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Court Review

Volume 42, Issue 2

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
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EDITOR'S NOTE

Our lead article will be of interest to all judges who made child-custody decisions as part of their work. Psychologist Ira Turkat notes a seldom-discussed but critical point about child-custody evaluations conducted by psychologists—there is no scientific data demonstrating the validity of these reports. Given that fact, he discusses questions judges should ask and the framework within which these reports should be viewed. He also notes a recent Florida Court of Appeals case, *Higginbotham v. Higginbotham* (reprinted at page 9), in which the court noted that a court-ordered psychological evaluation had cost \$20,000, an amount equal to the parties' net worth, in a case in which the appellate court considered the issues "neither complex nor voluminous." The Florida appellate court is right to point out that judges should carefully consider the costs attendant to these investigations. Dr. Turkat's article provides help in considering whether the benefits are likely to exceed the costs for a given case.

We next have Professor Whitebread's annual review of the civil decisions of the past Term of the United States Supreme Court. The final year of the Rehnquist Court was perhaps most noteworthy on the civil side for the opinion upholding the use of eminent domain for business-development purposes. There are other decisions of note as well; many judges find Judge Whitebread's overviews helpful to make sure that new cases have not been missed as each year rolls by.

We round out the issue with two student pieces. First, we have one of the winning papers in our law-student essay contest. In it, Ryan Farley criticizes a recent Ninth Circuit decision dealing with application of the Fourth Amendment in searches of individuals entering the United States at its borders. Second, we have a review by one of our student editors, Angela Brouse, of the book, *Courtroom 302*, which goes behind the scenes of a busy Chicago criminal court for the year 1998.

I believe that the addition of our student editors will help us to continue to have excellent contents in *Court Review* while also getting us back on schedule. We are in the first year of having regular student editors and have selected editors for the coming year as well, with some continuity in the process. We are in catch-up mode, which should be good for you. In the next 12 months, you will receive at least five issues, rather than the normal four. And we have authors and articles in the pipeline that I am sure will be of interest. Please let me know (sleben@ix.netcom.com) if there are topics or authors that you'd like to see in *Court Review*. Please remember, too, that letters to the editor reacting to what you've read or thoughts you'd like to address to other judges are welcome.—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 39. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review*'s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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Photo credit: Mary Watkins (marywatkinsphoto@earthlink.net). The cover photo is of the Surrogate's Courthouse in New York City, built from 1899 to 1907 at a cost of more than \$7 million. The Surrogate's Courthouse, a designated New York City landmark, is located at the corner of Chambers and Centre Streets in downtown Manhattan. For more information about the building and its history, go to http://www.nyc.gov/html/dcas/html/resources/man_surrogatecourt.shtml.

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President's Column

Michael Cicconetti

It seems as if our Annual Conference in Anchorage took place about a month ago, but it has been many months now since we returned home and my job as president of AJA began. Time seems to disappear and days become a blur when balancing the bench, AJA, and family.

Your officers and Executive Committee have totally immersed themselves in revitalizing the AJA beginning with plans for a great educational and fun-filled annual conference in New Orleans in October. In January, the Executive Committee met for two days discussing our priorities and goals for this year and the future of our organization.

Membership, as always, has been at the top of the discussion list for as long as I have been a member of AJA. Last year, the leadership and Board of Governors authorized the funding of a marketing campaign recently launched by a company called Marketing General. This professional marketing group is now conducting a targeted campaign for new members throughout the country.

Additionally, the Executive Committee, in our own way of improving public relations, authorized extending complimentary memberships to all presidents and vice presidents (or presidents-elect) of all statewide judicial organizations. In introductory correspondence with them, we are encouraging them to attend our annual conference in New Orleans this year. It is our hope they will take a meaningful experience back to their home organizations and promote the AJA.

One objective our organization has somewhat ignored has been the aggressive approach to sponsorships and fundraising. It is my firm belief that if this organization is to expand and flourish, it is critical to obtain outside funding. We, as judges, face an obvious handicap as judicial ethics rules prohibit us from soliciting any contributions or funding. This is where I need your help and suggestions. Although some corporate monies could be used for sponsoring social events, coffee breaks, or meals, this most likely would be advertising dollars from a corporation familiar to judges. Any substantial amounts of money would be and should be through the American Judges Foundation, a 501(C)(3) corporation. The AJF could then contribute those monies to the educational programs of AJA. This would have the affect of freeing up the registration monies for meals and social events rather than underwriting the cost of our educational programs.

How do we do this? I have researched and investigated outside fundraisers and found there are several specialties in this profession. There are general fundraisers, those who seek sponsors for specific events or projects, while others specialize in philanthropic giving or grant money. The costs of their services are either on a project basis with a flat fee or on a per-diem basis with daily expenses. Per-diem rates generally range from \$900

to \$2,000 per day and most of these fundraisers will consult with your organization and work with or train the volunteers of your organization and guide them through the fundraising process. Either way, it is expensive. I have also discovered most fundraising professional associations consider fundraising, on a contingency basis, to be unethical and require their members to sign a pledge not to engage in this form of compensation. The question becomes, do we risk spending more money with the possibility of securing money, or do we place this burden on the officers and board members of the American Judges Foundation with their thoughts as to a "game plan."

Recent times have brought unwarranted criticism to members of the judiciary throughout this country. It is time to begin our public relations work with our citizens at an earlier age. It is incumbent upon us to introduce the children of this country to the judicial system with the hope that they will understand and respect the role of judges as they grow older. With this thought in mind, we are planning a type of community outreach program at our annual conference in New Orleans. I am currently arranging to have an elementary class of students brought to our conference site hotel for an instructional class. During this time the elementary students would be taught by one of our colleagues through a demonstration of justice in action. Judges attending the conference would observe, with the idea to train judges and for them to be more comfortable in talking to elementary students in their respective communities.

Following the morning session, the participating judges will then go into the classrooms through the Orleans Parish School District and apply and use the lesson plan of the earlier morning session with the students. We are looking at this project as being beneficial to the judges on a long-term basis but also as a public relations opportunity for the American Judges Association.

Judge Mary Celeste has put in a tremendous effort in putting together an educational program that will offer something for everyone. She has worked extremely long hours and deserves all of our thanks.

Judges Jim McKay, David Gorbaty, John Conery, and Oliver Deleray are planning what sounds to be a spectacular social program. In spite of their personal suffering and inconvenience through Katrina, these judges are steadfast in their desire to show us the true New Orleans style. Of utmost importance is the attendance of our Board of Governors at our midyear meeting in Coeur d'Alene, Idaho, May 18-20, 2006. Some of the issues presented in this article and other important issues for our organization require their input and direction. If there was ever a time of opportunity for AJA, it begins now.

I look forward to seeing everyone in May and in October.





Courtroom 302:

How America's Criminal Justice System Really Works

Angela M. Brouse

STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE*. Alfred A. Knopf, 2005. 404 pp. \$25.00.

1998 was to be a big year for Courtroom 302 and the Cook County Criminal Courthouse—the biggest and busiest felony courthouse in the nation. Cook County alone would send nearly 16,000 convicted criminals to prison. Courtroom 302 and Judge Daniel Locallo would hear the controversial Bridgeport trial, known as a “heater” case for attracting publicity. The case revolved around three young white men, with supposed mafia ties, charged with the brutal beating of a 13-year-old black boy—the alleged motive being that the black boy was not welcome in the predominately white neighborhood. Due to the violent and racial undertones in the Bridgeport crime, Judge Locallo faced pressure from Chicago’s mayor and other influential figures among the community, such as Jesse Jackson. “Heater” cases are the exception to the norm, however. The bulk of the year’s cases would be disposed of quickly, with little thought or notice. The great majority of defendants who appeared in Courtroom 302 were African-American drug offenders, many already well acquainted with the Cook County Criminal Courthouse. Amidst the daily grind of the courtroom, 1998 also was a reelection year for Judge Locallo.

Steve Bogira’s depiction of a year in the life of Courtroom 302 is unique in that the reader dives into the minds of lawyers, jurors, deputies, defendants, families of the defendants and victims, and most importantly, Judge Locallo. Bogira provides impartial illustrations of the courtroom stories and manages to establish a significant amount of trust from those he interviews, to the point that he uncovers truths that never arose during attorney-client interviews, or even during trial. At times it is shocking to learn the reasoning played out in the minds of these courtroom actors, especially those enlisted with serving justice, as many willingly accept the “injustices” of the system.

The readers’ first introduction to the Cook County Criminal Courthouse is the vivid picture of alleged offenders being shuffled into the back of the courthouse like cattle, and herded into the lockups. Bogira thoroughly explains the process of bond hearings—spending more time on his explanation than actual defendants are given at their own hearings. The state’s attorneys and public defenders have 15 seconds each to give the

judge presiding over the bond hearing the rundown on each alleged offender. As many as 77 hearings are conducted in as few as 62 minutes.

While the stories of Courtroom 302 as Bogira tells them are absorbing, they are disturbing in that they rip away feelings of security embedded in America’s common belief about the criminal justice system. Instead, we are reminded of various factors that serve to undermine justice. Throughout the courtroom tales, Bogira weaves a picture of a justice system in which the ultimate goal is to dispose of cases, rather than serve justice. Bogira retells the history of police cover-ups and coerced confessions in Cook County. We are introduced to the world of plea bargaining and the “trial tax.” Several of the courtroom stories hinge on constitutional violations of the defendants’ rights. Bogira does an excellent job of framing the issues found in

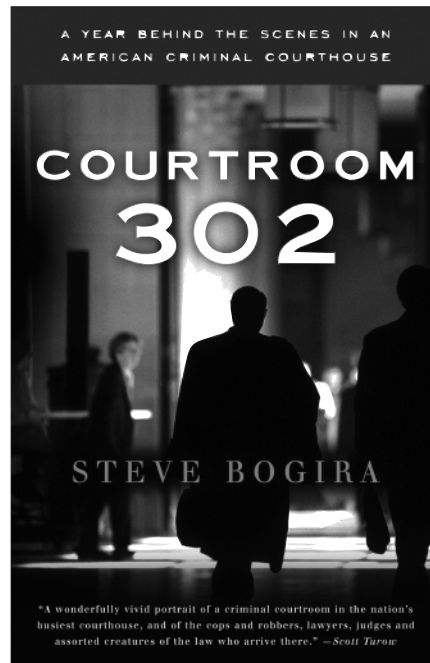
Courtroom 302 and Cook County as small examples of more prevalent problems in the nation’s criminal justice system.

Bogira thoroughly lays the scenario of Cook County in the 1980s when Lieutenant Jon Burge, commanding officer of the violent crimes unit, and his men carried out years of “systematic torture” of criminal suspects to coerce confessions. Years after this wrong was uncovered and those involved were prosecuted, judges like Locallo now rarely believe claims of torture from defendants.

Leroy Orange was sentenced to death in 1985. He is now before Judge Locallo in Courtroom 302 asking for a new trial, claiming he was brutally tortured by police officials until he finally confessed to multiple murders. Orange describes being suffocated with plastic bags and given electroshocks on multiple occasions. After multiple defendants claimed consistent

methods of such torture, an investigation team uncovered that at least 50 criminal suspects had indeed been tortured between 1973 and 1986. Although Orange’s allegations of police abuse are consistent with findings of the investigation and his lawyer presents medical testimony of marks found on Orange while he was imprisoned, Judge Locallo denies his motion. The judge is consistent in his rulings on motions to suppress a confession by a defendant alleging coercion—out of at least 100 similar cases, Locallo has ruled in every single instance that the defendant confessed voluntarily.

Bogira conveys a common theme among the criminal justice system known as the “sliding-scale” effect when judges rule on motions to suppress confessions based on alleged police con-



duct. Essentially, the bigger the case, the more likely police are to lie. Conversely, judges are less likely to challenge an officer's actions and suppress evidence in "heater" cases—even if a judge suspects the officer is lying. Bogira states the general rule among criminal courts in Chicago is "the hotter the heater, the less likely the judge will protect the defendant's constitutional rights." Bogira reasons that judges do not suppress evidence in "heater" cases because of personal revulsion of a violent crime or fear of adverse publicity.

Bogira demonstrates many examples of the plea-bargaining process that is so common in Courtroom 302. It appears that the concept of rehabilitation is completely lost within this system. The proper sentence is based on whatever both sides can agree upon.

Although defendants have a constitutional right to a trial by a jury of their peers, common practice reveals that is not always the case in Courtroom 302. Bogira outlines judges' use of the "trial tax," where a defendant pays in the form of a stiffer sentence for choosing trial over a plea bargain if he is eventually unsuccessful at trial. A guilty plea can be wrapped up in approximately 20 minutes, where a jury trial usually takes anywhere from two days to a week, along with posttrial motions and a sentencing hearing if the jury convicts. The markup is the highest when the defendant chooses a jury trial over a bench trial. This is merely one example given by Bogira in which a constitutional right is impeded in the interest of judicial efficiency.

Bogira portrays Judge Locallo as a likable character. He is compassionate when allowing contact visits among defendants and their families, and seems to be well liked among juries. There are instances, however, where even the judge is caught up in the injustices of the criminal system. Judge Locallo often ponders how judgments and sentences given in the courtroom will affect the upcoming election. Locallo seems to be popular among defense lawyers, although prosecutors consider the judge to be soft in sentencing. They claim it is common knowledge that Locallo has his focus set on the appellate court and he needs to please the defense bar to meet this goal.

During one of Bogira's conversations with Judge Locallo, he states that the 30 trial courtrooms at the 26th Street courthouse "are like 30 different countries." The sentencing standards vary greatly from courtroom to courtroom. Locallo has given probation to defendants who likely would have received double-digit prison terms from other judges. When considering the sentence of a convicted defendant, Locallo accounts for

the background and status of the victim, but not the offender. Bogira emphasizes that luck is the deciding factor in the sentencing process; a defendant's fate may hinge on a judge's mood, the jury pool, or whether a lawyer is fully prepared and in top form.

The reader also is sent back in time to Locallo's days as a prosecutor and his most significant case—the prosecution of George Jones. The claim was based on a home invasion that led to the rape and murder of a twelve-year-old girl. Jones was cleared of all charges when a "frightening abuse of power by members of the Chicago police force" was uncovered. Street detectives made a habit of utilizing a double-filing system when collecting evidence in relation to a crime. Somehow documents included in street files, usually containing mitigating evidence in favor of the defendant, never made their way into the office files handed over to state prosecutors. Locallo claimed to have no knowledge of the cover-up and was not found liable, although many of the other state actors were convicted. To this day he believes Jones was guilty, and that by suppressing evidence, the police were merely doing what was customary when it was believed a defendant was guilty. This experience as a prosecutor may be relevant to Judge Locallo's unwillingness to find police corruption when defendants claim a confession was involuntarily coerced from them.

Although many shortcomings of the American criminal justice system are evident through the personal accounts of Courtroom 302, the reader is often reminded that certain "injustices" are the only way to deal with overcrowded courtrooms and prisons. Justice has evolved to cope with the world's highest rate of imprisonment, mostly due to the war on drugs. For readers not familiar with the system, Courtroom 302 may come as a surprise because this is not how most Americans believe their criminal justice system works, especially with the current popularity of television shows where the evidence and the state are always right. Those working as part of the system will find the book confirms much that they already know, but may also offer much they do not know. Bogira's underlying themes serve as a good reminder that our system is far from perfect and justice often falls short.

Angela M. Brouse, a second-year law student at the University of Missouri–Kansas City School of Law, is a student editor for Court Review.

COEUR D'ALENE, IDAHO MAY 18-20, 2006

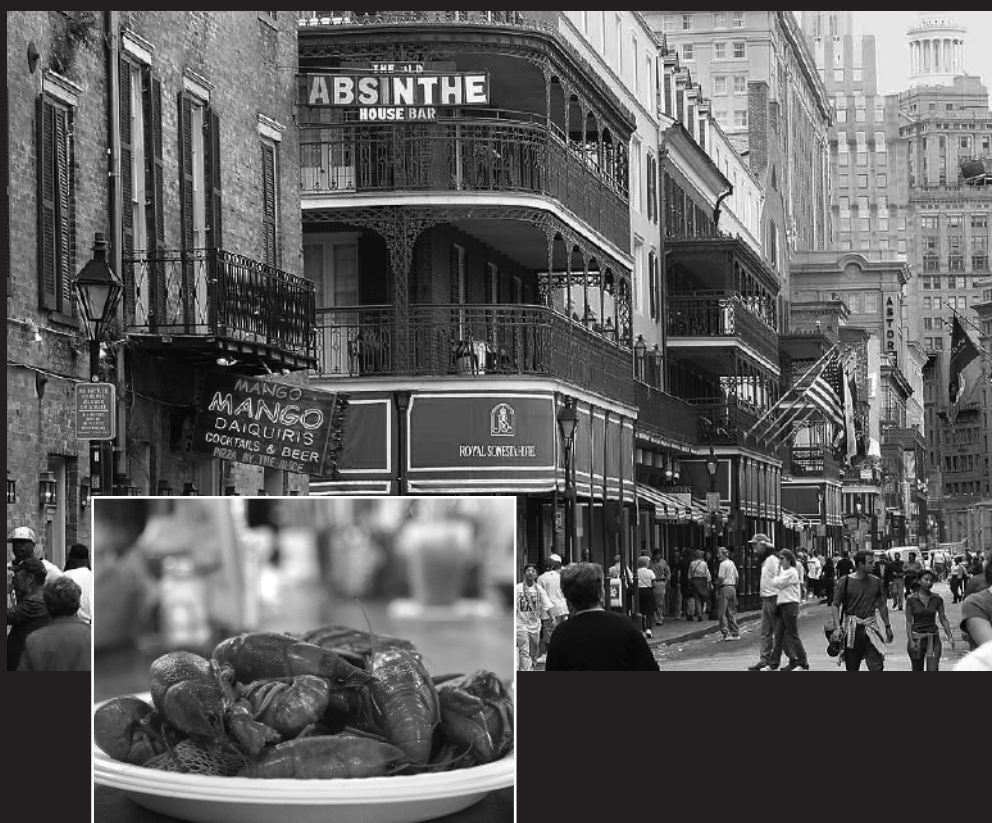
Coeur d'Alene (pronounced core-da-lane), 31 miles east of Spokane, Washington, is a lakefront resort community in one of the prettiest settings in the Western United States—overlooking Lake Coeur d'Alene and flanked by the foothills of the Bitterroot Mountains. Our 2006 midyear conference will be at the Coeur d'Alene Resort, called America's top mainland resort by Conde Nast Traveler and one of America's top 10 golf resorts by Golf Digest magazine. AJA's midyear meeting usually includes one or two continuing judicial education programs, plus business meetings of the AJA Board of Governors.

Courtesy of the Coeur d'Alene Resort



NEW ORLEANS, LOUISIANA OCTOBER 8-13, 2006

AJA will return to New Orleans, site of some of our most successful annual conferences, for the 2006 annual conference. We look forward to renewing acquaintance with many of our Louisiana members who—along with their courts—have been displaced. AJA's annual conference usually includes 12 to 15 hours of continuing judicial education, business meetings of the AJA Board of Governors and General Assembly (all members), cultural programs, entertainment, and free time to explore.



On the Limitations of Child-Custody Evaluations

Ira Daniel Turkat

Child-custody litigation is typically hostile, stressful, and expensive. For thousands of years, society has wrestled with the issue of properly assigning custody of children when parents fight over it. In King Solomon's court, there were no licensed psychologists to extensively interview families, apply psychological tests, and offer recommendations. Today, it is commonplace in our society to have psychologists evaluate families litigating over custody.

In the United States, approximately 100,000 custody battles take place each year.¹ However, psychological evaluations are not ordered in all contested custody cases. By and large, a custody investigation is ordered when it is unclear who should be designated as the primary residential parent² and when there are resources available to pay for the examination.

Custody evaluations can be pricey. Results of a nationwide survey of psychologists in 2001 in the United States revealed that the average charge for a custody evaluation was \$3,335, topping out at \$15,000.³ While some jurisdictions provide programs that offer custody investigations at reduced cost,⁴ fees exceeding the nationwide survey maximum have been reported. In 2003, the Florida Court of Appeal noted that one psychologist charged \$20,000—an amount equal to the parties' entire net worth, and questioned how it could be in a child's best interest for the family's resources to be depleted by fees of this magnitude.⁵ There are no statistics available in the psychological literature that measure the degree to which custody evaluations influence judicial decisions, but there is little question that these investigations affect the lives of those so evaluated.⁶

In light of the impact of custody examinations on families litigating over such matters, it is important to understand how well these investigations perform. Are families getting their money's worth? Do the recommendations stemming from these evaluations represent the best possible custodial arrangements? These are the fundamental questions underlying an order for a psychological evaluation of a family litigating over custody.

To answer these questions properly, one should rely on

sound scientific data. More specifically, well-conducted scientific research should tell us: (1) how a child's best interest will be served by being placed primarily with one parent over the other; and (2) how to identify the parent who can best serve that interest. Custody recommendations to the court should flow from such research.

SCIENTIFIC EVALUATION OF CUSTODY RECOMMENDATIONS

More than a decade ago, in 1993, I reviewed the state of scientific data supporting custody-evaluation reports and found that the lack of good data caused clear problems for judges:

Currently, there is no clear-cut body of scientific data about some of the basic questions that underlie a custody recommendation. For example, there is an absence of strong scientific evidence regarding precise parenting characteristics that guarantee "good parenting." Similarly, we lack sound research data regarding the effects on the future of a child who's been placed with the "wrong" parent. Given the absence of well-established scientific data on these issues, this leaves the mental health professional with tremendous leeway in regard to how he or she decides to go about doing a custody evaluation and in the interpretation of the data collected for that investigation. As such, what one mental health expert might see as critical, another similarly trained professional might see as trivial. This leaves the court in a terrible quandary—one of which the court, at times, may not even be aware.⁷

One year later, the American Psychological Association (APA) issued guidelines for conducting custody evaluations.⁸ The APA guidelines are not based on scientific evidence and are limited in nature. The APA guidelines offer non-mandatory recommendations⁹ about the psychologist's role in conducting custody evaluations, such as maintaining an impartial

Footnotes

1. Ira Daniel Turkat, *Custody Battle Burnout*, 28 AM. J. FAM. THERAPY 201 (2000).
2. Thus, this article focuses only on cases of this kind and not "slam-dunk" cases (e.g., where one parent has repeatedly and recently sexually abused a child in public whereas the other parent has no such history, is stable, and loving toward the child).
3. James N. Bow & Francella A. Quinnell, *Psychologists' Current Practices and Procedures in Child Custody Evaluations Five Years After American Psychological Association Guidelines*, 32 PROF. PSYCHOL. 261 (2001).
4. Leah S. Horvath, T.K. Logan & Robert Walker, *Child Custody Cases: A Content Analysis of Evaluations in Practice*, 33 PROF. PSYCHOL. 557 (2002).
5. *Higginbotham v. Higginbotham*, 857 So. 2d 341, 342 (Fla. App. 2003). See also *Hastings v. Rigbee*, 875 So. 2d 772, 778 n.1 (Fla. App. 2004) (urging careful consideration of costs, such as parenting coordinators, as compared to income of parties before such resources are used).
6. Lyn R. Greenberg & Jonathan W. Gould, *The Treating Expert: A Hybrid Role with Firm Boundaries*, 32 PROF. PSYCHOL. 469 (2001).
7. Ira Daniel Turkat, *Questioning the Mental Health Expert's Custody Report*, 7 AM. J. FAM. L. 175 (1993).
8. American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOL. 677 (1994).
9. In some states (e.g., California), however, the licensing board requires that psychologists adhere to APA guidelines.

stance, keeping the child's best interest paramount, and obtaining informed consent. The guidelines do not specify what interview format to follow, what tests to administer, or what particular family data should be generated in order to lead to a particular custodial recommendation.

In 2000, a review of the psychological literature on custody evaluations revealed that the scientific basis for these investigations remained highly deficient, leading the reviewers to a conclusion of significant concern about the usefulness of these evaluations:

One of the primary problems with child custody evaluations is that the assessment of a child's best interest necessarily involves a future prediction by a psychologist. A psychologist must somehow forecast how a particular child is likely to be psychologically adjusted several years postdivorce on the basis of a myriad of complex factors and interactions. It is well-noted that psychologists as a group are particularly inaccurate in making future behavioral predictions and may even be more inaccurate than lay persons are.¹⁰

More than a decade has passed since the APA guidelines were issued, yet current research indicates that scientifically validated tools to assess parenting competency are still not available.¹¹ If custody evaluations by psychologists are not scientifically validated, what then is the court getting when it orders examinations of this kind to take place? This article sees to provide judges with an answer to this critical question.

CUSTODY EVALUATION COMPONENTS

When a psychologist conducts a child-custody investigation, the tasks executed typically are:

- Interviewing key litigation participants;
- Administering psychological tests;
- Conducting observations of the parents and offspring;
- Conceptualizing the results of 1-3; and
- Making recommendations to the court.

Interviewing. Psychologists have yet to agree upon what variables should be evaluated in a custody investigation;¹² thus, there is no scientifically accepted interview format for conducting a custody evaluation. The design of the interviews will vary across evaluators and, quite likely, the quality of these interviews will vary as well. At the present time, *it is up to the evaluator to choose what questions will be asked, not the scientific literature.* In the absence of scientific validity, there is no

David Higginbotham v. Marianne Higginbotham n/k/a Marianne Vacchio

Florida Court of Appeals
857 So. 2d 341
Opinion filed October 17, 2003

We affirm the decision of the trial court in this matter but write on areas that otherwise cause us concern.

Dissolution of marriage cases are fraught with anxiety, emotion, and uncertainty. This case involves a seven-year marriage with three minor children. The issues were neither complex nor voluminous.

This court has previously expressed concern about parties spending limited resources that are otherwise needed for the welfare of the children. See *Wrona v. Wrona*, 592 So. 2d 694 (Fla. App. 1991). Here, the trial court signed a stipulated order appointing a licensed psychologist to perform a parenting assessment The psychologist selected was from Manatee County. The Husband's gross monthly income was \$5,446 including overtime, and the Wife's gross monthly income was \$1,560. The assets of the parties were modest. The cost of the twenty-nine-page parenting assessment was \$ 20,000. Scant mention was made of the assessment in the amended final judgment.

If a judicial system is trying to reach a child placement decision in the best interest of the child, it is difficult to grasp how it is in the best interest of the child to deplete the resources of the family to this extent. The concept should be to devise a more cost-effective way of doing a parenting assessment or fashion a court order that would set a financial cap on the amount to be expended, with appropriate directions to the party performing the assessment. The expert, without guidance from the court, may feel compelled to perform an array of tests not otherwise necessary. In fact, the parenting assessment in question delineated that fourteen psychological tests were performed regarding the parents and seven psychological tests were performed regarding two of the parties' three children.

The cost of the parenting assessment here was 24% of the parties' combined gross annual income and 100% of the parties' net worth as reflected on the Husband's financial affidavit.

Affirmed.

10. Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL. & L. 866 (2000).

11. Corina Benjet, Sandra T. Azar & Regina Kuersten-Hogan, *Evaluating the Parental Fitness of Psychiatrically Diagnosed Individuals: Advocating a Functional-Contextual Analysis of Parenting*, 17 J. FAM. PSYCHOL. 238 (2003).

12. Barbara Jameson, Marion F. Ehrenberg & Michael A. Hunter, *Psychologists' Ratings of the Best-Interests-of-the-Child Custody and Access Criterion: A Family Systems Assessment Model*, 28 PROF. PSYCHOL. 253 (1997).

objective way to know whether the interviews in any particular case are designed well or poorly, executed with skill or error, and/or contribute to or detract from the best custodial arrangement being ordered by the court.

Psychological testing. Since there is no scientifically accepted protocol for psychological testing of custody litigation participants,¹³ the assessment instruments chosen for a custody evaluation will depend ultimately on the individual preferences of the psychologist. In the absence of scientific evidence to guide custody examinations, a family that is evaluated by psychologist A may receive a very different evaluation than if seen by psychologist B or C. Where psychologist A may choose to use tests D, E, and F routinely, psychologist B may prefer tests G, H, I, and J, while psychologist C may not adopt any standard testing regimen. There are more than 2,000 psychological tests available commercially to psychologists.¹⁴ While judges may recognize the names of popular tests,¹⁵ such as the MMPI¹⁶ or Rorschach, it would be erroneous to assume that these psychological assessment instruments are scientifically validated for performing custody evaluations: there simply is no scientific evidence that these tests identify the “right” parent in custody litigation.

Observations. It would seem intuitive that to make predictions about how parents and children will behave with each other in the future, one would need to observe their current interactions. With no scientific-research base to determine whether such observations are necessary and, if so, how they should be conducted, it should come as no surprise that psychologists differ among themselves in how they conduct such observations.¹⁷ Whether each parent should be viewed with each child once, twice, or not at all, and, if seen, under what conditions (e.g., performing a difficult task together, playing a game together, discussing a particular topic), has yet to be established by a body of systematic psychological research.

Conceptualization of data. Because there is no consensual scientific guidance for interpreting the data collected during a custody evaluation, the appointed evaluator has tremendous discretion in determining what information to focus on or gloss over, assign weights of importance, or disregard completely. This leaves the psychologist with considerable power accompanied by virtually no oversight. While the evaluator may be subject to questioning by the bench and by counsel, these individuals are usually not practicing psychologists.

In the absence of scientific evidence, two custody evaluators viewing the exact same data set on a family could provide two very different interpretations.¹⁸ These interpretations will reflect the “leanings” of each psychologist toward particular interview, test, and observational data—or what the dictionary defines as bias. According to *Webster’s Revised Unabridged Dictionary*, bias is the “leaning of the mind” or “propensity or prepossession toward an object or view.” When scientific evidence to support a choice of evaluation instrument is lacking and when there is no professional consensus on the matter, the assessment tool chosen reflects the biases or “leanings” of the evaluator. The same holds true for interpretations of the constellation of interview, test, and observational data collected on a particular family.

Custody recommendations. Given that interview format, test selection, observational approach, and data interpretation are more likely influenced by the biases of the evaluator than by scientific evidence, it should come as no surprise that recommendations regarding timesharing and custodial placement suffer from the same weakness. *In the field of psychology, there are no scientifically validated and uniformly accepted timesharing and custodial placement guidelines.*¹⁹ Thus, when a psychologist offers custody recommendations, he or she is offering an opinion that could differ significantly from another psychologist’s interpretation of the same family data. And because psychologists involved in family-law cases can make mistakes in their evaluations, diagnoses, and treatment recommendations,²⁰ when two psychologists differ in their conclusions, it also is possible that both may be wrong.

RECOMMENDATIONS FOR THE JUDICIARY

In a nutshell, courts appropriately seek guidance from mental-health practitioners when ruling on fateful issues like child-custody determinations, but the scientific literature these clinicians rely upon is inadequate to support the needs of the court.²¹ Child-custody evaluations have significant limitations. What then should be done? Should the courts continue to order psychological investigations of families contesting custody? Should psychologists refrain from conducting these examinations?

At the present time, there are no easy answers to these questions. In fact, psychologists themselves disagree as to whether or not they should be offering child-custody recommendations to the court.²² Despite the lack of professional consensus and scientific validity, there are no indications at present that

13. Margaret A. Hagan & Nicole Castagna, *The Real Numbers: Psychological Testing in Custody Evaluations*, 32 PROF. PSYCHOL. 269 (2001).

14. THE FIFTEENTH MENTAL MEASUREMENTS YEARBOOK (Barbara S. Pale, et al. eds., 2003).

15. James N. Butcher & Steven V. Rouse, *Personality: Individual Differences in Clinical Assessment*, 47 A. R. PSYCHOL. 87 (1996).

16. Minnesota Multiphasic Personality Inventory.

17. Mark Ackerman & Melissa C. Ackerman, *Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited)*, 28 PROF. PSYCHOL. 137 (1997).

18. See Turkat, *supra* note 7.

19. This includes the many county guidelines that have appeared across the nation in recent years on timesharing among custodial and noncustodial parents.

20. Ira Daniel Turkat, *Parental Alienation Syndrome: A Review of Critical Issues*, 18 J. AM. ACAD. MATRIMONIAL L. 131 (2002).

21. It is beyond the scope of this article to address the standards for the admissibility of evidence. Some of the issues raised here might also raise questions regarding the admissibility of some of the evidence presented in custody-evaluation cases.

22. See Krauss & Sales, *supra* note 10.

courts and attorneys will stop ordering child-custody investigations. Thus, we come to this question: How can the court improve its utilization of these evaluations despite their significant limitations? To this end, consider this list of recommendations for consideration:

Assign an appropriate weight to the custody report. It is imperative to understand that there is no scientific evidence that a better ruling will be made when a custody evaluation is done versus when one hasn't been done. Furthermore, contrary to what the general public might expect, there is no scientific evidence that a psychologist is any better at determining the best custodial placement compared to a judge, an attorney, or a layperson. As such, when a custody recommendation seems based on clear-cut convincing evidence, it likely deserves greater consideration than a recommendation lacking it.

Recognize that quantity may not mean quality. When a psychologist performs a multitude of tests or engages in extensive interviewing, these activities may suggest the evaluation is comprehensive. However, a mechanic can inspect a malfunctioning automobile extensively yet still recommend the wrong course of action. In the case mentioned earlier of a family

being charged \$20,000 for a custody evaluation, the Florida Court of Appeal pointed out that the psychologist's 29-page assessment report seemed to have little, if any impact on the trial court's ruling.²³ A custody evaluation may appear more thorough when a psychologist generates a large amount of information on a family, but it should also be noted that such activity also increases the opportunity for more errors to be made.²⁴ There is no scientific evidence that a more intense custody evaluation leads to a better custodial recommendation.

Differentiate overt behavior from verbal report. Behaviors such as a child crying and a parent hugging one's offspring are overt, objectively measurable, and potentially incontrovertible. The child either cried or didn't. A hug was provided or it wasn't. On the other hand, what one parent says about a child crying or what a psychologist says about a parent's attitudes are more subject to error than overt nonverbal behaviors. Psychological research has shown for some time that overt nonverbal behavior is less prone to distortion than verbal reports of behavior.²⁵ Thus, when considering the contents of a custody-investigation report as part of the evidentiary record, greater confidence can be placed in the overt behaviors dis-

23. Higginbotham, 857 So. 2d at 342.

24. For example, the more tests used leads to more scoring and potentially more scoring errors. Similarly, the more complex our base of information, the more difficult it may be to make correct judg-

ments from it.

25. HANDBOOK OF BEHAVIORAL ASSESSMENT (A.R. Ciminero et al., eds. 1986).

played compared to individuals' reports about behavior. This does not mean that all verbal statements should be discounted; clearly, some assertions convey critical information. However, a prominent psychology professor captured the issue well when he said, "People can tell you anything, but behavior doesn't lie."²⁶

Differentiate between facts and interpretations. Consistent with the above distinction, the scientific literature shows generally that when observing interactions among individuals and providing explanations, "people agree about behavior but not about its causes."²⁷ Thus, when a parent comes to watch a child's soccer game, that parent's presence is typically a readily agreed-upon fact. However, *why* the parent came to the soccer game could be open to debate, ranging from loving intentions to manipulative motives. When studying a custody report, focusing on the behavior of the litigants over the interpretations provided makes the reader less dependent on the explanations themselves, which are prone to bias.

Recognize that quantitative information from psychological tests may not be as useful as desired. Test scores, quantitative indices, and statistical profiles are useful tools of the psychologist—when used appropriately. As noted earlier, there are no scientifically accepted psychological tests for performing a custody evaluation, yet the overwhelming majority of custody evaluators use them.²⁸ Further, the 2,000+ tests that psychologists can choose from differ from one another in many respects, such as the amount of scientific research available on the test, the degree to which the test has been validated, and whether or not the test has ever been used in research on custody litigants. At minimum, the custody evaluator should be able to articulate for the judge why a particular test was chosen for use over others, what deficiencies exist with the chosen test, and what limitations apply to the meaning of the test numbers generated in regard to the family at hand. While quantitative information can give an air of objectivity, it may or may not represent valid or practically useful information. Psychologists themselves indicated in a nationwide survey that they find psychological tests to be less influential when conducting a custody evaluation compared to interviewing and observing the parents and children.²⁹

Properly consider the source. A judge should not be swayed by the recommendations of a psychologist merely because he or she knows the psychologist, likes the psychologist, or respects his or her credentials. Heading a professional group or being involved in bar activities does not validate scientifically the value of such a psychologist's custody recommendations. The fact that a clinician has performed 500 custody evaluations does not mean that there is scientific evidence to

support his or her custody recommendations over someone who hasn't conducted that number of evaluations.³⁰ The most objective source of information is the overt behavior of the litigation participants themselves, devoid of verbal reports about their behavior—even if those reports are made by the most experienced and reputable custody evaluator.

Hold high expectations for a custody report. Given the lack of scientific validity for custody evaluations, some might suggest lowering expectations for what a psychological report should deliver. This would be a mistake. The bench should take a dim view of any custody-evaluation report that fails to be of the highest caliber. In the absence of scientific support for these reports, certain issues should receive considerable attention when reviewing them. For example, does the psychologist's description of the parties and events mesh well with what has been observed in the courtroom? If it doesn't, why is that? Is there a straightforward and logical rationale for the custody recommendations that fits the rest of the evidence in the case? It should. Does all of the information the psychologist gathered lead directly to precise recommendations that appear convincing? If not, why doesn't it? These questions represent the minimal kind of analysis that the court should undertake when evaluating custody-report recommendations.

CONCLUSION

The stakes are high when a family litigates over child custody. In the worst-case scenario, the offspring are assigned to the wrong parent and a suffering unfolds that cannot be undone. This possibility alone provides ample justification for judges to seek the best advice they can when making decisions about child placement.

With mental-health professionals appearing in courtrooms to assist with child-custody determinations, it is not unreasonable to hope that their input would be based on a strong scientific foundation. Just as a physician can rely on the latest research evidence on antibiotics to guide interventions for infections, one would like to believe that psychologists' custody recommendations are validated scientifically. Unfortunately, this is not the case. Not one scientific study has appeared that proves that the child-custody recommendations offered by psychologists lead to better lives for the children participating in these evaluations. Yet custody investigations can produce serious consequences for the children involved. Some consequences may be positive, but unfortunately, the consequences can also be quite negative. This leaves the families litigating over custody in less than optimal circumstances when they are ordered to participate in psychological examinations.

26. Henry E. Adams, personal communication to the author. Among other publications, Dr. Adams is the lead editor for the *Comprehensive Handbook of Psychopathology* (3rd ed. 2001) and wrote the book, *Abnormal Psychology* (1981).

27. Richard W. Robins, Gerald A. Medelsohn, Joanie B. Connell & Virginia S.Y. Kwan, *Do People Agree About the Causes of Behavior? A Social Relations Analysis of Behavior Ratings and Causal Attributions*, 86 J. PERSONALITY & SOC. PSYCHOL. 342 (2004).

28. See Ackerman & Ackerman, *supra* note 16.

29. See Bow & Quinnell, *supra* note 3.

30. This does not mean that experience has no value—just that there is no evidence in the literature that the custodial recommendation of a highly experienced evaluator leads to a better outcome for children involved in custody litigation as compared to an evaluator without such experience.

At present, it would appear that custody evaluators' recommendations are more likely to be influenced by the evaluators' respective biases than by scientific findings. The role of evaluator bias in custody investigations has yet to be adequately investigated by psychologists.

In light of the current scientific status of custody evaluations, judges are encouraged to view psychologists' timesharing and placement proposals with a critical eye. The recommendations presented here for inspecting a custody-evaluation report should prove helpful.

Hopefully, the scientific foundation to support custody recommendations will develop strongly in the future so that the court can come to rely more assuredly on psychological expertise. Families litigating over custody need the current limitations of custody recommendations to be overcome. When proper research evidence accumulates, judges will be able to place greater faith in the guidance offered by custody evaluators.



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Recent Civil Decisions of the United States Supreme Court: The 2004-2005 Term

Charles H. Whitebread

As I noted in reviewing the past term's criminal decisions,¹ what turned out to be the final year for the Rehnquist Court produced no blockbuster rulings. Nonetheless, there were several civil decisions of note. The Court's 5-4 ruling upholding the taking of private property for economic development purposes and two First Amendment cases involving public display of the Ten Commandments in a courthouse and in a school were among those receiving the most public attention.

FIFTH AMENDMENT TAKINGS

In a 5-4 decision, in *Kelo v. City of New London*,² the Court held that the taking of private property for the purpose of economic development satisfied the "public use" requirement of the Fifth Amendment. Justice Stevens delivered the opinion of the Court while Justice O'Connor led the dissent. New London, Connecticut was declared a "distressed municipality" by the State. Local and state officials targeted the area for economic revitalization and "[t]o this end, the respondent New London Development Corporation (NLDC), a private non-profit entity established some years earlier to assist the City in planning economic development, was reactivated." The NLDC formally submitted plans for the city's rejuvenation and, "[u]pon obtaining state-level approval . . . finalized an integrated development plan focused on 90 acres of the Fort Trumbull area." The area targeted by NLDC comprised, in part, "privately owned properties." The plan was approved in 2000. "The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name." Most of the private property in the area was successfully purchased by NLDC; however, "negotiations with the petitioners failed." In December 2000, the petitioners brought an action in state court, claiming among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment.

The Court began by restating the basic principles of a State's eminent-domain power: "On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B." However, "it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking." According to the Court, "[n]either of these propositions . . . determines the disposition of this case." First, the property is not being taken for private

purposes: "[t]he takings before us . . . would be executed pursuant to a carefully considered development plan," and there was no evidence that the City's purposes are illegitimate. Second, "this is not a case in which the City is planning to open the condemned land – at least not in its entirety – to use by general public." Even so, the Court has long since rejected that "public use" be determined by whether the land will be used by the public in favor of asking whether the land will be used for a "public purpose." The question then, according to the Court, was not whether the public will use the condemned land, but whether the City's development plan served a "public purpose." The Court stated that it has "defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."

After a discussion of its previous decisions, the Court stated that the City's plan for "economic rejuvenation is entitled to our deference." The Court also concluded that "[g]iven the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us . . . to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan." The Court declined to create a bright-line rule that disqualifies economic development for "public use": "Promoting economic development is a traditional and long accepted function of government," and the Court saw "no principled way of distinguishing economic development from the other public purposes that we have recognized." Further, the Court recognized that, as here, "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude."

Justice O'Connor, leading the dissent, believed the Court has abandoned a "long-held, basic limitation on government power" and the Court's holding made all private property "vulnerable to being taken and transferred to another private owner, so long as it might be upgraded." She would hold that economic takings are not constitutional because, generally, "any lawful use of real private property can be said to generate some incidental benefit to the public." Justice Thomas, who joined Justice O'Connor, also wrote separately because he believed that "[i]f such 'economic development' takings are for 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution."

Footnotes

1. Charles H. Whitebread, *Recent Criminal Decisions of the United States Supreme Court: The 2004-2005 Term*, COURT REVIEW, Spring

2005, at 26.

2. 125 S.Ct. 2655 (2005).

HABEAS CORPUS

Justice O'Connor delivered the opinion of the Court in *Rhines v. Weber*,³ which finally affirmed the federal courts' stay-and-abeyance procedure in the context of federal habeas petitions filed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Court held that a district court may issue a stay to hold a habeas petition in abeyance while the petitioner returns to state court to exhaust his unexhausted claims if the court believed: (1) there is good cause why the petitioner failed to previously exhaust his claims; (2) the claims are not without merit; and (3) it imposes a time limit upon the petitioner in which to exhaust those claims. The petitioner Charles Russell Rhines was sentenced to death after being convicted of first-degree murder and third-degree burglary. His conviction became final on December 2, 1996, and on December 5, 1996, the petitioner filed his state habeas petition. His request for relief was denied, and the petitioner filed for federal habeas relief pursuant to 28 U.S.C. section 2254 within the one-year statutory period. Almost two years later, the District Court determined that eight of the petitioner's claims had not been exhausted. By this time, the one-year statute of limitations had run. The District Court, however, granted the petitioner's motion and issued a stay to hold the petitioner's petition in abeyance "while he presented his unexhausted claims to the South Dakota courts." The Court of Appeals for the Eighth Circuit "vacated the stay and remanded the case to the District Court to determine whether Rhines could proceed by deleting unexhausted claims from his petition."

The Court determined that the stay-and-abeyance procedure used by the District Court was appropriate. In *Rose v. Lundy*,⁴ which was decided fourteen years prior to Congress's adoption of AEDPA, the Court held that "federal district courts may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims." The Court reasoned that the interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claim. When the Court decided *Lundy*, however, there was no statute of limitations on filing a federal habeas petition. Therefore, it was relatively easy for the petitioners to return to state court to exhaust their previously unexhausted claims before returning to federal court. The "enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions." The Court wrote: "Although the limitations period is tolled during the pendency of a 'properly filed application for State post-conviction or other collateral review,' . . . the filing of a petition for habeas corpus in federal court does not toll the statute of limitation." Therefore, many petitioners who come to federal court with mixed petitions risk the loss of federal review of their unexhausted claims.

To alleviate this problem, some courts had adopted the "stay-and-abeyance" procedure. The Court believed this to be an appropriate remedy, stating that "under this procedure, rather than dismiss the mixed petition pursuant to *Lundy*, a

district court might stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims." The Court went on to explain that typically, district courts have the authority to enter stays "where such a stay would be a proper exercise of discretion." The AEDPA does not limit this power. The Court believed, however, that the procedure should be "compatible with AEDPA's purposes: (1) to reduce delays in the execution of state and federal criminal sentences; and (2) require prisoners to seek state relief first, thereby streamlining federal habeas proceedings." The Court concluded that the frequent use of the stay-and-abeyance procedure would "undermine these twin purposes" and, therefore, believed it should only be available in the circumstances discussed above: (1) where "the district court determined there was good cause for the petitioner's failure to exhaust his claims first in state court;" (2) the unexhausted claims are not meritless; and (3) the petitioner acts with diligence to exhaust his unexhausted claims.

Justice Kennedy delivered the opinion of a 5-3 Court in *Brown v. Payton*,⁵ which held the California state court's determination that the instruction given in a death-penalty trial with regard to the "catch-all" provision of California Penal Code section 190.3 and its failure to declare a mistrial after the prosecutor misstated the law during closing argument was not an unreasonable application of Supreme Court precedent. Chief Justice Rehnquist took no part in the decision.

The respondent William Payton was tried and convicted for one count of rape and murder and two counts of attempted murder. During the penalty phase of the trial, the defense focused on Payton's actions after the crimes, in particular that Payton "participated in prison Bible study classes and a prison ministry, and had a calming effect on other prisoners." The trial judge gave an instruction, which followed the text of California Penal Code section 190.3, which "set[s] forth 11 different factors, labeled (a) through (k), for the jury to 'consider, take into account and be guided by' in determining whether to impose a sentence of life imprisonment or death." Factor (k), which is a "catch-all instruction," directs the jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." During closing arguments, the prosecutor argued that "factor (k) did not allow . . . [the jury] to consider anything that happened 'after the [crime] or later.'" The defense objected and moved for mistrial on grounds that the prosecutor misstated the law. The court declined. The jury returned a verdict of death and the respondent was sentenced.

On direct appeal to the California Supreme Court, Payton argued that the jury was "led to believe it could not consider

***Rhones v. Weber*
... finally affirmed
the federal courts'
stay-and-abeyance
procedure in the
context of federal
habeas petitions**

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3. 544 U.S. 269 (2005).

4. 455 U.S. 509 (1982).

5. 544 U.S. 133 (2005).

The Court disagreed with the Eleventh Circuit's categorization of the Rule 60(b) motion although it affirmed the dismissal of the petitioner's motion.

the mitigating evidence of his post-conviction conduct . . . in violation of the Eighth Amendment of the U.S. Constitution.” The California Supreme Court rejected the claim, applying United States Supreme Court’s decision in *Boyde v. California*,⁶ “which had considered the constitutionality of the same factor (k) instruction,” and determined that “in the context of

the proceedings there was no reasonable likelihood that Patyon’s jury believed it was required to disregard his mitigating evidence.” Payton subsequently filed a petition for a writ of habeas corpus in the District Court.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court’s review is limited and it “may not grant relief unless the state court’s adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.” The Court determined that the state court’s decision was not an unreasonable application of the law. The state court properly identified *Boyde* at the commencement of its analysis. In *Boyde*, the Court held that the text of factor (k) did not “limit the jury’s consideration of extenuating circumstances solely to circumstances of the crime.” Therefore, it determined that factor (k) did not preclude “the jury from considering evidence pertaining to a defendant’s background and character.” In this case, the California Supreme Court interpreted this holding as allowing both pre-crime and post-crime mitigation evidence. The Court believed that, in light of *Boyde*, this conclusion was reasonable.

The Court also believed it was not unreasonable for the state court to conclude that the “prosecutor’s arguments and remarks did not mislead the jury into believing it could not consider Payton’s mitigation evidence.” The defense presented “eight witnesses, spanning two days of testimony” regarding the mitigating evidence. For the jury to conclude that the evidence didn’t matter would mean they had to “believe that the penalty phase served virtually no purpose at all.” Further, “the prosecutor devoted specific attention to disputing the sincerity of Payton’s evidence,” thereby drawing focus on the evidence.

In *Gonzalez v. Crosby*,⁷ a 7-2 Court, in a decision delivered by Justice Scalia, held that a motion filed under Federal Rules of Civil Procedure Rule 60(b) that challenges a District Court’s previous ruling on the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is not a second or successive habeas petition and can be ruled upon without pre-certification. The petitioner pled guilty in a Florida circuit court to robbery with a firearm. He did not file an appeal and began serving his 99-year sentence in 1982. Within one year after AEDPA was enacted, the petitioner

filed two petitions for state post-conviction relief, which were denied. He then filed a federal habeas petition. The District Court dismissed the action as barred by the one-year statute of limitations. It concluded that “the limitations period was not tolled during the 163-day period while the petitioner’s second motion for state post-conviction relief was pending” because “Section 2244(d)(2) tolls the statute of limitations during the pendency of ‘properly filed’ applications only.” The second petition, according to the District Court, “was not ‘properly filed’ because it was both untimely and successive.” The Court of Appeals for the Eleventh Circuit “denied a certificate of appealability (COA).” On November 7, 2000, the Court decided *Artuz v. Bennett*,⁸ in which it held “that an application for state post-conviction relief can be ‘properly filed’ even if the state courts dismiss it as procedurally barred.” Approximately nine months later, the petitioner filed in the District Court a pro se “Motion to Amend or Alter Judgment,” contending that the District Court’s time-bar ruling was incorrect under *Artuz*’s construction of section 2242(d), and invoking Federal Rule of Civil Procedure 60 (b)(6), which permits a court to relieve a party from the effect of a final judgment.” The District Court denied the petition. The Eleventh Circuit eventually determined that “the petitioner’s motion – indeed any post-judgment motion under Rule 60(b)(6) save one alleging fraud on the court . . . was in substance a second or successive habeas petition.”

The Court disagreed with the Eleventh Circuit’s categorization of the Rule 60(b) motion although it affirmed the dismissal of the petitioner’s motion. “Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence.” Rule 60(b)(6), under which the petitioner moved, “permits reopening when the movant shows ‘any . . . reason justifying relief from the operation of the judgment’ other than the more specific circumstances set out in Rule 60(b)(1)-(5).” AEDPA does not “expressly circumscribe the operation of Rule 60(b).” In fact, 28 U.S.C. section 2254 states the Rules of Civil Procedure are applicable “to the extent that . . . [they are] not inconsistent with’ applicable federal statutory provisions and rules.” The initial question the Court answered was whether a Rule 60(b) motion is a habeas petition because “section 2254(b) applies only where the court acts pursuant to a prisoner’s ‘application’ for a writ of habeas corpus.” The Court believed “it is clear that for the purposes of section 2244(b) an ‘application’ for habeas relief is a filing that contains one or more ‘claims.’” According the Court, “a ‘claim’ as used in section 2244(b) is an asserted federal basis for relief from a state court’s judgment of conviction.” It concluded that “[i]n some instances, a Rule 60(b) motion will contain one or more ‘claims.’” The Court believed, as did most Courts of Appeals, that in these instances, “a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly.” To hold otherwise would circumvent the requirements of AEDPA. However, the Court believed that “when a Rule 60(b) motion attacks not the substance of the federal court’s resolution of a claim on the merits but some defect in

6. 494 U.S. 370 (1990).

7. 125 S.Ct. 2641 (2005).

8. 531 U.S. 4 (2000).

the integrity of the federal habeas proceedings, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application.” According to the Court, “[A]llowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules.” The Court believed that the petitioner’s motion fits within this category. The motion “confines itself not only to the first federal habeas petition, but to a non-merits aspect of the first federal habeas proceeding.”

FOURTEENTH AMENDMENT

In *Town of Castle Rock v. Gonzales*,⁹ a 7-2 Court, in an opinion written by Justice Scalia, held that an individual does not have a property interest in having the police enforce a restraining order even where police have probable cause to believe the restraining order has been violated. The respondent in this case obtained a restraining order against her husband from a state court in conjunction with divorce proceedings. On June 22, 1999, the respondent’s husband, in violation of the restraining order, “took the three daughters while they were playing outside the family home.” The respondent contacted the Castle Rock Police Department numerous times during the evening and into the night but was told that there was nothing the police could do. In short, they refused to act. At 3:20 a.m., the “husband arrived at the police station and opened fire with a semiautomatic handgun.” He was shot and killed by the police. “Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered.”

The respondent brought an action under 42 U.S.C. section 1983, “claiming that the town violated the Due Process Clause because its police department had ‘an official policy or custom of failing to respond properly to complaints of restraining order violations’ and ‘tolerated the non-enforcement of restraining orders by its police officers.’” The complaint also alleged “that the town’s actions ‘were taken either willfully, recklessly or with such gross negligence as to indicate wonton disregard and deliberate indifference to’ the respondent’s civil rights.” The District Court dismissed the action pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court of Appeals for the Tenth Circuit reversed in part, holding that the respondent had alleged a cognizable procedural due process claim.

The Court disagreed. The Court stated that it “left a similar question unanswered” in *DeShaney v. Winnebago County Dept. of Social Servs.*,¹⁰ where it “held that the so-called ‘substantive’ component of the Due Process Clause does not require the State to protect the life, liberty, and property of its citizens against invasion by private actors.” The Court did not answer whether “child protection statutes gave [him] an ‘entitlement’ to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection.” According to the Court, “[t]he procedural aspect of the Due Process Clause does not protect everything that might be described as a ‘benefit’: ‘To have a property interest in a benefit, a person clearly must have more than an

abstract need or desire and ‘more than a unilateral expectation of it.’” Instead, “[h]e must . . . have a legitimate claim of entitlement to it.” These entitlements are not created by the Constitution but by state law. The Court had previously held that a benefit is not an entitlement “if government officials may grant or deny it in their discretion.”

The Court believed “[t]he critical language in the restraining order did not come from any part of the order itself (which was signed by the state-court trial judge and directed to the restrained party . . .), but from the preprinted notice to law-enforcement personnel that appeared on the back of the order.” The notice essentially restated the statute “describing ‘peace officers’ duties’ related to the crime of violation of a restraining order.” The Court believed that the language, which creates the grounds upon which the respondent’s husband “could be arrested, criminally prosecuted, and held in contempt,” does not make “enforcement of restraining orders *mandatory*.” According to the Court and its precedent, discretion in law enforcement, despite “seemingly mandatory legislative commands,” is “deep-rooted.” Therefore, “a true mandate of police action would require some stronger indication from the Colorado Legislature.” The Court also believed that even if it did find that the statute created an entitlement, “it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a ‘property’ interest for purposes of the Due Process Clause.” It did not resemble “any traditional conception of property.” According to the Court, it differed significantly in the fact that “the alleged property interest here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed – to wit, arresting people who they have probable cause to believe have committed a criminal offense.”

FIRST AMENDMENT

In *Johanns v. Livestock Marketing Ass’n*,¹¹ a 6-3 Court, in an opinion written by Justice Scalia, held that the promotional campaign funded by the beef check-off program, as authorized by the Beef Promotion and Research Act, is government speech and, therefore, is immune from a First Amendment challenge. The Beef Promotion and Research Act of 1985 (Beef Act), “announces a federal policy of promoting the marketing and consumption of ‘beef and beef products,’ using funds raised by an assessment on cattle sales and importation.” The Secretary of Agriculture, following the procedures set forth in the Beef Act, issued an order for a “\$1-per-head assessment (or ‘check off’) on all sales or importation of cattle and a comparable assessment on imported beef products.” The “assessment is to

Town of Castle Rock v. Gonzales . . . held that an individual does not have a property interest in having the police enforce a restraining order

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9. 125 S.Ct. 2796 (2005).

10. 489 U.S. 189 (1989)

11. 544 U.S. 550 (2005)

The Court held the First Amendment does not prevent a state from declining to allow voters who are registered in a certain party to vote in the primaries of another party.

Board also “funds overseas marketing efforts; market and food science research . . . and informational campaigns for both consumers and beef producers.” Most promotional messages bear the attribution “Funded by America’s Beef Producers.” Further, “[m]ost print and television messages also bear a Beef Board logo.”

The respondents were two associations and various individuals who pay the check off. They brought a suit claiming “that the Board impermissibly used check off funds to send communications supportive of the beef program to beef producers.” While the litigation was pending, the Court decided *United States v. United Foods, Inc.*,¹² in which the Court held that “a mandatory check off for generic mushroom advertising violated the First Amendment.” Because the mushroom check-off program bore a resemblance to the beef check-off program, the respondents amended their complaint to allege a First Amendment violation.

Following a discussion of its First Amendment jurisprudence, the Court concluded: (1) “[i]n all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself;” (2) its “compelled-subsidy cases have consistently respected the principle that ‘compelled support of a private association is fundamentally different from compelled support of government;” (3) “[c]ompelled support of government’ . . . is of course perfectly constitutional;” and (4) “some government programs involve, or entirely consist of, advocating a position.” The Court had “generally assumed . . . that compelled funding of government speech does not alone raise First Amendment concerns.” The respondents did not dispute the conclusions drawn by the Court, but instead contended that the promotional campaigns funded by the check-off program “differ dispositively from the type of government speech that, our cases suggest, is not susceptible to First Amendment challenge.” The respondents relied on two points for their argument: (1) private entities and individuals are the ones who design the promotional campaign; and (2) “the use of mandatory assessment on beef producers to fund the advertising.” The Court dismissed these arguments. First, it concluded that “[t]he message of the promotional campaigns is effectively con-

be used to fund beef-related projects, including promotional campaigns, designed by the Operating Committee and approved by the Secretary.” Since May 1988, “more than \$1 billion has been collected though the check off . . . and a large fraction of that sum has been spent on promotional projects authorized by the Beef Act,” for instance, the trademarked slogan “Beef. It’s What’s for Dinner.” The Beef

trolled by the Federal Government itself.” Second, the Court found it irrelevant that the speech is “funded by a targeted assessment . . . rather than by general revenues.” The Court believed “[t]he First Amendment does not confer a right to pay one’s taxes into the general fund, because the injury of compelled funding (as opposed to the injury of compelled speech) does not stem from the Government’s mode of accounting.”

Justice Souter, joined by Justices Stevens and Kennedy, dissented. He stated that the Court “unwisely” accepts the Government’s defense that “the beef advertising is its own speech, exempting it from the First Amendment bar against extracting special subsidies from those unwilling to underwrite an objectionable message.” He wrote: “The error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own.”

Justice Thomas delivered the opinion of a 6-3 Court in *Clingman v. Beaver*,¹³ except in II-A of the opinion, where he wrote only for the plurality. The Court held the First Amendment does not prevent a state from declining to allow voters who are registered in a certain party to vote in the primaries of another party. “Oklahoma’s election laws provide that only registered members of a political party may vote in the party’s primary . . . unless the party opens its primary to registered Independents as well.” In May 2000, the Libertarian Party of Oklahoma (LPO) informed the State Election Board that it was opening its primaries to all voters. The Board agreed as to all voters registered as Independent, but not voters registered with other parties. “The LPO and several Republican and Democratic voters then sued for declaratory and injunctive relief in the United States District Court for the Western District of Oklahoma, alleging that Oklahoma’s semi-closed primary law unconstitutionally burdens their First Amendment right to freedom of political association.” After a trial, “the district court found that Oklahoma’s semi-closed primary system did not severely burden the respondents’ associational rights.” The Court of Appeals for the Tenth Circuit reversed. It concluded that “the State’s semi-closed primary statute imposed a severe burden on the respondents’ associational rights, and thus was constitutional only if the statute was narrowly tailored to serve a compelling state interest.” The Tenth Circuit did not find any of the State’s interests compelling.

The Court disagreed with the Court of Appeals. “The Constitution grants states broad power to prescribe the ‘time, places, and manner of holding elections for senators and representatives,’ . . . which power is matched by state control over the election process for state offices.” While regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest, if a regulation only imposes a “lesser burden,” a state’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. In *Tashjian v. Republican Party of Connecticut*,¹⁴ the Court struck down a closed primary system that prevented a political party from inviting Independent voters to vote in the party’s primary as inconsistent with the

12. 533 U.S. 405 (2001).
13. 544 U.S. 581 (2005).

14. 479 U.S. 208 (1986).

First Amendment. This case asked the question left open in *Tashjian*: “whether a State may prevent a political party from inviting registered voters of other parties to vote in its primary.”

The Court thought the burdens in *Clingman* were dissimilar to those in *Tashjian*. In *Tashjian*, the Court identified two ways in which Connecticut’s closed primary limited its citizens’ freedom of political association. First, it required Independent voters to affiliate publicly with a party to vote in its primary. In *Clingman*, however, the voters “have *already* affiliated publicly with one of Oklahoma’s political parties.” Second, under Connecticut law, political parties could not “broaden opportunities for joining . . . by their own act, without any intervening action by potential voters.” The Court saw a similar burden under Oklahoma’s law, but stated that burden should not be considered “severe” by itself: “Many electoral regulations, including voter registration, generally require that voters take some action to participate in the primary process.” The Court concluded that these minor barriers between voter and party “do not compel strict scrutiny.” According to the Court, to deem ordinary and widespread burdens like these severe “would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.” Instead of commanding strict scrutiny when a state electoral provision places no heavy burden on associational rights, “a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” In this case, Oklahoma had numerous interests that the Court recognized as important: “It preserves [political] parties as viable identifiable interest groups, . . . enhances parties’ electioneering and party-building efforts . . . and guards against party raiding and ‘sore loser’ candidacies by spurned primary contenders.”

In *Tory v. Cochran*,¹⁵ a 7-2 Court held that since the primary purpose of the injunction was invalidated by Johnnie Cochran’s death but the injunction was still valid under California law, it became an unacceptable prior restraint on Ulysses Tory’s speech. Cochran brought a successful state defamation suit against Tory and his associates. When it became apparent to the state trial court that Tory would continue to engage in the defamatory behavior in order to “coerce” Cochran into paying “amounts of money to which Tory was not entitled,” the court issued a permanent injunction, which, among other things, prohibited Tory, his associates, and their agents or representatives from picketing, displaying signs, placards, or other written or printed material, and from orally uttering statements about Johnnie L. Cochran, Jr., and about Cochran’s law firm in “any public forum.” Tory appealed and the decision was affirmed. The Court granted a writ of certiorari to answer the following question: “[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violated the First Amendment.” However, after oral argument, the Court was informed that Cochran was deceased. Tory agreed to the substitution of Cochran’s widow as plaintiff. Cochran’s counsel argued that the case was moot; however, Tory argued that it was not.

The Court stated that California law “does not recognize a cause of action for an injury to the memory of a deceased person’s reputation” However, neither the Court or counsel for either party discovered any case law that suggested that the injunction became automatically invalid at Cochran’s death, “not even the portion personal to Cochran.” However, the Court recognized that at the same time that

Cochran’s death made it unnecessary for them to explore the petitioners’ basic claims because, “as written, [the injunction] has now lost its underlying rationale.” The activities forbidden by the injunction can not longer coerce Cochran to pay “tribute” to Tory for desisting in those activities. The Court concluded, stating “Consequently, the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification.”

In *Cutter v. Wilkinson*,¹⁶ the Court interpreted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which “is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court’s precedent.” Enacted under the Spending and Commerce Clauses, RLUIPA targets two areas, land use and the religious exercises of institutionalized persons. Section 3 of RLUIPA, which relates to institutionalized persons, was at issue in this case. Section 3 provided that no state or local government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, unless the government shows that the burden furthers a compelling government interest and does so by the least restrictive means. The petitioners were current and former inmates of institutions operated by the Ohio Department of Rehabilitation and Correction, who practice “non-mainstream” religions, including Satanist, Wicca, Asatru, and the Church of Jesus Christ Christian. They asserted claims under the First and Fourteenth Amendment and, after the enactment of RLUIPA, Section 3. The respondents moved to dismiss on the grounds that RLUIPA violates the Establishment Clause. Pursuant to 28 U.S.C. section 2403(a), the United States intervened in the District Court to defend RLUIPA’s constitutionality.

A unanimous Court, led by Justice Ginsburg, held that Congress did not violate the Establishment Clause when it enacted legislation that forbids a state from interfering with institutionalized persons’ rights to freely exercise their religion. Under the Religion Clauses of the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” In between the Establishment

Congress did not violate the Establishment Clause when it enacted legislation that forbids a state from interfering with institutionalized persons’ rights to freely exercise their religion.

15. 544 U.S. 734 (2005)

16. 544 U.S. 709 (2005).

**In *McCreary County v. ACLU*,
a 5-4 Court held
that the
Establishment
Clause required the
removal of the Ten
Commandments
from the county's
courthouses**

Clause and the Free Exercise Clause “there is room for play . . . some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.” The Court determined that RLUIPA falls within this space: “On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.” First, it found RLUIPA com-

patible with the Establishment Clause “because it alleviates exceptional government-created burdens on private religious exercise.” Second, the Act contains no provisions that make it incompatible with the Court’s prior decisions: (1) “[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries;” and (2) “they must be satisfied that the Act’s prescriptions are and will be administered neutrally among different faiths.” According to the Court, RLUIPA only covers those persons “who are unable freely to attend to their religious needs and are therefore dependent on the government’s permission and accommodation for exercise of their religion.”

In *McCreary County v. American Civil Liberties Union of Kentucky*,¹⁷ a 5-4 Court held that the Establishment Clause required the removal of the Ten Commandments from the county’s courthouses because the county’s real purpose, as evidenced from the history of its legislation, is based on religion, despite a pretextual secular purpose. Justice Souter delivered the opinion of the Court. Justice Scalia filed a dissent and was joined by Chief Justice Rehnquist and Justice Thomas and Justice Kennedy in part.

In 1999, the petitioners McCreary County and Pulaski County, Kentucky, displayed in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the display was in response to an order of the county legislative body requiring the display to be posted in “a very high traffic area” of the courthouse. In Pulaski County, the Commandments were hung because they were “good rules to live by.” The ACLU brought an action under 42 U.S.C. section 1983 and sought a preliminary injunction claiming that the display violated the “prohibition of religious establishment included in the First Amendment.” During the course of the litigation, the counties changed their displays. At first, both counties’ legislative bodies authorized by nearly identical resolutions a second, expanded display reciting that the Ten Commandments are “the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded” and stating several grounds for taking that position. When the district court

expanded its preliminary injunction to include the expanded displays, the counties installed another display in the each courthouse called, “The Foundations of American Law and Government Display.” The counties argued that the display desired to demonstrate that the “Ten Commandments were part of the foundation of American Law and Government” and “to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government.”

In *Stone v. Graham*,¹⁸ the Court held that the display of the Commandments in Kentucky’s public schools violated the First Amendment’s bar against establishment of religion because their display was for a “predominantly religious purpose . . . given their prominence as an ‘instrument of religion.’” The Court stated that the counties asked for a different conclusion here based on two arguments: (1) “that [the] official purpose is unknowable and the search for it inherently vain;” or, alternatively, (2) that the scope of the purpose enquiry should be limited “so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case.” The Court stated that “[t]he touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.” The Court viewed the counties’ requests as one to “abandon” the purpose test set forth in under *Lemon v. Kurtzman*.¹⁹ It stated that “[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country.” It also made practical sense, “as in an Establishment analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter’s heart of hearts.” The Court stated: “*Lemon* said that government action must have a secular . . . purpose . . . and after a host of cases it is fair to add that although a legislature’s stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” The Court continued to quickly dispatch the counties’ argument “that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject.” The Court responded by stating: “But the world is not made brand new every morning, and the counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.”

The Court saw two similarities between *Stone* and this case: (1) “both set out a text of the Commandments as distinct from any traditionally symbolic representations;” and (2) “each stood alone, not part of an arguably secular display.” The Court stated: “*Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message . . . and for good

17. 125 S.Ct. 2722 (2005).
18. 449 U.S. 39 (1980).

19. 403 U.S. 602 (1971)

reason, the Commandments being a central point of reference in the religious and moral history of Jews and Christians.” According to the Court, the counties’ displays “unstinting focus was on religious passages, showing that the counties were posting the Commandments precisely because of their sectarian content.” Further, even their third displays, despite the nonreligious names, enhanced the sectarian spirit. The Court concluded that “[i]f the observer had not thrown up his hands, he would probably suspect that the counties were simply reaching for any way to keep religious documents on the walls of courthouses constitutionally required to embody religious neutrality.”

Justice Scalia dissented on the grounds that: (1) the Court is incorrect in reading the First Amendment as barring the government from favoring religious practice; (2) “today’s opinion extends the scope of that falsehood even beyond prior cases;” and (3) “even on the basis of the Court’s false assumptions the judgment here is wrong.” Justice Scalia looked at the history of the United States, including recent episodes, to show how the idea of monotheism is ingrained in our government. He argued that the Court’s decision expanded *Lemon* because “the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an ‘objective observer.’”

In *Van Orden v. Perry*,²⁰ the Court held the First Amendment does not bar the display of the Ten Commandments on a monument donated by a special interest group when the State’s reasons for accepting the monument were purely secular. Chief Justice Rehnquist announced the judgment of the Court and was joined by Justices Scalia, Kennedy, and Thomas. Justices Scalia and Thomas also filed concurring opinions. Justice Breyer filed an opinion concurring in the judgment. Justice Stevens, joined by Justice Ginsburg, and Justice Souter filed dissenting opinions.

The 22 acres that comprise the Texas State Capitol are dotted with monuments and historical markers. One monolith displays the text of the Ten Commandments, along with other religious symbols and symbols of the United States. The monument, as inscribed, was “PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.” The petitioner Thomas Van Orden, a native Texan, brought an action under 42 U.S.C. section 1983, “seeking both a declaration that the monument’s placement violates the Establishment Clause and an injunction requiring its removal.” The district court held that the monument did not contravene the Establishment Clause. It determined that the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency and “a reasonable observer, mindful of the history, purpose, and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion.” The Court of Appeals for the Fifth Circuit affirmed.

The Court agreed. The plurality believed that the Court’s precedent relating to the Establishment Clause point in two directions: (1) “[o]ne face looks toward the strong role played

by religion and religious traditions throughout our Nation’s history;” and (2) the “other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.” These two faces were evidenced in the Court’s cases invalidating laws under the Establishment Clause. The Court had pointed often to *Lemon* as providing the governing test in Establishment Clause cases. However, just two

years after *Lemon* was decided, the Court noted that the factors identified in *Lemon* serve as “no more than helpful signposts.” Many recent cases have either not applied the *Lemon* test or “applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.” Regardless, the plurality did not think the *Lemon* test is “useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds” and believed, “[i]nstead, our analysis is driven both by the nature of the monument and our Nation’s history.” The plurality first looked at *Lynch v. Donnelly*,²¹ where the Court recognized that “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” In the end, the plurality believed that Texas’s monument is merely an “acknowledgment of the role played by the Ten Commandments in our Nation’s heritage.” Similar displays are common throughout America, even in the Supreme Court. They did not dispute that the Commandments are religious in nature. However, “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” The plurality recognized that there are limits “to the display of religious messages or symbols.” It referred to *Stone v. Graham*,²² where it found that a Kentucky statute requiring the display of the Commandments in every classroom had a religious purpose and was, therefore, unconstitutional. However, the monument in Texas “is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day.”

Justice Scalia wrote a concurring opinion because he would prefer a holding that “is in accord with our Nation’s past and present practices, and that can be consistently applied – the central relevant feature of which is that there is nothing unconstitutional in a State’s favoring religion generally, honoring God . . . or, in a non-proselytizing manner, venerating the Ten Commandments.” Justice Thomas, also concurring, wrote because he also believed the Court should return to the original meaning of the word “establishment.” According to Justice

[T]he Court held the First Amendment does not bar the display of the Ten Commandments on a [donated] monument . . . when the State’s reasons for accepting the monument were purely secular.

20. 125 S.Ct. 2854 (2005).
21. 465 U.S. 668 (1984).

22. 449 U.S. 39 (1980).

[T]he Court held that Congress has the power under the Commerce Clause to regulate even the local cultivation and use of marijuana for medical purposes.

spirit of religion and the spirit of freedom are productively united, reigning together, but in separate spheres.” In determining Texas’s monument constitutional, he relied less “on a literal application of any particular test,” i.e., *Lemon*, “than upon consideration of the basic purposes of the First Amendment’s Religion Clauses themselves.” He believed that in certain contexts, the text of the Commandments does not convey a religious message but possibly a moral secular message or a historical message – “a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.”

Justices Stevens, O’Connor, and Souter dissented. Justice Stevens believed that the monument “is not a work of art and does not refer to any event in the history of the State,” but clearly just communicates a religious message. He believed “[t]he monolith displayed on Texas Capitol grounds cannot be discounted as a passive acknowledgment of religion, nor can the State’s refusal to remove it upon objection be explained as a simple desire to preserve a historic relic.” The Nation’s commitment to neutrality, as reflected in the Religious Clauses, “is flatly inconsistent with the plurality’s wholehearted validation of an official state endorsement of the message that there is one, and only one, God.” Justice Souter, also dissenting, wrote because he believed that the Court’s prior cases had made clear that the simple reality was “that the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same.”

FEDERALISM

In *Gonzales v. Raich*,²³ the Court considered California’s Compassionate Use Act of 1996 (Act), which “creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician.” California was only one of nine States that has legalized the use of marijuana for medicinal purposes. The purpose of the Act “was . . . to ensure that seriously ill residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need.” The respondents are

Thomas, “[t]he Framers understood establishment necessarily [to] involve actual legal coercion.” Justice Breyer concurs in the judgment. He believed that the Religious Clauses of the First Amendment “seek to maintain that separation of church and state that has long been critical to the peaceful dominion that religion exercises in [this] country, where the

California residents who suffer from various medical conditions, as well as primary caregivers who have sought to avail themselves of medical marijuana pursuant to the terms of the Act. The respondents filed this action against the United States Attorney General and the head of the DEA, “seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA). . . to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use.” Their claims are based on the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments, and the doctrine of medical necessity.

In a 6-3 decision, with Justice Stevens writing for the majority, the Court held that Congress has the power under the Commerce Clause to regulate even the local cultivation and use of marijuana for medical purposes. The Court began its opinion with a lengthy discussion of the history of the CSA. Its main objective was “to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.” In particular, Congress sought to control “the diversion of drugs from legitimate to illicit channels.” Therefore, Congress enacted a “closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.” Marijuana was and is classified as a Schedule I drug, which are drugs that have a “high potential for abuse, lack of any accepted medical use, and [the] absence of any accepted safety for use in medically supervised treatment.”

The respondents did not challenge the validity of the CSA but instead argued that “the CSA’s categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’s authority under the Commerce Clause.” The Court stated that to determine the validity of the CSA in these circumstances, “none of our Commerce Clause cases can be viewed in isolation,” primarily because the Court’s understanding of Congress’s power “has evolved over time.” Initially, “the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible.” Then, “Congress ‘ushered in a new era of federal regulation.’” During the new era, the Court has “identified three general categories of regulation in which Congress is authorized to engage under its commerce power:” (1) “Congress can regulate the channels of interstate commerce;” (2) “Congress has authority to regulate and protect the instrumentalities of interstate commerce, and person or things in interstate commerce;” and (3) “Congress has the power to regulate activities that substantially affect interstate commerce.” The Court’s case law had made clear that Congress can “regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”

The Court focused on one of its prior cases as instructive of the principles set forth above: *Wickard v. Fulburn*.²⁴ In that case, Congress had enacted a statute designed to “control the

23. 125 S.Ct. 2195 (2005).

24. 317 U.S. 111 (1942).

volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices.” Fulburn was only allowed 11.1 acres for his wheat crop but cultivated 23, claiming that the surplus was for use only on his farm. The Court determined that Fulburn’s cultivation of wheat for personal use was still within Congress’s power to regulate. The Court believed the similarities between these cases were “striking:” “The respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.” Like the agricultural law in *Wickard*, the CSA’s purpose was “to control the supply and demand of controlled substances in both lawful and unlawful drug markets.” As above, “[h]ere too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.” Further, Congress was right to be concerned that the demand for marijuana in the interstate market will “draw such marijuana into that market.” The Court reasoned that “One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.”

Justice O’Connor, joined by the Chief Justice and Justice Thomas in part, dissented. She believed the Court’s decision was incongruous with its prior holdings and “gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause.” She called California’s law an “experiment” that should be protected “to maintain the distribution of power fundamental to our federalist system of government.” Justice Thomas also wrote separately. He believed the respondents’ use of marijuana “has had no demonstrable effect on the national market for marijuana.” Under the Court’s rule, Congress will be able to regulate “anything – and the Federal Government is no longer one of limited and enumerated powers.” He also rejected the Court’s argument that banning the medical use of marijuana is necessary and proper to carry out Congress’s goals as set forth by CSA.

In *Granholm v. Heald*,²⁵ a 5-4 Court, in a decision written by Justice Kennedy, held that state laws that discriminate against out-of-state wineries violate the Commerce Clause; they are not saved by the Twenty-first Amendment even though it grants the States the broad power to regulate the transportation and importation of alcoholic beverages. Both Michigan and New York have laws which regulate the sale and importation of alcoholic beverages through a three-tier distribution system, meaning “[s]eparate licenses are required for producers, wholesalers, and retailers.” The Court has previously upheld “three-tier distribution scheme in the exercise of . . . [the States’] authority under the Twenty-first Amendment.” However, the Michigan and New York laws are before the Court because they apply only to out-of-state wineries. In Michigan, in-state wineries “are eligible for ‘wine maker’

licenses that allow direct shipment to in-state consumers,” while out-of-state wineries are not. In New York, in-state wineries can make “direct sales to consumers in New York on terms not available to out-of-state wineries.” Many small wineries “rely on direct shipping to reach new markets” because they do not produce enough product for wholesalers to purchase it. This case, based on a claim that the states violating the Commerce Clause, was filed by wine producers of small wineries “that rely on direct consumer sales as an important part of their business.”

The Court began its opinion by stating: “Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” This rule “follows . . . from the principle that states should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens” because they “deprive citizens of their right to have access to the markets of other states on equal terms.” The Court found that the “discriminatory character of the Michigan system is obvious.” While in-state wineries can obtain licenses to ship directly to consumers, out-of-state wineries cannot. Although the New York law is different, the Court found it also discriminates. It found the law “is just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system” and “grants in-state wineries access to the State’s consumers on preferential terms.”

The states “contend that their statutes are saved by section 2 of the Twenty-first Amendment, which provides:” “The transportation of importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” The ratification of the Twenty-first Amendment in 1933 ended nationwide prohibition by repealing the Eighteenth Amendment. Its aim was “to allow states to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.” The Court stated that its “more recent cases . . . confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that states may not give a discriminatory preference to their own producers.” Since the Court did not find that either State’s regime “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives,” it found that both run afoul of the Commerce Clause.

In *American Trucking Ass’n, Inc. v. Michigan Pub. Serv. Comm’n*,²⁶ the Court held that Michigan’s law that imposed a

In *Granholm v. Heald*, a 5-4 Court . . . held that state laws that discriminate against out-of-state wineries violate the Commerce Clause . . .

25. 544 U.S. 460 (2005).

26. 125 S.Ct. 2419 (2005).

Leocal v. Ashcroft
... held that a
conviction under a
statute for driving
under the influence
... is not a crime
of violence ...
requiring
deportation.

carriers that operate in intrastate commerce. The petitioners operated both interstate and intrastate commerce and both claimed “that trucks that carry *both* interstate *and* intrastate loads engage in intrastate business less than trucks that confine their operations to the Great Lakes State.” They argued that, “because Michigan’s fee was flat, it discriminates again interstate carriers and imposes unconstitutional burdens upon interstate trade.”

The Court began its opinion by stating: “Our Constitution ‘was framed upon the theory that the peoples of the several states must sink or swim together.’” Therefore, “this Court has consistently held that the Constitution’s express grant to Congress of the power to ‘regulate Commerce . . . among the several States, contains a further, negative command, known as the dormant Commerce Clause.’” The dormant Commerce Clause “‘create[s] an area free from interference by the States’ . . . and prevents them ‘jeopardizing the welfare of the Nation as a whole’ by ‘plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.’” Under the dormant Commerce Clause, the Court has invalidated a number of state laws in the following areas: (1) laws that “discriminate on their face against out-of-state entities;” (2) laws that “impose burdens on interstate trade that are clearly excessive in relation to the putative local benefits;” (3) laws that “impose taxes that facially discriminate against interstate business and offer commercial advantage to local enterprises;” (4) laws that “improperly apportion state assessments on transactions with out-of-state components;” and (5) laws that “have the inevitable effect [of] threatening the free movement of commerce by placing a financial barrier around the State.” The Court found that “[a]pplying these principles and precedents,” nothing in Michigan’s law offended the Commerce Clause. Michigan only imposed a flat fee of \$100 on trucks that operate within intrastate commerce. This law does not discriminate against out-of-state operators, “does not reflect an effort to tax activity that takes place . . . outside the State,” and “[n]othing in our case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause.”

Justice Scalia concurred in the judgment but would rest his decision “without advert[ing] to various tests from our wardrobe of ever-changing negative Commerce Clause fashions.” Instead he would “ask whether the fee ‘facially discriminates against

\$100 fee on motor carriers engaging in intrastate commerce does not violate the Commerce Clause. A subsection of Michigan’s Motor Carrier Act imposed upon each motor carrier for the administration of this act, an annual fee of \$100 for each self-propelled motor vehicle operated by or on behalf of the motor carrier. The fee was assessed only on motor

interstate commerce’ and whether it was ‘indistinguishable from a type of law previously held unconstitutional by this Court.’” Justice Thomas also concurred in the judgment but because “the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.”

Federal law required a Federal Permit for all motor carriers operating in interstate commerce. Michigan has a state law, which provided: “A motor carrier licensed in this state shall pay an annual fee of \$100.00 for each vehicle operated by the motor carrier which is registered in this state [i.e., which has a Michigan license plate] and operating entirely in interstate commerce.” In *Mid-Con Freight Systems, Inc. v. Michigan Public Serv. Comm’n*,²⁷ the Court considered whether the federal Single State Registration System (SSRS) preempted this state law. “The SSRS allows a trucking company to fill out one set of forms in one State (the base State), and by doing so to register its Federal Permit in *every* State through which its trucks will travel.” The SSRS allows the State to demand the following: “(1) proof of the trucking company’s possession of a Federal Permit, (2) proof of insurance, (3) the name of an agent designated to receive ‘service of process,’ and (4) a total fee (charged for the filing of the proof of insurance) equal to the sum of the individual state fees.” In addition, “[t]he SSRS statute specifies that a State may not impose any additional ‘registration requirement’” and provides, specifically, that “when a State Registration requirement imposes further obligations, ‘the part in excess is an unreasonable burden.’”

In a 6-3 decision, the Court held that the SSRS does not preempt Michigan’s \$100 fee because the latter relates to matters that fall outside the scope of the SSRS. The first question the Court addressed was what SSRS means when it uses the term “State registration requirement.” The Court concluded that the interpretation was very narrow: they “apply only to those state requirements that concern SSRS *registration* – that is, registration with a State of evidence that a carrier possesses a Federal Permit, registration of proof of insurance, or registration of the name of an agent ‘for service of process.’” The Court believed that the language of the statute “makes clear that the federal provision reaches no further.” The Court also believed that Michigan’s statute does not concern SSRS’s subject matter. First, “the Michigan statute imposing the \$100 fee makes no reference to evidence of a Federal Permit, to any insurance requirement, or to an agent for receiving service of process.” Second, legislative history shows the law was not established to circumvent the federal statute. Finally, “Michigan rules provide that a Michigan-plated interstate truck choosing Michigan as its SSRS base State can apparently comply with Michigan’s SSRS requirements even if it does not comply with Michigan’s \$100 fee requirement.” The truck owner could simply fill out a different form providing proof of a Federal Permit and another form to comply with Michigan and SSRS’s requirements. They would not receive a state decal, but “nothing . . . suggests the owner will have violated any other provision of Michigan law . . . [a]nd they have not demonstrated that Michigan law in

27. 125 S.Ct. 2427 (2005).

practice holds hostage a truck owner's SSRS compliance until the owner pays" the \$100 fee.

IMMIGRATION

Chief Justice Rehnquist delivered the opinion for a unanimous Court in *Leocal v. Ashcroft*.²⁸ It held that a conviction under a statute for driving under the influence, which does not have a mens rea component, is not a crime of violence under 18 U.S.C. section 16, requiring deportation. The petitioner immigrated to the United States and became a lawful permanent resident. Subsequently, the petitioner was charged under Florida law and pleaded guilty to two counts of driving under the influence of alcohol (DUI), causing seriously bodily injury. He was sentenced to two and a half years in prison. While serving his sentence, the Immigration and Nationalization Service (INS) initiated removal proceedings under section 237 of the Immigration and Nationalization Act (INA). Section 237 allows the Attorney General to order removal of an alien "who is convicted of an aggravated felony." An "aggravated felony" includes crimes of violence, as defined by 18 U.S.C. section 16, "for which the term of imprisonment [is] at least one year." Section 16 defines "crimes of violence" as follows: (1) crimes in which there is an element of "use, attempted use, or threatened use of physical force against the person or property of another;" or (2) an offense that is a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Immigration Judge determined that the petitioner was removable. The Board of Immigration Appeals and the Court of Appeals for the Eleventh Circuit affirmed.

The Court began by stating that section 16 directs the Court to look at "the elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime." The crime for which the petitioner was convicted is a third-degree felony under Florida law. Although the statute required proof of causation of injury, it does not require proof of "any particular mental state." To qualify as a "crime of violence" under the first part of section 16, the crime "must have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" The Court believed that focusing only on the word "use" is too narrow. Instead, "when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it." Looking at the phrase as a whole, the Court concluded that "'use' requires active employment." The Court believed that this interpretation does not include the use of force by "accident." The Court also found that Florida's DUI statute does not qualify as a crime of violence under the second part of the statute. It does not, according to the Court, include "all negligent misconduct," but "offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense," i.e., burglary. The Court concluded that even though the second part of section 16 is broader, it cannot construe it any more broadly than the first section since "it contains

the same formulation" with regard to the "use" of physical force. The Court concluded its opinion by stating that it "cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" It stated that the ordinary use of this term combined with "section 16's emphasis on the use of physical force . . . suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."

In *Jama v. Immigration and Customs Enforcement*,²⁹ a 5-4 Court, in an opinion written by Justice Scalia, held that the Attorney General need not obtain the advance consent of the "additional removal countries" to which an alien may be removed except in the last instance where, if it is "impracticable, inadvisable, or impossible," then the Attorney General may remove an alien to any country that gives its consent. The petitioner was born in Somalia and remains a citizen of that country. He was admitted to the United States as a refugee but his status was terminated in 2000 due to a criminal conviction. The Immigration and Naturalization Service (INS) brought a removal action. The petitioner "declined to designate a country to which he preferred to be removed." Therefore, the Immigration Judge ordered him removed to Somalia. The Board of Immigration Appeals affirmed and the petitioner did not seek further review. Instead, the petitioner sought a writ of habeas corpus, pursuant to 28 U.S.C. section 2241 "to challenge the designation of Somalia as his destination." He claimed "that Somalia had no functioning government, that Somalia therefore could not consent in advance to his removal, and that the Government was barred from removing him to Somalia absent advance consent."

The Attorney General determined an alien's destination after removal is ordered under 28 U.S.C. section 1231(b)(2). In sum, the statute provided "four consecutive removal commands:" (1) an alien "shall be removed to the country of his choice" unless certain conditions exist (hereinafter, "Subparagraphs A through C"); (2) "otherwise he shall be removed to the country of which he is a citizen, unless one of the conditions eliminating that command is satisfied" (hereinafter, "Subparagraph D"); (3) an alien shall be removed "to one of the countries with which he has a lesser connection" (hereinafter, "Subparagraph E, clauses (i) through (vi)"); or (4), if (3) is "impracticable, inadvisable, or impossible," then the alien "shall be removed to 'another country whose government will accept the alien into that country'" (hereinafter, "Subparagraph E, clause (vii)"). The Court stated that it will not "lightly assume that Congress has omitted from its adopted text requirements what it nonetheless intends to apply." This is

In *Clark v. Martinez*, a 7-2 Court . . . held that . . . an alien may be detained beyond the 90-day removal period, but only for as long as is reasonably necessary to effectuate removal.

28. 543 U.S. 1 (2004).

29. 543 U.S. 335 (2005).

especially true if “Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.” The Court concluded, therefore, that the statute does not require by its terms that acceptance by Somalia is necessary: the requirement that the destination country give approval applies only to Subparagraph E, clause (vii), not Subparagraph E, clauses (i) through (vi). The language of the statute is specific and no mention of approval is made in Subparagraph E except as it pertains to the terminal clause: “[i]f impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.”

In *Clark v. Martinez*,³⁰ a 7-2 Court, in an opinion written by Justice Scalia, held that under 8 U.S.C. section 1231(a)(6), an alien may be detained beyond the 90-day removal period, but only for as long as is reasonably necessary to effectuate removal. The respondents arrived in the United States from Cuba in June 1980 as part of the “Mariel boatlift.” Pursuant to 8 U.S.C. section 1182(d)(5), they were paroled in the country under the Attorney General’s authority. Until 1996, Cubans who were paroled into the United States could adjust their status after one year to that of “permanent lawful resident.” Martinez and Benitez did not qualify for the adjustment at the time they applied because of prior criminal convictions in the United States. After their application, both men were convicted of additional crimes. In both cases, the INS took the men into custody and they were ordered removed. Also in both cases, the men were detained beyond the 90-day removal period as set forth in section 1216(a)(6). The respondents filed petitions for writs of habeas corpus under 28 U.S.C. section 2241 “to challenge their detention beyond the 90-day removal period.”

Section 1231(a)(6) provided that three specific categories of aliens “may be detained beyond the removal period and, if released, shall be subject to the terms of supervision.” The

three categories of aliens are: (1) “those ordered removed who are inadmissible under section 1182;” (2) “those ordered removed who are removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4);” and (3) “those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk.” With regards to the second category, the Court, in *Zadvydas v. Davis*,³¹ “interpreted this provision to authorize the Attorney General . . . to detain aliens only as long as ‘reasonably necessary’ to remove them from the country.” The Court laid out its reasoning behind this decision: (1) the word “may” is ambiguous, but suggests discretion; and (2) there is a “serious constitutional threat” of “indefinite detention.” The question presented in this case is whether this reasoning also applied to the first category of aliens in section 1231(a)(6). The Court answers in the affirmative. The Court stated that the “operative” language in section 1231(a)(6), “‘may be detained beyond the removal period,’ applies without differentiation to all three categories of aliens.” The Court concluded that this “cannot justify giving the same detention provision a different meaning when such aliens are involved.” The “lowest common denominator,” or interpretation of the same ambiguous language, must apply to all three categories of aliens specified in the statute.



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30. 543 U.S. 371 (2005).

31. 533 U.S. 678 (2001).

Eroding Fourth Amendment Protections at the Border:

An Analysis of *United States v. Cortez-Rocha*

Ryan Farley

It was a great trip to Tijuana. You got two cases of real vanilla for everyone on your Christmas list, a huge bunch of real Mexican oregano, and a three-legged-pig clay sculpture to finish off your newly renovated Spanish-style living room. That pig was a great find. Already it's bringing you luck; there is hardly a line to cross back into the States, and at this rate, you will make it home in time to watch *Boston Legal*. Unfortunately, it won't work out that way. The border agents who are randomly pulling cars out of line, send you to the secondary inspection area. While you chat with the agent, he picks up the clay pig, and suddenly, he doesn't seem friendly any more. The dog circling your car has just dipped his head twice near your trunk, you are getting sweaty, and more agents seem to be taking an interest in your car. Before you know what's happening, the agent smashes the clay pig to look inside. Surely he can't do that! Surely this is an unreasonable search . . . isn't it? Unfortunately, it is probably okay.

Recently, the Ninth Circuit Court of Appeals decided the government can destroy personal property during a search at the border without restraint or probable cause.¹ The Ninth Circuit's holding in *United States v. Cortez-Rocha*² represents a dangerous precedent not only for border searches, but for the reasonableness standard embedded in the Fourth Amendment.³ However, this power should not eliminate all Fourth Amendment protections against unreasonable searches.⁴ Although the federal government may have the ability to conduct searches without probable cause at the border, that power does not allow federal agents to destroy personal property when agents can open a container with minimal dam-

age and when no exigent circumstances exist.⁵

On February 16, 2003, Julio Cortez-Rocha (Cortez) attempted to enter the United States from Mexico.⁶ During the routine border questioning, customs agents became suspicious of Cortez and sent him to a secondary inspection area.⁷ During the search, the agents slashed open his spare tire, found several bricks of marijuana, and arrested Cortez.⁸

The Ninth Circuit determined that a destructive search of personal property at the border was reasonable under the Fourth Amendment even though the agents could have disassembled or opened the container without destroying it.⁹ The decision in *Cortez-Rocha* raises troubling questions about citizens' rights, the status of the Fourth Amendment at the border, and the applicability of the exclusionary rule to border searches.

Constitutional protections are being restricted by the courts in the name of justice and national security. Although the government has a reasonable interest in regulating what crosses its borders, individuals do not lose constitutional protections at the border, and courts should affirm the substantial protections against unreasonable searches and seizures.¹⁰ The Ninth Circuit should have encouraged government agents to conduct their investigations within the boundaries set by *United States v. Flores-Montano*,¹¹ rather than further weighting the balancing test in favor of the government.¹² Suppressing the marijuana in the *Cortez-Rocha* case would not have prevented agents from inspecting containers crossing the border. Rather, the Ninth Circuit should have held that the destruction of a container, absent an additional justification, is particularly offensive and

Footnotes

1. *United States v. Cortez-Rocha*, 394 F.3d 1115 (9th Cir. 2005).
2. *Id.* The court's decision was initially rendered September 21, 2004 and reported at 383 F.3d 1093. Nearly four months later, the court supplemented its opinion with citation to a Prohibition-era decision upholding a warrantless search for contraband whiskey in an automobile, *Carroll v. United States*, 267 U.S. 132 (1924), and a 1982 case involving the warrantless search of an automobile during a traffic stop, *United States v. Ross*, 456 U.S. 798 (1982); the *Ross* case had cited *Carroll*. *Carroll*, but not *Ross*, is briefly cited in the Supreme Court's most recent case addressing border searches of automobiles, *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004), but did not factor significantly into the court's analysis.
3. U.S. CONST. amend. IV.
4. See *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (not deciding whether "a border search might be deemed unreasonable because of the particularly offensive manner in which it is carried out");

Marsh v. United States, 344 F.3d 317, 324 (5th Cir. 1965) ("Border searches are . . . not exempt from the constitutional test of reasonableness.").

5. See *Florida v. Jimeno*, 500 U.S. 248 (1991); *Florida v. Wells*, 495 U.S. 1 (1990); *United States v. Osage* 235 F.3d 518 (10th Cir. 2000).
6. Appellant's Opening Brief at 4, *United States v. Cortez-Rocha*.
7. Brief for Appellee at 2-3, *United States v. Cortez-Rocha*.
8. *Id.* at 2-3.
9. *United States v. Cortez-Rocha*, 394 F.3d 1115, 1125-26 (9th Cir. 2005).
10. See U.S. CONST. amend. IV; *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (1977).
11. 541 U.S. 149 (2004).
12. See *United States v. Flores-Montano*, 541 U.S. 149, 155-56 (2004) (holding that reasonable suspicion may be required for the destructive search of a operational or non-operational car-part component).

makes the search unreasonable.¹³ Instead of determining whether the trial judge correctly admitted the evidence, the Ninth Circuit held that the complete destruction of a person's property was not offensive, thereby further reducing an individual's protection against unreasonable searches and seizures.¹⁴

There is no justification for protecting searches that completely destroy an object, regardless of the object's value, when there are nondestructive methods for opening it.¹⁵ Agents have a lower threshold to meet to justify searches at the border and the scope of those searches is nearly unlimited. However, the border search does not eliminate the restraint agents must use when conducting the search. Allowing federal customs agents to destroy personal property when they can open the container with minimal damage and common tools eliminates all Fourth Amendment protections at the border.

I. CASE DESCRIPTION

Julio Cortez-Rocha (Cortez) attempted to enter the country through the Calexico Port of Entry between California and Mexico on February 16, 2003, while smuggling 42 kilograms of marijuana in his spare tire.¹⁶ Border customs agents were conducting a routine border check of Cortez's 1979 Chevy pickup and became suspicious when a drug dog signaled near the gas tank of Cortez's truck.¹⁷ Agents moved Cortez to a secondary inspection area, placed him in handcuffs, and conducted a detailed search of his vehicle.¹⁸ They placed a density meter against the spare tire, which registered a high reading.¹⁹ The agents put the truck on a hydraulic lift, removed the spare tire, and slashed it open.²⁰ The agents found 42.22 kilograms of marijuana and arrested Cortez.²¹

On February 26, 2003, the government charged Cortez with one count of importing marijuana and one count of possession with the intent to distribute.²² Prior to trial, Cortez asserted that "cutting open the spare tire . . . represented a 'non-routine' search that must be justified by reasonable, articulable suspicion."²³ Further, Cortez argued that the government had not established reasonable suspicion since it provided no evidence

on the reliability of the dog or the density buster.²⁴ To support his suppression motion, Cortez filed discovery motions on the reliability of the dog and density buster.²⁵

The government countered that the search did not require reasonable suspicion since the search was a routine border search and, therefore, reasonable.²⁶ Ultimately, the trial court denied both motions, determining that since the search was routine it did not require reasonable suspicion and that the discovery motion was moot.²⁷ After the trial court denied his motion, Cortez pleaded guilty to the importation of marijuana charge, conditioned on his appeal of the suppression motion.²⁸ The district court sentenced Cortez to time served and two years probation.²⁹ On appeal, the Ninth Circuit affirmed Cortez's conviction.³⁰

II. BACKGROUND

The Fourth Amendment prevents the government from conducting unreasonable searches and seizures without probable cause.³¹ Probable cause is a reasonable belief that the government will find evidence of a crime in a particular location.³² Typically, searches and seizures require a detached magistrate to determine whether probable cause exists to support the government's warrant request.³³ If the magistrate finds probable cause, the magistrate will issue a warrant.³⁴ If the government conducts a warrantless search, then a defendant may keep the evidence out of the prosecutor's case-in-chief presentation through the exclusionary rule.³⁵ However, several exceptions to the warrant requirement allow the prosecutor to bring in evidence obtained outside the warrant process.³⁶ Each exception defines reasonableness differently.³⁷

There is no justification for protecting searches that completely destroy an object . . . when there are nondestructive methods for opening it.

13. U.S. Const. amend. IV; *Ramsey*, 431 U.S. at 618 n.13.

14. *Mapp v. Ohio*, 367 U.S. 643, 653 (1961); *Ker v. California*, 374 U.S. 23, 34 (1963) ("[T]here is no formula for . . . reasonableness. Each case is to be decided on its own facts and circumstances . . .").

15. *See United States v. Osage*, 235 F.3d 518 (10th Cir. 2000).

16. *United States v. Cortez-Rocha*, 394 F.3d 1115, 1118 (9th Cir. 2005).

17. *Id.*

18. *Id.*

19. *Id.* Density busters measure the density of objects. *Id.*; Appellant's Opening Brief at 4, *United States v. Cortez-Rocha*. Agents compare the meter reading to an acceptable range for the object tested. *Id.* If the reading is "high," the object is denser than normal and suggests a strong probability there is a something hidden within the object. *Id.*

20. *Cortez-Rocha*, 394 F.3d at 1118.

21. *Id.*

22. *Id.*

23. Appellant's Opening Brief at 4, *United States v. Cortez-Rocha*.

24. *Id.*

25. *Id.* at 5.

26. *Id.*

27. *Id.* at 6.

28. *Id.*

29. *Id.*

30. *United States v. Cortez-Rocha*, 394 F.3d 1115, 1126 (9th Cir. 2005).

31. U.S. CONST. amend. IV.

32. *See Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

33. *Katz v. United States*, 389 U.S. 347, 356-57 (1967) (citations omitted).

34. *Katz*, 389 U.S. at 356-57.

35. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928)).

36. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).

37. E.g., *United States v. Leon*, 468 U.S. 897 (1984) (admitting evidence under "good-faith" exception); *Ramsey*, 431 U.S. 606, 616-17 (1977) (holding border searches are reasonable by virtue of their location); *New York v. Belton*, 453 U.S. 454 (1981) (holding a search during a custodial arrest is reasonable to prevent officer from harm).

The border-search exception allows for a search of the entire vehicle and its contents without obtaining a search warrant

A. Border Searches

The United States Supreme Court has long considered border searches reasonable without a finding of probable cause by a detached magistrate simply “by virtue of the fact that they occur at the border”³⁸ The border-search reasonableness definition is not rooted in the

“exigent circumstance”³⁹ analysis used in interior⁴⁰ Fourth Amendment analyses.⁴¹ Rather, the long-standing exception for border searches springs from the government’s interest in regulating what enters the country by securing its borders from unwanted contraband and preventing illegal immigration.⁴² Thus, border searches are more of a regulatory search, such as an inventory search,⁴³ and government agents are restricted in the manner in which they carry out the search.⁴⁴ The United States Supreme Court has reaffirmed the border-search exception numerous times.⁴⁵

The border-search exception allows for a search of the entire vehicle and its containers without obtaining a search warrant or establishing probable cause.⁴⁶ However, the individual may rebut the presumption of validity by showing agents conducted the search in a particularly offensive manner.⁴⁷ To determine whether the government has exceeded its authority, the court must use a balancing test to determine whether agents conducted the search in a “manner which will conserve public interests as well as the interests and rights of individual citizens.”⁴⁸

For example, in *United States v. Ramsey*⁴⁹ the United States Supreme Court held that an inspection of suspicious letters was reasonable because the agent conducted the search when the letters entered the country.⁵⁰ The agent searched the letters

at the point of entry into the United States for the letters, the functional equivalent of the border,⁵¹ and the border exception made the search reasonable.⁵²

Although individuals have greater constitutional protections than their property, customs agents may still detain individuals, regardless of where they enter, for a reasonable amount of time to determine whether they are smuggling contraband.⁵³ In *United States v. Montoya de Hernandez*,⁵⁴ customs agents suspected that Rosa Montoya de Hernandez was a “balloon swallower”⁵⁵ because of the suspicious characteristics of her story and dress.⁵⁶ During a pat-down and strip search, agents noticed Hernandez’s abdomen was firm and that she was wearing two pairs of elastic underwear.⁵⁷ Agents gave Hernandez the option to have an x-ray or wait until she had a bowel movement so they could determine what was in her abdomen.⁵⁸ After 16 hours, agents obtained a court order for a rectal exam and discovered 88 balloons filled with cocaine.⁵⁹

Hernandez moved to suppress the evidence, arguing that the search was unreasonable as it violated her privacy and dignity and that the government did not obtain a warrant until after she had been detained for 16 hours.⁶⁰ The United States Supreme Court considered the detention to be “routine” since agents confined Hernandez until they could determine whether she was smuggling drugs.⁶¹ Defining the agents’ search of Hernandez as routine would lead courts to extend the same analysis to property searched at the border.

B. The Ninth Circuit and the Routine/Non-Routine Analytical Framework

The Ninth Circuit has consistently held that agents must conduct border searches in a reasonable manner.⁶² In 1967, 1970, and 1984, the court held that the government does not need probable cause to initiate a border search but the agent must “proceed in a reasonable manner” and support more-intrusive searches with “some level of suspicion.”⁶³ The appel-

38. *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977).

39. See *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984) (summarizing several warrant-requirement exceptions).

40. “Interior” refers to searches or seizures within the United States’ borders. *Flores-Montano*, 541 U.S. at 154.

41. *Ramsey*, 431 U.S. at 622.

42. See *Carroll*, 267 U.S. at 154; *United States v. Knight*, 534 U.S. 112, 118-119 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

43. WAYNE R. LAFAYE, ET AL., *CRIMINAL PROCEDURE*, § 3.4 (3d ed. 2000).

44. *Florida v. Wells*, 495 U.S. 1, 4 (1990).

45. See, e.g., *Flores-Montano*, 541 U.S. 149 (border crossings); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (airports); *Ramsey*, 431 U.S. 606 (international mail).

46. LAFAYE, *supra* note 43 at 236.

47. See *Flores-Montano*, 541 U.S. at 155; *Ramsey*, 431 U.S. at 618, n.13; Appellant’s Opening Brief at 11, *United States v. Cortez-Rocha*.

48. *Carroll v. United States*, 267 U.S. 132, 149 (1925).

49. 431 U.S. 606, 616-17 (1977).

50. *Ramsey*, 431 U.S. at 624-25. Point of entry into the United States

of property or persons is the functional equivalent of the border.

Almeida-Sanchez v. United States, 413 U.S. 266, 272-273 (1973).

51. *Almeida-Sanchez*, 413 U.S. at 272-273.

52. *Ramsey*, 431 U.S. at 624-25.

53. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

54. 473 U.S. 531 (1985).

55. Balloon swallowers ingest condoms or balloons filled with drugs, enter the country, and naturally expel the drugs at their destination. *Id.* at 533.

56. *Id.* Hernandez claimed to be a buyer for a store in Columbia to account for her frequent trips between Bogotá and Los Angeles. *Id.* However, the lack of substantial luggage and hotel plans discounted her story. *Id.*

57. *Id.* at 534.

58. *Id.*

59. *Id.* at 535-36.

60. *Id.* at 536-38.

61. *Id.* at 541, 543-44.

62. *United States v. Des Jardins*, 747 F.2d 499, 504 (1984) (citations omitted); *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967).

63. *Id.*

late courts developed a test to evaluate the intrusiveness of a border search through the routine/non-routine analysis based on *Montoya de Hernandez*.⁶⁴

The Ninth Circuit extended the routine/non-routine analysis to border vehicle searches in *United States v. Molina-Tarazon*.⁶⁵ The Ninth Circuit held that removing the gas tank from a vehicle to inspect its interior was not routine and, therefore, required particularized suspicion.⁶⁶ In *Molina-Tarazon*, the agents became suspicious of Molina's truck and searched it to determine whether he had concealed drugs in the truck.⁶⁷ The search was inconclusive.⁶⁸ Unsatisfied, the agents directed the truck to the inspection area.⁶⁹ The mechanic put the truck on a lift and removed the gas tank.⁷⁰ After disassembling the tank, the mechanic discovered drugs.⁷¹

The Ninth Circuit held that the border-search exception was reasonable for routine searches, creating a three-part analysis to determine whether or not the search was routine.⁷² The three-part test required an evaluation of the amount of force used, the danger the search posed, and the effect of the search on the individual.⁷³ After determining that the search was non-routine, the court found that the agents established reasonable suspicion prior to removing the gas tank.⁷⁴ Since the agents had established reasonable suspicion to conduct the non-routine search, the court held the search was reasonable.⁷⁵

Prior to *Cortez-Rocha*, the Ninth Circuit had considered that slashing a spare tire was a routine search under the *Molina-Tarazon* test in *United States v. Vargas-Castillo*.⁷⁶ In *Vargas-Castillo*, customs agents referred the defendant's vehicle to a secondary inspection area after becoming suspicious of the vehicle.⁷⁷ Based on the evidence established during the secondary inspection, a customs agent made a small incision into the tire, discovered marijuana, and then cut the tire completely open to uncover the rest of the drugs.⁷⁸

In *Vargas-Castillo*, the Ninth Circuit answered a hypothetical question since neither party raised the suppression issue at trial nor did the court cite any authority to allow it to address the issue on appeal.⁷⁹ Additionally, the appellate court did not determine whether slashing the tire was routine or whether agents had established sufficient reasonable suspicion to con-

duct the search.⁸⁰ Thus, the Ninth Circuit used a routine/non-routine analysis to determine whether property searches conducted at the border were reasonable under the Fourth Amendment and suggested that slashing a tire might be a reasonable search.⁸¹

C. United States v. Flores-Montano's Effect on Border Searches

In *United States v. Flores-Montano*,⁸² the United States Supreme Court rejected the Ninth Circuit's routine/non-routine balancing test.⁸³ The facts in *Flores-Montano* were similar to those in *Molina-Tarazon*.⁸⁴ After suspecting that Flores's gas tank contained drugs, the agents sent the car to a secondary inspection area, put it on a lift, and summoned a mechanic to disassemble the gas tank.⁸⁵ After agents removed the tank, they noticed an extra plate attached to the top of the tank with bondo.⁸⁶ The agents knocked off the plate and discovered the hidden marijuana.⁸⁷

Flores-Montano contains two important holdings for border searches. First, the United States Supreme Court reaffirmed that the government does not have to establish probable cause to conduct a border search and that the scope of a property border search is unlimited.⁸⁸ Second, the government may remove, inspect, and replace any operational part of the vehicle without probable cause or judicial oversight when the government can accomplish the process in a reasonable amount of time and with little or repairable damage to the vehicle.⁸⁹ Although *Flores-Montano* eliminated *Molina-Tarazon*'s balancing test,⁹⁰ it did not clarify what amount of destruction makes a search unreasonable.⁹¹

On the facts presented, the Court determined the hour the agents required to summon the mechanic, complete the disassembly, search the tank, and reassemble the car was not unreasonable.⁹² The Court remanded the case but refused to deter-

Although *Flores-Montano* eliminated [the] balancing test, it did not clarify what amount of destruction makes a search unreasonable.

64. See *United States v. Flores-Montano*, 124 S. Ct. 1582, 1584-85 (2004).

65. 279 F3d 709 (9th Cir. 2002).

66. *United States v. Molina-Tarazon*, 279 F3d 709, 712 (9th Cir. 2002) *overruled in part*, *United States v. Flores-Montano*, 541 U.S. 149, 151-52 (2004).

67. *Molina-Tarazon*, 279 F3d at 711.

68. *Molina-Tarazon*, 279 F3d at 712.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 713. The court acknowledged that there may be additional factors that would add to the analysis. *Id.*

73. *Id.* at 713-16.

74. *Id.* at 717-18.

75. *Id.* at 717-18.

76. 329 F3d 715, 722-23 (9th Cir. 2003).

77. *Id.* at 717.

78. *Id.*

79. See *id.*; Appellant's Opening Brief at 17, *Cortez-Rocha*.

80. *Id.*

81. See *Vargas-Castillo*, 329 F3d at 722-23; *United States v. Molina-Tarazon*, 279 F3d 709, 713 (9th Cir. 2002).

82. 541 U.S. 149 (2004).

83. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

84. See *id.* at 150-51; *Molina-Tarazon*, 279 F3d at 711-12.

85. *Flores-Montano*, 541 U.S. at 151.

86. *Id.* Bondo is "a putty-like hardening substance that is used to seal openings . . ." *Id.*

87. *Id.*

88. *Id.* at 153.

89. *Id.* at 154-55 (commenting the search took approximately one hour and suggesting that a wait of two hours to enter the country would not be unreasonable).

90. *Id.* at 152-53.

91. *Id.* at 154 n.2 (refusing to discuss what type of manner might make a search unreasonable).

92. *Id.* at 155.

Reasonableness has different standards depending on the type, location, and circumstances of the search.

mine what level of destruction during a search made it unreasonable.⁹³ Thus, although the United States Supreme Court overruled the routine/non-routine balancing test, it did not determine what level of destruction makes a border search unreasonable.⁹⁴

D. Defining Reasonable Manner in Destruction of Property

Reasonableness has different standards depending on the type, location, and circumstances of the search.⁹⁵ Government agents may establish reasonableness through exigent circumstances or by developing additional reasonable suspicion to widen the scope of the search.⁹⁶ However, a search may become unreasonable depending on the manner in which agents conduct the search⁹⁷ or when the scope of the search exceeds the basis for the search.⁹⁸

In federal cases where a court has determined the government established reasonable suspicion beyond the justification for the initial search, it has admitted evidence obtained through destructive searches.⁹⁹ Conversely, courts have suppressed the evidence when the government failed to show sufficient reasonable suspicion to justify the destructive search.¹⁰⁰ Additionally, courts have admitted evidence uncovered during a nondestructive search.¹⁰¹

For example, the United States Supreme Court has held that agents conducted a reasonable search when they slashed open the interior of a car to determine whether suspects had hidden contraband in the seats because the government had established reasonable suspicion during the search.¹⁰² Thus, although the

manner of the search may appear unreasonable, the courts determined the agents established reasonable suspicion to widen the scope of the search and did not base the reasonableness of the search on the probable cause to stop the car.¹⁰³

Additionally, the majority of federal appellate courts to address destructive border searches have required the government to establish reasonable suspicion before destroying a container while conducting an otherwise reasonable search.¹⁰⁴ In each of the cases, the government drilled small holes or made small incisions to determine the contents of the “container.”¹⁰⁵ These cases presented the question whether the government had conducted a routine or non-routine search based on the interpretation of *Montoya de Hernandez*.¹⁰⁶ However, where courts allowed the evidence, it determined the agents had established reasonable suspicion to believe the container contained contraband.¹⁰⁷ By establishing reasonable suspicion, the agents were able to justify the continued intrusion into the property and greater latitude to conduct the drilling.¹⁰⁸

Even though reasonableness is a shifting standard, the government can conduct a wide array of searches through a warrant-requirement exception.¹⁰⁹ Further, when in doubt, obtaining a warrant gives an agent great latitude to conduct a seemingly unreasonable search.¹¹⁰

III. ANALYSIS

A. Parties’ Arguments

United States v. Cortez-Rocha required the Ninth Circuit to determine whether the destructive force used to open the spare tire was unreasonable under *Ramsey*¹¹¹ and *Flores-Montano*.¹¹² After the government submitted its brief, the United States Supreme Court ruled on *Flores-Montano*, which required the parties to adjust their arguments.¹¹³ The Ninth Circuit ruled that *Flores-Montano* applied only to operational parts of the

93. *Id.*

94. *Id.*

95. See *supra* notes 33-39.

96. *Id.*

97. *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (1977).

98. *Florida v. Wells*, 495 U.S. 1 (1990).

99. See *e.g.*, *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (holding that reasonable suspicion suspect was armed and dangerous supported exigent circumstances to justify seizure); *United States v. Bennett*, 363 F3d 947, 952 (9th Cir. 2004) (holding agents had established probable cause to justify destructive search); *Carroll v. United States*, 267 U.S. 132, 153 (1925) (holding that reasonable suspicion justified slashing into car upholstery).

100. See *e.g.*, *United States v. Rivas*, 157 F3d 364 (5th Cir. 1998) (holding the government did not establish reasonable suspicion to justify drilling). Cf. *United States v. Osage*, 235 F3d 518 (10th Cir. 2000) (holding the officer did not have sufficient reasonable suspicion to exceed the scope of consent by destroying the container).

101. See *United States v. Flores-Montano*, 541 U.S. 149 (2004); *United States v. Pena*, 920 F2d 1509 (10th Cir. 1990) (holding that removing a vent cover is a nondestructive search); *United States v. Torres*, 663 F2d 1019 (10th Cir. 1981) (holding that using a screwdriver to remove a panel is a nondestructive

search). See *cf.* *Florida v. Wells*, 495 U.S. 1, 4-5 (1990) (forcing open container absent existing police procedures was an unreasonable search).

102. *Carroll*, 267 U.S. at 153. A similar search would currently fall under the automobile exception.

103. *Carroll*, 267 U.S. at 162.

104. See *Flores-Montano*, 541 U.S. at 154 n. 2.

105. *Bennett*, 363 F3d at 952; *Rivas*, 157 F3d 364; *United States v. Weinbender*, 109 F3d 1327, 1329 (8th Cir. 1997); *Robles*, 45 F3d 1; *Carreon*, 872 F2d 1436.

106. See, *e.g.*, *Rivas*, 157 F3d at 367; *Robles*, 45 F3d at 5.

107. Compare *Rivas*, 157 F3d at 368 (holding the government did not meet its burden to establish reasonable suspicion) with *Robles*, 45 F3d at 5 (holding the government met its burden of reasonable suspicion).

108. *Id.*

109. See cases cited *supra* note 37.

110. See, *e.g.*, *Bennett*, 363 F3d at 952 (holding that agents had established probable cause to justify search).

111. *United States v. Ramsey*, 431 U.S. 605, 618, n. 13 (1977).

112. 541 U.S. 149.

113. Compare Appellant’s Opening Brief, *United States v. Cortez-Rocha* Brief for Appellee, *United States v. Cortez-Rocha* with Appellant’s Reply Brief, *United States v. Cortez-Rocha*.

vehicle and not to non-operational parts of the vehicle.¹¹⁴ Therefore, the holding in *Flores-Montano* did not cover the destructive search of the spare tire.¹¹⁵ This ruling was wrong because it ignored United States Supreme Court precedent requiring the Fourth Amendment to be “liberally construed” to preserve the integrity of Constitutional protections¹¹⁶ and because of the offensive manner of the search.¹¹⁷ Finally, the Ninth Circuit’s decision ignored analogous United States Supreme Court precedent and similar interpretations of other circuit courts requiring agents to establish reasonable suspicion before conducting destructive searches of property.¹¹⁸

1. Julio Cortez-Rocha

During the course of the appeal, the United States Supreme Court ruled on *United States v. Flores-Montano*,¹¹⁹ which changed the emphasis of the parties’ arguments. Initially, Cortez argued that slashing the spare tire was a non-routine search because the search completely destroyed the container.¹²⁰ Additionally, Cortez argued the destruction of the tire significantly reduced his sense of safety and caused him to be fearful of completing his journey without a spare tire.¹²¹ Cortez’s last argument in his opening brief attempted to discount the holding from *United States v. Vargas-Castillo*, since the Ninth Circuit had refused to consider the suppression motion because the parties had not raised the issue at trial.¹²² Cortez’s arguments all contained the same theme: the Fourth Amendment protects individuals against “unreasonable destruction of property,” regardless of whether the seizure occurs at the border or inside the country and that any destructive force used during a search requires agents to establish reasonable suspicion or lose the evidence to the exclusionary rule.¹²³

Following the United States Supreme Court’s decision in *Flores-Montano*, which struck down the routine/non-routine analysis,¹²⁴ Cortez revised his argument. Cortez argued that slashing the spare tire was the kind of destructive force the United States Supreme Court suggested was unreasonable.¹²⁵ However, in *Flores-Montano* the Court specifically refused to identify the level of destruction that would make an otherwise legal search unreasonable by the manner in which agents con-

ducted the search.¹²⁶

Incorporating *Flores-Montano* into his reply brief, Cortez contended that a destructive search required individualized suspicion and that *Flores-Montano* did not address whether a destructive search was unreasonable.¹²⁷ Cortez further asserted that although the routine/non-routine framework had been eliminated, the United States Supreme Court did not hold that an individual loses all possessory interests in property, or that a Fourth Amendment reasonableness analysis was eliminated.¹²⁸ Cortez urged the Ninth Circuit to join the majority of circuits requiring that government agents establish reasonable suspicion before using destructive force to carry out a border search.¹²⁹ Finally, Cortez requested that the court suppress the evidence since the government could have obtained it using other “least-intrusive” means.¹³⁰

Cortez requested that the court suppress the evidence since the government could have obtained it using other “least-intrusive” means.

2. United States

The government argued that the ruling in *United States v. Vargas-Castillo* was binding and asserted that the holding of that case classified the cutting open of a spare tire as a routine search that did not require reasonable suspicion.¹³¹ Additionally, the government focused on limiting *Montoya de Hernandez* to the intrusive search of a person and argued that the balancing test established in *Molina-Tarazon* was inconsistent with *Montoya de Hernandez*.¹³²

Further, the government identified several cases within the Ninth Circuit and from other circuits in which courts had held that minimal destructive force was reasonable and routine when the government conducted the search at the border.¹³³ For example, the government argued that the Eleventh Circuit has allowed searches, initially using minimal destructive force, to destroy large portions of a boat during a border search.¹³⁴ Finally, the government cited cases in the Seventh and Tenth

114. *United States v. Cortez-Rocha*, 394 F.3d 1115, 1119-20 (9th Cir. 2005).

115. *Id.*

116. *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (citing *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

117. *Ramsey*, 431 U.S. at 618 n.13.

118. *See Florida v. Jimeno*, 500 U.S. 248 (1991); and cases cited *supra* note 37.

119. 541 U.S. 149 (2004).

120. Appellant’s Opening Brief at 6-8, 12-15.

121. *Id.* at 15-16.

122. *Id.* at 17.

123. *Id.* at 6-7.

124. *Flores-Montano*, 541 U.S. 149, 152-53 (2004).

125. *Id.* at 154 n.2, 156.

126. *Id.*

127. Appellant’s Reply Brief at 4-5.

128. *Id.* at 5-6.

129. *Id.* at 6.

130. *See id.* at 2-4.

131. Brief for Appellee at 4.

132. *Id.* at 8-10.

133. *Id.* at 8-11 (citing *United States v. Ramos-Saenz*, 36 F.3d 59 (9th Cir. 1994) (limiting non-routine searches to body or strip searches and holding the destructive force to remove the sole of the shoe was reasonable); *United States v. Most* 789 F.2d 1411 (9th Cir. 1986) (inserting a beeper into a paperweight was a reasonable search)).

134. Brief for Appellee at 15-17 (citing *United States v. Puig*, 810 F.2d 1085, 1086-87 (11th Cir. 1987) (holding that drilling a small hole into the hull of ship which could easily be repaired was reasonable); *United States v. Sarda-Villa*, 760 F.2d 1232 (11th Cir. 1985) (holding that “reasonable suspicion justified using an axe and a crowbar” to search underneath the deck for drugs); *United States v. Moreno*, 778 F.2d 719, 721 (11th Cir. 1985) (drilling two small holes in a gas tank to insert a probe to determine the contents was a reasonable border search)).

In his dissenting opinion, Judge Sidney Thomas argued that the majority had created an overbroad and unnecessary power within the border-search exception.

circuits, in which minimal destructive force to establish the contents of luggage or a camper shell and in which both circuits determined that the searches were reasonable border searches.¹³⁵

The government concluded that by limiting *Montoya de Hernandez*'s routine/non-routine analysis to body searches and strip searches, the United States Supreme Court permitted the government greater freedom to use some destructive force to carry out a border

search.¹³⁶ The government requested that Cortez's conviction stand because the search of the tire was reasonable and that *Montoya de Hernandez* did not apply to property searches.¹³⁷

B. Ninth Circuit Court of Appeals Majority Opinion

The Ninth Circuit specifically distinguished *Flores-Montano* as pertaining only to the vehicle itself.¹³⁸ According to the majority, because the spare tire was unnecessary for immediate travel and destruction of the spare tire did not damage or destroy the vehicle, the search was reasonable, and no cause or suspicion was necessary to search the spare tire.¹³⁹ Although a destructive search of property may require reasonable suspicion, the Ninth Court held that since the United States Supreme Court had focused its analysis on the vehicle, the spare tire was not significant enough to be protected.¹⁴⁰ Further, the court held that it was unworkable to require agents to establish reasonable suspicion before opening any locked container and that to do so would impair the government's ability to protect its border.¹⁴¹ Additionally, the Ninth Circuit distinguished the "drilling cases"¹⁴² as irrelevant because those cases were based on a similar routine/non-routine determination specifically overruled in *Flores-Montano*.¹⁴³

The court justified its position as adhering to the admonition from the United States Supreme Court in *Flores-Montano* to avoid creating additional balancing tests to determine reasonableness.¹⁴⁴ The court noted the spare tire was a favored smuggling area for both drug runners and terrorists.¹⁴⁵ The court suggested that accepting Cortez's argument would encourage smugglers to conceal contraband in the spare tire and allow contraband and terrorists into the country unchecked.¹⁴⁶ Finally, the court held that although the search may have resulted in a constitutional tort or taking, the agents' actions were not severe enough to justify suppressing the evidence.¹⁴⁷ The majority implicitly decided that a civil suit against the government was a sufficient remedy for the complete destruction of the tire.¹⁴⁸ The Ninth Circuit determined that the search was reasonable and affirmed the guilty plea.¹⁴⁹

C. Dissenting Opinion

In his dissenting opinion, Judge Sidney Thomas argued the majority had created an overbroad and unnecessary power within the border-search exception.¹⁵⁰ Judge Thomas anchored his opinion on the United States Supreme Court acknowledgment that the facts in *Flores-Montano* showed that the search was nondestructive and that a destructive search may lead to a different result.¹⁵¹ Since the search in *Cortez-Rocha* was completely destructive, Judge Thomas argued that the existing totality-of-the-circumstances test was the appropriate test.¹⁵² The dissent identified three factors to consider in the analysis: "the degree of destruction, the ease [of repair], and the convenience, cost, and efficiency of non-destructive or less-destructive methods that were available . . ."¹⁵³ Applying his method, Judge Thomas determined the agents should have established reasonable cause before cutting into the tire.¹⁵⁴

Judge Thomas next attacked the majority's characterization of the tire as a nonessential component of a vehicle since the spare tire is a safety feature.¹⁵⁵ Finally, Judge Thomas warned against the majority's war-on-terrorism justification stating, "[t]he challenge in such times is not to allow our fear to overcome our values."¹⁵⁶

135. Brief for Appellee at 17-18; *United States v. Johnson*, 991 F.2d 1287, 1287 (9th Cir. 2001) (holding that the agent had established probable cause that contraband was hidden in a suitcase's hardshell before removing the interior liner); *United States v. Carreon*, 872 F.2d 1436 (10th Cir. 1989) (holding that drilling a small hole to determine the contents of a camper shell was a reasonable search).

136. Brief for Appellee at 22 (summarizing the holdings of the cases it cited in evaluating whether the use of destructive force makes a search non-routine or unreasonable).

137. *Id.* at 22-23.

138. *United States v. Cortez-Rocha*, 394 F.3d 1115, 1119-20 (9th Cir. 2005).

139. *Id.*

140. *Id.*

141. *Id.* at 1120.

142. See cases cited *supra* note 105 and accompanying text.

143. *Cortez-Rocha*, 394 F.3d at 1119.

144. *Id.* at 1122.

145. *Id.* at 1122-25.

146. *Id.* at 1125.

147. *Cortez-Rocha*, 394 F.3d at 1128 (Thomas, J., dissenting) (noting that "[a]ny damage caused would result from accident or negligence, not an unreasonable search . . . , and would therefore be properly cured by a tort").

148. *Id.*

149. *Id.* at 1126.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1126.

154. *Id.* at 1126-27.

155. *Id.* at 1127.

156. *Id.* at 1128.

COMMENTARY

Constitutional protections do not evaporate at the border.¹⁵⁷ Although the government may have broad power to conduct general searches at the border, this power should not allow the destruction of personal property when nondestructive methods exist to open the container.¹⁵⁸ The Ninth Circuit wrongly protected the evidence for trial to supposedly avoid creating another balancing test.¹⁵⁹ However, the Ninth Circuit failed to recognize that all Fourth Amendment cases are balancing tests, and suppressing the evidence would not have created a new exception or protected area.¹⁶⁰ Rather, the Ninth Circuit would have affirmed that Fourth Amendment protections do exist at the border. Instead, *Cortez-Rocha* represents a quiet, yet dangerous erosion of Fourth Amendment protections against unreasonable searches and seizures.

The decision in *Cortez-Rocha* was wrong for three reasons. First, the Ninth Circuit ignored United States Supreme Court precedent that requires Fourth Amendment protections be liberally construed to preserve the integrity of the Constitution.¹⁶¹ Second, the Ninth Circuit failed to conduct a reasonable-suspicion analysis even though it had conducted a reasonable-suspicion analysis to justify a “potentially destructive” border search prior to *Cortez-Rocha*.¹⁶² Finally, analogous United States Supreme Court decisions and decisions from other federal circuits do not support the Ninth Circuit’s holding.¹⁶³

The first error committed by the Ninth Circuit was its failure to conduct a balancing test to evaluate the search.¹⁶⁴ The court must interpret the Fourth Amendment in favor of the individual rather than the government.¹⁶⁵ When applying the Fourth Amendment to the facts, the government must prove either that probable cause existed to conduct the search or that the search fell within a well-delineated exception.¹⁶⁶ Because the United States Supreme Court has twice avoided the decision of whether a destructive search is reasonable,¹⁶⁷ the boundaries of the border exception are blurry and the presumption should have gone to the individual rather than the government.¹⁶⁸ By resolving the “tie” in favor of the government, the Ninth Circuit violated precedent and further

reduced Fourth Amendment protections at the border.¹⁶⁹

Expanding searches at the border creates the possibility for abuse that falls outside the scope of judicial review.¹⁷⁰ Absent a judicial ruling supporting Fourth Amendment protections, the Ninth Circuit has created a dangerous precedent for future cases regarding the government’s ability to destroy property at the border. The spare tire in this case is not the concern. Under the authority of *Cortez-Rocha*, an agent could destroy a three-legged clay pig to conduct a search for no reason other than the laziness of an agent. Further, *Cortez-Rocha* suggests that the court would not suppress the evidence obtained in an offensive search.

To justify the search, the Ninth Circuit did not need to conduct a complex analysis.¹⁷¹ It could have adopted the test urged by Cortez himself: whether the entire situation, conditions, and actions of the agents sufficiently established reasonable suspicion to justify the destruction of his property.¹⁷² Using a totality-of-the-circumstances approach would allow a court to evaluate whether agents established sufficient cause to use destructive force to open the container.¹⁷³ Agents should be required to attempt to open the container without employing destructive force.¹⁷⁴ If the container is completely closed, the officer should be required to establish reasonable suspicion before causing any damage to the property.¹⁷⁵

Such a test acknowledges existing precedent that allows government agents to conduct exploratory drilling into camper shells or to open packages entering the country.¹⁷⁶ In those cases, the courts evaluated the evidence the officer had and determined that the officer had articulable facts to support a reasonable suspicion for the exploratory drilling.¹⁷⁷ This essential analysis was missing in *Cortez-Rocha*.¹⁷⁸ Failing to conduct the reasonable suspicion analysis, regardless of the

Expanding searches at the border creates the possibility for abuse that falls outside the scope of judicial review.

157. See *United States v. Ramsey*, 431 U.S. 605, 618 n.13 (1977); *Marsh v. United States*, 344 F.3d 317, 324 (5th Cir. 1965) (“Border searches are . . . not exempt from the constitutional test of reasonableness . . .”).

158. See *Ramsey*, 432 U.S. at 618 n.13; *United States v. Flores-Montano*, 541 U.S. 149 (2004); *Marsh*, 344 F.3d at 324. Cf. *Osage v. United States*, 235 F.3d 518 (10th Cir. 2000) (holding the search was unreasonable because a reasonable person would not consent to the complete destruction of a container).

159. *Cortez-Rocha*, 394 F.3d at 1122.

160. See *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

161. See cases cited *supra* note 105.

162. Cf. *United States v. Bennett*, 363 F.3d 947, 952 (9th Cir. 2004) (holding that agents had established probable cause to justify the destructive search).

163. See cases cited *supra* note 37.

164. *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (citations omitted).

165. *Id.*

166. *Katz v. United States*, 389 U.S. 347, 357 (1967).

167. See *Flores-Montano*, 541 U.S. at 154 n. 2, 155-56; *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (1977).

168. Cf. *Mapp*, 367 U.S. at 647; *Katz*, 389 U.S. at 357 (emphasizing courts should construe Fourth Amendment protections in favor of the individual).

169. See *id.*

170. See *Katz*, 389 U.S. at 356-57.

171. See *United States v. Flores-Montano*, 541 U.S. 149 (2004) (overruling the *Molina-Tarazon* test).

172. *United States v. Cortez-Rocha*, 394 F.3d 1115, 1118 n.1, 1119-20 (9th Cir. 2005).

173. *United States v. Banks*, 540 U.S. 31, 36 (2003) (citations omitted).

174. The agents could have used reasonable force, such as using demounting tools to remove the tire from the wheel.

175. See cases cited *supra* note 118.

176. See *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

177. *Id.*

178. See Appellant’s Opening Brief at 6, *Cortez-Rocha*.

**The Ninth Circuit
erred by failing to
consider the
evaluation of
destructive force in
other federal
appellate decisions.**

initial justification for the search, defeats the purpose of judicial oversight.¹⁷⁹ Thus, the trial court and the Ninth Circuit failed to perform their constitutional function.

The Ninth Circuit also erred in its decision when it held, against its own precedent, that reasonable

suspicion was not required when conducting a potentially destructive search.¹⁸⁰ The Ninth Circuit did not acknowledge that it reviews a district court's "determination of the legality of a search de novo."¹⁸¹ By raising the issue of a destructive search pretrial and requesting the district court to conduct an evidentiary hearing, Cortez preserved the issue for review.¹⁸²

De novo review required the Ninth Circuit to apply existing precedent to the Cortez case.¹⁸³ By failing to conduct a reasonable-suspicion analysis, the Ninth Circuit violated the rule of *stare decisis* and incorrectly applied existing law. The Ninth Circuit error has two facets. First, the Ninth Circuit failed to distinguish *United States v. Bennett* from the facts in *Cortez-Rocha*, which creates an inconsistency in the Ninth Circuit. Instead, the Ninth Circuit cited *Bennett* to acknowledge that a destructive search may be offensive and, therefore, unreasonable without acknowledging that in *Bennett* the court found reasonable suspicion to conduct an arguably destructive search.¹⁸⁴ Failing to distinguish *Bennett* from *Cortez-Rocha* deprives district courts a clear interpretation to use in similar cases.

Second, the Ninth Circuit incorrectly applied *United States v. Vargas-Castillo*.¹⁸⁵ The Ninth Circuit cited *Vargas-Castillo* to demonstrate that the search of a spare tire did not rise to the level of intrusiveness to make a search unreasonable.¹⁸⁶ The Ninth Circuit erred by citing *Vargas-Castillo*, a legal justification that the United States Supreme Court rejected in *Flores-Montano*.¹⁸⁷ In *Vargas-Castillo*, the Ninth Circuit merely determined that had Vargas raised the issue at trial, it would have found slashing the tire open to be a routine and reasonable

search.¹⁸⁸ Thus, the precedent cited should have been unavailable to the court to use as support for its conclusion.

Finally, the Ninth Circuit incorrectly justified the entire search based on the border-search exception without determining whether or not the manner of the search was reasonable.¹⁸⁹ The United States Supreme Court has emphasized that the touchstone of any Fourth Amendment analysis is reasonableness.¹⁹⁰ Reasonableness requires a probable-cause determination by a detached magistrate unless it falls within one of the few well-delineated exceptions.¹⁹¹ The border search is one of those exceptions.¹⁹² However, a border search is similar to a regulatory search, such as an inventory search, therefore restricting agents in the manner in which they carry out a search.¹⁹³ Excessive destruction can make an otherwise legal search unreasonable under both *United States v. Ramsey*¹⁹⁴ and *United States v. Ramirez*.¹⁹⁵ The question is what level of destruction is reasonable?¹⁹⁶ The government cannot justify the destruction of the spare tire without an additional finding of reasonable suspicion.

The slashing of the tire was excessive and unnecessary. It was reasonable for the border agents to conduct an extensive search of the vehicle because Cortez was attempting to enter the country.¹⁹⁷ Border agents were entitled to use force to remove the spare tire from its secured location on the vehicle under the *Flores-Montano* analysis.¹⁹⁸ Under *Flores-Montano*, agents would have been within the boundaries of the Fourth Amendment to call a mechanic to the scene to dismount the tire from the wheel, or if properly trained, to dismount the tire themselves since the search would have been nondestructive. However, instead of proceeding with caution and restraint, the agents slashed open the tire to ascertain its contents and destroyed the tire beyond repair.¹⁹⁹ The United States Supreme Court's dicta in *Ramsey* and *Flores-Montano* regarding the potential unreasonableness of a search caused by the destruction of property is not limited to the operational parts of a vehicle, but rather to property as an entire class.²⁰⁰

The Ninth Circuit erred by failing to consider the evaluation of destructive force in other federal appellate decisions. A comparison of similar cases from other jurisdictions demonstrates that the Ninth Circuit's holding is inconsistent with

179. See cases cited *supra* notes 34-39 and accompanying footnote text.

180. Compare *United States v. Cortez-Rocha*, 394 F.3d 1115 (9th Cir. 2005) with *United States v. Bennett*, 363 F.3d 947, 951-52 (9th Cir. 2004), and *United States v. Des Jardins*, 747 F.2d 499, 504 (9th Cir. 1984) (citations omitted).

181. *United States v. Bennett*, 363 F.3d at 950.

182. *Id.*

183. See *id.*; *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 833 (9th Cir. 1999).

184. *United States v. Bennett*, 363 F.3d at 951-52.

185. See *United States v. Cortez-Rocha*, 394 F.3d 1115, 1119 (9th Cir. 2005) (citing *United States v. Vargas-Castillo*, 329 F.3d 715 (9th Cir. 2003)).

186. *Vargas-Castillo*, 329 F.3d at 722-23 (suggesting hypothetically that slashing the tire was a routine search).

187. *United States v. Flores-Montano*, 541 U.S. 149, 152-53.

188. *Vargas-Castillo*, 329 F.3d at 722-23.

189. *Cortez-Rocha*, 394 F.3d at 1118 n.1.

190. *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

191. See cases cited *supra* notes 34-39 and accompanying text.

192. *Ramsey*, 431 U.S. at 616-17.

193. See *Florida v. Wells*, 495 U.S. 1, 4-5 (1990); *Ramsey*, 431 U.S. at 620; *LaFAVE*, *supra* note 43, at 236.

194. See *Ramsey*, 431 U.S. at 618 n.13; *Marsh v. United States*, 344 F.3d 317, 324 (5th Cir. 1965).

195. 523 U.S. 65, 71 (1998).

196. *United States v. Flores-Montano*, 541 U.S. 149, 154 n. 2, 155-56 (2004).

197. *Carroll v. United States*, 267 U.S. 132, 154 (1925).

198. *Flores-Montano*, 124 S. Ct. at 1587 (removing, disassembling, and reassembling a vehicle part is reasonable).

199. See *United States v. Cortez-Rocha*, 394 F.3d 1115, 1118 (9th Cir. 2005).

200. See *Flores-Montano*, 541 U.S. at 154 n. 2, 155-56; *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (1977).

United State Supreme Court precedent and other circuit courts.²⁰¹ Additionally, the Ninth Circuit's holding is inconsistent with the balancing test used to determine the reasonableness of a regulatory search.²⁰² Comparing these holdings demonstrates the Ninth Circuit unnecessarily increased the exceptions to the reasonableness requirement.

The Ninth Circuit dismissively rejected other circuit opinions without carefully considering the holdings or fact patterns.²⁰³ When the other circuits admitted evidence from destructive searches, the courts held that reasonable suspicion justified the destructive force.²⁰⁴ The United States Supreme Court's rejection of the routine/non-routine analysis is immaterial because the circuit courts employed reasonable suspicion in analyzing destructive searches.²⁰⁵ While the border-search exception justified the initial stop, the court found reasonable suspicion to allow the destructive search.²⁰⁶

The failure of the Ninth Circuit to see the reasonable-suspicion determination in the other circuits' opinions demonstrates that the Ninth Circuit unnecessarily dismissed persuasive authority. Considering the holdings from the other circuits and the specific findings of reasonable suspicion to justify the exploratory drilling, the agents in *Cortez-Rocha* should have limited the amount of destructive force used to dismounting the tire or making a small repairable incision.²⁰⁷ The agents could have dismounted the tire without using destructive force and accomplished the search, which would have been as reasonable as removing the lid from a container or opening the folds of a paper bag.²⁰⁸

The Ninth Circuit was thus obligated to find reasonable suspicion to justify the destructive search or to justify the destructive search based on the agents' safety or the likelihood that the evidence would disappear.²⁰⁹ The court could have accomplished this analysis by determining whether the search was subject to the automobile exception or whether it was subject to the limitations of a regulatory search.

The automobile exception, justified by the ease evidence can be moved, would have been unavailable. For all practical purposes, Cortez was detained. He was handcuffed and being held away from his vehicle.²¹⁰ His vehicle was in a secondary-inspection area, removed from the main entry point into the country.²¹¹ Further, the government was exercising complete control over the vehicle, and there was no reason to believe that Cortez's truck would be stolen or that the evidence would disappear.²¹² Thus, the agents could have easily called in a telephone warrant and established probable cause for a

detached magistrate to issue a warrant to open the tire.²¹³ Alternatively, the government could have justified the search during the suppression motion both on the border exception for the initial search and reasonable suspicion to believe that contraband existed in the tire to justify the slashing open of the tire.²¹⁴

Because the Ninth Circuit ignored Fourth Amendment interpretation precedent, its own border-search precedent, and analogous case law from the United States Supreme Court and other circuits, the Ninth Circuit unnecessarily fashioned a new rule of law. The Ninth Circuit had multiple tools to admit the evidence without creating a dangerous precedent for future border searches. Because the Ninth Circuit failed to use these tools, it reduced the constitutional protections at the border without sufficient justification.

IV. CONCLUSION

The rejection of the non-routine/routine analysis in *Flores-Montano* requires courts to reevaluate their assessment of border searches. Cases prior to *Cortez-Rocha* have allowed searches when agents cause some, but repairable, damage to an individual's property. However, the facts in *Cortez-Rocha* demonstrate the search exceeded the bounds of reason when agents completely destroyed the tire. It is reasonable to expect agents to use only the amount of force necessary to conduct the search.²¹⁵ Any force greater than necessary to safely open the container is unreasonable per se and courts should suppress the evidence obtained from a destructive search absent an additional finding of reasonable suspicion.²¹⁶



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201. See *supra* notes 99-101.

202. LAFAVE, *supra* note 43 at 236.

203. *Cortez-Rocha*, 394 F3d at 1119-20 (commenting those searches used the routine/non-routine analysis).

204. See, e.g., *Robles*, 45 F3d at 5; *Carreon*, 872 F2d at 1444.

205. *Id.*

206. *Id.*

207. See *Rivas*, 157 F3d at 368; *Robles*, 45 F3d at 6; *Carreon*, 872 F2d at 1441.

208. See *supra* note 118 and accompanying text.

209. See *United States v. Acevedo*, 500 U.S. 565 (1991); *New York v.*

Belton, 453 U.S. 454 (1981).

210. *United States v. Cortez-Rocha*, 394 F3d 1115, 1118 (9th Cir. 2005).

211. *Id.*

212. *Id.*

213. See FED. R. CRIM. P. 41(d)(3).

214. Reasonable suspicion could have been asserted through the drug dog's alert and the density buster. 383 F3d at 1118.

215. See, e.g., *United States v. Pena*, 920 F2d 1509 (10th Cir. 1990); *United States v. Torres*, 663 F2d 1019 (10th Cir. 1981).

216. See *Katz v. United States*, 389 U.S. 347, 357 (1967).

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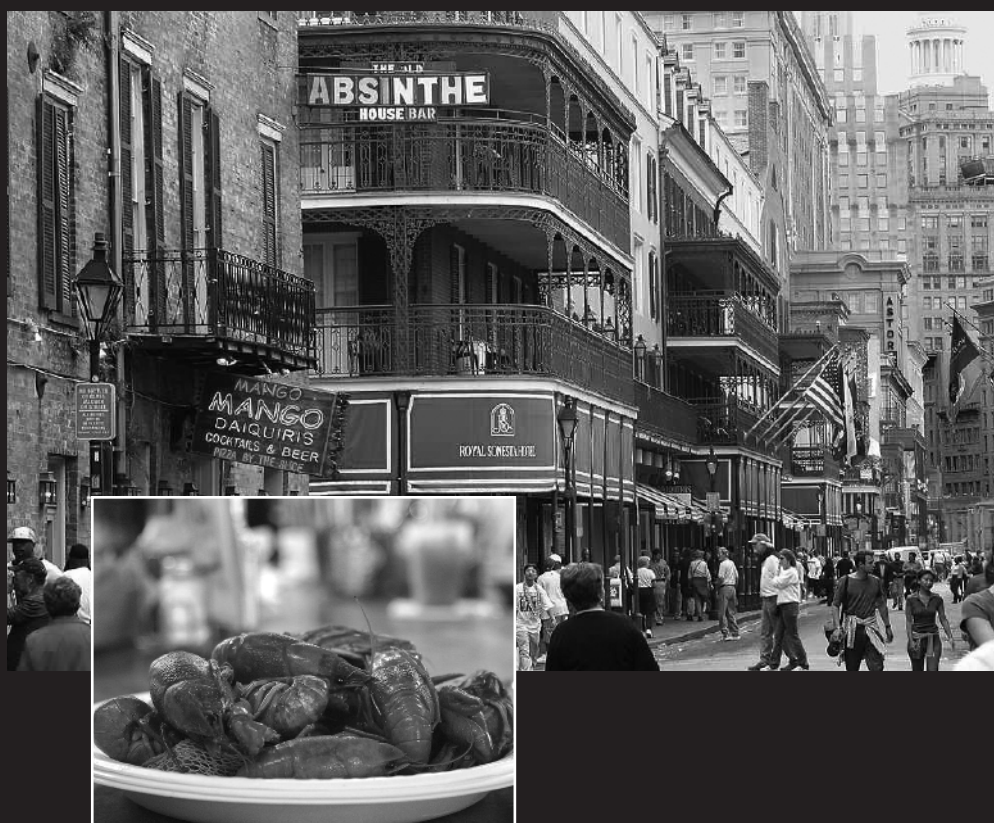
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The Resource Page



EMERGENCY PLANNING

Lawrence Siegel, Caroline S. Cooper & Allison L. Hastings, *Planning for Emergencies: Immediate Events and Their Aftermath—A Guideline for Local Courts* <http://spa.american.edu/justice/csdp.php>

Technical assistance work with more than 20 state trial courts led to the development of this 35-page “how to” guide for preparing a local court for various types of emergencies—fires, hurricanes, tornadoes, terrorists—and their aftermath. American University’s Justice Programs Office provides technical assistance to local courts through the Bureau of Justice Assistance (BJA) Criminal Courts Technical Assistance Project. That work, plus a State Justice Institute grant to compile the experience into a useful manual for other courts, led to this publication.

To be sure, no two “emergencies” (or courts, for that matter) will be identical. The authors contend, however, that the keys to successful responses are a plan that can be activated to deal with issues that could be anticipated and ongoing communication among various agencies to make the plan work. *Planning for Emergencies* provides an excellent start for any local court to use in the process. It provides step-by-step planning guides for dealing with various emergency situations, along with hypothetical scenarios to work through, a self-assessment planning guide, and sample plans and orders from other courts.

Limited technical assistance is available, free of charge, to courts interested in adapting *Planning for Emergencies* to their locales from the BJA Criminal Courts Technical Assistance Project at American University. For further information, contact Caroline S. Cooper or Allison Hastings at American University, (202) 885-2875, or justice@american.edu.



BOOKS OF NOTE

GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE. Greg Berman & John Feinblatt. The New Press, 2005 (\$24.95). 218 pp.

A PROBLEM-SOLVING REVOLUTION: MAKING CHANGE HAPPEN IN STATE COURTS. Greg Berman, Aubrey Fox & Robert V. Wolf, eds. Center for Court Innovation, 2004 (no charge). 300 pp.

Two new books from New York’s Center for Court Innovation make the case for problem-solving courts. While the authors—at least in their latest work, *Good Courts*—concede that questions of effectiveness remain to be further explored, they make a strong case for further application of the concepts behind problem-solving courts (also known in some states as collaborative-justice courts).

Good Courts is written by Greg Berman, director of the Center for Court Innovation, and John Feinblatt, New York City’s criminal justice coordinator. Both were involved in setting up New York’s Midtown Community Court and the Red Hook Community Justice Center in Brooklyn. Each of those programs has been recognized for successfully applying problem-solving justice in handling misdemeanor criminal cases.

Courts like these, along with drug courts and domestic-violence courts, form the bulk of the established problem-solving courts that Berman and Feinblatt review. They also note developing application of these concepts to mental-health courts, reentry courts, DWI courts, family courts, and housing courts. To these authors, the essence of a problem-solving approach is “to ensure not just that the punishment fits the crime . . . but that the process fits the problem.” Thus, judicial resources are matched to the needs of each case and partnerships with new players (like

community groups, treatment providers, or job-training programs) are encouraged.

The authors include serious discussion of the limits to evidence that these courts work and criticisms of them in terms of fairness to individual defendants. *Good Courts* is an excellent, up-to-date introduction to the possibilities of problem-solving justice.

A Problem-Solving Revolution, a collection of ten essays and discussion transcripts, presents an excellent companion volume. It focuses primarily on how problem-solving-court concepts can be taken from individual experiments to wide-scale implementation. As Berman says in the introduction, “Going to scale with an innovative idea or practice in any field is difficult.” The essays and group discussions in this volume no doubt will help in that process.

LOOKING FOR LOST EAGLES

Florida Circuit Court Judge Richard Howard is looking for former Eagle Scouts, who are invited to join the National Eagle Scout Association (NESA). The NESA is an alumni organization for Eagle Scouts of all ages, created in 1972 by the National Executive Board of the Boy Scouts of America. NESA seeks to identify, locate, and mobilize the talents and resources of Eagle Scouts.

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As Judge Howard puts it, “Remember, there are no ‘former Eagles.’ Once an Eagle, always an Eagle!” For more information or to join NESA, contact Hon. Richard A. Howard, Circuit Judge, Fifth Judicial Circuit, 110 North Apopka Ave., Inverness, Florida 34450.

