for which a person . . . has had civil rights restored." 18 U.S.C. § 921(a)(20). The case addressed a circuit split arising out of two main cases: *McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995), holding that such convictions are not excluded, and *United States v. Indelicato*, 97 F.3d 627 (1st Cir. 1996), holding the opposite. In the case at bar, the Seventh Circuit adopted the *McGrath* analysis.

The petitioner pleaded guilty in the Western District of Wisconsin to a violation of 18 U.S.C. § 922(g)(1), the felon-in-possession statute. His sentence was enhanced pursuant to the ACCA, and the district court imposed the relevant 15-year mandatory minimum. The court based the enhancement on the petitioner's three Wisconsin misdemeanor battery convictions, each punishable by up to three years' imprisonment. Although these convictions would otherwise count as "violent felonies" for ACCA purposes pursuant to 18 U.S.C. § 921(a)(20)(B), the petitioner argued that, because none of them caused the revocation of his civil rights, they were exempt pursuant to 18 U.S.C. §921(a)(20). That statute excludes from the relevant definition of a qualifying predicate offense:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

In support of his position that the term "restored" should be construed to include offenses for which civil rights were never revoked, the petitioner argued *inter alia* that the *McGrath* construction would contravene the purpose of the statute and produce absurd results. He argued that the purpose of the statute was to expand the reach of the exemption provision and to permit its application to be dictated by state law. He further argued that less serious offenders (i.e., those whose offenses did not result in the revocation of civil rights) would receive harsher treatment than more serious offenders (i.e., those whose offenses did result in revocation, but whose civil rights were later restored). In response, the government relied largely on textualist arguments, emphasizing the plain meaning of the term "restored" and its implication that something never lost may not be restored.

The Supreme Court examined Congressional intent, and summarized it as follows:

> Congress framed §921(a)(20) to serve two purposes. It sought to qualify as ACCA predicate offenses violent crimes that a State classifies as misdemeanors yet punishes by a substantial term of imprisonment, i.e., more than two years. Congress also sought to defer to a State's dispensation relieving an offender from disabling effects of a conviction. Had Congress included a retention-of-rights exemption, however, the very misdemeanors it meant to cover would escape ACCA's reach.

(Internal citations omitted.) The Supreme Court further observed that the petitioner's reading of the statute would also produce absurd or anomalous results, noting that Maine does not revoke any

offender's civil rights, and so offenders who committed the most dangerous offenses in Maine would receive less punishment than offenders who committed less serious offenses in other states. The Supreme Court also noted that Congress must have been aware that allowing state laws, which vary, to dictate application of the ACCA would produce some anomalous results. Ultimately, the Supreme Court held that it had "no warrant" to move beyond the plain language of the provision and observed: "We are not equipped to say what statutory alteration, if any, Congress would have made had its attention trained on offenders who retained civil rights; nor can we recast §921(a)(20) in Congress' stead."

***Watson v. United States*, 128 S. Ct. 579 (Dec. 10, 2007). Opinion by Justice Souter.**

In a unanimous opinion, the Supreme Court held that, for purposes of 18 U.S.C. § 924(c)(1)(A), a person who receives a firearm in a drugs-for-firearms transaction does not "use" the firearm "during and in relation to ... [a] drug trafficking crime." The Court observed that a circuit conflict had arisen regarding the construction of the term "use" in this context, and reversed the Fifth Circuit's ruling in this case, remanding for proceedings consistent with the opinion.

The Court began by noting that section 924(c)(1)(A) prescribes a mandatory minimum sentence for a defendant who "during and in relation to any crime of violence or drug trafficking crime[,] . . . uses or carries a firearm," but does not define the term "uses." The court further observed that it had addressed the definition of the term in two earlier cases, *Smith v. United States*, 508 U.S. 223 (1993) and *Bailey v. United States*, 516 U.S. 137 (1995). In *Smith*, the Court held that a person who trades a firearm for drugs does "use" the firearm for purposes of the statute; the *Watson* court observed that this ruling relied mostly on the "ordinary or natural meaning" of the term "use" in the context of the statute. In *Bailey*, the Court held that possessing a firearm when the firearm was stored near the scene of drug trafficking did *not* constitute "use" for purposes of section 924(c)(1). The *Watson* court again observed that this construction relied on the "ordinary or natural" meaning of the term and held that the statute "requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense."

The Court observed that neither *Smith* nor *Bailey* answered the question presented in the case at bar, and stated:

> With no statutory definition or definitive clue, the meaning of the verb "uses" has to turn on the language as we normally speak it; there is no other source of a reasonable inference about what Congress understood when writing or what its words will bring to the mind of a careful reader. (Internal citations omitted.)

The Court concluded that "regular speech would not say that" the person in these circumstances had "used" the item received in the barter.

The Court then turned to the government's arguments for a different construction of the term, rejecting each in turn. The government's first argument asked the Court to read section 924(c)(1)(A) in conjunction with section 924(d), arguing that the *Smith* court's observation that

section 924(d) supported its reading of 924(c) means that the Court must construe the two provisions to give the same meaning to the term "use" in both sections. The Court rejected this reading of *Smith*, and concluded that the differences between the two provisions render section 924(d) unhelpful in this case. This is because, the Court said, "[section 924(d)] tells us a gun can be 'used' in a receipt crime, but not whether both parties to a transfer use the gun, or only one, or which one." Since the two provisions operate at different levels of specificity, the Court held, construing them differently does not bring them into conflict.

The government's second argument was, the Court said, essentially a policy argument; the government characterized the ordinary meaning of the statute as leading to "unacceptable asymmetry" with *Smith*. The Court held that if Congress concluded that the asymmetry was unacceptable, it could amend the statute, noting that "law depends on respect for language and would be better served by a statutory amendment . . . than by racking statutory language to cover a policy it fails to reach."

Justice Ginsburg concurred in the judgment and wrote separately to observe that distinguishing between the two parties to the gun-for-drugs transaction "makes scant sense," but that she joined the judgment because she had since concluded that *Smith* was wrongly decided and would overrule it, holding that the term "use" in section 924(c)(1) was limited to using the firearm "as a weapon, not . . . in a bartering transaction."

***Begay v. United States*, 128 S. Ct. 1581 (Apr. 16, 2008). Opinion by Justice Breyer.**

The Supreme Court, in a 6-3 opinion, held that a conviction for felony driving under the influence (DUI) is not a "violent felony" that can trigger the mandatory 15-year minimum under the Armed Career Criminal Act. Justice Breyer wrote for the majority, in which Chief Justice Roberts and Justices Stevens, Kennedy, Souter, and Ginsburg joined. Justice Scalia, writing separately, concurred in the judgment; Justice Alito, joined by Justices Souter and Thomas, dissented.

The Court was asked to construe the "residual clause" of 18 U.S.C. § 924(e)(2)(B)(ii), which defines a "violent felony" as, *inter alia*, a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The petitioner challenged the enhancement of his sentence on the basis of the prior DUI, arguing that the "otherwise" clause of the above provision was not intended to encompass DUI. The government argued that, because DUI presents a serious potential risk of physical injury to another, it falls within the scope of the statute and therefore qualified the petitioner for the enhanced sentence. The district court accepted the government's view of the statute and applied the enhancement, and the court of appeals upheld the sentence.

The Supreme Court concluded that the lower courts had erroneously construed the statute, holding that a prior conviction for DUI should not expose a defendant to the 15-year mandatory minimum. The Court began with the presumption that "the lower courts were right in concluding that DUI involves conduct that 'presents a serious potential risk of physical injury to another.'"

The Court then faced the issue of why Congress included the enumerated offenses (burglary, arson, extortion, and offenses involving "use of explosives") in the provision. The Court rejected the government's argument that the examples were intended "to demonstrate no more than the degree of risk sufficient to bring a crime within the statute's scope," concluding that "the examples are so far from clear in respect to the degree of risk each poses that it is difficult to accept clarification in respect to degree of risk as Congress' only reason for including them." Rather, the Court concluded, "we should read the examples as limiting the crimes . . . to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." The Court held that the legislative history of the ACCA supported this conclusion.
Applying this standard, the Court concluded that DUI does not sufficiently resemble the enumerated crimes to bring it within the ambit of the statute. The most significant distinction, according to the Court, is the fact that DUI offenses are essentially strict liability crimes, whereas the enumerated offenses typically involve "purposeful, violent, and aggressive conduct . . . [which] makes it more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim."

In a separate concurrence, Justice Scalia followed the analysis set forth in his dissent in *James v. United States*, a case from last term in which the Court addressed whether attempted burglary fell within the statute. Under this analysis, Justice Scalia concluded that, without further evidence, he could not find that DUI "pose[s] at least as serious a risk of physical injury to another as burglary" and that the rule of lenity therefore required the conclusion that the defendant's sentence could not be enhanced under the ACCA.

In dissent, Justice Alito argued that the text of the statute requires only the analysis of whether the offense in question presents a serious risk of physical injury to another, and concluded that the DUI in this case did pose such a risk.

***United States v. Rodriquez*, 128 S. Ct. 1783 (May 19, 2008). Opinion by Justice Alito.**

The Supreme Court, in a 6-3 opinion, held that a previous offense for which the statutory maximum sentence was 10 years' imprisonment only because the defendant was a repeat offender qualified as a predicate offense under the Armed Career Criminal Act (ACCA). Justice Alito, writing for Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Breyer concluded that the recidivism enhancement applied under state law should be used to calculate the "maximum term of imprisonment" for ACCA purposes. Justice Souter authored a dissenting opinion, which was joined by Justices Stevens and Ginsburg.

In the case at bar, the defendant had two California burglary convictions and three convictions in Washington state for delivery of a controlled substance. The district court, in sentencing the defendant on a federal felon-in-possession charge, declined to apply the ACCA enhancement because the defendant was subject to the ten-year maximum in Washington state only because he was a repeat offender; under that law, first offenders face only a statutory maximum of five years. The Ninth Circuit affirmed, noted that its holding on this issue was in conflict with law from the Seventh Circuit and "in tension" with precedent from the Fourth and Fifth Circuits.

The Court held that the government's interpretation of the ACCA was the correct one, focusing on the statute's definition of three terms: "offense," "law," and "maximum term." The Court said:

> The "offense" in each of the drug-delivery cases was a violation of §§69.50.401(a)(ii)–(iv). The relevant "law" is set out in both that provision, which prescribes a "maximum term" of five years for a first "offense," and §69.50.408(a), which prescribes a "maximum term" of 10 years for a second or subsequent "offense." Thus, in this case, the maximum term prescribed by Washington law for at least two of respondent's state drug offenses was 10 years.

The Ninth Circuit's approach, the Court said, "contorts ACCA's plain terms" and was "inconsistent with the way in which the concept of the 'maximum term of imprisonment' is customarily understood by participants in the criminal justice process."

Addressing the respondent's arguments, the Court rejected the argument that the term "offense" as used in the ACCA should be defined as the elements of the offense, of which a recidivism enhancement (at least of the kind in this case) is not one. The Court held that this reading added a limitation to the ACCA that was not part of the plain language of that statute. Additionally, the court rejected the respondent's argument that the government's reading contradicted the "manifest purpose" of the ACCA. The respondent argued that, since the sentence length was used essentially as a proxy for the seriousness of the offense (thus limiting application of the ACCA enhancement to those convicted of more serious prior offenses), including recidivism enhancements skews this measurement. The Court stated that "[t]his argument rests on the erroneous proposition that a defendant's prior record of convictions has no bearing on the seriousness of an offense," instead noting that "an offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit greater punishment" and that "a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation." Additionally, the Court observed that "the ACCA itself is a recidivist statute," concluding that this fact "bolster[ed]" its reading of the statute in that "Congress must have had such provisions in mind and must have understood that the 'maximum penalty prescribed by [state] law' in some cases would be increased by state recidivism provisions."

Finally, the Court rejected the respondent's arguments that the Court's prior decisions in *LaBonte* and *Taylor*, as well as the policy and practical implications of the government's reading, support the respondent's interpretation of the statute. With respect to *LaBonte*, the Court rejected the respondent's argument that Congress's decision not to make reference to a "category of offenders" in the ACCA as it did in 18 U.S.C. § 994(h) (which the Court interpreted in *LaBonte*) supported his interpretation of the ACCA. The Court said: "Respondent does not explain how 18 U.S.C. § 924(e)(2)(A) could have easily been reworded to mirror 28 U.S.C. § 994(h). But in any event, the language used in ACCA, for the reasons explained above, is more than clear enough." The Court similarly rejected the respondent's argument that the Court's decision in *Taylor*, adopting the categorical approach, supported his interpretation, finding "no connection . . .

between the issue in *Taylor* . . . and the issue here. . .."

In dissent, Justice Souter argued that the majority "chooses one reading of the [ACCA] over another that would make at least as much sense of the statute's ambiguous text and would follow the counsel of a tradition of lenity in construing perplexing criminal laws" and that the majority's interpretation "promises hard times for the trial courts that will have to make the complex sentencing calculations this decision demands."

***Chambers v. United States*, 129 S. Ct. 687 (Jan. 13, 2009). Opinion by Justice Breyer.**

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 prior 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*, 544 U.S. 13 (2005), 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:

> 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*, 553 U.S. ---, --- (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], at 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.

Justice Alito, joined by Justice Thomas, wrote a separate concurring opinion, noting a continuing disagreement with the use of the categorical approach in these cases, but recognizing the precedential value of earlier cases on the issue. Additionally, Justice Alito emphasized the view that action from Congress is required to properly address the issue.

Fed. R. Crim. P. 16(a)(1)(C) — Selective Prosecution

***United States v. Armstrong*, 517 U.S. 456 (1996). Opinion by Chief Justice Rehnquist**.

The Supreme Court, in an 8-1 decision, held that Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure "authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case-in-chief, but not to the preparation of selective prosecution claims." The defendants moved for discovery or dismissal of the indictment, asserting that they were singled out for prosecution under the much more stringent statutes and sentencing guidelines in Federal Court on crack and firearms violations because they are black. In support of their motion, they offered an affidavit from a paralegal in the Office of the Public Defender stating that the defendant was black in every one of the cases prosecuted to completion during 1991 under 21 U.S.C. §§ 841 and 846. The district court granted the discovery motion, and upon the Government's notice that it would not comply, dismissed the case. To meet the threshold showing of materiality necessary to obtain such discovery, the defendant must "produce some evidence of differential treatment of similarly situated members of other races or protected classes." "A selective prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Because the Attorney General and United States Attorneys have been designated by statute as the President's delegates to help him discharge his constitutional duty to see that "the Laws be faithfully executed," they have broad discretion to enforce federal criminal laws. There is a strong presumption of regularity supporting a prosecutor's decisions, and a claimant of selective prosecution "must demonstrate

that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" "The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such claim."

Fifth Amendment

***Mitchell v. United States*, 526 U.S. 314 (1999). Opinion by Justice Kennedy**.

The Supreme Court, in a 5-4 decision, held that a defendant could plead guilty, assert the privilege against self-incrimination at the sentencing hearing, and not have a judge draw an adverse inference from the defendant's sentence. The defendant had refused to testify at a sentencing hearing about her involvement in a cocaine conspiracy. The judge sentenced the defendant to ten years' imprisonment, stating that he drew a negative inference from the defendant's refusal to discuss the details of the crime. The Third Circuit affirmed the district court's decision, but the Supreme Court reversed. The Supreme Court held that neither the defendant's guilty plea nor her statements at a plea colloquy functioned as a waiver of her right to remain silent at sentencing. Furthermore, the Court held that the defendant should have been allowed to remain silent without it being held against her. The Court relied on *Griffin v. California*, 380 U.S. 609 (1995), in which the Court held that it was constitutionally impermissible for the prosecutor or judge to comment on a criminal defendant's refusal to testify. The majority concluded that there is no reason not to apply this rule to sentencing hearings.

Sixth Amendment

***Apprendi v. New Jersey*, 530 U.S. 466 (2000).** See p. 9.

***Ring v. Arizona*, 536 U.S. 584 (2002). Opinion by Justice Ginsberg.**

The Supreme Court, in a 7-2 decision, following *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the Sixth Amendment entitles defendants in capital cases to a jury determination of any aggravating factors that increase their maximum punishment from life imprisonment to death. The Court overruled its prior decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which had upheld the Arizona state capital sentencing scheme. In *Ring*, the jury found the defendant guilty of first-degree felony murder. The sentencing judge then conducted a sentencing hearing and found the existence of aggravating factors beyond a reasonable doubt, and sentenced the defendant to death. The Supreme Court noted that the defendant could not receive the death penalty unless the court found the existence of at least one aggravating factor beyond a reasonable doubt; therefore, such a finding increases the maximum punishment from life imprisonment to death. The Court held that, because Arizona's enumerated aggravating factors operate as the "functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.

Justice Scalia filed a concurring opinion, joined by Justice Thomas. Justice Scalia makes the point that he never agreed with the line of cases beginning with *Furman v. Georgia*, 408 U.S.

238 (1972), that invalidated the death penalty and caused states to enact death penalty schemes with aggravating factors. His concurrence here is based on the holding of *Apprendi* that the jury must find facts that are used to increase the sentence beyond what is authorized by the jury's verdict.

Justice Kennedy filed a brief concurrence noting that he still believes *Apprendi* was wrongly decided, but that *Apprendi* and *Walton* cannot stand together. Thus, Justice Kennedy joins in the majority holding.

Justice Breyer filed an opinion concurring in the judgment but not the opinion of the majority. Justice Breyer concurs because he believes that jury sentencing in capital cases is mandated by the Eighth Amendment and not by the Sixth Amendment analysis of the majority (Justice Breyer dissented in *Apprendi*). Justice Breyer speaks of the continued difficulty of justifying capital punishment and concludes that the "danger of unwarranted imposition of the penalty cannot be avoided" unless a jury makes the determination.

Justice O'Connor, joined by Chief Justice Rehnquist, filed a dissenting opinion. Justice O'Connor states that the decision in *Apprendi* "was a serious mistake." Justice O'Connor does not agree that the Constitution requires that any fact that increases the maximum penalty must be treated as an element and found by a jury. Justice O'Connor speaks of the increase in habeas filings and the disruption of the criminal justice system caused by *Apprendi*.

***Blakely v. Washington*, 542 U.S. 296 (2004). Opinion by Justice Scalia.**

The Supreme Court, in a 5-4 decision, held that the defendant's sentence violated his Sixth Amendment right to a jury trial, because the sentencing judge increased his sentence above the prescribed guideline range based on an aggravating factor found by the judge and not admitted by the defendant in his guilty plea. The State of Washington charged defendant Ralph Blakely with first-degree kidnaping. Blakely pleaded guilty to second-degree kidnaping for which the statutory maximum sentence was ten years of imprisonment. Under the state's sentencing guidelines, the "standard sentencing range"or presumptive sentence for the kidnaping charge was 49 to 53 months. Under the Washington guidelines, the sentencing court must impose a sentence within the standard sentencing range, unless the court finds aggravating or mitigating circumstances by a preponderance of the evidence that justify an "exceptional sentence." After conducting a sentencing hearing, the judge found that Blakely acted with deliberate cruelty, one of the specified statutory aggravating factors, and sentenced Blakely to 90 months of imprisonment. The Supreme Court found that this increase beyond the presumptive range was unconstitutional.

The Court held that any fact, other than a prior conviction, that raises the penalty beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Court defined "statutory maximum" as the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." In other words, the Court said, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings" beyond what the jury found in its verdict or what was admitted by the defendant The

majority did not address the application of the case to the federal sentencing guidelines. *See* 124 S. Ct. at 2538 n.9.

Three dissenting opinions were filed. Justice O'Connor wrote a dissent joined by Justice Breyer in its entirety, and by Chief Justice Rehnquist and Justice Kennedy, except as to the section addressing the possible impact on the federal guidelines. Justice O'Connor warned that the majority's opinion may bring an end to 20 years of sentencing reform. Prior to the enactment of the Washington guidelines, there was unguided discretion that resulted in racial disparity and a general lack of uniformity in sentencing. The new system "placed meaningful restraints on discretion" and eliminated parole. Justice O'Connor noted that the sentencing system sought uniformity, transparency, and accountability, and that it had largely met those goals. Justice O'Connor also wrote of the far-reaching impact the decision could have on other states' sentencing guideline systems and the federal sentencing guidelines.

Justice Kennedy wrote a brief separate dissent joined by Justice Breyer. Justice Kennedy portrays sentencing as a collaborative process between the legislatures and the courts. Justice Kennedy cites *Mistretta v. United States*, 488 U.S. 361 (1989), as recognizing that this interchange among the branches of government "is consistent with the Constitution's structural protections."

Justice Breyer also wrote separately in dissent joined by Justice O'Connor. Justice Breyer stated that this holding "threatens the fairness of our traditional criminal justice system" and distorts historical sentencing practices. Justice Breyer concludes that, as a result of this opinion, the legislatures will have several options for sentencing systems in the future, and he outlines these approaches. Justice Breyer concludes, however, that these alternative approaches are problematic because they shift power to the prosecutor, they lack uniformity, or they are too complex and expensive to implement. Lastly, Justice Breyer questions whether it will be possible to distinguish the federal sentencing guidelines from the Washington system.

***Schriro v. Summerlin*, 542 U.S. 348 (2004). Opinion by Justice Scalia.**

The Supreme Court, in a 5-4 decision, held that *Ring v. Arizona*, 536 U.S. 584 (2002), did not apply retroactively to death penalty cases already final on direct review, because it was a procedural rule rather than a substantive rule and because *Ring* did not announce a watershed rule of criminal procedure. When the Supreme Court announced *Ring*, it established a new rule that applied to all criminal cases still pending on direct review. The Court held that *Ring* established a procedural rule because it allocated decisionmaking authority by demanding that a jury rather than a judge make findings regarding aggravating factors in death penalty cases. However, new rules of procedure generally do not apply retroactively to cases already final on direct review. The exception is that "watershed rules of criminal procedure" that implicate the fundamental fairness and accuracy of the criminal proceeding will be applied retroactively. The Court did not find that this was a watershed rule because judicial factfinding did not so seriously diminish the accuracy of the proceeding so at to create an impermissibly large risk of punishing conduct inappropriately.

Justice Breyer filed a dissenting opinion joined by Justices Stevens, Souter, and Ginsberg. The dissenters view the right to have jury sentencing in the capital context as both a "fundamental

aspect of constitutional liberty and also significantly more likely to produce an accurate assessment of whether death is the appropriate sentence." Justice Breyer states that juries are more capable of making community-based value judgments that are important in death penalty cases, that retroactivity assures more uniformity among similarly situated defendants, that death is different so greater accuracy is needed, and that giving this rule retroactive effect would not inordinately burden the criminal justice system because of the small number of prisoners affected (approximately 110 persons on death row).

***Shepard v. United States*, 544 U.S. 13 (2005). Opinion by Justice Souter.**

In *Shepard v. United States,* the Supreme Court, in a plurality decision (5-1-2), held that a sentencing court cannot look to police reports in making a "generic burglary" decision under the Armed Career Criminal Act.

The ACCA mandated a fifteen-year minimum sentence for any person found to have committed certain federal firearms violations if that person had three prior convictions for "violent felonies." Congress specified that the term "violent felony" included "burglary," and the Court in *Taylor v. United States*[5] held that the ACCA's use of the term "burglary" encompasses only "generic burglary." A "burglary" was considered a "generic burglary" if three elements were present: "[i] unlawful or unprivileged entry into, or remaining in, [ii] a building or structure, [iii] with intent to commit a crime." In *Taylor*, the Court stated that a sentencing court, in determining whether a previous trial-based conviction is for a "generic burglary," can look to the statutory definition, charging documents and jury instructions. *Taylor*, therefore, does not require that recidivism be proved beyond a reasonable doubt for the purposes of sentencing under the ACCA. The Court in *Shepard*, however, did not expand *Taylor* to allow a sentencing court to examine the police record and complaint to determine whether an earlier guilty plea to burglary counts as a "generic burglary," and thus considered a "violent felony," for the purposes of sentencing pursuant to the ACCA.

Justice Souter, delivering the opinion of the Court, except as to Part III, concluded that judicial enquiry under the ACCA, as to whether a guilty plea to burglary is a "violent felony," "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." In Part III of the plurality opinion, Justice Souter attempted to distinguish the situation found in *Shepard* from all other situations where a jury need not find the factor of recidivism beyond a reasonable doubt. Justice Souter, joined by Justice Stevens, Justice Scalia, and Justice Ginsburg, explained that the fact of a prior conviction in the *Shepard* context "is too far removed from the conclusive significance of a prior judicial record" because the sentencing judge would have to "make a disputed finding of fact about what the defendant and the state judge must have understood as the factual basis of the prior plea."

---

[5] *Taylor v. United States,* 495 U.S. 575 (1990).

***United States v. Booker*, 543 U.S. 220 (2005).** See p.12.

***Washington v. Recuenco*, 548 U.S. 212 (2006). Opinion by Justice Thomas.**

In this 7-2 decision, the Supreme Court reversed the Supreme Court of Washington. The Court held that failure to submit a sentencing factor to the jury is not "structural" error which always invalidates a conviction. Rather, *Blakely* violations may be subject to harmless error review.

Recuenco was convicted of second-degree assault based on the jury's finding that he was armed with a "deadly weapon." Rather than requesting the one-year enhancement corresponding to a finding of the involvement of a deadly weapon, the state sought a mandatory three-year enhancement because the defendant was armed with a firearm. Under Washington law, a firearm qualifies as a deadly weapon, but the jury form did not require the jury to make the specific finding that a firearm was used. The trial court found that the weapon was a firearm and imposed the higher penalty. The state conceded before the Washington Supreme Court that a Sixth Amendment violation occurred under *Blakely*. The Washington Supreme Court refused to apply harmless-error analysis to the *Blakely* error, vacated the sentence, and remanded for sentencing based on the deadly weapon enhancement.

In reversing the state court, the Court noted that it has repeatedly recognized that "commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, most constitutional errors can be harmless."

***Cunningham v. California*, 549 U.S. 270 (2007). Opinion by Justice Ginsburg.**

The Supreme Court in a 6-3 opinion struck down California's Determinate Sentencing Law (DSL) on grounds that it violated the Sixth Amendment's jury trial right, as interpreted by the Supreme Court in the *Apprendi* line of cases. The specific question presented in the case was: "Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments." The Court concluded that it did, holding that the relevant stautory maximum for Sixth Amendment purposes under California's DSL was the middle term sentence because a judge was required to find no facts beyond the jury's verdict to impose it. In so holding, the Court overruled a California Supreme Court case, *People v. Black*, 113 P.3d 534 (Cal. 2005), which had determined that the DSL did not violate *Blakely*.

***James v. United States*, 127 S. Ct. 1586 (2007). Opinion by Justice Alito.**

The Supreme Court in a 5-4 opinion upheld the Eleventh Circuit's determination that a conviction for attempted burglary under Florida law is a "violent felony" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The issue was whether "overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein, is 'conduct that presents a serious potential risk of physical injury to another.'" The Court said that "[t]he main risk of burglary arises not from the simple physical act or wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party - whether an occupant, a police officer, or a bystander - who comes to

investigate." Attempted burglary, the Court said, "poses the same kind of risk." The Court also noted that, because attempted burglaries that give rise to convictions are typically those that were interrupted by such a third party, attempted burglaries that are ACCA predicates may actually pose a greater risk than completed burglaries. The Court concluded: "As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of" the ACCA.

***Rita v. United States*, 127 S. Ct. 2456 (June 21, 2007).** See p. 13.

***Kimbrough v. United States*, 128 S. Ct. 558 (Dec. 10, 2007).** See p. 15.

***Gall v. United States*, 128 S. Ct. 586 (Dec. 10, 2007).** See p. 17.

Supervised Release

***United States v. Johnson*, 529 U.S. 53 (2000). Opinion by Justice Kennedy.**

The Supreme Court, in a unanimous decision, held that under 18 U.S.C. § 3624(e), a supervised release term does not commence until an individual "is released from imprisonment." Therefore, the length of supervised release is not reduced by excess time served in prison. The defendant had two of his convictions declared invalid, pursuant to *Bailey v. United States*, 516 U.S. 137 (1995), and had served 24 months extra prison time. The defendant was released from prison, but a three-year term of supervised release was yet to be served on the remaining convictions. The defendant filed a motion to reduce his supervised release term by the amount of extra prison time he served. The district court denied the relief, explaining that supervised release commenced upon respondent's actual release from incarceration, not before. The Sixth Circuit reversed and held that his supervised release term commenced not on the day he left prison, but when his lawful term of imprisonment expired. The Supreme Court, in its decision to reverse the Sixth Circuit, resolved a circuit split over whether the excess prison time should be credited to the supervised release term. *Compare United States v. Blake*, 88 F.3d 824 (9th Cir. 1996) (supervised release commences on date defendants should have been released, not dates of actual release) with *United States v. Jeanes*, 150 F.3d 483 (5th Cir. 1998) (supervised release cannot run during any period of imprisonment); *United States v. Joseph*, 109 F.3d 34 (1st Cir. 1997) (same); *United States v. Douglas*, 88 F.3d 533 (8th Cir. 1996) (same). The Supreme Court examined the text of section 3624(e) which states: "[t]he term of supervised release commences on the day the person is released from imprisonment." The Court concluded that the ordinary commonsense meaning of release is to be freed from confinement. The Court found additional support in 18 U.S.C. § 3583(a) which authorizes the imposition of a "term of supervised release after imprisonment." Furthermore, the objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release. Congress intended supervised release to assist individuals in their transition to community life.

***United States v. Johnson*, 529 U.S. 694 (2000). Opinion by Justice Souter**.

The Supreme Court, in an 8-1 decision, resolved a split in the circuits by holding that post-

revocation penalties relate to the original offense, and under the *Ex Post Facto* Clause, a law "burdening private interests" cannot be applied to a defendant whose original offense occurred before the effective date of the statute. *Compare United States v. Johnson*, 181 F.3d 105 (6th Cir. 1999) (unpublished); *United States v. Sandoval*, 69 F.3d 531 (1st Cir.)(unpublished), *cert. denied,* 519 U.S. 821 (1996); *United States v. St. John*, 92 F.3d 761 (8th Cir. 1996) (no *ex post facto* violation in applying section 3583(h) to a defendant whose offense occurred before date statute enacted) *with United States v. Dozier*, 119 F.3d 239 (3d Cir. 1997); *United States v. Lominac*, 146 F.3d 308 (4th Cir. 1998); *United States v. Eske*, 189 F.3d 536 (7th Cir. 1999), *United States v. Collins*, 118 F.3d 1394 (9th Cir. 1997); and *United States v. Meeks*, 25 F.3d 1117 (2d Cir. 1994) (because revocation penalties punish the original offense, retroactive application of section 3583(h) violates *Ex Post Facto* Clause). Absent a clear indication by Congress that a statute applies retroactively, a statute takes effect the day it is enacted.

In the case below, the Sixth Circuit held that application of section 3583(h) (explicitly authorizing reimposition of supervised release upon revocation of supervised release) did not violate the *Ex Post Facto* Clause even though the defendant's original offense occurred in 1993, a year before the statute was enacted. The lower court held that revocation penalties punish a defendant for the conduct leading to the revocation, not the original offense. Thus, because the statute was enacted before the defendant violated his supervised release, there was no *ex post facto* violation. *United States v. Johnson*, 181 F.3d 105 (6th Cir. 1999). The government disavowed the position taken by the lower court of appeal, and "wisely so" opined the Supreme Court "in view of the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." *Johnson*, 120 S. Ct. at 1800.

In addition to making the determination that *ex post facto* analysis for revocation conduct relates to the date of the original offense, the Supreme Court found that no *ex post facto* analysis was necessary in the defendant's case because Congress gave no indication that section 3583(h) applied retroactively. The statute could not be applied to the defendant because it did not become effective until after the defendant committed the original offense. Nevertheless, the version of section 3583(e)(3) in effect at the time of the original offense authorized a court to reimpose a term of supervised release upon revocation. Congress's unconventional use of the term "revoke" rather than "terminate" would not preclude additional supervised release, and this reading is consistent with congressional sentencing policy.

The Supreme Court's finding that the pre-Crime Bill version of section 3583(e)(3) authorizes supervised release as part of a revocation sentence resolved another split in the Circuits. The Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits held that section 3583(e)(3) did not authorize a court to impose an additional term of supervised release following revocation and imprisonment. The First and Eighth Circuits held that section 3583(e)(3) did grant a court such authority. *See Johnson*, 120 S. Ct. at 1800 (n.2) (2000) (citing cases).