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NEW SUPREME COURT TERM TO LOOK AT MAJOR QUESTIONS INVOLVING DEATH PENALTY AND DOUBLE JEOPARDY

BY HARRY SANDICK AND KATHRINA SZYMBORSKI

every fall, the Supreme Court takes up a series of criminal law cases that can have a major impact on criminal practice across the country. Some years are more eventful than others. The most consequential term in this century was likely October Term 2003, which gave us *Crawford v. Washington* and *Blakely v. Washington*, each of which changed important aspects of trial and sentencing procedure. While it is too soon to say whether this term will

rival October 2003's transformative effects—additional cases still may be added to this year's docket—it is already apparent that we should expect important decisions in areas as diverse as the Double Jeopardy Clause, the Excessive Fines Clause, and death penalty practice. In this article, we provide a short preview of the leading criminal law cases that have been placed on the docket and also briefly review a few cert petitions that some Court followers think could be granted.

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DOUBLE JEOPARDY CLAUSE: *GAMBLE V. UNITED STATES*

Gamble v. United States, which proposes to reconsider the longstanding separate-sovereign exception to the Double Jeopardy Clause, has the potential to bring about a major change in federal-state relations in the area of criminal law. The Double Jeopardy Clause of the Eighth Amendment prohibits being twice tried for the same offense. However, the separate-sovereign exception permits successive prosecutions by a state and the federal government. The Supreme Court recognized

this exception most notably in *Bartkus v. Illinois*, 359 U.S. 121 (1959). *Bartkus* held that the states and the federal government are distinct sovereigns with the independent ability to punish criminal conduct. Justices Ginsberg and Thomas—two justices who do not frequently vote with each other when the Court is divided—recently called for “fresh examination” of this exception. (*Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsberg, J., concurring).) In a concurring opinion two years ago, Justice Ginsberg wrote that the Double Jeopardy doctrine is meant “to shield individuals from the harassment of multiple prosecutions for the same misconduct.” (*Id.*) She explained that the separate-sovereign doctrine does not advance this objective. (*Id.*)

In his petition for certiorari, Gamble argued that the separate-sovereign exception is not consistent with the plain text, original meaning, or purpose of the Constitution. (Petition for Writ of Certiorari at 10, *United States v. Gamble*.) The government defends the rule as required by precedent and contends that it is consistent with the basic structure of federalism. (Brief of Respondent in Opposition at 6.) The government also argues that a decision to undo the separate-sovereign doctrine would be a dramatic change in the law, although many states (like New York) already afford individuals protection against a successive prosecution. (*Id.*)

Some observers have commented that the decision in this case may have special significance for the ongoing investigation of the Office of the Special Counsel Robert Mueller, or for any referrals to state prosecutors that he might make in the future if there are presidential pardons. (See Colby Hamilton & Dan Clark, *Upcoming SCOTUS Case Could Complicate NY Effort to Close Double Jeopardy “Loophole”*, N.Y.L.J. (July 2, 2018).) In the absence of the separate-sovereign doctrine, a presidential pardon of an individual could bar that person’s prosecution in state court.

Beyond its potential significance to the Mueller investigation, *Gamble* could create disincentives for state and federal prosecutors to work together. If only one jurisdiction can ultimately convict a defendant, there could be a race to charge individuals. But the system works better when prosecutors have the time needed to make certain that a particular prosecution is just; a “race” between prosecutors to charge and convict an individual could result in errors and even wrongful convictions. Already there is some natural “competition” between state and federal prosecutors in certain parts of the country. This can be healthy to some extent, such as when a neighborhood or type of crime is ignored by one office and the other steps in to fill the gap. But this competition might intensify in ways that will ultimately result in a less just system if each jurisdiction fears being “jeopardied out,” so to speak, by the other.

THE EXCESSIVE FINES CLAUSE: *TIMBS V. INDIANA*

This case considers whether the Excessive Fines Clause of the Eighth Amendment has been incorporated by the Supreme Court under the Fourteenth Amendment, and thereby made

applicable to the States. According to Timbs’ cert petition, two circuits and 14 state high courts already have held that the Excessive Fines Clause has been incorporated, but a growing minority of states, including Indiana, have concluded the opposite. (Petition for Writ of Certiorari at 13, *Timbs v. Indiana*.) The Supreme Court has held in a number of prior instances—including as recently as *Hall v. Florida*—that the entire Eighth Amendment is incorporated. (134 S. Ct. 1986, 1992 (2014).) But some contrary dicta in *McDonald v. City of Chicago* has created uncertainty that is ripe for resolution by the Supreme Court. (561 U.S. 742, 745 n.13 (2010) (stating in a footnote that the Court “never [has] decided” whether the Excessive Fines Clause applies to the states).)

This case is of particular interest to those who practice in the asset forfeiture area, as the Excessive Fines Clause is a check on the use of civil forfeiture by states to seize property without affording people the rights guaranteed in criminal proceedings. The facts of this case are disturbing in this regard. Using life insurance proceeds, Timbs purchased a Land Rover for \$41,588, which he then used to drive to sell a total of \$385 in heroin to undercover officers. The maximum fine that could be imposed for this crime was \$10,000, and Timbs served no prison time, but the state decided to forfeit the Land Rover. It is precisely to prevent forfeitures under these unfair and disproportionate circumstances that we have an Excessive Fines Clause. The trial court found the forfeiture disproportionate under the Excessive Fines Clause, but the Indiana Supreme Court reversed, ruling that Indiana and the other “sovereign state[s] within our federal system” were not required to follow the Excessive Fines Clause absent a sufficiently clear statement from the Supreme Court. (See Petition for Writ of Certiorari, app. at 27.) Given the problematic use of civil forfeiture in this case and many others, it is high time that the Supreme Court resolved the issue.

DEATH PENALTY LITIGATION: *MADISON V. ALABAMA, BUCKLEW V. PRECYTHE, AND FLOWERS V. MISSISSIPPI*

There are three death penalty cases already on the docket for this coming year, each of which will address significant issues in the application of the death penalty. The first one, *Madison v. Alabama*, was argued on October 2, 2018. This case involves a defendant, Madison, who has been on death row for more than 30 years. As this litigation has unfolded, he has sustained multiple severe strokes. He now suffers from vascular dementia, cognitive impairment, and memory loss; speaks in a slurred manner; is legally blind; and cannot walk independently. Madison’s counsel argues that he no longer has any memory of the crime he committed and therefore he does not understand why he is being punished. (See Petition for Writ of Certiorari at 18, *Madison v. Alabama*.)

The question to be decided in *Madison* is whether the Eighth Amendment permits the execution of such a person, or whether that would amount to cruel and unusual punishment. In 1986, the Supreme Court held that someone who is incompetent

may not be executed, consistent with the Eighth Amendment. (*Ford v. Wainwright*, 477 U.S. 399 (1986).) It has issued several decisions over the last several decades building on this principle, including one holding that a defendant may not be executed if he does not understand the reason for which he is being executed. (*Panetti v. Quarterman*, 551 U.S. 930, 957 (2007).) The State does not disagree that the Eighth Amendment prohibits the execution of someone who lacks a rational understanding of the reasons for his or her execution, but it contends that Madison does not meet this standard, even though he may be unable to recall the offense that he committed. (Brief of Respondent in Opposition.)

This case also raises an issue presented by Justice Breyer when he called for a reconsideration of the death penalty in his dissenting opinion in *Glossip v. Gross*: whether the death penalty is unconstitutional because of the “excessively long periods of time that individuals typically spend on death row, alive but under a sentence of death.” (135 S. Ct. 2727, 2764 (2015) (Breyer, J., dissenting).) The average delay between sentencing and execution has been steadily growing; by 2014, it was 18 years. (*Id.*) The passage of time itself can detach the punishment of death from some of the traditional penological grounds that have been invoked to support the death penalty’s constitutionality. (*Id.* at 2765.)

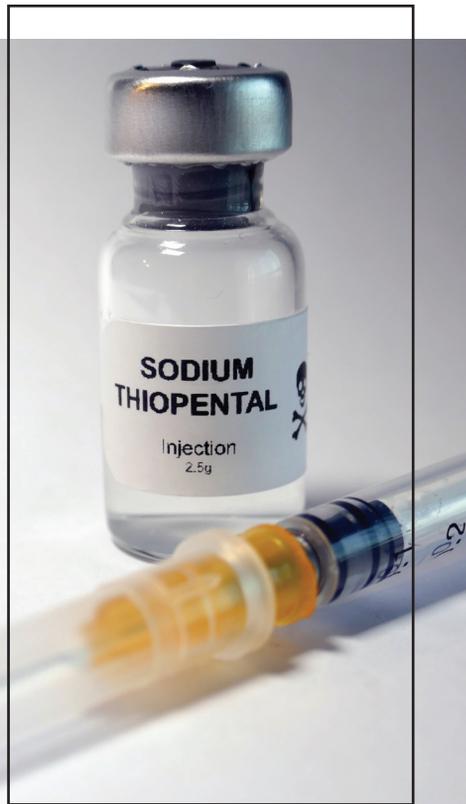
Justice Breyer also has drawn attention to this excessive delay in an earlier stage of *Madison’s* long path through the federal courts and noted that increased delays mean we will see more defendants like Madison who develop serious medical impairments while on death row. (*See Dunn v. Madison*, 138 S. Ct. 9, 13 (2017) (Breyer, J., concurring).) Echoing his dissent in *Glossip*, he predicted that “we may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty while at the same time undermining its penological rationale.” (*Id.*) In Justice Breyer’s view, “[r]ather than develop a constitutional jurisprudence that focuses upon the special circumstances of the aged . . . it would be wiser to reconsider the root cause of the problem—the constitutionality of the death penalty itself.” (*Id.*) *Madison* gives Justice Breyer and those on the Court who agree with him another opportunity to question the constitutionality of the death penalty.

In a second death penalty case, *Bucklew v. Precythe*, argued on November 6, 2018, the Court will deal with a legal question

considered in *Glossip v. Gross*: whether a particular method of execution is unconstitutional as cruel and unusual punishment under the Eighth Amendment. In Justice Alito’s majority opinion in *Glossip*, the Court held that a defendant who challenges the method of execution is required under the Eighth Amendment to identify an alternative, available method of execution. (135 S. Ct. at 2726.) This shifts the burden from the state to the defendant to identify a nonpainful method. Justice Sotomayor’s dissent stated that under the Court’s rule, “it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake”—anything goes unless the defendant could prove that a less painful method of execution is available. (*Id.* at 2795 (Sotomayor, J., dissenting).)

In *Bucklew*, the defendant has an unusual medical condition that will make the proposed method of execution unusually painful to him. His lawyers have written that it will be “gruesome and painful far beyond the pain inherent in the process of an ordinary lethal injection execution.” (Petition for Writ of Certiorari at 3, *Bucklew v. Precythe*.) Here, the Court will decide an as-applied challenge (as opposed to the facial challenge in *Glossip*) to the operation of a particular method of execution, and it raises several novel questions about how to interpret *Glossip*. For example, given that the medical condition is unusual, should the court presume that medical personnel will be able to treat the defendant appropriately? Does the defendant have to prove that there is an adequate alternative method, or does that requirement only exist when a healthy defendant makes a facial challenge? *Bucklew* will be another important chapter in the Supreme Court’s assessment of whether the death penalty as it is applied in the United States is consistent with the standards of decency that are inherent in the Eighth Amendment.

Finally, in *Flowers v. Mississippi*, in which cert was granted on November 2, 2018, the Supreme Court will assess whether Mississippi’s highest court properly applied the rule of *Batson v. Kentucky* in a death penalty case. *Batson* is the landmark Supreme Court decision that makes it unconstitutional for prosecutors to strike jurors based on race. *Flowers* has been tried on six separate occasions for murder. In those trials (many of which resulted in deadlocks), prosecutors struck all or nearly all African Americans from the venire. One issue that the Court will examine is whether it was appropriate for the Mississippi Supreme Court to ignore the use of race to strike jurors in the trials prior to the one giving rise to the instant appeal.



FURTHER REFINEMENTS OF THE ARMED CAREER CRIMINAL ACT: *UNITED STATES V. SIMS*, *UNITED STATES V. STITT*, AND *STOKELING V. UNITED STATES*

In recent years, the Court has addressed the Armed Career Criminal Act (ACCA) on multiple occasions. Much of this litigation concerned the so-called residual clause to the definition of “violent felony,” which the Supreme Court ruled unconstitutional in *United States v. Johnson*, 135 S. Ct. 2551 (2015). This term, in a set of three cases argued on October 9, 2018, the Court will address two other questions arising under ACCA.

First, in *United States v. Sims* and *United States v. Stitt*, the Court will decide whether state law burglary of a nonpermanent or mobile structure counts as a burglary under ACCA. Under the ACCA, a defendant who commits three violent felonies or drug crimes prior to committing their offense of conviction is subject to a mandatory minimum 15-year sentence. One of the crimes identified as a violent crime is “burglary,” which the Supreme Court defined in *Taylor v. United States* to include “any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building, or structure, with intent to commit a crime.” (495 U.S. 575, 599 (1990).) Courts employ the categorical approach when determining if a particular offense is a burglary; that is, courts look only at the elements of the offense to see if the jury verdict or guilty plea necessarily reflects conduct that constitutes a burglary under ACCA.

Stitt involved a conviction under a Tennessee statute that criminalized the burglary of a “habitation,” but this term was defined to include not only buildings but mobile homes, trailers, and other vehicles adapted for the overnight use of people. The Sixth Circuit held that a violation of this statute could not constitute a burglary under the ACCA. (*United States v. Stitt*, 860 F.3d 854, 856 (6th Cir. 2017).) In seeking certiorari, the government observed that such a rule would unfairly treat the burglary of mobile homes differently from the burglary of mansions. (Petition for Writ of Certiorari at 10, *United States v. Stitt*.) *Sims* involves the same question but arises under an Arkansas statute that also covers movable structures in which a person lives or that are used for overnight accommodations. In opposing cert, the defendant pointed out that all circuits but one have ruled as the Sixth and Eighth Circuits ruled here. (Respondent’s Brief in Opposition at 7, *United States v. Sims*.)

In addition, in *Stokeling v. United States*, the Court will ask whether a particular robbery statute in Florida qualifies as a “violent felony” under ACCA even though state courts have construed that statute to require only slight force. ACCA’s definition of “violent felony” includes a felony that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” In Florida, a violation of the robbery statute can involve as little force as is needed for a pickpocket to pull a wallet from the victim’s grasp. (*See* FLA. STAT. § 812.13.) The Eleventh Circuit ruled that this level of force was sufficient under ACCA, *United States v. Stokeling*, 684 F. App’x 870 (11th Cir. 2017), while the Ninth Circuit reached a contrary ruling, holding that the level of force that is sufficient under Florida law is insufficient to be deemed

“violent,” in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017).

INEFFECTIVE ASSISTANCE OF COUNSEL: *GARZA V. IDAHO*

This case, argued on October 30, 2018, addresses whether there is ineffective assistance of counsel when counsel does not file a notice of appeal as directed by a client. In a prior case, *Roe v. Flores-Ortega*, the Supreme Court held that when a defendant asks his or her attorney to file a notice of appeal, the attorney’s failure to file such a notice is presumed to be prejudicial. (528 U.S. 470 (2000).) In some state jurisdictions and two circuits, there is an exception to this rule in cases in which the attorney declined to file the notice of appeal because of the terms of an appeal waiver in the plea agreement. The Supreme Court granted cert to resolve the split of authority.

In seeking cert, petitioner pointed out that even when there is an appeal waiver in a plea agreement, the waiver does not necessarily bar all appeals, as the scope of the appeal waiver can itself be the subject of litigation. (Petition for Writ of Certiorari at 3, *Garza v. Idaho*; *see also* *United States v. Burden*, 860 F.3d 45 (2d Cir. 2017) (construing plea agreement waiver of appeal “narrowly”).) Moreover, even though some of the arguably waived appeals may lack merit, a defense counsel exceeds his role when he refuses to allow the defendant to pursue such an appeal. As we saw last term in *McCoy v. Louisiana*, the Court protects the right of defendants to make the major strategic decisions in their cases. (138 S. Ct. 1500 (2018).)

THE CRIMINAL LAW ON NATIVE AMERICAN RESERVATIONS: *CARPENTER V. MURPHY* AND *HERRERA V. WYOMING*

Carpenter v. Murphy presents a narrow but important question relating to whether the land within the boundaries of the Creek Nation (established in 1866 in the part of the country that is now Oklahoma) remains an Indian reservation today. If it does, as the Tenth Circuit held, then crimes committed by Native Americans on the reservation are beyond the reach of the courts of the United States. This is significant; more than 19 million acres of Oklahoma (roughly half of the state) would be treated as an Indian reservation. In its brief to the Supreme Court, Oklahoma stated that “[a]ffirmance would plunge eastern Oklahoma into civil, criminal, and regulatory turmoil and overturn 111 years of Oklahoma history.” (Petitioner’s Brief, *Carpenter v. Murphy*.) Counsel for the defendant will likely argue that Congress never disestablished the Creek Nation. The stakes are high for the defendant: He will be able to avoid the death penalty if the Court concludes that the Creek Nation remained a reservation even after Oklahoma became a state.

In *Herrera v. Wyoming*, the Court will take up another question requiring analysis of the rights of Native Americans: Does an 1868 treaty between the United States and the Crow Tribe relating to hunting rights block a criminal conviction of a tribe member who engaged in hunting for food? As part of the 1868 treaty between the United States and the Crow Tribe, the Tribe retained the right to “hunt on the unoccupied lands of the United States.” In 2014, a member of the Crow Tribe went hunting on the Crow Reservation and followed a

herd of elk into the Bighorn National Forest. He shot and killed three elk and then used the elk to feed family members. The defendant was convicted of unlawfully hunting elk in the Bighorn National Forest. This conviction was upheld over arguments that the treaty permitted the shooting of the elk, based on a prior Tenth Circuit decision holding that the Tribe's rights were categorically abrogated by both Wyoming's 1890 admission to the United States and the 1897 establishment of the Bighorn National Forest (since the lands are no longer unoccupied).

POSSIBLE CERT GRANTS: JONES V. OKLAHOMA AND WOOD V. OKLAHOMA

Two pending petitions that would be interesting candidates for further review by the Supreme Court involve racial

discrimination in connection with the death penalty, *Jones v. Oklahoma* and *Wood v. Oklahoma*: These cases both challenge the constitutionality of the Oklahoma death penalty mechanism based on a new statistical study that suggests that the race of a homicide victim is a significant driver of whether a jury ultimately votes for the death penalty. In particular, people of color are three times more likely to receive a sentence of death when the victim is white. This type of claim was raised and rejected in *McCleskey v. Kemp*, some 30 years ago, and it seems high time to revisit the racial disparities in our capital punishment system. (481 U.S. 279 (1987).) These cases have been relisted 13 times over the past year, suggesting that there is strong sentiment within the Court to consider the issue. ■

CHAIR'S COUNSEL

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Award is given to an attorney or legal service provider who has either directly represented specific victims in criminal, juvenile, or appellate courts or who has worked to promote or implement policies to improve the treatment of crime victims in the criminal justice system. This year's award was presented to the Navy Victims Legal Counsel Program for their leadership in the field of victims' rights. The Norm Maleng Minister of Justice Award, which is bestowed on a prosecutor who embodies the principles enunciated in the ABA Standards for Criminal Justice, Prosecution Function, was awarded to Kevin Curtin, a prosecutor who exemplifies the principle that "the duty of the prosecutor is to seek justice, not merely to convict." Finally, the Raeder-Taslitz Award is given to a law professor whose excellence in scholarship, teaching, or community service has made a significant contribution to promoting public understanding of criminal justice, justice and fairness in the criminal justice system, or best practices on the part of lawyers and judges. This year's recipient was Professor Paolo Annino for his work on behalf of children.

The final event at the Fall Institute was a presentation entitled, "Enhancing Justice: Reducing Bias—Strategies for Change in the Criminal Justice System." The session was led by Judge Bernice Donald of the United States Sixth Circuit Court of Appeals, and past Chair of the Criminal Justice Section, and Professor Sarah Redfield of the University of New Hampshire School of Law. Judge Donald and Professor Redfield lead the Criminal Justice Section's Implicit Bias Initiative and have worked tirelessly over the last few years educating the national criminal justice community about this vital issue. After one of their recent presentations as part of a US Department of Justice, Civil Rights Division, series on implicit bias, they received a thank you letter that said, "In short, we learned a lot about ourselves and the role we may play in perpetuating unconscious biases... Once again, thank you for sharing time and knowledge with us." We echo these sentiments and thank Judge Donald and Professor Redfield for devoting so much time and effort to educate others and

to make the Criminal Justice Section a thought leader in this field. I could think of no better way to conclude a conference highlighting the work of the Section than to showcase their ongoing work.

The Fall Institute was a great opportunity to be reminded of the diverse and important work being done every day by our members. Let me conclude, therefore, by thanking each of you for your work in the criminal justice field, for your dedication to service, and for your willingness to volunteer your time with the Criminal Justice Section so we can contribute to and be leaders in the criminal justice system in so many different and meaningful ways. ■



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