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2007-08 Term in Review

Big Decisions of 2007-08 Term Addressed Sentencing, Death Penalty, Money Laundering

Law professors, prosecutors, and defense attorneys recently picked the criminal law decisions from the U.S. Supreme Court's 2007-08 term that they deemed to have the most significance. The cases topping the list included the justices' decisions on federal sentencing, money laundering, and capital punishment. Although not strictly a criminal law decision, the high court's gun-control ruling also stuck out for professors and practitioners.

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 741.

Capital Punishment. In *Kennedy v. Louisiana*, the court held that a death sentence imposed upon a defendant who was convicted of raping a child violated the Eighth Amendment's prohibition of cruel and unusual punishment. It applied the ''evolving standards of decency'' test that it has used in recent years to forbid death sentences for mentally retarded and juvenile murderers.

The enduring significance of the decision in *Kennedy* lies in the fact that the opinion ''lays down a clear dividing line between crimes that result in death and those that do not,'' said Professor Jeffrey L. Fisher, of the Stanford Law School Supreme Court Litigation Clinic, Stanford, Calif. Fisher argued the case for the defendant in *Kennedy*. The court could have adopted a more flexible test that took into account the manner in which particular offenses were committed, but the court rejected that approach with language that suggests a more categorical approach, Fisher said.

For example, Fisher observed that the court's opinion asserts that there is ''a distinction between intentional first-degree murder on the one hand and non-homicide crimes against individual persons,'' even such ''devastating'' crimes as the rape of a child, on the other. The court also said that judges have had a hard enough time ensuring the fair administration of the death penalty in homicide cases that it backed away from extending the debate to nonhomicide cases: The ''imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred.''

Joshua Marquis, the district attorney for Clatsop County, Ore., reported that prosecutors are more worried about the ruling in *Kennedy* than they were about the court's decisions to ban the death penalty for mentally retarded and juvenile offenders. Marquis is on the executive committee of the National District Attorneys Association. What makes prosecutors ''nervous,'' Marquis said, is that the court was willing to establish an Eighth Amendment limit on the death penalty with much less basis for finding a consensus and when ''the tide was going the other way.'' He also expressed concern that anti-death-penalty policy choices in a handful of states in the Northeast might be enough to persuade the court to set up additional constitutional barriers to the imposition of the death penalty across the country.

The fight over death sentences for nonhomicide offenses is not yet over. The Louisiana officials and the U.S. Solicitor General's Office have filed petitions for rehearing in *Kennedy* based on the parties' failure to cite—and the court's failure to include in its consensus analysis—a 2007 executive order that authorizes the death penalty under the Uniform Code of Military Justice.

Money Laundering. Daniel Margolis, of Pillsbury Winthrop Shaw Pittman LLP, New York, said the cases that his clients will be most interested in are the two money-laundering decisions. ''The fact that these cases arose in the context of drugs and gambling does not mean that their holdings are not applicable in the white collar context,'' Margolis advised. He said that ''anyone

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who is charged with money laundering will look hard at these two decisions.''

In *Cuellar v. United States,* the court held that prosecutors trying to prove a violation of the provision that forbids transporting tainted cash out of the country with a design to conceal it must prove more than that the defendant made substantial efforts to conceal the money while transporting it.

Margolis noted that, when the government maintained at oral argument that evidence that a defendant placed proceeds in a suitcase might be sufficient to support a conviction for concealing the funds, Chief Justice John G. Roberts Jr. responded, ''When I use a suitcase I'm using it to carry my clothes—not to 'conceal' them.'' Even though the government had presented evidence that Mexico has a ''cash economy'' that makes it easier to spend larger sums of cash without raising suspicions, the court decided that there needed to be more evidence that this was the motivation for the defendant's trip to Mexico in a car with more than $80,000 in cash in a hidden compartment.

The same reasoning could be used, Margolis explained, to support a similar argument with respect to any lawful use of tainted money that is alleged to be taken to conceal it. For example, a white collar defendant charged with trying to hide funds by depositing them in a Swiss bank account or by buying land could contend that he or she—like millions of other people—was simply depositing money or buying land, albeit with the proceeds of a crime, Margolis suggested.

In *United States v. Santos,* the court held that only net profits, not gross receipts, can qualify as ''proceeds'' from an illegal gambling enterprise within the meaning of the federal money-laundering statute's prohibition against using criminal proceeds to engage in transactions designed to promote the unlawful activity. The lessons from the *Santos* case can also be applied in the white collar context, Margolis said, especially in cases in which defendants are charged with activity in which they skimmed small amounts from transactions involving much greater amounts of money. He reported that he saw plenty of cases like this while he was prosecuting federal money-laundering cases in the Southern District of New York.

Margolis also suggested that a defendant who sells securities based on inside information and who deposits the proceeds of the sale into his or her bank account could argue that only the profits, and not all the funds on deposit, could be the subject of a money-laundering charge. The ruling has clear implications for forfeiture proceedings as well, Margolis added.

Dan Himmelfarb, of Mayer Brown, Washington, D.C., identified something else in the *Santos* opinion with more general, and potentially greater, significance. Until last year, Himmelfarb worked for the Department of Justice, first as an assistant U.S. attorney and then, for the last five years, in the Solicitor General's Office. He thinks that the way that the *Santos* court applied the rule of lenity has broad implications for the interpretation of any federal statute. No longer is this rule of statutory construction the final refuge of the defendant who has nothing left to argue, and ''it will be interesting to see how often *Santos* pops up in future cases,'' Himmelfarb said.

Looking at the term as a whole, Fisher came away with the opposite impression of the future importance of the rule of lenity. In a number of other cases, including one that Fisher argued, *Burgess v. United States*, the court gave short shrift to seemingly plausible interpretations of confusing statutory language. *Burgess* addressed a circuit split on whether prior state convictions for offenses that the state classifies as misdemeanors can qualify as a ''felony drug offense'' for purposes of federal statutes that set out mandatory minimum sentences for drug offenses. Similarly, in *United States v. Rodriguez,* a defendant was able to convince only three justices that language in another federal mandatory-minimum statute that had caused a circuit split was ambiguous in a way that required application of the rule of lenity.

Professor Ellen S. Podgor, of Stetson University College of Law, St. Petersburg, Fla., was much less impressed with the importance of the court's money-laundering decisions. Podgor is the editor of the White Collar Crime Prof Blog, and she felt as though the court had ''overlooked'' white collar crime this year. Although *Santos* and *Cuellar* provided defense counsel with some new arguments to make, there was no condemnation by the justices of prosecutors' overly aggressive use of the broadly worded money-laundering statutes, Podgor observed.

Podgor also expressed disappointment that the court chose not to review the D.C. Circuit's decision that the Constitution's Speech or Debate Clause bars executive branch investigators from searching a Congress member's files without affording the legislator an opportunity to assert legislative privilege at the outset, *United States v. Rayburn House Office Bldg.,* 497 F.3d 654, 81 CrL 563 (D.C. Cir. 2007).

Confrontation. In *Giles v. California*, the court made it harder for state prosecutors to use unavailable witnesses' hearsay statements to obtain convictions. Marquis said the ruling in *Giles* is the ''most important and the least understood decision of the term.''

Just a few years ago, in *Crawford v. Washington,* 541 U.S. 36, 74 CrL 401 (2004), the court abandoned its long-held interpretation of the Sixth Amendment and adopted new limits on the admission of hearsay. Although the *Crawford* court indicated that the common law ''forfeiture by wrongdoing'' doctrine was incorporated into the Sixth Amendment, the court did not say which of the various versions of the doctrine the Sixth Amendment permits. In *Giles,* the court adopted a more stringent approach, holding that the doctrine does not allow the admission of out-of-court statements unless the state shows not only that the accused's misconduct caused the declarant to be unavailable to testify, but also that the misconduct was undertaken by the accused to prevent the declarant's future testimony.

Marquis complained that prosecutors will be hard pressed to come up with evidence to prove that someone who killed a wife or girlfriend during a beating did so to keep her off the stand. In a dissenting opinion in *Giles*, Justice Stephen G. Breyer argued that, because often there will be no evidence whatsoever as to what a murderer was thinking at the critical moment, prosecutors should be required to show only that defendants intended to take the actions that made hearsay declarants unavailable as witnesses. Marquis said this approach makes more sense to him than the rule adopted by the court.

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Federal Sentencing. In *United States v. Booker*, 543 U.S. 220, 76 CrL 251 (2005), the court held that the mandatory U.S. Sentencing Guidelines violated defendants' Sixth Amendment right to a jury trial, and it remedied the problem by converting the guidelines from mandatory to advisory. The *Booker* court also ordered the courts of appeals to review the sentences selected by district judges for ''reasonableness'' in light of the general sentencing factors set out in 18 U.S.C. § 3553(a). This reasonableness standard was the key mechanism by which the court hoped to keep the new discretion it was granting to district judges from resulting in the type of widespread disparity in sentences that had led Congress to adopt the guidelines in the first place.

During the 2006-07 term, the court provided some guidance on how that reasonableness standard was to be applied but only with respect to review of sentences within the guidelines range. Last term, the court took up how the circuits are to review sentences outside the guidelines range. In *Kimbrough v. United States,* the court held that district judges may impose a sentence below the range provided by the crack guideline to reflect their disagreement with the U.S. Sentencing Commission's policy choice to treat one gram of crack the same as 100 grams of powder cocaine. In *Gall v. United States*, the court provided more general guidance, striking down a rule adopted in some circuits that had restricted district judges' ability to impose nonguidelines sentences by requiring the judges to be able to point to ''extraordinary circumstances.''

Fisher and Podgor agreed that these decisions are significant in that they provided much-needed guidance on whether, and to what extent, judges are free to deviate from the advisory sentencing guidelines. In *Gall* and *Kimbrough*, the justices made clear that ''they really mean what they said in *Booker* about the guidelines being advisory,'' Fisher explained. He added that, assuming Congress does not make a move, he would not be surprised if the high court becomes content with what it has said about the federal advisory guidelines scheme and ''goes out of the *Booker* business for a while.''

Himmelfarb made clear that the sheer number of cases affected by the court's decisions in *Gall* and *Kimbrough* makes them extremely significant. However, Himmelfarb also thought that the narrowness of the rulings in *Gall* and *Kimbrough* indicates that the justices have said what they wanted to say about *Booker* issues. For example, he emphasized that, even though the decision in *Gall* struck down the ''extraordinary circumstances'' test for nonguidelines sentences, the opinion acknowledged that a reviewing court's assessments of the reasonableness of a sentence may still take into account the extent of any deviation from the guidelines. He also agreed with Fisher that the diminished vehemence in the justices' opinions in *Gall* and *Kimbrough* suggests that they have grown ''weary'' of *Booker* issues. The court's opinions in these cases ''raise as many questions as they answer,'' which would have provided fodder for additional guidance from the justices had they been inclined to offer it, Himmelfarb said. For example, he pointed out that the lower courts continue to disagree about how to treat a variance from guidelines that—unlike the crack guidelines at issue in *Kimbrough*—reflect an exercise of the Sentencing Commission's special expertise.

One of the things that was driving the debate on the court regarding *Booker* was, Himmelfarb continued, ''the inherent tension between the court's constitutional ruling in [Justice John Paul Stevens's opinion] in that case and the remedial ruling [in Breyer's opinion].'' Unless and until Congress does something, this fight appears to be over, Himmelfarb said. He noted that Stevens wrote the court's opinion in *Gall* and that Breyer did not even add a concurrence. Because the court remains deeply divided, it will be hard for the court to come up with any more broad, categorical rules, rather than ''fact-bound'' rulings like *Gall,* Himmelfarb added.

Firearms. In *District of Columbia v. Heller*, the court struck down the District of Columbia's ban on possession of handguns as violating the Second Amendment. The court held that the amendment codifies a preexisting individual right, recognized under English common law, to keep and carry arms in self-defense.

The court reasoned that the amendment's reference to a ''militia'' does not restrict the right to militia-related uses; instead, that language announces only the amendment's purpose of preventing elimination of the militia by depriving the people of their firearms. The District's handgun ban, as well as an ordinance requiring that lawful weapons generally be kept unloaded and disassembled or bound by a trigger lock, would not pass muster under ''any of the standards of scrutiny that we have applied to enumerated constitutional rights,'' because they effectively prohibit an ''entire class of 'arms' that is overwhelmingly chosen by American society'' for the lawful purpose of self-defense in the home, the court ruled.

John Payton, president and director-counsel, NAACP Legal Defense and Educational Fund Inc., New York, who as private counsel filed an amicus brief in *Heller* on behalf of the Brady Center to Prevent Gun Violence and police officer groups supporting the District, said that *Heller* leaves a lot of latitude for cities and states to implement ''comprehensive gun regulations.'' In particular, *Heller* ''approvingly referred to the appropriateness of bans on certain weapons, bans on weapons in certain places, and the power of government officials to impose conditions and qualifications on gun ownership through regulation,'' Payton said.

Payton, like prosecutor Marquis, noted *Heller*'s statement that nothing in the opinion should be taken ''to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill or laws forbidding the carrying of firearms in places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'' The precise limit of this regulatory power ''will only be known after future litigation which the court has invited,'' Payton added.

Professor Laurie Levenson, of Loyola Law School, Los Angeles, likewise pointed out that Justice Antonin Scalia made a ''big point of saying that this is not the end of gun regulation.'' In fact the decision ''is a 'full employment Act' for lawyers on both sides of the gun control issue,'' she said. Levenson said she hoped the decision ''doesn't cause havoc for law enforcement. Given all of the open questions left by the decision, my guess is that police are being told to enforce gun laws just like they have before until they are told differently by the courts.'' She predicted that many jurisdictions

will start constructing ''no-gun'' zones such as those *Heller* recognized would be valid around schools and government buildings. If government officials can be protected, why not the public at sports arenas, theaters, and parks? Levenson asked. Create enough such zones and it will be ''nearly impossible to carry a gun in public,'' she observed. Another problem with the decision is ''sorting out what kinds of guns are permitted,'' she noted.

C. Kevin Marshall, of Jones Day, Washington, D.C., who filed an amicus brief on behalf of the Cato Institute supporting *Heller*, said the standard of review employed by the Supreme Court was similar to that used by the D.C. Circuit below, in that each ruled out regulations that impair the ''core conduct'' of self-defense in the home. Similarly, Robert Goldstein, a professor at UCLA Law School, Los Angeles, said that *Heller* ''clearly anticipated adopting a categorical approach, in analogy to First Amendment doctrine,'' but that there was ''absolutely no reason to make First and Second Amendment doctrine analogous.''

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