



## Supreme Court 2005 — 2006 Review

**I**n recent years, we have become accustomed to blockbuster cases being decided by the U.S. Supreme Court. Although there were no blockbuster cases decided in the 2005-2006 term, several important cases were handed down. In two high-publicity cases, the Court struck down the military tribunal procedures for Guantanamo Bay detainees and also upheld Oregon's Death with Dignity Act. In less publicized but more important cases, the Court revisited Crawford to determine what statements are "testimonial" in nature and also readdressed Apprendi/Blakely, finding that non-compliance is subject to harmless error analysis.

There were four capital punishment decisions as well as five cases focusing on search and seizure. The Court surprisingly found that a federal defendant cannot waive his right to a speedy trial. Probably the most significant aspect of the term was the effect of the addition of Justice Samuel Alito and Chief Justice John Roberts.

### Search and Seizure

#### Invalid Search Based on Co-Tenant's Consent

*Georgia v. Randolph*, 126 S.Ct. 1515 (2006). In a 5-3 decision (Justice Alito did not participate), the Supreme Court ruled that the search of the defendant's home was invalid, notwithstanding his wife's consent. Scott Randolph was present and unequivocally rejected the

police officers' request for consent to search. The officers then turned to his wife, Janet Randolph, who consented to the search, which yielded a white, powdery substance believed by officers to be cocaine. The Georgia Supreme Court invalidated the search due to Scott Randolph's contemporaneous objection.

The majority opinion, written by Justice Souter, upheld the Georgia Supreme Court, notwithstanding that a "majority" of the courts considering this issue had ruled the opposite way, citing *United States v. Matlock*, 415 U.S. 164 (1974). Justice Souter admitted that the majority's decision would not extend to, for example, a defendant who was asleep inside the premises when a co-tenant consented to the search. See *Illinois v. Rodriguez*, 497 U.S. 177 (1990). He analogized to a situation where a third party is at a door and is simultaneously invited in by one co-tenant but refused admission by the other co-tenant. He concluded that the average person would not enter the premises under such a conflicted situation. In the absence of a "hierarchy" between the tenants, the invitation to enter would be at a stalemate. Police officers are in no better situation. "Hierarchy" situations would include parent/child or military barracks housing with personnel of different military rank.

Chief Justice Roberts authored a dissenting opinion and was joined by Justice Scalia. He criticized the majority for having a "happencence basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but

**Editor's Note:** The longer version of this article, which includes cases involving impaired mental condition and AEDPA, is available at [www.nacdl.org](http://www.nacdl.org).

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Article 36 confers enforceable rights to foreign nationals arrested in this country. However under the facts of these two cases, she concurred with the majority that suppression was not warranted and that procedural default was justified.

While some have argued that the door has been closed on a violation of the Vienna Convention yielding any positive results for the accused, this may not be the case. Both defendants here had relatively weak arguments concerning prejudice. Since there are many foreign nationals being arrested in this country, as well as residing in our jails and prisons, it is probably still important to litigate these issues, if for no other reason than to avoid a post-conviction claim for ineffective assistance.

## Defenses

### Duress Defense — Federal Prosecution — Prove by Preponderance of the Evidence

*Dixon v. United States*, 126 S.Ct. 2437 (2006). Keshia Dixon purchased multiple firearms at two gun shows, provided an incorrect address, and falsely stated that she was not under indictment for a felony. She claimed at trial that she knew she was under indictment but made the purchases because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him.

Unlike a majority of the other circuits, the Fifth Circuit had ruled that the defense of duress must be proven by the defendant to a preponderance of the evidence, and the trial judge so instructed the jury. Dixon had requested an instruction requiring the government to prove beyond a reasonable doubt that she did not act under duress. Four other circuits most likely would have placed the burden of persuasion squarely on the prosecution, but the issue would have depended on the actual wording of the statutes allegedly violated. Only the Fifth Circuit had squarely ruled that the burden of persuasion was upon the defendant to a preponderance of the evidence.

The U.S. Supreme Court (7-2) agreed with the Fifth Circuit in a decision by Justice Stevens. The majority looked to the common law, which traditionally placed the burden of proving duress upon the person asserting the issue. Justice Breyer dissented, joined by Justice Souter, and argued that in the face of silence by Congress, the Court should not assume that Congress was defaulting to the common law. Instead, it was equally likely that Congress "expected the courts to develop burden rules governing affirmative defenses as they have done in the

past." He analogized to self-defense and entrapment where the prosecution bears the burden of disproving those defenses.

This case should be worrisome to state practitioners throughout the country. Several states place the burden of disproving defenses or "affirmative" defenses on the prosecution beyond a reasonable doubt. The ruling in *Dixon* may spawn several states to re-evaluate the burden of proof allocation, not only concerning duress, but other defenses as well.

## Sentencing

### Harmless Error Analysis Applies to *Apprendi* Errors

*Washington v. Recuenco*, 126 S.Ct. 2546 (2006). In an opinion written by Justice Thomas, the Supreme Court (7-2) concluded that *Apprendi/Blakely* errors did not qualify as structural errors and, therefore, were subject to harmless error analysis.

The state prosecutors in this case conceded that under *Apprendi/Blakely*, the defendant's right to a jury trial was violated at sentencing. The defendant was found guilty of second degree assault and, in a special verdict, the jury found the assault was committed with a deadly weapon. The impact of the special verdict was to subject the defendant to a one-year sentence enhancement. At the sentencing hearing, the judge found that the deadly weapon was a firearm which triggered a mandatory three-year enhancement of the defendant's sentence.

The majority found that the case was indistinguishable from *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, the Court held that jury instructions which failed to submit an element of an offense were subject to harmless error review. The majority rejected the defendant's reliance on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), which held that a jury instruction which erroneously defined reasonable doubt amounted to a structural error. Justice Kennedy concurred, but wrote separately to reiterate his opinion that *Apprendi* and *Blakely* were wrongly decided.

Justice Ginsberg dissented, joined by Justice Stevens, and argued that *Neder* was distinguishable. In addition, Justice Stevens wrote separately to argue that *certiorari* should not have been granted since it was questionable whether the Court had jurisdiction.

## Miscellaneous

### Guantanamo Bay Detainees

*Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). In a case that attracted

huge publicity, the Supreme Court (5-3), per Justice Stevens, invalidated the scheme providing for trial by military commission for the Guantanamo Bay detainees. Hamdan, a detainee at Guantanamo Bay, initiated federal *habeas corpus* proceedings and argued, in part, that a trial by military commission violated the Geneva Convention and the Uniform Code of Military Justice. The federal district court judge agreed and enjoined the trial. The District of Columbia Circuit reversed, holding that the Geneva Conventions are not judicially enforceable.

During the pendency of proceedings, Congress passed the 2005 Detainee Treatment Act ("DTA"), attempting to preclude courts from hearing *habeas corpus* suits filed by Guantanamo Bay detainees. Based on the DTA, the government moved the Supreme Court to dismiss certiorari proceedings. The majority sidestepped ruling on the enforceability of the DTA by finding that Congress did not intend the *habeas* proceedings initiated before the date of the DTA. The majority then proceeded to hold that the 1949 Geneva Conventions extend to the Guantanamo Bay detainees and that, by the very terms of the Geneva Conventions, the detainees must be tried by a "regularly constituted court." A regularly constituted court would be a court martial pursuant to the Uniform Code of Military Justice. The Court found that the government failed to demonstrate that it would be an unnecessary burden or impracticable to implement the court martial procedures. ❁

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