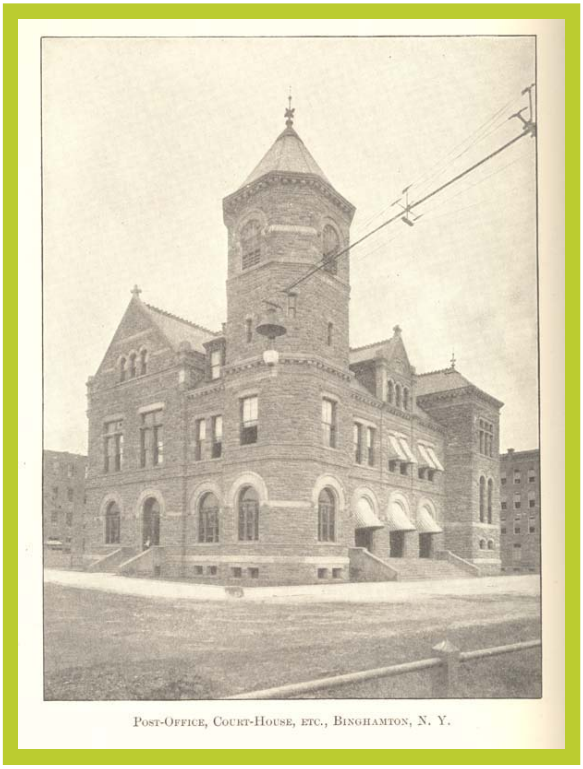

Table of Contents

Breaking News

On October 3, 2013, the Second Circuit rejected the use of penile plethysmograph testing as a standard condition of supervised release. Rather, the court held "that this extraordinarily invasive condition is unjustified, is not reasonably related to the statutory goals of sentencing, and violates McLaurin's right to substantive due process." ***United States v. McLaurin***, no. 12-3514 (Oct. 3, 2013).

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Introduction

The Supreme Court and the Second Circuit Court of Appeals have recently provided several opinions which will help in your criminal defense work. We invite you to take a look below, and, as always, we are happy to help with questions or comments you may have in your federal defense practice. E-mail inquiries are the best way to start so that we can research the issue and respond to you.

In these uncertain budgetary times, you should know that our office is open and will remain a resource to you.

Michael L. Desautels, Federal Public Defender

The categorical approach really does make a difference

At its most basic, the categorical approach provides defense counsel with a tool to fight the use of a prior conviction to enhance a sentence. The categorical approach also applies in other settings such as determining whether a conviction satisfies the criteria for removability. ***Higgins v. Holder***, 677 F.3d 97, 101 (2d Cir. 2012). In this article, we explain how applying the categorical approach can make a huge difference and can save a defendant from the fifteen-year mandatory minimum in the Armed Career Criminal Act ("ACCA"), which will apply to defendants with three or more violent felonies. As we explain, once freed from the mandatory minimum, the courts sentenced two real-life defendants to forty-five and twenty-four months imprisonment (one a client of our office and the other a defendant in the District of Connecticut).

In a recent case, the draft PSR concluded that our client was ACCA eligible based on his *five* prior burglary convictions. In this case, four of our client's burglary convictions were from Connecticut and were more than twenty-five years old. Three of those convictions were under Connecticut's third-degree burglary statute, Conn. Gen. Stat. § 53a-103(a). As we explain, this provision, however, is overbroad and does not constitute a "violent felony" within the meaning of the ACCA.

Connecticut's 3rd degree burglary statute is not a violent felony under ACCA.

For its part, the ACCA defines a violent felony as (a) an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (b) an offense that "is burglary, arson, or extortion, involves the use of explosives"; or (c) an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(1)(B). The third of these options is the so-called residual clause and, as we will see, it is only under the residual clause that Connecticut's third-degree burglary provision would qualify as a violent felony. (cont. p. 5)

Supreme Court Review (October Term 2012)

Use of narcotics detection dog in warrantless search

The Supreme Court addressed two important Fourth Amendment issues related to canine searches during its last term. In ***Florida v. Jardines***, 133 S.Ct. 1409 (2013), the defendant challenged the warrantless use of a narcotics detection dog on his front porch. Justice Scalia authored the majority opinion in which the Court concluded that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Id*. at 1417-1418. The Court's opinion turned not on privacy interests, but on an invasion of property rights with the Court holding that the police went beyond what members of the public could do when they used a police dog to investigate the defendant's front porch:

> [A] police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.

Id. at 1416 (citations omitted).

Reliability of narcotics detection dog

In ***Florida v. Harris***, 133 S.Ct. 1050 (2013), the Court considered the type of evidence required to prove that a narcotics detection dog is reliable. The Supreme Court concluded that there was no "strict evidentiary checklist, whose every item the State must tick off," *id*. at 1056, and in so doing explained that a defendant must have sufficient information to challenge the government's claim of reliability:

> A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the dog's (or handler's) (cont. p. 3)

Supreme Court Preview

The Supreme Court's October 2013 docket contains a number of cases that may be of interest.

Consensual searches

In ***Fernandez v. California***—decision below at 208 Cal. App.4th 100 (2012)—police chased the defendant into his apartment where they arrested and removed him. Prior to being removed, the defendant objected to any search of the premises. After his removal, authorities obtained consent for the search from his co-tenant. Previously, in ***Georgia v. Randolph***, 547 U.S. 103, 120 (2006), the Supreme Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." The Court will thus consider whether the objection of a no-longer-present co-tenant to a search is overridden by the consent later provided by the other, still-present co-tenant.

Tenth Amendment/Federalism

Next, Ms. Bond's case returns to the court. In ***Bond v. United States***, 131 S.Ct. 2355, 2365 (2011), the Court unanimously held that "[j]ust as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism." The Court's opinion also made it clear that "[f]ederalism secures the freedom of the individual" and,

> The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate. (cont. p. 4)

Around the circuit

In a notable Fourth Amendment decision, the Second Circuit vacated the defendant's conviction and his 572 month sentence based on an overbroad and invalid warrant; the case was remanded for further factfinding. ***United States v. Galpin***, 720 F.3d 436 (2d Cir. 2013). The decision also considers the application of the plain-view doctrine to a search of a computer. Galpin had a prior New York conviction that stemmed from abusing 22 boys between the ages of 10 and 15; this conviction required him to register as a sex offender. After concerned citizens suggested that Galpin was again targeting young boys, "surveillance revealed numerous boys between the ages of 10 and 16 [were] visiting the residence and spending the night." *Id*. at 440. Further investigation showed that Galpin was communicating with some boys using the internet and indicated he had failed to register one of his screen names as required by New York's sex offender registration law. Based on this information, authorities sought a warrant to search Galpin's residence and all his personal property "for, inter alia, cameras, computers, cell phones, and any and all computing or data processing software, 'which may reveal evidence which substantiates violations of Penal Law statutes, Corrections Law statutes and or Federal statutes.'" *Id*. Not surprisingly, authorities found numerous images constituting child pornography when they seized Galpin's computer. The images led to a nine-count indictment to which Galpin pled guilty.

At its most basic, the district court and the Second Circuit concluded that the failure to identify with particularity the offense being targeted rendered the warrant invalid. *Id*. at 445 ("a warrant must identify the specific offense for which the police have established probable cause."). It is the Fourth Amendment's particularity requirement that is offended by broadly worded warrants:

> To prevent such "general, exploratory rummaging in a person's belongings" and the attendant privacy violations, the Fourth Amendment provides that "a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity."

Id. (citations omitted). In Galpin's case, there was no question that a warrant authorizing a search for "evidence which substantiates violations of Penal Law statutes, Corrections Law statutes and or Federal statutes" was overbroad and invalid; indeed, the government conceded the point.

Because the only actual crime cited in the warrant was the failure-to-register offense, the more problematic issue was the district court's conclusion that the invalid portions of the warrant could be severed from the valid portions of the warrant. Also potentially problematic was the district court's conclusion that the child pornography found was in plain view (on the hard drive). In the view of the *Galpin* Court, such a conclusion presents important concerns when dealing with electronic property because:

> Once the government has obtained authorization to search the hard drive, the government may claim that the contents of every file it chose to open were in plain view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant. There is, thus, "a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant." This threat demands a heightened sensitivity to the particularity requirement in the context of digital searches.

Id. at 447 (citations omitted). (cont. p. 4)

Supreme Court Review (cont.)

> history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant, as the Solicitor General acknowledged at oral argument. See Tr. of Oral Arg. 23–24 ("[T]he defendant can ask the handler, if the handler is on the stand, about field performance, and then the court can give that answer whatever weight is appropriate"). And even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions.

Id. at 1057-1058.

Harris supports a claim for discovery when challenging a search

The Court's decision in *Harris* lends support to those defendants seeking discovery in order to challenge a search. The principles affirmed in *Harris* have already been adopted in this district, ***United States v. Wright***, 2008 WL 8797841 (D.Vt. 2008) (Sessions, J.), and have been applied to other settings, including the use of automated computer programs to discovery child pornography, ***United States v. Budziak***, 697 F.3d 1105 (9th Cir. 2012).

Involuntary taking of blood and DNA

In two cases involving the involuntary taking of biological samples, the Supreme Court reached differing results. On the one hand, in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), the Court considered whether exigent circumstances supported a nonconsensual and warrantless blood draw following an arrest for DUI. The Supreme Court concluded it did not and held that "natural dissipation of alcohol in the bloodstream does not establish a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." (cont. p. 5)

Supreme Court Preview (cont.)

Id. at 2364. Furthermore, the Supreme Court made it clear that individuals could raise claims related to both "principles of limited national powers and state sovereignty." *Id*. at 2366. On remand, the Third Circuit rejected her challenge and concluded that the normal limits on federal power are not applicable to statutes that implement a valid treaty. 681 F.3d 149 (3d Cir. 2012). The Third Circuit thought this result was required under the Supreme Court's decision in ***Missouri v. Holland***, which stated that "if [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. 416, 432 (1920).

Aiding & abetting

In ***Rosemond v. United States***—decision below at 695 F.3d 1151 (10th Cir. 2012)—the Supreme Court will consider whether liability for aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime requires proof of (a) intentional facilitation or encouragement of the use of the firearm or (b) simple knowledge that the principal used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated.

Distribution of drugs causing death

Finally, in ***Burrage v. United States***—decision below at 687 F.3d 1015 (8th Cir. 2012)—the Supreme Court will consider whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime—without a foreseeability or proximate cause requirement—or whether a person can be convicted for distribution of heroin causing death utilizing jury instructions which allow a conviction when the heroin that was distributed "contributed to," death by "mixed drug intoxication," but was not the sole cause of death of a person.

Brushing up on administrative law

Relevant federal regulations can provide a potent tool to wield on behalf of a client. The Sex Offender Registration and Notification Act ("SORNA"), for example, has implementing regulations that may weigh against application of SORNA for some defendants. The DOJ-promulgated regulations tend to cabin the most expansive SORNA provisions by employing an elements-based, categorical approach rather than a facts-based or conduct-centered approach, a difference that may mean the difference between guilt and innocence. ***United States v. Piper***, 2013 WL 4052897 (D.Vt.).

Earlier this year, David McColgin conducted a bench trial in front of Judge Murtha that was essentially limited to determining whether the defendant's Vermont conviction for lewd and lascivious conduct, 13 V.S.A. § 2601, required him to register as a sex offender under 42 U.S.C. § 16911.

By way of background, the federal criminal offense found in 18 U.S.C. § 2250 provides penalties for sex offenders who move in interstate commerce and who violate the registration (cont. p. 6)

Around the circuit (cont.)

The Second Circuit ultimately remanded the case to the district court for further fact finding and in doing so explained how the severability analysis should be conducted. Specifically, the opinion sets forth a three-part analysis:

> First, the court must separate the warrant into its constituent clauses. Second, the court must examine each individual clause to determine whether it is sufficiently particularized and supported by probable cause. Third, the court must determine whether the valid parts are distinguishable from the nonvalid parts.

Id. at 448-449 (citations omitted). "In sum," the *Galpin* Court explained, "the court must be able to excise from the warrant those clauses that fail the particularity or probable cause requirements in a manner that leaves behind a coherent, constitutionally compliant redacted warrant." *Id*. at 449.

Still, even when the warrant is grammatically amenable to severance, the Second Circuit cautioned that:

> The district court must also determine whether the valid portions make up "only an insignificant or tangential part of the warrant." Even where parts of the warrant are valid and distinguishable, severance may be inappropriate where, for instance, the sufficiently particularized portion is "only a relatively insignificant part of a sweeping search," or where "the warrant is generally invalid but as to some tangential item meets the requirement of probable cause." This step of the analysis should not simply be a technical exercise of counting words and phrases but, rather, "a holistic test that examines the qualitative as well as the quantitative aspects of the valid portions of the warrant relative to the invalid portions."

Id. (citations omitted). Only if the warrant was severable could the district court reach the question of whether the evidence ultimately discovered was in plain view. The Second Circuit provided guidance on this point as well.

Because a valid warrant would have been limited to a search for evidence of the registration offense, any search of the defendant's computer would have been similarly limited. Thus, on remand, the Second Circuit ordered the district court to examine the nature of the search undertaken by the computer forensic examiners (which testimony suggested was unduly broad). *Id*. at 451 ("the district court's review of the plain view issue should take into account the degree, if any, to which digital search protocols target information outside the scope of the valid portion of the warrant. To the extent such search methods are used, the plain view exception is not available."). (cont. p. 7)

Categorical approach makes a difference (cont.)

The Connecticut provision provides that "[a] person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein." Conn. Gen. Stat. § 53a-103(a). The relevant definitional provisions further expand the meaning of "building":

> "Building" in addition to its ordinary meaning, includes any watercraft, aircraft, trailer, sleeping car, railroad car or other structure or vehicle or any building with a valid certificate of occupancy.

Id. § 53a-100(a)(1). On the face of it, the Connecticut law does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(1)(B). Nor can the Connecticut offense qualify as a burglary because in the ACCA setting, the Supreme Court has said that a burglary offense must be a generic burglary, that is, a burglary "committed in a building or enclosed space ('generic burglary'), not in boat or motor vehicle." ***Shepard v. United States***, 544 U.S. 13, 16 (2005). As was the case in *Shepard*, Connecticut's burglary statute does not limit the meaning of building to vehicles used for overnight lodging or for business. Instead, the Connecticut statute extends to ordinary cars, watercraft, and aircraft.

Thus, a Connecticut third-degree burglary conviction could only qualify as a violent felony if it "otherwise involves conduct that presents a serious potential risk of physical injury to another"; that is, only if the offense qualifies under the so-called residual clause. While it is true that the Second Circuit has previously concluded that New York's third-degree burglary statute qualifies as a violent felony, the New York provision is narrower. Thus, a court considering the same Connecticut law explained that "New York's burglary statute limits its reach to the sorts of vehicles where such a heightened risk exists—vehicles where a person might live or commercial vehicles where persons might work. Connecticut's third degree burglary statute is much broader." ***United States v. Alvarado***, 2013 WL 662659 at *5 (D. Conn.). Because the Connecticut provision includes a broader range of conduct, it will include conduct—e.g., theft from an unoccupied vehicle—that does not "'in the ordinary case, present[] a serious potential risk of injury to another' [and] that is 'comparable to that posed by its closest analog among the enumerated [ACCA] offenses.'" ***United States v. Harrington***, 689 F.3d 124, 132 (2d Cir.2012) (quoting ***United States v. James***, 550 U.S. 192, 208 (2007)). In short, this means that Connecticut's third-degree burglary statute is not a violent felony and the ACCA enhancement does not apply.

Needless to say, the difference between a fifteen-year mandatory minimum sentence (180 months) and a forty-five or twenty-four month sentence is huge for a client. The sentences ultimately imposed—forty-five months for our client in Vermont and twenty-four months for the defendant in Connecticut—provide a clear example of the extent to which a mandatory minimum binds the judge's hands and precludes him or her from "impos[ing] a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)]." 18 U.S.C. § 3553(a). In addition to spending less time behind bars, those 289 months not served by these defendants also amounts to some $695,849 in savings to the taxpayer.

Supreme Court Review (cont.)

In another case, ***Maryland v. King***, 133 S. Ct. 1958 (2013), the Court considered whether the Fourth Amendment permitted authorities to take an involuntary DNA sample as part of normal booking procedures. The Supreme Court concluded that—at least for serious offenses—a minimally intrusive cheek swab is a reasonable search that advances legitimate state interests and can be conducted as part of a routine booking procedure.

The "modified" categorical approach is used only with divisible statutes

The categorical approach provides counsel with a powerful tool to contest the use of a prior conviction to enhance a client's sentence. The Supreme Court's decision in ***Descamps v. United States***, 133 S.Ct. 2276 (2013), affirms the Second Circuit's decision in ***United States v. Beardsley***, 691 F.3d 252 (2d Cir. 2012), and makes it clear that the so-called modified categorical approach can apply only when a divisible statute is involved. As a recent Second Circuit decision summarized, *Descamps* Court explained that:

> As both the Supreme Court and this court have since clarified, however, this statement was erroneous in two respects. First, the modified categorical approach is "applicable only to divisible statutes," and does not apply merely because "the congruency of the [state] and federal statutes [cannot] be determined from their text alone." Second, "the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute," and therefore a court employing that approach may not "analyze whether the facts underlying the state conviction satisfied the elements of the federal statute." Rather, the modified categorical approach simply provides a tool enabling courts to discover the *elements* of the defendant's prior conviction. These principles apply to any prior conviction, whether stemming from a jury verdict or a guilty plea.

United States v. Barker, 723 F.3d 315, 321 (2d. Cir. 2013) (citations omitted, emphasis in original). As the quote makes clear, even when the modified categorical approach is used, it is only used "to discover the *elements* of the defendant's prior conviction." The modified categorical approach ***is never used*** to determine whether the defendant's conduct satisfied the predicate enhancement. (cont. p. 7)

Administrative law (cont.)

requirements in 42 U.S.C. § 16911. For its part, § 16911 requires sex offenders to register and defines sex offender as "an individual who was convicted of a sex offense." Section 16911's definition of sex offense includes "a criminal offense that is a specified offense against a minor," *id.* § 16911(5)(A)(ii). A later subdivision further expands the "specified offense against a minor" definition as follows:

> The term "specified offense against a minor" means an offense against a minor that involves any of the following:
> (A) An offense (unless committed by a parent or guardian) involving kidnapping.
> (B) An offense (unless committed by a parent or guardian) involving false imprisonment.
> (C) Solicitation to engage in sexual conduct.
> (D) Use in a sexual performance.
> (E) Solicitation to practice prostitution.
> (F) Video voyeurism as described in section 1801 of Title 18.
> (G) Possession, production, or distribution of child pornography.
> (H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
> (I) Any conduct that by its nature is a sex offense against a minor.

Id. § 16911(7). It is subdivision (7)(I)—"[a]ny conduct that by its nature is a sex offense against a minor"—that courts have described as a catch-all "that could not be any broader" because, among other things, its text tends to invite a court to examine the conduct underlying a defendant's prior conviction. ***United States v. Dodge***, 597 F.3d 1347, 1355 (11th Cir. 2010). Indeed, most courts considering the issue have concluded that the use of the term "conduct" means that a court should not apply an elements-based, categorical approach. *Id.*; ***United States v. Byun***, 539 F.3d 982, 992 (9th Cir. 2008).

In this case, a fact- or conduct-based approach would clearly have required the defendant to register as a sex offender because the underlying conduct involved masturbating in front of children. An elements-based approach, however, would not have required him to register because the offense of conviction, 13 V.S.A. § 2601, does not require the victim to be a minor.

Crucially, the Department of Justice has expressly stated that courts should employ an elements-based approach. Thus in the so-called SMART Guidelines the Attorney General has said that:

> The final clause [of section 16911] covers '[a]ny conduct that by its nature is a sex offense against a minor.' It is intended to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense, such as specially defined child molestation or child prostitution offenses, and other offenses prohibiting sexual activity with underage persons. Jurisdictions can comply with the offense coverage requirement under this clause by including convictions for such offenses in their registration requirements.

Office of the Attorney General, The National Guidelines for Sex Offender Registration and Notification, 73 FR 38030, 38053 (July 2, 2008). Whether a court would defer to and/or accept the Attorney General's interpretation depends on the application of the *Chevron* two-step and whether *Chevron* deference is applicable at all.

While there is some authority for the proposition that *Chevron* deference is inapplicable to criminal justice matters, Judge Murtha determined that *Chevron* deference was applicable for two reasons. *Piper*, 2013 WL 4052897 at 5-7. First, Congress specifically charged the Attorney General with defining the scope of the criminal enforcement provisions and, hence, the SMART Guidelines are not merely advisory. Second, SORNA is a hybrid regulatory scheme that, on the one hand, establishes a comprehensive national sex offender registry and, on the other hand, establishes criminal liability for violating the registration requirements.

Once a court determines that deference is appropriate, the *Chevron* two-step requires a court to consider:

> [W]hether Congress has clearly spoken to the question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." . . . . If we determine that "Congress has not directly addressed the precise question at issue," we proceed to *Chevron* step two, which instructs us to defer to an agency's interpretation of the statute, so long as it is "reasonable."

Mizrahi v. Gonzales, 491 F.3d 156, 158 (2d Cir. 2007) (internal citations omitted). In the first instance, Judge Murtha reasoned that Congress had not clearly spoken on whether courts should employ an elements-based approach under § 16911(7)(I). While it is true that subsection (7)(I) references "conduct," it is also true that other portions of § 16911 specify an elements-based approach and, further, Congress specifically tasked the Attorney General defining the scope of the provision. For these reasons, and because an elements-based approach would better serve the Congressional goal of a unified national approach, Judge Murtha concluded that Congress had not directly addressed the issue. *Piper*, 2013 WL 4052897 at *7-10. Because, Judge Murtha concluded that the Attorney General's interpretation was reasonable and because the offense of conviction did not require proof of the victim's age as an element, Judge Murtha concluded as a matter of law that the defendant was not guilty. *Id.* at *11.

Supreme Court Review (cont.)

Other notable Supreme Court decisions

The Supreme Court heard a number of other notable cases, including ***Bailey v. United States***, 133 S. Ct. 1031 (2013), in which the High Court reversed the Second Circuit. In *Bailey*, the Court declined to extend ***Michigan v. Summers***, 452 U.S. 692 (1981), which allows officers to detain the occupants of a premises being searched while the search is being conducted. For its part, the Second Circuit thought that *Summers* permitted the police to detain Bailey, who was a mile away from the premises and who had been handcuffed prior to the search warrant being executed.

In ***Alleyne v. United States***, 133 S. Ct. 2151 (2013), the Supreme Court held that all facts that fix the penalty range of a crime must be found by a jury. Because this rule extends to the facts that establish a mandatory minimum penalty, the Court overruled its decision in ***Harris v. United States***, 536 U.S. 545 (2002). Unfortunately, ***Almendarez-Torres v. United States***, 523 U.S. 224 (1998), remains good law, though perhaps on weaker footing. *Alleyne*, 133 S.Ct. at 2160 n.1. ("In *Almendarez–Torres* . . ., we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.").

Low level drug offenses are not aggravated felonies

Also notable is ***Moncrieffe v. Holder***, 133 S. Ct. 1678, (2013), in which the Court concluded that a low-level drug offense may not qualify as an "aggravated felony" and therefore subject an alien to removal: "[i]f a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA." The Court's decision in *Moncrieffe* is in keeping with its earlier holdings that minor drug offenses may not satisfy the criteria for removability. *See, e.g.*, ***Carachuri-Rosendo v. Holder***, 560 U.S. 563 (2010).

Ex Post Facto clause and the Guidelines

Finally, in ***Peugh v. United States***, 133 S. Ct. 2072 (2013), the Supreme Court held that the Ex Post Facto clause is violated when a defendant is sentenced under a guideline manual that is more severe than what was in effect at the time of the offense.

Around the circuit (cont.)

Closed courtrooms

In ***United States v. Gomez***, 705 F.3d 68 (2d Cir. 2013), the Second Circuit concluded that the exclusion of the defendant's family members from the courtroom during voir dire was harmless error. The decision in *Gomez* stands in some contrast to prior decisions such as ***United States v. Gupta***, 699 F.3d 682 (2d Cir. 2012), where the defendant's conviction was reversed based on the closure of the courtroom during voir dire. The problem in *Gupta* (and in *Gomez* as well) was that the district court failed to consider the criteria specified by the Supreme Court in ***Waller v. Georgia***, 467 U.S. 39, 48 (1984):

> (1) "the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced"; (2) "the closure must be no broader than necessary to protect that interest"; (3) "the trial court must consider reasonable alternatives to closing the proceeding"; and (4) the trial court "must make findings adequate to support the closure,"

Although the Second Circuit has previously said that there may be some instances in which the closure of the court room will be trivial and will not warrant reversal, the facts of *Gomez* would seem to have been sufficiently similar to those in *Gomez* to command the same outcome. Instead, the *Gomez* Court refused to state that the exclusion was even error, characterized any error as being invited, and stated that "the fairness and public reputation of the proceeding would be called into serious question if a defendant were allowed to gain a new trial on the basis of the very procedure he had invited." 705 F.3d 68, 76.

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