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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

The Role of the Judge in Establishing a VTC

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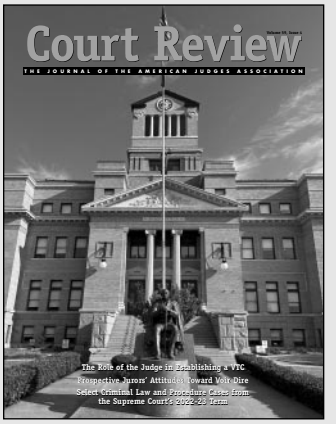
Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 59, Issue 4 2023

EDITOR'S NOTE

Welcome to your quarterly visit with *Court Review*, your chance to learn about developments affecting judges and courts. In this issue, we start with an informative overview of trauma informed courts for veterans. Military conflict is an unfortunate reality of our modern world. It has substantial and long-term impacts on the people involved. In many states in our country, and in many countries around the world, court systems are developing Veterans' Trauma Courts ("VTC"). In a discussion originally developed for Ukraine, Dr. Al Mourmin and her colleagues provide us with an understanding of how VTC are designed and how they operate. Like other treatment or problem-solving courts, they are backed with extensive research and have many lessons to offer those of us handling more traditional dockets. Their article is the *Role of the Judge in Establishing a VTC*.



Next, we look into some of our most fundamental assumptions undergirding our system of justice. We examine the jury system. Specifically, we examine the jury selection system and the perspective of the potential jurors themselves in *Prospective Jurors' Attitudes Toward Voir Dire* by Prof. Wendy Heath and Bruce Grannemann. One of the puzzling aspects of our system is how rarely we talk to such key players as the jurors about their insights on the system. You will find this look informative and fascinating.

We then move to our annual round up of the United States Supreme Court's criminal law and procedure docket from the 2022-23 term. Prof. Primus and mark Rucci have provided us with an excellent explanation of the criminal law and procedure opinions issued this term. Whether you currently have a criminal docket or not, you will find several absorbing points of analysis that have application to your docket.

Our ethics guru, Cynthia Gray warns us about the limits on free speech rights for judges. As always, her column is a must read for judges.

We also have our regular insights from AJA's incoming president, thoughts from Canada, and the crossword.

—David Prince

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 187 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, email aja@ncsc.org at call (800) 616-6165.

On the cover: The Navarro County Courthouse, located in Corsicana, Texas, USA, is a stunning testament to architectural elegance. Built-in 1905, it showcases the Beaux Arts style by architect James E. Flanders. This courthouse holds a special place in history, as it's listed on the National Register of Historic Places and recognized as both a State Antiquities Landmark and a Recorded Texas Historic Landmark, reflecting local customs and heritage. Photo by Michael Fairchild.

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President's Column

Catherine Carlson

THE AMERICAN JUDGES ASSOCIATION - MAKING BETTER JUDGES SINCE 1959, AND CONTINUING TO LEAD THE WAY!

Greetings Colleagues and Friends in AJA:

In anticipation of becoming the president of the American Judges Association in September, in beautiful Honolulu, Hawaii, at AJA's Annual Conference, I conducted a little historical research about AJA. Although I have been an AJA member for 12 years, and served on the Executive Committee for five years, I knew little of how AJA started.

I was interested to learn that AJA was founded in 1959 as the National Association of Municipal Judges. It was renamed in 1973 as the American Judges Association to expand its base. The AJA now has over 1,100 members, from across the United States and Canada, and from all court levels. I was excited to realize that means that in 2024, AJA will be celebrating the 65th anniversary of its founding!

AJA will be marking its 65th anniversary, with special features in *Court Review* and a special history project, with a reveal at AJA's annual conference in New Orleans in October, 2024. One of the reasons AJA has remained an active, vital organization for so many years is that it has provided cutting-edge resources, education, and opportunities to its members so that they can stay at the top of their judicial game and can be leaders and innovators in their courts.

A shining example of this ability of AJA to stay at the forefront of judicial education is AJA's "team" of seven judges, diverse across jurisdictions and levels of court, selected to participate in a program offered by the National Courts and Sciences Institute (NCSI). This program, funded by the State Justice Institute, will provide high-level education in artificial intelligence applications that will permit the participants to become resource judges for their respective courts and for AJA. AJA thanks Judge Michael Pietruszka (ret.) and Dr. Franklin Zweig, Vice President of DS & AI Strategic Initiative at NCSI, for bringing this opportunity to AJA. The AJA team judges will be sharing their knowledge at the AJA 2024 annual conference in October, in New Orleans.

Excellence in educational programming has long been the cornerstone of AJA. AJA has two exciting education conferences planned for 2024. The midyear conference will be held from April 5 to 7, 2024 at the Intercontinental Times Square in New York, New York. The theme is "Building Better Courts for Children and Families." Topics include approaches to addressing domestic violence to produce better outcomes for children, neuroscience and the adolescent brain, court outreach programs for kids, how trauma impacts children as victims and witnesses, competency remediation of children, specialty courts for children, and teens and juvenile human trafficking. In addition to exceptional education, there will be opportunities to experience New York and to socialize with old friends and meet new ones. Registration for the New York conference is now open.

The AJA's annual conference will be held at the Westin New Orleans, in New Orleans, Louisiana from October 5 to 10, 2024. The theme is "Welcome to the New Age: The Future of Courts in the Era of Artificial Intelligence." In addition to education sessions providing the most up-to-date information about AI as it impacts the judiciary and the courts, the always enthusiastic contingent of Louisiana judges will ensure that conference attendees enjoy Louisiana hospitality and all that New Orleans has to offer. Registration will open in the spring.

In the first few months of my presidency, I have been privileged to travel to bring greetings from the AJA and to spread the word about the value of AJA membership. In September, I attended the annual conference of the Canadian Association of Provincial Court Judges (CAPCJ) in St. John's, Newfoundland. AJA and CAPCJ have a reciprocal arrangement whereby the president of each association is invited to the other association's annual conference. At CAPCJ, I was able to address the Board of Directors and committee chairpersons and share information about AJA. In October, while I was a guest at the Alberta Provincial Judges' Association conference and meetings in Banff, I was invited to address the membership about AJA.

At both the CAPCJ and Alberta meetings, I was asked "Why is a Canadian judge the president of the American Judges Association?" That is a fair question, given the association's name. Once I explained that the AJA has members from both the U.S. and Canada, and extolled the benefits of AJA membership, many Canadian judges expressed great interest. One of my hopes this year is that many Canadian judges will learn about AJA and become new members. My 12 years as an AJA member, meeting and working with many American judges, and my 17 years as a provincial court judge in Manitoba, Canada, have led me to realize that whether we are Canadian or American judges, we can learn much from each other, and that while many of our systems are very different, we all need education in areas of social context, diversity, sciences, and technology that cross borders. Also, despite the differences in our systems as to how we come to be judges, we all value the principle of judicial independence as a cornerstone of our respective judicial systems.

In November, I traveled to Washington, D.C. for the NCSC Fall Events, including an event at the Supreme Court of the United States honoring Nebraska District Court Judge James E. Doyle, IV, who accepted the annual William H. Rehnquist Award for Judicial Excellence. I was privileged to meet judges from across the U.S. and to attend this very special event representing AJA.

AJA is an extraordinary organization due to the efforts of its executive and committee chairpersons, but also due to the members who work on committees. If you are not a member of a committee, I encourage you to review the list of committees on the AJA website, and to join one that interests you. The new AJA year has just begun. There is lots of time to get involved and make a difference. Your active participation can contribute to making better judges, and to ensuring that AJA continues to lead the way in 2024.

Together in AJA we can do great things!

The Role of the Judge in Establishing a VTC

Mishkat Al Moumin, Judge Gayle Williams-Byers & Amber Menchio

Even though the United States has concluded most of its military campaigns, veterans consistently appear in courtrooms facing charges. The criminal justice system aims to protect society, prevent the commission of a future crime, and rehabilitate the offender. In cases involving individuals with serious mental illness, treating that mental illness has proven to be a more effective way to accomplish those goals than incarceration.[1] While mental health and drug courts have proven to be highly successful, veterans present as a unique population who benefit from the individualized focus, support, and perspective that a specialized Veterans Treatment Court (VTC) can provide.

This paper focuses on the specific issues of establishing a VTC that is expected to address many of the concerns its veterans experience. More specifically, this concept identifies the goals and principles of the VTC; legislative and internal regulations; financial and human resources; the role of a judge, interdisciplinary team and volunteer veteran mentors and other components of the VTC establishment. Mental health and drug courts exist to ensure that those in the criminal justice system in need of treatment rather than punishment receive the care required to accomplish the goal of rehabilitation.[2]

The basic premise of jail diversion for veterans is that their military service may have contributed to their instability which subsequently led to their charges and/or arrests. Establishing a VTC does not give the veterans immunity from responsibility, rather, it allows them to explore appropriate treatment options as a way to resolve their war wounds under the strict supervision of the court. War leaves veterans with physical and mental injuries that impact them and their families – at times severely enough to destroy lives. Because these injuries are not visible, they often go undetected until the veteran is accused of breaking the law and is required to appear before the court.

Whether it is Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), military sexual trauma, or Major Depression, these injuries do not make the veteran a criminal, rather, the veteran becomes a defendant in need of help treating and resolving their war wounds. The creation of a specialized VTC then becomes a unique tool available through the court to address the challenges these heroes face. This paper examines the goals of a VTC, the methods utilized in other jurisdictions that established a successful VTC, how they function, and why they are a necessary component of a functioning modern-day judicial system.

PROBLEM STATEMENT

Many combat veterans return home from deployment suffering from post-traumatic stress disorder, traumatic brain injuries, and mental disease. Some veterans find it difficult to integrate back into the community. Returning veterans are finding themselves in trouble with the criminal justice system because the injuries they suffered while on deployment have been linked to substance abuse, domestic violence, and other criminal activity. Therefore, this paper examines strategies and techniques required to establish a veterans' treatment court to provide an overview for judges who are looking to establish such a court in their jurisdiction. Furthermore, this paper explores the possibility of using the judiciary as a venue to heel rather than to punish.

THE GOAL OF THE VTC ESTABLISHMENT

The VTC is designed to address underlying healthcare issues that may have contributed to the veteran's arrest rather than criminally punishing the defendant.[3] The result is not an avoidance of responsibility but rather a more successful rehabilitative result designed with the goal of preventing future offenses. VTCs, like all other specialized treatment courts, apply evidence-based behavior change strategies that are administered fairly and consistently. Punishment is not used when veterans are fully compliant with treatment or counseling. However, the VTC is different from the drug treatment court by focusing on veterans' needs and incorporating the involvement of volunteer veteran mentors.[4] The purpose of the court extends beyond whether a veteran-defendant is guilty; instead, the court employs services to ensure that the veteran is receiving the healthcare and tools they will need to lead productive and law-abiding lifestyles.[5]

In these courts, veterans participate in a program tailored to address their specific needs. Participants frequently meet with a judicial officer, other veterans, treatment providers, mentors, and support teams. The model of a VTC was established based on a judicial initiative started by Judge Robert Russell, who helped create several problem-solving courts, including drug treatment and mental health treatment courts.[6] Judge Russell, an associate judge in Buffalo's City Court, noticed an immediate positive response from a veteran who appeared in his mental health court after Judge Russell asked two veterans who worked at his court to talk to the veteran defendant. According to Judge Russell:

Authors Note: *This paper discusses principles applicable to any veterans treatment court but began as a research paper that was part of a program helping Ukraine establish a veterans' court.*

Footnotes

1. Ashok Paparao Yerramsetti, Daniel David Simons, Loretta Coonan & Andrea Stolar, *Veteran treatment courts: A promising solution*, 35 Behav. Sci. & L. 512 (2017).
2. *Id.* at 512.
3. *Id.* at 514.
4. *Id.* at 515.
5. *Id.* at 514-15.
6. Robert T. Russell, *Veterans Treatment Courts*, 31 Touro. L. Rev. 385 (2015).

> I also noticed that the veterans had positive reactions to the veterans who were working in the court: Jack O'Connor, who served with the Army's 82nd Airborne, and the late Hank Pirowski, who served as a Marine in Vietnam. When I matched a discouraged veteran with veterans O'Connor and Pirowski, right away after a brief meeting, the veteran's behavior had totally changed.[7]

Because of the increased appearance of veterans in drug treatment court, a court designed to administrate treatment to overcome drug abuse, and the noticeable change in the veteran's response, Judge Russell thought of establishing a court designed to help veterans by capitalizing on their military culture and discipline.[8] This resulted in his creation and presiding over the first VTC in the United States in January 2008.[9] With Judge Russell's leadership and ability to mentor other judges, more than 400 courts are currently operating nationwide.

Beyond simply providing veterans a diversion option, it is also important as a goal of the court's creation that veterans are working with other veterans in the program. As Judge Russell noted, there was a stark behavior change when veterans worked together. The VTC provides a resource where those who understand one another and have shared experiences can come together. A veteran suffering from a mental illness or an addiction receives an inadequate resolution by being punished through fines or jail time (as does their family and society) and is left to continue to suffer.[10] Rather, the veteran who receives the option of treatment receives a second chance.[11]

COLLABORATION AND PARTNERSHIP BUILDING

Because it is a problem-solving court, establishing a VTC requires continuous collaboration and successful partnership building. As a first step, Judge Russell reached out to veterans' hospitals to see what assistance they could provide, including assigning a behavioral health supervisor and a secure veteran administration computer in the courtroom to help veterans check for benefit eligibility and make clinical appointments on-site.[12] Thus, establishing a partnership with the Veterans Administration or Ministry of Veterans Affairs is crucial to the success of the veteran's court. Providing reliable access to benefits and checking eligibility from the courthouse is another cornerstone of the court's establishment and success. Establishing a collaborative approach with the prosecutor, public defender, treatment providers, mentors, veterans' administration liaisons, and counselors.[13] For example, veterans plead guilty to the charges, but their sentences are stayed pending the program's completion. Staying a sentence requires the cooperation of the prosecutor and the public defender.[14] The court may allow veterans to withdraw their guilty pleas and have their charges dismissed or resolved by a non-criminal disposition when they complete their programs successfully.[15]

"Participation can be an alternative to incarceration ..."

Participation can be an alternative to incarceration or re-sentencing due to a probation violation. Therefore, the cooperation of the probation officer is essential to achieving the goal of effective case resolution without traditional sentencing. The court will connect veterans to programs and services that meet their individual needs. In this case, a veteran administration liaison works closely with the veterans to facilitate enrollment in services and coordinate with the courts to provide status reports.

PRINCIPLES OF VTC FUNCTIONING

In the establishment of the VTC, there are certain concepts that the presiding judge should adhere to as part of the judicial philosophy required to operate a court of this nature.

The concepts that make up this judicial philosophy are:

- community-oriented judging,
- confidentiality,
- voluntariness,
- performance evaluation,
- equity and inclusion,
- peer-to-peer approach,
- collaboration, and
- partnership building.

COMMUNITY-ORIENTED JUDGE

The community-oriented judge recognizes and acknowledges the needs of certain members of the community. Judge Russell demonstrated this concept by noticing the increased number of veterans presenting in his mental health court during Operation Iraqi Freedom and Operation Enduring Freedom.[16] The traditional treatment courts were not sufficient to serve the veteran community at its full capacity, so an approach specific to the veteran population was necessary.[17] Additionally, U.S. experts identified readjustment issues to civilian life that veterans face as a specific population.

These readjustment struggles include domestic disturbances, drug abuse, rent or eviction claims, homelessness, mental health, and traumatic brain injury as impacting veterans' stability. Justice and treatment have an opportunity to come together more wholly during a time that both are being reformed and while all involved

7. *Id.* at 392.
8. *Id.* at 387.
9. *Id.* at 385.
10. See e.g., John Leicester, *'Do something:' Ukraine works to heal soldiers' mental scars*, (Dec. 1, 2022), https://apnews.com/article/russia-ukraine-kyiv-health-europe-veterans-affairs-811a986e0e9a202d8eb32b16f6730e4c.
11. Bernard Edelman, *Veterans Treatment Courts: A Second Change for Vets Who Have Lost Their Way*, U.S. Department of Justice, National Institute of Corrections (May 2016), https://info.nicic.gov/jiv/sites/info.nicic.gov.jiv/files/030018.pdf (accessed Nov. 4, 2023); Lauren Van Metre, *Battle on the home front: Care for Ukraine's veterans,* (Oct. 1, 2020), https://www.atlanticcouncil.org/blogs/ukrainealert/battle-on-the-home-front-care-for-ukraines-veterans/.
12. Edelman, *supra* note 11, at 44.
13. *Id.* at 74.
14. Robert T. Russell, Attorney's Guide to Defending Veterans in Criminal Court (2014) [hereinafter *Attorney's Guide*].
15. *Id.* at 521.
16. Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 Crim. & Civ. Confinement 357 (2009) [hereafter *Veterans Treatment Court*].
17. *Id.* at 357.

"Leadership roles should be assigned to those best suited for getting key players invested in the project."

are aware of the challenges that war imposes on its veterans. The foundations of partnership, at least, are in the works.

WAYS OF PROBLEM-SOLVING

The following concepts are listed as methods for the successful implementation and establishment of the VTC in a given jurisdiction.

THE PLANNING PROCESS TO IDENTIFY WHAT IS NEEDED FOR SUCCESSFUL IMPLEMENTATION

Proper planning is essential to avoid poor performance and ensure long-term success. To successfully implement a VTC, there is a multitude of working parts that must be assembled—everything from location to cost to accessibility. When the desire to set up a VTC exists, some background research is the very first step of the planning process.[18] Data must be collected to determine factors about the area the court will be set up in, such as: how many veterans are in that area; what resources are available to those veterans already; who the complete list of partners desired to come on board (who are the key players and what are their roles); what criteria make an individual eligible/what crimes are acceptable for admittance to the VTC, etc.[19]

It is also important to have ready explanations and justifications for the existence of the VTC in the first place.[20] For those who may view the court with the misperception that it is a way for criminals to escape responsibility, that misperception must be corrected efficiently.[21] The justification for providing veterans their own court must be ready.[22] Leadership roles should be assigned to those best suited for getting key players invested in the project.[23] Beyond the beginning planning stages, further planning for the court's functionality is also required.

LEGISLATIVE AND INTERNAL REGULATIONS

A VTC will also, at some point, create a plan as to how the court process itself will function. As the nation's first VTC, the Buffalo VTC provides one example of how these courts can be regulated in a manner geared toward success. In the Buffalo court, veterans with serious mental illnesses or drug addictions are eligible (as is the case with many VTCs); however, some may restrict eligibility to veterans who were deployed to combat zones or qualify for VHA services.[24] The types of offenses that make a veteran eligible also vary.[25] It is common to see crimes like DUIs, thefts, and drug possession; likewise, domestic violence may also be eligible as long as the individual did not get into trouble for this prior to entering the service.[26] It is important to note that there are no VTCs that accept seriously violent crimes like rape and murder.[27] In Los Angeles, only felonies are eligible, while others still accept violent cases with some limitations (for example, murder and sexual assault in Orange County, California) under the justification that VTCs are designed to make communities safer.[28]

Buffalo VTC also requires eligible veterans to plead guilty to the crime they were charged with. In exchange for the guilty plea, their sentence is stayed and will eventually be removed from their record upon successful completion of their program.[29] Knowing a criminal sentence awaits them for failure to complete their program incentivizes them to stick with the program and follow the rules. Instead of a full removal from their record, VTCs in other locations have decided that successful completion results in a more favorable, non-criminal disposition.[30] Most courts do not require an honorable discharge, so even those without an honorable discharge would still remain eligible for the VTC in some locations; however, veterans may be required to be eligible for VA benefits.[31] But VTCs will only accept those who have been clinically diagnosed with substance abuse and/or mental health disorders because if an initial assessment reveals no treatable conditions of this nature, then the veteran is not eligible for VTC services.[32]

As part of their programs, the veterans receive whatever medical, psychological, or other types of care and assistance necessary to ensure they remain out of trouble and are able to lead productive lives.[33] This treatment includes completing phases adopted by the VTC which, for example, generally include meeting with court personnel (and other required persons under their treatment programs) weekly (phase one), bi-weekly (phase two), monthly (phase three), and as directed (phase IV).[34]

FINANCIAL AND HUMAN RESOURCES

Beginning with the financial aspect of the VTC, the US has seen that such courts are more cost-effective. Not only are they justifiable from the perspective that they provide veterans in need with substantive help with their struggles, but the help they receive by going through the VTC rather than the standard prosecutorial system is much more cost-effective in terms of resources expended and incarceration.[35] VTCs (and other types of treatment-focused courts like mental health courts and drug courts) have seen success in lowering the recidivism rate, which ultimately saves resources, time, and money. "For every dollar spent on Drug Courts, 27 are saved on prosecution and incarceration."[36] By placing eligible veterans into treatment programs, it saves a substantial

18. Edelman, *supra* note 11, at 35.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Russell, *Attorney's Guide, supra* note 14, at 522.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 522-23.
29. *Id.* at 523.
30. *Id.*
31. Holbrook, Justin G. & Anderson, Sara, Veterans Courts: Early Outcomes and Key Indicators for Success (August 19, 2011). Widener Law School Legal Studies Research Paper No. 11-25, Available at SSRN: https://ssrn.com/abstract=1912655.
32. *Id.* at 26-7; Edelman, *supra* note 11, at 11.
33. Russell, *Attorney's Guide, supra* note 14, at 523.
34. Holbrook, *supra* note 31, at 28.
35. Edelman, *supra* note 11, at 22.
36. *Id.* at 66.

amount of money and resources because it treats their underlying struggles that have contributed to the conduct that brought them before the court in the first place. Putting those veterans through treatment is not only more cost-effective than incarcerating them for extended periods of time, but it also helps reduce the chances that they will re-offend and return to the court in the future, thus costing more. Not only does the VTC make sense in terms of health, but it also makes financial sense. It benefits the veteran, the legal system, and the taxpayer.[37]

METHODS TO IDENTIFY VETERANS ENTERING THE CRIMINAL JUSTICE SYSTEM

VTCs are necessary for any jurisdiction where there is a significant veteran population.[38] Beyond that, it is also important to be aware that some veterans may not be self-identifying as veterans.[39] Thus, it is important to acknowledge that there may be veterans in the justice system in need of certain services who will never inform someone that they are a veteran, and instead, someone else may have to discover that information.[40] Regardless, identifying every veteran who enters the criminal justice system as soon as possible is a key component of the VTC.[41] Treatment programs focus on alcohol/drug treatment and mental health services.[42] Because arrest can be a traumatic event and cause an upheaval in an individual's life, a veteran suffering from mental health complications already or who may go into drug withdrawal upon removal from their daily lives needs to get into the proper treatment environment in a timely manner so that the process of proper identification and placement can be initiated as soon as possible.

There are certain methods in place currently for identifying these individuals. For example, the Buffalo VTC utilizes a process that identifies veterans when they are arrested and then referred to the VTC once determined eligible.[43] Entry into the program can occur at any point from pre-disposition to post-disposition and can include probation violations. Once with the court, the veteran will be set up with the services necessary for their situation.[44] The National Veteran Treatment Courts Enhanced Initiative suggested pre-adjudication screenings to identify veterans entering the criminal justice system that also includes information to assess their re-offending risk in order to gauge their suitability for treatment court.[45] Following that screening, those who are suitable for treatment court will take a full screening to confirm eligibility and assess their individual risks and needs.[46] The focus of these methods relies on identifying veterans as soon as possible upon their arrest and, once they are identified as veterans, determining their VTC eligibility as quickly as possible. However, VTCs may employ the use of electronic database systems that are manually updated with information as to which offenders are veterans since such electronic systems are more beneficial than self-reporting through forms or verbal questioning.[47]

"Treatment court typically lasts about 12 to 18 months for a participant."

TREATMENT AND COMPLIMENTARY SUPPORT SERVICES

In the VTC, veterans are provided an array of services ranging from healthcare to daily living, and court appearances. Once referred to the VTC, veterans will be linked to services with the help of VA staff that meet their individual needs. The VA liaison will also work with the courts to provide treatment status reports, drug test results, appointments, case management, and crisis management when required.[48]

The Federal Office of Veterans Benefit Affairs ensures those who should be receiving pensions and disability continue to do so and correct any mistakes impacting their eligibility. Other court staff and volunteer mentors assist veterans with stabilization services which include "emergency financial assistance, counseling services, employment and skills training, safe housing, and other supportive services."[49]

Treatment court typically lasts about 12 to 18 months for a participant.[50] Over the course of that time, the veteran will attend regular status hearings and have their treatment plan adjusted as necessary. For example, in the beginning, counseling may occur once a week, but as time progresses, it may be suitable to decrease it to once a month. Following the conditions may result in rewards, while failure to follow them may result in sanctions.[51] For example, Buffalo does not have a strict cut-off for removal from the program; rather, when determining removal, the court uses a case-by-case evaluation approach while taking into account the individual's personal challenges.[52]

UTILIZING BEHAVIORAL MODIFICATION TECHNIQUES IN TREATMENT COURTS

Behavior modification uses learning techniques to change human behavior.[53] Since VTCs aim to treat the challenges troubling veterans and desire to keep society safe, treatment of veterans throughout their court process will utilize various behavior modification techniques to ensure their overall success in the program. One such technique is the use of rewards for compliance with rules while also sanctioning failures to adhere to the rules.[54] It is valuable not to wait until the next hearing or meeting to impose a sanc-

37. Russell, *Veterans Treatment Courts, supra* note 16, at 386.
38. Edelman, *supra* note 11, at 71.
39. *Id.* at 72.
40. *Id.*
41. *Id.* at 25.
42. *Id*
43. Russell, *Attorney's Guide, supra* note 14, at 521.
44. *Id.*
45. National Institute of Corrections, National Veterans Treatment Court Enhanced Initiative, (last accessed Feb. 8, 2023) https://info.nicic.gov/jiv/node/4.
46. *Id.*
47. Julie M. Baldwin, Richard D. Hartley, & Erika J. Brooke, *Identifying Those Who Served - Modeling Potential Participant Identification in Veterans Treatment Courts*, (Jan. 1, 2018), at 21.
48. Russell, *Attorney's Guide, supra* note 14, at 521.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 522.
53. American Psychological Association, *APA Dictionary of Psychology*, https://dictionary.apa.org/behavior- modification.
54. All Rise, *Behavior Modification*, www.allrise.org, https://allrise.org/trainings/vtc-statewide-training/#behavior-modification (last visited Nov. 4, 2023).

"The key players should know what behavior modification is, how it works, why it works, and how to utilize it ..."

tion, rather, sanctions should be imposed immediately.[55] While it is not a guarantee to work, research has demonstrated greater success rates when positive behaviors are positively reinforced on a reliable basis, and reliable responses are made to negative behaviors.[56]

Another technique VTC key players can utilize is learning what things put each veteran at risk of continuing to commit crimes, because once the court understands what elements make it more likely for an individual to continue a life involved in the justice system, they will be better equipped to prevent a lifetime of crime.[57] Alongside getting to know the veteran, motivational interviewing is a technique that can be used to discover what matters to a participant.[58] Having that opportunity to discuss their own preferences and concerns allows the veteran to feel heard, valued, and engaged in their own VTC process, which can have a positive result in their overall outcomes.[59]

It is recommended that the key players involved in the VTC receive training in areas like behavior modification so they can be educated on the best ways to incorporate this into the VTC courtroom.[60] The key players should know what behavior modification is, how it works, why it works, and how to utilize it effectively and efficiently so that they are all on the same page about what will work best for veterans they are dealing with.

INCORPORATING COMMUNITY SUPERVISION IN A VTC

As Judge Russell noted, the VTC was modeled partially off the Drug Court model due to that court's success. The Drug Court employs supervision requirements such as "mandatory drug testing, substance-abuse treatment, and other social services" that provide participants with an alternative to being incarcerated.[61] While the VTC was modeled partially off the Drug Court, veterans still need different support and supervision than their non-veteran counterparts, and providing them the proper supervision throughout the VTC process reduces recidivism and helps veterans to get their lives on the right path to "lead sober, healthy, and productive lives."[62]

INTERDISCIPLINARY TEAMWORK

Teamwork is key to success in a court with so many pieces working together to achieve a common goal. For all members of the team, communication, willingness to work together, and willingness to work with clients are all skills that must be operating efficiently.[63] If the court is thought of as a machine, all the pieces must be in good working order for the product it produces to come out properly (or at all). If one piece is broken, it can throw everything else off. Everyone involved (the judge, the prosecutor, the defense attorney, the VA, etc.) must be working to achieve the same goal for the veteran.[64] The key players include the judge, prosecutor, defense counsel, law enforcement (police officers and probation officers), VA staff, and volunteer veteran mentors.

The judge of a VTC must have appropriate insight and knowledge into the kind of world that these veterans are coming from, and have an understanding and appreciation that the challenges those men and women have faced during their service mean that they need treatment, not harsh punishment.[65] It must be someone who has a true understanding of mental illness and addiction and is willing to be trained to learn more. For example, a judge who completely refuses to recognize that relapses are a natural part of an individual's journey on recovery from addiction is not well suited to be at the VTC. A judge who is passionate about the VTC and willing to understand and learn more about the nature of the types of circumstances they will encounter is better suited for that type of work.[66] The judge plays a very important role in the VTC which goes beyond simply knowing the law.[67] The judge is also *the manager of the court team* who keeps people on task and things running efficiently – the judge is a leader. VTC judges should know the veterans who appear before the court as well as possible, be personable and come prepared to listen.[68]

The veterans' treatment court judge shall:

- Serve as the leader of the team.
- Preside over status review hearings.
- Engage the community to generate local support for the VTC.
- Communicate with the participants in a positive manner and make final decisions regarding incentives and sanctions and program continuation.
- Consider the perspective of all team members before making final decisions that affect participants' welfare or liberty interests, and explain the rationale for such decisions to team members and participants.
- Rely on the expert input of duly trained treatment professionals when imposing treatment-related conditions on the participants.
- Provide program oversight and ensure communication and partnership with treatment.
- Shall consider whether to terminate a participant's participation in the VTC program if that participant is accused of a new crime.[69]

55. Michigan Association of Treatment Court Professionals, Veterans Treatment Court Standards, Best Practices, and Promising Practices, (March 2021), https://www.courts.michigan.gov/49d906/siteassets/court-administration/best- practices/psc/vtc-bpmanual.pdf, at 8.
56. All Rise, *supra* note 54.
57. *Id.*
58. *Id.*
59. *Id.*
60. Michigan Association of Treatment Court Professionals, *supra* note 55.
61. Russell, *Attorney's Guide, supra* note 14, at 517.
62. *Id.* at 516.
63. Edelman, *supra* note 11, at 74.
64. *Id.* at 74.
65. *Id.* at 37.
66. *Id.*
67. *Id.* at 38.
68. *Id.*
69. Michigan Association of Treatment Court Professionals, *supra* note 55.

UNDERSTANDING THE PROSECUTOR'S ROLE

The prosecutor's goals must be focused on treatment and prevention rather than on retribution. Just like all others involved, the prosecutor's dedication must lie in helping the veterans get their lives back on track. While VTC prosecutors should recognize that violent offenders and drug offenders may require different types of treatment and a different number of chances, they must also know where to draw the line.[70] They must know when to remove a veteran from the program for failure to participate and when doing so may be too early; just like VTC judges, they must be willing to recognize that VTC participants are going to need multiple chances.[71] The prosecutor is not making a strictly legal decision on their own in the VTC but instead is making their decisions collaboratively with the judge, defense counsel, and the input of mental health professionals.

The prosecuting attorney shall:

- Provide legal screening of eligible participants.
- Attend review hearings.
- Represent the interests of the prosecutor and law enforcement.
- Advocate for public safety.
- Advocate for victim interest.
- Hold participants accountable for meeting their obligations.

If a plea agreement is made based on completion of the program, complete appropriate court documents for resultant modification(s) upon the participant's successful completion of the program (a reduced charge, nolle prosequi, etc.). May help resolve other pending legal cases that impact participants' legal status or eligibility.[72]

THE ROLE OF THE DEFENSE COUNSEL

Defense counsel clearly must be just as open to the goals and understanding of the issues the VTC deals with as well.[73] Defense counsel is there to get to know the veteran as thoroughly as possible and to advocate to the best of their ability for the veteran they are working for.[74]

The defense counsel representative shall:

- Ensure that a defense counsel representative is present at all staffing meetings to avoid ex-parte communication.
- Attend review hearings.
- Ensure that the defendants' procedural and due process rights are followed.
- Ensure that the participant is treated fairly and that the VTC team follows its own rules.
- When appropriate, and without breaching attorney-client privilege, encourage clients to be forthcoming and honest regarding their recovery process.[75]

LAW ENFORCEMENT

"Law enforcement ... can help identify veterans and advocate for the VTC program ..."

Law enforcement sheriffs can help identify veterans and advocate for the VTC program, as well as make referrals to the court when they have an individual come into the system they think may be a good fit for the VTC.[76] Law enforcement officers assist with home checks for participants.

Probation will also be involved and have more of a dual role within the VTC: to ensure the veterans comply with the conditions of the program and to ensure public safety.[77] Not only must they recognize that their veterans will make mistakes, but they must know how to reconcile those situations and help them get back on track. Being able to deal with these circumstances may require additional training. Their dual role requires them to get to know the veterans thoroughly (their strengths, weaknesses, barriers) in order to understand them and know how to best help them individually; however, they must hold the veterans accountable for their mistakes and failure to comply with the program and jeopardizing public safety.[78]

The probation officer in the VTC is not simply taking orders from the judge as they may in a regular court setting. In a VTC, the probation officer is part of a system working together where their opinions, recommendations, and suggestions too. Probation officers may be another group who can help to identify veterans who are good fits for VTC. Probation is an option for treatments that are either unavailable through the VA or for veterans who are ineligible for VA services. There may be some overlap between the services that probation can provide for veterans and those that mentors can help them navigate, however, probation officers keep the rest of the court updated on the veteran's status.[79]

Because veterans may have difficulty trusting probation officers due to a feeling that they are not there to help, it is beneficial for probation officers to reassure veterans of their roles and desired outcomes and that they are doing their best to keep the veteran out of jail.[80]

The probation officer and court case manager shall:

- Administer a validated criminogenic risk/needs assessment tool to participants during the referral process to ensure the VTC is serving the appropriate target population.
- Attend review hearings
- Work with the program coordinator in supervising and monitoring the individuals in the program.
- Prepare presentence reports and perform alcohol and drug tests as needed.
- Schedule probation violations or show cause hearings for participants who have violated the program rules and are

70. Edelman, *supra* note 11, at 38.
71. *Id.* at 38-9.
72. MICHIGAN ASSOCIATION OF TREATMENT COURT PROFESSIONALS, *supra* note 55.
73. Edelman, *supra* note 11, at 40.
74. *Id.*
75. MICHIGAN ASSOCIATION OF TREATMENT COURT PROFESSIONALS, *supra* note 55.
76. Edelman, *supra* note 11, at 40-42.
77. *Id.* at 42.
78. *Id.*
79. *Id.*
80. *Id.* at 42-43.

"VA participation is crucial if the VTC is going to offer the necessary treatment for veterans."

subject to termination from the program or if a liberty interest is at stake.

- Enter data into the DCCMIS system.[81]

VA participation is crucial if the VTC is going to offer the necessary treatment for veterans. The Veterans Health Administration had a Veterans Justice Outreach coordinator (VJO) placed in every VA medical center. Buffalo VTC's VJO said the VJO is responsible for connecting veterans to the VA and ensuring the VTC has links to the treatment it needs by working with case management staff.[82] For veterans connected to the VA, the VJO is able to pull up that veteran's medical records right in court which enables treatment recommendations on the spot rather than delaying recommendations until the following day or even later. For example, if a veteran is struggling with drug addiction, the VJO is able to make a consult for residential substance abuse treatment right from the courtroom.[83]

The sooner care can begin, the better. For example, as with the drug addiction example, a veteran who may be facing withdrawal or cravings or mental health symptoms related to their substance abuse may be at serious risk if their treatment is delayed. Beyond the ability to make recommendations and appointments, the VJO can also check information such as appointments the veteran had and lab test results from drug screens. For example, if the veteran says they missed a court date or some other appointment because they had a medical appointment, the VJO can verify that information.[84]

The program coordinator shall:

- Arrange for additional screenings of persons aside from the prosecutor's legal screening.
- Attend review hearings.
- Answer inquiries from defense attorneys on possible eligibility.
- Enter data into the DCCMIS system.
- Liaison with non-treatment agencies that are providing services to the participants.
- Ensure that new team members are provided with formal training within three months of joining the team on the topics of confidentiality, and his or her role on the team, ensure that the new team member is provided with copies of all program policy and procedure manuals, the participant handbook, and a copy of all current memoranda of understanding.[85]

HOPE-INSTILLING TECHNIQUES FOR JUDGES TO USE IN TREATMENT COURT WITH VETERAN PARTICIPANTS

One veteran from Harris County, Texas, described the events that culminated after his return from Iraq as leaving him "completely broken with all hope lost" and leaving his family in "total ruins" after substance abuse, job loss, homelessness, and multiple arrests took over his life.[86]

He was eventually placed with the VTC which provided him a "new beginning" and a "fresh start" with VA treatment, religious involvement, and marriage counseling. He went on to mentor more than 100 combat veterans to "instill hope" just as "countless others have done for [him]."[87]

When veterans enter the program, they are often in a state where they see no recovery in sight and are struggling to find hope. There are multiple hope-instilling aspects of the VTC that provide veterans with the hope that they are missing. Since all key players are working together towards a common goal, the veteran is supported by people who are striving to get them the treatment necessary to get their lives back on track. For some, like the veteran described above from Harris County, who are homeless with destroyed families and struggling with addiction, getting back on their feet is no easy task and may even seem impossible. Once placed with the VTC, they are surrounded by a group that is helping them discover and coordinate their needs, providing resources to meet those needs, and putting their needs first. Furthermore, mentors (who are veterans themselves) can provide a great deal of hope because they give participants a relatable individual whom they can identify with and work during their time in the program.[88]

All parties shall:

- Participate as a team member, operating in a non-adversarial manner.
- On an annual basis, attend current training events on legal and constitutional issues in VTC, judicial ethics, evidence-based substance abuse and mental health treatment, behavior modification, and/or community supervision.
- Help to identify potential and eligible VTC participants.
- Provide feedback, suggestions, and ideas on the operation of the VTC.
- Attend staffing meetings, and provide input on incentives and sanctions for participants.
- Share information as necessary, and in compliance with federal confidentiality laws, to appraise participants' progress in, and compliance with, the conditions of VTC.
- The parties, including each party's employees and other agents, shall maintain the confidentiality of all records generated during the term of this MOU in accordance with all applicable state and federal laws and regulations[89]

81. MICHIGAN ASSOCIATION OF TREATMENT COURT PROFESSIONALS, *supra* note 55.
82. Edelman, *supra* note 11, at 44.
83. *Id.*
84. *Id.*
85. MICHIGAN ASSOCIATION OF TREATMENT COURT PROFESSIONALS, *supra* note 55.
86. *Veterans Treatment Courts Offers Renewed Hope, Fresh Start*, TEXAS COUNTY PROGRESS, https://countyprogress.com/veterans-treatment-courts-offes-renewed-hope-fresh-start/.
87. *Id.*
88. Edelman, *supra* note 11, at 27.
89. MICHIGAN ASSOCIATION OF TREATMENT COURT PROFESSIONALS, *supra* note 55.

Beyond the team involved in helping the veterans, the VTC in general has a structure and culture built on expectation and accountability which is a familiar environment for veterans because it is similar to the culture in the military.[90] Veterans have a familiar structure on which to begin rebuilding their lives.[91]

ROLE OF VOLUNTEER VETERAN MENTORS IN VTC

The mentoring aspect of the court makes this diversion program stand out from others and has been described as the "key to the whole program."[92] These mentors are not individuals from an institution (like doctors, probation officers, or psychiatrists) but rather are veterans just like the participant they are assisting through the program. The mentor provides the veteran someone with a familiar and relatable identity to guide them through the diversion process.[93] Mentors are designated to work solely with the veteran to whom they are assigned.[94] The mentor builds a relationship based on trust with the veteran, can share similar experiences, and let the veteran know that they are not alone.[95] The element of trust is stronger here because the mentors do not report to the court or law enforcement any information unless the veteran has threatened to harm themselves or another.

Mentors can ensure that veterans do all things as simple as getting to their appointments on time and filling out the correct paperwork, all the way to assisting them in finding housing and securing meals.[96]

Veterans have been shown to be much more comfortable and open when talking to other veterans as opposed to "outsiders".[97] This piece of information becomes highly relevant for the mentoring aspect of the VTC and is why it is so important for mentors to be other veterans (and also justifies the benefit of a VTC rather than a standard mental health or drug court, especially considering that some VTCs require group therapy or sessions of NA/AA).[98]

To provide assurance that an individual is right for the program, mentors should be interviewed through several stages, have a set of rules to adhere to, and be trained for the position to learn their roles and responsibilities of how to deal with potential issues that may arise, whether they be legal or psychological.[99] Judge Carter in Houston developed a mentor boot camp program that Mental Health America took over and now provides free training.[100] In the Buffalo VTC, mentors must apply, pass a background check, and undergo training.[101]

INCORPORATING INTERDISCIPLINARY EDUCATION FOR THE VTC TEAM

For members of the team who are not familiar with aspects of treating mental health conditions and addictions, they will have to undergo training and education in these areas. This applies especially to judges, lawyers, probation officers, and mentors. This is necessary because the VTC is relying on more than simply the law—more than the education required for a JD is necessary to be applied in these cases. The team must understand the complications that can come with treating these individuals and why they may be more likely to have missteps or failures to adhere to requirements. They must understand that things like relapse in addiction treatment are part of recovery, and missed appointments may be the product of depression and not indicative of failure requiring removal from the VTC. It is necessary for the entire team to have the same training and understanding because they are all working together for a common goal: keeping the veteran out of jail.

"The mentoring aspect of the court makes this diversion program stand out from others ..."

Interdisciplinary education requires more than just educating those with law degrees and legal backgrounds on veteran treatment issues like mental illness and substance abuse disorders.[102] It also requires educating VA staff and other members who may be unfamiliar with the criminal justice system on relevant legal matters and how the criminal justice system works so that they can understand the process, what the veteran has gone through, and what the other team members are talking about.[103] Interdisciplinary education amongst all team players will serve for a common culture among everyone working together, serve to make communication more efficient and effective, and keep everyone on the same page.

THE IMPORTANCE OF DATA COLLECTION TO REVIEW, MODIFY AND ENHANCE A VTC PROGRAM

Data collection from the VTC is highly important in order to know the actual success of the court and how well the programs are working. VTCs have seen promising results in terms of recidivism. Since 2011, Buffalo VTC had a 0% recidivism rate among 71 graduated participants, and San Jose VTC only had a small number of its 72 graduates rearrested since 2008.[104] Nationally, 75% of graduates were *not* rearrested for the next two years.[105] Buffalo VTC has even followed up with graduates to know that all are employed or pursuing education and leading successful, healthy lives.[106]

While a majority of VTCs document recidivism, not all of them have always conducted formal evaluations and tracked partici-

90. Eileen M. Ahlin & Anne S. Douds, *Military Socialization: A Motivating Factor for Seeking Treatment in a Veterans' Treatment Court,* 41 Am. J. Crim. Just. 83 (2016).
91. *Id.* at 93.
92. Edelman, *supra* note 11, at 27.
93. *Id.*
94. *Id.* at 27-8.
95. *Id.* at 28.
96. *Id.* at 29.
97. Ahlin & Douds, *supra* note 91, at 94.
98. *Id.*
99. Edelman, *supra* note 11, at 31.
100. *Id.* at 32.
101. Robert T. Russell, Buffalo Veterans Treatment Court Program Mentor Guide, http://buffaloveteranstreatmentcourt.org/wp-content/uploads/2018/03/Mentor-Handbook_0.pdf.
102. Russell, *Veterans Treatment Court*, *supra* note 16, at 367.
103. *Id.*
104. Russell, *Attorney's Guide*, *supra* note 14, at 524.
105. *Id.*
106. *Id.*

"The VTCs operating in the US have been largely successful ..."

pants after their graduation from the program.[107] VTCs may struggle with data collection and follow-up resources.[108] It has been suggested that data tracking includes information such as the services the participant received, how much they participated and whether they completed, their participation in positive and healthy lifestyle choices, behavioral risk assessments prior to and post-VTC, mental health profiles pre and post-VTC, and case management outcomes such as housing, employment, relapse, and further justice-involvement.[109]

In situations where one VTC is doing something different from another, data collection allows for discovering whether one practice may be better than another, or it may uncover that there are multiple options just as successful as each other. It can provide insight into how to better the system and help it to operate even more efficiently.

As time progresses and the way combat changes due to technology and as different generations will be coming into the court, certain techniques or programs may need to be modified to account for changes within society in general, and being able to look at data to see how things are working in the aggregate is a beneficial practice. Research that currently exists will need to be updated in the future to account for changes over time.[110]

LESSONS LEARNED AND BEST PRACTICES

The VTCs operating in the US have been largely successful and have supplied a great deal of information in terms of how to establish and implement a successful VTC. There are elements crucial to any VTC such as having judges, prosecutors, defense counsel, and the rest of the team players working towards a common goal. This requires finding judges and prosecutors who particularly have a compassionate understanding of mental health and substance abuse challenges, favor treatment over punishment, and are willing to build on that understanding through additional training and education so they become best equipped to handle VTC participants. The mentoring aspect of the VTC program is another great practice offered by the VTC since it provides the veteran participants with an individual with whom they can feel connected and have shared experiences since the mentors are other veterans, as opposed to outsiders.[111] While the VTCs have had a great deal of success, this does not mean that they are perfect. Some research has shown areas that could benefit from improvement.

While VTCs have learned invaluable lessons on what is best for the court and its participants, it also has learned what may be in need of some improvement or updates. For example, a 2019 study acknowledging that all cases are not successful, examined why that may be with a Pennsylvania VTC.[112] The study found that while mentors were very proud of the work they did and satisfied with their positions, they felt the VTC should be more open to getting feedback from them and wished they had received a greater amount of training.[113] There were some concerns that some mentors would not adequately be able to spot signs of substance abuse or other signs of crisis, however, the veteran participants themselves had little to nothing negative to say about the mentoring program.[114]

The study suggested that "a standard protocol for how to select, train, supervise, and utilize mentors in VTCs should be established to put more of a foundation into an already vital component of the VTC.[115] Ensuring the requisite training and clearly defined roles should be well developed for all team players in the VTC.

As a treatment court, VTCs have some key components that come together to provide some best practices. These are integrating substance abuse treatment and mental health treatment with the justice system; utilizing a non-adversarial approach; identifying eligible veterans as early as possible and placing them with the VTC; providing a continuum of rehabilitative services; frequent drug/alcohol testing; monitoring a veteran's progress via their compliance with their treatment program; ongoing judicial interaction with veterans; program monitoring to gauge achievement in the program and effectiveness of the program; continuing interdisciplinary education; forging partnerships among key players/working as a team to generate local support and make the VTC more effective.[116] While these practices have shown to be successful, they should still be monitored for ways to improve upon them.

EXPECTED RESULTS AND BENEFITS OF THE VTC ESTABLISHMENT

Establishing a VTC is expected to address many of the concerns the country and its veterans are currently articulating. As stated previously, just like the veterans in Buffalo City, veterans who have returned from battle also struggle with reintegration and resocialization, experiencing serious repercussions such as mental illness, substance abuse, domestic disturbances, joblessness, homeless, etc., that contribute to the destruction of their lives and those of their families, resulting in their appearance before criminal courts.[117]

Beyond these issues, veterans have also found themselves the target of discrimination - being termed violent criminals and fascists - which can likely be difficult for certain individuals to cope with, especially those who are involved in the criminal justice system. Not only can the VTC serve to remedy the reintegration and resocialization struggles for justice-involved veterans, but it can also serve to remedy issues surrounding discrimination of their veterans and help show that these individuals are not violent criminals.

107. Holly Matto, *Veterans Treatment Courts: Identifying Key Findings from a Collaborative Survey* (2017), https://ndcrc.org/wp-content/uploads/2022/02/Veterans_Treatment_Courts_Identifying_Key_Findings_From_a_Collaborative_Survey.pdf.
108. *Id.* at 1.
109. *Id.* at 7.
110. Julie Marie Baldwin, *Investigating the Programmatic Attack: A National Survey of Veterans Treatment Courts*, 105 J. CRIM. L. & CRIMINOLOGY 705 (2015).
111. Ahlin & Douds, *supra* note 91, at 94.
112. Anne S. Douds & Don Hummer, *When a Veterans' Treatment Court Fails: Lessons Learned from a Qualitative Evaluation,* 14 VICTIMS & OFFENDERS 3 (2019).
113. *Id.* at 331.
114. *Id.*
115. *Id.* at 340.
116. Russell, *supra* note 6, at 367.
117. Leicester, *supra* note 10.

Problem-solving court judges were shown to be more likely than other judges to believe that their courts were actually helping the litigants who appeared before them.[118] For those veterans who become involved in the criminal justice system, their public image can be improved by viewing them as candidates for treatment for the injuries war has caused them as opposed to their genuinely criminal counterparts. Those veterans in the VTC would also receive the necessary healthcare, psychological treatment, benefits, and resources necessary to live a productive, law-abiding lifestyle going forward. The Veteran Support Reform may be beneficial in terms of veterans as a general population, but the VTC can offer those same services of providing justice-involved veterans individualized rehabilitation services leading to long-term positive results while preventing them from suffering criminal punishment (such as incarceration), which is generally more costly and less effective.

Benefits of VTC:

- Reduce criminal recidivism;
- Facilitate participant sobriety;
- Increase compliance with treatment and other court-ordered conditions;
- Improve access to VA benefits and services;
- Improve family relationships and social support connections;
- Improve life stability;
- Regain lost pride;
- Honor those who have served our nation by helping them remove criminal convictions from their record.[119]

VTC's establishment in any jurisdiction aims at assisting veterans who become entangled in the criminal justice system and providing them with necessary care, treatment, and resources while bettering their public image by de-stigmatizing the viewpoint that they are violent and criminal. Much like the results seen in Buffalo, it would also be expected to be a more cost-effective option with better outcomes: more successful offender rehabilitation and lower recidivism.[120]

CONCLUSION

The VTC team, which is made up of legal personnel, VA staff, law enforcement, and veteran mentors share a common goal of supporting the veterans' compliance with a treatment program and keeping them out of jail whenever possible.[121] Successful VTCs in the United States have revealed that a collaborative effort among the VTC team is required, meaning that beyond simply sharing the same goal, the entire team must be open to interdisciplinary education and discussion about recovery addressing the root causes of illnesses veteran participants face, and the best ways to address those.[122]

VTCs provide a veteran-specific chance at rehabilitation, and while some may argue against them, they have been shown to be extremely beneficial for justice-involved veterans. They provide an environment of a familiar structure, with people from their own population such as veteran mentors and a team that works specifically with veterans that are familiar with those struggles and complications and provide the veteran who is suffering after serving their country a second chance.[123] When those who risk their lives to fight for their country return only to have their lives shattered as a result of psychological trauma from battle finds themselves in the hands of the criminal justice system, costly incarceration that is likely to be repeated in the future is a much less desirable outcome than is the option with a lower recidivism rate geared directly towards rehabilitation by treating the source of the struggle and providing a second chance by rebuilding once-shattered lives: the Veterans Treatment Court.

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118. Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 UC DAVIS L. REV. 1573, 1600 (2021).
119. JUDICIAL COUNCIL OF CALIFORNIA, FACT SHEET: VETERANS COURTS (June 2011), https://www.courts.ca.gov/documents/veteranscourts.pdf.
120. Edelman, *supra* note 11, at 42.
121. *Id.* at 74.
122. *Id.*
123. *Id.* at 27; Russell, *supra* note 6, at 387.

Prospective Jurors' Attitudes Toward Voir Dire

Wendy P. Heath & Bruce D. Grannemann

The main goal of *voir dire* is to determine if a prospective juror will be impartial or biased against one of the parties in the litigation; anyone determined to be biased would generally be excluded from the jury in question. To accomplish this goal, jurors are asked questions, sometimes by the judge, sometimes by the attorneys, and often in open court.[1]

There is evidence that jurors are not always entirely honest during *voir dire*, especially when it is held in open court. For example, Seltzer found that jurors' responses during *voir dire* in open court differed substantially from jurors' responses to the same questions asked after the verdict.[2] Specifically, Seltzer found that approximately 25% of the jurors interviewed after their trials should have, although did not indicate during *voir dire* that they or family members had been crime victims. [3] It is, of course, possible that thoughts and feelings related to being or knowing a crime victim affected decisions in their trials. Relatedly, one judge found that many of the prospective jurors who were silent during the initial questioning in open court had much to say when questioned individually.[4] For example, when questioned privately, prospective jurors said things such as, "Two of my family members were locked up on drug charges. I heard they were roughed up by the cops. Therefore, I am more skeptical of police witnesses," "I know [the] defendant. He's a member of my church," "My religion tells me I cannot judge." One prospective juror questioned privately even stated, "I'm the defendant's fiancée." After this "private" questioning, all of these jurors were excused for cause. Had this judge stopped questioning in open court, no one would have known of these jurors' thoughts and feelings.

Why do jurors choose not to reveal information? Thirty-nine percent of the jurors surveyed by the National Center for State Courts revealed that answering personal questions in the presence of strangers was at least a moderately stressful experience.[5] In fact, Marshall found that jurors who reported feeling nervous were less likely to be honest during *voir dire*.[6] Jurors may not be willing to reveal personal information in open court because they are embarrassed. They may also not be willing to reveal information because they are concerned that the information will not make a favorable impression on the observers. This phenomenon, termed the social desirability effect,[7] refers to the idea that people want to portray themselves in a positive light. It is reasonable to assume that it can be difficult to admit prejudices in front of strangers as it is not the socially appropriate response, yet it is often these prejudices that could justify exclusion from the jury.

Jurors also may not be willing to provide information in open court because they have concerns for their privacy. Twenty-seven percent of the jurors in North Carolina questioned by Rose indicated that some of the questions were "too private."[8] Many of those surveyed for the National Center for State Courts reported that they were at least moderately afraid of being publicly identified as a juror.[9] Perhaps they have a concern of being held accountable to the media for their verdicts. Certainly, juries have been criticized for particularly controversial verdicts.[10]

Jurors may also not be willing to be candid because they do not understand why they are being asked particular questions. *Brandborg v. Lucas*[11] is relevant to this issue. Dianna Brandborg was a prospective juror who refused to answer a number of questions on her juror questionnaire because she saw the requested

Authors Note: *This article was inspired by the first author's experience as a juror in a civil trial. What surprised her most about voir dire was the amount and type of information she had to provide. In addition to answering a series of questions that pertained to the case at hand (e.g., had she ever had a neck injury?), she had to stand up in open court and recite answers to a series of questions presented on a large, laminated poster. She had to stand up and state her name, town, occupation, school/employer, marital status, occupation of spouse, number and ages of children and their occupations, her education, her hobbies, newspapers read, bumper stickers (the judge said that prospective jurors could leave out political stickers), and tv/radio programs to which she watches or listens. The personal nature of many of these questions left her wary of answering them in open court. Did others feel this way?*

Footnotes

1. Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, National Center for State Courts, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (2007), https://cdm16501.contentdm.oclc.org/digital/collection/juries/id/112.
2. Richard Seltzer, Mark A. Venuiti & Grace M. Lopes, *Juror Honesty During the Voir Dire*, 19 J. Crim. Just. 451, 455 (1991), https://doi.org/10.1016/0047-2352(91)90019-R.
3. *Id.*
4. Gregory E. Mize, *On Better Jury Selection – Spotting UFO Jurors Before They Enter the Jury Room*, 33 Ct. Rev. 10, 12-13 (1999).
5. National Center for State Courts, *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* (1998), https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0022/7438/through-the-eyes-of-the-juror.pdf.
6. Linda L. Marshall & Althea Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120 J. Psychol. 205, 213 (1986), https://doi.org/10.1080/00223980.1986.10545246.
7. Allen L. Edwards, The Social Desirability Variable in Personality Assessment and Research (1957).
8. Mary R. Rose, *Expectations of Privacy? Jurors' Views of Voir Dire Questions*, 85 Judicature 1 (2001).
9. National Center for State Courts, *supra* note 5, at 78.
10. *See e.g., Hinckley Verdict Tested More Than the Jury*, N.Y. Times (June 27, 1982), http://www.nytimes.com/1982/06/27/weekinreview/hinkley-verdict-tested-more-than-the-jury.html?sec=health (last visited Nov. 4, 2023).
11. Brandborg v. Lucas, 891 F.Supp. 352 (1995).

information as "private, irrelevant information."[12] She was found guilty of contempt. This conviction was later overturned; according to the ruling, the trial court judge should have determined that the questions were in fact, relevant, and then if so, offer the juror the option of answering in the judge's chambers. Previous research has revealed that this issue of question relevance is a concern for some. Specifically, Rose[13] found that 43% of the jurors sampled thought that there were *voir dire* questions that were unrelated or unnecessary.

Finally, jurors may also not be willing to provide information because they are afraid. Safety concerns have indeed been noted by jurors; for example, 17% of those surveyed by the National Center for State Courts indicated that they had at least a moderate level of fear for their safety.[14] Jurors have reported being afraid of retaliation from the defendant and/or his/her family and friends if they render a guilty verdict.[15] In addition, in some cases, jurors who render a not guilty verdict have feared the anger that can arise from public dissatisfaction with the verdict and/or sentence.[16] These concerns are perhaps understandable given that jurors in some trials have received disturbing phone calls, letters, and even death threats.[17] Perhaps this is even more worrisome these days; due to digital technology, it is especially easy to locate a person (i.e., residence, place of employment) when you know their identity.[18]

In response to jurors' concerns about privacy and safety, some have proposed that questionnaires be used to allow jurors to disclose information privately.[19] Answering questions using a questionnaire format is likely to elicit more honest responding,[20] but jurors may still have safety concerns; they may wonder who has access to the information on their questionnaires. This is not an unreasonable thought. Consider for example, a case in which a man convicted of murder was on his way back to prison after his trial and was found with a list of the names, cities and occupations of all those on his jury.[21] In another case, a Florida inmate spelled out the names of his jury while on a jailhouse call, and said that they needed to "pray."[22] In other instances, court clerks have noted that inmates have requested contact information for jurors[23] (in fact, potentially the court, counsel, the parties, the press and the public all can have access).[24]

Others have proposed a more radical solution in response to concerns regarding juror safety and privacy, that jurors should be anonymous.[25] There are a variety of ways to do this.[26] For example, for a maximum amount of anonymity, only the court would have access to identifying information about jurors. The lawyers, the parties involved, the press and the public would not, and this restricted access could continue for an extended period (as in Derek Chauvin's murder trial).[27] On the other end of the anonymity spectrum, the court, lawyers and parties would have access to juror information before and during the trial, but the public and the press would not be given access until a verdict has been rendered or in some situations even later.[28] For example, in the recent trial in which Donald Trump was found liable of sexual abuse and defamation, the judge, who had ordered an anonymous jury before the trial began, advised the jurors to remain anonymous long after the trial (once the trial was over, they could identify themselves as jurors if they wished).[29] While anonymous juries are most commonly used in cases involving organized crime or terrorism, Judge Lewis Kaplan said that he was ordering the anonymity of jurors to prevent "harassment or worse by Trump supporters."[30] Judges in some high-profile cases

12. *Id*.
13. Rose, *supra* note 8, at 17.
14. National Center for State Courts, *supra* note 5, at 86.
15. Michael E. Antonio, *Jurors' Emotional Reactions to Serving on a Capital Trial*, 89 Judicature 282, 287 (2006); s*ee also*, United States v. Scarfo, 850 F.2d 1015, 1023 (1988); Rose, *supra* note 8, at 16.
16. Antonio, *supra* note 15; *see also*, Antoinette Kelly, *Casey Anthony's Juror's Identities Released-Fear Retribution from Angry Public*, Irish Central (October 25, 2011), https://www.irishcentral.com/ news/casey-anthonys-jurors-identities-released-fear-retribution-from-angry-public-132519003-237419381 (last visited Nov. 4, 2023).
17. Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123, 127-128 (1996).
18. Jane E. Kirtley, *Fairness, the Appearance of Fairness and Public Confidence in the System: The Case Against Anonymous Juries*, 48 Litigation 27 (2021); *see also* Natalia Antolak-Saper, *Public Duty Versus Private Information: Jury Privacy in the Information Age*, Bond L. Rev. 217 (2018).
19. Jan M. Spaeth, *Swearing with Crossed Fingers; Juror Honesty and Voir Dire*, 6 Ariz. Att'y. 38, 40 (2001).
20. *Id*.
21. *Man Convicted of Northampton Co. Murder Found with Jury List*, Pocono Record (2010), https://www.poconorecord.com/ article/20100918/NEWS90/100919837.
22. Marc Freeman, *Should Names of Jurors Be Kept Hidden From Defendants, the Public?*, Sun Sentinel, (May 18, 2018), https://www.sun-sentinel.com/2018/05/18/should-names-of-jurors-be-kept-hidden-from-defendants-the-public/.
23. *Cf*. King, *supra* note 17, at 129.
24. American Judicature Society, *Judicious Use of Juror Anonymity*, 86 Judicature 180, 180 (2003).
25. Kit R. Roane, *We, the Jury, Who Are Anonymous*, N.Y. Times (August 12, 1994), https://www.nytimes.com/1994/08/12/us/we-the-jury-who-are-anonymous.html (last visited Nov. 4, 2023).
26. Leonardo Mangat, *A Jury of Your [redacted]: The Rise and Implications of Anonymous Juries*, 103 Cornell L. Rev. 1621, 1625-28 (2018) (for information regarding varying degrees of anonymity).
27. Steve Karnowski, *Explainer: Chauvin Jury Could Stay Anonymous for a Long Time*, U.S. News (April 21, 2021), https://www.usnews.com/ news/us/articles/2021-04-21/explainer-chauvin-jury-could-stay-anonymous-for-a-long-time#:~:text=U.S.%20News%C2%AE-,EXPLAINER%3A%20Chauvin%20Jury%20Could%20Stay%20Anonymous%20for%20a%20Long%20Time,safe%20to%20release%20their%20names.&text=Names%20of%20jurors%20and%20other,soon%20after%20trials%20in%20Minnesota (last visited Nov. 4, 2023).
28. *See* Camille Mann, *Casey Anthony Judge Delays Release of Jurors' Names*, CBS News (July 27, 2011), https://www.cbsnews.com/ news/casey-anthony-judge-delays-release-of-jurors-names/ (last visited Nov. 4, 2023) (for a description of the delayed release of names in the Casey Anthony trial).
29. Lauren Sforza, *Judge Advises Jurors in Trump-Carroll Case to Remain Anonymous "for a Long Time,"* The Hill (May 9, 2023), https://the-hill.com/regulation/court-battles/3996579-judge-advises-jurors-trump-carroll-case-anonymous/ (last visited September 4, 2023).
30. Erik Larson, *Trump's Protest Calls Lead to Anonymous Jury in Rape Trial,* www.Bloomberg.com (March 23, 2023), https://www.bloomberg.com/ news/articles/2023-03-23/trump-s-protest-calls-lead-to-anonymous-jury-in-rape-suit-trial#xj4y7vzkg (last visited Nov. 4, 2023).

have ordered anonymous juries because they expect the jurors will encounter a lot of media attention.[31]

Some judges have elected to use a version of anonymity in their courtroom,[32] and some federal and state courts have ruled on this issue[33] although the practice of having anonymous jurors has met with some criticism.[34] The press's First Amendment rights can be seen to conflict with both the defendant's Sixth Amendment right to a fair trial and with the privacy concerns of the jurors.[35] So, for example, some defense lawyers object to the anonymity of jurors arguing that this leads jurors to think that the defendant is dangerous.[36, 37] On the other hand, some in defense of anonymity have argued that if jurors are routinely anonymous, this conclusion would not be made.[38]

Members of the news media often object to jurors being anonymous because it means that the particular perspectives of the jury members cannot be used to help explain verdicts to the public.[39] Members of the press have also argued that the release of the jurors' names help to make jurors accountable to the public.[40] Interestingly, Hazelwood[41] found that anonymous juries had a higher conviction rate than those who were not anonymous when there was strong evidence against a defendant, although anonymous juries did not report feeling less accountable.

One purpose of the present study is to detail the process of *voir dire* as reported by the prospective jurors themselves. Researchers have previously documented some of the details involved in the process of *voir dire* as reported by courtroom personnel. Most notably, the large-scale "State-of-the-States Survey" by Mize et al.[42] provided basic information regarding how jury trials are conducted. For the present study, we were interested in the components of *voir dire* that the jurors experience directly. Thus, pertinent to this study, we have learned from Mize et al.[43] that since trial judges have considerable discretion over *voir dire* practices in their courtrooms, there is much variation in the practice of *voir dire*. We were expecting to see this level of variation in our own results when we asked how jurors were questioned.

The second and main purpose of this study is to investigate prospective jurors' thoughts and feelings regarding the *voir dire* process and the potential for anonymous jurors. Although researchers have examined perceptions of juror stress over many components of an entire trial,[44] few have surveyed prospective jurors in depth on their thoughts and feelings regarding what happened in *voir dire*. In addition, we are not aware of any research that has focused on views of juror anonymity and whether people thought that anonymity might alleviate potential concerns.

In line with previous research, it was expected that prospective jurors would express concerns about privacy and safety. Furthermore, congruent with the work of Marshall and Smith,[45] jurors who report feeling anxious and fearful were expected to be less likely to be honest during *voir dire*. Higher levels of concern (i.e., anxiety, fear) are generally expected in criminal rather than civil cases due to the perceived possibility of violent retaliation. In addition, higher levels of concern were expected for female as compared to male prospective jurors. This hypothesis stems from previous research revealing that females reported more fear than males during capital trials,[46] and females report higher levels of

31. Kirtley, *supra* note 18.
32. *See* Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U.S.F. L. Rev. 531, 531 (2010); Roane, *supra* note 25.
33. *Id.; See also* Ashley Gauthier, *Secret Justice: Anonymous Juries*, The Reporters Committee for Freedom of the Press (2000), https://www.rcfp.org/wp-content/uploads/imported/SJANONJURIES.pdf; Kimberley Keyes, *Secret Justice: Secret Juries*, The Reporters Committee for Freedom of the Press (2005), https://www.rcfp.org/wp-content/uploads/imported/SJSECRETJURIES.pdf; Clinton T. Speegle, *Socially Unpopular Verdict: A Post-Casey Anthony Analysis of the Need to Reform Juror Privacy Policy*, 43 Cumb. L. Rev. 259, 270 (2012).
34. Keleher, *supra* note 32; *see also* Marco della Cava, *Anonymous Jury in Derek Chauvin Trial Part of a Growing Trend That Has Some Legal Experts Worried*, USA Today (April 25, 2021), https://www.usatoday.com/story/news/nation/2021/04/25/chauvin-trial-jury-anonymous-concerning-trend-us-justice/7342909002/ (last visited September 4, 2023).
35. Keleher, *supra* note 32, at 555-59; *see also* Scott J. Sholder, *"What's in a Name?": A Paradigm Shift from Press-Enterprise to Time, Place, and Manner Restrictions When Considering the Release of Juror-Identifying Information in Criminal Trials*, 36 Am. J. Crim. L. 97 (2009); Laura N. Wegner, *Juror Anonymity in Criminal Trials: The Media, the Defendant, and the Juror—Providing for the Rights of All Interested Parties*, 3 Albany Gov't. L. Rev. 429 (2010) (for discussions of this issue and for historical information regarding anonymous juries).
36. Steve Chapman, *Why Don't We Protect the Privacy of Jurors?* Reason (Aug. 14, 2008), https://reason.com/2008/08/14/why-dont-we-protect-the-privac/ (last visited Nov. 4, 2023).
37. Vanessa Romo, *Judge Rules That "El Chapo" Jury Will Remain Anonymous*, NPR (Feb. 6, 2018), https://www.npr.org/sections/thetwo-way/2018/02/06/583739445/judge-rules-that-el-chapo-jury-will-remain-anonymous (last visited Nov. 4, 2023) (discussing how the defense attorney made this very argument in the trial of Joaquin "El Chapo" Guzman, a Mexican drug lord who had been charged with murder, drug trafficking and money laundering. The judge in this trial ultimately ruled that the jury would be anonymous and partially sequestered. Perhaps the judge was not swayed by the United Press International headline that announced, "Accused drug kingpin El Chapo promises he won't kill jurors"); *see also* Susan McFarland, *Accused Drug Kingpin El Chapo Promises He Won't Kill Jurors*, UPI (January 25, 2018), https://www.upi.com/Top_News/US/2018/01/25/Accused-drug-kingpin-El-Chapo-promises-he-wont-kill-jurors/7511516888929/ (last visited Nov. 4, 2023).
38. National Center for State Courts, *supra* note 5, at 18-19.
39. Gauthier, *supra* note 33, at 2.
40. Chapman, *supra* note 36, at 2.
41. D. Lynn Hazelwood & John C. Brigham, *The Effects of Juror Anonymity on Jury Verdicts*, 22 Law Hum. Behav. 695, 695 (1998), https://doi.org/10.1023/A:1025711024462.
42. Mize et al., *supra* note 1.
43. *Id.*
44. *See generally*, Brian Bornstein et al., *Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors*, 23 Behav. Sci. Law 321 (2005), https://doi.org/10.1002/bsl.635; Michelle Lonergan et al., *Prevalence and Severity of Trauma-and Stressor-Related Symptoms Among Jurors: A Review*, 47 J Crim. Just. 51 (2016), https://doi.org/10.1016/j.jcrimjus.2016.07.003.
45. Marshall & Smith, *supra* note 6, at 213.
46. Micheal E. Antonio, *Stress and the Capital Jury: How Male and Female Jurors React to Serving on a Murder Trial*, 29 Just. Sys. J., 396, 399 (2008), https://www.ncsc.org/__data/assets/pdf_file/0021/16635/stress-and-the-capital-jury.pdf.

anxiety and fear than males do generally.[47] Given these anticipated concerns, it was also expected that a substantial percentage of the sample would endorse a technique of using anonymous jurors. Study participants were tested online.

METHOD

PARTICIPANTS

Respondents were recruited through The Social Psychology Network,[48] "Hanover College's site for Psychological Research on the Net,"[49] as well as neighborhood flyers, email blasts to the home university and social media sites (e.g., *Linked In*) with a request to consider answering an anonymous questionnaire if they had been questioned for jury duty within the last year.[50] All participants were volunteers; they did not receive compensation from the research team, although they may have received participation credit from their home university. To confirm participation eligibility, participants were asked, early in the questionnaire, if they had been questioned for jury duty within the last year. Of those who said "yes," 15 were eliminated because they were not U.S. citizens, 5 were eliminated because they provided nonsense answers, and two were eliminated because they reported that they were less than 18 years of age. The final dataset was composed of 469 U.S. citizens (147 males and 322 females) who had been questioned for jury duty within the last year. Of these, 294 (63%) fully completed the survey. Unless otherwise specified, all 469 respondents answered the question of interest.

The respondents were 38 years old on average, with ages ranging from 18-76; 73% were White, 12% were African American, 9% were Hispanic, 2% were Asian, 1% were Native American and 2% reported "other." (Thirty respondents did not indicate a race/ethnicity.) Respondents were asked to report their highest level of education. Less than 1% indicated having less than a high school education, while approximately 5% stated that they had graduated high school or had their GED, 23% had some college, 15% had a 2-year college degree, 27% had a 4-year college degree, 14% had a masters, 11% had a doctorate, and 3% had a professional degree (e.g., M.D./J.D.). (Thirty-three did not indicate their level of education.)

Respondents were questioned for jury duty in 40 states and the District of Columbia with most respondents (n = 108) questioned in NJ. On the average it had been 6.24 months (SD = 3.98) since the participants had been questioned for jury duty (N = 436). When asked what kind of trial respondents were questioned for, approximately 65% said that they were questioned for a criminal trial while 35% of the 331 that answered this question indicated that they were questioned for a civil trial.

MATERIALS AND PROCEDURE

After getting respondents' informed consent, respondents answered an anonymous online questionnaire, and then were debriefed.

RESULTS

THE PROCESS OF *VOIR DIRE*

The first series of questions were presented to establish the prevalence of the different procedures used during *voir dire*. Unless otherwise noted, respondents were asked to choose one response from the options provided.

First we established who asked the questions as well as how and where the questions were asked. Participants were also asked how people referred to them in the courtroom and how they would have liked those in the courtroom to refer to them. See Table 1 for respondents' answers.

THE CONTENT OF *VOIR DIRE*

Participants were asked specifically what kinds of information they provided during the juror selection process. A series of items were presented in the questionnaire (e.g., name, exact address), and participants were asked to write "yes" in the corresponding column if they were asked for this information. (The data from 289 respondents are included in this section; each provided at least one answer in this group of questions.) See Table 2 for the full report of these results. The few results noted here were chosen to highlight the extent to which the information provided clearly identifies prospective jurors. Eighty-seven percent indicated that they provided their name, and 56% said that they provided their exact address. Fifty-five percent were asked to state their place of employment, and 9% percent were asked to provide the names of family members.

VIEWS OF THE *VOIR DIRE* EXPERIENCE

We asked people if the questions they were asked were too personal, embarrassing or uncomfortable. The responses are presented in Table 3.

Those who said that they were uncomfortable were asked to elaborate as to why they were uncomfortable (they could choose multiple answers) (see Table 4).

Participants were also asked if they were concerned that they would not make a good impression on those who could hear their answers. Twenty-six percent of the 294 who answered indicated that this was a concern; for 65% this was not a concern (9% did not recall how they felt).

Participants were asked how much anxiety and fear they experienced during the questioning. Anxiety, on some level, was a concern for most; fear was less of a concern. Sixty-one percent indicated that they were not afraid at all. Thirty-nine percent of 294 respondents acknowledged that they were at least "a little afraid." See Table 5 for the complete set of responses to these questions.

Participants were asked how much they were bothered knowing others could hear their responses, and we determined that participants were bothered differentially as a function of who they thought could hear them. While people were generally less concerned that the judge and the attorneys could hear their

47. Carmen P. McLean & Emily R. Anderson, *Brave Men and Timid Women? A Review of the Gender Differences in Fear and Anxiety*, 29 Clin. Psychol. Rev. 496, 502 (2009), https://doi.org/10.1016/j.cpr.2009.05.003.
48. Social Psychology Network, Online Social Psychology Studies, https://www.socialpsychology.org/expts.htm (last visited Nov. 4, 2023).
49. Hanover College, Hanover College Psychology Department, https://psychology.hanover.edu/ (last visited Nov. 4, 2023).
50. Data were collected from January 25, 2011 until December 13, 2017.

TABLE 1: THE PROCESS OF *VOIR DIRE* (*n*=331)						
QUESTIONS	**ANSWERS**					
When you were questioned for jury duty, who asked the questions? (Choose all that apply.)	The attorneys: 43%	The judge: 28%	Both the judge and attorneys: 27%	Neither: 4%		
Which of the following describes the conditions of your questioning? (Choose all that apply.)	Questioned individually in open court: 28%	Questioned in open court as a group: 25%	Questioned in open court as individuals and as a group: 23%	Questioned as a group in the judge's chambers: 7%	Questioned individually in the judge's chambers: 3%	"Other" or none of the options listed were available: 7%
As a prospective juror, were you referred to by name or by your juror number while in the courtroom?	Name: 19%	Number: 51%	Both name and number: 16%	Neither name or number: 5%	Do not recall: 9%	
As a prospective juror, how would you have liked those in the courtroom to refer to you?	Name: 14%	Number: 43%	Did not matter: 44%			
Did you fill out a questionnaire?	Yes: 61%	No: 25%	There was a questionnaire, but we had to answer the questions out loud: 13%			
Which of the following people could hear your responses to questions asked during the juror selection process? (Choose all that apply.)	Judge: 81%	Attorneys: 85%	Defendant(s): 61%	Victim(s)/ Plaintiff(s): 36%	Other prospective jurors: 70%	Spectators: 42%
Were you given an opportunity to speak to the judge and attorneys privately?	Yes: 39%	No: 46%	Do not remember: 16%			

TABLE 2: WHAT KINDS OF INFORMATION WERE YOU ASKED TO PROVIDE DURING *VOIR DIRE*? (*n*=289)						
Name: 87%	Exact address: 56%	Town: 75%	Phone number: 43%	Email address: 23%	Education: 68%	Occupation: 84%
Place of employment: 55%	Marital status: 65%	Names of family members: 9%	Occupation of spouse: 30%	Information about children: 22%	Personal experiences: 39%	Likes and dislikes: 16%
Hobbies: 21%	Membership in clubs: 13%	TV/Radio watched/listened to: 27%				

TABLE 3: WERE THE QUESTIONS TOO PERSONAL, EMBARRASSING, UNCOMFORTABLE? (*n*=297)			
QUESTIONS	**ANSWERS**		
	Yes	No	Do not recall
Were the questions too personal?	27%	59%	14%
Were the questions embarrassing?	15%	75%	10%
Did the questions make you feel uncomforable?	30%	61%	8%

TABLE 4: WHY WERE YOU UNCOMFORTABLE? (*n*=89)				
Safety concerns	Question was not relevant to a juror's ability to be fair and impartial	Question/ answer was too embarrassing	Question/ answer was too personal	Other reasons (e.g., privacy concerns)
27%	29%	28%	46%	20%

TABLE 5: INDICATE THE AMOUNT OF ANXIETY AND FEAR YOU EXPERIENCED DURING THE JUROR SELECTION PROCESS (*n*=294)					
QUESTIONS	**ANSWERS**				
How Much Anxiety Did You Experience During Questioning?	I was not at all anxious: 21%	I was a little anxious: 34%	I was somewhat anxious: 26%	I was very anxious: 13%	I was extremely anxious: 5%
How Much Fear Did You Experience During Questioning?	I was not afraid at all: 61%	I was a little afraid: 19%	I was somewhat afraid: 15%	I was very afraid: 5%	I was extremely afraid: 0%

responses, many participants were bothered that the defendant could hear their answers; 37% were bothered to at least some degree (12% were "very" or "extremely" bothered by this). (See Table 6 for the full report of these responses.)

Participants were asked why they were bothered that the defendant could hear their answers. Ninety-six participants answered; of these, 47% indicated that they were afraid of the defendant/concerned about retaliation (e.g., "He was accused of burglary, and now I was telling him my address"), and 24% said that they did not like sharing such personal information (e.g., "It seemed an invasion of my privacy").

Thirty percent were also at least a little bothered by the idea that the other prospective jurors in the courtroom could hear their responses, while approximately 25% of the prospective jurors were concerned that spectators could overhear them. Interestingly, those who indicated why they were bothered that other prospective jurors could hear them were much more unified in their reasons. Sixty-eight percent of the 70 who explained why they were bothered by the presence of other prospective jurors said it was because of the personal nature of the questions (e.g., "Who wants to disclose their religion and politics to strangers?"). The personal nature of the questions also concerned 57% of those who thought that spectators in the courtroom were listening (60 respondents explained why they were bothered by spectators overhearing them). In addition, 22% of respondents bothered by the presence of spectators stated their concerns for their safety (e.g., "There may have been relatives connected to the case taking down our personal information"). Knowing that other prospective jurors could hear their answers did not generally cause safety concerns in the respondents.

Overall Feelings Regarding the Jury Selection Process.

Forty-seven percent of the 294 who responded felt "somewhat positive" or "extremely positive" when asked how they felt about the juror selection process overall, while 26% reported that they felt "extremely negative" or "somewhat negative" (the rest were undecided). Feelings toward the jury selection process did not vary as a result of being chosen for a jury[51] or as a function of being questioned for a criminal versus a civil trial.[52]

Did You Want to Be Selected and Were You Selected for the Jury?

Forty-eight percent of the 294 respondents acknowledged that they did not want to be selected as a juror, while 40% did (the rest were undecided). Ultimately, 37% of these respondents were selected for jury duty.

How Honest Were You During Questioning?

Most (86%) of the 294 who answered acknowledged that they were "very" or "completely" honest when answering the *voir dire* questions.

Potential Reasons for Variation in Honesty.

We expected that jurors who reported feeling anxious and fearful would be less likely to be honest during *voir dire*, and we found support for this.[53]

Did Anxiety and Fear Differ as a Function of Gender and Type of Trial (Criminal/Civil)?

As predicted, females reported feeling significantly more anxious than males during jury selection questioning.[54] Participants also reported a higher level of anxiety for criminal trials over civil trials.[55] On the other hand, the level of fear did not differ as a function of gender or the type of trial.[56]

TABLE 6: HOW MUCH WERE YOU BOTHERED KNOWING OTHERS COULD HEAR YOU? (varied sample sizes)

Were You Bothered Knowing These People Could Hear Your Answers?	I was not at all bothered by this	I was a little bothered by this	I was somewhat bothered by this	I was very bothered by this	I was extremely bothered by this	I was not heard	Sample Size
The Judge	77%	10%	6%	2%	2%	4%	322
The Attorney(s)	83%	8%	6%	1%	1%	2%	319
The Defendant(s)	46%	13%	12%	6%	6%	18%	319
The Victim(s)/ Plaintiff(s)	44%	6%	7%	3%	4%	37%	317
Other Prospective Jurors	63%	15%	9%	4%	2%	8%	316
Spectators	47%	10%	7%	4%	4%	29%	315

51. (selected for the jury: M = 3.38, SD = 1.41; excused from the jury: M = 3.22, SD = 1.14), F (1, 292) = 1.42, p = .24, partial η^2 = .01.
52. (criminal trial: M = 3.24, SD = 1.14; civil trial: M = 3.36, SD = 1.15), F (1, 292) = .78, p = .38, partial η^2 = 0.
53. There was a negative correlation between the amount of anxiety felt and how honest the participants were (r = -.19, p < .01), and there was a negative correlation between the amount of fear experienced and how honest the participants were (r = -.23, p < .01) (fear and anxiety were positively correlated (r = .61, p < .01)).
54. (females: M = 2.56, SD = 1.14; males: M = 2.26, SD = 1.06), F (1, 290) = 4.68, p = .03, partial η^2 = .02.
55. (criminal trials: M = 2.59, SD = 1.13; civil trials: M = 2.26, SD = 1.08), F (1, 290) = 5.49, p = .02, partial η^2 = .02. The interaction between gender and type of trial on the level of anxiety was not significant, F (1, 290) = .11, p = .74, partial η^2 = 0.
56. (male: M = 1.53, SD = .96; female: M = 1.75, SD = 1.01), F (1, 290) = 1.97, p = .16, partial η^2 = .01. (criminal: M = 1.75, SD = 1.02; civil: M = 1.56, SD = .95), F (1, 290) = 1.26, p = .26, partial η^2 = .00. The interaction between gender and type of trial on the level of fear was not significant, F (1, 290) = .54, p = .47, partial η^2 = 0.

ANONYMITY OF JURORS

Were You Anonymous During Questioning?

Twenty-eight percent of the 308 respondents to this question indicated that they were anonymous; 49% said that their identities were known to those around them; 12% did not know if they were anonymous, and 11% did not recall.

Participants were asked a series of questions regarding juror anonymity. Most notably, 80% of the 308 respondents wanted anonymity for jurors in some form (see Table 7). Seventy-four percent of the 308 respondents believe that juror anonymity could affect verdicts, and when asked in what way anonymity would affect the verdict, 58% of the 185 respondents noted that anonymity would eliminate a juror's fear of reprisal. Nineteen percent indicated that if jurors were anonymous, they would feel able to be more honest. Only 4% indicated that an anonymous jury would be less accountable. Interestingly, 67% of 297 prospective jurors said that they would be more willing to serve on a jury if juror anonymity could be guaranteed.

EXPLORATORY ANALYSES

To investigate further how people felt about the jury selection process, we conducted a series of exploratory analyses to determine how perceptions of the *voir dire* experience affected prospective jurors' level of anxiety, level of fear, level of comfort during questioning, and feelings toward the juror selection process overall. We were also curious as to whether prospective jurors' feelings varied as a function of the type of trial (criminal, civil).[57]

In the first set of analyses, we asked participants if the questions were too personal (yes versus no). We then determined how their perception of the questions (too personal or not) and

TABLE 7: ANONYMITY OF JURORS (varied sample sizes)

QUESTIONS	ANSWERS				SAMPLE SIZE
Do you think that jurors should serve anonymously?	Yes, in all cases (civil and criminal): 56%	Yes, but only in criminal cases (all types): 11%	Yes, but only in very violent criminal cases: 13%	No: 16%	308
What level of anonymity should be used? Who should have access to juror information?	Only authorized court employees: 47%	Only authorized court employees and attorneys: 33%	Only authorized court employees, attorneys, and involved parties: 11%	All can have access except public and press access to juror identity should be provided only after verdict is announced: 8%	297

TABLE 8: HOW PERCEPTIONS OF THE *VOIR DIRE* EXPERIENCE (WERE QUESTIONS TOO PERSONAL?) AND TYPE OF TRIAL (CRIMINAL VERSUS CIVIL) AFFECTED PROSPECTIVE JURORS' LEVEL OF ANXIETY, LEVEL OF FEAR, LEVEL OF COMFORT DURING QUESTIONING, AND FEELINGS TOWARD THE JUROR SELECTION PROCESS: NOTABLE FINDINGS (*n*=255)

Level of Anxiety	Participants asked to reveal information that they considered too personal experienced more anxiety than those who did not feel the questions were too personal.[58] Participants felt more anxious in criminal than in civil trials.[59] Anxiety levels were highest when people were asked questions perceived as too personal while being questioned for a criminal trial. Asking personal or non-personal questions in a civil trial or asking non-personal questions in a criminal trial led to similarly lower levels of anxiety.[60]
Level of Fear	Participants who thought the questions were too personal experienced more fear than those who did not feel the questions were too personal.[61] Those in criminal trials felt more fear than those in civil trials.[62] Asking questions perceived as too personal in a criminal trial tended to heighten reported fear.[63]
Level of Comfort	Participants who were asked questions that they perceived as too personal felt less comfortable with the jury selection process than those for whom the questions were not perceived as too personal.[64] Those questioned in criminal trials felt marginally less comfortable during jury selection than those questioned in civil trials.[65]
Feelings About Juror Process Overall	Perceiving questions as too personal was associated with less positive feelings about the juror selection process overall.[66]

57. A 2 x 2 Analysis of Variance was conducted for each exploratory analysis unless otherwise specified. Note that for each analysis, all "I don't recall" and "I don't know" responses were deleted before analysis.
58. (too personal: $M = 2.89$, $SD = 1.16$; not too personal: $M = 2.18$, $SD = 1.00$), $F(1, 251) = 12.41$, $p < .001$, partial $\eta^2 = .05$.
59. (criminal trials: $M = 2.54$, $SD = 1.14$; civil trials: $M = 2.13$, $SD = .97$), $F(1, 251) = 13.26$, $p < .001$, partial $\eta^2 = .05$.
60. Interaction: $F(1, 251) = 7.91$, $p = .01$, partial $\eta^2 = .03$.
61. (too personal: $M = 1.99$, $SD = 1.02$; not too personal: $M = 1.47$, $SD = .87$), $F(1, 251) = 10.19$, $p = .002$, partial $\eta^2 = .04$.
62. (criminal trials: $M = 1.72$, $SD = .99$; civil trials: $M = 1.45$, $SD = .83$), $F(1, 251) = 6.75$, $p = .01$, partial $\eta^2 = .03$.
63. The interaction between the type of trial and the experience of personal questions was marginally significant, $F(1, 251) = 3.01$, $p = .08$, partial $\eta^2 = .01$. The pattern of these data approximates the pattern seen with anxiety.
64. (too personal: $M = 2.56$, $SD = .99$; not too personal: $M = 3.46$, $SD = 1.15$), $F(1, 251) = 29.14$, $p < .001$, partial $\eta^2 = .10$.
65. (criminal trials: $M = 3.07$, $SD = 1.20$; civil trials: $M = 3.39$, $SD = 1.09$), $F(1, 251) = 3.81$, $p = .05$, partial $\eta^2 = .02$. The interaction was not significant, $F(1, 251) = .28$, partial $\eta^2 = .00$.
66. (too personal: $M = 2.90$, $SD = 1.04$, not too personal: $M = 3.57$, $SD = 1.11$), $F(1, 251) = 19.18$, $p < .001$, partial $\eta^2 = .07$. The type of trial did not impact feelings about the juror selection process overall, $F(1, 251) = .98$, $p = .32$, partial $\eta^2 = .00$, and the interaction was not significant, $F(1, 251) = .23$, $p = .63$, partial $\eta^2 = .00$.

TABLE 9: HOW PERCEPTIONS OF THE *VOIR DIRE* EXPERIENCE (WERE QUESTIONS EMBARRASSING?) AND TYPE OF TRIAL (CRIMINAL VERSUS CIVIL) AFFECTED PROSPECTIVE JURORS' LEVEL OF ANXIETY, LEVEL OF FEAR, LEVEL OF COMFORT DURING QUESTIONING, AND FEELINGS TOWARD THE JUROR SELECTION PROCESS: NOTABLE FINDINGS (*n*=265)

Level of Anxiety	Respondents asked to reveal something they considered embarrassing experienced more anxiety than those who did not perceive questions in this manner.[67] Those questioned for criminal trials experienced more anxiety than those questioned for civil trials.[68] Anxiety levels tended to be higher when people were asked questions perceived as embarrassing while being questioned for a criminal trial.[69]
Level of Fear	Those who were embarrassed experienced similar levels of fear to those who were not embarrassed.[70] Those questioned in criminal trials experienced greater levels of fear than those questioned in civil trials.[71] Fear was heightened in a criminal trial when participants were asked what they considered to be embarrassing questions.[72]
Level of Comfort	Those who were embarrassed felt less comfortable with the jury selection process than those who were not embarrassed.[73] Respondents were less comfortable with the jury selection process when they were questioned for a criminal trial rather than a civil trial.[74]
Feelings About Juror Process Overall	Those who were embarrassed felt less positive about the juror selection process overall than those who were not embarrassed.[75]

TABLE 10: HOW PERCEPTIONS OF THE *VOIR DIRE* EXPERIENCE (DID THE QUESTIONS MAKE YOU UNCOMFORTABLE?) AND TYPE OF TRIAL (CRIMINAL VERSUS CIVIL) AFFECTED PROSPECTIVE JURORS' LEVEL OF ANXIETY, LEVEL OF FEAR, LEVEL OF COMFORT DURING QUESTIONING, AND FEELINGS TOWARD THE JUROR SELECTION PROCESS: NOTABLE FINDINGS (*n*=269)

Level of Anxiety	Those for whom questions were uncomfortable felt more anxiety during the juror selection process than those for whom the questions did not cause discomfort.[76] Those questioned for a criminal trial were more anxious than those questioned for a civil trial.[77]
Level of Fear	Those who found the questions uncomfortable were more fearful during the juror selection process than those who did not find the questions uncomfortable.[78] More fear was experienced by those in criminal trials rather than by those in civil trials.[79]
Level of Comfort	Those who found questions uncomfortable were more uncomfortable with the jury selection process.[80]
Feelings About Juror Process Overall	Participants who indicated there were questions that made them uncomfortable felt less positive about the juror selection process overall than those who did not feel the questions were uncomfortable.[81]

the type of trial (criminal, civil) affected their level of anxiety, fear, comfort during questioning, and feelings toward the juror selection process overall. Notable results are listed in Table 8.

Were the Questions Embarrassing?

We asked participants if the questions were embarrassing (yes versus no). We then determined how their perception of the questions (embarrassing or not) and the type of trial (criminal, civil) affected their level of anxiety, fear, comfort during questioning, and feelings toward the juror selection process overall. Notable results are listed in Table 9.

67. (embarrassing: $M = 3.13$, $SD = 1.18$; not embarrassing: $M = 2.26$, $SD = 1.00$), $F(1, 261) = 15.79$, $p < .001$, partial $\eta^2 = .06$.
68. (criminal trials: $M = 2.52$, $SD = 1.10$; civil trials: $M = 2.19$, $SD = 1.03$), $F(1, 261) = 8.00$, $p = .005$, partial $\eta^2 = .03$.
69. $F(1, 261) = 3.03$, $p = .08$, partial $\eta^2 = .01$.
70. (embarrassed: $M = 1.96$, $SD = 1.21$; not embarrassed: $M = 1.54$, $SD = .84$), $F(1, 261) = 1.80$, $p = .18$, partial $\eta^2 = .00$.
71. (criminal trials: $M = 1.69$, $SD = .95$; civil trials: $M = 1.46$, $SD = .84$), $F(1, 261) = 11.60$, $p < .001$, partial $\eta^2 = .04$. Those who were embarrassed experienced similar levels of fear ($M = 1.96$, $SD = 1.21$) to those who were not embarrassed ($M = 1.54$, $SD = .84$), $F(1, 261) = 1.80$, $p = .18$, partial $\eta^2 = .00$.
72. Interaction: $F(1, 261) = 8.95$, $p = .003$, partial $\eta^2 = .03$.
73. (embarrassed: 2.44, $SD = .97$; not embarrassed: $M = 3.29$, $SD = 1.15$), $F(1, 261) = 13.18$, $p < .001$, partial $\eta^2 = .05$.
74. (criminal trial: $M = 3.05$, $SD = 1.20$; civil trial: $M = 3.33$, $SD = 1.08$), $F(1, 261) = 4.53$, $p = .03$, partial $\eta^2 = .02$. The interaction was not significant, $F(1, 261) = 1.53$, $p = .22$, partial $\eta^2 = .00$.
75. (embarrassed: $M = 2.76$, $SD = 1.00$; not embarrassed: $M = 3.50$, $SD = 1.08$), $F(1, 261) = 14.74$, $p < .001$, partial $\eta^2 = .05$. The type of trial did not impact feelings about the juror selection process overall, $F(1, 261) = .55$, $p = .46$, partial $\eta^2 = .00$, and the interaction was not significant, $F(1, 261) = .01$, $p = .94$, partial $\eta^2 = .00$.
76. (uncomfortable: $M = 2.92$, $SD = 1.17$; not uncomfortable: $M = 2.18$, $SD = 1.00$), $F(1, 265) = 18.63$, $p < .001$, partial $\eta^2 = .07$.
77. (criminal trial: $M = 2.55$, $SD = 1.13$; civil trial: $M = 2.17$, $SD = 1.04$), $F(1, 265) = 7.56$, $p = .01$, partial $\eta^2 = .03$. The interaction was not significant, $F(1, 265) = 1.95$, $p = .16$, partial $\eta^2 = .01$.
78. (uncomfortable: $M = 1.92$, $SD = 1.07$; not uncomfortable: $M = 1.45$, $SD = .82$), $F(1, 265) = 8.90$, $p = .003$, partial $\eta^2 = .03$.
79. (criminal trials: $M = 1.70$, $SD = .98$; civil trials: $M = 1.42$, $SD = .81$), $F(1, 265) = 6.15$, $p = .01$, partial $\eta^2 = .02$. The interaction was not significant, $F(1, 265) = 2.12$, $p = .15$, partial $\eta^2 = .01$.
80. (uncomfortable: $M = 2.53$, $SD = .96$; comfortable: $M = 3.41$, $SD = 1.15$), $F(1, 265) = 29.21$, $p < .01$, partial $\eta^2 = .10$. The type of trial did not affect participants' level of comfort, $F(1, 265) = 2.44$, $p = .12$, partial $\eta^2 = .01$. The interaction was also not significant, $F(1, 265) = .29$, $p = .59$, partial $\eta^2 = .00$.
81. (uncomfortable: $M = 2.97$, $SD = 1.03$; not uncomfortable: $M = 3.50$, $SD = 1.12$), $F(1, 265) = 11.11$, $p < .01$, partial $\eta^2 = .04$. The type of trial did not affect the overall assessment of the juror selection process, $F(1, 265) = .75$, $p = .39$, partial $\eta^2 = .00$, and the interaction was not significant, $F(1, 265) = .02$, $p = .88$, partial $\eta^2 = .00$.

TABLE 11: HOW BEING ABLE TO SPEAK PRIVATELY TO THE JUDGE AND ATTORNEYS (YES VERSUS NO) AND TYPE OF TRIAL (CRIMINAL VERSUS CIVIL) AFFECTED PROSPECTIVE JURORS' LEVEL OF ANXIETY, LEVEL OF FEAR, LEVEL OF COMFORT DURING QUESTIONING, AND FEELINGS TOWARD THE JUROR SELECTION PROCESS: NOTABLE FINDINGS (*n*=251)

Level of Anxiety	Those who were given an opportunity to talk privately to the judges and lawyers did **not** differ in their level of anxiety than those who did not have that opportunity.[82] Those questioned for a criminal trial experienced a higher level of anxiety than those questioned for a civil trial.[83]
Level of Fear	Fear levels did **not** differ between those given an opportunity to talk privately to the judges and lawyers and those who were not.[84] For those questioned in a criminal trial, fear was marginally higher than for those questioned in a civil trial.[85]
Level of Comfort	Those who were able to talk privately with the judge and attorneys were more comfortable during jury selection.[86] Those questioned for a civil trial were marginally more comfortable with the questioning than those questioned for a criminal trial.[87]
Feelings About Juror Process Overall	Those who were given an opportunity to talk with the judge and attorneys privately felt more positively about the juror selection process overall than those who were not given such opportunities.[88]

TABLE 12: HOW THINKING YOU WERE ANONYMOUS (YES VERSUS NO) AND TYPE OF TRIAL (CRIMINAL VERSUS CIVIL) AFFECTED PROSPECTIVE JURORS' LEVEL OF ANXIETY, LEVEL OF FEAR, LEVEL OF COMFORT DURING QUESTIONING, AND FEELINGS TOWARD THE JUROR SELECTION PROCESS: NOTABLE FINDINGS (*n*=230)

Level of Anxiety	The prospective jurors' anxiety level was **not** impacted by their perception of being anonymous.[89] Participants were less anxious in a civil trial than in a criminal trial.[90]
Level of Fear	Participants' level of fear did **not** vary as a function of being anonymous.[91] Participants were marginally more fearful in criminal trials than in civil trials.[92]
Level of Comfort	Those who said that they were anonymous indicated that they were **just as comfortable** during jury selection than those who said that their identity was known.[93]
Feelings About Juror Process Overall	Participants' feelings about the jury selection process overall **were similar** between those who were anonymous and those who were not.[94]

Did the Questions Make You Uncomfortable?

We asked participants if the questions made them uncomfortable (yes versus no). We then determined how their perception of the questions (uncomfortable or not) and the type of trial (criminal, civil) affected their level of anxiety, fear, comfort during questioning, and feelings toward the juror selection process overall. Notable results are listed in Table 10.

Did it Help to Be Able to Speak Privately to the Judge and Attorneys?

Given that some were affected by the personal, embarrassing and uncomfortable nature of the questions, we wanted to see if those who were given an opportunity to speak to the judges and the attorneys had altered feelings about the experience.

We ran a series of analyses to investigate whether being able to speak privately to the judge and attorneys (yes, no) and the type of trial (criminal, civil) affected feelings of anxiety, fear, comfort, and overall feelings about juror selection (see Table 11 for notable results).

Did it Help to Be Anonymous?

Similarly, we wanted to see if those who thought they were

82. (private: M = 2.43, SD = 1.08; not private: M = 2.48, SD = 1.15), F (1, 247) = .51, p = .48, partial η^2 = .00.
83. (criminal trial: M = 2.59, SD = 1.14; civil trial: M = 2.20, SD = 1.04), F (1, 247) = 7.38, p = .01, partial η^2 = .03. The interaction was not significant, F (1, 247) = .53, p = .47, partial η^2 = .00.
84. (private: M = 1.54, SD = .87; not private: M = 1.75, SD = 1.08), F (1, 247) = 2.63, p = .11, partial η^2 = .01. The interaction was not significant, F (1, 247) = .06, p = .82, partial η^2 = .00.
85. (criminal trial: M = 1.73, SD = 1.04; civil trial: M = 1.51, SD = .90), F (1, 247) = 2.99, p = .09, partial η^2 = .01. The interaction was not significant, F (1, 247) = .06, p = .82, partial η^2 = .00.
86. (private: M = 3.20, SD = 1.19; non-private: M = 2.96, SD = 1.14), F (1, 247) = 4.11, p = .04, partial η^2 = .02.
87. (civil trial: M = 3.23, SD = 1.11; criminal trial: M = 2.98, SD = 1.19), F (1, 247) = 3.32, p = .07, partial η^2 = .01. The interaction between privacy and type of trial was not significant, F (1, 247) = 1.35, p = .25, partial η^2 = .01.
88. (private: M = 3.51, SD = 1.11; not private: M = 3.11, SD = 1.18), F (1, 247) = 7.28, p = .01, partial η^2 = .03. The type of trial did not affect how jurors felt about the jury selection process overall, F (1, 247) = .94, p = .33, partial η^2 = .00, nor was the interaction significant, F (1, 247) = .01, p = .94, partial η^2 = .00.
89. (anonymous: M = 2.41, SD = 1.09; not anonymous: M = 2.55, SD = 1.51), F (1, 226) = .61, p = .44, partial η^2 = .00.
90. (civil trials: M = 2.22, SD = 1.06; criminal trials: M = 2.63, SD = 1.14), F (1, 226) = 5.98, p = .02, partial η^2 = .03. The interaction was not significant, F (1, 226) = .12, p = .73, partial η^2 = .00.
91. (anonymous: M = 1.55, SD = .89; not anonymous: M = 1.68, SD = .98), F (1, 226) = .59, p = .44, partial η^2 = .00.
92. (criminal trials: M = 1.72, SD = 1.01; civil trials: M = 1.43, SD = .78), F (1, 226) = 3.74, p = .06, partial η^2 = .02. The interaction was not significant, F (1, 226) = .36, p = .55, partial η^2 = .00.
93. (anonymous: M = 3.24, SD = 1.20; not anonymous: M = 2.97, SD = 1.19), F (1, 226) = 1.99, p = .16, partial η^2 = .01. The type of trial did not impact comfort level ratings, F (1, 226) = 1.32, p = .25, partial η^2 = .01, and the interaction was not significant, F (1, 226) = .19, p = .66, partial η^2 = .00.
94. (anonymous: M = 3.40, SD = 1.16; not anonymous: M = 3.33, SD = 1.15), F (1, 226) = .13, p = .72, partial η^2 = .00. The type of trial also did not impact feelings about the jury selection process overall, F (1, 226) = .50, p = .48, partial η^2 = .00, and the interaction was not significant, F (1, 226) = .06, p = .81, partial η^2 = .00.

anonymous versus those who thought their identities were known during the questioning process felt differently about the *voir dire* experience. We ran a series of analyses to investigate whether being anonymous (yes, no) and the type of trial (criminal, civil) affected feelings of anxiety, fear, comfort, and overall feelings about juror selection (see Table 12 for notable results).

Did Where and How You Were Questioned Matter?

We also wanted to see if the setting for *voir dire* (the judge's chambers, open court), how the prospective jurors were questioned (as individuals, in a group), and the type of trial (criminal, civil) affected the prospective jurors' *voir dire* experience (for this set of analyses we deleted those who indicated that they were questioned in open court both individually *and* as a group (*n* = 77); 183 remained).[95] We report these results in Table 13.

TABLE 13: DID WHERE YOU WERE QUESTIONED (CHAMBERS, OPEN COURT), HOW YOU WERE QUESTIONED (AS INDIVIDUALS, IN A GROUP) AND TYPE OF TRIAL (CRIMINAL VERSUS CIVIL) AFFECT PROSPECTIVE JURORS' LEVEL OF ANXIETY, LEVEL OF FEAR, LEVEL OF COMFORT DURING QUESTIONING, AND FEELINGS TOWARD THE JUROR SELECTION PROCESS: NOTABLE FINDINGS (*n*=183)

Level of Anxiety	Those questioned in the judge's chambers were marginally more anxious than those questioned in open court.[96]
Level of Fear	Participants reported more fear when questioned in the judge's chambers than when questioned in open court.[97] The most frightening experience for these jurors was to be in a group in the judge's chambers while the least frightening experience was being questioned as a group in open court.[98]
Level of Comfort	Participants were more comfortable in open court than in the judge's chambers.[99]
Feelings About Juror Process Overall	Participants felt similarly positive about the juror process overall when they were either questioned in the judge's chambers for a criminal trial or in open court for a civil trial. They felt most negative when they were questioned in the judge's chambers for a civil trial.[100]

DISCUSSION

As expected, when we asked respondents to tell us about the process of their *voir dire* experience, we found great variation. Jurors were sometimes questioned by the attorneys, sometimes by the judge, and sometimes by both. Furthermore, although many were questioned individually and/or as part of a group in open court, some jurors were given an opportunity to provide answers privately. These results are all congruent with that found by Mize et al.[101]

We also asked our respondents to reveal the types of information they provided. Importantly, we found that many were asked to give information that clearly provided their identities and contact information (e.g., addresses) to those in the courtroom. Perhaps therefore, it is not surprising that some were concerned about the personal nature of the questions that were asked. Specifically, we found that overall, approximately a quarter of the respondents indicated that they were asked to reveal information that they considered to be too personal.[102] Many of those bothered by the idea that others (e.g., the defendant, other prospective jurors, spectators) in the courtroom could hear their responses frequently cited the personal nature of the questions/answers as a reason for being bothered. In addition, those that considered the questions to be too personal or embarrassing had more negative feelings about the juror selection process. We also found that anxiety levels were highest when people were asked questions they perceived as too personal when being questioned for a criminal trial. Fear too was heightened when participants were asked what they considered to be embarrassing questions in preparation for a criminal trial.

A concern about safety issues was also a recurring theme for many of our study participants. For example, many of those who said that they were uncomfortable during questioning cited safety concerns as a reason. Many also cited safety concerns when indicating why they were bothered that others in the courtroom, especially the defendant and spectators, could hear their responses. Other researchers have also found that jurors have a fear of reprisal/concerns for their personal safety.[103] Clearly, there is evidence that safety issues are a real concern for jurors.

Overall, in the present study, almost 80% of respondents were at least a little anxious during questioning with 18% indicating that they were "very" or "extremely" anxious. Thirty-nine percent overall were also experiencing at least a little fear. Perhaps not surprisingly, people were more anxious and fearful when being questioned for criminal rather than civil trials. Researchers at the National Center for State Courts who studied the experience of juror stress across the entire trial did find that jurors in *all* types of trials reported experiencing stress, although more stress was generally reported in death penalty cases and in cases concerning criminal acts committed against people. They also found that the process of jury selection was noted as one of the ten strongest sources of stress within the jury duty experience.[104] Thus our results with regard to anxiety are in line with what others have found.

We also found that females were reportedly more anxious than males during *voir dire* (note that we did not find a difference

95. For this series of 2 x 2 x 2 analyses, we will only report marginally significant or significant findings.
96. (chambers: $M = 2.83$, $SD = 1.20$; open court: $M = 2.35$, $SD = 1.09$), $F(1, 175) = 3.23$, $p = .07$, partial $\eta^2 = .02$.
97. (chambers: $M = 2.29$, $SD = 1.23$; open court: $M = 1.60$, $SD = .94$), $F(1, 175) = 6.07$, $p = .02$, partial $\eta^2 = .03$.
98. $F(1, 175) = 4.48$, $p = .04$, partial $\eta^2 = .03$.
99. (open court: $M = 3.18$, $SD = 1.23$; chambers: $M = 2.67$, $SD = 1.17$), $F(1, 175) = 6.58$, $p = .01$, partial $\eta^2 = .04$.
100. $F(1, 175) = 4.30$, $p = .04$, partial $\eta^2 = .02$.
101. Mize et al., *supra* note 1.
102. See also Rose, *supra* note 8.
103. National Center for State Courts, *supra* note 5.
104. *Id.* at 71.

in level of fear as a function of gender). This replicates, in part, the finding that females report higher levels of anxiety and fear than males do generally.[105]

Marshall and Smith[106] found that jurors who reported feeling nervous were less likely to be honest during *voir dire*, and we found evidence to support this. Even though most acknowledged that they were "very" or "completely" honest during *voir dire*, less anxiety and fear during questioning was associated with more honesty in answers. Of course, as Marshall and Smith[107] pointed out, the reason for this correlation is not clear. The prospective jurors may have been dishonest because they were anxious and fearful, or they may have been anxious and fearful because they were dishonest (or a third variable may have had an influence on anxiety/fear and honesty levels).

Having fearful/anxious and dishonest prospective jurors is certainly problematic; however, at least some of these concerns (i.e., the experience of fear/anxiety) may be more easily addressed by modifications made by the justice system. There are a variety of options available to those conducting *voir dire* that may decrease juror anxiety and fear. For example, giving prospective jurors the opportunity to speak to the judge and attorneys privately when answering personal questions[108] may be expected to help alleviate the prospective jurors' concerns and increase honesty. While our data suggest that anxiety and fear levels were not altered by the opportunity to have an audience with the judge and attorneys, those provided this opportunity were more comfortable during jury selection and felt more positively about the juror selection process overall.

Interestingly, when we considered the question of where, how and for what kind of trial jurors were questioned, being questioned as part of a group in the judge's chambers was found to be a particularly frightening experience for our prospective jurors. They generally felt more comfortable in open court than in chambers, although here, the type of trial mattered. Participants were the most positive about the juror selection process overall after being questioned in chambers for a criminal trial or in open court for a civil trial; being questioned in chambers for a civil trial led to relatively negative ratings. The reason for this finding is not known; however, note that very few were questioned in the judge's chambers. Future researchers may wish to examine the impact of this option more directly.

The use of questionnaires during *voir dire* might also be able to alleviate prospective jurors' concerns about the personal nature of the questions as long as the confidentiality of the questionnaire content is clear. In some jurisdictions, the questionnaires are destroyed as soon as the trial is over, while in others, the questionnaires become part of the public record, accessible to anyone (e.g., members of the press) upon request.[109] Recall that in the present study, questionnaires were used in over 70% of cases, however, in a portion of those cases, prospective jurors were asked to provide their questionnaire answers out loud in open court, likely eliminating any solace.

Referring to prospective jurors exclusively by number instead of by name might also help alleviate jurors' anxiety and/or fear. Referring to jurors by number is an approach that has support among some legal scholars.[110] This was also the procedure used in Derek Chauvin's recent trial.[111] About half of the participants in the present study indicated that this procedure was followed in their *voir dire* process. Note that only 43% of the sample said that their preference was to be referred to by number.

There is a more extreme reform that might alleviate juror concerns, and that is to have anonymous jurors, a possibility that has support from this sample. Eighty percent of respondents in the present study thought jurors should serve anonymously in at least some types of cases with 67% of the sample indicating that they would be more willing to serve if anonymity could be guaranteed.

Anonymity of jurors can mean many different things.[112] Our study participants mostly preferred a heavier cloak of anonymity with approximately half of the respondents supporting the idea that only court employees should have access to juror identifying information; an additional 33% was willing to allow the court *and* the lawyers to have access to this information.

There are also reasons to consider anonymity as a safeguard for jurors who have been chosen for duty (i.e., not just anonymity during *voir dire*). Jurors are exposed to many stressors.[113] For example, jurors may feel isolated emotionally due to the fact that they are not allowed to discuss the trial with anyone while the trial is ongoing (it is worth noting that while American jurors can talk about the trial once the trial is over, Canadian jurors are never allowed to talk about any information relevant to the proceedings of the jury).[114] Jurors may be isolated physically, sequestered, kept from family and friends, and media sources. They may undergo the stress of confrontation through heated deliberations. They may have to view graphic evidence and/or hear emotional testimony. They may have to decide someone's fate, and that decision could mean a life or even a death sentence. While some courts have offered posttrial counseling ("jury

105. McLean & Anderson, *supra* note 47.
106. Marshall & Smith, *supra* note 6.
107. *Id.* at 215.
108. See Mize, *supra* note 4; *see also* Gregory E. Mize, *Jury Trial Innovation Round #2*, 59 Ct. Rev. 64 (2023), https://digitalcommons.unl.edu/ajacourtreview/860/.
109. *See, e.g.*, *In re Access to Jury Questionnaires*, 37 A.3d 879 (D.C. 2012).
110. *See, e.g.,* Antolak-Saper, *supra* note 18, at 243, 246-47.
111. Karnowski, *supra* note 27.
112. *See* Eyal Zamir & Christoph Engel, *Sunlight Is the Best Disinfectant-Or Is It? Anonymity as a Means to Enhance Impartiality*, 63 Ariz. L. Rev. 1063, 1075 (2021).
113. *See generally*, Laurence Miller, *Juror Stress: Symptoms, Syndromes, and Solutions*, 10 Int. J Emerg. Ment. Health 203 (2008), https://www.researchgate.net/publication/23710143_Juror_stress_Symptoms_Syndromes_and_Solutions (last visited Nov. 4, 2023); *see also* Mark Rabil, Dawn McQuiston & Kimberly D. Wiseman, *Secondary Trauma in Lawyering: Stories, Studies, and Strategies*, 56 Wake Forest L. Rev. 825 (2021).
114. *See* Don Butler, *The Hours Are Long, the Benefits Are Lousy and the Work Is Highly Stressful*, The Ottawa Citizen (January 27, 2007); *see also* Bill Graveland, *Bill That Would Have Improved Mental Support for Jurors Dies in Senate*, The Canadian Press (June 23, 2019) (discussing information about a bill in Canada that would have allowed former jurors to talk about their jury experience in therapy; the bill did not pass).

debriefing" or "crisis debriefing") that is meant to alleviate the stress that can come from jury duty,[115] it is reasonable to ask if some of the stress that jurors experience throughout the trial process could be alleviated if jurors are anonymous.

Courts have sometimes allowed for an anonymous jury, typically when the release of jurors' names could mean potential harm could come to jurors (e.g., in trials of gang or organized crime members) or could, in high-profile cases, lead to harassment from the press and the public.[116] However, the information presented here suggests that jury members who are empaneled in other types of trials also have concerns for their safety and privacy. (Over half of the respondents did explicitly indicate that juror anonymity would eliminate their fear of reprisal.) As the judges noted in *United States* v. *Scarfo*,[117] "even in routine criminal cases, veniremen are often uncomfortable with disclosure of their names and addresses to a defendant." Interestingly, those in the present study who thought they were anonymous during their questioning did not report feeling differently in terms of anxiety, fear, or comfort level than those who did not think they were anonymous. In any case, future researchers need to address how the use of anonymity and other procedural modifications designed to protect the jurors from courtroom stressors will impact the jurors and the decisions they need to make.

LIMITATIONS

There are some limitations of this work. To begin, we allowed respondents to be within 1 year of their jury service. While the average amount of time since reporting for service was approximately 6 months, we still have to consider that respondents may be misremembering the *voir dire* process or their feelings about that process.

Another set of limitations comes from the fact that we sought to explore how people experience *voir dire* generally. There are certainly other ways to consider this question. For example, we did not consider potential differences in *voir dire* in state versus federal cases, and differences may certainly exist.[118]

Another concern is the sample itself. We attempted to increase the generalizability of the present work by testing a sample beyond the typical university population. Testing online may not provide an ideal representation of the target population; however, the ability to test a more diverse population can increase the external validity of the work.[119] While online testing did allow us to obtain a mix of different ethnicities, ages, and education levels, the lack of random sampling likely means that the results are not generalizable to all jurors.

There is evidence that the present sample is not reflective of the prospective juror population. Using the U.S. Census Bureau demographics as a guide to representativeness as Caprathe[120] suggests, it appears that the present sample is not representative of the adult U.S. community in terms of gender split and educational attainment. Specifically, the most recent census data reports that 33.4% of adults in the U.S. have a bachelor's degree or higher[121] and the number of those with this degree of educational attainment in the present study is approximately 55%. As for gender, recent Census data reveals an almost 50%/50% split of gender;[122] this sample is 69% female. However, note that the responses of this sample do tend to replicate the results found by other researchers in those cases when previous research is available for a comparison.[123] Thus, while the sample may be said to be different demographically than U.S. adults, the experience of the prospective jurors appears to be similar. What we do not know definitively is whether the perceptions of that experience as ascertained is representative of the experience that prospective jurors have in general. Future researchers may wish to explore this further.

The online nature of the sample also leads to another concern. The dropout rate does tend to be relatively high for online research when compared to traditional in-person testing,[124] although interestingly, dropout rates are often not reported or perhaps not even detected by researchers.[125] Here, we reported a dropout rate of 37% overall. While this rate is not uncommon from that reported in online research,[126] caution is warranted when considering these data for there is a possibility of a non-response bias. For example, fully participating in this study may have appealed particularly to those who had strong feelings to impart. Suggestions for minimizing attrition in online research have been provided by researchers;[127] future researchers may wish to extend the present research with these modifications in place.

POLICY IMPLICATIONS

Scholars have suggested a variety of ways that the privacy and safety concerns of jurors can be addressed while still protecting the rights of the media and the defendant. For example, Han-

115. *See generally* Marjorie O. Dabbs, *Jury Traumatization in High Profile Criminal Trials: A Case for Crisis Debriefing?,* 16 Law & Psychol. Rev. 201 (1992); *see also* Dawn E. McQuiston, M. Dylan Hooper & Abbey E. Brasington, *Vicarious Trauma in the Courtroom: Judicial Perceptions of Juror Distress,* 58 Judges' J. 32, 33-34 (2019).
116. Gauthier, *supra* note 33, at 2, 4; Speegle, *supra* note 33.
117. United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988).
118. Mize et al., *supra* note 1, at 6.
119. Tarika Daftary-Kapur & Sarah Greathouse, *Forensic Psychological Research and the Internet*, in *Research Methods in Forensic Psychology* 63-77 (Barry Rosenfeld & Steven D. Penrod eds., 2011).
120. William Caprathe et al., *Assessing and Achieving Jury Pool Representativeness*, 55 Judges' J. 16, 17 (2016).
121. *Highest Educational Levels Reached by Adults*, United States Census Bureau (March 30, 2017), https://www.census.gov/newsroom/press-releases/2017/cb17-51.html (last visited Nov. 4, 2023).
122. U.S. Census Bureau, Age and sex composition in the United States: 2021, https://www.census.gov/data/tables/2021/demo/age-and-sex/2021-age-sex-composition.html (last visited Nov. 4, 2023).
123. *See, e.g.,* Mize et al., *supra* note 1.
124. Haotian Zhou & Ayelet Fishbach, *The Pitfall of Experimenting on the Web: How Unattended Selective Attribution Leads to Surprising (Yet False) Research Conclusions*, 111 J. Pers. Soc. Psychol. 493, 494-95 (2016), https://doi.org/10.1037/pspa0000056.
125. *Id.* at 495 (providing a review of dropout statistics from research studies using Amazon's online labor market Mechanical Turk).
126. *Id.* at 494.
127. John J. Horton, David G. Rand & Richard J. Zeckhauser, *The Online Laboratory: Conducting Experiments in a Real Labor Market*, 14 Exp. Econ. 399 (2011).

naford[128] suggests that courts separate the juror information necessary for determining juror bias from juror information necessary for qualification and administrative purposes (e.g., paying jurors). Thus, the information regarding jurors' contact information would not be disclosed with this process, while the information relevant to jurors' ability to be fair and impartial would be accessible to the public. Wegner[129] suggests a slightly different approach; she suggests that prospective jurors in all criminal trials be assigned a number. All information could then be accessible to the public except for jurors' names and addresses, which would only be accessible to those within the judicial system (e.g., judges, attorneys). Wegner[130] argues that this approach protects jurors' right to privacy; it protects the rights of the media to access trial information, and this approach does not hinder the defendant from having a fair trial. More specifically, an impartial jury can be empaneled because anonymous jurors will "be less guarded and will instead candidly share his or her responses and opinions."[131]

Wegner[132] also agrees with a point made earlier; if anonymous jurors become routine, then the anonymity will not be a signal that the defendant is dangerous. The analogy cited by King[133] makes this point well. If we conduct a safety screening of airline travelers on some, but not all flights, then people on the screened flights might reasonably become concerned as to why their flight was being singled out. But if we screen airline travelers on all flights, the screening itself, and analogously, the anonymity of jurors, would just be seen as a matter of course, not an aberration that needs an explanation.[134]

Even with most of the prospective jurors reporting feeling anxiety during questioning and wishing for anonymity, half of the respondents felt at least somewhat positive about the juror process overall, and 40% indicated that they wanted to be selected as a juror. Other researchers have also found that jurors report feeling positively about jury duty,[135] although interestingly, some have found that those who actually serve as jurors reported feeling more positively than those who were questioned and then dismissed (i.e., the latter respondents tended to see the experience as a waste of time).[136] In any case, having prospective jurors feel positively about jury duty is admittedly a goal for the legal system.[137] The National Center for State Courts acknowledged the concern well: "as greater numbers of citizens devise ways to avoid jury service and the stress associated with jury service, juries become less representative of their communities. This can contribute to the decline of public trust and confidence in jury verdicts in particular and the justice system in general."[138] Thus, making jurors as comfortable as possible with the process of jury duty should be an important goal. Future research can help determine if the procedures discussed here (e.g., juror anonymity) can help achieve that goal.

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128. Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18, 21 (2001), https://www.researchgate.net/publication/299040121_Safeguarding_juror_privacy_-_a_new_framework_for_court_policies_and_procedures (last visited Nov. 4, 2023).
129. Laura N. Wegner, *Juror Anonymity in Criminal Trials: The Media, the Defendant, and the Juror—Providing for the Rights of all Interested Parties*, 3 ALBANY GOV. LAW REV. 429, 453-55 (2010); *see also* Antolak-Saper, *supra* note 18, 243, 246-47.
130. *Id.*
131. *Id.* at 458.
132. *Id.* at 453.
133. King, *supra* note 17, at 146.
134. *See also* State v. Bowles, 530 N.W.2d 521, (1995).
135. Lorie L. Sicafuse, Julianna C. Chomos & Monica K. Miller, *Promoting Positive Perceptions of Jury Service: An Analysis of Juror Experiences, Opinions, and Recommendations for Courts*, 34 JUST. SYS. J. 85, 94 (2013), https://www.jstor.org/stable/26595479 (last visited Nov. 4, 2023).
136. NATIONAL CENTER FOR STATE COURTS, *supra* note 5, at 63.
137. Gregory E. Mize & Christopher J. Connelly, *Jury Trial Innovations: Charting a Rising Tide*, 41 CT. REV. 4 (2004).
138. *Id.* at 2.

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Constitutional Losses and (Some) Statutory Wins for Criminal Defendants:

Select Criminal Law and Procedure Cases from the Supreme Court's 2022-23 Term

Eve Brensike Primus & Mark Rucci

LOOK BACK

The Supreme Court's 2022–23 Term included a number of important statutory interpretation rulings, as well as significant cases concerning the scope of the Confrontation Clause; the Venue, Vicinage, and Double Jeopardy Clauses; the federal courts' ability to entertain claims of legal innocence; and the contours of the adequate and independent state ground doctrine. It also was the first term for Justice Ketanji Brown Jackson—the first former public defender and first Black woman to join the centuries-old institution. Although Justice Jackson joined a Court ruptured along ideological lines and confronting serious challenges to its legitimacy[1] and ethical standards,[2] she quickly proved comfortable with both building consensus and going it alone.

Justice Jackson voted with the majority to narrow the statutory scope of criminal liability in a number of cases, creating cross-ideological alliances and imposing additional *mens rea* requirements on a true threats statute to ensure it complied with the First Amendment (*Counterman v. Colorado*), preventing a conviction of aggravated identify theft for ancillary conduct (*Dubin v. United States*), avoiding vague and overly broad constructions of criminal liability under the federal wire fraud statute (*Percoco v. United States* and *Ciminelli v. United States*), and refusing to interpret a penalty enhancement statute to require consecutive sentences (*Lora v. United States*).

When interpreting the scope and substance of defendants' constitutional rights, however, the majority of the Court was less receptive to defendants' claims. In *Samia v. United States*, the Court paved the way for prosecutors to introduce confessions in multiple defendant trials by substantially cutting back on defendants' Confrontation Clause rights. And in *Jones v. Hendrix*, the Court issued a decision that effectively prevents many federal prisoners who are legally innocent—meaning that their conduct does not satisfy the elements of the crimes they were convicted of—from ever having their innocence considered in federal post-conviction proceedings.

It was here that Justice Jackson showed her independence and experience, parting ways with her colleagues and authoring solo dissenting opinions. Not since Clarence Thomas joined the Court in 1991 has a first-term Justice authored a solo dissent.[3] Dissenting in both cases, Justice Jackson decried the Court's pattern of limiting constitutional remedies for criminal defendants—a call that may become familiar in future terms.

CONFRONTATION CLAUSE

In *Samia v. United States*,[4] the Supreme Court made it easier for prosecutors to introduce confessions in multiple defendant trials by holding that the Confrontation Clause is "not violated by the admission of a nontestifying codefendant's confession that d[oes] not directly inculpate the defendant," provided the jury is given a proper limiting instruction indicating that the confession is not admissible against the defendant.[5]

Adam Samia was accused of shooting and killing Catherine Lee along with two other people—Joseph Hunter and Carl Stillwell—as part of a murder-for-hire scheme directed by Paul LeRoux. When LeRoux was later arrested, he became a cooperating witness and implicated Samia, Stillwell, and Hunter in the murder. After being arrested, Stillwell admitted to driving the van in which Lee was killed and claimed that Samia had shot Lee. The Government charged all three men with murder and conspiracy charges and moved *in limine* to admit Stillwell's confession at their joint trial.

The trial court permitted a DEA agent to testify that Stillwell had confessed to driving the van in which Lee was murdered. The agent testified that Stillwell said he was with another person in that van and that "the *other person* he was with pulled the trigger on that woman."[6] The agent's testimony also described "the other person" as someone who carried a firearm and as someone with whom Stillwell had traveled and lived (all of which described Samia). The trial judge then instructed the jurors that

Footnotes

1. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.
2. *See, e.g.*, Alison Durkee, *Here Are the Recent Controversies Supreme Court Justices Have Been Caught Up in—As Senate Committee Votes on Ethics Bill*, FORBES (July 17, 2023, 11:22 AM), https://www.forbes.com/sites/alisondurkee/2023/07/17/here-are-the-recent-controversies-supreme-court-justices-have-been-caught-up-in-as-senate-committee-votes-on-ethics-bill/?sh=100be8503954.
3. *See* Kimberly Strawbridge Robinson, *Justice Jackson Unafraid to Speak Up, Go It Alone in First Term*, BLOOMBERG LAW (July 3, 2023, 3:54 PM), https://news.bloomberglaw.com/us-law-week/justice-jackson-unafraid-to-speak-up-go-it-alone-in-first-term.
4. 143 S. Ct. 2004 (2023).
5. *Id.* at 2018.
6. *Id.* at 2011 (emphasis in original).

Stillwell's confession was only admissible as to Stillwell and not as to Samia or Hunter.

The jury convicted Samia and his codefendants on all counts, and Samia was sentenced to life plus 10 years in prison. The U.S. Court of Appeals for the Second Circuit affirmed Samia's conviction, noting that it commonly approved the replacement of a defendant's name with a neutral noun or pronoun in a nontestifying codefendant's confession. The Supreme Court affirmed in a decision written by Justice Thomas and joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh.

As a historical matter, the majority noted that nontestifying codefendants' confessions have routinely been admitted in joint trials as long as the jury is told that it cannot use the confessions against the nonconfessing defendants. Justice Thomas explained that this practice did not run afoul of the Confrontation Clause, because the confession was not considered evidence "against the accused."[7]

Fifty-five years ago, the Court recognized an exception to this rule in *Bruton v. United States*[8] when it held that the Confrontation Clause prohibits the admission of a nontestifying codefendant's confession when that confession directly names the defendant, even with a proper limiting instruction. In that circumstance, there is too great a risk that the jury will ignore the instruction and use the confession against the defendant without the defendant having had the opportunity to confront his accuser.[9] In *Richardson v. Marsh*,[10] the Court refused to extend *Bruton* to a co-defendant's confession that was redacted to omit not only the defendant's name but any reference to her existence, even though other evidence admitted at trial implicated her. But in *Gray v. Maryland*,[11] the Court prohibited the admission of an obviously redacted confession that simply replaced the defendant's name with a blank space or the world "deleted," noting that such a statement was "directly accusatory" and could not be distinguished from using the defendant's name, which was prohibited in *Bruton*.[12]

Viewing these precedents together, Justice Thomas distinguished between "confessions that directly implicate a defendant and those that do so indirectly."[13] Directly implicating the defendant—by using a name, a blank space, or the word "deleted"—runs afoul of the Confrontation Clause, but indirect references to other persons that only become incriminating when linked with other evidence—as in Samia's case—do not. To support its holding, the majority noted the practical costs of severance to both the system and to victims, the need for the government to be able to rely on confessions to demonstrate guilt, and also the centrality of the law's "presumption that jurors follow limiting instructions."[14]

Justice Barrett filed a concurring opinion in which she agreed with the majority's result but not its historical analysis. Justice Barrett accused the majority of focusing on late-nineteenth and early-twentieth century cases that were "far too late to inform the meaning of the Confrontation Clause at the time of the founding."[15] Additionally, the cases and the treatises cited by the majority interpreted hearsay rules rather than the Confrontation Clause, which "weakens the importance of these sources."[16] While she noted that history is often important (and sometimes dispositive), she cautioned the Court to be discriminating in its use. Otherwise, the Court "risk[s] undermining the force of historical arguments when they matter most."[17]

"After *Samia*, lower courts will struggle to determine which replacement descriptions ... implicate the Confrontation Clause."

Justice Kagan, joined by Justices Sotomayor and Jackson, dissented, accusing the majority of "elevating form over substance" and permitting "an end-run around [the Court's] precedents."[18] According to Justice Kagan, it "didn't make a lick of difference" that Stillwell didn't refer to Samia by name, because referring to him as "the other person" still directly implicated him and was no different from the blank space or "deleted" references found inadequate in *Gray*.[19] "When a modified confession has an accusatory effect similar to one with names," it should be excluded.[20] Justice Kagan accused the majority of taking aim at *Bruton* itself and wondered if it was the next "precedent on this Court's chopping block," before concluding that a formal overruling of that decision would now be unnecessary: Under *Samia*, "prosecutors can always circumvent *Bruton*'s protections."[21]

Justice Jackson filed a separate dissent in which she took issue with the majority's framing of *Bruton* as an exception to the general rule that a nontestifying codefendant's incriminating confession is admissible, so long as it is accompanied by a limiting instruction. Instead, she argued that the Court's analysis must start from the premise that Stillwell's confession was not admissible at the joint trial because the statement implicated Samia on its face and Samia could not cross-examine the declarant. "[T]he majority fails to acknowledge what is the default rule and what is the exception," she wrote, "[a]nd it thereby sets the stage for considerable erosion of the Confrontation Clause right that *Bruton* protects."[22]

After *Samia*, lower courts will struggle to determine which replacement descriptions for defendants' names in nontestifying codefendants' confessions are sufficiently "direct" to implicate the Confrontation Clause. It seems clear that detailed descriptions such as the "red-haired, bearded, one-eyed man-with-a-

7. *Id.* at 2012.
8. 391 U.S. 123 (1968).
9. *Id.* at 137.
10. 481 U.S. 200 (1987).
11. 523 U.S. 185 (1998).
12. *Id.* at 194-95.
13. *Samia*, 143 S. Ct. at 2014.
14. *Id.* at 2014.
15. *Id.* at 2019 (Barrett, J., concurring) (internal quotations omitted).
16. *Id.* (Barrett, J., concurring).
17. *Id.* at 2020 (Barrett, J., concurring).
18. *Id.* at 2021 (Kagan, J., dissenting).
19. *Id.* at 2023-23 (Kagan, J., dissenting).
20. *Id.* at 2024 (Kagan, J., dissenting) (internal quotations omitted).
21. *Id.* at 2025 (Kagan, J., dissenting).
22. *Id.* at 2026 (Jackson, J., dissenting).
23. *Id.* at 2017 (quoting *Gray*, 532 U.S. at 195).

"Research suggests jurors will be unable to comply with the limiting instructions ..."

limp"[23] directly implicate a defendant, while references to "the other person" do not, but there is a lot of *Gray* area in the middle. Without constitutional protection, defendants will rely on evidentiary rules to try to exclude nontestifying codefendants' redacted confessions. Research suggests jurors will be unable to comply with the limiting instructions and are likely to use the confessions unfairly for the impermissible purpose[24]—factors that courts routinely consider as part of Rule 403 analyses.[25]

VENUE, VICINAGE, AND DOUBLE JEOPARDY

In *Smith v. United States*,[26] the Supreme Court unanimously held that a retrial is constitutionally permissible when an appellate court vacates a conviction because the venue for the original criminal trial was improper.

Timothy Smith was indicted in the Northern District of Florida for, among other charges, theft of trade secrets belonging to a fishing technology company. Before trial, Smith moved to dismiss the indictment for lack of venue, citing the Constitution's Venue Clause[27] and its Vicinage Clause.[28] He argued that trial in the Northern District of Florida was improper—despite the fishing technology company being headquartered there—because he accessed the trade secrets from his home in the Southern District of Alabama and the servers storing the information were located in the Middle District of Florida. The district court denied Smith's motion, and he was convicted after a jury trial. On appeal, the U.S. Court of Appeals for the Eleventh Circuit found that venue was improper, but the appropriate remedy was to vacate the conviction and permit retrial rather than issue a judgment acquitting Smith. The U.S. Supreme Court agreed that retrial was the appropriate remedy.

Justice Alito delivered the opinion for the Court, which began by articulating the background principle that the usual remedy for constitutional errors is a new trial rather than a complete dismissal of the case, and neither text, nor precedent, nor history provided a basis for the Court to create exceptions to that general rule for violations of the Venue and Vicinage Clauses.

The Court made clear that the protections of the Venue and Vicinage Clauses do not function solely to protect criminal defendants from hardship. Instead, retrial after a constitutional violation strikes an appropriate balance between the societal concern for "[e]nsuring that the guilty are punished" and the individual interests of the accused in "obtaining fair readjudication of his guilt."[29] The Court also parsed the common law historical record regarding retrial. Justice Alito noted that English courts permitted retrial when a defendant's conviction was set aside based on improper venue. He uncovered no evidence that the ratification of the Constitution was intended to displace the backdrop availability of retrial and found it "not surprising that American treatises from this period agreed with their English counterparts regarding the availability of retrial."[30]

Because retrial is permissible when a trial terminates "on a basis unrelated to factual guilt or innocence of the offence of which [the defendant] is accused,"[31] the Court rejected Smith's other argument that the Constitution's Double Jeopardy Clause[32] was implicated. When reversal results from a judgment of acquittal based on a violation of the Venue or Vicinage Clauses, it does not resolve "the bottom-line question of 'criminal culpability.'"[33] According to the Court, an appellate reversal for improper venue "is perfectly consistent with the possibility that the defendant is guilty of the charged offense."[34]

Smith did not disturb settled law that when venue is presented to the jury and evaluated as part of a general verdict, an acquittal means that the defendant may not be retried. But what if a jury considers venue as part of a special verdict form—if a court later sets aside that verdict for want of venue, is reprosecution barred under the Double Jeopardy Clause? Under the logic of *Smith*, if a jury found that lack of venue was the only flaw in a prosecution, there seems to be no constitutional basis to bar retrial, unless venue was formally declared an element of the charged offense.

POST-CONVICTION REVIEW

LEGAL INNOCENCE CLAIMS

In line with its current trend toward narrowing the scope of federal habeas review for individuals who have been convicted of crimes,[35] the Supreme Court—in *Jones v. Hendrix*[36]—closed the courthouse doors to incarcerated individuals with legal innocence claims that only became clear after they lost initial motions for post-conviction relief under 28 U.S.C. § 2255.

Marcus DeAngelo Jones was convicted in federal court of being a felon in possession of a firearm and sentenced to 327

24. *See, e.g.*, Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985); *Bruton*, 391 U.S. at 129 & n.4 (discussing research showing that "the limiting instruction actually compounds the jury's difficulty in disregarding the inadmissible hearsay").
25. *See, e.g.*, FED. R. EVID. 403; *see also* Commentary to FED. R. EVID. 403 ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.").
26. 143 S. Ct. 1594 (2023).
27. U.S. CONST. ART. III, § 2, cl. 3 ("The Trial of all Crimes … shall be held in the State where the said Crimes shall have been committed….").
28. U.S. CONST. AMEND. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed….").
29. *Smith*, 143 S. Ct. at 1601 (quoting Burks v. United States, 437 U.S. 1, 15 (1978)).
30. *Id.* at 1607.
31. *Id.* at 1608 (quoting United States v. Scott, 437 U.S. 82, 99 (1978) (alteration in original)).
32. U.S. CONST. AMEND. V.
33. *Smith*, 143 S. Ct. at 1609 (quoting Evans v. Michigan, 568 U.S. 313, 324 n.6 (2013)).
34. *Id.*
35. *See e.g.*, Shinn v. Ramirez, 142 S. Ct. 1718 (2022); Brown v. Davenport, 142 S. Ct. 1510 (2022).
36. 143 S. Ct. 1857 (2023).

months in prison. Years later—after Jones had already filed (and lost) a § 2255 post-conviction motion to set aside the judgment in his case—the Supreme Court decided *Rehaif v. United States*,[37] which held that the government must prove that a person knew of the status that disqualified them from owning a firearm before they can be convicted under the federal felon-in-possession statute. Because the government never proved that Jones knew of his felon status, Jones was now legally innocent of the federal gun offense. But Jones had already filed and lost a § 2255 motion and was therefore barred by the Antiterrorism and Effective Death Penalty Act (AEDPA) from filing another one.

Section 2255 requires individuals who are convicted of federal crimes and who want to file post-conviction challenges to the legality of their convictions or sentences to file motions attacking their sentences in the courts where they were sentenced instead of filing traditional habeas petitions under 28 U.S.C. § 2241. Section 2255(e), which has come to be known as the "savings clause," permits incarcerated individuals to file traditional habeas petitions instead of § 2255 motions only when the § 2255 process is "inadequate or ineffective to test the legality of [the person's] detention."[38] As part of AEDPA, Congress amended § 2255 and included a provision prohibiting petitioners from filing second or successive § 2255 motions, unless they could demonstrate that their successive motion relied on either (a) newly discovered evidence sufficient to establish that no reasonable factfinder would have found them guilty, or (b) "a new rule of *constitutional* law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[39] Because the Court's decision in *Rehaif* was a new interpretation of a federal *statute* and not a new interpretation of *constitutional* law, § 2255(h) did not permit Jones to file his legal innocence claim through a successive motion. So, Jones filed a traditional habeas petition under § 2241, invoking the savings clause of § 2255(e) and arguing that the § 2255 process was inadequate to test the validity of his detention. The district court dismissed Jones's habeas petition for lack of subject-matter jurisdiction, and the U.S. Court of Appeals for the Eighth Circuit affirmed.

Justice Thomas, joined by Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Barrett, agreed with the lower courts that § 2255(e)'s savings clause "does not permit [an incarcerated person] asserting an intervening change in statutory interpretation to circumvent AEDPA's restrictions on second or successive § 2255 motions by filing a § 2241 petition."[40] The majority found that § 2255's savings clause was historically limited to "unusual circumstances in which it is impossible or impracticable for a prisoner to seek relief from the sentencing court,"[41] such as dissolution of the sentencing court.

According to the majority, AEDPA did not change that and only placed additional limits on obtaining relief through § 2255 motions. Relying on the statutory canon of *expressio unius est exclusio alterius*, Justice Thomas wrote that "§ 2255(h)(2)'s authorization of a successive collateral attack based on new rules 'of *constitutional* law' implies that Congress did not authorize successive collateral attacks based on new rules of *nonconstitutional* law."[42] Justice Thomas felt that "[a]ny other reading would make AEPDA curiously self-defeating."[43] Congress would have "accomplished nothing" when it limited the availability of successive petitions if petitioners could "merely reroute[] them from one remedial vehicle and venue to another."[44] In fact, the majority explained, petitioners with "nonconstitutional claims" would have an "end-run around AEDPA"[45] and thus have a "superior remedy"[46] to those with constitutional claims, because they could avoid the procedural restrictions of § 2255 by filing § 2241 petitions instead. This, according to the majority, would be contrary to Congress's desire in enacting AEDPA to limit the availability of habeas relief. As the majority put it, "the best interpretation is the straightforward one:" "Congress has chosen finality over error correction."[47]

"'[A federal statute's] authorization of successive collateral attacks based on new rules 'of *constitutional* law' ... did not authorize [them] based on new rules of *non-constitutional* law.'"

Justices Sotomayor and Kagan issued a joint dissent to express their concern that the majority's decision "yields disturbing results," because an actually innocent person who has been "imprisoned for conduct that Congress did not criminalize, is forever barred . . . from raising that claim, merely because he previously sought post-conviction relief."[48] They would interpret the savings clause as "allowing recourse to habeas when the 'remedy by motion' under § 2255 is 'inadequate or ineffective' compared to the remedy it replaced: an 'application for a writ of habeas corpus.'"[49] Because they felt that the Court has "long held that federal prisoners can collaterally attack their convictions in successive petitions if they can make a colorable showing that they are innocent under an intervening decision of statutory construction," § 2255(h)'s prohibition on successive petitions presents "the kind of mismatch the saving clause was designed to address."[50]

Justice Jackson wrote a separate dissent that challenged the majority's interpretation of § 2255 and expressed concern about "the constitutional implications of the nothing-to-see-here approach the majority takes with respect to the incarceration of legal innocents."[51] First, Justice Jackson objected to the majority's

37. 139 S. Ct. 2191 (2019).
38. *See* 28 U.S.C. § 2255(e).
39. *See* 28 U.S.C. § 2255(h) (emphasis added).
40. *Jones*, 143 S. Ct. at 1864.
41. *Id.* at 1866.
42. *Id.* at 1868 (emphasis in original).
43. *Id.* at 1869.
44. *Id.*
45. *Id.* at 1868.
46. *Id.* at 1869.
47. *Id.*
48. *Id.* at 1877 (Sotomayor & Kagan, JJ., dissenting).
49. *Id.* (Sotomayor & Kagan, JJ., dissenting).
50. *Id.* (Sotomayor & Kagan, JJ., dissenting).
51. *Id.* at 1878 (Jackson, J., dissenting).

"Justice Jackson described *Jones* as one of 'a recent series of troubling AEDPA interpretations' ..."

interpretation of the savings clause, noting that, as a matter of history and intent, the clause operates "to preserve from inadvertent extinguishment postconviction claims that would have been previously cognizable for federal prisoners but cannot be brought by operation of § 2255."[52] Because statutory innocence claims were previously cognizable in successive petitions and § 2255 does not provide individuals with any meaningful opportunity to raise those claims now, the savings clause should be interpreted to reach them unless Congress expressly overrides that presumption through a clear statement. According to Justice Jackson, Congress expressly overrode the savings clause in § 2255(h) when it narrowed the availability of successive petitions for those raising new evidence or new constitutional laws, but it did not override the savings clause with respect to claims of statutory innocence.

Justice Jackson also would not read § 2255(h)'s successive petition barrier as barring Jones's legal innocence claim. Arguing that "the negative-inference canon 'must be applied with great caution,'"[53] Justice Jackson looked to the historical context and purposes of the successive petition barrier and noted that it was designed to prevent claim splitting. The two statutory exceptions to the barrier in § 2255(h) both implicate innocence and involve instances where claims could not have been split because the new evidence or new constitutional rule could not have been presented before. Because the same conditions exist for legal innocence claims, Justice Jackson would not interpret § 2255(h) as prohibiting successive petitions raising legal innocence claims absent a clear statement from Congress. Justice Jackson emphasized that the Court has repeatedly said Congress may only restrict the scope of the Great Writ with a clear statement that it intends to do so, and no such statement exists for legal innocence claims.

Justice Jackson then turned to the canon of constitutional avoidance, finding that "[t]here is a nonfrivolous argument that the Constitution's protection against 'cruel and unusual punishment' prohibits the incarceration of innocent individuals" and that the Suspension Clause may apply to jurisdictional claims that "a person was incarcerated for noncriminal behavior."[54]

Justice Jackson described *Jones* as one of "a recent series of troubling AEDPA interpretations" that "collectively manage[] to transform a statute that Congress designed to provide for a rational and orderly process of federal postconviction judicial review into an aimless and chaotic exercise in futility."[55] She ended by imploring Congress "to step in and fix this problem"[56] to prevent the needless continued incarceration of legally innocent people.

ADEQUATE AND INDEPENDENT STATE GROUNDS

In *Cruz v. Arizona*,[57] the Supreme Court declared Arizona's novel interpretation of a state procedural rule inadequate to block the claim of a person on death row that his due process rights were violated at his sentencing hearing.

John Montenegro Cruz was convicted in Arizona of murdering a police officer and sentenced to death. At trial, Cruz wanted to tell the jury that life without parole was the only available sentence should it reject the death penalty, but the trial court would not permit it. Cruz argued—both at trial and on direct appeal—that this was error in light of the Supreme Court's 1994 decision in *Simmons v. South Carolina*,[58] holding that, when "a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without the possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility . . . .'"[59] The state courts rejected Cruz's *Simmons* argument, believing that Arizona's sentencing and parole scheme did not trigger application of *Simmons*.

In 2016, after Cruz's conviction had become final, the U.S. Supreme Court summarily reversed the Arizona Supreme Court's interpretation of *Simmons* in *Lynch v. Arizona*,[60] holding that *Simmons* applied to Arizona's sentencing regime. Relying on *Lynch*, Cruz filed a motion for state post-conviction relief under Arizona Rule of Criminal Procedure 32.1(g), which permits a defendant to bring a successive petition if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence."[61] The Arizona Supreme Court denied relief after concluding that *Lynch* was not a "significant change in the law," but merely a change in the *application* of law that was clearly established at the time of Cruz's case. The U.S. Supreme Court reversed in a 5-4 decision, holding that the Arizona courts' interpretation of Rule 32.1(g) was so "novel and unfounded that it does not constitute an adequate state procedural ground" upon which to preclude Cruz's due process claim.[62]

Justice Sotomayor, joined by Chief Justice Roberts and Justices Kagan, Kavanaugh, and Jackson, wrote for the majority. Ordinarily, she wrote, a violation of a state procedural rule that is "firmly established and regularly followed"[63] will be adequate to foreclose review of the underlying federal claim. But Cruz's case presented "the rarest of situations," because the Arizona state courts' interpretation of Rule 32.1(g) was "novel and unforeseeable" and lacked "fair or substantial support in prior state law."[64] Before Cruz's case, Arizona had interpreted Rule 32.1(g) as applying to "transformative event[s] . . . [and] clear break[s] from the past."[65] "The archetype of such change," Justice Sotomayor wrote, "occurs when an appellate court overrules previously

52. *Id.* at 1880 (Jackson, J., dissenting).
53. *Id.* at 1886 (Jackson. J., dissenting) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012)).
54. *Id.* at 1897-98 (Jackson, J., dissenting).
55. *Id.* at 1898 (Jackson, J., dissenting).
56. *Id.* at 1899 (Jackson, J., dissenting).
57. 143 S. Ct. 650 (2023).
58. 512 U.S. 154 (1994).
59. *Cruz*, 143 S. Ct. at 655 (quoting Shafer v. South Carolina, 532 U.S. 36, 39 (2001) (alteration in original)).
60. 578 U.S. 613 (2016) (per curiam).
61. Ariz. R. Crim. P. 32.1(g).
62. *Cruz*, 143 S. Ct. at 660.
63. *Id.* at 658 (quoting Lee v. Kemna, 534 U.S. 362, 376 (2002)).
64. *Id.*
65. *Id.*

binding case law."[66] The fact that Arizona refused to apply *Simmons* for more than two decades until *Lynch* meant that it was a "transformative event" that fell within the scope of Rule 32.1(g). Before *Lynch*, Arizona's capital defendants could not inform juries of their parole ineligibility; after *Lynch*, they had a due process right to provide juries with that information whenever future dangerousness was at issue. "It is hard to imagine a clearer break from the past."[67] Arizona was unable to point to any other instances in which the overturning of binding precedent failed to satisfy Rule 32.1(g)'s "significant change in the law" requirement. Nor could the state locate any other decision distinguishing between a "change in the law" and a "change in the *application* of the law." For these reasons, the majority held that Arizona's interpretation of its procedural rule was inadequate to bar consideration of Cruz's federal due process claim.

Justice Barrett, joined by Justices Thomas, Alito, and Gorsuch, dissented, arguing that "the Arizona Supreme Court did not contradict its own settled law. Instead, it confronted a new question and gave an answer reasonably consistent with its precedent."[68] Arizona had never considered when interpreting Rule 32.1(g) how to handle an intervening decision that reaffirmed existing law but fixed a longstanding erroneous interpretation of that law. Citing principles of federalism and comity, the dissenters believed the Arizona Supreme Court's interpretation was a reasonable one. Justice Barrett explained that "[n]ovelty does *not* mean that a rule is inadequate merely because a state court announced it for the first time in the decision under review."[69] Because this was "a question of first impression" in the state, the dissenters would show "the utmost deference to the state court."[70]

The Court's decision entitles Cruz and any other similarly situated individuals on death row in Arizona to new sentencing hearings. It also reminds state courts that novel and unforeseeable interpretations of their state procedural rules will not be sufficient to bar federal consideration of underlying federal claims.

STATUTORY INTERPRETATION

Cross-ideological alliances between justices led the Court to narrow the scope of a number of important criminal statutes this Term. That narrowing came in various forms—from a desire to avoid thorny constitutional questions to commonsense, contextual interpretations designed to avoid government overreach.

FIRST AMENDMENT

The Court addressed two cases involving First Amendment challenges to criminal statutes. In *Counterman v. Colorado*,[71] the Court considered whether—in a state criminal prosecution for issuing true threats—the First Amendment requires proof that the accused had some subjective understanding of the threatening nature of his statements. The majority answered in the affirmative and found that a mental state of recklessness is sufficient to satisfy the Constitution.

"Cross-ideological alliances ... led the Court to narrow the scope of a number of important criminal statutes this Term."

In 2014, Billy Ray Counterman began sending C.W., a local musician, thousands of unwanted Facebook messages asking about her personal life, insinuating that he was physically surveilling her, and telling her he wanted her to die. When C.W. reported the communications, Colorado charged Counterman under a statute making it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress."[72] The state's only evidence at trial were the Facebook messages. Counterman moved to dismiss the charge, arguing that the First Amendment required the State to prove that he was aware of the threatening nature of his communications. Both the trial and appellate courts in Colorado rejected that argument, instead analyzing whether the statements were true threats using an objective reasonable person standard. The U.S Supreme Court reversed.

Justice Kagan, joined by Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson, wrote the majority decision. She began by reaffirming that "threats of violence are outside the bounds of First Amendment protection,"[73] just as statements that incite violence, defamatory statements, and obscene materials fall outside the Amendment's protections. But, she explained, for all of these categories of unprotected speech, a subjective *mens rea* requirement is necessary to provide "breathing room for more valuable speech."[74] An objective, reasonable person standard would cast too wide a net and potentially suppress speech that was not intended as truly threatening, leading to a chilling effect and suppressing protected speech due to a "speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs."[75]

The more difficult question for the Court to resolve was which subjective standard to employ. Recognizing that a subjective intent requirement "comes at a cost," because it "will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought,"[76] the majority settled on a recklessness standard rather than requiring a purposeful or knowing *mens rea*. According to Justice Kagan, the "recklessness standard [] fits with the analysis in [the Court's] defamation decisions . . . And we see no reason to offer greater insulation to threats than to defamation."[77]

Recklessness requires a person to "consciously disregard[] a substantial [and unjustifiable] risk that the conduct will cause

66. *Id.* (citations omitted).
67. *Id.* at 659.
68. *Id.* at 663 (Barrett, J., dissenting).
69. *Id.* (Barrett, J., dissenting) (emphasis in original).
70. *Id.* at 663, 665 (Barrett, J., dissenting).
71. 143 S. Ct. 2106 (2023).
72. COLO. REV. STAT. § 18-3-602(1)(c) (2022).
73. *Counterman*, 143 S. Ct. at 2111.
74. *Id.* at 2115 (internal quotations omitted).
75. *Id.* at 2116.
76. *Id.* at 2115.
77. *Id.* at 2118.

"Helamen Hansen earned nearly $2 million by promising hundreds of noncitizens a path to U.S. citizenship through 'adult adoption' ..."

harm to another."[78] Here, that mental state requires the speaker to be "aware that others could regard his statements as threatening violence and [he] delivers them anyway."[79] For Justice Kagan, "reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm."[80] Such a standard also strikes the proper balance between avoiding the suppression of non-threatening speech and allowing a state to protect its citizens from "the profound harms"[81] that flow from true threats.

Justice Sotomayor concurred in the judgment, joined in part by Justice Gorsuch. They agreed with the majority that some subjective *mens rea* is required in true-threats cases and that a recklessness *mens rea* was sufficient in Counterman's case. But they would have left for another day the more general question of what *mens rea* is required to prosecute true threats generally. Counterman was prosecuted for stalking—a charge that involves a course of conduct that may or may not involving threatening speech. For that reason, Justice Sotomayor wrote that stalking cases require "less First Amendment scrutiny" than the isolated and often political utterances characteristic of other kinds of true threat cases.[82] Noting that "incitement itself is often only a hair's-breadth away from threats"[83] and that incitement requires specific intent, Justice Sotomayor, writing now for herself only, would limit more general true threats prosecutions to intentionally threatening speech as well. Justice Sotomayor was concerned about overcriminalization and selective prosecution of true threats with a lessened *mens rea* of recklessness: "Members of certain groups, including religious and cultural minorities, can … use language that is more susceptible to being misinterpreted by outsiders. And unfortunately yet predictably, racial and cultural stereotypes can also influence whether speech is perceived as dangerous."[84] Given the current political "climate of intense polarization," Justice Sotomayor thought it "dangerous to allow criminal prosecutions for heated words based solely on an amorphous recklessness standard."[85]

Justice Barrett filed a dissenting opinion, in which Justice Thomas joined.[86] They would have held that an objective standard was constitutionally sufficient and affirmed Counterman's conviction. Justice Barrett emphasized that many other categories of unprotected speech may be restricted using an objective standard—including fighting words; false, deceptive, or misleading commercial speech; and obscenity,[87] and she did not want to give true threats "preferential treatment."[88] She also expressed skepticism about whether an objective test would suppress non-threatening speech, accusing the majority of creating "a prophylactic buffer zone to avoid chilling protected speech."[89] She claimed that an objective standard comes with two built-in safeguards. First, the speaker must express an intent to commit an unlawful act of violence; and second, the statement must be deemed threatening by a reasonable listener who is familiar with the entire factual context in which the statement occurs, including the tone, audience, medium, and broader exchange. Thus, the band of true threats is narrow and already includes requirements that weed out protected speech.

Justice Barrett also discussed the broad and sweeping civil implications of the majority's First Amendment ruling. She lamented that the decision will make it more difficult for individuals to (a) obtain restraining orders against harassers, (b) bring civil enforcement actions against those who threaten people obtaining reproductive health or exercising their religion at places of worship, and (c) discipline students who make true threats at school.

The Court's other First Amendment case was *United States v. Hansen*.[90] In that case, the Court upheld a federal statute that makes it unlawful to "encourage" or "induce" a noncitizen to unlawfully come to, enter, or reside in the United States against a First Amendment overbreadth challenge.

Helaman Hansen earned nearly $2 million by promising hundreds of noncitizens a path to U.S. citizenship through "adult adoption," knowing that no such path to citizenship existed. The Government charged Hansen with violating 8 U.S.C. § 1324(a)(1)(A)(iv), which forbids "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of law."[91] He was convicted and moved to dismiss the charges on First Amendment overbreadth grounds. The district court rejected that argument, but the U.S. Court of Appeals for the Ninth Circuit interpreted subsection (iv)'s prohibition against encouraging or inducing a noncitizen to come to the country according to the everyday meaning of encouragement and inducement and therefore held the statute could criminalize large swaths of protected speech and was unconstitutionally overbroad. The Supreme Court, in a 7-2 decision, disagreed.

Justice Barrett, joined by Chief Justice Roberts and Justices Thomas, Alito, Kagan, Gorsuch, and Kavanaugh, interpreted "encourage or induce" to be specialized terms of art that Congress used to incorporate "common-law liability for solicitation

78. *Id.* at 2117 (second brackets in original) (quoting Voisine v. United States, 579 U.S. 686, 691 (2016)).
79. *Id.* (internal quotations omitted).
80. *Id.* at 2118.
81. *Id.* at 2117.
82. *Id.* at 2121 (Sotomayor, J., concurring).
83. *Id.* at 2128 (Sotomayor, J., concurring).
84. *Id.* at 2123 (Sotomayor, J., concurring).
85. *Id.* at 2132 (Sotomayor, J., concurring).
86. Justice Thomas also filed a short solo dissenting opinion in which he took aim at *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), describing that case as a "policy-driven decision[] masquerading as constitutional law," and suggesting that the Court should reconsider its libel rulings. *See id.* at 2132 (Thomas, J., dissenting).
87. Here, she disagreed with the majority's reading of the obscenity cases.
88. *Id.* at 2133 (Barrett, J., dissenting).
89. *Id.* at 2134 (Barrett, J., dissenting).
90. 143 S. Ct. 1932 (2023).
91. 8 U.S.C. § 1324(a)(1)(A)(iv).

and facilitation."[92] Just as the word "attempt" in criminal statutes does not mean simply "try" but rather taking a substantial step toward completing the crime with the requisite *mens rea*, "encourage or induce" means the intentional encouragement of an unlawful act (solicitation) or the giving of assistance to someone who violates the law with the intent to further the commission of the offense (facilitation). As Justice Barrett put it, "[w]hen words have several plausible definitions, context differentiates among them"[93] and the statutory history and language demonstrate that "encourage" and "induce" in subsection (iv)'s prohibition refer only to conduct that falls within the established common-law crimes of solicitation and facilitation—both of which required *purposeful* intent to solicit or facilitate a specific act *known* to violate the law. She emphasized that Congress placed the words "encourage" and "induce" alongside "assist" and "solicit" in the original statute. Although Congress later dropped the "assist" and "solicit" language, Justice Barrett attributed that to statutory streamlining rather than any attempt to change the specialized criminal-law meaning of the terms.

In response to Hansen's argument that subsection (iv) is missing the necessary *mens rea* for solicitation and facilitation, Justice Barrett emphasized that the words chosen by Congress "implicitly incorporate[] the traditional state of mind required for aiding and abetting."[94] After all, when Congress "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," Justice Barrett wrote, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word."[95]

Justice Barrett faulted the Ninth Circuit for "stack[ing] the deck in favor of ordinary meaning" without giving "specialized meaning a fair shake."[96] Finally, she noted that, "even if the Government's reading were not the best one, the interpretation is at least 'fairly possible,'" so the canon of constitutional avoidance also compelled the majority's ultimate disposition.[97]

Justice Thomas joined the majority opinion but also wrote separately to ask the Court to reconsider the overbreadth doctrine in a future case. To Justice Thomas, the doctrine lacks any basis in the text or history of the First Amendment and distorts the judicial role, offering a license for federal courts to act as "roving commissions assigned to pass judgment on the validity of the Nation's laws."[98]

Justice Jackson, joined by Justice Sotomayor, dissented, accusing the majority of departing from ordinary principles of statutory interpretation to save the statute. On its face, Justice Jackson read the statute in accordance with its plain meaning as prohibiting "speech that merely persuades, influences, or inspires a noncitizen to come to, enter, or reside in this country in violation of law."[99] All parties agreed that if the statute reached such conduct, it would be constitutionally overbroad. The dissenters pointed out that the words "solicitation" and "facilitation" do not appear in the statute and accused the majority of attempting to read words back into the statute that Congress explicitly deleted. Noting that there was "no signal from Congress" that it was merely engaged in streamlining or cleaning up the statute, Justice Jackson would "presume differences in language … convey differences in meaning."[100]

"In *Dubin v. United States*, the Court narrowed the range of conduct sufficient to convict someone of aggravated identity theft ..."

Justice Jackson also rebuked the majority for too hastily applying the canon of constitutional avoidance, noting that the canon "does not give the Court license 'to rewrite a statute as it pleases.'"[101] She believed that laypeople would continue to react to the statute's "broad, speech-chilling language"[102] by unnecessarily curbing their conduct—regardless of the Court's narrowed interpretation. That the government had not yet prosecuted aid and religious workers assisting undocumented people did not matter to the dissenters, for there are a number of actions short of criminal prosecutions that can chill protected speech—including recent "watchlists" created by border officials and congressional letters sent to religious organizations that aid undocumented immigrants notifying them of potential congressional investigation.

AGGRAVATED IDENTITY THEFT & AVOIDING VAGUENESS

In *Dubin v. United States*,[103] the Court narrowed the range of conduct sufficient to convict someone of aggravated identity theft under 18 U.S.C. § 1028A(a)(1) by holding that a person only "uses" another person's identity "in relation to" a predicate offense when the "use is at the crux of what makes the conduct criminal;" it cannot merely be "an ancillary feature of a billing method."[104]

Under § 1028A(a)(1), a person who, "during and in relation to any [predicate offense], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" commits aggravated identity theft and is subject to a mandatory minimum sentence of two years in prison in addition to the punishment for the predicate offense. At issue in *Dubin* was the meaning of "use" and "in relation to."

David Dubin submitted a false bill to Medicaid relating to a psychological exam for a patient. The exam was given, but the bill falsely provided a date that allowed for the exam to qualify for payment and an overstatement of the qualifications of the employee who performed the testing. The "means of identifica-

92. *Hansen*, 143 S. Ct. at 1942.
93. *Id.*
94. *Id.* at 1945.
95. *Id.* at 1942 (quoting Morissette v. United States, 342 U.S. 246, 263 (1952)).
96. *Id.*
97. *Id.* at 1946.
98. *Id.* at 1949 (Thomas, J., concurring) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 610–11 (1973)).
99. *Id.* at 1953 (Jackson, J., dissenting).
100. *Id.* at 1958 (Jackson, J., dissenting).
101. *Id.* at 1961 (Jackson, J., dissenting).
102. *Id.*
103. 143 S. Ct. 1557 (2023).
104. *Id.* at 1563.

"[T]he Supreme Court continued to express concern about the breadth of criminal liability under the federal mail and wire fraud statutes..."

tion" in the false bill were the patient's name and Medicaid ID number. The Government charged Dubin under two statutes: (1) healthcare fraud for the false bill under 18 U.S.C. § 1347, a charge Dubin did not dispute; and (2) aggravated identity theft under § 1028A(a)(1) because the false bill included the patient's name and Medicaid ID number. Dubin disputed the § 1028A(a)(1) charge, arguing that the patient's identifying information was incidental to the underlying fraud scheme and not "without lawful authority," as required by the statute, because the patient authorized the use of his information to submit bills to Medicaid. The Government argued that Dubin exceeded his lawful authority when he "used" a means of the identification of the patient "in relation to" committing healthcare fraud. The district court denied Dubin's posttrial challenge to his aggravated identity theft conviction, and the U.S. Court of Appeals for the Fifth Circuit affirmed.

Choosing between two competing readings, "one limited and one near limitless,"[105] Justice Sotomayor authored the majority opinion in favor of Dubin. She was joined by Chief Justice Roberts and Justices Thomas, Alito, Kagan, Kavanaugh, Barrett, and Jackson. To satisfy the statute's requirements, the majority wrote, a person "uses" another person's means of identification "in relation to" a predicate offense when the use is "at the crux" of what makes the conduct criminal, rather than an ancillary feature. The Court reasoned that the crux of Dubin's overbilling was a misrepresentation about the qualifications of his employee, "while the patient's means of identification was an ancillary part of the Medicaid billing process."[106] To arrive at this conclusion, Justice Sotomayor noted that the terms "uses" and "in relation to" are indeterminate, requiring the words to be read in context, which commanded a narrow reading centered on the ordinary understanding of identity theft. To Justice Sotomayor, that ordinary understanding refers to the "fraudulent appropriation and use of another person's identifying data or documents."[107] Such an understanding is bolstered by looking at the accompanying verbs that Congress placed in the statute. The terms "transfers" and "possesses" are "most naturally read in the context of § 1028A(a)(1) to connote theft."[108] And the "*noscitur a sociis* [canon of statutory construction] indicates that 'uses' should be read in a similar manner to its companions."[109] Congress's use of this trio of verbs captures various aspects of "classic identity theft."[110] Justice Sotomayor also explained how the function of the statute reinforces this reading: § 1028A(a)(1) creates an enhancement that is targeted at situations where the means of identification plays a key role, and is thus at the crux of the underlying criminality. Being at the crux, however, does not reduce the requirement to a but-for cause. The use of the identity must be "a key mover in the criminality."[111] And with fraud or deceit crimes, like here, the means of identification must be used in a manner that was fraudulent or deceptive. "Such fraud or deceit going to identity can often be succinctly summarized as going to 'who' is involved."[112]

Ultimately, the Court deployed a rule-of-lenity-like argument, explaining that it traditionally exercises restraint when interpreting criminal statutes "out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world"[113] about what the law criminalizes. The opinion also emphasized the practical, nonsensical implications of a broad interpretation that would mandate an additional two years in prison for a "lawyer who rounds up her hours from 2.9 to 3 and bills her client electronically" or a "waiter who serves flank steak but charges for filet mignon" using a customer's credit card.[114]

In his solo concurrence, Justice Gorsuch agreed with the majority's narrowing of the statutory text. But he would have gone further and held that § 1028A(a)(1) is void for vagueness under the Due Process Clause, because it does not provide ordinary people with fair notice of the conduct that it punishes. According to Justice Gorsuch, the Court's "crux" test seemingly offers no sure way through a "blizzard of . . . hypotheticals."[115] It is not possible, he thinks, to provide sufficient guidance as to the appropriate standard of the *causal relationship* between the use of the identification and the success of the underlying offense. It remains to be seen if lower courts interpreting the majority's "crux" test will be able to find a boundary that "separates conduct that gives rise to liability from conduct that does not."[116]

WIRE FRAUD

In a pair of cases, the Supreme Court continued to express concern about the breadth of criminal liability under the federal mail and wire fraud statutes[117] this Term, further narrowing federal prosecutors' efforts to pursue federal charges to combat public corruption in state government. The prosecutions in *Percoco v. United States* and *Ciminelli v. United States* both targeted fraudulent activities surrounding former New York Governor Andrew Cuomo's administration. And both cases involved aspects of the federal wire fraud statute—18 U.S.C. § 1343—which criminalizes "devis[ing] or intending to devise any scheme or artifice to defraud, or [] obtaining money or property by means of false or fraudulent pretenses, representations, or promises" through wire communications.

Percoco v. United States[118] held that the U.S. Court of Appeals

105. *Id.* at 1565.
106. *Id.* at 1563.
107. *Id.* at 1568.
108. *Id.* at 1569.
109. *Id.* at 1570.
110. *Id.*
111. *Id.* at 1568.
112. *Id.* at 1573.
113. *Id.* at 1572 (quoting Marinello v. United States, 138 S. Ct. 1101, 1106 (2018)).
114. *Id.* at 1563.
115. *Id.* at 1576 (Gorsuch, J., concurring) (citation omitted).
116. *Id.* at 1577 (Gorsuch, J., concurring).
117. *Accord* Kelly v. United States, 140 S. Ct. 1565 (2020); McDonnell v. United States, 579 U.S. 550 (2016).
118. 143 S. Ct. 1130 (2023).

for the Second Circuit's interpretation of 18 U.S.C. § 1346—which defines "scheme or artifice" in the wire fraud statute as including "a scheme or artifice to deprive another of the intangible right of honest services" —was too vague as applied to private citizens.

Joseph Percoco was charged with conspiring to commit honest-services wire fraud[119] during a period of time that included an eight-month interval between two stints as Executive Deputy Secretary to then-Governor Andrew Cuomo. During that brief interval—when Percoco had resigned to manage the Governor's reelection campaign—a New York real estate developer paid Percoco $35,000 for his help in avoiding a "Labor Peace Agreement" with local unions. Days before returning to his government job, Percoco called a senior official and urged him to let the development go forward without the labor-peace requirement. One day later, state officials reversed their decision and informed the developer that the agreement was not necessary.

When the United States brought conspiracy to commit honest-services wire fraud charges against him, Percoco sought to dismiss the charges, arguing that a private citizen cannot be convicted of depriving the public of its right to honest services. The district court denied Percoco's motion and instructed the jury that: "Percoco could be found to have had a duty to provide honest services to the public during the time when he was not serving as a public official if the jury concluded, first, that 'he dominated and controlled any governmental business' and, second, that 'people working in the government actually relied on him because of a special relationship he had with the government.'"[120] The jury convicted Percoco, and he was sentenced to six years in prison. The Second Circuit affirmed.

In an opinion by Justice Alito that was joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson, the Court held that the Second Circuit's interpretation of the honest-service wire fraud statute was "too vague."[121] Justice Alito reasoned that the lower court's jury instruction could result in the conviction of anyone whose "clout exceeds some ill-defined threshold" and thus sweeps in "particularly well-connected and effective lobbyists."[122] According to the Court, the jury instructions failed to "define 'the intangible right of honest services' 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,'" causing a risk of "arbitrary and discriminatory enforcement."[123] Importantly, the Court declined to adopt the *per se* rule that Percoco wanted—namely, that a person nominally outside public employment can *never* have the required fiduciary duty to the public. But, having found that the jury instructions in this case were not sufficient, the Court did not go further and did not define when a private person owes a fiduciary duty to the general public. Without much guidance, lower courts will continue to struggle with defining when a private person has sufficient government ties to trigger a fiduciary duty to provide honest services to the public.

Justice Gorsuch, joined by Justice Thomas, wrote a separate concurrence. In their view, "no set of instructions could have made things any better," because "the phrase 'honest-services fraud' is unworkably vague."[124] They would have declared the statute unconstitutionally vague and returned it to Congress to write a clearer federal law.

"[T]he Court held that the Second Circuit's interpretation of the honest-service wire fraud statute was 'too vague.'"

In *Ciminelli v. United States*,[125] the Court again rebuked the Second Circuit, rejecting its interpretation of "property" in the wire fraud statute as including "potentially valuable economic information necessary to make discretionary economic decisions."[126]

Louis Ciminelli, the owner of a Buffalo construction firm LPCiminelli, paid a lobbyist with deep ties to the Cuomo Administration to help LPCiminelli obtain state-funded jobs. One such job was part of the "Buffalo Billion" initiative, which aimed to invest $1 billion in projects in upstate New York. The scheme involved drafting a set of requests for proposal (RFPs) that treated unique aspects of LPCiminelli as qualifications for preferred-developer status. Those RFPs effectively guaranteed that LPCiminelli would be (and was) selected as a preferred developer for the $750 million project. Ciminelli was indicted on 18 counts, including wire fraud and conspiracy to commit wire fraud. The Government relied on the Second Circuit's "right to control theory," under which it could establish wire fraud by showing that a defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions. The Second Circuit's theory thus extends the property interest to include "the interest of a victim in controlling his or her own assets."[127] The jury convicted Ciminelli, and he was sentenced to 28 months in prison followed by 2 years of supervised release. The Second Circuit affirmed based on its longstanding right-to-control precedents.

Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson joined. The Court reaffirmed its interpretation of the federal wire fraud statute as protecting only historically rooted property rights and noted that the statute does not vest a general power in the Government to enforce its view of integrity in broad swaths of state and local policymaking. "The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest."[128] At oral argument, the Government even seemed to concede that the "right to control" theory was "unmoored from the federal fraud statutes' text."[129] The Court noted that Congress has only acted once to preserve an intangible property right within the wire fraud statutes—the intangible right of honest services.[130]

119. 18 U.S.C. §§ 1343, 1346, 1349.
120. *Percoco*, 143 S. Ct. at 1135.
121. *Id.* at 1138.
122. *Id.*
123. *Id.*
124. *Id.* at 1139-40 (Gorsuch, J., concurring).
125. 143 S. Ct. 1121 (2023).
126. *Id.* at 1125.
127. *Id.* at 1127 (quoting United States v. Lebedev, 943 F.3d 40, 48 (2d Cir. 2019)).
128. *Id.* at 1128.
129. *Id.*
130. *See* 18 U.S.C. § 1346.

"[F]ederal prosecutors should not use the property fraud statutes to set standards of 'good government for state and local officials'..."

But "'Congress's reverberating silence about other [such] intangible interests' forecloses the expansion of the wire fraud statute to cover the intangible right to control."[131]

The majority also invoked concerns about federalism and overcriminalization, finding that the "right to control" theory criminalizes traditionally civil matters and federalizes traditionally state matters. "Because the theory treats mere information as the protected interest," Justice Thomas wrote, "almost any deceptive act could be criminal."[132] Moreover, federal prosecutors should not use the property fraud statutes to set standards of "good government for state and local officials" or to "regulat[e] the ethics (or lack thereof) of state employees and contractors."[133]

Justice Alito, writing for himself, concurred in the judgment. He emphasized the narrowness of the majority opinion, noting that Ciminelli may raise other procedural issues below and that the Government could retry Ciminelli on a fraud theory rooted in a traditional form of property.

SENTENCING

In *Lora v. United States*,[134] the Court unanimously held that the requirement of consecutive sentences in 18 U.S.C. § 924(c)—which provides enhanced penalties for individuals who use, carry, or possess firearms in furtherance of crimes of violence or drug trafficking-crimes—does not also apply to 18 U.S.C. § 924(j)'s penalty enhancements for individuals who cause death while violating § 924(c).

After Efrain Lora ordered the assassination of a rival New York drug trafficker and acted as a scout for the murder, a jury convicted Lora of aiding and abetting the killing in violation of § 924(j)(1), which penalizes a "person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm," where "the killing is a murder."[135] Lora was also convicted of conspiracy to distribute drugs.[136] At sentencing, Lora asked the district court to exercise its usual discretion to run the sentences concurrently; the district court declined, reasoning that § 924(c)(1)(D)(ii)'s bar on concurrent sentences governed § 924(j) sentences, such that both of Lora's sentences had to run consecutively. The district court sentenced Lora to 25 years on the conspiracy count, five consecutive years on the § 924(j) count, and five years of supervised release. The U.S. Court of Appeals for the Second Circuit affirmed.

Justice Jackson, writing for a unanimous Court, reversed, noting that § 924(c) itself limited the scope of its consecutive imprisonment requirement to only a "term of imprisonment imposed on a person *under this subsection*."[137] "To state the obvious," Justice Jackson wrote, "subsection (j) is not located within subsection (c). Nor does subsection (j) call for imposing any sentence from subsection (c)."[138] According to the Court, Congress incorporated in "plain terms"[139] the essential *elements* of a conviction under subsection (c) when it wrote that subsection (j) only applies when a person causes death in the course of violating subsection (c). But that does not mean that Congress incorporated the sentencing provisions of subsection (c). Subsection (j) has its own sentencing requirements, and a sentencing court "cannot follow both subsection (c) and subsection (j) as written. Combining the two subsections would set them on a collision course; indeed, in some cases, the maximum sentence would be lower than the minimum sentence."[140]

In addition to relying on text and structure, Justice Jackson also explained why Congress might have adopted a "different approach to punishment"[141] in subsections (c) and (j). Subsection (c) was adopted first and is full of mandatory penalties—mandatory minimums and a consecutive sentence requirement. Subsection (j), by contrast, came later at a time when Congress seemed to "favor sentencing flexibility over mandatory penalties,"[142] so it does not have mandatory minimums and gives judges the "flexibility to choose between concurrent and consecutive sentences."[143]

STATUTE OF LIMITATIONS – SECTION 1983

In *Reed v. Goertz*,[144] the Supreme Court held that, when a prisoner pursues state post-conviction DNA testing through a state-provided process, the statute of limitations for a procedural due process challenge to the state-provided process under 42 U.S.C. § 1983 begins to run "when the state litigation ends," including any appeals to the state's highest court.[145]

Rodney Reed was convicted and sentenced to death for the rape and murder of Stacey Stites. Reed claimed he was innocent and filed a motion in state court under Texas's post-conviction DNA testing law to test evidence to help identify the perpetrator. The state trial court denied Reed's motion, and the Texas Court of Criminal appeals affirmed. Reed sued in federal court under 42 U.S.C. § 1983, claiming that Texas's post-conviction DNA testing law failed to provide procedural due process. The district court dismissed the complaint and the U.S. Court of Appeals for the Fifth Circuit affirmed on the ground that Reed's § 1983 suit was filed after the applicable two-year statute of limitations period had run. The U.S. Supreme Court took the case to address whether the statute of limitations period began to run when the state trial court denied DNA testing (which would make Reed's §

131. *Ciminelli*, 143 S. Ct. at 1128 (citation omitted).
132. *Id.*
133. *Id.* (citing *Kelly*, 140 S. Ct. at 1565).
134. 143 S. Ct. 1713 (2023).
135. 18 U.S.C. § 924(j)(1).
136. 21 U.S.C. §§ 841, 846.
137. *Lora*, 143 S. Ct. at 1717 (citing § 924(c)(1)(D)(ii)) (emphasis in original).
138. *Id.*
139. *Id.*
140. *Id.* at 1718.
141. *Id.* at 1719.
142. *Id.*
143. *Id.*
144. 143 S. Ct. 955 (2023).
145. *Id.* at 961.

1983 claim untimely) or when the state appellate process concluded (which would make it timely).

Justice Kavanaugh wrote a short opinion for the Court, which was joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Barrett, and Jackson. He explained that the statute of limitations for a § 1983 action begins to run when a plaintiff has a "complete and present cause of action"[146] based on the specific constitutional right. For a procedural due process claim, the claim is not complete when the deprivation occurs, but only when the state fails to provide due process. That failure occurred, Justice Kavanaugh found, when the Texas Court of Criminal Appeals denied Reed's motion for rehearing on his request for DNA testing. That triggering date was necessary, according to the majority, to allow the state appellate court to first address the claim, which could render the federal suit unnecessary and prevent "senseless duplication"[147] of lawsuits in state and federal court. Such parallel litigation would "run counter to core principles of federalism, comity, consistency, and judicial economy."[148] Reed's § 1983 motion was timely.

Justice Thomas dissented, arguing that, even if Reed had timely filed his federal suit, the district court did not have subject-matter jurisdiction over the state-court judgment of the Texas Court of Criminal Appeals. In his view, Reed lacked standing and his § 1983 claim was an improper appeal in disguise. Justice Alito also dissented, joined by Justice Gorsuch. While he conceded that there is "room for debate about exactly when Reed's DNA testing claim accrued,"[149] he was unconvinced that the limitations period begins to run when a state's highest court refuses to *rehear* and *overturn* its interpretation of the state DNA testing statute. He would start the statute of limitations either (a) when the highest state court issued its original decision interpreting the state testing statute, or (b) when the district attorney initially refused Reed's testing request. Either way, Reed would be untimely.

FOREIGN SOVEREIGN IMMUNITIES ACT

In *Turkiye Halk Bankasi A.S. v. United States*,[150] the Supreme Court held that the Federal Sovereign Immunities Act of 1976 (FSIA)[151] "does not grant immunity to foreign states or their instrumentalities in criminal proceedings."[152]

Federal prosecutors in the Southern District of New York indicted Halkbank—a bank owned by the Republic of Turkey—on charges that it participated in a multi-year scheme to launder billions of dollars from the sale of Iranian oil and natural gas through the global financial system—including the U.S. financial system—in violation of U.S. sanctions. Halkbank filed a motion to dismiss claiming that the federal court had no jurisdiction over it and that it was immune from suit under FSIA. The U.S. Court of Appeals for the Second Circuit affirmed, holding that that the district court had jurisdiction under 18 U.S.C. § 3231, and that, even if FSIA provided immunity in criminal proceedings, Halkbank's charged conduct fell within the statute's exception for commercial activities.

"[T]he Federal Sovereign Immunities Act ... 'does not grant immunity to foreign states or their instrumentalities in criminal proceedings.'"

Justice Kavanaugh wrote for the Court majority, joined by Chief Justice Roberts and Justices Thomas, Sotomayor, Kagan, Barrett, and Jackson. First, the Court held that § 3231, which grants federal district courts the power to hear all criminal cases involving "offenses against the laws of the United States,"[153] "plainly encompasses Halkbank's alleged criminal offenses."[154] The Court refused to implicitly exclude foreign sovereigns from the sweeping language of the statute. Next, the Court held that FSIA is a "comprehensive scheme governing claims of immunity in *civil* actions against foreign states and their instrumentalities."[155] FSIA, thus, does not shield Halkbank from *criminal* prosecutions. The Court looked to the language of the statute: FSIA refers to "civil action[s]" and outlines quintessentially civil litigation procedures, such as service of process, removal, counterclaims, default judgments, and punitive damages. Moreover, FSIA is housed in Title 28, which concerns civil procedure, not Title 18, which addresses criminal law and procedure. The statute is also silent with respect to criminal proceedings, and that, coupled with the presence of foreign criminal investigations at the time of FSIA's enactment, was sufficient for Justice Kavanaugh to decline to extend FSIA's immunity to Halkbank's criminal prosecution. The Court did not address whether Halkbank could assert a common law immunity from suit as an instrumentality of a foreign sovereign. That issue—which had not been fully considered below—was remanded to the lower court.

Justice Gorsuch, joined by Justice Alito, authored an opinion concurring in part and dissenting in part. He agreed that the federal court had jurisdiction over the prosecution of foreign sovereigns, but he parted ways with the majority about FSIA. Focusing on a section of FSIA codified at 28 U.S.C. § 1604, which says a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter," Justice Gorsuch would hold that FSIA applies to both civil and criminal cases. In his view, the later references throughout the statute to civil cases "shows that when Congress wanted to limit its attention to civil suits, it knew how to do so."[156] Nevertheless, Justice Gorsuch would allow the criminal case against Halkbank to proceed for the same reason the Second Circuit did: that the Bank's alleged conduct falls within the commercial activity exception to FSIA. Finally, Justice Gorsuch criticized the majority's decision to remand this case, because, in his view, forcing the lower courts to address the scope of a common law immunity claim "overcomplicates the law for no good reason."[157]

146. *Id.*
147. *Id.* at 962.
148. *Id.*
149. *Id.* at 973 (Alito, J., dissenting).
150. 143 S. Ct. 940 (2023).
151. 28 U.S.C. §§ 1330, 1602 *et seq.*
152. *Turkiye Halk Bankasi A.S.*, 143 S. Ct. at 947.
153. 18 U.S.C. § 3231.
155. *Turkiye Halk Bankasi A.S.*, 143 S. Ct. at 944.
155. *Id.* at 947 (emphasis added).
156. *Id.* at 953 (Gorsuch, J., concurring in part and dissenting in part).
157. *Id.* at 955 (Gorsuch, J., concurring in part and dissenting in part).

"Individuals can obstruct the process of justice even when an investigation or proceeding is not pending."

It remains to be seen what the contours of any common law immunity will look like. Many of the questions Justice Gorsuch raised will have to be addressed on remand including to what extent the federal courts should defer to the Executive Branch's judgment on whether to grant immunity to a foreign sovereign and whether the federal courts should consider customary international law to define the scope of any immunity.

AGGRAVATED FELONIES & OBSTRUCTION OF JUSTICE

In *Pugin v. Garland*,[158] the Court held that a federal or state offense can be one "relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S) even when it does not involve a pending investigation or proceeding. As a result, noncitizens who are convicted of such offenses are removable from the United States, because offenses "relating to obstruction of justice" are aggravated felonies.

Fernando Cordero-Garcia, a Mexican citizen, was convicted in California of dissuading a witness from reporting a crime, and Jean Francois Pugin, a Mauritius citizen, was convicted in Virginia of being an accessory after the fact to a felony. The U.S. claimed they were both removable, because they had been convicted of aggravated felonies—namely, offenses "relating to obstruction of justice." In both cases, an immigration judge and the Board of Immigration Appeals ruled for the United States. Both Cordero-Garcia and Pugin petitioned for review in their respective federal appellate courts. In Cordero-Garcia's case, the Ninth Circuit concluded that dissuading a witness from reporting a crime could not relate to obstruction of justice, because the state offense did not require a pending investigation or proceeding. In Pugin's case, the Fourth Circuit disagreed and held that a state offense can relate to obstruction of justice even if no investigation or proceeding was pending. The U.S. Supreme Court agreed with the Fourth Circuit.

Justice Kavanaugh, joined by Chief Justice Roberts and Justices Thomas, Alito, Barrett, and Jackson, examined dictionaries, federal laws, state laws, the Model Penal Code, and common sense to conclude that "[i]ndividuals can obstruct the process of justice even when an investigation or proceeding is not pending."[159] According to the majority, dictionaries describe obstruction of justice generally as including "influencing, threatening, harming or impeding" witnesses or willfully impairing "the machinery of the civil or criminal law."[160] They don't have any requirement that an investigation or proceeding be pending. The majority also noted that the chapter of the U.S. Criminal Code entitled "Obstruction of Justice" also included offenses like witness tampering and destroying, altering, or falsifying records—neither of which require a pending investigation. Justice Kavanaugh pointed to state obstruction offenses at the time of § 1101(a)(43)(S)'s enactment that similarly had no such requirement, and noted that the Model Penal Code never required a pending investigation or proceeding for obstruction. In the words of the majority (quoting the Solicitor General), "one can obstruct the wheels of justice even before the wheels have begun to move; indeed, obstruction of justice is often 'most effective' when it prevents 'an investigation or proceeding from commencing in the first place.'"[161]

Justice Jackson concurred to emphasize that Congress's use of the phrase "offense relating to obstruction of justice" in § 1101(a)(43)(S) most likely referenced the offenses in Chapter 73 of Title 18 of the U.S. Code under the heading "Obstruction of Justice," and not all of those offenses have a pending-proceeding requirement. Because the parties did not "fully ventilate[]" arguments that Chapter 73 might substantively define the entire "universe of offenses that 'relat[e] to obstruction of justice,'" she would consider that question in a future case.[162]

Justice Sotomayor, joined by Justices Gorsuch and Kagan, dissented, criticizing the majority for failing to adhere to the categorical approach dictated by precedent. Under the categorical approach, the Court compares the elements of the state statutes under which these individuals were convicted to the "basic elements" of "generic" obstruction of justice as it was commonly understood when § 1101(a)(43)(S) was enacted. According to the dissenters, "obstruction of justice" is a term of art that historically required a pending investigation or proceeding, and the generic form of obstruction of justice incorporates that requirement. The dissent analyzed the same dictionary definitions as requiring "interference" which includes the "act of meddling in or hampering an activity or process" and interpreted the word "impede" as meaning "to interfere with or get in the way of the progress of" something or someone.[163] As for Chapter 73, the dissenters emphasized that its six main provisions all require a pending proceeding or investigation and accused the majority of relying on "outlier" provisions when it should have been defining the "heartland" of the obstruction offense.[164] The dissenters also noted that the majority of the states that had obstruction of justice offenses when § 1101(a)(43)(S) was enacted required a pending investigation or proceeding. And the dissenters described the Model Penal Code as "fundamentally a 'reform movemen[t]'" that "eschews any talk of 'obstruction of justice'" and is therefore unhelpful.[165] Justice Sotomayor, now joined only by Justice Gorsuch, also noted that the Court must "resolve[] doubts in favor of the non-U.S. citizen in keeping with the general rule that ambiguities in penal statutes should be construed against the government."[166]

According to the dissenters, the Court's holding was limited to finding that generic obstruction of justice includes one offense—dissuading a witness from reporting a crime—that does not require a pending investigation or proceeding, and "difficult questions" remain "about what [other] offenses qualify as categorical matches for § 1101(a)(43)(S)."[167]

158. 143 S. Ct. 1833 (2023).
159. *Id.* at 1840.
160. *Id.* at 1839.
161. *Id.* at 1840–41.
162. *Id.* at 1844 (Jackson, J., concurring).
163. *Id.* at 1848 (Sotomayor, J., dissenting).
164. *Id.* at 1850 (Sotomayor, J., dissenting).
165. *Id.* at 1853 (Sotomayor, J., dissenting).
166. *Id.* at 1855 (Sotomayor, J., dissenting).
167. *Id.* at 1856 (Sotomayor, J., dissenting).

QUALIFIED IMMUNITY & EXCESSIVE FORCE

The Court continued to duck calls to reexamine qualified immunity despite some justices repeatedly questioning the doctrine's constitutional, textual, and historical bases and applications.[168] Twice this term Justice Sotomayor dissented from the Court's refusal to grant certiorari in cases resting on qualified immunity for state officials. In *N.S. v. Kansas City Board of Police Commissioners*,[169] a case involving an officer shooting an unarmed Black man who was surrendering in the back, Justice Sotomayor argued that the U.S. Court of Appeals for the Eighth Circuit failed to draw factual inferences in favor of the petitioner and improperly "dodged" the Supreme Court's binding precedent in *Tennessee v. Garner*[170] "by identifying immaterial differences between the facts of cases."[171] These two mistakes, which she described as "the calling card of many courts' qualified immunity jurisprudence," have resulted in "an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations" and are reasons why the Court "should reexamine its judge-made doctrine of qualified immunity."[172]

Lombardo v. City of St. Louis[173] was another case from the Eighth Circuit involving the death of a person in police custody. Nicholas Gilbert died after six officers held him face down on the ground in handcuffs and leg irons while one of them pressed down on his back for 15 minutes until he stopped breathing. When his parents sued alleging excessive force, the federal district court rejected the claim, noting that the officers did not violate a clearly established right. The Eighth Circuit affirmed, finding that no constitutional right had been violated. The Supreme Court summarily vacated that decision and remanded the case for the lower courts to consider important facts and circumstances that "the Eighth Circuit improperly 'failed to analyze' or 'characterized' 'as insignificant.'"[174] On remand, the Eighth Circuit found that any right Gilbert had was not "clearly established." Although Justice Jackson would have granted the second petition for certiorari, the majority of the Court voted not to take the case. Justice Sotomayor dissented, once again calling on the Court to "reexamine the doctrine of qualified immunity," noting that "[w]hen taken too far, as here, the [clearly established prong of the qualified immunity analysis] allows lower courts to split hairs in distinguishing facts or otherwise defining clearly established law at a low level of generality, which impairs the ability of constitutional torts to deter and remedy official misconduct."[175] Additionally, qualified immunity "inhibits the development of the law,"[176] because courts may grant qualified immunity without ever resolving the merits of a plaintiff's claim. "Important constitutional questions go unanswered precisely because those questions are yet unanswered."[177]

"[T]he Court continued to duck calls to reexamine qualified immunity despite some justices repeatedly questioning the doctrine's constitutional, textual, and historical bases..."

CAPITAL PUNISHMENT

Although capital cases continued to bubble up on the emergency docket, the Court declined to decide any death penalty issues this Term. Justices Jackson and Sotomayor, sometimes joined by Justice Kagan, penned multiple dissents to disagree with that choice.

First, in *Chinn v. Shoop*,[178] the Court declined to take up Davel Chinn's claim that Ohio suppressed exculpatory evidence in violation of *Brady v. Maryland*[179] by withholding evidence that its key witness had an intellectual disability that affected his ability to remember and testify accurately. Justice Jackson, joined by Justice Sotomayor, dissented to emphasize the "relatively low burden" that is "materiality" under *Brady*, a "qualitatively lesser standard" than "reasonable probability" and "preponderance of the evidence."[180] She would have summarily reversed Chinn's conviction, because the Sixth Circuit inappropriately applied a "more-probable-than-not standard."[181]

In *Johnson v. Missouri*,[182] the Court declined to stay the execution of Kevin Johnson even though a Missouri prosecutor had filed a motion to vacate Johnson's conviction. Justice Jackson, joined again by Justice Sotomayor, dissented from the denial of a stay, arguing that Missouri had violated its own post-conviction review procedures by denying Johnson a statutorily required hearing on the prosecutor's motion. Because "a State cannot provide a process for postconviction review . . . and then arbitrarily refuse to follow the prescribed procedures,"[183] Justice Jackson thought it likely that Johnson would have succeeded on the merits of his due process claim. She also noted that there was substantial evidence of racial bias and racially insensitive remarks by the prosecutor, but those claims were also not developed because no hearing was granted.

In *Barber v. Ivey*,[184] the Court declined to stay the execution of James Barber and refused to grant his petition for a writ of certiorari. Barber's core contention was that his execution by lethal

168. *See e.g.*, Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (Thomas, J., statement respecting the denial of certiorari); Baxter v. Bracey, 140 S. Ct. 1862 (2020) (Thomas J., dissenting from the denial of certiorari); Kisela v. Hughes, 138 S. Ct. 1148 (2018) (Sotomayor, J., dissenting); Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (Thomas, J., concurring in part and concurring in the judgment).
169. 143 S. Ct. 2422 (2023).
170. 471 U.S. 1 (1985).
171. *N.S.*, 143 S. Ct. at 2424 (Sotomayor, J., dissenting from the denial of certiorari).
172. *Id.*
173. 143 S. Ct. 2419 (2023).
174. *Id.* at 2420 (Sotomayor, J., dissenting from the denial of certiorari).
175. *Id.* at 2421(Sotomayor, J., dissenting from the denial of certiorari).
176. *Id.* (Sotomayor, J., dissenting from the denial of certiorari).
177. *Id.* (Sotomayor, J., dissenting from the denial of certiorari).
178. 143 S. Ct. 28 (2022).
179. 373 U.S. 83 (1963).
180. *Chinn,* 148 S. Ct. at 28 (Jackson, J., dissenting from the denial of certiorari).
181. *Id.* (Jackson, J., dissenting from the denial of certiorari).
182. 143 S. Ct. 417 (2022).
183. *Id.* at 418 (Jackson, J., dissenting from denial of application for stay).
184. 143 S. Ct. 2545 (2023).

injection would constitute cruel and unusual punishment under the Eighth Amendment. He made this claim in the wake of three botched executions in Alabama in 2022, resulting in Governor Kay Ivey ordering a moratorium on executions by lethal injection, as well as a review of the state's lethal injection protocol. According to Barber, the review was perfunctory, internal, and led to no meaningful changes. Because he had a history of medical personnel being unable to access his veins, he argued that he faced a substantial risk of serious harm at the hands of the state and should be executed by nitrogen gas instead. Justice Sotomayor dissented from the decision to allow Barber's execution to proceed; she was joined by Justices Kagan and Jackson. Her dissent focused both on the merits of Barber's claim, as well as the way in which the Court routinely handles applications for a stay of execution. On the merits, Justice Sotomayor claimed that the "Eighth Amendment demands more than the State's word that this time will be different."[185] Any changes recommended in the state's one-and-a-half-page letter to Governor Ivey did "not address the unnecessary pain [] prisoners may experience."[186] On the Court's procedure, she criticized the regular practice of lifting stays of execution by "issu[ing] unreasoned orders vacating long, well-reasoned stays issued by" lower courts.[187] If the Court continues this practice, Justice Sotomayor warned of stymied Eighth Amendment law and serious constitutional questions about execution practices that risk never being answered.

Less than two weeks later, in *Johnson v. Vandergriff*,[188] the Court refused to stay Missouri's execution of Johnny Johnson and also denied his petition for a writ of certiorari. Justice Sotomayor—again joined by Justices Kagan and Jackson—dissented, arguing that Johnson, who suffers from severe mental illness, was denied his right to a hearing probing his competency. According to the dissenters, "[e]xecuting a prisoner who has lost his sanity has, for centuries, been branded inhuman."[189] To safeguard the Eighth Amendment's prohibition on executing a prisoner who lacks capacity to form a rational understanding of the reasons for his execution, Justice Sotomayor would require courts to "provide a fair hearing to determine a prisoner's competency to be executed," "once a prisoner makes a substantial threshold showing of insanity."[190]

LOOK AHEAD

The 2023–24 Term will feature some high profile constitutional and statutory criminal law and procedure cases. In *United States v. Rahimi*,[191] the Court will determine whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence restraining orders, facially violates the Second Amendment. This case is expected to provide further clarity to the Court's modern Second Amendment jurisprudence as outlined in *Bruen*,[192] a decision that has left lower courts fractured in applying a "history and tradition" standard to firearm regulation. In *McElrath v. Georgia*,[193] the Court will consider whether the Fifth Amendment's Double Jeopardy Clause prohibits retrial after a person is acquitted on one charge and convicted on another and the appellate court vacates that conviction as logically and legally inconsistent with the acquittal. On the statutory side of its docket, the Court will consider the definition of "serious drug offense" in the Armed Career Criminal Act[194] and address the scope of the federal drug-sentencing "safety valve" provision in 18 U.S.C. § 3553(f)(1) as amended by the First Step Act of 2018.[195]

Notably, however, no Fourth Amendment cases are on the Court's docket yet again. The Court has not decided a Fourth Amendment case since October Term 2020. In the most recent Term, the Court denied certiorari in *Moore v. United States*,[196] a case asking whether long-term use of a surveillance camera targeted at a person's home and curtilage is a search, and in *Pennington v. West Virginia*,[197] which asked the Court to determine whether probable cause that a person is home is required to execute an arrest warrant. For now, these issues will continue to percolate in the lower courts.

It remains to be seen whether cross-ideological alignment among the justices will continue to result in more narrow interpretations of the scope of criminal statutes. It is likely that a majority of the Court will continue to narrowly construe constitutional criminal procedure rights, leaving more defendants arguing for greater state constitutional and subconstitutional protections.

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Mark Rucci *graduated from the University of Michigan Law School in May of 2023. He is currently clerking in the U.S. District Court for the Eastern District of Virginia and will clerk in the U.S. Court of Appeals for the Third Circuit during the 2025–26 term.*

185. *Id.* at 2546 (Sotomayor, J., dissenting from the denial of application for stay).
186. *Id.* at 2548 (Sotomayor, J., dissenting from the denial of application for stay).
187. *Id.* at 2549 (Sotomayor, J., dissenting from the denial of application for stay).
188. 143 S. Ct. 2551 (2023).
189. *Id.* (Sotomayor, J., dissenting from the denial of application for stay and denial of certiorari).
190. *Id.* (Sotomayor, J., dissenting from the denial of application for stay and denial of certiorari).
191. No. 22-915.
192. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).
193. No. 22-721.
194. Brown v. United States, No. 22-6389.
195. Pulsifer v. United States, No. 22-340.
196. 143 S. Ct. 2494 (2023).
197. 143 S. Ct. 2493 (2023).

Court Review Author Submission Guidelines

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

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Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

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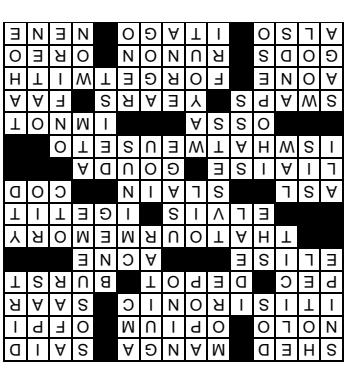
Answers to Crossword
from page 191



Publication Bans:

The Supreme Court of Canada Considers Their Impact Upon the Conflict Between the Open Court Principle and the Right to a Fair Trial

Wayne K. Gorman

In *La Presse inc. v. Quebec*, 2023 SCC 22, October 6, 2023, the Supreme Court of Canada considered two appeals, which it described as raising the conflict inherent between "the open court principle and the right to a fair trial" (para. 4).

The two appeals involved a consideration of the application of Canada's mandatory prohibition on the media publicizing information not heard by a jury until the jury retires to consider its verdict, such as evidence excluded by the trial judge or evidence presented on a constitutional challenge (see *Criminal Code*, R.S.C. 1985, § 648(1) (Can.)).

In Canada, this prohibition on publication is both mandatory and very broad. The trial judge, for instance, does not have discretion as to whether the publication ban should be issued and the ban on publication applies to rulings made before a jury is empaneled. The Supreme Court noted that it has on earlier occasions "recognized" the open court principle "as fundamental throughout the entirety of criminal proceedings" (para. 5).

The Court held that there "is no irreconcilable conflict between the open court principle and trial fairness. They both serve to instill public confidence in the justice system. The public can understand the work of the courts, and thus come to trust the judicial process and its outcomes, only if informed of 'what a judge decides' and 'why the particular decision is made'.…Needless to say, the media play a crucial role in making this possible" (para. 7).[1]

However, the Court suggested that the "protection of fair trial interests, such as the right to an independent, impartial, and representative jury, is also essential to public confidence in the administration of justice.…Parliament has chosen to impose a temporary publication ban for the purposes of shielding the jury from information it has never been permitted to consider and promoting efficient trials" (para. 8).

THE BACKGROUND TO THE APPEAL

The appeal involved two criminal matters: *The King v. Silva* and *The King v. Coban*.

THE KING V. SILVA

In *Silva*, the accused was charged with four counts of murder and one count of attempted murder. Before the empanelment of the jury, the accused applied for a judicial "stay of proceedings" to be entered based upon alleged police misconduct. The trial judge dismissed the application and issued an order pursuant to section 648(1) of the *Criminal Code*, prohibiting the publication and broadcasting of his decision. The Supreme Court noted that "[i]t is anomalous that these 'orders' were made, given that, when s. 648(1) applies, it applies automatically, by operation of statute" (para. 10).

The Media (La Presse Inc.), applied to have the publication ban set aside. It argued that section 648(1) applies only after the jury is empaneled. The trial judge dismissed this application.

The accused was subsequently found guilty on one count and the section 648(1) publication ban was lifted.

THE KING V. COBAN

In *Coban*, the accused was charged with several offences relating to child pornography and child luring. The Supreme Court noted that the matter "drew national and international attention" (para. 14).

Before the empanelment of the jury, the trial judge issued a mandatory order, pursuant to section 486.4(3) of the *Criminal Code*, prohibiting the publication of information that could identify the complainants.

The Canadian Broadcasting Corporation and other media outlets applied for a "declaration" that section 648(1) only applies after the jury is empanelled. The trial judge dismissed the application.

THE PUBLICATION BANS IN ISSUE

The *Criminal Code of Canada* requires that in a jury trial an automatic "publication ban," prohibiting the publication of information about portions of the criminal trial at which the jury is not present, be issued. It is not a matter of judicial discretion.

This nature of the ban is found in section 648(1) of the *Criminal Code*. It states as follows:

> *After permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.*

The *Criminal Code* also allows the trial judge conducting the trial to make evidentiary rulings before the jury is empaneled. This power is found in section 645(5). It states as follows:

> *In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) or (3.1) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.*

In these appeals, numerous matters were dealt with in each

case before the respective juries were empaneled. The Supreme Court indicated that the "question before this Court is whether and, if so, how this automatic publication ban applies before the jury is empanelled, given the jurisdiction conferred by § 645(5) of the *Criminal Code* upon trial judges…to deal with certain matters before the empanelment of the jury" (para. 2).

THE ISSUE

The Supreme Court noted that Canadian trial courts "are divided on the interpretation of § 648(1)….Some courts have held that § 648(1) applies only after the jury is empaneled.… Others have held that § 648(1) also applies before the jury is empaneled" (para. 19).

The Court indicated that this "judicial divide presents two issues" (para. 20):

> *(a) Does § 648(1) apply before the jury is empanelled?*
> *(b) If § 648(1) applies before the jury is empanelled, what hearings and what information are captured by a publication ban under this section?*

The Supreme Court of Canada held that the publication prohibition in section 648(1) of the *Criminal Code* "applies before the jury is empanelled to matters dealt with pursuant to § 645(5). This conclusion follows from an understanding of the text of § 648(1) when considered in its full context and in light of Parliament's purpose. This interpretation does not expand the coverage of the publication ban: only matters that were captured by the ban prior to the enactment of § 645(5) continue to be captured by it today. This interpretation has not 'evolved' or 'changed' in a way that departs from any previous meaning held by § 648(1). The context of modern trials simply reveals § 648(1)'s full temporal scope" (para. 9).

The Court concluded that section 648(1) of the *Criminal Code* seeks to "enhance trial fairness" by making publications bans automatic (paras. 42-43):

> *By enacting s. 648(1) in 1972, Parliament intended to enhance trial fairness through the protection of two interconnected interests. First, there is the fundamental interest of the accused in being tried by jurors who are not exposed to, and biased by, the rulings rendered on matters dealt with in their absence. I find this to be immediately apparent from the wording of the provision — which bans the publication of information regarding portions of the trial at which the jury is not present — and readily inferable from Hansard. Second, trial fairness under s. 648(1) is also concerned with the interest of both the accused and society in the efficiency of our system of trial by jury. This is revealed by Parliament's choice to introduce an automatic publication ban that applies simply by operation of statute and thus does not require the intervention of a court.*
>
> *These two interests are best served when the trial proceeds only on information properly available to the jury.*

THE SUPREME COURT'S ANALYSIS

The Court commenced its analysis by noting that it "is well established that, under the modern approach to statutory interpretation, 'the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.'" However, the Court noted that "the plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning — context, purpose, and relevant legal norms" (paras. 22-23).

"'[O]ne of Parliament's objectives was to shield the jury from information about any portion of the trial from it was absent.'"

The Court indicated that before the enactment of section 648(1), the common law in Canada "precluded a trial judge from making evidentiary rulings until after a jury was empanelled," but that "in a modern trial, the bulk of so-called 'pre-trial' applications are dealt with by the trial judge or case management judge before the jury is empanelled" (paras. 32, 36).

The Court concluded that "one of Parliament's objectives was to shield the jury from information about any portion of the trial from which it was absent, so that its verdict is based only on the evidence found admissible in court.…This objective is relevant with respect to both the existent jury and the prospective jury, that is, the jury yet to be empanelled…as a result of the introduction of § 645(5), the matters that should 'remain a secret' for the jury are now dealt with both before and after its empanelment" (paras. 49-50).

The Court concluded that "[a]ll indicators of legislative meaning — text, context, and purpose — admit of only one interpretation of s. 648(1): that it applies not only after the jury is empanelled but also before the jury is empanelled with respect to matters dealt with pursuant to s. 645(5)." Thus, section 648(1) "applies before the jury is empanelled only when a judge is exercising jurisdiction traceable to s. 645(5) to deal with a matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn" (paras. 58, 76). What do these last words mean?

A MATTER THAT WOULD ORDINARILY OR NECESSARILY BE DEALT WITH IN THE ABSENCE OF THE JURY AFTER IT HAS BEEN SWORN

The Supreme Court noted that section 648(2) of the *Criminal Code* "makes it a summary conviction offence to violate the s. 648(1) publication ban." Thus, "interpreting s. 648(1) as applying before the jury is empanelled, but only to some matters, could give rise to uncertainty over what matters are covered by the publication ban" (paras. 64, 65).

The Court indicated that it would "be prudent for judges holding a hearing pursuant to s. 645(5) to announce that they are exercising their jurisdiction under that section and to note that s. 648(1) automatically prohibits the publication of any information regarding that portion of the trial" (para. 66).

However, the Supreme Court declined "to provide a comprehensive list of matters that would be captured or excluded" by § 648(1), though it noted that there are "kinds of hearings that have never been required to take place 'at trial' and that "these would not be covered by the prohibition found in s. 648(1)" (para. 67).

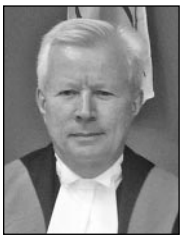
This latter element of the Court's decision may be disappoint-

ing to some. The Court had the opportunity to clarify this issue so that all parties to a matter would know exactly what is or is not subject to a publication ban, but declined to do so.

CONCLUSION

The Court concluded its decision by stating that since it has "interpreted s. 648(1) as applying before the jury is empanelled to matters dealt with pursuant to s. 645(5)" both appeals must be dismissed (paras. 79-80):

> *In Mr. Silva's case, David J. understood s. 648(1) as applying to matters dealt with before the jury is empanelled. He did not specify, however, whether it would cover information about all matters or only those dealt with pursuant to s. 645(5). Regardless, the order dismissing the application to lift the publication bans should be upheld. One of the matters dealt with by David J. concerned the admissibility of evidence (a Garofoli application). The other was a motion for a stay of proceedings for abuse of process. This clearly concerned the indictment and had to be dealt with by the trial judge (or case management judge exercising the powers of a trial judge) so that it would be reviewable on appeal from the conviction. Therefore, it is only by virtue of s. 645(5) that these matters could be dealt with prior to the empanelment of the jury, and it follows that they were covered by s. 648(1). I would dismiss the appeal in this case.*
>
> *The reasoning in Mr. Coban's case was that s. 648(1) applies to "all pretrial applications" (para. 2). This is not consistent with the proper interpretation of s. 648(1). However, the order was simply as follows: ". . . the Application to clarify or declare that the publication ban herein pursuant to section 648 of the Criminal Code of Canada applies only to proceedings after the jury is empanelled, is dismissed" (A.R., CBC et al., at pp. 7-8). The media had applied for a declaration that s. 648(1) applies only after the jury has been empanelled. The judge dismissed that application. That was the extent of the order. While the judge did not adopt the interpretation I have presented, the dismissal is consistent with the proper interpretation of s. 648(1). I would therefore dismiss the appeal in this case as well.*



Wayne Gorman *is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up Is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.*

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1. Subsequent to rendering its decision in ***La Presse***, the Supreme Court considered another appeal on the issuing and setting aside of publication bans, further entrenching their strength of publication bans in Canadian law. In ***Canadian Broadcasting Corp. v. Manitoba***, 2023 SCC 27, during a proceeding before the Manitoba Court of Appeal, "an accused sought to introduce as new evidence an affidavit sworn by his lawyer concerning the death of a witness involved in those proceedings". The Court of Appeal issued a publication ban in relation to the affidavit.

   After the appeal was completed, the Court of Appeal ordered that the publication ban was to remain in effect The Canadian Broadcasting Corporation (the "CBC") filed a motion to set aside the publication ban. The Court of Appeal held that it did not have jurisdiction to hear the motion to set aside the publication because it was *functus officio* (2019 MBCA 122). The CBC sought and obtained leave to appeal both judgments to this Court.

   The appeals were dismissed. The Supreme Court of Canada concluded that the Court of Appeal "did not commit a reversible error in issuing the publication ban and ordering that it remain in effect" (at paragraph 7).

   The Supreme Court, quoting from an earlier decision, indicated that a person asking a court to exercise discretion in a way that limits the open court presumption must establish that: "(1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects" (at paragraph 8).

   The Supreme Court concluded that the "benefits" of the "publication ban significantly outweigh its minimal deleterious effect on the right of free expression and, by extension, the principle of open and accessible court proceedings" (at paragraph 12):

   > Finally, as to the third branch, we agree with the Court of Appeal in the Judgment on Remand that the benefits of the 2018 publication ban significantly outweigh its minimal deleterious effect on the right of free expression and, by extension, the principle of open and accessible court proceedings. The benefit of the publication ban is to protect the dignity of the witness's spouse as already explained, whereas the publication ban has a minimal negative effect on the right of free expression and the open court principle (paras. 92 93). The affidavit did not relate to the wrongful conviction or the legitimacy of the accused's appeal before the Court of Appeal in 2018. As the Court of Appeal observed in the Judgment on Remand, the affidavit was "capable of proving nothing" (para. 91). Here, the affidavit was not admitted as evidence in the wrongful conviction proceedings and, therefore, did not play a role in determining that a wrongful conviction had occurred.

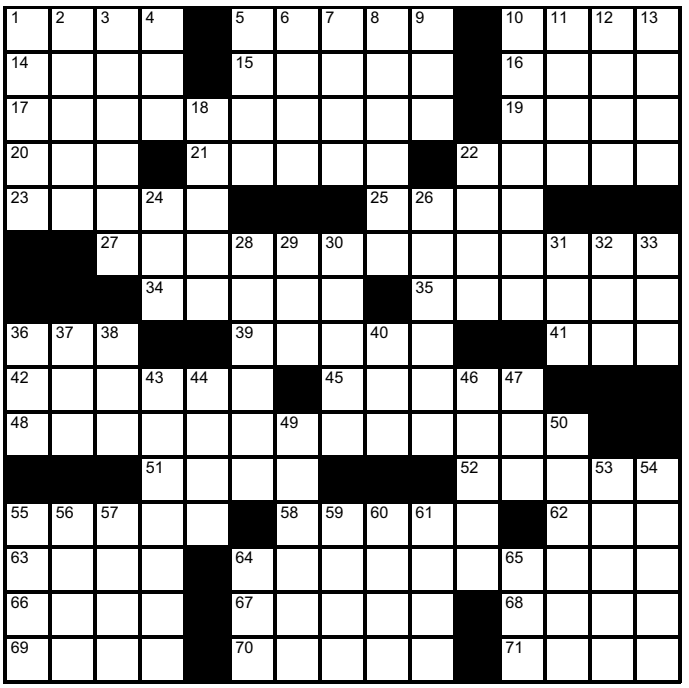
AMERICAN JUDGES ASSOCIATION: PROCEDURAL FAIRNESS INTERVIEWS

The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges. The interviews were done in August 2014; job titles are shown as of the date of the interviews.

Visit http://proceduralfairnessguide.org/interviews/ to watch the interviews.

MENTAL OXYMORON by Judge Vic Fleming © 2023

Do you recall the cross-examination query "What else do you not remember?"



Across

1 Tool storage site
5 Japanese comics style
10 "When all is ___ and done ..."
14 Court plea, briefly
15 Addictive narcotic
16 "Life ___" (2001 Yann Martel novel)
17 Start of an observation
19 German coal district
20 Bodybuilder's muscle
21 Bus stop
22 Break open suddenly
23 Beethoven dedication "Fur___"
25 Benzoyl peroxide target
27 Part 2 of the observation
34 "Don't Be Cruel" singer
35 "Understood!"
36 Gesture-based communication (abbr.)
39 Killed, as a dragon
41 Boston catch
42 Act as a go-between
45 Cheese choice
48 Part 3 of the observation
51 Mount in Greek myth
52 "___ kidding!"
55 Barters
58 Parts of decades
62 Air agcy.
63 Best-rated
64 End of the observation
66 Deities
67 Kind of sentence
68 Big Stuf cookie
69 Too
70 "Give ___" (try)
71 Hawaii's state bird

Down

1 Criticize snidely, with "at"
2 "Heartbreak ___" (34-Across classic)
3 Draw forth, as testimony
4 Two in Havana
5 "... to form a ___ perfect union ..."
6 For each
7 El ___ (oceanic phenomenon)
8 Taylor product
9 Old-film network
10 Invitation to a would-be plaintiff
11 "It's ___ cry..."
12 Hoppy brews, briefly
13 Cleanser target
18 Absolutely perfect
22 Rare blood type, casually
24 "Ain't ___ Sweet?"
26 Lower-than-average grade
28 Boob tubes
29 ___ and vinegar
30 Application, as of language
31 Exchange letters
32 Brazilian city, familiarly
33 Since Jan. 1, to CPAs
36 "Arabian Nights" name
37 "___ for Silence" (Sue Grafton book)
38 Judge's field
40 Debtor's note
43 "Let it be true"
44 Answer with attitude
46 Certain believer
47 24-hr. banking service
49 Exit
50 Lit
53 Adjective for some cereals
54 California border lake
55 "Roots," for example
56 Smart___ (sock brand)
57 Toos
59 K.'s cousin in Kafka's "The Trial"
60 In a dither
61 Clinton's attorney general
64 H.S. football night
65 Got a favorable verdict

Judge Fleming is a widely published cruciverbalist. Send questions and comments to judgevic@gmail.com.

Solution is on page 187.

Constructive Criticism

Cynthia Gray

In addition to the usual declaration that judges may "write, lecture, speak, or teach on legal subjects," the new Virginia code of judicial conduct makes clear that a judge "may express and explain his or her disagreement with existing precedent so long as he or she does so in a respectful manner and acknowledges his or her duty to faithfully apply existing precedent notwithstanding the judge's disagreement with it."[1]

That explicit permission to disagree, unique to the Commonwealth, may have been prompted by a 2020 opinion from the Virginia Judicial Ethics Advisory Committee nixing a judge's proposed article about the state supreme court's interpretation of a criminal law.[2] Noting its assumption that the author would be "scholarly and respectful" and would not discuss pending or impending cases, the committee determined that the article would likely be "a permissible educational or scholarship exercise"—if the judge-author only analyzed the statute and the court's decisions.[3]

However, the judge also intended "to assert that the Court has interpreted the statute 'incorrectly' and to provide an alternative interpretation."[4] In the committee's opinion, readers would likely infer from that analysis that, in ruling as a judge, the author would substitute their preferred interpretation rather than follow the criticized precedent.[5] Acknowledging the "natural tension" between judges having opinions about legal issues and judges being open-minded, the committee concluded that the proposed article appeared to represent "pre-judging or predisposition that would create in reasonable minds a perception that the judge is partial." The committee also rejected the inquiring judge's suggestion that the article would be permissible if the author included a disclaimer stating that they were not expressing an opinion on any case that may come before them.[6] The committee noted that it does not have the authority to address First Amendment issues.[7]

One committee member dissented, evoking the Hans Christian Andersen folk tale to argue that judges have the responsibility to respectfully point out "if the emperor has no clothes," that is, if "an appellate court may have misapplied a rule of construction or applied faulty logic."[8] The dissent noted that the inquiring judge was not advocating for nullification of the law, casting "aspersions on the competence or integrity of members of the judiciary," or suggesting "rebellion and defiance against the appellate court's ruling."[9] It explained:

> Barring publication of constructive and scholarly comments by a judge on issues relating to legal analysis would . . . silence those who would be most competent to speak to the issue, . . . inappropriately suggest that decisions of appellate judges are beyond criticism, and . . . inappropriately curtail activities designed to improve administration of justice.

The dissent disagreed with the majority's conclusion that the article's constructive criticism implied that the author would "disregard his or her duty to adhere to decisions of higher courts."

Stating that "improving the law is best done in an environment of robust and honest dialogue," the dissent argued that "the motherly maxim, 'if you don't have something good to say, don't say it at all!'" should not be added to the code of judicial conduct.[10]

The importance of judicial participation in the "long tradition of vigorous public debate" about judicial decisions was also emphasized by the Judicial Council of the United States Court of Appeals for the Seventh Circuit when it concluded that a judge who wrote an article titled "The Roberts Court's Assault on Democracy" had not violated the code, at least in most of what he had written.[11] The article had been published in *Harvard Law and Policy Review* and was written by a United States District Court judge.[12] The thesis of the article was, according to the Council, that, in decisions over the last 15 years, the United States Supreme Court has "undermined the rights of poor people and minorities to vote" and "increased the economic and political power of corporations and wealthy individuals," resulting in "a form of government that is not as responsive as it should be to the will of the majority of the people."[13]

Following media reports about the article, three individuals filed complaints against the judge-author. For example, one stated: "I don't see how a party with a conservative background appearing before [the judge] could be confident that they would receive fair, even handed treatment."

The Seventh Circuit Judicial Council described the "competing policy considerations."[14] On the one hand, judges should be encouraged to "offer the public valuable perspectives on the controversial cases of the day after they have been decided," "bring[ing] to bear their professional skills, experience, and training to evaluate the debates among Justices over the meaning and scope of prece-

Footnotes

1. Virginia Code of Judicial Conduct Canon 1L (2022), https://www.vacourts.gov/courts/scv/canons_of_judicial_conduct.pdf.
2. Jud. Ethics Advisory Comm., Opinion 20-2 (2021), https://www.vacourts.gov/programs/jeac/opinions/2020/20_2.pdf. The Virginia Supreme Court had approved the opinion as a rule requires the committee to "submit any proposed advisory opinion to the Supreme Court of Virginia for approval prior to its release to the inquirer and the public." Order Establishing the JEAC 3 (2019), https://www.vacourts.gov/programs/jeac/resources/order.pdf.
3. Jud. Ethics Advisory Comm., *supra* note 2, at 5.
4. *Id.* at 1.
5. *Id.* at 6.
6. *Id.*
7. *Id.* at 7.
8. *Id.* at 11.
9. *Id.* at 12.
10. *Id.* at 11.
11. Jud. Council of the Seventh Jud. Cir., Resolution of Judicial Misconduct Complaints about District Judge Lynn Adelman (2020), https://www.ca7.uscourts.gov/judicial-conduct/judicial-conduct_2020/07-20-90046_90044.pdf.
12. Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 Harv. L. & Pol'y Rev. 131 (2019).
13. Resolution of Judicial Misconduct Complaints, *supra* note 14, at 1.

dents and other legal arguments made in those opinions."[15] On the other hand, judges "have special responsibilities in their public extrajudicial writings and speaking" not to "interfere with their work as judges" or "with public perceptions that the judges will approach the cases before them fairly and impartially."[16]

Explaining that the judge had based much of his article on opinions dissenting from the decisions he criticized, the Council concluded that "the vast majority" of his "substantive criticism of Supreme Court decisions" was "well within the boundaries of appropriate discourse," although it noted it was not "endorsing or disagreeing" with his views.[17]

However, the Council did admonish the judge for parts of the article. The article began:

> By now it is a truism that Chief Justice John Roberts' statement to the Senate Judiciary Committee that a Supreme Court justice's role is the passive one of a neutral baseball "umpire who [merely] calls the balls and strikes," was a masterpiece of disingenuousness. Roberts' misleading testimony inevitably comes to mind when one considers the course of decision-making by the Court over which he presides.[18]

According to the Council, the article also criticized "the Republican Party's support for measures to restrict voting rights and to enhance the political and economic power of corporations and the wealthy" and described "the party as having become more partisan, more ideological and more uncompromising."[19]

The Council concluded:

> The opening two sentences could reasonably be understood by the public as an attack on the integrity of the Chief Justice rather than disagreement with his votes and opinions in controversial cases. The attacks on Republican party positions could be interpreted, as the complainants have, as calling into question Judge Adelman's impartiality in matters implicating partisan or ideological concerns.[20]

The Council noted that its public admonition would remind all judges of their obligations to ensure that their "public speaking and writing do not undermine public confidence in the fair administration of justice."[21]

How judges can acknowledge disagreement among judges and call for improvements in the administration of justice without undermining public confidence in the judiciary and the courts is not a new debate.

In 1983 a Texas justice of the peace noticed that charges were dismissed or fines were reduced for the great majority of defendants who appealed their traffic offense convictions from justice or municipal courts to the county court-at-law.[22] He believed this practice "unfairly allowed those 'in the know' to violate the traffic laws repeatedly and with impunity while penalizing less sophisticated individuals who committed the same offenses." In an "open letter" to county officials, he attacked the prosecutor's office and the county court-at-law. If the county refused to change this practice, the judge stated, "the public at least should be made aware of it, and the court-at-law 'would be really busy then.'" The judge also told a reporter, "It seems the county court system is not interested in justice," or words to that effect. The truth of his claims was not contested.

The Texas State Commission on Judicial Conduct publicly reprimanded the judge for public statements that "were inconsistent with the proper performance of your duties as a justice of the peace and cast public discredit upon the judiciary."[23] The judge challenged the reprimand in a federal lawsuit contending that his statements were constitutionally protected speech.

The United States Court of Appeals for the Fifth Circuit agreed with the judge and held that, under the First Amendment, the judge could not be reprimanded for his "truthful public statements critical of the administration of the county judicial system of which he is a part."[24] The federal court emphasized that the judge should be expected, not only to exercise independent judgement in deciding cases, but also to "be willing to speak out against what he perceived to be serious defects in the administration of justice."[25] It concluded:

> The goals of promoting an efficient and impartial judiciary . . . are ill served by casting a cloak of secrecy around the operations of the courts" and that the judge had in fact furthered those goal "by bringing to light an alleged unfairness in the judicial system.[26]

A "silence is golden" approach by judges may not promote confidence in the judiciary for a public very aware of the criticism and challenges courts face and sometimes invite. Judges may join the debate without tarnishing the judiciary's reputation if they are thoughtful and constructive, requiring the balance judges are accustomed to bringing to all aspects of their role.

Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the Judicial Conduct Reporter*, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics.*

14. *Id.* at 3.
15. *Id.* at 6.
16. *Id.* at 2.
17. *Id.* at 8-9.
18. Adelman, *supra* note 15.
19. RESOLUTION OF JUDICIAL MISCONDUCT COMPLAINTS, *supra* note 14, at 2.
20. *Id.* at 9.
21. *Id.* at 10.
22. The judge's letter and subsequent events are described in Scott v. Flowers, 910 F.2d 201, 203-04 (5th Cir. 1990).
23. *Id.* at 204-05.
24. *Id.* at 203. The Commission has also reprimanded the judge for insensitive statements to litigants, but the Court did not order that portion of the reprimand expunged.
25. *Id.* at 212.
26. *Id.* at 213.

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THE AMERICAN JUDGES ASSOCIATION HONORS JUDGES, OTHERS, DURING ANNUAL CONFERENCE

The AMERICAN JUDGES ASSOCIATION (AJA) recognized a group of professionals for their significant contributions to the judiciary and association during its annual conference in September. Founded in 1959 to promote judicial excellence and improve the administration of justice, AJA represents judges from the United States, Canada, Mexico, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

THE 2023 AWARDEES INCLUDE:

CHIEF JUSTICE RICHARD W. HOLMES AWARD OF MERIT

Named for one of AJA founders, the late Kansas Chief Justice Richard W. Holmes, the award honors a judge for outstanding contributions to the judiciary.

Awardee: Chief Justice Alexander G. Gesmundo, Supreme Court of the Philippines

Chief Justice Gesmundo joined the supreme court in 2017 and became the chief justice in 2021. Previously, he served as an associate justice of the Sandiganbayan for 12 years.

HAROLD V. FROELICH AWARD FOR JUDICIAL COURAGE

This award recognizes a judge who makes fair and impartial judgments according to the rule of law, exercising independence from personal consequence.

Awardee: Chief Justice Rebeca Martinez, Fourth Court of Appeals, Texas

Chief Justice Martinez was elected to the Fourth Court of Appeals in 2013. Prior to her judicial service, she was president of her litigation practice for 14 years, representing individuals and entities involved in multi-party litigation in state and federal court.

JUDGE WILLIAM H. BURNETT AWARD

Named for Colorado Judge William H. Burnett, the first president of the North American Judges Association (now the AJA), this honor recognizes a member for outstanding service to AJA.

Awardee: Judge Peter Sferrazza, Ely Shoshone Tribal Court, Nevada

After retiring from the Reno Justice Court, Judge Sferrazza now serves as a senior justice court judge and the elected judge for the Ely Shoshone Tribal Court. Before retirement, he served as the chief judge of the Reno Justice Court and as a tribal judge for the Moapa Paiute, Yerington Paiute, Ely Shoshone, Intertribal Court of Appeals, Fallon Paiute-Shoshone, Pyramid Lake Paiute, Walker River Paiute, and the Washoe Tribe.

JUDGE ELLIOT ZIDE AWARD FOR EXCELLENCE IN JUDICIAL EDUCATION

This award recognizes a judge for significant contributions to judicial education.

Awardee: Chief Judge Donald R. Johnson, 19th Judicial District Court, Louisiana

Chief Judge Johnson was elected to the 19th Judicial District Court in 1999. He has presided over all divisions of the court and currently serves on criminal, traffic, drug treatment, and the pretrial release court.

JUDGE LIBBY HINES DOMESTIC VIOLENCE AWARD

This award honors a judge for significant contributions to effective judicial responses in handling domestic violence cases.

Awardee: Chief Judge Bernadette D'Souza, Family Court, Civil District Court, Louisiana

Chief Judge D'Souza became the first family court judge in the Civil District Court in New Orleans in 2012 and first Asian-American judge in Louisiana. She served as chief judge of the Civil District Court from 2021 to 2023. Prior to her judicial service, she was a public interest lawyer, representing poor clients in family, housing, and domestic violence laws for more than 18 years.

PRESIDENT'S AWARD

This award recognizes a member for exemplary service to the association.

Awardee: Justice Piper Griffin, Associate Justice, Louisiana Supreme Court

Justice Griffin was elected as an associate justice of the Louisiana Supreme Court in 2020. In 2001, she was elected to the Orleans Parish Civil District Court where she served as chief judge from 2008 to 2010. Prior to her judicial service, she was a practicing attorney for 14 years, specializing in casualty litigation.

NACHTIGAL AWARD FOR CONTRIBUTIONS TO THE JUDICIARY

This honor recognizes a non-judge who has substantially contributed to improving the judiciary.

Awardee: Dr. Angela White-Bazile, Attorney and Executive Director, Louisiana Judges and Lawyers Assistance Program

Dr. White-Bazile is the executive director of the Louisiana Judges and Lawyers Assistance Program (JLAP) and has been a practicing attorney for more than 20 years. Before joining JLAP, she was the executive counsel at the Louisiana Supreme Court.

AMERICAN GAVEL AWARD

The American Gavel Award recognizes a legal journalist who achieves the highest standards of reporting about courts and the justice system.

Awardee: Ian Lind, Reporter, Honolulu Civil Beat

Lind is an investigative reporter and columnist who has blogged daily for more than 20 years. The American Judges Association is one of the largest judges' associations in North America, and is committed to the effective administration of justice, and to maintaining the independence of the judiciary.

The Resource Page

ETHICS OF CHATGPT ADVOCACY

Artificial intelligence is a popular topic of discussion these days. Many industries are embracing the efficiencies and value of using AI tools to enhance productivity as well as creativity. Several industries are also struggling with the question of how to adapt to the growth of AI. Education is the field most commonly cited in news articles as threatened by AI and searching for tactics to address students increasingly outsourcing their homework assignments to AI. While less commonly mentioned, judges must keep in mind that the legal industry needs to grapple with the increasing use of AI by lawyers and advocates—a trend increasing with each graduating class from law school.

A recent ethics decision in Colorado that received extensive press coverage is a good resource for illustrating the challenges judges may face. According to media reports, a young lawyer was suspended from the practice of law for at least 90 days with a two year probation and a stayed 366 day suspension. The lawyer had used an AI application, ChatGPT, to prepare a pleading he filed in a civil case. Do you know the ethics implications of that decision? If not, read on.

Reportedly, the young lawyer was hired by a client to set aside a judgment entered against the client in a civil case. The lawyer, who appears to have had limited experience in practicing law and less in civil litigation, turned to ChatGPT for assistance. Media reports state that the lawyer spent hours going over samples of prior motions and templates before preparing a first draft. The lawyer became concerned that the process was taking too long and sought the help of AI to finish the motion.

We can imagine that the lawyer was delighted and relieved to find that the AI was able to supply legal authorities that supported the client's position. With the welcomed held of AI, the lawyer finalized and filed the briefing.

The case was pending before a state court judge of long civil experience. The judge also happens to be a colleague of mine as we sit on the same bench in the same district so I can vouch for his considerable knowledge of state civil procedure authorities. The judge was, presumably, puzzled by seeing unusual citations to cases he could not recall that seemed at variance with his prior experiences but were remarkably "on point" in support of setting aside a judgment. The judge sought to review the first case to understand the context of the cited principle and its potential application. The judge was having difficulty locating the case by citation but errors in those specifics are not uncommon. The judge used alternative approaches to search for the case but still could not find it. As he moved on to the next citation he found, case after case, the same experience. He simply could not find the cases cited.

A hearing on the motion was scheduled. According to media reports, the lawyer discovered just before the hearing that the cited cases did not exist. The lawyer had not checked the citations provided by the AI until that time. Despite the discovery, the lawyer apparently made no mention of it at the hearing. As the hearing progressed, the judge noted concerns about the accuracy of the citations. According to the media, the lawyer responded by saying "I leaned a little too heavily on *a legal intern* in this case, who I believe got some mistake in case cites." (emphasis added)

The lawyer would later file an affidavit apologizing to the court and explaining the use of AI. While not in the media reports, I believe the judge had set a follow up procedure to address the erroneous citations at the hearing. Presumably, this led to the affidavit later filed.

The Colorado Office of Attorney Regulation counsel pursued an examination of the lawyer's conduct which led to a stipulation. The attorney stipulated that the conduct violated the following rules of professional conduct: Rule 1.1 requiring competent representation from a lawyer; Rule 3.3 prohibiting a lawyer from making a false statement of material law or fact to a tribunal; and Rule 8.4 prohibiting dishonesty, fraud, deceit, or misrepresentation. The description of the discipline can be found at https://www.coloradosupremecourt.com/pdj/Decisions/Crabill,%20Stipulation%20to%20Discipline,%2023PDJ067,%2011-22-23.pdf

The lesson for judges is that AI is no longer just a suggestion from Word to modify one's grammar or correct spelling in a brief. If allowed, today's AI will develop the analytical theory and simply invent facts, law, and/or authorities to fit the assignment. The Colorado case illustrates the easiest problem judges must address, fictional case citations. As the case reflects, we judges are in a pretty good position to recognize reasons to suspect a dodgy case citation. We also have readily available tools to check them. However, an invented fact or analytical framework may be harder to spot and harder to confirm if we have suspicions. Like educators, we need to begin thinking about how our systems should adapt to address the increasing use of a tool, particularly a tool that carries the dangers of misdirection involved here.

NCSC DATA DIVES

For judges today, rapidly advancing technology is constantly impacting the work we do. Sometimes it arises overtly in the case pending before us and we struggle to apply traditional legal principles to a new world never contemplated by the law's architects. Sometimes it is less visible to us because it is used to process our own work product in ways we never intended and ways we might want to guard against.

Among the least understood sides of developing technology's impact on courts is in the field of data. For example, did you know how ChatGPT was already being used by participants in your courtroom before reading the preceding section? Do you know what "Web Scraping" is and why a judge should care? What is "georeferencing" or "data governance"?

Our friends at the National Center for State Courts have an excellent resource for judges and court professionals seeking a better understanding of data analytics. They have classes and interactive discussions at a program they call the Data Dives Series. You can find it at https://www.ncsc.org/consulting-and-research/areas-of-expertise/data/data-dives