Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

June - July 2012

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

VIOLENCE TOWARDS EX-GIRLFRIEND ADMISSIBLE TO SHOW MOTIVE TO ATTEMPT MURDER OF HER BOYFRIEND

State v. Mead, full court opinion. 2012 VT 36. FAIR TRIAL: JUROR CONTACT WITH WITNESS. ADMISSION OF DEFENDANT'S STATEMENTS IN ANOTHER COURT AND JUDGE'S SKEPTICAL QUESTIONING; PRIOR BAD ACTS TO SHOW MOTIVE; JURY UNANIMITY: GUNSHOTS.

Attempted second degree murder affirmed. 1) The defendant's right to a fair trial was not violated when a witness, a police officer, had a brief conversation unrelated to the trial, outside the courthouse with a juror, before realizing that the person was a juror. The juror indicated that the conversation would not affect her evaluation of the credibility of the officer who, in any event, did not testify to any contested matters. 2) There was no plain error in the trial court's admission of the defendant's videotaped appearance in Family Court concerning a relief from abuse order issued arising out of the same factual circumstances, in which the Family Court judge expresses skepticism concerning the defendant's version of events. His statements in that setting were almost entirely consistent with his statements in this trial, and the skeptical tone of the judge's questioning was harmless in view of the fact that the defendant's credibility as to his version of events was so severely undermined by the multitude of inconsistencies effectively exposed by the prosecution's cross-examination. On its face, the defendant's version of events was not believable, and his credibility was hopeless compromised. 3) The defendant's prior bad acts, consisting of violence and possessiveness towards his ex-girlfriend was admissible to show his motive to kill her new boyfriend. In addition, the court conducted a Rule 403 weighing of the evidence. 4) The jury did not need to be unanimous in finding which of the gunshots were the basis for the conviction, where he fired the shots within a span of minutes, if not seconds, and the shots were all part of a continuous course of events. Skoglund, with Dooley, concurring: Would find that it was an abuse of discretion, although harmless, for the trial court to admit a videotape of another judge expressing skepticism about the defendant's version of events. Doc. 2010-414, June 14, 2012. http://info.libraries.vermont.gov/supct/current/op2010-414.html

DEFENDANT CAN BE DENIED RIGHT TO REPRESENT HIMSELF

*State v. Burke, full court opinion. 2012 VT 50. SPEEDY TRIAL: DELAYS CAUSED BY DEFENSE. IMPEACHMENT: PRIOR FALSE REPORT OF SEXUAL ASSAULT; CONVICTIONS. DENIAL OF REQUEST TO PROCEED PRO SE. SHACKLING OF DEFENDANT. INDETERMINATE SENTENCING. SUFFICIENCY OF THE EVIDENCE.

Sexual assault affirmed. 1) The defendant was not denied his right to a speedy trial where the delays were almost entirely caused by the defendant's filing of numerous motions and continuous refusal to begin taking depositions; the defendant raised his right to a speedy trial but simultaneously with actions that postponed trial; and the defendant cannot assert prejudice because he caused significant delay himself. 2) The trial court acted within its discretion in excluding evidence of the victim's alleged false report of a sexual assault by a third person against a fourth person, as having low probative value and requiring a mini-trial. 3) The defendant was not entitled to cross-examine witnesses for the State concerning prior convictions that did not fall within the ambit of Rule 609. 4) The trial court did not abuse its discretion in denying the defendant's request to proceed pro se, where it was clear from the record that he was prone to yelling, outbursts, and threatening behavior, and that he was unable to listen to and take direction from the trial judge. 5) The trial court did not abuse its discretion in requiring the defendant to be shackled during trial, where the defendant had threatened the State's attorney, his own attorney, the court, and others on numerous occasions, and where steps were taken to minimize attention and prejudice caused by the shackles. 6) The trial court's sentence of 18 to 20 years did not violate the indeterminate sentencing law, because a sentence is not considered fixed as long as the minimum and maximum terms are not identical. 7) The trial court acted within its discretion in denying the motion for a new trial based on the insufficiency of the evidence, where the sole issue was the credibility of the defendant and of the complainant, and the jury believed the complainant. Doc. 2010-437, June 14, 2012. http://info.libraries.vermont.gov/supct/current/op2010-437.html

RESTITUTION REQUIRES REPLACEMENT COST, NOT PRESENT VALUE

State v. Tetrault, 2012 VT 51. RESTITUTION: TRESPASS AS PREDICATE OFFENSE FOR RESTITUTION FOR DAMAGED ITEMS – PRESERVATION. RESTITUTION: REPLACEMENT COST VERSUS ACTUAL VALUE. RESTITUTION: REPLACEMENT OF USED BUT NOT DESTROYED ITEMS.

Full court published entry order. Restitution order in trespassing case affirmed. 1) The defendant did not preserve for appeal his argument that unlawful trespass cannot be the predicate offense for an award of restitution for damages arising from his other actions while engaged in the trespass, such as damaging or destroying items present in the place where he was trespassing. 2) The defendant was responsible for the replacement costs for

items that he had merely used, and not destroyed, such as pots and pans and bedding, where that use involved a disturbing violation of personal privacy. Not knowing the identity of the squatters or the precise activities they undertook while illegally occupying his home, the owner was, reasonably, uncomfortable ever using these items again, and replaced them at a relatively modest cost at Wal-Mart. 3) The court was justified in awarding the replacement cost of items, not their actual value at the time of the trespass. The defendant's suggestion that the replacement cost of, say, a toaster, can be estimated by what it might fetch at a yard sale is "pettifoggery." Doc. 2011-068, July 5, 2012. http://info.libraries.vermont.gov/supct/current/eo2011-068.html

FAILURE TO INSTRUCT THAT DEFENDANT MUST KNOW OF LACK OF CONSENT NOT PLAIN ERROR WHERE DEFENSE WAS NOT CONSENT

*State v. Hammond, 2012 VT 48. SEXUAL ASSAULT: SUFFICIENCY OF THE EVIDENCE. JURY INSTRUCTION: DEFINITION OF SEXUAL ACT, GENITAL OPENING; DEFENDANT'S KNOWLEDGE OF LACK OF CONSENT. RAPE SHIELD STATUTE: COMPLAINANT'S LACK OF SEXUAL EXPERIENCE. OPINION TESTIMONY: WITNESSES NOT OFFERED AS EXPERTS.

Full court published opinion. Sexual assault and lewd and lascivious conduct affirmed. 1) The trial court correctly denied the defendant's motion for judgment of acquittal despite the defendant's argument that the complainant's testimony was objectively incredible. The question of the witness's objective credibility was ultimately for the jury to determine, and not for the Court to weigh on appeal. 2) The trial court correctly denied the defendant's motion for a new trial in the interest of justice based on the insufficiency of the evidence. This claim was not raised below and therefore was not preserved for appeal. 3) A jury instruction which contained the entire definition of "sexual act," including anal intrusion, given after the jury asked if the anus qualified as a genital opening, was not plain error even though there was no allegation of an anal intrusion, where the trial court also noted that anal insertion had not been charged. 4) There was no plain error in the trial court's failure to instruct the jury that the defendant must have known that the sexual contact was not consensual, where the crux of the defense was lack of intentional sexual contact with the complainant, not that the defendant perceived her as acquiescing to a sexual advance. 5) Even assuming, without deciding, that the rape shield statute bars evidence of a complainant's lack of prior sexual experience, there was no error in permitting testimony to this effect here, because the line of testimony was intended to rebut the defense claim that the complainant's failure to fully disclose the nature of the act undermined her credibility. Her lack of experience was used by the State to explain her uncertainty over exactly what had happened; and in any event the defense had opened the door to the complainant's knowledge of sexual matters. 6) There was no plain error in permitting lay witnesses to testify to their experience with delayed reporting by adolescent females, as these witnesses were not necessarily unqualified to give such testimony. Nor did these witnesses improperly rely upon anecdotal evidence on this point. Doc. 2011-100, July 6, 2012. http://info.libraries.vermont.gov/supct/current/op2011-100.html.

IDLING TRUCK IN PARKING LOT AT NIGHT IS NOT REASONABLY SUSPICIOUS

State v. Paro, 2012 VT 53. MV STOPS: REASONABLE SUSPICION.

Full court published entry order. Denial of motion to suppress reversed. Observing a truck idling in the middle of the night in the parking lot of an auto repair shop that had previously been burglarized does not give rise to a reasonable and articulable suspicion of criminal activity. Docs. 2011-184 and 185, July 10, 2012. http://info.libraries.vermont.gov/supct/current/eo2011-184.html

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

Note: The precedential value of decisions of three-justice panels of the Vermont Supreme Court is governed by V.R.A.P. 33.1(c), which states that such decisions "may be cited as persuasive authority but shall not be considered as controlling precedent." Such decisions are controlling "with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued."

ELEMENT OF CRIME CAN ALSO BE RELIED UPON TO AGGRAVATE SENTENCE

State v. Decelle, three-justice entry order. SENTENCING: RELIANCE ON A FACTOR THAT IS ALSO AN ELEMENT.

4 to 15 year sentence for aggravated assault and four counts of reckless endangerment affirmed. The defendant fired two rifle shots into a parked car, wounding one of the five occupants of the car. The defendant pleaded guilty pursuant to a plea agreement under which the State could argue for up to 4 to 15 years to serve, and the defendant could argue for any lawful sentence. The court did not err in relying upon the extremely reckless nature of the action in determining the sentence even where reckless behavior is an element of some of the charged offenses. The court's finding that this recklessness overcame other factors that might have otherwise mitigated the sentence was not an abuse of discretion. Doc. 2011-412, July Term, 2012. http://www.vermontjudiciary.org/d-upeo/eo11-412.pdf

TRIAL COURT ERRED IN STANDARD OF PROOF IN CLAIM OF INEFFECTIVE ASSISTANCE

In re Combs, three-justice entry order. INEFFECTIVE ASSISTANCE: STANDARD OF PROOF.

Denial of post-conviction relief reversed. The petitioner alleged that he received

ineffective assistance of counsel when his attorney failed to enter into a stipulation with the State as to the petitioner's insanity. The trial court granted judgment to the State, ruling that "it was incumbent on the petitioner to call" the original prosecutor and establish that he would have agreed to such a stipulation. Absent this evidence, the trial court ruled, the petitioner had failed to "prove by a preponderance of the evidence that there was a reasonable probability that there would have been a different outcome in the case." This statement of the standard is error – the petitioner's burden was to show a reasonable probability of a different outcome; the preponderance of the evidence standard does not apply here. Although the standards are similar, the preponderance test is more stringent. Doc. 2012-027, July Term, 2012. http://www.vermontjudiciary.org/d-upeo/eo12-027.pdf

SUMMARY OF THE 2011 SUPREME COURT TERM

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OPINIONS

Criminal Law – Criminal Procedure

1. *Smith v. Cain*, 10-8145. By an 8-1 vote, the Court held that prosecutors violated *Brady v. Maryland* by failing to provide defense counsel with statements by the single eyewitness who linked petitioner to the crime that called into question the reliability of that identification. Specifically, the lead detective's notes, made the night of the murder and five days later, contain statements by the eyewitness stating that he could not identify the perpetrators and did not see any faces. These "undisclosed statements were plainly material."

2. *Perry v. New Hampshire*, 10-8974. By an 8-1 vote, the Court held that the Due Process Clause does not require a trial judge to screen eyewitness evidence for reliability pretrial when suggestive circumstances surrounding the identification were not arranged by law enforcement officers. The Court distinguished earlier cases that required such a pretrial judicial screening when police orchestrated the suggestive circumstances by, for example, using an improper lineup.

3. *United States v. Jones*, 10-1259. Without dissent, the Court held that federal agents conducted a search, within the meaning of the Fourth Amendment, when they installed a global positioning system (GPS) tracking device on the undercarriage of respondent's car and then monitored the car's movements for 30 days. Through a 5-Justice majority opinion, the Court held that "[t]he Government physically occupied private property for the purpose of obtaining information" and "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." The Court ruled that the "reasonable

expectation of privacy" test announced in *Katz v. United States* is "not the sole measure of Fourth Amendment violations." A four-Justice concurring opinion disagreed with that "trespass-based rule," but concluded that the long-term monitoring that took place here was a search because it "involved a degree of intrusion that a reasonable person would not have anticipated."

4. *Ryburn v. Huff*, 11-208. Through a unanimous *per curiam* opinion, the Court summarily reversed a Ninth Circuit opinion that had denied qualified immunity to two police officers who were sued under §1983 for entering a house without a warrant because they were concerned about an imminent threat of violence. The Court criticized the Ninth Circuit majority for "tak[ing] the view that conduct cannot be regarded as a matter of concern so long as it is lawful"; for "look[ing] at each separate event in isolation," rather than the "combination of events"; and for failing to be cautious before "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation."

5. *Howes v. Fields*, 10-680. The Court unanimously held that the Sixth Circuit erred when it held that the Court's precedents established a categorical rule that a prisoner is always "in custody" for purposes of *Miranda* any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison. And by a 6-3 vote, the Court held that respondent was not in custody when he was taken to a conference room by prison guards and questioned by law enforcement officers about a crime because he was told at the outset of the interrogation that he was free to go back to his cell at any time, and he was neither physically restrained nor threatened.

6. *Messerschmidt v. Millender*, 10-704. The Court reversed a Ninth Circuit decision that had denied qualified immunity to police officers who obtained a facially valid, but possibly overbroad, warrant to search respondents' home. The officers obtained the search warrant in connection with the investigation of a known gang member for shooting at his ex-girlfriend with a sawed-off shotgun. Respondents filed a §1983 suit, alleging that the search violated their Fourth Amendment rights because there was not sufficient probable cause to believe certain items listed (such as "all guns" and gang-related material) were evidence of the crime under investigation. The Court held that the officers were entitled to qualified immunity because (1) when a neutral magistrate has issued a warrant, the officers necessarily acted in an objectively reasonable manner unless "it is obvious that no reasonably competent officer would have concluded that a warrant should issue"; and (2) this case does not fall within that narrow exception.

7. *Lafler v. Cooper*, 10-209. By a 5-4 vote, the Court held that a defendant's Sixth Amendment right to effective counsel is violated when his counsel provides deficient advice not to accept a plea offer and he is then convicted after a fair trial and sentenced to a longer term than he would have received under the plea offer. The Court ruled that such a defendant can establish *Strickland* prejudice by showing "that but for the ineffective advice of counsel there is a reasonable probability that the plea

offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than the judgment and sentence that in fact were imposed." The Court held that the proper remedy will generally be to require the prosecution to reoffer the plea proposal and for the trial court then to exercise its discretion as to which convictions, if any, to vacate and to resentence the defendant accordingly. (The Court also found that the Michigan state court's decision in the case was not entitled to AEDPA deference because the court failed even to apply *Strickland* when assessing the defendant's claim.)

8. Missouri v. Frye, 10-444. For similar reasons, the Court held by a 5-4 vote that a defendant's Sixth Amendment right to effective counsel is violated when his counsel's deficient performance results in loss of a plea offer and he later pleads guilty and is sentenced to a longer term than he would have received under the lost plea offer. The Court stated that the central importance of plea bargains to our criminal justice system means that the Sixth Amendment requires counsel to provide adequate assistance during that plea bargain process ─ including, at the very least, communicating to the defendant any formal plea offers from the prosecution. Defendants may show prejudice by "demonstrat[ing] a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel" and "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." (As to remedy, the Court cross-referenced its opinion in Laffler v. Cooper.)

9. *Florence v. Board of Chosen Freeholders of County of Burlington*, 10-945. By a 5-4 vote, the Court held that the Fourth Amendment was not violated by a county jail's policy of strip searching every detainee placed in the general jail population, including persons arrested for minor offenses. The Court applied its general rule that deference must be given to the judgment of correction officials unless there is "substantial evidence" showing that the officials' response to the situation is exaggerated. And it found the county jail's strip-search policy reasonable to protect the safety of all concerned, including the detainee. The Court expressly stated that its ruling does not address cases where the detainee is held separately from the general jail population.

10. *Blueford v. Arkansas*, 10-1320. At petitioner Blueford's murder trial, the jury was instructed on the greater offense of capital murder and three lesser-included offenses, and was told it could convict on one of them or acquit on all of them. A few hours after it starting deliberating, the jury forewoman reported that the jury was unanimous against guilt on the charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide. After further deliberations, the jury reported that it could not reach a verdict, and the court declared a mistrial. By a 6-3 vote, the Court held that the Double Jeopardy Clause does not bar Arkansas from retrying Blueford on the charges of capital murder and first-degree murder. The Court concluded that the jury's report was not a final resolution that acquitted Blueford of those two charges; and that the trial court did not abuse its

discretion by declaring a mistrial without ordering the jury to vote (contrary to Arkansas law) on whether to acquit on those two charges.

11. *Williams v. Illinois*, 10-8505. By a 4-1-4 vote, the Court held that a defendant's Confrontation Clause rights were not violated when an expert witness, relying on the DNA testing performed ─ and lab report prepared ─ by another DNA analyst, gave her expert opinion that there was a DNA match. A four-Justice plurality (the Chief Justice and Justices Alito, Kennedy, and Breyer) reasoned that the expert could be cross-examined and that the out-of-court statements (the lab report) related by the expert to explain her assumptions "are not offered for their truth and thus fall outside the scope of the Confrontation Clause." An opinion by Justice Thomas concurring in the judgment rejected that reasoning but reached the same result based on his conclusion that the statements in the lab report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." He specifically noted that the lab report was "neither a sworn nor a certified declaration of fact," and that although it was signed by two "reviewers," neither of them "purport[ed] to have performed the DNA testing nor certif[ied] the accuracy of those who did."

12. *Southern Union Co. v. United States*, 11-94. In a 6-3 ruling, the Court held that the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ─ that the Sixth Amendment requires a jury to find beyond a reasonable doubt any fact (other than a prior conviction) that increases a criminal defendant's maximum potential sentence ─ also applies to sentences of criminal fines.

13. *Miller v. Alabama*, 10-9646. By a 5-4 vote, the Court held that the Eighth Amendment's ban against cruel and unusual punishment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for juveniles who have committed homicide offenses. Instead, the Court held, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."

Criminal Law – Habeas Corpus/Capital Punishment

1. *Cavazos v. Smith*, 10-1115. By a 6-3 vote, the Court (through a *per curiam* opinion) summarily reversed a Ninth Circuit decision that had granted habeas relief under *Jackson v. Virginia*, 443 U.S. 307 (1979) (allowing court to set aside jury's verdict if no rational trier of fact could have agreed with jury). In this "shaken baby" case, the Court found that the jury was presented with competing experts with competing explanations of how the baby died and could reasonably have credited the prosecution's experts, who testified that the baby died from shaken baby syndrome. "In light of the evidence presented at trial, the Ninth Circuit plainly erred in concluding that the jury's verdict was irrational, let alone that it was unreasonable for the California Court of Appeal to think otherwise."

2. *Bobby v. Dixon*, 10-1540. Through a unanimous *per curiam* opinion, the Court summarily reversed a Sixth Circuit decision that had granted habeas relief based

on purported *Miranda* violations. The Sixth Circuit concluded that the Ohio Supreme Court's decision affirming respondent Archie Dixon's murder conviction was objectively unreasonable in three respects, but the Court said it wasn't clear the Ohio Supreme Court had erred at all. Specifically, held the Court, the Sixth Circuit erred (1) in holding that the police could not speak to Dixon following his invocation of his right to counsel during an encounter with the police that was *not* a custodial interrogation; (2) in holding "that police violated the Fifth Amendment by urging Dixon to 'cut a deal' before his accomplice . . . did so"; and (3) in holding that Dixon's confession to murder was inadmissible under *Missouri v. Seibert* because it followed a previous confession, made in violation of *Miranda*, in which Dixon confessed to forgery but denied committing the murder.

3. *Greene v. Fisher*, 10-637. Under 28 U.S.C. §2254(d)(1), a federal court may not grant habeas relief with respect to a claim that has been "adjudicated on the merits in State court proceedings" unless the state-court adjudication "resulted in 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." The Court unanimously held that a decision it handed down *before* a state prisoner's conviction became final but *after* his last state-court adjudication on the merits does not qualify as "clearly established Federal law" for purposes of this provision. The Court reasoned that "§2254(d)(1) requires federal courts to focu[s] on what a state court knew and did, and to measure state-court decisions against this Court's precedents *as of the time the state court renders its decision*" (internal quotation marks omitted).

4. *Hardy v. Cross*, 11-74. Through a unanimous *per curiam* opinion, the Court summarily reversed a Seventh Circuit decision that had granted habeas relief based on the prosecution's purported failure to make a good faith effort to obtain the presence of a key witness at trial. The Court held that, contrary to the Seventh Circuit's ruling, the state court reasonably applied the Court's Confrontation Clause precedents when it held that the various efforts taken by the prosecution to track down the witness sufficed. The Court reiterated that "when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, . . . but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how promising."

5. *Gonzalez v. Thaler*, 10-895. The Court construed two provisions of AEDPA. First, the Court held (by an 8-1 vote) that AEDPA's requirement that a certificate of appealability (COA) "shall indicate [the] specific issue" on which the petitioner has made a "substantial showing of the denial of a constitutional right" is a mandatory but non-jurisdictional rule. "Accordingly, a judge's failure to 'indicate' the requisite constitutional issue in a COA does not deprive a court of appeals of subject-matter jurisdiction to adjudicate the habeas petitioner's appeal." Having therefore found jurisdiction, the Court turned to the second issue, involving the construction of AEDPA's one-year statute of limitations, which begins to run on the date the state judgment becomes final "by the conclusion of direct review or the expiration of the time for seeking such

review." By an 8-0 vote, the Court held that "for a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires."

6. *Maples v. Thomas*, 10-63. By a 7-2 vote, the Court held that petitioner's counsel abandoned him while his state post-conviction application was pending, which was "cause" to excuse the procedural default that occurred when he failed to appeal the denial of that application. Petitioner failed to file a timely appeal because his out-of-state pro bono counsel (two associates at Sullivan & Cromwell) had left the firm by the time the trial court issued its order, and the firm's mail room declined to accept the envelopes containing the order. (Local counsel received the order, but apparently assumed lead counsel would handle the matter.) The Court held that his counsel had abandoned him and therefore were not his agents when the default occurred. As a consequence, the default resulted from "something *external* to petitioner" and could be cause to excuse the default.

7. *Wetzel v. Lambert*, 11-38. By a 6-3 vote, the Court summarily reversed a Third Circuit decision that had granted habeas relief to respondent on the ground that the state, by failing to turn over a "police activity sheet" prior to trial, violated *Brady v. Maryland*. The document noted that an individual named Mr. Woodlock "is named as a co-defendant" by one of the state's primary witnesses at trial. Finding the document "entirely ambiguous," the Pennsylvania Supreme Court rejected Lambert's claim that the document was exculpatory because it suggested that someone other than or in addition to him and his accomplices committed the crime. The Third Circuit granted habeas relief. The Supreme Court criticized that ruling for failing even to address the state court's holding that the notations were ambiguous and that any connection to this crime was speculative. A federal court may not grant habeas relief "unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA."

8. *Martel v. Clair*, 10-1265. In this capital case, the district court declined petitioner's request ─ after 10 years of federal habeas proceedings ─ to replace his court-appointed habeas counsel. On appeal, the Ninth Circuit held that the district court abused its discretion when it denied that motion without further inquiry; the court therefore appointed a replacement habeas counsel, vacated the district court judgment denying habeas relief, and remanded for further proceedings to allow the new counsel to raise additional claims. The U.S. Supreme Court unanimously reversed, holding that the district court did not abuse its discretion in denying the substitution motion. During the course of its opinion, the Court stated that the standard for evaluating motions to substitute counsel in capital cases where counsel was appointed under 18 U.S.C. §3599 is the "interests of justice" standard that applies in non-capital cases under 18 U.S.C. §3006A.

9. *Martinez v. Ryan*, 10-1001. In many states, a defendant may not assert ineffective assistance of trial counsel on direct review; the first time he may assert that claim is in a state post-conviction proceeding. By a 7-2 vote, the Court held that in such

states ineffective assistance of state post-conviction counsel, or the lack of any counsel, can constitute "cause" that can excuse a procedural default of a claim of ineffective assistance of trial counsel. The Court declined to hold that prisoners have a constitutional right to counsel in state post-conviction proceedings that are the first opportunity to raise an ineffective-assistance-of-trial-counsel claim. Rather, the Court exercised its equitable discretion in elaborating on the federal habeas rules governing when prisoners may excuse their procedural defaults.

10. *Wood v. Milyard*, 10-9995. By a 7-2 vote, the Court held that a federal court of appeals has the authority to raise *sua sponte* an AEDPA statute of limitations defense. The Court further held, however, that the Tenth Circuit abused its discretion when it did so in this case because the state ─ by telling the district court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition," deliberately waived the statute of limitations defense.

11. *Coleman v. Johnson*, 11-1053. Through a unanimous *per curiam* opinion, the Court summarily reversed a Third Circuit decision that had granted habeas relief on the ground that the evidence at trial was insufficient to support the conviction under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). The Court stated that the Third Circuit failed to afford "due respect to the role of the jury," as required by *Jackson*, and failed to afford due respect to the state courts, as required by AEDPA.

12. *Parker v. Matthews*, 11-845. Through a unanimous *per curiam* opinion, the Court summarily reversed a Sixth Circuit decision that had granted habeas relief to respondent. Stating that the Sixth Circuit's decision "is a textbook example of what [AEDPA] proscribes," the Court held that the Sixth Circuit erred when it granted habeas relief on the grounds that the Kentucky Supreme Court improperly shifted to respondent the burden of proving extreme emotional disturbance, the Commonwealth had failed to prove the absence of extreme emotional disturbance beyond a reasonable doubt, and certain remarks in the prosecutor's closing argument constituted a denial of due process.

Criminal Law – Federal Statutes and Rules

1. *Reynolds v. United States*, 10-6549. The Sex Offender Registration and Notification Act (SORNA) requires convicted sex offenders to register, and keep the registration current, in all states and makes it a crime to fail to do so. By a 7-2 vote, the Court held that SORNA does not require persons who committed their sex offenses before SORNA's enactment to register unless and until the Attorney General specifies that the registration provisions apply to such offenders. (The Attorney General adopted an Interim Rule specifying that SORNA applies to pre-Act offenders and a valid final rule to that effect. The Court did not address the validity of the Interim Rule, which petitioner challenged in the lower courts on constitutional and APA grounds.)

2. *Setser v. United States*, 10-7387. By a 6-3 vote, the Court held that a federal "district court, in sentencing a defendant for a federal offense, has authority to order that

the federal sentence be consecutive to an anticipated state sentence that has not yet been imposed." The Court found that no federal statute deprives federal district courts of their broad discretion in selecting whether the sentence they impose will run concurrently or consecutively with respect to other sentences.

3. *Dorsey v. United States*, 11-5683. Prior to August 3, 2010, the 5- and 10-year mandatory minimum prison terms for federal drug crimes were based on a 100-to-1 disparity between the amounts of crack cocaine and powder cocaine needed to trigger the minimums. The Fair Sentencing Act of 2010 reduced it to an 18-to-1 disparity by increasing the amounts of crack needed to trigger the minimums. By a 5-4 vote, the Court held that the Fair Sentencing Act's new, more lenient penalty provisions apply retroactively to crack offenders who committed their offense prior to the Act's effective date but who were sentenced after that date.

3. *Arizona v. United States*, 11-182. By a 5-3 vote, the Court struck down as preempted three provisions of an Arizona law targeting illegal immigration; and without dissent rejected the federal government's pre-enforcement challenge to a fourth provision. Specifically, the Court held that §3 of Arizona's statute, which makes it a state-law crime to fail to comply with federal alien-registration requirements, is preempted because Congress has fully occupied the field of alien registration. The Court next held that the federal law imposing sanctions on *employers* who hire illegal immigrants impliedly preempts §5(c), which attacked the issue on the *employee* side by making it a state crime for illegal immigrants to apply for or attain a job in Arizona. The Court also invalidated §6, which authorized state officials to arrest without a warrant persons unlawfully in the country if officials believe they have committed a deportable offense. The Court found that §6 creates an obstacle to federal law, which creates a different regime governing when removable aliens may be arrested. Lastly, the Court held that the Ninth Circuit erred in enjoining the operation of §2(b) before it took effect. That section requires state and local law enforcement officers to check the immigration status of persons whom they have lawfully detained. The Court held that the mandatory nature of the status checks does not interfere with the federal immigration scheme, which encourages federal-state communication. The Court added, however, that §2(b) in practice may raise constitutional concerns by delaying the release of detainees for no reason other than to check their immigration status.

<u>§1983, *Bivens* Actions, Private Rights of Action</u>

1. *Rehberg v. Paulk*, 10-788. The Court unanimously held that (1) grand jury witnesses, including witnesses who are law enforcement officers, enjoy the same absolute immunity from §1983 claims as witnesses at trial, and (2) there is no "complaining witness" exception to that rule. As to the latter holding, the Court acknowledged that a "complaining witness" (such as a police officer who submits an affidavit in support of an application for an arrest warrant) is entitled only to qualified immunity. But, held the Court, a law enforcement officer who testifies before a grand jury is not a "complaining witness" as that concept was understood at common law. Rather, "the term 'complaining witness' "was used to refer to a party who procured an

arrest and initiated a criminal prosecution," whether or not the person later testified before a grand jury or at trial.

2. *Reichle v. Howards*, 11-262. The Court unanimously held that two federal law enforcement agents are entitled to qualified immunity from a §1983 action alleging they arrested respondent in retaliation for his political speech, where the agents had probable cause to arrest respondent for committing a crime. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Court held that probable cause to arrest defeats a First Amendment claim of retaliatory *prosecution*. In this case, the Court declined to decide whether a similar rule applies to a First Amendment claim of retaliatory *arrest*. Rather, the Court held that *Hartman* left the law sufficiently uncertain that it was not clearly established that an arrest supported by probable cause could still violate the First Amendment.

Cases Dismissed as Improvidently Granted:

1. *Vasquez v. United States*, 11-199. The Court had granted certiorari to address whether the harmless-error standard in a criminal trial is (1) whether the error had any effect on the verdict or (2) whether there was overwhelming evidence of guilt that was untainted by the error.

CASES TO BE ARGUED IN THE 2012 TERM
(State AGO cases in bold)

Criminal Law

1. ***Florida v. Jardines***, 11-564. At issue is "[w]hether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause." The Florida Supreme Court held that it is, even though the U.S. Supreme Court reaffirmed in *Illinois v. Caballes*, 543 U.S. 405 (2005), that a dog sniff is not a search because the sole knowledge a dog obtains by sniffing is the presence of contraband, as to which a person lacks a reasonable expectation of privacy.

2. ***Cavazos v. Williams***, 11-465. The Court granted California's cert petition, limited to the first question, which asked: "Whether a habeas petitioner's claim has been 'adjudicated on the merits' for purposes of 28 U.S.C. §2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim."

3. ***Ryan v. Gonzales***, 10-930. At issue is whether the Ninth Circuit erred when it held that 18 U.S.C. §3599 ─ which provides that an indigent state inmate pursuing federal habeas relief in a capital case "shall be entitled to the appointment of one or

more counsel" ─ entitles a death row inmate to stay the habeas proceeding if he is not competent to assist his counsel.

4. ***Tibbals v. Carter***, 11-218. This case presents a similar issue: Whether the Sixth Circuit erred when it held that 18 U.S.C. §4241 ─ which authorizes competency hearings "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence" ─ entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist his counsel. The Sixth Circuit read *Rees v. Peyton*, 384 U.S. 312 (1966), as dictating that result.

5. ***Florida v. Harris***, 11-817. The question presented is whether the Florida Supreme Court erred when it held that "an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle." Expressing concerns about false alerts, the Florida court stated that "when assessing the factors bearing on the dog's reliability, it is important to include, as part of a complete evaluation, how often the dog has alerted in the field without illegal contraband having been found."

6. *Chaidez v. United States*, 11-802. At issue is whether the Court's holding in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their counsel fail to advise them that pleading guilty to an offense will subject them to deportation applies retroactively to persons whose convictions became final before *Padilla* was announced. The Third Circuit, applying *Teague v. Lane*, 489 U.S. 288 (1989), held that *Padilla* announced a new rule and therefore does not apply retroactively.

7. *Bailey v. United States*, 11-770. The question presented is: "Whether, pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed."

8. *Evans v. Michigan*, 11-1327. The question presented is: "Does the Double Jeopardy Clause bar retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a midtrial directed verdict of acquittal because the prosecution failed to prove that fact?" In this case, the trial court granted a directed verdict to a defendant charged with "burning other real property" on the ground that the prosecution failed to prove that the building in question was not a dwelling. The Michigan appellate courts held that the building not being a dwelling was not an element of "burning other real property," and permitted the state to retry the defendant for that offense.

9. *Smith v. United States*, 11-8976. Under review is a D.C. Circuit decision holding that "[o]nce the Government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from [the] conspiracy by

a preponderance of the evidence." Petitioners argue that the government should have to prove beyond a reasonable doubt that they were members of the conspiracy during the relevant period.

10. *Henderson v. United States*, 11-9307. Under review is a Fifth Circuit opinion holding that although the district court erred in giving petitioner a longer sentence in violation of the subsequently decided *Tapia v. United States*, 131 S. Ct. 2382 (2011), petitioner did not preserve the error because he failed to show that the court plainly erred. The circuit court ruled that the error could not be corrected by motion under Federal Rule of Criminal Procedure 35(a) because the error was not "clear" at the time of defendant's sentencing.

Cases marked with an asterisk were handled by the AGO.

Vermont Criminal Law Month is published bi-monthly by the Vermont Attorney General's Office, Criminal Justice Division. Computer-searchable databases are available for Vermont Supreme Court slip opinions back to 1985, and for other information contained in this newsletter. For information contact David Tartter at (802) 828-5515 or dtartter@atg.state.vt.us.