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# DNA, Dogs, the Nickel, and Other Curiosities:

## Criminal Law Cases in the Supreme Court's 2012-2013 Term

Charles D. Weisselberg

For readers who would like to review the truly momentous cases of the Supreme Court's last Term, I heartily recommend Professor Todd E. Pettys's article, *More than Marriage: Civil Cases in the Supreme Court's 2012-2013 Term*, which also appears in this issue of *Court Review*. During this past Term, like the one before it, the real blockbusters were on the civil side. But the Court's criminal docket was not without its charms. The justices wrestled with the collection of DNA evidence from arrestees, canine sniffs at the front door, non-custodial suspects' silence in the face of questioning, and increased minimum sentences based on facts not submitted to the jury. This article reviews these and other criminal cases that may most interest jurists and lawyers in state courts, and concludes with a brief glimpse at the October 2013 Term.

### FOURTH AMENDMENT

Of all the criminal-law-related rulings this past Term, the Fourth Amendment decisions were perhaps the most significant. The Court issued important holdings on collecting forensic evidence (DNA and blood) without a warrant, using narcotics detection dogs, and detaining residents during a warrant search. The decisions regarding blood draws (*Missouri v. McNeely*) and detentions (*Bailey v. United States*) matter a lot in day-to-day policing. The DNA case (*Maryland v. King*) may well spur state legislatures to enact or revise laws for obtaining DNA from arrestees. Altogether, these rulings will influence police and courts for many years to come.

### DNA, BLOOD, AND WARRANTS

In *Maryland v. King*,<sup>1</sup> an important and much-awaited ruling, the Court held that the Fourth Amendment does not prevent the government from obtaining and analyzing arrestees' DNA.

Alonzo King was arrested for assault for allegedly menacing a group of people with a shotgun. At booking, jail personnel used a cheek swab to take a DNA sample, pursuant to the provisions of the Maryland DNA Collection Act. The sample was analyzed, and King's DNA profile was uploaded into Maryland's DNA database. It was subsequently forwarded to the national database supervised by The FBI (CODIS), and matched to a DNA profile from a DNA sample collected in an unsolved 2003 rape case. King was convicted of rape, but the Maryland Court of Appeals struck down part of the Act authorizing officers to collect DNA from felony arrestees. The Supreme Court reversed in a 5-4 decision authored by Justice Kennedy, and joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito.

The Court found that the process of obtaining a DNA sample was a search, but that the search was reasonable within the meaning of the Fourth Amendment. The legitimate government interests served by the Act are well-established and include "the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody."<sup>2</sup> Justice Kennedy described the process of obtaining a DNA sample and adding it to various databases. In a lengthy portion of the opinion, the majority contended that obtaining an arrestee's DNA is a critical part of identifying the arrestee so that the government will know with certainty who is in its possession, whether the arrestee poses a danger and should (for example) not be released on bail, and other matters. The Court analogized to fingerprint evidence and an old photo-based system of categorizing arrestees. The justices also noted the gentle process for obtaining a swab, compared with a venipuncture or surgical procedure, and appeared reassured by the protections of the Act, which requires the DNA profile to be entered in the database only after a judicial officer finds probable cause to detain. Further, the DNA sample must be destroyed if the individual is acquitted or unconditionally pardoned. The majority concluded that the "DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure."<sup>3</sup>

Justice Scalia penned the dissent, arguing that the category of constitutionally permissible suspicionless searches does not include searches designed to serve the ordinary needs of law enforcement. In the view of the dissenting justices, the Maryland Act and the process followed in King's case were in no way focused upon identifying King or in serving any other administrative purpose. The dissent is a frankly devastating rejoinder to the claim that the evidence was obtained for identification purposes. The dissenters summed their position up this way: "DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test. When they are tested, they are checked against" profiles in a federal database of unsolved crimes, rather than the profiles in the database of individuals who have been arrested and convicted, "which could be used to identify them."<sup>4</sup>

The dissenting justices also disagreed with the analogy to fingerprint identification, as well as the majority's claim that the process of DNA testing and entry into the national registry could take much less time in the future. According to the dissenters, the question was whether King's search was reasonable,

### Footnotes

1. 133 S. Ct. 1958 (2012).
2. *Id.* at 1970.

3. *Id.* at 1980.
4. *Id.* at 1986 (Scalia, J., dissenting).

not whether some hypothetical search in the future would be.

Turning from DNA to blood, the issue in *Missouri v. McNeely*<sup>5</sup> was whether the natural metabolism of alcohol in the blood stream amounts to a *per se* exigency, thus allowing officers to obtain blood samples without a warrant in *all* drunk-driving cases. In a 5-4 ruling, the Court rejected the argument, and required the government to establish exigent circumstances on a case-by-case basis.

The majority's opinion, authored by Justice Sotomayor, noted that a warrantless search of the person is reasonable only if it falls within a recognized exception, such as exigent circumstances. The Court examined its prior ruling in *Schmerber v. California*,<sup>6</sup> where a blood draw was permitted. That case, the majority said, fit comfortably within decisions applying the exigent-circumstances exception. A significant delay in testing will negatively affect the probative value of the test results. However, "it does not follow that we should part from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State."<sup>7</sup> "[W]here police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."<sup>8</sup> Justice Kennedy joined the majority opinion but wrote separately to say that this case did not provide an appropriate vehicle to give greater guidance to law enforcement about the existence of exigent circumstances.<sup>9</sup>

Four justices dissented in whole or in part. The primary dissent was written by Chief Justice Roberts (joined by two others); it contended that "[a] police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test."<sup>10</sup> The Chief Justice underscored the evanescence of blood evidence. The destruction of alcohol in the blood stream "is not simply a belief. . . ; it is a biological certainty. . . . Evidence is literally disappearing by the minute."<sup>11</sup> Noting that many jurisdictions provide for electronic warrant applications, and that there may be time to obtain a warrant in many cases, these three Justices also rejected the State's proposed rule. But they propounded a different test, providing for an exception to the warrant requirement if an officer could reasonably conclude that there was not time to seek and receive a warrant before blood could be drawn, or if the officer did not receive a response before blood could be drawn.<sup>12</sup> Justice Thomas also dissented. In his view, the rapid destruction of evidence should permit a warrantless blood draw in every situation where police

have probable cause to arrest a drunk driver.<sup>13</sup>

### THE DOGGY DUO

Two "canine sniff" cases issued during the past Term. The first was *Florida v. Harris*,<sup>14</sup> where all members of the Court agreed that if a dog "alert" provides probable cause to search, the Fourth Amendment does not require the State to present an extensive set of records to establish the dog's reliability.

The case arose from a routine traffic stop. A sheriff's officer pulled over a truck, noticed that the driver appeared nervous, and that he had an open can of beer. After consent to search was refused, the deputy returned to the car with his narcotics detection dog, Aldo, who "alerted" on the driver's side door handle. A search of the car did not disclose any of the drugs that the dog was trained to detect, but the officer found pseudoephedrine, which is used in manufacturing methamphetamine. While the defendant was out on bail, he encountered the officer and dog once more, and the dog again "alerted" on the door. This time nothing was found. The Florida Supreme Court found that to demonstrate a dog's reliability and establish probable cause, the State needed to produce more than simply the fact that the dog had been trained and certified. The dog's training and certification records, experience and training of the officer handling the dog, and field performance records must also be produced.<sup>15</sup>

Reversing, the Court emphasized that its prior decisions established that probable cause is a "practical and common-sensical standard," in which one looks at the totality of the circumstances.<sup>16</sup> The test "is not reducible to 'precise definition or quantification.'"<sup>17</sup> Noting that the Court has "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach," the justices unanimously rejected the ruling below.<sup>18</sup> The defendant argued that the dog had actually shown himself untrustworthy, because he twice indicated that particular drugs were present, but they could not be found. The Court was not persuaded, perhaps influenced by the claim that the door had residual odor from the driver's hands. Moreover, the justices were not convinced that documents such as field performance records were necessarily accu-

**[A]ll members of the Court agreed that if a dog "alert" provides probable cause to search, the Fourth Amendment does not require . . . an extensive set of records to establish the dog's reliability.**

5. 133 S. Ct. 1552 (2013).

6. 384 U.S. 757 (1966).

7. *McNeely*, 133 S. Ct. at 1561.

8. *Id.* In a part of her opinion for a plurality of the Court, Justice Sotomayor also rejected a categorical rule proposed by the Chief Justice under which a warrantless blood draw would be permitted if the officer could not obtain a warrant in the time it would take to bring the suspect to a hospital or similar facility and obtain medical assistance. *Id.* at 1563-67 (Sotomayor, J., joined by Justices Scalia, Ginsburg, and Kagan).

9. *Id.* at 1568 (Kennedy, J., concurring in part).

10. *Id.* at 1569 (Roberts, C.J., joined by Justices Breyer and Alito, concurring in part and dissenting in part).

11. *Id.* at 1570-71.

12. *Id.* at 1573.

13. *Id.* at 1574 (Thomas, J., dissenting).

14. 133 S. Ct. 1050 (2013).

15. *Id.* at 1055.

16. *Id.*

17. *Id.* (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).)

18. *Id.* at 1055-56.

**Jardines . . . marks something of a shift in even Justice Scalia's analysis of a property-based theory of a search.**

rate, since they would not contain (for example) false negatives.

*Harris* is not of great import, other than to signal the Court's current reluctance to assess the overall reliability of narcotics detection dogs.<sup>19</sup> The other half of the doggy duo is much more significant.

*Florida v. Jardines*<sup>20</sup> presented the question of whether a dog sniff at a front door is a search

within the meaning of the Fourth Amendment. Officers received an unverified tip that marijuana was being grown in *Jardines*'s home. Two detectives, including one with a drug-sniffing dog, went onto the front porch of the home. The dog, Franky,<sup>21</sup> sat down at the base of the front door, indicating the strongest location for odors he was trained to detect. On the basis of the dog's behavior, a detective obtained a warrant, and a subsequent search revealed marijuana plants. The Florida Supreme Court found that the use of the dog was a search within the meaning of the Fourth Amendment that was not supported by probable cause. In a 5-4 decision, the U.S. Supreme Court agreed.

Writing for the majority, Justice Scalia drew on his opinion in the previous Term's blockbuster, *United States v. Jones*, for the proposition that a search occurs "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects . . . ."<sup>22</sup> That part of *Jones* had garnered five votes, but a different group of five than in *Jardines*. Nevertheless, the *Jardines* majority found that officers were in the curtilage of the house—"the area 'immediately surrounding and associated with the home'"—which enjoys protection as part of the home itself.<sup>23</sup> The justices determined that the implicit license typically granted to visitors to approach a home does not extend to officers who bring a trained dog to explore the area in the hopes of discovering incriminating evidence. There is no customary

invitation for that act.<sup>24</sup> The Fourth Amendment right to be free in one's home from unreasonable governmental intrusion "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity."<sup>25</sup> Justice Kagan authored a concurrence for three of the justices in the majority, finding in addition that the action was a search because it infringed on a reasonable expectation of privacy,<sup>26</sup> a point the majority opinion did not address.

Justice Alito dissented in an opinion joined by the Chief Justice, and Justices Kennedy and Breyer. They argued that "[t]he law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time."<sup>27</sup> They saw no basis to distinguish between welcome and unwelcome visitors, and of course this implied license to approach the front door extends to the police because officers are ordinarily allowed to approach a front door, knock, and attempt to speak to an occupant. The detectives did not exceed the scope of this license when they used a dog at the front door. In addition, the dissenting justices would find that there is no reasonable expectation of privacy with respect to odors emanating from the home that may be detected by a person or a dog. They noted that a previous decision already rejected the claim that the use of a narcotics dog is the same as using a thermal-imaging device.<sup>28</sup>

*Jardines* is important for several reasons. Of course, it is significant for limiting what officers may do with a narcotics detection dog. But more generally, it is the first Supreme Court ruling interpreting the landmark *Jones* case. It marks something of a shift in even Justice Scalia's analysis of a property-based theory of a search. In *Jones*, Justice Scalia tied his historical analysis of the Fourth Amendment to common-law trespass.<sup>29</sup> In *Jardines*, his opinion for the majority does not even contain the word trespass, although it still takes a property-based approach. In the wake of *Jardines*, some courts have analyzed whether officers were within the scope of the "license" granted to ordinary visitors. Some courts reference the law of trespass<sup>30</sup> while others do not.<sup>31</sup>

19. For an argument in favor of such an assessment, see *Illinois v. Caballes*, 543 U.S. 405, 410-11 (2005) (Souter, J., dissenting) ("What we have learned about the fallibility of dogs . . . would itself be reason to call for reconsidering [the] decision against treating the intentional use of a trained dog as a search. The portent of this very case, however, adds insistence to the call . . .").

20. 133 S. Ct. 1409 (2013).

21. Aldo . . . and now Franky? This is by no means a robust sample, but is there a trend towards somewhat mild names? Compare *Harris* and *Jardines*, *supra*, with *United States v. Dickerson*, 873 F.2d 1181, 1183 (9th Cir. 1988) ("Brutus"); *Matheson v. State*, 870 So. 2d 8, 10 (Fla. Dist. Ct. App. 2d Dist. 2003) ("Razor").

22. 133 S. Ct. at 1414 (quoting *United States v. Jones*, 132 S. Ct. 945, 950-51 n.3 (2012)).

23. *Id.* at 1414 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

24. *Id.* at 1416.

25. *Id.* at 1414.

26. *Id.* at 1418 (Kagan, J., concurring).

27. *Id.* at 1420 (Alito, J., dissenting).

28. *Id.* at 1425 (citing *Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005)). The thermal-imaging device case is, of course, *Kyllo v. United States*, 533 U.S. 27 (2001).

29. See *United States v. Jones*, 132 S. Ct. 945, 949, 953 (2012).

30. See, e.g., *People v. Barnes*, 216 Cal. App. 4th 1508, 1518 (Cal. App. 1st Dist. 2013) (no search "where there was no physical trespass or intrusion"); *State v. Ojeda*, 2013 Fla. App. LEXIS 6904, 27 (Fla. Dist. Ct. App. 3d Dist. May 1, 2013) ("A trespass by a government agent in combination with an unlawful purpose implicates the Fourth Amendment," citing *Jardines*).

31. See, e.g., *State v. Campbell*, 300 P.3d 72, 78 (Kan. 2013) (officer "affirmatively chose to conceal his identity by covering the [apartment door] peephole and affirmatively positioning himself to block the occupant's ability to determine who was standing at the door . . . . 'No customary invitation' permits approaching someone's door in this manner," quoting *Jardines*, 133 S. Ct. at 1416); *McClintock v. State*, 2013 Tex. App. LEXIS 7124, 7 (Tex. App. Houston 1st Dist. June 11, 2013) (dog sniff within curtilage "exceeds the implicit license granted by custom that allows strangers to approach a home and briefly solicit its occupants . . .").

## DETENTIONS DURING WARRANT SEARCHES

Over 20 years ago, the Court decided *Michigan v. Summers*,<sup>32</sup> and upheld the detention of a resident during the search of his home. Summers was walking down his front steps when he was detained. The defendant in this Term's case, *Bailey v. United States*,<sup>33</sup> was detained about a mile from his home, where officers were about to execute a search warrant. In a 6-3 decision authored by Justice Kennedy, the Court determined that the detention could not be upheld as incident to a lawful search.<sup>34</sup>

The majority found that the law-enforcement interests listed in *Summers* did not support Bailey's detention. First, detaining someone who has left the premises is not necessary for reasons of officer safety; police can mitigate any risk by taking routine precautions, such as posting someone near the door in the event a resident returns. Second, detention of a former occupant is unnecessary to facilitate the orderly completion of the search. Third, detention does not serve the interest of preventing any damage to the integrity of the search.<sup>35</sup> According to the Court, "[t]he categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched," and Bailey was detained "at a point beyond any reasonable understanding of the immediate vicinity of the premises . . ." <sup>36</sup> Three of the justices in the majority also joined a concurring opinion by Justice Scalia. They wrote separately to emphasize that *Summers* established a categorical, a bright-line rule, contrary to the Court of Appeals' balancing approach. To resolve the issue in this case, "a court need ask only one question: was the person seized within 'the immediate vicinity of the premises to be searched?'"<sup>37</sup> Conducting a *Summers* seizure incident to a search is not a right that the government has; it is an exception to the rule that would otherwise make the seizure unlawful. "*Summers* embodies a categorical judgment that in one narrow circumstance—the presence of occupants during the execution of a search warrant—seizures are reasonable despite the absence of probable cause."<sup>38</sup>

Justice Breyer, joined by Justices Thomas and Alito, dissented. In their view, the stop and detention was reasonable based on a variety of factors cited by the lower court, including that the premises were subject to a valid search warrant, the people detained were seen leaving the premises, and the detention was effected as soon as reasonably practicable.<sup>39</sup> These justices also contended that a bright-line rule permitting the search would be easily administered, while the majority's

approach invites case-by-case litigation over the definition of "immediate vicinity."<sup>40</sup>

## FIFTH AMENDMENT

No *Miranda* cases made it onto the docket this past Term. The justices issued only one Fifth Amendment opinion, *Salinas v. Texas*.<sup>41</sup> But *Salinas* will, in my view, turn out to be quite significant over the long term. It has important implications for policing as well as for what it means to take the nickel (assert the Fifth Amendment privilege).<sup>42</sup>

The defendant in *Salinas* was suspected of shooting two brothers. Officers came to his home, where he handed over his shotgun and agreed to go with them to the police station for questioning. During a non-custodial interview, officers asked him if his shotgun would match the shells found at the murder scene. *Salinas* did not answer and instead looked down at the floor. At trial, the State introduced evidence of his silence and reaction. In a 5-4 decision, the Supreme Court found no violation of the Fifth Amendment, though the majority split on the reasons.

Justice Alito delivered the judgment of the Court. In an opinion joined by the Chief Justice and Justice Kennedy, he wrote that *Salinas*'s Fifth Amendment claim failed because he simply remained silent and did not expressly invoke the privilege. There are several circumstances in which an individual need not expressly invoke to avail herself of the Fifth Amendment's protections. A defendant "need not take the stand and assert the privilege at his own trial,"<sup>43</sup> and *Griffin v. California*<sup>44</sup> prohibits comment on the decision not to testify. Moreover, due to the compelling pressures of an unwarned custodial interrogation, an individual need not expressly invoke. Likewise, the privilege need not be affirmatively asserted where there are threats, such as the withdrawal of government benefits,<sup>45</sup> or where assertion itself would be incriminating.<sup>46</sup> But the three-justice plurality declined to create what they characterized as another exception to the invocation requirement; among other reasons, mere silence in the face of questioning does not put police on notice that the privilege is itself the reason for the decision not to answer.<sup>47</sup> And a contrary rule "would also be very difficult to reconcile with *Berghuis v. Thompkins*," where a defendant in custody "failed to invoke the privilege when he refused to respond to police questioning for 2 hours and 45

**Salinas will, in my view, turn out to be quite significant over the long term.**

32. 452 U.S. 692 (1981).

33. 133 S. Ct. 1031 (2013).

34. The Court remanded so that the Court of Appeals could consider whether the stop and detention were lawful under *Terry v. Ohio*, 392 U.S. 1 (1968). The District Court had upheld the stop on this alternative ground, though the Court of Appeals did not reach it. 133 S. Ct. at 1037, 1043.

35. *Id.* at 1038-41.

36. *Id.* at 1041-42.

37. *Id.* at 1043-44 (Scalia, J., concurring, joined by Justices Ginsburg and Kagan) (citation omitted).

38. *Id.* at 1044.

39. *Id.* at 1045 (Breyer, J., dissenting).

40. *Id.* at 1047-48.

41. 133 S. Ct. 2174 (2013).

42. See Robert Davis, *Days in Court: How Dan Webb Became One of America's Top Trial Lawyers*, CHI. TRIB., Jan. 13, 1985, 1985 WLNR 902666 ("We had called in a lot of cops by that time, and they all took the nickel . . ."), available at: [http://articles.chicago.tribune.com/1985-01-13/features/8501030322\\_1\\_bauer-federal-district-court-applicants](http://articles.chicago.tribune.com/1985-01-13/features/8501030322_1_bauer-federal-district-court-applicants).

43. *Id.* at 2179.

44. 380 U.S. 609 (1965).

45. 133 S. Ct. at 2180 (citing, e.g., *Garrity v. New Jersey*, 385 U.S. 493 (1967)).

46. *Id.* (citing, e.g., *Leary v. United States*, 395 U.S. 6 (1969)).

47. *Id.* at 2181-82.

**If officers are able to conduct a non-custodial interview or interrogation, and a suspect does not expressly invoke, the State may now comment on her silence.**

minutes” after receiving *Miranda* warnings.<sup>48</sup> Justice Thomas, joined by Justice Scalia, concurred in the judgment.<sup>49</sup> They contended that “the Court’s decision in *Griffin* ‘lacks foundation in the Constitution’s text, history, or logic’ and should not be extended” to this case.<sup>50</sup>

Justice Breyer wrote for the four dissenting justices.<sup>51</sup> In their view, the majority’s rule undermines the Fifth Amendment’s basic protections. It has long been held “that ‘no ritualistic formula is necessary in order

to invoke the privilege,’” and Salinas was not represented by counsel.<sup>52</sup> *Thompkins*, the dissenters argued, is beside the point, as that case concerned the admissibility of his later speech, not comment on his silence after receiving *Miranda* warnings. And since the silence was in response to a question aimed at determining if Salinas was guilty of murder, it would be reasonable to infer that his silence derived from his exercise of the privilege.<sup>53</sup> The “need to categorize Salinas’ silence as based on the Fifth Amendment” is supported by the predicament of “forcing Salinas to choose between incrimination through speech and incrimination through silence” and the absence of any special reason why police had to know with certainty whether Salinas’ silence was in fact in reliance on the Fifth Amendment.<sup>54</sup>

For police, at least, this is an important case. *Miranda* warnings need not be given when a suspect is interrogated but is not in custody. In many jurisdictions, officers have been trained in techniques for questioning suspects, including—for example—providing *Beheler* warnings, to increase the likelihood that even interrogations in police stations might be found non-custodial.<sup>55</sup> *Salinas* increases the potential payoff of this approach. If officers are able to conduct a non-custodial interview or interrogation, and a suspect does not expressly invoke, the State may now comment on her silence. The three-justice plurality also suggested an additional tactic to obtain a confession: officers might tell a non-custodial suspect that her silence may be used against her in a future prosecution.<sup>56</sup> By contrast, of course, the prosecution cannot comment about silence after *Miranda* warn-

ings are given in a custodial interrogation, and the warnings convey that principle.<sup>57</sup>

## SIXTH AMENDMENT

The justices decided two important Sixth Amendment cases during the last Term and ducked a third. The most significant of the decided cases was *Allelyne v. United States*, which was yet another *Apprendi* holding. The Court also addressed mistrials and the Double Jeopardy Clause.

## RIGHT TO A JURY—APPRENDI ISSUES

Thirteen years ago, in the landmark decision in *Apprendi v. New Jersey*, the Court ruled that “[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.”<sup>58</sup> *Apprendi* held that a hate-crime allegation, which—if found to be true—would increase the *maximum* possible sentence, is essentially an element of the crime and must be submitted to a jury. Two years later, the Court decided *Harris v. United States*,<sup>59</sup> determining that allegations that increase the *minimum* sentence need *not* be submitted to the jury. In this Term’s important case, *Allelyne v. United States*,<sup>60</sup> the justices overruled *Harris*, finding no basis to distinguish facts that increase the minimum term of a sentence and those that increase the maximum.

Allen Allelyne was charged with using or carrying a firearm in relation to a crime of violence pursuant to 18 U.S.C. §924(c)(1)(A). The offense carried a five-year mandatory minimum term. The mandatory minimum term increased to seven years if the firearm was “brandished.” At trial, the jury indicated on the verdict form that he had used or carried a firearm but did not make any finding that the firearm was brandished. At sentencing, the District Court ruled that the evidence supported a finding of brandishing, and Allelyne received seven years. In a 5-4 decision, the Court vacated the sentence on that count.

Writing for the Court, Justice Thomas held that “[i]t is impossible to dissociate the floor of the sentencing range from the penalty affixed to the crime. . . . [C]riminal statutes have long specified both the floor and ceiling of sentencing ranges, which is evidence that both define the legally prescribed penalty.”<sup>61</sup> While the majority acknowledged the dissenters’ argument that the seven-year sentence for the §924(c) count was authorized by the jury’s verdict, they found it to be “beside the point.”<sup>62</sup> “When a finding of fact alters the legally pre-

48. *Id.* at 2182 (citing *Berghuis v. Thompkins*, 560 U.S. 370 (2010)).

49. *Id.* at 2184 (Thomas, J., concurring).

50. *Id.* (quoting *Mitchell v. United States*, 526 U.S. 314, 341 (1999) (Thomas, J., dissenting)).

51. *Id.* at 2185 (Breyer, J., dissenting).

52. *Id.* at 2186 (quoting *Quinn v. United States*, 349 U.S. 155 (1955)); *id.* at 2190-91.

53. *Id.* at 2189.

54. *Id.* at 2190.

55. See Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1542-47 (2008). Following *California v. Beheler*, 463 U.S. 1121 (1983), a “*Beheler* warning” is advice to a suspect that she is not under arrest or that she is free leave. This admonishment may

be considered in determining whether, under the totality of the circumstances, a person is in custody for *Miranda* purposes.

56. 133 S. Ct. at 2183 (rejecting an argument that officers may unduly pressure suspects into talking by telling them that their silence may be used in a future prosecution, as officers do nothing wrong when they accurately state the law) (citations omitted).

57. See *Doyle v. Ohio*, 426 U.S. 610 (1976).

58. 530 U.S. 466, 490 (2000).

59. 536 U.S. 545 (2002).

60. 133 S. Ct. 2151 (2013).

61. *Id.* at 2160.

62. *Id.* at 2162 (footnote omitted).

scribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that defendant could have received the same sentence with or without that fact.” *Harris*, the Court held, was inconsistent with *Apprendi*, and was overruled.<sup>63</sup> Justice Breyer concurred and explained that he had previously accepted *Harris*’s holding because he was not ready to accept the rule in *Apprendi*. But now, over a decade later, “the law should no longer tolerate the anomaly that the *Apprendi/Harris* distinction creates.”<sup>64</sup> Justice Sotomayor wrote separately to explain why *Harris* should be overruled despite the principles of *stare decisis*.<sup>65</sup>

The Chief Justice penned the primary dissent, arguing that “[o]ur holdings that a judge may not sentence a defendant to more than the jury has authorized properly preserve the jury right as a guard against judicial overreaching.”<sup>66</sup> Where, as here, a sentence is imposed within the range authorized by the jury’s verdict, there is no such risk of judicial overreaching. The jury’s verdict authorized the judge to impose a seven-year sentence for precisely the reason he imposed it. The Sixth Amendment does not demand more.<sup>67</sup> Justice Alito dissented separately, arguing that while *stare decisis* is not an inexorable command, “[i]f the Court is of a mind to reconsider existing precedent, a prime candidate should be *Apprendi* . . . .”<sup>68</sup>

*Alleyne* is an important ruling, which state courts are beginning to address.<sup>69</sup> It may be worth noting that the federal courts have already reached different outcomes on whether resentencing is required when an *Alleyne* error is found. Several circuits have found the error to be harmless, but others have automatically reversed.<sup>70</sup>

## DOUBLE JEOPARDY

A Michigan statute defines the offense of burning a dwelling house. Even though the evidence suggested that the defendant in *Evans v. Michigan*<sup>71</sup> had burned an occupied house, he was tried on charges of burning “other real property,” which is set out in a different section of the statute. At the conclusion of the prosecution’s case, *Evans* moved for a directed verdict of acquittal on the theory that an essential element of the offense was that the structure was not a dwelling house, and the State had failed to meet its burden. The trial court granted the motion. As it turned out, the trial judge misinterpreted state law. Burning “other real property” is a lesser included offense, and the

State is not required to disprove the greater offense. Does the Double Jeopardy Clause prohibit retrial? In an 8-1 decision, the Supreme Court said it does.

Justice Sotomayor’s majority opinion is a primer on long-standing principles of double-jeopardy law. The Double Jeopardy Clause forbids a retrial following a court-decreed acquittal even if it is based on an erroneous foundation. A mistaken acquittal is still an acquittal. It is unreviewable whether a judge directs a jury to return a verdict of not guilty or enters the verdict herself. The acquittal precludes retrial even if it is based on an erroneous decision to exclude evidence, a mistaken understanding of the evidence required for conviction, or a misconstruction of the statute defining the requirements to convict. While there may be a retrial following a procedural dismissal as opposed to a substantive ruling, here the trial court evaluated the State’s evidence.<sup>72</sup> The Court’s prior decisions “all instruct that an acquittal due to insufficient evidence precludes retrial, whether the Court’s evaluation of the evidence was ‘correct or not.’”<sup>73</sup> The majority rejected the State’s arguments for a different outcome in the case at bench; among other things, it was unpersuaded that the erroneous addition of an extraneous element of the offense was any different than a simple misinterpretation or misconstruction of the statute. And it did not matter that the acquittal was sought by the defendant. Justice Alito was the sole dissenter.<sup>74</sup>

**[T]he federal courts have already reached different outcomes on whether resentencing is required when an *Alleyne* error is found.**

## SPEEDY TRIAL

Finally, in *Boyer v. Louisiana*,<sup>75</sup> the Court dismissed the petition for writ of certiorari as improvidently granted. The Court had accepted the case to determine whether the State’s failure to fund counsel for an indigent defendant for five years should be weighed against the State for speedy trial purposes. Justice Alito, joined by Justices Scalia and Thomas, concurred in the order of dismissal, saying that the record did not show that much of the delay was caused by the State, and thus review had been granted on the basis of a mistaken factual premise.<sup>76</sup> Four

63. *Id.* at 2163. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in this ruling. Another portion of Justice Thomas’s opinion, reviewing common law, early American practice, and the right to a jury trial, was joined by three other justices.

64. *Id.* at 2166, 2166 (Breyer, J., concurring in part and concurring in the judgment).

65. *Id.* at 2164 (Sotomayor, J., concurring, joined by Justices Ginsburg and Kagan).

66. *Id.* at 2167, 2169 (Roberts, C.J., joined by Justices Scalia and Kennedy).

67. *Id.* at 2170.

68. *Id.* at 2172, 2172 (Alito, J., concurring).

69. See *Lightfoot v. State*, 2013 Ala. LEXIS 83 (Ala. July 12, 2013) (vacating sentence on firearms enhancement and remanding for resentencing); *People v. Mendoza*, 2013 Cal. App. Unpub. LEXIS

5274, 79-82 (Cal. App. 5th Dist. July 25, 2013) (distinguishing *Alleyne*, and finding any error to be harmless).

70. See *United States v. Mack*, 2013 U.S. App. LEXIS 18581, 32-33 (6th Cir. Tenn. 2013) (finding harmless error and collecting cases).

71. 133 S. Ct. 1069 (2013).

72. *Id.* at 1074-76 (citations omitted).

73. *Id.* at 1075-76 (citation omitted).

74. *Id.* at 1081 (Alito, J., dissenting). His opinion contains a lengthy discussion of the origins of the prohibition against double jeopardy, the underlying purposes of the doctrine, the definition of an acquittal, and policy considerations.

75. 133 S. Ct. 1702 (2013) (per curiam).

76. *Id.* at 1702, 1704 (Alito, J.).

**[T]he justices found that the decision was not applicable to people whose convictions became final before *Padilla* was announced.**

justices dissented. They concluded that delay resulting from a State's failure to fund an indigent's defense should weigh against the State and that any remaining factual issues could be resolved on remand.<sup>77</sup>

#### **RETROACTIVITY AND THE EX POST FACTO CLAUSE**

The Court decided three cases that relate to the retroactive application of law. The retroactivity

issues were assessed under different legal principles—habeas doctrine, the Ex Post Facto Clause, and the Due Process Clause—but it seems appropriate to consider them together.

#### **RIGHT TO COUNSEL/ADVICE ABOUT IMMIGRATION CONSEQUENCES**

Three Terms ago, the Court decided *Padilla v. Kentucky*,<sup>78</sup> and held that the Sixth Amendment right to effective assistance of counsel includes the right to advice on the immigration consequences of a guilty plea, at least where the consequences of the conviction are clear. Lower courts split on the question whether *Padilla* applies retroactively. In *Chaidez v. United States*,<sup>79</sup> the justices found that the decision was not applicable to people whose convictions became final before *Padilla* was announced.

Writing for six members of the Court, Justice Kagan analyzed the retroactivity question under the framework of *Teague v. Lane*.<sup>80</sup> A decision is not applied retroactively if it is a “new rule,” meaning one which “breaks new ground or imposes a new obligation” on the government.<sup>81</sup> A case sets forth a new rule “if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.”<sup>82</sup> *Padilla*, said the Court, would not have created a new rule had it only applied *Strickland v. Washington*'s<sup>83</sup> ineffective-assistance-of-counsel standard to a new factual situation. But *Padilla* did more. It “considered a threshold question: Was advice about deportation ‘categorically removed’ from the scope of the Sixth Amendment right to counsel because it involved only a ‘collateral consequence’ of a conviction, rather than a component of the criminal sentence?”<sup>84</sup> *Padilla*'s holding about the former distinction between direct and collateral consequences points to the conclusion that it announced a new rule.<sup>85</sup> Justice Thomas concurred in the judgment only, maintaining that *Padilla* was wrongly decided.<sup>86</sup>

Justices Sotomayor and Ginsburg dissented. In their view,

“*Padilla* is built squarely on the foundation laid out by *Strickland*” and “relied upon controlling precedent.”<sup>87</sup> The dissenting justices were not persuaded that *Padilla*'s discussion of direct and collateral consequences indicated that it was establishing a new rule. They contended that the *Padilla* Court said it had never previously distinguished between direct and collateral consequences in defining the scope of effective assistance of counsel, and the *Padilla* majority expressly declined to consider whether that distinction was appropriate in that case.<sup>88</sup> The dissenters argued that “[w]hat truly appears to drive the majority's analysis is its sense that *Padilla* occasioned a serious disruption in lower court decisional reasoning. . . . But the fact that a decision was perceived as momentous or consequential, particularly by those who disagreed with it, does not control in the *Teague* analysis.”<sup>89</sup>

#### **EX POST FACTO CLAUSE**

The petitioner in *Peugh v. United States*<sup>90</sup> committed bank fraud in 1999 and 2000. In 2010, he received a sentence of 70 months in federal prison. Peugh claimed that his sentence violated the Ex Post Facto Clause<sup>91</sup> because the judge applied the Federal Sentencing Guidelines range in effect at the time of sentencing (70-87 months) rather than the range in effect when the offense was committed (30-37 months). The Ex Post Facto Clause prohibits—among other things—laws “that change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed.”<sup>92</sup> Did the Guidelines amendment accomplish such a change, inasmuch as the Court decided in *United States v. Booker*<sup>93</sup> that the Guidelines are advisory, not mandatory? In a 5-4 opinion written by Justice Sotomayor, the Court said yes.

Critical to the majority was the understanding that it is not necessary for a law to increase the defendant's maximum eligible sentence in order to violate the Ex Post Facto Clause. Nor does the fact that the sentencing court has a degree of discretion defeat such a claim, though the possibility must be more than mere speculation. “The touchstone” of the inquiry is whether the change in law “presents a ‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’”<sup>94</sup> Justice Sotomayor explained that while the Guidelines are advisory, the sentencing judge uses the range as the starting point in the analysis. “That a district court may ultimately sentence a given defendant outside the Guidelines range does not deprive the Guidelines of force as the framework for sentencing.”<sup>95</sup> Moreover, the significance of the Guidelines is underscored by the fact that appellate review for reasonableness uses the Guide-

77. *Id.* at 1704, 1707-08 (Sotomayor, J., joined by Justices Ginsburg, Breyer and Kagan).

78. 559 U.S. 356, 130 S. Ct. 1473 (2010).

79. 133 S. Ct. 1103 (2013).

80. 489 U.S. 288 (1989).

81. *Chaidez*, 133 S. Ct. at 1107 (quoting *Teague*, 489 U.S. at 301).

82. *Id.*

83. See *Strickland v. Washington*, 466 U.S. 668 (1984).

84. *Chaidez*, 133 S. Ct. at 1108 (quoting *Padilla*, 559 U.S. at 366).

85. *Id.* at 1111-12.

86. *Id.* at 1113 (Thomas, J., concurring in the judgment).

87. *Id.* at 1115 (Sotomayor, J., dissenting, joined by Justice Ginsburg).

88. *Id.* at 1117.

89. *Id.* at 1120.

90. 133 S. Ct. 2072 (2013).

91. U.S. Const., art. I, § 9, cl. 3 (applies to federal government); see also art. I, § 10, cl. 1 (applies to state governments).

92. *Calder v. Bull*, 3 Dall. 386, 390 (1798).

93. 543 U.S. 220 (2005).

94. *Peugh*, 133 S. Ct. at 2082 (quoting *Garner v. Jones*, 529 U.S. 244, 250 (2000) and *California Dep't of Corr. v. Morales*, 514 U.S. 499, 505 (1995)).

95. *Id.* at 2083.



lines as a benchmark, and a mistake in calculating the Guidelines is procedural error. Contrary to the government's arguments, the majority considered the Guidelines to have more force than merely nonbinding policy statements. In the end, the Court saw this case as closest to *Miller v. Florida*,<sup>96</sup> where a change in Florida's guidelines scheme was held to violate the Clause. Florida's guidelines provided a presumptive sentencing range, and clear and convincing reasons had to be given for a departure from that range. The majority in *Peugh* concluded that applying the amended Guidelines to the defendant violated the Ex Post Facto Clause.<sup>97</sup>

Justice Thomas wrote the dissent, joined by the Chief Justice and Justices Scalia and Alito. They countered the majority's claim that the Guidelines were more like binding law because an incorrect calculation is reversible error. In the dissenters' view, "the fact that courts must give due consideration to the recommendation expressed in the *correct* Guidelines does not mean that the Guidelines constrain the district court's discretion to impose an appropriate sentence; it simply means that district courts must consider the correct variables before exercising their discretion."<sup>98</sup> Moreover, "[i]t is difficult to see how an advisory Guideline, designed to lead courts to impose sentences more in line with fixed statutory objectives, could ever constitute an ex post facto violation."<sup>99</sup> Writing for himself in another part of his opinion, Justice Thomas contended that the opinion also demonstrated the unworkability of the Court's ex post facto jurisprudence, and that the Court should return to the original meaning of the Clause. He argued that the justices should not adhere to prior cases that find a violation when there is a sufficient "risk" of an increased sentence.<sup>100</sup>

#### THE DUE PROCESS CLAUSE—RETROACTIVITY

While the Ex Post Facto Clause does not measure the retroactive application of a judicial decision, the Due Process Clause does. In *Metrish v. Lancaster*,<sup>101</sup> a federal habeas corpus petitioner challenged the retroactive application of a decision from the Michigan Supreme Court. Beginning in 1973, Michigan's intermediate appellate courts began recognizing a diminished-capacity defense to negate the *mens rea* element of first-degree murder. In 1975, the Michigan Legislature passed a law that set forth the requirements of a defense based upon mental illness or mental retardation. The 1975 Act was amended in 1994, to clarify who bore the burden of proof. In 2001, the Michigan Supreme Court held that defendants could not raise diminished capacity, as it was not included within Michigan's comprehensive statutory scheme. Lancaster's offense took place in 1993. At his trial, the judge applied the 2001 decision retroactively and denied Lancaster's request to present evidence of diminished capacity. In a unanimous opinion by Justice Ginsburg, the

Court found that Lancaster was not entitled to habeas corpus relief.

The Court compared Lancaster's claim to the two primary precedents, *Bouie v. City of Columbia*<sup>102</sup> and *Rogers v. Tennessee*.<sup>103</sup> *Bouie* was not on point; there, a decision of the South Carolina Supreme Court was retroactively applied to make an act criminal that was otherwise not proscribed. *Rogers* was closer. In that case, the Tennessee Supreme Court retroactively abolished the common-law "year-and-a-day rule" in murder cases. The decision not to adhere to the rule in *Rogers's* case did not violate the Due Process Clause principle of fair warning because the rule was widely viewed as an outdated relic, and had only a tenuous foothold in Tennessee. Lancaster's claim "is arguably less weak" than that rejected in *Rogers*, since diminished capacity was not an outdated relic and has been acknowledged repeatedly by the Michigan Court of Appeals.<sup>104</sup> However, Lancaster could not meet the demanding standards required for federal habeas corpus relief. He would need to establish an unreasonable application of federal law. And "[d]istinguishing *Rogers*, a case in which we rejected a due process claim, . . . does little to bolster Lancaster's argument that the [state court's] decision unreasonably applied clearly established federal law . . . This Court has never found a due process violation in circumstances remotely resembling Lancaster's case . . ." <sup>105</sup>

**While the Ex Post Facto Clause does not measure the retroactive application of a judicial decision, the Due Process Clause does.**

#### DUE PROCESS—BURDEN OF PROOF

The Court also decided an interesting case about the assignment of the burden of proof. The defendant in *Smith v. United States*<sup>106</sup> was charged with conspiracy and other crimes relating to his alleged role in a drug distribution organization. He claimed that the conspiracy counts were barred by the five-year statute of limitations, pointing to the fact that he was in prison on other charges for the last six years of the charged conspiracy. The trial court instructed the jury that the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence. On appeal, he argued that it was the government's burden to disprove a defensive withdrawal before the limitations period. In an opinion by Justice Scalia for a unanimous Court, the justices disagreed.

The opinion rehearsed the relevant basic principles. While the Due Process Clause assigns the government the burden of proving every fact necessary to constitute the crime beyond a reasonable doubt, proof of the nonexistence of all affirmative

96. 482 U.S. 423 (1987).

97. *Peugh*, 133 S. Ct. at 2088. Writing for a plurality, Justice Sotomayor also argued in another part of her opinion that the holding was consistent with the principles of fairness that animate the Clause. See *id.* at 2084-85.

98. *Id.* at 2088, 2090 (Thomas, J., dissenting, joined by Chief Justice Roberts and Justices Scalia and Alito).

99. *Id.* at 2091.

100. *Id.* at 2093-95 (Thomas, J., dissenting).

101. 133 S. Ct. 1781 (2013).

102. 378 U.S. 347 (1964).

103. 532 U.S. 451 (2001).

104. *Lancaster*, 133 S. Ct. at 1791-92.

105. *Id.* at 1792.

106. 133 S. Ct. 714 (2013).

**United States v. Davila . . . also briefly discusses the sorts of errors that are considered to be structural.**

defenses is not constitutionally required. The prosecution is foreclosed from shifting the burden to the defendant only when an affirmative defense negates an element of crime. However, where an affirmative defense instead excuses conduct that would otherwise be punishable, but does not negate any of the elements of the offense itself, the government does not

have a constitutional duty to overcome the defense beyond a reasonable doubt. The Court found that withdrawal did not negate an element of Smith's conspiracy crime. "Commission of the crime *within the statute-of-limitations period* is not an element of the conspiracy offense."<sup>107</sup> Thus, "[w]ithdrawal terminates the defendant's liability for postwithdrawal acts of his co-conspirators, but he remains guilty of conspiracy."<sup>108</sup> In another part of the opinion, the Court noted that Congress was free to alter the assignment of proof with respect to the existence or nonexistence of withdrawal.

#### FEDERAL CRIMINAL LAW

One federal criminal appeal, *United States v. Davila*,<sup>109</sup> may be of interest.<sup>110</sup> While it primarily involves the construction of Federal Rule of Criminal Procedure 11, it also briefly discusses the sorts of errors that are considered to be structural.

The defendant in *Davila* was dissatisfied with his legal representation, and complained that his attorney had advised him to plead guilty. In what all parties later agreed was a clear violation of Rule 11(c)(1), the Magistrate Judge essentially urged him to plead guilty and cooperate with the government in this or other cases. He said that to obtain the sentence reduction for "acceptance of responsibility," which is regularly given defendants who plead guilty, *Davila* had to "come to the cross."<sup>111</sup> *Davila* pleaded guilty several months later. The Supreme Court unanimously held that any Rule 11 violation of this type is assessed for harmless error; reversal is not automatic.

Writing for the Court, Justice Ginsburg first noted that Rule 11(h) specifically provides that a variance from the rule "is harmless error if it does not affect substantial rights."<sup>112</sup> The justices rejected the claim that this type of violation, which occurs before a defendant decides whether to plead guilty, should be treated differently than the sort of procedural errors that can occur during a plea colloquy. Under the plain language of Rule 11, and consistent with the Advisory Committee's com-

mentary, both are amenable to review for harmless error. "Structural error" refers to a very limited class of errors that "trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole," and this error does not fit within that category.<sup>113</sup> The Court remanded for the lower courts to assess the error in light of the full record. Justices Scalia and Thomas concurred. They agreed that a defendant must be prejudiced to obtain relief, but would have reached that conclusion by applying the plain language of Rule 11, without reference to the Advisory Committee's comments.<sup>114</sup>

#### HABEAS CORPUS

There are several noteworthy federal habeas cases from the last Term. The Court took on the question of competency and habeas, as well as a more ordinary set of cases concerning procedural default and habeas practice under the Antiterrorism and Effective Death Penalty Act (AEDPA).

#### RIGHT TO COMPETENCE

Does a federal habeas corpus petitioner, who is challenging a state capital conviction, have a right to stay the habeas proceeding if he is not competent to proceed? In *Ryan v. Gonzales* and *Tibbals v. Carter*,<sup>115</sup> the Court said no.

The case arose from two separate habeas corpus petitions, one in the Sixth Circuit and one in the Ninth. The Courts of Appeals both stayed the proceedings, albeit on the basis of different statutory provisions. The Court's unanimous opinion, written by Justice Thomas, found no statutory basis for a stay. There is no right to competence in the text of 18 U.S.C. § 3599, the statute that provides federal habeas petitioners on death row the right to federally funded counsel. Nor may such a right be implied from the statutory right to counsel—that would not be consistent with the Court's constitutional precedents. An incompetent defendant may not be tried, but that protection stems from the Due Process Clause. The Court has never said it is derived from the Sixth Amendment right to counsel. Further, a right to competence cannot be found in 18 U.S.C. § 4241, which generally applies only to federal criminal defendants (not state defendants who become federal habeas petitioners). The Court did, however, note that District Courts have discretion to grant stays. In one of the cases, the District Court did not abuse its discretion in denying a stay, because all of the claims were record-based or resolvable as a matter of law, irrespective of the petitioner's competence. In the other case, the Court remanded to determine whether there is a likelihood that the petitioner will regain competence in the foreseeable

107. *Id.* at 720.

108. *Id.* at 719.

109. 133 S. Ct. 2139 (2013). Disclosure: I joined an *amicus curiae* brief submitted on behalf of a number of law professors in this case.

110. I apologize to readers if I have excluded some notable decisions. A few close calls included *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013) (the Constitution's Necessary and Proper Clause affords Congress the power to require federal sex offenders to register, even if they completed their sentences prior to the Act; *Kebodeaux* did not, however, address any *ex post facto* claims)

and *Descamps v. United States*, 133 S. Ct. 2276 (2013) (characterization of state offenses for the purposes of the federal Armed Career Criminal Act).

111. 133 S. Ct. at 2144.

112. *Id.* at 2143 (quoting Fed. R. Crim. P. 11(h)). See also Fed. R. Crim. P. 52(a) ("Any error . . . that does not affect substantial rights must be disregarded.").

113. *Davila*, 133 S. Ct. at 2149 (citations omitted).

114. *Id.* at 2150 (Scalia, J., concurring, joined by Justice Thomas).

115. 133 S. Ct. 696 (2013).

future and whether the claim could substantially benefit from his assistance.

What is most interesting about this opinion is how it conceives the role of the federal courts in capital habeas cases. “Given the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner’s competence.”<sup>116</sup> Citing *Cullen v. Pinholster*<sup>117</sup> and *Harrington v. Richter*,<sup>118</sup> the justices emphasized that review is usually limited to the record that was before the state court.<sup>119</sup> “Attorneys are quite capable of reviewing the state-court record, identifying legal errors, and marshaling relevant arguments, even without their clients’ assistance.”<sup>120</sup>

#### **ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT/PROCEDURAL DEFAULT**

A few procedural default cases are worth a brief mention. In *McQuiggin v. Perkins*,<sup>121</sup> the Court ruled 5-4 that “actual innocence,” if proved, can provide a gateway to federal habeas corpus review, even if the petitioner failed to file her petition within AEDPA’s one-year limitations period. *Trevino v. Thaler*<sup>122</sup> provided an opportunity to revisit *Martinez v. Ryan*,<sup>123</sup> which was decided last Term. In *Martinez*, a state law required a claim of ineffective assistance of trial counsel to be raised in an initial-review collateral proceeding (instead of on direct review), and the Court found that ineffective assistance of state counsel in the collateral proceeding may excuse the failure to raise the claim about trial counsel. The *Trevino* Court examined Texas’s procedural system and determined that it does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal. In a 5-4 ruling, the justices found no distinction between (1) a system “that denies permission to raise the claim on direct appeal” and (2) a system “that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so . . . .”<sup>124</sup>

The Court also addressed the circumstance in which a state criminal defendant attempts to raise a federal claim and a state court rules against the defendant in an opinion that addresses some issues but does not expressly address the federal claim. In *Johnson v. Williams*, the justices held that a federal habeas court “must presume (subject to rebuttal) that the federal claim was adjudicated on the merits.”<sup>125</sup> The justices were unanimous in finding that the presumption was not rebutted simply because the state court addressed some but not all of the claims. The

opinion noted that “it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference.”<sup>126</sup> While the Court found that the presumption was not rebutted, it also rejected the State’s argument that the presumption should be made irrebuttable. Justice Scalia concurred, arguing that the presumption should only be rebuttable by a showing, based on the text of the court’s order or upon practice in the jurisdiction, that the judgment did not purport to decide the federal question.<sup>127</sup>

Finally, during the 2011-12 Term, the Court granted certiorari and summarily reversed in six habeas corpus cases. As I wrote a year ago, the justices did so to underscore AEDPA’s demanding standards.<sup>128</sup> This year, the justices continued the practice, but with fewer cases—three—all from the Ninth Circuit. In *Marshall v. Rodgers*,<sup>129</sup> they reversed the Circuit’s grant of habeas relief, finding that there is no clearly established Federal law, as determined by the Supreme Court, with respect to a criminal defendant’s ability to reassert his right to counsel once he has validly waived it. The Court criticized the Court of Appeals for its “mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.”<sup>130</sup> Another summary reversal came in *Nevada v. Jackson*,<sup>131</sup> where the state courts excluded evidence of a rape victim’s prior uncorroborated allegations of rape by the defendant, largely because the accused did not give notice of his intent to introduce extrinsic evidence. While it is well-established, as a general principle, that a defendant has a meaningful opportunity to present a complete defense, “[n]o decision of this Court clearly establishes that this notice requirement is unconstitutional.”<sup>132</sup> Finally, in *Ryan v. Schad*,<sup>133</sup> the justices ruled that the Court of Appeals abused its discretion in failing to issue its mandate after Supreme Court review was denied; the Circuit *sua sponte* sought to reconsider an argument it had previously rejected.

**In *McQuiggin v. Perkins*, the Court ruled 5-4 that “actual innocence,” if proved, can provide a gateway to federal habeas corpus review, even if the petitioner failed to [timely] file her petition . . . .**

116. *Id.* at 704.

117. 131 S. Ct. 1388 (2011).

118. 131 S. Ct. 770 (2011).

119. 133 S. Ct. at 705, 708-09.

120. *Id.* at 705.

121. 133 S. Ct. 1924 (2013).

122. 133 S. Ct. 1911 (2013).

123. 132 S. Ct. 1309 (2012).

124. 133 S. Ct. at 1921.

125. 133 S. Ct. 1088, 1091 (2013) (applying holding of *Harrington v. Richter*, 131 S. Ct. 770 (2011)).

126. *Id.* at 1094.

127. *Id.* at 1099 (Scalia, J., concurring).

128. See Charles D. Weisselberg, *GPS Monitoring and More: Criminal Law Cases in the Supreme Court’s 2011-12 Term*, 48 COURT REV. 60, 71 (2012).

129. 133 S. Ct. 1990 (2013) (per curiam).

130. *Id.* at 1450.

131. 133 S. Ct. 1990 (2013) (per curiam).

132. *Id.* at 1993.

133. 133 S. Ct. 2548 (2013) (per curiam).

## A LOOK AHEAD

As this article goes to press, the Court's 2013 Term has just begun. It is still quite early for a full preview, but there are a few cases to watch. The justices will consider whether the Fifth Amendment is violated when a State uses a court-ordered mental evaluation to rebut a capital defendant's showing about his mental state;<sup>134</sup> whether the government can obtain an ex parte order to freeze assets that a defendant needs to retain counsel, and not provide a pretrial, adversarial hearing on the underlying charges;<sup>135</sup> if officers who receive an anonymous tip about a drunk or reckless driver need to corroborate dangerous driving before stopping the vehicle;<sup>136</sup> what standards and relief are appropriate for a claim that a defendant would have pled guilty but for ineffective assistance of counsel;<sup>137</sup> and whether a resident must be personally present to object when officers ask a cotenant for consent to search a dwelling, or whether a previous objection remains effective.<sup>138</sup> It should be another interesting year.



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134. *Kansas v. Cheever*, No. 12-609.

135. *Kaley v. United States*, No. 12-464.

136. *Navarette v. California*, No. 12-9490.

137. *Burt v. Titlow*, No. 12-414.

138. *Fernandez v. California*, No. 12-7822.