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Carachuri-Rosendo v. Holder (09-60)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (May 29, 2009)
Oral argument: March 31, 2010

Under the Immigration and Naturalization Act (INA), a permanent resident alien who is convicted of any violation of law related to a controlled substance becomes deportable from the United States pursuant to 8 U.S.C. § 1227(a)(2)(B)(i). Once an alien becomes deportable, he or she may apply to the U.S. attorney general for a discretionary cancellation of removal. *Id.* § 1229b(a). However, a deportable alien is ineligible to petition the attorney general if the alien has been "convicted of any aggravated felony." *Id.* The term "aggravated felony" includes any "drug trafficking crime." 8 U.S.C. § 1101(a)(43)(B). A "drug trafficking crime," in turn, includes "any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). Although simple, first-time possession of a controlled substance is usually a misdemeanor under the Controlled Substances Act (CSA), it is a felony for an individual to possess a controlled substance after already being convicted for a narcotics offense under state or federal law. 21 U.S.C. § 844(a); 18 U.S.C. 3559(a)(5). This case will resolve a circuit split over whether a deportable alien who has been twice convicted in state court for nonfelony simple possession of a controlled substance, but who *could* have been prosecuted for felony recidivist possession under federal law, is ineligible to seek cancellation of removal.

Background

The petitioner, Jose Angel Carachuri-Rosendo, came to the United States in 1993 and became a lawful permanent resident. In 2004, in a Texas court, he pleaded guilty to misdemeanor possession of marijuana. In 2005, again in a Texas court, he pleaded nolo contendere to misdemeanor possession of Alprazolam (Xanax®). In the second action, Carachuri-Rosendo was not tried as a recidivist.

In 2006, Carachuri-Rosendo received notice that he had become deportable under 8 U.S.C. § 1227(a)(2)(B)(i). He moved for cancellation of his removal proceedings, but an immigration judge found him ineligible under 8 U.S.C. § 1229b(a), ruling that Carachuri-Rosendo had committed an "aggravated felony." The immigration judge held that Carachuri-Rosendo had committed a drug trafficking crime because his second misdemeanor conviction under state law could hypothetically qualify as a felony under the CSA in light of his prior drug-related conviction. The judge therefore found that Carachuri-Rosendo had been convicted of what constituted an "aggravated felony" under the INA, and that he was ineligible to petition for cancellation of his removal proceedings under 8 U.S.C. § 1229b(a). *See Carachuri-Rosendo v. Holder*, 570 F.3d 263, 265 (5th Cir. 2009).

Carachuri-Rosendo appealed to the Board of Immigration Appeals, which affirmed the lower court's holding. He then appealed to the U.S. Court of Appeals for the Fifth Circuit, which agreed with the Board of Immigration Appeals and held that he was ineligible to petition for cancellation of removal. *Carachuri-Rosendo*, 570 F.3d at 268. The Fifth Circuit acknowledged a circuit split as to whether the second of two state law misdemeanor convictions qualifies as an "aggravated felony," because the second conviction could have been prosecuted as a felony under the CSA. *Id.* at 268, n.5. On Dec. 14, 2009, the U.S. Supreme Court granted certiorari to resolve the circuit split.

State and Federal Legal Systems

In support of Carachuri-Rosendo, the National Association of Criminal Defense Lawyers (NACDL) argues that plea-bargaining greatly increases the efficiency of state criminal justice systems by reducing the number of trials and the length of sentences. Under the Fifth Circuit's holding, NACDL argues, the distinction between simple possession and recidivist possession becomes meaningless for aliens: federal law would treat two possession convictions as an aggravated felony regardless of the individual's actual convictions in state court. Therefore, NACDL concludes, aliens would always take even the most routine drug charges to trial to avoid losing the right to petition for cancellation.

Carachuri-Rosendo adds that the Fifth Circuit's ruling undermines state prosecutors' discretion regarding whether to pursue recidivist enhancement. In line with this view, the Center for the Administration of Criminal Law states that prosecutorial discretion allows for calibration of punishment to fit "the characteristics of the specific offense and offender." The center specifies that prosecutorial discretion is especially important in recidivism cases, which tend to have "grave sentencing implications," and argues that an immigration court should respect a prosecutor's decision not to pursue recidivist prosecution.

Attorney General Eric Holder, the respondent, contends that the existence of prosecutorial discretion in criminal cases does not undermine Congress' determination that recidivist aliens should be deported from the United States. He emphasizes that the portions of the INA at issue here reflect Congress' explicit judgment that aliens who have been found guilty of violating federal drug laws more than once cannot claim the benefits of the immigration laws. From Holder's perspective, this judgment is "separate and apart from any individual prosecutorial decision." Holder maintains that the Court should not ignore Congress' concern that criminal aliens—particularly those who are recidivists—pose a threat to society and impose substantial burdens on penal

PREVIEWS *continued on page 60*

systems in the United States. Holder adds that reversing the Fifth Circuit would lead to the inconsistent application of federal immigration law because, under Carachuri-Rosendo's position, an alien in a state with no recidivist enhancement for offenses involving possession of a controlled substance could be convicted multiple times and remain eligible to petition for cancellation of removal, whereas an alien in a state with recidivist enhancement would become ineligible to petition for cancellation after a second conviction.

Legal Arguments

Plain Meaning of the Immigration and Naturalization Act

Carachuri-Rosendo argues that he was not convicted of an aggravated felony as defined by the INA because the state court that convicted him of his second simple possession offense did not make a finding of recidivism. Carachuri-Rosendo argues that the plain meaning of the INA's text requires the *convicting court* to actually make a finding of recidivism and that an immigration judge's determination that he *could have been* prosecuted for felony recidivist possession is insufficient.

Conversely, Attorney General Holder argues that the term "aggravated felony," as used in the INA, is defined to include any "felony punishable under the Controlled Substances Act," which, according to Holder, treats recidivist possession offenses as drug trafficking felonies. Focusing on the term "punishable," Holder claims that Carachuri-Rosendo was, in fact, *punishable* for a felony, because his second drug offense could have been prosecuted under federal law as recidivist possession under the CSA. In support of his argument, Holder points to *Lopez v. Gonzales*, 539 U.S. 47 (2006), in which the Court held that a drug conviction that constituted a felony under state law but was punishable only as a misdemeanor under the CSA could not be considered an aggravated felony under the INA. It follows, Holder argues, that the measure of whether an offense is an aggravated felony must be whether specific conduct could potentially be punished as a felony under federal law.

Carachuri-Rosendo counters that, notwithstanding the term "punishable," the INA also requires that an individual be convicted of such punishable conduct. Thus, Carachuri-Rosendo argues, in order to be convicted of a felony punishable under the Controlled Substances Act, there must first have been a formal judgment by the convicting court that (1) he possessed a controlled substance and (2) he did so after having been convicted of a prior drug offense. Carachuri-Rosendo points out that the convicting court made no finding of his prior offense; rather, it was the immigration judge who "bundle[d]" together two simple possession convictions to deny Carachuri-Rosendo access to the discretionary cancellation process.

Congressional Intent

To support his position, Attorney General Holder points to Congress' purpose in including the provisions related to aggravated felonies in the Immigration and Naturalization Act. He argues that Congress determined that "aliens who commit serious drug crimes should be removable from the United States and should not be eligible for immigration benefits." Looking to the history of the laws against recidivist drug possession, Holder claims that Congress clearly intended to deny immigration benefits to resident aliens who, like Carachuri-Rosendo, have been repeatedly convicted of drug possession crimes.

Carachuri-Rosendo analogizes to other provisions of the Controlled Substances Act to explain why his second offense is not an aggravated felony. He contends that, even though the CSA includes "possession with intent to distribute" as an aggravated felony, a state might not have a corresponding offense. Carachuri-Rosendo argues that individuals convicted of possession in a state without an "intent to distribute offense" would not be treated under the INA as if they had been convicted of intent to distribute a controlled substance—even if such an individual had been in possession of a large quantity of drugs and could have been convicted of a felony if prosecuted in federal court. He points out that the *Lopez v. Gonzales* Court observed that, in such a case, "an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount." 539 U.S. at 60.

Carachuri-Rosendo also points to the "illegal reentry statute," 18 U.S.C. § 1326(b), pursuant to which aliens convicted of an aggravated felony who illegally re-enter the United States can be imprisoned for up to 20 years. Individuals whose only offenses consist of three or more misdemeanors involving drugs, however, face a maximum penalty of only 10 years. Thus, Carachuri-Rosendo urges, the Fifth Circuit's bundling approach ignores the fact that Congress has clearly made distinctions between multiple drug misdemeanors and aggravated felonies.

Holder argues that this comparison to § 1326(b) is inappropriate, because it was "enacted well after the aggravated felony definition at issue here, and it therefore cannot be read to modify or constrict the definition. …" Furthermore, Holder points out that § 1326(b) applies to both drug offenses and "crimes against the person"—that is, an individual convicted of one drug misdemeanor and two nondrug misdemeanors would qualify for the 10-year penalty under § 1326's, whereas two convictions of controlled substances offenses could constitute a felony subject to the 20-year penalty. In addition, Holder argues that the lower 10-year penalty would apply "if an alien committed three drug possession [misdemeanors] in succession, each before the last became final, neither his second nor third offense would qualify as an aggravated felony" under the CSA's recidivism provision. Thus, Holder urges that the penalty scheme included in § 1326(b) is consistent with the government's aggravated felony theory for recidivist possession in this case.

Conclusion

The Supreme Court's ruling in this case will reconcile the split between the circuit courts concerning the treatment of drug convictions under state law for the purpose of determining eligibility

for discretionary cancellation under the Immigration and Naturalization Act. Specifically, the Court will resolve whether multiple state misdemeanor possession convictions amount to an "aggravated felony" under the INA in light of the CSA's treatment of recidivist possession as a felony. **TFL**

Prepared by Kevin Jackson and Eric Johnson. Edited by Lucienne Pierre and Joe Rancour.

Dillon v. United States (09-6338)

Appealed from the U.S. Court of Appeals for the Third Circuit (June 10, 2009)
Oral argument: March 30, 2010

Percy Dillon, the petitioner, was tried and convicted in federal court for possession of crack cocaine and was sentenced to 322 months in prison under the Federal Sentencing Guidelines. Subsequently, in *United States v. Booker*, the U.S. Supreme Court determined that the guidelines were only advisory, not mandatory, and Congress retroactively reduced the guidelines' range for offenses involving crack cocaine. Dillon filed a motion to have his sentence retroactively reduced and argued that, under *Booker*, the Federal Sentencing Guidelines are not binding on his resentencing. The district court rejected this view but reduced Dillon's sentence to 277 months under the new guidelines. The Third Circuit affirmed, and the Supreme Court granted certiorari to resolve the issue of whether the Federal Sentencing Guidelines are binding or merely advisory on retroactive sentencing modifications.

Background

In 1993, the U.S. District Court for the Western District of Pennsylvania convicted Percy Dillon of a number of federal crimes relating to his possession of crack cocaine. Applying the Federal Sentencing Guidelines, the district court calculated Dillon's offense level and criminal history score and sentenced him at the bottom of the permissible range provided by the guidelines—322 months. At sentencing, the trial judge noted that he believed the sentence imposed by the guidelines was unreasonable. Despite noting that a period of 322 months was "unfair to the defendant," the district court concluded that it was "bound by the guidelines range."

Two important events related to the Federal Sentencing Guidelines took place after Dillon was sentenced. First, in 2005, the Supreme Court held in *United States v. Booker* that certain aspects of the Federal Sentencing Guidelines violated the Sixth Amendment, because they allowed a defendant to be sentenced based on judge-found facts that were not determined by a jury beyond a reasonable doubt. 543 U.S. 220, 233 (2005). The Court concluded that the guidelines could no longer be binding on judges when they were imposing sentences. *Id.* at 245. After *Booker*, the relevant law was changed to indicate that the guidelines are advisory; district courts are encouraged to impose sentences based on the guidelines, but they are no longer required to do so. 18 U.S.C. § 3553(c).

The second relevant development occurred in 2007, when the U.S. Sentencing Commission promulgated new guidelines that lowered the base offense level for crack cocaine. U.S. Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report* 1 (Jan. 2010) (hereafter referred to as USSC Report). The commission also determined that the revised guidelines would be applied retroactively. *Id.* Defendants sentenced for crack cocaine offenses under the old guidelines can now petition to have their sentences reduced to fall in line with the new guidelines pursuant to 18 U.S.C. § 3582(c)(2). However, this section explicitly requires that modifications be "consistent with applicable policy statements" made by the U.S. Sentencing Commission. The Sentencing Commission policy statement concerning these term reductions states that sentence modification proceedings "do not constitute a full resentencing" and that a court may not reduce a prisoner's sentence "to a term that is less than the minimum of the amended guidelines range." Federal Sentencing Guidelines § 1B1.10 (2009).

Dillon filed a motion in the district court for a sentencing reduction under 18 U.S.C. § 3583(c)(2) and also argued that *Booker* should apply to the sentence modification. Adhering to the new guidelines, the district court reduced Dillon's sentence to 270 months but concluded that *Booker* did not apply to sentence modifications under § 3583(c)(2).

Dillon appealed to the U.S. Court of Appeals for the Third Circuit, which ruled that *Booker* did not apply to retroactive sentence reductions under § 3582(c)(2) but applied only to initial sentences and de novo resentencings that replace original sentences vacated for error. *United States v. Dillon*, 572 F.3d 146, 149 (3d Cir. 2009). Noting that its position was consistent with "the overwhelming majority of our sister Courts of Appeals," the Third Circuit affirmed the district court's decision. *Id.* at 149–150. The Third Circuit also rejected Dillon's supplemental argument that the district court should have recalculated his criminal history score upon resentencing and concluded that the district court had no authority to do so in a § 3582(c)(2) motion. *Id.* at 150. The Supreme Court granted certiorari on Sept. 1, 2009.

Implications

Because of the vast number of inmates who have been convicted on crack cocaine charges and are currently eligible for resentencing under 18 U.S.C. § 3582(c)(2), the Supreme Court's ruling in this case has the potential to affect thousands of prisoners. *See USSC Report* at Table 2. As such, numerous amicus curiae have submitted briefs.

In support of Dillon, a group of federal defenders contend that the plain language of 18 U.S.C. § 3553(a) (the general federal sentencing statute that makes the guidelines only one factor that a sentencing court must consider) applies with the same force whether a defendant is being sentenced initially or resentenced pursuant to 18 U.S.C. § 3582(c)(2). The defenders further argue that § 3582(c)(2) cannot be read to give "policy statements" issued by the Sentencing Commission the force of law, because these statements have not been adopted pursuant to formal rulemaking as required by the Administrative Procedure Act. Thus, the defend-

PREVIEWS *continued on page 62*

ers argue that the commission's policy statement, which purports to make the new guideline floors binding on courts faced with retroactive sentencing modifications, is invalid.

The Washington Legal Foundation contends that mandatory adherence to the Federal Sentencing Guidelines cannot be imposed under any circumstance. Fundamentally, the Legal Foundation argues that the right to individualized sentencing is fundamentally "enmeshed" in the U.S. Constitution. According to the foundation, the period from when the mandatory guidelines were imposed in 1987 until *Booker* was decided in 2005 was a "historical anomaly," which the *Booker* decision corrected. Finally, the foundation notes the disparity that exists between capital cases, in which individualized sentencing determinations are required by the Eighth Amendment, and noncapital cases, in which the Eighth Amendment is not applied to sentencing, and argues that the Court should correct this inequality by requiring individualized sentencing determinations in all cases.

The U.S. Sentencing Commission, in support of the United States, argues that it has statutory authority to promulgate binding rules regarding retroactive sentence modifications under 28 U.S.C. § 994(u). According to the commission, *Braxton v. United States* controls; in this case, the Supreme Court noted that "Congress has granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect." 500 U.S. 344, 348 (1991). Furthermore, the Sentencing Commission asserts that determining the appropriate parameters of a retroactive sentence modification could present an undue burden on individual judges. Conversely, the commission argues that it is uniquely positioned and empowered to weigh the complicated policy choices that must be made whenever retroactive sentence modifications are authorized. Finally, the commission raises the prudential concern about the flood of litigation and resulting uncertainty that would occur if the Court adopted a rule requiring individualized determinations for all retroactive resentencing proceedings. Ultimately, the U.S. Sentencing Commission concludes that, if *Booker* is held to apply in this context, the commission might be less likely to recommend retroactive modifications to the Federal Sentencing Guidelines in the future.

Legal Arguments

Application of Booker

When imposing sentences, federal judges must consider factors listed in 18 U.S.C. § 3553(a), such as the seriousness of the offence, characteristics of the defendant, and the goals of deterrence and protecting the public. Although *Booker* dealt with the initial imposition of sentences under § 3553, Dillon argues that a district court retroactively reducing a sentence pursuant to 18 U.S.C. § 3582(c)(2) is subject to *Booker*'s rule and cannot be bound by the Federal Sentencing Guidelines. Dillon urges that *Booker* applies to any resentencing that relies on the factors listed in §3553(a) and that a sentence modification under § 3582(c)(2) is functionally equivalent to the sentencing at issue in *Booker*. Dillon points out that *Booker* applies to formal resentencing in cases in which an original sentence is vacated as unlawful because 18 U.S.C. § 3742(g), which governs remands for resentencing in such cases, directs courts to resentence defendants in accordance with § 3553(a). Dillon argues that, because § 3582(c) also directs judges to consider the factors in §3553(a) when modifying a prisoner's sentence, *Booker* must apply.

However, the United States, the respondent, rejects the application of *Booker* in this case. The United States maintains that *Booker* does not apply to sentences that were already final when *Booker* was decided in 2005 and that its holding only applies to plenary sentencing—initial sentencing or formal resentencing occurring after an original sentence has been struck down as unlawful. In the United States' view, a § 3582(c)(2) sentence modification falls outside the scope of *Booker*, precisely because it is not a de novo resentencing that is imposed to replace a sentence that has been vacated but, instead, is a discretionary reduction of an *otherwise final* sentence based on a specific amendment to the Federal Sentencing Guidelines. The United States contends that, unlike de novo sentencing, § 3582(c)(2) resentencing does not implicate the Sixth Amendment, because, under § 3582(c)(2), the court is not using its own judge-found facts to formulate a new sentence or increase the length of a prisoner's sentence, but rather, the court exercises its discretion to reduce an otherwise final sentence so that it reflects the amendments to the guidelines. The United States also emphasizes that § 3582(c) permits the discretionary reduction of a prison sentence only insofar as the reduction is consistent with the policy statement in § 1B1.10(b)(2) of the Federal Sentencing Guidelines, which precludes reducing a sentence to a term less than the minimum of the amended range set by the guidelines.

Dillon acknowledges the mandate of § 1B1.10(b)(2) of the Federal Sentencing Guidelines but asserts that a sentence must comport with existing law, irrespective of the context, and that the Sixth Amendment is violated whenever a sentence "exceeds the maximum allowed under the facts found by the jury or admitted by the defendant." Dillon argues that the United States' reliance on § 1B1.10(b)(2) is misplaced, because "[Section] 1B1.10 attempts to resurrect the mandatory Guidelines system *Booker* invalidated." Citing *Stinson v. United States*, 508 U.S. 36, 38 (1993), Dillon urges that the policy statement cannot limit a court's discretion to apply the factors in § 3553(a) because, when a policy statement and federal statutory law conflict, the policy statement must yield.

Conclusion

This case provides an opportunity for the Supreme Court to clarify the reach of its holding in *Booker* and has the immediate potential to affect the sentences thousands of prisoners nationwide. Furthermore, the Supreme Court will have the opportunity to clarify the scope of the Sixth Amendment as it relates to the overall constitutionality of the Federal Sentencing Guidelines. **TFL**

Prepared by Tom Kurland and Daniel Shatz. Edited by Joe Rancour

Astrue v. Ratliff (08-1322)

Appealed from the U.S. Court of Appeals for the Eighth Circuit (Sept. 5, 2008)
Oral argument: Feb. 22, 2009

Michael J. Astrue, the petitioner, argues that an award of fees and expenses under the Equal Access to Justice Act (EAJA) is payable to the prevailing party in cases involving the Social Security Administration. The respondent, Catherine G. Ratliff, counters that an award of attorneys' fees should go to the prevailing party's attorney as compensation for services rendered. Astrue asserts that an award of attorneys' fees is subject to an administrative offset to satisfy the prevailing party's debt to the United States. Ratliff argues that, because the award belongs to the party's attorney and not to the party itself, the attorneys' fees cannot be subject to such an offset. The Eighth Circuit held that Congress intended attorneys' fees awarded under EAJA to go to the prevailing party's attorney and not to the prevailing party. The Supreme Court must resolve whether an award of attorneys' fees under EAJA is payable to the prevailing party rather than to the party's attorney and, therefore, is subject to an administrative offset for a pre-existing debt owed by the prevailing party to the federal government. Full text is available at topics.law.cornell.edu/supct/cert/08-1322. **TFL**

Prepared by Barbara Bispham and Kate Hajjar. Edited by Lauren Jones.

Barber v. Thomas (09-5201)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (July 3, 2008)
Oral argument: March 30, 2010

Michael Barber and Tahir Jihad-Black, the petitioners, are serving sentences in federal prison for various gun and drug charges and are challenging the Bureau of Prisons' interpretation of 18 U.S.C. § 3624(b), which allows well-behaved federal prisoners to receive up to 54 days off their sentences for "each year of the prisoner's term of imprisonment." The petitioners argue that "term of imprisonment" means the total sentence imposed by the court. The respondent contends that it refers to the prisoners' actual time served. The standard of computation ends up differing because, under the petitioners' method, prisoners would receive credit for good behavior for years they do not end up serving. In this case, the Court will decide how to interpret § 3624(b) as well as whether the rule of lenity requires application of the plaintiffs' interpretation. Full text is available at topics.law.cornell.edu/supct/cert/09-5201. **TFL**

Prepared by Kevin Sholette and Robert Tricchinelli. Edited by Lara Haddad.

Berghuis, Warden v. Thompkins (08–1470)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (Nov. 19, 2008)
Oral argument: March 1, 2010

In 2001, police officers questioned Van Chester Thompkins for roughly three hours about a shooting that had occurred over one year previously. Thompkins remained silent for much of the interrogation but ultimately provided police with incriminating statements. In 2002, Thompkins was convicted of first-degree murder. In a habeas corpus petition, the Sixth Circuit reversed the conviction, finding that Thompkins had not waived his *Miranda* rights and that he had been prejudiced by ineffective assistance of counsel. The Supreme Court will decide whether the Sixth Circuit (1) erroneously expanded the *Miranda* rule so as to prevent officers from persuading defendants to cooperate who neither invoked nor waived their *Miranda* rights and (2) violated 28 U.S.C. § 2254(d) by failing to afford the state appellate court deference with respect to the ineffective assistance of counsel claim. Full text is available at topics.law.cornell.edu/supct/cert/08-1470. **TFL**

Prepared by Will Rosenzweig and Daniel Shatz. Edited by Joe Rancour.

Carr v. United States (08-1301)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (Dec. 22, 2008)
Oral argument: Feb. 24, 2010

The Sex Offender Registration and Notification Act (SORNA) requires convicted sex offenders to register in any jurisdiction in which they reside and also imposes criminal penalties on any sex offenders who travel to other states and knowingly fail to register in the state to which they traveled. Before SORNA was enacted, Thomas Carr, a convicted sex offender, moved to Indiana but failed to register there. A federal grand jury indicted Carr for his failure to register under SORNA. Carr appealed to the Seventh Circuit, arguing that applying SORNA violated the Ex Post Facto Clause, because his conviction and travel predated the enactment of SORNA. The Seventh Circuit held that SORNA did not violate the Ex Post Facto Clause, because the failure to register occurred after SORNA was enacted. The Supreme Court's decision will settle a circuit split over whether SORNA can punish sex offenders who traveled in interstate commerce before the law was enacted. Full text is available at topics.law.cornell.edu/supct/cert/08-1301. **TFL**

Prepared by Sarah Chon. Edited by James McConnell.

Hamilton v. Lanning (08-998)

Appealed from the U.S. Court of Appeals for the Tenth Circuit (Nov. 8, 2008)
Oral argument: March 22, 2010

This case concerns the extent of a bankruptcy court's flexibility in determining a debtor's "projected disposable income" under 11 U.S.C. § 1325(b)(1)(B). Stephanie Kay Lanning filed for bankruptcy in October 2006 and proposed monthly payments of $144, based on her current income and expenses. Jan Hamilton, Lanning's bankruptcy trustee, objected and said that Lanning's projected disposable income was actually more than $1,000 per month. The U.S. Bankruptcy Court

PREVIEWS *continued on page 64*

for the District of Kansas overruled the objection and approved Lanning's plan. The court found that, even though Hamilton's calculation of Lanning's projected disposable income based on her income from the prior six months was correct under Form 22C, the results were inequitable, because Lanning's income was artificially inflated for two months as a result of a buyout by her prior employer. The Bankruptcy Appeals Panel and the Tenth Circuit Court of Appeals both affirmed. Hamilton argues that the plain language of the statute mandates his "mechanical" approach, whereas Lanning argues that her "forward-looking" approach avoids absurd results. The Supreme Court's decision in this case will provide clarity to a statutory term that has flummoxed the lower courts. Full text is available at topics.law.cornell.edu/supct/cert/08-998. **TFL**

Prepared by Michelle Lynn and Chris Maier. Edited by Katie Worthington.

Health Care Service Corporation v. Pollitt (No. 09-38)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (March 10, 2009)
Oral argument: March 3, 2010

In 2007, Juli Pollitt sued Health Care Service Corporation in state court for bad-faith insurance practices. HCSC removed the case to federal court, where it was dismissed because the court reasoned that the Federal Employees Benefit Act pre-empted the case. Pollitt appealed, and the Seventh Circuit vacated the lower court's decision, holding that removal was inappropriate because the claim was not "completely preempted" by federal law. The Seventh Circuit held that the federal officer removal statute applied here was a question of fact and remanded the case for further proceedings. The Supreme Court will determine whether a government contractor who provides insurance coverage to federal employees is entitled to remove a suit under either the "complete preemption" doctrine or the federal officer removal statute. Full text is available at topics.law.cornell.edu/supct/cert/09-38. **TFL**

Prepared by Lilian Balasanian and Tamilia Chiu. Edited by Lucienne Pierre.

Holland v. Florida (09-5327)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (Aug. 18, 2008)
Oral argument: March 1, 2010

Albert Holland, an inmate on death row, twice wrote letters to his attorney to inquire about the status of his federal habeas petition, and his attorney failed to reply to both letters. Holland eventually filed a pro se federal habeas petition in federal district court. However, with the delay in filing, the district court denied the habeas petition as untimely. After gaining new counsel, Holland argued that his attorney's "egregious conduct" constituted "extraordinary circumstances" that triggered equitable tolling of the petition. The Eleventh Circuit held that, even though representation of Holland was "grossly negligent," only an attorney's "bad faith, dishonesty, divided loyalty, mental impairment, or so forth" could be considered extraordinary circumstances. The Supreme Court will determine whether "gross negligence" by an attorney constitutes extraordinary circumstances under the equitable tolling doctrine. Full text is available at topics.law.cornell.edu/supct/cert/09-5327. **TFL**

Prepared by Joanna Chen and Oliver Reimers. Edited by James McConnell.

Hui v. Castaneda (08−1529)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Oct. 2, 2008)
Oral argument: March 2, 2010

This case involves a lawsuit brought by the estate of decedent Mr. Castaneda against two U.S. Public Health Service (PHS) officials for failing to provide proper medical care to Castaneda while he was in the custody of a state immigration facility. Castaneda had a growing, fungating lesion on his penis but PHS officials denied his request for a simple biopsy. Consequently, Castaneda died of penile cancer at the age of 36. At issue here is whether the Federal Employees Liability Reform and Tort Compensation Act of 1988, providing that federal employees are not protected from constitutional tort claims, extends to 422 U.S.C. § 233(a) of the Emergency Health Personnel Act, which covers PHS officials. The Supreme Court's decision in this case may significantly affect the extent to which prisoners may seek recourse if denied constitutionally guaranteed access to adequate medical care while in custody. Full text is available at topics.law.cornell.edu/supct/cert/08-1529. **TFL**

Prepared by Andrew Kaplan and Catherine Suh. Edited by Lara Haddad.

Humanitarian Law Project v. Holder (09-89); Holder v. Humanitarian Law Project (08-1498)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Dec. 10, 2007)
Oral argument: Feb. 23, 2010

It is illegal to provide material support and resources to groups that the government has determined are foreign terrorist organizations. The Humanitarian Law Project argues that this prohibition violates First and Fifth Amendment rights of those individuals or groups that wish to provide resources to the humanitarian arms of foreign terrorist organizations. The government contends that the law is not unconstitutionally vague and that these provisions are necessary to combat terrorism effectively. In addition to determining the scope of the First and Fifth Amendments with respect to this aspect of anti-terrorism efforts, the case will also affect how various groups engage in humanitarian campaigns abroad. Full text is available at topics.law.cornell.edu/supct/cert/09-89. **TFL**

Prepared by Rebecca Vernon and Frederick Wu. Edited by James McConnell.

Kawasaki Kisen Kaisha v. Regal-Beliot Corp. (08-1553); Union Pacific Railroad Co. v. Regal-Beliot Corp. (08-1554)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Feb. 17, 2009)
Oral argument: March 24, 2010

The respondent Regal-Beliot is a manufacturer of electric motors who brought suit against the petitioners, Kawasaki Kisen Kaisha and Union Pacific Railroad, the shippers of the motors. Regal-Beliot alleges that goods were damaged while they were traveling on a Union Pacific train that derailed in Oklahoma. Kawasaki and Union Pacific sought and were granted dismissal at the trial level, pursuant to a forum selection clause in the bill of lading between the parties. Regal-Beliot claims that the bill of lading clause should not apply because the Carmack Amendment governs this transaction, while the petitioners claim that it does not. The Ninth Circuit held that the Carmack Amendment applied and reversed the lower court. This case highlights a conflict between the forum selection clause in the bill of lading and the Carmack Amendment, which preempts state and common law claims and provides that it be the exclusive remedy for interstate shipping and also narrowly restricts the venues in which disputes may be heard. The Court's decision in this case will have an impact on manufacturers and shippers across all industries. The petitioners charge that a decision favoring Regal-Beliot may upset the settled expectations of the international shipping industry, whereas Regal-Beliot contends that a decision for the petitioners denying applicability of the Carmack Amendment could potentially lead to litigation chaos. Full text is available at topics.law.cornell.edu/supct/cert/08-1533. **TFL**

Prepared by Andrew Kaplan and Catherine Suh. Edited by Lara Haddad.

Levin v. Commerce Energy Inc. (09-223)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (Feb. 4, 2009)
Oral argument: March 22, 1010

Commerce Energy Inc. sued Ohio's tax commissioner, Richard Levin, alleging that Ohio's tax scheme violates the Commerce Clause and the Equal Protection Clause of the U.S. Constitution. Commerce contends that four Ohio companies benefit from certain tax exemptions for which Commerce is not eligible because it is an out-of-state company. Levin argues that the Tax Injunction Act and principles of comity bar Commerce's suit from proceeding to a federal court. Commerce counters that a federal court has jurisdiction to hear the suit. In this case, the Supreme Court will clarify the scope of the federal judiciary's authority to hear lawsuits regarding state tax law. Full text is available at topics.law.cornell.edu/supct/cert/09-223. **TFL**

Prepared by Samuel Farina-Henry and Kelly Vaughan. Edited by Joe Rancour.

Lewis v. City of Chicago, IL (08-974)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (June 4, 2008)
Oral argument: Feb. 22, 2010

The petitioners, Arthur L. Lewis Jr., et al., a group of African-Americans who applied to become firefighters in Chicago, sued the city under the Civil Rights Act of 1964, claiming that Chicago's use of an eligibility test had a disparate racial impact on African-Americans, effectively resulting in employment discrimination. The plaintiffs won their lawsuit in the federal district court, but the Seventh Circuit reversed, because the claim had not been filed within the 300-day filing period for employment discrimination claims. The court held that the filing period began at the time that the applicants were informed of the results of the test. This case presents the Court with the opportunity to determine whether the subsequent *use* of the results of an eligibility test with disparate racial impact qualifies as a discretely new violation of the Civil Rights Act that would begin anew another 300-day filing period. Full text is available at topics.law.cornell.edu/supct/cert/08-974. **TFL**

Prepared by Matthew Benner and Mian Wang. Edited by Katie Worthington.

Magwood v. Culliver (09-158)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (Jan. 23, 2009)
Oral argument: March 24, 2010.

The Antiterrorism and Effective Death Penalty Act prohibits the filing of "second or successive" habeas petitions by state prisoners. The petitioner, Billy Joe Magwood, and the respondent, Warden Tony Patterson, disagree as to whether Magwood, who received habeas relief from an earlier death sentence, may challenge a subsequent state-issued death sentence for the same act. Magwood argues that a habeas petition challenging a new judgment for the first time cannot be "second or successive." Patterson asserts that Magwood had a full and fair opportunity to litigate his new claim in the first habeas petition, and it would be an abuse of the writ and a violation of 28 U.S.C. § 2244(b) to raise the claim in this subsequent petition. The Supreme Court must now decide whether a petitioner who obtained federal relief from an earlier sentence may challenge a resentencing in a subsequent habeas petition if that petitioner could have challenged the first sentence on the same constitutional grounds now used to challenge the second sentence. Full text is available at topics.law.cornell.edu/supct/cert/09-158. **TFL**

Prepared by Barbara Bispham and Kate Hajjar. Edited by Lauren Jones.

McDonald v. Chicago (08-1521)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (June 2, 2009)
Oral argument: March 2, 2010

The 2008 Supreme Court case *Heller v. District of Columbia* ruled that

PREVIEWS *continued on page 66*

Washington, D.C.'s gun control laws effectively banning the possession of handguns violated the Second Amendment. The Petitioners, Otis McDonald, et al., challenge the constitutionality of Chicago's gun control laws, arguing that they are similar to the issues raised in *Heller*. After *Heller*, the federal government cannot prohibit the possession of handguns in the home. This case raises the question of whether the same restriction applies to state governments. McDonald argues that the right to bear arms is a fundamental right that states cannot infringe. Chicago argues that states should be able to tailor firearm regulation to local conditions. The outcome of this case will affect the ability of states to regulate handguns in their jurisdictions and could have far-reaching effects on long-held conceptions of federalism. Full text is available at topics.law.cornell.edu/supct/cert/08-1521. **TFL**

Prepared by Kevin Jackson and Eric Johnson. Edited by Lucienne Pierre.

Morrison v. National Australia Bank (08-1191)

Appealed from the U.S. Court of Appeals for the Second Circuit (Jan. 11, 2010)
Oral argument: Mar. 29, 2010

National Australia Bank (NAB), the respondent, is an Australian corporation that has significant operations in the United States. In 2001, NAB acknowledged flaws in the method that its Florida subsidiary, HomeSide Lending, had used in calculating the value of its mortgages and recording this value on its balance sheet. This recognition led to a drop both in NAB's stock, which is not traded on a U.S. exchange, and in its American Depository Receipts, which trade on the New York Stock Exchange. The petitioners, who represent a class of Australian and American NAB shareholders, brought suit against NAB for alleged violations of §§ 10(b) and 20(a) of the Securities and Exchange Act of 1934. The Second Circuit dismissed the case for lack of subject matter jurisdiction. On appeal, the petitioners argue that the Securities and Exchange Act applies to NAB's actions, while NAB argues that there is a presumption against extraterritorial application of the act. The Supreme Court's decision in this case will strike a balance between providing a U.S. forum for litigation between international parties and furnishing recourse for international shareholders who fall victim to the fraudulent activity of international corporations with significant American operations. Full text is available at topics.law.cornell.edu/supct/cert/08-1191. **TFL**

Prepared by Lilian Balasanian and Tamilia Chiu. Edited by Katie Worthington.

New Process Steel v. NLRB (08-1457)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (May 1, 2009)
Oral argument: Mar. 23, 2010

Under 29 U.S.C. § 153(b), the National Labor Relations Board (NLRB) "is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. … A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to [delegation]." New Process Steel argues that the National Labor Relations Board is prohibited by statute from deciding issues when it acts with only two sitting members of a five-member board. The NLRB contends that it has the authority to issue decisions, even with only two current members on a five-member board, if it previously delegated authority to a three-member panel. The Court will decide how to interpret the 29 U.S.C. § 153(b) and whether the current two-member quorum meets the minimum statutory requirement. This case may affect how the NLRB handles pending or future cases when there are vacancies on the board. Full text is available at topics.law.cornell.edu/supct/cert/08-1457. **TFL**

Prepared by Frederick Wu and Oliver Reimers. Edited by James McConnell.

Renico v. Lett (09-338)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (March 10, 2009)
Oral argument: March 29, 2010

Reginald Lett was convicted of second-degree murder in a Michigan state court in his second trial for the same offense. In his first trial, the judge determined that the jury was deadlocked and declared a mistrial. Lett filed a habeas corpus petition in the District Court for the Eastern District of Michigan, and his petition was granted. On appeal, the Sixth Circuit Court of Appeals affirmed the district court's ruling on the basis that Lett's Fifth Amendment right to be free from double jeopardy had been violated, because the trial court had not used "sound discretion" in finding a "manifest necessity" to declare a mistrial and terminate the ongoing proceedings. This case presents the Supreme Court with the opportunity to clearly articulate what state courts must do before declaring a mistrial to avoid running afoul of the Fifth Amendment. Full text is available at topics.law.cornell.edu/supct/cert/09-338. **TFL**

Prepared by Matthew Benner and Mian Wang. Edited by Katie Worthington.

Robertson v. United States, ex rel. Watson (08-6261)

Appealed from the District of Columbia Court of Appeals (Jan. 24, 2008)
Oral argument: March 31, 2010

Wykenna Watson, the respondent, obtained a civil protection order (CPO) against John Robertson, the petitioner, alleging that Robertson had attacked her in March 1999. In June 1999, Robertson violated the CPO when he attacked Watson again. In a plea bargain with the U.S attorney's office, Robertson agreed to plead guilty to attempted aggravated assault for the March incident in return for the United States' agreement not to pursue two other charges arising from the June incident. Later, Watson brought a criminal contempt action against Robertson, alleging that the June incident had

violated the CPO. The trial court convicted Robertson of three violations of his CPO, and Robertson subsequently petitioned to have his convictions vacated. Robertson argued that Watson's criminal contempt action violated his plea bargain with the United States because criminal contempt proceedings are necessarily brought on behalf of the United States. The Supreme Court's decision may alter criminal contempt proceedings in the face of plea bargains and affect the balance of power between the branches of government. Full text is available at topics.law.cornell.edu/supct/cert/08-6261. **TFL**

Prepared by Joanna Chen and Sarah Chon. Edited by James McConnell.

Samantar v. Yousuf (08-1555)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (Jan. 8, 2009)
Oral argument: March 3, 2010

Numerous plaintiffs filed claims against Mohamed Ali Samantar, Somalia's former prime minister and minister of defense, alleging that he was personally liable for the systematic torture and killing of civilians by Somali intelligence agencies during the 1980s. The district court found that Samantar was immune to suit under the Foreign Sovereign Immunities Act (FSIA) and dismissed the case. The Fourth Circuit reversed the decision, holding that the statutory language of FSIA does not cover either current or former government officials. In determining the scope of the FSIA as it relates to individuals, the Supreme Court will have an opportunity to clarify the language of the statute and resolve ambiguities between the FSIA and other immunity statutes. The decision could have a major impact on U.S. international relations by altering the immunity enjoyed by U.S. officials abroad and influencing the number of international claims in U.S. courts. Full text is available at topics.law.cornell.edu/supct/cert/08-1555. **TFL**

Prepared by Michelle Lynn and Chris Maier. Edited by Katie Worthington.

Skilling v. United States (08-1394)

Appealed from for the U.S. Court of Appeals for the Fifth Circuit (Jan. 6, 2009)
Oral argument: March 1, 2010

Jeffrey K. Skilling, the former chief executive officer of the Enron Corporation, was convicted by a federal jury in Houston of numerous counts of conspiracy, securities fraud, and insider trading relating to Enron's bankruptcy. The Fifth Circuit upheld Skilling's conviction. In this case, the Supreme Court will determine the scope and constitutionality of 18 U.S.C. § 1346, which makes it a crime for an employee of a corporation to fraudulently deprive the corporation of that employee's "intangible honest services." In addition, the Court will determine to what extent the government was required to prove that no member of the Houston jury that convicted Skilling was actually prejudiced by the widespread negative media attention the Enron bankruptcy received before and during Skilling's initial trial. Full text is available at topics.law.cornell.edu/supct/cert/08-1394. **TFL**

Prepared by Tom Kurland. Edited by Lara Haddad.

United States v. Marcus (08-1341)

Appealed from the U.S. Court of Appeals for the Second Circuit (Aug. 14, 2008)
Oral argument: Feb. 24, 2010

A jury convicted Glenn Marcus, the respondent, on federal charges of sex trafficking and forced labor under the Trafficking Victims Protection Act of 2000. On appeal, the Second Circuit vacated the convictions as a violation of the Ex Post Facto Clause, because Congress had enacted the statute two years after the earliest criminal conduct the indictment alleged. Although Marcus failed to preserve the ex post facto violation for appeal, the Second Circuit cited the "plain error doctrine" found in Rule 52(b) of the Federal Rules of Criminal Procedure for authority to vacate. The United States, the petitioner, asserts that the Court of Appeals applied an erroneous "any possibility" standard that contradicts Supreme Court precedent. The government argues that a defendant must demonstrate a "reasonable possibility" a conviction was based on his pre-enactment conduct to violate the Ex Post Facto Clause. Marcus disputes the government's interpretation, contending that the Second Circuit's decision was consistent with Supreme Court precedent. Full text is available at topics.law.cornell.edu/supct/cert/08-1341. **TFL**

Prepared by Kevin Sholette and Robert Tricchinelli. Edited by Lara Haddad.

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

Appealed from the U.S. Court of Appeals for the First Circuit (Sept. 23, 2008)
Oral argument: Feb. 23, 2010

Arthur Burgess and Martin O'Brien pled guilty to a variety of criminal charges, including possession of a firearm in furtherance of a violent crime. However, at sentencing, the judge determined that he could not apply the 30-year mandatory minimum sentence for possession of an automatic weapon in furtherance of a violent crime, because the government had not proven beyond a reasonable doubt that either defendant had possessed an automatic weapon that was used during the crime. In this case, the Supreme Court will decide whether the nature of a weapon is a sentencing factor, to be determined by the judge by a preponderance of the evidence, or an element of an offense, to be determined by a jury beyond a reasonable doubt. Full text is available at topics.law.cornell.edu/supct/cert/08-1569. **TFL**

Prepared by Samuel Farina-Henry and Kelly Vaughan. Edited by Joe Rancour.