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One Term, Two Courts: Selected Criminal-Law Cases in the Supreme Court's 2015-2016 Term

Charles D. Weisselberg
the University of California, Berkeley

Juliana DeVries
U.S. Court of Appeals for the Ninth Circuit

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One Term, Two Courts:

Selected Criminal-Law Cases in the Supreme Court's 2015-2016 Term

Charles D. Weisselberg and Juliana DeVries

In a way, we had not one but two Supreme Courts last Term.[1] The first Court sat from October 5, 2015, to February 12, 2016. The Term of the successor Court began on February 13, 2016, when Associate Justice Antonin Scalia unexpectedly passed away on a Texas ranch. We will review important criminal-law decisions from both 2015-2016 Courts. But for those who adjudicate, study, prosecute, or defend criminal cases, the death of Justice Scalia was the most significant aspect of the year. Whether one was a fan of his jurisprudence or not, it is impossible to deny his outsized impact upon the Court for almost three decades. We will begin by noting some of his most influential criminal-law and procedure opinions before turning to the rulings of the 2015-2016 Term.

JUSTICE ANTONIN SCALIA AND CONSTITUTIONAL CRIMINAL LAW—A REMEMBRANCE

During his decades on the bench, Justice Antonin Scalia authored transformative opinions in criminal law and procedure.

Justice Scalia shaped Fourth Amendment jurisprudence with decisions such as *United States v. Jones*,[2] the GPS-tracking-device case, which reintroduced property-law principles in determining what amounts to a search. He also wrote the dog-sniff sequel of *Florida v. Jardines*.[3] In *Jardines*, as well as in the thermal-imaging-device case of *Kyllo v. United States*,[4] Justice Scalia established himself as the Court's fiercest protector of the home. Justice Scalia was less fond, however, of the Fourth Amendment exclusionary rule, as demonstrated in *Hudson v. Michigan*,[5] which removed "knock and announce" violations from the scope of the rule.

Justice Scalia authored the foundational opinion in *Whren v. United States*,[6] upholding the pretext use of traffic infractions, and in *Ashcroft v. al-Kidd*,[7] which did the same with material-witness warrants. In *United States v. Gonzalez-Lopez*,[8] he vigorously supported a defendant's right to choose retained counsel, and he dissented in *Indiana v. Edwards*[9] to support the right of a defendant with a severe mental illness to represent himself. His dissent in *Edwards* was characteristically fiery, just like his disagreements with the majorities in *Mistretta v. United States*,[10] *Maryland v. Craig*,[11] *Dickerson v. United States*,[12] *Maryland v. King*,[13] and *Navarette v. California*.[14] Justice Scalia's concurrence in *Thornton v. United States*[15] directly led to the Court's change of position in *Arizona v. Gant*, which restricted searches of automobiles incident to the driver's arrest, though the jurist would have gone even further.[16] He also wrote for the majority in *District of Columbia v. Heller*,[17] finding that the District of Columbia's ban on handgun possession in the home violates the Second Amendment.

It is difficult to select which of his opinions will have the most lasting importance, but surely a leading contender is *Crawford v. Washington*,[18] which invoked the Confrontation Clause to overturn the longstanding rule that an unavailable witness's out-of-court statement could be admitted if it bore adequate indicia of reliability. He wrote for the Court in the later Confrontation Clause cases of *Davis v. Washington*[19] and *Melendez-Diaz v. Massachusetts*[20] and then fought to prevent

Footnotes

1. We are grateful to Professor Tejas Narechania for suggesting this characterization of the Court's Term.
2. 132 S. Ct. 945 (2012).
3. 133 S. Ct. 1409 (2013).
4. 533 U.S. 27 (2001).
5. 547 U.S. 586 (2006).
6. 517 U.S. 806 (1996).
7. 563 U.S. 731 (2011).
8. 548 U.S. 140 (2006).
9. 554 U.S. 164, 179 (2008) (Scalia, J., dissenting) (quipping that "the Court's opinion does not even have the questionable virtue of being politically correct").
10. 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (contending that Congress's delegation of authority to the U.S. Sentencing Commission violates separation-of-powers principles by creating a "junior-varsity Congress").
11. 497 U.S. 836, 860 (1990) (Scalia, J., dissenting) (arguing that the use of closed-circuit television for child witnesses violates the Confrontation Clause; "[f]or good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it").
12. 530 U.S. 428, 444 (2000) (Scalia, J., dissenting) (arguing that the Constitution permits *Miranda v. Arizona* to be replaced by statute; "[t]he Constitution is not, unlike the *Miranda* majority, offended by a criminal's commendable qualm of conscience or fortunate fit of stupidity").
13. 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting) (contending that the State may not take DNA samples from arrestees; "if the Court's identification theory is not wrong, there is no such thing as error").
14. 134 S. Ct. 1683, 1692 (2014) (Scalia, J., dissenting) (arguing that an anonymous tip of a traffic violation does not amount to reasonable suspicion of drunk driving and accusing the majority opinion of "serv[ing] up a freedom-destroying cocktail").
15. 541 U.S. 615, 625 (2004) (Scalia, J., concurring).
16. 556 U.S. 332, 351 (2009) (Scalia, J., concurring) (joining the majority but expressing the willingness to find that officers should not be able to search vehicles incident to arrest on the ground of officer safety).
17. 554 U.S. 570 (2008).
18. 541 U.S. 36 (2004).
19. 547 U.S. 813 (2006) (911 call was not testimonial).
20. 557 U.S. 305 (2009) (forensic analysts' affidavits were testimonial).

the Court from retreating from *Crawford* in a series of dissents.[21]

Perhaps we may soon know whom President-elect Trump will select to replace Justice Antonin Scalia. But whomever the nominee may be, it is difficult to imagine a justice who will have a greater or more lasting impact on constitutional criminal law and procedure.

Now on to the opinions from 2015-2016.

FOURTH AMENDMENT

The year provided two significant Fourth Amendment decisions that matter for the day-to-day functioning of the criminal law. The most noteworthy (and, for us, most puzzling) opinion was *Utah v. Strieff*,[22] which applied the attenuation doctrine to uphold admission of evidence following an unconstitutional investigatory stop. *Strieff* may narrow the exclusionary rule going forward. Another important case this Term, *Birchfield v. North Dakota*,[23] addressed whether officers may obtain breath or blood evidence of intoxication without a warrant as part of a search incident to arrest.

In *Strieff*, a detective received an anonymous tip of narcotics activity at a home. He conducted intermittent surveillance and stopped one visitor leaving the home. When the visitor, Edward Strieff, produced his identification, the detective called it in and learned that Strieff had an outstanding arrest warrant for a traffic violation. The detective then arrested and searched Strieff, finding methamphetamine and drug paraphernalia. The State conceded that the stop was without reasonable suspicion, and the State only learned of the outstanding warrant and the contraband as a result of the stop. The Utah Supreme Court found that the evidence was inadmissible, but the U.S. Supreme Court reversed.[24]

Writing for a five-justice majority, Justice Thomas noted that under the attenuation doctrine, evidence is admissible "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance" such that suppressing the evidence would not serve the interest protected by the Fourth Amendment.[25] Analyzing the case under the factors articulated in *Brown v. Illinois*,[26] the Court found that while the temporal proximity of the unlawful stop and the search favored exclusion, two other factors counseled in favor of admission. The warrant was an "intervening circumstance" because its existence predated the stop and was independent of it. Further, the officer's conduct was not purposeful or flagrant; it was, at most, negligent.[27]

Three justices dissented. Justice Kagan, joined by Justice Ginsburg, disputed the majority's application of the attenuation doctrine, characterizing the detective's conduct as purposeful and not an innocent mistake. Nor were they willing to consider the discovery of the warrant to be an intervening circumstance; it was a foreseeable consequence of the stop, and the detective testified that checking for outstanding warrants was a normal practice. They concluded that the majority's opinion creates incentives for police to make suspicionless stops.[28]

[A] capacious definition of "intervening circumstances" can substantially narrow the exclusionary rule . . . .

Justice Sotomayor also dissented in a forceful opinion joined in part by Justice Ginsburg. In a section written only for herself, Justice Sotomayor described the impact of unlawful stops upon ordinary Americans, and especially people of color:

> For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. . . . Until their voices matter too, our justice system will continue to be anything but.[29]

It will be interesting to see the impact of *Strieff* in the years ahead. One astute observer, Professor Orin Kerr, remains unpersuaded by the majority's analysis of the *Brown* factors. He thinks of an "intervening circumstance" as "an outside event that changes what is expected to happen," and the stop here "unfolded exactly as the officer expected it would."[30] We agree and find it difficult to foresee how future courts will interpret "intervening circumstances." Further, a capacious definition of "intervening circumstances" can substantially narrow the exclusionary rule and create incentives for officers to conduct suspicionless stops. In addition, along with Kerr, we note that the majority inferred that the officer's conduct was at most negligent, even though the record did not contain much evidence either way. We will see whether this case leads courts to consider officers' subjective intent in assessing either attenuation or the overall application of the exclusionary rule.[31]

21. *See* Michigan v. Bryant, 562 U.S. 344, 379 (2011) (Scalia, J., dissenting) (arguing that a gunshot victim's statements were testimonial); Williams v. Illinois, 132 S. Ct. 2221, 2264 (2012) (Kagan, J., dissenting, joined by Justices Scalia, Ginsburg, and Sotomayor) (contending that a defendant has the right to cross-examine the analyst who generated a DNA profile).
22. 136 S. Ct. 2056 (2016).
23. 136 S. Ct. 2160 (2016).
24. *Id.* at 2059-60.
25. *Id.* at 2061.
26. 422 U.S. 590 (1975).
27. *Strieff*, 136 S. Ct. at 2061-63.
28. *Id.* at 2071, 2072-74 (Kagan, J., dissenting).
29. *Id.* at 2064, 2069-71 (Sotomayor, J., dissenting).
30. Orin Kerr, *Opinion Analysis: The Exclusionary Rule Is Weakened But It Still Lives*, SCOTUSBLOG (June 20, 2016, 9:35 PM), http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/.
31. *See* Herring v. United States, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate . . . . As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct . . . .").

Justice Alito's majority opinion begins with a primer on laws relating to driving under the influence, including informed consent.

Birchfield is a sequel to *Missouri v. McNeeley*,[32] where the Court found that the natural dissipation of alcohol from the bloodstream does not always amount to exigent circumstances that justify taking a blood sample without a warrant. All 50 states have enacted "implied consent" laws, requiring motorists to consent to tests for blood alcohol concentration (BAC) as a condition of driving. Some states have also criminalized the refusal to undergo testing. *Birchfield* addresses three different defendants' appeals, all related to whether an arrested person may refuse to consent to a blood or breath test and whether that refusal may be criminalized. In all of the cases, the defendants were first placed under arrest, and the officers *later* sought to obtain BAC evidence.

Justice Alito's majority opinion begins with a primer on laws relating to driving under the influence, including informed consent.[33] The opinion then reviews the principles of searches incident to arrest, culminating in the ruling two Terms ago in *Riley v. California*.[34] The *Riley* Court reaffirmed the "categorical" approach to searches incident to arrest. The authority to search depends on the fact of arrest and is permitted to further officer safety and preserve evidence. In determining "whether to exempt a given type of search from the warrant requirement," courts assess "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."[35] Applying these principles, subjecting motorists to a *breath test* does not implicate significant privacy concerns, furthers legitimate governmental interests, and may be performed incident to arrest, without a warrant.[36] "Blood tests are a different matter."[37] They require piercing the skin, and give law enforcement a sample that can be preserved and used for other purposes. They may not be obtained without a warrant, incident to arrest.[38] The majority also found that, while implied-consent laws may impose civil penalties and evidentiary consequences on those who refuse consent, motorists "cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."[39] The Court affirmed one defendant's conviction for refusing a warrantless *breath* test, reversed a conviction for refusing a warrantless *blood draw*, and remanded where a defendant submitted to a blood test after being told he had no right to refuse.[40]

Five justices were in the majority. Justices Sotomayor and Ginsburg dissented from the majority's conclusion with respect to breath tests. They disagreed with the application to breath tests of the search-incident-to-arrest framework. They would find that officers should obtain a warrant for BAC evidence unless exigent circumstances exist in a particular case.[41] Justice Thomas wrote separately to state his disagreement with *McNeely*. He would instead hold that both blood and breath BAC tests may be performed without a warrant due to exigent circumstances.[42]

Strieff and *Birchfield* were both decided by the Court without Justice Scalia. Would they have been decided differently before his passing? Justice Scalia had strong views about the scope of the exclusionary rule and the attenuation doctrine, as *Hudson* shows. In *McNeely*, he joined the majority in finding no exigent circumstances, as a categorical matter, to support warrantless blood draws. His vote was not necessary to obtain numerical majorities—each opinion commanded five votes—yet his voice was loud on Fourth Amendment issues. We may never know how these two opinions would read had he lived to see them written—or, perhaps, had he authored them himself.[43]

SIXTH AMENDMENT

Last Term the Court issued a number of substantial Sixth Amendment rulings, plus a per curiam reversal. *Betterman v. Montana*[44] answered whether the speedy-trial guarantee applies to sentencing: it does not. In *Hurst v. Florida*,[45] the justices overturned Florida's capital-punishment system, reinforcing the principle that the jury must find the facts necessary to a capital judgment. *Luis v. United States*[46] is an important ruling about seizing assets that deprive a defendant of counsel of choice. *United States v. Bryant*[47] addressed the use of uncounseled tribal-court convictions as predicate offenses for prosecutions under a federal statute. And in *Maryland v. Kulbicki*,[48] the justices summarily reversed a state court that faulted defense counsel for not uncovering a report about the validity of a certain type of forensic evidence.

32. 133 S. Ct. 1552 (2013).
33. *See Birchfield*, 136 S. Ct. at 2167-70.
34. 134 S. Ct. 2473 (2014).
35. *Birchfield*, 136 S. Ct. at 2176 (quoting *Riley*, 134 S. Ct. at 2484).
36. *Id.* at 2176-80, 2184.
37. *Id.* at 2178.
38. *Id.* at 2184.
39. *Id.* at 2186.
40. *Id.*
41. *See id.* at 2187 (Sotomayor, J., joined by Ginsburg, J., concurring in part and dissenting in part).
42. *See id.* at 2196 (Thomas, J., concurring in judgment in part and dissenting in part).
43. Assuming he voted with the majority in *Strieff*, there is a significant chance that Justice Scalia would have been assigned to write the opinion. *Strieff* was argued in the February 2016 sitting. We note that Justice Thomas, who wrote for the Court in *Strieff*, was also assigned the opinion in another case from the February sitting, *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016). Assigning *Strieff* to Justice Scalia would have more evenly spread the Court's workload and perhaps made sense, given his prior opinion in *Hudson*.
44. 136 S. Ct. 1609 (2016).
45. 136 S. Ct. 616 (2016).
46. 136 S. Ct. 1083 (2016).
47. 136 S. Ct. 1954 (2016).
48. 136 S. Ct. 2 (2015) (per curiam).

SPEEDY TRIAL

Betterman is the Sixth Amendment decision with the broadest applicability. Brandon Betterman failed to show up in court for a domestic-violence assault charge. He was charged with bail-jumping and pleaded guilty to that offense. Betterman was then held for 14 months before sentencing, and he argued that the sentencing delay violated the Sixth Amendment's Speedy Trial Clause. The Court found, unanimously, that the Clause does not apply to delayed sentencing.

Writing for the Court, Justice Ginsburg divided criminal proceedings into three phases. The first phase, before arrest or indictment, may be governed by the Due Process Clause, which protects against fundamentally unfair prosecutorial conduct.[49] The Sixth Amendment's Speedy Trial Clause applies in the second period; it attaches upon arrest or indictment and lasts through conviction. But this Sixth Amendment right then detaches upon conviction, which triggers the third stage that lasts until sentencing.[50]

The Court found that this division of the criminal proceeding into three stages, with the Speedy Trial Clause only applying during the second stage, is consistent with the purposes and historical understanding of the speedy-trial right. The three-stage model "reflect[s] the concern that a presumptively innocent person should not languish under an unresolved charge."[51] Moreover, the language of the Sixth Amendment references the "accused," not someone already convicted.[52] While guilty pleas may be prevalent in our system, making sentencing the main event for most defendants, factual disputes at sentencing do not relate to the question of guilt.[53] To the extent that sentencing proceedings are unduly delayed, rules of court and the Due Process Clause may still be relevant. Justice Thomas (joined by Justice Alito) and Justice Sotomayor concurred to address possible applications of the Due Process Clause.[54]

RIGHT TO A DECISION BY A JURY

In *Hurst*, an 8-1 decision with Justice Scalia in the majority, the Court overturned Florida's capital-punishment scheme because it does not require a jury to find the facts necessary to sentence a defendant to death. Timothy Hurst received the death penalty from a judge, who found sufficient aggravating circumstances to impose a sentence of death following an *advisory* verdict by a jury.

In the foundational case of *Ring v. Arizona*,[55] the Court found that Arizona's capital-sentencing scheme violated the Sixth Amendment (and the *Apprendi v. New Jersey*[56] line of cases) because Arizona permitted a judge rather than a jury to find the facts required to sentence a defendant to death. In several cases, such as *Spaziano v. Florida*[57] and *Hildwin v. Florida*,[58] the Court had expressed support for Florida's capital-sentencing scheme, holding in both cases that the jury need not make the specific findings authorizing the sentence of death. *Hurst* overturned *Spaziano* and *Hildwin* as irreconcilable with *Apprendi* and *Ring*.[59] The Court did not reach the question of whether the error was harmless but overruled *Spaziano* and *Hildwin* "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty."[60] Justice Breyer concurred in the judgment.[61] Justice Alito was the lone dissenter, arguing that a Florida judge essentially fills a reviewing function and that any error was harmless.[62]

Justice Ginsburg divided criminal proceedings into three phases . . . . with the Speedy Trial Clause only applying during the second stage . . . .

Apart from its importance for the state of Florida, *Hurst* makes clear that *Ring* stands strong. A jury must make the factual findings necessary to sentence a defendant to death.

RIGHT TO COUNSEL

In the forfeiture ruling, *Luis*, Justice Breyer, joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, concluded that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment."[63] Justice Thomas concurred, providing the fifth vote.[64]

The federal government charged Sila Luis in 2012 with healthcare fraud in the amount of $45 million, almost all of which she had already spent by the time she was indicted. When the government caught up with her, Luis had $2 million in her possession, which the district court ordered frozen for potential future payment of restitution and other criminal penalties, but which Luis wished to spend on her defense. The government and Luis agreed that the frozen $2 million were legitimate, untainted funds not connected to the alleged crime.[65]

The plurality recognized that past Supreme Court cases allowed the government to freeze a criminal defendant's assets

49. *See Betterman*, 136 S. Ct. at 1613.
50. *Id.*
51. *Id.* at 1614.
52. *Id.* at 1614-15.
53. *Id.* at 1616. In distinguishing between trial and sentencing, the Court did "not mean to convey that provisions of the Sixth Amendment protecting interests other than the presumption of innocence"—such as the right to counsel—"are inapplicable to sentencing." *Id.* at 1615 n.4.
54. *See id.* at 1618 (Thomas, J., concurring) and *id.* at 1619 (Sotomayor, J., concurring).
55. 536 U.S. 584 (2002).
56. 530 U.S. 466 (2000).
57. 408 U.S. 447 (1984).
58. 490 U.S. 638 (1989) (per curiam).
59. *Hurst*, 136 S. Ct. at 623.
60. *Id.* at 624.
61. *Id.* at 624 (Breyer, J., concurring).
62. *Id.* at 624, 625-25 (Alito, J., dissenting).
63. 136 S. Ct. at 1088.
64. *Id.* at 1096 (Thomas, J., concurring).
65. 136 S. Ct. at 1088.

> **[T]he justices summarily reversed a state court that had found that counsel's performance was deficient for failing to uncover a report . . . .**

pretrial and prevent her from using those assets to hire her counsel of choice.[66] They distinguished these precedents, however, as limited to restraint of a criminal defendant's *tainted* assets, that is, those traceable to the crime charged. In contrast, the court order here prevented Luis from using her own money to hire the private defense counsel of her choice.

Justice Breyer's plurality opinion reasons that the government has a substantial property interest in tainted assets that it does not have in untainted property. It also balances the interest in the fundamental right to assistance of counsel against the government's contingent interest in securing criminal forfeiture and the victim's interest in restitution and finds that the Sixth Amendment right trumps. It notes the impact that an opposite decision would have on the public defense system: "accepting the Government's views would—by increasing the government-paid-defender workload—render less effective the basic right the Sixth Amendment seeks to protect."[67] The plurality additionally surmised that "the constitutional line we have drawn should prove workable" because "the law has tracing rules that help courts implement the kind of distinction we require in this case."[68]

Concurring, Justice Thomas agreed that freezing untainted assets pretrial violates the Sixth Amendment, reasoning that "constitutional rights necessarily protect the prerequisites for their exercise."[69] He disagreed, however, with the plurality's "balancing approach,"[70] arguing that such balancing "'do[es] violence' to the constitutional design."[71]

Justice Kennedy wrote a dissenting opinion joined by Justice Alito. His main criticism of the plurality was that the distinction between tainted and untainted assets makes little sense because money is fungible. "There is no difference," he asserts, "between a defendant who has preserved his or her own assets by spending stolen money and a defendant who has spent his or her own assets and preserved stolen cash instead."[72]

Justice Kagan wrote a separate and short but intriguing dissent. She would have revisited the "troubling" decision in *Monsanto*, which held that the government is allowed to freeze tainted assets pretrial that the defendant needs to hire an attorney. However, given that Luis did not ask the Court to overturn *Monsanto*, Justice Kagan agreed with the principal dissent that there is no difference between tainted and untainted assets, since that money is fungible.[73]

This case will likely have the largest impact on white-collar defendants, who might have legitimate assets in addition to and separate from those linked to their alleged crimes, and on the private criminal-defense bar, which may lose fewer clients to public-defender offices. It will also be interesting to see if counsel latch on to Justice Kagan's dissent and try to challenge the constitutionality of the *Monsanto* decision. Courts will also have to hold traceability hearings or find another way to separate tainted from untainted assets, which may prove more difficult than Justice Breyer predicts.

The Term's other right-to-counsel case was *Bryant*, which concerned a conviction under a federal statute that makes it a crime for any person to commit a domestic assault in Indian country if the person has at least two prior convictions for domestic violence.[74] Bryant had multiple prior tribal-court convictions, which were uncounseled and included jail time. Had Bryant been convicted in state or federal courts, those prior convictions would have been obtained in violation of the Sixth Amendment right to counsel. But it is well settled that the Sixth Amendment does not apply to tribal-court proceedings. Writing for a unanimous Court, Justice Ginsburg noted that the tribal-court convictions "did not violate the Sixth Amendment when obtained, and they retain their validity" when invoked as predicate offenses in a federal prosecution.[75] The Court's opinion also points to the high rates of domestic violence among Native American women, the complex patchwork of law that makes it difficult to address this violence, and the inability or unwillingness of states to fill the enforcement gap.[76]

INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, in *Kulbicki*, the justices summarily reversed a state court that had found that counsel's performance was deficient for failing to uncover a report about the reliability of bullet-fragment forensic evidence. Kulbicki was convicted of murder in 1995 in a trial where the State's expert purportedly matched the composition of lead in a bullet fragment in the victim's brain with a bullet fragment in the defendant's truck. A 1991 report undermined the legitimacy of "Comparative Bullet Lead Analysis," although courts widely accepted this analytical technique until 2003. The Supreme Court ruled that a diligent search would not necessarily have discovered the early report undermining the bullet expert's analysis, so counsel's performance was not deficient.[77]

EIGHTH AMENDMENT

The Court decided three notable Eighth Amendment cases

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66. *See id.* at 1090-92 (citing United States v. Monsanto, 491 U. S. 600 (1989) and Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989)).
67. *Luis*, 136 S. Ct. at 1095.
68. *Id.* at 1095.
69. *Id.* at 1098 (Thomas, J., concurring).
70. *Id.* at 1096.
71. *Id.* at 1102 (quoting Crawford v. Washington, 541 U.S. 36, 67-68 (2004)).
72. *Id.* at 1109 (Kennedy, J., dissenting).
73. *Id.* at 1112 (Kagan, J., dissenting).
74. 136 S. Ct. at 1959.
75. *Id.*
76. *See id.* at 1959-60. Justice Thomas concurred to address aspects of the Sixth Amendment and tribal sovereignty. *See id.* at 1967 (Thomas, J., concurring).
77. *See Kulbicki*, 136 S. Ct. at 4-5.

this Term. Justice Scalia provided the majority opinion in one and a dissent in another, and the third was issued after his death. In *Kansas v. Carr*,[78] the Court opined on whether the Eighth Amendment requires courts to instruct capital-sentencing juries regarding the burden of proof for mitigating circumstances. *Montgomery v. Louisiana*[79] raised the question of whether the rule announced in *Miller v. Alabama* applies retroactively on state collateral review. And in *Lynch v. Arizona*,[80] the Court summarily reversed the Arizona Supreme Court, which had upheld the death penalty where the trial court did not allow the defendant to inform the sentencing jury that he was parole ineligible.

In his last majority opinion for the Court, Justice Scalia delivered the ruling in *Carr*, where eight justices agreed that the Kansas Supreme Court improperly vacated the death sentences of Sidney Gleason, Reginald Carr, and Jonathan Carr. Gleason had participated in a conspiracy to rob an elderly man and then murder Gleason's co-conspirator and her boyfriend. The Carr brothers committed a series of heinous crimes, set out in excruciating detail in Justice Scalia's majority opinion, which culminated in the rape and shooting of five people, one of whom survived to recount the horrific tale.

The Kansas Supreme Court vacated the sentences after finding that the Eighth Amendment requires sentencing courts to instruct juries that mitigating circumstances need not be proved beyond a reasonable doubt. Justice Scalia, however, wrote that the Constitution requires no such thing. He concluded that whether mitigating circumstances exist "is largely a judgment call (or perhaps a value call)," rather than a factual determination amenable to a burden-of-proof determination, so a reasonable-doubt instruction would only confuse the jury.[81]

The Kansas Supreme Court also found that the Carrs' joint capital-sentencing proceeding violated their constitutional right to an individualized sentencing determination. Again, the majority disagreed. Reginald argued that he was prejudiced by Jonathan's portrayal of him as the corrupting older brother and Jonathan's presentation of testimony from their sister that tended to show that Reginald, not Jonathan, was the shooter. Jonathan contended that the joint sentencing proceeding caused the jury to unfairly associate him with his dangerous older brother. Analyzing the issue under the Due Process Clause, the Court found that any evidentiary unfairness during the joint sentencing phase did not rise to the level of a constitutional violation.[82]

Justice Sotomayor wrote a lone dissent, in which she argued that the Court never should have taken these cases, where Kansas merely overprotected the constitutional rights of its citizens, something states are permitted to do with state law, if they so choose. She criticized the majority for unnecessarily cutting off state experimentation by opining on the best way for states to provide individual rights, "without any empirical foundation or any basis in experience." Leaving the states alone to experiment, she noted, "is particularly important in the criminal arena because state courts preside over many millions more criminal cases than their federal counterparts." We would like to point out that Justice Sotomayor is the only sitting justice with experience in a state criminal-justice system.[83]

[T]he Court found that the rule announced in *Miller v. Alabama* applies retroactively on state collateral review.

In the second Eighth Amendment case, *Montgomery v. Louisiana*,[84] the Court found that the rule announced in *Miller v. Alabama* applies retroactively on state collateral review. In 1963, when Henry Montgomery was 17 years old, he killed a deputy sheriff and received a mandatory life sentence without parole.[85] This would not lawfully happen today, since the Court in 2012 announced in *Miller v. Alabama*[86] that the Eighth Amendment prohibits states from imposing mandatory life without parole on juveniles. *Miller* required sentencing courts to consider the diminished culpability and high capacity for change of youth offenders before imposing a life sentence. It also noted that life sentences for juveniles should be "uncommon."[87] In *Montgomery*, the Court clarified that the Constitution requires this rule to apply even to cold cases like Montgomery's.

The Court in *Montgomery* announced that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."[88] Substantive, as opposed to procedural, rules are those that "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose."[89] The majority reasoned that the *Miller* rule is substantive in that it "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their [juve-

78. 136 S. Ct. 633 (2016).
79. 136 S. Ct. 718 (2016).
80. 136 S. Ct. 1818 (2016).
81. *Carr*, 136 S. Ct. at 642.
82. *Id.* at 645.
83. *See* Radley Balko, *The Supreme Court's Massive Blind Spot*, THE WASHINGTON POST, Jan. 22, 2015, https://www.washingtonpost.com/news/the-watch/wp/2015/01/22/the-supreme-courts-massive-blind-spot/ (noting that "[o]f our current Supreme Court lineup, only two justices—Samuel Alito and Sonia Sotomayor—have any significant experience with criminal law" and that "[o]nly Sotomayor has real experience with a local, day-to-day criminal justice system, and even that experience isn't all that overwhelming: She spent four and a half years as an assistant district attorney in Manhattan, thirty years ago.").
84. 136 S. Ct. 718 (2016).
85. *Id.* at 725-26.
86. 132 S. Ct. 2455 (2012).
87. *Id.* at 2469.
88. *Montgomery*, 136 S. Ct. at 729. The *Montgomery* case also involves a thorny federal-question jurisdictional issue that is beyond the scope of this project. *See* Jason M. Zarrow & William H. Milliken, *Retroactivity, the Due Process Clause, and the Federal Question in* Montgomery v. Louisiana, 68 STAN. L. REV. ONLINE 42 (2015) (unpacking the jurisdictional issue in *Montgomery*).
89. *Montgomery*, 136 S. Ct. at 729.

The Court decided the year's most significant Due Process and Equal Protection Clause decisions without Justice Scalia.

nile] status.'" The rule therefore applies retroactively.[90] The Court, however, assured states that they "may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."[91]

In his last dissent in a criminal case, Justice Scalia argued that the decision of whether to revisit an already-finalized conviction is entirely within the State's control—the Constitution, he said, does not have an opinion either way.[92] Justice Thomas wrote separately to emphasize that the Court lacked jurisdiction to hear the case in the first place because it did not implicate any federal right.[93]

The third Eighth Amendment case, *Lynch*,[94] was a per curiam decision reversing the Arizona Supreme Court, which had upheld the death penalty for Shawn Patrick Lynch. At Lynch's penalty-phase hearing, the State suggested that the jury should impose death because Lynch could be dangerous in the future. To rebut this argument, defense counsel asked the trial court to inform the jury that Lynch was ineligible for parole under Arizona law, but the court refused. The Supreme Court found that this violated *Simmons v. South Carolina*, which held that:

> Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible.[95]

The high court in Arizona mistakenly thought that *Simmons* did not apply because, under state law, Lynch could have received a life sentence with eligibility for "release" after 25 years. The per curiam opinion notes, however, that because Lynch only would have been eligible for executive clemency, not parole, Lynch was entitled to the instruction on parole ineligibility.

In dissent, Justices Thomas and Alito criticized the majority for "such 'micromanage[ment of] state sentencing proceedings.'"[96] They were skeptical that knowing the current state of the law on parole would impact a jury's decision to impose a death sentence. They also found the per curiam decision "a remarkably aggressive use of [the Court's] power to review the States' highest courts," particularly given that *Simmons* was "a fractured decision of this Court that did not produce a majority opinion."[97] Justice Scalia, who passed away before the *Lynch* opinion came down, had dissented in *Simmons*.[98] We might assume that, had he been alive when *Lynch* came down, he would have joined Justices Thomas and Alito or authored his own dissent.

DUE PROCESS & EQUAL PROTECTION

The Court decided the year's most significant Due Process and Equal Protection Clause decisions without Justice Scalia. In *Williams v. Pennsylvania*,[99] the Court clarified and expanded its standard for when the Due Process Clause requires a judge to recuse herself from a case. And in *Foster v. Chatman*,[100] the Court found that Georgia prosecutors were motivated by discriminatory purpose in striking black jurors from a death-penalty case. The Court also delivered a summary reversal.

In *Williams*, Justice Kennedy, writing for a five-justice majority, stated that where a judge has had "significant, personal involvement in a critical trial decision" regarding the defendant's case, the Due Process Clause requires the judge's recusal.[101] Terrance Williams murdered Amos Norwood in Philadelphia in 1984. At that time, Ronald Castille was the district attorney, and he gave his approval for the line prosecutor to seek the death penalty against Williams. Williams was convicted and sentenced to death.

In 2012, Williams challenged his sentence in a post-conviction petition, claiming that the line prosecutor at his murder trial had violated *Brady*. That court stayed Williams's execution and granted him a new sentencing hearing. The Commonwealth appealed. By this time, former District Attorney Castille was the Chief Justice of the Pennsylvania Supreme Court. Over defense counsel's objection, he joined the rest of that court in overturning the lower court's decision and reinstating the death penalty in Williams's case.

A majority of the U.S. Supreme Court concluded that Williams's due-process rights were violated when Chief Justice Castille refused to recuse himself from the Commonwealth's appeal. Justice Kennedy reasoned that "[w]hen a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome."[102] According to the Court, Chief Justice Castille made a critical decision in Williams's case by authorizing the prosecutor to pursue the death penalty, and that choice was significant in that, without his express authorization, the prosecutor would not have been able to seek the death penalty. Thus, Chief Justice Castille's previous involvement in the case created an "unacceptable risk

90. *Id.* at 734.
91. *Id.* at 736.
92. *Id.* at 737, 741 (Scalia, J., dissenting) ("Once a conviction had become final, whether new rules or old ones will be applied to revisit the conviction is a matter entirely within the State's control; the Constitution has nothing to say about that choice.")
93. *Id.* at 744, 745 (Thomas, J., dissenting).
94. 136 S. Ct. at 1818.
95. 512 U.S. 154, 178 (1994) (O'Connor, J., concurring).
96. *Lynch*, 136 S. Ct. at 1820, 1822 (Thomas, J., dissenting) (quoting Shafer v. South Carolina, 532 U.S. 36, 58 (2001) (Thomas, J., dissenting)).
97. *Id.*
98. *Simmons*, 512 U.S. at 185 (Scalia, J., dissenting).
99. 136 S. Ct. 1899 (2016).
100. 136 S. Ct. 1737 (2016).
101. *Id.* at 1907.
102. *Id.* at 1906.

of actual bias" that "so endangered the appearance of neutrality that his participation in the case 'must be forbidden if the guarantee of due process is to be adequately implemented.'"[103]

Chief Justice Roberts, joined by Justice Alito, dissented, as he did in the Court's last major due-process recusal case, *Caperton v. Massey* (there joined by Justices Scalia, Thomas, and Alito).[104] They would rather leave it "up to state authorities—not this Court—to determine whether recusal should be required."[105] Justice Thomas also wrote a separate dissent in *Williams*, arguing that the majority opinion should have distinguished the due-process rights of criminal defendants from those of parties in post-conviction proceedings.[106]

A few points are particularly worth noting. First, the majority held that "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote."[107] Thus, there is a due-process issue even if the offending judge served on a unanimous panel and even, seemingly, if the judge voted in the complaining party's favor.

Second, the majority did not limit itself to death-penalty cases or invoke the Eighth Amendment. The holding therefore appears to apply to any significant personal involvement a judge has had in any critical trial decision, not just in decisions in capital cases.

Third, this case could have an interesting impact on how former prosecutors make decisions about whether to recuse. While "[m]ost questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case,"[108] *Williams* makes clear that these rules have constitutional dimensions.

The eight-justice Court decided *Chatman*[109] in May 2016 in an opinion Chief Justice Roberts assigned to himself. The Court first determined that the Georgia habeas court's application of res judicata principles to Timothy Foster's *Batson* claim was not independent of the merits of that claim; the justices could therefore review the *Batson* issue.[110] The Court then found that state prosecutors were motivated by discriminatory intent when they used their peremptory strikes to remove all the prospective black jurors from Foster's death-penalty case, which violates the Equal Protection Clause.[111]

Foster supported his *Batson* case with an array of documents he obtained pursuant to a state open-records request, including the jury-venire list, which showed that each black prospective juror's name was highlighted and notated with a "B." On each of the juror questionnaires, the juror's response indicating his or her race was circled. Foster also received a draft affidavit prepared by the state's investigator at the prosecutor's request, in which the investigator wrote: "If it comes down to having to pick one of the black jurors, [this one] might be okay" under one of the black prospective juror's names. Foster received handwritten notes on three black prospective jurors, which referred to those jurors as "B#1," "B#2," and "B#3," and a handwritten list titled "definite NO's" that included all of the black prospective jurors' names. Another handwritten document titled "Church of Christ" included a notation that read: "<u>NO</u>. No <u>Black</u> Church."[112]

[T]he majority held that "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote."

Although the prosecutors presented alternative reasons for why they struck each of the black prospective jurors, the Court rejected these justifications, noting the State's "shifting explanations, the misrepresentation of the record, and the persistent focus on race."[113] "[T]he focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."[114]

Justice Alito wrote separately to assert that the state court on remand could still reject Foster's claim on state habeas grounds.[115] Dissenting, Justice Thomas accused the majority of "[in]adequately grappling with the possibility that we lack jurisdiction," as it was unclear from the Supreme Court of Georgia's summary order whether it based its opinion on state or federal law.[116] "The Court today imposes an opinion-writing requirement on the States' highest courts."[117]

In its per curiam decision in *Wearry v. Cain*,[118] the Court summarily reversed a Louisiana post-conviction court due to a *Brady* violation. Michael Wearry had been convicted and sentenced to death for murder in rural Louisiana in 1998. No physical evidence connected Wearry to the murder, and the prosecution built its case on inmate witnesses. But it later became clear that the prosecution failed to disclose material evidence that would have undercut the witnesses' credibility. The Court found that under settled constitutional principles, this undermined confidence in the jury verdict and therefore violated Wearry's due-process rights. The state court erred by evaluating the materiality of each piece of evidence individually, rather than cumulatively.[119] Justices Alito and Thomas dis-

103. *Id.* at 1908-09 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
104. 556 U.S. 868, 890 (2009) (Roberts, C.J., dissenting).
105. *Williams*, 136 S. Ct. at 1910, 1914 (Roberts, C.J., dissenting).
106. *Id.* at 1917 (Thomas, J., dissenting).
107. *Id.* at 1909.
108. *Id.* at 1908.
109. 136 S. Ct. at 1737.
110. *Id.* at 1746-47.
111. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (finding that purposeful racial discrimination in jury selection violates the defendant's equal-protection rights under the Fourteenth Amendment).
112. *Foster*, 136 S. Ct. at 1743-44.
113. *Id.* at 1754.
114. *Id.* at 1755.
115. *Id.* at 1755, 1760 (Alito, J., concurring).
116. *Id.* at 1761 (Thomas, J., dissenting).
117. *Id.* at 1765.
118. 136 S. Ct. 1002.
119. *Id.* at 1006-07.

The justices decided one Second Amendment case, . . . summarily reversing the Supreme Judicial Court of Massachusetts.

sented. Although there was "no question" that the prosecution should have disclosed the information, they were not sure that disclosure would have affected the verdict and thus disfavored a summary reversal.[120]

SECOND AMENDMENT

The justices decided one Second Amendment case, *Caetano v. Massachusetts*,[121] summarily reversing the Supreme Judicial Court of Massachusetts. The Massachusetts court had found that the Second Amendment does not protect stun guns for several reasons, including that stun guns were not in common use at the time of the Second Amendment's enactment and are not readily adaptable to military use. The U.S. Supreme Court rejected these reasons as inconsistent with the holding in *District of Columbia v. Heller*[122] and remanded for further proceedings.[123] Justices Alito and Thomas concurred, providing a much more critical review of the state court's holding.[124]

TIDBITS

The Court also decided a series of federal criminal cases and issued a summary reversal in a habeas case, that, for our purposes, are worth a brief mention.

In a closely watched case, *McDonnell v. United States*,[125] the Court unanimously reversed the federal criminal conviction of the former Governor of Virginia, Bob McDonnell. The key part of the decision is the Court's interpretation of what amounts to a proscribed "official act" within the meaning of the federal bribery statute, 18 U.S.C. § 201. The justices rejected an expansive construction, ruling that that merely hosting an event or meeting with others is not enough. Rather, the public official must make a decision or take an action on the matter by doing something specific and focused, such as deciding an issue or exerting pressure on another official to do so.[126]

Another case of interest is *Voisine v. United States*,[127] where the Court ruled 6-2 that a federal law barring a person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm includes convictions for reckless conduct. The majority found no indication in the text, background, or history of the statute that the firearms ban should be limited to knowing or intentional conduct. "And the state-law backdrop" to the federal statute, "which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said."[128]

Welch v. United States[129] is a sequel to last Term's decision in *Johnson v. United States*,[130] where the justices ruled that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(e)(B)(ii), was unconstitutionally vague. In *Welch*, the Court determined that the rule announced in *Johnson* is substantive and thus applies retroactively to cases on collateral review under the framework set forth in *Teague v. Lane*.[131]

The summary reversal came in *White v. Wheeler*,[132] where the Court reversed the Sixth Circuit, as it has often done as of late.[133] The Sixth Circuit had granted habeas relief on Due Process and Sixth Amendment grounds in a death-penalty case where the Kentucky trial court had dismissed a juror for giving equivocal and inconsistent answers as to whether he could impose the death penalty. The Court found that the lower court misapplied the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which requires deference to the state courts. The Court communicated its apparent exasperation with the Sixth Circuit: "this Court again advises the Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty."[134]

TWO COURTS, AND A LOOK AHEAD

We have suggested that the 2015-2016 Term had two Courts, one with Justice Antonin Scalia and one without. With such a private governmental entity, it is difficult to assess how his passing affected the remaining justices' decision making. His death would not likely have changed the outcomes of any criminal cases decided in the second half of the Term. Yet his was such a strong voice that it is difficult to imagine the opinions not being shaped by him in some way. And there is always the possibility, nay, probability, that the justices decided the cases as they did to avoid a 4-4 tie.

The 2016-2017 Term is now underway, with a number of

120. *Id.* at 1008-09 (Alito, J., dissenting).
121. 136 S. Ct. 1027 (2016) (per curiam).
122. 554 U.S. 570 (2008).
123. *Caetano*, 136 S. Ct. at 1028.
124. *See id.* (Alito, J., joined by Thomas, J.).
125. 136 S. Ct. 2355 (2016).
126. *Id.* at 2371-72.
127. 136 S. Ct. 2272 (2016).
128. *Id.* at 2282. Justice Thomas, joined in part by Justice Sotomayor, dissented. *See id.* at 2282 (Thomas, J., dissenting).
129. 136 S. Ct. 1257 (2016).
130. 135 S. Ct. 2551 (2015).
131. *Welch*, 136 S. Ct. at 1264-65 (citing Teague v. Lane, 489 U.S. 288 (1989)). Seven justices joined the majority in *Welch*. Justice Thomas dissented, arguing that the majority misconstrued the *Teague* framework and that the ruling would undermine limitations on the finality of convictions. *See id.* at 1268 (Thomas, J., dissenting).
132. 136 S. Ct. 456 (2015).
133. Jonathan H. Adler, *The Sixth Circuit Reversed Yet Again in a Habeas Case*, THE VOLOKH CONSPIRACY (Mar. 30, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/the-sixth-circuit-reversed-yet-again-in-a-habeas-case/?tid=a_inl ("Over the past several years, the Sixth Circuit has been reversed in an extraordinary number of cases.").
134. *Wheeler*, 136 S. Ct. at 462; *see also* Jonathan H. Adler, *Sixth Circuit Smackdown Watch: White v. Wheeler,* THE VOLOKH CONSPIRACY (Dec. 14, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/14/sixth-circuit-smackdown-watch-white-v-wheeler/ ("This is the court's muted way of saying to the Sixth: 'We shouldn't have to keep repeating ourselves. Get with the program.'").

important criminal-law cases on the docket. For starters, *Pena-Rodriguez v. Colorado*[135] will examine whether evidence of racial bias may be used to impeach a jury's verdict. And *Moore v. Texas*[136] will explore whether it violates the Eighth Amendment to prohibit the use of current medical standards on intellectual disability in determining whether a person may be executed. But the most important question for the coming Term is whom President-elect Trump will nominate to fill the seat of the late Justice Antonin Scalia.

Charles D. Weisselberg is Shannon C. Turner Professor of Law at the University of California, Berkeley. He teaches criminal procedure, criminal law, and other subjects.

Juliana DeVries is a J.D. candidate at Berkeley Law in the class of 2017. Following graduation, she will be clerking on the U.S. Court of Appeals for the Ninth Circuit.

135. No. 15-606.

136. 15-797.