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Good *Finally* at Supreme



Time the Court

It is all a matter of interpretation, and English. In arguments to be made before the United States Supreme Court this month, the question of what the phrase “term of imprisonment” means will be debated.

This issue revolves around good time credits in the BOP. 18 U.S.C. § 3624(b)(1)'s states that an inmate should receive credit for “54 days at the end of each year of the prisoner’s term of imprisonment.”

Most people believe that “term of imprisonment” unambiguously means the sentence imposed, not time actually served. The BOP, though, in an Orwellian view of the world, interprets the unambiguous, and states that “term of imprisonment” means only the time of imprisonment served. The difference in view represents days, weeks, and months of good time credits for inmates.

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The Supreme Court will be asked to determine which is correct. Does “Term of imprisonment” mean the sentence imposed? Is it both a term of art in federal sentencing and a phrase that carries its ordinary and natural meaning? Virtually every federal prisoner hears the judge pronounce sentence with the words that the defendant is committed to the custody of the BOP for a “term of” a number of months “imprisonment.” Those words are derived from the sentencing statute, which authorizes judges to sentence defendants to a “term of imprisonment” in 18 U.S.C. § 3581(a) (2006), and the Guidelines manual, which instructs judges on the “Imposition of a Term of Imprisonment” in U.S.S.G. § 5C1.1 (2009).

If the ordinary meaning of the phrase carries the day in Court, Congress’ intention to simplify the computation of good time credits, which is as easy as calculating 15 percent of any number, will be clear. But if the BOP’s position is upheld, the agency’s method of computation, which currently takes many pages of complex mathematical formulas (and works out to approximately 13%), will remain policy.

How does this help the average inmate? At this point, we do not want to guess at the Court’s ultimate opinion, but know that once it is issued, we will be at the forefront in determining how current (and possibly former) inmates should react. Stay tuned . . . Arguments are scheduled for Tuesday, March 30th.

DNA Collection

We continue to receive questions about the BOP’s policy of DNA collection.

The DNA Analysis Backlog Elimination Act of 2000, enacted back in December 19, 2000, requires the BOP to collect DNA (deoxyribonucleic acid) samples from offenders convicted of a qualifying federal, military, or D.C. Code offense. See DNA Identification System, 28 C.F.R. pt. 28 (2006). Inmates are subject to disciplinary action should they fail to voluntarily cooperate. The involuntary taking of a blood sample may be required in some instances. The BOP is required to furnish each DNA sample collected to the Federal Bureau of Investigation (FBI), where it is supposed to be catalogued in their computer system.

Constitutional and statutory challenges to the collection of DNA samples have not been successful. The DNA collection of information from federal prisoners who commit a felony, sexual abuse offense or crime of violence, as well as others in federal custody such as undocumented or improperly documented aliens, continues.

The FBI processes and maintains these samples

in its Combined DNA Index System (“CODIS”), which is a national database used by law enforcement to match DNA profiles.

Readers should note that even challenges based on the Free Exercise Clause, the Religious Freedom and Restoration Act, Equal Protection, self incrimination, and unreasonable search and seizures have all been unsuccessful.

The Toyota Defense

This recent Article was published by the Associated Press on February 25, 2010.

*“Toyota Defense’ Might Rescue Jailed Minnesota Man
by The Associated Press*

LINO LAKES, Minn. February 25, 2010, 06:43 am ET

Ever since his 1996 Toyota Camry shot up an interstate ramp, plowing into the back of an Oldsmobile in a horrific crash that killed three people, Koua Fong Lee insisted he had done everything he could to stop the car.

A jury didn’t believe him, and a judge sentenced him to eight years in prison. But now, new revelations of safety problems with Toyotas have Lee pressing to get his case reopened and his freedom restored. Relatives of the victims — who condemned Lee at his sentencing three years ago — now believe he is innocent and are planning to sue Toyota. The prosecutor who sent Lee to prison said he thinks the case merits another look.

‘I know 100 percent in my heart that I took my foot off the gas and that I was stepping on the brakes as hard as possible, Lee said in an interview Wednesday at the state prison in Lino Lakes. ‘When the brakes were looked at and we were told that nothing was wrong with the brakes, I was shocked.’

Lee’s accident is among a growing number of cases, some long resolved, that are getting new attention since Toyota admitted its problems with sudden acceleration were more extensive than originally believed. Numerous lawsuits involving Toyota accidents have been filed over the recent revelations, and attorneys expect the numbers will climb.

In testimony before Congress, company executive renewed their apologies for underestimating the safety problems but also acknowledged that they still may not have identified all the causes for the sudden acceleration.

The uncertainty could wind up helping Lee and others. Attorneys for both the 32-year-old St. Paul man as well as the victims’ families say they’re encouraged by the evidence that the problems went beyond models that originally were recalled.

If Lee’s car was defective, ‘We don’t want an innocent man sitting in prison,’ said Phil Carruthers, who prosecuted the case for Ramsey County.”

-----How many other Toyota victims are currently in prison charged with crimes such as vehicular homicide, DUI manslaughter or something similar? The real answer is we may never know. Cases where there were both DUI and Toyota problems may still have issues.

But every case where someone is jailed due to an accident occurring while they were driving a Toyota must now be scrutinized. These are not yet easy cases. Expert witnesses, examinations of the vehicle, if it still exists, and protracted litigation may still be in the future for these victims. We have seen how slow the states and federal government were to respond to actual innocence claims based on DNA. This will be even more complicated.

Importantly though, everyone should now consider themselves to be on notice regarding this potential defense. That means time limits may be running, evidence may be getting destroyed (I doubt many Sheriff's offices are holding on to old wrecked Toyotas right now). Your time may be running out if you are a Toyota victim.

Toyota's bad acts may extend further than criminal courts as well. Prior personal injury or car wreck cases may need to be reopened. A relative that died or was severely injured in a collision involving a Toyota may have new grounds to sue the manufacturer of these vehicles. If you or someone you know was injured in or by a Toyota, they need to seek legal representation immediately. Over 16 class action lawsuits have already been filed. Your loved one may want to pursue their own action before the lawyers leave nothing behind for the victims.

NEED AN ATTORNEY THAT WILL FIGHT FOR YOU?

In another article from the Associated Press . . .

“Ex-Klansman sues FBI, claims agency used mafia hit man and secret informants against him

By HOLBROOK MOHR

| Associated Press | Feb 25, 10 2:11 PM CST in US

A former Ku Klux Klansman convicted in the 1964 slayings of three civil rights workers has sued the FBI, claiming the government used a mafia hit man to pistol-whip and intimidate witnesses for information in the case.

Edgar Ray Killen, an 85-year-old former saw mill operator and one-time Baptist preacher, was convicted in 2005 of manslaughter based in part on testimony from a mistrial 40 years ago in Mississippi.

The lawsuit filed Wednesday in federal court seeks millions of dollars in damages and a declaration that Killen's rights were violated when the FBI allegedly used a gangster known as "The Grim Reaper" during its investigation.

‘Money is secondary, we really just want the truth out,’ said Robert A. Ratliff of Mobile, Ala., who represents Killen. ‘What we're looking for is the complete, unredacted FBI file. Stand up and tell us what happened.’

Killen has maintained his innocence in the killings. He is serving a 60-year sentence at a prison in central Mississippi.

Ratliff said one of the defense lawyers, the late Clayton Lewis, who represented Killen and several others in a 1967 federal trial was a paid FBI informant.

And, he said, known gangster and killer Gregory Scarpa Sr. was hired by the FBI allegedly for \$30,000 to coerce witnesses to tell where the bodies were buried and who put them there.

The FBI has never acknowledged using Scarpa. FBI spokeswoman Deborah Madden had not seen the lawsuit and had no immediate comment.

Killen walked out of federal court in 1967 because the jury couldn't reach a verdict.

Some of the information and testimony from that trial was later used to convict him, when many witnesses were dead and he no longer had the chance to question his accusers, Ratliff said. Some of that testimony was based on information gathered by Lewis and Scarpa, he said.

Stories about Scarpa, who died in 1994, has been the stuff of gangland lore. But in 2007, Scarpa's mistress testified in an unrelated case involving an FBI agent.

Linda Schiro said she came to Mississippi with Scarpa and he once shoved a gun into a Klansman's mouth to get information for the FBI. Her entire testimony during that trial was later questioned, though, and an FBI agent accused of conspiring in a mob murder spree was cleared.

Still, after that trial, New York Supreme Court Justice Gustin Reichbach said he was troubled by Schiro's testimony and referenced the Mississippi Klansman story.

‘That a thug like Scarpa would be employed by the federal government to beat witnesses and threaten them at gunpoint to obtain information ... is a shocking demonstration of the government's unacceptable willingness to employ criminality to fight crime,’ the judge said.

The lawsuit also claims Mississippi Attorney General Jim Hood, who helped prosecute Killen in 2005, was complacent in a "conspiracy of silence" for knowing about the FBI's alleged improper conduct.

‘I get sued everyday or criticized for playing by the rules and doing my job,’ Hood said. ‘I'm getting used to the job. We've got 3,000 suits out there and this is just another one.’

In 1964, Michael Schwerner and Andrew Goodman, two white men from New York, came to Mississippi as part of Freedom Summer and teamed up with James Chaney, a young black Mississippian, to help register black voters.

They were ambushed by members of the Klan in June and killed before being buried in an earthen dam. Their bodies were found weeks later after an intense search.

A desire for swift justice reached the highest

levels of federal government, including then-FBI Director J. Edgar Hoover, who dispatched numerous agents to Mississippi.

The lawsuit claims the FBI brought in Scarpa, who found the burial site through "the use of intimidation of potential witnesses, pistol-whipping actual witnesses, and assaulting other local residents."

The lawsuit also names as a defendant John Doar, a federal prosecutor in 1967, and six unknown FBI agents. Doar is now in private practice and did not immediately respond to a message left at his New York office.

Killen claims in the lawsuit that Hood, Doar and the FBI conspired to 'suppress, chill, and tortuously interfere with his constitutionally protected activities of free speech and freedom of association, all in defense of his society and culture, and otherwise injure him and abridge his civil rights.'"

----- One thing I hear from a lot of my clients is that they feel their attorney was working with the Government, or were to close to the prosecutors. We don't have that problem here. We represent our clients vigorously. The above case is just one example of the steps we will take to protect our clients rights and do what needs to be done to prevail.

If you need aggressive, knowledgeable representation, give us a call or write.

Ask Barry



Dear Barry:

I am very unhappy with the facilities that exist here at my USP. We are placed in control units that are called "general population" units but serve to act just like SHU units. Do we have any way to change the BOP in the way they have set up these units?

Signed,
Cold and Alone

Dear Cold:

Don't give up hope! A recent lawsuit was filed in Colorado on this particular issue. The inmates there claimed that their 5th and 8th Amendment rights were violated because the BOP placed inmates in units that are labeled "general population," but that actually replicate the conditions of the "control unit,,,," i.e., allow for total isolation and little access to the outdoors or other prison programs. The Plaintiff in that case also alleged that inmates placed in the sham "general population" units do not receive hearings. This type of sham facility has allowed the BOP to place inmates in solitary confinement for an

indefinite amount of time without any due process protections in place. The BOP tried to dismiss the matter on summary judgment but the judge would not hear of it. The case moves on now toward trial. We will keep you informed.

Barry

Dear Barry:

I am getting ready to be released in the next few months. Aside from the basic stuff that we are told in pre-release meetings, do you have any additional thoughts of things I should attend to?

Signed,
Anxious

Dear Anxious,

Pre-release planning is an important element of this last phase of prison life. How you prepare can determine the level and intensity of the frustration and challenges when you get out. There is a host of factors that come into play so it would be far too limiting for me to present them all here.

However, I urge you focus on pre-release and feel free to contact us or any consulting group that deals with pre-release planning to get ahead of the proverbial curve. The world is not fair nor easy when you get out and being prepared is the key to success. Good luck.

Barry

Dear Barry,

A few of us here at FPC Manchester were talking the other day about the waste of money in the BOP system. Do you know how much we actually waste here in the prisons?

Signed,
Curious

Dear Curious,

For this current fiscal year of 2010, taxpayers provide \$6.1 BILLION for the BOP. All this money is, in the DOJ's words, "to ensure that sentenced criminals and detainees are housed in facilities that are safe, humane, cost-efficient, and appropriately secure." The BOP operates 114 federal prisons and contracts for low security prison beds to confine approximately 205,000 inmates. The BOP projects that the federal prison population will increase by approximately 4,500 in FY 2010. Therefore, the FY 2010 budget also expands federal prison capacity by funding two new medium security prisons (over 2,400 prison beds). It also provides for medical care and other operational increases, contract bed

space, and over 1,000 additional correctional workers to help manage you guys.

Hope this helps your conversations!

Barry



Riding the Circuit : a case update review



U.S. Supreme Court

Thaler v. Haynes, No. 09-273 (02/22/10)

In a capital habeas matter, the court of appeals' reversal of the denial of petitioner's habeas petition is reversed and the matter remanded where clearly established law did not provide that a demeanor-based explanation for a peremptory challenge, in response to a Batson claim, must be rejected unless the judge personally observed and recalled the relevant aspect of the prospective juror's demeanor.

Wilkins v. Gaddy, No. 08-10914 (02/22/10)

In a 42 U.S.C. section 1983 action alleging excessive force by a correctional officer, a court of appeals' affirmance of dismissal of the complaint is reversed where the district court's approach (based on its determination that plaintiff's injuries were "de minimis") was at odds with precedent directing it to decide excessive force claims based on the nature of the force, rather than the extent of the injury.

Florida v. Powell, No. 08-1175 (02/24/10)

In a state prosecution for possession of a weapon by a convicted felon, a reversal of defendant's conviction on Miranda grounds is reversed where the police satisfied Miranda's requirements by informing defendant that he had "the right to talk to a lawyer before answering any of their questions," and that he had "the right to use any of his rights at any time he wanted during the interview."

Maryland v. Shatzer, No. 08-680 (02/24/10)

In a sexual child abuse prosecution, the state court of appeals' reversal of defendant's conviction is reversed where defendant experienced a break in Miranda custody lasting more than two weeks between first and second attempts at interrogation, and thus Edwards did not mandate suppression of defendant's statements during the second interrogation.

U.S. 1st Circuit Court of Appeals

US v. Mitchell, No. 09-1260 (02/22/10)

Conviction of defendant for conspiring to distribute cocaine is affirmed where: 1) the government offered more than sufficient extrinsic evidence to support the admission of co-conspirator statements; and 2) the need for a buyer-seller instruction was not supported by the record.

U.S. 2nd Circuit Court of Appeals

Perkins v. Herbert, No. 08-1490 (02/23/10)

In a robbery prosecution, conditional grant of petitioner's habeas petition is reversed where: 1) the prosecution failed to meet its burden in showing that petitioner procured the absence of a witness, and that the state appellate court and magistrate judge, therefore, both correctly concluded that

petitioner did not waive his right of confrontation; but 2) the erroneously admitted evidence was cumulative of properly admitted evidence, and the remaining evidence of guilt, including petitioner's oral confession, was strong.

US v. Savoca, No. 08-4610 (02/25/10)

Defendant's amended sentence for attempted robbery is affirmed where: 1) an obstruction of justice enhancement applied to conduct that occurred with respect to an otherwise closely related case, such as that of a co-defendant; 2) except in extraordinary cases, the application of an enhancement for obstruction of justice ordinarily indicated that the defendant had not accepted responsibility to warrant a reduction in.

U.S. 3rd Circuit Court of Appeals

US v. Brown, No. 04-4164 (02/23/10)

Former Chief Legal Counsel for Rite Aid's conviction and sentence for conspiracy to commit accounting fraud, filing false statements with the SEC, and other related crimes, is affirmed in part, reversed in part and remanded where: 1) district court did not abuse its discretion in denying defendant's Rule 33 motion based on newly discovered evidence; 2) defendant's pre-trial suppression motion of the taped conversations was properly denied; 3) district court did not abuse its discretion in its reaction to defendant's plea agreement; and 4) defendant's sentence is vacated and remanded as the district court failed to explain, in the manner now required under Booker, how it considered the section 3553(a) factors in imposing the sentence.

U.S. 4th Circuit Court of Appeals

Culosi v. Bullock, No. 09-1042 (02/22/10)

In plaintiffs' 42 U.S.C. section 1983 action against a police officer and others for the fatal shooting of an optometrist, whom the police were investigating for felony gambling offenses, the parties' appeals are dismissed in their entirety where: 1) the order of the district court denying qualified immunity to officer-defendant is not immediately appealable because the district court merely determined that genuine disputes of material fact existed, a determination not subject to interlocutory appeal; and 2) under the circumstances, the court of appeal declines to exercise jurisdiction over the plaintiffs' cross-appeal pursuant to the Rule 54(b) certification order entered by the district court.

Gao v. Holder, No. 07-2070 (02/23/10)

BIA's denial of Chinese petitioner's applications for withholding of removal and asylum based on her conviction for unlawful export of technology to China is affirmed where: 1) an offense need not be an aggravated felony to qualify as a particularly serious crime for purposes of withholding; and 2) the BIA may determine that a non-aggravated felony is a particularly serious crime for purposes of asylum through the process of case-by-case adjudication.

US v. Thompson, No. 09-4247 (02/23/10)

District court's judgment revoking defendant's supervised release and sentencing him to 18 months' imprisonment is vacated and remanded as the district court's failure to

explain its chosen sentence was plainly unreasonable.

In Re: Grand Jury Subpoena (T-112), No. 06-2125 (02/24/10)

District court's decision holding twelve corporations, interrelated for-profit and not-for-profit corporations suspected of participating in the financing of terrorist activity, in contempt for refusing to turn over documents demanded by grand jury subpoena duces tecum is affirmed where: 1) a grand jury enforcement action is not the appropriate place to litigate the validity of one corporation's claims of illegal wiretapping; and 2) the other eleven corporations' claim that the district court abused its discretion by finding them in contempt because the order was ambiguous, and that they did not know they were violating a valid decree when they failed to comply, does not square with the facts of the record.

US v. Rooks, No. 08-4725 (02/25/10)

Conviction of defendant for possession with intent to distribute crack cocaine and sentence of 360 months' imprisonment are affirmed where: 1) the district court did not err in denying a motion to suppress the seized drugs and statement to a police officer; 2) district court did not err in admitting evidence of federal convictions; and 3) district court did not err in sentencing defendant as a career offender under section 4B1.1 of the 2007 edition of the guidelines manual.

US v. Rivers, No. 09-4336 (02/25/10)

District court's sentencing of a defendant convicted of being a felon in possession of a firearm, as an armed career criminal under the ACCA, is reversed as, in light of *Chambers v. US*, ___ U.S. ___, 129 S.Ct. 687 (2009), under no circumstances is a violation of South Carolina's blue light statute a violent felony under the ACCA.

US v. Baptiste, No. 07-4493 (02/26/10)

Conviction of defendant for drug related crimes is affirmed where: 1) without a showing that alleged intimidation prejudiced defendant, it cannot be found that the court's failure to conduct voir dire following the allegations of intimidation affected his substantial rights; 2) the district court did not plainly err in finding that witness's methodology was sufficiently reliable to allow him to testify as an expert; 3) defendant failed to show that the alleged lack of clear distinction between the witness's role as a fact witness and his role as an expert witness actually affected the outcome of the trial; and 4) the district court did not plainly err in allowing the prosecutor's closing argument.

US v. Jarmon, No. 08-4624 (02/26/10)

A sentence for being a felon in possession of a firearm is affirmed where a North Carolina offense of larceny from the person resembles the enumerated offense of burglary both in kind and in degree of risk, and so constitutes a "crime of violence" under the "otherwise" clause of section 4B1.2 of the Guidelines.

US v. Godwyn, No. 09-7316 (02/26/10)

District court's decision treating defendant's request for a sentence reduction as a motion for reconsideration, thereby reducing defendant's sentence by two years for the second time in less than eight months, is reversed as the district court lacked the authority to grant the motion for

reconsideration.

U.S. 5th Circuit Court of Appeals

US v. Banelos-Romero, No. 09-10465 (02/23/10)

Defendant's drug possession conviction is affirmed where the officer who searched defendant's vehicle had probable cause to search the car, and this allowed the officer to continue the detention until he confirmed or dispelled the suspicion that there was contraband hidden in the vehicle.

U.S. 6th Circuit Court of Appeals

Tolliver v. Sheets, No. 08-3177 (02/22/10)

Denial of a petition for habeas relief brought by a defendant convicted of killing his live-in girlfriend is affirmed where: 1) while portions of defendant's interview with police were obtained unconstitutionally, the trial court's error in admitting the unconstitutionally-obtained statements was harmless; and 2) defendant has not demonstrated good cause for the procedural default of his ineffective assistance claim.

Gagne v. Booker, No. 07-1970 (02/23/10)

Grant of habeas relief to a defendant convicted of criminal sexual misconduct is affirmed as a Michigan Court of Appeals opinion constituted an unreasonable application of clearly established federal law that deprived defendant of his constitutional right to a meaningful opportunity to present a complete defense as articulated by the Supreme Court.

US v. Thorton, No. 08-3349 (02/23/10)

Sentence and conviction of defendant for drug and firearm related crimes are affirmed where: 1) defendant's claim that district court erred by excluding him from the jury instruction conference is rejected; 2) allowing testimony about the details of co-defendant's plea agreement was not error; 3) defendant's sentence was not unconstitutional; 4) even if there was a Federal Criminal Rule 11 violation, defendant has not shown actual prejudice from such violation; 5) any challenge to the district court's holding that there was probable cause has been waived; and 6) there was sufficient evidence to support defendant's conviction.

U.S. 7th Circuit Court of Appeals

US v. Hines, No. 083255 (02/23/10)

Sentence of defendant to 168 months in prison for crack cocaine possession and intent to distribute is vacated and remanded for resentencing as the government presented no evidence to contradict the statement of "Individual A" that defendant was a distributor of both powder and crack cocaine, and as such, there is no basis for assuming that he cooked into crack all 1.531 kilograms of powder that he bought.

US v. Napadow, No. 09-1920 (02/23/10)

In a prosecution of defendant for devising a scheme to defraud and obtain money from home inspectors by selling fraudulent insurance, district court's denial of defendant's motion to dismiss his indictment is affirmed as the district court correctly determined that there had been no violation of the Speedy Trial Act.

Whitlock v. Brown, No. 08-2800 (02/24/10)

In plaintiffs' 42 U.S.C. section 1983 action against an officer with the Department of Natural Resources, alleging violation of their Fourth Amendment rights, district court's grant of qualified immunity for defendant is affirmed where: 1) the constitutional question is not whether there was probable cause for the arrest, but whether the officer intentionally or recklessly withheld material information from his warrant application; 2) the proper focus of the qualified immunity inquiry is whether it would have been clear to a reasonable officer that the information allegedly omitted was material to the probable-cause determination; and 3) officer was entitled to qualified immunity as it is not clear under Indiana law that the information the officer allegedly withheld was material to the probable cause determination for a charge of criminal conversion.

US v. Phillips , No. 09-1262 (02/25/10)

Conviction of defendant for Medicare fraud is affirmed where: 1) defendant can show no plain error in denying her motion to exclude redacted recording nor can she show admission of a recording likely changed the trial's outcome; 2) there was no error when admitting a redacted recording in failing to consider redacted exculpatory statements because defendant had the burden of pointing them out and she failed to do so; and 3) defendant waived her remaining arguments.

US v. Sellers, No. 09-2037 (02/25/10)

Conviction for possession of crack cocaine with intent to distribute and sentence to 168 months' imprisonment is affirmed as defendant's post-arrest phone call asking his wife to warn his biggest buyer and a jail fight were inconsistent with a sincere acceptance of responsibility for his criminal conduct.

Gentry v. Sevier, No. 08-3574 (02/26/10)

District court's denial of defendant's habeas petition based on a claim of ineffective assistance of counsel is reversed as the Court of Appeals of Indiana unreasonably applied federal law when it determined that the evidence concerning the search of a wheelbarrow was admissible and that defendant's counsel's performance did not fall below an objective standard of reasonableness.

US v. Meux , No. 09-1430 (02/26/10)

Following defendant's conviction and sentence of 37 months' imprisonment and order to pay a mandatory restitution of \$134,218.52, a magistrate judge's order granting the government's motion for turnover of funds that was held in custody by a US Marshal in an unrelated case is affirmed as the magistrate judge had authority to hold a hearing and to order the turnover of funds to satisfy the lien. Furthermore, record reflects that defendant was provided with essentially the same due process protections he would have been accorded in garnishment proceedings.

Miniz v. Canarecci, No. 09-2001 (02/26/10)

In plaintiff's 42 U.S.C. section 1983 suit against several jail officials for their alleged deliberate indifference to her inmate-son's suicide risk, the district court's grant of summary judgment in favor of the defendants is affirmed as the evidence produced was not enough to overcome the "high hurdle" set by the deliberate indifference standard for

liability under section 1983.

US v. Curby , No. 09-2853 (02/26/10)

Conviction of defendant for distributing cocaine and sentence to 151 months in prison are affirmed as the district court's discussion showed that it had considered defendant's argument of his extensive criminal history and a psychologists' report, and provided a basis for rejecting it.

U.S. 8th Circuit Court of Appeals

Polson v. Bowersox, No. 08-3919 (02/23/10)

In a drug possession prosecution, dismissal of petitioner's habeas petition is reversed where the statute of limitations was tolled during the pendency of petitioner's petition for relief pursuant to Missouri Supreme Court Rule 91, and thus, petitioner's federal habeas petition was timely.

Murray v. Lene, No. 09-1198 (02/23/10)

In a 42 U.S.C. section 1983 action alleging, inter alia, an unlawful seizure, dismissal of the complaint is affirmed in part where: 1) the district court did not abuse its discretion by declining to exercise supplemental jurisdiction over plaintiff's remaining state law claims; 2) plaintiff's conspiracy claim failed because the complaint failed to allege a "meeting of the minds" among the alleged conspirators; and 3) recklessness could be inferred from the omission of information from an affidavit only when the material omitted would have been clearly critical to the finding of probable cause.

US v. Lowry, No. 09-1514 (02/23/10)

Defendant's sentence for failing to register as a sex offender is affirmed where the district court properly followed the process unambiguously set forth in the Guidelines and the Sex Offender Registration and Notification Act by comparing defendant's underlying Illinois conviction to the crimes listed in 42 U.S.C. section 16911(4)(A)(i).

US v. Molina-Perez, No. 09-1611 (02/23/10)

Defendant's conviction and sentence for conspiring to manufacture marijuana and maintaining a place to manufacture marijuana are affirmed where: 1) there were sufficient grounds on which the jury could find defendant guilty of conspiracy beyond a reasonable doubt; 2) a singular, benign reference to homicide that did not link defendant to the deaths and in no way caused him to suffer prejudice did not require a mistrial; and 3) the government provided sufficient evidence with which the district court could find that defendant maintained a leadership role in the offense.

King v. US, No. 09-2212 (02/23/10)

In a drug possession prosecution, the district court's denial of defendant's motion to reduce his sentence is vacated where, because a conviction is not a "prior felony" within the meaning of U.S.S.G. section 4B1.1 unless it receives criminal history points under subsection (a), (b), or (c) of section 4A1.1, and because it was uncertain whether defendant's convictions for resisting arrest received points under one of those subsections, the rule of lenity resulted in a shorter sentence.

Baribeau v. Minneapolis, No. 08-3165 (02/24/10) In an action claiming that plaintiff-protesters were seized without probable cause and in retaliation for exercising their First Amendment rights, summary judgment for defendants is affirmed in part where: 1) a reasonable jury could not find that retaliatory animus was a substantial factor or "but-for" cause of the plaintiffs' arrest and detention; and 2) balancing the nature of the intrusion against the need for institutional security, the decision to confiscate one plaintiff's prosthetic leg was reasonable. However, the judgment is reversed in part where: 1) the arresting officers did not have probable cause to arrest plaintiffs for committing misdemeanor disorderly conduct; and 2) the state of the law at the time of the arrests was clearly established such that a reasonable person would have known there was no probable cause to arrest the plaintiffs for engaging in protected expressive conduct under the disorderly conduct statute.

US v. Lomeli, No. 09-1366 (02/25/10)

Defendant's drug and money laundering sentence is affirmed where: 1) the doctrine of specialty did not operate to bar consideration of all pre-extradition conduct when determining a defendant's punishment for the extradited offense; 2) the district court properly calculated defendant's offense level and criminal history and correctly determined his advisory Guidelines sentencing range; and 3) the district court's discussion of the 18 U.S.C. section 3553(a) factors was sufficient to comply with 18 U.S.C. section 3584 and U.S.S.G. section 5G1.3.

US v. Littlewind, No. 08-4000 (02/26/10)

Defendant's assault conviction is affirmed where: 1) evidence of past crimes was probative of defendant's intent to commit the offenses at issue; 2) there was more than adequate evidence in the record to support a jury finding that the victim suffered a gunshot wound; and 3) a reasonable jury could have rationally hypothesized that defendant intended to assault the victim with a gun.

U.S. 9th Circuit Court of Appeals

Robinson v. Schriro, No. 05-99007 (02/22/10)

In a capital habeas matter, the denial of the petition is reversed in part and remanded for a new sentencing proceeding where: 1) the state courts arbitrarily found that petitioner committed the murder at issue in an especially cruel, heinous, or depraved manner in violation of the Eighth Amendment; and 2) petitioner received ineffective assistance of counsel at sentencing in violation of the Sixth Amendment.

Harrison v. Gillespie, No. 08-16602 (02/22/10)

In a capital habeas matter, a denial of the petition is reversed where the state trial court abused its discretion by declaring a mistrial without first polling the jury, as requested by petitioner, in order to determine whether petitioner had been acquitted of the death penalty. Further, the state may not seek the death penalty at a sentencing retrial, and no such penalty may be imposed by the court. (Superseding opinion)

Avalos v. Baca, No. 07-56511 (02/24/10)

In an action based on alleged violations of plaintiff's rights under the Fourth and Fourteenth Amendments based on his

over-detention and for defendants' efforts to procure an involuntary waiver of his civil rights claim based on his over-detention, summary judgment for defendants is affirmed where: 1) plaintiff failed to show an unconstitutional custom, policy or practice of over-detention; 2) there was no actionable claim under section 1983 for procuring a coercive or involuntary waiver of a civil rights claim; 3) the district court properly granted summary judgment for defendants on plaintiff's conspiracy claims; and 4) plaintiff failed to present sufficient evidence of a RICO violation or any harm to his business or property from the alleged act of racketeering.

US v. Jennen, No. 09-30146 (02/24/10)

Defendant's firearm possession conviction and sentence are affirmed where: 1) the anonymous tip supporting the search warrant at issue included a "range of details" that were more than "easily observed facts and conditions"; 2) a failed controlled purchase did not undermine probable cause that defendant had the items sought in the warrant in his residence; and 3) Washington's crime of second degree assault with a deadly weapon was categorically a crime of violence.

Doody v. Schriro, No. 06-17161 (02/25/10)

In a murder prosecution, a denial of petitioner's habeas petition is reversed where: 1) the Miranda advisement provided to petitioner, which consumed twelve pages of transcript and completely obfuscated the core precepts of Miranda, was inadequate; and 2) nearly thirteen hours of relentless overnight questioning of a sleep-deprived teenager by a tag team of officers overbore the will of petitioner, rendering his confession involuntary.

US v. Garrido, No. 08-10398 (02/25/10)

Defendant's robbery and firearm use conviction is affirmed where the district court did not err under Fed. R. Evid. 701 and 702 by allowing lay witnesses to testify that defendant used a gun during the robbery. However, his sentence is vacated where the district court erred when it concluded that it had no legal authority to consider a reduction for acceptance of responsibility after defendant failed to plead guilty and contested the charge that he used and carried a firearm.

US v. Bright, No. 07-17027 (02/26/10)

In defendants' appeal from the district court's order enforcing IRS summonses requiring production of documents, including those relating to offshore accounts, and finding defendants in contempt, the orders are affirmed in part where: 1) a taxpayer cannot refuse to produce a privilege log or documents for in camera review in response to an order to show cause and then protest an insufficient opportunity to present a claim of privilege; and 2) defendants were in contempt based on their failure to produce documents related to the two previously identified offshore accounts named in the summons. However, the order is modified where the district court's application of the foregone conclusion exception to records of two additional credit cards not named during the enforcement proceeding was clear error.

US v. Gus E. Other Medicine, No. 09-30020 (02/26/10)

Is a prosecution of defendant's for "felony child abuse", denial of defendant's motion to dismiss the indictment is affirmed where: 1) although federal criminal law includes a misdemeanor for assault on a minor, no federal law defined and punished felony child abuse, and thus state law was properly used to define the offense; and 2) the charge of felony child abuse was not vague as applied to defendant's admitted conduct.

U.S. 10th Circuit Court of Appeals

US v. Corber, No. 09-3006 (02/22/10)

In a crack cocaine distribution prosecution, dismissal of defendant's motion to reduce his sentence under 18 U.S.C. section 3582(c)(2) is affirmed where, for purposes of a sentence modification under section 3582(c)(2), the "applicable guideline range" and the range upon which a sentence was "based" was, as a matter of law, the range produced under the guidelines' sentencing table after a correct determination of the defendant's total offense level and criminal history category, but prior to any discretionary variances.

US v. Garcia, No. 08-5090 (02/23/10)

Defendant's drug possession conviction is affirmed where: 1) a witness's assertion did not come close to establishing "inherent incredibility"; 2) there was direct evidence of defendant's ownership of the drugs and his intent to distribute them; and 3) the instructions did not mislead the jury about the need to find guilt beyond a reasonable doubt.

US v. Ramos-Arenas, No. 09-2165 (02/23/10)

Defendant's conviction for falsely impersonating an officer or employee of the U.S. is affirmed where: 1) a reasonable jury could infer that defendant intended for his unsolicited lie to a state police officer to result in reducing his girlfriend's ticket to a warning; and 2) 18 U.S.C. section 912 did not require defendant to obtain something of value through the impersonation.

US v. Washington, No. 09-3091 (02/23/10)

Defendant's firearm possession conviction is affirmed where: 1) the district court did not err in denying defendant's motion to dismiss the indictment under the Interstate Agreement on Detainers (IAD) because the Supreme Court had specifically required actual delivery of a request under the IAD to both the prosecutor and the court, and refused to carve a "fairness" exception to the express language of the IAD in cases in which a third party had negligently or maliciously prevented delivery from occurring; 2) the evidence, at best, would support a favorable finding as to only the first element of a fleeting possession defense; and 3) even without the transcript of defendant's prior testimony, the jury had sufficient evidence to find that defendant at the very least constructively possessed the firearms.

U.S. 11th Circuit Court of Appeals

US v. Phillips, No. 08-17248 (02/23/10)

Defendant's drug and firearm possession sentence is vacated where, under 18 U.S.C. section 3582(c) and Fed. R. Crim. P. 35(a), the district court on January 26, 2009 did not have jurisdiction after seven days had passed to modify

and vacate defendant's 324-month sentence imposed on December 5, 2008.

Coffin v. Brandau, No. 08-14538 (02/24/10)

In an action based on defendant-officers' alleged warrantless entry into plaintiffs' garage, and one plaintiff's arrest, claiming a violation of plaintiffs' Fourth Amendment rights, summary judgment for defendants is affirmed where plaintiffs' garage was not included within the unambiguous physical dimensions of an individual's home, and it was not clear that it fell into the category of curtilage.

US v. Whitson, No. 09-10521 (02/24/10)

Defendant's cocaine importation sentence is vacated where defendant's prior conviction for non-overt act criminal conspiracy was not a "crime of violence," in light of Begay v. United States, 128 S. Ct. 1581 (2008), and thus, she does not qualify as a "career offender."

U.S. D.C. Circuit Court of Appeals

Gonzalez-Vera v. Townley, No. 09-5134 (02/23/10)

In an action seeking to invoke one of 18 U.S.C. section 3523's enforcement procedures, the appointment of a guardian to help collect a judgment against an individual under the Witness Protection Program, the dismissal of the complaint is affirmed where: 1) Congress intended to make guardianship available only where the Attorney General found that the protected person was failing to make reasonable efforts—that is, only where disclosure to a guardian was necessary to enforce the judgment; and 2) here, the Attorney General determined that the protected person was making reasonable efforts to satisfy the judgment.

US v. Davis, No. 07-3100 (02/26/10)

Defendant's theft conviction is vacated where: 1) given defense counsel's failure to articulate a justification for a witness's proposed testimony independent of certain document labels' truth, the court did not abuse its discretion by excluding it; and 2) the district court abused its discretion under Fed. R. Evid. 408 in permitting a witness to testify regarding defendant's offer of settlement and the statements that followed.

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