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## Supreme Court Watch: Recent Decisions and Upcoming Criminal Cases for the 2008-2009 Docket

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# SUPREME COURT WATCH: RECENT DECISIONS AND UPCOMING CRIMINAL CASES FOR THE 2008-2009 DOCKET

Emily Pasternak\*

## *Watson v. United States*

128 S.Ct. 579

Decided December 10, 2007

### Question Presented:

Where a defendant receives a gun in exchange for drugs, has he “used” the gun “during and in relation to . . . [a] drug trafficking crime within the meaning of the federal drug law 18 U.S.C. Section 924(c)(1)(A)?

### Facts:

18 U.S.C. Section 924(c)(1)(A) sets a mandatory minimum sentence for a defendant who, “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.” The statute does not define the term “uses,” and the breadth of the term is what gives rise to this case.

Michael Watson told a government informant that he wanted to buy a gun. The informant suggested that Watson pay in narcotics. Watson exchanged twenty-four doses of OxyContin for a .50 caliber semiautomatic pistol and was arrested. A federal grand jury indicted him for distributing a controlled substance and for “using” the pistol during and in relation to that crime, in violation of Section 924(c)(1)(A). Watson pled guilty to both charges but reserved the right to challenge the factual basis for a Section 924(c)(1)(A) conviction.

The Fifth Circuit Court of Appeals, following Circuit precedent, affirmed the decision of the District Court that Watson had “used” the firearm. The Supreme Court granted certiorari to resolve a conflict among the circuit courts.

### Decision:

Justice Souter wrote the majority opinion in this unanimous judgment, holding that a person does not “use” a firearm under 18 U.S.C. Section 924(c)(1)(A) when he receives it in trade for drugs. The Supreme Court has addressed the meaning of the term “uses” twice before, in *Smith v. United States*, 508 U.S. 223 (1993) and in *Bailey v. United States*, 516 U.S. 137 (1995).

In *Smith*, the issue raised was the converse of the issue raised in this case. The Court held that “a criminal who trades his firearm for drugs ‘uses’ it during and in relation to a drug trafficking offense within the meaning of Section 924(c)(a).”

In *Bailey*, the issue was whether possessing a firearm near the scene of drug crime is “used” under Section 924(c)(1). The Court held that the mere possession of a gun does not amount to “using” the gun under the statute. In both decisions the Court used the ordinary and natural meaning of the verb “to use.”

In making its decision, the *Watson* Court stated that, “[t]he Government may say that a person ‘uses’ a firearm

simply by receiving it in a barter transaction, but no one else would.” The Court cited previous decisions to support its interpretation of the term “uses.” In *United States v. Stewart*, the Court held that “[w]hen a person pays a cashier a dollar for a cup of coffee in the courthouse cafeteria, the customer has not used the coffee. He has only used the dollar bill.” 246 F.3d 728, 731 (C.A.D.C. 2001). Therefore, when Watson handed over the drugs for the pistol, the informant “used” the pistol, but “regular speech would not say that Watson himself used the pistol in the trade.”

Justice Ginsburg concurred in judgment.

## *Kimbrough v. United States*

128 S.Ct. 558

Decided December 10, 2007

### Questions Presented:

(1) When imposing a sentence for distributing crack cocaine, may a District Court judge consider the impact of the 100-to-1 crack/powder ratio and the Sentencing Commission’s view that the ratio leads to exaggerated sentences for crimes involving crack cocaine?

(2) May a District Court judge, in an effort to avoid a sentencing disparity, impose a sentence that is below the range recommended by the 100-to-1 crack/powder ratio in the Guidelines?

### Facts:

In September 2004, petitioner Derrick Kimbrough was indicted in the United States District Court for the Eastern District of Virginia and charged with four offenses: (1) conspiracy to distribute crack and powder cocaine; (2) possession with intent to distribute more than fifty grams of crack cocaine; (3) possession with intent to distribute powder cocaine; and (4) possession of a firearm in furtherance of a drug-trafficking offense. Kimbrough pled guilty to all four charges.

Even though crack cocaine and powder cocaine are chemically similar, they are treated very differently for sentencing purposes. Based on assumptions that crack cocaine was more dangerous than powder, the Sentencing Commission, following the Congressional Act of 1986, adopted a 100-to-1 ratio that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine. “The 100-to-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs.” The Commission has since sought, unsuccessfully, to eliminate the disparity in the Guidelines between crack and powder cocaine.

In *United States v. Booker*, 543 U.S. 220 (2005), the Court held that the mandatory sentencing guidelines system violated the Sixth Amendment. *Booker* rendered the guide-

lines “effectively advisory.” The statute, 18 U.S.C. Section 3553, “as modified by Booker, contains an overarching provision instructing district courts to ‘impose a sentence sufficient, but not greater than necessary’ to accomplish the goals of sentencing” and lists several factors for a court to consider.

According to the Guidelines, Kimbrough should have been subjected to an aggregate sentence of fifteen years to life in prison. However, the District Court believed that this sentence would have been greater than necessary and “commented that the case exemplified the ‘disproportionate and unjust effect that crack cocaine guidelines have in sentencing.’”

The District Court chose to sentence Kimbrough as if he had been charged, not with possession of crack cocaine, but with an equivalent amount of powder cocaine.

As a result, the guideline range fell from “228 to 270 months” to the lesser range of “97 to 106 months.”

Deciding that the statutory minimum sentence was “clearly long enough” to accomplish the objectives listed in the statute, Section 3553(a), the court sentenced Kimbrough to fifteen years, or 180 months, in prison plus five years of supervised release. The prison sentence consisted of 120 months for each of the three drug counts, to run concurrently, plus 60 months for the firearm count to run consecutively.

The Fourth Circuit Court of Appeals vacated the sentence according to precedent that a sentence “outside the guidelines range is *per se* unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.” *United States v. Eura*, 440 F.3d 625 (C.A.4 2006).

The Supreme Court granted certiorari to determine “whether the crack/powder disparity adopted in the United States Sentencing Guidelines has been rendered ‘advisory’ by [their] decision in *Booker*,” a question that has divided the Courts of Appeals.

#### Decision:

Justice Ginsburg delivered the Court’s 7-2 decision holding that the sentence imposed on Kimbrough should survive appellate review because although the District Court assigned him a sentence outside of the guidelines, it was not an abuse of discretion because the sentence was reasonable and would achieve the purpose of Section 3553(a).

The Government argued that the Guidelines adopting the 100-to-1 ratio are an exception to the “general freedom that sentencing courts have to apply the Section 3553(a) factors” because the ratio is a “specific policy determination that Congress has directed sentencing courts to observe.”

The Court rejected the Government’s argument, holding that while the Commission’s recommendation of a sentence range reflects a rough approximation of sentences that might achieve Section 3553(a)’s objectives, the sentencing judge is familiar with the individual case and defendant and therefore, the judge is “in a superior position to find facts and judge their import under Section 3553(a).”

The Court further noted that the Commission itself has reported that the disparity between crack and powder

sentences results in “disproportionately harsher sanctions.” Therefore, the Court held that it is not an abuse of discretion for a district court to decide that the crack/powder disparity results in a sentence “greater than necessary” to achieve Section 3553(a)’s purpose for an individual defendant. Justice Scalia filed a concurring opinion.

Justice Thomas and Justice Alito filed dissenting opinions.

### *Logan v. United States*

128 S.Ct. 475

Decided December 4, 2007

#### Question Presented:

Does the “civil rights restored” exemption contained in 18 U.S.C. Section 921(a)(20) encompass, and therefore remove from the Armed Career Criminal Act’s reach, state-court convictions that at no time deprived the offender of civil rights?

#### Facts:

James Logan pled guilty in a United States District Court to being a felon in possession of a firearm, in violation of 18 U.S.C. Section 922(g)(1). Because of Logan’s record, which included three Wisconsin court convictions of misdemeanor battery, the District Court imposed a fifteen year to life sentence of imprisonment.

The minimum of fifteen years was mandated by the Armed Career Criminal Act (ACCA), 18 U.S.C. Section 924(e)(1), which offers guidelines to enhance sentences. However, the ACCA states that a prior conviction may be disregarded if the offender has had civil rights restored. The convictions that triggered Logan’s ACCA-enhanced sentence caused no loss of civil rights.

In District Court and the Court of Appeals, Logan argued that his Wisconsin misdemeanor convictions did not qualify as enhanceable offenses under the ACCA because they did not cause him to lose his civil rights. Logan reasoned that retained rights are equivalent to rights lost but later restored, and therefore the exception clause in Section 921(a)(20) covered his three state-court misdemeanor convictions. This would result in the reduction of Logan’s minimum sentence of fifteen years under the ACCA to a maximum sentence of ten years.

The District Court rejected Logan’s argument and the Court of Appeals affirmed the decision holding that “an offender whose civil rights have been neither diminished nor returned is not a person who ‘has had civil rights restored.’”

The Supreme Court granted certiorari to resolve a split among the Circuits as to whether Section 921(a)(20)’s exception for “civil rights restored” should be interpreted to include civil rights never lost.

#### Decision:

Justice Ginsburg delivered the opinion of the unanimous court holding that the Section 921(a)(20) exemption provision does not cover the case of an offender who retained civil rights at all times. The Court rejected Logan’s

argument that retention of rights must be treated as the legal equivalent to restoration of rights to prevent less serious offenders from receiving ACCA enhanced penalties while more serious offenders who have had civil rights restored may escape heightened punishment.

First, the Court examined the plain meaning of the word “restore” and found that it means “to give back something that had been taken away.” The Court noted that “[w]ords in a list are generally known by the company they keep.” The words accompanying “restore” in Section 921(a)(20) are “expunged,” “set aside,” and “pardoned.” Each term describes a way for the government to relieve the offender from some or all of the consequences of his conviction. “In contrast, a defendant who retains rights is simply left alone.”

Next the Court discussed the effect Logan’s interpretation of the statute would have. The Court explained that some states do not revoke any offender’s civil rights, and that under Logan’s interpretation of the statute, the most dangerous recidivists could fall under the Section 921(a)(20) exception.

Finally, the Court noted that the statutory language rejects Logan’s argument. Section 921(a)(20) reads “[a] person shall not be considered to have been convicted if the conviction . . . is an offense for which the person has been pardoned or has had civil rights restored (*if the law of the applicable jurisdiction provides or the loss of civil rights under such an offense*).” The Court emphasized that the parenthetical qualification shows that the phrase “civil rights restored” does not refer to a person whose civil rights were never revoked.

### *Gall v. United States*

128 S. Ct. 586

Decided December 10, 2007

#### **Question Presented:**

May the Court of Appeals apply a “proportionality test” and require that a sentence that constitutes a substantial variance from the Sentencing Guidelines be justified by extraordinary circumstances?

#### **Facts:**

In early 2000, Brian Gall, while a student at the University of Iowa, became a member of an ecstasy distribution conspiracy. For seven months, he delivered ecstasy pills to co-conspirators, netting over \$30,000. Gall voluntarily left the conspiracy in September 2000. He did not sell any drugs after that time, and, after graduating in 2002, he entered the construction industry, where he has worked ever since. On April 28, 2004, Gall was indicted for participating in a conspiracy to distribute ecstasy, cocaine, and marijuana.

The District Court, considering Gall’s post-offense conduct, including his obtaining a college degree, the start of his own business, the support of his family and friends, lack of criminal history, and his age, sentenced Gall to probation for a term of thirty-six months.

The Court of Appeals for the Eighth Circuit reversed and remanded for resentencing. It held that a sentence outside of the range of the Sentencing Guidelines must be supported by a justification that “is proportional to the extent of the difference between the advisory range and the sentence imposed” and that such a variance must be supported by extraordinary circumstances. It held that neither of these requirements were met in the case at hand. First, it held that the difference between a sentence of probation and the minimum sentence suggested by the sentencing guidelines (thirty months imprisonment) was 100%. Next, it held that the District Judge made five errors in reasoning: (1) he gave “too much weight to Gall’s withdrawal from the conspiracy;” (2) he gave too much weight to studies showing impetuous behavior by those under the age of eighteen; (3) he did not “properly weigh” the seriousness of Gall’s offense; (4) he failed to consider “unwarranted” disparities caused by the sentence; and (5) he placed “too much emphasis on Gall’s post-offense rehabilitation.”

#### **Decision:**

Justice Stevens delivered the 7-2 opinion of the Court. The Court held that because the Sentencing Guidelines are now advisory in nature, “appellate review of sentencing decisions is limited to determining whether they are reasonable” under the abuse of discretion standard of review. The Court specifically rejected rules that require extraordinary circumstances to justify sentences outside of Guidelines range and rejected the use of mathematical formulas that use percentage of departure from the Guidelines as the standard for determining the strength of justification that must be made by the district court. It held that these approaches “come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”

The court held that the proper method of appellate review is for the appellate court to first make sure that the district court did not commit a procedural error (such as failing to calculate or improperly calculating the Sentencing Guidelines range, treating the Guidelines as mandatory, failing to consider the Section 3553(a) factors, or failing to adequately explain the chosen sentence), and to then consider the substantive reasonableness of the sentence under an abuse of discretion standard, taking into account the totality of the circumstances. The court concluded that the District Judge did not commit a significant procedural error, nor was the sentence he imposed on Gall unreasonable under the abuse of discretion standard. Justice Scalia filed a concurring opinion.

Justices Thomas and Alito filed dissenting opinions.

### *Allen v. Siebert*

128 S.Ct. 2

Decided November 5, 2007

#### **Question Presented:**

Under the Antiterrorism and Effective Death Penalty Act, is the statute of limitations for a federal habeas

petition tolled when an untimely application for state post-conviction relief is filed?

**Facts:**

Daniel Siebert was convicted and sentenced to death in Alabama for murder. Siebert's conviction and sentence were affirmed on direct appeal. On August 25, 1992, Siebert filed a petition for post-conviction relief in Alabama State Court, and his petition was denied as untimely because it was filed after the statute of limitations had run. On September 14, 2001, Siebert filed a petition for a federal writ of habeas corpus in an Alabama District Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one-year statute of limitations for filing a federal habeas petition. However, the statute of limitations is paused, or tolled, while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."

**Decision:**

In a per curiam decision, the Supreme Court held that for an application for post-conviction relief to be "properly filed," it must be timely, and therefore, an untimely application does not toll the statute of limitations for the AEDPA. This holding relied on the Supreme Court decision in *Pace v. DiGuilmo*, 544 U.S. 408 (2005), holding that a state post-conviction petition rejected as untimely is not properly filed within the meaning of the AEDPA.

Although the District Court followed *Pace* and rejected Siebert's habeas petition, the Court of Appeals reversed, distinguishing *Pace* on the grounds that Rule 32.2(c) (the Alabama rule that rendered Siebert's application for post-conviction relief untimely), unlike the statute of limitations in *Pace*, "operates as an affirmative defense." The Supreme Court rejected this reasoning and stated, "[w]hen a post-conviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of [the AEDPA]."

*Rita v. United States*

127 S.Ct. 2456  
Decided June 21, 2007

**Question Presented:**

May a Court of Appeals apply a presumption of reasonableness to a District Court sentence that reflects a proper application of the Sentencing Guidelines according to 18 U.S.C. Section 3553(a)(2)?

**Facts:**

Victor Rita committed perjury while testifying in front of a grand jury. The District Court concluded that the sentencing guideline range of thirty-three to forty-one months in prison under Section 3553(a)(2) was appropriate and sentenced him to thirty-three months in prison.

Rita appealed and argued that the sentence was

"unreasonable" because it was "greater than necessary to comply with the purposes of sentencing" under Section 3553(a)(2). The Fourth Circuit held that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable." The Supreme Court granted certiorari to resolve a conflict among the Circuits.

**Decision:**

Justice Breyer delivered the 8-1 majority decision of the Court affirming the Circuit Court's holding that a sentence based on the Guidelines is presumptively reasonable during appellate review.

The Court first pointed out that a presumption is not binding and does not lead to strong judicial deference. Instead, "the presumption reflects the fact that, by the time an appeals court is considering a with-in-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case." Therefore, when a judge sentences a defendant within the guidelines, he is consistent with the Commission's judgment in general.

Rita argued that, because the Guidelines change in the presence of special facts, such as brandishing a weapon, and because the judge would be determining these facts in many instances, the Guidelines violate the Sixth Amendment. The Court rejected Rita's argument, holding that the Sixth Amendment does "not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence."

Justice Scalia filed an opinion concurring in part and concurring in the judgment, in which Justice Thomas joined. Justice Souter filed a dissenting opinion.

QUESTIONS PRESENTED IN UPCOMING  
CASES GRANTED CERTIORARI

*Begay v. United States*

Docket: 06-11543  
Tenth Circuit Court of Appeals

**Question presented:**

Is a felony driving offense a "violent felony" for the purposes of the Armed Career Criminal Act?

*Irizarry v. United States*

Docket: 06-7517  
Eleventh Circuit Court of Appeals

**Question Presented:**

Must a judge give both the prosecution and the defense advance notice before imposing a criminal sentence that departs from the Federal Sentencing Guidelines?



### *Snyder v. Louisiana*

Docket: 06-10119  
Louisiana Supreme Court

#### Questions Presented:

Did a prosecutor's reference to the O.J. Simpson murder trial prejudice an all-white jury against a black defendant who was eventually sentenced to death? Did the lower court ignore the import of *Miller-El* by failing to consider probative evidence of discriminatory intent, including the prosecutor's repeat references to the Simpson trial, the prosecutor's use of challenges to purge all African Americans from the jury, the disparate questioning of white and black prospective jurors, and the documented pattern of the prosecutor's office diluting minority presence in petit juries? Did the lower court err in holding that failure to raise a *Batson* objection can never result in prejudice under *Strickland v. Washington*?

### *Baze v. Rees*

Docket: 07-6439  
Supreme Court of Kentucky

#### Question Presented:

Do lethal injections in capital cases create an unnecessary risk of pain and suffering in violation of the Eighth Amendment's prohibition against cruel and unusual punishment?

### *Greenlaw v. United States*

Docket: 07-330  
Eighth Circuit Court of Appeals

#### Question Presented:

May an appellate court, without a motion from the prosecution, increase a sentence when the district court misinterpreted the case law and sentenced the defendant to a term less than the mandatory minimum?

### *United States v. Santos, Efrain, and Diaz*

Docket: 06-1005  
Seventh Circuit Court of Appeals

#### Question presented:

Under 19 U.S.C. Section 1956(a)(1), the federal money laundering statute, which makes it a crime to engage in a financial transaction using the proceeds from certain illegal activities with the intent of promoting these activities or concealing the proceeds, are proceeds the gross receipts from the illegal activities or only the profits?

### *Kennedy v. Louisiana*

Docket: 07-343  
Louisiana Supreme Court

#### Questions Presented:

Does the Louisiana statute allowing the death penalty for the rape of a child under the age of twelve violate the Eight Amendment ban on cruel and unusual punishment?

### *District of Columbia v. Heller*

Docket: 07-290  
D.C. Circuit Court of Appeals

#### Question Presented:

Do three District of Columbia firearms ordinances: D.C. Code Section 7-2502.02(a)(4), barring the registration of handguns; D.C. Code Section 22-4504(a), prohibiting carrying a pistol without a license; and D.C. Code section 7-2507.02, requiring that all lawfully owned firearms be kept unloaded and either disassembled or trigger locked, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

### *Arave v. Hoffman*

Docket: 07-110  
Ninth Circuit Court of Appeals

#### Question Presented:

When a defendant who rejects a plea bargain because his attorney assured him he would not receive the death penalty is sentenced to death, has his attorney provided ineffective assistance of counsel under *Strickland v. Washington*?

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