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United States Supreme Court: Criminal Law Cases in the October 2015 Term

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Summary

The white collar crimes on the Supreme Court's 2015 docket consist of three Hobbs Act cases and one on computer fraud (*Musacchio v. United States*). The Hobbs Act outlaws robbery and extortion when committed in a manner which "in any way or degree" obstructs interstate commerce. One of the Hobbs Act cases before the Court (*Taylor v. United States*) involves the robbery of suspected drug dealers. The second (*Ocasio v. United States*) consists of a kickback conspiracy between traffic cops and body shop owners. The third (*McDonnell v. United States*) involves a local drug manufacturer who showered a state governor and his wife with gifts in an apparent attempt to use the governor's office as a bully pulpit for one of his products.

The sex offense entries involve the sex offender registration obligations of an overseas resident (*Nichols v. United States*) and construction of the recidivist mandatory minimum sentencing provisions of federal law (*Lockhart v. United States*).

Perhaps spurred on by the result below, the Supreme Court held that stun guns used for self-defense are not necessarily beyond the guarantees of the Second Amendment right to bear arms (*Caetano v. Massachusetts*). The other firearms cases on the Court's docket raise interpretative issues under the Armed Career Criminal Act (*Welch v. United States* and *Mathis v. United States*) and the firearm possession disqualification triggered by a domestic violence misdemeanor (*Voisine v. United States*).

The trio of Fourth Amendment cases present questions on the exclusionary rule (*Utah v. Strieff*), the warrant requirement for sobriety tests (*Birchfield v. North Dakota*), and qualified official immunity in the face of use of excessive force allegations (*Mullenix v. Luna*).

The Court's Sixth Amendment cases this term offer a variety of issues ranging from ineffective assistance of counsel (*Maryland v. Kulbicki*), to speedy trial (*Betterman v. Montana*), to forfeiture and the right to counsel of choice (*Luis v. United States*), to the use of uncounseled convictions as predicate offenses (*United States v. Bryant*).

Capital punishment cases represent the lion's share of the Court's sentencing cases this term. However, the class also includes the matter of the retroactive application of the *Miller v. Alabama* prohibition on a life without parole sentence for murder by a juvenile (*Montgomery v. Louisiana*) and the harmless error standard in sentencing cases (*United States v. Molina-Martinez*).

The menu of the Court's capital punishment cases offers cases concerning jury instructions (*Carr v. Kansas*); jury selection (*Foster v. Chatman)*; exclusive jury sentencing prerogatives (*Hurst v. Florida*); Brady violations (*Wearry v. Cain*); insufficient capital jury instructions (*Lynch v. Arizona*); appellate court judge recusals (*Williams v. Pennsylvania*); and the application of habeas corpus standards (*White v. Wheeler*).

The Prisoner Reform Litigation Act, designed to curb frivolous inmate suits, generated two of the cases on the Court's 2015 docket—one on the act's installment payment feature (*Bruce v. Samuels*) and the other on the required exhaustion of administrative remedies (*Ross v. Blake*).

As noted throughout the course of this report, its text draws heavily from previously prepared, individual legal sidebars.

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White Collar Crime

The white collar crimes on the Supreme Court's 2015 docket consist of three Hobbs Act cases and one on computer fraud.

Hobbs Act Cases

The Hobbs Act outlaws robbery and extortion when committed in a manner which "in any way or degree" obstructs interstate commerce.[1] One of the cases before the Court, *Taylor v. United States*, involved the robbery of suspected drug dealers.[2] The second, *Ocasio v. United States*, consisted of a kickback conspiracy between traffic cops and body shop owners.[3] The third, *McDonnell v. United States*, involved a local drug manufacturer who showered a state governor and his wife with gifts in an apparent attempt to use the governor's office as a bully pulpit for one of his products.[4]

Taylor v. United States

Holding: "*In order to obtain a conviction under the Hobbs Act for the robbery or attempted robbery of a drug dealer, the Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines. Rather, to satisfy the Act's commerce element, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is commerce over which the United States has jurisdiction. And it makes no difference ... that any actual or threatened effect on commerce in a particular case is minimal*."[5]

The Court, in a 7-1 decision written by Justice Alito, made it clear that *Taylor* was more about drugs than about the Hobbs Act: "Our holding today is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds. We do not resolve what the government must prove to establish Hobbs Act robbery where some other type of business or victim is targeted."[6]

Taylor, the petitioner in the case, was a member of a gang of inept home invaders who sought to rob drug dealers of their cash and drugs.[7] The two robberies for which he was convicted netted the group a total of $40 in cash, three cell phones, a marijuana cigarette, and some jewelry.[8] Federal prosecutors charged Taylor under the Hobbs Act, which condemns anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion."[9] Taylor sought to introduce evidence at his trial that the victim of the robbery dealt only in marijuana grown in-state, but the U.S. District

[1] 18 U.S.C. 1951.

[2] Taylor v. United States, No. 14, 6166, cert. granted, 136 S. Ct. 26 (2015).

[3] Ocasio v. United States, No. 14-361, cert. granted, 135 S. Ct. 1491 (2015).

[4] McDonnell v. United States, No. 15-474, cert. granted, 136 S. Ct. 891 (2016).

[5] Taylor v. United States, 136 S. Ct. 2074, 2081 (2016).

[6] *Id*. at 2082.

[7] *See* United States v. Taylor, 754 F.3d 217, 220-21 (4th Cir. 2014).

[8] *Id.*

[9] 18 U.S.C. §1951(a).

Court for the Western District of Virginia barred admission, holding that drug dealing affects interstate commerce as a matter of law.[10] Taylor was convicted and appealed.[11]

On appeal, he questioned whether the government had satisfied the Hobbs Act's commerce element, but he faced two obstacles. Lower federal appellate courts had generally construed the "in any way or degree" language to mean that Congress intended to exercise the full extent of its Commerce Clause powers and that the prosecution need establish no more than a de minimis impact on interstate commerce. Second, the Supreme Court's *Raich* decision seemed to reenforce the government's position. The *Raich* opinion declared that "Congress can regulate purely intrastate activity that is not itself commercial ..., if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."

The Fourth Circuit affirmed Taylor's conviction. It concluded that "it was entirely reasonable for the jury to conclude that the robberies would have the effect of depleting the assets of an entity engaged in interstate commerce.... Because drug dealing in the aggregate necessarily affects interstate commerce, the government was simply required to prove that Taylor depleted or attempted to deplete the assets of such an operation."[12]

The Second and Seventh Circuits had expressed a somewhat different understanding. The Second Circuit had declared that "[p]roof of drug trafficking is no longer regarded as automatically affecting interstate commerce; instead, even in drug cases, the jury must find such an effect as part of its verdict."[13] The Seventh Circuit indicated that proof of an individualized impact is not necessary for prosecution under the federal drug law, but is required for Hobbs Act prosecutions.[14] The Supreme Court explicitly rejected the arguments of the two circuits.[15]

The resolution of the *Taylor* case, the Court said, "require[d] no more than ... [to] graft [its] holding in *Raich* onto the commerce element of the Hobbs Act." In *Raich*, the Court had recognized "Congress' power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce."[16] It also had acknowledged there that "[t]he production, possession, and distribution of controlled substances constitute a class of activities that in the aggregate substantially affect interstate commerce."[17] In the eyes of the Court in *Taylor*, "the market for marijuana, including its intrastate aspects, is 'commerce over which the United States has jurisdiction.' It therefore follows as a simple matter of logic that a robber[, like Taylor,] who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction."[18]

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[10] *See Taylor*, 754 F.3d at 221.

[11] *Id.*

[12] *Id.* at 224 (internal quotation marks and citations omitted).

[13] *See* United States v. Needham, 604 F.3d 673, 678 (2d Cir. 2010).

[14] United States v. Peterson, 236 F.3d 848, 854 (7th Cir. 2001).

[15] Taylor v. United States, 136 S. Ct. 2074, 2080-81 (2016).

[16] *Id.* at 2080 (quoting Gonzalez v. Raich, 545 U.S. 1, 17 (2005)).

[17] *Id.* (citing *Raich*, 545 U.S. at 22).

[18] *Id.*

Justice Thomas dissented. He felt that the limits of congressional authority under the Commerce Clause required a holding that the Hobbs "Act punishes a robbery only when the Government proves that the robbery itself affected interstate commerce."[19]

Ocasio v. United States

Holding: *"A defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an agreement with the owner of the property in question to obtain that property under color of official right."*[20]

Ocasio was a Baltimore police officer, who with several other officers received kickbacks for referring accident victims to a particular auto body shop.[21] For his efforts, Ocasio was convicted of extortion and conspiracy to commit extortion under the Hobbs Act.[22] The Hobbs Act punishes anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by ... extortion or attempts or conspires so to do."[23] It defines extortion to include "the obtaining of property from another, with his consent ... under color of official right."[24]

Ocasio argued at trial and on appeal that the Hobbs Act does not outlaw obtaining property from a co-conspirator.[25] His argument proceeded under alternative theories. First, he contended that a statute which punishes conspirators for obtaining the property "of another" under color of law is limited to victims who are "other" than conspirators.[26] Second, he asserted that otherwise every victim would be liable as a conspirator: "The law must require that a victim under the Hobbs Act be a person outside the conspiracy because otherwise every victim's 'consent' could be considered an agreement to enter into a conspiracy with its victimizer, thereby creating a separately punishable conspiracy in every §1951(a) case."[27]

Ocasio claimed persuasive support from a Sixth Circuit case, *U.S. v. Brock*,[28] which seemed to endorse his alternative theories. The U.S. Court of Appeals for the Fourth Circuit, however, was not convinced.[29] It responded that Ocasio's "property of another" argument was undermined by the fact that the term "property of another" might easily mean the property of anyone other than one acting "under color of law."[30] As for his "consent" argument, it was foreclosed by an earlier Fourth Circuit case "which underscored the proposition that mere acquiescence in an extortion scheme is not conspiratorial conduct. Rather, conduct more active than mere acquiescence is necessary before a person may depart the realm of a victim and may unquestionably be subject to

[19] *Id.* at 2082 (Thomas, J., dissenting).

[20] Ocasio v. United States, 136 S. Ct. 1423, 1436 (2016).

[21] United States v. Ocasio, 750 F.3d 399, 401-02 (4th Cir. 2014).

[22] *See* 18 U.S.C. §§1951, 371; *Ocasio,* 750 F.3d at 401.

[23] 18 U.S.C. §1951(a).

[24] 18 U.S.C. §1951(b)(2).

[25] *Ocasio,* 750 F.3d at 408.

[26] *See id.* at 409-11.

[27] *Id.* at 411.

[28] 501 F.3d 762 (6th Cir. 2007).

[29] *Ocasio,* 750 F.3d at 410-11.

[30] *Id.* at 411.

conviction for aiding and abetting and conspiracy."[31] Therefore it is "wrong to suggest that every extortion scheme will necessarily involve a conspiracy to commit extortion."[32]

The Supreme Court affirmed the Fourth Circuit's decision.[33] The Court's conspiracy case law provided his undoing. Justice Alito wrote the opinion for the Court joined by four of his colleagues.[34] He pointed to earlier Court decisions which held "that a person may be convicted of conspiring to commit a substantive offense that he or she cannot personally commit."[35] They confirmed that "[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it."[36] In Ocasio's case, the body shop owners could not commit extortion because they could not act "under color of official right."[37] Nevertheless, "they could ... conspire to commit Hobbs Act extortion by agreeing to help [Ocasio] and the other officers commit the substantive offense."[38] And as a consequence, Ocasio could be convicted of conspiring with them.[39]

Justice Alito also responded with precedent to Ocasio's argument that the Court's conspiracy theory would eliminate the distinction between extortion (coercive corruption) and bribery (consensual corruption). Justice Alito explained that the Court had already declared in *Evans* that Hobbs Act "color of law" extortion is the "rough equivalent of bribery."[40]

Justice Thomas dissented, as he had in *Evans*, because that case "erred in equating common-law extortion with taking a bribe."[41] Justice Breyer joined in the majority opinion, but offered a concurrence acknowledging that he finds troubling, but binding, the *Evans* "extortion is the rough equivalent of bribery" precedent.[42] Justice Sotomayor and Chief Justice Roberts dissented because they did not believe that "a group of conspirators can agree to obtain property 'from another' in violation of the Act even if they agree only to transfer property among themselves."[43]

McDonnell v. United States

Holding: *Arranging a meeting or hosting an event does not qualify as an "official act" for purposes of the federal bribery statute unless it involves "the formal exercise of governmental power" with respect to some pending or anticipated "question, matter, cause, suit, proceeding or controversy."*[44]

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[31] *Id.* at 411 (quoting United States v. Spitler, 800 F.2d 1267, 1276 (4th Cir. 1985)).

[32] *Id.*

[33] Ocasio v. United States, 136 S. Ct. 1423, 1437 (2016).

[34] *Id.* at 1426.

[35] *Id.* at 1432 (citing United States v. Holte, 236 U.S. 140 (1915) and Gebardi v. United States, 287 U.S. 112 (1932)).

[36] *Ocasio*, 136 S. Ct. at 1432.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 1433.

[40] *Id*. at 1434 (citing Evans v. United States, 504 U.S. 255, 260 (1992)).

[41] *Ocasio*, 136 S. Ct. at 1437-38 (Thomas, J., dissenting).

[42] *Id*. at 1437 (Breyer, J., concurring).

[43] *Id*. at 1440 (Sotomayor, J., with Roberts, C.J., dissenting).

[44] McDonnell v. United States, 136 S. Ct. 2355, 2374 (2016).

On September 4, 2014, a jury convicted former Virginia Governor Bob McDonnell and his wife on corruption charges based on his activities as governor.[45] The convictions covered wire fraud, conspiracy, and Hobbs Act offenses.[46] The U.S. Court of Appeals for the Fourth Circuit affirmed.[47] On January 15, 2016, the Supreme Court granted certiorari to review the lower court's definition of the term *official act*—a necessary element of the mail fraud conviction and by implication of the Hobbs Act convictions.[48]

The governor, and his wife, had been showered with gifts during the governor's term in office.[49] Their benefactor, a constituent, was a drug manufacturer who hoped to have one of his products, an antismoking substance, approved by the U.S. Food and Drug Administration, which would require studies of the products.[50] To that end, he sought to have state university medical research and facilities test and report favorably on the products' efficacy.

For his part, the governor forwarded promotional material and the company's suggested research protocol to the state official with authority to approve the study.[51] The governor's name was used on invitations, and he attended a promotional luncheon at the Governor's Mansion on behalf of the company.[52] The governor also pitched the company's product to the official responsible for determining the products covered by the state's employee health plans.[53]

The wire fraud statute under which the governor was convicted outlaws the use of wire communications as part of a scheme to defraud another of his property.[54] A second statute defines the scheme to defraud element to include any scheme to defraud another of "honest services" to which he is entitled.[55] The Supreme Court, however, has construed this honest services definition to encompass no more than bribery or kickbacks.[56] The Court understands honest services bribery to correspond to the misconduct described in the general federal bribery statute.[57] There, bribery is a corrupt quid pro quo—the exchange of something of value for a public official's commission or omission of an official act.[58]

The same kind of official act will upon occasion be an element of the extortion prong of a Hobbs Act violation. Among other things the Hobbs Act outlaws obstructing interstate commerce in any

[45] United States v. McDonnell, 792 F.3d 476, 493 (4th Cir. 2015).

[46] *Id*.

[47] *Id*. at 486.

[48] McDonnell v. United States, 136 S. Ct. 891 (2016).

[49] *McDonnell*, 792 F.3d at 486-92.

[50] *Id*. at 487.

[51] *Id*. at 487-89.

[52] *Id*. at 490.

[53] *Id*. at 492.

[54] 18 U.S.C. §1343.

[55] 18 U.S.C. §1346.

[56] Skilling v. United States, 561 U.S. 358, 404 (2010). The Court felt compelled to interpret the honest services statute narrowly in order to avoid a void for vagueness challenge. *Id*. at 408. Justices Scalia, Thomas, and Kennedy would have found the statute unconstitutionally vague, thus rendering Skilling's conviction contrary to the demands of Due Process. *Id*. at 415 (Scalia, J., concurring in part and concurring in the judgment).

[57] *Id*. at 412.

[58] 18 U.S.C. §201(b)(2)("Whoever ... being a public official ... corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally ... in return for: (A) being influenced in the performance of any official act; ... (C) being induced to do or omit to do any act in violation of the official duty of such official or person ... shall be fined ... or imprisoned.... ").

manner by extortion under color of law.[59] The Supreme Court views this Hobbs Act extortion offense as the rough equivalent of bribery—accepting something of value for the commission or omission of an official act.[60]

An official act for bribery purposes is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[61]

The prosecution argued that the governor had committed at least five qualifying official acts:

"(1) arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc;

"(2) hosting, and ... attending, events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors for referral to their patients;

"(3) contacting other government officials in the [Governor's Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine;

"(4) promoting Star Scientific's products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific's business to exclusive events at the Governor's Mansion; and

"(5) recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs."[62]

The governor argued that the instructions to the jury permit it to convict him without finding that he had exercised or endeavored to influence the formal exercise of governmental power necessary to constitute an official act. The Supreme Court unanimously agreed. It found the instructions deficient on three grounds. First, the jury was not instructed that it must find "a 'question, matter, cause, suit, proceeding or controversy' *involving the formal exercise of governmental power*."[63] Without such guidance, the jury may have "thought that a typical meeting, call, or event was itself a 'question, matter, cause, suit, proceeding or controversy'" and was enough without more to constitute an official act.[64]

Second, the jury was not instructed that "the 'question, matter, cause, suit, proceeding or controversy' must be more specific and focused than a broad policy objective."[65] And so, the jury

[59] 18 U.S.C. §1951(a), (b)(2).

[60] Evans v. United States, 504 U.S. 255, 260, 268 (1992) ("At common law, extortion ... by the public official was the rough equivalent of what we would now describe as 'taking a bribe.' ... [O][ur construction of [Hobbs Act extortion] is informed by the common-law tradition from which the term of art was drawn and understood. We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts").

[61] 18 U.S.C. §201(a)(3).

[62] *McDonnell*, 136 S. Ct. at 2365-66.

[63] *Id*. at 2374 (emphasis added).

[64] *Id*.

[65] *Id*.

may have erroneously concluded, as the prosecution argued in closing, that "[w]hatever it was Governor McDonnell had done, it's all official action." [66]

Finally, "the jury was not told that merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter."[67] And so, the jury may have thought arranging a meeting or hosting an event did constitute an "official act," without making the additional finding that the governor agreed to take or exert pressure on other officials to take an official action.[68]

The Court's decision seems in line with its historic reluctance to endorse federal authorities' policing of state and local political affairs in the absence of clear congressional directive.[69] The decision, however, makes no such statement. Nor does it refer to the cases that evidence that reluctance. Instead, it builds upon its "official act" precedents:

> The question remains whether—as the Government argues—merely setting up a meeting, hosting an event, or calling another official qualifies as a decision or action, [as an official act]…. Although the word "decision," and especially the word "action" could be read expansively to support the Government's view, our opinion in *United States v. Sun-Diamond Growers of Cal*. rejects that interpretation.[70]

Computer Fraud

Musacchio v. United States

Holding: *"We first consider how a court should assess a challenge to the sufficiency of the evidence in a criminal case when a jury instruction adds an element to the charged crime and the Government fails to object. We conclude that the sufficiency of the evidence should be assessed against the elements of the charged crime. We next consider whether the statute-of-limitations defense contained in 18 U.S.C. §3282(a) (the general federal criminal statute of limitations) may be successfully raised for the first time on appeal. We conclude that it may not be."*

The U.S. Supreme Court recently upheld a computer fraud conviction over objections that the prosecution was not timely and the jury's instructions were in error in *Musacchio v. United States*.[71] The case presented two questions. First, may a defendant present a statute of limitation

[66] *Id.*

[67] *Id*. at 2375.

[68] *Id.*

[69] *E.g*., McNally v. United States, 483 U.S. 350, 360 (1987) ("Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights"); McCormick v. United States, 500 U.S. 257, 272 (1991) ("Whatever ethical considerations and appearances may indicate, to hold that [state] legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interest of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.'").

[70] McDonnell, 136 U.S. at 2370; see also *id*. at 2370-17 (citing United States v. Birdsall, 233 U.S. 223 (1914) and United States v. Evans, 504 U.S. 255 (1992)).

[71] 136 S. Ct. 709 (2016). This summary relies heavily on a free-standing legal sidebar, CRS Legal Sidebar WSLG1514, *Computer Fraud Conviction Survives Delay and Erroneous Jury Instructions*, by Charles Doyle.

challenge for the first time on appeal?[72] Second, may a conviction be undone by a sufficiency-of-the-evidence attack on an extraneous element? The Court answered no to both questions.[73]

Musacchio hacked into the computer network of his former employer.[74] The portion of the Computer Fraud and Abuse statute under which he was indicted outlaws accessing a computer system without authorization *or* in excess of authorization.[75] The indictment charged him with access without authorization.[76] The judge's instructions to the jury, however, suggested that Musacchio could be convicted only if the government proved access both without authorization *and* in excess of authorization.[77] Musacchio was convicted nonetheless.[78]

On appeal, he conceded that there was sufficient evidence at trial to convict for access without authority, but argued without success that there was insufficient evidence to prove access in excess of authorization.[79] He also argued to no avail that the five-year statute of limitations should have barred his prosecution, because his indictment had been filed seven years after the commission of the offense.[80]

The two questions had divided the lower federal appellate courts.[81] The Supreme Court took the opportunity to answer them in a single case. First, a statute of limitations bar is ordinarily a defense that must be claimed.[82] If a defendant does not object before conviction that prosecution of his case is untimely, the defense is lost.[83] It may not be raised for the first time on appeal.[84] Congress, however, is free to abrogate the general rule. It may decree that, with respect to a particular statute of limitations, prosecution of a stale charge is a fatal flaw, which may be brought to the attention of the courts at any time. Congress makes its intent clear in the language of the statute, its context, and its legislative history.[85] The Court found no such evidence in the case of the statute at issue, general criminal statute of limitations, 18 U.S.C. Section 3282.[86] Thus, the delay in bringing Musacchio's prosecution was not an issue that could be raised for the first time on appeal.[87]

Second, when jury instructions contain extraneous elements, only the necessary elements of the crime charged need to satisfy a sufficiency-of-the-evidence test.[88] As the Court explained, "When

[72] *Id.*

[73] *Id.*

[74] United States v. Musacchio, 590 F. App'x 359, 360-61 (5th Cir. 2014).

[75] 18 U.S.C. §1030(a).

[76] United States v. Musacchio, 590 F. App'x at 361.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 362-63.

[80] 18 U.S.C. §3282; *Musacchio*, 590 F. App'x at 363-64.

[81] *See* Musacchio v. United States, 136 S. Ct. 709, 714-15 (2016) (collecting cases showing circuit splits).

[82] *Id.* at 717-18.

[83] *Id.*

[84] *Id.* at 716.

[85] *Id.* at 717.

[86] *Id.* at 717-18.

[87] *Id.* at 716-18.

[88] *Id.* at 715.

a jury finds guilt after being instructed on all elements of the charged crime plus one more element, the jury has made all the findings that due process requires."[89]

The Fifth Circuit, from which the case arose, had decided it on the basis of the rule-of-the-case doctrine.[90] The doctrine states that when a court has addressed a legal issue in a particular case it will not revisit the matter at a later stage of the same case.[91] The Fifth Circuit, however, erroneously *applied* the rule with regard to a lower court ruling in the same case.[92] For, "the doctrine is 'something of a misnomer' when used to describe how an appellate court assesses a lower court's rulings. An appellate court's function *is* to revisit matter decided in the trial court."[93]

The Court left unaddressed the questions of whether the result would have been different had the indictment contained extraneous elements or had the trial court's instructions on the necessary elements been in error.

Sex Offenses

The sex offense entries on the Court's docket involve the sex offender registration obligations of an overseas resident and construction of the recidivist mandatory minimum sentencing provisions of federal law.

Lockhart v. United States

Holding: "*[T]he text and structure of §2252(b) (2) confirm that the provision applies to prior state convictions for 'sexual abuse' and 'aggravated sexual abuse,' whether or not the convictions involved a minor or ward.*"[94]

The U.S. Supreme Court in a 6-2 decision upheld imposition of a mandatory minimum sentencing enhancement in a child pornography case.[95] The case turned on a matter of statutory construction. The statute at issue set a 10-year mandatory minimum term of imprisonment for a defendant convicted of child pornography:

> ... if such person has a prior conviction under ... chapter 109A [sexual abuse of a child or adult], or chapter 117 [unlawful sex-related interstate travel involving a child or adult], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice) [rape and sexual assault], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct *involving a minor or ward*.... [96]

[89] *Id.*

[90] *Musacchio*, 590 F. App'x at 362-63.

[91] *See Musacchio*, 136 S. Ct. at 716 (quoting Pepper v. United States, 562 U.S. 476, 506) (2011)).

[92] *See id.*

[93] *Id.* (quoting United States v. Wells, 519 U.S. 482, 487 n.4 (1997)).

[94] Lockhart v. United States, 136 S. Ct. 958, 968 (2016). This summary borrows heavily from a free-standing legal sidebar, CRS Legal Sidebar WSLG1510, *Supreme Court Upholds Recidivist Mandatory Minimum*, by Charles Doyle.

[95] *Id.*

[96] 18 U.S.C. §2252(b)(2).

Lockhart had pleaded guilty to federal child pornography charges.[97] He had earlier been convicted of first degree sexual abuse of an adult under New York state law.[98] The trial court concluded it had no choice but to assess the 10-year mandatory minimum.[99] Lockhart appealed. The U.S. Court of Appeals for the Second Circuit affirmed.[100] Its decision was in line with those of the Fourth, Fifth, and Ninth Circuits and at odds with those of the Sixth, Eighth, and Tenth Circuits.[101] The question that divided the appellate panels was whether the phrase *involving a minor or ward* applied to aggravated sexual abuse and sexual abuse cases or only to cases of abusive sexual conduct. Did the mandatory minimum apply to Lockhart whose crime involved sexual abuse of an adult? The Supreme Court concluded that it did.[102]

Justice Sotomayor, writing for the Court, examined the text of the statute first under the "last antecedent" rule of statutory construction, which suggests that "a limiting clause or phrase," such as involving a minor or ward, "should ordinarily be read as modifying only the noun or phrase that it immediately follows; in this case "abusive sexual conduct."[103]

The Justice then pointed out the symmetry between state and federal triggering offenses. The terms *aggravated sexual abuse*, *sexual abuse*, and *abusive sexual conduct* used to identify the state predicate offenses are the very terms used as captions for the federal predicate offenses in Chapter 109A.[104] She wrote, "If Congress had intended to limit each of the state predicates to conduct 'involving a minor or ward,' we doubt it would have followed, or thought it needed to follow, so closely the structure and language of Chapter 109A."[105]

Moreover, the Justice was at a loss to "explain *why* Congress would have wanted to apply the mandatory minimum to individuals convicted in federal court of sexual abuse or aggravated sexual abuse involving an adult, but not to individuals convicted in state court of the same."[106]

The opinion seems to have captured the seriousness with which Congress viewed repeat offenders who engage in child pornography. Nevertheless, Justice Kagan's Scalia-like observation in dissent may give one pause: "Suppose a real estate agent promised to find a client 'a house, condo, or apartment in New York.' Wouldn't the potential buyer be annoyed if the agent sent him information about condos in Maryland or California?"[107]

It is possible that Congress may reconsider the Court's construction of the repeat offender mandatory minimum in child pornography cases. There have been a number of proposals to

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[97] *Lockhart*, 136 S. Ct. at 961-62.

[98] *Id.* at 962.

[99] *Id.*

[100] United States v. Lockhart, 749 F.3d 148, 150 (2d Cir. 2014).

[101] *Id*. at 154-55, citing in accord, United States v. Spence, 661 F.3d 194 (4th Cir. 2011); United States v. Hubbard, 480 F.3d 341 (5th Cir. 2007); as well as United States v. Sinerius, 504 F.3d 737 (9th Cir. 2007); and in opposition, United States v. Mateen, 739 F.3d 300 (6th Cir. 2014), vac'd and rev'd en banc, United States v. Mateen, 764 F.3d 627, 633 (6th Cir. 2014); United States v. Hunter, 505 F.3d 829 (8th Cir. 2007); United States v. McCutchen, 419 F.3d 1122 (10th Cir. 2005).

[102] *Lockhart*, 136 S. Ct. at 961.

[103] *Id*. at 965.

[104] *Id*. at 966-67.

[105] *Id.*

[106] *Id*. at 968.

[107] *Id*. at 969 (Kagan, J., with Breyer, J., dissenting).

reduce recidivist mandatory minimums in various federal criminal statutes in the 114th Congress. Few, if any, involve child pornography.

Nichols v. United States

Holding: *The federal Sex Offender Registration and Notification Act (SORNA) requirement that offenders notify the "jurisdiction"(state or territory) in which they reside of any change of address does not apply to offenders who reside overseas (i.e., other than in a SORNA jurisdiction).*[108]

The Supreme Court granted certiorari in *Nichols* in order to resolve a conflict among the lower federal appellate courts over whether an individual required to register as a sex offender must continue to follow registration requirements when he relocates overseas.[109] The Court held that he did not, although subsequent legislation imposes a related obligation.[110]

The federal Sex Offender Registration and Notification Act (SORNA) requires individuals convicted of federal or state qualifying sex offenses to register with each state ("jurisdiction") "(a) ... where the offender resides, ... is an employee, and ... is a student."[111] It further insists that after initial registration[s] the individual "not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 *jurisdiction involved* pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.... "[112] It is a federal crime for an individual convicted of a federal sex offense to fail to comply.[113] It is also a federal crime for an individual convicted of a state sex offense to fail to comply and subsequently travel in interstate or foreign commerce.[114]

In the case before the Supreme Court, Nichols was convicted of a federal qualifying sex offense and upon his release from prison registered with Kansas authorities.[115] He subsequently relocated in the Philippines without appearing or returning to appear before Kansas registration officials.[116] The Philippines deported him back to the United States, where he faced a federal indictment for failing to appear and update his Kansas registration information.[117] He sought unsuccessfully to dismiss the indictment on the grounds that SORNA did not require him to register once he was in the Philippines.[118] He pleaded guilty, reserving the right to appeal.[119]

Nichols appealed to the U.S. Court of Appeals for the Tenth Circuit, where he contended that the SORNA's change of residency requirement does not apply when an individual changes his

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[108] Nichols v. United States, 136 S. Ct. 1113, 1117-18 (2016).

[109] *Id*. at 1117 (citing Nichols v. United States, 775 F.3d 1225 (10th Cir. 2014) and United States v. Lunsford, 725 F.3d 859 (8th Cir. 2013). Much of the introductory material that appears here can be found in a free-standing legal sidebar, Must an Overseas Resident Update His U.S. Sex Registration: The Courts Cannot Agree, by Charles Doyle.

[110] *Nichols*, 136 S. Ct. at 1117-18, 1119 (2016).

[111] 42 U.S.C. §16913(a).

[112] 42 U.S.C. §16913(c).

[113] 18 U.S.C. §2250.

[114] *Id.*

[115] United States v. Nichols, 775 F.3d 1225, 1227 (10th Cir. 2014).

[116] *Id.*

[117] *Id.*

[118] *Id.* at 1228.

[119] *Id.*

residency in a non-SORNA jurisdiction.[120] The Tenth Circuit rejected the argument on the basis of binding circuit precedent.[121] The Supreme Court in a unanimous opinion by Justice Alito reversed.[122]

SORNA requires an offender to appear in one of "three possible jurisdictions: where the offender resides, where the offender is an employee, [or] where the offender is a student."[123] It defines "jurisdictions" as the several states, the various territories of the United States, and certain Indian tribes.[124] The Philippines is not a SORNA jurisdiction. Moreover, Justice Alito explained, SORNA "uses only the present tense: 'resides,' 'is an employee,' 'is a student.' A person who moves from Leavenworth to Manilla no longer 'resides' (present tense) in Kansas; although he once *resided* in Kansas, after his move he 'resides' in the Philippines."[125] Therefore, "once Nichols moved to Manila, he was no longer required to appear in Kansas to update his registration, for Kansas was no longer a 'jurisdiction'" where he resides, is an employee, or is a student.[126]

Justice Alito also noted that Congress had addressed the issue while the case was pending before the Court. In early February, it passed the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders [Act].[127] The statute requires sex offenders to provide information related to any foreign travel to "the appropriate official for inclusion in the sex offender registry ... in conformity with any time and manner requirements prescribed by the Attorney General."[128]

Firearms

Perhaps spurred on by the result below, the Supreme Court held that stun guns used for self-defense are not necessarily beyond the guarantees of the Second Amendment right to bear arms. The other firearms cases on the Court's docket raise interpretative issues under the Armed Career Criminal Act and the firearm possession disqualification triggered by a domestic violence misdemeanor.

Caetano v. Massachusetts

Holding: *Supreme Judicial Court of Massachusetts's reasoning for upholding stun gun ban—lack of common use of stun guns at time of Second Amendment's enactment, unusual nature of stun guns as a modern invention, and lack of ready adaptability of stun guns for use in the military—does not preclude stun guns from being protected by Second Amendment right to bear arms.*[129]

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[120] *Id.*

[121] *Id.* at 1229 (citing United States v. Murphy, 664 F.3d 798 (10th Cir. 2011)).

[122] Nichols v. United States, 136 S. Ct. 1113, 1115 (2016).

[123] 42 U.S.C. §16913(a), (c).

[124] 42 U.S.C. §16911(10).

[125] Nichols, 136 S. Ct. at 1117.

[126] *Id.*

[127] *Id*. at 1119 (citing P.L. 114-119, 130 Stat. 23 (2016)).

[128] P.L. 114-119, §6, 130 Stat. 22-3 (2016), codified at 42 U.S.C. 16914(a)(7), (c). Violations are punishable under 18 U.S.C. 2250(b).

[129] Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016).

In *Caetano v. Massachusetts,* in one fell swoop (and without oral argument) the U.S. Supreme Court granted a petition for certiorari and issued a per curiam opinion vacating the judgment of the Massachusetts Supreme Court that had upheld a Massachusetts law prohibiting the possession of stun guns.[130]

Massachusetts has a law that bans the possession of weapons that emit electrical currents (e.g., stun guns), which was challenged as unconstitutional under the Second Amendment by a woman who had been arrested for violating that law.[131] The Massachusetts court had concluded that the Second Amendment does not encompass stun guns, and thus the statute's prohibition was lawful, because, among other things, stun guns are dangerous, unusual, and were not in common use at the time the Bill of Rights was enacted.[132] Additionally, the court concluded, the stun gun, as used by the defendant, was not used to defend herself in the home.[133]

The U.S. Supreme Court vacated the Massachusetts ruling, concluding that its reasoning directly conflicted with the holdings in *District of Columbia v. Heller,*[134] in which the Court concluded that the Second Amendment encompasses an individual right to possess firearms for traditional, lawful purposes, and *McDonald v. Chicago*,[135] which applies that right to the states through the Fourteenth Amendment. The Court noted that *Heller* stated that "the Second Amendment['s protection] 'extends ... to arms ... that were not in existence at the time of the founding'" as well as to firearms that are not readily adaptable for military use.[136] Yet, the Massachusetts court erroneously found Second Amendment protection wanting because stun guns like Caetano's "were not in common use at the time of the Second Amendment's enactment."[137] And in the same misguided vein, the Massachusetts court "found 'nothing in record to suggest that stun guns are readily adaptable to use in the military.'"[138]

Voisine v. United States[139]

Holding: "A *misdemeanor conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a gun*."[140]

Under federal law, individuals who have been convicted of a misdemeanor crime of domestic violence may not possess a firearm.[141] The statute defines "misdemeanor crime of domestic violence" as a federal, state, or tribal misdemeanor, that has as an element "the use … of physical force" and is committed against a person with whom the defendant was living or had lived.[142]

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[130] *Id.*

[131] *See* MASS. GEN. LAWS ch.140, §131J; Commonwealth v. Caetano, 26 N.E.3d 688, 689 (Mass. 2015).

[132] *Caetano,* 26 N.E.2d at 692.

[133] *Id.*

[134] 554 U.S. 570 (2008).

[135] 561 U.S. 742 (2010).

[136] *Caetano,* 136 S. Ct. at 1027-28 (quoting *Heller,* 554 U.S. at 582).

[137] *Caetano,* 136 S. Ct. at 1028 (quoting *Caetano,* 26 N.E.3d at 1027).

[138] *Caetano,* 136 S. Ct. at 1028 (quoting *Caetano,* 26 N.E.3d at 1028).

[139] CRS Legal Sidebar WSLG 1445, *Tying Up Loose Ends ... Supreme Court To Evaluate Federal Firearms Provision Again,* by Vivian Chu addresses the background of the case in a free-standing sidebar.

[140] Voisine v. United States, 136 S. Ct. 2272, 2277-78 (2016).

[141] 18 U.S.C. §922(g)(9).

[142] 18 U.S.C. §921(a)(33)(A).

In an earlier case, *Castleman*, the Court held that an individual convicted of *knowingly or intentionally* committing domestic violence may no longer be eligible to possess a firearm, but set aside the question of whether *recklessly* committing such an offense is also disqualifying.[143] Here in *Voisine*, the Court decided it was.[144]

When federal authorities investigated Voisine for suspicion of killing of a bald eagle, they discovered he owned a rifle and had a previous state domestic abuse conviction under state law for beating his girlfriend.[145] They charged him with unlawful possession of a firearm.[146] Following his conviction, Voisine appealed, arguing that the state domestic violence misdemeanor conviction was not disqualifying because the state statute covered *reckless* domestic violence.[147] The United States Court of Appeals for the First Circuit rejected the argument,[148] as did the Supreme Court.[149]

Justice Kagan wrote the opinion for the seven-member majority of the Court.[150] She observed that nothing in the operative "use of physical force" phrase conveys the notion that the word "'use' marks a dividing line between reckless and knowing conduct."[151] The word ordinarily encompasses both. Circumstances surrounding enactment confirmed for Justice Kagan that Congress chose its words for their everyday meaning.[152] "Congress enacted [the ban] in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors ... from owning guns. Then, as now, a significant majority of jurisdictions ... defined such misdemeanor offenses to include the *reckless* infliction of bodily harm."[153] To ignore reckless abuse convictions, Justice Kagan reasoned, "would have undermined Congress's aim."[154]

In sum, "[t]he federal ban on firearms possession applies to any person with a prior misdemeanor conviction for the 'use ... of physical force' against a domestic relation. That language, naturally read, encompasses acts of force undertaken recklessly…."[155] Moreover, "the state-law backdrop ... indicates that Congress meant just what it said."[156]

Justice Thomas dissented on the basis of Second Amendment right-to-bear-arms grounds and because he felt the term "'use of physical force' has a well-understood meaning applying only to intentional acts designed to cause harm."[157] Justice Sotomayor joined the latter part of the dissent.[158]

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[143] United States v. Castleman, 134 S. Ct. 1405, 1414 n.8 (citing Leocal v. Ashcroft, 543 U.S. 1 (2004)).

[144] *Voisine*, 136 S. Ct. at 2277-78.

[145] United States v. Voisine, 778 F.3d 176, 178 (1st Cir. 2015).

[146] *Id.*

[147] *Id.* at 177.

[148] *Id*.

[149] *Voisine*, 136 S. Ct. at 2277-78.

[150] *Id*. at 2276.

[151] *Id.* at 2279.

[152] *Id.* at 2280.

[153] *Id*.

[154] *Id*. at 2281.

[155] *Id*. at 2282.

[156] *Id*.

[157] *Id.* at 2282 (Thomas, J., with Sotomayor, J. in part, dissenting).

[158] *Id.*

Armed Career Criminal Act

Welch v. United States

Holding: *The Supreme Court's earlier decision in* Johnson v. United States*, which found the residual clause of the Armed Career Criminal Act constitutionally vague, applies retroactively to the convictions of federal prisoners who seek collateral (habeas corpus) review.*[159]

The Armed Career Criminal Act (ACCA) calls for a mandatory 15-year term of imprisonment for a defendant convicted of certain firearms offenses, if the defendant has three prior drug or violent felony convictions.[160] The qualifying violent felony convictions fall within one of three clauses.[161] The first clause consists of crimes that have physical force or attempted physical force as an *element*.[162] The second is made up of drug trafficking and other *enumerated* crimes such as burglary, arson, and extortion.[163] The third is a *residual* clause that includes offenses "that present[] a serious potential risk of physical injury to another."[164] The Supreme Court declared the ACCA's residual category unconstitutionally vague in *Johnson v. United States*.[165] Here, the Court held *Johnson* retroactively applicable.[166]

Welch was convicted of unlawful possession of firearm.[167] The United States District Court for the Southern District of Florida sentenced him under the ACCA on the basis of three state robbery convictions.[168] On appeal, he contended that one of the prior convictions did not qualify as an ACCA predicate conviction, under either the residual or the elements clause.[169] The United States Court of Appeals for the Eleventh Circuit affirmed the sentence on the basis of the residual clause and found it unnecessary to address the elements clause argument.[170]

Some years later, Welch sought collateral review under the federal statutory counterpart of habeas corpus.[171] The district court denied his petition.[172] No sooner had the Eleventh Circuit denied him the certificate of appeal ability necessary for further review then the Supreme Court held the residual clause unconstitutionally vague in *Johnson*.[173] The Court granted Welch's petition for certiorari to determine whether *Johnson* should be applied retroactively.[174] The Court ultimately

[159] Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

[160] 18 U.S.C. §924(e).

[161] 18 U.S.C. §924 (e)(2).

[162] 18 U.S.C. §924 (e)(2)(B)(i).

[163] 18 U.S.C. §924 (e)(2)(A), (e)(2)(B)(ii).

[164] 18 U.S.C. §924 (e)(2)(B)(ii).

[165] 135 S. Ct. 2551 (2015).

[166] Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

[167] *Id*. at 1262.

[168] *Id*.

[169] United States v. Welch, 683 F.3d 1304, 1310 (11th Cir. 2012).

[170] *Id*. at 1313.

[171] *Welch*, 136 S. Ct. at 1263.

[172] *Id.*

[173] *Id*.

[174] Welch v. United States, 136 S. Ct. 790 (2016).

concluded it should but returned the case to the Eleventh Circuit to determine whether Welch's state robbery conviction qualified for ACCA sentencing under the elements clause.[175]

Justice Kennedy, writing for the seven members of the majority of the Court, pointed out that the retroactivity of a decision like Johnson, which announces a novel constitutional interpretation (a new rule), is governed by the *Teague* doctrine.[176] The doctrine is calculated, in the interests of finality, to encourage resolution of a prisoner's constitutional challenges on direct appeal rather than waiting to raise them for the first time on collateral review.[177] The doctrine bars federal collateral review to announce or apply a new rule.[178]

There are two exceptions, one substantive and one procedural. The procedural exception exists when the new rule constitutes a "watershed" rule in criminal procedure, one that "implicat[es] the fundamental fairness and accuracy of the criminal proceeding."[179] *Gideon v. Wainwright* is one of the frequently cited, rarely occurring examples of the procedural exception.[180] The substantive exception exists when the new rule "alters the range of conduct or the class of persons that the law punishes."[181] *Johnson* is an example of the substantive exception.[182]

Justice Kennedy explained that "[b]y striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'"[183] He reasoned that "[b]efore *Johnson*, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison."[184] In contrast, "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act…."[185]

The lone dissenter, Justice Thomas, argued that the case was not ready for the Supreme Court review and "undermin[ed] any principled limitation on the finality of federal convictions."[186]

Mathis v. United States

Holding: "*To determine whether a past conviction [qualifies as an ACCA predicate conviction], courts compare the elements of the crime of conviction with the elements of the 'generic' version*

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[175] *Welch*, 136 S. Ct. at 1268

[176] *Id*. at 1264 (referring to Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion)).

[177] *Teague*, 489 U.S. at 307-8.

[178] *Welch*, 136 S. Ct. at 1264. *See also* Saffle v. Parks, 494 U.S. 484 (1990) ("In *Teague*, we defined a new rule as a rule that 'breaks new ground,' 'imposes a new obligation on the states or the Federal Government,' or was not 'dictated by precedent existing the time of the defendant's conviction became final.'").

[179] *Welch*, 136 S. Ct. at 1264 (quoting *Saffle*, 494 U.S. at 495).

[180] *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 419 (2007); Beard v. Banks, 542 U.S. 406, 417 (2004).

[181] Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (quoting Bousley v. United States, 523 U.S. 614, 620) ("Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him.").

[182] *Welch*, 136 S. Ct. at 1265.

[183] *Id*.

[184] *Id.*

[185] *Id.*

[186] *Id*. at 1269 (Thomas, J., dissenting) ("Today the Court holds that Johnson applies retroactively to already final sentences of federal prisoners. That holding comes at a steep price. The majority ignores an insuperable procurable procedural obstacle: when, as here, a court fails to rule on a claim not presented in a prisoner's §2255 motion, there is no error for us to reverse. The majority also misconstrues the retroactivity framework developed in *Teague*….").

of the [ACCA's] listed offenses—i.e., the offense as commonly understood…. [O]ur decisions have held that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense. The question in this case is whether the ACCA makes an exception to that rule when a defendant is convicted under a statute that lists multiple alternative means of satisfying one (or more) of its elements. We decline to find such an exception."[187]

The Armed Career Criminal Act (ACCA) sets a 15-year mandatory minimum term of imprisonment for defendants, guilty of certain firearms offenses, who have three prior state or federal serious drug or violent felony convictions.[188] The statute defines the term *violent felony* to include *burglary*.[189] *Burglary*, in the ACCA, said the Supreme Court in *Taylor v. United States*, means generic burglary—that is, burglary as commonly understood, a crime involving "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[190] Conviction under a state burglary statute qualifies as an ACCA predicate conviction only when the state crime's "elements are the same as, or narrower than, those of the generic offense."[191]

Mathis was convicted of unlawful possession of a firearm.[192] He was sentenced under the ACCA on the basis of five Iowa burglary convictions.[193] He questioned whether his Iowa burglary convictions qualified as ACCA burglary convictions. The Iowa burglary statute matched the elements of the generic crime of "burglary": unlawful entry into a building or structure with the intent to commit a crime.[194] Elsewhere, however, the Iowa criminal code provided a binding definition of the "building or structure" element to include cars, boats, and planes.[195] Mathis argued that the Iowa burglary convictions were not ACCA qualifying convictions. The United States District Court and Eighth Circuit Court of Appeals disagreed.[196] The Supreme Court reversed.[197]

Whether a state burglary conviction qualifies as an ACCA burglary conviction is a matter of elements: "A crime counts as 'burglary' under the Act if its elements are the same as, or narrower than, those of the generic offense," wrote Justice Kagan for the Court.[198] Conversely, "if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA 'burglary.'"[199]

The Iowa statute "enumerates various factual means of committing a single element" when it "itemizes the various places that crime could occur as disjunctive factual scenarios rather than

[187] Mathis v. United States, 136 S. Ct. 2243, 2247-48 (2016).

[188] 18 U.S.C. §924(e).

[189] 18 U.S.C. §924(e)(2)(B).

[190] Taylor v. United States, 495 U.S. 575, 598 (1990)).

[191] *Id.*

[192] United States v. Mathis, 786 F.3d 1068, 1070 (8th Cir. 2015).

[193] *Id*.

[194] *Id.* at 1073-74 (citing Iowa Code §713.5).

[195] *Id.* at 1074 (citing Iowa Code §712.12).

[196] *Id.* at 1076.

[197] Mathis v. United States, 136 S. Ct. 2243, 2257 (2016).

[198] *Id*. at 2248.

[199] *Id*.

separate elements."[200] As the Iowa Supreme Court observed, the Iowa statute sets out "'alternative methods' of committing one offense, so that a jury need not agree whether the burgled location was a building ... or vehicle."[201] This makes it broader than the generic offense that does not encompass unlawful entry into a *vehicle* to commit a crime. "Because the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's convictions under that law cannot give rise to an ACCA sentence."[202]

Two concurring members of the Court offered less-than-ringing endorsements of the four-Justice main opinion. Justice Kennedy wrote that the "opinion is required by its precedents," with which he disagrees.[203] Those precedents, he observed, are matters of statutory construction that Congress is free to wash away by amending the ACCA.[204] He declared, moreover, that "continued congressional inaction in the face of a system that each year proves more unworkable should require this Court to revisit its precedents in an appropriate case."[205] Justice Thomas was only slightly more enthusiastic: "I join the Court's opinion, which faithfully applies our precedents" and which "avoids further extending its precedents."[206]

Justices Breyer and Ginsburg dissented because they believed the federal court should have been allowed to examine the charging documents relating to Mathis's Iowa convictions to determine if the jury there was required to find all the elements of generic burglary.[207] Justice Alito in dissent would go even further and allow the federal court to examine the entire record of prior proceedings, not merely those that identify what the jury must have found.[208]

Fourth Amendment

The trio of Fourth Amendment cases presents questions on the exclusionary rule, the warrant requirement for sobriety tests, and qualified official immunity in the face of use of excessive force allegations.

Utah v. Strieff

Holding: *The attenuation exception to the exclusionary rule "applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest."*[209]

The national debate over policing practices stemming from the deaths of Michael Brown in Ferguson, Missouri, and Freddie Gray in Baltimore, Maryland (and other police-related

[200] *Id*. at 2249.

[201] *Id.* at 2256 (citing State v. Duncan, 312 N.W. 519, 523 (Iowa 1981)).

[202] *Id*. at 2257.

[203] *Id.* at 2258 (Kennedy, J., concurring).

[204] *Id*.

[205] *Id*. Recall that either in spite of, or because of, the Court's precedents, the Court felt compelled to declare the ACCA's residual clause unconstitutionally vague in *Johnson*, 135 S. Ct. at 2563.

[206] *Id*. at 2258 (Thomas, J., concurring).

[207] *Id.* at 2266 (Breyer & Ginsburg, JJ., dissenting).

[208] Id. at 2269-70 (Alito, J., dissenting).

[209] Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016).

deaths),[210] made its way to the Supreme Court in *Utah v. Strieff*—a case about evidence suppression in criminal proceedings.[211] The novel question before the Court was whether evidence should be suppressed (through the exclusionary rule) if it was seized after a search incident to a lawful arrest on an outstanding warrant, when the warrant was discovered only because of an initial, illegal stop by the police. Discussion at oral argument, at times, focused on how the Court's decision would impact heavily policed communities, like Ferguson, where a significant percentage of the population has outstanding arrest warrants for minor offenses, like failing to pay traffic fines.[212]

The judicially created exclusionary rule requires the suppression of evidence obtained through illegal searches or seizures, as well as evidence later obtained as a result of the earlier Fourth Amendment violation—the so-called fruit of the poisonous tree.[213] However, this rule will be applied only if a court concludes that suppression would deter future police misconduct and that the potential deterrence outweighs potential costs, such as releasing a criminal into the public.[214] Therefore, not all illegally obtained evidence—and derivative evidence—will be excluded. For example, under the attenuation doctrine, a court will not suppress evidence obtained subsequent to an illegal search or seizure if "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'"[215] To determine whether the intervening event was sufficiently independent of the illegal act to warrant the evidence's admission, courts balance three factors: (1) the temporal proximity of the illegal police activity and the discovery of evidence; (2) the intervening event; and (3) the purpose and flagrancy of the police misconduct.[216] The Court in *Strieff* reviewed whether evidence obtained from a search incident to a lawful arrest on an outstanding arrest warrant, discovered from a warrant check (the alleged intervening event) during an illegal investigatory stop, falls under the attenuation doctrine and thus should be admissible.

In *Strieff,* the police department in Salt Lake City, Utah, received an anonymous tip that there was ongoing drug activity at a house, after which Officer Doug Fackrell surveilled the house intermittently for approximately three hours total over a weeklong period.[217] During that time, Officer Fackrell observed short-term traffic at the house, which he believed was consistent with drug activity.[218] When the officer saw Edward Strieff leave the house, he questioned him and asked him to produce his ID.[219] Officer Fackrell then ran a warrant check and discovered that

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[210] *See, e.g.,* Carrie Wells, *Protesters March Against Police Brutality on Anniversary of Ferguson Unrest,* BALT. SUN (Aug. 8, 2015, 7:07 PM), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-ferguson-anniversary-20150808-story.html; Mark Berman, *How the Response to Protests over Police Force Changed Between Ferguson and Baltimore,* WASH. POST (May 1, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/05/01/from-ferguson-to-baltimore-how-the-response-to-protests-over-police-force-has-changed-nationwide/.

[211] State v. Strieff, 357 P.3d 532 (Utah 2015).

[212] *See* Transcript of Oral Argument at 6:3-9:18, 12:8-12:21, 21:18-23:17, *Utah v. Strieff,* 136 S. Ct. 27 (2015) (No. 14-1373).

[213] *See, e.g.,* Davis v. United States, 131 S. Ct. 2419, 2424 (2011); Segura v. United States, 468 U.S. 796, 804 (1984).

[214] *Davis*, 131 S. Ct. at 2426-27.

[215] Wong Sun v. United States, 371 U.S. 471, 487 (1963) (quoting Nardone v. United States 308 U.S. 338, 341 (1939)); *see* United States v. Smith, 715 F.3d 1110, 1115-16 (8th Cir. 2013); United States v. Fofana, 666 F.3d 985, 992-93 (6th Cir. 2012); United States v. McKinnon, 92 F.3d 244, 247 (4th Cir. 1996).

[216] *See* Brown v. Illinois, 422 U.S. 590, 603-04 (1975); United States v. Montgomery, 777 F.3d 269, 273 (5th Cir. 2015).

[217] State v. Strieff, 357 P.3d 532, 536 (Utah 2015).

[218] *Id.*

[219] *Id.*

Strieff had an outstanding arrest warrant for failing to pay a traffic ticket and searched his body incident to arrest.[220] The search uncovered methamphetamine and drug paraphernalia, and Strieff subsequently was prosecuted for a drug crime.[221]

At the suppression hearing, the state conceded that the seizure violated the Fourth Amendment because Officer Fackrell did not have reasonable suspicion to stop and interrogate Strieff.[222] Therefore, the dispute focused on whether the officer's discovery of the outstanding warrant sufficiently attenuated the illegal stop from the discovery of the drugs and paraphernalia.[223] The trial court concluded that it did and denied the motion to suppress.[224] The Utah Supreme Court reversed, however, concluding that only the defendant's voluntary conduct—not police conduct (here, discovering the outstanding warrant)—can attenuate evidence obtained from illegal searches and seizures.[225]

Neither party, however, appeared to agree with the Utah Supreme Court's interpretation of the attenuation doctrine, and on appeal to the Supreme Court both Utah and Strieff focused on the flagrancy portion of the three-part attenuation analysis.[226] For example, Utah (with the support of the United States) argued that an arrest warrant that had been issued previously by a neutral and detached magistrate judge should erase the taint of an illegal stop (during which the warrant was discovered) so long as the stop was not "flagrant," and in this case, the state contended, it was not.[227] Conversely, Strieff contended that police activity is flagrant when, as in this case, an officer runs a warrant check during a stop when there is no reasonable suspicion or articulable fear for the officer's safety.[228]

Notably, in response to these arguments at oral argument, the Court pondered whether there should be a subjective component (atypical in Fourth Amendment jurisprudence)[229] to the flagrancy portion of the analysis, where a court would ask whether the officer was exploiting the system to obtain evidence of other crimes.[230] Justice Kagan asserted that this potentially could deter illegal stops because, in some jurisdictions, "[i]f you know that there is a significant possibility that somebody you stop is going to have an arrest warrant, that's another reason to stop them."[231] On the other hand, Justice Alito stressed the costs associated with ruling for Strieff, pointing out that it would be "an unusual and unprecedented result" to suppress the fruit of a

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[220] *Id.*

[221] *Id.*

[222] *Id.* at 536-37; *see* Terry v. Ohio, 392 U.S. 1 (1968).

[223] State v. Strieff, 357 P.3d at 537.

[224] *Id.*

[225] *Id.* at 544-47.

[226] *See* Brief for Petitioner at 8-9, 29-33, Utah v. Strieff, 136 S. Ct. 27 (No. 14-1373); Brief for Respondent at 29 n.4, 32-39 Utah v. Strieff, 136 S. Ct. 27 (No. 14-1373); Transcript of Oral Argument at 57:5-57:13, *Utah v. Strieff,* 136 S. Ct. 27 (2015) (No. 14-1373).

[227] *See* Transcript of Oral Argument at 15:17-15:23, 23:23-24:25, 28:11-28:17, *Utah v. Strieff,* 136 S. Ct. 27 (2015) (No. 14-1373); Brief for Petitioner at 8-9, 29-33 Utah v. Strieff, 136 S. Ct. 27 (No. 14-1373).

[228] *See* Transcript of Oral Argument at 43:1-43:15, *Utah v. Strieff,* 136 S. Ct. 27 (2015) (No. 14-1373); Brief for Respondent at 32-39, Utah v. Strieff, 136 S. Ct. 27 (No. 14-1373).

[229] *See, e.g.,* Brigham City, Utah v. Stuart, 547 U.S. 398, 404 (2006); Whren v. United States, 517 U.S. 806, 813 (1996).

[230] *See* Transcript of Oral Argument at 13:6-14:5, 25:1-25:5, *Utah v. Strieff,* 136 S. Ct. 27 (2015) (No. 14-1373).

[231] *See* Transcript of Oral Argument at 23:1-21:8, *Utah v. Strieff,* 136 S. Ct. 27 (2015) (No. 14-1373).

lawful search, and thus a defendant ought to present "strong circumstances" to justify suppression.[232]

The Supreme Court ultimately held, in a 5-3 decision, that the discovery of the warrant was sufficiently attenuated from the illegal stop that the evidence discovered incident to Strieff's arrest was admissible. Writing for the Court, Justice Thomas concluded that Officer Fackrell, in making the illegal stop, "was at most negligent," not flagrant.[233] The Court rejected the notion that "this unlawful stop was part of any systemic or recurrent police misconduct."[234] Rather, the Court concluded, "all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house."[235] But the dissent criticized the majority for characterizing such officer behavior as "isolated instance[s] of negligence," noting that it is widespread practice in many localities to stop citizens and run warrant checks, which is especially problematic, according to Justice Sotomayor, given that outstanding warrants for minor offenses like traffic tickets are "surprisingly common."[236] In another dissent, Justice Kagan echoed Justice Sotomayor's concerns, contending that the majority's ruling will increase an officer's incentive to violate the Constitution by giving law enforcement a green light to stop persons without reasonable suspicion, knowing that "[s]o long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution."[237]

Birchfield v. North Dakota

Holding: *In the absence of a warrant, "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving," and "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."* [238]

In *Birchfield*, the Supreme Court consolidated three cases that address the Fourth Amendment question of the circumstances under which police who, having made an arrest for drunk driving, may conduct a warrantless sobriety test. The three are *Birchfield v. North Dakota,*[239] *Bernard v. Minnesota,*[240] and *Beylund v. Levi*.[241]

Birchfield drove his car into a ditch.[242] When the police arrived, Birchfield's speech was slurred, he was unsteady on his feet, and he smelled of alcohol.[243] He agreed to a breathalyzer test after he was informed that if he refused he could lose his license and might be prosecuted for the failure to comply.[244] When he failed the test, the officer arrested him and took him to a hospital for a blood

[232] *See* Transcript of Oral Argument at 36:11-36:15, *Utah v. Strieff,* 136 S. Ct. 27 (2015) (No. 14-1373).

[233] Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

[234] *Id.*

[235] *Id.*

[236] *Id.* at 2068 (Sotomayor & Ginsburg, JJ., dissenting).

[237] *Id.* at 2074 (Kagan & Ginsburg, JJ., dissenting).

[238] Birchfield v. North Dakota, 136 S. Ct. 2160, 2185, 2186 (2016).

[239] 136 S. Ct. 614 (2015) (No. 14-1468).

[240] 136 S. Ct. 615 (No. 14-1470).

[241] 136 S. Ct. 614 (2015) (No. 14-1507).

[242] State v. Birchfield, 858 N.W.2d 302, 303 (N.D. 2015).

[243] *See* Brief of Respondent at 10, 136 S. Ct. 614 (2015) (No. 14-1468).

[244] *See id.* at 11.

test, which Birchfield refused to allow.[245] Birchfield pleaded guilty to a class B misdemeanor for the refusal, but he reserved the right to appeal the Fourth Amendment issue.[246] The North Dakota Supreme Court affirmed the conviction.[247]

Bernard's truck became stuck when he tried to pull a boat out of the water.[248] The police arrived in response to a complaint of public drunkenness.[249] Bernard smelled of alcohol.[250] He assured officers that he had not driven the truck although the keys were in his hand at the time.[251] He refused to take a field sobriety test and was arrested.[252] He refused to take a breathalyzer test at the police station and was criminally charged for the refusal.[253] The Minnesota Supreme Court upheld the trial court's decision not to dismiss the charges stemming from Bernard's refusal to agree to the test.[254]

Beylund was arrested after police saw him driving erratically.[255] He agreed to a blood test after he was told the criminal penalties for the refusal and for drunk driving were the same.[256] He subsequently challenged the suspension of his driver's license.[257] The North Dakota Supreme Court upheld the action.[258]

The Fourth Amendment,[259] in conjunction with the Due Process Clause of the Fourteenth Amendment,[260] prohibits unreasonable governmental searches and seizures.[261] A search or seizure is not unreasonable when conducted pursuant to a warrant issued by a neutral magistrate upon a finding of probable cause.[262] The Supreme Court has recognized several exceptions to the warrant requirement. One occurs under exigent circumstances when evidence must be seized immediately or it will be lost.[263] A second consists of a search incident to a lawful arrest.[264] A third occurs when the subject of law enforcement attention consents to the search or seizure.[265]

Justice Alito, the author of the opinion for the Court, began with the exigent circumstance exception. He noted the *McNeely* holding "that the natural dissipation of alcohol from the

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[245] *See id.* at 12.

[246] *Birchfield,* 858 N.W.2d at 303.

[247] *See id.* at 310.

[248] State v. Bernard. 859 N.W.2d 762, 764 (Minn. 2015).

[249] *See id.*

[250] *See id.*

[251] *See id.*

[252] *See id.*

[253] *See id.* at 764-65.

[254] *See id.* at 766-74.

[255] Beylund v. Levi, 859 N.W.2d 403, 406 (N.D. 2015).

[256] *See id.*

[257] *See id.* at 406-07.

[258] *See id.* at 407-14.

[259] U.S. CONST. amend. IV.

[260] U.S. CONST. amend. XIV.

[261] *See* Maryland v. King, 133 S. Ct. 1958, 1968 (2013).

[262] *See, e.g.,* City of Los Angeles, Ca. v. Patel, 135 S. Ct. 2443, 2451-52 (2015); Illinois v. McArthur, 531 U.S. 326, 330 (2001).

[263] *See, e.g.,* Schmerber v. California, 382 U.S. 757 (1966).

[264] *See, e.g.,* Riley v. California, 134 S. Ct. 2473, 2482 (2014).

[265] *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

bloodstream does not *always* constitute an exigency justifying the warrantless taking of a blood sample," but stated that the existence of an exigency exception "depend[s] on all of the facts and circumstances of the particular case."[266]

Justice Alito then addressed the incident to arrest exception. Here too he found answers in the Court's recent pronouncements. In *Riley*, the Court had explained that incident to arrest claims are weighed by measuring "the degree to which they intrude upon an individual's privacy and the degree to which they are needed for the promotion of legitimate government interests."[267]

He concluded that under such a measure breath tests qualified for the exception, but blood tests did not. "A breath test does not 'implicate significant privacy concerns.' Blood tests are a different matter.... Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative for a breath test."[268] Thus, "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, [Justice Alito] concluded that a [warrantless] breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving."[269]

Turning to the consent exception, Justice Alito acknowledged that the Court's "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply."[270] Yet in his mind, the prospect of criminal penalties carried blood tests beyond that to which a motorist could reasonably be said to have implicitly consented.[271]

As for Birchfield, Bernard, and Beylund, Birchfield's conviction, predicated upon a refusal to submit to a warrantless, and thus unlawful, blood test, had to be reversed.[272] Bernard's conviction, predicated upon a refusal to submit to a warrantless, but lawful, breath test, remained in place.[273] Beylund, who submitted to a blood test in the face of threatened criminal prosecution and suffered the civil and administrative consequences, saw his case returned to state court to determine whether his consent was voluntary.[274]

Justices Sotomayor and Ginsburg concurred in *Birchfield* and *Beylund*, but dissented in *Bernard,* because they felt the Court too readily endorsed warrantless breath tests.[275] Justice Thomas likewise concurred in part and dissented in part, but from the opposite point of view.[276] He would

[266] Birchfield v. North Dakota, 136 S. Ct. 2160, 2174 (2016) (citing Missouri v. McNeely, 133 S. Ct. 1552, 1560 (2013)).

[267] *Id*. at 2176 (quoting Riley v. California, 134 S. Ct. 2473, 2484 (2014)).

[268] *Id*. at 2178 (quoting Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 626 (1989)).

[269] *Id*. at 2185.

[270] *Id*.

[271] *Id*. at 2185-86.

[272] *Id*. at 2186.

[273] *Id*.

[274] *Id*.

[275] *Id*. at 2187, 2196 (Sotomayor & Ginsburg, JJ., concurring in part and dissenting in part) ("Here, the Court lacks even the pretense of attempting to situate breath searches within the narrow and weighty law enforcement needs that have historically justified the limited use of warrantless searches. I fear that if the Court continues down this road, the Fourth Amendment's warrant requirement will become nothing more than a suggestion.").

[276] *Id*. at 2196 (Thomas, J., concurring in part and dissenting in part).

have overruled *McNeely* and held that both alcohol tests—blood tests and breath tests—always fall within the exigent circumstance exception to the warrant clause.[277]

Mullenix v. Luna

Holding: "*The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.... [E]xcessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted.... [W]e ... reverse the Fifth Circuit's determination that Mullenix is not entitled to qualified immunity.*"[278]

Amidst widespread concern over police use of excessive force, the Supreme Court confirmed that under existing law police officers are entitled to qualified immunity from civil liability for the use of force in performance of their duties, except in those cases in which they should have known their conduct was unlawful.[279]

The issue arose in the context of a Texas state trooper who fired a rifle at a car involved in a high-speed chase, killing the driver.[280] The chase began when local police tried to arrest Israel Leija at a drive-in restaurant.[281] He fled onto the Interstate with troopers in pursuit.[282] In the course of his flight, which at times reached speeds of 110 miles per hour, Leija called the police dispatcher and threatened to shoot his pursuers unless they gave up the chase.[283]

In order to stop Leija, police set out tire spikes on the approach to a highway underpass in his path.[284] Trooper Mullenix, situated on the top of the underpass, decided to try to shoot out the engine of Leija's car to stop him.[285] There is some dispute over whether Mullenix heard the radio dispatch from his supervisor suggesting that he wait to see if the tire spikes did the job first.[286] As the speeding car approached, Mullenix fired six shots.[287] The car hit the spikes and rolled over a couple of times.[288] Leija was dead with four shots in his upper body.[289]

Leija's family sued under federal civil rights laws pleading that Mullenix had used excessive force against Leija in violation of Leija's Fourth Amendment right to be free of an unreasonable seizure.[290] Mullenix asked the court to dismiss the case before trial on qualified immunity grounds, which shield law enforcement officers and other officials for performance of their

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[277] *Id*. at 2197.

[278] Mullenix v. Luna, 136 S. Ct. 305 (2015). This entry lifted substantial portions of its discussion from a legal sidebar, CRS Legal Sidebar WSLG1513, *When Can a Defendant Use Her Own Money to Pay for Her Attorney?*, by Charles Doyle.

[279] Mullenix v. Luna, 136 S. Ct. 305 (2015).

[280] *See id.* at 306-08.

[281] *Id.* at 306.

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.* at 306-07.

[286] *See id.*

[287] *Id.* at 307.

[288] *Id.*

[289] *Id.*

[290] Luna v. Mullenix, 773 F.3d 712, 717-18 (5th Cir. 2014), *rev'd* Mullenix v. Luna, 136 S. Ct. 305 (2015).

official duties under some circumstances.[291] The U.S. district court refused.[292] Mullenix appealed.[293] The three-judge panel of the U.S. Court of Appeals for the Fifth Circuit agreed with the district court.[294]

The panel pointed out that "the doctrine of qualified immunity shields 'government officials performing discretionary functions ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[295] The test is two-fold.[296] First, did the official violate a constitutional or statutory right?[297] Second, was the constitutional or statutory right so clearly established that the official must have known that it banned his conduct?[298]

As for the first step, the panel distinguished two recent Supreme Court cases that had found qualified immunity warranted in cases involving police shootings to terminate a high-speed chase.[299] They felt that "the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable," and that based only on the plaintiff's facts the use of deadly force was not justified.[300] On the second step, they concluded it was clearly established that an officer may use deadly force against a fleeing suspect only when the suspect poses a threat of immediate, serious harm to others.[301]

Mullenix asked for a rehearing en banc. The Fifth Circuit denied the request, but 7 members of the 19 judges on the Fifth Circuit disagreed.[302]

The Supreme Court in an 8-1, unsigned opinion agreed with Mullenix. Without reaching the Fourth Amendment first step, the Court concluded that any Fourth Amendment right was not clearly established.[303] The standard applied by the panel of the Fifth Circuit ("was the threat sufficient to justify the use of deadly force") was too general.[304] As for the more particularized inquiry, the "excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted."[305]

Justice Scalia agreed with the result but thought the law was not clearly established for a different reason.[306] In his mind, the car-chase cases cited by the Court involve the use of deadly force in

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[291] *Id.* at 718.

[292] *Id.*

[293] *Id.*

[294] *Id.* at 726.

[295] *Id.* at 718 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[296] *See* Tolan v. Cotton, 134 S. Ct. 1861, 1865 (2014).

[297] *See id.*

[298] *See id.* at 1866.

[299] *See* Luna v. Mullenix, 773 F.3d 712, 720 (analyzing Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) and Scott v. Harris, 550 U.S. 372 (2007)).

[300] *See id.* at 720-24 (internal quotation marks and citation omitted).

[301] *See id.* at 724-25.

[302] Mullenix v. Luna, 136 S. Ct.305, 308 (2015).

[303] *Id.* at 308-12.

[304] *See id.*

[305] *Id.* at 309.

[306] *See id.* at 312-13 (Scalia, J., concurring).

order to make an arrest.[307] He felt that Mullenix should have been seen as a question of deadly force directed at the car rather than its driver.[308]

Justice Sotomayor dissented.[309] She would have held that Mullenix "violated Leija's clearly established right to be free of intrusion absent some governmental interest," when he failed to wait to see if the tire spikes would disable Leija's car.[310] She also expressed a concern that "[b]y sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow."[311]

Fifth Amendment

Puerto Rico v. Sanchez Valle[312]

Holding: *The Double Jeopardy Clause of the United States Constitution bars the federal government and Puerto Rico from successively prosecuting a defendant on like charges for the same conduct*.[313]

Luis Sanchez Vallee sold a firearm to an undercover police officer.[314] A Puerto Rican grand jury indicted him for violation of Puerto Rican law,[315] and a federal grand jury indicted him for violating federal law for the same sale.[316] Sanchez Valle pleaded guilty to the federal charges and moved to dismiss the Puerto Rican charges on double jeopardy grounds.[317] The trial court granted the motion to dismiss.[318] The Puerto Rican Court of Appeals reversed and was in turn reversed by the Supreme Court of Puerto Rico.[319]

The double jeopardy issue is grounded in history. Acquired by treaty after the Spanish-American War of 1898,[320] the Commonwealth of Puerto Rico has been granted self-government, it has adopted a constitution, and its residents have been given U.S. citizenship.[321] The nature of the relationship between the U.S. territory and the federal government, however, remains the subject of a long-standing legal and political dispute.[322] Based in part on statutory language providing

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[307] *See id.* at 312.

[308] *See id.* at 312-13.

[309] *Id.* at 313-16 (Sotomayor, J., dissenting).

[310] *Id.* at 314-15.

[311] *Id.* at 316.

[312] Kenneth Thomas, a legislative attorney in the American Law Division, prepared this section of the report. It is available as a free-standing legal sidebar, CRS Legal Sidebar WSLG1427, *Tropical Storm? The Supreme Court Considers Double Jeopardy and the Sovereign Status of Puerto Rico*, by Kenneth R. Thomas.

[313] Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016).

[314] *Id*. at 1869.

[315] *Id.* (noting P.R. LAWS ANN. tit. 25, §458 (2008)).

[316] *Id.* (noting 18 U.S.C. §§922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2)).

[317] *Id*. (citing App. to Petition for Writ of Certiorari, Puerto Rico v. Valle (No. 15-108), at 307a-352a).

[318] *Id*.

[319] Puerto Rico v. Valle, 192 D.P.R. 594 (P.R. 2015), ___ P.R. OFFIC. TRANS. ___ (*translation available at* http://www.scotusblog.com/wp-content/uploads/2015/10/SanchezValleEnglish.pdf).

[320] Treaty of Peace Between the United States of America and the Kingdom of Spain, 30 Stat. 1754, T.S. No. 343 (1899).

[321] *See* 48 U.S.C. §§731b, 733; 8 U.S.C. §1402; CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO.

[322] See CRS Report R42765, *Puerto Rico's Political Status and the 2012 Plebiscite: Background and Key Questions*,

that the relationship between Puerto Rico and the United States is "in the nature of a compact,"[323] arguments have been made that any change in Puerto Rico's political status must be consented to by both parties.[324] Others argue that, under the Territory Clause,[325] the United States has plenary authority to legislate regarding Puerto Rico without first obtaining the Puerto Rican government's consent.[326]

In *Puerto Rico v. Sanchez Valle*,[327] the Court was called upon to decide whether defendants in a criminal case can be prosecuted under the local laws of Puerto Rico if they have been previously convicted under federal criminal law for the same offense. The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "for the same offense ... be twice put in jeopardy of life or limb."[328] Under the dual sovereignty doctrine, however, if two separate sovereigns prosecute a person for the same offense, the constitutional protection against double jeopardy is not triggered.[329] Thus, the Supreme Court has held that state and federal prosecutions can be brought for the same offense,[330] and similarly, it has allowed dual prosecutions by the federal government and Indian tribes.[331] The Court, however, has also held that, as territories operate under power delegated to them by Congress, they are not to be treated as separate sovereigns for purposes of the Double Jeopardy Clause.[332]

The case came to the Court from the Supreme Court of Puerto Rico, the island's highest territorial court, which held, consistent with U.S. Supreme Court precedent, that since Puerto Rico is not a separate sovereign, it cannot prosecute a person who has been convicted in federal court for the same crime.[333] This view, however, conflicted with an earlier opinion by the federal appellate court with jurisdiction over Puerto Rico, the U.S. Court of Appeals for the First Circuit, which held that Puerto Rico should be treated as a state for purposes of double jeopardy, allowing a person to be prosecuted for the same crime under Puerto Rican and federal laws.[334] There was also a long-standing circuit split between the First Circuit decision and an opinion by the U.S. Court of Appeals for the Eleventh Circuit on this issue.[335]

Puerto Rico, in its petition to the Court for a writ of certiorari, conceded that the dual sovereignty doctrine has not previously been applied to a territory, but it argued that the nature of Puerto

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by R. Sam Garrett.

[323] *See* 48 U.S.C. §731b.

[324] *Testimony on the Nov. 6, 2012, Referendum on the Political Status of Puerto Rico and the Admin.'s Response: Hearing Before the Comm. on Energy & Nat. Res.*, 113th Cong. (2013).

[325] U.S. CONST., art. IV, §3, cl. 2.

[326] MAGGIE GRANT ET AL., REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS (December 2007), *available at* http://www.justice.gov/sites/default/files/opa/legacy/2007/12/21/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf#page=12.

[327] 136 S. Ct. 28 (2015).

[328] U.S. CONST. amend. V, cl. 2.

[329] *See, e.g.*, United States v. Dixon, 509 U.S. 688, 724-25 (1993).

[330] *See* Abbate v. United States, 359 U.S. 187, 194-95 (1959).

[331] *See* United States v. Lara, 541 U.S. 193, 208-09 (2004).

[332] *See* Grafton v. United States, 206 U.S. 333, 354-55 (1907).

[333] Puerto Rico v. Valle, 192 D.P.R. 594 (P.R. 2015), *translation available at* http://www.scotusblog.com/wp-content/uploads/2015/10/SanchezValleEnglish.pdf.

[334] *See* United States v. Lopez Andino, 831 F.2d 1164, 1167-68 (1st Cir. 1987).

[335] *See* United States v. Sanchez, 992 F.2d 1143, 1151-53 (11th Cir. 1993).

Rico's relationship with the United States changed in 1950.[336] In that year, Congress passed P.L. 81-600 (Public Law 600), which contains the "compact" language that allowed Puerto Rico to "organize a government pursuant to a constitution of their own adoption," subject to congressional approval. Puerto Rico argued that when Congress subsequently approved its constitution, this approval established the sovereignty of Puerto Rico in much the same way that other territories have achieved statehood.[337] Puerto Rico analogized this legislatively created sovereignty to the sovereignty of Indian tribes, and further notes instances where Puerto Rico has been treated as a state in statutory contexts.[338]

The defendants, in their response to the petition, argued that the passage of Public Law 600 did not change the nature of the relationship between Puerto Rico and the United States, noting Congress's retention of plenary authority to review Puerto Rico's constitution before it became effective.[339] Further, the defendants argued, the legislative history of Public Law 600 provided that nothing in the law would change Puerto Rico's political, social, and economic relationship to the United States.[340]

The Court, speaking through Justice Kagan, concluded that the Double Jeopardy Clause does not permit the two entities, the federal government and Puerto Rico, to successively prosecute the defendant for essentially the same crime.[341] She began with the observation that the inquiry did "not probe whether a government possesses the usual attributes, or acts in the common manner, of a sovereign…. [but] whether [the prosecuting entities] draw their authority to punish the offender from distinct sources of power."[342]

She explained that, for example, "the States rely on 'authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.'"[343] By the same token, "[o]riginally … 'the [Indian] tribes were self-governing sovereign political communities,' possessing … the 'inherent power to prescribe laws for their members and to punish infractions of those laws.'"[344]

In the case of Puerto Rico, Justice Kagan saw the question as: "Do the prosecutorial powers belonging to Puerto Rico and the Federal Government derive from whole independent sources?" She confirmed that with Public Law 600 and with the Commonwealth's subsequent adoption of a constitution, Puerto Rico underwent a profound political change.[345] The question, however, was not about the change, but about the power to make the change.[346] "Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico's prosecutors," Justice Kagan reminded the parties.[347] When "an entity's authority to enact and

[336] Petition for Writ of Certiorari, Puerto Rico v. Valle, 136 S. Ct. 28 (2015) (No. 15-108).

[337] *Id.*

[338] *Id.*

[339] Reply Brief in Opposition to Petition for Writ of Certiorari, 136 S. Ct. 28 (2015) (No. 15-108).

[340] 136 S. Ct. 28 (2015) (No. 15-108).

[341] Puerto Rico v. Sanchez Vallee, 136 S. Ct. 1863, 1870 (2016).

[342] *Id*. at 1870-71.

[343] *Id.* at 1871.

[344] *Id*.

[345] *Id*. at 1874.

[346] *Id*.

[347] *Id*.

enforce criminal law ultimately comes from Congress," she continued, "then it cannot follow a federal prosecution with its own. That is true of Puerto Rico, because Congress authorized and approved its Constitution, from which prosecutorial power now flows."[348]

The Court therefore affirmed the decision of the Supreme Court of Puerto Rico that the Double Jeopardy Clause's dual sovereign doctrine does not permit successive federal and Puerto Rico prosecutions for the "same offense."[349]

Justices Ginsburg and Thomas joined in the Court's opinion, but offered a concurring opinion to reflect their view that the dual sovereign doctrine seems at odds with the spirit of the Double Jeopardy Clause.[350] Justice Thomas filed an individual concurrence in which he declined to join that portion of the Court's opinion that recited its Indian law-Double Jeopardy precedents.[351]

Justices Breyer and Sotomayor dissented, because they believe "for Double Jeopardy Clause purposes that the criminal law of Puerto Rico and the criminal law of the Federal Government do not find their legitimacy-conferring origin in the same 'source.'"[352]

Sixth Amendment

The Court's Sixth Amendment cases this term offer a variety of issues ranging from speedy trial, to forfeiture and the right to counsel of choice, to the use of uncounseled convictions as predicate offenses.

Luis v. United States

Holding: *"Pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." (Plurality).*[353]

The Supreme Court decided in a 4-1-3 opinion that the "pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment."[354] Justice Breyer, in an opinion joined by the Chief Justice and Justices Ginsburg and Sotomayor, based his conclusion on "the nature and importance of the constitutional right taken together with the nature of the assets" in the case.[355] Justice Thomas, who concurred in the judgment, based the same conclusion "strictly on the Sixth Amendment's text and common-law backdrop."[356]

Sila Luis was indicted for health care fraud.[357] The indictment also identified certain of Luis's assets as property generated by the offense.[358] The government initiated a civil forfeiture proceeding based on the grand jury's probable cause finding.[359] It also secured a pre-trial freeze

[348] *Id*. at 1875.

[349] *Id.* at 1876-77.

[350] *Id*. at 1877 (Ginsburg & Thomas, JJ., concurring).

[351] *Id*. (Thomas, J., concurring in part and concurring in the judgment).

[352] *Id*. at 1884-85 (Breyer & Sotomayor, JJ., dissenting).

[353] Luis v. United States, 136 S. Ct. 1083, 1088 (2016).

[354] *Id.*

[355] *Id*. (Breyer, Ginsburg, Sotomayor, JJ., & Roberts, Ch.J.).

[356] *Id*. at 1096 (Thomas, J., concurring in the judgment).

[357] United States v. Luis, 564 Fed. Appx. 493 (11th Cir. 2014).

[358] *Id.* at 494.

[359] *Id.*

order covering substitute assets ("property of equivalent value" to the tainted assets) not traceable to the tainted assets, after the court found that Luis had disposed of some of the tainted assets.[360] Luis argued before both the district court and the U.S. Court of Appeals for the Eleventh Circuit that she needed to substitute assets to pay her defense attorney and that as a consequence the freeze order violated her Fifth and Sixth Amendment rights.[361] The Eleventh Circuit held that her arguments were foreclosed by the Supreme Court's *Monsanto*, *Caplin & Drysdale*, and *Kaley* decisions.[362] The Supreme Court granted certiorari to decide the constitutional issue.[363]

The Court's *Caplin & Drysdale* and *Monsanto* cases arose under the Controlled Substances Act (CSA). The CSA authorizes the confiscation of tainted property traceable to a violation of its provisions. It also authorizes the confiscation of untainted property ("substitute assets") when the tainted property is unavailable. Moreover, it states that the United States acquires title to tainted property when the forfeiture-triggering offense is committed. And most pertinent here, it authorizes pre-trial restraining orders to prevent the dissipation of tainted and untainted assets.

The *Caplin & Drysdale* decision declared that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of counsel." Thus, it held "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice."

The *Monsanto* decision held that a judicial finding of probable cause to believe assets were tainted and therefore forfeitable was all that the Constitution required for a pre-trial restraining order barring disposal of the assets, even to pay attorneys' fees. The *Kaley* decision held that a grand jury's finding of probable cause was enough for a restraining order without the necessity of a judicial probable cause hearing.

Luis noted that each of these cases involved tainted assets and that her case involved untainted assets. She argued that therefore the untainted assets she intended to use to finance her criminal defense may not be frozen as a matter of Sixth Amendment right. Five of the Justices essentially agreed.

Justice Breyer reiterated that "the Sixth Amendment grants a defendant 'a fair opportunity to secure counsel of his own choice.'"[364] He agreed with Luis that fact that her frozen assets were untainted represented a critical departure from the Court's earlier cases.[365] He offered three reasons to conclude that the restraining order offended Luis's Sixth Amendment rights. First, Luis's constitutionally protected right to her counsel of choice carried greater weight than the government's interest in forfeiture and restitution.[366] Second, as a matter of legal history, seizure

[360] *Id.*

[361] *Id.*

[362] *Id.*, citing, United States v. Monsanto, 491 U.S. 600, 616 (1989); Caplin & Drysdale Chartered v. United States, 491 U.S. 617, 631 (1989); and Kaley v. United States, 134 S Ct. 1090, 1105 (2014).

[363] Luis v. United States, 135 S. Ct. 2798 (No. 14-419) (2015).

[364] *Luis*, 136 S. Ct. at 1089 (quoting Powell v. Alabama, 287 U.S. 45, 53 (1932)).

[365] *Id*. at 1090 ("The property at issue here, however, is not loot, contraband, or otherwise 'tainted.' It belongs to the defendant. That fact undermines the Government's reliance upon precedent, for both *Caplin & Drysdale* and *Monsanto* relied critically upon the fact that the property at issue was 'tainted' and that title to the property therefore had passed from the defendant to the Government before the court issued its order freezing (or otherwise disposing of) the assets").

[366] *Id*. at 1093.

of untainted property prior to conviction was virtually unheard of.[367] Third, the government's position carried to its logical conclusion could sweep away a defendant's right to the assistance of a counsel of choice.[368]

Justice Thomas agreed the Sixth Amendment barred pre-trial restraint of the defendant's untainted assets, but he would stop there. He declined to "endorse the plurality's atextual balancing analysis." [369]

Justice Kennedy, joined by Justice Alito in dissent, bemoaned the fact that the plurality's "unprecedented holding rewards criminals who hurry to spend, conceal, or launder stolen property by assuring them that they may use their own funds to pay for an attorney after they have dissipated the proceeds of their crime." [370] Justice Kagan dissented because she believed the Court was bound by its *Monsanto* precedent.[371]

Betterman v. Montana

Holding: *The Sixth Amendment's Speedy Trial Clause does not apply once a defendant has pleaded guilty or has been found guilty after a trial.*[372]

Betterman v. Montana presented the question of whether the Sixth Amendment right to a speedy trial applies through sentencing or, instead, ends once a conviction has been obtained.[373] The Sixth Amendment states that "the accused shall enjoy the right to a speedy and public trial,"[374] which the Court has described as a "fundamental right" that is "specifically affirmed in the Constitution."[375] The Fourteenth Amendment's Due Process Clause makes the Sixth Amendment binding on the states.[376] The right to a speedy trial is enforced, in part, by the Speedy Trial Act of 1984, as amended, which sets deadlines (with statutory exceptions) for federal courts to complete various stages of a criminal prosecution.[377] Montana has a corresponding constitutional right but no comparable statutory provision.[378] The consequence of denying this Sixth Amendment right to a defendant is having the charges against the accused dismissed.[379]

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[367] *Id*. at 1093-94.

[368] *Id*. at 1094.

[369] *Id*. at 1101 (Thomas, J., concurring in the judgment).

[370] *Id*. at 1103 (Kennedy & Alito, JJ., dissenting).

[371] *Id*. at 1112 (Kagan, J., dissenting) (quoting *Monsanto*, 491 U.S. at 616) ("No constitutional violation occurs when, after probable cause is adequately established the Government obtains an order barring a defendant from ... dissipating his assets prior to trial").

[372] Betterman v. Montana, 136 S. Ct. 1609, 1613 (2016).

[373] This section of the report was the beneficiary of contributions found in a legal sidebar, CRS Legal Sidebar WSLG1525, *Does a Defendant Have a Right to Speedy Sentencing Proceedings?*, by Sarah S. Herman.

[374] U.S. CONST. amend. VI.

[375] *See* Barker v. Wingo, 407 U.S. 514, 533 (1972).

[376] Smith v. Hooey, 393 U.S. 374, 374-75 (1969); Klopfer v. North Carolina, 386 U.S. 213, 216-26 (1967).

[377] *See* 18 U.S.C. §§3161-3174; *see also* UNITED STATES ATTORNEYS' CRIMINAL RESOURCE MANUAL §628, *available at* https://www.justice.gov/usam/criminal-resource-manual-628-speedy-trial-act-1974 (last visited Mar. 28, 2016).

[378] *See* MONT. CONST. art. II, §24.

[379] *See* Strunk v. United States, 412 U.S. 434, 440 (1973); Barker v. Wingo, 407 U.S. 514, 522 (1972); United States v. Moreno, 789 F.3d 72, 78 (2d Cir. 2015); United States v. Margheim, 770 F.3d 1312, 1325 (10th Cir. 2014).

Brandon Betterman was charged with bail jumping after failing to appear for his sentencing hearing for a domestic assault conviction in Montana.[380] Eventually, Betterman turned himself in, after which he was sentenced for the domestic assault charges; he remained in county jail (instead of being transferred to a state penitentiary to begin serving his sentence) during the criminal proceedings for the bail jumping charge.[381] Fourteen months passed between the date on which Betterman was arraigned for, and pleaded guilty to, the bail jumping charge (April 19, 2012) and his sentencing hearing (June 27, 2013).[382] While he awaited sentencing, Betterman moved to dismiss the bail jumping charge after nine months had passed since his guilty plea, contending that the delay in sentencing violated his right to a speedy trial under the Sixth Amendment.[383] The trial court denied that motion, and the Montana Supreme Court affirmed.[384]

One of Betterman's principal arguments for why the Sixth Amendment's Speedy Trial Clause should apply until sentencing concludes centers on the Framers' intent and the text and history of the Clause.[385] Yet with Justice Scalia no longer on the bench, it was hard to predict how those rationales would factor into the Court's analysis. According to Betterman, when the Framers penned the Bill of Rights, criminal proceedings were "unitary," and so when using the word "trial" in the Amendment's text, the Framers "adopted protections encompassing not just the petit jury stage but also the sentence and judgment that followed."[386] Montana disputes Betterman's contention, and adds that the Amendment's text, which affords a right to the "accused"—not the convicted—lends support to the conclusion that the right does not continue through sentencing.[387] The National Association of Criminal Defense Lawyers (NACDL) filed an amicus brief in support of Betterman, bringing a human-impact hook for the Court to consider. According to the NACDL, many prisoners, like Betterman, spend long periods in jail awaiting trial, but those facilities are often overcrowded and ill-equipped to handle extended stays, preventing prisoners from accessing adequate medical care and various rehabilitation programs.[388] Thus, the NACDL argues, applying the right to sentencing proceedings could reduce the amount of time in, and allegedly oppressive consequences of, state jail stays.[389]

The Supreme Court was unpersuaded by Betterman's arguments and unanimously held that the Sixth Amendment's Speedy Trial Clause does not apply once a defendant has pleaded guilty or been found guilty after trial.[390] The Court, in an opinion by Justice Ginsburg, noted that the Speedy Trial Clause helps protect the accused's presumption of innocence by "'prevent[ing] undue and oppressive incarceration prior to trial ... and ... limit[ing] the possibilities that long delay will impair the ability of an accused to defend himself.'"[391] But that protection, the Court

[380] *See* Joint Appendix at 10-15, Betterman v. Montana, 136 S. Ct. 582 (2015) (No. 14-1457).

[381] *See* State v. Betterman, 342 P. 3d 971, 973 (Mont. 2015).

[382] *Id.* at 973-74.

[383] *Id.* at 973.

[384] *Id.* 973, 981.

[385] *See* Brief for Petitioner at 10-11, Betterman v. Montana, 136 S. Ct. 582 (2015) (No. 14-1457).

[386] *Id.* at 11.

[387] *See* Brief for Respondent at 27, Betterman v. Montana, 136 S. Ct. 582 (2015) (No. 14-1457).

[388] *See* Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 6-10, Betterman v. Montana, 136 S. Ct. 582 (2015) (No. 14-1457).

[389] *Id.* at 2-3.

[390] Betterman v. Montana, 136 S. Ct. 1609 (2016).

[391] *Id.* at 1614 (quoting United States v. Marion, 404 U.S. 307, 320 (1971)).

clarified, "loses force upon conviction."[392] Additionally, the Court reasoned that its conclusion fits with the historical understanding of the right to a speedy trial, noting that the Framers believed that "a presumptively innocent person should not languish under an unresolved charge," and thus the language chosen—guaranteeing a right to the "accused"—was purposeful and distinct from the convicted.[393] Moreover, the Court added that "[t]he sole remedy for a violation of the speedy trial right—dismissal of the charges—fits the preconviction focus of the Clause" because, the Court reasoned, "it would be an unjustified windfall, in most cases, to remedy sentencing delay by vacating validly obtained convictions."[394] Still, the Court noted that a defendant who experiences "inordinate delay in sentencing" possibly may be able to seek relief through the Due Process Clause—an issue that Betterman did not raise,[395] but which Justices Thomas, Alito, and Sotomayor noted in separate concurrence.[396]

United States v. Bryant

Holding: *Reliance on valid uncounseled tribal-court misdemeanor convictions to prove 18 U.S.C. Section 117(a)'s predicate offense element violates neither the Sixth Amendment nor the Due Process Clause.*[397]

The federal domestic assault by an habitual offender law makes it a crime punishable by imprisonment for up to five years to commit domestic violence within Indian country or U.S. territorial jurisdiction if the offender has at least two prior federal, state, or tribal convictions for a comparable offense.[398] As a general rule, the Constitution assures indigent defendants the right to an appointed attorney in any criminal case *where a term of imprisonment is imposed*.[399] Indian defendants in tribal courts, however, enjoy no such constitutional assurance.[400]

Bryant, a tribal member and reservation resident, had been convicted in tribal court of domestic violence on a number of occasions.[401] He had been imprisoned more than once as a consequence, although always for less than a year.[402] When he was indicted under the federal domestic violence law, he asked the U.S. District Court for the District of Montana to dismiss the charges.[403] He argued that the Sixth Amendment did not permit use of his uncounseled tribal court convictions as proof of an element of the federal domestic violence offense.[404] The district court refused to dismiss.[405] The Ninth Circuit reversed.[406] It felt bound by its earlier decision in *United States v.*

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[392] *Id.*

[393] *See id.*

[394] *See id.* at 1615 (internal citations omitted).

[395] *Id.* at 1612.

[396] *Id.* at 1618 (Thomas & Alito, JJ., concurring); *id.* (Sotomayor, J. concurring).

[397] United States v. Bryant, 136 S. Ct. 1954, 1959, 1966 (2016).

[398] 18 U.S.C. §117.

[399] *See, e.g.,* Scott v. Illinois, 440 U.S. 367 (1979)

[400] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[401] *See* United States v. Bryant, 769 F.3d 671, 672-73 (9th Cir. 2014); Brief for Respondent at 3, 136 S. Ct. 690 (No. 15-420).

[402] *See Bryant*, 769 F.3d at 673; Brief for Respondent at 3, 136 S. Ct. 690 (No. 15-420).

[403] *Bryant*, 769 F.3d at 673.

[404] *See id.*

[405] *Id.*

[406] *Id.* at 679.

*Ant d*ecision and was unconvinced by later developments.[407] It concluded that "[b]ecause Bryant's tribal court domestic abuse convictions would have violated the Sixth Amendment right to counsel had they been obtained in federal or state court, using them to establish an element of the offense in a subsequent [federal] prosecution is constitutionally impermissible."[408]

The *Ant* decision held that the Sixth Amendment barred the evidence of a defendant's uncounseled tribal court guilty plea in a parallel federal prosecution.[409] Soon thereafter, however, the Supreme Court observed in the course of its *Duro v. Reina* opinion that in proceedings against tribal members, a tribal court was not bound by the Bills of Rights—and that even when reinforced by the Indian Civil Rights Act, there was no right to appointed counsel in tribal courts.[410] Still later, the Supreme Court in *Nichols* declared "an uncounseled [state] misdemeanor conviction[] valid ... because no prison term was imposed," and "also valid when used to enhance punishment at a subsequent [federal] conviction."[411]

The Ninth Circuit saw no incompatibility between *Ant* and *Nichols* because "even after *Nichols*, uncounseled convictions that resulted in imprisonment generally could not be used in subsequent prosecutions."[412] As the Ninth Circuit conceded, the Eighth and Tenth Circuits saw it differently.[413] For them, the lesson from *Nichols* was not why uncounseled convictions were valid, but that the reason didn't matter as long as they were valid convictions: "The ultimate question ... is whether an uncounseled conviction resulting in a tribal incarceration that involved no actual constitutional violation may be used later in federal court.... As per *Nichols*, then, we believe it is necessary to accord substantial weight to the fact that [the defendant's] prior convictions involved no actual constitutional violation" because the Sixth Amendment does not apply in tribal court.[414]

The Supreme Court agreed. Justice Ginsburg pointed out in the opinion for the Court that "Bryant's tribal-court convictions ... infringed no constitutional right because the Sixth Amendment does not apply to tribal-court proceedings."[415] What counted for Sixth Amendment purposes was that Bryant enjoyed the full advantage of counsel at his subsequent federal Section 117 trial.[416] Moreover, Justice Ginsburg observed, echoing sentiments expressed below, "It would be 'odd to say that conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected.'"[417]

Bryant fared no better with his argument that the want of counsel in tribal court undermined the validity of tribal convictions, triggering a due process bar to their use in later federal criminal

[407] *See id.* at 676-79.

[408] *Id.* at 677.

[409] United States v. Ant, 882 F.2d 1389 (9th Cir. 1989).

[410] Duro v. Reina, 495 U.S. 676 (1990).

[411] Nichols v. United States, 511 U.S. 738, 749 (1994).

[412] *Bryant*, 769 F.3d at 677.

[413] *Id.* at 678 (citing United States v. Shavanaux, 647 F.3d 993 (10th Cir. 2011) and United States v. Cavanaugh, 643 F.3d 592 (8th Cir. 2011)).

[414] *See Cavanaugh*, 643 F.3d at 603-04.

[415] United States v. Bryant, 136 S. Ct. 1954, 1964 (2016).

[416] *Id.* at 1965.

[417] *Id.* (quoting United States v. Bryant, 769 F.3d 671, 679 (9th Cir. 2014) (Watford, J., concurring).

proceedings. Not so, said Justice Ginsburg. The panoply of statutory rights guaranteed there "sufficiently ensure the reliability of tribal-court convictions."[418]

Justice Thomas filed a concurring opinion.[419] He agreed the Court's precedents dictated the result.[420] He continued, however, to question the validity of those earlier pronouncements.[421]

Maryland v. Kulbicki

Holding: *Failure to anticipate that the Comparative Bullet Lead Analysis would be discredited did not constitute ineffective assistance of counsel*.[422]

In its first opinion of the 2015 term, *Maryland v. Kulbicki*, the Court reversed per curiam and unanimously, a decision of the Maryland Court of Appeals.[423]

Kulbicki had been convicted of first degree murder, based in part on the testimony of a forensic expert whose testimony relied on a so-called Comparative Bullet Lead Analysis (CBLA).[424] Some years later, Maryland's highest court declared Comparative Bullet Lead Analysis unreliable.[425] Kulbicki filed a petition for post-conviction relief challenging both the reliability of the analysis and the effectiveness of his attorney's cross-examination of the forensic expert.[426] The trial court denied the petition.[427] The Maryland Court of Special Appeals affirmed.[428] Then, the Maryland Court of Appeals reversed based upon counsel's failure to unearth and exploit a report that cast doubt on the analysis.[429] The Supreme Court overturned the decision of the Maryland Court of Appeals.[430]

The Sixth Amendment, made binding on the states through the Due Process Clause of the Fourteenth Amendment, assures the criminally accused of the effective assistance of counsel.[431] The assistance of counsel is constitutionally ineffective when counsel's "performance is deficient, meaning his errors are 'so serious' that he no longer functions as 'counsel,' and prejudicial, meaning his errors deprive the defendant of a fair trial.[432]

The Maryland Court of Appeals erroneously used hindsight to judge the effectiveness of Kulbicki's counsel, the Supreme Court concluded.[433] The appropriate standard looks at the adequacy of performance at the time it occurred.[434] At the time of Kulbicki's trial, the analysis

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[418] *Id*. at 1966.

[419] *Id*. at 1967 (Thomas, J., concurring).

[420] *Id.*

[421] *Id*.

[422] Maryland v. Kulbicki, 136 S. Ct. 2, 3 (2015).

[423] *Id*. at 2.

[424] Kulbicki v. State, 99 A.3d 730, 731-32 (Md. 2014).

[425] *Id*. at 732.

[426] *Id.*

[427] *Id*.

[428] Kulbicki v. State, 53 A.3d 361 (2012).

[429] *Kulbicki*, 99 A.3d at 734.

[430] *Kulbicki*, 136 S. Ct. at 5.

[431] *Id*. at 2-3 (quoting U.S. CONST. amend. VI and citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

[432] *Id*. at 3 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[433] *Id.*

[434] *Id.* (citing Lockhart v. Fretwell, 506 U.S. 364, 372 (1993), and *Strickland*, 466 U.S. at 690).

was widely accepted. Thus, Kulbicki's "[c]ounsel did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis," the Court explained.[435]

Sentencing

Capital punishment cases represent the lion's share of the Court's sentencing cases this term. However, the class also includes the matter of the retroactive application of *Miller v. Alabama*'s prohibition on a life without parole sentence for murder by a juvenile and the harmless error standard in sentencing cases.

Montgomery v. Louisiana

Holding: *The United States Supreme Court has "jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect to ... Miller."*

"*Miller's prohibition on mandatory life without parole for juveniles [without] the opportunity to show their crime did not reflect irreparable corruption" applies retroactively even in state collateral review proceedings*.[436]

Early in the year, the U.S. Supreme Court declared that the previously announced ban on mandatory life imprisonment for juvenile crimes must apply to crimes committed before the ban.[437] The case, *Montgomery v. Louisiana*, has several distinctive aspects. First, it grants a 69-year-old inmate relief based on a sentence imposed for a murder that occurred when he was 17.[438] Second, it departs from a tradition under which groundbreaking Court decisions rarely travel back to long finalized cases. Third, it uses the so-called *Teague*[439] doctrine as a vehicle, even though the doctrine was heretofore only invoked to limit state prisoner access to federal habeas corpus review. Finally, its burdens fall most heavily upon the states because federal juvenile prosecutions are few, and federal murder prosecutions are even more uncommon.

If the particulars of the Court's disposal of the case were somewhat unusual, the result was probably not totally unexpected. The Court had already stated that the Eighth Amendment's cruel and unusual punishment clause would not permit (1) use of the death penalty for a murder committed by a juvenile;[440] (2) a sentence of life imprisonment without the possibility of parole for an offense other than murder committed by a juvenile;[441] or (3) a sentence of life imprisonment without the possibility of parole for a murder committed by a juvenile.[442]

At 17 years of age in 1963, Montgomery killed a deputy sheriff.[443] He was sentenced to life in prison with no chance of parole, the only sentence available when the jury declined to vote for the

[435] *Id.* It also noted that "[g]iven the uncontroversial nature of CBLA at the time of Kulbicki's trial, the effect of the judgment below is to demand that lawyers go 'looking for a needle in a haystack,' even when they have 'reason to doubt there is any needle there,'" *id*. at 4-5 (quoting Rompilla v. Beard, 545 U.S. 374, 389 (2005).

[436] *Montgomery v. Louisiana*, 136 S. Ct. 718, 732, 736 (2016).

[437] *Id.*

[438] *See id.* at 725-26.

[439] *See* Teague v. Lane, 489 U.S. 288 (1989).

[440] *See* Roper v. Simmons, 543 U.S. 551 (2005).

[441] *See* Graham v. Florida, 560 U.S. 48 (2010).

[442] *See* Miller v. Alabama, 132 S. Ct. 2455 (2012).

[443] *Montgomery*, 136 S. Ct. at 725.

death penalty.[444] He asked the Louisiana courts to toss out his sentence when its constitutional defects become apparent after *Miller*.[445] They refused on the ground that the Supreme Court's decisions have not been carried back to the cases of inmates like Montgomery whose appeals had long since become final.[446]

State prisoners may ask for review of their convictions or sentences in three stages. First, they may appeal their convictions or sentences in state court ("direct review"). Second, they may ask their state courts to overturn their convictions or sentences under a post-appeal procedure available in each of the states ("collateral review"). Finally, they may ask the federal courts to overturn their convictions or sentences under federal habeas corpus procedures.

Montgomery was at the second stage. Had he been at the third stage, the federal habeas corpus stage, he would have encountered the *Teague* doctrine. The doctrine, so named for the Supreme Court case in which it was first stated, *Teague v. Lane*, seeks finality.[447] It provides that federal habeas corpus review is not available to consider an inmate's request for a "new rule," that is, a groundbreaking constitutional interpretation.[448] The doctrine has two exceptions.[449] It does not apply to substantive new rules that void a previously valid crime or penalty.[450] And, it does not apply when the new rule is a "watershed" decision, one that "implicat[es] the fundamental fairness and accuracy of the criminal proceeding."[451]

The Supreme Court in *Montgomery* decided to apply *Teague's* exception to the second stage, the stage at which Montgomery found himself: "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." In the eyes of the Court, the *Miller* decision is such a rule; it voided a sentence of life imprisonment without the possibility of parole for a murder committed by a juvenile who was denied the opportunity to prove that he was not irreparably corrupted.[452] The Court returned Montgomery's case to Louisiana with the option either to resentence him or to make him eligible for parole.[453]

Justice Thomas in dissent disagreed with the Court's jurisdictional assessment that the case involved a federal constitutional issue rather than a matter of state law.[454] Justice Scalia, in a dissent joined by Justices Thomas and Alito, objected to "ripping *Teague*'s first exception from its moorings, [and] converting an equitable rule governing federal habeas relief to a constitutional command governing state courts as well."[455]

Congress is free to change the result. The Court's appellate jurisdiction is a matter of statute, but the statute has been amended only infrequently.

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[444] *Id.* at 725-26.

[445] *Id.* at 726.

[446] *Id.* at 726-27.

[447] 489 U.S. 288 (1989).

[448] *See id.*

[449] *See Montgomery*, 136 S. Ct. at 728.

[450] *See id*.

[451] *See id.*

[452] *See id.* at 733-37.

[453] *See id.* at 737.

[454] *See id.* at 744-50 (Thomas, J., dissenting).

[455] *See id.* at 742-43 (Scalia, J. dissenting).

United States v. Molina-Martinez

Holding: *When "the record is silent as to what the district court might have done had it considered the correct Guidelines range," as was the case here, "the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights" when conducting plain-error review. And when the defendant's original sentence had fallen within both the incorrect and correct Guidelines sentencing ranges, courts cannot require, as the Fifth Circuit had, defendants to provide additional evidence that the sentencing outcome would have been different.*[456]

In *United States v. Molina-Martinez,* the Supreme Court addressed a circuit split concerning how to determine, under plain error review, whether a district court's application of an incorrect guidelines range affected the defendant's substantial rights.[457] When imposing a sentence, the district judge first must calculate the defendant's advisory guidelines range by using the U.S. Sentencing Guidelines (the guidelines) to determine the defendant's total offense level and criminal history score.[458] The district judge must then choose a sentence after considering the guidelines range and weighing, among other things, aggravating and mitigating factors set forth in 18 U.S.C. Section 3553(a).[459] If the defendant does not object to the district court's calculation at sentencing, Federal Rule of Criminal Procedure 52(b) limits appellate review of the sentence to plain error. To establish plain error, the defendant must show (1) that the court made an error; (2) the error was plain (i.e., obvious); and (3) the error affected the defendant's substantial rights, which typically means that it "affected the outcome of the district court proceedings."[460] If the defendant makes that showing, the reviewing court has the discretion to grant relief if the court also concludes that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[461] Conversely, if a defendant timely objects at sentencing to a guidelines error, the government has the burden of proving on appeal that the error was harmless.[462]

In *United States v. Molina-Martinez*, defendant Saul Molina-Martinez, a Mexican citizen, was convicted of being unlawfully present in the United States after having been removed previously.[463] The district court adopted the probation office's calculation of Molina-Martinez's guidelines range of 77 to 96 months, based on a total offense level of 21 and criminal history category VI.[464] And though Molina-Martinez objected to the total offense level calculation, which

[456] United States v. Molina-Martinez, 136 S. Ct. 1338, 1347 (2016).

[457] Id., 136 S. Ct. at 1345. Much of the discussion which follows appeared earlier in a legal sidebar, CRS Legal Sidebar WSLG1516, *UPDATED: Does a Guidelines Calculation Error Always Affect a Defendant's Substantial Rights? Supreme Court to Decide*, by Sarah S. Herman.

[458] *See* Peugh v. United States, 133 S. Ct. 2072, 2083 (2013); Gall v. United States, 552 U.S. 38, 46 (2007) United States v. Booker, 543 U.S. 220 (2005); United States v. Gibbs, 578 F.3d 694, 695 (7th Cir. 2009).

[459] *See, e.g.,* United States v. Glosser, 623 F.3d 413, 418 (7th Cir. 2010); United States v. Blinkinsop, 606 F.3d 1110, 1114 (9th Cir. 2010); United States v. Tomko, 562 F.3d 558, 567 (3d Cir. 2009) (en banc).

[460] Puckett v. United States, 556 U.S. 129, 135 (2009) (internal quotation marks and citation omitted).

[461] United States v. Olano, 507 U.S. 725, 732 (1993).

[462] *See* FED. R. CRIM. P. 52(a); United States v. Vonn, 535 U.S. 55, 58 (2002); United States v. Franco-Flores, 558 F.3d 978, 980-81 (9th Cir. 2009).

[463] *See* 8 U.S.C. §1326.

[464] *See* United States v. Molina-Martinez, 588 F. App'x 333, 334 (5th Cir. 2014); Brief of Petitioner at 2-4, Molina-Martinez v. United States, 136 S. Ct. 26 (No. 14-8913).

the court overruled, he did not object to the criminal history score.[465] The district court then imposed a 77-month sentence—the bottom of the guidelines range.[466]

Molina-Martinez appealed to the Fifth Circuit, contending that the district court plainly erred when it incorrectly calculated his criminal history score.[467] The government conceded that Molina-Martinez's criminal history score should have been category V, not VI, and with that score, the correct guidelines range would have been 70 to 87 months' imprisonment.[468] The court found this error to be "plain" but concluded, nevertheless, that Molina-Martinez had not established that the error had affected his substantial rights.[469] To do so in the Fifth Circuit, a defendant must show that "but for the district court's misapplication of the Guidelines, he would have received a lesser sentence."[470] And "[w]hen the correct and incorrect [guidelines] ranges overlap *and the defendant is sentenced within the overlap,*" as was the case here, the Fifth Circuit requires that the defendant provide additional evidence to show that his sentence may have been different (e.g., an indication by the district judge that the guidelines range was the primary factor relied on in choosing a sentence).[471] Because the court concluded that Molina-Martinez did not meet that additional burden, it affirmed the district court's judgment.[472]

Molina-Martinez petitioned for a writ of certiorari, limited to this question: when a district court incorrectly calculates a defendant's guidelines range, should an appellate court applying plain-error review presume that the error affected the defendant's substantial rights?[473] Molina-Martinez had argued to the Fifth Circuit that such a presumption should apply, but the court—in a footnote—rejected that argument as foreclosed by circuit precedent.[474]

In urging the Supreme Court to establish the rebuttable presumption, Martinez-Molina pointed to the Third[475] and Tenth Circuits,[476] which disagree with the Fifth Circuit and presume plain error when the district court imposes a sentence after miscalculating the defendant's guidelines range.[477] And without using the word "presumption," the Seventh[478] and Ninth Circuits[479] have also held that a sentence based on an improperly calculated guidelines range constitutes plain error and requires a remand for resentencing.[480] In arguing that those circuits are correct, Martinez-Molina relied[481] on the Supreme Court's comments in *Peugh v. United States* that the

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[465] Brief of Petitioner at 4, Molina-Martinez v. United States, 136 S. Ct. 26 (No. 14-8913).

[466] *See* United States v. Molina-Martinez, 588 F. App'x 333, 334 (5th Cir. 2014).

[467] *Id.*

[468] *Id.*

[469] *Id.*

[470] United States v. Garcia-Carrillo, 749 F.3d 376, 379 (5th Cir. 2014) (internal quotation marks and citation omitted).

[471] *See* United States v. Molina-Martinez, 588 F. App'x 333, 335 (5th Cir. 2014) (quoting United States v. Mudekunye, 646 F.3d 281, 290 (5th Cir. 2011).

[472] *See* United States v. Molina-Martinez, 588 F. App'x 333, 335 (5th Cir. 2014).

[473] Molina-Martinez v. United States, 136 S. Ct. 26 (2015) (No. 14-8913).

[474] United States v. Molina-Martinez, 588 F. App'x 333, 334 n.1 (5th Cir. 2014).

[475] United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001).

[476] United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014).

[477] *See* Brief for Petitioner, Molina-Martinez v. United States at 28-31, 136 S. Ct. 26 (2015) (No. 14-8913).

[478] *See* United States v. Jenkins, 772 F.3d 1092, 1097 (7th Cir. 2014).

[479] *See* United States v. Vargem, 747 F.3d 724, 728-29 (9th Cir. 2014); United States v. Bonilla-Guizar, 729 F.3d 1179, 1188-89 (9th Cir. 2013).

[480] *See* Brief for Petitioner, Molina-Martinez v. United States at 30 & n.12, 136 S. Ct. 26 (2015) (No. 14-8913).

[481] *See* Brief for Petitioner, Molina-Martinez v. United States at 36, 136 S. Ct. 26 (2015) (No. 14-8913).

"federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are *anchored* by the Guidelines" and that empirical evidence presented "indicat[ed] that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges."[482] It follows, said Martinez-Molina, that miscalculations resulting in an incorrect guidelines range fit into a "special category" of errors that should be presumed prejudicial[483]—a premise that the Court raised and left open in *United States v. Olano*.[484] Conversely, the government opposed the presumption,[485] reminding the Court that it has "repeatedly cautioned that '[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice."[486]

At oral argument, the Justices seemed divided over whether the Court should adopt the presumption. For example, Justice Breyer appeared to suggest that in cases in which the defendant proves that the district court incorrectly calculated his guidelines range, the burden of proof should shift to the government "to rebut the common sense notion that of course using the wrong Guideline had an effect on the sentence."[487] Conversely, Justice Scalia asked whether sentencing policy should "establish[] a system ... that induces lawyers to make objections when objections are proper" by continuing to make the defendant's burden more stringent on appeal when he fails to raise errors in the trial court.[488]

In its unanimous ruling reversing the Fifth Circuit, the Court, in an opinion crafted by Justice Kennedy, declined to adopt Molina-Martinez's requested presumption unequivocally. Instead, the Court narrowly held that "the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome outside the error."[489] The Court reasoned that its holding was supported by the "Guidelines' central role in sentencing," as the "starting point" and "benchmark" for sentencing decisions, thus making sentencing calculation errors "particularly serious."[490] Even so, the Court cautioned that "[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist."[491] Still, the Court continued, "[a]bsent unusual circumstances [a defendant] will not be required to show more" than the error, and thus the Court explicitly rejected the Fifth Circuit's unique approach.[492] Indeed, the Court added, "[n]othing in the text of Rule 52(b), its rationale, or the Court's precedents supports a requirement that a defendant," in seeking plain-error review of a Guidelines error, "make some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings."[493]

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[482] Peugh v. United States, 133 S. Ct. 2072, 2083-84 (2013) (emphasis added).

[483] *See* Brief for Petitioner, Molina-Martinez v. United States at 28-43, 136 S. Ct. 26 (2015) (No. 14-8913).

[484] United States v. Olano, 507 U.S. 725, 735 (1993).

[485] *See* Brief for Respondent, Molina-Martinez v. United States at 17, 136 S. Ct. 26 (2015) (No. 14-8913).

[486] *See* Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

[487] Transcript of Oral Argument at 26:13-27:24, Molina-Martinez v. United States, 136 S. Ct. 26 (2015) (No. 14-8913).

[488] *Id.* at 18:7-19:10.

[489] Molina-Martinez v. United States, 136 S. Ct. 1338, 1345 (2016).

[490] *See id.* at 1345-46.

[491] *See id.* at 1346-47.

[492] *See id.* at 1345, 1347.

[493] *Id.* at 1345.

Capital Punishment

The menu of the Court's capital punishment cases offers cases concerning jury instructions, jury selection, exclusive jury sentencing prerogatives, *Brady* violations, appellate court judge recusals, and the application of habeas corpus standards.

Kansas v. Carr

Holdings: *"The Eighth Amendment [does not] require ... capital-sentencing courts to instruct the jury that mitigating circumstances need not be proved beyond a reasonable doubt.... The [Carr's] joint sentencing proceedings did not render the sentencing proceedings fundamentally unfair."* [494]

Justice Antonin Scalia wrote his last opinion for the Court in a capital punishment case, *Kansas v. Carr*.[495] There, the Court reversed two decisions of the Kansas Supreme Court and held that "the Eighth Amendment [does not] require ... capital-sentencing courts to instruct the jury that mitigating circumstances need not be proved beyond a reasonable doubt."[496] It also held that the Eighth Amendment did not require separate trials for two of the defendants in one of the Kansas cases.[497]

The defendants in one of the cases, the Carr brothers, were convicted of 4 counts of capital murder, 1 count of attempted first-degree murder, 5 counts of aggravated kidnaping, 9 counts of aggravated robbery, 20 counts of rape or attempted rape, 3 counts of aggravated criminal sodomy, 1 count each of aggravated burglary and burglary, 1 count of theft, and 1 count of cruelty to animals as part of one crime spree.[498] Reginald Carr was also convicted of kidnapping, aggravated robbery, aggravated battery, and criminal damage to property committed on another occasion.[499] Both Reginald and Jonathan Carr were convicted of first-degree felony murder in connection with yet a third episode.[500] The defendant in the second case, Gleason, was convicted of two counts of capital murder, aggravated kidnaping, aggravated robbery, and criminal possession of a firearm.[501]

Defendants in both cases were sentenced to death, and in both cases the Kansas Supreme Court vacated their sentences on Eighth Amendment grounds.[502] The Kansas court's *Gleason* decision acknowledged an apparent conflict with U.S. Supreme Court precedent, which it thought distinguishable.[503] It found constitutionally insufficient the trial court's jury instructions that left the jury "to speculate as to the correct burden of proof for mitigating circumstances, and [under which] reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt."[504] The Kansas court reiterated that view in its *Carr*

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[494] Kansas v. Carr, 136 S. Ct. 633, 641, 646 (2015). Contributions from a legal sidebar CRS Legal Sidebar WSLG1512, *Justice Antonin Scalia's Last Opinion*, by Charles Doyle.

[495] 136 S. Ct. 633 (2016).

[496] *Id.* at 641-44.

[497] *Id.* at 644-46.

[498] State v. Carr, 331 P.3d 544, 573-74 (Kan. 2014), *rev'd,* Kansas v. Carr, 136 S. Ct. 633 (2016).

[499] *Id.* at 573.

[500] *Id.* at 574.

[501] State v. Gleason, 329 P.3d 1102, 1133, *rev'd, Carr*, 136 S. Ct. 633 (2016).

[502] *Carr*, 136 S. Ct. at 640.

[503] *Gleason*, 329 P.3d at 1145-48.

[504] *Id.* at 1148.

decision, in which it also "concluded that R. Carr's Eighth Amendment right to an individualized sentencing determination was fatally impaired by [the] failure to" separate the capital sentencing proceeding of the two brothers, who were thought to have antagonistic death penalty mitigating defenses.[505]

Justice Scalia's opinion for the Court rejected the Kansas court's characterization of the jury instructions.[506] "[N]o juror would reasonably have speculated that mitigating circumstances must be proved by any particular standard, let alone beyond a reasonable doubt.... The instructions repeatedly told the jurors to consider *any* mitigating factor, meaning any aspect of the defendants' background or the circumstances of their offense. Jurors would not have misunderstood these instructions to prevent their consideration of constitutionally relevant evidence."[507]

The Carrs' severance argument fared no better. As Justice Scalia phrased it, "The Kansas Supreme Court agreed with the defendants that, because of the joint sentencing proceedings, one defendant's mitigating evidence put a thumb on death's scale for the other."[508] Yet, the trial court had impressed on the jury the importance of judging the defendants individually.[509] More to the point, vacating the death sentence required a showing that joint proceedings had been fundamentally unfair.[510] "Only the most extravagant speculation would lead to the conclusion that the supposedly prejudicial evidence rendered the Carr brothers' joint sentencing proceeding fundamentally unfair."[511] Justice Scalia explained that the slight prospect of relatively greater or lesser culpability paled next to graphic evidence of the level of equally shared responsibility.[512] "What these defendants did—acts of almost inconceivable cruelty and depravity—was described in excruciating detail by [a surviving victim], who relived with the jury, for two days, the Wichita Massacre. The joint sentencing proceedings did not render the sentencing proceedings fundamentally unfair."[513]

Justice Sotomayor, the sole dissenting member of the Court, objected that the Court should have left the cases where they found them and deny certiorari.[514] Instead, the Court had overturned a state high court ruling, not because of a breach of any federal constitutional right, but because the state court had applied the law more generously than would have the highest federal court.[515]

Justice Scalia responded that had the Kansas Supreme Court decisions been grounded in state law, they would indeed have been "none of our business."[516] On the other hand, he said, "what a state court cannot do is experiment with our Federal Constitution and expect to elude this Court's review as long as victory goes to the criminal defendant. 'Turning a blind eye' in such cases 'would change the uniform "law of the land" into a crazy quilt.'"[517]

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[505] State v. Carr, 331 P.3d at 718-20.

[506] Kansas v. Carr, 136 S. Ct. at 642-44.

[507] *Id.* at 643-44.

[508] *Id.* at 644.

[509] *Id.* at 645.

[510] *Id.* at 644.

[511] *Id.* at 646.

[512] *Id.*

[513] *Id.*

[514] *Id.* at 646-51 (Sotomayor, J. dissenting).

[515] *Id.* at 646.

[516] *Id.* at 641 (Scalia, J.).

[517] *Id.* at 641-42 (quoting Kansas v. Marsh, 548 U.S. 163, 186 (2006)).

White v. Wheeler

Holding: *"The Kentucky Supreme Court was not unreasonable in its application of clearly established federal law when it concluded that the exclusion of Juror 638 did not violate the Sixth Amendment." Thus, the U.S. Court of Appeals for the Sixth Circuit's grant of habeas relief to reverse the death sentence is overturned*.[518]

In mid-December, the U.S. Supreme Court announced its decision in *White v. Wheeler* and in doing so reversed a lower federal appellate court decision which would have sent back for re-trial a 1997 Kentucky murder case.[519] The Supreme Court, without dissent, held that Kentucky courts had been given insufficient deference in their application of Supreme Court precedents in the area of death-penalty-ambivalent prospective jurors.[520]

Wheeler had been convicted and sentenced to death for the murder of a Louisville Kentucky couple.[521] During the questioning of prospective jurors, one initially expressed uncertainty about whether he could vote for the death penalty but ultimately stated he believed he could consider all of the penalty options.[522] The Supreme Court has held that a prospective juror must be excused if he states either that he would always or never vote for the death penalty.[523] The prosecution asked the court to excuse the prospective juror, which the court did after it had questioned him more closely.[524]

The Kentucky courts affirmed his conviction and sentence on appeal and denied habeas-like relief after a round of collateral review.[525] The U.S. district court denied Wheeler's petition for federal habeas corpus review, which the U.S. Court of Appeals for the Sixth Circuit reversed.[526] The Sixth Circuit weighed the statutory standard for habeas review of state convictions: "[A] writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.... "[527] The Sixth Circuit concluded that the Kentucky courts had misapplied the Supreme Court's "death qualified jury" case law.[528]

The Supreme Court disagreed. First, the Court explained that the statutory standard is a particularly demanding one.[529] It "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court."[530] To overcome it, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in

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[518] *White v. Wheeler*, 136 S. Ct. 456, 462 (2015).

[519] White v. Wheeler, 136 S. Ct. 456 (2015).

[520] *Id.* at 461-62.

[521] *Id.* at 458-59.

[522] *Id.*

[523] *See id.* at 460 (citing Witherspoon v. Illinois, 391 U.S. 510 (1968), Wainwright v. Witt, 469 U.S. 412 (1985), and their progeny).

[524] *Id.* at 459.

[525] *Id.*

[526] *Id.*

[527] Wheeler v. Simpson, 779 F.3d 366, 380 (6th Cir. 2015) (quoting 28 U.S.C. §2254(d)), *rev'd,* White v. Wheeler, 136 S. Ct. 456 (2015).

[528] *Id.* at 371-74.

[529] White v. Wheeler, 136 S. Ct. at 458.

[530] *Id.* at 460 (internal quotation marks and citation omitted).

justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[531] The task is even more arduous when it involves jury selection challenges. There, the decision of the state judge, who questioned and observed the prospective juror's answers, is entitled to "double deference."[532]

As for Supreme Court precedent, in jury selection cases, a prospective juror may be excused "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law."[533] Moreover, "when there is ambiguity in the prospective juror's statements, the trial court is entitled to resolve it in favor of the State."[534]

In the eyes of the Court, the Sixth Circuit simply applied the test incorrectly. "A fairminded jurist could readily conclude that the trial judge's exchange with [the prospective juror] reflected a diligent and thoughtful *voir dire*; that she considered with care the juror's testimony; and that she was fair in the exercise of her broad discretion in determining whether the juror was qualified to serve in this capital case."[535]

The habeas standard is one of congressional creation. Congress passed it as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) in an effort to reduce delays in capital cases and eliminate federal-state judicial friction.[536] Congress is therefore free to change the standard. However, there have been no proposals to revisit AEDPA's standard in recent years.

Wearry v. Cain

Holding: *"Contrary to the state postconviction court, we conclude that the prosecution's failure to disclose material evidence violated Wearry's due process rights."* [537]

On March 7, 2016, the U.S. Supreme Court overturned a death penalty conviction because authorities had withheld material evidence favorable to the defendant. The Court's 6-2, unsigned per curiam decision in *Wearry v. Cain* suggests that the Court may have been influenced in part by the poor performance of the defendant's trial attorney, by the defendant's limited mental competence, and perhaps by suspicions of a racially discriminatory jury selection process.[538]

Testimony at Wearry's trial claimed that he, Sam Scott, Eric Brown, Randy Hutchison, and others had stopped the victim's car; driven the victim around, stopping periodically to beat him; and then murdered the victim by running over him with his car.[539] Scott and Brown testified against Wearry, who claimed to have been at a wedding, miles away, at the time.[540]

Scott and Brown admitted their testimony conflicted with statements they had made to the police earlier.[541] More to the point, authorities failed to disclose evidence that would have undermined

[531] *Id.* (internal quotation marks and citations omitted).

[532] *See id.*

[533] *Id.* (quoting Wainwright v. Witt, 469 U.S. 412, 425-26 (1985)).

[534] *Id.* at 461 (quoting Uttecht v. Brown, 551 U.S. 1, 7 (2007)).

[535] *Id.* (internal quotation marks and citation omitted).

[536] P.L. 104-132, §105, 110 Stat. 1220 (1996); 28 U.S.C. 2254(d).

[537] *Wearry v. Cain*, 136 S. Ct.1002, 1002 (2016).

[538] *Id.*

[539] *Id.* at 1003.

[540] *Id.*

[541] *Id.*

their credibility at trial.[542] Inmates jailed with Scott reported that he wanted to get even with Wearry for telling the police of Scott's involvement in the murder.[543] Then, in spite of the prosecutor's assurances to the jury, the police had undisclosed evidence that Brown had sought to bargain for a reduced sentence in exchange for his testimony.[544] Finally, authorities did not turn over medical records relating to Hutchison's recent knee surgery, which might have cast doubt on testimony concerning the events surrounding the murder, particularly whether Hutchison could have engaged in the physical activities attributed to him at trial.[545]

The Supreme Court's *Brady v. Maryland* decision and the cases that follow it require the prosecution to disclose to the defendant material exculpatory evidence or evidence that materially undermines the credibility of a witness against him.[546] Its *Strickland v. Washington* decision and related cases guarantee defendants the assistance of competent attorneys.[547] Its *Batson v. Kentucky* decision and its progeny bar prosecutors from conducting jury selection in a racially discriminatory manner.[548] Finally, its *Atkins v. Virginia* decision precludes execution of the mentally retarded.[549]

The Court's *Wearry* opinion found that the evidence withheld "suffices to undermine confidence in Wearry's conviction" and returned the case to the Louisiana courts.[550] The opinion is interwoven with signs of the Court's want of confidence for other reasons as well, beginning with the Court's unflattering description of the work of Wearry's trial attorney. His "defense at trial rested on an alibi."[551] Yet, he failed to present impartial corroborative witnesses or to discover additional available corroborative evidence in support of the alibi.[552] In fact, "he had conducted no independent investigation into Wearry's innocence and had relied solely on evidence the State and Wearry had provided."[553] The Court explained, however, that the presence of the *Brady* error made it unnecessary to consider Wearry's ineffective-assistance-of-counsel argument.[554]

The Court's relatively short opinion, nevertheless, took time to observe that various members of the appellate panels below had found credible Wearry's jury selection challenges ("Finding both jury-selection claims credible, then-Justice Johnson dissented")[555] and his mental competence objections ("Justice Crichton would have ... remanded for the trial court to address [Wearry's] claim of intellectual disability under *Atkins*").[556]

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[542] *Id.* at 1004-05.

[543] *Id.* at 1004.

[544] *Id.*

[545] *Id.* at 1005.

[546] Brady v. Maryland, 373 U.S. 83 (1963).

[547] *E.g.,* Strickland v. Washington, 466 U.S. 668 (1984).

[548] *E.g.,* Batson v. Kentucky, 476 U.S. 79 (1986).

[549] Atkins v. Virginia, 536 U.S. 304 (2002).

[550] *Wearry,* 136 S. Ct. at 1006-08.

[551] *Id.* at 1003.

[552] *Id.* at 1005.

[553] *Id.*

[554] *Id.* at 1006.

[555] *Id.* at 1004 n.1.

[556] *Id.* at 1005 n.5.

Wearry's case, however, did not turn on the state of the law, but on its application.[557] Did the evidence withheld undermine judicial confidence in the verdict? The majority said it did. Justices Alito and Thomas dissented because they concluded that full disclosure to the defendant would not have changed the result.[558]

Lynch v. Arizona

Holding: "*[W]here a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole," the Due Process Clause "entitles the defendant to inform the jury of his parole ineligibility.*"[559]

When the prosecution raises the issue of a capital defendant's future dangerousness, the defendant is entitled to have the jury informed that the only sentencing options are death or life imprisonment without the possibility of parole.[560] In *Lynch*, the Supreme Court and the Arizona courts disagreed over whether the defendant had any "possibility" of parole.

Lynch was convicted of murder.[561] Murder is a capital offense under Arizona law punishable by death or life imprisonment.[562] Arizona has long since abolished parole in most instances.[563] However, if the jury opts for a sentence of life imprisonment, the court may sentence a defendant to release-eligibility.[564] Release-eligibility makes a defendant eligible for a pardon after 25 years, or in some cases 35 years, in prison.[565]

Prior to sentencing, Lynch offered to waive the prospect of a release-eligible sentence and requested that the jury be informed that the only sentences available were death and life imprisonment without the possibility of parole.[566] The trial court refused to accept the waiver or to instruct the jury as requested.[567] Lynch was sentenced to death, and the appellate court affirmed.[568]

The Supreme Court reversed in a per curiam opinion.[569] The prospect of clemency was not enough to make parole "possible."[570] Arizona argued before the Court that "nothing prevents the legislature from creating a parole system in the future for which Lynch would have been eligible

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[557] *Id.* at 1006-07.

[558] *Id.* at1008-12 (Alito, J., dissenting).

[559] Lynch v. Arizona, 136 S. Ct. 1818, 1818 (2016) (quoting Shafer v. South Carolina, 532 U.S. 36, 39 (2001)).

[560] Simmons v. South Carolina, 512 U.S. 154, 156 (1994).

[561] State v. Lynch, 357 P.3d 119, 126 (2015).

[562] ARIZ. REV. STAT. ANN. §§13-1105, 13-751.

[563] *Lynch*, 357 P.3d at 138 (citing ARIZ. REV. STAT. ANN. §41-1604.09(I)) ("Further, parole is available only to individuals who committed a felony before January 1, 1994, and juveniles.").

[564] *Lynch*, 357 P.3d at 138 (citing ARIZ. REV. STAT. ANN. §13-703, later renumbered as, ARIZ. REV. STAT. ANN. §13-751).

[565] *Lynch*, 136 S. Ct. at 1819 ("But under state law, the only kind of release for which Lynch would have been eligible—as the State does not contest—is executive clemency.").

[566] *Lynch*, 357 P.3d at 138.

[567] *Id*.

[568] *Id.* at 127, 144.

[569] *Lynch*, 136 S. Ct. at 1819.

[570] *Id.* at 1819-20.

had the court sentenced him to life with the possibility of release after 25 years."[571] The Court didn't buy it. It had already rejected a similar argument in *Simmons*.[572] The prosecution had raised the issue of Lynch's future dangerousness.[573] The only realistic choices left to the jury were death or imprisonment for life without possibility of parole.[574] Under those facts, Lynch was entitled to have the jury so informed.[575] He requested such an instruction and was refused.[576] The Arizona appellate court declined to correct the error.[577] That decision had to be reversed and the case returned for correction.[578]

Justice Thomas, joined by Justice Alito, dissented. In their view, it was the heinous nature of the defendants' crimes, not ignorance of the absence of parole, that produced the juries' death penalty verdicts, here and in the Court's earlier cases.[579]

Hurst v. Florida[580]

Holding: *"Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance" denied the capital defendant of his Sixth Amendment right to trial by an impartial jury.*

Hurst was charged and convicted of first-degree murder for killing a coworker during a robbery at their place of employment.[581] He was sentenced to death and appealed.[582] During post-conviction proceedings, Hurst was granted a new sentencing trial.[583] At the second penalty phase proceeding, the jury returned a recommendation of death by a vote of 7-5.[584] In accordance with state law, the trial court independently weighed the aggravating and mitigating circumstances before sentencing Hurst to death.[585] Hurst appealed his sentence, again asserting that in light of Supreme Court precedent, the trial court committed constitutional error inasmuch as the jury had neither been unanimous in its recommendation nor required to find specific facts regarding aggravating factors.[586] The Florida Supreme Court rejected Hurst's arguments and affirmed the death sentence, holding that the Sixth Amendment does not require that the imposition of death

[571] *Id*. at 1820.

[572] *Id.* at 1820 (citing Simmons v. South Carolina, 512 U.S. 154, 166 (1994)).

[573] *Id.* at 1819.

[574] *Id.* at 1819-20.

[575] *Id*. at 1820.

[576] *Id.* at 1819.

[577] *Id.*

[578] *Id.* at 1820.

[579] *Id.* at 1820-21 (Thomas & Alito, JJ., dissenting) (citing Simmons v. South Carolina, 512 U.S. 154 (1994); Kelly v. South Carolina, 534 U.S. 246 (2002); and Shafter v. South Carolina, 532 U.S. 36 (2002)).

[580] Alison Smith, a legislative attorney in the American Law Division, prepared this portion of the report, which is available as a free-standing legal sidebar, CRS Legal Sidebar WSLG1487, *The Supreme Court Invalidates Florida's Death Penalty Procedures,* by Alison M. Smith.

[581] Hurst v. State, 147 So.3d 435, 437 (Fla. 2014), *rev'd by* Hurst v. Florida, 136 S. Ct. 616 (2016).

[582] *Id.*

[583] *Id.* at 439-40.

[584] *Id.* at 440.

[585] *Id.* at 440-41; *see also* Spencer v. State, 615 So.2d 688, 690-91 (Fla. 1993).

[586] Hurst v. State, 147 So.3d at 445.

sentences be made by the jury and that Supreme Court precedent does not require the jury to make either specific findings of aggravating circumstances or a unanimous recommendation.[587]

The Sixth Amendment in relevant part provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[588] In a series of cases, the Court has held that given the Sixth Amendment right to trial by jury, judges cannot impose sentences beyond the prescribed statutory maximum unless the facts supporting such an increase are found by a jury beyond a reasonable doubt; these cases cover guilty pleas,[589] sentencing guidelines,[590] mandatory minimums,[591] criminal fines,[592] and capital punishment.[593] In invalidating Florida's capital sentencing scheme, the Supreme Court relied heavily on its decision in *Ring v. Arizona*, in which it held that "[c]apital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment."[594]

In *Ring*, a jury found the defendant guilty of felony murder.[595] Under Arizona law, Ring could not be sentenced to death, unless further findings were made by a judge conducting a separate sentencing hearing and only if the judge found that the aggravating circumstances outweigh any mitigating ones.[596] The Supreme Court held that because Arizona's enumerated aggravating factors operate as "'the functional equivalent of an element of a greater offense' ... the Sixth Amendment requires that they be found by a jury."[597] According to the Court, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years [as in Apprendi],[598] but not the factfinding necessary to put him to death."[599]

The Supreme Court in *Hurst* concluded that Florida's capital sentencing scheme is analogous to the one invalidated in *Ring,* as Florida requires the judge—not the jury—to make the requisite findings for imposing the death penalty.[600] The *Hurst* Court found that the advisory nature of Florida's jury recommendation does not comport with Sixth Amendment requirements articulated in *Ring*.[601] In other words, the Sixth Amendment requires that a jury make specific findings necessary to authorize a death sentence.[602]

What lies in the aftermath of this decision remains unclear. While the Court invalidated the method by which Florida imposes the death penalty, it did not invalidate the death penalty itself.

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[587] *Id.* at 445-47.

[588] U.S. CONST. amend. VI.

[589] Blakely v. Washington, 542 U.S. 296 (2004).

[590] United States v. Booker, 543 U.S. 220 (2005).

[591] Alleyne v. United States, 133 S. Ct. 2151 (2013).

[592] Southern Union Co. v. United States, 132 S. Ct. 2344 (2012).

[593] Ring v. Arizona, 536 U.S. 584 (2002).

[594] *Id.* at 589.

[595] *Id.* at 591.

[596] *See id.* at 592.

[597] *Id.* at 609 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19 (2000)).

[598] Apprendi v. New Jersey, 530 U.S. 466 (2000); *see also* Hurst v. Florida, 136 S. Ct. 616, 621 (2016).

[599] *Ring*, 536 U.S. at 609.

[600] Hurst v. Florida, 136 S. Ct. at 621-22.

[601] *Id.* at 622.

[602] *See id.*

It appears that the Florida legislature will have to revise their procedures to make them consistent with the *Hurst* decision. It also appears that the Florida courts may have to decide whether the decision has retroactive applicability. If so, the state may have to conduct resentencing hearings.

Foster v. Chatman

Holding: *In a highly fact-specific ruling, the Court held that, in striking two of the prospective black jurors from Foster's trial, the "prosecutors were motivated in substantial part by race," and thus violated the principles of* Batson.[603]

Thirty years after *Batson v. Kentucky,*[604] in which the Supreme Court recognized a defendant's right to object to the prosecution's peremptory challenges during jury selection on the ground that the state engaged in purposeful discrimination by attempting to exclude members of the defendant's race from the jury, the Court in *Foster v. Chatman* revisited how to analyze so-called *Batson* challenges.[605] In jury trials, the parties' lawyers and the presiding judge have the opportunity to examine potential jurors for suitability during a process called voir dire.[606] Based on what is learned during voir dire, the parties may strike potential jurors for cause or exercise peremptory challenges (subject to numerical limitations based on applicable state or federal law) to excuse a juror "for any reason," so long as that reason doesn't violate the Equal Protection Clause of the Fourteenth Amendment.[607]

Currently, when a defendant makes a *Batson* challenge, courts engage in a three-step inquiry: First, the defendant must make a "prima facie showing" that the prosecution exercised a peremptory challenge based on the race of a particular juror; next, the prosecution must provide a race-neutral reason for striking that juror; and finally, the court decides whether the state had purposefully discriminated.[608] In one of the Supreme Court's more recent rulings interpreting *Batson,* the Court left open the question whether mixed-motive analysis[609] may be applied to *Batson* challenges, which would allow a prosecutor to defeat a *Batson* challenge by proving that, despite being motivated *in part* by race to strike a juror, he would have struck that juror for some other, race-neutral reason,[610] as some circuits currently allow.[611]

Foster involved a *Batson* challenge from Timothy Tyrone Foster's 1987 capital murder trial in Georgia.[612] The potential jury pool for Foster's trial had four black individuals, and the prosecution exercised a peremptory strike against each one.[613] Foster, an African American, raised a *Batson* challenge based on those strikes, but the trial judge concluded that the prosecution

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[603] Foster v. Chapman, 136 S. Ct. 1737, 1755 (2016).

[604] 476 U.S. 79 (1986).

[605] Foster v. Humphrey, 135 S. Ct. 2349, No. 14-8349 (May 26, 2015).

[606] *Voir Dire*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[607] *See* United States v. Blanding, 250 F.3d 858, 860 (4th Cir. 2001) (quoting Batson v. Kentucky, 476 U.S. 79, 86, 89 (1986)) (internal quotation marks omitted).

[608] *See* Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008).

[609] *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 228 (1985).

[610] *Snyder*, 552 U.S. at 485.

[611] *See* United States v. Douglas, 525 F.3d 225, 239 (2d Cir. 2008); Gattis v. Snyder, 278 F.3d 222, 231-35 (3d Cir. 2002); Weaver v. Bowersox, 241 F.3d 1024, 1032 (8th Cir. 2001); Wallace v. Morrison, 87 F.3d 1271, 1274-75 (11th Cir. 1996).

[612] *See* Foster v. State, 374 S.E.2d 188 (Ga. 1988).

[613] *See id.* at 191.

rebutted his assertion of purposeful discrimination.[614] The court noted that the prosecutor had supplied numerous race-neutral reasons for striking those potential jurors, including having ties to social workers (because, in the prosecution's view, they tend to "sympathize" with criminal defendants); having close relationships with people who abuse drugs and alcohol (because of Foster's own drug and alcohol problems, which allegedly played a role in the murder); giving untruthful answers during voir dire; and expressing reluctance to impose the death penalty. Foster was ultimately convicted and sentenced to death.[615]

During postconviction habeas corpus proceedings in state court, Foster renewed his *Batson* claim, arguing that newly discovered evidence—the prosecutor's notes from jury selection—supported his allegation that the state dismissed the four black jurors based on their race.[616] On the prosecution's jury pool list, each black juror's name had been highlighted in green, and there was a corresponding note explaining that the green highlighting "Represents Blacks." Additionally, the four black jurors were ranked number one to number four, and were the first four names on a list labeled "Definite Nos."[617] The Superior Court of Butts County still did not find a *Batson* violation,[618] and the Supreme Court of Georgia declined to issue a "Certificate of Probable Cause," which would have permitted Foster to appeal the superior court's ruling.[619]

Although the parties' briefs focus heavily on the specific facts of Foster's trial—as is typical in *Batson* challenges—at oral argument some of the Justices raised questions that honed in on broader issues about how to resolve *Batson* claims. Justice Kennedy, for example, asked "how the Court should approach the *Batson* analysis" when, in a case like this, the prosecution presents a "laundry list" of allegedly race-neutral reasons for striking a potential juror.[620] And Justice Sotomayor piped in, asking whether an appropriate rule for these "laundry list" cases would be one in which the prosecution could defeat a *Batson* challenge by supplying just one legitimate race-neutral reason.[621] Foster's lawyer remarked that, in these cases, "the Court should scrutinize the reasons very carefully" because, otherwise, the prosecution will be "encourage[d] ... to just give as many reasons as possible and hope that one will be acceptable."[622] Justice Breyer seemed to agree with Foster's position, posing the following hypothetical:

> Now, if my grandson tells me ... I don't want to do my homework tonight at 7:00 because I'm just so tired. And besides, I promised my friend I'd play basketball. And besides that, there's a great program on television. And besides that, you know ... my stomach is upset, but I want to eat spaghetti. And so he's now given me five different reasons. What do I think of those reasons?.... And so I would say my answer to my grandchild is, look, you're not too tired to do your homework. And I think any reasonable person looking at this [case]

[614] *Id.* at 191-92.

[615] *Id.* at 190.

[616] Foster v. Humphrey, No. 1989-V-2275, Order Denying Petitioner's Request for Habeas Relief at 14-15 (Ga. Super. Ct. Dec. 4, 2013).

[617] *Id.* at 15; Brief for Petitioner at 14-20, Foster v. Chatman, 135 S. Ct. 2349, No. 14-8349.

[618] Foster v. Humphrey, No. 1989-V-2275, Order Denying Petitioner's Request for Habeas Relief at 16-17 (Ga. Super. Ct. Dec. 4, 2013).

[619] Foster v. Humphrey, No. S14E0771, Order Denying Application for Certificate of Probable Cause (Ga. Nov. 3, 2014).

[620] Transcript of Oral Argument at 24:3-24:7, Foster v. Chatman, 135 S. Ct. 2349 (2015) (No. 14-8349).

[621] *Id.* at 22:14-22:22.

[622] *Id.* at 24:9-24:17.

> would say no, his reason was a purpose to discriminate on the basis of race. Now, tell me why I'm wrong.[623]

In a 7-1, highly fact-specific ruling, the Court held that the "prosecutors were motivated in substantial part by race" when it struck two of the prospective black jurors from Foster's trial.[624] In so holding, the Court reasoned that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury," and thus "[t]he contents of the prosecution's file ... plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner."[625] However, the Court did not dive into deeper *Batson* issues raised by the parties and discussed at oral argument, like how to treat cases when the prosecution produces a "laundry list" of race-neutral reasons for excluding a prospective juror or whether a court should apply mixed-motive analysis to a *Batson* challenge. Thus, *Foster* provides little guidance on modern-day *Batson* challenges.

Williams v. Pennsylvania

Holding: *"[U]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."*[626]

The U.S. Supreme Court in *Williams v. Pennsylvania* reviewed whether a Pennsylvania inmate on death row was denied due process of law when a Pennsylvania Supreme Court judge—who, as a former district attorney, participated in the decision to seek the death penalty in his case—declined to recuse himself when the court reviewed (and overturned) a lower court's ruling vacating the death sentence.[627] Recusal is constitutionally required in the rare case[628] when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[629] In assessing that probability, a court makes an objective inquiry, "ask[ing] not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[630] Constitutional standards for recusal differ from legislatively imposed ones,[631] yet this case raised questions about whether certain statutory bases for recusal—such as previously acting in an advisory capacity in a case[632]—should be construed as a floor for constitutional recusal standards, particularly when a judge's ruling implicates the death penalty and the Eighth Amendment's prohibition against cruel and unusual punishment.[633]

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[623] *Id.* at 42:6-43-11.

[624] Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016).

[625] *Id.*

[626] Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016).

[627] *See Williams v. Pennsylvania*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/williams-v-pennsylvania/ (last visited Mar. 29, 2016).

[628] *See* Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 890 (2009).

[629] *See* Withrow v. Larkin, 421 U.S. 35, 47 (1975).

[630] *Caperton*, 556 U.S. at 881.

[631] *See id.* at 889-90.

[632] *See* 28 U.S.C. §455.

[633] U.S. CONST. amend VIII.

Terrance Williams was convicted of murder and sentenced to death 30 years ago.[634] The prosecutor handling the case sought approval from higher-ups to seek the death penalty by setting forth aggravating and mitigating circumstances in a written memorandum that made its way to then-Philadelphia District Attorney Ronald Castille.[635] In a handwritten notation on the memorandum, Castille approved the request.[636] During post-conviction proceedings in 2012, newly discovered evidence showed that the trial prosecutor had withheld exculpatory evidence that could have been presented to the sentencing jury as mitigating factors weighing against the death penalty.[637] The post-conviction court granted a stay of execution and vacated Williams's death sentence.[638] The state appealed to the Pennsylvania Supreme Court.[639] At the time, Castille was serving as the Chief Justice, prompting Williams to request that Castille recuse himself.[640] Castille declined to do so and provided no explanation behind his decision.[641] The Pennsylvania Supreme Court, in a unanimous decision, lifted the stay of execution and reinstated the death penalty for Williams.[642]

Williams appealed to the U.S. Supreme Court, which agreed to hear the following two questions: (1) whether the Due Process Clause of the Fourteenth Amendment is violated when someone who participated in the initial decision to seek the death penalty in a criminal trial later sits on a judicial panel reviewing the penalty imposed in that same criminal case; and (2) if so, whether due process is still violated, requiring vacateur, when that judge's vote was not decisive?[643]

Concerning the first question, Williams argued that the likelihood of bias when "a judge had significant prosecutorial involvement in a criminal case" requires recusal.[644] He pointed to cases involving criminal contempt hearings, in which the Supreme Court had ruled that the Due Process Clause forbids judges from playing certain dual roles.[645] For example, the Court concluded in *In re Murchison* that in so-called one-man grand jury proceedings (where a single judge plays the investigatory role of the grand jury), if the "judge-grand jury" accuses a witness of being in contempt, that same judge cannot preside over the contempt hearings.[646] The Court later elaborated in *Mayberry v. Pennsylvania* that when one is "part of the accusatory process, he 'cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.'"[647] It follows, said Williams, that the dual role Castille allegedly played—"personally authoriz[ing] the trial prosecutor to pursue a death sentence against Mr. Williams" as district

[634] Commonwealth v. Williams, 570 A.2d 75 (Pa. 1990).

[635] Brief for Petitioner at 4-5, Williams v. Pennsylvania, 136 S. Ct. 28 (No. 15-5040).

[636] *Id.* at 5; *See* Respondent's Motion to Recuse Chief Justice Castille, Commonwealth of Pennsylvania v. Williams, No. 163 EM 2012 (Pa. Oct. 1, 2012), 2015 WL 7774181, at *181A.

[637] Commonwealth v. Williams, 105 A.3d 1234, 1236-39 (Pa. 2014).

[638] *Id.* at 1237-38.

[639] *Id.* at 1239.

[640] *See* Respondent's Motion to Recuse Chief Justice Castille, Commonwealth of Pennsylvania v. Williams, No. 163 EM 2012 (Pa. Oct. 1, 2012), 2015 WL 7774181, at *181A.

[641] *See* Order, Commonwealth of Pennsylvania v. Williams, No. 163 EM 2012 (Pa. Oct. 1, 2012), 2015 WL 7774181, at *171A.

[642] *Williams*, 105 A.3d at 1245.

[643] *See Williams v. Pennsylvania*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/williams-v-pennsylvania/ (last visited Mar. 29, 2016).

[644] Brief for Petitioner at 22, Williams v. Pennsylvania, 136 S. Ct. 28 (No. 15-5040).

[645] *Id.* at 22-23.

[646] 349 U.S. 133 (1955).

[647] 400 U.S. 455, 465 (1971) (quoting *Murchison*, 349 U.S. at 137).

attorney, and then sitting as a judge on the panel deciding whether to vacate the death penalty—violated his due process rights.[648] Pennsylvania, on the other hand, described Castille's prior involvement in the case as a "single administrative act," which, in its view, is insufficient to require recusal.[649] Additionally, Pennsylvania cautioned that creating the rule Williams requested would result in a "dramatic expansion" of the Court's recusal precedent.[650]

The second question—concerning how due process may be impacted by a judge's failure to recuse when he does not cast a decisive vote—had been left unresolved by the Supreme Court in *Aetna Life Insurance Co. v. Lavoie*.[651] In *Lavoie,* unlike the case here, a judge who had a pecuniary interest in the outcome of the case was part of the majority in a 5-4 decision, and the Court concluded that his failure to recuse violated due process.[652] However, the Court left open the question whether due process could be violated if the judge in question did not cast a decisive vote.[653] Williams contended[654] that the Court should adopt the views of three concurring justices in *Lavoie* that whether the judge (who should have recused) cast a deciding vote is irrelevant to the Court's analysis because the judge's "mere participation in the shared enterprise of appellate decisionmaking—whether or not he ultimately wrote, or even joined, the ... opinion—pose[s] an unacceptable danger of subtly distorting the decisionmaking process."[655] However, Pennsylvania argued that applying the theory that "one bad apple spoils the bunch" runs afoul of the principle that "[t]he law presumes that judges will carry out their duty to maintain impartiality."[656]

Ultimately, in a 5-3 ruling, the U.S. Supreme Court reversed the decision of the Pennsylvania Supreme Court. The Court first held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."[657] As applied to the facts of this case, the Court concluded that "due process compelled [the] justice's recusal" given that Castille had participated in the decision to overturn a postconviction court's ruling that had vacated the death penalty in a case for which he had authorized the prosecuting attorney to seek the death penalty when he was a district attorney decades earlier.[658] Additionally, the Court answered the question left open in *Lavoie*, concluding that even when a judge's vote is not dispositive, a judge's unconstitutional failure to recuse in and of itself is a structural error requiring reversal.[659] In holding that such a judicial failure is "not amendable to harmless-error review," the Court reasoned that "deliberations of an appellate panel, as a general rule, are confidential," and thus "it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process."[660] Moreover, the Court opined that "the fact that the interested judge's vote was not dispositive may mean only that the judge was

[648] Brief for Petitioner at 24-28, Williams v. Pennsylvania, 136 S. Ct. 28 (No. 15-5040).

[649] Brief for Respondent at 17, Williams v. Pennsylvania, 136 S. Ct. 28 (No. 15-5040).

[650] *Id.*

[651] 475 U.S. 813 (1986).

[652] *Id.* at 816-19, 824-25.

[653] *Id.* at 827-28; *id.* at 830 (Brennan, J., concurring).

[654] Brief for Petitioner at 35-36, Williams v. Pennsylvania, 136 S. Ct. 28 (No. 15-5040).

[655] Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 831 (Blackmun, J., concurring).

[656] Brief for Respondent at 59, Williams v. Pennsylvania, 136 S. Ct. 28 (No. 15-5040).

[657] Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016).

[658] *Id. at* 1903.

[659] *See id.* at 1909.

[660] *Id.* at 1909 (internal quotation marks and citation omitted).

successful in persuading most members of the court to accept his or her position," and "[t]hat outcome does not lessen the unfairness to the affected party."[661] Thus, the Court's ruling seemingly brings constitutional recusal standards an inch closer to one of the federal statutory standards.

Prisoners

The Prisoner Reform Litigation Act designed to curb frivolous inmate suits generated two of the cases on the Court's 2015 docket—one on the act's installment payment feature and the other on the required exhaustion of administrative remedies.

Bruce v. Samuels

Holding: *"[M]onthly installment payments [to cover the costs of* in forma pauperis *court filings under the Prisoner Reform Litigation Act], like the initial partial payment, are to be based on a per-case basis.... [Section] 1915(b)(2) calls for simultaneous, not sequential, recoupment of multiple filing fees."*[662]

Early in the year, the Supreme Court resolved a split among the circuits involving federal inmate payments for court filing fees with a decision that held that the monthly assessments under the Prisoner Reform Litigation Act (PRLA) must be stacked rather than satisfied on a one-a-month basis.[663] The PRLA states in relevant part:

> (b)(1) ... (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the [the prisoner's account] ... (2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.[664]

Bruce, a federal inmate with several pending cases and outstanding filing fee assessments, sued to challenge his assignment to a "special management unit."[665] He argued that collection for the filing fees for the new case should begin only after he had paid the last installment on the filing fees from his earlier cases—that the installments should be lined up, one beginning only after the final installment of its predecessor.[666] The United States District Court of Appeals for the District

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[661] *Id.*

[662] Bruce v. Samuels, 136 S. Ct. 627, 629, 631 (2016).

[663] The Court described the split as follows: "Compare *Atchison* v. *Collins*, 288 F. 3d 177, 181 (CA5 2002) (*per curiam*); *Newlin* v. *Helman*, 123 F. 3d 429, 436 (CA7 1997), overruled in part on other grounds by *Lee* v. *Clinton*, 209 F. 3d 1025 (CA7 2000), and *Walker* v. *O'Brien*, 216 F. 3d 626 (CA7 2000); *Lefkowitz* v. *Citi-Equity Group, Inc.*, 146 F. 3d 609, 612 (CA8 1998); *Christensen* v. *Big Horn Cty. Bd. of Cty. Comm'rs*, 374 Fed. Appx. 821, 829-833 (CA10 2010); and *Pinson* v. *Samuels*, 761 F. 3d 1, 7-10 (CADC 2014) (case below) (adopting per-case approach), with *Whitfield* v. *Scully*, 241 F. 3d 264, 276-277 (CA2 2001); *Siluk* v. *Merwin*, 783 F. 3d 421, 427-436 (CA3 2015); and *Torres* v. *O'Quinn*, 612 F. 3d 237, 241-248 (CA4 2010) (adopting per-prisoner approach)." 136 S. Ct. at 629 n.1.

[664] 28 U.S.C. §1915(b).

[665] *Bruce* at 630.

[666] *Id.* at 630-31.

of Columbia Circuit, from whom he sought a writ of mandamus, disagreed.[667] It explained in simple terms, the "monthly payment obligation ... applies on a per-case basis."[668]

The Supreme Court in a brief unanimous opinion written by Justice Ginsburg agreed. In the eyes of the Court, "[t]he per-case approach more vigorously serves the statutory objective of containing prisoner litigation."[669]

Ross v. Blake

Holding: *The Fourth Circuit's "special circumstances" exception to the Prison Litigation Reform Act's exhaustion requirement is "inconsistent" with the text and history of the act, which permits only one exception: Prisoners need not exhaust if administrative remedies are not "available."*

The Supreme Court recently opined on the legality of a judicially created exception to the exhaustion requirement in the Prison Litigation Reform Act of 1995 (PLRA, or the act)[670] in *Ross v. Blake*. Congress enacted the PLRA,[671] in part, to reduce frivolous prisoner lawsuits that purportedly had been overwhelming federal courts.[672] The act, in relevant part, states that "[n]o action shall be brought" by inmates about prison conditions "until such administrative remedies as are available are exhausted."[673] In *Ross,* the Fourth Circuit joined the Second Circuit in concluding that an inmate may bypass the PLRA's exhaustion requirement and maintain a suit in federal court if special circumstances created a situation in which the inmate "reasonably believed that he had sufficiently exhausted his remedies."[674] Other circuits had concluded differently, perhaps prompting the Supreme Court's review of this case.[675]

During a cell block transfer of Shaidon Blake, a Maryland inmate, a state corrections officer, Lieutenant James Madigan—with a key wrapped around his fingers—punched Blake in the face five times.[676] When Madigan struck, another state corrections officer, Lieutenant Michael Ross, was holding a handcuffed Blake against a wall and failed to intervene.[677] Blake reported the episode to senior corrections officers.[678] The Internal Investigative Unit (IIU) of the Maryland Department of Public Safety and Correctional Services concluded, after a year-long investigation,

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[667] Pinson v. Samuels, 761 F.3d 1, 8-9 (D.C. Cir. 2014), *aff'd sub nom*., Bruce v. Samuels, 136 S. Ct. 627 (2016).

[668] *Pinson* at 761 at 9.

[669] Bruce v. Samuel, 136 S. Ct. at 633.

[670] Title VII of P.L. 104-134, 110 Stat. 1321 (1995). This discussion borrows heavily from a legal sidebar CRS Legal Sidebar WSLG1533, *Can "Special Circumstances" Trump the Prison Litigation Reform Act's Requirement to Exhaust Administrative Remedies?*, by Sarah S. Herman.

[671] 42 U.S.C. §1997e.

[672] *See* 141 Cong. Rec. S18136-87 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); *see also* Woodford v. Ngo, 548 U.S. 81, 83 (2006) ("A centerpiece of the PLRA's effort 'to reduce the quantity ... of prisoner suits' is an 'invigorated' exhaustion provision.").

[673] 42 U.S.C. §1997e(a).

[674] Blake v. Ross, 787 F.3d 693, 695, 698 (2015).

[675] *See* Pavey v. Conley, 663 F.3d 899, 905-06 (7th Cir. 2011); Panaro v. City of N. Las Vegas, 432 F.3d 949, 953-54 (9th Cir. 2005); Thomas v. Woolum, 337 F.3d 720 (6th Cir. 2003), *abrogated on other grounds by* Woodford v. Ngo, 548 U.S. 81, 87 (2006).

[676] Blake v. Ross, 787 F.3d 693, 695 (4th Cir. 2015).

[677] *Id.*

[678] *Id.*

that Madigan used excessive force.[679] Blake did not submit an administrative complaint in accordance with Maryland's Administrative Remedy Procedure (ARP) for inmate grievances.[680] He later filed a civil-rights suit under 42 U.S.C. Section 1983 against Madigan and Ross (among other prison personnel), alleging that the lieutenants violated his Eighth Amendment rights when Madigan struck him multiple times and Ross failed to protect him.[681] The district court granted summary judgment for Ross on the ground that Blake failed to exhaust available administrative remedies before filing suit.[682] (Madigan, however, did not raise the affirmative defense of exhaustion and was found civilly liable after a trial.[683])

Blake successfully appealed the district court's ruling for Ross to the Fourth Circuit. The court framed the question before it as whether Blake failed to exhaust administrative remedies as required by the PLRA.[684] A majority of the Fourth Circuit panel concluded that "special circumstances" justified Blake's failure to comply with Maryland's administrative procedures.[685] In doing so, the Fourth Circuit adopted the methodology established by the Second Circuit[686] in an earlier case, which asks (1) whether the inmate "was justified in believing" that his participation in another investigatory proceeding procedurally exhausted his administrative remedies; and (2) whether the inmate's participation in that other proceeding substantively exhausted his administrative remedies by giving the prison an opportunity to address the complaint internally.[687] The Fourth Circuit concluded that this two-part inquiry, by having a procedural component—which "ensures that an uncounseled inmate attempting to navigate the grievance system will not be penalized for making a reasonable, albeit flawed, attempt to comply with the relevant administrative procedures"—along with a substantive component—which "safeguards a prison from unnecessary and unexpected litigation"—is consistent with the purposes behind the PLRA's exhaustion requirement.[688] Applying that test, the majority concluded that "Blake reasonably interpreted Maryland's murky grievance procedures" and that his participation in the IIU investigation "provided the Department [of Public Safety and Correctional Services] with ample notice and opportunity to address internally the issues raised."[689]

Judge Agee dissented, asserting that "[t]he PLRA's exhaustion requirement may not even be amenable to any exceptions," and, even if it was, Blake failed to satisfy the test that the majority

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[679] *Id.* at 695-96.

[680] *Id.* at 697.

[681] "After conviction, the Eighth Amendment 'serves as the primary source of substantive protection ... in cases ... where the deliberate use of force is challenged as excessive and unjustified.'" Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (quoting Whitley v. Alberts, 475 U.S. 312, 327 (1986)); *see also* Walls v. Tadman, 762 F.3d 778, 782 (8th Cir. 2014) (recognizing failure-to-protect claim under the Eighth Amendment when prisoner can show that "the prison official was deliberately indifferent to a 'substantial risk of serious harm.'"); Kinney v. Ind. Youth Center, 950 F.2d 462, 465 (7th Cir. 1991) ("The eighth amendment applies to excessive force claims arising after conviction.").

[682] Blake, 787 F.3d at 696.

[683] *Id.*

[684] *Id.*

[685] *Id.* at 698-701.

[686] Macias v. Zank, 495 F.3d 37 (2d Cir. 2007); Johnson v. Testman, 380 F.3d 691 (2d Cir. 2004).

[687] Blake, 787 F.3d at 698.

[688] *Id.*

[689] *Id.* at 698-701.

announced.[690] Additionally, Judge Agee noted that three other circuits have ruled that an inmate does not exhaust administrative remedies by participating in an internal investigation.[691]

The Supreme Court, presented with the opportunity to resolve the circuit split, asked the parties to address whether the Fourth Circuit misapplied Supreme Court precedents "in holding, in conflict with several other federal courts of appeals, that there is a common law 'special circumstances' exception to the Prison Litigation Reform Act."[692] Ross argued, among other things, that the Second and Fourth Circuits' exhaustion exception conflicts with Congress's intent in enacting the PLRA as well as the Supreme Court's interpretation of the act and its goals.[693] Ross contended that in two previous cases, *Booth v. Churner*[694] and *Woodford v. Ngo*,[695] the Supreme Court refused to uphold other judicially created exceptions to the PLRA's exhaustion requirement.[696] For instance, the Court stated in *Booth* that "we stress the point ... that we will not read ... exceptions into statutory exhaustion requirements where Congress has provided otherwise."[697] Additionally, Ross contended that the PLRA's mandatory exhaustion requirement was designed to fix an alleged flaw in the act's precursor—the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA)—which authorized, but did not obligate, courts to require exhaustion "in the interests of justice."[698] Thus, Ross argued, allowing the exception would "restore[] to courts a significant amount of the discretion expressly removed by Congress" when enacting the PLRA.[699] Blake, in his response brief, devoted little space to answering the question that the Supreme Court certified, contending, instead, that this case is really about whether administrative remedies were "available" to him.[700] He contended that there were no "available" administrative remedies for him to exhaust (as the statute requires),[701] and so he did not need to prove any exceptions to the requirement.[702] According to Blake, when the IIU is investigating a prison incident, "the prison will dismiss any other administrative grievance as procedurally improper" and thus the Court should affirm on the alternative ground that Maryland's ARP was not available to Blake or dismiss the writ of certiorari as improvidently granted.[703]

In a unanimous ruling the Supreme Court reversed the Fourth Circuit, concluding that the text and history of the PLRA did not allow the circuit court's "special circumstances" exception to the PLRA's exhaustion requirement.[704] Focusing on the PLRA's text, the Court reasoned that the language is mandatory and does not permit a court to excuse a failure to exhaust available

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[690] *Id.* at 703-06 (Agee, J. dissenting).

[691] *Id.* at 702-03.

[692] *See Ross v. Blake,* SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/ross-v-blake/ (last visited Mar. 29. 2016).

[693] Brief for Petitioner at 1-6, 20-24, Ross v. Blake, 136 S. Ct. 614 (2015) (No. 15-339).

[694] 532 U.S. 731 (2001).

[695] 548 U.S. 81 (2006).

[696] Brief for Petitioner at 27-28, Ross v. Blake, 136 S. Ct. 614 (2015) (No. 15-339).

[697] *Booth,* 532 U.S. at 741 n.6.

[698] Civil Rights of Institutionalized Persons Act, P.L. 96-247, §7, 94 Stat. 349, 352 (1980).

[699] Brief for Petitioner at 37, Ross v. Blake, 136 S. Ct. 614 (2015) (No. 15-339).

[700] Respondent's Brief at 10-13, Ross v. Blake, 136 S. Ct. 614 (2015) (No. 15-339).

[701] *See, e.g.,* Kaba v. Stepp, 458 F.3d 678, (7th Cir. 2006) (noting that "[i]f administrative remedies are not 'available' to an inmate, then the inmate cannot be required to exhaust," and that courts must determine when administrative remedies are and are not available to an inmate because "the PLRA does not say when a process is 'available.'").

[702] Respondent's Brief at 15-30, Ross v. Blake, 136 S. Ct. 614 (2015) (No. 15-339).

[703] Respondent's Brief at 15, 31-34.

[704] Ross v. Blake, 136 S. Ct. 1850, 1856-58 (2016).

remedies.[705] Indeed, the Court added, to date it had "reject[ed] every attempt to deviate ... from [the act's] textual mandate," including in *Booth* and *Woodford*—the cases cited by Ross.[706] The Court also agreed with Ross's contention that "the history of the PLRA underscores the mandatory nature of its exhaustion regime," noting that "[i]n enacting the PLRA, Congress thus substituted an 'invigorated' exhaustion provision" for the "weak exhaustion provision" in the former CRIPA.[707] And permitting the special circumstances exception, in the Court's view, would "resurrect CRIPA's scheme, in which a court could look to all particulars of a case to decide whether to excuse a failure to exhaust administrative remedies.[708]

Next, the Supreme Court considered Blake's contention that administrative remedies were unavailable to him—the exception written into the text of the PLRA—clarifying when administrative remedies are "unavailable."[709] Under that exception, "an inmate is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'"[710] Thus, remedies are unavailable when (1) "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) when the administrative remedial scheme is "so opaque that it becomes, practically speaking, incapable of use," such that "no ordinary prison can discern or navigate it"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."[711] Because "[t]he facts of this case raise questions about whether, given these principles, Blake had an 'available' administrative remedy to exhaust," the Court remanded the case to the lower court to evaluate that question in the first instance.[712]

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[705] *Id.* at 1856-57

[706] *Id.* at 1857.

[707] *Id.* at 1857-58.

[708] *Id.* at 1858.

[709] *Id.* at 1858-62.

[710] *Id.* at 1859.

[711] *Id.* at 1859-60.

[712] *Id.* at 1860-62.

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