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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, one on insider trading (*Salman v. United States*), and the final 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 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*); 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, published and yet to be published.

This report will be revised after the end of the Term.

Contents

White Collar Crime	1
Hobbs Act Cases	1
Taylor v. United States	1
Ocasio v. United States	3
McDonnell v. United States	4
Insider Trading	8
Salman v. United States	8
Computer Fraud	9
Musacchio v. United States	9
Sex Offenses	11
Lockhart v. United States	11
Nichols v. United States	13
Firearms	14
Caetano v. Massachusetts	14
Voisine v. United States	15
Armed Career Criminal Act	17
Welch v. United States	17
Mathis v. United States	19
Fourth Amendment	21
Utah v. Strieff	21
Birchfield v. North Dakota	23
Mullenix v. Luna	26
Fifth Amendment	28
Puerto Rico v. Sanchez Valle	28
Sixth Amendment	30
Luis v. United States	30
Betterman v. Montana	32
United States v. Bryant	33
Sentencing	35
Montgomery v. Louisiana	35
United States v. Molina-Martinez	37
Capital Punishment	39
Kansas v. Carr	39
White v. Wheeler	41
Weary v. Cain	43
Hurst v. Florida	45
Foster v. Chatman	46
Williams v. Pennsylvania	48
Prisoners	51
Bruce v. Samuels	51
Ross v. Blake	52

Contacts

Author Contact Information 55

White Collar Crime

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

Hobbs Act Cases

The three Hobbs Act cases might easily be decided on narrow technical grounds. On the other hand, the Court might decide one or more of them in a way which further marks the outskirts of Congress's authority to enact criminal laws. 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*, involves the robbery of suspected drug dealers.² The second, *Ocasio v. United States*, consists of a kickback conspiracy between traffic cops and body shop owners.³ 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.⁴

Taylor v. United States

Question: *Whether, in a federal criminal prosecution under the Hobbs Act, 18 U.S.C. §1951, the Government is relieved of proving beyond a reasonable doubt the interstate commerce element by relying exclusively on evidence that the robbery or attempted robbery of a drug dealer is an inherent economic enterprise that satisfies, as a matter of law, the interstate commerce element of the offense?*

The U.S. Supreme Court has agreed to decide whether a robbery victim's status as a suspected drug dealer is sufficient to establish federal interstate commerce jurisdiction in *Taylor v. United States*.⁵ Robbery is essentially a local crime. On the other hand, drug dealing is clearly a commercial activity, and the Hobbs Act's jurisdictional element is stated in sweeping terms.⁶ Moreover, the Court has already decided that the traffic in drugs affords Congress legislative authority to regulate purely local noncommercial activities.⁷ Is it enough that the government proved that the defendant believed he was robbing a drug dealer? Or must the government prove that the drugs that were the target of the offense moved in or affected interstate commerce?

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.⁸ 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.⁹ 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

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, ___ S. Ct. ___ (Jan. 15, 2016).

⁵ 136 S. Ct. 236 (2015).

⁶ See 18 U.S.C. § 1951.

⁷ See *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁸ See *United States v. Taylor*, 754 F.3d 217, 220-21 (4th Cir. 2014).

⁹ *Id.*

commodity in commerce, by robbery or extortion.”¹⁰ 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 Court for the Western District of Virginia barred admission, holding that drug dealing affects interstate commerce as a matter of law.¹¹ Taylor was convicted and appealed.¹²

On appeal, he questioned whether the government had satisfied the Hobbs Act’s commerce element, but he faced two obstacles. Lower federal appellate courts have 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 seems to re-enforce 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.”¹³

Taylor argues before the Supreme Court that the Fourth Circuit is wrong. “The Fourth Circuit’s per se rule that all drug dealing affects commerce for purposes of the Hobbs Act, regardless of the circumstances of the charged offense, conflicts with the approach in the Second Circuit and the Seventh Circuit, in which the courts have held that drug dealing in and of itself is insufficient to establish that a crime affects commerce within the meaning of the Hobbs Act; there must be an additional individualized factual finding beyond a reasonable doubt supporting a legal conclusion of jurisdiction in a particular case.”¹⁴

The Second Circuit has in fact 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.”¹⁵ The Seventh Circuit on the other hand indicated that proof of an individualized impact is not necessary for prosecution under the federal drug law, but is required for Hobbs Act prosecutions.¹⁶

Perhaps the Supreme Court granted certiorari to resolve the apparent conflict between the Second, Fourth, and Seventh Circuits. The Fourth Circuit believes proof of an individual impact on interstate commerce is not necessary in Hobbs Act cases.¹⁷ The Seventh Circuit believes it is necessary in Hobbs Act cases, but not in federal drug law prosecutions.¹⁸ And the Second Circuit believes it is necessary in both Hobbs Act and federal drug prosecutions.¹⁹

¹⁰ 18 U.S.C. § 1951(a).

¹¹ See *Taylor*, 754 F.3d at 221.

¹² *Id.*

¹³ *Id.* at 224 (internal quotation marks and citations omitted).

¹⁴ Brief for Petitioner at 21, *Taylor v. United States*, 136 S. Ct. 236 (2015) (No. 14-6166).

¹⁵ See *United States v. Needham*, 604 F.3d 673, 678 (2d Cir. 2010).

¹⁶ *United States v. Peterson*, 236 F.3d 848, 854 (7th Cir. 2001).

¹⁷ See *United States v. Taylor*, 754 F.3d 217 (4th Cir. 2014).

¹⁸ *Peterson*, 236 F.3d at 854.

¹⁹ *Needham*, 604 F.3d at 678.

Resolution of the apparent conflict without more would clarify the law. On the other hand, a substantial number of federal crimes have an interstate commerce element. The Supreme Court's decision would have far greater consequences if it repudiates the "de minimis" impact theory or otherwise reads Congress's Commerce Clause power narrowly.

Ocasio v. United States

Question: *Does a conspiracy to commit extortion require that the conspirators agree to obtain property from someone outside the conspiracy?*

The Supreme Court has agreed to review *Ocasio v. United States*, a case in which the government argues that the owner of an auto body shop was at once the victim and co-conspirator in an extortion scheme involving kickbacks he paid for business referrals.²⁰

Ocasio was a Baltimore police officer, who with several other officers received kickbacks for referring accident victims to the 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 unconvinced.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

²⁰ 135 S. Ct. 1491 (2015) (No. 14-361).

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

Ocasio reiterated his argument in his brief to the Supreme Court.³³ He also added a federalism argument; a suggestion that the courts should be hesitant to assume that Congress intended to make federal crimes out of run-of-the mill state offenses.³⁴ The contention is reminiscent of one raised in *Bond v. United States*.³⁵ There, the Court concluded that Congress could not have intended the statute implementing the Chemical Weapons Treaty to apply to a minor domestic assault case.³⁶ The Court explained that “the background principle that Congress does not normally intrude upon the police power of the States is critically important.”³⁷ A number of former United States Attorneys made the same point in an amicus brief in support of Ocasio.³⁸ The difficulty is that, unlike the chemical weapons statute, the Hobbs Act has been long, regularly, and widely prosecuted, and Congress has yet to limit the range of activities that may be prosecuted under its terms.

McDonnell v. United States

Question: *Under the federal bribery statute, Hobbs Act, and honest-services fraud statute, 18 U.S.C. §§ 201, 1346, 1951, it is a felony to agree to take “official action” in exchange for money, campaign contributions, or any other thing of value. The question presented is whether “official action” is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power; and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional.*

On September 4, 2014, a jury convicted former Virginia Governor McDonnell and his wife on corruption charges based on his activities as Governor.³⁹ The convictions covered wire fraud, conspiracy, and Hobbs Act violations.⁴⁰ The U.S. Court of Appeals for the Fourth Circuit affirmed.⁴¹ 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.⁴²

The Governor, and particularly his wife, had been showered with gifts during the Governor’s term in office.⁴³ Their benefactor, a constituent, was a drug manufacturer who hoped to have one of his products approved by the U.S. Food and Drug Administration, which would require studies of the

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

³² *Id.*

³³ Brief for Petitioner at 16-19, *Ocasio v. United States*, 135 S. Ct. 1491 (2015) (No. 14-361).

³⁴ *Id.* at 19, 42-46.

³⁵ 134 S. Ct. 2077 (2014).

³⁶ *Id.*

³⁷ *Id.* at 2092.

³⁸ See Brief for Former U.S. Attorneys as *Amici Curiae* Supporting Petitioner, *Ocasio v. United States*, 135 S. Ct. 1491 (2015) (No. 14-361).

³⁹ *United States v. McDonnell*, 792 F.3d 476, 493 (4th Cir. 2015).

⁴⁰ *Id.*

⁴¹ *Id.* at 486.

⁴² *McDonnell v. United States*, 136 S. Ct. 891 (2016).

⁴³ *McDonnell*, 792 F.3d at 486-92.

products.⁴⁴ To that end, he sought to have state university medical research and facilities to favorably test and report 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.⁴⁵ The Governor's name was used on invitations and he attended a promotional luncheon at the Governor's Mansion on behalf of the company.⁴⁶ The Governor also pitched the company's product to the official responsible for determining the products covered by the state's employee health plans.⁴⁷

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.⁴⁸ A second statute defines the scheme to defraud element to include any scheme to defraud another of "honest services" to which he is entitled.⁴⁹ The Supreme Court, however, has construed this honest services definition to encompass no more than bribery or kickbacks.⁵⁰ The Court understood honest services bribery to correspond to the misconduct described in the general federal bribery statute.⁵¹ 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.⁵²

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 manner by extortion under color of law.⁵³ 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.⁵⁴

The trial court's instruction to the jury as to what constitutes an "official act" lies at the heart of the Governor's attack on his conviction. The trial court advised the jury that

The term official action means 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 public official's official capacity. Official action as I just defined it includes those actions that have been clearly established by

⁴⁴ *Id.* at 487.

⁴⁵ *Id.* at 487-89.

⁴⁶ *Id.* at 490.

⁴⁷ *Id.* at 492.

⁴⁸ 18 U.S.C. § 1343.

⁴⁹ 18 U.S.C. § 1346.

⁵⁰ *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).

⁵¹ *Id.* at 412.

⁵² 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. . .").

⁵³ 18 U.S.C. § 1951(a), (b)(2).

⁵⁴ *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").

settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.⁵⁵

The Fourth Circuit rejected the Governor's challenge. It did concede that the payor's subjective belief aspect might be "debatable," but concluded that any error was harmless. The jury would have convicted the Governor in any event.⁵⁶

Before the Supreme Court, the Governor argues that the lower court's decision is contrary to Supreme Court precedent, at odds with decisions of other federal appellate courts, and would criminalize the ordinary, innocent political practices of federal, state, and local public officials.⁵⁷ The government disputes each of these points.⁵⁸

The Fourth Circuit claimed support from *United States v. Birdsall*, an early twentieth century Supreme Court case in which the Court defined expansively the official acts covered by earlier bribery statutes.⁵⁹ Both sides might claim support from a later Supreme Court remark in *United States v. Sun-Diamond* that not every "official act" by a public servant is an "official act" for purposes of bribery; instead the term only those "decision[s] or action[s] on any question, matter ... or controversy, which may ... be pending, or which may by law be brought before any public official, in such official's official capacity...."⁶⁰

From the Governor's perspective his conduct involved little more than acts of political courtesy for a constituent. From the government's perspective his conduct involved the subtle acts of official direction to a junior public official. Their different points of view color how the two sides see related cases in other circuits. In the D.C. Circuit's *Valdes v. United States* case, where a police officer conducted an unauthorized criminal records check, the Governor sees a case in which a comparable "official act" jury instruction was declared harmfully erroneous.⁶¹ The government sees a case in which the official's actions had no relation to the official governmental action upon a "question, matter, ... or controversy."⁶² The Governor looks upon the Eighth Circuit's *United States v. Rabbitt* and the First Circuit's *United States v. Urciuoli* decisions as

⁵⁵ *McDonnell*, 792 F.3d at 505-506.

⁵⁶ *Id.* at 512.

⁵⁷ Petitioner for Writ of Certiorari, *McDonnell v. United States*, No 15-474 (U.S. 2015).

⁵⁸ Brief for the United States in Opposition, *McDonnell v. United States*, No. 15-474 (U.S. 2015).

⁵⁹ *McDonnell*, 792 F.3d at 507, citing *United States v. Birdsall*, 233 U.S. 223 (1914) which observed that "[t]o constitute [] official action, it is not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constitute the common law of the department and fixed the duties of those engaged in its activities. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery." *Id.* at 230-31 (internal citations omitted).

⁶⁰ *United States v. Sun-Diamond Growers*, 526 U.S. 398, 407 (1999), quoting the definition of "official act" in the bribery statute, 18 U.S.C. § 201(a)(3).

⁶¹ *Valdes v. United States*, 475 F.3d 1319, 1325 (D.C. Cir. 2007).

⁶² *Id.* at 1325-326.

cases in which powerful legislators promoted constituent interests to state and local officials, and no extortion was found.⁶³ For the government, it is a case where the legislators neither took nor compelled any governmental action.⁶⁴

The Supreme Court's grant of certiorari, however, may involve considerations other than the opportunity to resolve a possible conflict in the circuits over the definition of official act. It may have more to do with the Court's desire to confirm or refine its historic caution in cases involving federal prosecution based on state and local political activities.

In the 1987 case of *McNally v. United States*, the Court it turned back mail fraud convictions built on the theory that the defendants had defrauded the citizens of the Commonwealth of Kentucky, not out of money or other property, but out of their "intangible right to honest and impartial government."⁶⁵ The Court made its rationale clear: "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 [the mail fraud statute] as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has."⁶⁶

The government was no more successful when it took a comparable approach under the extortion branch of the Hobbs Act. In 1991, the Court overturned the conviction of McCormick, a West Virginia legislator, for soliciting and accepting campaign contributions from those whose interests he espoused legislatively.⁶⁷ Again, the Court refused to read the criminal statute expansively, without a clear expression of congressional intent:

Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests 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." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.⁶⁸

Congress then responded by enacting the section which folds honest services fraud into the mail and wire fraud statutes. Yet here too, in 2010, the Court in *Skilling v. United States* found the statute's breadth troubling: "[T]here is no doubt that Congress intended §1346 to reach *at least* bribes and kickbacks. Reading the statute to prescribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that §1346 criminalizes only the bribe-and-kickback core of the pre-*McNally* case law."⁶⁹

⁶³ *United States v. Rabbitt*, 583 F.2d 1014, 1028 (8th Cir. 1978); *United States v. Urciuoli*, 513 F.3d 290, 293-95 (1st Cir. 2008).

⁶⁴ *Rabbitt*, 583 F.2d at 1028; *Urciuoli*, 513 F.3d at 295.

⁶⁵ *McNally v. United States*, 483 U.S. 350, 352, 360 (1987).

⁶⁶ *Id.* at 360.

⁶⁷ *McCormick v. United States*, 500 U.S. 257, 274 (1991).

⁶⁸ *Id.* at 272.

⁶⁹ *Skilling v. United States*, 561 U.S. 358, 408-409 (2010).

McDonnell may turn on the Court’s historic reluctance to endorse federal regulation of state political practices. On the other hand, the Court may conclude that at the heart of the issue is the question of whether, a corrupter and jury may infer an intent to commit a public act once a public official knowingly accepts lavish gifts.

Insider Trading

Salman v. United States

Question: *Does the personal benefit to the insider that is necessary to establish insider trading under Dirks v. SEC, 463 U.S. 646 (1983), require proof of “an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature,” as the Second Circuit held in United States v. Newman, 773 F.3d 438 (2d Cir. 2014), cert. denied, No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?”*

Insider trading is a federal crime.⁷⁰ It occurs when securities trading follows from a faithless insider’s disclosure, for personal benefit, of a corporation’s confidential market sensitive information.⁷¹ The lower federal appellate courts are at odds over the nature of the personal benefit sufficient to satisfy that element of the offense.⁷²

The case now under Supreme Court review, *Salman v. United States*, began when Maher Kara began sharing insider information with his brother Michael who, in his securities dealings, traded on the information.⁷³ Michael later became friends with Salman to whom he conveyed some of the insider information that his brother had provided.⁷⁴ Salman was ultimately convicted of insider trading and conspiracy to commit insider trading.⁷⁵ Salman appealed on the grounds that the government had failed to establish that Salman knew that Maher Kara, the insider, received a personal benefit in exchange for the information that Michael Kara received and passed on to Salman.⁷⁶

⁷⁰ 15 U.S.C. § 78ff (“Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful . . . shall upon conviction be fined not more than \$5,000,000, or imprisoned not more than 20 years”); 15 U.S.C. 78j (“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. . . .”); 17 C.F.R. §240.105b-1 (“The ‘manipulative and deceptive devices’ prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b–5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the share-holders of that issuer, or to any other person who is the source of the material nonpublic information”).

⁷¹ *Id.* See generally CRS Report RS21127, *Federal Securities Law: Insider Trading*, by Michael V. Seitzinger.

⁷² Compare *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015), with *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).

⁷³ *Salman*, 792 F.3d at 1089.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1088, 1090.

⁷⁶ *Id.* at 1090.

The U.S. Court of Appeals for the Ninth Circuit affirmed the conviction. Its decision pointed to the Supreme Court's *Dirks v. SEC* opinion⁷⁷ in which the Court had addressed the downstream liability of "tippees," like Michael Kara and Salman:

"Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure," *id.* at 662, 103 S.Ct. 3255, for in that case the insider is breaching his fiduciary duty to the company's shareholders not to exploit company information for his personal benefit.[] And a tippee is equally liable if "the tippee knows or should know that there has been [such] a breach," *id.* at 660, 103 S.Ct. 3255 (i.e., knows of the personal benefit).

Of particular importance here, the Court then went on to define what constitutes the "personal benefit" that constitutes the breach of fiduciary duty. It would include, for example, "a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* at 663, 103 S.Ct. 3255. However, "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend." *Id.* at 664, 103 S.Ct. 3255 (emphasis supplied).⁷⁸

In Salman's case, Maher Kara was the insider and Michael Kara was the "trading relative," as Salman was well aware.⁷⁹ The insider Maher Kara's personal benefit was the benefit of knowing he was assisting his brother.⁸⁰

The Ninth Circuit conceded that the Second Circuit Court of Appeals had a different point of view as evidenced by its opinion in *United States v. Newman*.⁸¹ There, the Second Circuit declared the personal benefit element in the form of "gift to a trading relative or friend" was limited to instances that involve "a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."⁸²

However the Supreme Court rules, Congress is likely to be asked to reconsider the issue.

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's 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*.⁸³ The case presented two questions. First, may a defendant present a statute of limitation

⁷⁷ 463 U.S. 646 (1983).

⁷⁸ *Salman*, 792 F.3d at 1092 (footnote 4 of the *Salman* opinion omitted).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*, citing, *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).

⁸² *Id.* at 1093, quoting *Newman*, 773 at 452.

⁸³ 136 S. Ct. 709 (2016). This summary relies heavily on a free standing legal sidebar, CRS Legal Sidebar WSLG1514, (continued...)

challenge for the first time on appeal?⁸⁴ Second, may a conviction be undone by a sufficiency-of-the-evidence attack on an extraneous element? The Court answered no to both questions.⁸⁵

Musacchio hacked into the computer network of his former employer.⁸⁶ 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.⁸⁷ The indictment charged him with access without authorization.⁸⁸ The judge's instructions to the jury, however, suggested that Musacchio could only be convicted if the government proved access both without authorization *and* in excess of authorization.⁸⁹ Musacchio was convicted nonetheless.⁹⁰

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.⁹¹ 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.⁹²

The two questions had divided the lower federal appellate courts.⁹³ 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.⁹⁴ If a defendant does not object before conviction that prosecution of his case is untimely, the defense is lost.⁹⁵ It may not be raised for the first time on appeal.⁹⁶ 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.⁹⁷ The Court found no such evidence in the case of the statute at issue, general criminal statute of limitations, 18 U.S.C. § 3282.⁹⁸ Thus, the delay in bringing Musacchio's prosecution was not an issue that could be raised for the first time on appeal.⁹⁹

Second, when jury instructions contain extraneous elements, only the necessary elements of the crime charged need to satisfy a sufficiency-of-the-evidence test.¹⁰⁰ As the Court explained,

(...continued)

Computer Fraud Conviction Survives Delay and Erroneous Jury Instructions, by Charles Doyle.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *United States v. Musacchio*, 590 F. App'x 359, 360-61 (5th Cir. 2014).

⁸⁷ 18 U.S.C. § 1030(a).

⁸⁸ *United States v. Musacchio*, 590 F. App'x at 361.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 362-63.

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

⁹³ *See Musacchio v. United States*, 136 S. Ct. 709, 714-15 (2016) (collecting cases showing circuit splits).

⁹⁴ *Id.* at 717-18.

⁹⁵ *Id.*

⁹⁶ *Id.* at 716.

⁹⁷ *Id.* at 717.

⁹⁸ *Id.* at 717-18.

⁹⁹ *Id.* at 716-18.

¹⁰⁰ *Id.* at 715.

“[w]hen 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.”¹⁰¹

The Fifth Circuit, from which the case arose, had decided it on the basis of the rule-of-the-case doctrine.¹⁰² 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.¹⁰³ The Fifth Circuit, however, erroneously *applied* the rule with regard to a lower court ruling in the same case.¹⁰⁴ 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.”¹⁰⁵

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.”¹⁰⁶

The U.S. Supreme Court in a 6-2 decision upheld imposition of a mandatory minimum sentencing enhancement in a child pornography case.¹⁰⁷ 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*....¹⁰⁸

Lockhart had pleaded guilty to federal child pornography charges.¹⁰⁹ He had earlier been convicted of first degree sexual abuse of an adult under New York state law.¹¹⁰ The trial court

¹⁰¹ *Id.*

¹⁰² *Musacchio*, 590 F. App’x at 362-63.

¹⁰³ *See Musacchio*, 136 S. Ct. at 716 (quoting *Pepper v. United States*, 562 U.S. 476, 506) (2011)).

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* (quoting *United States v. Wells*, 519 U.S. 482, 487 n.4 (1997)).

¹⁰⁶ *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.

¹⁰⁷ *Id.*

¹⁰⁸ 18 U.S.C. § 2252(b)(2).

¹⁰⁹ *Lockhart*, 136 S. Ct. at 961-62.

¹¹⁰ *Id.* at 962.

concluded it had no choice but to assess the 10-year mandatory minimum.¹¹¹ Lockhart appealed. The U.S. Court of Appeals for the Second Circuit affirmed.¹¹² 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.¹¹³ The question which 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.¹¹⁴

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.”¹¹⁵

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.¹¹⁶ 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.”¹¹⁷

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.”¹¹⁸

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?”¹¹⁹

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

¹¹¹ *Id.*

¹¹² *United States v. Lockhart*, 749 F.3d 148, 150 (2d Cir. 2014).

¹¹³ *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).

¹¹⁴ *Lockhart*, 136 S. Ct. at 961.

¹¹⁵ *Id.* at 965.

¹¹⁶ *Id.* at 966-67.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 968.

¹¹⁹ *Id.* at 969 (Kagan, J., with Breyer, J., dissenting).

Nichols v. United States

Question: *Whether 42 U.S.C. §16913(a) requires a sex offender who resides in a foreign country to update his registration in the jurisdiction where he formerly resided, a question that divides the courts of appeals.*

The federal appellate courts are divided over whether an individual convicted of a crime which requires him to register as a sex offender must continue to follow registration requirements when he relocates overseas. The issue is now before the Supreme Court in *United States v. Nichols*.¹²⁰

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.”¹²¹ 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....”¹²² It is a federal crime for an individual convicted of a federal sex offense to fail to comply.¹²³ 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.¹²⁴

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.¹²⁵ He subsequently relocated in the Philippines without appearing or returning to appear before Kansas registration officials.¹²⁶ The Philippines deported him back to the United States, and he was indicted for failing to keep current his Kansas registration.¹²⁷ He sought unsuccessfully to dismiss the indictment on the grounds that SORNA did not require him to register once he was in the Philippines.¹²⁸ He pleaded guilty, reserving the right to appeal.¹²⁹

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 residency in a non-SORNA jurisdiction.¹³⁰ The Tenth Circuit rejected the argument on the basis of binding circuit precedent in which the court had concluded: “First, abandoning one’s living place constitutes a change in residence under SORNA. Second, when an offender leaves a residence in a state, and then leaves the state entirely, that state remains a ‘jurisdiction involved.’ And third, a

¹²⁰ 136 S. Ct. 445 (2015). Much of what appears here can be found in a free standing legal sidebar, CRS Legal Sidebar WSLG1508, *Must an Overseas Resident Update His U.S. Sex Registration: The Courts Cannot Agree*.

¹²¹ 42 U.S.C. § 16913(a).

¹²² 42 U.S.C. § 16913(c).

¹²³ 18 U.S.C. § 2250.

¹²⁴ *Id.*

¹²⁵ *United States v. Nichols*, 775 F.3d 1225, 1227 (10th Cir. 2014).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1228.

¹²⁹ *Id.*

¹³⁰ *Id.*

reporting obligation does not disappear simply because an individual manages to relocate to a non-SORNA jurisdiction before the three-day deadline for updating a registration has passed.”¹³¹

A concurring member of the *Nichols* panel favored a position similar to that taken by the Eighth Circuit and contrary to the Tenth Circuit’s precedent.¹³² Under the Eighth Circuit’s construction an offender is only obliged to update his registration information in “at least 1 jurisdiction involved pursuant to subsection (a)” that is, in a jurisdiction where he resides, is employed, or is a student.¹³³ In the eyes of the Eighth Circuit, the obligation is “to keep the registration current in the jurisdiction where he ‘resides’ not a jurisdiction where he ‘resided.’”¹³⁴ That would mean in *Nichols*’ case that Kansas “was not a ‘jurisdiction involved’ after [Nichols] changed his residence to somewhere in the Philippines, so [he] was not required by the federal statute to update the [Kansas] registry.”¹³⁵

Congress resolved the dispute 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.¹³⁶ The statute requires sex offenders to “provide the appropriate official for inclusion in the sex offender registry”¹³⁷ information related to any foreign travel, “in conformity with any time and manner requirements prescribed by the Attorney General.”¹³⁸ In the interim, however, the legislation will have no impact on *Nichols* and those similarly situated. If the Court accepts their arguments, their convictions for failure to update will be overturned. If it does not, their convictions will stand.

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*

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

¹³¹ *Id.* at 1229 (internal citations omitted).

¹³² *Id.* at 1233 (McKay, J., concurring).

¹³³ *United States v. Lunsford*, 725 F.3d 859, 860 (8th Cir. 2013).

¹³⁴ *Id.* at 861.

¹³⁵ *See id.* at 861-62.

¹³⁶ P.L. 114-119 (Feb. 8, 2016).

¹³⁷ 42 U.S.C. §16914(a).

¹³⁸ P.L. 114-119 (Feb. 8, 2016).

the Massachusetts Supreme Court that had upheld a Massachusetts law prohibiting the possession of stun guns.¹³⁹

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.¹⁴⁰ 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.¹⁴¹ Additionally, the court concluded, the stun gun, as used by the defendant, was not used to defend herself in the home.¹⁴²

The U.S. Supreme Court vacated the Massachusetts ruling, concluding that its reasoning directly conflicted with the holdings in *District of Columbia v. Heller*,¹⁴³ in which the Court concluded that the Second Amendment encompasses an individual right to possess firearms for traditional, lawful purposes, and *McDonald v. Chicago*,¹⁴⁴ which applies that right to the States through the Fourteenth Amendment. For instance, the Court noted that *Heller* stated that “the Second Amendment ‘extends . . . to arms . . . that were not in existence at the time of the founding’” as well as firearms that are not readily adaptable for military use.¹⁴⁵ Additionally, the Court criticized the state court's ruling for defining “unusual”—as used in *Heller* to describe firearms that have historically been prohibited—as weapons that are a “modern invention.”¹⁴⁶

The U.S. Supreme Court's ruling is limited to the Massachusetts court's analysis, though, which, according to the Court, had run afoul of its precedent. So the Court's decision does not mean that the Second Amendment protects all electrical weapons, such as stun guns, and does little to add to, or clarify, current Second Amendment jurisprudence.

Voisine v. United States¹⁴⁷

Question: *Does a misdemeanor crime with the mens rea of reckless qualify as a ‘misdemeanor crime of domestic violence’ as defined by 18 U.S.C. §§921(a)(33)(A) and 922(g)(9).*

The Supreme Court recently heard *Voisine v. United States*,¹⁴⁸ a decision examining the federal provision that makes it unlawful for an individual to possess a firearm or ammunition if that person has been convicted of a misdemeanor crime of domestic violence (MCDV). A MCDV is defined as a misdemeanor offense under federal or state law that has, as an element, “the use or attempted use of physical force, or the threatened use of a deadly weapon” committed by and against certain persons.¹⁴⁹ The Court decided to hear one of two questions presented: whether a

¹³⁹ *Caetano v. Massachusetts*, No. 14-10078, —S. Ct.—2016 WL 1078932 (Mar. 21, 2016).

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

¹⁴¹ *Caetano*, 26 N.E.2d at 692.

¹⁴² *Id.*

¹⁴³ 554 U.S. 570 (2008).

¹⁴⁴ 561 U.S. 742 (2010).

¹⁴⁵ *Caetano*, 2016 WL at *1 (quoting *Heller*, 554 U.S. at 582).

¹⁴⁶ *Id.*

¹⁴⁷ Vivian Chu, a legislative attorney in the American Law Division, wrote this section of the report. It is also available as a free standing legal sidebar CRS Legal Sidebar WSLG 1445, *Tying Up Loose Ends . . . Supreme Court To Evaluate Federal Firearms Provision Again*, WSLG 1445.

¹⁴⁸ 136 S. Ct. 386 (2015).

¹⁴⁹ 18 U.S.C. § 921(a)(33).

misdeemeanor crime with a *mens rea* of recklessness qualifies as a “misdeemeanor crime of domestic violence” as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9).¹⁵⁰ The Court decided not to review the constitutionality of the provision under the Second, Fifth, and Sixth Amendments or the Ex Post Facto Clause.¹⁵¹

Arguably the Justices paved the way for this case when deciding *United States v. Castleman*¹⁵² last term. In *Castleman*, the Supreme Court held that the “physical force,” for the purposes of a MCDV, is the degree of force that supports a battery conviction at common law, namely “offensive touching.”¹⁵³ However, the Court noted that it had not resolved whether “a reckless application of force could constitute ‘use’ of force.”¹⁵⁴ This is now the issue before the Court when it hears *Voisine*.

In *Voisine*, the First Circuit upheld the defendants’ MCDV conviction under 18 U.S.C. § 922(g)(9), finding that their underlying convictions under Maine law qualified as predicate MCDV offenses.¹⁵⁵ In doing so, the First Circuit analyzed whether Maine’s assault statute, which includes reckless acts, categorically fits within § 922(g)(9).¹⁵⁶ The First Circuit in *United States v. Booker* had earlier held that a reckless misdemeanor satisfies the federal definition of MCDV.¹⁵⁷ In *Castleman*, the Supreme Court did not say *Booker* was wrong, but highlighted other circuit court decisions, which had determined that “recklessness is not sufficient” to satisfy the use-of-force requirement.¹⁵⁸ In *Voisine*, the First Circuit expressed disagreement with these other circuit cases, stating that “[a]ll but one of the ten cases cited in *Castleman* ... as deciding the § 922(g)(9) mens rea issue in fact considered other statutes in other contexts ...”¹⁵⁹ Given § 922(g)(9)’s legislative history and unique purpose in ensuring that “domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms,” the First Circuit opined that the provision should be interpreted more broadly than other statutes, which do not include reckless crimes as qualifying predicate offenses.¹⁶⁰

Section 922(g)(9), according to the First Circuit, “is meant to embrace those seemingly minor predicate acts, occurring sometimes in moments of passion, where the perpetrator consciously disregarded a risk in light of known circumstances.”¹⁶¹ The court reviewed Maine’s definition of recklessness—“A person acts recklessly with respect to a result of the person’s conduct when the person consciously disregards a risk that the person’s conduct will cause such a result”—and concluded that the definition involves a volitional component and a substantial amount of deliberateness and intent.¹⁶² The First Circuit found the state’s definition of reckless “sufficiently

¹⁵⁰ See 136 S. Ct. 386 (2015); Petition for Writ of Certiorari at I, *Voisine v. United States* (2015) (No. 14-10154).

¹⁵¹ See 136 S. Ct. 386 (2015); Petition for Writ of Certiorari at I, *Voisine v. United States* (2015) (No. 14-10154).

¹⁵² 134 S. Ct. 1405 (2014).

¹⁵³ See *Castleman*, 134 S. Ct. at 1410-13.

¹⁵⁴ See *id.* at 1414 n.8 (citing *Leocal v. Ashcroft*, 543 U.S. 1 (2004)).

¹⁵⁵ *United States v. Voisine*, 778 F.3d 176, 177-78, 187 (1st Cir. 2015).

¹⁵⁶ *Id.* at 183-86.

¹⁵⁷ 644 F.3d 12, 21 (1st Cir. 2011).

¹⁵⁸ *Castleman*, 134 S. Ct. at 1414 n.8.

¹⁵⁹ *Voisine*, 778 F.3d at 180-81 & n.3.

¹⁶⁰ See *id.* at 183.

¹⁶¹ *Id.* at 184.

¹⁶² ME. REV. STAT. ANN. tit. 17-A, § 35(3)(A); see *United States v. Voisine*, 778 F.3d at 183-86.

volitional,” such that the crime of reckless assault in Maine constitutes a predicate offense for purposes of § 922(g)(9).¹⁶³

Notably, the First Circuit made clear that it was not deciding that “recklessness in the abstract is always enough to satisfy § 922(g)(9),” acknowledging that the term has not always been consistently used.¹⁶⁴ Given the First Circuit’s focus on whether Maine’s *mens rea* requirement of recklessness satisfies the statute and the different definitions a state may employ, it will be interesting to see what definition the Court will turn to upon hearing *Voisine*. Will it survey the states to see how they have defined recklessness in a particular context or will the Court turn to the meaning of the term under common law? If the Court overturns the First Circuit’s decision, the result could limit the types of state domestic violence convictions that qualify as predicate offenses under § 922(g)(9). As a consequence, there could be an increase in the number of persons eligible to possess a firearm, despite a misdemeanor conviction for domestic abuse, as such offenses would no longer satisfy § 922(g)(9). Were the Court to exclude crimes of domestic violence with a *mens rea* requirement of recklessness, Congress could pass a law including recklessness as a type of mental state that would satisfy § 922(g)(9)’s definition of MCDV.

Armed Career Criminal Act

Welch v. United States

Questions: 1. *Whether the District Court was in error when it denied relief on Petitioners’ §2255 motion to vacate, which alleged that a prior Florida conviction for ‘sudden snatching,’ did not qualify for ACCA [Armed Career Criminal Act] enhancement pursuant to 18 U.S.C. §924(e).*

2. *Whether Johnson v. United States, 135 S. Ct. 2551(2015), announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review. Furthermore, Petitioner ask[s] this Court to resolve the Circuit split which has developed on the question of Johnson retroactivity in the Seventh and the Eleventh Circuit Courts of Appeals.*

Last year, the Supreme Court declared the Armed Career Criminal Act (ACCA)’s residual category unconstitutionally vague in *Johnson v. United States*.¹⁶⁵ In January, the Court’s *Montgomery v. Louisiana*¹⁶⁶ decision revisited the test used to determine whether such cases should be applied retroactively. With *Welch v. United States*, the Court is being asked to apply the test in an ACCA case.¹⁶⁷

The ACCA calls for a mandatory 15-year term of imprisonment for a defendant convicted of certain firearms offenses, if the defendant has three prior serious drug or violent felony convictions.¹⁶⁸ The qualifying serious drug and violent felony convictions fall within one of three categories.¹⁶⁹ The first category consists of crimes that have *physical force* or attempted physical force as an element.¹⁷⁰ The second is made up of drug trafficking and other *enumerated* crimes

¹⁶³ *Id.* at 186.

¹⁶⁴ *See id.* at 186 & n.5.

¹⁶⁵ 135 S. Ct. 2551 (2015).

¹⁶⁶ 136 S. Ct. 718 (2016).

¹⁶⁷ 136 S. Ct. 790 (2016).

¹⁶⁸ 18 U.S.C. § 924(e).

¹⁶⁹ 18 U.S.C. § 924 (e)(2).

¹⁷⁰ 18 U.S.C. § 924 (e)(2)(B)(i).

such as burglary, arson, and extortion.¹⁷¹ The third is a *residual* category that includes offenses “that present[] a serious potential risk of physical injury to another.”¹⁷² Welch was convicted of being a felon in possession of a firearm.¹⁷³ The trial court sentenced him under the ACCA on the basis of prior Florida convictions.¹⁷⁴

Welch argued that one of his three prior convictions did not fall within any of the qualifying offense categories.¹⁷⁵ The government asserted that it qualified under the physical force category and the residual category. The U.S. Court of Appeals for the Eleventh Circuit agreed that the earlier Florida conviction came within the residual category and found it unnecessary to decide whether it also qualified under the physical force category.¹⁷⁶ Welch filed for habeas relief, which the district court and the Eleventh Circuit denied.¹⁷⁷ Two weeks later, the Supreme Court handed down its *Johnson* decision voiding the residual category.¹⁷⁸ The Supreme Court granted Welch’s petition for review of two questions: (1) whether Welch should have been granted habeas relief because his Florida prior conviction did not fall within the physical force category, in which case he would be ineligible for sentencing under the ACCA; and (2) whether the *Johnson* decision should be applied retroactively to Welch’s case.

The question of the retroactivity of a novel Supreme Court interpretation arose earlier in the Court’s term in *Montgomery v. Louisiana*.¹⁷⁹ There, the Court pointed out that under the *Teague* doctrine, a ground-breaking Supreme Court interpretation (a “new rule”) may be applied retroactively to a habeas petitioner when the new rule finds either the crime of conviction or the penalty imposed substantively unconstitutional.¹⁸⁰ Welch argues that he is entitled to retroactive habeas relief because the *Johnson* Court found unconstitutional the ACCA residual category that was the basis for his prior conviction.¹⁸¹

The government agrees to the extent that the conviction was for an offense qualifying under the residual category, but asks the Court resolve an issue that has arisen under a conflicting decision out of the U.S. Court of Appeals for the Fifth Circuit, *In re Williams*.¹⁸² The *Williams* court declined to apply *Johnson* retroactively because it believed that Congress could cure the vagueness defect in ACCA’s residual category.¹⁸³

The Court also agreed to consider whether Welch’s prior Florida conviction qualified under the ACCA’s physical force category. Welch contends that the “sudden snatching” statute under which he was convicted does not include the physical force element necessary to qualify under the ACCA’s physical force category.¹⁸⁴ The government argues that he was convicted under a statute

¹⁷¹ 18 U.S.C. § 924 (e)(2)(A), (e)(2)(B)(ii).

¹⁷² 18 U.S.C. § 924 (e)(2)(B)(ii).

¹⁷³ See 18 U.S.C. § 922(g)(1); *United States v. Welch*, 683 F.3d 1304, 1306 (11th Cir. 2012).

¹⁷⁴ *Welch*, 683 F.3d at 1306.

¹⁷⁵ See *id.* at 1310.

¹⁷⁶ See *id.* at 1310-14.

¹⁷⁷ See Petitioner’s Brief at 7-8, 136 S. Ct. 790 (2016) (No. 15-6418).

¹⁷⁸ 135 S. Ct. 2551 (2015).

¹⁷⁹ 136 S. Ct. 718 (2016).

¹⁸⁰ See *id.*

¹⁸¹ See Petitioner’s Brief at 13-15, 136 S. Ct. 790 (2016) (No. 15-6418).

¹⁸² See Respondent’s Brief at 12-16, 136 S. Ct. 790 (2016) (No. 15-6418).

¹⁸³ 806 F.3d 322 (5th Cir. 2015).

¹⁸⁴ See Petitioner’s Reply Brief at 24-25, 136 S. Ct. 790 (2016) (No. 15-6418).

that in fact has a physical force element.¹⁸⁵ The government suggests that the case be returned to the Eleventh Circuit to address the issue.¹⁸⁶

Regardless of how the Supreme Court resolves the issues, Congress is likely to remove the now extraneous residual category¹⁸⁷ from the ACCA.

Mathis v. United States

Question: *Whether a predicate prior conviction under the Armed Career Criminal Act, 18 U.S.C. §924(e)(1), must qualify as such under the elements of the offense simpliciter, without extending the modified categorical approach to separate statutory a definitional provisions that merely establish the means by which reference elements may be satisfied rather than stating alternative elements or versions of the offense.*

Interpretation of the Armed Career Criminal Act (ACCA) has bedeviled the courts almost since its enactment. The ACCA sets a 15-year mandatory minimum term of imprisonment for defendants guilty of certain firearms offenses if they have three prior state or federal serious drug or violent felony convictions.¹⁸⁸ It defines violent felony to include any felony “that ... (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”¹⁸⁹ Last year in *Johnson v. United States*, the Supreme Court found the residual clause (“or otherwise involves ...”) unconstitutionally vague.¹⁹⁰ This year in *Mathis v. United States*,¹⁹¹ it will consider the question of when a state burglary conviction is an ACCA burglary conviction. The case turns on application of the Court’s decisions in *Taylor v. United States*¹⁹² and *Descamps v. United States*.¹⁹³

In its *Taylor* decision, the Supreme Court stated that the term “burglary” in the ACCA 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.”¹⁹⁴ The statute of prior conviction determines whether a defendant was convicted of such conduct. Some statutes, however, define burglary in the alternative; proscribing some conduct which matches the generic description and some that does not. For example, some statutes include cars and boats along with buildings and structures as the location of the crime of burglary.¹⁹⁵ In which case, the courts are said to take a “modified categorical approach” which means that a prior state burglar conviction constitutes a ‘burglary’ conviction (1) if the elements of the state statute corresponded to the elements of generic burglary or (2) when the state statute exhibits alternative sets of elements – one qualifying, another not – if “the charging paper and jury instructions

¹⁸⁵ See Respondent’s Brief at 43-46, 136 S. Ct. 790 (2016) (No. 15-6418).

¹⁸⁶ See Respondent’s Brief at 16, 43-46, 136 S. Ct. 790 (2016) (No. 15-6418).

¹⁸⁷ 18 U.S.C. § 924 (e)(2)(B)(ii).

¹⁸⁸ 18 U.S.C. § 924(e).

¹⁸⁹ 18 U.S.C. § 924(e)(2)(B).

¹⁹⁰ 135 S. Ct. 2551 (2015).

¹⁹¹ 136 S. Ct. 894 (No. 15-6092).

¹⁹² 495 U.S. 575 (1990).

¹⁹³ 133 S. Ct. 2276 (2013).

¹⁹⁴ *Taylor v. United States*, 495 U.S. 575, 598 (1990).

¹⁹⁵ See *id.* at 599-600.

actually required the [state] jury to find all of the elements of generic burglary in order to convict the defendant.”¹⁹⁶

In its *Descamps* decision, the Supreme Court stated that recourse to the charging documents, jury instructions, and the like (the charging documents) was only permissible when the statute of prior conviction could be divided into a set of qualifying and a set of nonqualifying offenses.¹⁹⁷ Such recourse was not permissible if the statute had a single set of elements, that is, if it was not divisible.¹⁹⁸ For example, the statute at issue in *Descamps* outlawed entry into a building with intent to commit a crime.¹⁹⁹ It implied but did not state alternative offenses – *unlawful* entry into a building with intent to commit a crime and *lawful* entry into a building with intent to commit a crime. Consequently, it was not divisible; courts could not look the charging documents to determine under which alternative *Descamps* had been convicted; and it did not qualify as an ACCA burglary conviction.²⁰⁰

Mathis was convicted of firearm possession by a felon.²⁰¹ He was sentenced under the ACCA on the basis of five Iowa burglar convictions.²⁰² The Iowa burglary statute matches the generic description, but the Iowa criminal code contains a generally applicable definition of “occupied structure” which includes cars and boats as well as buildings.²⁰³ The trial court and U.S. Court of Appeals found the Iowa statute divisible and concluded that the charging documents established that Mathis had been convicted under a set of statutory elements that corresponded to the generic description of burglary.²⁰⁴

Mathis’s arguments before the Supreme Court are the same ones he unsuccessfully urged upon the U.S. Court of Appeals for the Eighth Circuit. First, the Iowa burglary statute is not divisible.²⁰⁵ Therefore, the Supreme Court’s precedents do not allow recourse to the charging documents.²⁰⁶ Like the *Descamps* statute, it implies rather than states alternative offenses, one of which is ACCA qualified and other of which is not.²⁰⁷ Second, the Court’s precedents draw a distinction between the statutory elements of a prior conviction and the facts or means surrounding the conduct that lead to conviction.²⁰⁸ The burglary statute does not make the type of location an element.²⁰⁹ It encompasses both permissible locations and impermissible locations.²¹⁰ It is a fact or means of committed the offense, like the lawful or unlawful means of entry in *Descamps*.²¹¹

¹⁹⁶ *See id.* at 600-02.

¹⁹⁷ *See Descamps v. United States*, 133 S. Ct. 2276, 2283-93 (2013).

¹⁹⁸ *See id.*

¹⁹⁹ *See id.* at 2282.

²⁰⁰ *See id.* at 2282-2293.

²⁰¹ *See United States v. Mathis*, 786 F.3d 1068, 1069 (8th Cir. 2015).

²⁰² *See id.* at 1070.

²⁰³ *See id.* at 1073-74.

²⁰⁴ *See id.* at 1071-75.

²⁰⁵ Brief for Petitioner at 12, *Mathis v. United States*, 136 S. Ct. 894 (No. 15-6092) (2016).

²⁰⁶ *See id.* at 2, 12-15.

²⁰⁷ *See id.* at 15-36.

²⁰⁸ *See id.*

²⁰⁹ *See id.*

²¹⁰ *See id.*

²¹¹ *See id.*

The Eighth Circuit dismissed Mathis' arguments as essentially an elements/means argument, foreclosed by a statement in *Descamps*: "Whatever a statute lists (whether elements or means), the [chagrining] documents we approved in *Taylor* and *Shepard* ... would reflect the crime's elements."²¹² The Eighth Circuit acknowledged disagreement among the lower federal appellate courts over the element/means question and the question of whether a statute of prior conviction may be considered divisible by virtue of statutory provisions, or perhaps other statements of law, found elsewhere.²¹³

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

Question: *Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?*

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 deaths),²¹⁴ has made its way to the Supreme Court in *Utah v. Strieff*—a case about evidence suppression in criminal proceedings.²¹⁵ The novel question before the Court is 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.²¹⁶

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."²¹⁷ 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.²¹⁸ Therefore, not all illegally obtained evidence—and derivative evidence—will be excluded. For

²¹² See *Mathis*, 786 F.3d at 1074-75 (emphasis omitted).

²¹³ See *id.* at 1075 n.6 & n.7.

²¹⁴ 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/>.

²¹⁵ *State v. Strieff*, 357 P.3d 532 (Utah 2015).

²¹⁶ 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).

²¹⁷ See, e.g., *Davis v. United States*, 131 S. Ct. 2419, 2424 (2011); *Segura v. United States*, 468 U.S. 796, 804 (1984).

²¹⁸ *Davis*, 131 S. Ct. at 2426-27.

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.’”²¹⁹ 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.²²⁰ The Court in *Strieff* is reviewing 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.²²¹ During that time, Officer Fackrell observed short-term traffic at the house, which he believed was consistent with drug activity.²²² When the officer saw Edward Strieff leave the house, he questioned him and asked him to produce his ID.²²³ Officer Fackrell then ran a warrant check and discovered that Strieff had an outstanding arrest warrant for failing to pay a traffic ticket and searched his body incident to arrest.²²⁴ The search uncovered methamphetamine and drug paraphernalia, and Strieff subsequently was prosecuted for a drug crime.²²⁵

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.²²⁶ 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.²²⁷ The trial court concluded that it did and denied the motion to suppress.²²⁸ 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.²²⁹

Neither party, however, appears to agree with the Utah Supreme Court’s interpretation of the attenuation doctrine, and on appeal to the Supreme Court both Utah and Strieff focus on the flagrancy portion of the three-part attenuation analysis.²³⁰ For example, Utah (with the support of

²¹⁹ *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).

²²⁰ See *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975); *United States v. Montgomery*, 777 F.3d 269, 273 (5th Cir. 2015).

²²¹ *State v. Strieff*, 357 P.3d 532, 536 (Utah 2015).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 536-37; see *Terry v. Ohio*, 392 U.S. 1 (1968).

²²⁷ *State v. Strieff*, 357 P.3d at 537.

²²⁸ *Id.*

²²⁹ *Id.* at 544-47.

²³⁰ 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).

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 contends, it was not.²³¹ Conversely, Strieff contends 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.²³²

Notably, in response to these arguments at oral argument, the Court pondered whether there should be a subjective component (atypical in Fourth Amendment jurisprudence)²³³ 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.²³⁴ 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.”²³⁵ 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 lawful search, and thus a defendant ought to present “strong circumstances” to justify suppression.²³⁶ Accordingly, the rule the Court announces will likely hinge on its cost-deterrence analysis. A ruling for the government could prove to be a potential boon for law enforcement, especially in communities with large segments of the population that have outstanding warrants.

Birchfield v. North Dakota

Question: *Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person’s blood.*

The Supreme Court has agreed to review and has 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*,²³⁷ *Bernard v. Minnesota*,²³⁸ and *Beylund v. Levi*.²³⁹

Birchfield drove his car into a ditch.²⁴⁰ When the police arrived, Birchfield’s speech was slurred; he was unsteady on his feet; and he smelled of alcohol.²⁴¹ 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.²⁴² When he failed the test, the officer arrested him and took him to a hospital for a blood

²³¹ 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).

²³² 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).

²³³ See, e.g., *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006); *Whren v. United States*, 517 U.S. 806, 813 (1996).

²³⁴ 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).

²³⁵ See Transcript of Oral Argument at 23:1-21:8, *Utah v. Strieff*, 136 S. Ct. 27 (2015) (No. 14-1373).

²³⁶ See Transcript of Oral Argument at 36:11-36:15, *Utah v. Strieff*, 136 S. Ct. 27 (2015) (No. 14-1373).

²³⁷ 136 S. Ct. 614 (2015) (No. 14-1468).

²³⁸ 136 S. Ct. 615 (No. 14-1470).

²³⁹ 136 S. Ct. 614 (2015) (No. 14-1507).

²⁴⁰ *State v. Birchfield*, 858 N.W.2d 302, 303 (N.D. 2015).

²⁴¹ See Brief of Respondent at 10, 136 S. Ct. 614 (2015) (No. 14-1468).

²⁴² See *id.* at 11.

test, which Birchfield refused to allow.²⁴³ Birchfield pleaded guilty to a class B misdemeanor for the refusal, but he reserved the right to appeal the Fourth Amendment issue.²⁴⁴ The North Dakota Supreme Court affirmed the conviction.²⁴⁵

Bernard's truck became stuck when he tried to pull a boat out of the water.²⁴⁶ The police arrived in response to a complaint of public drunkenness.²⁴⁷ Bernard smelled of alcohol.²⁴⁸ He assured officers that he had not driven the truck although the keys were in his hand at the time.²⁴⁹ He refused to take a field sobriety test and was arrested.²⁵⁰ He refused to take a breathalyzer test at the police station and was criminally charged for the refusal.²⁵¹ 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.²⁵²

Beylund was arrested after police saw him driving erratically.²⁵³ He agreed to a blood test after he was told the criminal penalties for the refusal and for drunk driving were the same.²⁵⁴ He subsequently challenged the suspension of his driver's license.²⁵⁵ The North Dakota Supreme Court upheld the action.²⁵⁶

The Fourth Amendment,²⁵⁷ in conjunction with the Due Process Clause of the Fourteenth Amendment,²⁵⁸ prohibits unreasonable governmental searches and seizures.²⁵⁹ A search or seizure is not unreasonable when conducted pursuant to a warrant issued by a neutral magistrate upon a finding of probable cause.²⁶⁰ The Supreme Court has recognized several exceptions to the warrant requirement. One occurs when the subject of law enforcement attention consents to the search or seizure.²⁶¹ A second consists of a search incident to a lawful arrest.²⁶² A third occurs when evidence must be seized immediately or it will be lost.²⁶³ A fourth exception is somewhat open-

²⁴³ *See id.* at 12.

²⁴⁴ *Birchfield*, 858 N.W.2d at 303.

²⁴⁵ *See id.* at 310.

²⁴⁶ *State v. Bernard*, 859 N.W.2d 762, 764 (Minn. 2015).

²⁴⁷ *See id.*

²⁴⁸ *See id.*

²⁴⁹ *See id.*

²⁵⁰ *See id.*

²⁵¹ *See id.* at 764-65.

²⁵² *See id.* at 766-74.

²⁵³ *Beylund v. Levi*, 859 N.W.2d 403, 406 (N.D. 2015).

²⁵⁴ *See id.*

²⁵⁵ *See id.* at 406-07.

²⁵⁶ *See id.* at 407-14.

²⁵⁷ U.S. CONST. amend. IV.

²⁵⁸ U.S. CONST. amend. XIV.

²⁵⁹ *See Maryland v. King*, 133 S. Ct. 1958, 1968 (2013).

²⁶⁰ *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).

²⁶¹ *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

²⁶² *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2482 (2014).

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

ended – it exists when the Court, after balancing individual privacy interests against governmental interests does not consider a particular search unreasonable.²⁶⁴

States have sought to take advantage of each of these exceptions in their efforts to curb drunk driving. They have enacted *implied* consent statutes under which drivers are said to consent to sobriety tests as a condition for receiving a driver’s license.²⁶⁵ States often supplemented these provisions with *laws* that make it a crime to refuse to consent to a sobriety test.²⁶⁶ Their courts have concluded that a sobriety test may be conducted *incident* to a lawful arrest for drunk driving.²⁶⁷ The Supreme Court’s decision in *Schmerber v. California* stands for the proposition that a sobriety test may be conducted in the context of a traffic accident when emergency conditions indicate that evidence of an arrested driver’s blood alcohol level might otherwise be lost.²⁶⁸ Finally, the courts have sometimes concluded that the government’s interest in highway safety *outweighs* individual privacy interests, particularly in the case of field sobriety tests which are less intrusive.²⁶⁹

The Supreme Court’s decision in *Missouri v. McNeely* signaled that the Court was inclined to reconsider the law in the area.²⁷⁰ There, the Court held that the dissipation of alcohol in the blood is not a *per se* justification for a warrantless sobriety test.²⁷¹ In *Birchfield* and its companion cases, the Court has agreed to consider “[w]hether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person’s blood.”

Birchfield and company argue that (1) the consent from implied consent statutes is not Fourth Amendment consent since it is involuntary, precludes assessment of the totality of the circumstances, and does not permit consent to be withdrawn – all trademarks of Fourth Amendment consent; (2) the “unconstitutional constraints doctrine” invalidates consent secured in exchange for surrendering a governmental benefit; (3) the cases do not qualify for the incident to arrest exception because they cannot be justified under either the officer safety or the preservation of evidence grounds upon which the exception is based; and (4) the intrusiveness of a blood test balanced against the minimal inconvenience associated with securing a warrant renders a warrantless search unreasonable.²⁷²

The States respond that (1) the fact that the implied consent statute offers a driver difficult choices does not make it coercive or his consent any less voluntary; (2) the “unconstitutional constraints doctrine” arises in the context of First and Fifth Amendment rights and is not a good fit in this Fourth Amendment context; (3) there is not “a single case anywhere in the country that holds that a warrantless breath test is not permissible under the search-incident-to-a-valid-arrest exception;” and (4) the implied consent feature is reasonable because on balance it is in the

²⁶⁴ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

²⁶⁵ *See Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) (“For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense.”).

²⁶⁶ *See, e.g., Birchfield v. North Dakota*, 858 N.W.2d 302 (N.D. 2015) (describing North Dakota’s statute).

²⁶⁷ *See Bernard v. Minnesota*, 859 N.W.2d 762 (Minn. 2015).

²⁶⁸ *Schmerber v. California*, 384 U.S. 757 (1966).

²⁶⁹ *See Birchfield v. North Dakota*, 858 N.W.2d 302 (N.D. 2015).

²⁷⁰ *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

²⁷¹ *See id.*

²⁷² Brief for Petitioner, *Birchfield v. North Dakota*, 136 S. Ct. 614 (2015) (No. 14-1468); Brief for Petitioner, *Bernard v. Minnesota*, 136 S. Ct. 615 (No. 14-1470); Brief for Petitioner, *Beylund v. Levi*, 136 S. Ct. 614 (2015) (No. 14-1507).

interest of highway safety, stands as an alternative to an intrusive search to which the petitioners object, and avoids physical confrontations between police and drivers unwilling to cooperate.²⁷³

The impact of the Court's decision will depend largely on the breadth of its opinion.

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.’*”²⁷⁴

Amidst wide-spread 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.²⁷⁵

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.²⁷⁶ The chase began when local police tried to arrest Israel Leija at a drive-in restaurant.²⁷⁷ He fled onto the Interstate with troopers in pursuit.²⁷⁸ 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.²⁷⁹

In order to stop Leija, police set out tire spikes on the approach to a highway underpass in his path.²⁸⁰ Trooper Mullenix, situated on the top of the underpass, decided to try to shoot out the engine of Leija’s car to stop him.²⁸¹ 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.²⁸² As the speeding car approached, Mullenix fired six shots.²⁸³ The car hit the spikes and rolled over a couple of times.²⁸⁴ Leija was dead with four shots in his upper body.²⁸⁵

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.²⁸⁶ Mullenix asked the court to dismiss the case before trial on qualified immunity

²⁷³ Brief for Respondent, *Birchfield v. North Dakota*, 136 S. Ct. 614 (2015) (No. 14-1468); Brief for Respondent, *Bernard v. Minnesota*, 136 S. Ct. 615 (No. 14-1470); Brief for Respondent, *Beylund v. Levi*, 136 S. Ct. 614 (2015) (No. 14-1507).

²⁷⁴ *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?*.

²⁷⁵ *Mullenix v. Luna*, 136 S. Ct. 305 (2015).

²⁷⁶ *See id.* at 306-08.

²⁷⁷ *Id.* at 306.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 306-07.

²⁸² *See id.*

²⁸³ *Id.* at 307.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Luna v. Mullenix*, 773 F.3d 712, 717-18 (5th Cir. 2014), *rev’d* *Mullenix v. Luna*, 136 S. Ct. 305 (2015).

grounds, which shield law enforcement officers and other officials for performance of their official duties under some circumstances.²⁸⁷ The U.S. district court refused.²⁸⁸ Mullenix appealed.²⁸⁹ The three-judge panel of the U.S. Court of Appeals for the Fifth Circuit agreed with the district court.²⁹⁰

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.’”²⁹¹ The test is two-fold.²⁹² First, did the official violate a constitutional or statutory right?²⁹³ Second, was the constitutional or statutory right so clearly established that the official must have known that it banned his conduct?²⁹⁴

As for the first step, the panel distinguished two recent Supreme Court cases which had found qualified immunity warranted in cases involving police shootings to terminate a high-speed chase.²⁹⁵ 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.²⁹⁶ On the second step, they concluded it was clearly established that an officer may only use deadly force against a fleeing suspect when the suspect poses a threat of immediate, serious harm to others.²⁹⁷

Mullenix asked for a rehearing en banc. The Fifth Circuit denied the request, but seven members of the nineteen judges on the Fifth Circuit disagreed.²⁹⁸

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.²⁹⁹ The standard applied by the panel of the Fifth Circuit (“was the threat sufficient to justify the use of deadly force”) was too general.³⁰⁰ As for the more particularized inquiry, the “excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted.”³⁰¹

Justice Scalia agreed with the result but thought the law was not clearly established for a different reason.³⁰² In his mind, the car-chase cases cited by the Court involve the use of deadly force in

²⁸⁷ *Id.* at 718.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 726.

²⁹¹ *Id.* at 718 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

²⁹² *See Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014).

²⁹³ *See id.*

²⁹⁴ *See id.* at 1866.

²⁹⁵ *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)).

²⁹⁶ *See id.* at 720-24 (internal quotation marks and citation omitted).

²⁹⁷ *See id.* at 724-25.

²⁹⁸ *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

²⁹⁹ *Id.* at 308-12.

³⁰⁰ *See id.*

³⁰¹ *Id.* at 309.

³⁰² *See id.* at 312-13 (Scalia, J., concurring).

order to make an arrest.³⁰³ He felt that Mullenix should have been seen as a question of deadly force directed at the car rather than its driver.³⁰⁴

Justice Sotomayor dissented.³⁰⁵ 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.³⁰⁶ She also expressed a concern that “[b]y sanctioning a ‘shoot first, think latter’ approach to policing, the Court renders the protections of the Fourth Amendment hollow.”³⁰⁷

Fifth Amendment

Puerto Rico v. Sanchez Valle³⁰⁸

Question: *Whether the Commonwealth of Puerto Rico and the Federal Government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.*

Acquired by treaty after the Spanish-American War of 1898,³⁰⁹ the Commonwealth of Puerto Rico has been granted self-government, it has adopted a constitution, and its residents have been given U.S. citizenship.³¹⁰ 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.³¹¹ Based in part on statutory language providing that the relationship between Puerto Rico and the United States is “in the nature of a compact,”³¹² arguments have been made that any change in Puerto Rico’s political status must be consented to by both parties.³¹³ Others argue that, under the Territory Clause,³¹⁴ the United States has plenary authority to legislate regarding Puerto Rico without first obtaining the Puerto Rican government’s consent.³¹⁵

A case recently accepted by the Supreme Court will consider anew the relationship between Puerto Rico and the United States. In *Puerto Rico v. Sanchez Valle*,³¹⁶ the Court will decide

³⁰³ See *id.* at 312.

³⁰⁴ See *id.* at 312-13.

³⁰⁵ *Id.* at 313-16 (Sotomayor, J., dissenting).

³⁰⁶ *Id.* at 314-15.

³⁰⁷ *Id.* at 316.

³⁰⁸ 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*.

³⁰⁹ Treaty of Peace between the United States of America and the Kingdom of Spain, 30 Stat. 1754, T.S. No. 343 (1899).

³¹⁰ See 48 U.S.C. §§731b, 733; 8 U.S.C. § 1402; CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO.

³¹¹ See CRS Report R42765, *Puerto Rico’s Political Status and the 2012 Plebiscite: Background and Key Questions*, by R. Sam Garrett.

³¹² See 48 U.S.C. § 731b.

³¹³ *Testimony on the Nov. 6, 2012, Referendum on the Political Status of Puerto Rico and the Admin.’s Response: Hr’g Before the Comm. on Energy & Nat. Res.*, 113th Cong. (2013).

³¹⁴ U.S. CONST., art. IV, § 3, cl. 2.

³¹⁵ 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>.

³¹⁶ 136 S. Ct. 28 (2015).

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.”³¹⁷ 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.³¹⁸ Thus, the Supreme Court has held that state and federal prosecutions can be brought for the same offense,³¹⁹ and similarly, it has allowed dual prosecutions by the federal government and Indian tribes.³²⁰ 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.³²¹

The case being considered by the Court comes 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.³²² This decision, however, creates a conflict 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.³²³ There is 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.³²⁴

Puerto Rico, in its petition to the Court for a writ of certiorari, concedes that the dual sovereignty doctrine has not previously been applied to a territory, but it argues that the nature of Puerto Rico’s relationship with the United States changed in 1950.³²⁵ In that year, Congress passed P.L. 81-600 (Public Law 600), which contains the “compact” language noted above and which allowed Puerto Rico to “organize a government pursuant to a constitution of their own adoption,” subject to congressional approval. Puerto Rico argues 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.³²⁶ Puerto Rico analogizes 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.³²⁷

The defendants, in their response to the petition, argue 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.³²⁸ Further, the defendants argue, the legislative history of Public Law 600 provided that

³¹⁷ U.S. CONST. amend. V, cl. 2.

³¹⁸ *See, e.g.*, *United States v. Dixon*, 509 U.S. 688, 724-25 (1993).

³¹⁹ *See Abbate v. United States*, 359 U.S. 187, 194-95 (1959).

³²⁰ *See United States v. Lara*, 541 U.S. 193, 208-09 (2004).

³²¹ *See Grafton v. United States*, 206 U.S. 333, 354-55 (1907).

³²² *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>.

³²³ *See United States v. Lopez Andino*, 831 F.2d 1164, 1167-68 (1st Cir. 1987).

³²⁴ *See United States v. Sanchez*, 992 F.2d 1143, 1151-53 (11th Cir. 1993).

³²⁵ *Petition for Writ of Certiorari, Puerto Rico v. Valle*, 136 S. Ct. 28 (2015) (No. 15-108).

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Reply Brief in Opposition to Petition for Writ of Certiorari*, 136 S. Ct. 28 (2015) (No. 15-108).

nothing in the law would change Puerto Rico’s political, social, and economic relationship to the United States.³²⁹ The defendants also cautioned the Supreme Court against accepting a case that appears likely to have political implications beyond the narrow legal questions raised in the petition.³³⁰ This latter argument appears to be a caution that the Court disregarded.

If the Court finds that Puerto Rico is not a separate sovereign, then this might bring into question prior convictions in the Puerto Rico courts where an individual was prosecuted in both federal and territorial courts for the same crime. If the Court finds that Puerto Rico is a separate sovereign, this would allow future prosecutions in both the federal and territorial courts for the same crime. Oral arguments were held on January 13, 2016.

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).*

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.” 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.³³¹ Justice Thomas, who concurred in the judgment, based the same conclusion “strictly on the Sixth Amendment’s text and common-law backdrop.”³³²

Sila Luis was indicted for health care fraud.³³³ The indictment also identified certain of Luis’s assets as property generated by the offense.³³⁴ The government initiated a civil forfeiture proceeding based on the grand jury’s probable cause finding.³³⁵ It also secured a pre-trial freeze 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.³³⁶ Luis argued before both the district court and the U.S. Court of Appeals for the Eleventh Circuit that she need to substitute assets to pay her defense attorney and that as a consequence the freeze order violated her Fifth and Sixth Amendment rights.³³⁷ The Eleventh Circuit held that her

³²⁹ 136 S. Ct. 28 (2015) (No. 15-108).

³³⁰ *Id.*

³³¹ *United States v. Luis*, Opinion of Breyer, J. at 3 (No. 14-419) (Mar. 30, 2016).

³³² *United States v. Luis*, Opinion of Thomas, J. at 1 (No. 14-419) (Mar. 30, 2016).

³³³ *United States v. Luis*, 564 Fed. Appx. 493 (11th Cir. 2014).

³³⁴ *Id.* at 494.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

arguments were foreclosed by the Supreme Court's *Monsanto*, *Caplin & Drysdale*, and *Kaley* decisions.³³⁸ The Supreme Court granted certiorari to decide the constitutional issue.³³⁹

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 notes that each of these cases involved tainted assets and that her case involves untainted assets. She argues that therefore the untainted assets she intends 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.'"³⁴⁰ He agreed with Luis that fact that her frozen assets were untainted represented a critical departure from the Court's earlier cases.³⁴¹ He offered three reasons to conclude that the restraining order offended Luis' Sixth Amendment rights. First, Luis' constitutionally protected right to her counsel of choice carried greater weight than the government's interest in forfeiture and restitution.³⁴² Second, as a matter of legal history, seizure of untainted property prior to conviction was virtually unheard of.³⁴³ 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.³⁴⁴

³³⁸ *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).

³³⁹ *Luis v. United States*, 135 S. Ct. 2798, No. 14-419 (2015).

³⁴⁰ *United States v. Luis*, Opinion of Breyer, J. at 4 (No. 14-419) (Mar. 30, 2016), quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

³⁴¹ *United States v. Luis*, Opinion of Breyer, J. at 6 (No. 14-419) (Mar. 30, 2016) ("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").

³⁴² *Id.* at 12.

³⁴³ *Id.* at 12-13.

³⁴⁴ *Id.* at 14-15.

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."³⁴⁵

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."³⁴⁶ Justice Kagan dissented because she believed the Court was bound by its *Monsanto* precedent.³⁴⁷

Betterman v. Montana

Question: *Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution, protecting a criminal defendant from inordinate delay in final disposition of his case?*

The Supreme Court recently heard oral argument in *Betterman v. Montana*, which presents the question whether the Sixth Amendment right to a speedy trial applies through sentencing or, instead, ends once a conviction has been obtained.³⁴⁸ The Sixth Amendment states that "the accused shall enjoy the right to a speedy and public trial,"³⁴⁹ which the Court has described as a "fundamental right" that is "specifically affirmed in the Constitution."³⁵⁰ The Fourteenth Amendment's Due Process Clause makes the Sixth Amendment binding on the states.³⁵¹ 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.³⁵² Montana has a corresponding constitutional right but no comparable statutory provision.³⁵³ The consequence of denying this Sixth Amendment right to a defendant is having the charges against the accused dismissed.³⁵⁴

Brandon Betterman was charged with bail jumping after failing to appear for his sentencing hearing for a domestic assault conviction in Montana.³⁵⁵ 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.³⁵⁶ Fourteen months passed between the date on which

³⁴⁵ United States v. Luis, Opinion of Thomas, J. at 9 (No. 14-419) (Mar. 30, 2016).

³⁴⁶ United States v. Luis, Opinion of Kennedy, J. at 1 (No. 14-419) (Mar. 30, 2016).

³⁴⁷ United States v. Luis, Opinion of Kagan, J. at 2 (No. 14-419) (Mar. 30, 2016), 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").

³⁴⁸ 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?*

³⁴⁹ U.S. CONST. amend. VI.

³⁵⁰ See *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

³⁵¹ *Smith v. Hooy*, 393 U.S. 374, 374-75 (1969); *Klopfert v. North Carolina*, 386 U.S. 213, 216-26 (1967).

³⁵² 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).

³⁵³ See MONT. CONST. art. II, § 24.

³⁵⁴ 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).

³⁵⁵ See Joint Appendix at 10-15, *Betterman v. Montana*, 136 S. Ct. 582 (2015) (No. 14-1457).

³⁵⁶ See *State v. Betterman*, 342 P. 3d 971, 973 (Mont. 2015).

Betterman was arraigned for, and pleaded guilty to, the bail jumping charge (April 19, 2012) and his sentencing hearing (June 27, 2013).³⁵⁷ 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.³⁵⁸ The trial court denied that motion and the Montana Supreme Court affirmed.³⁵⁹

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.³⁶⁰ Yet with Justice Scalia no longer on the bench, it is hard to predict how those rationales will 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."³⁶¹ 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.³⁶² 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.³⁶³ 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.³⁶⁴

If the Court were to conclude that the Sixth's Amendment's right to a speedy trial includes a defendant's sentencing phase, the result would impact both state and federal criminal justice systems. Congress might amend the Speedy Trial Act, or enact separate legislation, that would include deadlines for sentencing to ensure federal compliance with the newly construed Sixth Amendment.

United States v. Bryant

Question: *Whether reliance on valid uncounseled tribal-court misdemeanor convictions to prove 18 U.S.C § 117(a)'s predicate offense element violates the Constitution.*

Can a five-year federal felony charge be based on tribal misdemeanor convictions for which the defendant had no attorney ("uncounseled convictions)? The federal appellate courts have come up with conflicting answers. At the heart of the matter is the fact that "reasonable decision-makers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of convictions that are valid because and only because they arose in a [tribal]

³⁵⁷ *Id.* at 973-74.

³⁵⁸ *Id.* at 973.

³⁵⁹ *Id.* 973, 981.

³⁶⁰ See Brief for Petitioner at 10-11, *Betterman v. Montana*, 136 S. Ct. 582 (2015) (No. 14-1457).

³⁶¹ *Id.* at 11.

³⁶² See Brief for Respondent at 27, *Betterman v. Montana*, 136 S. Ct. 582 (2015) (No. 14-1457).

³⁶³ 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).

³⁶⁴ *Id.* at 2-3.

court where the Sixth Amendment did not apply.”³⁶⁵ The Supreme Court has agreed to review the issue in *United States v. Bryant*.³⁶⁶

The federal domestic assault by a 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.³⁶⁷ 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*.³⁶⁸ Indian defendants in tribal courts, however, enjoy no such constitutional assurance.³⁶⁹

Bryant, a tribal member and reservation resident, had been convicted in tribal court of domestic violence on a number of occasions.³⁷⁰ He had been imprisoned more than once as a consequence, although always for less than a year.³⁷¹ 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.³⁷² 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.³⁷³ The district court refused to dismiss.³⁷⁴ The Ninth Circuit *reversed*.³⁷⁵ It felt bound by its earlier decision in *United States v. Ant* decision and was unconvinced by later developments.³⁷⁶ 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.”³⁷⁷

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.³⁷⁸ 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.³⁷⁹ 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.”³⁸⁰

³⁶⁵ See *United States v. Bryant*, 769 F.3d 671, 681 (Watford, J., concurring) (quoting *United States v. Cavanaugh*, 643 F.3d 592, 605 (8th Cir. 2011)).

³⁶⁶ 136 S. Ct. 690 (No. 15-420).

³⁶⁷ 18 U.S.C. § 117.

³⁶⁸ See, e.g., *Scott v. Illinois*, 440 U.S. 367 (1979).

³⁶⁹ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

³⁷⁰ 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).

³⁷¹ See *Bryant*, 769 F.3d at 673; Brief for Respondent at 3, 136 S. Ct. 690 (No. 15-420).

³⁷² *Bryant*, 769 F.3d at 673.

³⁷³ See *id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 679.

³⁷⁶ See *id.* at 676-79.

³⁷⁷ *Id.* at 677.

³⁷⁸ *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989).

³⁷⁹ *Duro v. Reina*, 495 U.S. 676 (1990).

³⁸⁰ *Nichols v. United States*, 511 U.S. 738, 749 (1994).

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.”³⁸¹ As the Ninth Circuit conceded, the Eighth and Tenth Circuits saw it differently.³⁸² 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.³⁸³

The Supreme Court’s decision may have implications for the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), which expanded tribal criminal jurisdiction in cases of domestic violence to include non-Indians in some instances.³⁸⁴

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 ... 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.*³⁸⁵

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.³⁸⁶ 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 17.³⁸⁷ Second, it departs from a tradition under which ground breaking Court decisions rarely travel back to long finalized cases. Third, it uses the so-called *Teague*³⁸⁸ 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.

³⁸¹ *Bryant*, 769 F.3d at 677.

³⁸² *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)).

³⁸³ *See Cavanaugh*, 643 F.3d at 603-04.

³⁸⁴ P.L. 113-4, §904, 127 Stat. 120-23 (2013); 25 U.S.C. § 1304.

³⁸⁵ *Montgomery v. Louisiana*, 136 S. Ct. 718, 732, 736 (2016).

³⁸⁶ *Id.*

³⁸⁷ *See id.* at 725-26.

³⁸⁸ *See Teague v. Lane*, 489 U.S. 288 (1989).

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;³⁸⁹ (2) a sentence of life imprisonment without the possibility of parole for an offense other than murder committed by a juvenile;³⁹⁰ or (3) a sentence of life imprisonment without the possibility of parole for a murder committed by a juvenile.³⁹¹

At 17 years of age in 1963, Montgomery killed a deputy sheriff.³⁹² He was sentenced to life in prison with no chance of parole, the only sentence available when the jury declined to vote for the death penalty.³⁹³ He asked the Louisiana courts to toss out his sentence when its constitutional defects become apparent after *Miller*.³⁹⁴ 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.³⁹⁵

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.³⁹⁶ It provides that federal habeas corpus review is not available to consider an inmate's request for a "new rule," that is, a ground breaking constitutional interpretation.³⁹⁷ The doctrine has two exceptions.³⁹⁸ It does not apply to substantive new rules that void a previously valid crime or penalty.³⁹⁹ 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."⁴⁰⁰

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.⁴⁰¹

³⁸⁹ See *Roper v. Simmons*, 543 U.S. 551 (2005).

³⁹⁰ See *Graham v. Florida*, 560 U.S. 48 (2010).

³⁹¹ See *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

³⁹² *Montgomery*, 136 S. Ct. at 725.

³⁹³ *Id.* at 725-26.

³⁹⁴ *Id.* at 726.

³⁹⁵ *Id.* at 726-27.

³⁹⁶ 489 U.S. 288 (1989).

³⁹⁷ See *id.*

³⁹⁸ See *Montgomery*, 136 S. Ct. at 728.

³⁹⁹ See *id.*

⁴⁰⁰ See *id.*

⁴⁰¹ See *id.* at 733-37.

The Court returned Montgomery’s case to Louisiana with the option either to resentence him or to make him eligible for parole.⁴⁰²

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.⁴⁰³ 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.”⁴⁰⁴

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.

United States v. Molina-Martinez

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?*

The Supreme Court recently heard argument on whether a federal court of appeals, when applying plain-error review, should presume—subject to rebuttal—that a defendant’s substantial rights are affected when the district court incorrectly calculates the defendant’s sentencing range under the Federal Sentencing Guidelines.⁴⁰⁵ 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.⁴⁰⁶ 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. § 3553(a).⁴⁰⁷ 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.”⁴⁰⁸ 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.”⁴⁰⁹ 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.⁴¹⁰

⁴⁰² See *id.* at 737.

⁴⁰³ See *id.* at 744-50 (Thomas, J., dissenting).

⁴⁰⁴ See *id.* at 742-43 (Scalia, J. dissenting).

⁴⁰⁵ Much of the discussion here appeared earlier in a legal sidebar, CRS Legal Sidebar WSLG1516, *Does a Guidelines Calculation Error Always Affect a Defendant’s Substantial Rights? Supreme Court to Decide*.

⁴⁰⁶ 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).

⁴⁰⁷ See, e.g., *United States v. Glosser*, 623 F.3d 413, 418 (7th Cir. 2010); *United States v. Blinksop*, 606 F.3d 1110, 1114 (9th Cir. 2010); *United States v. Tomko*, 562 F.3d 558, 567 (3d Cir. 2009) (en banc).

⁴⁰⁸ *Puckett v. United States*, 556 U.S. 129, 135 (2009) (internal quotation marks and citation omitted).

⁴⁰⁹ *United States v. Olano*, 507 U.S. 725, 732 (1993).

⁴¹⁰ 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).

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.⁴¹¹ 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.⁴¹² And though Molina-Martinez objected to the total offense level calculation, which the court overruled, he did not object to the criminal history score.⁴¹³ The district court then imposed a 77-month sentence—the bottom of the guidelines range.⁴¹⁴

Molina-Martinez appealed to the Fifth Circuit, contending that the district court plainly erred when it incorrectly calculated his criminal history score.⁴¹⁵ 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.⁴¹⁶ 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.⁴¹⁷ 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.”⁴¹⁸ 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).⁴¹⁹ Because the court concluded that Molina-Martinez did not meet that additional burden, it affirmed the district court’s judgment.⁴²⁰

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?⁴²¹ 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.⁴²²

In urging the Supreme Court to establish the rebuttable presumption, Martinez-Molina pointed to the Third⁴²³ and Tenth Circuits,⁴²⁴ which disagree with the Fifth Circuit and presume plain error when the district court imposes a sentence after miscalculating the defendant’s guidelines range.⁴²⁵ And without using the word “presumption,” the Seventh⁴²⁶ and Ninth Circuits⁴²⁷ have

⁴¹¹ See 8 U.S.C. § 1326.

⁴¹² 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).

⁴¹³ Brief of Petitioner at 4, *Molina-Martinez v. United States*, 136 S. Ct. 26 (No. 14-8913).

⁴¹⁴ See *United States v. Molina-Martinez*, 588 F. App’x 333, 334 (5th Cir. 2014).

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *United States v. Garcia-Carrillo*, 749 F.3d 376, 379 (5th Cir. 2014) (internal quotation marks and citation omitted).

⁴¹⁹ 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)).

⁴²⁰ See *United States v. Molina-Martinez*, 588 F. App’x 333, 335 (5th Cir. 2014).

⁴²¹ *Molina-Martinez v. United States*, 136 S. Ct. 26 (2015) (No. 14-8913).

⁴²² *United States v. Molina-Martinez*, 588 F. App’x 333, 334 n.1 (5th Cir. 2014).

⁴²³ *United States v. Knight*, 266 F.3d 203, 207-10 (3d Cir. 2001).

⁴²⁴ *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014).

⁴²⁵ See Brief for Petitioner, *Molina-Martinez v. United States* at 28-31, 136 S. Ct. 26 (2015) (No. 14-8913).

also held that a sentence based on an improperly calculated guidelines range constitutes plain error and requires a remand for resentencing.⁴²⁸ In arguing that those circuits are correct, Martinez-Molina relied⁴²⁹ on the Supreme Court’s comments in *Peugh v. United States* that the “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.”⁴³⁰ It follows, says Martinez-Molina, that miscalculations resulting in an incorrect guidelines range fit into a “special category” of errors that should be presumed prejudicial⁴³¹—a premise that the Court raised and left open in *United States v. Olano*.⁴³² Conversely, the government opposed the presumption,⁴³³ 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.”⁴³⁴

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.”⁴³⁵ 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.⁴³⁶ Thus, the Supreme Court’s decision likely will hinge on various matters of sentencing policy that will be hashed out in the months to come.

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*

(...continued)

⁴²⁶ See *United States v. Jenkins*, 772 F.3d 1092, 1097 (7th Cir. 2014).

⁴²⁷ 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).

⁴²⁸ See Brief for Petitioner, *Molina-Martinez v. United States* at 30 & n.12, 136 S. Ct. 26 (2015) (No. 14-8913).

⁴²⁹ See Brief for Petitioner, *Molina-Martinez v. United States* at 36, 136 S. Ct. 26 (2015) (No. 14-8913).

⁴³⁰ *Peugh v. United States*, 133 S. Ct. 2072, 2083-84 (2013) (emphasis added).

⁴³¹ See Brief for Petitioner, *Molina-Martinez v. United States* at 28-43, 136 S. Ct. 26 (2015) (No. 14-8913).

⁴³² *United States v. Olano*, 507 U.S. 725, 735 (1993).

⁴³³ See Brief for Respondent, *Molina-Martinez v. United States* at 17, 136 S. Ct. 26 (2015) (No. 14-8913).

⁴³⁴ See *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

⁴³⁵ Transcript of Oral Argument at 26:13-27:24, *Molina-Martinez v. United States*, 136 S. Ct. 26 (2015) (No. 14-8913).

⁴³⁶ *Id.* at 18:7-19:10.

[Carr's] joint sentencing proceedings did not render the sentencing proceedings fundamentally unfair."⁴³⁷

Justice Antonin Scalia wrote his last opinion for the Court in a capital punishment case, *Kansas v. Carr*.⁴³⁸ 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."⁴³⁹ It also held that the Eighth Amendment did not require separate trials for two of the defendants in one of the Kansas cases.⁴⁴⁰

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.⁴⁴¹ Reginald Carr was also convicted of kidnaping, aggravated robbery, aggravated battery, and criminal damage to property committed on another occasion.⁴⁴² Both Reginald and Jonathan Carr were convicted of first-degree felony murder in connection with yet a third episode.⁴⁴³ 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.⁴⁴⁴

Defendants in both cases were sentenced to death, and in both cases the Kansas Supreme Court vacated their sentences on Eighth Amendment grounds.⁴⁴⁵ The Kansas court's *Gleason* decision acknowledged an apparent conflict with U.S. Supreme Court precedent, which it thought distinguishable.⁴⁴⁶ 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."⁴⁴⁷ The Kansas court reiterated that view in its *Carr* 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.⁴⁴⁸

Justice Scalia's opinion for the Court simply rejected the Kansas court's characterization of the jury instructions.⁴⁴⁹ "[N]o juror would reasonably have speculated that mitigating circumstances

⁴³⁷ *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*, appear throughout this section.

⁴³⁸ 136 S. Ct. 633 (2016).

⁴³⁹ *Id.* at 641-44.

⁴⁴⁰ *Id.* at 644-46.

⁴⁴¹ *State v. Carr*, 331 P.3d 544, 573-74 (Kan. 2014), *rev'd*, *Kansas v. Carr*, 136 S. Ct. 633 (2016).

⁴⁴² *Id.* at 573.

⁴⁴³ *Id.* at 574.

⁴⁴⁴ *State v. Gleason*, 329 P.3d 1102, 1133, *rev'd*, *Carr*, 136 S. Ct. 633 (2016).

⁴⁴⁵ *Carr*, 136 S. Ct. at 640.

⁴⁴⁶ *Gleason*, 329 P.3d at 1145-48.

⁴⁴⁷ *Id.* at 1148.

⁴⁴⁸ *State v. Carr*, 331 P.3d at 718-20.

⁴⁴⁹ *Kansas v. Carr*, 136 S. Ct. at 642-44.

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.⁴⁵⁰

The Carrs' severance argument fared no better. As Justice Scalia phrased it, "[t]he 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."⁴⁵¹ Yet, the trial court had impressed on the jury the importance of judging the defendants individually.⁴⁵² More to the point, vacating the death sentence required a showing that joint proceedings had been fundamentally unfair.⁴⁵³ "Only the most extravagant speculation would lead to the conclusion that the supposedly prejudicial evidence rendered the Carr brothers' joint sentencing proceeding fundamentally unfair."⁴⁵⁴ 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.⁴⁵⁵ "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."⁴⁵⁶

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.⁴⁵⁷ 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.⁴⁵⁸

Justice Scalia responded that had the Kansas Supreme Court decisions been grounded in state law they would indeed have been "none of our business."⁴⁵⁹ 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.'"⁴⁶⁰

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.⁴⁶¹

⁴⁵⁰ *Id.* at 643-44.

⁴⁵¹ *Id.* at 644.

⁴⁵² *Id.* at 645.

⁴⁵³ *Id.* at 644.

⁴⁵⁴ *Id.* at 646.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 646-51 (Sotomayor, J. dissenting).

⁴⁵⁸ *Id.* at 646.

⁴⁵⁹ *Id.* at 641 (Scalia, J.).

⁴⁶⁰ *Id.* at 641-42 (quoting *Kansas v. Marsh*, 548 U.S. 163, 186 (2006)).

⁴⁶¹ *White v. Wheeler*, 136 S. Ct. 456, 462 (2015).

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.⁴⁶² 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.⁴⁶³

Wheeler had been convicted and sentenced to death for the murder of a Louisville Kentucky couple.⁴⁶⁴ 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.⁴⁶⁵ 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.⁴⁶⁶ The prosecution asked the court to excuse the prospective juror, which the court did after it had questioned him more closely.⁴⁶⁷

The Kentucky courts affirmed his conviction and sentence on appeal and denied habeas-like relief after a round of collateral review.⁴⁶⁸ 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.⁴⁶⁹ 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...."⁴⁷⁰ The Sixth Circuit concluded that the Kentucky courts had misapplied the Supreme Court's "death qualified jury" case law.⁴⁷¹

The Supreme Court disagreed. First, the Court explained that the statutory standard is a particularly demanding one.⁴⁷² It "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court."⁴⁷³ 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 justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."⁴⁷⁴ 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."⁴⁷⁵

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

⁴⁶³ *Id.* at 461-62.

⁴⁶⁴ *Id.* at 458-59.

⁴⁶⁵ *Id.*

⁴⁶⁶ *See id.* at 460 (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Wainwright v. Witt*, 469 U.S. 412 (1985), and their progeny).

⁴⁶⁷ *Id.* at 459.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *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).

⁴⁷¹ *Id.* at 371-74.

⁴⁷² *White v. Wheeler*, 136 S. Ct. at 458.

⁴⁷³ *Id.* at 460 (internal quotation marks and citation omitted).

⁴⁷⁴ *Id.* (internal quotation marks and citations omitted).

⁴⁷⁵ *See id.*

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.”⁴⁷⁶ Moreover, “when there is ambiguity in the prospective juror’s statements, the trial court is entitled to resolve it in favor of the State.”⁴⁷⁷

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.”⁴⁷⁸

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.⁴⁷⁹ 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.”⁴⁸⁰

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.⁴⁸¹

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.⁴⁸² Scott and Brown testified against Wearry, who claimed to have been at a wedding, miles away, at the time.⁴⁸³

Scott and Brown admitted their testimony conflicted with statements they had made to the police earlier.⁴⁸⁴ More to the point, authorities failed to disclose evidence that would have undermined their credibility at trial.⁴⁸⁵ Inmates jailed with Scott reported that he wanted to get even with Wearry for telling the police of Scott’s involvement in the murder.⁴⁸⁶ 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.⁴⁸⁷ Finally, authorities did not turn

⁴⁷⁶ *Id.* (quoting *Wainwright v. Witt*, 469 U.S. 412, 425-26 (1985)).

⁴⁷⁷ *Id.* at 461 (quoting *Uttecht v. Brown*, 551 U.S. 1, 7 (2007)).

⁴⁷⁸ *Id.* (internal quotation marks and citation omitted).

⁴⁷⁹ P.L. 104-132, §105, 110 Stat. 1220 (1996); 28 U.S.C. 2254(d).

⁴⁸⁰ *Wearry v. Cain*, 136 U.S.1002, 1002 (2016).

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 1003.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 1004-05.

⁴⁸⁶ *Id.* at 1004.

⁴⁸⁷ *Id.*

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.⁴⁸⁸

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.⁴⁸⁹ Its *Strickland v. Washington* decision and related cases guarantee defendants the assistance of competent attorneys.⁴⁹⁰ Its *Batson v. Kentucky* decision and its progeny bar prosecutors from conducting jury selection in a racially discriminatory manner.⁴⁹¹ Finally, its *Atkins v. Virginia* decision precludes execution of the mentally retarded.⁴⁹²

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.⁴⁹³ 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.”⁴⁹⁴ Yet, he failed to present impartial corroborative witnesses or to discover additional available corroborative evidence in support of the alibi.⁴⁹⁵ In fact, “he had conducted no independent investigation into Wearry’s innocence and had relied solely on evidence the State and Wearry had provided.”⁴⁹⁶ The Court explained, however, that the presence of the *Brady* error made it unnecessary to consider Wearry’s ineffective-assistance-of-counsel argument.⁴⁹⁷

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”)⁴⁹⁸ and his mental competence objections (“Justice Crichton would have ... remanded for the trial court to address [Wearry’s] claim of intellectual disability under *Atkins*”).⁴⁹⁹

Wearry’s case, however, did not turn on the state of the law, but on its application.⁵⁰⁰ 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.⁵⁰¹

⁴⁸⁸ *Id.* at 1005.

⁴⁸⁹ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴⁹⁰ *E.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴⁹¹ *E.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁴⁹² *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴⁹³ *Wearry*, 136 S. Ct. at 1006-08.

⁴⁹⁴ *Id.* at 1003.

⁴⁹⁵ *Id.* at 1005.

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 1006.

⁴⁹⁸ *Id.* at 1004 n.1.

⁴⁹⁹ *Id.* at 1005 n.5.

⁵⁰⁰ *Id.* at 1006-07.

⁵⁰¹ *Id.* at 1008-12 (Alito, J., dissenting).

Hurst v. Florida⁵⁰²

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 co-worker during a robbery at their place of employment.⁵⁰³ He was sentenced to death and appealed.⁵⁰⁴ During postconviction proceedings, Hurst was granted a new sentencing trial.⁵⁰⁵ At the second penalty phase proceeding, the jury returned a recommendation of death by a vote of 7-5.⁵⁰⁶ In accordance with state law, the trial court independently weighed the aggravating and mitigating circumstances before sentencing Hurst to death.⁵⁰⁷ 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.⁵⁰⁸ 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 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.⁵⁰⁹

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.”⁵¹⁰ 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,⁵¹¹ sentencing guidelines,⁵¹² mandatory minimums,⁵¹³ criminal fines,⁵¹⁴ and capital punishment.⁵¹⁵ 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.”⁵¹⁶

⁵⁰² 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*.

⁵⁰³ Hurst v. State, 147 So.3d 435, 437 (Fla. 2014), *rev’d* by Hurst v. Florida, 136 S. Ct. 616 (2016).

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* at 439-40.

⁵⁰⁶ *Id.* at 440.

⁵⁰⁷ *Id.* at 440-41; *see also* Spencer v. State, 615 So.2d 688, 690-91 (Fla. 1993).

⁵⁰⁸ Hurst v. State, 147 So.3d at 445.

⁵⁰⁹ *Id.* at 445-47.

⁵¹⁰ U.S. CONST. amend. VI.

⁵¹¹ Blakely v. Washington, 542 U.S. 296 (2004).

⁵¹² United States v. Booker, 543 U.S. 220 (2005).

⁵¹³ Alleyne v. United States, 133 S. Ct. 2151 (2013).

⁵¹⁴ Southern Union Co. v. United States, 132 S. Ct. 2344 (2012).

⁵¹⁵ Ring v. Arizona, 536 U.S. 584 (2002).

⁵¹⁶ *Id.* at 589.

In *Ring*, a jury found the defendant guilty of felony murder.⁵¹⁷ 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.⁵¹⁸ 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.”⁵¹⁹ 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*],⁵²⁰ but not the factfinding necessary to put him to death.”⁵²¹

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.⁵²² The *Hurst* Court found that the advisory nature of Florida’s jury recommendation does not comport with Sixth Amendment requirements articulated in *Ring*.⁵²³ In other words, the Sixth Amendment requires that a jury make specific findings necessary to authorize a death sentence.⁵²⁴

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. 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

Question: *Whether Georgia courts erred by failing to find a Batson error during a 30-year-old capital murder trial?*

Thirty years after *Batson v. Kentucky*,⁵²⁵ 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* is revisiting how to analyze so-called *Batson* challenges.⁵²⁶ 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.⁵²⁷ 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)

⁵¹⁷ *Id.* at 591.

⁵¹⁸ *See id.* at 592.

⁵¹⁹ *Id.* at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19 (2000)).

⁵²⁰ *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *see also* *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016).

⁵²¹ *Ring*, 536 U.S. at 609.

⁵²² *Hurst v. Florida*, 136 S. Ct. at 621-22.

⁵²³ *Id.* at 622.

⁵²⁴ *See id.*

⁵²⁵ 476 U.S. 79 (1986).

⁵²⁶ *Foster v. Humphrey*, 135 S. Ct. 2349, No. 14-8349 (May 26, 2015).

⁵²⁷ *Voir Dire*, BLACK’S LAW DICTIONARY (10th ed. 2014).

to excuse a juror “for any reason,” so long as that reason doesn’t violate the Equal Protection Clause of the Fourteenth Amendment.⁵²⁸

Currently, when a defendant makes a *Batson* challenge, courts engage in a 3-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.⁵²⁹ In one of the Supreme Court’s more recent rulings interpreting *Batson*, the Court left open the question whether mixed-motive analysis⁵³⁰ 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,⁵³¹ as some circuits currently allow.⁵³² Based on questions raised at oral argument in *Foster*, the Court might offer some guidance on that open question.

Foster involves a *Batson* challenge from Timothy Tyrone Foster’s 1987 capital murder trial in Georgia.⁵³³ The potential jury pool for Foster’s trial had four black individuals, and the prosecution exercised a peremptory strike against each one.⁵³⁴ Foster, an African American, raised a *Batson* challenge based on those strikes, but the trial judge concluded that the prosecution rebutted his assertion of purposeful discrimination.⁵³⁵ The court noted that the prosecutor had supplied more 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.⁵³⁶

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.⁵³⁷ 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 #1 to #4, and were the first four names on a list labeled “Definite Nos.”⁵³⁸ The Superior Court of Butts County still did not find a *Batson* violation,⁵³⁹ and

⁵²⁸ 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).

⁵²⁹ See *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008).

⁵³⁰ See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

⁵³¹ *Snyder*, 552 U.S. at 485.

⁵³² 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).

⁵³³ See *Foster v. State*, 374 S.E.2d 188 (Ga. 1988).

⁵³⁴ See *id.* at 191.

⁵³⁵ *Id.* at 191-92.

⁵³⁶ *Id.* at 190.

⁵³⁷ *Foster v. Humphrey*, No. 1989-V-2275, Order Denying Petitioner’s Request for Habeas Relief at 14-15 (Ga. Super. Ct. Dec. 4, 2013).

⁵³⁸ *Id.* at 15; Brief for Petitioner at 14-20, *Foster v. Chatman*, 135 S. Ct. 2349, No. 14-8349.

⁵³⁹ *Foster v. Humphrey*, No. 1989-V-2275, Order Denying Petitioner’s Request for Habeas Relief at 16-17 (Ga. Super. Ct. Dec. 4, 2013).

the Supreme Court of Georgia declined to issue a “Certificate of Probable Cause,” which would permit Foster to appeal the superior court’s ruling.⁵⁴⁰

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.⁵⁴¹ 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?⁵⁴² 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.”⁵⁴³ 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] would say no, his reason was a purpose to discriminate on the basis of race. Now, tell me why I’m wrong.⁵⁴⁴

This case, indeed, illustrates “the difficulty of finding a legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge.”⁵⁴⁵ Based on the Justices questions, though, it is possible that the Court may offer some guidance on whether the legal test may include mixed-motive analysis. If that kind of analysis were allowed, the prosecution likely would face an easier burden at step two of a court’s *Batson* analysis.

Yet it is also possible that there will be no ruling on the merits because of a couple procedural idiosyncrasies that turn on the interpretation of Georgia law, including whether the Court is precluded from reviewing Foster’s claim at all, and if not, whether the Court ought to review the ruling of the Georgia Supreme Court or the lower court ruling from the Superior Court of Butts County, Georgia.⁵⁴⁶ Some of the Justices even suggested that before the Court rules, that the Court certify questions to the Georgia Supreme Court for clarification.⁵⁴⁷

Williams v. Pennsylvania

Question: *Are the Eighth and Fourteenth Amendments violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether his vote is ultimately decisive?*

⁵⁴⁰ Foster v. Humphrey, No. S14E0771, Order Denying Application for Certificate of Probable Cause (Ga. Nov. 3, 2014).

⁵⁴¹ Transcript of Oral Argument at 24:3-24:7, Foster v. Chatman, 135 S. Ct. 2349 (2015) (No. 14-8349).

⁵⁴² *Id.* at 22:14-22:22.

⁵⁴³ *Id.* at 24:9-24:17.

⁵⁴⁴ *Id.* at 42:6-43-11.

⁵⁴⁵ See Miller-El v. Dretke, 545 U.S. 231, 267 (2005) (Breyer, J., concurring).

⁵⁴⁶ Transcript of Oral Argument at 3:13-14:9, 28:9-38:18, Foster v. Chatman, 135 S. Ct. 2349 (2015) (No. 14-8349).

⁵⁴⁷ See *id.* at 29:24, 37:18-37-20.

The U.S. Supreme Court in *Williams v. Pennsylvania* is reviewing 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.⁵⁴⁸ Recusal is constitutionally required in the rare case⁵⁴⁹ when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”⁵⁵⁰ 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.’”⁵⁵¹ Constitutional standards for recusal differ from legislatively imposed ones,⁵⁵² yet this case raises questions about whether certain statutory bases for recusal—such as previously acting in an advisory capacity in a case⁵⁵³—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.⁵⁵⁴

Terrance Williams was convicted of murder and sentenced to death thirty years ago.⁵⁵⁵ 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.⁵⁵⁶ In a handwritten notation on the memorandum, Castille approved the request.⁵⁵⁷ 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.⁵⁵⁸ The post-conviction court granted a stay of execution and vacated Williams’s death sentence.⁵⁵⁹ The state appealed to the Pennsylvania Supreme Court.⁵⁶⁰ At the time, Castille was serving as the Chief Justice, prompting Williams to request that Castille recuse himself.⁵⁶¹ Castille declined to do so and provided no explanation behind his decision.⁵⁶² The Pennsylvania Supreme Court, in a unanimous decision, lifted the stay of execution and reinstated the death penalty for Williams.⁵⁶³

⁵⁴⁸ See *Williams v. Pennsylvania*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/williams-v-pennsylvania/> (last visited Mar. 29, 2016).

⁵⁴⁹ See *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 890 (2009).

⁵⁵⁰ See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

⁵⁵¹ *Caperton*, 556 U.S. at 881.

⁵⁵² See *id.* at 889-90.

⁵⁵³ See 28 U.S.C. § 455.

⁵⁵⁴ U.S. CONST. amend VIII.

⁵⁵⁵ *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990).

⁵⁵⁶ Brief for Petitioner at 4-5, *Williams v. Pennsylvania*, 136 S. Ct. 28 (No. 15-5040).

⁵⁵⁷ *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.

⁵⁵⁸ *Commonwealth v. Williams*, 105 A.3d 1234, 1236-39 (Pa. 2014).

⁵⁵⁹ *Id.* at 1237-38.

⁵⁶⁰ *Id.* at 1239.

⁵⁶¹ 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.

⁵⁶² See Order, *Commonwealth of Pennsylvania v. Williams*, No. 163 EM 2012 (Pa. Oct. 1, 2012), 2015 WL 7774181, at *171A.

⁵⁶³ *Williams*, 105 A.3d at 1245.

Two questions are before the U.S. Supreme Court: (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 vacatur, when that judge's vote was not decisive?⁵⁶⁴

Concerning the first question, Williams argues that the likelihood of bias when “a judge had significant prosecutorial involvement in a criminal case” requires recusal.⁵⁶⁵ He points to cases involving criminal contempt hearings, in which the Supreme Court ruled that the Due Process Clause forbids judges from playing certain dual roles.⁵⁶⁶ 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.⁵⁶⁷ 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.’”⁵⁶⁸ It follows, says Williams, that the dual role Castille allegedly played—“personally authoriz[ing] the trial prosecutor to pursue a death sentence against Mr. Williams” as district attorney, and then sitting as a judge on the panel deciding whether to vacate the death penalty—violated his due process rights.⁵⁶⁹ Pennsylvania, on the other hand, describes Castille's prior involvement in the case as a “single administrative act,” which, in its view, is insufficient to require recusal.⁵⁷⁰ Additionally, Pennsylvania cautions that creating the rule Williams requests would result in a “dramatic expansion” of the Court's recusal precedent.⁵⁷¹

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—was left unresolved by the Supreme Court in *Aetna Life Insurance Co. v. Lavoie*.⁵⁷² 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.⁵⁷³ However, the Court left open the question whether due process could be violated if the judge in question did not cast a decisive vote.⁵⁷⁴ Williams contends⁵⁷⁵ 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.”⁵⁷⁶ However, Pennsylvania

⁵⁶⁴ See *Williams v. Pennsylvania*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/williams-v-pennsylvania/> (last visited Mar. 29, 2016).

⁵⁶⁵ Brief for Petitioner at 22, *Williams v. Pennsylvania*, 136 S. Ct. 28 (No. 15-5040).

⁵⁶⁶ *Id.* at 22-23.

⁵⁶⁷ 349 U.S. 133 (1955).

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

⁵⁶⁹ Brief for Petitioner at 24-28, *Williams v. Pennsylvania*, 136 S. Ct. 28 (No. 15-5040).

⁵⁷⁰ Brief for Respondent at 17, *Williams v. Pennsylvania*, 136 S. Ct. 28 (No. 15-5040).

⁵⁷¹ *Id.*

⁵⁷² 475 U.S. 813 (1986).

⁵⁷³ *Id.* at 816-19, 824-25.

⁵⁷⁴ *Id.* at 827-28; *id.* at 830 (Brennan, J., concurring).

⁵⁷⁵ Brief for Petitioner at 35-36, *Williams v. Pennsylvania*, 136 S. Ct. 28 (No. 15-5040).

⁵⁷⁶ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (Blackmun, J., concurring).

argues 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.”⁵⁷⁷

During oral argument the Court appeared to grapple with where to draw the line for when a judge’s former involvement in a case constitutionally requires recusal. For instance, looking beyond the facts of this case, Justice Breyer asked whether the Constitution would require a legislator-turned-judge to recuse himself when a statute he voted for came before the court.⁵⁷⁸ To avoid a broad rule, the Court could choose to rule narrowly by extending the reasoning in *Murchison* and *Mayberry* and conclude only that due process forbids a person from acting as both prosecutor and judge. Whatever the outcome, it will be important for judicial behavior and decision-making as to recusal decisions.

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”⁵⁷⁹

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.⁵⁸⁰ 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.⁵⁸¹

⁵⁷⁷ Brief for Respondent at 59, *Williams v. Pennsylvania*, 136 S. Ct. 28 (No. 15-5040).

⁵⁷⁸ Transcript of Oral Argument at 19:10-19:23, *Williams v. Pennsylvania*, 136 S. Ct. 28 (No. 15-5040).

⁵⁷⁹ *Bruce v. Samuels*, 136 S. Ct. 627, 629, 631 (2016).

⁵⁸⁰ 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 (CA10 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.

⁵⁸¹ 28 U.S.C. § 1915(b).

Bruce, a federal inmate with several pending cases and outstanding filing fee assessments, sued to challenge his assignment to a “special management unit.”⁵⁸² He argued that collection for the filing fees for the new case should only begin 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.⁵⁸³ The United States District Court of Appeals for the District of Columbia Circuit, from whom he sought a writ of mandamus, disagreed.⁵⁸⁴ It explained in simple terms, the “monthly payment obligation ... applies on a per-case basis.”⁵⁸⁵

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.”⁵⁸⁶

Ross v. Blake

Question: “*Did the Fourth Circuit misapply this Court’s 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 that relieves a n inmate of his mandatory obligation to exhaust administrative remedies when the inmate erroneously believes that he satisfied exhaustion by participating in an internal investigation?*”

The Supreme Court recently heard argument on the legality of a judicially created exception to the exhaustion requirement in the Prison Litigation Reform Act of 1995 (PLRA or the Act)⁵⁸⁷ in *Ross v. Blake*. Congress enacted the PLRA,⁵⁸⁸ in part, to reduce frivolous prisoner lawsuits that purportedly had been overwhelming federal courts.⁵⁸⁹ 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.”⁵⁹⁰ 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.”⁵⁹¹ Other circuits have concluded differently, perhaps prompting the Supreme Court’s review of this case.⁵⁹²

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

⁵⁸² *Bruce* at 630.

⁵⁸³ *Id.* at 630-31.

⁵⁸⁴ *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).

⁵⁸⁵ *Pinson* at 761 at 9.

⁵⁸⁶ *Bruce v. Samuel*, 136 S. Ct. at 633.

⁵⁸⁷ 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?*

⁵⁸⁸ 42 U.S.C. § 1997e.

⁵⁸⁹ 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.”).

⁵⁹⁰ 42 U.S.C. § 1997e(a).

⁵⁹¹ *Blake v. Ross*, 787 F.3d 693, 695, 698 (2015).

⁵⁹² 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).

five times.⁵⁹³ When Madigan struck, another state corrections officer, Lieutenant Michael Ross, was holding a handcuffed Blake against a wall and failed to intervene.⁵⁹⁴ Blake reported the episode to senior corrections officers.⁵⁹⁵ The Internal Investigative Unit (IIU) of the Maryland Department of Public Safety and Correctional Services concluded, after a year-long investigation, that Madigan used excessive force.⁵⁹⁶ Blake did not submit an administrative complaint in accordance with Maryland’s Administrative Remedy Procedure (ARP) for inmate grievances.⁵⁹⁷ He later filed a civil-rights suit under 42 U.S.C. § 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.⁵⁹⁸ The district court granted summary judgment for Ross on the ground that Blake failed to exhaust available administrative remedies before filing suit.⁵⁹⁹ (Madigan, however, did not raise the affirmative defense of exhaustion and was found civilly liable after a trial.⁶⁰⁰)

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.⁶⁰¹ A majority of the Fourth Circuit panel concluded that “special circumstances” justified Blake’s failure to comply with Maryland’s administrative procedures.⁶⁰² In doing so, the Fourth Circuit adopted the methodology established by the Second Circuit⁶⁰³ in an earlier case, which asked (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.⁶⁰⁴ 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.⁶⁰⁵ 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

⁵⁹³ Blake v. Ross, 787 F.3d 693, 695 (4th Cir. 2015).

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.* at 695-96.

⁵⁹⁷ *Id.* at 697.

⁵⁹⁸ “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. Tadmán*, 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.”).

⁵⁹⁹ Blake, 787 F.3d at 696.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.*

⁶⁰² *Id.* at 698-701.

⁶⁰³ *Macias v. Zank*, 495 F.3d 37 (2d Cir. 2007); *Johnson v. Testman*, 380 F.3d 691 (2d Cir. 2004).

⁶⁰⁴ Blake, 787 F.3d at 698.

⁶⁰⁵ *Id.*

Correctional Services] with ample notice and opportunity to address internally the issues raised.”⁶⁰⁶

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 announced.⁶⁰⁷ Additionally, Judge Agee noted that three other circuits have ruled that an inmate does not exhaust administrative remedies by participating in an internal investigation.⁶⁰⁸

The Supreme Court now has the opportunity to resolve the circuit split, asking 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.”⁶⁰⁹ Ross argues, among other things, that the Second and Fourth Circuits’ exhaustion exception conflicts with Congress’s intent in enacting the PLRA as well as the Court’s interpretation of the Act and its goals.⁶¹⁰ Ross contends that in two previous cases, *Booth v. Churner*⁶¹¹ and *Woodford v. Ngo*,⁶¹² the Court refused to uphold other judicially created exceptions to the PLRA’s exhaustion requirement.⁶¹³ 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.”⁶¹⁴ Additionally, Ross contends 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—which authorized, but did not obligate, courts to require exhaustion “in the interests of justice.”⁶¹⁵ Thus, Ross argues, allowing the exception would “restore[] to courts a significant amount of the discretion expressly removed by Congress” when enacting the PLRA.⁶¹⁶ 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.⁶¹⁷ He contends that there were no “available” administrative remedies for him to exhaust (as the statute requires),⁶¹⁸ and so he did not need to prove any exceptions to the requirement.⁶¹⁹ 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

⁶⁰⁶ *Id.* at 698-701.

⁶⁰⁷ *Id.* at 703-06 (Agee, J. dissenting).

⁶⁰⁸ *Id.* at 702-03.

⁶⁰⁹ See *Ross v. Blake*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/ross-v-blake/> (last visited Mar. 29, 2016).

⁶¹⁰ Brief for Petitioner at 1-6, 20-24, *Ross v. Blake*, 136 S. Ct. 614 (2015) (No. 15-339).

⁶¹¹ 532 U.S. 731 (2001).

⁶¹² 548 U.S. 81 (2006).

⁶¹³ Brief for Petitioner at 27-28, *Ross v. Blake*, 136 S. Ct. 614 (2015) (No. 15-339).

⁶¹⁴ *Booth*, 532 U.S. at 741 n.6.

⁶¹⁵ Civil Rights of Institutionalized Persons Act, P.L. 96-247, §7, 94 Stat. 349, 352 (1980).

⁶¹⁶ Brief for Petitioner at 37, *Ross v. Blake*, 136 S. Ct. 614 (2015) (No. 15-339).

⁶¹⁷ Respondent’s Brief at 10-13, *Ross v. Blake*, 136 S. Ct. 614 (2015) (No. 15-339).

⁶¹⁸ See, e.g., *Kaba v. Stepp*, 458 F.3d 678, (7th Cir. 2006) (noting that “[i]f administrative remedies are no ‘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.’”).

⁶¹⁹ Respondent’s Brief at 15-30, *Ross v. Blake*, 136 S. Ct. 614 (2015) (No. 15-339).

alternative ground that Maryland's ARP was not available to Blake or dismiss the writ of certiorari as improvidently granted.⁶²⁰

The Court heard arguments on Tuesday, March 29, 2016. It remains to be seen whether the Court will address the circuit split. The Court may choose to leave the circuit split unresolved if it were to adopt one of Blake's arguments and either affirm on an alternate ground or determine that its writ of certiorari was improvidently granted. Alternatively, the Court may consider the question it certified and address the question of exceptions to the PLRA exhaustion requirement, which may require it to reexamine the precedents of *Booth v. Churner*⁶²¹ and *Woodford v. Ngo*.⁶²² Were the Court to affirm the Fourth Circuit's decision, and allow the judicially created exception to the PLRA's exhaustion requirement, this could potentially pave the way for lower courts to employ other exceptions to the PLRA's exhaustion requirement. Congress could choose to respond to any such decision legislatively, for example, by amending the PLRA to clarify that such exceptions are either prohibited or allowed by the PLRA.

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⁶²⁰ Respondent's Brief at 15, 31-34.

⁶²¹ 532 U.S. 731 (2001).

⁶²² 548 U.S. 81 (2006).