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Court Accepts Six Cases; Denies *Padilla*

From January through April 3, the U.S. Supreme Court granted certiorari in six cases of interest to criminal practitioners. Two cases have been returned to the calendar for reargument: *Kansas v. Marsh* (No. 04-1170), originally argued on December 7, 2005, was reset for April 25; *Hudson v. Michigan* (No. 04-1360), originally argued on January 9, was to be reargued on May 18. Seven other criminal cases were to be heard during the final regular argument sessions of the term in April. Merits briefs, transcripts of oral arguments, and the Court's calendar, including argument and nonargument dates, are available at the Court's Web site at www.supremecourtus.gov.

On April 3, 2006, the Court denied the petition for certiorari filed by Jose Padilla from the judgment of the Court of Appeals for the Fourth Circuit upholding his detention by military authorities. (*Padilla v. Hanft*, 2006 WL 845383 (No. 05A578).) Justice Kennedy, in an opinion concurred in by Chief Justice Roberts and Justice Stevens, explained that because Padilla had been transferred to civilian authorities to respond to an indictment charging federal crimes, which was part of the relief he sought, his current custody would not be affected by a ruling in his favor. Thus the "fundamental issues respecting the separation of powers" raised by Padilla were, "at least for now, hypothetical." Justice Kennedy specifically observed that in addition to prompt ruling by a civilian court on any attempt by the government to change his status, Padilla "retains the option of seeking a writ of habeas corpus in this Court," citing S. Ct. Rule 20; 28 U.S.C. §§ 1651(a), 2241. Justices Ginsburg, Souter, and Breyer would have granted the petition for certiorari. Justice Ginsburg, writing separately to explain her dissent from the denial of certiorari, observed that the serious issue of executive power raised by Padilla was not moot because the government could again change his custody. (*See Cert Alert*, 21:1 CRIM. JUST. at 45 (Spring 2006).)

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CERTIORI GRANTED

Related Civil Case

Gonzales v. Carhart, *cert. granted*, Feb. 21, 2006, 126 S. Ct. 1314 (No. 05-380), decision below at 413 F.3d 791 (8th Cir. 2005). Whether, notwithstanding Congress's determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 [which contains criminal penalties] is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

Immigration

The Court granted certiorari in two cases involving the interplay between federal immigration law and state and federal definitions of drug crimes. The cases were consolidated and one hour allotted for oral argument.

Lopez v. Gonzales, *cert. granted*, Apr. 3, 2006, 2006 WL 845511 (No. 05-547), decision below at 417 F.3d 934 (8th Cir. 2005). Whether an immigrant who is convicted in state court of a drug crime that is a felony under the state's law but that would only be a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

Toledo-Flores v. United States, *cert. granted*, Apr. 3, 2006, 2006 WL 842994 (No. 05-7664), decision below unpublished (5th Cir. No. 04-41378, Aug. 17, 2005). Has the Fifth Circuit erred in holding—in opposition to the Second, Third, Sixth, and Ninth Circuits—that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

Prison Litigation Reform Act

The Court granted certiorari in two cases involving interpretation of the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e (PLRA). The cases were consolidated and one hour was allowed for oral argument.

Jones v. Bock, *cert. granted*, Mar. 6, 2006, 126 S. Ct. 1462 (No. 05-7058), decision below unpublished (6th Cir. No. 03-2576, June 15, 2005). (1)

Whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether nonexhaustion is an affirmative defense that must be pleaded and proven by the defense. (2) Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

***Williams v. Overton**, cert. granted*, March 6, 2006, 126 S. Ct. 1463 (No. 05-7142), decision below unpublished (6th Cir. June 22, 2005, No. 03-2507). (1) Whether the PLRA requires a prisoner to name a particular defendant in his or her administrative grievance in order to exhaust his or her administrative remedies as to that defendant and to preserve his or her right to sue [the defendant]. (2) Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

Sentencing

Cunningham v. California, *cert. granted*, Feb. 21, 2006, 126 S. Ct. 1329 (No. 05-6551), decision below unpublished (Cal. App. 1 Dist. Apr. 18, 2005, *reh'g denied,* May 4, 2005 (No. A103501), *review denied*, June 29, 2005). Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

DECIDED CASES

Death Penalty Sentencing

Oregon v. Guzek, 126 S. Ct. 1226 (February 22, 2006) (No. 04-928). The case concerned Guzek's claim, accepted by the Oregon Supreme Court, that at a sentencing proceeding a capital defendant has a right to offer additional evidence and argument that casts doubt on his or her guilt of the charge itself. The Court denied Gusek's motion to dismiss the writ as improvidently granted, concluding that the state court's decision was based on federal law. On the merits, the Court rejected Guzek's contention that the Eighth Amendment provides a right to cast "residual doubt" on the question of guilt at the sentencing phase, and held that the state can set "reasonable limits" on the evidence a defendant can submit at sentencing and the method by which it is submitted. The Court observed that the sentencing proceeding does not traditionally consider whether a defendant committed the offense, that the parties have previously litigated whether the defendant is guilty, and, in any event, under Oregon law the defendant can introduce at sentencing all the innocence evidence from the original trial, although by transcript rather than by live testimony. (Opinion of the Court by Breyer, J., joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, and Ginsburg. Justice Scalia filed an opinion concurring in the judgment, in which Justice Thomas joined. Justice Alito took no part in the consideration or decision of the case.)

Fourth Amendment

Georgia v. Randolph, 2006 WL 707380 (March 22, 2006) (No. 04-1067). The Court held that one co-occupant's consent to a warrantless search of premises is ineffective to justify the search when another occupant is present and objects to the search. The common understanding is that each occupant has an expectation of privacy in the shared premises. Although an otherwise unwelcome visitor may be admitted by one tenant in the other's absence, the objection of an occupant who is present will cause a "sensible person" to decline to enter. A police officer faced with a similar situation is in no better position and entry over the objection of an occupant who is present is therefore unreasonable. The Court specifically noted that this ruling on evidentiary searches does not affect the ability of the police to enter a dwelling at the invitation of one tenant, over the objection of another tenant, to protect a resident from domestic violence. (Opinion of the Court by Justice Souter, joined by Justices Stevens, Kennedy, Ginsburg, and Breyer. Justices Stevens and Breyer filed concurring opinions. Chief Justice Roberts filed a dissenting opinion, in which Justice Scalia joined. Justices Scalia and Thomas filed dissenting opinions. Justice Alito took no part in the consideration or decision of the case.)

United States v. Grubbs, 2006 WL 693453 (March 21, 2006) (No. 04-1414). Reversing a decision of the Ninth Circuit, the Court held that an "anticipatory" search warrant is not necessarily

invalid, since any valid warrant reflects a determination that it is now probable that contraband, evidence of a crime, or a fugitive is on the premises to be searched, and will be on the premises when the warrant is executed. The affidavit in support of the anticipatory warrant merely shows that it is probable that the triggering condition will occur. [Parts I and II] Moreover, the Fourth Amendment requires only that the warrant particularly describe the place to be searched and the things or person to be seized. It does not require that the warrant specify the triggering condition under which the warrant will be executed [Part III], although Justice Souter, in a separate concurring opinion, suggests that it would be wise for a magistrate to set out the triggering condition in the warrant. (Opinion of the Court by Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Breyer, and by Justices Stevens, Souter, and Ginsburg as to Parts I and II. Justice Souter filed an opinion concurring in part and concurring in the judgment, in which Justices Stevens and Ginsburg joined. Justice Alito took no part in the consideration or decision of the case.)

Relevant Civil Cases

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211 (February 21, 2006) (No. 04-1084). Members of the respondent church receive communion by drinking hoasca, a tea brewed from plants containing DMT, a Schedule I controlled substance. When U.S. Customs inspectors seized a shipment of hoasca and threatened prosecution, the church sued for declaratory and injunctive relief. After a hearing on the motion for a preliminary injunction, at which the government conceded that its actions would substantially burden a sincere exercise of religion, the district court granted relief, holding that the government had failed to demonstrate a compelling interest justifying the burden and thus its actions violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1. The Court affirmed and remanded for further proceedings. (Opinion of the Court by Chief Justice Roberts, joined by all members except Justice Alito, who took no part in the consideration or decision of the case.)

Scheidler v. National Organization for Women, Inc., 126 S. Ct. 1264 (No. 04-1244), and ***Operation Rescue v. National Organization for Women, Inc***. (No. 04-1352) (February 28, 2006). The Hobbs Act, 18 U.S.C. § 1951(a), proscribes only acts or threats of physical violence in furtherance of a plan to engage in robbery or extortion and related attempts and conspiracies. (Opinion of the Court by Justice Breyer, joined by all members except Justice Alito, who took no part in the consideration or decision of the cases.) (*Cert. Alert*, 20:3 CRIM. JUST. at 52 (Fall 2005).)

ARGUMENTS SCHEDULED

The following cases of interest to readers of *Criminal Justice* were scheduled for argument during the April sessions.

April 17, 2006: *Washington v. Recuenco*, No. 05-83, decision below at 110 P.3d 188 (Wash. 2005). Should error as to the definition of a sentencing enhancement be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement?. (*Cert Alert*, 20:4 CRIM. JUST. at 53 (Winter 2005).)

April 18, 2006: *United States v. Gonzalez-Lopez*, No. 05-352, decision below at 399 F.3d 924 (8th Cir. 2005). Does a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice require automatic reversal of his conviction? (*Cert Alert*, 21:1 CRIM. JUST. at 46 (Spring 2006).)

Zedner v. United States, No. 05-5992, decision below at 401 F.3d 36 (2d Cir. 2005). Application of the Speedy Trial Act. (*Cert Alert*, 21:1 CRIM. JUST. at 46 (Spring 2006).)

April 19, 2006: *Clark v. Arizona,* No. 05-5966, decision below unpublished, Arizona, lower court case numbers 1-CA-CR -03-0851; 1 CA 03-0985, January 25, 2005. Did the application of Arizona's insanity law and Arizona's blanket exclusion of evidence of mental disease or defect to rebut the state's evidence on the element of mens rea violate petitioner's right to due process under the Fourteenth Amendment? (*Cert Alert*, 21:1 CRIM. JUST. at 45 (Spring 2006).)

April 24, 2006: *Brigham City v. Stuart,* No. 05-502, decision below at 2005 UT 13 (2005). (1) Does the "emergency aid exception" to the warrant requirement recognized in *Mincey v. Arizona*, 437 U.S. 385 (1978) turn on an officer's subjective motivation for entering the house? (2) Was the gravity of the "emergency" or "exigency" sufficient to justify, under the Fourth Amendment, the officer's entry into the home to stop the fight? (*Cert. Alert*, 21:1 CRIM. JUST. at 46 (Spring 2006).)

April 25, 2006: *Dixon v. United States*, No. 05-7053, decision below at 413 F.3d 520 (5th Cir. 2005). Where a criminal defendant raises a duress defense,

should the burden of persuasion be on the government to prove beyond a reasonable doubt the defendant was not under duress, or upon the defendant to prove duress by a preponderance of the evidence? (*Cert Alert*, 21:1 CRIM. JUST. at 45 (Spring 2006).)

Kansas v. Marsh, No. 04-1170, decision below at 102 P.2d 445 (Kan. 2004). One hour for reargument, originally argued on December 7, 2005. (*Cert Alert*, 20:4 CRIM. JUST. at 54 (Winter 2005).)

April 26, 2006: *Hill v. McDonough*, No. 05-8794, decision below unpublished (11th Cir. No. 06-10621, January 24, 2006). (1) Is a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254? (2) Whether, under the Court's decision in *Nelson* [*v. Campbell*, 541 U.S. 637 (2004)] , a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983? (*Cert. Alert*, 21:1 CRIM. JUST. at 45 (Spring 2006).)