

CRIMINAL YEAR SEMINAR

April 15, 2016 - Tucson, Arizona
May 6, 2016 - Phoenix, Arizona
May 13, 2016 - Chandler, Arizona



2015 CONSTITUTIONAL LAW UPDATE

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**END OF OCTOBER TERM 2015
AND
OCTOBER TERM 2016
SUPREME COURT OF THE UNITED STATES**



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About the Court?



Court Diversity



+ Merrick Garland = Jewish

- ✦ No Protestants
- ✦ No geographic diversity
- ✦ No experience or educational diversity

Catholics = 21% of America's population
Jews = just over 2 percent American's population.

Tipping the scales of justice

THE LEFT THE SWING VOTER THE RIGHT

Two justices over 80

2016 Age: Roberts 80, Scalia 80, Kennedy 79, Sotomayor 57, Kagan 56, Ginsburg 81

↪ In the Roberts Court, 85 cases split 5 to 4 or 5 to 3 with Justice Scalia in the conservative majority.

↪ 30 of 85 cases = criminal procedure.
↪ E.g. *Florence v. County of Burlington* (2012) (all strip search of people arrested for any offense allowed).

↪ Merrick Garland is considered pre-prosecution.

Scalia's Departure

↪ Scalia's votes in unannounced cases will be invalidated.

↪ 4-4 splits do not create a binding precedent and the lower court decision is affirmed.

↪ Circuit conflicts = unresolved.

↪ The court has been divided 5-4 about a 1/4 of the time; most decisions are unanimous.

Pending Cases

- ◊ Obama's executive action regarding undocumented immigrants.
- ◊ Texas' abortion center regulations - if the court splits 4-4, Texas' law stands because the lower court upheld it.




Bill of Rights
Compare to United States Constitution

©, the Brave New World of the 4th Amendment

The 4th Amendment
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTH
4
AMENDMENT



SUPREME COURT OF THE UNITED STATES
OTIS OF LOS ANGELES, CALIFORNIA v. PATEL ET AL.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
No. 13-4178. Argued March 7, 2015. Decided June 23, 2015.

The "No Tell - Hotel" Case

- ◊ Motel owners challenged Los Angeles Municipal Code (LAMC) requiring them to give the police registry information.
- ◊ Information includes:
 - ◊ guest's name and address;
 - ◊ number of people in each party;
 - ◊ guest's vehicles information;
 - ◊ date and time of arrival;
 - ◊ departure date;
 - ◊ the room number;
 - ◊ rate charged, and
 - ◊ the method of payment.
- ◊ Guests without reservations, or who pay with cash, or who rent for less than 12 hours must present photographic ID.



RECEPTION

◆ A hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a \$1,000 fine.

◆ Fourth Amendment declaratory and injunctive relief.

Held:
 ◆ LAMU is unconstitutional because "... the subject of the search must be afforded an opportunity to obtain pre-compliance review before a neutral decision maker."

◆ Hotel operators can give consent to searches of their registries.

◆ Police can get a warrant, or

◆ Exception to the warrant requirement such as exigent circumstances.

◆ Facial challenges allowed under the Fourth Amendment:

◆ Fourth Amendment History Equitable Actions for Trespass

◆ Civil aspect as well as criminal.

◆ Different than the 5th, 6th and 8th Amendments.

◆ *Writ of Habeas Corpus*, 20 Eng. Rep. 489 (C.P. 1763), 19 Howd. State Trials 1183.

◆ *Entick v. Carrington*, 19 Howd's State Trials 1028 (1765).

Chief Justice Pratt (Lord Camden)

"To enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."

Bill of Rights

The 5th Amendment

FIFTH AMENDMENT

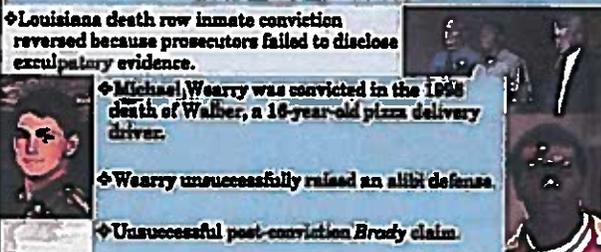
Case No. 877 U.S. _____, 2016-1 Per Curiam
 SUPREME COURT OF THE UNITED STATES
MICHAEL WEARRY & BURL CAIN, WARDEN
 PETITION FOR WRIT OF HABEAS CORPUS TO THE DISTRICT COURT OF LOUISIANA, LIVINGSTON PARISH
 No. 14419908. Decided March 7, 2016

◆ Louisiana death row inmate conviction reversed because prosecutors failed to disclose exculpatory evidence.

◆ Michael Wearry was convicted in the 1998 death of Walber, a 16-year-old pizza delivery driver.

◆ Wearry unsuccessfully raised an alibi defense.

◆ Unsuccessful post-conviction *Brady* claim.



WEARRY & CAIN

◆ Nearly two years after the murder, inmate Sam Scott contacted authorities and implicated Michael Wearry in Walber's death.

◆ Scott changed his story four times before trial.

◆ At Trial - Scott Testified:

- ◆ Playing dice when Walber drove past and Wearry decided to rob him.
- ◆ Wearry and Hutchinson stopped the car, Hutchinson shoved the victim into the cargo area.
- ◆ Scott, Hutchinson, and Wearry, drove around until Wearry and two others killed the Walber by running him over.

WEARRY & CAIN

Three pieces of evidence were at issue:

- ◆ 1) The State did not tell defense
 - ◆ An inmate heard Scott say that he wanted to make sure Wearry got "the needle cause he jacked me over."
 - ◆ Another witness recanted saying Wearry commit the murder explaining "Scott had told me what to say" and that lying about the murder "would help him get out of jail."
- ◆ 2) Prosecution claimed at trial that Brown "hasn't asked for a thing."
 - ◆ Brown twice sought a deal to reduce his sentence.
- ◆ 3) The prosecution failed to turn over Hutchinson's medical records showing he had knee surgery and could not have withstood running, bending, or lifting substantial weight.



WEARRY v. CAIN

Per Curiam

- ✦ The state court erred by denying the defendant's *Brady* claim
- ✦ "The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than (the defendant's) alibi."

✦ Florida post-conviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively

✦ Also, failed to mention the statements of the two inmates impeaching Scott.

SUPREME COURT OF THE UNITED STATES
MCFADDEN v. UNITED STATES
 CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
 No. 14-578. Argued April 21, 2015. Decided June 18, 2015

"Bath Salts" no one uses in the Bath.

- ✦ Controlled Substances Act sec. 841 requires the government to prove the defendant knows it is a controlled substance.



MCFADDEN v. UNITED STATES

- ✦ The Controlled Substances Act regulates certain substances:
 - ✦ Congress defined some drugs.
 - ✦ DEA and FDA defines others.
- ✦ The Controlled Substance Analogue Enforcement Act of 1986 extended enforcement to all "controlled substance analogues."

Designer drugs known as "bath salts."

- ✦ 2012 - Stephen McFadden was found guilty for controlled substance analogues.
- ✦ McFadden lost his appeal in the 4th Circuit that the Analogue Act was unconstitutionally vague.



MCRAADDEN v. UNITED STATES
Held:

- ♦ The government must prove the defendant knew he was dealing with a controlled substance under the Controlled Substances Act or the Controlled Substance Analogue Enforcement Act.
- ♦ That can be established by evidence a defendant knew the substance is controlled, regardless of whether he knew the substance's identity.
- ♦ Or, by evidence the defendant knew the specific analogue he was distributing, even if he did not know its legal status as an analogue.

Bill of Rights
The 6th Amendment
SIXTH
6
AMENDMENT

OCTOBER TERM, 2015
SUPREME COURT OF THE UNITED STATES
HUIB v. UNITED STATES

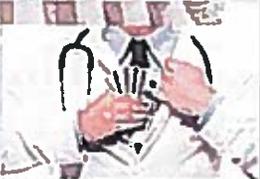
IN LEGAL TROUBLE?
Better call Saul!
BY THE WAY

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LUIS v. UNITED STATES

MEDICAR FRAUD

- ◊ Sila Luis provided home health care and physical therapy to Medicare patients.
- ◊ Luis took dozens of overseas trips, bought luxury cars, and gave millions of dollars to her family through shell corporations.
- ◊ In 2012 Luis was indicted for Medicare fraud
 - ◊ kickbacks for patient referrals and billing for unnecessary or unperformed services.
 - ◊ \$45 million fraud.



LUIS v. UNITED STATES

United States v. Monsanto (1989) (the government may seize all of a drug dealer's assets before trial even if that leaves no money for a lawyer).

- ◊ Federal prosecutors asked the trial court to freeze all of Luis' assets.
- ◊ Luis sought permission to use her "untainted" assets to pay her lawyers.
- ◊ District and Circuit courts denied that request.



LUIS v. UNITED STATES

- ◊ Plurality - Unusual split. Breyer, Roberts, Ginsburg, Sotomayer
- ◊ Concurrence - Thomas
- ◊ Dissenting - Kennedy, Kagan, Alito

5 to 3 split

- ◊ Breyer Plurality Opinion: "[T]he pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.




LUIS v. UNITED STATES



- ◊ "How are defendants whose innocent assets are frozen in cases like these supposed to pay for a lawyer?"
- ◊ Defendant has a right to use her \$2 million "innocent" and "untainted" funds for her legal defense.
- ◊ This money "belongs to the defendant, pure and simple."
- ◊ "In this respect, it differs from a robber's loot, a drug seller's cocaine, a burglar's tools or other property associated with the planning, implementing or concealing of a crime."



- ◊ The district court compared Luis to a bank robber indicted for stealing \$100,000:
- ◊ if the robber can't use the \$100,000 that he stole he also shouldn't be able to spend that \$100,000 and then spend a different \$100,000 for his lawyer.

LUIS v. UNITED STATES



- ◊ **Thomas Concurrence:** "the Sixth Amendment prevents the Government from freezing untainted assets in order to secure a potential forfeiture."

Kennedy Dissent:

- ◊ Sophisticated criminals know how to make criminal proceeds look untainted.
- ◊ They can "disguise the origins of their funds" and if convicted, none of the ill-gotten gains will be left.

Kagan Dissent: Bound by Monsanto.




SUPREME COURT OF THE UNITED STATES
MARYLAND, PETITIONER v. JAMES KULBICKI
 ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND
 No. 14-648. Decided October 8, 2015.
 PER CURIAM.

Ineffective Assistance of Counsel

- ◊ Reversal of Maryland ineffective assistance finding.
- ◊ 1995 trial FBI Agent Peele testified regarding Comparative Bullet Lead Analysis.
- ◊ Peele linked a bullet fragment from the victim's brain to defendant's gun.





MARYLAND v. KULBICKI

- ◆ 2006 - the defendant asserted a post-conviction claim his defense attorneys were ineffective for failing to question Lead Bullitt Analysis.
- ◆ 2006 - Maryland Court of Appeals held Lead Bullitt Analysis is not generally accepted by the scientific community and inadmissible.
- ◆ Maryland Court - defendant's lawyers were deficient for failing to unearth a report co-authored by Peele in 1991 that could have been used to undermine Lead Bullitt Analysis.



MARYLAND v. KULBICKI
Per Curiam

- ◆ Reversed
- ◆ At defendant's trial Lead Bullitt Analysis "was widely accepted ..."
- ◆ The 1991 report did not question its validity.
- ◆ "Counsel did not perform deficiently by dedicating their time and focus to elements ... that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis."

Change in expanding Strickland.
 ◆ *Padilla v. Kentucky* (2010)
 ◆ *Lafley v. Cooper* (2012)
 ◆ *Hinton v. Alabama* (2014)

Supreme Court of the United States

RANDY WHITE, WARDEN v. ROGER L. WHEELER
 ON PETITION FOR WRIT OF HABEAS CORPUS - SIXTH CIRCUIT
 No. 14-1572 - Decided December 14, 2015
 PER CURIAM

Jury Selection Case - 6th Amendment (8th Amendment)

- ◆ 1997 - Louisville police found the bodies of Malone and Warfield.
- ◆ Trial Court granted a prosecution motion to strike Juror 638 for cause for inconsistent replies.
- ◆ Kentucky Supreme Court upheld trial judge.
- ◆ Sixth Circuit reversed





♦ **Juror 638 answers:**

- ♦ "I'm not sure that I have formed an opinion ... I believe there are arguments on both sides."
- ♦ I've "never been confronted with that situation in a real-life sense of having to make that kind of determination."
- ♦ "So it's difficult ... to judge how I would I guess act."

♦ He was "not absolutely certain whether [he] could realistically consider" the death penalty and described himself as "a bit more contemplative on the issue of taking a life and, uh, whether or not we have the right to take that life."

♦ He stated he could consider all the penalty options.

WARDEN v. WHEELER



Per Curiam

♦ **Held:** Juror 638's exclusion did not violate the Sixth Amendment.

SUPREME COURT OF THE UNITED STATES
MUSACCHIO v. UNITED STATES
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
No. 14-1203, Argued November 20, 2015 - Decided January 23, 2016

Extra Elements of the Case

- ♦ 2004 - Musacchio resigned as president of ETS.
- ♦ 2005 - Musacchio started a competing company, TTS, and several ETS agents moved to the new company.
- ♦ ETS became suspicious when potential new agents were unexpectedly familiar with the terms of ETS contracts.
- ♦ Musacchio and other TTS agents had been accessing ETS servers (parties settled for \$10 million).
- ♦ 2010 - the government indicted Musacchio and other TTS agents under the Computer Fraud and Abuse Act.



MUSACCHIO v. UNITED STATES

- ◊ The district court incorrectly instructed the jury the government had to prove more stringent elements than the statute requires.
- ◊ The government did not object.

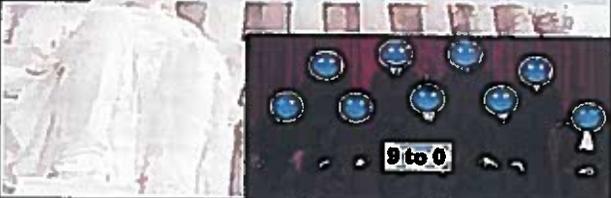


- ◊ Musacchio was convicted.
- ◊ Argued on appeal that, by not objecting, the government acceded to the higher burden and failed to meet it.
- ◊ Fifth Circuit held the district court's instructional error did not become the law of the case when the government failed to object.

MUSACCHIO v. UNITED STATES



- ◊ Held: When a jury instruction adds an element to the charged crime and the government fails to object, a challenge to the sufficiency of the evidence should be assessed against the elements of the charged crime, rather than the elements set forth in the erroneous jury instruction.





Delitz v. Bouldin, No. 15-408

“Whether, after a judge has discharged a jury from service and the jurors have left the judge’s presence, the judge may recall the jurors for further service in the same case?”

SUPREME COURT OF THE UNITED STATES
DAVIS, ACTING WARDEN v. AYALA
 CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
 No. 13-4128 Argued March 3, 2015 Decided June 18, 2015

Batson Case

- ◆ Death sentence of Hispanic defendant upheld despite all Blacks and Hispanics jurors excluded.
- ◆ Hctor Ayala convicted of murdering three people.
- ◆ Prosecution used peremptory challenges to strike all Black and Hispanic jurors
- ◆ The trial court allowed the prosecution to explain the basis for the strikes outside the presence of Ayala's counsel, "so as not to disclose trial strategy."



DAVIS v. AYALA

JUSTICE ALITO delivered the opinion of the Court.



Held:

- ◆ The exclusion of Ayala's counsel during the *Batson* hearings was harmless error.
- ◆ No habeas relief unless prisoners can show "actual prejudice," which Ayala did not show.



- ◆ Dissent: Ayala's sentence should be reversed because the exclusion of Ayala's counsel from the hearings "substantially influenced the outcome."
- ◆ No basis for the Court's confidence that the prosecution's peremptory challenges were race neutral.

- ◆ Solitary confinement?
- ◆ Ayala "has been held for ... most of the past 20 years ... in a windowless cell no larger than a typical parking spot for 23 hours a day ..."
- ◆ Solitary confinement "bears a further terror and peculiar mark of infamy".

"The degree of civilization in a society can be judged by entering its prisons."

- ◆ Response to Kennedy - Ayala's accommodations "are a far sight more spacious than those in which his victims, Ernesto Dominguez Mender, Marlon Antonio Zamora, and Jose Luis Rositas, now rest."





Bill of Rights
 The 8th Amendment

EIGHTH AMENDMENT

The Eighth Amendment and America

♦ The "proscription of cruel and unusual punishments ... is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. at 378
 ♦ What is "cruel and unusual" must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society" and punishment must accord with the "dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)

The 8th Amendment's Perverse Boundaries = Citizenship

♦ Denaturalization is "a form of punishment more punitive than torture, for it destroys for the individual the political existence that was centuries in the making." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
 ♦ VS.
 ♦ *Rummel v. Estelle*, 100 S. Ct. 1133 (1980), the Supreme Court held that a life sentence for three minor felony thefts aggregating in \$229.11 was not a "cruel and unusual" punishment.

OCTOBER TERM, 2014
 SUPREME COURT OF THE UNITED STATES
GLOSSIP ET AL. v. GROSS ET AL.
 CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
 No. 14-7965. Argued April 29, 2015 — Decided June 23, 2015

◆ Whether Oklahoma's execution method violates the 8th Amendment because it creates an unacceptable risk of severe pain.



5 to 4 split

GLOSSIP v. GROSS



JUSTICE ALITO delivered the opinion of the Court.

◆ Hold: "Death-row inmates failed to establish a likelihood of success of their claim that midazolam, a sedative, as the first drug in Oklahoma's lethal injection protocol violates the Eighth Amendment because it fails to render a person insensate to pain."

◆ While methods of execution have changed, "(t)his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."

Premise: Because capital punishment is constitutional, there must be a constitutional means of carrying it out.

◆ The death penalty was accepted at the adoption of the Constitution and the Bill of Rights.

◆ Hanging remained the standard method of execution through much of the 19th century, but that began to change.



◆ 1880 - New York appointed a commission to find "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases."

◆ 1888 - New York adopted electrocution as less painful and more humane than hanging.





◆ In 1921, Nevada adopted lethal gas as "the most humane manner known to modern science."

◆ Hanging and the firing squad retained in some States.

◆ After *Gregg* reaffirmed the death penalty, States adopted lethal injection, the most prevalent method today.

◆ Oklahoma adopted lethal injection in 1977.





The "Cocktail":

1. A barbiturate sedative induces a deep coma like unconsciousness.
2. A paralytic agent inhibits all muscular-skeletal movements by paralyzing the diaphragm and stops respiration.
3. Potassium chloride induces cardiac arrest.





The Breyer Dissent

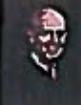
◆ "Rather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution."

◆ *Gregg v. Georgia*, 428 U. S. 153, 187 (1976) - upheld the death penalty.

◆ "In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against these constitutional problems."

◆ "I believe that it is now time to reopen the question."





♦ Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed.
 ♦ The death penalty involves three fundamental constitutional defects:
 ♦ (1) serious unreliability,
 ♦ (2) arbitrariness in application, and
 ♦ (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result,
 ♦ (4) most places within the United States have abandoned its use.



♦ Convincing evidence in the past three decades innocent people have been executed.
 ♦ "The evidence the death penalty has been wrongly imposed (whether or not it was carried out), is striking."
 ♦ "Since 2002, the number of exonerations in capital cases has risen to 115."
 ♦ "In 2014, six death row inmates were exonerated based on actual innocence all imprisoned for more than 30 years."





SUPREME COURT OF THE UNITED STATES
ANTHONY RAY HINTON v. ALABAMA
 WRIT OF HABEAS CORPUS TO THE COURT OF CRIMINAL APPEALS OF ALABAMA
 No. 13-6448. Decided February 24, 2014.

Justice Breyer: "Last Term ...Anthony Ray Hinton, who had been convicted of murder ... was exonerated ... because the forensic evidence used against him was flawed."

♦ The One-eyed Defense Ballistics Expert
 ♦ Hinton spent 30 years on death row.

♦ "In light of these and other factors, researchers estimate that about 4% of those sentenced to death are actually innocent."

♦ "The arbitrary imposition of punishment is the antithesis of the rule of law."

♦ Despite *Gregg's* hope for fair administration of the death penalty, 40 years of further experience show the death penalty is imposed arbitrarily.

♦ Circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.

♦ Individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty.

♦ Gender of the defendant or the gender of the victim makes a not-otherwise-warranted difference.

RACE OF DEATH ROW INMATES

- Black
- Hispanic
- White
- Other



Role of Geography

♦ It is not simply because some States permit the death penalty ... Rather *within* a State, the imposition of the death penalty heavily depends on the county in which a defendant is tried.

♦ Studies indicate the disparity reflects the ... the power of the local prosecutor.

♦ "From a defendant's perspective ... that sentence ... is the equivalent of being struck by lightning."



The Death Penalty has become "Unusual"

♦ In sum, if we look to States, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual...

♦ 6%, i.e., three States, account for 80% of all executions.

♦ ... about 66% of the Nation lives in a State that has not carried out an execution in the last three years.

♦ And if we look to counties, in 56% there is effectively no death penalty.

♦ It seems fair to say that it is now unusual to find capital punishment in the United States, at least when we consider the Nation as a whole.

Executions by Year



STATES WITH AND WITHOUT DEATH PENALTY



◆ I recognize a strong counterargument that favors constitutionality. Why should we not leave the matter up to the people acting democratically through legislatures?

◆ The Constitution foresees a country that will make most important decisions democratically.

◆ Most nations that have abandoned the death penalty have done so through legislation.

◆ The answer is that the matters I have discussed are quintessentially judicial matters.

◆ Thus we are left with a judicial responsibility.

Recent Death Penalty Cases

◆ 2005 - *Roper v. Simmons* - the death penalty for children under 18 unconstitutional.

◆ 2010 - *Graham v. Florida* - a life sentence without parole unconstitutional for non-murder crimes.

◆ 2012 - *Miller v. Alabama* - "lifetime incarcerations without the possibility of parole" for children violates the Eighth Amendment.

Death Penalty Cases

◆ No grant of certiorari on constitutionality of Death Penalty.

◆ But *Montgomery v. Louisiana* and *Hurst v. Florida* raise serious questions about the nature of crime and punishment in America.

MONTGOMERY v. LOUISIANA

◆ Miller is retroactive because it "necessarily carries a significant risk that a defendant"—here, the vast majority of juvenile offenders—"faces a punishment that the law cannot impose upon him."

◆ Henry Montgomery is in his early 70s and a model prisoner.

Montgomery could affect 2000 prisoners



OCTOBER TERM, 2015
 SUPREME COURT OF THE UNITED STATES
 HURST v. FLORIDA
 CERTIORARI TO THE SUPREME COURT OF FLORIDA No. 14-7506
 Argued October 13, 2015—Decided January 19, 2016

◆ Issue = validity of Florida's "hybrid" capital sentencing scheme.

◆ 2000 - Timothy Hurst sentenced to death for murdering his co-worker while robbing Popeye's Restaurant.

◆ The jury voted 7-5 Hurst was eligible for the death penalty.

◆ Following Florida trial procedure, recommendation was sent to the judge, who affirmed the sentence.



◆ Florida Capital Sentencing:

◆ Sentencing juries gave advisory verdicts, which need not be unanimous, as to aggravating factors and punishment.

◆ Juries told their verdict is merely advisory.

◆ Notwithstanding this recommendation, the judge held a separate hearing and determines whether sufficient aggravating circumstances existed to justify imposing the death penalty.

◆ Certiorari granted to resolve whether Florida's capital sentencing scheme violates *Ring v. Arizona*.



◆ *Ring v. Arizona* (2002) = under Sixth Amendment the jury and not the judge determines the death penalty.

◆ The *Hurst* judge articulated the aggravating factors that made the defendant death eligible.

Held: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's recommendation is not enough."



HURST v. FLORIDA

◆ Puts in doubt the sentences of 390 Florida death row inmates.

All Death Sentences in Florida Between 2010 and 2015



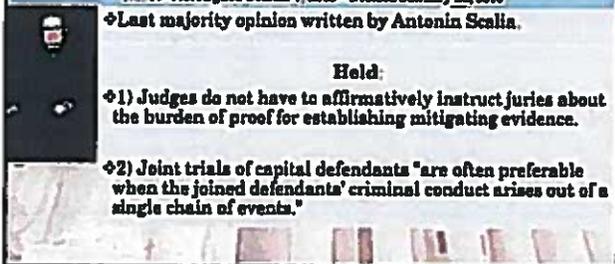
OCTOBER TERM, 2015
 SUPREME COURT OF THE UNITED STATES
KANSAS v. CARR
 CERTIORARI TO THE SUPREME COURT OF KANSAS
 No. 14-438. Argued October 7, 2015—Decided January 20, 2016

◆ Last majority opinion written by Antonin Scalia.

Held:

◆ 1) Judges do not have to affirmatively instruct juries about the burden of proof for establishing mitigating evidence.

◆ 2) Joint trials of capital defendants "are often preferable when the joined defendants' criminal conduct arises out of a single chain of events."



◆Reginald and Jonathan Carr jointly sentenced to death for the "Wichita Massacre" - rape, kidnapping, and murder of five people in Wichita, Kansas.



◆Kansas Supreme Court reversed the death sentences
 ◆Trial Court should affirmatively instruct that the defense need not prove mitigating circumstances beyond a reasonable doubt.
 ◆The Carrs should have been tried separately.



◆Trial courts need not inform jurors that "mitigating factors need not be beyond a reasonable doubt."
 ◆Because the jury instructions told jurors to "consider any mitigating factor ... jurors would not have misunderstood these instructions to prevent their consideration of constitutionally relevant evidence."
 ◆Also, given the evidence at trial, the joint trial of defendants "did not render the sentencing proceedings fundamentally unfair."

◆Dissent: The Supreme Court should not have reviewed these cases because Kansas did not violate any party's constitutional rights.
 ◆"I worry that cases like these prevent States from serving as necessary laboratories for experimenting with how best to guarantee defendants a fair trial."





◆Procedural issue case.
 ◆Not to the "heart of the death penalty."
 ◆The 8-1 vote was unexpected in light of Justice Ruth Bader Ginsburg and Justice Stephen Breyer's previous disapproval of capital punishment.

Federal Cases



New Federal Cases Are Appointed



SUPREME COURT OF THE UNITED STATES
OCASIO v. UNITED STATES
CERTIORARI TO THE FOURTH CIRCUIT
 No. 14-361, Decided May 2, 2015



Facts:

- ✦ Ocasio and other Baltimore police officers agreed with Majestic Auto Repair Shop to steer cars accident victims to the body shop for a kickback.



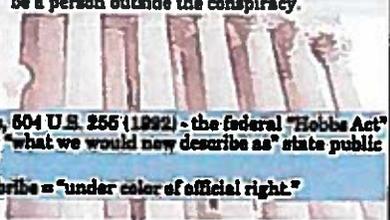
✦ Officers committed federal Hobbs Act extortion because they "affected commerce" by "obtaining property from another" (the body shop owners), "under color of official right" (that is, by virtue of their official positions as first responders to traffic accidents).

✦ **Key Fact:** Majestic a Victim



Issue:

- ✦ Ocasio argued he cannot be guilty of conspiring to commit extortion with Majestic because Majestic is a victim.
- ✦ The victim of a Hobbes Act conspiracy must be a person outside the conspiracy.



✦ *Evans v. United States*, 504 U.S. 255 (1992) - the federal "Hobbs Act" extortion statute reaches "what we would now describe as" state public officials "taking a bribe."

✦ A public official takes a bribe = "under color of official right."

Held: 5-3 majority

- ◆ A conspiracy to commit extortion can involve the victims of the extortion as members of the conspiracy.
- ◆ Ergo: You can be a victim and a conspirator at the same time under the Hobbs Act.
- ◆ Although conspirators have to be pursuing the same criminal objective, an individual conspirator need not agree to facilitate every element of the crime; the intent to agree that the substantive offense be committed is all that is necessary.

JUSTICE ALITO delivered the opinion of the Court.



◆ Evans wrongly conflated bribery with extortion.

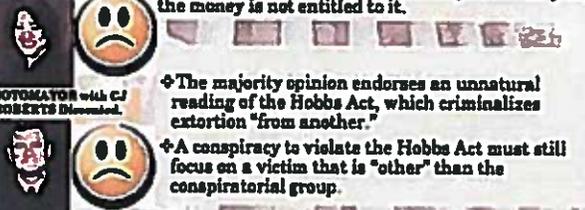
◆ Under the Hobbs Act definition of extortion, people cannot conspire to extort one of their own because all those involved would know that the person accepting the money is not entitled to it.

◆ The majority opinion endorses an unnatural reading of the Hobbs Act, which criminalizes extortion "from another."

◆ A conspiracy to violate the Hobbs Act must still focus on a victim that is "other" than the conspiratorial group.

THOMAS Dissented.

ROTMAN with **CJ ROBERTS** Dissented.



OCTOBER TERM, 2014
 SUPREME COURT OF THE UNITED STATES
JOHNSON v. UNITED STATES
 CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
 No. 13-47158. Argued November 5, 2014. Re argued April 20, 2015. Decided June 26, 2015.

Held:

- ◆ The "residual clause" of the Armed Career Criminal Act is unconstitutionally vague and violates due process.
- ◆ The Armed Career Criminal Act (ACCA) - part of the Comprehensive Crime Control Act of 1984.
- ◆ Tougher sentences in firearms cases on defendants who have three or more "violent" felony convictions.



OCTOBER TERM, 2014
 SUPREME COURT OF THE UNITED STATES
JOHNSON v. UNITED STATES
 CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
 No. 13-7128. Argued November 5, 2014. Reargued April 20, 2015. Decided June 25, 2015

◆ 18 U.S.C. § 924(a)(2)(B) defines a "violent felony" as "use of physical force against ... another," "is burglary, arson, or extortion...."

◆ The "residual clause"

◆ Or "otherwise involves conduct that presents a serious potential risk of physical injury to another."



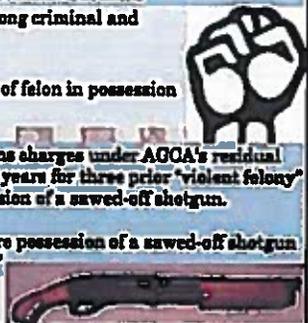
JOHNSON v. UNITED STATES

◆ Samuel James Johnson was a lifelong criminal and white supremacist.

◆ 2012 - Indicted on multiple counts of felon in possession of firearms.

◆ Johnson plead guilty to the weapons charges under AGCA's residual clause to a statutory minimum of 15 years for three prior "violent felony" convictions, one of which was possession of a sawed-off shotgun.

◆ Johnson's lawyers argued that mere possession of a sawed-off shotgun does not qualify as a "violent felony."



JOHNSON v. UNITED STATES

Held:

◆ The residual clause violates the 5th Amendment.

◆ Scalia described the statute as a "failed enterprise" that invited "arbitrary enforcement."

◆ "A criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes" violates due process.

• Welch v. United States, 15-6418 (argued Mar 30, 2016).

• Johnson is retroactive.

SUPREME COURT OF THE UNITED STATES
HENDERSON v. UNITED STATES
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
No. 13-1487 Argued February 24, 2015 Decided May 14, 2015

Who Gets the Guns?

- ◆ Issue: Does 18 USC §922(g) bar a third party from receiving a felon's guns?
- ◆ Convicted former Border Patrol agent could no longer legally possess his 19 firearms.
- ◆ Henderson wanted them to go to his friend to sell or to his wife.
- ◆ The government refused.



◆ Hold: A court may seek assurances the transferee will not give the felon possession, but may not generally prohibit the owner from transferring the weapons.

SUPREME COURT OF THE UNITED STATES
ELONIS v. UNITED STATES
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 13-881 Argued December 11, 2014 Decided June 23, 2015



- ◆ 18 U.S.C. § 875(c) makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another."

Holding:

- ◆ Jury instruction requiring only negligence in communicating a threat, is insufficient to support a conviction under 18 U.S.C. § 875(c).

SUPREME COURT OF THE UNITED STATES
LOCKHART v. UNITED STATES
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
No. 14-633 Argued November 3, 2015 Decided March 1, 2016

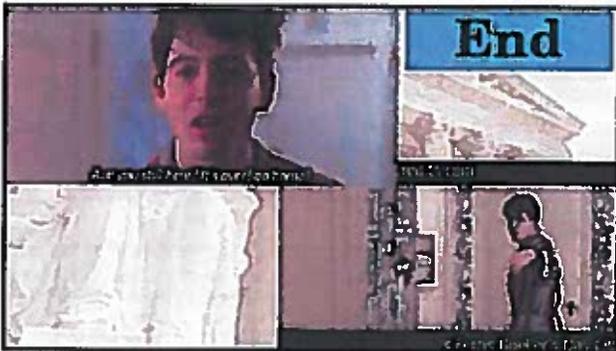
- ◆ Under 18 USC §2252(b)(2) a conviction for possessing child pornography gets a mandatory 10 year sentence if he has a prior sex abuse conviction.
- ◆ Lockhart had a prior for sexual abuse of his 53-year-old girlfriend.
- ◆ He appealed claiming the qualifier "involving a minor or ward" applies to the whole series, making his prior conviction to not trigger the sentence enhancement.

Held: The phrase only modifies the final item in the series, upholding the 10 year minimum sentence imposed on Lockhart.



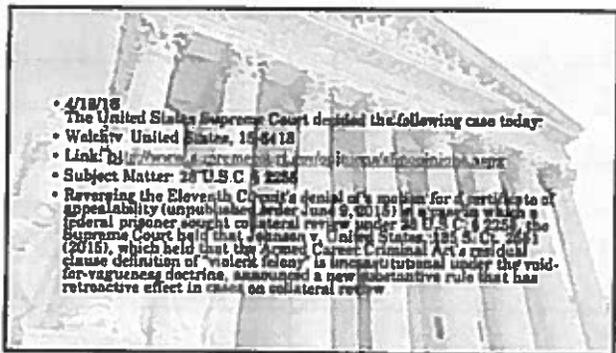
Taylor v. United States, No. 14-6166 (Argued February 23, 2016)

- ◆ The nexus between homegrown marijuana and federal jurisdiction over interstate commerce.
- ◆ The outcome here could limit the federal government's jurisdiction to prosecute defendants accused of a drug-related crime under the Hobbs Act, 18 U.S.C. §1961(a).

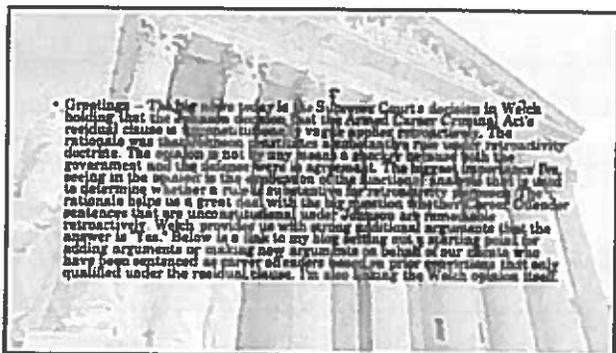


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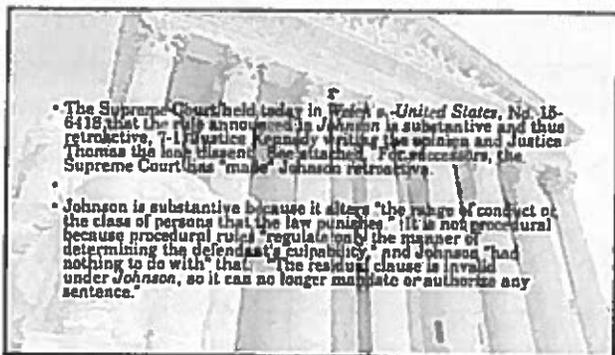




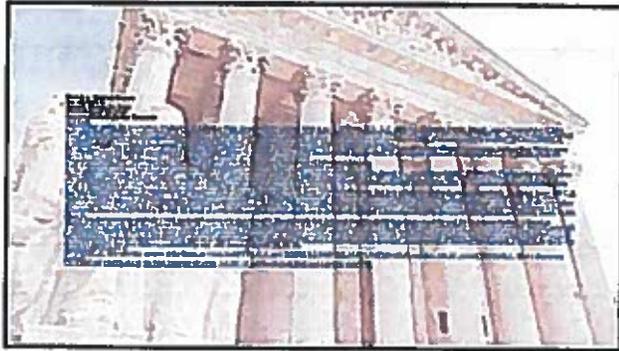
- 4/18/16
- The United States Supreme Court decided the following case today:
- *Walsh v. United States*, 15-8418
- Link: <http://www.courts.michigan.gov/judicialbranch/0,4570,7-113,00.html>
- Subject Matter: 28 U.S.C. § 2254
- Reversing the Eleventh Circuit's denial of a motion for a certificate of appealability (unpublished order June 9, 2015) in a case in which a federal prisoner sought collateral review under 28 U.S.C. § 2254, the Supreme Court held that *Johnson v. United States*, 135 S. Ct. 2031 (2015), which held that the Armed Career Criminal Act's residual clause definition of "violent felony" is unconstitutional under the void-for-vagueness doctrine, announced a new substantive rule that has retroactive effect in cases on collateral review.



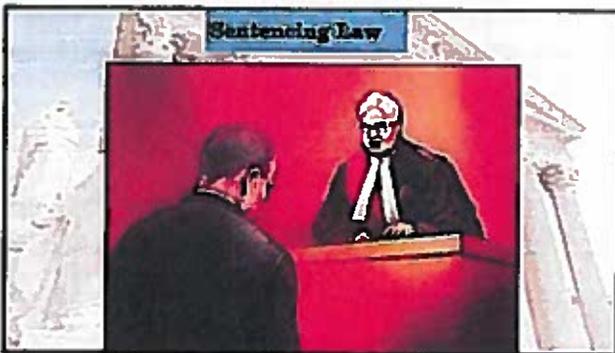
- *Crutcher* – The big news today is the Supreme Court decision in *Walsh* holding that the *Johnson* decision that the Armed Career Criminal Act's residual clause is unconstitutional, *Walsh* applied retroactively. The rationale was that *Johnson* establishes a substantive rule under retroactivity doctrine. The opinion is 5-4 by any means a pretty close call with the government and the defense were in agreement. The biggest importance in seeing in the opinion is the application of the functional analysis that is used to determine whether a rule is substantive for retroactivity purposes. The rationale helps us a great deal with the big question whether "great" offender sentences that are unconstitutional, under *Johnson* are retroactive retroactively. *Walsh* provides us with saying additional arguments that the answer is "yes." Below is a link to my blog setting out a starting point for adding arguments or making new arguments on behalf of our clients who have been sentenced as "great" offenders based on prior convictions that only qualified under the residual clause. I'm also linking the *Walsh* opinion itself.



- The Supreme Court held today in *Walsh v. United States*, No. 15-8418 that the rule announced in *Johnson* is substantive and thus retroactive. 7-1 Justice Kennedy writes the opinion and Justice Thomas the lone dissenter. See attached PDF. In essence, the Supreme Court has "made" *Johnson* retroactive.
- *Johnson* is substantive because it alters "the range of conduct of the class of persons that the law punishes." It is not procedural because procedural rules "regulate only the manner of determining the defendant's culpability," and *Johnson* "had nothing to do with" that. "The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence."











SUPREME COURT OF THE UNITED STATES
WARGER v. SHAUERS
 CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
 No. 13-817 Decided December 8, 2014

- Negligence case -- verdict for Shauers
- A juror claimed that Regina Whipple, the jury foreperson, said during deliberations that her daughter had been at fault in a fatal motor vehicle accident and that a lawsuit would have ruined her daughter's life
- Warger moved for a new trial arguing Whipple deliberately lied during *voir dire*
- The District Court denied under Federal Rule of Evidence 606(b)



SUPREME COURT OF THE UNITED STATES
WARGER v. SHAUERS

♦ Rule 606(b) During an Inquiry into the Validity of a Verdict or Indictment.

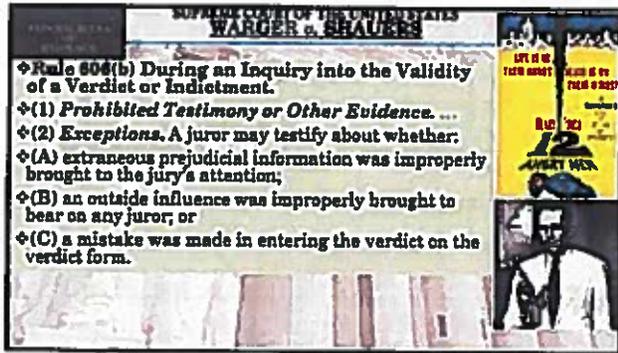
♦ (1) Prohibited Testimony or Other Evidence. ...

♦ (2) Exceptions. A juror may testify about whether:

♦ (A) extraneous prejudicial information was improperly brought to the jury's attention;

♦ (B) an outside influence was improperly brought to bear on any juror; or

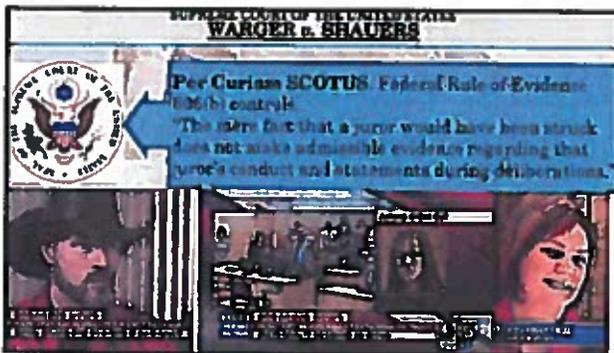
♦ (C) a mistake was made in entering the verdict on the verdict form.



SUPREME COURT OF THE UNITED STATES
WARGER v. SHAUERS

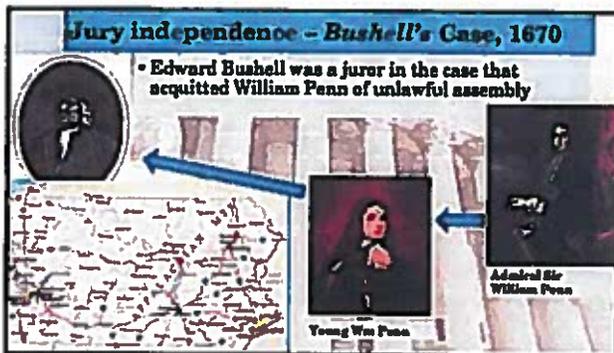
Per Curiam SCOTUS: Federal Rule of Evidence 606(b) control.

The mere fact that a juror would have been struck does not make admissible evidence regarding that juror's conduct and statements during deliberations.



Jury independence - Bushell's Case, 1670

• Edward Bushell was a juror in the case that acquitted William Penn of unlawful assembly



Jury independence - Bushell's Case, 1670

The jury "shall not be dismissed until we have a verdict that the court will accept."

- Ordered "no food, drink, fire, tobacco or a chamber pot" until they reached an acceptable verdict.
- Jury refused
- Judge fined them
- Bushell refused to pay

"The Verdict of a Jury and Evidence of a Witness are very different things ... A witness swears but to what he hath heard or seen ... but a jury-man swears to what he can infer and conclude from the testimony of such witnesses by the act and force of his understanding"

Jury independence - Original Intent = Nullification

"It would be an absurdity for jurors to be required to accept the judges' view of the law against their own opinion, judgement, and conscience."

"[I]t is usual for the jurors to decide the fact, and to refer the law ... to the judges. But this division of the subject lies with their discretion only ... The jury [may] undertake to decide both law and fact."

SUPREME COURT OF THE UNITED STATES
GLEBE v. FROST
 CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
 No. 14-84. Decided November 17, 2014

- ◆ Joshua Frost helped two associates commit armed robberies
- ◆ Trial = Frost testified and claimed duress
- ◆ Frost's lawyer wanted to argue both:
 1. State failed burden of proof, and
 2. Frost acted under duress
- ◆ The trial judge insisted the defense choose
- ◆ Defense argued duress

◆ Frost convicted of six counts of robbery, one count of attempted robbery, one count of burglary, and two counts of assault