Criminal Justice Division
Vermont Attorney General's Office

Vermont Criminal Law Month

June - July 2011

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

WRONDOING OF VICTIM PROPERLY EXCLUDED IN VOLUNTARY MANSLAUGHTER TRIAL

State v. Boglioli, full court entry order. 2011 VT 60. VOLUNTARY MANSLAUGHTER: SUFFICIENCY OF THE EVIDENCE OF SUDDEN PASSION AND GREAT PROVOCATION. NEW TRIAL BASED ON WEIGHT OF THE EVIDENCE. INSTRUCTIONS: UNANIMITY AS TO EXACT MENTAL STATE NOT REQUIRED. INSTRUCTIONS: UNDUE EMPHASIS ON STATE'S THEORY. SELF-DEFENSE: ACTUAL AND REASONABLE BELIEF OF IMMINENT PERIL REQUIRED. SELF-DEFENSE: EVIDENCE OF VICTIM'S THREATS AGAINST THIRD PARTIES. REFERENCE TO JAILHOUSE RECORDINGS.

Voluntary manslaughter affirmed. 1) The evidence was sufficient to support the conviction, despite the defendant's claim that there was insufficient evidence of sudden passion and great provocation. On the day of the shooting the victim appeared before the defendant, brandishing an axe handle, and stating, "come on mother fucker, let's get this over." This evidence, along with the victim's history of violent behavior towards the defendant, is sufficient to fairly and reasonably convince a trier of fact that the defendant was provoked, that the provocation was adequate, that he had insufficient time to cool off, and that he had in fact not cooled off at the time he shot the victim. 2) The trial court's denial of a new trial based upon the weight of the evidence was not an abuse of discretion, as the evidence did not preponderate heavily against a verdict of voluntary manslaughter. 3) The trial court was not required to instruct the jury that they must be unanimous as to which of the three possible mental states it found when determining if the defendant committed voluntary manslaughter: intent to kill, intent to inflict great bodily harm, or wanton disregard of the likelihood of death or great bodily harm. 4) The court did not unduly emphasize the State's theory of the case in its self-defense instruction when it iterated each of the possible ways in which the State could disprove self-defense. 5) The court's supplemental jury instruction, given in answer to a question from the jury, which consisted of rereading the portion of the instruction challenged above, was not an abuse of discretion. 6) The trial court correctly instructed the jury that the defendant's belief of imminent peril must be

both actual, and reasonable. 7) The defendant argued that the court erred in excluding evidence of specific incidents of threats by the victim against others, to support the claim of self-defense. Some of the incidents were, in fact, admitted. Other incidents were properly excluded under Rule 403, since threats of violence are less supportive of the defense than actual instances of violence. 8) The court properly excluded the opinion of a third person, expressed to the defendant, that if he did not stop calling the police, the third person was not going to be able to control the victim's response. What this person thought the victim might do is not relevant to the defendant's state of mind at the time of the killing. 9) Evidence of the victim's alleged threat to burn down a barn was properly excluded as the defendant was not aware of the threat at the time of the shooting, and therefore it could not be relevant to his state of mind at that time. It may be probative of the victim's state of mind, but that is immaterial to self-defense. 10) The defendant was not entitled to a new trial as a result of the state referring to recordings of conversations between the defendant and his sister as "jailhouse recordings." Doc. 2009-410, June 16, 2011.

NO PRIVACY INTEREST IN INTERNET SERVICE PROVIDER SUBSCRIBER DATA AND OTHER NON-CONTENT MATERIAL.

State v. Simmons, full court opinion. SEARCH AND SEIZURE: SUBSCRIBER INFORMATION FOR INTERNET SERVICE. VERMONT CONSTITUTION: PRESERVATION, PLAIN ERROR. ANONYMOUS TIPSTER: NOT RELIED UPON FOR PROBABLE CAUSE.

Denial of motion to suppress affirmed. The police received a tip that a man named Graham, who lived on a certain street, possessed a computer stolen from a neighbor, and was using it to access the internet through his neighbor's wireless internet network. The police identified Graham and his address through public records, and determined that a neighbor had lost a computer in a break in, and had a wireless network. The police also located a person in MySpace with the same name, whose photograph resembled that of the defendant on his driver's license. The police then subpoenaed MySpace in order to obtain the defendant's internet protocol. This revealed that the defendant was using his neighbor's wireless connection to access the internet. With this information, the police obtained a search warrant, and located stolen computers and other items in the defendant's home. The defendant challenged the issuance of the warrant as having been based on information illegally obtained through a subpoena, without probable cause, and on an anonymous tip whose reliability was not reasonably established. 1) The defendant had no privacy information in subscriber information and other non-content data to which service providers must have access, and therefore the police were not required by the Fourth Amendment to obtain a search warrant for this information. 2) The defendant's state constitutional claim on this point was not preserved, but there was no plain error. Nothing in the court's Article 11 rulings suggests that an internet subscriber address and frequency of use data, unembellished by any personal information, should be treated as private. 3) The use of the anonymous tipster did not require suppression, as the tip simply initiated the detective's inquiry, and probable cause was established by information obtained by the police from public records and from the legitimate subpoenas. Doc. 2010-066, June 23, 2011.

PCR DECISION REMANDED FOR FINDINGS ON UNRESOLVED CLAIM

In re Combs, 2011 VT 75. POST CONVICTION RELIEF: PURSUIT OF INSANITY DEFENSE AND STIPULATION CONCERNING INSANITY. FAILURE TO MAKE FINDINGS AND CONCLUSIONS ON ISSUE BEFORE THE COURT.

Full court published entry order. Denial of post-conviction relief reversed. The defendant was convicted of first degree murder and sentenced to 35 to life in prison. 1) Defense counsel was not ineffective when he failed to review with the defendant an offer from the trial court to conduct a bifurcated trial, first on factual guilt, and then on the insanity claim, where defense counsel had already discussed the insanity defense at length with the defendant, and the defendant had categorically rejected an insanity defense under all circumstances. 2) The petitioner claimed that defense counsel should have sought a stipulation with the prosecutor that the defendant was not guilty by reason of insanity. The State's expert witness testified that it was speculative whether the prosecutor would have entered into such a stipulation. The PCR court failed to make any findings on the disputed evidence and to address this claim of ineffective assistance. The matter is therefore remanded for proper findings and determination of the claim. Doc. 2009-422, July 6, 2011.

TRIAL COURT'S REFUSAL TO STAY DENIAL OF ORDER TO SEAL SEARCH WARRANTS PENDING APPEAL IS REVERSED

In re Search Warrants, 2011 VT 88. Full court published entry order. MOTION TO SEAL SEARCH WARRANTS: STAY PENDING APPEAL.

The trial court's denial of a stay pending appeal of its order refusing to seal executed search warrants and accompanying documents is reversed. A stay pending appeal is appropriate where facts not known to the general public were discovered during a search of the home of a missing couple. Denial of the stay would preclude the State from appealing the denial of the motion to seal, and potentially hamper the state's investigation. Additionally, this case is distinguishable from In re Sealed Documents, 172 Vt. 152, where the victims of the crime were deceased and the suspects in custody, and thus here there is a heightened interest in not undermining the criminal investigation through the revelation of facts not generally known to the public. The public's right to access court documents may be trumped by the State's interest in preserving the integrity of the investigation of a potentially serious crime. Dooley and Johnson dissent: The State has not demonstrated a strong likelihood of success. There is very little special about the facts the State wants to withhold in this case, and there is no specific showing that disclosing the facts will make it easy for suspects to evade detection. Doc. 2011-228, July 18, 2011.

ADMISSION OF EVIDENCE THAT DEFENDANT DECLINED PRELIMINARY BREATH TEST WAS HARMLESS ERROR, IF ERROR AT ALL

State v. Kinney, 2011 VT 74. ADMISSIBILITY OF PRELIMINARY BREATH TEST REFUSAL; HARMLESS ERROR. CLOSING ARGUMENT: EXPRESSION OF OPINION, COMMENT ON RIGHT TO REMAIN SILENT.

Full court opinion. DUI, 3rd offense, and attempting to elude an officer affirmed. 1) Any error in the admission of evidence that the defendant declined to submit to the preliminary breath test was harmless beyond a reasonable doubt, given the strength of the remaining evidence. 2) There was no plain error in the prosecutor's closing argument, where he stated that the defendant had lied to the police, and had failed to offer any explanation as to who the mysterious person was who was actually driving, or where he had gone. There is nothing here to suggest that the prosecutor was expressing a personal view; and there was no inappropriate comment on the defendant's failure to testify, where the prosecutor was discussing the defendant's statements to the officer at the scene of the offense. Johnson and Skoglund concur, stating that, although the admission of the PBT refusal was harmless, they would hold that the statute prohibits the introduction of such evidence. Reiber and Burgess concur, stating that they would hold that refusal to submit to a PBT is admissible. Doc. 2009-265, July 22, 2011.

A BOOM LIFT IS A VEHICLE FOR PURPOSES OF DUI STATUTE

State v. Smith, 2011 VT 83. Full court opinion. DUI: MOTOR VEHICLES: BOOM LIFT. APPEALS: DISMISSAL OF MISDEMEANOR.

Dismissal of DUI and DLS charges reversed. The defendant was operating a boom lift on a public highway while intoxicated. The trail court dismissed the charge on the grounds that the boom lift was not a "motor vehicle" as defined in the statute. The statute defines a motor vehicle as a vehicle propelled or drawn by power other than muscular power. Although the statute contains exceptions, none of them apply to a boom lift. The defendant argued that a boom lift should not be included because it is meant to be used primarily in a stationary position, is not used for transportation, and lacks common characteristic of motor vehicles such as a steering wheel and seat. However, the statute contains express exceptions, and therefore the presumption is that other cases are not excepted. The dismissal of the misdemeanor DLS charge is not considered on appeal, as the State cannot appeal a final judgment in a misdemeanor case. Docs. 2010-388 and 2010-389, July 28, 2011.

T-SHIRTS MEMORIALIZING VICTIM DIDN'T TAINT JURY

State v. Herrick, 2011 VT 94. JURORS: EXPOSURE TO T-SHIRTS MEMORIALIZING MURDER VICTIM. VOLUNTARY MANSLAUGHTER: INSTRUCTION ON PROVOCATION.

Full court opinion. Second degree murder affirmed. 1) On the morning of the first day of trial, three people walked into the courtroom wearing green shirts with the statement, "In Loving Memory of [Victim]." The court sent the jury out again, ordered the individuals not to wear the shirts while in the courtroom, and polled the jury. Two jurors had seen the shirts, but said it would not affect them. There was some inconsistency in jurors indicating whether they had seen the shirts, and whether they had been mentioned in the jury room. The court did not abuse its discretion when it denied a mistrial. The Court first notes that the motion for a mistrial was inappropriate as the jury had not yet been impaneled. The defendant should have filed challenges to individual jurors for cause. In any event, there was no error. In connection with the motion for a mistrial, the trial court credited the jurors' assurances of impartiality, and this Court defers to the trial court's conclusion. Nor could the defendant have shown that the jurors demonstrated a fixed bias, which is the standard for excuse for cause. 2) The court did not commit plain error when it failed to instruct the jury to assess the reasonable of the defendant's provocation, for purposes of voluntary manslaughter, in light of his individual characteristics. The instruction tracked Vermont case law on adequate provocation, which requires actual provocation and adequate provocation, which means whether a reasonable person in the defendant's position would have been so provoked. Doc. 2010-252, August 12, 2011.

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."

EXPUNGEMENT OF ARREST RECORD DENIED

State v. Cameron, three-justice entry order. EXPUNGEMENT OF ARREST RECORD.

Denial of motion to expunge criminal arrest records on the grounds that the arrest was "bogus" affirmed. The arrest arose out of a custodial interference issue, and the charges were dismissed by the prosecutor. There are no grounds for reversal where the arrest was supported by probable cause and the defendant claimed nothing more unusual or extraordinary than job-related inconvenience and distress. Doc. 2010-321, July Term, 2011.

FAILURE TO ENTER ACQUITTAL ON GROUNDS OF MISTAKEN IDENTITY WAS NOT PLAIN ERROR

State v. Penn, three-justice entry order. SEXUAL ASSAULT: SUFFICIENCY OF THE EVIDENCE OF IDENTITY; FAILURE TO PRESERVE.

Aggravated sexual assault, three counts, and sexual assault, affirmed. The defendant argues that the evidence at trial was insufficient to establish beyond a reasonable doubt that he was the person who committed the charged offenses. This ground for acquittal was not raised in his motion for judgment of acquittal at the close of the State's case, and he did not renew that motion upon completion of the case, and therefore the issue on appeal is whether the trial court should have entered a judgment of acquittal on its own motion because the record reveals that the evidence is so tenuous that a conviction would be unconscionable. The defendant cannot satisfy that standard. Doc. 2010-450, July Term, 2011.

Criminal And Appellate Rule Changes

The Vermont Supreme Court has proposed that a Comment be added to Rule 4.1 of the Vermont Rules of Professional Conduct. Rule 4.1 states that, "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." The comment would address concerns expressed by government lawyers that the Supreme Court's decision in In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523, might be understood as affecting the traditional use of deception as an investigative mechanism in the enforcement of criminal or other laws. The proposed comment, and the Reporter's Notes to it, read as follows:

Government Lawyers

[3] Rule 4.1 does not prohibit a lawyer from advising or supervising lawful activity that is part of a government investigation into violations of law. In engaging in such practices, a government lawyer remains subject to Rule 8.4(c).

Reporter's Notes-2011 Amendment

Comment [3] is added to Rule 4.1 to address concerns expressed by government lawyers that the Supreme Court's decision in *In re PRB Docket No. 2007-046*, 2009 VT 115, 187 Vt. 35, 989 A.2d 523, might be understood as affecting the traditional use of deception as an investigative mechanism in the enforcement of the criminal or other law. While Rule 4.1 prohibits a government lawyer from directly making a false statement to another in the course of an investigation, the Comment recognizes that law enforcement officers and other nonlawyer investigators may engage in deception when investigating unlawful activity. The supervising lawyer must have the ability to advise and supervise in such investigations to prevent investigators from violating constitutional or other

legal rights of any person.

Rule 4.1 also does not prohibit a government official who is a lawyer from engaging in deception in activity that does not involve client representation—e.g., a law enforcement officer who is a lawyer but is acting as an investigator. As Comment [1] suggested, however, all government lawyers remain subject to the prohibition of Rule 8.4(c) against engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation," which the Court in *In re PRB, 2009* VT 115, It 12, held applies only "to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law."

Other jurisdictions have recognized that investigative supervision by prosecutors and other government lawyers is not misconduct. See *United States v. Parker,* 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001) (explaining that it is not unethical for prosecuting attorneys to supervise or advise undercover investigations); Utah State Bar Ethics Advisory Opinion, Opinion No. 02-05 (March 18, 2002) (concluding that it is not misconduct for a government lawyer to supervise or participate in a lawful covert government operation that employs dishonesty, fraud or misrepresentation for the purpose of gathering relevant information); Arizona Ethics Opinion 99-11 (not professional misconduct for attorneys to supervise testers who make misrepresentations regarding identity or purpose to gather facts regarding an ongoing violation of law). See also DC Bar Ethics Opinion 323 (March 29, 2004) (related to lawyers involved in intelligence gathering, such as FBI); Florida Rule 8.4(c) ("it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule").

SUMMARY OF THE 2010 SUPREME COURT TERM, DECISIONS OF INTEREST TO PROSECUTORS AND POLICE

Prepared by Dan Schweitzer,
NAAG Supreme Court Counsel
June 28, 2011

OPINIONS

Criminal Law – Criminal Procedure

1. *Michigan v. Bryant*, 09-150. By a 6-2 vote, the Court held that questions posed by an officer to a wounded citizen concerning the perpetrator and circumstances of the shooting were not testimonial within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). The Court construed the "primary purpose" test adopted in *Davis v.*

Washington, 547 U.S. 813 (2006), as requiring an objective inquiry into the purpose of the interrogation based on "all relevant circumstances," and which "accounts for both the declarant and the interrogator." Applying that approach, the Court concluded that the victim ─ whose answers to the "officers' questions were punctuated with questions about when emergency medical services would arrive" ─ did not have a primary purpose "to establish or prove past events potentially relevant to later criminal prosecution"; and that the police's questions about "what had happened, who had shot him, and where the shooting occurred," were designed to "enable them to meet an ongoing emergency" involving a gunman on the loose.

2. *Kentucky v. King***,** 09-1272. By an 8-1 vote, the Court rejected the "police-created exigency" doctrine that many lower courts had adopted to limit the scope of the exigent circum-stances exception to the Fourth Amendment's warrant requirement. In this case, police officers smelled marijuana emanating from an apartment, knocked on the door, and then entered the apartment after they heard noises which indicated that physical evidence was being destroyed. The Kentucky Supreme Court held that the large quantity of drugs the officers found had to be suppressed because the officers created the exigency by knocking on the door. Reversing, the Court held "that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable" within the meaning of the Fourth Amendment.

3. *Ashcroft v. Al-Kidd*, 10-98. Reversing a Ninth Circuit decision that had denied qualified immunity to former Attorney General John Ashcroft, the Court held that he did not violate the Fourth Amendment by allegedly authorizing federal officials to arrest terrorism suspects based on material-witness warrants, but without any intent of securing their testimony at others' trials. A 5-Justice majority held that officers' subjective intent does not matter under the Fourth Amendment (with limited exceptions not applicable here); as long as a neutral magistrate issued the material-witness warrant based on individualized suspicion, the motives underlying the arrest were irrelevant. All eight Justices participating in the case agreed that Ashcroft was at least entitled to qualified immunity. (Four of the Justices stated that whether material witness warrants are, as a general matter, proper under the Fourth Amendment is a difficult issue not raised in this case because Al-Kidd's argument focused solely on the alleged pretextual use of such warrants.)

4. *J.D.B. v. North Carolina*, 09-11121. By a 5-4 vote, the Court held that a child's age is relevant to the *Miranda* custody analysis. The Court reasoned that "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave," and saw "no reason for police officers or courts to blind themselves to that commonsense reality." The Court therefore reversed a North Carolina Supreme Court decision that did not take age into account when it held that a 13-year-old student taken from his class to a school conference room and questioned about a crime by a police officer and school officials was not in custody.

5. *Davis v. United States*, 09-11328. By a 7-2 vote, the Court held that the exclusionary rule does not apply to a search conducted by police "in compliance with binding precedent that is later overruled." The Court stated that the purpose of the exclusionary rule is to deter future Fourth Amendment violations, and that purpose is not served when an officer acts "in strict compliance with then-binding Circuit law." The Court therefore affirmed an Eleventh Circuit decision holding that evidence seized prior to the Supreme Court's decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), need not be excluded because the officers acted in good faith based on pre-*Gant* law.

6. *Bullcoming v. New Mexico*, 09-10876. In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court held that a forensic laboratory report stating the results of a drug test was testimonial for purposes of the Confrontation Clause. Here, the Court held by a 5-4 vote that the Confrontation Clause does not permit the prosecution to introduce such a lab report through the in-court testimony of an analyst who neither signed the certification nor personally performed or observed the performance of the test: "[t]he accused's right is to be confronted with the analyst who made the certification."

7. Bond v. United States, 09-1227. The Court unanimously ruled that a person charged with violating a federal criminal statute may challenge its constitutionality on Tenth Amendment grounds— asserting that the statute intrudes upon the sovereignty and authority of the states — even though no state is a party. In so doing, the Court expressly repudiated language from its opinion in *Tennessee Electric Power v. TVA*, 306 U.S. 118 (1939), which had suggested that state participation and objection was required before a party would have standing. Petitioner Carol Bond harassed her husband's lover, culminating in a minor state-court conviction. But then Bond began placing caustic substances on objects the woman was likely to touch. Federal prosecutors charged Bond with violating 18 U.S.C. §229, which criminalizes the possession of dangerous chemicals when not intended for a peaceful purpose. Congress enacted the provision to implement an anti-terrorism treaty ratified by the United States. Bond claimed that the statute violated the Tenth Amendment because it exceeded Congress' authority. After the district court denied her request to dismiss the charges on that ground, Bond entered a conditional guilty plea, reserving her right to appeal. The Third Circuit, relying on *Tennessee Electric Power*, ruled that Bond had no standing to challenge the statute on Tenth Amendment grounds because no state was party to the proceed-ings. In an opinion by Justice Kennedy, the Court reversed.

Criminal Law – Habeas Corpus/Capital Punishment

1. *Wilson v. Corcoran*, 10-91. The Court summarily reversed a Seventh Circuit decision that had granted habeas relief on the ground that the trial judge, in violation of Indiana law, considered non-statutory aggravating factors when deciding whether to impose the death penalty. In reversing, the Court faulted the Seventh Circuit for failing to explain how a purported violation of *state* law amounts to a violation of *federal* law, the necessary predicate for habeas relief. The court of appeals' decision does not

"even articulate what federal right was allegedly infringed." The Court therefore reversed and remanded, expressing "no view about the merits of the habeas petition."

2. *Harrington v. Richter*, 09-587. By an 8-0 vote, the Court held that the *en banc* Ninth Circuit erred when it granted habeas relief on the ground that defense counsel was ineffective in declining to investigate expert testimony on the source of a pool of blood at the crime scene. The Court held that (1) AEDPA deference under 28 U.S.C. §2254(d) applies to a state court's summary disposition of a claim, including a *Strickland* claim; (2) a federal court fails to comply with AEDPA when it reviews a federal claim *de novo* and, after finding a constitutional violation, "declare[s], without further explanation, that the 'state court's decision to the contrary constituted an unreasonable application of [federal law]'"; and (3) on the facts here, a state court could reasonably conclude that a competent attorney could elect a strategy that did not require using blood evidence experts and that any error would not have been prejudicial.

3. *Premo v. Moore*, 09-658. By an 8-0 vote, the Court held that the Ninth Circuit erred when it granted habeas relief to respondent, who pleaded guilty to murder, on the ground that his counsel was ineffective in failing to attempt to suppress a confession he made to police. The Court ruled that (1) the state court could reasonably have accepted as a justification for counsel's action that suppression would have been futile in light of respondent's other admissible confessions to two witnesses; (2) AEDPA and *Strickland* deference are particularly warranted in the plea context; and (3) the Ninth Circuit erred by relying on *Arizona v. Fulminante*, 499 U.S. 279 (1991), a case applying the harmless error standard after a constitutional error was found.

4. *Swarthout v. Cooke*, 10-333. The Court summarily reversed a Ninth Circuit decision that had granted habeas relief on the ground that the California state courts had unreasonably applied the state-law "some evidence" standard for reviewing parole denials and therefore denied due process to respondents. The Court reiterated that "federal habeas corpus relief does not lie for errors of state law," and held that the "Due Process Clause merely requires fair procedures." There was no question that respondents received fair procedures at their parole hearings and appeals; their complaint concerned the merits of the state court rulings. The Court stated that to convert California's "some evidence" rule into "a component" of a federal liberty interest would wrongly "subject to federal-court merits review the application of all state-prescribed procedures in cases involving liberty or property interests," which "has never been the law."

5. *Walker v. Martin*, 09-996. The Court unanimously held that California's time limitation on applications for post-conviction relief ─ which requires petitioners to file known claims "as promptly as the circumstances allow" ─ is an independent state ground adequate to bar federal habeas relief. The Court reiterated that discretionary state rules can be "firmly established" and "regularly followed" (the traditional test of adequacy) "even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases and not others."

6. *Skinner v. Switzer*, 09-9000. By a 6-3 vote, the Court held that a convicted prisoner seeking access to biological evidence for DNA testing, and who asserts that the state's post-conviction DNA statute violates the Due Process Clause, may assert that claim in a civil rights action under 42 U.S.C. §1983. The Court ruled that because the suit for DNA testing, if successful, would not "necessarily imply" the invalidity of his conviction — since success would only require testing, which may or may not prove exculpatory — it does not have to brought through a habeas corpus action.

7. *Wall v. Kholi*, 09-868. The Court unanimously held that a motion to reduce sentence under Rhode Island law — which permits a court to reduce a sentence if, among other reasons, the court concludes it was too severe — is form of collateral review that tolls AEDPA's one-year limitations period on filing federal habeas petitions. The Court reasoned that "the phrase 'collateral review' in 28 U.S.C. §2244(d)(2) means judicial review of a judgment in a proceeding that is not part of direct review," and "the parties agreed that a motion to reduce sentence under Rhode Island law is not part of the direct review process."

8. *Felkner v. Jackson*, 10-797. The Court summarily reversed a Ninth Circuit decision that had granted habeas relief on the ground that the California state courts had unreasonably applied *Batson v. Kentucky*. Calling the Ninth Circuit's one-sentence explanation for its decision "as inexplicable as it is unexplained," the Court concluded that "the trial court credited the prosecutor's race-neutral explanations, and the California Court of Appeal carefully reviewed the record at some length in upholding the trial court's findings. . . . There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner."

9. *Cullen v. Pinholster*, 09-1088. In reversing a Ninth Circuit decision granting habeas relief on the ground that counsel provided ineffective assistance during the sentencing phase of the capital trial, the Court issued two holdings. First, the Court held that review of a state-court adjudication under 28 U.S.C. §2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." Accordingly, "evidence introduced in federal court" at a federal evidentiary hearing "has no bearing on §2254(d)(1) review." Second, the Court held that the California Supreme Court did not unreasonably apply federal law when, based on the state-court record, it rejected respondent's penalty-phase ineffective-assistance claim.

10. *Bobby v. Mitts*, 10-1000. Through a unanimous *per curiam* opinion, the Court summarily reversed a Sixth Circuit decision that had granted habeas relief on the ground that the penalty phase instructions were contrary to *Beck v. Alabama*, 447 U.S. 625 (1980). In *Beck*, the Court held that the death penalty may not be imposed when the jury was not permitted to consider a lesser-included non-capital offense, and therefore had to choose between conviction of a capital offense and acquittal. In this case, the jury (having already convicted respondent) was instructed to first determine whether to recommend a death sentence and then, if it declined to do so, to choose between two possible life imprisonment sentences. The Court held that the instructions

given in this case "are surely not invalid under" *Beck* because *Beck* was concerned with the risk of an unwarranted *conviction*. In contrast to the jurors in *Beck*, the jurors here could not "have been improperly influenced by a fear that a decision short of death would have resulted in [respondent] walking free."

Criminal Law – Federal Statutes and Rules

1. *Abbott v. United States*, 09-479. Under 18 U.S.C. §924(c)(1), a person convicted of a drug-trafficking crime or crime of violence shall receive an additional mandatory minimum sentence of five years whenever he "uses or carries a firearm, or . . . in further of any such crime, possesses a firearm," "[e]xcept to the extent a greater minimum sentence is . . . provided . . . by any other provision of law." By an 8-0 vote, the Court held that the "except" clause has only one function: it spares defendants from being subjected to "stacked sentences for violating §924(c)," *e.g.*, from receiving a five-year mandatory minimum for possessing the gun under §924(c)(1)(A)(i) *plus* an additional seven-year mandatory minimum for brandishing the gun under §924(c)(1)(A)(ii) *plus* an additional ten-year mandatory minimum for discharging the gun under §924(c)(1)(A)(iii). The "except" clause does not relieve a defendant of a mandatory minimum five-year sentence for violating §924(c) where the defendant received "a higher mandatory minimum on a different count of conviction."

2. *Pepper v. United States*, 09-6822. By a 7-1 vote, the Court held that, under the federal Sentencing Guidelines, "when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range."

3. *Fowler v. United States*, 10-5443. The federal witness tampering statute makes it a crime to "kill[] . . . another person, with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. §1512(a)(1)(C). This case involved a defendant who "killed a person with the intent to prevent that person from communicating with law enforcement officers in general but . . . did not have federal enforcement officers . . . particularly in mind." The Court held "that, in such circumstances, the Government must show that there was a *reasonable likelihood* that a relevant communication would have been made to a federal officer."

4. *United States v. Tinklenberg*, 09-1498. The federal Speedy Trial Act requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court (whichever is later). It excludes from the 70-day period "any delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. §3161(h)(1)(D). By an 8-0 vote, the Court held that "the filing of a pretrial motion falls within this provision irrespective of whether it actually causes, or is expected to cause, delay in starting a trial."

5. *McNeill v. United States*, 10-5258. The federal Armed Career Criminal Act imposes a 15-year mandatory minimum sentence upon felons who unlawfully possess a firearm and have three or more prior convictions "for a violent felony or a serious drug offense." The statute defines a "serious drug offense" as one with "a maximum term of imprisonment of ten years or more." The Court unanimously held that where a state imposed a maximum sentence of 10 years for the offense at the time of conviction, but later amended the law to impose a maximum sentence of fewer than 10 years, the offense constitutes a "serious drug offense." In short, "the 'maximum term of imprisonment' for a defendant's prior state drug offense is the maximum sentence applicable to his offense when he was convicted of it."

6. *Sykes v. United States*, 09-11311. As noted, the federal Armed Career Criminal Act imposes a 15-year mandatory minimum sentence upon felons who unlawfully possess a firearm and have three or more prior convictions for drug crimes or "violent felon[ies]." 18 U.S.C. §924(e)(1). The Act defines "violent felony" as, *inter alia*, a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." By a 6-3 vote, the Court held that using a vehicle to flee from police after being ordered to stop, in violation of Indiana law, constitutes such a "violent felony."

7. *DePierre v. United States*, 09-1533. Under 21 U.S.C. §841(b)(1)(A), a 10-year mandatory minimum sentence must be imposed upon persons who engage in a drug-related offense involving (a) 5000 grams or more of "coca leaves" or "cocaine," or (b) 50 grams or more of those substances, or of a mixture of those substances, "which contain[] cocaine base." The Court unanimously held that "the term 'cocaine base' as used in this statute refers generally to cocaine in its chemically basic form" and not "exclusively to what is colloquially known as 'crack cocaine.'"

8. *Tapia v. United States*, 10-5400. The Court unanimously held that the Sentencing Reform Act "precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation." The Court relied on the language of 18 U.S.C. §3582(a), which states that a court ordering imprisonment must "recognize[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation."

9. *Freeman v. United States*, 09-10245. Under 18 U.S.C. §3582(c)(2), a criminal defendant sentenced to a term of imprisonment based on the Federal Sentencing Guidelines is permitted to apply for a reduction in sentence if the Guidelines range is later reduced. By a 4-1-4 vote, the Court held that a defendant may seek such a reduction even if his sentence is pursuant to a guilty plea under Federal Rule of Criminal Procedure 11(c)(1)(C) ─ so long as the plea agreement ties the recommended sentence to the Guidelines sentencing range.

§1983, *Bivens* Actions, Private Rights of Action

1. *Connick v. Thompson*, 09-571. By a 5-4 vote, the Court held that a district attorney's office may not be held liable under §1983 for a *Brady* violation committed by one of its prosecutors where no pattern of violations was shown. Specifically, the Court ruled that "this case does not fall within the narrow range of 'single-incident' liability hypothesized in *Canton* [*v. Harris*, 489 U.S. 378, 390 n.10 (1989)] as a possible exception to the pattern of violations necessary to prove deliberate indifference in §1983 actions [against municipalities] alleging failure to train." The Court found that "[a]ttorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." As a consequence, "recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law" ─ and therefore do not fit within the narrow exception.

2. *Camreta v. Greene*, 09-1454. In this §1983 action, the Ninth Circuit held that (1) Oregon officials violated the Fourth Amendment when, without a warrant, they interviewed at a school a child who had allegedly been abused by her father; but (2) the officials were entitled to qualified immunity. The officials sought review in the Supreme Court because, even though qualified immunity shielded them from damages, the Ninth Circuit's constitutional ruling adversely affected government operations. The Supreme Court held that (1) it "generally may review a lower court's constitutional ruling at the behest of a government official granted immunity," but (2) this particular case is moot because the "the child has grown up and moved across the country, and so will never again be subject to the Oregon in-school interviewing practices whose constitutionality is at issue." The Court therefore vacated "the part of the Ninth Circuit's opinion that decided the Fourth Amendment issue."

3. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 09-834. By a 6-2 vote, the Court held that an oral complaint of a violation of the Fair Labor Standards Act is protected conduct under the Act's anti-retaliation provision, 29 U.S.C. §215(a)(3). The Court therefore reversed a Seventh Circuit decision holding that the provision ─ which protects employees who have "filed any complaint" ─ refers solely to written complaints.

Miscellaneous

1. *United States v. Juvenile Male*, 09-940. By a 5-3 vote, the Court vacated as moot a Ninth Circuit decision holding that the requirements of the Sex Offender Registration and Notification Act (SORNA) violate the *Ex Post Facto* Clause. Respondent only had to register under SORNA until his 21st birthday; he turned 21 while the case was on appeal; and the Montana Supreme Court told the Court in answer to a certified question that registration under Montana law does not depend on the conditions of his federal confinement.

Dismissed as Improvidently Granted:

1. *Tolentino v. New York*, 09-11556. The Court had granted certiorari to review a New York Court of Appeals decision holding that, under the Fourth Amendment, "a defendant may not invoke the fruit-of-the-poisonous tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name."

CASES TO BE ARGUED IN THE 2011 TERM
(State AGO cases in bold)

Criminal Law – Criminal Procedure

1. ***Missouri v. Frye***, 10-444. The question presented by Missouri is whether "a defendant who validly pleads guilty [can] successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms." The Court also directed the parties to brief and argue the following question: "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?"

2. ***Lafler v. Cooper***, 10-209. The petition seeks review of a Sixth Circuit decision holding that a criminal defendant was prejudiced by his counsel's deficient advice not to accept a plea agreement when he was later convicted at trial and subject to a greater sentence than the plea offer. The question presented is: "Did the Sixth Circuit contravene 28 U.S.C. §2254(d)(1) where this Court has not clearly established entitlement to relief for ineffective assistance of counsel during plea bargain negotiations when the defendant is later convicted and sentenced pursuant to a fair trial?"

3. ***Howes v. Fields***, 10-680. The question presented is whether the Supreme "Court's clearly established precedent under 28 U.S.C. §2254 holds 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 regardless of the surrounding circumstances." In this case, respondent was escorted from his prison cell to a conference room where he was questioned by police ─ but he was neither shackled nor handcuffed, and he was told he could leave whenever he wanted to. The Sixth Circuit held that a Michigan Court of Appeals decision holding that he was not in custody for *Miranda* purposes was contrary to, and an unreasonable application, of clearly established law.

4. *Florence v. Board of Chosen Freeholders of the County of Burlington*, 10-945. The question presented is "[w]hether the Fourth Amendment permits a jail to conduct a

suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances." In this case, petitioner was strip searched at a jail after being arrested, following a stop for a traffic infraction, based on an outstanding bench warrant for failure to pay a fine.

5. ***Perry v. New Hampshire***, 10-8974. The question presented is: "Do the Due Process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, as some courts have held, or only when the suggestive circumstances were orchestrated by the police?"

6. *Smith v. Louisiana*, 10-8145. At issue is whether prosecutors violated *Brady v. Maryland* by failing to provide defense counsel with various witness statements that might have been helpful in impeaching the only eyewitness to the crime, prior (allegedly inconsistent) statements made by that eyewitness, and several statements that allegedly suggested the defendant was not the culprit.

7. *United States v. Jones*, 10-1259. In this case, federal agents installed a global positioning system (GPS) tracking device on respondent's car, and then monitored the car's movements for 30 days. At issue are (1) whether, as the D.C. Circuit held, "the warrantless use of a tracking device on respondent's vehicle to monitor its movement on public streets violated the Fourth Amendment"; and (2) "[w]hether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent."

8. *Williams v. Illinois*, 10-8505. At issue is whether ─ in light of *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico* ─ a defendant's Confrontation Clause rights are 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.

Criminal Law – Habeas Corpus/Capital Punishment

1. ***Maples v. Thomas***, 10-63. At issue in this capital case is whether petitioner showed cause to excuse procedurally defaulting his claims by failing to timely appeal the state trial court's denial of post-conviction relief. 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.) Petitioner argues that he has shown cause because (1) the trial court clerk was obligated to take action once it received the unopened envelopes, and (2) the Sullivan & Cromwell attorneys were no longer functioning as his agent once they left the firm and failed to provide notice to the Alabama courts.

2. *Greene v. Fisher*, 10-637. At issue is whether, for purposes of applying 28 U.S.C. §2254(d), a decision handed down by the Supreme Court *before* a state

prisoner's conviction became final but *after* his last state-court adjudication on the merits qualifies as "clearly established Federal law." In this case, the Third Circuit held that *Gray v. Maryland*, 523 U.S. 185 (1998) ─ which the Court issued after the state intermediate court affirmed his conviction on the merits, but before the Pennsylvania Supreme Court dismissed his appeal through a summary order ─ was not "clearly established Federal law" for purposes of assessing his federal habeas claim under §2254(d)(1).

3. ***Martinez v. Ryan***, 10-1001. The question presented in this very important habeas case is: "Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim."

4. ***Gonzalez v. Thaler***, 10-895. AEDPA's one-year statute of limitations 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." At issue is when "the conclusion of direct review" is when the prisoner declines to seek review in the state's highest court, and whether "expiration of the time for seeking [direct] review" includes the 90-day "period for filing a petition for a writ of certiorari with [the Supreme] Court even when the petitioner forewent discretionary review in the state's highest court." The Court also asked the parties to address whether there was "jurisdiction to issue a certificate of appealability under 28 U.S.C. §2253(c) and to adjudicate petitioner's appeal." This issue arises because the Fifth Circuit granted a certificate of appealability limited to the district court's procedural ruling dismissing Gonzales's petition on statute-of-limitations grounds, but did not ─ as required by *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) ─ also specify that Gonzales advanced a substantial underlying constitutional claim.

5. ***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 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 question presented is "[w]hether a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence."

<u>Criminal Law – Federal Statutes and Rules</u>

1. *Reynolds v. United States*, 10-6549. At issue is whether an individual convicted of violating the Sex Offender Registration and Notification Act ─ which requires every sex offender to register, and keep the registration current, in all states ─

has standing to challenge an interim rule adopted by the Attorney General that applies the law to those who were convicted of sex crimes before the law's enactment.

2. *Setser v. United States*, 10-7387. The Court granted certiorari to resolve whether a federal district court has the authority to order a federal criminal sentence "to run consecutively to an anticipated, but not-yet-imposed, state sentence."

§1983, *Bivens* Actions, Private Rights of Action

1. *Rehberg v. Paulk*, 10-788. The question presented is "[w]hether a government official who acts as a 'complaining witness' by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a Section 1983 claim for civil damages."

2. *Messerschmidt v. Millender*, 10-704. At issue is whether police officers are entitled to qualified immunity from a §1983 suit "where [the officers] obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search."

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.