Criminal Law Update

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CRIMINAL LAW UPDATE

Judicial Conclave

June 7, 2019

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SELECTED U.S. SUPREME COURT DECISIONS[1]

INTRODUCTION

These materials are designed to highlight the most important Supreme Court decisions that address criminal law and procedure issues from the current term and the end of last year's term (which were not yet issued at the time of the 2018 Conclave). It also includes cases in which certiorari has been granted and the cases are still pending before the Supreme Court.

I. SEARCH & SEIZURE

A. Electronic Evidence -- Historical Cell Phone Location Data

Carpenter v. United States, 138 S. Ct. 2206 (June 22, 2018)

ROBERTS, C.J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. GORSUCH, J., filed a dissenting opinion.

In this case, as in thousands of cases each year, the government sought and obtained the historical cell phone location data of a private individual pursuant to a disclosure order under the Stored Communications Act (SCA) rather than by securing a warrant. The historical data revealed the location and movements of Carpenter, a cell phone user, over the course of 127 days, and was used to prove his location in the vicinity at the time of multiple armed robberies. Under the SCA, a disclosure order does not require a finding of probable cause. Instead, the SCA authorizes the issuance of a disclosure order whenever the government "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). As a result, the district court never made a probable cause finding before ordering Carpenter's service provider to disclose months' worth of his cell phone location records.

[1] These materials cover U.S. Supreme Court opinions and pending cases from May 14, 2018 through May 14, 2019. Many of these Supreme Court summaries were prepared by Paul M. Rashkind, Chief, Appellate Division, Office of the Federal Public Defender, S.D. Florida.

A divided panel of the Sixth Circuit held that there is no reasonable expectation of privacy in these location records, relying in large part on four-decade-old decisions of the Supreme Court. Those decisions form what is known as the third-party doctrine, which exempts from the Fourth Amendment warrant clause records or information that someone voluntarily shares with someone or something else— here, the phone companies from which the records were obtained.

The Supreme Court reversed, in a 5-4 decision authored by Chief Justice Roberts, holding that obtaining such historical cell site records was a Fourth Amendment search requiring a search warrant. The majority opinion holds that because of the "unique nature of cellphone location information," the third-party doctrine did not apply. The majority focused on the nature of the information at issue and the "seismic shifts in digital technology," to justify carving out such records from the third-party doctrine. The third-party doctrine was left intact as it originally applied to a telephone number and bank records, but was made inapplicable to cellphone location information. It should be noted that the opinion confines its holding to historical information of a week or more, and it specifically exempts the acquisition of information in an emergency setting, distinguishing "current" location information used to stop an ongoing crime, from historical information gathered to prosecute a completed crime.

The four dissenting justices (Kennedy, Thomas, Alito & Gorsuch) wrote separate opinions, although sometimes interlocking.

B. Vehicles and Motorists

1. Warrantless Search of Vehicle at Residence

Collins v. Virginia, 138 S. Ct. 1663 (May 29, 2018)[2]

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion. ALITO, J., filed a dissenting opinion.

County police officers were looking for the person who eluded them on a motorcycle in two high-speed incidents. Although the rider's helmet had obscured his face, the officers suspected

[2] This opinion was discussed at last year's Conclave but had not been included in the materials. As a result, I am including the summary in this year's materials but I will not be discussing it at this year's Conclave.

Ryan Collins. A few months after the eluding incidents, the officers encountered Collins at the DMV. During their conversation, one officer visited Collins's Facebook page and spotted a picture of a motorcycle, covered by a tarp, parked at a house. Collins told the officers he did not know anything about the motorcycle. After leaving the DMV, one of the officers located the house in the photograph. Collins's girlfriend (and mother of his child) lived there, as did Collins himself at least several nights each week. A dark-colored car was parked about halfway up the driveway, where a visitor might pass to reach the front door. A motorcycle covered in a white tarp sat behind that car. The motorcycle rested on the part of the driveway running past the house's front perimeter. This portion of the driveway was enclosed on three sides: the home on one side, a brick retaining wall on the opposite side, and a brick wall in the back. The motorcycle was no more than a car's length away from the side of the dwelling. Seeing the motorcycle covered in a tarp, the officer walked onto the driveway. He did not have permission to go onto this property. The officer then entered the partially enclosed parking space alongside the home, removed the tarp, and obtained the license tag and VIN number. After running the VIN number, the officer learned the motorcycle was flagged as stolen. He knocked at the front door, and Collins was arrested for possession of stolen goods after admitting that he owned the motorcycle.

The state courts upheld the search under the automobile exception to the warrant requirement. The Supreme Court reversed (8-1) in an opinion by Justice Sotomayor. "This case presents the question whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein. It does not." The Court held that where a vehicle is parked on the curtilage of a home, the automobile exception cannot justify the intrusion into protected areas necessary to conduct the vehicle search—in other words, the automobile exception yields. Reasoning that "the scope of the automobile exception extends no further than the automobile itself," the Court determined that the search of a vehicle on the curtilage of a home was no more permissible than the absurd suggestion that an officer could use the automobile exception to enter a living room and search a motorcycle he saw through the window. The Court emphasized that its own

precedent has long guarded against allowing exceptions to the warrant requirement to "justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." Allowing the automobile exception to justify such an intrusion onto the curtilage threatened to "transform what was meant to be an exception into a tool with far broader application" and "unmoor[ed] the exception from its justifications."

In reaching its conclusion, the Court rejected Virginia's arguments supporting the search. First, the Court rejected Virginia's assertion that the automobile exception was "categorical," permitting warrantless searches "anytime, anywhere." Second, the Court declined Virginia's invitation to draw the line somewhere other than curtilage—specifically, a bright line at "the physical threshold of a house or a similar fixed, enclosed structure inside the curtilage." The Court rejected this argument in part because it "rests on a mistaken premise about the constitutional significance of visibility," and further because it would "automatically . . . grant constitutional rights to those persons with financial means" to have such structures.

Justice Thomas concurred, writing separately to question the Court's authority to require that state courts apply the federal exclusionary rule. Justice Alito dissented in no uncertain terms.

2. Warrantless Blood Draw from Unconscious Motorist

Mitchell v. Wisconsin, 139 S. Ct. 915 (cert granted Jan. 11, 2019); decision below at 914 N.W.2d 151 (Wis. 2018)

In both *Missouri v. McNeely* and *Birchfield v. North Dakota*, the Supreme Court referred approvingly to "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" with tests for alcohol or drugs when they have been arrested on suspicion of driving while intoxicated. 569 U.S. at 141, 161 (2013); 136 S. Ct. 2160, 2185 (2016). But a majority of states, including Wisconsin, have implied-consent laws that do something else entirely: they authorize blood draws without a warrant, without exigency, and without the assent of the motorist, under a variety of circumstances—most commonly when the motorist is

unconscious. State appellate courts have sharply divided on whether such laws comport with the Fourth Amendment.

The question presented is: Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

3. Reasonable Suspicion To Stop Motorist

Kansas v. Glover, 139 S. Ct. 1445, 2019 WL 1428943 (cert. granted Apr. 1, 2019); decision below at 422 P.3d 64 (Kan. 2018)

While on routine patrol, a Kansas police officer ran a registration check on a pickup truck with a Kansas license plate. The Kansas Department of Revenue's electronic database indicated the truck was registered to Charles Glover, Jr. and that Glover's Kansas driver's license had been revoked. The officer stopped the truck to investigate whether the driver had a valid license because he "assumed the registered owner of the truck was also the driver." The stop was based only on the information that Glover's license had been revoked; the deputy did not observe any traffic infractions and did not identify the driver. Glover was in fact the driver, and was charged as a habitual violator for driving while his license was revoked. Though Glover admitted he "did not have a valid driver's license," he moved to suppress all evidence from the stop, claiming the stop violated the Fourth Amendment, as interpreted in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Delaware v. Prouse*, 440 U.S. 648 (1979), because the deputy lacked reasonable suspicion to pull him over.

The trial court granted the motion to suppress based only on the judge's anecdotal personal experience that it is not reasonable for an officer to infer that the registered owner of a vehicle is the driver of the vehicle. The first state court of appeal reversed, but the state supreme court granted review and reinstated the order of suppression – Although it expressly rejected reliance on just "common sense," it held that an officer lacks reasonable suspicion to stop a vehicle when the stop is based on the officer's suspicion that the registered owner of a vehicle is driving the vehicle unless the officer has "more evidence" that the owner actually is the driver.

The state petitioned for cert, contending: (1) The Kansas decision conflicts with state and federal precedent involving "12 other state supreme courts, 13 intermediate state appellate courts, and 4 federal circuit courts, including the Tenth Circuit, which covers Kansas. *See, e.g., United States v. Pyles*, 904 F.3d 422, 425 (6th Cir. 2018) (noting the split); *United States v. Cortez-Galaviz*, 495 F.3d 1203, 120708 (10th Cir. 2007) (Gorsuch, J.)"; (2) The Kansas ruling adopted a more demanding standard than the "minimal" suspicion set forth in *United States v. Sokolow*, 490 U.S. 1, 7 (1989); and (3) The Kansas ruling defies common sense on an important and recurring Fourth Amendment question about "judgments and inferences" that law enforcement officers make every day. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)."

The Supreme Court granted cert to determine: "[W]hether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary."

II. FIFTH AMENDMENT – DOUBLE JEOPARDY

A. Separate Sovereigns

Gamble v. United States, 138 S. Ct. 2707 (cert. granted June 28, 2018); decision below at 694 F. App'x 750 (11th Cir. 2017)

The Fifth Amendment states that "No person shall . . . be twice put in jeopardy" "for the same offence." Yet, Terance Martez Gamble has been subjected to two convictions and two sentences – one in state court and one in federal court – for the single offense of being a felon in possession of a firearm. As a result of the duplicative conviction, he must spend three additional years of his life behind bars. Gamble argues that the Double Jeopardy Clause prohibits that result and that existing Supreme Court precedent should be overruled. The fact that Gamble's sentences were imposed by separate sovereigns—Alabama and the United States—should make no difference. He argues that the court-manufactured "separate sovereigns" exception— pursuant to which his otherwise plainly unconstitutional duplicative conviction was upheld—is inconsistent with the plain text and original meaning of the Constitution, and outdated in light of incorporation and a vastly expanded system of federal criminal law. For precisely these reasons,

Justices Ginsburg and Thomas have called for "fresh examination" of the exception. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring); *see also id*. ("The [validity of the exception] warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA.").

Question presented: Whether the Supreme Court should overrule the "separate sovereigns" exception to the double jeopardy clause.

B. Double Jeopardy Following Acquittal at Severed Trial

Currier v. Virginia, 138 S. Ct. 2144 (June 22, 2018)

GORSUCH, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part III, in which ROBERTS, C.J., and THOMAS and ALITO, JJ., joined. KENNEDY, J., filed an opinion concurring in part. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

The Double Jeopardy Clause protects the integrity of acquittals through the doctrine of issue preclusion, also known as collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *see also Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016) (preferring the term "issue preclusion" to "collateral estoppel"). Issue preclusion dictates that where a jury's acquittal has necessarily decided an issue of ultimate fact in the defendant's favor, the Double Jeopardy Clause bars the prosecution "from trying to convince a different jury of that very same fact in a second trial." *Bravo-Fernandez*, 137 S. Ct. at 359.

Here, Currier faced three charges relating to the burglary of a home and theft of a safe containing cash and firearms: (i) breaking and entering, (ii) grand larceny, and (iii) possessing a firearm after being convicted of a felony. The firearm charge was based on the theory that he had briefly handled the guns inside the safe. In Virginia, evidence that a defendant has committed crimes other than the offense for which he is being tried is highly prejudicial and generally inadmissible. Therefore, "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction. The parties acceded to that procedure here.

Trying all three charges simultaneously would have unduly prejudiced petitioner by bringing his prior convictions to the attention of the jury to which the breaking-and-entering and grand larceny charges would be tried. Accordingly, the trial court severed the felon-in-possession charge from the other two charges. The Commonwealth elected to first try Currier for breaking and entering and grand larceny. Notably, due to a discovery violation, the trial court excluded from evidence a DNA report connecting Currier to a cigarette butt found in the pickup truck used in the theft. In the end, both the prosecution and defense agreed that the sole issue before the jury was whether Currier was involved in stealing the safe. The prosecutor argued to the jury: "What is in dispute? Really only one issue and one issue alone. Was the defendant, Michael Currier, one of those people that was involved in the offense?" He was acquitted of breaking and entering and larceny charges. He then argued that he couldn't be tried on the question of whether he had a gun during a burglary because, as the jury had found, he hadn't taken part in the burglary.

The trial court rejected his challenge. Given the second opportunity to convince a jury of Currier's involvement in the break-in and theft, the Commonwealth modified its presentation in two ways: (1) Its key witnesses refined their testimony and redelivered it with greater poise; and (2) The Commonwealth corrected its procedural error from the first trial by successfully introducing into evidence the cigarette butt found in the back of the pickup truck—thereby confirming that Currier had at some point been in the truck used to steal the safe. This time, the jury found Currier guilty and sentenced him to five years in prison. Currier moved to set aside the verdict on double jeopardy grounds. Virginia courts rejected his challenge.

The Supreme Court affirmed, rejecting his double jeopardy challenge (5-4) in an opinion written by Justice Gorsuch (joined by C.J. Roberts, Thomas, Alito, and Kennedy (in part)). The majority held that because Currier consented to have the charges tried separately, his trial and conviction on the felon-in-possession charge did not violate the Double Jeopardy Clause (Parts I and II of Gorsuch's opinion). The majority determined that consenting to multiple trials waives not only the protection against multiple trials but also the protection against re-litigation of an issue following an acquittal (an *Ashe v. Swenson* issue). Justice Kennedy, who provided the deciding fifth vote, would have ended the inquiry there.

A plurality of the Court went further, setting forth broader grounds for the ruling. In Part III of his opinion, Gorsuch (with Roberts, Thomas and Alito) questioned whether re-litigating an issue after acquittal violates double jeopardy at all—directly challenging *Ashe*'s constitutional issue preclusion. For them, issue preclusion is a doctrine related to civil litigation that should not be imported into criminal cases. Justice Ginsburg dissented (with Breyer, Sotomayor, and Kagan), providing a detailed background of the principles and protections involved, and the confusion caused by the majority/plurality decision.

III. Fourteenth Amendment Incorporation of Bill of Rights

A. Sixth Amendment: Unanimous Verdicts

Ramos v. Louisiana, 139 S. Ct. 1318 (cert. granted Mar. 18, 2019); decision below at 231 So.3d 44 (La. App. 2017)

Evangelisto Ramos was charged with second-degree murder. He was tried by a twelve-member jury. The State's case against Mr. Ramos was based on purely circumstantial evidence. The prosecution did not present any eyewitnesses to the crime. Some of the evidence was susceptible of innocent explanation. After deliberating, ten jurors found that that the government had proven its case against Ramos. However, two jurors concluded that the government had failed to prove Ramos guilty beyond a reasonable doubt. Notwithstanding the different jurors' findings, under Louisiana's non-unanimous jury verdict law, a guilty verdict was entered. Ramos was sentenced to spend the remainder of his life in prison without the possibility of parole.

Ramos challenged the non-unanimous verdict law in state court. On appeal, the Court of Appeal noted that "some of the evidence may be susceptible of innocent explanation," yet, it rejected his challenge, concluding that "non-unanimous twelve-person jury verdicts are constitutional, ..." Ramos petitioned the Supreme Court for cert, arguing that under the Sixth Amendment, a unanimous jury is required and this right should be incorporated to the states under the Fourteenth Amendment: "The vast majority of the Bill of Rights have been fully incorporated and made applicable to the states through the Fourteenth Amendment. The Fourteenth Amendment should incorporate the Sixth Amendment's guarantee of a unanimous jury because a) this Court has made clear that the guarantees in the Bill of

Rights must be protected regardless of their current functional purpose; b) this Court has rejected the notion of partial incorporation or watered down versions of the Bill of Rights, and c) Louisiana's non-unanimous jury rule was adopted as part of a strategy by the Louisiana Constitutional Convention of 1898 to establish white supremacy." The Supreme Court granted cert.

Question presented: Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?

B. Eighth Amendment: Excessive Fines Clause

Timbs v. Indiana, 139 S. Ct. 682 (Feb. 20, 2019)

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C.J., and BREYER, ALITO, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. GORSUCH, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died. The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand.

Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause.

The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N. E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. Timbs sought cert, arguing that the Eighth Amendment's Excessive Fines Clause is an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause.

The Supreme Court granted certiorari and reversed in a unanimous opinion authored by Justice Ginsburg. "Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal law-enforcement authority. This safeguard, we hold, is 'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.' *McDonald v. Chicago*, 561 U. S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment."

C. Eighth Amendment: Abrogation of Insanity Defense

Kahler v. Kansas, 139 S. Ct. 1318 (cert. granted Mar. 18, 2019); decision below at 410 P.3d 105 (Kan. 2018)

In Kansas, along with four other states (Alaska, Idaho, Montana, and Utah), it is not a defense to criminal liability that mental illness prevented the defendant from knowing his actions were wrong. So long as he knowingly killed a human being— even if he did it because he believed the devil told him to, or because a delusion convinced him that his victim was trying to kill him, or because he lacked the ability to control his actions—he is guilty. Petitioner argues that this rule defies a fundamental, centuries-old precept of our legal system: "People cannot be punished for crimes for which they are not morally culpable. Kansas's rule therefore violates the Eighth Amendment's prohibition of cruel and unusual punishments and the Fourteenth Amendment's due process guarantee." Even a capital murder defendant need not be of sound mind. Yet, state statutes abolishing the M'Naughten Rule (or a variant of it) have been upheld by those five states.

The Supreme Court granted cert in response to Kahler's petition asking the Supreme Court to determine the question reserved in *Clark*

v. Arizona: Whether "the Constitution mandates an insanity defense." 548 U.S. 735, 752 n.20 (2006); *see Delling v. Idaho*, 133 S. Ct. 504, 506 (2012) (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting from denial of certiorari) (urging review of this question).

Question presented: Do the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense?

IV. CRIMES

A. Federal Preemption of State Prosecutions

Kansas v. Garcia, Morales and Ochoa-Lara 139 S. Ct. 1317 (cert. granted Mar. 18, 2019) (petition by Kansas as to three separate criminal prosecutions); decisions below at 401 P.3d 588 (Kan. 2017)

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), which made it illegal to employ unauthorized aliens, established an employment eligibility verification system, and created various civil and criminal penalties against employers who violate the law. 8 U.S.C. § 1324a. Regulations implementing IRCA created a "Form I-9" that employers are required to have all prospective employees complete—citizens and aliens alike. IRCA contains an "express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens," *Arizona v. United States*, 567 U.S. 387, 406 (2012), but IRCA "is silent about whether additional penalties may be imposed against the employees themselves." IRCA also provides that "[the Form I-9] and any information contained in or appended to such form, may not be used for purposes other than enforcement of [chapter 12 of Title 8] and sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. § 1324a(b)(5). Here, Respondents used other peoples' social security numbers to complete documents, including a Form I-9, a federal W-4 tax form, a state K-4 tax form, and an apartment lease.

Kansas prosecuted Respondents for identity theft and making false writings without using the Form I-9, but the Kansas Supreme Court held that IRCA expressly barred these state prosecutions. This petition presents two questions: (1) Whether IRCA expressly preempts the States from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in

non-IRCA documents, such as state tax forms, leases, and credit applications; and (2) If IRCA bars the States from using all such information for any purpose, whether Congress has the constitutional power to so broadly preempt the States from exercising their traditional police powers to prosecute state law crimes.

B. Oklahoma Tribal Jurisdiction

Royal, Warden v. Murphy, 138. S. Ct. 2026 (cert. granted May 21, 2018; Justice Gorsuch recused); decision below at 875 F.3d 896 (10th Cir. 2017)

The Tenth Circuit held that Oklahoma lacks jurisdiction to prosecute a capital murder committed in eastern Oklahoma by a member of the Creek Nation. The panel held that Congress never disestablished the 1866 boundaries of the Creek Nation, and all lands within those boundaries are therefore "Indian country" subject to exclusive federal jurisdiction under 18 U.S.C. § 1153(a) for serious crimes committed by or against Indians. In its cert petition, the state argues that this holding has already placed a cloud of doubt over thousands of existing criminal convictions and pending prosecutions.

To put this holding into perspective, the former Creek Nation territory encompasses 3,079,095 acres and most of the City of Tulsa. Moreover, other litigants have invoked the decision below to reincarnate the historical boundaries of all "Five Civilized Tribes"—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. This combined area encompasses the entire eastern half of the State. According to the state, the decision thus threatens to effectively redraw the map of Oklahoma. The state also contends that prisoners have begun seeking post-conviction relief in state, federal, and even tribal court, contending that their convictions are void *ab initio*; and that civil litigants are using the decision to expand tribal jurisdiction over non-members.

Question presented: Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

C. ACCA

1. Florida Robbery as a "Violent Felony" Under ACCA

Stokeling v. United States, 139 S. Ct. 544 (Jan. 15, 2019)

THOMAS, J., delivered the opinion of the Court, in which BREYER, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which ROBERTS, C.J., and GINSBURG and KAGAN, JJ., joined.

Robbery under Florida law is a violent felony under the ACCA, even though Florida court decisions have virtually dispensed with a physical force requirement. In a 5-4 decision authored by Justice Thomas, the Court held: "This case requires us to decide whether a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of 'physical force' within the meaning of the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(2)(B)(i). We conclude that it does." The majority's holding significantly diluted the Court's earlier opinion in *Curtis Johnson*. In *Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court defined "physical force" as a quantity of "force capable of causing physical pain or injury," adding words such as "severe," "extreme," "furious," or "vehement" to define "physical force."

In its majority decision here the Court limited its reading of *Johnson*, holding that "*Johnson* [] does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality." Applying this definition, the Court held that "the elements clause encompasses robbery offenses that require the criminal to overcome the victim's resistance." The Court ruled that Florida robbery is one of these offenses because it requires an "amount of force necessary to overcome a victim's resistance," even though Florida robbery only requires force "however slight" to overcome that resistance. The majority's holding concludes that the term "physical force" in the ACCA was meant to "encompass[] the degree of force necessary to commit common law robbery." That included the quantity of force necessary to "pull a diamond pin out of a woman's hair when doing so tore away hair attached to the pin." Justice Thomas's opinion was joined by Breyer, Alito, Gorsuch & Kavanaugh.

Justice Sotomayor dissented (joined by Roberts, Ginsburg & Kagan). The dissent claims the majority "distorts" the "physical force" definition laid out earlier by the Court in *Johnson*, as it requires "only slight force." Noting that under Florida law "[i]f the resistance is minimal, the force need only be minimal as

well," the dissenting opinion cites to Florida cases where the "force element . . . is satisfied by a [thief] who attempts to pull free after the victim catches his arm," "pulls cash from a victim's hand by 'peel[ing] [his] fingers back,'" "grabs a bag from a victim's shoulder . . ., so long as the victim instinctively holds on to the bag's strap for a moment," and "caus[es] a bill to rip while pulling cash from a victim's hand." Furthermore, "as anyone who has ever pulled a bobby pin out of her hair knows, hair can break from even the most minimal force." The dissenters would not predicate a 15-year mandatory minimum sentence on such conduct and find that by so doing the Court leaves in the dark a common-sense understanding of robbery, Congressional intent to impose an enhanced penalty on offenders with prior "violent" felonies, and its prior decision in *Johnson*.

2. Burglary of Nonpermanent or Habitable Mobile Structure as "Violent Felony" Under ACCA

United States v. Stitt, 139 S. Ct. 399 (Dec. 10, 2018)

BREYER, J., delivered the opinion for a unanimous Court.

Two defendants, Stitt and Sims, challenged state burglary convictions used as ACCA predicates that were bottomed on allegedly non-generic burglary laws. Stitt was convicted under a Tennessee statute defining burglary as "burglary of a habitation," and defining "habitation" as any "structure" or "vehicle . . . designed or adapted for overnight accommodation." Sims was convicted under an Arkansas statute prohibiting burglary of a residentially occupiable structure, including a "vehicle, building, or other structure . . . customarily used for overnight accommodation of persons."

The Court unanimously rejected the claim that these statutes do not qualify as predicates: "The Armed Career Criminal Act requires a federal sentencing judge to impose upon certain persons convicted of unlawfully possessing a firearm a 15-year minimum prison term. The judge is to impose that special sentence if the offender also has three prior convictions for certain violent or drug-related crimes. 18 U.S.C. §924(e). Those prior convictions include convictions for 'burglary.' §924(e)(2)(B)(ii). And the question here is whether the statutory term 'burglary' includes burglary of a structure or vehicle that

has been adapted or is customarily used for overnight accommodation. We hold that it does." The Court held that Congress intended for the ACCA to apply to generic burglaries as defined by most states at the time the law was passed; it found that a majority of states at that time applied it to vehicles adapted or customarily used for lodging. On the other hand, the Court agreed that generic burglary does not apply to statutes covering *any* boat, vessel, or railroad car without the customary lodging caveat (laws that would apply whether or not the vehicle or structure is customarily used for overnight accommodations).

Both defendants had been successful in the court of appeals and the Supreme Court reversed both cases, but Sims' case was remanded for consideration of his additional claim that was never ruled on below: The statute in his case includes burglary of a vehicle "in which any person lives," which seemingly covers an automobile in which a homeless person sleeps occasionally (a broader definition than "customarily used for overnight accommodations").

3. Requisite Intent Under ACCA for Home Invasion

Quarles v. United States, 139 S. Ct. 914 (cert. granted Jan. 11, 2019); decision below at 850 F.3d 856 (6th Cir. 2017)

The Armed Career Criminal Act, 18 U.S.C. § 924(e), imposes a mandatory fifteen-year prison term upon any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony or * * * serious drug offense." The definition of a "violent felony" includes a burglary conviction that is punishable by imprisonment for a term exceeding one year. See § 924(e)(2)(B)(ii). In *Taylor v. United States*, 495 U.S. 575 (1990), this Court held that § 924(e) uses the term "burglary" in its generic sense, to cover any crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 598-99.

The question presented is: Whether (as two circuits hold) *Taylor*'s definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, or whether (as the court below and

three other circuits hold) it is enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure.

D. *Johnson* and 924(c)

United States v. Davis, 139 S. Ct. 782 (cert. granted Jan 4, 2019); decision below at 903 F.3d 483 (5th Cir. 2018)

The Supreme Court has granted cert to resolve the circuit conflict over the application of *Johnson*'s holding to 924(c)'s residual clause.

Question presented: Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. §924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.

E. Requisite Proof Under § 922(g)(5) for Undocumented Alien Knowingly Possessing Firearm

Rehaif v. United States, 139 S. Ct. 914 (cert. granted Jan. 11, 2019); decision below at 888 F.3d 1138 (11th Cir. 2017)

Rehaif is a citizen of the UAE who overstayed his student visa. He was convicted under § 922(g)(5) for unlawful possession of a firearm and ammunition by an undocumented immigrant. At trial, the court instructed the jury that the government is not required to prove that the defendant knew that he was "illegally or unlawfully in the United States" at the time he possessed the firearm and ammunition. The Eleventh Circuit affirmed his conviction.

Question presented: Whether the "knowingly" provision of 18 U.S.C. § 924(a)(2) applies to both the possession and status elements of an offense under § 922(g), or whether it applies only to the possession element.

V. SENTENCING

A. Mandatory Career Offender Guidelines Post-*Johnson* & *Beckles*

Brown v. United States, 139 S. Ct. 14 (cert. denied Oct. 15, 2018)

Petitioners in a series of cases argued that the pre-*Booker* mandatory career offender guidelines suffered from the same unconstitutional vagueness that *Johnson* found in the residual clause of ACCA. The question had seemingly been left open by the Court's decision in *Beckles*, which addressed the question as it relates to advisory guidelines, post-*Booker*.

The Supreme Court denied cert in each of the cases. Only two justices – Sotomayor and Ginsburg – dissented from the Court's denial of certiorari. Justice Sotomayor's dissent explains that the refusal to grant cert "all but ensures that the question will never be answered": "Today this Court denies petitioners, and perhaps more than 1,000 like them, a chance to challenge the constitutionality of their sentences. They were sentenced under a then mandatory provision of the U.S. Sentencing Guidelines, the exact language of which we have recently identified as unconstitutionally vague in another legally binding provision. These petitioners argue that their sentences, too, are unconstitutional. This important question, which has generated divergence among the lower courts, calls out for an answer."

The dissent explains the significant circuit conflict on the issue: "The question for a petitioner like Brown [] is whether he may rely on the right recognized in *Johnson* to challenge identical language in the mandatory Guidelines. Three Courts of Appeals have said no. *See* 868 F.3d 297 (CA4 2017) (case below); *Raybon v. United States*, 867 F.3d 625 (CA6 2017); *United States v. Greer*, 881 F.3d 1241 (CA10 2018). One Court of Appeals has said yes. *See Cross v. United States*, 892 F.3d 288 (CA7 2018). Another has strongly hinted yes in a different posture, after which point the Government dismissed at least one appeal that would have allowed the court to answer the question directly. *See Moore v. United States*, 871 F.3d 72, 80–84 (CA1 2017); *see also United States v. Roy*, 282 F.Supp.3d 421 (Mass. 2017); *United States v. Roy, Withdrawal of Appeal* in No. 17–2169 (CA1). One other court has concluded that the mandatory Guidelines themselves cannot be challenged for vagueness. *See In re Griffin*, 823 F.3d 1350, 1354 (CA11 2016)." The dissent strongly suggests that one reason cert was denied is a related timeliness concern for these underlying 2255 petitions for collateral relief, a concern that the dissent refutes: "Federal law imposes on prisoners seeking to mount collateral attacks on final sentences '[a] 1year period of limitation . . . from the latest of' several events. *See* 28 U.S.C. §2255(f). One event that can reopen this window

is this Court 'newly recogniz[ing]' a right and making that right 'retroactively applicable to cases on collateral review.' §2255(f)(3). The right recognized in the ACCA context in *Johnson*, we have held, is retroactive on collateral review. *Welch v. United States*, 578 U.S. ___, ___ (2016) (slip op., at 9)." Although the dissent rejects this timeliness concern, it seemingly lies at the heart of the cert denial by the balance of the justices.

B. Retroactive Reduction of Applicable Sentencing Guidelines Under 18 U.S.C. §3582(c)(2)

1. Eligibility Following Rule 11(c)(1)(C) Sentence

Hughes v. United States, 138 S. Ct. 1765 (June 4, 2018)

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a concurring opinion. ROBERTS, C.J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined.

Is a defendant who enters into an agreed sentence under Fed. R. Crim. P. 11(c)(1)(C) eligible for a later sentence reduction based on a retroactively applicable change in the Sentencing Guidelines, under 3583(c)(2)? In a 6-3 decision authored by Justice Kennedy, the Court held that such a defendant is eligible for 3582(c) relief, clarifying confusion about its prior plurality opinion in *Freeman v. United States*. "The proper construction of federal sentencing statutes and the Federal Rules of Criminal Procedure can present close questions of statutory and textual interpretation when implementing the Federal Sentencing Guidelines.

Seven Terms ago the Court considered one of these issues in a case involving a prisoner's motion to reduce his sentence, where the prisoner had been sentenced under a plea agreement authorized by a specific Rule of criminal procedure. *Freeman v. United States*, 564 U.S. 522 (2011). The prisoner maintained that his sentence should be reduced under 18 U.S.C. §3582(c)(2) when his Guidelines sentencing range was lowered retroactively. 564 U.S., at 527– 528 (plurality opinion). No single interpretation or rationale in *Freeman* commanded a majority of the Court.

The courts of appeals then confronted the question of what principle or principles considered in *Freeman* controlled when an opinion by four Justices and a concurring opinion by a single Justice had allowed a majority of this Court to agree on the judgment in *Freeman* but not on one interpretation or rule The application and construction of seemingly competing Supreme Court precedent is highlighted by the detailed question presented by petitioner: "This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."'" For future guidance on similar questions involving the same statute and rule, courts turned to the Court's opinion in *Marks v. United States.* Some courts interpreted *Marks* as directing them to follow the 'narrowest' opinion in *Freeman* that was necessary for the judgment in that case; and, accordingly, they adopted the reasoning of the opinion concurring in the judgment by JUSTICE SOTOMAYOR." The *Marks* rule, though, has been subject to great criticism because it seemingly allows the Court's holding to be determined by a single justice with whom eight other justices disagree.

The Court found no need to alter the *Marks* rule for construing plurality opinions in this case. Instead, the majority here found that the district court accepted Hughes' Type-C agreement after concluding that a 180-month sentence was consistent with the Sentencing Guidelines. The court then calculated Hughes' sentencing range and imposed a sentence that the court deemed "compatible" with the Guidelines. Thus, the sentencing range was a basis for the sentence that the District Court imposed. That range has "subsequently been lowered by the Sentencing Commission," so Hughes is eligible for relief under §3582(c)(2). In so ruling, the majority rejected the government's "recycled" *Freeman* arguments to the contrary.

Justice Sotomayor concurred, adhering to her *Freeman* concurrence, but acknowledging that her concurrence in that case led to unsettled law, so she now joins the majority decision in full in order to settle the legal precedent.

Chief Justice Roberts dissented, joined by Thomas and Alito, and in the end recommended that the government can obviate this holding by obtaining waivers of future 3582(c) relief as a condition of a Type-C plea agreement.

2. Ineligibility Following Substantial Assistance Sentence

Koons v. United States, 138 S. Ct. 1783 (June 4, 2018)

ALITO, J., delivered the opinion for a unanimous Court.

In a unanimous decision, written by Justice Alito, the Court held that a defendant is not eligible for 3582(c) relief in a drug case with a mandatory minimum sentence even if he was sentenced lower based upon substantial assistance. "Under 18 U.S.C. §3582(c)(2), a defendant is eligible for a sentence reduction if he was initially sentenced 'based on a sentencing range' that was later lowered by the United States Sentencing Commission. The five petitioners in today's case claim to be eligible under this provision. They were convicted of drug offenses that carried statutory mandatory minimum sentences, but they received sentences below these mandatory minimums, as another statute allows, because they substantially assisted the Government in prosecuting other drug offenders. We hold that petitioners' sentences were 'based on' their mandatory minimums and on their substantial assistance to the Government, not on sentencing ranges that the Commission later lowered. Petitioners are therefore ineligible for §3582(c)(2) sentence reductions.

The government had asked the Court to go further in its ruling, applying it to any sentence with a mandatory minimum, but the Court declined, in footnote 1: "The Government argues that defendants subject to mandatory minimum sentences can never be sentenced 'based on a sentencing range' that the Commission has lowered, 18 U.S.C. §3582(c)(2), because such defendants' 'sentencing range[s]' are the mandatory minimums, which the Commission has no power to lower. . . . We need not resolve the meaning of 'sentencing range' today."

3. Explanation for Denial of Relief

Chavez-Meza v. United States, 138 S. Ct. 1959 (June 18, 2018)

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C.J., and THOMAS, GINSBURG, and ALITO, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined. GORSUCH, J., took no part in the consideration or decision of the case.

This case concerns a criminal drug offender originally sentenced in accordance with the Federal Sentencing Guidelines. Subsequently, the Sentencing Commission lowered the applicable Guidelines sentencing range; the offender asked for a sentence reduction in light of the lowered range; and the district judge reduced his original sentence from 135 months' imprisonment to 114 months. Believing he should have obtained a yet greater reduction, Chavez-Meza argued that the district judge did not adequately explain why he imposed a sentence of 114 months rather than a lower sentence. The Tenth Circuit held that the judge's explanation was adequate.

In a 5-3 decisions authored by Justice Breyer (Gorsuch recused), the Supreme Court agreed with the court of appeals. The Court noted that at the defendant's initial sentencing he sought a variance from the Guidelines range (135 to 168 months) on the ground that his history and family circumstances warranted a lower sentence. The judge denied his request. In doing so, the judge noted that he had "consulted the sentencing factors of 18 U.S.C. 3553(a)(1)." He explained that the "reason the guideline sentence is high in this case, even the low end of 135 months, is because of the [drug] quantity." He pointed out that the defendant had "distributed 1.7 kilograms of actual methamphetamine," a "significant quantity." And he said that "one of the other reasons that the penalty is severe in this case is because of methamphetamine." He elaborated this latter point by stating that he had "been doing this a long time, and from what [he] gather[ed] and what [he had] seen, methamphetamine, it destroys individual lives, it destroys families, it can destroy communities." This record was before the judge when he considered petitioner's request for a sentence modification. He was the same judge who had sentenced petitioner originally. Petitioner asked the judge to reduce his sentence to 108 months, the bottom of the new range, stressing various educational courses he had taken in prison. The Government pointed to his having also broken a moderately serious rule while in prison. The judge certified (on

a form) that he had "considered" petitioner's "motion" and had "tak[en] into account" the relevant Guidelines policy statements and the §3553(a) factors. He then reduced the sentence to 114 months.

The Court's majority held that the record as a whole strongly suggests that the judge originally believed that, given petitioner's conduct, 135 months was an appropriately high sentence. "So it is unsurprising that the judge considered a sentence somewhat higher than the bottom of the reduced range to be appropriate. As in *Rita*, there was not much else for the judge to say."

Justice Kennedy dissented (joined by Sotomayor and Kagan) because merely checking a box on the current form AO-247 does not allow for meaningful appellate review of the decision, and he recommended changes to expand on that form. "My disagreement with the majority is based on a serious problem—the difficulty for prisoners and appellate courts in ascertaining a district court's reasons for imposing a sentence when the court fails to state those reasons on the record; yet, in the end, my disagreement turns on a small difference, for a remedy is simple and easily attained. Just a slight expansion of the AO–247 form would answer the concerns expressed in this dissent in most cases, and likely in the instant one."

C. Supervised Release

1. Mandatory Minimum Sentence for Supervised Release Violation

United States v. Haymond, 139 S. Ct. 398 (cert. granted Oct. 26, 2018); decision below at 869 F.3d 1153 (10th Cir. 2017)

Haymond was originally convicted of one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). The district court sentenced him to 38 months of imprisonment, to be followed by ten years of supervised release. Following his release from prison, Haymond was charged with violating his supervised release by viewing child pornography. The determination was made by a preponderance of evidence, not beyond a reasonable doubt. The district court applied 18 U.S.C. § 3583(k) to

Haymond's violation, requiring revocation of supervised release and reimprisonment for at least five years on a finding that a defendant like Haymond has violated supervised release. Finding "no factor present that warrant[ed]" reimprisonment beyond the required five years, the district court ordered Haymond to return to prison for five years, to be followed by five years of supervised release. *See* 18 U.S.C. § 3583(h) (allowing for a term of supervised release to follow reimprisonment). However, the court noted its "serious concerns about" the requirement that Haymond return to prison for at least five years.

The court of appeals affirmed the revocation of supervised release, but vacated the order of reimprisonment and remanded. A majority of the appellate panel concluded that the case should be remanded for further proceedings in which only 18 U.S.C. § 3583(e)(3), and not § 3583(k), would apply to the district court's imposition of additional consequences for the supervised release violation. The majority excised, as "unconstitutional and unenforceable," the final two sentences of Section 3583(k), which require revocation of supervised release and reimprisonment for at least five years on a finding that a particular type of defendant has violated. In the majority's view, §3583(k) "violates the Fifth and Sixth Amendments" for two reasons: (1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt. The majority concluded that § 3583(k) "violates the Sixth Amendment" under *United States v. Booker*, 543 U.S. 220 (2005), which applied *Apprendi* to the federal Sentencing Guidelines. The majority reasoned that "[b]y requiring a mandatory term of reimprisonment, 18 U.S.C. § 3583(k) increases the minimum sentence to which a defendant may be subjected." The court of appeals observed that "when [respondent] was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years." (citing 18 U.S.C. 2252(b)(2)).

The court further observed that "[a]fter the judge found, by a preponderance of the evidence" that respondent had violated a condition of his supervised release, Section 3583(k) required

respondent to serve "a term of reincarceration of at least five years." In the majority's view, "[t]his unquestionably increased the mandatory minimum sentence of incarceration to which Haymond was exposed from no years to five years," thereby "chang[ing] his statutorily prescribed sentencing range" without a jury finding beyond a reasonable doubt. As to the second rationale for its constitutional holding, the court of appeals did not dispute that "committing any crime" could permissibly result in respondent's reimprisonment for up to two years under Section 3583(e)(3). But the court took the view that § 3853(k) "impermissibly requires a term of imprisonment based ** * on the commission of a new offense—namely 'any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed.'" (quoting 18 U.S.C. 3583(k)). The majority reasoned that "[b]y separating [certain] crimes from other violations, § 3583(k) imposes a heightened penalty" that does not depend on the original offense, and "must be viewed, at least in part, as" imposing "punishment for the subsequent conduct" rather than the original offense. Viewed in that manner, the court concluded, Section 3583(k) invites the double-jeopardy and jury-trial concerns that the Supreme Court has previously avoided by treating supervised-release revocation as punishment for the original offense. The government petitioned for cert, arguing that the majority's holding that the invalidated provisions cannot constitutionally be applied is premised on a novel interpretation of the Fifth and Sixth Amendments (and the supervised-release statute itself) at odds with their text and history, the precedents of the Supreme Court, and the statements of other courts of appeals. "Nothing in the Constitution requires jury findings beyond a reasonable doubt as a prerequisite to the implementation or administration of a previously imposed sentence."

Question presented: Whether the court of appeals erred in holding unconstitutional and unenforceable the portions of 18 U.S.C. 3583(k) that required the district court to revoke respondent's ten-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that respondent violated the conditions of his release by knowingly possessing child pornography.

2. Tolling Supervised Release Term

Mont v. United States, 139 S. Ct. 451 (cert granted Nov. 2, 2018); decision below at 723 F. App'x 325 (6th Cir. 2018)

BOP and the Executive Branch interpret 18 U.S.C. § 3624(e) as allowing it to unilaterally suspend a term of supervised release pending pretrial detention for a new state arrest. The statute in question allocates authority to BOP during the custodial portion of the sentence, but does not cover the supervised release portion of a sentence. A different statute, 18 U.S.C § 3583, allocates to the district court the authority or impose a new term of supervised release. Nevertheless, Sixth Circuit precedent holds that a directive from BOP as to calculations of a prisoner's release also controls that release after being placed under the supervision of the Judicial Branch. The Fourth, Fifth, and Eleventh Circuits agree. The Ninth and DC Circuits disagree, holding instead that 3624(e) does not toll or affect the running of a supervised release term after the releasee is placed under the supervision of United States Probation. Question Presented: Is a district court required to exercise its jurisdiction in order to suspend the running of a supervised release sentence as directed under 18 U.S.C. § 3583(i) prior to expiration of the term of supervised release, when a supervised releasee is in pretrial detention, or does 18 U.S.C. § 3624(e) toll the running of supervised release while in pretrial detention?

D. Extent of Mandatory Restitution

Lagos v. United States, 138 S. Ct. 1684 (May 29, 2018)

BREYER, J., delivered the opinion for a unanimous Court.

Under the Mandatory Victims Restitution Act (MVRA), courts must order the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense*." 18 U.S.C. § 3663A(b)(4). The Fifth Circuit held that this provision covers the costs of private internal investigations and private expenses that were "neither required nor requested" by the government; these private costs were incurred outside the government's official investigation,

and, indeed, were incurred before the government's investigation even began.

The Supreme Court reversed, in a unanimous opinion authored by Justice Breyer: "We must decide whether the words 'investigation' and 'proceedings' are limited to government investigations and criminal proceedings, or whether they include private investigations and civil proceedings. In our view, they are limited to government investigations and criminal proceedings."

VI. DEATH PENALTY

A. Incompetency to be Executed

1. Vascular Dementia

Madison v. Alabama, 139 S. Ct. 718 (Feb. 27, 2019)

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS and GORSUCH, JJ., joined. KAVANAUGH, J., took no part in the consideration or decision of the case.

Death row inmate Madison suffers vascular dementia, which prevents him from remembering the crimes for which he is scheduled to be executed. He previously obtained collateral relief that was reversed by the Supreme Court based on limitations in available remedies under AEDPA. The Supreme Court did not address the merits of his claims in the first case. On remand, his execution was scheduled on an expedited basis. Madison applied to the state circuit court to suspend entry of the death penalty due to his incompetency. That effort was denied. With no available appeal in the Alabama state courts, Madison filed a petition for writ of certiorari in the Supreme Court directed to the state trial court, this time "outside of the AEDPA context," requesting that his execution be stayed and certiorari be granted to address the following two substantive questions: (1) Consistent with the Eighth Amendment, and this Court's decisions in *Ford v. Wainwright* and *Panetti v. Quarterman*, may the State execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense? *See Dunn v. Madison*, 138 S. Ct. 9, 12 (Nov. 6,

2017) (Ginsburg, J., with Breyer, J., and Sotomayor, J., concurring); (2) Do evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution?

The Court stayed the execution and granted certiorari. In a 6-3 decision authored by Justice Kagan, the Court answered the two questions ("No" and "Yes" -- consistent with the parties' newfound agreement in the Supreme Court), but remanded to the state court to apply those answers to the ultimate resolution of whether Madison can be executed. "The Eighth Amendment, this Court has held, prohibits the execution of a prisoner whose mental illness prevents him from "rational[ly] understanding" why the State seeks to impose that punishment. *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). In this case, Vernon Madison argued that his memory loss and dementia entitled him to a stay of execution, but an Alabama court denied the relief. We now address two questions relating to the Eighth Amendment's bar, disputed below but not in this Court. First, does the Eighth Amendment forbid execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime? We (and, now, the parties) think not, because a person lacking such a memory may still be able to form a rational understanding of the reasons for his death sentence. Second, does the Eighth Amendment apply similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions? We (and, now, the parties) think so, because either condition may—or, then again, may not—impede the requisite comprehension of his punishment. The only issue left, on which the parties still disagree, is what those rulings mean for Madison's own execution. We direct that issue to the state court for further consideration in light of this opinion."

Justice Alito dissented, joined by Thomas and Gorsuch; Kavanaugh did not participate in the decision.

2. Intellectual Disability

Moore v. Texas, 139 S. Ct. 666 (Feb. 19, 2019) (per curiam)

Chief Justice Roberts filed a concurring opinion. Justice Alito filed a dissenting opinion, in which Justice Thomas and Justice Gorsuch joined.

Bobby James Moore fatally shot a store clerk during a botched robbery. He was convicted of capital murder and sentenced to death. Moore challenged his death sentence on the ground that he was intellectually disabled and therefore exempt from execution. A state habeas court made detailed fact findings and determined that, under the Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. ___ (2014), Moore qualified as intellectually disabled. For that reason, the court concluded, Moore's death sentence violated the Eighth Amendment's proscription of "cruel and unusual punishments." The habeas court therefore recommended that Moore be granted relief. The Texas Court of Criminal Appeals declined to adopt the judgment recommended by the state habeas court. In the court of appeals' view, the habeas court erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides adopted by the Texas Court of Criminal Appeals in *Ex parte Briseno*, 135 S.W.3d 1 (2004). The appeals court further determined that the evidentiary factors announced in *Briseno* "weigh[ed] heavily" against upsetting Moore's death sentence.

The U.S. Supreme Court vacated that ruling in 2017 in a 5-3 decision authored by Justice Ginsburg: "As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.' . . . That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. Moreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of the [Texas Court of Criminal Appeals] untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseno* factors 'creat[e]an unacceptable risk that persons with intellectual disability will be executed,' . . . Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled."

Chief Justice Roberts dissented, joined by Justices Thomas and Alito. *Moore v. Texas*, 581 U. S. ___, ___ (2017) (slip op., at 18). The state appeals court subsequently reconsidered the matter on remand but reached the same conclusion. *Ex parte Moore*, 548 S. W. 3d 552, 573 (Tex. Crim. App. 2018) (*Ex parte Moore* II).

Moore filed a second cert petition, challenging that conclusion. Notably, the prosecutor, the district attorney of Harris County, agreed with Moore that he is intellectually disabled and cannot be executed. Moore also had amicus support from the American Psychological Association, the American Bar Association, and other amici. The Texas Attorney General persisted, however, filing a motion to intervene in the current cert proceeding, and arguing that relief should be denied.

The Supreme Court reversed the second determination (and denied the Attorney General's motion to intervene) in a per curiam decision from which three justices dissented (Alito, Thomas and Gorsuch). The Chief Justice, who dissented from the Court's original decision, this time filed a concurrence to the reversal, explaining his apparent change of heart. "When this case was before us two years ago, I wrote in dissent that the majority's articulation of how courts should enforce the requirements of *Atkins v. Virginia*, 536 U.S. 304 (2002), lacked clarity. *Moore v. Texas*, 581 U.S. ___, ___–___ (2017) (slip op., at 10–11). It still does. But putting aside the difficulties of applying *Moore* in other cases, it is easy to see that the Texas Court of Criminal Appeals misapplied it here. On remand, the court repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance. The court repeated its improper reliance on the factors articulated in *Ex parte Briseno*, 135 S.W. 3d 1, 8 (Tex. Crim. App. 2004), and again emphasized Moore's adaptive strengths rather than his deficits. That did not pass muster under this Court's analysis last time. It still doesn't."

B. Method of Execution

Bucklew v. Precythe, 139 S. Ct. 1112 (Apr. 1, 2019)

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C.J., and THOMAS, ALITO, and KAVANAUGH, JJ., joined. THOMAS,

J., and KAVANAUGH, J., filed concurring opinions. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined as to all but Part III. SOTOMAYOR, J., filed a dissenting opinion.

Russell Bucklew was scheduled for execution on March 20 by a method that he alleged is very likely to cause him needless suffering because he suffers from a rare disease, cavernous hemangioma. The disease is progressive, and has caused unstable, blood-filled tumors to grow in his head, neck, and throat. Those highly sensitive tumors easily rupture and bleed. The tumor in his throat often blocks his airway, requiring frequent, conscious attention from Bucklew to avoid suffocation. His peripheral veins are also compromised. That means that the lethal drug cannot be administered in the ordinary way, through intravenous access in his arms. An expert who examined Bucklew concluded that while undergoing Missouri's lethal injection protocol, Bucklew is "highly likely to experience . . . the excruciating pain of prolonged suffocation resulting from the complete obstruction of his airway." As he struggles to breathe through the execution procedure, Bucklew's throat tumor will likely rupture. "The resultant hemorrhaging will further impede Mr. Bucklew's airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood during the lethal injection process." Bucklew's execution will very likely be gruesome and painful far beyond the pain inherent in the process of an ordinary lethal injection execution. He proposed an alternative lethal gas method of execution, which was rejected by the district court.

In a 2-1 decision, a panel of the Eighth Circuit concluded that this execution is not cruel and unusual solely because, in its view, Bucklew failed to prove that his alternative method would substantially reduce his risk of needless suffering.

The Supreme Court granted cert and a stay of execution, but then affirmed the Eighth Circuit in a 5-4 decision authored by Justice Gorsuch (joined by Roberts, Thomas, Alito and Kavanaugh). The majority summarized its holding in the opening paragraph of Justice Gorsuch's opinion: "Russell Bucklew concedes that the State of Missouri lawfully convicted him of murder and a variety of other crimes. He acknowledges that the U.S. Constitution permits a sentence of execution for his crimes. He accepts, too, that the State's lethal injection protocol is constitutional in most applications. But because of his unusual medical condition, he contends the protocol is unconstitutional as applied to him. Mr. Bucklew raised this claim for

the first time less than two weeks before his scheduled execution. He received a stay of execution and five years to pursue the argument, but in the end neither the district court nor the Eighth Circuit found it supported by the law or evidence. Now, Mr. Bucklew asks us to overturn those judgments. We can discern no lawful basis for doing so."

The majority held that two of its prior decisions govern all Eighth Amendment challenges, whether facial or as-applied, alleging that a method of execution inflicts unconstitutionally cruel pain. In *Baze v. Rees,* 553 U.S. 35 (2008) (plurality), the Court had held that a state's refusal to alter its execution protocol could violate the Eighth Amendment only if an inmate first identified a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." And, in *Glossip v. Gross*, 576 U.S. ___ (2015) – which also held that the *Baze* plurality is controlling law – the Court held that an inmate must show his proposed alternative method of execution is not just theoretically feasible, but also readily implemented. The majority here held that Bucklew failed to satisfy the *Baze-Glossip* tests. In addition, the majority held that Bucklew failed to provide a detailed alternative means of execution that is both viable and likely to significantly reduce the substantial risk of severe pain.

Justice Thomas concurred, but noted in a separate opinion his belief that punishment violates the Eighth Amendment only if it is deliberately designed to inflict pain. Justice Kavanaugh concurred and in a separate opinion noted that a valid alternative means of execution need not necessarily be authorized by a state's law – "all nine Justices today agree on that point." Justice Breyer dissented (joined by in part by Ginsburg, Sotomayor and Kagan), and Justice Sotomayor filed her own dissent as well. The portion of Justice Breyer's dissent in which he stands alone (part III) reasserts his oft-stated belief that the excessive delays caused by a condemned inmate's legitimate constitutional challenges make it impossible for capital punishment to be constitutionally imposed.

C. Florida Death Penalty

Reynolds v. Florida, 139 S. Ct. 27 (cert. denied Nov. 13, 2018)

Justices Breyer and Sotomayor wrote statements critical of the Court's denial of certiorari. Justice Breyers' statement begins: "This case, along with 83 others in which the Court has denied certiorari in recent weeks, asks us to decide whether the Florida Supreme Court erred in

its application of this Court's decision in *Hurst v. Florida*, 577 U.S. ___ (2016). In *Hurst*, this Court concluded that Florida's death penalty scheme violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence. The Florida Supreme Court now applies *Hurst* retroactively to capital defendants whose sentences became final after this Court's earlier decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which similarly held that the death penalty scheme of a different State, Arizona, violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence. The Florida Supreme Court has declined, however, to apply *Hurst* retroactively to capital defendants whose sentences became final before *Ring*. *Hitchcock v. State*, 226 So.3d 216, 217 (2017). As a result, capital defendants whose sentences became final before 2002 cannot prevail on a "*Hurst*-is-retroactive" claim."

After some discussion of Justice Breyer's general concerns about the death penalty and its administration, he identified the key issue he and Justice Sotomayor believe is at the heart of these cases and that should be preserved and raised in future cases: "Although these cases do not squarely present the general question whether the Eighth Amendment requires jury sentencing, they do present a closely related question: whether the Florida Supreme Court's harmless-error analysis violates the Eighth Amendment because it 'rest[s] a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.' *Caldwell v. Mississippi*, 472 U.S. 320, 328–329 (1985). For the reasons set out in JUSTICE SOTOMAYOR's dissent, post, at 3–7, I believe the Court should grant certiorari on that question in an appropriate case. That said, I would not grant certiorari on that question here. In many of these cases, the Florida Supreme Court did not fully consider that question, or the defendants may not have properly raised it. That may ultimately impede, or at least complicate, our review."

VII. APPEALS – FOURTH PRONG OF PLAIN ERROR REVIEW

Rosales-Mireles v. United States, 138 S. Ct. 1897 (June 18, 2018)

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.

Rosales-Mireles pleaded guilty to illegal reentry, in violation of 8 U.S.C. § 1326. The PSR calculated a total offense level of 21 and criminal history of 13 points, resulting in a criminal history category of VI = advisory guidelines range of 77 to 96 months' imprisonment. The probation officer made a mistake, however, in calculating the criminal history score. The officer counted a 2009 Texas conviction of misdemeanor assault twice, assessing four criminal history points instead of two. Without the two extra erroneously applied criminal history points, Rosales's criminal history category was V, yielding an advisory Guidelines range of 70 to 87 months. Counsel for Rosales instead requested a below-Guideline sentence of 41 months. Counsel argued that, under proposed amendments to the illegal reentry guideline, §2L1.2, a 41-month sentence would be a within-Guidelines sentence. The district court denied the requested variance and sentenced Rosales to 78 months' imprisonment.

On appeal, Rosales argued that the district court plainly erred by calculating his Guidelines range based on double-counting the prior conviction in his criminal history. The government agreed that the district court committed a plain error. However, it argued that the error did not affect Rosales's substantial rights, and that the court of appeals should not exercise its discretion to remedy the error. The court of appeals held that, by adding a total of four points to Rosales's criminal history score based on the same conviction, the district court had committed a plain error. It also held that Rosales had satisfied the third prong of plain-error review. Without the criminal history error, Rosales's Guidelines range would have been 70 to 87 months, rather than 77 to 96 months. And the district court did not explicitly and unequivocally indicate that it would have imposed the same sentence irrespective of the Guidelines range.

Notwithstanding, the Fifth Circuit declared that it would not exercise its discretion under the fourth prong of plain error review to correct the error. The court of appeals described its exercise of discretion as occurring "only where 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" (quoting *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *United States v. Puckett*, 556 U.S. 129, 135 (2009)). Such errors, the court said, are "'ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). It found there to be "*no* discrepancy between the sentence and the correctly calculated range," and thus "[w]e cannot say that the error or resulting sentence would shock the conscience." The court of appeals thus affirmed.

But, the Supreme Court reversed, 7-2 in an opinion by Justice Sotomayor. "Federal Rule of Criminal Procedure 52(b) provides that a court of appeals may consider errors that are plain and affect substantial rights, even though they are raised for the first time on appeal. This case concerns the bounds of that discretion, and whether a miscalculation of the United States Sentencing Guidelines range, that has been determined to be plain and to affect a defendant's substantial rights, calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence. The Court holds that such an error will in the ordinary case, as here, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief." Justice Thomas dissented (joined by Alito) because he sees the holding, as applied to an ordinary case, goes far beyond the specific question presented and contravenes what he sees as long-established principles of appellate review. The majority opinion, together with the dissent, clarify the burden of plain error review, making it a far less onerous standard of review.

VIII. IMMIGRATION – CANCELLATION OF REMOVAL

Pereira v. Sessions, 138 S. Ct. 2105 (June 21, 2018)

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. KENNEDY, J., filed a concurring opinion. ALITO, J., filed a dissenting opinion.

Nonpermanent residents who are subject to removal proceedings and have accrued 10 years of continuous physical presence in the United States, may be eligible for a form of discretionary relief known as cancellation of removal. 8 U.S.C. §1229b(b)(1). Under the so-called "stop-time rule" set forth in §1229b(d)(1)(A), however, that period of continuous physical presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." Section 1229(a), in turn, provides that the government shall serve noncitizens in removal proceedings with "written notice (in this section referred to as a 'notice to appear') . . . specifying" several required pieces of information, including "[t]he time and place at which the [removal] proceedings will be held." §1229(a)(1)(G)(i).1 The narrow question before the Supreme Court in this case lies at the intersection of those statutory provisions. If the government serves a noncitizen with a document that is labeled "notice to appear," but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule?

The First Circuit held that the stop-time rule is triggered when the government serves a document that is labeled "notice to appear" but that lacks the "time and place" information required by the definition of a qualifying "notice to appear." Its ruling disagreed with the Third Circuit but agreed with the Board of Immigration Appeals and other circuits.

The Supreme Court reversed (8-1) in an opinion written by Justice Sotomayor. As to the question presented – Does the incomplete document stop-time? – the Court held that "[t]he answer is as obvious as it seems: No. A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule. The plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion." Justice Kennedy concurred, agreeing with the majority opinion in full, but questioning the manner in which *Chevron* deference to administrative determinations has come to be understood and applied. Justice Alito dissented, at length, because he believes *Chevron* deference requires the Court to accept the government's and BIA's interpretation.

IX. COLLATERAL CONSEQUENCES – SEX OFFENDER REGISTRATION & NOTIFICATION ACT – NON-DELEGATION

Gundy v. United States, 138 S. Ct. 1260 (cert. granted Mar. 5, 2018); decision below at 695 Fed. Appx. 639 (2d Cir. 2017)

Congress did not determine SORNA's applicability to individuals convicted of a sex offense prior to its enactment. Instead, 42 U.S.C. § 16913(d) delegated to the Attorney General the "authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . ." The authority to legislate is entrusted solely to Congress. U.S. Const. Art. I §§ 1, 8. "Congress manifestly is not permitted to abdicate or transfer to others the legislative functions" with which it is vested. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). This "nondelegation doctrine is rooted in the principle of separation of powers." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). While the nondelegation doctrine does not prevent Congress from "obtaining the assistance of its coordinate Branches," it can do so only if it provides clear guidance. *Id.* at 372-73. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not forbidden delegation of legislative power.'"

Question presented: Whether Congress violated the nondelegation doctrine by delegating to the Attorney General the authority to determine if SORNA's

registration requirements apply to offenders convicted prior to SORNA's enactment.

X. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2241, 2254 AND 2255

A. Retroactivity: Mandatory Life Without Parole for Juveniles

Mathena v. Malvo, 139 S. Ct. 1317 (cert. granted Mar. 18, 2019); decision below at 893 F.3d 265 (4th Cir. 2018)

This case involves the notorious serial murders committed by the D.C. snipers. One of the two snipers, Lee Malvo was originally sentenced in 2004 to life without parole, even though he was a juvenile when the crime occurred. The life sentence was not mandatory under the sentencing statute. Eight years later, in *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " Four years after that, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court held that "*Miller* announced a substantive rule of constitutional law" that, under *Teague v. Lane*, 489 U.S. 288 (1989), must be given "retroactive effect" in cases where direct review was complete when *Miller* was decided. The Fourth Circuit concluded that Virginia must resentence Malvo for crimes for which he was sentenced in 2004. The basis of that decision was the Fourth Circuit's conclusion that *Montgomery* expanded the prohibition against "mandatory life without parole for those under the age of 18 at the time of their crimes" announced in *Miller v. Alabama* to include discretionary life sentences as well.

Virginia's highest court has adopted a diametrically opposed interpretation of *Montgomery*. In its view, *Montgomery* did not extend *Miller* to include discretionary sentencing schemes but rather held only that the new rule of constitutional law announced in *Miller* applied retroactively to cases on collateral review. *See Jones v. Commonwealth*, 795 S.E.2d 705, 721, 723 (Va.), cert. denied, 138 S. Ct. 81 (2017). The Supreme Court of Virginia acknowledged that prohibiting discretionary life sentences for juvenile homicide offenders may be the next step in the Supreme Court's Eighth Amendment jurisprudence, but it concluded that both *Montgomery* and *Miller* "addressed mandatory life sentences without possibility of parole."

The question presented is: Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision *(Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

B. Prosecutor as Career *Batson* Offender

Flowers v. Mississippi, 139 S. Ct. 451 (cert. granted Nov. 2, 2018); decision below at 240 So.3d 1082 (Miss. 2018)

Curtis Flowers has been tried six times for the same offense in Mississippi state court. Through the first four trials, prosecutor Doug Evans relentlessly removed as many qualified African American jurors as he could. He struck all ten African Americans who came up for consideration during the first two trials, and he used all twenty-six of his allotted strikes against African Americans at the third and fourth trials. (The fifth jury hung on guilt-or-innocence and strike information is not in the available record). Along the way, Evans was twice adjudicated to have violated *Batson v. Kentucky* -- once by the trial judge during the second trial, and once by the Mississippi Supreme Court after the third trial. At the sixth trial Evans accepted the first qualified African American, then struck the remaining five.

When Flowers challenged those strikes on direct appeal, a divided Mississippi Supreme Court affirmed, reviewing Evans' proffered explanations for the strikes deferentially and without taking into account his extensive record of discrimination in this case. Flowers then sought review, asking: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?"

The Supreme Court responded by granting certiorari, vacating the Mississippi Supreme Court's judgment, and remanding "for further consideration in light of *Foster v. Chatman*, 136 S. Ct. 1737 (2016)." On remand, a divided Mississippi Supreme Court again affirmed. Over three dissents, the state court majority emphasized deference to the trial court, and insisted both that the "[t]he prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons," and that "the historical evidence of past discrimination . . . does not alter

our analysis . . . .” The state court majority then repeated, nearly word-forword, its previous, history-blind evaluation of Evans’ strikes.

Because a prosecutor’s personal history of verified, adjudicated discrimination is highly probative of both his propensity to discriminate and his willingness to mask that discrimination with false explanations at *Batson*’s third step, the barely altered question presented to the Supreme Court here is, “Whether a prosecutor's history of adjudicated purposeful race discrimination may be dismissed as irrelevant when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?” In granting cert, the Supreme Court shortened and “limited” the question presented: “Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U.S. 79 (1986) in this case.

C. IAC: Failure to Appeal Following Plea Waiver

Garza v. Idaho, 139 S. Ct 738 (Feb. 27, 2019)

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, KAGAN, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined, and in which ALITO, J., joined as to Parts I and II.

In a 6-3 decision authored by Justice Sotomayor, the Court held that the presumptive prejudice standard applies where counsel fails to appeal following a guilty plea in which the defendant waives the right to appeal. In *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), the Supreme Court held that when an attorney’s deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed “with no further showing from the defendant of the merits of his underlying claims.” This case asks whether that rule applies even when the defendant has, in the course of pleading guilty, signed what is often called an “appeal waiver”—that is, an agreement forgoing certain, but not all, possible appellate claims. “We hold that the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether the defendant has signed an appeal waiver.”

SELECTED NEW MEXICO DECISIONS
SINCE THE 2018 JUDICIAL CONCLAVE

I. SEARCH AND SEIZURE

A. Emergency Assistance Doctrine

State v. Yazzie, 2019-NMSC-008, 437 P.3d 281 (Jan. 24, 2019) (Vigil, J.)

Here the Court revisited when an officer may make a warrantless entry into a home under the emergency assistance doctrine. Relying on cases interpreting the Fourth Amendment to the United States Constitution, the New Mexico Supreme Court had held in *State v. Ryon*, 2005-NMSC-005, ¶ 39, 137 N.M. 174, 108 P.3d 1032, that a warrantless entry is reasonable under the emergency assistance doctrine when (1) law enforcement officers "have reasonable grounds to believe that there is an emergency at hand and an immediate need for assistance for the protection of life or property;" (2) the officers' primary motivation for the search is a "strong sense of emergency" and not "to arrest a suspect or to seize evidence[;]" and (3) the officers have some reasonable basis, approximating probable cause, to connect the emergency to the area to be searched.

After *Ryon* was decided, the U.S. Supreme Court in *Brigham City v. Stuart*, 547 U.S. 398 (2006), held that the emergency assistance doctrine under the Fourth Amendment focuses on the objective reasonableness of the officer's actions and does not include a subjective component. Applying the interstitial approach, the N.M. Supreme Court held that an officer's subjective motivation remains relevant to the reasonableness of a warrantless entry under Article II, Section 10 of the New Mexico Constitution.

Under either standard, the Court concluded that the officer's actions in this case were reasonable. The officer knew that very young children appeared to have been left unattended and unable to rouse their parents. In those circumstances, he had few reasonable alternatives but to open the door and check on the occupants. The safety sweep that he conducted was also reasonable.

B. Seizure of DNA Upon Arrest

State v. Blea, 2018-NMCA-052, 425 P.3d 385 (June 21, 2018) (Vigil, J.)

Defendant's DNA taken in 2008 matched DNA obtained in a rape almost 20 years before. Defendant contended that the seizure of his DNA upon his arrest in 2008 violated the Fourth Amendment to the United States Constitution. The Court of Appeals found that his argument had been rejected by the U.S. Supreme Court in *Maryland v. King*, 569 U.S. 435 (2013). Under the New Mexico DNA Identification Act, a DNA sample is tested and placed in CODIS upon arrest and the burden of expungement is placed on the arrestee. Although this distinguished the NM statute from the statute in *King*, the Court found that did not justify a different outcome.

The Court then considered whether Article II, Section 10 of the New Mexico Constitution, should provide greater protection than the Fourth Amendment. The Court of Appeals found no justification for doing so in this case. It noted that the State had obtained Defendant's DNA in a manner that was both lawful and consistent with the New Mexico Constitution. The real complaint was that other information, lawfully in the State's possession—DNA from unsolved crime scenes—can be compared to the arrestee's known DNA. In response to that argument, the Court concluded that a defendant has no constitutionally protected privacy interest in DNA he or she leaves at a past or future crime scene, and a defendant has no constitutionally protected interest in the DNA used for identification at booking upon arrest. Under those circumstances, the Court did not find a constitutional violation. For these reasons, the Court held that the initial collection of a DNA sample as part of a routine booking procedure, and its subsequent use under CODIS did not violate Article II, Section 10 of the New Mexico Constitution.

C. Reasonable Suspicion for a Traffic Stop

State v. Salazar, ___-NMCA-___, 2018 WL 6132529 (Nov. 20, 2018) (Attrep, J.)

The State Police had set up a DWI checkpoint on Camino Real Road in Las Cruces. Just as the sun was setting an officer saw a red or maroon sedan approach the checkpoint from the south. About 100 yards before the checkpoint, the car pulled completely off the road onto the dirt

shoulder. The car lingered at the side of the road and then made a U-turn and drove rapidly away. The officer had his radar turned off and was unsure whether the car had at any point traveled faster than the posted the speed limit or committed any other traffic violation. The officer suspected from his experience that the driver was trying to avoid the checkpoint. The officer activated his emergency lights and pursued the car. He lost contact for a short period of time. He came to a four-way stop made his "best guess" and turned right. After driving in that direction briefly, he noticed in his rearview mirror a maroon car parked in a driveway. A man stood outside the car. The officer believed, though he did not know, that this was the "same maroon vehicle" he had been pursuing. He made a U-turn and approached the man standing next to the car. He asked the man whether he had been trying to evade him, and the man conceded that he had. After conducting field sobriety tests, he arrested Defendant for aggravated DWI (refusal) and evading an officer.

The Court concluded that while a legal turn in the vicinity of a checkpoint will not typically give rise to reasonable suspicion, a legal turn observed in combination with other circumstances may well support a reasonable suspicion of criminal activity—particularly where the circumstances suggest the turn is made for the purpose of evading the checkpoint. Based on all the facts here, the Court found that the officer had reasonable suspicion to support the stop.

In addition, Defendant challenged the district court's order that he turn over to the State a copy of the video from the officer's camera. The video had been given to Defendant in discovery. Before trial, the State had lost its copy of the video. The Court concluded that the video was the State's evidence and was produced in compliance with its discovery obligations. Because the video originated with the State and remained unaltered by the defense, it appeared that no constitutional, statutory, or common law prohibition on disclosure applied. In the absence of an identified prohibition or protection, the district court was entitled to resolve the dispute with an eye toward promoting "fairness in administration and the elimination of unjustifiable ... delay" as contemplated by the rules. See Rule 5-101(B). In short, fairness, expediency, and the absence of an identified prohibition or protection all counseled in favor of production here, regardless whether Rule 16-304(A) required it.

D. Consensual Encounter

State v. Simpson, ___-NMCA-___, 2019 WL 311489 (Jan. 22, 2019) (Gallegos, J.)

At around 11:00 p.m., a park ranger and animal control officer saw a car drive into a nearby parking lot. The driver of the car—later identified as Defendant—parked and turned off her lights. Because the officer found this suspicious, he reported the vehicle to dispatch. A police officer arrived in uniform and in a marked patrol car at approximately 11:20 p.m. to investigate. He entered the parking lot and parked near Defendant's stationary vehicle. At no time did he engage his vehicle's emergency lights. The officer approached Defendant's vehicle on foot. Defendant turned on her lights and started to drive away. The officer then reached out and tapped on the window of Defendant's moving vehicle. Defendant stopped and rolled down her window. The officer quickly detected the strong odor of alcohol, which led to a DWI investigation and Defendant's eventual arrest.

Police contact is consensual so long as a reasonable person would feel free to disregard the police and go about his business or to decline the officers' requests or otherwise terminate the encounter. For purposes of the Fourth Amendment, a seizure based on a show of authority, as opposed to physical force, requires submission to the assertion of authority. However, in *State v. Garcia*, 2009-NMSC-046, ¶ 35, 147 N.M. 134, 217 P.3d 1032, the New Mexico Supreme Court held that the New Mexico Constitution did not require submission to authority, and instead, the "free-to-leave" test articulated in *Mendenhall* provides the standard for determining whether a person is seized for purposes of Article II, Section 10 of the New Mexico Constitution.

Viewing the circumstances in their totality, and balancing the intrusion into Defendant's privacy against the State's interest in crime prevention, the Court concluded that the officer's approach on foot and his minimally intrusive tap on Defendant's car window did not constitute a "show of authority" at such a level of "accosting and restraint" that it would have conveyed the message to Defendant that she was not free to leave. Therefore, this encounter was consensual and there was no seizure at the point at which Defendant stopped and rolled down her window.

E. Scope of Search

State v. Cummings, 2018-NMCA-055, 425 P.3d 745 (June 28, 2018) (Vanzi, C.J.)

In this case, while searching the house for firearms, bullets, and ammunition, which were items specified in the search warrant for seizure, an officer found a locked safe that, when he handled it, sounded like it had a metal object inside, had some weight to it, and was large enough to hold a firearm. Although the search warrant did not specify that a lockbox or a safe was an item to be seized, it is a container that a reasonable officer could conclude was likely to contain any number of the items described with particularity in the warrant—to wit: firearms, ammunition, weapons or tools, cell phones, prescription and illegal narcotics and paraphernalia, documentation of the premises, and records as to the state of mind of the subjects of the warrant, including diaries or journals. Although the container in the present case was locked, the Court held that it was nonetheless reasonable for the officer to open the container to discover whether it contained the items identified with particularity in the search warrant. Therefore, the opening of the safe did not exceed the scope of the search warrant, and, as such, the district court did not err in denying Defendant's motion to suppress.

F. Second Strip Search of Inmate

State v. Chacon, 2018-NMCA-065, 429 P.3d 347 (Aug. 6, 2018) (Vigil, J.)

As a matter of first impression, the Court determined that reasonable suspicion was the appropriate standard required to perform a second strip search of an inmate who has had no contact with anyone outside of the jail. Because the strip search of Defendant was supported by reasonable suspicion, his conviction was affirmed.

G. Arrest by Reserve Deputy Sheriff

State v. Wright, ___-NMCA-___, 2019 WL 667741 (Feb. 14, 2019) (Kiehne, J.)

A reserve deputy sheriff's officer followed Defendant home after seeing her truck driving erratically on the highway. When Defendant arrived

home, her truck struck a parked vehicle in the driveway, and then backed up, almost hitting the reserve deputy's vehicle. The reserve deputy approached Defendant's truck and, after she admitted to having drunk four beers, advised her to “hang tight.” Defendant sat in her truck until a regular commissioned deputy sheriff arrived four to five minutes later to continue the investigation. Defendant was ultimately charged with driving while intoxicated (DWI).

It was undisputed that the reserve deputy lacked statutory authority under the Motor Vehicle Code to require Defendant to remain in her truck until the commissioned deputy arrived on the scene. It was also undisputed that the reserve deputy's action constituted an arrest under New Mexico law, albeit one that did not violate the Fourth Amendment. The question for the Court of Appeals was whether the arrest was constitutionally unreasonable under Article II, Section 10 of the New Mexico Constitution. The district court found that the reserve deputy's action was unconstitutional, and suppressed all evidence obtained by law enforcement after the reserve deputy directed Defendant to “hang tight.”

The Court of Appeals reversed concluding that the arrest was constitutionally reasonable, because the State's strong interest in apprehending and prosecuting drunk drivers outweighed the minor intrusion on Defendant's privacy rights.

Judge Vargas dissented, arguing that while the State had a compelling interest in deterring drunk driving and maintaining highway safety, she did not believe that New Mexico jurisprudence supported the majority’s conclusion that the exigent circumstances of this case allowed for the warrantless, unauthorized arrest of Defendant.

II. FIFTH AMENDMENT – *MIRANDA*

State v. Serna, ___-NMCA-___, 429 P.3d 1283 (Sept. 13, 2018) (Gallegos, J.)

Defendant was arrested and charged with an open count of murder (firearm enhancement), tampering with evidence, and aggravated stalking. While he was in police custody, Defendant made several potentially incriminating statements to the arresting deputy. The deputy gave Defendant the following *Miranda* warning:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney during any and all questionings. If you can't afford an attorney, one will be provided for you.

The Court's analysis of the adequacy of the deputy's *Miranda* warning turned on two primary questions: (1) does *Miranda* require that a person subject to custodial interrogation be warned of that person's right to have counsel present prior to questioning; and (2) if so, was this right reasonably conveyed by the warnings given by the deputy?

The Court concluded that *Miranda* warnings must convey, at least implicitly, the right to the presence of counsel prior to questioning; and the *Miranda* warning in this case did not reasonably convey the right to the presence of counsel before questioning. The Court's decision did not preclude the State from raising on remand whether any of the Defendant's statements were volunteered in such a manner that *Miranda* did not apply.

III. RIGHT OF SELF-REPRESENTATION

State v. Barela, 2018-NMCA-067, 429 P.3d 961 (Aug. 2, 2018) (Vigil, J.)

In this case, the record supports the district court's finding that Defendant's motion to represent himself was untimely. Defendant had made repeated requests for a new attorney and was granted several continuances of his trial. Based on Defendant's three prior requests for new counsel, his repeated continuances resulting in a three-year delay, the timing of his pro se motion, and the probable need for a continuance because of his unpreparedness, the district court did not err in its decision to deny Defendant's motion.

IV. VIOLATION OF RIGHT TO EFFECTIVE REPRESENTATION

State v. Hildreth, ___-NMCA-___, 2019 WL 1033626 (Feb. 27, 2019) (Vanzi, J.)

Defense counsel filed a motion on behalf of Defendant seeking a continuance of the jury trial on the basis that, among other things, the State had filed its disclosures and witness list late. Specifically, the State had provided discovery the previous day in the form of a CD that counsel had not yet had a chance to review. When the district court refused to grant a continuance, defense counsel announced that he would not be able to be ready and would not participate in the trial. The trial record demonstrated that he remained

steadfast in that decision. The record confirms that defense counsel played the most marginal of roles at trial: he did not participate in jury selection, give a substantive opening statement, cross-examine any of the State's witnesses, call any witnesses on behalf of Defendant, move for a directed verdict, meaningfully participate in the submission of jury instructions, or give a closing argument. His active involvement during trial was limited and narrowly confined.

On appeal, the State conceded that Defendant was denied his right to assistance of counsel and that reversal and remand for a new trial was warranted. The Court of Appeals agreed finding that this was not a case of ineffective assistance of counsel, but rather a case where Defendant had been refused any assistance of counsel which was sufficient to create a presumption of prejudice. Defense counsel's purposeful failure to participate in any meaningful way in Defendant's trial represented a constitutional violation under both the United States and New Mexico Constitutions.

The Court addressed the unusual and unseemly situation occasioned by defense counsel's adamant refusal to provide his client with a defense in a felony trial and the district judge's decision to proceed with such a trial in circumstances where some form of guilty verdict was not only a near certainty, but had no realistic chance of being upheld on appeal.

Defense counsel's conduct violated his constitutional responsibility to his client and his duty to the tribunal for which, as a licensed attorney, he served as an officer. Stated simply, attorneys in New Mexico are not empowered with decisional autonomy regarding when trials commence and when they do not commence. District courts are.

The Court went on to provide district courts with some guidance as to how to respond to situations like this in the future. The Court explained that a district judge is not helpless when faced with an attorney threatening to withdraw from participation in a criminal trial. The court has various options to address the situation. For instance, the district court can order new counsel to represent the defendant. Or it can impose a sanction on the culpable attorney while at the same time granting a continuance to give the defendant and his or her attorney time to prepare for trial. If, in that circumstance, the attorney still refuses to participate in the face of a clear order to do so, the court can invoke its contempt powers against the obstructionist attorney. While the Court understood the district court's concerns over the efficient administration of its docket, forcing a criminal defendant to go to trial with an attorney who refuses to participate itself

hinders, rather than promotes judicial economy by wasting scarce court resources while all but ensuring a violation of the defendant's constitutional rights.

Finally, the Court concluded that retrial was not barred. First, it refused to extend *State v. Breit*, 1996-NMSC-067, ¶ 32, 122 N.M. 655, 930 P.2d 792, to judicial misconduct. Second, even if it were to extend *Breit* to instances of judicial misconduct, the district court here acted appropriately and appeared impartial throughout the proceedings.

V. SPEEDY TRIAL

State v. Deans, 2019-NMCA-015, 435 P.3d 1280 (Dec. 13, 2018) (Attrep, J.)

Defendant was initially charged with twenty counts of possession of child pornography. While his case was pending trial, the New Mexico Supreme Court determined that multiple counts of possession of child pornography (like those in Defendant's indictment) could only be charged as one count. *See State v. Olsson*, 2014-NMSC-012, 324 P.3d 1230. As a result, the district court merged the twenty counts of possession of child pornography Defendant faced into one count, dramatically reducing Defendant's exposure from thirty years of incarceration to eighteen months of incarceration.

Defendant challenged his conviction on speedy trial grounds. After analyzing the four *Barker v. Wingo* factors, the Court concluded in this case, although the length of the delay (30 months) weighed heavily in Defendant's favor, the reasons for the delay and the assertion of the right to a speedy trial on balance weighed only slightly in his favor. And while the Court could presume prejudice because of the length of Defendant's pretrial incarceration, it did not weigh this factor in Defendant's favor given the unique circumstances of this case, which ultimately resulted in a benefit to Defendant. The Court, therefore, concluded that Defendant was not deprived of his right to a speedy trial.

VI. DOUBLE JEOPARDY

A. Deadlock on Greater Offense; Modified Acquit First Jury Instruction

State v. Lewis, 2019-NMSC-001, 433 P.3d 276 (Nov. 1, 2018) (Vigil, J.)

The New Mexico Supreme Court addressed two issues which arise when a jury is asked to render a verdict on a count that includes both greater and lesser offenses and it deadlocks in its deliberations on the greater offense.

First, the Court clarified what is required of the district court under Rule 5-611(D) NMRA in polling the jury to determine on which offense the jury has deadlocked. The Court held that a district court satisfies the requirements under Rule 5-611(D) when it has established a clear record as to which offense the jury is deadlocked. Strict compliance with the provisions of Rule 5-611(D) is not necessary to fulfill its purpose.

Second, the Court recognized an ambiguity in the existing jury instructions regarding the order in which a jury must deliberate on counts which include both greater and lesser included offenses. To resolve this ambiguity and provide guidance to courts and litigants going forward, the Court adopted a "modified acquit first" approach to jury instructions that enables the jury to consider both the greater and lesser offenses under a count in any order it deems appropriate provided it return a verdict of not guilty on the greater offense before the court may accept a verdict on the lesser included offense.

B. Predicate Offenses in Racketeering Prosecution

State v. Loza, 2018-NMSC-034, 426 P.3d 34 (Aug. 23, 2018) (Vigil, J.)

Defendant was convicted of racketeering. In support of the racketeering charges, the State alleged the underlying predicate offenses of murder, arson, and bribery of a public officer. Later the State prosecuted Defendant for the predicate offenses. Defendant argued that this violated his right to be free from double jeopardy.

The N.M. Supreme Court disagreed, it looked first to federal double jeopardy authority in racketeering cases and then applied that federal authority to successive prosecutions for New Mexico racketeering offenses and underlying predicate offenses. The Court concluded that this subsequent prosecution was separate and apart from the crime of racketeering and was not, as Defendant contended, "a new trial" for the same offense. Thus, contrary to Defendant's assertion, the plain language of Article II, Section 15 did not support a different result from the federal approach. "The prohibition against double jeopardy, as

guaranteed by both the United States and New Mexico constitutions, does not bar the State from prosecuting Defendant for the predicate offenses on which his racketeering convictions were based."

C. Legislative Intent to Punish Felon in Possession of a Firearm and Receiving a Stolen Firearm Separately

State v. Cummings, 2018-NMCA-055, 425 P.3d 745 (June 28, 2018 (Vanzi, C.J.)

Defendant pled to and was convicted of both possession of a firearm by a felon and receiving stolen property based on the single gun found within his locked safe. The emphasis of the legislative intent in the felon in possession statute is on deterring recidivism and keeping firearms out of the hands of persons previously convicted. It is not simply a "higher risk" individual that the Legislature identified, but specifically those with prior criminal records in order to deter recidivism. Conversely, the emphasis of the legislative intent in the receiving a stolen firearm statute is on increasing public safety by highlighting that the danger to the public is heightened when individuals obtain or possess firearms that were obtained illegally. The focus there is not in deterring recidivism but in protecting the public from a situation that contains heightened danger. The Court therefore concluded that the Legislature intended to punish possession of a firearm by a felon and receiving a stolen firearm separately, and, as such, Defendant's convictions did not violate double jeopardy.

D. Careless Driving Subsumed Within Elements of Aggravated Fleeing

State v. Gonzales, ___-NMCA-___, 2019 WL 2067270 (May 2, 2019) (Attrep, J.)

Applying modified *Blockburger* to the State's theory of the case, all elements of careless driving are subsumed within the elements of aggravated fleeing. Thus, there is no indication that the Legislature intended to punish these two crimes separately. The Court, therefore, concluded that Defendant's convictions for both aggravated fleeing and careless driving violated double jeopardy, and consequently Defendant's conviction for careless driving had to be vacated.

E. Two Offenses with Overlapping Time Periods

State v. Candelaria, ___-NMCA-___, 2019 WL 1435069 (Apr. 1, 2019) (Kiehne, J.)

Defendant Candelaria was convicted of two counts of fraud—Count 11 (fraud over $2,500 but less than $20,000), relating to conduct occurring between September 22, 2008, and January 22, 2009; and Count 13 (fraud over $20,000), which encompassed acts from July 8, 2008 to January 22, 2009. Aside from the increased dollar amount and the extended date range, the indictment and jury instruction for Count 13 were identical to those relating to Count 11, and nowhere in these documents did the State describe the specific conduct on which these charges are based.

Because the factual basis for differentiating between Counts 11 and 13 was not clear from the indictment, the jury instructions, or even the State's closing argument, the Court concluded that the jury could have convicted Defendant Candelaria twice for the same conduct. Accordingly, the Court remanded this case to the district court with instructions that the fraud count carrying the lesser sentence be vacated.

F. Separate Convictions for Possession of Two Deadly Weapons Violated Double Jeopardy

State v. Benally, ___-NMCA-___, 2019 WL 1123630 (Mar. 6, 2019) (Hanisee, J.)

Prison staff received information from an inmate that prompted a "shakedown" of the particular area of the prison where Defendant was housed. Defendant slept on the bottom mattress of a three-stack bunk, with the middle bunk being vacant. In Defendant's bunk area were pieces of legal paperwork, mail, and other items that bore only Defendant's name. On an "L" shaped support bar of the vacant, middle bunk at the top of Defendant's bunk area, prison staff found a shaving razor with a playing card folded around it to form a handle (razor weapon). Upon discovering the razor weapon, prison staff removed the mattress from Defendant's bunk and noticed a four- to five-inch slit in its side. They cut open the mattress and found a sharpened piece of the end of a plastic mop handle (mop weapon) concealed within. Approximately eighty feet away in the shower area of the pod, prison

staff next found orange plastic shavings that matched the end of a mop handle found in a shower stall and similar residue ground into the concrete lip of the shower pan. After checking a utility closet that contained items used by inmates to clean their cells, prison staff also determined that an end to one of the plastic mop handles had been removed.

The Court concluded that even though the weapons were secreted and found in separate hiding places each within arm's-length of the other that did not reflect possessory conduct sufficiently distinct in nature to support multiple punishments. Because the razor weapon and the mop weapon each qualified as a "deadly weapon" as that term is defined in the Criminal Code, and there being no other reliable indicators of legislative intent, the Court concluded that the minor differences in functionality between the two prison-made weapons possessed by Defendant did not justify convicting him of separate counts under Section 30-22-16. Applying the rule of lenity, the Court held that Defendant's convictions for simultaneously possessing two deadly weapons violated his right to be free from double jeopardy.

VII. EVIDENCE

A. Expert Testimony

State v. Ruffin, 2019-NMCA-009 (Oct. 22, 2018) (Hanisee, J.)

Defendant was charged, inter alia, with homicide by vehicle and driving while under the influence of intoxicating liquor or drugs. Defendant filed a motion in limine, seeking to prohibit the investigating deputy from testifying as an expert witness on the issue of causation and accident reconstruction, and to limit his testimony to only his personal observations during his investigation of the accident scene. Defendant also argued that the deputy's proposed expert testimony should also be excluded under Rule 11-403 because it bore "a legitimate risk of misleading the jury."

The Court of Appeals concluded that the deputy was being asked to testify regarding both non-scientific expert testimony and scientific expert testimony. The non-scientific expert testimony consisted of the following: He was able to match "specific damage" to the Ford Bronco's red tail light lens and the Toyota 4Runner's clear front lens, which led him to conclude that the front of the Toyota 4Runner had made contact

with the rear of the Ford Bronco. He also located the Ford Bronco's red lens and the Toyota 4Runner's clear lens approximately seven or eight hundred feet from the vehicles, allowing him to conclude that the Toyota 4Runner and the Ford Bronco collided where the lenses were discovered. He planned to inform the jury about the yaw and gouge marks he observed and the phenomena those marks generally indicate. Finally, based on the yaw and gouge marks found on the road and the physical damage to the Ford Bronco, the deputy concluded that the Ford Bronco rolled over. This non-scientific expert testimony was based on his personal observations of physical evidence found at the scene, was straightforward, and appeared to fit directly within the scope of his specialized training. Moreover, none of these points of testimony arose from application of scientific principles or mathematic computations. The Court therefore concluded that this testimony was not based on "scientific knowledge" and thus, the district court erred in applying the *Alberico-Daubert* standard to this testimony. Given the district court's application of the wrong legal standard to the deputy's non-scientific expert testimony, the Court concluded that the district court abused its discretion in excluding this testimony and remanded for the district court to apply the proper legal standard.

The Court also concluded that, applying Rule 403, the danger of unfair prejudice or misleading the jury by admitting the non-scientific expert testimony was minimal compared to its probative value.

Finally, according to the deputy's own description of the methodology needed to identify the cause of a collision that results in a vehicle rollover, any expert testimony concerning the cause of this apparent rollover would require application of mathematical principles and would therefore be scientific expert testimony and must be subjected to the heightened *Alberico-Daubert* standard. Here the deputy elected not to conduct a full reconstruction, apply mathematical formulae, or engage in other procedures consistent with a final determination of what happened and why. He did not testify to or document any discernible methodology from the which the district court could test the reliability of his opinion. As a result, the district court's exclusion of his proposed scientific expert opinion was not an abuse of discretion.

B. Admission of Co-Defendant's Guilty Plea as Substantive Evidence

State v. Flores, 2018-NMCA-075, 430 P.3d 534 (Sept. 17, 2018) (Vanzi, C.J.)

A detective was looking for Scott Veretto. This detective had previously arrested Veretto for stealing motorcycles and he had confirmed on NCIC that Veretto was a wanted fugitive. He learned that Veretto was staying with Defendant, who was Veretto's girlfriend at the time. The detective saw a partially disassembled Nissan Murano parked in the backyard of the house from which he had seen Venetto leave. The vehicle identification number (VIN) plate had been removed from the Murano's dashboard, but the detective found a label with the VIN on the inside of the driver's side door. A National Crime Information Center (NCIC) check established that Defendant's mother owned the vehicle. The detective then went to Defendant's mother's home, where Defendant also lived, and located Defendant. There, he saw a different and fully assembled Nissan Murano. The VIN plate on the dashboard of the Murano "appeared to have been tampered with." Defendant gave the detective access to the inside of the Murano by crawling through the back of the car to unlock the car, and an NCIC search of the VIN from the secondary label confirmed that the vehicle was not owned by Defendant or her mother, but had been reported as stolen. Also, when Defendant opened the Murano for the detective to examine the secondary VIN, he saw "a little computer" in the back of the vehicle. Defendant explained that she used the computer "to reset her key in order to start the car" using written instructions that Veretto had given to her.

Defendant was charged with receiving or transferring a stolen vehicle, conspiracy to receive or transfer a stolen vehicle, possession of burglary tools, and two counts of harboring a felon. On the same date, the State charged Veretto with receiving or transferring a stolen vehicle, conspiracy to receive or transfer a stolen vehicle, possession of burglary tools, and other crimes related to vehicle theft. Veretto subsequently entered into a plea and disposition agreement in which he agreed to plead guilty to receiving or transferring a stolen 2007 white Nissan Murano and conspiracy to commit receiving or transferring a stolen 2007 white Nissan Murano, among other offenses. Defendant's case proceeded to trial.

The State called Veretto to testify in its case in chief. Veretto initially refused to testify about anything in his plea agreement which he characterized as "lies." As a result, the State moved to admit certified copies of Veretto's indictment and plea agreement into evidence. Over Defendant's objection, the district court admitted the indictment and plea agreement. The Court of Appeals concluded that the record demonstrated that the State did not use Veretto's plea for impeachment or other permissible reasons, but rather it used those documents as substantive evidence to argue that Defendant knew or should have known that the vehicle was stolen. Because the State used the codefendant's plea agreement and indictment solely for the substantive purpose of proving the elements of receiving or transferring a stolen vehicle against Defendant, it violated her right to a fair trial and to due process under the Sixth and Fourteenth Amendments of the United States Constitution. Finding this was not harmless error, the Court reversed and remanded.

C. Admission of Text Messages

State v. Jackson, 2018-NMCA-066, 429 P.3d 674 (Sept. 12, 2018) (Vargas, J.)

In the case involving human trafficking, the State sought to introduce various text messages at trial. It presented a witness who it qualified as an expert in the areas of digital analysis and digital forensic analysis. This expert testified that he performed a digital analysis of two cell phones. One phone was associated with a phone number beginning with the digits, 712 ("the 712 number" or "712 phone"), while the other had a phone number beginning with the digits, 804 ("the 804 number" or "804 phone"). Extracting information from the 712 phone, the State's expert created a phone examination report setting out a timeline of that cell phone's activity between December 2012 and March 16, 2013. The report showed numerous contacts between the 712 number and the 804 number. B.G. testified that the 712 number belonged to Defendant and that the 804 number belonged to Tiffany, who worked as a prostitute and was named as Defendant's co-conspirator in the indictment.

The Court found that the State's evidence linking Defendant to the 712 and 804 phones, presented before moving the text message exhibit into evidence, was adequate to authenticate the exhibit. It established the relevance of the 712 and 804 phones' activities, and presented

sufficient evidence to show, by a preponderance of the evidence, that the information in the exhibit came from the 712 and 804 phones. Therefore, the district court did not abuse its discretion in admitting the exhibit. Moreover, any text messages authored by Defendant were "non-hearsay" under Rule 11-801(D)(2)(a). Similarly, text messages authored by Tiffany were "non-hearsay" under Rule 11-801(D)(2)(e) (co-conspirator's statements). Defendant did not point to anything in the record that suggested anyone other than Defendant and Tiffany had access to or used the 712 and 804 phones. Thus, with regard to text messages sent from the 712 and 804 number, the State has adequately identified the author to overcome a hearsay challenge.

VIII. CRIMES

A. Depraved Mind Murder

State v. Candelaria, 2019-NMSC-004, 434 P.3d 297 (Dec. 1, 2018) (Vigil, J.)

New Mexico courts, receiving little guidance from the Legislature, have struggled to distinguish first-degree depraved mind murder from second-degree murder. Although the parties did not address the fine distinction between depraved mind murder and second-degree murder in their briefing, the Court took this opportunity to define the distinction between the two types of murder in an effort to assist parties and lower courts in the future.

Second-degree murder, which carries a basic penalty of fifteen years in prison, is defined as follows:

> Unless [the person] is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death [the person] knows that such acts create a strong probability of death or great bodily harm to that individual or another.

The Court made clear that the four indicators of a depraved mind are as follows: (1) "more than one person [was] endangered by the defendant's act," (2) the defendant's act was "intentional" and "extremely reckless," (3) the defendant had "subjective knowledge that

his act was greatly dangerous to the lives of others," and (4) the defendant's act "encompass[ed] an intensified malice or evil intent." The Court acknowledged that first-degree depraved mind murder and second-degree murder shared the same subjective knowledge requirement—that a defendant know "the probable consequences" of the defendant's act, as opposed to should have known of the probable consequences, but the other factors serve to distinguish between the two kinds of murder.

The Court concluded in this case that the evidence that Defendant shot into a vehicle containing multiple people and killing an 8-year-old child was sufficient to support his conviction for first-degree depraved mind murder.

B. Possession of a Synthetic Cannabinoid

State v. Arias, 2018-NMCA-057, 427 P.3d 129 (July 19, 2018) (Hanisee, J.)

Defendant contended that there was insufficient evidence to support his conviction because the State failed to meet its burden of proving that the substance in his possession was a "synthetic cannabinoid" within the meaning of the term as used in the Controlled Substances Act ("CSA"). The only witnesses who testified at Defendant's bench trial were Ms. Lucero, Ms. Lucero's supervisor who also participated in the visit to Defendant's home, and Officer Loomis. Ms. Lucero and Officer Loomis both offered lay opinions, based on their training and experience, that the substance found on Defendant's dresser was a synthetic cannabinoid. With respect to training, both testified that they received training regarding synthetic cannabinoids in their respective academies, Ms. Lucero describing her academy training as "just a short, little class." Ms. Lucero also testified that she receives email notices from her department several times a year with pictures of "synthetics" and "what's new out there on the streets." With respect to experience, Ms. Lucero testified that in her work as a probation officer, she had come into contact with substances—later confirmed through laboratory testing—that she believed to be synthetic cannabinoids on at least ten occasions. Officer Loomis testified to having come into contact with synthetic cannabinoids fewer than ten times during his time as a police officer. Neither offered any testimony regarding the chemical composition of the substance found on Defendant's dresser, and both conceded that they had no training in forensic chemistry and

had never personally obtained a positive identification of a synthetic cannabinoid through field or laboratory testing.

To sustain a conviction for an offense involving a substance alleged to be "synthetic cannabinoids," the State must prove beyond a reasonable doubt one of the following: that the substance (1) is one of the chemical compounds enumerated in either the statute or the regulation; (2) falls into of one of the classes of chemicals listed in the regulation; or (3) has a high potential for abuse, has no accepted medical use in treatment, and demonstrates binding activity to the cannabinoid receptor or analogs or homologs with binding activity. Given that, the State must introduce scientific evidence to prove the identity of a substance suspected of being a synthetic cannabinoid. The State in this case failed to present any competent evidence that would allow the district court to draw the specific inference that the substance found on Defendant's dresser was a "synthetic cannabinoid" as defined under the CSA.

The Court went on to state:

> We note that oftentimes, the process of proving a substance to be a synthetic cannabinoid involves not one but two steps. The first step . . . consists of scientifically testing the substance to determine what chemical compound it consists of or, more accurately, has been applied to it. In cases where the chemical makeup of the substance matches an enumerated chemical compound listed in a statute or regulation, no additional evidence establishing the substance as a "synthetic cannabinoid" may be needed. . . . In cases where the chemical identified is not specifically listed, however, a second step is required in which additional evidence is presented to try to establish that the chemical comes within the definition of "synthetic cannabinoids." Typically, this comes in the form of expert testimony by a forensic scientist who can explain both the structure of the chemical compound and its effects, i.e., whether it fits within either a controlled class of chemicals or the neurochemical definition of "synthetic cannabinoids."

C. Racketeering

State v. Catt, 2019-NMCA-013, 435 P.3d 1255 (Nov. 13, 2018) (Attrep, J.)

To convict a defendant of racketeering under Section 30-42-4(C), the jury must find that the defendant committed at least two predicate acts. To do so, it is necessary that the jury is instructed on the essential elements of the alleged predicate acts upon which racketeering is based. The instruction in this case was flawed because it failed to define the elements of each predicate offense that must be proved at trial, and that error warranted vacating Defendant's conviction for racketeering.

The instruction on conspiracy to commit racketeering omitted, among other things, any elements pertaining to an enterprise or a pattern of racketeering. The State acknowledges that the instruction for conspiracy to commit racketeering must contain such elements. Because the conspiracy to commit racketeering instruction permitted the jury to convict Defendant on the mere agreement to commit a single predicate act, Defendant's conviction on the conspiracy count could not stand.

The conspiracy to commit a racketeering act can serve as a predicate offense under the New Mexico Racketeering Act. In this case, the Court concluded that conspiracy to commit trafficking in controlled substances could serve as a predicate offense for racketeering. Finally, the fact that the jury deadlocked on two of the possible predicates resulted in a mistrial, not an acquittal, of the racketeering charges.

D. SORNA

State v. Winn, 2019-NMCA-011, 435 P.3d 1247 (Oct. 17, 2018) (Vigil, J.)

After Defendant moved to New Mexico, an indictment filed in February 2014 charged Defendant with one count of failure to register as a sex offender in violation of SORNA. Defendant argued that his misdemeanor Colorado conviction for third degree sexual assault was not “equivalent” to any SORNA offense.

The State contended that "Defendant was convicted at [a] jury trial of engaging in sexual contact, intrusion, or penetration with a child for the purpose of his own sexual gratification." The conduct forming the basis of this conviction, the State argued, was equivalent to the registrable New Mexico offense of criminal sexual contact of a minor (CSCM) or criminal sexual penetration (CSP). To provide a factual basis for this assertion, the State tendered an unfiled, unsigned presentence report purporting to describe, based on information provided by the Littleton Police Department, the victim's and Defendant's accounts of the conduct giving rise to his convictions in Colorado.

The Court of Appeals first found that because the potentially equivalent SORNA offenses in this case contained one or more additional elements, the statute under which Defendant was convicted in Colorado was not, on its face, equivalent to a SORNA offense. Thus, the Court had to consider the defendant's actual conduct. Turning to the only factual evidence presented by the State, the Court concluded that the presentence report lacked proof of authenticity and reliability, and therefore constituted inadmissible evidence that the district court erred in considering and determining Defendant's actual conduct underlying his Colorado sexual assault conviction. The Court found that Defendant's actual conduct, as demonstrated by the judgment and sentence, had it occurred in New Mexico, did not constitute an offense requiring registration pursuant to SORNA.

E. Human Trafficking

State v. Jackson, 2018-NMCA-066, 429 P.3d 674 (Sept. 12, 2018) (Vargas, J.)

The Court held that human trafficking does not require knowledge of the age of the person being recruited, solicited, enticed, transported, or obtained. The intentional exploitation of a person under the age of eighteen for commercial sexual activity amounts to a violation of Section 30-52-1(A)(2), regardless of a defendant's actual awareness of that person's age.

F. Failure to Enforce Compulsory School Attendance

State v. Roeper, 2019-NMCA-001, 433 P.3d 311 (Sept. 4, 2018) (Vargas, J.)

Defendant was the mother of three children, including fifteen-year-old J.M.. Her son had a history of behavioral problems and had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Defendant also cared for her younger son, who was deaf and suffered from autism and Down syndrome. Along with her own three children, Defendant also cared for her grandchild. In the winter of 2012, following a stay in hospice, Defendant's husband died. Defendant suffered from bipolar disorder and depression, and eight or nine months after her husband's death, in the fall of 2013, Defendant suffered a mental breakdown and checked herself into a hospital for approximately three weeks. While Defendant was hospitalized, the son's grandmother enrolled him at Eddy Alternative School in mid-August 2013. The son began school there as an eighth grader after having been held back from high school for one year. Her son's attendance at the school was "sporadic," and he quickly accumulated an impermissible number of absences. The school attempted, without success, to contact Defendant regarding her son's absences on several occasions. On September 19, 2013, the school mailed Defendant notice that her son had four unexcused absences, following up with another letter the next day, notifying of her of his fifth unexcused absence. Both letters requested that Defendant contact the school within one week to schedule a meeting with the school's principal. On October 14, 2013, the school sent Defendant written notice that her son had accumulated ten and a half unexcused absences.

The school forwarded its file to the chief juvenile probation officer who reviewed it and decided solely from that review that Defendant may have caused her son's habitual truancy. The State then charged Defendant with one count of failure to enforce compulsory school attendance in violation of § 22-12-7. At trial, Defendant testified that her son was sometimes violent toward her and that she was afraid of him. Between April 2013 and December 2013, emergency services received at least five 911 calls reporting disturbances involving her son at the family home.

The plain language of the statute clearly requires the juvenile probation office to conduct an investigation into whether a habitually truant student is "a neglected child or a child in a family in need of services" if the student continues to accrue unexcused absences after written notice is given to the student's parent. While the Court declined to define what specifically must be done to comply with that

statutory mandate, it held that, unless the student's file itself demonstrates that a child is neglected or a child in a family in need of services, simply reviewing the file is not sufficient. Instead, the Court expected that in most instances, an investigation will include, at the very least, interviews with the student's teachers to determine whether they have any information about the student's family life that would assist the juvenile probation office in making its determination. The Court expected that the juvenile probation office would attempt to speak with the student and student's parent, guardian, or other caretaker, seeking similar information. Absent such interviews, the Court found it difficult to see how the juvenile probation office could properly determine whether the student was "a neglected child or a child in a family in need of services." Section 22-12-7(C).

The Court then went on to consider whether a proper investigation was a prerequisite to a prosecution under Section 22-12-7(E), concluding that it was. As a result, the failure to satisfy this statutory prerequisite to prosecuting Defendant required reversal of Defendant's conviction. Finally, the Court found that the evidence was not sufficient to support Defendant's conviction.

G. Following Too Closely

State v. Chavez, 2018-NMCA-056, 427 P.3d 126 (July 17, 2018) (Zamora, J.)

Defendant challenged § 66-7-318 (the following too closely statute) as unconstitutionally vague. Section 66-7-318 prohibits a driver of a motor vehicle from "follow[ing] another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." In *State v. Sanchez*, No. A-1-CA-34170, 2016 WL 1546619 (N.M. Ct. App. Mar. 2, 2016) (non-precedential) the Court had held that the provision's "reasonable and prudent" standard provides adequate notice to drivers of what driving behavior is proscribed by the statute. The Court had also held that the provision did not invite ad hoc application or inconsistent enforcement, and that the possibility of flexibility in applying the statute did not overcome the presumption that a given statute is constitutional. The Court found no reason to depart from the overwhelming weight of precedent addressing this issue, finding that the statute was constitutional.

H. Driving Without a Valid Driver's License

State v. Anthony L., 2019-NMCA-003, 433 P.3d 347 (Sept. 26, 2018) (Zamora, J.)

Child was charged with driving without a valid driver's license. He contended that the State had failed to prove that he did not have a valid driver's license at the time; instead they proved that he did not have a driver's license in his possession at the time. The State agreed, and the Court held that the jury's verdict on this offense should be reversed.

The Court also found "good cause shown" in the record, although not memorialized in the order granting an extension of the time limits, to conclude that there was no abuse of discretion in granting the State's motion for an extension of time in which to begin the adjudicatory hearing.

I. Forgery

State v. Candelaria, ___-NMCA-___, 2019 WL 1435069 (Apr. 1, 2019) (Kiehne, J.)

Whether a defendant signs another's name by hand, or uses a signature stamp, his or her actions tell a lie about the document itself—that it has been made with the approval of the apparent signer, and is therefore genuine—and does not merely tell a lie about a fact or facts stated in the document. The Court therefore concluded that Defendants' use of a signature stamp and the checks outside the scope of their authorization to do so were acts which, when combined with the required intent to injure or defraud, constituted forgery.

IX. SENTENCING

A. Authority to Amend Clerical Error in Judgment and Sentence

State v. Stejskal, 2018-NMCA-045, 421 P.3d 856 (May 15, 2018) (Bohnhoff, J.)

Defendant appealed an amended judgment and sentence entered two years after the entry of his original judgment and sentence. By changing the word "concurrent" to "consecutive," the amended

judgment had the practical effect of increasing Defendant's term of incarceration from nine years to ten years.

In this case, the Defendant entered his plea of no contest pursuant to an agreement by which he would receive two consecutive sentences resulting in a total of ten years of incarceration. The parties and court all understood that agreement and accurately recited its sentencing terms at various points in the proceedings. The district court's pronouncement of sentence in open court was consistent with both written agreement and the parties' unanimously expressed understanding. The Court of Appeals thus concluded that the written judgment and sentence imposing concurrent sentences resulting in a total of nine years of incarceration was the product of clerical error, which the district court could correct pursuant to Rule 5-113(B).

B. Felony Escape and Habitual Enhancement

State v. Sanchez, 2019-NMCA-006 (Oct. 4, 2018) (Vargas, J.)

Defendant was convicted of felony possession of a controlled substance and was committed to the community custody release program ("CCP"). Two weeks after being committed to CCP Defendant cut off his ankle monitor, failed to respond to messages from monitoring officers, and was then taken into custody. The State charged Defendant with felony escape from CCP because the possession charge, for which Defendant was committed to CCP, was also a felony. A jury found him guilty. The State then sought to enhance Defendant's felony escape conviction by eight years pursuant to the habitual offender statute, asserting that Defendant had three or more prior felony convictions, one of which was his conviction for possession of a controlled substance (felony possession). The district court found Defendant was a habitual offender, and enhanced his sentence for felony escape by eight years.

The Court of Appeals found that Defendant's status as a felon, particularly his conviction for felony possession, was not an element of his conviction for escape from CCP. It merely served to place him in the CCP from which he subsequently escaped. As such, the Court concluded his prior felony possession conviction was sufficiently removed from his felony escape sentence as to allow for a habitual enhancement under double-enhancement analysis.

X. APPEALS – DISTRICT COURT REVIEW OF POTENTIALLY DISPOSITIVE DISCOVERY SANCTION ENTERED IN MAGISTRATE COURT

State v. Verret, 2019-NMCA-010 (Oct. 23, 2018) (Gallegos, J.)

Defendant was charged with one count of aggravated DWI in magistrate court. Before trial the defense was not able to interview the arresting officer. The defendant moved to exclude the officer from testifying. The magistrate ordered the State to provide the witness interview by the day of jury selection. When that day came, Defendant had still not been given the opportunity to interview the officer. At that point, the magistrate granted Defendant's motion to exclude the officer's testimony.

Rather than proceeding to trial, the State filed a nolle prosequi in magistrate court and refiled Defendant's case in district court. Defendant filed a motion for reconsideration. In his motion for reconsideration, Defendant argued that the district court was required to make a de novo determination of whether the magistrate court's exclusion order—entered as a discovery sanction—was correctly issued based on the merits of the motion as they existed at the time the magistrate court entered the order. The district court concluded in its order denying Defendant's motion for reconsideration that "[b]ecause this case is not an appeal but is a refiling, the [d]istrict [c]ourt's role is not to pass upon the merits of the lower court's decision but to determine whether the motion, raised and filed in [d]istrict [c]ourt, is meritorious now." The district court then denied the motion because Defendant had interviewed the officer following the refiling in district court.

The Court of Appeals concluded that the district court should have conducted an independent review of the pretrial motion to exclude filed in magistrate court. The district court was bound by events that transpired in magistrate court and therefore was required to base its independent judgment on the limited record brought before it and the arguments made by counsel in district court. The Court reversed the ruling of the district court and remanded with an instruction that the district court determine if it would have excluded the officer's testimony based on the events in the magistrate court or if it would have considered alternatives to exclusion.

XI. CRIMINAL COMMITMENT—DEFINITION OF "MAXIMUM SENTENCE"

State v. Quintana, ___-NMCA___, 2019 WL 474779 (Feb. 5, 2019) (Vanzi, J.)

Upon a determination by the district court that there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time, the district court may conduct criminal commitment proceedings. Section 31-9-1.4. If the court determines by clear and convincing evidence that the defendant committed the crime charged and is dangerous, the defendant must be detained in a secure, locked facility, Section 31-9-1.5(D)(1), for a period not to exceed the maximum sentence available had he been convicted in a criminal proceeding, Section 31-9-1.5(D)(2).

In this case, the district court found that both "[t]he brutality and viciousness with which this crime was committed" and "[the] threat to community safety" were "valid aggravating factor[s] by which to increase Defendant's commitment to the New Mexico Behavioral Health Institute (NMBHI) [.]" Based on these findings, the district court ordered Defendant to be committed to NMBHI for fifteen years (the basic sentence for second-degree murder) plus five years for aggravating circumstances.

Defendant argued that the phrase "maximum sentence" referred only to the basic sentence. The Court of Appeals disagreed. It held that it was reasonable to conclude that the "maximum sentence" can consist of basic sentences for the crimes that trigger commitment, and any enhancements of those basic sentences that are expressly based on inherently dangerous criminal conduct as set out in Section 31-9-1.5(D) or defined in Section 31-9-1.2.