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Recent Criminal Decisions of the United States Supreme Court: The 2005-2006 Term

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In this term, as in the previous one, the United States Supreme Court reasserted the rule of law in the context of the detainees in the war on terror. At the same time, however, the addition of two new justices shifted the Court's ideological balance to the right. In terms of criminal cases, the Court handed down a mixed bag of decisions. It was a bad term for Fourth Amendment claimants with the government prevailing in four of five search-and-seizure cases. Outside the context of the Fourth Amendment, however, criminal defendants fared a little better.

In this article, I review some of the Court's decisions in the criminal context. In a separate article, I review some of the Court's decisions in the civil context.

FOURTH AMENDMENT

Justice Scalia delivered the opinion of the majority in *United States v. Grubbs*,[1] which held that anticipatory warrants do not violate the Fourth Amendment so long as there is probable cause to believe that contraband or evidence of crime will be found in a particular place when the warrant is executed. Justices Souter, Stevens, and Ginsburg concurred in part but believed the court erred when it held that an anticipatory warrant does not need to state the contingency intended by the magistrate to trigger authorization.

Jeffrey Grubbs purchased a child pornography videotape from a Web site run by an undercover postal inspector. The Postal Inspection Service arranged for a controlled delivery of the videotape to Grubbs's residence and applied for a search warrant proposing that the search warrant would not be executed "unless and until the parcel has been received by a person(s) and has been physically taken into the residence." The magistrate judge issued the warrant and the controlled delivery proceeded. The postal inspectors executed the warrant, giving Grubbs a copy of the warrant, which included two attachments that described the places to be searched and the things to be seized, but not the affidavit that explained when the warrant would be executed. Grubbs moved to exclude the evidence, arguing the warrant was invalid because it failed to list the triggering condition. The district court denied the motion and the Ninth Circuit reversed.

The Court begins its analysis by concluding that anticipatory warrants are not categorically unconstitutional. Most anticipatory warrants have conditions precedent to their execution and, if executed before that condition occurs, "probable cause has not yet been satisfied when the warrant is issued." The Court rejects the argument, however, that this condition precedent makes anticipatory warrants a violation of the Fourth Amendment. According to the Court, "[p]robable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place." Therefore, all warrants are "anticipatory" because the requirement of probable cause focuses on whether evidence will be discovered "when the search is conducted." The Fourth Amendment only calls for two additional requirements for anticipatory warrants to be valid: (1) "if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place"; and (2) "that there is probable cause that the triggering condition will occur."

The majority also believes that the Fourth Amendment does not require the anticipatory warrant to specify the triggering condition. The Fourth Amendment "specifies only two matters that must be 'particularly described' in the warrant: the place to be searched and the persons or things to be seized." The Court declines to expand these requirements to include the conditions precedent to the execution of a warrant.

In *Georgia v. Randolph*,[2] a 5-3 Court held that even if a co-occupant consents to a warrantless search, if the other occupant is present and expressly denies the police permission to enter the premises, the search is unreasonable under the Fourth Amendment. Justice Souter delivered the opinion while Chief Justice Roberts and Justices Scalia and Thomas filed dissenting opinions. Justice Alito took no part in the decision.

Respondent's wife called police to complain about a domestic dispute. She also accused her husband of using cocaine. Respondent's wife consented to a search of the house while respondent, who was present, expressly refused the police permission to enter. The police found a drinking straw with cocaine residue. Respondent's wife subsequently withdrew her consent, but the police obtained a warrant and searched the house. They found further evidence of drugs and respondent was indicted for possession of cocaine.

Respondent moved to suppress the evidence as products of a warrantless search. The trial court denied the motion stating that respondent's wife had "common authority to consent to the search." The Court of Appeals of Georgia reversed and the Georgia Supreme Court affirmed, stating that "the consent to conduct a warrantless search of a residence given by one occu-

Footnotes

1. 126 S.Ct. 1494 (2006).
2. 126 S.Ct. 1515 (2006).

pant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." The state supreme court found the case of *United States v. Matlock*[3] distinguishable because *Matlock* did not address the scenario where the co-occupant was at the scene and expressly denied consent to a search.

The Supreme Court agrees. Warrantless searches of a person's house are "unreasonable *per se*" with "one jealously and carefully drawn exception…consent of an individual possessing authority." That consent can be given by "a fellow occupant who shares common authority over property, when the suspect is absent." The Court does not believe, however, that consent by a co-occupant to a warrantless search should extend to situations where the householder is present and refuses to give consent. As evident in *Matlock*, Fourth Amendment rights are not limited by laws of property but are heavily influenced by "widely shared social expectations."

The Court starts with the assumption that without any recognized hierarchy, for example, a parent and child relationship, there is no "common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders." It concludes that "the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all."

In light of its decision, the Court feels it must discuss *Matlock*, where the tenant was in a squad car not far away, and *Illinois v. Rodriguez*,[4] where the tenant was asleep in his room. The Court does not want to undercut the holdings in those cases by its decision and admits it is drawing a fine line. However, it finds this line justified. It adds that the police cannot remove the objector for the sake of avoiding a possible objection, but that police are not required to seek out possible objectors as this would be impractical and "would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field."

Chief Justice Roberts dissents, stating that the "Court creates constitutional law by surmising what is typical when a social guest encounters an entirely atypical situation." He believes the Court's precedent clearly establishes that "[i]f an individual shares information, papers, or places with another, he assumes the risk that the other person will in turn share access to that information or those papers or places with the government." Under the Fourth Amendment, the test is whether the search is unreasonable, not whether consent is given. Justice Scalia also dissents. He argues that the issue is not that neither the wife nor husband is master over the other, but what to do when there is a "conflict between two equals." Justice Thomas, also dissenting, finds that *Coolidge v. New Hampshire*[5] is controlling in this case. In *Coolidge*, the Court held that no Fourth Amendment search occurs where "the spouse of an accused voluntarily leads the police to potential evidence of wrongdoing."

Brigham City v. Stewart . . . held that police have an objectively reasonable basis for entering a home without a warrant when they see an occupant of the home is seriously injured . . . .

In *Brigham City v. Stuart*,[6] a unanimous Court held that police have an objectively reasonable basis for entering a home without a warrant when they see an occupant of the home is seriously injured or imminently threatened with serious injury. In *Brigham*, police responded to a call regarding a loud party at a residence. When they arrived, they heard shouting inside and proceeded up the driveway to investigate. They saw two juveniles drinking beer in the backyard and, through the screen door and windows, saw an altercation between four adults and one juvenile taking place in the kitchen. The police opened the door to the kitchen and announced their presence. Nobody noticed so the police entered the kitchen and announced their presence again. Respondents were arrested and charged with contributing to the delinquency of a minor, disorderly conduct, and intoxication. Respondents moved to suppress all evidence arguing that the warrantless entry violated the Fourth Amendment.

The Supreme Court granted certiorari "in light of differences among state courts and the Courts of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation." While warrantless searches and seizures inside a home are presumptively unreasonable, "the exigencies of the situation" may make "the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." One exigency "is the need to assist persons who are seriously injured or threatened with such injury." The Court reiterates that when determining if an emergency situation exists, making warrantless entry reasonable, the circumstances must be viewed objectively. In this case, "the officers were confronted with ongoing violence within the home." The Court believes that "the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning."

The Court also concludes that the "manner of the officers' entry was also reasonable." In these circumstances, the officer's announcement after he opened the door but prior to entering was equivalent to and satisfied the knock-and-announce rule. The Court states, "once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence."

3. 415 U.S. 164 (1974).
4. 497 U.S. 177 (1990).
5. 403 U.S. 443 (1971).
6. 126 S.Ct. 1943 (2006).

Samson v. California . . . held that the Fourth Amendment does not bar a police officer from conducting a suspicionless search of a parolee.

granted certiorari.

Justice Stevens filed a short concurrence in which he calls this "an odd fly-speck of a case." He writes that the only difficult question is what is "most peculiar": (1) that the state courts found a Fourth Amendment violation; (2) that the case was pursued all the way to the Supreme Court; or (3) that the Court

The Court held in *Hudson v. Michigan*[7] that exclusion is not a remedy for violation of the knock-and-announce rule. Justice Scalia delivered the opinion of a five-member majority and an opinion in part. Justice Kennedy concurred in part and in the judgment, while Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented.

In this case, police obtained a warrant to search petitioner's home for drugs and firearms. When they arrived, the police announced their presence but only waited about three to five seconds before entering. Petitioner moved to exclude the evidence found during the search, "arguing that the premature entry violated his Fourth Amendment rights." The trial court granted the motion, but the Michigan Court of Appeals reversed. Hudson was convicted and renewed his claim on appeal.

Since respondent concedes a violation of the knock-and-announce rule, the Court focuses only on a remedy for the violation. The Court writes that "[s]uppression of evidence...has always been our last resort, not our first impulse." It is "applicable only where its remedial objectives are thought most efficaciously served,…that is, where its deterrence benefits outweigh its substantial social costs." The Court clarifies its approach by stating that "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." Instead, the more appropriate question in such a case is "whether granting establishment of the primary illegality, the evidence to which instant objection is made, has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." This attenuation can occur when the causal connection is remote and, "even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."

The warrant requirement shields individuals and their property from government scrutiny. The Court has held that "[e]xclusion of the evidence obtained by a warrantless search vindicates that entitlement." However, the Court believes the interests protected by the knock-and-announce requirement are different. The latter protects human life and limb, "because an unannounced entry may provoke violence in supposed self-defense by the surprised resident," property from being destroyed by a destructive entry, and "those elements of privacy and dignity that can be destroyed by a sudden entrance," for example, by giving individuals time to dress. It concludes that applying the exclusionary rule to a violation of the knock-and-announce rule does not vindicate these interests.

In addition, the Court believes the deterrence benefits do not outweigh the social costs. It finds the costs here considerable. The costs include not only "the grave adverse consequences that exclusion of relevant incriminating evidence always entails," but also would result in a flood of challenges regarding alleged failures to follow the rule. In addition, the Court believes that applying the exclusionary rule would result in police "refraining from timely entry," which may result in such things as violence against officers or destruction of evidence. At the same time, the Court concludes that the "deterrence benefits" do not amount to much. While a violation of the knock-and-announce rule might occasionally lead to the discovery of otherwise undiscoverable evidence, ignoring the rule primarily achieves nothing other than "the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises–dangers which, if there is even 'reasonable suspicion' of their existence, suspend the knock-and-announce requirement anyway."

Justice Breyer dissents because the Court's opinion "destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement." Justice Breyer also believes the majority opinion is a significant departure from the Court's precedent, and "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection."

In *Samson v. California*,[8] a 6-3 Court, in an opinion written by Justice Thomas, held the Fourth Amendment does not bar a police officer from conducting a suspicionless search of a parolee. Petitioner was on parole in California when he was stopped and searched without a warrant or probable cause. The search was conducted pursuant to California Penal Code section 3067(a), which authorizes a warrantless and suspicionless search of a parolee. The officer conducting the search found a plastic baggie containing methamphetamine and petitioner was charged with possession. The trial court denied petitioner's motion to suppress the evidence, finding that section 3067(a) "authorized the search and that the search was not arbitrary or capricious." Petitioner was convicted and the conviction was affirmed on appeal.

The Court begins by conducting a Fourth Amendment analysis, examining the "'totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." The Court states, "[w]hether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." The Court mentions that it recently applied this approach in *United State v. Knights*,[9] where it determined that a California law subject-

7. 126 S.Ct. 2159 (2006).
8. 126 S.Ct. 2193 (2006).
9. 534 U.S. 112 (2001).

ing a probationer to a warrantless search was reasonable. In *Knights*, the Court determined (1) that a probationer's expectation of privacy was significantly diminished due to his status as a probationer, and (2) that the law was necessary to promote legitimate governmental interests, mainly the dual interests of "integrating probationers back into the community and combating recidivism."

Applying the same analysis, the Court believes that a parolee has even less of an expectation of privacy than a probationer because parolees "are on the continuum of state-imposed punishments." In addition, the Court finds salient, as it did in *Knights*, that "the parole search condition under California law…was clearly expressed to petitioner;" he "signed an order submitting to the condition and thus was unambiguously aware of it." The Court also finds, as it did in *Knights*, that the state's interests are substantial. The state's interests in reducing recidivism and promoting reintegration in society "warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." The Court looks at empirical evidence regarding recidivism to support its conclusion.

SIXTH AMENDMENT

In *Washington v. Recuenco*,[10] Justice Thomas delivered the opinion of a 7-2 Court, which held that a *Blakely* error is subject to a harmless-error analysis. Respondent threatened his wife with a handgun. He was charged with second-degree assault, which is defined under Washington law as "intentional assault…with a deadly weapon." The trial court used a special-verdict form "that directed the jury to make a specific finding whether respondent was armed with a deadly weapon at the time of the commission of the crime." There was nothing on the form, however, that identified the deadly weapon as a handgun. The jury returned a guilty verdict. At sentencing, the trial court determined that respondent qualified for, and imposed, the three-year firearm enhancement instead of the one-year deadly weapon enhancement.

Before the Washington Supreme Court heard respondent's appeal, the Supreme Court decided *Apprendi v. New Jersey*[11] and *Blakely v. Washington*.[12] In *Apprendi*, the Court held that, pursuant to the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Court held that "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." The Washington Supreme Court held that a Sixth Amendment violation occurred. It also determined that a harmless-error analysis did not apply.

The Court states that it has "repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal." Only a "structural" error, an error that "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," requires automatic reversal. Relying on its decision in *Neder v. United States*,[13] the Court concludes that a *Blakely* error is not a structural error. In *Neder*, the district court failed to instruct the jury on an element of the crime. The Court held that a harmless-error analysis applied "because an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." The Court believes this case is indistinguishable from *Neder* because its decision in *Apprendi* makes clear that elements of a crime and sentencing factors are "treated the same for Sixth Amendment purposes."

Washington v. Recuenco . . . held that a Blakely error is subject to a harmless-error analysis.

Justices Stevens and Ginsburg filed dissenting opinions. Justice Stevens believes that even if the Court had the power to decide this case, there was no reason it should since the Washington Supreme Court can set its own standards for this type of error. He also states that the Court did not address respondent's strongest argument: "that *Blakely* errors are structural because they deprive criminal defendants of sufficient notice regarding the charges they must defend against." Justice Ginsburg believes that no error occurred during trial. The prosecutor proceeded under the theory of assault with a deadly weapon and the jury rendered a guilty verdict as requested. According to Justice Ginsburg, "[t]he harmless-error doctrine was not designed to allow dislodgment of that error-free jury determination."

In *Davis v. Washington*,[14] the Court considered the companion cases of *Davis v. Washington*[15] and *Hammon v. Indiana*.[16] An 8-1 Court, in an opinion delivered by Justice Scalia, held that statements made during a 911 call are non-testimonial, and not covered by the Sixth Amendment's Confrontation Clause, when objective circumstances show that the interrogation by police is necessary to assist in an ongoing emergency. However, statements made to the police are testimonial when there is no ongoing emergency and objective circumstances show the primary purpose of the interrogation is to gather evidence for later criminal prosecution.

In *Davis*, Michelle McCottry made numerous statements to a 911 operator who had determined that McCottry was involved in a domestic disturbance with her former boyfriend, Adrian Davis. McCottry did not testify at Davis's trial so, to establish McCottry's injuries were caused by Davis, the prosecution, over Davis's objections, used the 911 tapes. Davis was convicted and his conviction was affirmed on appeal.

In *Hammon*, police responded to a reported domestic dis-

10. 126 S.Ct. 2546 (2006).
11. 530 U.S. 466 (2000).
12. 542 U.S. 296 (2004).
13. 527 U.S. 1 (1999).
14. 126 S.Ct. 2266 (2006).
15. No. 05-5224.
16. No. 05-5705.

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose . . . is to enable police assistance to meet an ongoing emergency."

turbance call. Amy Hammon admitted and signed an affidavit to the effect that her husband physically assaulted her. Amy did not testify at trial and, over petitioner's objections, an officer testified to what Amy told him that night and authenticated Amy's affidavit. Petitioner was convicted and his conviction was affirmed on appeal. The Indiana Supreme Court determined that "Amy's statement was admissible for state-law purposes as an excited utterance" and was not testimonial under Sixth Amendment standards. It did, however, determine that the affidavit was testimonial and inadmissible, but found its erroneous admission harmless beyond a reasonable doubt.

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." In *Crawford v. Washington*,[17] the Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical component of this holding is the definition of "testimonial statements" because the Confrontation Clause only applies to witnesses who make testimonial statements. In *Crawford*, the Court identifies "statements taken by police officers in the course of interrogations" as testimonial. However, the Court did not have to establish what kind of police interrogations produce testimony.

Without producing an "exhaustive classification of all conceivable statements," the Court holds that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." However, statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." In *Crawford*, the Court recognized that the Confrontation Clause "applies to 'witnesses' against the accused–in other words, those who bear testimony." In turn, "[t]estimony,…is typically a solemn declaration of affirmation made for the purpose of establishing or proving some fact." Therefore, an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."

As to a 911 call, the Court believes it "is ordinarily not designed primarily to 'establish or prove' some past fact, but to describe current circumstances requiring police assistance." The Court views McCottry's statements as speaking to events as they occurred and that McCottry was facing an ongoing emergency. In addition, the Court concludes that, viewed objectively, "the elicited statements were necessary to be able to resolve the present emergency." The Court concludes that while a 911 call may become testimonial, "the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency." She was not a "witness" or in the act of "testifying."

As to *Hammon*, the Court believes the statements are "not much different from the statements we found to be testimonial in *Crawford*." The Court writes, "[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly acknowledged." While it is true that the interrogation in *Crawford* was much more formal, that difference only makes it more objectively apparent that the statements obtained were testimonial in nature; it does not change the characterization of the statements made in *Hammon*. Although the Court implicitly rejects the Indiana Supreme Court's implication that "virtually any initial inquiries at the crime scene will not be testimonial…[it] do[es] not hold the opposite—that no questions at the scene will yield nontestimonial answers." As the Court already indicated, the police might need to obtain answers to "assess the situation, the threat to their own safety, and possible danger to the potential victim."

Justice Thomas concurs in the judgment in part and dissents in part. He believes that the Court has adopted a test as equally unpredictable as that abandoned by *Crawford*. Instead of requiring courts to divine the primary purpose of police interrogations, Justice Thomas would focus instead on what type of statements qualify as testimonial: those include "extrajudicial statements…contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confession." He believes that neither the 911 call nor the statements made by Amy to the police are testimonial.

In *United States v. Gonzalez-Lopez*,[18] Justice Scalia, writing for a 5-4 Court, held that the denial of a defendant's Sixth Amendment right to private counsel based on the erroneous disqualification of counsel requires automatic reversal. Respondent was charged with conspiracy to distribute marijuana. His family hired John Fahle to represent him. After the arraignment, respondent hired Joseph Low, an attorney from California. The trial court denied Low's numerous motions for admission *pro hoc vice* on the grounds that Low violated Rule 4-4.2, which prohibits a lawyer from contacting a represented client directly without consent of counsel. The district court determined that Low's contact with respondent was made without consent by Fahle. During trial, respondent was represented by local counsel Karl Dickhause and was convicted.

17. 541 U.S. 36 (2004).

18. 126 S.Ct. 2557 (2006).

The Eighth Circuit reversed after it determined that the district court erred in interpreting Rule 4-4.2. It then concluded that because of this error, the district court "violated respondent's Sixth Amendment right to paid counsel of his choosing." It held that the violation was not subject to harmless-error review. The Supreme Court agrees.

The Sixth Amendment guarantees a criminal defendant the right to counsel. The Court has previously interpreted this guarantee as including "the right of a defendant who does not require appointed counsel to choose who will represent him." The Court does not believe, as argued by the government, "that the Sixth Amendment violation is not 'complete' unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland v. Washington*,[19]—i.e., that substitute counsel's performance was deficient and the defendant was prejudiced by it." Nor does it believe "that the defendant must at least demonstrate that his counsel of choice would have pursued a different strategy that would have created a reasonable probability that…the result of the proceedings would have been different." The Court writes that "the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details." The purpose of the Sixth Amendment is ultimately to provide a fair trial; however, "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair."

Following this same line of reasoning, the Court also held that this error is not subject to review for harmlessness. The Court cites to *Arizona v. Fulminante*,[20] where it divided constitutional errors into two classes: (1) "'trial error,' because the errors occurred during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt"; and (2) "structural defects" that "defy analysis by 'harmless-error' standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself." The Court has little difficulty in concluding that the deprivation of counsel of one's choice is a structural error. The Court again rejects the government's attempt to compare this type of error with ineffective assistance of counsel.

EIGHTH AMENDMENT

In *Oregon v. Guzek*,[21] the Court determined that the Eighth and Fourteenth Amendments do not provide a criminal defendant with the right to introduce new evidence of innocence at a sentencing hearing. Justice Breyer delivered the opinion of the Court while Justice Scalia, joined by Justice Thomas, filed an opinion concurring in the judgment. Justice Alito took no part in the decision.

Respondent was convicted of capital murder and sentenced to death. On appeal, the Oregon Supreme Court affirmed the conviction but remanded for a new sentencing hearing. Guzek was sentenced to death two more times and each time the Oregon Supreme Court ordered a new sentencing hearing. When the case was before it a fourth time, the Oregon Supreme Court, "[s]eeking to avoid further errors…also addressed the admissibility of certain evidence Guzek [sought] to introduce at that proceeding, including live testimony from his mother about his alibi." This type of evidence falls into the category of "residual doubt" evidence as it goes toward whether the defendant committed the crime as opposed to his or her role in the crime. The Oregon Supreme Court held "that the Eighth and Fourteenth Amendments provide Guzek a federal constitutional right to introduce this evidence at his upcoming sentencing proceeding."

Oregon v. Guzek . . . determined that the Eighth and Fourteenth Amendments do not provide a criminal defendant with the right to introduce new evidence of innocence at a sentencing hearing.

The Supreme Court does not agree. The Court distinguishes the cases relied on by the Oregon Supreme Court. In *Lockett v. Ohio*,[22] the plurality determined that the Eighth and Fourteenth Amendments require introduction of evidence related to "any aspect of defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." This statement was adopted by the majority in *Eddings v. Oklahoma*.[23] The Court states that *Lockett* is distinguishable from the case before it because in *Lockett* the evidence "tended to show how, not whether, the defendant committed the crime. Nor was the evidence directly inconsistent with the jury's finding of guilt."

The Court also points out that, contrary to the Oregon Supreme Court's understanding, its decision in *Green v. Georgia*[24] does not undermine this factual distinction. That opinion "focused only upon the hearsay problem, and it implicitly assumed that, in the absence of the hearsay problem, state law would not have blocked admission of the evidence." Regardless, the Court concludes that its subsequent opinion, *Franklin v. Lynaugh*,[25] made "clear, contrary to the Oregon Supreme Court's understanding, that this Court's previous cases had not interpreted the Eighth Amendment as providing a capital defendant the right to introduce at sentencing evidence designed to cast 'residual doubt' on his guilt."

The Court in *Franklin* did not determine whether the Eighth Amendment required a trial court to allow residual-doubt evidence to be introduced during a sentencing hearing. Instead, the plurality held that "the sentencing scheme at issue was constitutional even if such a right existed." The Court

19. 466 U.S. 668 (1984).
20. 499 U.S. 279 (1991).
21. 126 S.Ct. 1226 (2006).
22. 438 U.S. 586 (1978).
23. 455 U.S. 104 (1982).
24. 442 U.S. 95 (1979).
25. 487 U.S. 164 (1988).

Holmes v. South Carolina . . . held that a rule barring the admission of evidence that a third-party committed the crime cannot rest on the strength of the prosecution's case.

makes the same determination here: even if an Eighth Amendment right does exist, "it could not extend so far as to provide this defendant with a right to introduce the evidence at issue." The Eighth Amendment only requires: (1) "reliability in the determination that death is the appropriate punishment in a specific case"; and (2) "that a sentencing jury be able to consider and give effect to mitigating evidence." According to the Court, "the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted."

FOURTEENTH AMENDMENT

Justice Alito wrote for a unanimous Court in *Holmes v. South Carolina*,[26] which held that a rule barring the admission of evidence that a third-party committed the crime cannot rest on the strength of the prosecution's case. Petitioner was convicted for murder, first-degree criminal sexual conduct, first-degree burglary, and robbery. He was sentenced to death and his conviction was affirmed on appeal. Petitioner received a new trial after successful post-conviction review. At the second trial, petitioner sought to undermine the prosecution's case by showing that the evidence was contaminated and the police were trying to frame him. As part of this, petitioner introduced the testimony of expert witnesses and evidence that a third party committed the crime.

The trial court excluded petitioner's third-party guilt evidence, citing *State v. Gregory*,[27] which states that such evidence is admissible if it "raises a reasonable inference or presumption as to [the defendant's] own innocence" but is inadmissible if it merely "casts a bare suspicion upon another" or "raises a conjectural inference as to the commission of the crime by another." The South Carolina Supreme Court affirmed, holding that where strong evidence of an appellant's guilt exists—especially strong forensic evidence—evidence of a third party's guilt "does not raise a reasonable inference as to the appellant's own innocence."

The Court begins by recognizing the constitutional broad latitude afforded to state and federal rulemakers to enact rules excluding evidence from criminal trials. However, this latitude is limited by a criminal defendant's right to present a complete defense. The Court does not specify from where this limitation stems but recognizes that it may arise from the "Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment." A defendant's right to present a complete defense is undercut by evidentiary rules that "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve."

The Court provides examples from previous cases where it held that a defendant's right to present a full defense was violated. It writes that although the Constitution prohibits rules that exclude evidence and which "serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of issues, or potential to mislead the jury." For instance, evidence that another individual committed the crime may be regulated under these principles if the evidence is inconsistent with a defendant's guilt and do not raise a reasonable inference or presumption as to the defendant's innocence. However, South Carolina attempted to extend this type of rule.

The Court criticizes South Carolina's approach because the trial judge does not weigh the probative value or potential adverse effects of admitting the third-party guilt evidence, and instead the critical analysis turns on the strength of the prosecution's case. Further, this approach "seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence." The Court concludes that this rule "does not rationally serve the end that the *Gregory* rule and its analogues in other jurisdictions were designed to promote, i.e., to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues."

Justice Souter delivered the opinion of the Court in *Clark v. Arizona*,[28] which held that a state does not violate the Due Process Clause by limiting evidence of insanity to the insanity defense and excluding its admission to rebut *mens rea*. Justice Breyer filed an opinion concurring in part and dissenting in part. Justice Kennedy, joined by Justices Stevens and Ginsburg, filed a dissenting opinion.

Petitioner Eric Clark killed a police officer. Clark was charged with first-degree murder and "did not contest the shooting or death, but relied on his undisputed paranoid schizophrenia at the time of the incident in denying that he had the specific intent to shoot a law enforcement officer or knowledge that he was doing so, as required by the statute." He wanted to present the evidence of mental illness in two ways: (1) as an affirmative defense; and (2) to rebut the prosecutor's evidence of the requisite *mens rea*. The trial court held that Clark could not use evidence of his mental illness to dispute the *mens rea*. It relied on *State v. Mott*,[29] which "refused to allow psychiatric testimony to negate specific intent,…and held that Arizona does not allow evidence of a defendant's mental disorder short of insanity…to negate the *mens rea* element of a crime." The Court of Appeals of Arizona affirmed and the Arizona Supreme Court denied further review.

26. 126 S.Ct. 1727 (2006).
27. 198 S.C. 98 (1941).
28. 126 S.Ct. 2709 (2006).
29. 931 P.2d 1046 (Ariz. 1997) (en banc), *cert. denied*, 520 U.S. 1234 (1997).

When Arizona first codified the insanity rule, it adopted the "landmark English rule in *M'Naghten's Case*," which provides that a party is not guilty by reason of insanity if "the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." In 1993, however, Arizona modified its insanity rule and dropped the cognitive-incapacity portion. Thus, under current law, "a defendant will not be adjudged insane unless he demonstrates that at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." The Court rejects Clark's argument that the *M'Naghten* test "represents the minimum that a government must provide in recognizing an alternative to criminal responsibility on grounds of mental illness or defect."

The Court also rejects Clark's alleged due-process violation based on the Arizona Supreme Court's adoption of the rule in *Mott*. The Court believes that Clark's argument "turns on the application of the presumption of innocence in criminal cases, the presumption of sanity, and the principle that a criminal defendant is entitled to present relevant and favorable evidence on an element of the offense charged against him." As to the presumption of innocence, the prosecution must prove each element of a crime beyond a reasonable doubt, including the *mens rea*. The presumption of sanity is "equally universal in some variety or other, being (at least) a presumption that a defendant has the capacity to form the *mens rea* necessary." However, unlike the presumption of innocence, a state can decide whether to allow a defendant to bring forth "evidence of mental disease or incapacity for the bearing it can have on the government's burden to show *mens rea*" or may allow insanity only to be raised as an affirmative defense. In these instances, the burden is carried by the defendant and the state may determine the extent of that burden.

Finally, the Court believes that Clark's argument touches upon the principle that a criminal defendant has the due-process right to "present evidence favorable to himself on an element that must be proven to convict him." This right may be curtailed for good reason. The Court writes: "While the Constitution…prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." The Court believes that Arizona's law channeling and restricting mental-disease and capacity evidence satisfies the standard of fundamental fairness required by due process. The Court concludes by stating that Arizona has the "authority to define its presumption of sanity…by choosing an insanity definition…and by placing the burden of persuasion on defendants who claim incapacity as an excuse from customary criminal responsibility."

In *Dixon v. United States*,[30] a 7-2 Court held that neither the Due Process Clause nor modern common law requires the government to bear the burden of disproving duress. Petitioner was indicted and convicted of "one count of receiving a firearm while under indictment…and eight counts of making false statements in connection with the acquisition of a firearm." At trial, petitioner "admitted that she knew she was under indictment when she made the purchases and that she knew doing so was a crime; her defense was that she acted under duress because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him." She argued that "the Government should be required to disprove beyond a reasonable doubt the duress." The district court, bound by Fifth Circuit precedent, denied the request and petitioner renewed her argument on appeal, claiming: (1) "her defense controverted the *mens rea* required for conviction and therefore that the Due Process Clause requires the Government to retain the burden of persuasion on that element"; and (2) "that the Fifth Circuit's rule is contrary to modern common law."

The Court held that the Hobbs Act only criminalizes violence that is related to robbery or extortion; it does not criminalize free-standing physical violence.

The Supreme Court disagrees. The Court states: "[t]he duress defense, like the defense of necessity…may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself." In addition, the Court believes it bears repeating that under common law, the defendant had the burden of proving an affirmative defense. The Court does not believe that any recent developments, including its decision in *Davis v. United States*,[31] support a contrary conclusion.

CRIMINAL STATUTORY INTERPRETATION

In *Scheidler v. NOW*,[32] Justice Breyer delivered the opinion of the Court in which all justices joined except Justice Alito, who took no part in the decision. The Court held that the Hobbs Act only criminalizes violence that is related to robbery or extortion; it does not criminalize free-standing physical violence.

Respondents brought an action against petitioners under the Hobbs Act and the Racketeer Influenced and Corrupt Organizations Act (RICO), claiming that petitioners' protest activities at abortion clinics amounted to extortion and "that these extortionate acts created a pattern of racketeering activity." The Hobbs Act, Title 18 of the United States Code, "says that an individual commits a federal crime if he or she 'obstructs, delays, or affects commerce' by robbery, extortion, or committing or threatening physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section."

30. 126 S.Ct. 2437 (2006).
31. 160 U.S. 469 (1895).
32. 126 S.Ct. 1264 (2006).

A jury found in favor of respondents and the district court entered a nationwide injunction. The Seventh Circuit affirmed but the Supreme Court reversed. It noted that the Hobbs Act defines extortion "as necessarily including improper obtaining property from another." The Court did not agree that the "claimed property consisted of a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services for free from wrongful threats, violence, coercion, and fear." On remand, the Seventh Circuit did not reverse the district court's decision or terminate the injunction. Instead, it "considered respondents' argument that the jury's RICO verdict rested not only upon many instances of extortion-related conduct, but also upon four instances (or threats) of physical violence unrelated to extortion." Since this theory was not presented in the district court, the Seventh Circuit determined that the Court did not have a chance to determine if these acts were sufficient to constitute a Hobbs Act violation. The Seventh Circuit remanded, but the petitioners sought, and the Court granted, a writ of certiorari.

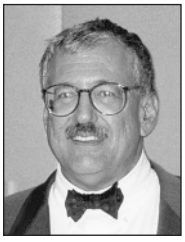
The Supreme Court believes the determinative question is whether the phrase, "in furtherance of a plan or purpose to do anything in violation of this section," as used in the Hobbs Act, refers to violence "(1) that furthers a plan or purpose to affect commerce…by robbery or extortion, or to violence (2) that furthers a plan or purpose simply to affect commerce." The Court chooses the former, more restrictive, reading for four reasons. First, the Court believes the "more restrictive reading [is] the more natural one" in light of the entire subparagraph. Second, the Court finds support in the fact that "Congress often intends such statutory terms as 'affect commerce' or 'in commerce' to be read as terms of art connecting the congressional exercise of legislative authority with the constitutional provision (here, the Commerce Clause) that grants Congress that authority." Here, it provides a limit to what Congress intended to define as criminal conduct. Third, the Court relies on legislative history. Finally, the Court believes that the other reading "broadens the Act's scope well beyond what case law has assumed" and "would federalize much ordinary criminal behavior."

In *Zedner v. United States*,[33] Justice Alito delivered the opinion of the Court, holding that a criminal defendant may not prospectively waive application of the Speedy Trial Act of 1974. He was joined by all the Members of the Court except Justice Scalia who joined only in part and filed a separate opinion concurring in part and in the judgment.

Petitioner was indicted by a grand jury on seven counts of attempting to defraud a financial institution and one count of knowingly possessing counterfeit obligations of the United States. After numerous continuances, the trial court requested that petitioner waive his rights under the Act "for all time." The petitioner gave both an oral and written waiver. Due to other delays, the trial did not start for another six years. Petitioner moved to dismiss the charges for violation of the Act, but the trial court denied the motion based on petitioner's prospective waiver. Petitioner was convicted and the Second Circuit affirmed. It determined that petitioner's waiver may have been ineffective; however, an exception exists "when defendant's conduct causes or contributes to a period of delay."

The Court begins its opinion with a synopsis of the Act's provisions and purposes. The Act requires a trial to begin within 70 days from the time the information or indictment is filed or the defendant makes his initial appearance. The Act also provides a "detailed list of periods of delay that are excluded in computing the time within which the trial must start." Among these is an "ends-of-justice" continuance, which "permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial."

The Court agrees with petitioner that he could not prospectively waive application of the Act. First, the Court notes that the Act does not list as one of the categories of delay a period during which the defendant waives application of the Act. Instead, it specifically requires "that defense continuance requests fit within one of the specific exclusions set out" in the Act. Even the flexible "ends-of-justice" delay requires the district court to consider certain factors on the record. The Court believes that if a "defendant could simply waive the application of the Act whenever he or she wanted more time, no defendant would ever need to put such considerations before the court under the rubric of an ends-of-justice exclusion." Additionally, the Court believes that the "purposes of the Act also cut against exclusion on the grounds of mere consent or waiver." The Act protects both a defendant's rights and the public's interests in a speedy resolution; the latter cannot be served if defendants can opt out of the Act.



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33. 126 S.Ct. 1976 (2006).