

Editor's Note: The Federal Lawyer is pleased to include this new department of Supreme Court previews. The previews are contributed by the Legal Information Institute, a non-profit activity of Cornell Law School. This department includes an indepth look at two cases plus executive summaries of other cases before the Supreme Court. The executive summaries include a link to the full text of the preview.

Marrama v. Citizens Bank of Massachusetts (05-996)

Appealed from the U.S. Court of Appeals for the First Circuit
Oral Argument: Nov. 6, 2006

Robert Marrama sought to convert his Chapter 7 bankruptcy case to a Chapter 13 case after meeting the requirements for Chapter 13 filing. The bankruptcy court denied Marrama's motion to convert based on his prior bad faith conduct in failing to report in his bankruptcy schedules the value of a tax refund and a vacation home. The Bankruptcy Appellate Panel and the U.S. Court of Appeals for the First Circuit affirmed the ruling. In this case, the Supreme Court will determine whether courts have the discretion to deny conversions based on an evaluation of the debtor's conduct. The decision will hinge on the statutory language and legislative history of the U.S. Bankruptcy Code. Although this issue may be limited to filings that occurred before Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, it will give the court the opportunity to clarify the scope of the good faith requirement in bankruptcy proceedings and the amount of discretion afforded to bankruptcy judges.

Facts

Robert Marrama entered the flooring business as a teenager and converted his family's small enterprise into a multimillion-dollar company. However, Marrama's financial fortunes took a turn for the worse, and he asked Citizens Bank of Massachusetts to increase a credit line it had previously extended

to him. The bank refused, recalling the note and requesting payment in full. When Marrama was unable to pay, the bank commenced an action against him in state court. With a debt of \$800,000, Marrama filed for bankruptcy protection on March 11, 2003.

Marrama filed under Chapter 7 of the U.S. Bankruptcy Code, which requires that a debtor release all nonexempt assets (such as cars and household furnishings) to a trustee, who liquidates the assets and distributes the cash to creditors. Even though Chapter 7 is a tidy way of administering the bankruptcy process, both creditors and debtors prefer Chapter 13 reorganization proceedings, because they allow debtors to restructure their assets in a way that permits them to repay their creditors fully while maintaining control of assets like a house or car. Importantly, § 706(a) of the code allows debtors one opportunity to convert their case from Chapter 7 to Chapter 13.

After securing work and a steady income at his brother's flooring company, Marrama applied to the U.S. Bankruptcy Court for the District of Massachusetts to convert to a Chapter 13 bankruptcy case. The bankruptcy court refused Marrama's application on grounds of bad faith, indicating that Marrama had failed to report an \$11,000 tax refund and had concealed his ownership of real estate valued at \$85,000 by placing it in a spendthrift trust, making his girlfriend the trustee and himself the sole beneficiary, just seven months before filing for bankruptcy. Marrama claimed that the failures were mere oversights, but the decision was affirmed by the Bankruptcy Appellate Panel (BAP).

Marrama appealed to the U.S. Court of Appeals for the First Circuit, claiming that § 706 of the U.S. Bankruptcy Code gave an eligible debtor who had not previously converted his case an "absolute right" to seek conversion. On Oct. 31, 2005, the First Circuit disagreed and unanimously upheld the BAP's decision. According to the majority, § 706 granted only a presumptive right to convert that could be denied if the court found an "extreme circumstance," such as when the debtor acts

in bad faith by concealing assets from the bankruptcy process. The court reasoned that this interpretation conforms to a fundamental purpose of the U.S. Bankruptcy Code: to prevent abuse or manipulation of the bankruptcy process. On June 12, 2006, the Supreme Court granted certiorari.

Bankruptcy in America and the BAPCPA

When Robert Marrama filed for bankruptcy in 2003, he was not alone. In 2003, over one million Americans filed for individual bankruptcy. Two years earlier, more people had filed for bankruptcy than had suffered heart attacks, had been diagnosed with cancer, had filed for divorce, or had graduated from college. Although the majority of these debtors belongs to the middle class, an increase in bankrupt consumers affects all segments of society by increasing the cost of credit.

Marrama's case unfolded against a backdrop of a larger national debate that took center stage during the proposed reforms to the U.S. Bankruptcy Code in 2005, encapsulated in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The reforms created controversy by making Chapter 7 bankruptcies less attractive and thus prompting debtors to structure their bankruptcy under the less debtor-friendly Chapter 13 requirements.

The fact pattern in *Marrama* is ironic in light of the BAPCPA, because the primary issue in the case is whether bad faith should *prevent* a debtor from entering Chapter 13. Furthermore, the BAPCPA addressed this issue directly by requiring good faith even when the petition was filed initially. In light of the 2005 amendments to the Bankruptcy Code, the impact of this decision may be limited to its facts. Nevertheless, *Marrama* will determine whether the federal bankruptcy scheme contains an implied requirement of good faith.

Marrama's Arguments

Marrama and the National Association of Consumer Bankruptcy Attorneys argue that debtors have an un-

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qualified and absolute right to Chapter 13 conversion based on the language of § 706, which provides that the debtor “may convert a case under this chapter to a case under chapter ... 13 ... at any time” and that “[a]ny waiver of the right to convert a case ... is unenforceable,” and plainly grants the debtor sole discretion to convert. Therefore, provided that the debtor has not already converted and meets the requirements for Chapter 13 filings, the debtor is free to convert and the courts are compelled to grant the conversion.

Marrama further argues that Congress intended that § 706(a) would give debtors an absolute right to convert based on the legislative history of § 706(a), in which Congress specifically declared that the provision vests the debtor with an “absolute right” to convert. Moreover, because Congress inserted good faith requirements in other provisions, it must have deliberately omitted a good faith requirement from § 706(a). Furthermore, Congress has enumerated debtor punishments in other provisions and, therefore, did not intend courts to withhold conversion as a means of punishment.

Finally, Marrama maintains that grafting a good faith requirement onto § 706 conversions runs counter to the general purpose of the bankruptcy process: to make creditors whole while giving debtors a fair chance to regain their financial footing. Congress has stipulated that even debtors who commit actual fraud are given an opportunity to clear their financial ledgers by filing Chapter 13 bankruptcies. Furthermore, because “bad faith” is difficult to define, individual judicial definitions and findings will vary widely and courts will not administer justice uniformly or predictably.

Citizens Bank’s Arguments

Citizens Bank, the trustee appointed to the case, and the National Association of Bankruptcy Trustees argues that the verb “may” suggests conditionality, and therefore the right to convert to Chapter 13 is presumptive but not absolute.

Moreover, they contend that the term “absolute” used in the legislative history should be read in the context

of the entire U.S. Bankruptcy Code, which includes a general requirement of good faith conduct in all bankruptcy proceedings and provides latitude for judges to ensure that parties act in good faith. Also, because bankruptcy courts have the power to reconvert Chapter 13 proceedings to Chapter 7 proceedings after a showing of a debtor’s bad faith, it would be illogical and inefficient for a bankruptcy court, which has already found evidence of the debtor’s bad faith conduct, to perfunctorily convert a case to Chapter 13 and then reconvert the case to Chapter 7.

What is relevant here is that Citizens Bank argues that allowing Marrama to convert to a Chapter 13 bankruptcy violates the fundamental principle that bankruptcy processes should not be used for fraudulent purposes. Thus, debtors who act in bad faith should not be permitted to avail themselves of the benefits of bankruptcy proceedings. In cases where the debtor clearly attempts to thwart the bankruptcy process, courts should have the authority to exercise their § 105 powers and prevent abuse of process.

Impact of the Supreme Court Decision

If the U.S. Supreme Court finds for Marrama, courts and trustees may be less able to manage bankruptcy proceedings effectively. Determining that a debtor can convert to Chapter 13 automatically and unconditionally—and thereby unilaterally divest the Chapter 7 trustee of powers under the code—will inhibit the trustee’s ability to investigate fraud and to protect creditors’ interests. A victory for Citizens Bank, on the other hand, would allow a bankruptcy court to retain control over the transfer to a Chapter 13 bankruptcy and the attendant legal implications (for example, the appointment of a new trustee under § 1302).

The Court may also resolve the issue of whether the U.S. Bankruptcy Code contains an implied requirement of good faith. A decision for Marrama might be a pyrrhic victory because, even though Marrama could automatically file for bankruptcy under Chapter 13, he would be required to file a plan

and attend a hearing in which the court will consider bad faith in confirming or denying the plan. However, allowing debtors to automatically obtain the benefits afforded by Chapter 13 filings, despite the filers’ abuse of the bankruptcy proceedings, suggests a general lack of a good faith requirement unless explicitly mandated by Congress.

Alternatively, the Court may confirm that bankruptcy courts have the power to inquire into bad faith even absent an explicit directive. Such a decision would give courts greater discretion to control the bankruptcy process by expanding the reach of § 105(a). Although this could aid trustees in managing the bankruptcy process, such a fuzzy requirement could lessen the predictability of the process for creditors, bankruptcy attorneys, and debtors.

Regardless of the outcome, a Supreme Court decision will clarify the good faith issue. The term “bad faith” is not defined in the U.S. Bankruptcy Code and has suffered from a lack of uniformity in findings by lower courts. Instead, courts have applied a “sniff test,” in which they will find that parties acted in bad faith when they sense “something fishy.” Commentators have criticized this approach as too subjective and have proposed, instead, that courts use a “totality of the circumstances” test, which would employ easily identifiable subjective and objective factors like improper conduct, debtor response to court orders, and seemingly tactical timing of the filing. Regardless, the Supreme Court’s ruling in *Marrama* should clarify the applicability of a good faith requirement to the U.S. Bankruptcy Code. **TFL**

Prepared by Ferve Ozturk and Jamie Rogers. The authors would like to thank Professor Theodore Eisenberg for his insight into this case.

Gonzales v. Planned Parenthood Federation of America Inc. (05-1382)

Appealed from the U.S. Court of Appeals for the Ninth Circuit

Oral Argument: Nov. 8, 2006

The Fourteenth Amendment to the U.S. Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” The Supreme Court has held that “liberty” encompasses a woman’s right to choose to have an abortion. Although states may regulate abortion after the fetus has reached viability, they may only do so if their regulations provide an exception for procedures that are necessary to preserve the life or health of the mother. In 2000, the Supreme Court invalidated as unconstitutional a Nebraska ban on partial-birth abortions that lacked a health exception, based on district court evidence of the medical necessity of such a procedure. Congress subsequently determined that such an exception based on preserving the mother’s health was unnecessary, because the procedures used for partial-birth abortion, in Congress’ view, are never necessary to preserve the health or life of the mother. Congress then enacted the Partial-Birth Abortion Ban Act of 2003. In 2004, the Planned Parenthood Federation of America sued to have the act declared unconstitutional and to enjoin its enactment. The Supreme Court will now take up the constitutionality of the act.

Facts

The Partial-Birth Abortion Ban Act defined “partial-birth abortion” as “deliberately and intentionally vaginally deliver[ing] a living fetus ... for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and perform[ing] the overt act, other than completion of delivery, that kills the partially delivered living fetus.” The procedure used for such an abortion is called dilation and evacuation (D&E) and consists of two types—intact and non-intact. Both types begin by dilating the cervix; but in an intact D&E, doctors use forceps to remove the fetus intact in one pass, collapsing the skull to allow it to pass through the cervix. In a non-intact D&E, the doctor attempts to bring the fetus through the cervix without collapsing the head, which usually causes the fetus to disarticulate, or break apart. Disarticulation of the fetus means that

the doctor will need to make multiple passes to remove the multiple parts, and it may be considered less safe than the intact D&E, which requires “fewer instrument passes, a shorter operating time and consequently less bleeding and discomfort for the patient, less likelihood of retained fetal or placental parts that can cause infection or hemorrhage, and little or no risk of laceration from bony fetal parts.”

The congressional findings in preparation for the Partial-Birth Abortion Ban Act include the statement that in the “very informed judgment of the Congress ... a partial-birth abortion is never necessary to preserve the health of a woman.” After hearing testimony during the 104th, 105th, 107th, and 108th Congresses, Congress found that the procedure “poses serious risks to the health” of the patient; that no credible medical evidence existed that the procedure was safe or was safer than other procedures; and that a “prominent medical association” concluded that the procedure is not accepted medical practice, but is “ethically wrong.” The act was therefore enacted in late 2003 without an exception to preserve the mother’s health.

In early 2004, Planned Parenthood Federation of America brought suit in the U.S. District Court for the Northern District of California, challenging the act as unconstitutional. The trial lasted about three weeks, and the district court heard the testimony of 13 expert witnesses. The district judge held that the act is unconstitutional, because it places an undue burden on a woman’s right to choose, is unconstitutionally vague, and lacks a required health exception. Consequently, the judge permanently enjoined enforcement of the act. The government appealed the ruling to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the unconstitutionality of the act on all three bases and upheld the injunction as the only appropriate remedy. The United States sought certiorari, which was granted on the issue of the necessity of a health exception to the act despite congressional findings to the contrary.

Legal Framework

In 1973, the Supreme Court held in

Roe v. Wade that the Due Process Clause of the Fourteenth Amendment protects a woman’s right to terminate a pregnancy. The Court also acknowledged the states’ interest in the potential life of the fetus, holding that this interest becomes compelling at the point of viability—the point at which the fetus may be capable of life outside the womb. States may protect their post-viability interest by regulating abortion, unless the regulated procedure is “necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” In *Planned Parenthood v. Casey* (1992), the Court reaffirmed viability as the point at which a state’s interest becomes compelling but clarified that, prior to viability, the state may regulate abortion only to the extent that it imposes no “undue burden” on a woman’s right to choose to have an abortion.

Stenberg v. Carhart, decided by the Court in 2000, held that a Nebraska statute that banned “partial-birth” abortions was unconstitutional, both because it lacked a necessary health exception and because it placed an undue burden on women’s ability to choose a D&E abortion, which the Court held was an undue burden on “the right to choose abortion itself.” The Court reviewed the trial court’s evidence regarding the necessity of the D&E procedure to preserve a woman’s health and noted that the *Roe* and *Casey* requirement of “necessity, in appropriate medical judgment” could not signify absolute necessity or absolute proof. In addition, the Court ruled that the phrase could not refer to unanimity of medical opinion, because the absence of unanimity among medical professionals indicates the presence, not the absence, of risk.

The Arguments

The United States submits that the act (1) unambiguously prohibits intact D&E procedures, (2) allows non-intact D&E procedures, and (3) is a valid exercise of the government’s “meaningful constitutional role in regulating abortion.” Furthermore, the Court should defer to Congress’ assessment that the ban on partial-birth abortions does not create significant health risks for wom-

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en and thus does not require a health exception. But if the Court nevertheless finds the act unconstitutional in some respect, the United States requests that the Court issue an injunction addressing that specific aspect, while leaving the rest of the act intact.

Planned Parenthood argues that the Ninth Circuit correctly found the act unconstitutional on three grounds: (1) it lacks a constitutionally required health exception for women; (2) it unduly burdens women's ability to obtain pre-viability abortions; and (3) its language is unconstitutionally vague, thus preventing doctors from knowing whether performing a particular procedure could result in criminal liability.

Lack of a Health Exception for Women

The United States argues that *Stenberg's* "substantial medical authority" requirement cannot mean that complete medical consensus must exist regarding the safety of abortion procedures, because such a requirement would allow a "small minority of physicians" to dictate the constitutionality of abortion regulations by testifying contrary to the "overwhelming weight of authority." Instead, the United States interprets *Stenberg* as allowing Congress to make "factual findings on the medical necessity of partial-birth abortion," and permitting courts to review these findings to determine only whether "substantial evidence supported Congress'... finding." Planned Parenthood argues that the Ninth Circuit correctly interpreted *Stenberg* as requiring a health exception as long as there is a "lack of consensus" in the medical community about the possible medical necessity of an abortion procedure. Furthermore, even when the Ninth Circuit limited its inquiry, it found that the evidence in the congressional record did not "substantially support[]" Congress' finding.

Undue Burden

According to Court precedent, a statute imposes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus," and "a statute that bans

D&Es as a general category imposes an undue burden."

The United States argues that the act's definition of partial-birth abortion clearly limits the prohibition on intact D&E procedures, because the definition requires the doctor to "deliberately and intentionally" remove the intact fetus up to specific "anatomical landmarks" before disarticulating it. In addition, the United States reasons that Congress' finding that partial-birth abortions are "never medically necessary," combined with the government's "profound interest in potential life," prevents the ban from rising to the level of an undue burden.

Planned Parenthood's position relies on doctors who testified both before Congress and at trial when interpreting the act to include all D&Es, rather than only intact D&Es. The "anatomical landmark" language is inadequate, because sometimes nonintact D&E procedures require removing a substantial portion of the intact fetus from the mother's body before disarticulation occurs. According to Planned Parenthood's reading, the act prohibits such a procedure. Furthermore, the uncertain definition of "partial-birth abortion" encourages doctors to "err on the safe side" and refuse to perform all D&E abortions, thereby placing a substantial obstacle in the paths of women seeking abortions in their second trimester.

Vagueness

The United States argues that the act's language restricts the prohibition on intact D&E procedures "under any reasonable understanding of that concept" and is not unconstitutionally vague. Based on the undue burden arguments, Planned Parenthood finds the act's language unconstitutionally vague and warns (1) that doctors could incur liability despite their efforts to comply with the law and (2) that the act could be subject to "arbitrary and discriminatory enforcement."

Implications for Abortion Rights

If the Court affirms the Ninth Circuit, the total injunction against the act will continue. Partial-birth abortions, including both intact and nonintact

D&E procedures, will be legal. Given the legislative history of the act, which included extensive hearings over the course of four recent congressional sessions, such a result is likely to stimulate new legislation to ban the intact D&E procedure in a manner consistent with the Court's decision.

If the Court reverses the Ninth Circuit, it will reinstate the federal ban on partial-birth abortions, and the abortion procedure described in the act will be illegal unless a risk to a woman's life requires it as an emergency measure. According to Planned Parenthood, allowing such a broad restriction on second trimester abortions would represent a fundamental change in the Court's historical protection of women's right to have pre-viability abortions.

Implications for Judicial Discretion in Favor of Congressional Findings

The Ninth Circuit explicitly rejected the congressional findings upon which the act was based and, in so doing, implicated a standard of review issue in the already contentious area of abortion regulation. The Court's decision in this case will clarify the constitutional requirements of partial-birth abortion statutes, but they also have the opportunity to enunciate the level of deference that federal courts must apply to congressional findings.

If the Court holds in favor of Planned Parenthood, it will conflict with Congress' explicit finding that "medical ... consensus" regards partial-birth abortion as "never medically necessary," which was used to justify the act's omission of any health exception as required by *Stenberg*. This would indicate that, at least in some instances, courts may independently evaluate congressional evidence to establish facts contrary to congressional findings, thereby affecting the balance of power between the legislative and judicial branches of government.

Notably, the Court could distinguish between the act—which restricts a fundamental constitutionally protected right to have an abortion—from other legislation that affects activities that are not constitutionally protected, such as attending school or driving a car. Thus,

the Court's ruling could hold narrowly that only congressional findings related to constitutionally protected rights are subject to a lower level of deference. This result would both reinforce previous cases involving nonconstitutionally protected activities in which the Supreme Court has held that the judiciary must treat congressionally found facts with great deference and protect the judiciary's "independent judgment of the facts bearing on an issue of constitutional law."

If the Court holds in favor of the government on the issue of a health exception, it could require a high level of deference to congressional findings regardless of their bearing on constitutional rights. Such a result would underscore Congress' sole power to legislate but would constrain the Court's authority to review the constitutionality of future legislation and limit "the judiciary's preeminent role as interpreter of the Constitution." Importantly, if courts must defer to congressionally found facts regardless of their evidentiary basis, then Congress might begin to tailor statutes to resist judicial scrutiny by grounding them in congressionally found facts. **TFL**

Prepared by Kelly Cooke & Heidi Guetschow.

Osborn v. Haley (05-593)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (Sept. 8, 2005)

Oral Argument: Oct. 30, 2006

Pat Osborn sued Barry Haley, a U.S. Forest Service manager, in state court, alleging that Haley had acted outside the scope of his employment when he influenced her employer to fire her. Pursuant to the Westfall Act, the U.S. attorney general certified that Haley had acted within the scope of his employment and successfully removed the case to federal district court. Once there, the United States denied that Haley had interfered with Osborn's employment and proposed to substitute itself for Haley. The district court refused and remanded the action to state court. The Sixth Circuit Court of Appeals reversed, ruling that the lower court must

resolve the underlying factual disputes and that the Westfall Act forecloses remanding the case to state court. In addition to the procedural questions, the Supreme Court will determine whether the Westfall Act empowers the attorney general to certify that a federal employee was acting within the scope of his office at the time of the incident while also denying that the incident ever occurred. Full text is available at www.law.cornell.edu/supct/cert/05-593.html. **TFL**

Prepared by Dylan Letrich and Michael Fornasiero.

Jones v. Michigan Dept. of Corrections (05-7058); Williams v. Overton (05-7142)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (June 15, 2005); (June 22, 2005)

Consolidated Oral Argument: Oct. 30, 2006

Lorenzo Jones and Timothy Williams filed suit against the Michigan Department of Corrections for violating their constitutional civil rights during their incarceration. The circuit court held that neither plaintiff had totally exhausted his available administrative remedies under the Prisoner Litigation Reform Act (PLRA). Jones failed, because his complaint did not describe or attach proof of how he had exhausted administrative remedies. Williams failed, because he did not specifically name the defendant in his initial grievance filings with prison officials. While petitioners maintain that the circuit court's holdings amount to judicially created pleading requirements that are inconsistent with the PLRA's text, respondents find with the circuit court's heightened pleading requirements consistent with the act. How the Supreme Court decides these cases will reflect its view of the correct balance of burdens between inmate plaintiffs and the judiciary by requiring either prisoners to be more vigilant in asserting their rights or the judiciary to be more active in defending prisoners' rights. Full text is available at www.law.cornell.edu/supct/cert/05-7058.html. **TFL**

Prepared by Tim Birnbaum and Peter Milligan.

Philip Morris USA Inc. v. Williams (05-1256)

Appealed from the Supreme Court of Oregon (Feb. 2, 2006)

Oral Argument: Oct. 31, 2006

Mayola Williams brought suit against Philip Morris U.S.A., alleging that the company had fraudulently and negligently caused the death of her husband, who had smoked Philip Morris cigarettes for more than 40 years. The Oregon Supreme Court affirmed a trial jury's punitive damages award of \$79.5 million. Philip Morris contends that the award was unconstitutionally excessive, because it was not reasonably related to Mr. Williams' injuries. Williams argues that the Oregon Supreme Court acted within its discretion when it affirmed the trial jury's punitive damages award, because the award conformed with many of the guidelines for determining reasonable damages. Huge jury verdicts against "big tobacco" have been front-page news, but the Supreme Court's decision will go beyond tobacco litigation and will have a significant impact on the dollar amount of punitive damages in future product liability and other tort cases. Full text is available at www.law.cornell.edu/supct/cert/05-1256.html.

Prepared by Clinton Becker and Samantha Kim.

Lawrence v. Florida (05-8820)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (Aug. 26, 2005)

Oral Argument: Oct. 31, 2006

For a criminal defendant to appeal a conviction under a writ of habeas corpus, the defendant must file a petition for relief with the district court within one year of the final resolution of his or her appeal to the state court. An extension of this time is granted if it is authorized by statute or there is an extraordinary circumstance justifying equitable tolling of the statute of

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limitations. In this case, the Court must determine whether a pending request for Supreme Court certiorari is either a statutory tolling event or an extraordinary event justifying equitable tolling, especially when a state-assigned attorney delays filing. The Court's resolution will determine the availability of habeas corpus relief for indigent criminal defendants with assigned counsel and will clarify the one-year statute of limitations' starting point for filing habeas petitions so that, in the future, fewer limits will be missed on account of complicated appellate proceedings. Full text is available at www.law.cornell.edu/supct/cert/05-8820.html. **TFL**

Prepared by Robin M. Davis and Khara Ashlynn Tusa.

Whorton v. Bockting (05-595)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Jan. 14, 2005)
Oral Argument: Nov. 1, 2006

Marvin Bockting was convicted of rape and sentenced to life in prison. Bockting challenges the constitutionality of the decision, because the court admitted his victim's hearsay testimony without providing an opportunity for cross-examination. Even though no such requirement was in place at the time of his conviction, the Supreme Court subsequently held in *Crawford v. Washington* that, to admit this type of hearsay testimony, a witness must be unavailable and the defendant must have had the opportunity to cross-examine the witness. The Supreme Court is now asked to determine whether this new rule must be applied retroactively. Its decision will clarify the power of federal courts to hear cases on writs of habeas corpus when the retroactive application of a criminal procedure rule is at issue. Should the Supreme Court agree with Bockting, many inmates are likely to demand that their cases be reheard, because they were not given the opportunity to cross-examine witnesses against them. Full text is available at www.law.cornell.edu/supct/cert/05-595.html. **TFL**

Prepared by Elizabeth Cusack and John Schultz.

Environmental Defense v. Duke Energy Corp. (05-848)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (June 15, 2005)
Oral argument: Nov. 1, 2006

In 2000, the EPA sued Duke Energy Corporation for making a number of upgrades to its power plants without seeking permits under the Prevention of Significant Deterioration (PSD) program, which regulates "major modifications" to existing power plants. Duke argues that the 1971 New Source Performance Standards (NSPS) provide a definition of "modification" that governs the PSD program and that the changes to its plants do not fall within the NSPS definition. In 1980, the U.S. Environmental Protection Agency promulgated regulations providing a more stringent definition of "modification," and Environmental Defense, which has stepped in as the plaintiff, maintains that this definition applies to the PSD program. The U.S. Court of Appeals for the Fourth Circuit agreed with Duke Energy. The Supreme Court's decision will affect how energy companies assess the costs of rebuilding or renovating older plants and could lead environmentalists to push for more stringent standards for changes made to existing plants. Full text is available at www.law.cornell.edu/supct/cert/05-848.html. **TFL**

Prepared by Molly Curren Rowles and Jill Diamond.

Wallace v. City of Chicago (05-1240)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (March 8, 2006)
Oral Argument: Nov. 6, 2006

Andre Wallace was convicted of a murder, but his conviction was later overturned when the appellate court in Illinois held that he had been arrested without probable cause and

his unlawfully obtained confession could not be used because it was not "sufficiently attenuated from his unlawful arrest." Wallace sued the city of Chicago and two detectives under 42 U.S.C. § 1983 for violating his Fourth Amendment rights. The district court held, and the Seventh Circuit affirmed, that the two-year statute of limitations barred Wallace's claim because, they argued, it tolls at the time of arrest rather than when the claimant's conviction is overturned. The Court granted certiorari to resolve the split among the circuits. Whether the statute of limitations begins to run at the time of arrest or at the time a conviction is overturned will influence when a claimant can bring § 1983 claims and may limit § 1983 remedies. Full text is available at www.law.cornell.edu/supct/cert/05-1240.html. **TFL**

Prepared by Heidi Abreu and Miguel Loza.

Burton v. Waddington (05-9222)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (July 28, 2005)
Oral Argument: Nov. 7, 2006

A jury convicted petitioner Lonnie Lee Burton of rape, robbery, and burglary. On remand, the sentencing judge imposed the previously given 562-month aggregate sentence but ran the three sentences consecutively because Burton's earlier sentence was too lenient. As a result, Burton's sentence exceeded the statutory sentencing range ceiling of 304 months by 258 months. Burton contends that the sentencing court violated *Blakely v. Washington*, which was decided after his sentence became final, and that *Blakely* is not a new rule but, rather, is dictated by the earlier case, *Apprendi v. New Jersey*. If the Court agrees that *Blakely* is a new rule, it must decide whether it applies retroactively. The Court's decision will clearly have an impact on judicial discretion over sentencing, but some argue that retroactively applying the burden-of-proof holdings of *Blakely* and *Apprendi* will help prevent wrongful convictions, whereas others

contend that it will open a floodgate of collateral attacks and appeals. Full text is available at www.law.cornell.edu/supct/cert/05-9222.html. **TFL**

Prepared by Emily Green and Kiernan Joliat.

James v. United States (05-9264)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (Nov. 17, 2005)

Oral Argument: Nov. 7, 2006

Alphonso James was convicted of four felonies between 1997 and 2003. At the sentencing for James' firearms offense, the government argued in favor of applying the Armed Career Criminal Act's 15-year mandatory minimum, because one of his prior convictions was for a "violent felony" (attempted burglary) and two were for serious drug offenses. James contests the classification of attempted burglary as a violent felony, whereas the government maintains that the classification fits within the statute's definition, because the offense poses a potential risk of physical injury to another person. Moreover, James argues that determining whether his attempted burglary presented the specified risk would require the court to conduct impermissible fact-finding. But if the Supreme Court agrees with both the District Court for the Middle District of Florida and the Eleventh Circuit that attempted burglary is a violent felony, more federal defendants will be subject to this modified "three strikes" rule, thus adding fuel to the national debate on mandatory minimums and increasing prison populations. Full text is available at www.law.cornell.edu/supct/cert/05-9264.html. **TFL**

Prepared by Cecelia Sander and Breanne Atzert.

Gonzales v. Carhart (05-380)

Appealed from the U.S. Court of Appeals for the Eighth Circuit (July 8, 2005)

Oral Argument: Nov. 8, 2006

A group of doctors, led by Dr. Leroy Carhart, sued the federal gov-

ernment, arguing that the Partial-Birth Abortion Ban Act of 2003 is unconstitutional. Carhart's argument, with which the Nebraska District Court and the Eighth Circuit agreed, is that any abortion ban must have an exception for cases in which the health of the mother is at risk. The government believes that a health exception is unnecessary, because Congress found that "partial-birth abortion is never medically indicated to preserve the health of the mother." The Court's decision will determine whether the government's interests in protecting potential life and prohibiting procedures that resemble infanticide outweigh a woman's constitutional right to choose an abortion without the government placing undue obstacles in her path. Advocates on both sides of the abortion debate view a decision to uphold the act as a first step toward future restrictions on the availability of abortions. Full text is available at www.law.cornell.edu/supct/cert/05-380.html. **TFL**

Prepared by Angela Winfield and Richard Beaulieu.

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