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Criminal Law Reporter™

2010-2011 Term in Review

Prosecutors, Scholars, and Defense Lawyers Pick Most Important Decisions of Last Term

Criminal law experts interviewed by BNA characterized the U.S. Supreme Court's 2010-2011 term as one typified more by the court's application of blockbuster rulings of recent past terms than by landmark rulings of its own. There were, however, a number of cases that prosecutors, defense attorneys, and law professors said stood out as being the most significant of the term.

A table that summarizes the holdings of all the term's criminal law opinions and provides cites to stories and text in the *Criminal Law Reporter* begins on page 701.

Continuation of Trends. Rebecca Pennell, of The Federal Defenders of Eastern Washington and Idaho, Yakima, Wash., admitted, ''I don't think there were any big issue criminal cases this term.''

''Instead, the Supreme Court seems to have been continuing with certain trends,'' such as ''heightened concern for procedural protections of juveniles (*J.D.B. v. North Carolina*),'' a ''retreat from the exclusionary rule (*Davis v. United States*),'' and ''disagreement with the Ninth Circuit's handling of habeas corpus cases (*Harrington v. Richter*, *Premo v. Moore*, . . . *Cullen v. Pinholster*, *Felkner v. Jackson*, *Walker v. Martin*, *Swarthout v. Cooke*,'' Pennell said.

Similarly, the importance of the court's decision in *Bullcoming v. New Mexico* lies in its continued application of the newer, more stringent understanding of the Confrontation Clause in *Melendez-Diaz v. Massachusetts*, 85 CrL 473 (U.S. 2009).

In *Melendez-Diaz*, a 5-4 majority of the court required forensic lab analysts who conducted testing of controlled substances to appear in court for cross-examination. This term, *Bullcoming* provided prosecutors and the *Melendez-Diaz* dissenters (Chief Justice John G. Roberts Jr. and Justices Anthony M. Kennedy, Stephen G. Breyer, and Samuel A. Alito Jr.) with an opportunity to persuade the two justices who were not on the court when *Melendez-Diaz* was decided (Justices Sonia Sotomayor and Elena Kagan) to limit the reach of the *Melendez-Diaz* rule by allowing lab technicians to testify in place of their colleagues in certain situations.

That did not happen, and the *Bullcoming* court decided, in another 5-4 decision, to continue to apply *Melendez-Diaz* in a robust manner. Professor Richard Friedman, of the University of Michigan Law School, Ann Arbor, Mich., has written extensively on the Confrontation Clause, and he told BNA that the decision in *Bullcoming* was a straightforward application of *Melendez-Diaz* whose significance lies in its revelation of Sotomayor's and Kagan's views of the *Melendez-Diaz* rule and the dissenters' continued opposition to that rule.

Sentencing Cases. Seven sentencing cases were decided during the term, but with a few notable exceptions most of them dealt with more isolated issues. One of the exceptions was *Freeman v. United States*, where the court allowed certain defendants who pleaded guilty to take advantage of the retroactive lowering of the sentences for crack cocaine offenses set out in the U.S. Sentencing Guidelines. In terms of the sheer number of cases affected, the decision ranks among the more important of the term.

Most circuits had held that defendants with plea agreements that contained sentence stipulations could not obtain sentence reductions based on the amendments. These courts had reasoned that the sentences in such cases were not, in the words of the controlling statute, ''based on'' an amended guidelines range but, instead, were based on the plea bargains.

In a 5-4 ruling with a divided majority, the court held that a stipulated sentence that explicitly takes into account the applicable guidelines range is ''based on'' the guidelines for purposes of the sentence reduction statute. The case was argued by Frank W. Heft Jr., of the Federal Defender's Office, Louisville, Ky., and he told BNA the court's decision will have a significant impact

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on the drafting of plea agreements with sentence stipulations.

In the other standout sentencing case, *United States v. Sykes*, the court backed away from how lower courts had applied the Armed Career Criminal Act as interpreted in *Begay v. United States*, 553 U.S. 137, 83 CrL 76 (2008).

The ACCA authorizes enhanced sentences for a firearms offender with a prior conviction for a ''violent felony.'' In *Begay*, the court held that the list of ''violent felonies'' expressly provided in the ACCA (burglary, arson, extortion, use of explosives) informs the types of other offenses that will qualify under a statutory catchall provision that includes any other offense that ''otherwise involves conduct that presents a serious potential risk of physical injury to another.'' The *Begay* court said offenses included in the catchall are to be ''roughly similar, in kind as well as in degree of risk posed,'' to the enumerated offenses. The enumerated offenses involve ''purposeful, violent, and aggressive conduct,'' in a way that drunken driving does not, the *Begay* court decided.

This term, in *Sykes*, the court decided that vehicular flight from police qualifies as a violent felony under the residual clause. The court explained that *Begay* did not require an offense to involve ''purposeful, violent, and aggressive conduct,'' and that the phrase was used merely to explain the court's decision, which was based primarily on the comparative risks posed.

William E. Marsh, of the Indiana Federal Community Defenders, Indianapolis, argued for the defendant in *Sykes*, and he characterized the decision in this case as ''overrul[ing] *Begay*, at least insofar as the 'violent and aggressive' part of its analytical phrase.'' He said the decision ''will resolve the issue of vehicular flight, but not much else.''

Habeas Corpus. In addition to the sentencing cases, six habeas corpus cases were decided this term. Jonathan M. Kirshbaum, of the Center for Appellate Litigation in New York, identified two of these decisions as being particularly important in the long term, *Harrington v. Richter* and *Cullen v. Pinholster*. ''There can be no doubt that these two decisions are going to make it significantly more difficult for state prisoners to obtain habeas relief in federal court,'' Kirshbaum predicted.

The federal habeas statute, 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act, restricts the federal courts' authority to grant habeas relief on claims that were ''adjudicated on the merits.'' Except when a claim is based on state-court factfinding, Section 2254(d)(1) allows a federal court to grant relief only when the state court's ruling constitutes ''a decision that was contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.''

In *Richter*, the court made clear that even when state courts do not give reasons for rejecting a federal claim their decisions will be presumed to be adjudications on the merits for purposes of the AEDPA's deference requirement. The court explained that Section 2254(d)(1)'s use of the terms ''decision'' and ''adjudicated'' shows that lawmakers intended federal courts to focus on the overall disposition rather than the underlying reasoning.

In addition, in cases in which state courts decided cases without assigning reasons, habeas petitioners will have to come up with and rebut the reasonableness of all possible justifications for the state courts' decisions. ''Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief,'' the court said.

This is so even when a claim has multiple parts and there is no way to determine which part was the basis of the state court's decision. For example, *Richter* involved a Sixth Amendment claim of ineffective assistance of counsel, which requires a petitioner to show both that his attorney's performance was deficient and that the substandard performance prejudiced him. When a state court denies a claim without assigning reasons, one cannot tell which prong of the Sixth Amendment test the court relied upon. The Supreme Court made clear in *Richter* that this does not affect the deference the federal courts will ascribe to both prongs. Section 2254(d)(1) ''applies when a 'claim,' not a component of one, has been adjudicated,'' the court stressed.

''A state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement,'' the court said. It stressed that federal habeas corpus is a safeguard against only ''extreme malfunctions in the state criminal justice systems'' and that the habeas statute makes the state court proceedings the ''principal forum'' for litigating constitutional claims.

Kirshbaum said the *Richter* court's explanation of the role of federal habeas is especially significant for two reasons. First, it adopted an understanding of the statutory term ''unreasonable'' that is more stringent than the court's prior caselaw reflected; second, its narrow focus on the state court proceedings ''incorporated—for the first time—res judicata principles into a federal court's review of a state court's decision on the merits of a constitutional claim,'' Kirshbaum explained.

Moreover, in *Pinholster*, the court held that federal courts assessing the unreasonableness of state court decisions are to confine themselves to the record on which the state court's decision was based. In *Pinholster*, that meant a federal court should not have granted habeas relief to a death-row inmate on the ground that his attorney was ineffective for failing to investigate mitigating evidence, because the previously undiscovered mitigating evidence the petitioner presented to the federal court had not been presented to the state courts.

Like *Richter*, *Pinholster* ''shifts the focus of habeas entirely to the state court's actions'' and ''now gives preclusive effect to a state court decision that no further evidentiary exploration of an issue is necessary, even if the petitioner diligently pursued the claim in state court,'' Kirshbaum said. A more thorough discussion by Kirshbaum on *Richter* and *Pinholster* is available at Jonathan Kirshbaum, *Supreme Court's Recent Decisions in* Richter *and* Pinholster *Further Tilt Playing Field Against State Prisoners Seeking Habeas Relief, 89 CrL 672 (2011)*.

Ronald Eisenberg handles capital habeas cases for the Philadelphia District Attorney's Office. He told BNA the *Pinholster* decision is particularly important because the most common type of case in which the fed-

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eral courts grant habeas relief is new-evidence cases, especially cases involving ineffective-assistance claims related to new mitigating evidence.

White Collar Crime. The 2009-2010 term brought tumultuous changes to the white collar world with big decisions restricting the reach of the federal ''honest services'' fraud statute. This past term was comparatively ''quiet,'' observed Professor Ellen Podgor. She teaches courses on white collar crime and international criminal law at Stetson University Law School, Gulfport, Fla.

Podgor highlighted one decision, *Global-Tech Appliances v. SEB S.A.*, 79 U.S.L.W. 2604 (U.S. 2011), that she called ''a sleeping giant that no one anticipated.'' Although this ''was not a criminal case, was not briefed by the criminal bar, and there were no amici briefs filed by criminal law players. . . . it is likely to have a significant influence in some white collar cases,'' Podgor told BNA.

Global-Tech addressed a civil patent infringement statute that requires ''knowledge of the patent'' infringed. In an 8-1 decision, the court borrowed principles from the criminal law to hold that knowledge can be proven with evidence of ''willful blindness.'' The court then elaborated on what ''willful blindness'' means.

''The Court makes it clear that if the government seeks a willful blindness instruction, they will need to show that the accused took 'deliberate action' to avoid learning the facts in question. Skating by with recklessness or negligence will not be sufficient. In white collar cases when a CEO or other top executive claims that they did not have knowledge of the wrongful conduct, and the government tries to show that these executives were willfully blind, they will have the burden to affirmatively prove 'deliberate action' to avoid learning of the conduct,'' Podgor explained.

More on Global-Tech's implications for criminal cases is available at Dane C. Ball, *Improving 'Willful Blindness' Jury Instructions In Criminal Cases After High Court's Decision in Global-Tech*, 89 CrL 426 (2011).

Surprise Ruling. Another standout decision was the court's ruling on prison overcrowding in *Brown v. Plata*. There the court upheld an injunction under the Prison Litigation Reform Act, ordering California to reduce its prison inmate population by approximately 37,000 inmates.

''It seemed to me to cut against everything the Supreme Court has said in the last decade about the role of courts,'' Kenneth S. Geller, of Mayer Brown, Washington, D.C. told BNA. Geller said that, in the past, the court ''tended to shy away from managing the prison system, and it tended to shy away from imposing huge financial burdens on the states.'' Even though there were four dissenting justices who seemed to try to adhere to those principles, ''you would have thought maybe they would have tried to find some middle ground,'' he pointed out.

In a dissenting opinion, Justice Antonin Scalia said the order was seriously overbroad and warned that the majority's decision would result in the release of ''fine physical specimens who have developed intimidating muscles pumping iron in the prison gym,'' as opposed to the sick and infirm represented by the plaintiff classes.

Kannon K. Shanmugam, head of the Supreme Court practice at Williams & Connolly LLP, Washington, D.C., found the tone of the dissent particularly ''noteworthy.'' Shanmugam clerked for Scalia, and he said, ''Even by the standards of a Justice Scalia dissent, this one is a very interesting one because he starts by saying that the court is affirming what is probably 'the most radical injunction in the nation's history,' which is fairly strong medicine—even from Justice Scalia.''

BY HUGH B. KAPLAN AND TOM P. TAYLOR