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U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

May 28, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Theodore B. Olson
by [Signature]

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- **Supreme Court Decided Patent Case.** On May 28, the Supreme Court issued its decision in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* The questions presented were (i) whether an amendment that narrows the scope of a patent claim for reasons related to statutory patent requirements creates prosecution history estoppel with respect to the amended portion of the claim, and (ii) whether such estoppel bars invocation of the doctrine of equivalents. The United States argued as *amicus curiae* that prosecution history estoppel does apply to such a patent amendment, but that prosecution history estoppel does not totally preclude application of the doctrine of equivalents, but instead creates a presumption against its applicability in cases falling within the scope of the amendment and places the burden on the patentee to overcome the presumption. The Court agreed entirely with our position as *amicus curiae* in a unanimous opinion.

- **Supreme Court Decided Eleventh Amendment Case.** On May 28, the Supreme Court issued its decision in *Federal Maritime Commission v. South Carolina State Ports Authority*. The question presented was whether the Eleventh Amendment or principles of state sovereign immunity prevent the Federal Maritime Commission (FMC) from resolving, in an administrative non-judicial proceeding, a private party's claim that the State's agency violated the Shipping Act of 1984. The Department argued that such a federal agency proceeding is not constitutionally prohibited. The Supreme Court disagreed, holding that sovereign immunity bars the FMC from adjudicating a private

party's complaint against a nonconsenting state. Justice Thomas wrote the opinion for the Court. Justice Stevens wrote a dissenting opinion. Justice Breyer also wrote a dissenting opinion, which was joined by Justices Stevens, Souter, and Ginsburg.

- **Supreme Court Decided Social Security Case.** On May 28, the Supreme Court issued its decision in *Gisbrecht v. Barnhart*. The question presented was whether reasonable attorney's fees under 42 U.S.C. 406(b) -- which are available as deductions from a prevailing claimant's back benefit award of social security benefits -- should be calculated using the lodestar method, which essentially multiplies the hours the attorney worked by a reasonable hourly rate, or whether the court may rebuttably presume that the attorney should receive the maximum contractual award permitted by the statute. The Department argued that courts should employ the lodestar method. The Court disagreed, holding that section 406(b) does not displace contingent-fee arrangements that are within the maximum permitted by statute. Rather, section 406(b) instructs courts to review fees yielded by such agreements for reasonableness. Justice Ginsburg wrote the opinion for the Court. Justice Scalia filed a dissenting opinion.

- **Supreme Court Decided Habeas Case.** On May 28, the Supreme Court issued its decision in *Bell v. Cone*. The questions presented were: (i) under what standard should the courts analyze defendant's claim of ineffective assistance based on his lawyer's not presenting mitigating evidence and not offering a closing argument during a capital sentencing hearing, and (ii) whether a state court's decision to deny such a claim involved an unreasonable application of clearly established federal law. The Department argued that the claim should be analyzed under *Strickland v. Washington*, which requires that a defendant prove both that his counsel's performance was deficient and prejudicial. The Court agreed, holding that respondent's claim was governed by *Strickland* and that the state court's decision that trial counsel's performance was reasonable was neither "contrary to" nor involved "an unreasonable application of clearly established federal law." Chief Justice Rehnquist wrote the opinion for the Court. Justice Stevens filed a dissenting opinion.

- **Supreme Court Granted Certiorari in Social Security Case.** On May 28, the Supreme Court granted a petition for certiorari in *Washington State Dept. of Social & Health Services v. Estate of Danny Keffeler*. Sections 405(j) and 1383(a) of Title 42 authorize the Commissioner of Social Security to appoint a representative payee to receive benefits on behalf of a beneficiary, and social security regulations provide that the payee may use the benefits to pay for the beneficiary's current care. Section 407(a) of Title 42 provides that these benefits are not subject to "execution, levy, attachment, garnishment, or other legal process." The question presented is whether a representative payee violates 42 U.S.C. 407(a) when the payee uses the benefits to pay for the beneficiary's current care.

- **Supreme Court Granted Certiorari in First Amendment Case.** On May 28, the Supreme Court granted a petition for certiorari in *Virginia v. Black*. The question presented is whether the Virginia statute that bans cross burning with intent to intimidate violates the First Amendment, even

though the statute reaches *all* such intimidation and is not limited to any racial, religious or other content-focused category.

- **Supreme Court Granted Certiorari in Criminal Case.** On May 28, the Supreme Court granted the government's petition for certiorari in *United States v. Recio*. The question presented is whether a conspiracy ends as a matter of law when the government frustrates its objective.
- **Supreme Court Granted Certiorari in Tax Case.** On May 27, the Supreme Court granted a petition for certiorari in *The Boeing Co. v. United States*. The question presented is whether Treasury Regulation § 1.861-8(e)(3), which governs the allocation of research and development costs between foreign and domestic income, may be applied to the computation of taxable income for export subsidiaries entitled to special tax treatment under the Internal Revenue Code. The Department had filed a brief urging the Court to deny the petition.

C. LAST WEEK

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Patent Case.** On May 22, at the Supreme Court's invitation, the Department filed a brief as *amicus curiae* opposing the grant of certiorari in *Fin Control Systems Pty, Ltd. v. Surfco Hawaii*. The question presented is whether a person that sells a replacement part for a patented invention is liable for contributory patent infringement if the part is used, without permission of the patentee, to replace an unpatented working part of the invention. The Department argued that the sale of such replacement parts does not infringe the patent for the invention.
- **Supreme Court Decided Criminal Case.** On May 20, the Supreme Court issued its unanimous decision in *United States v. Cotton*. The question presented was whether a defendant's enhanced sentence should be reversed because his indictment omitted a fact justifying the enhancement, even though the defendant failed to object to the omission, the government's evidence was overwhelming, and the defendant received notice that his sentence could be enhanced. The Department argued that reversal under such circumstances is improper, and the Supreme Court agreed. The Court unanimously held that factual omissions in an indictment do not present a jurisdictional error, and that such omissions are subject to plain error review. Where the government's evidence is overwhelming and undisputed, the Court held that such indictment errors do not affect a judicial proceeding's fairness, reputation, or integrity, and thus cannot justify reversal if the defendant fails to object at trial.
- **Supreme Court Decided Telecommunications Act Case.** On May 20, the Supreme Court issued its unanimous decision in *United States v. Public Service Commission of Maryland*. The Telecommunications Act of 1996 provides authority for state utility commissions to regulate "interconnection agreements" between local exchange carriers and potential competitors. The questions presented were: (1) whether a state commission's enforcement of an interconnection

agreement is reviewable in federal court, (2) whether the participation of a state commission in the Act's regulatory scheme constitutes a waiver of Eleventh Amendment immunity, and (3) whether injunctive relief is available for commissioners' ongoing violations of federal regulatory responsibilities. The Department argued that a commission's enforcement activities are federally reviewable, that participation under the Act constitutes an Eleventh Amendment waiver, and that *Ex parte Young* permits prospective injunctive relief. The Supreme Court agreed as to the questions of reviewability and prospective relief, and it did not decide the question of Eleventh Amendment waiver. Justice Kennedy filed a concurring opinion, and Justice Souter filed a concurring opinion that Justices Ginsburg and Breyer joined.

- **Supreme Court Dismissed Telecommunications Act Case.** On May 20, the Supreme Court issued an opinion dismissing as improvidently granted the writ of certiorari in *Mathias v. Worldcom Technologies*. *Mathias* raised issues identical to those considered in the *Public Service Commission* case.
- **Supreme Court Granted Certiorari in Sex Offender Case.** On May 20, the Supreme Court granted a petition for certiorari in *Connecticut Department of Public Safety v. Doe*. The question presented is whether a sex offender registration law violates the Due Process Clause by failing to provide a hearing before publicly disseminating an offender's conviction history and other personal facts. In an *amicus curiae* brief supporting the petitioners, the Department urged the Court to grant certiorari and argued that such a registration law does not violate due process.



UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
10th & Constitution Avenue, N.W.
Washington, DC 20530

TELEFAX TO:

RECIPIENT'S NAME: Brett Kavanaugh

AGENCY/FIRM: _____

ADDRESS: _____

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