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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 opinion, 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 opinion, 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 opinion, 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 opinion, 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 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 opinion, 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 opinion, 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 held, "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 opinion (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.

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[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. *See United States v. Thurston,* 358 F.3d 51 (1st Cir. 2004); *United 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,* 2004 U.S. App. LEXIS 3513 (9th Cir. Wash. Feb. 25, 2004).

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

The Court ruled 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. 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 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. 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 opinion, 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 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 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. 1144 (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 opinion, 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 opinion, 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 opinion, 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.**

This case concerns 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. **Held:** The U.S. Supreme Court 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.

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

The Supreme Court, in a unanimous opinion, 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 held, 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.*

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 opinion, 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 court 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 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'Conner.**

The Supreme Court 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 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

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[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."MACROBUTTONHtmlResAnchorhttp://www.ussc.gov/research.htm.

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 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.[3] The Court noted that these considerations make this a stronger "separate crime" case than either *United States v. Jones*[4] or *United States v. Almandarez-Torres*[5]—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.

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 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. The Supreme Court 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." 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

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[3] *Id.*

[4] 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).

[5] 523 U.S. 224, 118 S. Ct. 1219 (1998)(recidivism treated merely as a sentencing factor rather than as an element of the offense).

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

***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*, ___ U.S. ___, 124 S. Ct. 2531 (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*, ___ U.S. ___, 124 S. Ct. 2519 (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).

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 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).