IN HOT PURSUIT
of Federal Criminal Justice

Message from the Co-Chair

By Donna F. Coltharp

It has been an honor to assist in getting the Criminal Law Section's newsletter up and running again. I'm proud to present our third issue, which includes an excellent update on what's going on in the Supreme Court, a look at race-conscious representation, and a timely editorial about qualified immunity. My favorite thing about working on the newsletter has been reading submissions and working with authors. I've been updated, educated, and challenged by the pieces that have been submitted for publication. If you're reading this, I hope you'll consider making a contribution to upcoming issues. Criminal law is very much in the public eye right now—from decisions limiting Congress's reach in white collar statutes to immigration offenses to policing to incarceration. If we are to follow and help shape the law that we practice, the new attention requires thoughtful conversations among and responses from us.

Unfortunately, because of time constraints, this is the last issue of the newsletter that I will co-chair. I fully expect to continue contributing as a writer, and I look forward to reading your pieces in future issues. In know my co-editor, Chad Curtlett, ccurlett@LevinCurlett.com, will be happy to accept your contributions. I very much appreciate Chair Hartley West for giving me the opportunity to serve the section. •

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Congress Passes Significant Drug-Offense and Incarceration Reform, Signaling Renewed Interest in Proportionate Punishment and Rehabilitation

By Donna Coltharp

On December 21, 2018, President Trump signed into law the First Step Act of 2018 (or, the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act). See Pub. L. 115–391, Title I, 101(a) (Dec. 21, 2018). The criminal-justice reform package received broad bipartisan support, ranging from President Donald Trump and Senator Chuck Grassley to Senator Dick Durbin and the Civil Liberties Union. It has also received criticism from both sides of the political debate: conservatives fault it for releasing dangerous offenders from prison (see Press Release, Tom Cotton, Arkansas Senator, "Statement on the First Step Act," *located at* https://www.cotton.senate.gov/?p=press_release&id=1039); reform advocates fault it for not going far enough (see James Lartey, "Trump's prison reform: Republicans on side but some progressives hold out," The Guardian (June 5, 2018), *located at* https://www.theguardian.com/us-news/2018/jun/05/trump-prison-reform-first-step-act-tension). The bipartisan support and criticism reflect a central truth about the Act: it is the product of deep compromise. Families Against Mandatory Minimums (FAMM), "Frequently Asked Questions on the First Step Act, S. 756, *located at* https://famm.org/wp-content/uploads/First-Step-Act-FAQs.pdf. Even so, the new law signals a significant shift in America's thinking about punishment—particularly punishment for drug offenses.

The most notable indication of such a shift is that, in its emphasis on reducing recidivism through programming, the Act reflects renewed interest in rehabilitation as a goal of sentencing. See #FirstStepAct, "About the FIRST STEP Act," *located at* https://www.firststepact.org/about. Congress explicitly rejected rehabilitation as an appropriate goal of sentencing when it passed the Sentencing Reform Act of 1984 (SRA). *See Tapia v. United States*, 564 U.S. 319, 324 (2011). In that Act, Congress made clear that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). Its rejection of rehabilitation was informed and intentional: the "indeterminate sentencing" system that preceded the SRA was "premised on a faith in rehabilitation." *Tapia*, 564 U.S. at 324. But rehabilitation-based models "fell into disfavor" based on claims that they produced disparate sentences, did not succeed in reducing crime, and were difficult to implement and assess. *Id.* at 324–25.

The First Step Act challenges at least the latter two claims. Its attention to the management of prison programming suggests renewed faith on the part of lawmakers that the Bureau of Prisons (BOP) is able to implement rehabilitative programming and measure the success of that programming. This subject is, in fact, the main focus of the Act. For example, the Act requires the Attorney General and the Bureau of Prisons to institute a system for assessing the risks of recidivism in the prison population and develop recommendations for rehabilitative programming. 18 U.S.C. §§ 3631–34. It provides incentives, in the form of privileges or sentence-credit, for successful completion of rehabilitative programs. 18 U.S.C. § 3632(a)(6), (d).[1]

The First Step Act reflects a second concern: that some defendants are serving too much time in prison. The Act addresses this concern in some small ways, such as clarifying the method for calculating "good time credits" that are available to criminal defendants. Title 18 U.S.C. § 3624(i) required that federal defendants be given a good time credit of 54 days a year, but, prior to the Act's passage, a BOP interpretation of the statute resulted in credits of only 47 days. The First Step Act rectifies this misinterpretation by making clear that "for each year of the prisoner's sentence," 54 days should be deducted. 18 U.S.C. § 3624(i) (2018). The amendment is retroactive.[2] Another small, but significant, change is to compassionate release process. The Act expands elderly release to include prisoners who are 60 years and older. And, while prior regulations permitted only the BOP to initiate compassionate-relief requests, the amendments now authorize inmates to seek relief on their own behalf.

The First Step Act reflects an even deeper commitment to reducing the burdens of excessive incarceration, by enacting significant sentencing reforms. Most of these reforms do not apply retroactively—a fact that frustrated some advocates. As the American Civil Liberties Union observed, "Retroactivity is a vital part of any meaningful sentencing reform. Not only does it ensure that the changes we make to our criminal justice system benefit the people most impacted by it, but it's also one of the keys to reducing mass incarceration." Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward, ACLU* (Dec. 3, 2018), located at https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-moves-criminal-justice-reform-forward. Some of the reforms, however, are retroactive and will result in significant and immediate reductions in the prison population. Practitioners should be aware of both sets of reforms and expect questions from former and current clients about them.

Reforms with prospective application

The Act calls for significant reductions in sentences for new drug offenses. In particular, it takes aim at harsh mandatory minimums that, in the views of critics, have contributed to overpopulated prisons and wreaked unfair harm on families and communities. Under the prior version

of the drug statutes, offenders who possessed relatively small quantities of controlled substances were subject, under 21 U.S.C. § 841(b)(1)(A), to mandatory minimum sentences of 20 years if they had a prior "felony drug offense" and mandatory minimum sentences of life if they had two or more prior "felony drug offenses." Now, those mandatory minimums have been reduced to 15 and 25 years, respectively. The Act also limits the universe of qualifying prior drug offenses to "serious drug felonies" but adds "serious violent felonies" to that universe.[3] A "serious drug felony" is one that is described in 18 U.S.C. § 924(e)(2), for which the defendant served a term of imprisonment of more than 12 months and was released from that term within 15 years of the date she committed the current offense. A "serious violent felony" is an offense described in 18 U.S.C. § 3559(c)(2)(F) or any assault that would be a felony violation under 18 USC § 113 for which the defendant served a term of imprisonment of more than 12 months.

If the prior offense is alleged to be a violent felony under § 3559, defense attorneys must ensure that the offense truly belongs in that category. Subsection (c)(2)(F) of that statute defines "serious violent felony" with both an enumerated-offense clause and a hybrid "force"/"residual" clause that includes "any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." The latter clause should be familiar to federal criminal practitioners who have been litigating the similar provision in 18 U.S.C. § 16(b). *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (finding § 16(b) unconstitutionally vague); *United States v. Morrison*, No. 16-56841, 2019 WL 516613, at *1 (Feb. 11, 2019) (questioning constitutionality of § 3559(c)(2)(F)).

The First Step Act provides additional sentencing relief by broadening the "safety valve" provision found in 18 U.S.C. § 3553(f), which makes it possible for some offenders to receive sentences below governing mandatory minimums. Under the former version of that provision, a defendant who had one or fewer criminal history points was eligible for a sentence below the mandatory minimum, after the Government is given the opportunity to recommend the lower sentence and the defendant provides truthful information about his involvement in the offense. Under the First Step Act, a defendant may have as many as four criminal-history points (excluding points resulting from single-point offenses) and still be eligible for a safety-valve sentence. However, the defendant may not have any prior three-point offenses or any prior two-point *violent* offense. Note that, like the term "violent felonies," the term "violent offense" is likely to require litigation under *Dimaya*.

Perhaps one of the most welcomed changes brought by the First Step Act are amendments to 18 U.S.C. 924(c), or the Armed Career Criminal Act. That provision imposes enhanced penalties for violent offenses that involve firearms or are "second or subsequent convictions" for other violent offenses. In *Deal v. United States*, 508 U.S. 129 (1993), the Supreme Court held that convictions in the same proceedings can count as "second or subsequent" for purposes of the enhancements. Thus, a defendant could incur a conviction for a robbery that involved the use of a weapon. If, in the same proceedings, he was convicted of additional counts of robbery with a weapon, he would be subject to § 924(c)'s mandatory minimums. In The First Step Act, Congress clarifies that it did not intend this result. Instead, the Act states that a defendant is eligible for enhanced penalties only if the offense occurs "after a prior conviction under this subsection has become final."

Reforms with Retroactive Application

The Fair Sentencing Act of 2010 (Pub.L. 111–220) reduced the disparity in sentences for drug offenses involving crack cocaine and those involving powder cocaine from 100:1 to 18:1. In addition, it eliminated the mandatory-minimum punishment for simple possession of crack cocaine under 21 U.S.C. § 844(a). Those amendments were made not made retroactive. The First Step Act does so, defining a "covered offense" as a "violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010" (FSA) that "was committed before August 3, 2010."

Defense practitioners should be aware of this change and be prepared to proactively identify, or respond to inquiries by, potentially eligible clients.[4] Identifying eligible clients will require some creativity. The list will likely include those whose mandatory minimum sentences have been reduced, those career offenders who now have a reduced statutory maximum sentence under the First Step Act, those who have already served the statutory maximum sentence, and perhaps those who were denied relief because they were career offenders under the former version of the statute but are not so under the amendments.

The procedure for invoking the new law is different from that used to litigate recent amendments to the United States Sentencing Guidelines, which required litigants to rely upon 18 U.S.C. § 3582(c)(2) or U.S.S.G. §1B1.10. However, relief under the new law is discretionary, and it is not available if a motion for reduction under the First Step Act was denied "after a complete review of the motion on the merits."

Conclusion

Hundreds of thousands of criminal defendants and incarcerated people are expected to benefit from the First Step Act. United States Sentencing Comm'n, Sentence and Prison Impact Estimate Summary, *located at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf. However, critics point out its flaws: in many ways, it does not go far enough to reverse the mass incarceration brought about by years of flawed policy

and enforcement. Its emphasis on risk assessment fails to address the need to rebuild the lives of incarcerated persons so as to give them a better chance at success, and some of the new policies fail to address real racial disparities in the enactment and enforcement of federal criminal law. *See* DeAnna R. Hoskins, Opinion, "Is this really the best we can do for criminal-justice reform?", THE WASHINGTON POST (Dec. 20, 2018), located at https://www.washingtonpost.com/opinions/2018/12/20/is-this-really-best-we-can-do-criminal-justice-reform/?utm_term=.ba79cd1c5de3.

Additional reforms, however, may be on their way, including changes to conspiracy law. See Justin George, "Okay, What's the Second Step?" The Marshall Project (Dec. 19, 2018), located at https://www.themarshallproject.org/2018/12/19/okay-what-s-the-second-step. Clear indications that the First Step Act, while the product of hard compromises, nonetheless signals new thinking about drug offenses and incarceration are feeding the hope that this first step will not be the last.

Donna Coltharp is First Assistant Federal Public Defender for the Western District of Texas.

Endnotes:

[1]In addition to the recidivism provisions, the Act directs the BOP to improve prison conditions for some prisoners, prohibiting the use of restraints on prisoners who are pregnant or recovering from childbirth, requiring the BOP to place prisoners within 500 driving miles of their residences, requiring that low-risk and low-needs prisoners be placed on home confinement for the maximum permitted period of time, and restricting the use of solitary confinement for juveniles.

[2]There have been some problems implementing this amendment. See Sarah N. Lynch, "Error in U.S. prisons law means well-behaved inmates wait longer for release," Reuters (Jan. 9, 2019), *located at* https://www.reuters.com/article/us-usa-justice-prisons/error-in-u-s-prisons-law-means-well-behaved-inmates-wait-longer-for-release-idUSKCN1P3239. An apparent drafting error is preventing prompt application of the provision. *Id*

[3]The same changes are made to importing offenses, under 21 U.S.C. § 960(b)(1), although there was no mandatory minimum of life under the prior version of that provision.

[4]In many districts, the Federal Public Defenders' Offices have initiated efforts to locate and assist eligible defendants. The office may already have obtained a list from the Sentencing Commission of potentially eligible clients. While this list should not be considered exhaustive, it can provide a starting point.

Docket Check: Criminal Cases Currently Before the U.S. Supreme Court

By Jennifer S. Freel & Jeyshree Ramachandran

Some Supreme Court observers have suggested the Court's October 2018 docket lacks the excitement of recent terms.[1] For criminal practitioners, however, there's buzz about several potentially ground-breaking cases. Indeed, one post on the popular SCOTUSblog said this term's docket was a criminal law professor's "dream."[2] With the Court considering double jeopardy, excessive fines, the death penalty, and the elements of generic crimes referenced in the Armed Career Criminal Act, there is a lot to watch.[3] Below is a summary of the Court's cases that every criminal practitioner will want to follow.

Double Jeopardy

***Gamble v. U.S.*, No. 17-646**

Status: Argued on December 6, 2018.

Issue: Whether the Supreme Court should overrule the separate sovereigns exception to the Double Jeopardy Clause.

Commentary: The separate sovereigns exception states that because the federal and state governments are "separate sovereigns," the Double Jeopardy Clause does not apply to prosecution of the same crime under both federal and state laws. Petitioner Terance Gamble was prosecuted by the state of Alabama for possession of a firearm as a convicted felon and served one year in prison as a result. The federal government later charged him with illegal possession of a firearm for the same incident. Gamble asked the district court to dismiss his federal indictment, arguing that it violated his Fifth Amendment protection from Double Jeopardy. The district court held, and the Eleventh Circuit Court of Appeals agreed, that the separate sovereigns exception permitted the federal proceedings.

The majority of the justices appeared to side with the government's position at the oral argument and seemed reluctant to change long-standing precedent. Justice Kagan commented that: "part of what stare decisis is, is a kind of doctrine of humility where we say we are really uncomfortable throwing over 170-year-old rules that 30 justices have approved." The justices were also curious as to the effects of removing the separate sovereigns exception and whether there would, for example, be a "race to the courthouse". This case is being closely watched as it may affect Special Counsel Robert Mueller's investigation into Russian interference during the 2016 presidential election and the ability of state prosecutors to charge defendants in the investigation even where they receive pardons from the President.

Excessive Fines

***Timbs v. Indiana*, No. 17-1091**

Status: Decided February 20, 2019.

Issue: Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment.

Commentary: The Court held that the Eighth Amendment's prohibition on excessive fines applies to the states. In an opinion drafted by Justice Ginsburg, the Court held the Excessive Fines Clause is "fundamental to our scheme of ordered liberty" with "deep roots in our history and tradition."

The case arose from a civil forfeiture action. Petitioner Tyson Timbs had pled guilty to dealing a controlled substance and conspiracy to commit theft. He was sentenced to one year of home detention, five years of probation, and ordered to pay fees and costs totaling $1,203. The drug charge at issue carried a maximum fine of $10,000.

In a civil suit, the government sought to forfeit Timbs's Land Rover, which was valued at $42,000. Evidence showed Timbs had transported drugs in the Land Rover. A state appeals court held that forfeiting the car was unconstitutional under the Eighth Amendment's Excessive Fines Clause, and the Indiana Supreme Court reversed, holding that the Supreme Court had not held that the Excessive Fines Clause applied to state governments.

At the Supreme Court, the State of Indiana argued that even if the Excessive Fines Clause applied to the states, it did not apply to civil *in rem* forfeiture actions. The Court rejected that argument, holding it would be improper to exclude civil *in rem* forfeiture cases from application of the excessive fines prohibition.

The opinion does not grapple with how courts should decide whether a particular fine is excessive. While the Court was willing to say "[e]xorbitant tolls undermine other constitutional liberties," it did not provide guidance for determining when a fine is exorbitant

Death Penalty

***Madison v. Alabama*, No. 17-7505**

Status: Decided February 27,2019.

Issues: (1) Whether, consistent with the Eighth Amendment, and the Court's decisions in *Ford v. Wainwright,* 477 U.S. 399 (1986) and *Panetti v. Quarterman*, 551 U.S. 930 (2007), a state may execute a prisoner whose mental disability leaves him with no memory of his commission of the capital offense. (2) Whether 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 that prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution.

Commentary: The Court held the Eighth Amendment may permit executing a prisoner even if he cannot remember

committing his crime, but it may prohibit executing someone who suffers from dementia or another disorder rather than psychotic delusions. The key to the determination is whether the person is able to form a rational understanding of the reasons for his death sentence. Justice Kagan wrote the 5-3 decision. Justice Alito wrote a dissent, joined by Justices Thomas and Gorsuch. Justice Kavanaugh did not participate in the decision.

The case concerned Petitioner Vernon Madison, who has had several strokes and brain damage, and suffers from dementia and other medical conditions. He does not remember committing the crime for which he is to be executed. *Ford* held that the Eighth Amendment prevents the execution of inmates who are mentally incompetent. *Panetti* held that lower courts should consider an inmate's claim that he suffers from a condition that prevents him from understanding the meaning of his death sentence.

The Supreme Court remanded the case so state court for further review of Madison's competency to understand the rational for his death sentence.

***Bucklew v. Precythe*, No. 17-8151**

Status: Decided in favor of the Respondent on April 1, 2019.[4]

Issues: (1) Whether a court evaluating an as-applied challenge to a state's method of execution based on an inmate's rare and severe medical condition should assume that medical personnel are competent to manage his condition and the procedure will go as intended. (2) Whether evidence comparing a state's method of execution with an alternative proposed by an inmate must be offered via a single witness, or whether a court at summary judgment must look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate. (3) Whether the Eighth Amendment requires an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition. (4) Whether the Petitioner's proposed alternative method of execution met the burden under *Glossip v. Gross,* 576 U.S. ___ (2015).

Commentary: Petitioner Russell Bucklew suffers from a unique congenital medical condition. He argues that executing him by Missouri's lethal injection procedure would constitute cruel and unusual punishment under the Eighth Amendment, because the lethal injection might cause him to hemorrhage and choke on his own blood. He proposes execution by nitrogen hypoxia.

Oral argument indicated a divided Court. Justice Kavanaugh pressed the Missouri Solicitor General on the limits surrounding how much pain an execution could cause. In considering the alternative proposed by Bucklew, Chief Justice Roberts stated that an inmate needed to show there was a less painful alternative that had been used in a previous execution. Justice Breyer did not want to reject the alternative simply because it had not been used before.

SORNA

***Gundy v. U.S.*, No. 17-6086**

Status: Argued on October 2, 2018.

Issue: Whether the federal Sex Offender Registration and Notification Act's (SORNA) delegation of authority to the attorney general to "specify the applicability" of SORNA's registration requirement to "sex offenders convicted before" the date of SORNA's enactment violates the nondelegation doctrine.

Commentary: The nondelegation doctrine states that Congress cannot transfer its power to legislate to another branch of government without setting an "intelligible principle" for the agency to follow. The case started when Petitioner Herman Gundy traveled, unaccompanied, from a federal prison in Pennsylvania to a re-entry facility in New York. The Bureau of Prisons had approved this travel. Gundy did not register as a sex offender when he traveled, and was indicted under SORNA for traveling from Pennsylvania to New York and for staying in New York without registering as a sex offender. Gundy appealed his conviction and argued that Congress had violated the nondelegation doctrine by delegating the interpretation and regulation of SORNA's application to preexisting cases to the U.S. attorney general.

At oral argument, the justices scrutinized both parties, and the justices' leanings were difficult to assess. With Gundy's counsel, the justices questioned (1) whether other provisions of SORNA provided the necessary guidance and (2) what differentiated SORNA from other cases where delegations of authority had been upheld. The government argued that SORNA provided an intelligible principle to guide the attorney general, and that the attorney general was tasked with merely implementing SORNA and not rendering any policy decisions.

Jury Selection

***Flowers v. Mississippi*, No. 17-9572**

Status: Oral argument scheduled March 20, 2019

Issue: Whether the Mississippi Supreme Court erred in its application of *Batson v. Kentucky*, 476 U.S. 79 (1986) in this case.

Commentary: Petitioner Curtis Flowers was convicted of committing four murders. Flowers argues that his Sixth and Fourteenth Amendment rights were violated during the jury selection process because the State of Mississippi used its peremptory strikes in a racially discriminatory fashion. *Batson* states that the use of peremptory challenges to remove a potential juror from the jury pool based on race violates the Equal Protection Clause of the Fourteenth Amendment. Mississippi has tried Flowers six times for the murders. During the first four trials, the prosecutor was found to have violated *Batson*. The fifth trial resulted in a hung jury. In the sixth trial, now at issue, the prosecutor seated one African-American juror, but struck the remaining five African-Americans.

Ineffective Assistance of Counsel

***Garza v. Idaho*, No. 17-1026**

Status: Decided February 27, 2019.

Issue: Whether a presumption of prejudice applies to a criminal defendant's counsel where counsel failed to file an appeal of a conviction because the defendant had waived the right to appeal.

Commentary: The Court held the presumption of prejudice applies regardless of whether a defendant agreed to waive his appellate rights. Thus, a defense attorney who fails to file an appeal of a guilty plea, despite his client's request to do so, renders ineffective assistance of counsel even if there was an appellate waiver. Justice Sotomayor wrote the 6-3 opinion. Justice Thomas filed a dissenting opinion joined by Justice Gorsuch and joined, in part, by Justice Alito.

The Court rejected the argument, made by the State of Idaho and by the Department of Justice as amicus curiae, that the ineffective-assistance-of-counsel analysis should be different where a defendant waived his appellate rights. The Court reasoned that no appeal waiver eliminates every possible ground for an appeal.

Petitioner Gilberto Garza, Jr. pleaded guilty with a plea agreement that required him to waive his right to appeal. Garza later filed a petition for post-conviction relief claiming that his trial attorney was ineffective for not filing a notice of appeal, in spite of Garza's waiver of his rights.

According to *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), those claiming ineffective assistance of counsel must show that (1) counsel's representation was deficient and (2) counsel's deficient performance prejudiced the defendant. In this case, the Idaho Supreme Court, contrary to the majority of federal circuit courts, held that *Flores-Ortega* does not require an automatic presumption of prejudice where counsel fails to file an appeal, regardless of whether the defendant had waived the right to appeal.

Justice Thomas's dissent has received a great deal of attention, because it questioned the Supreme Court's entire ineffective-assistance-of-counsel jurisprudence. He looked at the original-intent of the right to assistance of counsel in the Sixth Amendment and questioned whether this included a right to "effective" counsel. He cautioned that the Court should tread carefully before extending its precedents in this area. Justice Alito did not join that portion of the dissent.

Supervised Release

***Mont v. United States*, No. 17-8995**

Status: Argued February 26, 2019.

Issue: Whether a period of supervised release for one offense is tolled under 18 U.S.C. Section 3624(e) during a period of pretrial confinement that upon conviction is credited toward a defendant's term of imprisonment for another offense.

Commentary: Petitioner Jason Mont was sentenced to ten years in prison for drug trafficking with five years of supervised release. Mont served his sentence and began his period of supervised release. About six months before the supervised release period was scheduled to end, Mont was arrested, held in jail, and then sentenced to a new six-year period of incarceration. His pretrial detention was credited toward his new sentence. When the district court that decided his first case later considered whether to revoke Mont's supervised release, Mont argued the court no longer had jurisdiction because the term had expired. The court disagreed and sentenced him to 42 months' imprisonment for violating the terms of his supervised release.

Mont suggests that the issue of tolling has divided the courts of appeals. The Fourth, Fifth, Sixth and Eleventh Circuit Courts have held that pretrial detention tolls the running of a supervised release sentence, so long as that detention is credited as time served on the conviction for which the defendant was in custody. The District of Columbia and the Ninth Circuits have held that any supervised release term could not be tolled based upon the person's detention for new charges.

***United States v. Haymond*, No. 17-1672**

Status: Argued February 26, 2019.

Issue: Whether 18 U.S.C. Section 3583(k) is unconstitutional because it requires a district court to impose five years of reimprisonment when there is finding by a preponderance of the evidence that an individual violated the conditions of his supervised release by knowingly possessing child pornography.

Commentary: Respondent Andre Ralph Haymond was convicted and sentenced to imprisonment followed by ten years of supervised release for possession and attempted possession of child pornography. During his supervised release period, Haymond was found in possession of child pornography. The district court found that this triggered the mandatory minimum sentence of five years' incarceration under 18 U.S.C. Section 3583(k). The Tenth Circuit vacated this sentence, holding the statute was unconstitutional because it takes away a sentencing court's discretion and because it imposes heightened punishment on sex offenders based on new conduct which is not subjected to the beyond a reasonable doubt standard of proof. The Tenth Circuit is the first circuit court to address the constitutionality of 18 U.S.C. Section 3583(k).

ACCA

***U.S. v. Stitt*, No. 17-765; U.S. v. Sims, No. 17-766 [consolidated actions]**

Status: Decided on December 10, 2018.

Issue: Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation qualifies as "burglary" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. Section 924(e)(2)(B)(ii).

Commentary: ACCA imposes a mandatory minimum fifteen-year prison sentence on felons guilty of possessing a firearm who have at least three prior convictions for a violent felony or serious drug offense. For felonies specifically mentioned in ACCA, like burglary, judges are required to use the "generic" definition of the crime.

Victor Stitt was found guilty of possession of a firearm as a convicted felon. He had nine prior "violent felony" convictions, and was thus designated and sentenced as an armed career criminal under ACCA. Sitt argues that none of his nine prior convictions are violent felonies. Separately, Jason Sims pleaded guilty to possession of a firearm as a felon and received an enhanced sentence under ACCA based on two previous residential burglary convictions in Arkansas.

The Court unanimously held that the term "burglary" in ACCA "includes burglary of structure or vehicle that had been adapted or is customarily used for overnight accommodation." Justice Breyer, writing for the Court, explained, in part, that Congress was concerned about the possibility of a violent confrontation between a burglar and an occupant of a dwelling, thus making burglary an inherently dangerous crime. He continued that a burglar who "breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging runs a similar or greater risk of violent confrontation." Further interpretations of ACCA will have to wait until the opinion on *Stokeling*.

***Stokeling v. U.S.*, No. 17-5554**

Status: Decided on January 15, 2019.

Issue: Whether a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is a "violent felony" under ACCA where the offense has been interpreted by state appellate courts to require only slight force to overcome resistance.

Commentary: Pursuant to ACCA, for those felonies not specifically mentioned in the statute, like robbery, a court must decide whether a particular law meets ACCA's general definition of "violent felony:" any crime with a possible sentence of more than a year "that has as an element the use, attempted use, or threatened use of physical force against the person." Petitioner Denard Stokeling was guilty of being a felon in possession of a firearm and ammunition. He had two prior convictions for robbery in Florida. An element of robbery under Florida law was "overcoming victim resistance," which some state courts have interpreted as requiring only slight force, not violent use of force. Petitioner argued that his prior convictions should not count as "violent felonies" for the purposes of enhanced sentencing under ACCA.

The Court held, in a 5-4 decision, that state statutes that require overcoming resistance by physical force meet the requirements under ACCA even where the force is minimal. The Court reasoned, in part, that Petitioner's reading would disqualify many state robbery statutes from coming within ACCA's provisions, and "federal criminal statutes should not be construed in ways that would render them inapplicable in many States." Justice Thomas delivered the majority opinion and was joined by Justices Breyer, Alito, Gorsuch and Kavanaugh. Justice Sotomayor wrote the dissent and was joined by Justices Roberts, Ginsburg and Kagan.

***Quarles v. United States*, No. 17-778**

Status: Oral argument scheduled for April 24, 2019.

Issue: Whether the definition of generic burglary in *Taylor v. United States*, 495 U.S. 575 (1990), requires proof that intent to commit a crime was present at the time of unlawful entry or when the defendant first unlawfully remained inside the building (as two circuits hold) or whether it is enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure (as four circuits hold).

Commentary: ACCA's Section 924(e) imposes a mandatory fifteen-year prison term for any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions of any "violent felony." "Violent felony" includes a burglary conviction punishable by imprisonment for more than one year. In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court held that Section 924(e) of ACCA 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."

Petitioner Jamar Quarles pleaded guilty to being a felon in possession of a firearm. At sentencing, Petitioner argued that a prior conviction under Michigan law did not qualify as a "violent felony" under ACCA because the Michigan law did not require proof of intent to commit a crime at the moment the defendant entered or first unlawfully remained inside the building. The district court concluded that a conviction under the Michigan law constituted generic burglary under ACCA and the court of appeals affirmed. Petitioner approached the Supreme Court to resolve the circuit split regarding the proof of intent element for generic burglary.

Vinson & Elkins LLP, along with others, serves as counsel for Petitioner in this action.

Warrants

***Mitchell v. Wisconsin*, No. 18-6210**

Status: Oral argument scheduled for April 23, 2019.

Issue: Whether a Wisconsin statute permitting a blood draw from an unconscious motorist provides a permissible exception to the Fourth Amendment's warrant requirement.

Commentary: Wisconsin's implied-consent law, found at Statutes Section 343.305(3)(b), provides that a "person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent" under certain circumstances. Petitioner Gerald Mitchell was arrested for driving while intoxicated in May 2013. As Petitioner became more weary, the officers transported him to a hospital where an officer read him a form regarding Wisconsin's implied-consent law. Petitioner was too incapacitated to demonstrate whether he consented or not, and became unconscious soon after. Petitioner's blood was drawn about an hour after his arrest.

In his petition for review to the Supreme Court, Petitioner argues that there is a "nationwide controversy" on laws sanctioning warrantless blood draws from unconscious intoxicated driving suspects, including that appellate courts in seven states have held "unconscious clauses" in their implied-consent laws to be in violation for the Fourth Amendment while appellate courts of seven other states have held that implied-consent laws are consistent with the Fourth Amendment.

Jennifer S. Freel is counsel in the Austin, Texas office of Vinson & Elkins LLP. Before coming to the firm, Freel worked as a prosecutor in the U.S. Attorney's Office for the Western District of Texas for nine years. Her principal areas of practice include government and internal investigations, and white collar criminal defense.

Jeyshree Ramachandran is a member of the in-house legal team at Penumbra, Inc. in Alameda, California where she advises on corporate and general legal matters, and reviews and negotiates various contracts. Prior to her current position, her practice focused on complex litigation and government investigations.

Endnotes:

[1]See The Associated Press, Quiet start to Supreme Court term amid tumult over Kavanaugh, Sep. 29, 2018, available at https://www.mprnews.org/story/2018/09/29/quiet-start-to-supreme-court-term-amid-tumult-over-kavanaugh.

[2]Rory Little, Criminal cases in the October 2018 term: A law professor's dream, Sep. 18, 2018, available at http://www.scotusblog.com/2018/09/criminal-cases-in-the-october-2018-term-a-law-professors-dream/.

[3]Id.

[4]The case was decided after this article was submitted for publication.

Officers

CHAIR
Hartley M. K. West
Kobre & Kim
Hartley.West@kobrekim.com

IMMEDIATE PAST CHAIR
Charles N. Curlett, Jr.
Rosenberg Martin Greenberg, LLP
ccurlett@rosenbergmartin.com

CHAIR-ELECT
Darrel Gardner
Federal Public Defender
darrel_gardner@fd.org

SECRETARY
Edward J. Rymsza
Miele & Rymsza, P.C.
http://www.mielerymsza.com/
rymsza@comcast.net

TREASURER
Jennifer S. Freel
Vinson & Elkins
jennifer.freel@outlook.com

NATIONAL OUTREACH COORDINATOR
Rodney Villazor
Smith Villazor LLP
rodney.villazor@smithvillazor.com

NEWSLETTER
CHAIR: Donna F. Coltharp
donna_coltharp@fd.org

CO-CHAIR: Chad Curlett
ccurlett@rosenbergmartin.com

COMMUNICATIONS
CHAIR: Darrel Gardner
darrel_gardner@fd.org

CO-CHAIR: Laura Conover
laura@conoverlawpllc.com

LAW SCHOOL OUTREACH
Rodney Villazor
Smith Villazor LLP
rodney.villazor@smithvillazor.com

Jennifer S. Freel
Vinson & Elkins
jennifer.freel@outlook.com

CORRECTIONS AND SENTENCING
Ian Wallach
The Law Offices of Ian Wallach, PC
iwallach@wallachlegal.com

Marcia Shein
Federal Criminal Law Center
marcia@msheinlaw.com

WHITE COLLAR CRIME
Jackie Arango
Akerman LLP
jacqueline.arango@akerman.com

Marcia Shein
Federal Criminal Law Center
marcia@msheinlaw.com

RULES OF CRIMINAL PROCEDURE AND EVIDENCE
Carl Lietz
Finch McCranie, LLP
carl@finchmccranie.com

SCIENCE AND TECHNOLOGY
Lisa Rivera
Bass Berry & Sims
lrivera@bassberry.com

SOLO AND SMALL PRACTITIONERS
Vacant

Opinion

Shouldn't a Reasonable Person and a Reasonable Officer Be One in the Same?

By Ndubuisi Vincent Obah, Esq

Today in America, tension has been rising between the police and the people they are sworn to protect and serve. It seems that you cannot turn on the television, or even browse through your social media without hearing about a shooting by a police officer.

Philando Castile, Antwon Rose, Daniel Shaver, Jemel Roberson all were gunned down by the police. Each of them was either unarmed or legally allowed to possess a gun at the time of his deadly encounters with the police. In the case of Castile, video shows him informing Jeronimo Yanez, the officer who pulled him over, that he had a gun on his person and that he was legally allowed to possess it, but he was still killed.[1] Roberson, a security guard of a nightclub and one of the more recent civilians shot by police, was killed right after he had subdued a suspect who had been shooting in the nightclub.[2]

Although it is too early to know what will happen to the officers involved in killing Jemel Roberson, when it comes to the other victims, either a jury or local prosecutor's office came to the same conclusion: "the officer's actions were justified." Even if the victim is unarmed, even if there is video evidence, even if the victim has just protected the community by preventing a mass shooting, none of that seems to not matter. It begs the question…why are these officers not held accountable?

Many believe that police shootings, particularly ones involving white officers shooting black victims, are racially motivated, and there is evidence to support this conclusion.[3] However, the focus of this article is the law that governs the police's ability to use deadly force with civilians.

In the landmark case *Tennessee v. Garner*, the Supreme Court of the United States made law that would have significant effects on how policing is approached today.[4] The *Garner* Court held that, pursuant to the Fourth Amendment, police officers could use deadly force to prevent the escape of a suspect—even if the suspect is unarmed—if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.[5] The language of the standard seems to base an officer use of force against how other reasonably prudent officers would react when approached with the same circumstances, rather than a standard asking how a "reasonable person" would react in general to the same situation. Are officers more likely to be "fear" for their life or the life of others in a highly stressful situation than an average civilian? In fact, it logically follows that police officers would be able to react more appropriately than an average civilian. Excluding field training, the average officer has to go through 21 weeks of training at a police academy.[6] This includes "use-of-force" training that equips officers with the skill can equipped for critical decision-making and employing potentially life preserving tactics under the duress of realistic conditions, such as a situation where an officer would decide to use deadly force or not.[7] Moreover, police officers are trained in other use-of-force techniques besides deadly force and are trained to use force based on the force they receive.[8] Officers are normally issued equipment for non-deadly force such as pepper spray and an electronic control device (taser), a baton, etc.[9] However, in the situations listed above, and in many other identical situations, officers employed deadly force instead of using the multiple non-deadly approaches available to them.

Garner and decisions applying it have created an almost impenetrable barrier to holding officers accountable. The lack of accountability is reflected by the policies and procedures that have been adopted by police departments throughout the country after these decisions came down. In fact, it is a very common police defense that officers involved in shootings "feared for his/her life" or that he/she believed that the victim was "a danger to others." It is common because police departments craft their policies and procedures based on the language offered by the Garner Court and companion cases that came after it.

And, the "fear" or "danger" is often not tested by the courts. For example, Jeronimo Yanez, the officer who shot and killed Philando Castile in front of his girlfriend and five-year-old daughter, stated to investigators after the shooting that he feared for his life in part because he smelled "burnt marijuana" coming from Philando's car.[10] In the case of Daniel Shaver, the officer who fired the fatal shots, Philip Brailsford, testified that he "feared for his life and others officers' lives" before he shot a crawling, and sobbing Shaver who just seconds before being killed begged the officer "please don't shoot me."[11] In both cases, the supposed fear or danger was not tested.

Although the *Garner* decision is well-established, law can change. The current standard that governs police use of force essentially relieves officers of culpability when they've acted impulsively, recklessly, out of bias, or intentionally in ending a person's life without good reason. A cop's subjective "fear" cannot and should not justify every police shooting. Now is the time for SCOTUS and other jurisdictions to adopt a new standard that governs police use of force, especially deadly force so that we can have a system that not only protects officers, but also protects the public.

Ndubuisi Vincent Obah is an Assistant Attorney General for the Illinois Attorney General's Office. Mr. Obah received his bachelor's degree in Criminal Justice and Sociology from the University of Dubuque in Iowa and received his Juris Doctor Degree from DePaul College of Law.

Endnotes:

[1]Mark Berman, "What the police officer who shot Philando Castile said about the shooting," The Washington Post (2017).

[2]Holly Yan, "Hero' security guard killed by police was working extra shifts for his son's Christmas," CNN.

[3]Ronald G. Fryer, Jr., An Empirical Analysis of Racial Differences in Police Use of Force (2017).

[4]*Tennessee v. Garner*, 471 U.S. 1 (1985).

[5]*Id.*

[6]Brian Reaves, "State and Local Law Enforcement Training Academies, 2013." U.S. Dept. of Justice: Bureau of Justice Statistics (2016) pp 1-19, 4.

[7]*Id.* at 6.

[8]National Justice Institute, The Use-of-Force Continuum, https://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/continuum.aspx (2009).

[9]Timothy Roufa, What Police Officers Wear on Their Duty Belts, https://www.thebalancecareers.com/police-equipment-and-duty-belts-974544 (2019).

[10]Furber & Smith, "'I had no choice'" Minnesota Officer Testifies on Shooting. The New York Times (2017).

[11]Uriel J. Garcia, "Ex-Mesa Officer who charged with murder testifies he was 'sad' after shooting." azcentral (2017), *located at* https://www.azcentral.com/story/news/local/mesa/2017/11/29/ex-mesa-officer-philip-brailsford-murder-trial-testifies-sad-after-shooting/907307001/.