Motorists, Motels, Mistakes, and More:

Criminal-Law Cases in the Supreme Court's 2014-2015 Term

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Despite its relatively modest size, last Term's Supreme Court criminal docket packed a punch. The Court decided search-and-seizure issues important to day-to-day policing, it returned to the *Crawford v. Washington* line of cases, and several justices opined on the constitutionality of solitary confinement and the death penalty. This article reviews these and other criminal decisions with an eye toward issues most relevant to state courts. It closes with a brief glance toward the 2015 Term.

FOURTH AMENDMENT

Traffic stops and administrative searches were the focus of this Term's Fourth Amendment cases. The Court issued important rulings on "add-ons" to legitimate police stops, the reasonableness of searches and seizures made pursuant to an officer's mistake of law, and the constitutionality of city ordinances permitting the police to inspect hotel registries without prior permission from a judge.

TRAFFIC STOPS

Rodriguez v. United States[1] is a simple but important case, with significant implications for day-to-day policing. Rejecting a "*de minimis*" add-on to a traffic stop to search for drugs, the justices held that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."[2]

An officer stopped Rodriguez for a traffic infraction. After checking his license and registration and conducting a brief conversation, the officer issued a warning ticket. The officer then asked for permission to walk his narcotics-detection dog around the vehicle, but Rodriguez refused. The defendant was held for another seven or eight minutes until another officer arrived and the dog alerted to the presence of drugs in the vehicle. A search turned up methamphetamine. The court of appeals upheld the search, ruling that the delay was a *de minimis* intrusion on the defendant's liberty.[3] The Court reversed.

Writing for six justices, Justice Ginsburg stated the basic principle that "[l]ike a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop . . . and to attend to related safety concerns."[4] The Fourth Amendment may permit "certain unrelated checks during an otherwise lawful traffic stop," but these may not prolong the stop "absent the reasonable suspicion ordinarily demanded to justify detaining an individual."[5] A dog sniff is "aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'"[6] Since it is not ordinarily part of a traffic stop, even a *de minimis* increase in the length of detention to facilitate a dog sniff is unlawful. The permissible duration of a traffic stop has come to an end "when tasks tied to the traffic infraction are—or reasonably should have been—completed."[7] The majority remanded for the court of appeals to determine if the officer had reasonable suspicion to detain Rodriguez beyond the traffic-stop investigation.

Justice Thomas, joined by Justices Alito and Kennedy, dissented, finding that the overall length of the stop was reasonable. They also argued that the majority's test will produce arbitrary results, as a rookie officer might reasonably take longer to complete a traffic-stop investigation than a seasoned officer and that it will be difficult to determine which activities are permissibly related to the objectives of a traffic stop.[8] Two of the dissenters also would have ruled that the detention pending the dog sniff was justified by reasonable suspicion.[9]

A few points are important to note, and it will be interesting to see their treatment in the state courts and the lower federal courts. First, just as in *Riley v. California* (the recent cell-phone-search blockbuster), the Court has again tightly "tethered" the scope of a warrantless search or seizure to the purposes for it.[10] Here, even a *de minimis* prolongation of detention is not reasonable since it does not serve the purpose for the stop. Second, the justices determined that the permissible length of a stop may vary depending on the circumstances and the purpose of the stop. The Court rejected a bright-line rule proposed by Rodriguez, who had suggested that it was unreasonable to hold him beyond the point where the officer actually issued the ticket warning. A large part of the petitioner's

Footnotes

1. 135 S. Ct. 1609 (2015).
2. *Id.* at 1612.
3. *Id.* at 1612-14.
4. *Id.* at 1614 (citing Illinois v. Caballes, 543 U.S. 405, 407 (2005)).
5. *Id.* at 1615.
6. *Id.* at 1615 (quoting Indianapolis v. Edmond, 531 U.S. 32, 40-41 (2000)).
7. *Id.* at 1614.
8. *Id.* at 1617, 1618-20 (Thomas, J., dissenting).
9. *Id.* at 1622; *see also id.* at 1623 (Alito, J., dissenting).
10. *See* Riley v. California, 134 S. Ct. 2473 (2014) (asking whether application of the search-incident-to-arrest doctrine to cell phones "would 'untether the rule from the justifications underlying'" the warrant exception (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).

oral argument was consumed with whether such a bright line would be workable or whether officers would simply delay issuing a warning until after a dog sniff.[11] The majority made clear that "[t]he critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs'—*i.e.*, adds time to—'the stop' . . . ."[12] Third, there will be some sorting out of the activities that are permissibly related to a traffic stop. Dog sniffs are not included; they "[l]ack[] the same close connection to roadway safety as the ordinary inquiries," such as checking the driver's license, determining if there are outstanding warrants, and inspecting the registration and proof of insurance.[13] But surely the law on this will develop over time.

In another traffic-stop case, *Heien v. North Carolina*,[14] the Court found that a search or seizure made pursuant to a reasonable mistake of law does not violate the Fourth Amendment. In *Heien*, a sheriff's officer pulled over a car for a broken left brake light. After the driver and passenger gave consent to search the vehicle, the deputy found a bag of cocaine. The North Carolina Court of Appeals found that the initial traffic stop was invalid because, according to the state's vehicle code, driving with "a [single] stop lamp" was not a violation of law.[15] The North Carolina Supreme Court reversed, finding the misunderstanding of law to be reasonable, and the Supreme Court affirmed.

Chief Justice Roberts authored the majority opinion, making clear that even if a police officer is mistaken about the *law* justifying a search or seizure, that search or seizure does not violate the Constitution if the mistake is reasonable. After all, the "ultimate touchstone of the Fourth Amendment is reasonableness."[16] The Court had already held that searches and seizures based on mistakes of *fact* can provide reasonable suspicion or probable cause, and "[t]here is no reason . . . why this same result" should not be acceptable "when reached by way of a similarly reasonable mistake of law."[17] The Court had "little difficulty" concluding that the officer's error of law was reasonable based on a perceived ambiguity in the pertinent statute.[18] Justice Kagan, joined by Justice Ginsburg, concurred to emphasize that only "genuinely ambiguous" statutes, those requiring "hard interpretive work"—as this one did—can support a claim of a reasonable mistake of law.[19] The mistake must be objectively reasonable; an officer's subjective understanding of the law is not relevant.[20] Justice Sotomayor dissented, arguing that a "fixed legal yardstick"— the actual state of the law, not just a reasonable understanding of it—should govern.[21]

This distinction proved important to the Illinois Supreme Court.

The decision is significant in a number of respects. In addition to the substantive holding itself, the majority employed the mistake framework to determine that the seizure did not violate the Fourth Amendment at all, as opposed to finding that there was a violation of the Fourth Amendment but that the exclusionary rule should not apply.[22] This distinction proved important to the Illinois Supreme Court. Illinois has sometimes interpreted the scope of its exclusionary rule more broadly than the federal exclusionary rule, but it generally construes the state constitution's "search and seizure" phrase consistent with that of the federal constitution. Following *Heien*, the Illinois Supreme Court found that a mistaken belief about the legality of a trailer hitch did not make a stop unreasonable under either the state or federal constitutions.[23] A number of state courts have already applied *Heien* to uphold seizures based upon reasonable mistakes of law in a variety of settings.[24] However, not every mistake will do. At least one court has found that an officer's mistake of law was unreasonable where the state courts had already clearly construed the meaning of the relevant statute.[25]

ADMINISTRATIVE SEARCHES

City of Los Angeles v. Patel[26] provided a significant victory for hotel operators and their guests, but it may have repercussions for more than 100 municipalities across the country. A provision of the Los Angeles Municipal Code compels hotel operators to obtain and record specified information about

11. *See* Transcript of Oral Argument at 8, Rodriguez v. United States, 135 S. Ct. 1609 (2015) (No. 13-9972) (Justice Sotomayor: "[B]ut you've tied it to . . . just writing the ticket, which is crazy"); *id.* at 11 (Justice Alito: "If we hold that it's okay to have a dog sniff so long as it's before the ticket is issued, then every police officer other than those who are uninformed or incompetent will delay the handing over of the ticket until the dog sniff is completed"); *id.* at 12 (Justice Ginsburg: "[T]he easiest thing to get around . . . would be the sequence in which . . . I won't think of issuing the ticket until I've had the dog sniff . . . .").
12. *Rodriguez*, 135 S. Ct. at 1616.
13. *Id.* at 1615.
14. 135 S. Ct. 530 (2014).
15. *Id.* at 534-35.
16. *Id.* at 536 (quoting Riley v. California, 134 S. Ct. 2473, 2482 (2014)).
17. *Id.* at 536.
18. *Id.* at 540.
19. *Id.* at 540, 541 (Kagan, J., concurring).
20. *Id.*
21. *Id.* at 542, 542 (Sotomayor, J., dissenting).
22. The exclusionary-rule approach was taken in *Herring v. United States*, 555 U.S. 135, 144-46 (2009), and *Davis v. United States*, 131 S. Ct. 2419, 2428-29 (2011).
23. People v. Gaytan, 32 N.E.3d 641, 653-54 (Ill. 2015). *See also* State v. Houghton, 868 N.W.2d 143, at ¶¶ 49-52 (Wis. 2015) (interpreting state and federal constitutions consistently and applying *Heien* to overturn a recently decided case).
24. *See*, *e.g.*, State v. Stadler, 2015 Kan. App. Unpub. LEXIS 574 (Kan. Ct. App. July 17, 2015) (possible mistake of law of trespass); State v. Dopslaf, 2015 N.M. App. LEXIS 71 (N.M. Ct. App. June 24, 2015) (reasonable interpretation of traffic laws); and People v. Guthrie, 30 N.E.3d 880 (N.Y. 2015) (reasonable interpretation of laws relating to stop signs).
25. *See* People v. Jones, 2015 Cal. App. Unpub. LEXIS 2886, at *10 (Cal. Ct. App. Apr. 23, 2015).
26. 135 S. Ct. 2443 (2015).

While the holding may appear uncontroversial, the decision further revealed the rift among the justices regarding their fealty to *Crawford*.

their guests.[27] It also requires hotels to make guest records available to officers for inspection upon request. A group of motel operators sued, alleging the provision was facially unconstitutional. The Supreme Court agreed in an opinion by Justice Sotomayor.

The case involved a facial challenge to the code provision. The municipal ordinance violated the Fourth Amendment because it failed to provide hotel operators with an opportunity for precompliance review before a neutral decision maker. Admittedly, because the searches at issue served a special need beyond conducting criminal investigations, namely, ensuring compliance with the recordkeeping requirement (which in turn deterred criminal enterprises on hotel premises), they fell beyond the ambit of the warrant requirement.[28] Nonetheless, such administrative searches still require the opportunity for precompliance review. The ability to search without precompliance review was not necessary to the regulatory scheme, and the inspection scheme at issue did not provide an adequate substitute for a warrant.[29] The Court suggested that searches utilizing administrative subpoenas would be constitutional since an objecting hotel operator could move to quash the subpoena before any search takes place.[30] Justice Scalia authored the main dissent, joined by Chief Justice Roberts and Justice Thomas.[31] He argued that the searches were necessary to deter criminal activity in motels, "obvious havens for those who trade in human misery."[32] Because hotels are closely regulated industries subject to stricter government regulation, warrantless searches are not unreasonable.

The Term also included a per curiam reversal involving a civil search. The petitioner in *Grady v. North Carolina*[33] was a recidivist sex offender whom the State sought to subject to satellite-based monitoring under a civil statute. Grady claimed that ordering him to wear a monitoring device and continuously tracking his movements would be an unreasonable search. The North Carolina courts rejected his challenge on the theory that civil monitoring is distinguishable from searches in criminal cases such as *United States v. Jones*.[34] The justices granted Grady's petition for a writ of certiorari and summarily reversed. In light of *Jones* and *Florida v. Jardines*,[35] a state "conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."[36] The civil-criminal distinction was immaterial, since the Fourth Amendment extends beyond criminal investigations. "[T]he government's purpose in collecting information does not control whether the method of collection constitutes a search."[37] The Justices remanded for the state courts to determine whether the monitoring program is reasonable when it is properly viewed as a search.

SIXTH AMENDMENT

The Court's sole Sixth Amendment decision, *Ohio v. Clark*,[38] is the latest in the *Crawford v. Washington*[39] line of cases. While the holding may appear uncontroversial, the decision further revealed the rift among the justices regarding their fealty to *Crawford*.

Crawford, of course, rejected the approach to the Confrontation Clause marked by *Ohio v. Roberts*, under which hearsay statements against a criminal defendant were admissible if the statements bore "adequate indicia of reliability."[40] *Crawford* instead "prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had a prior opportunity for cross-examination.'"[41] Statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency" and that "the primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution."[42] Applying the "primary purpose" test, the Supreme Court has found the following to be nontestimonial: calls to a 911 operator,[43] a dying victim's identification of his shooter (who was still on the loose),[44] and a lab report arguably not offered for its truth.[45] Statements deemed testimonial include descriptions of spousal abuse provided to police[46] and reports from forensic analysts.[47] In *Clark*, the Supreme Court applied the "primary purpose" test to statements made by three-year-old "L.P." to preschool teachers. L.P. appeared at school with injuries that suggested child abuse. He told teachers that his mother's boyfriend had caused the injuries. At trial, the state introduced L.P.'s statements to his teachers; L.P. did not testify. Though the justices split on their reasoning and language, the Court unanimously

27. This includes the guest's name and address, the size of each guest's party, any guest vehicles, date and time of arrival and departure, assigned room number, rate charged, and method of payment. *Id.* at 2447-48. There are more than 100 similar laws in cities and counties across the nation. *Id.* at 2457, 2460 (Scalia, J., dissenting).
28. *Id.* at 2452.
29. *Id.* at 2453, 2456.
30. *Id.* at 2453.
31. Justice Alito, joined by Justice Thomas, authored a separate dissent arguing that the ordinance was not facially unconstitutional. *Id.* at 2464 (Alito, J., dissenting).
32. *Id.* at 2457, 2461 (Scalia, J., dissenting).
33. 135 S. Ct. 1368 (2015) (per curiam).
34. 132 S. Ct. 945 (2012).
35. 133 S. Ct. 1409 (2013).
36. *Grady*, 135 S. Ct. at 1370.
37. *Id.* at 1371.
38. 135 S. Ct. 2173 (2015).
39. 541 U.S. 36 (2004).
40. 448 U.S. 56, 66 (1980).
41. *Clark*, 135 S. Ct. at 2179 (quoting *Crawford*, 541 U.S. at 54).
42. *Id.* at 2179-80 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).
43. *Davis*, *supra* note 42.
44. Michigan v. Bryant, 562 U.S. 344 (2011).
45. Williams v. Illinois, 132 S. Ct. 2221 (2012).
46. *Davis*, *supra* note 42.
47. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

ruled that admitting the statements did not violate the Confrontation Clause.

Justice Alito wrote for the Court. Applying *Crawford* and its progeny, the justices found that L.P.'s statements occurred in the context of an ongoing emergency. Because there was no indication that the primary purpose of the conversation between L.P. and his teachers was to gather evidence for Clark's prosecution, the admission of testimony about L.P.'s out-of-court statements did not violate the Confrontation Clause even though the teachers were subject to mandatory reporting requirements.[48] Justice Scalia, joined by Justice Ginsburg, concurred, emphasizing that the statements were non-testimonial under the precedent applicable to informal police interrogation.[49] Justice Thomas was of the view that the child's statements did not "bear sufficient indicia of solemnity to qualify as testimonial."[50]

While at first blush this case appears uncontroversial, Justice Scalia had harsh words for the majority. He wrote separately to "protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford v. Washington*."[51] Justice Scalia took issue with the majority's characterization of *Crawford* as merely a "different approach" from *Ohio v. Roberts*, and he assailed Justice Alito for his "hostility to *Crawford* and its progeny."[52] More substantively, Justice Scalia criticized the majority for what he took as dictum suggesting that *defendants* must show that the evidence would have been excluded in criminal cases at the time of the founding. If true, that would signal a significant retreat from *Crawford*,[53] though subsequent courts do not appear to read the case that way.[54]

EIGHTH AMENDMENT

In *Glossip v. Gross*,[55] the only Eighth Amendment case decided last Term, the Court held that midazolam—a controversial drug used to render prisoners unconscious as part of Oklahoma's lethal-injection protocol—worked adequately enough to survive Eighth Amendment scrutiny. In doing so, the Court affirmed a test used by a plurality of the Court in a previous method-of-execution case, *Baze v. Rees*.[56]

When Oklahoma adopted lethal injection as its chosen form of capital punishment, the state settled on a three-drug protocol that included sodium thiopental, a chemical that produces unconsciousness during an execution. In *Baze*, the Court upheld Kentucky's use of this same three-drug protocol, rejecting a challenge by inmates who claimed that the risk of a botched execution was so great that it effectively amounted to the infliction of cruel and unusual punishment.[57] After *Baze*, Oklahoma was unable to secure this and another barbiturate, so it turned to midazolam, a sedative it had not used before, to render prisoners unconscious during lethal injection. The plaintiffs in *Glossip* brought a federal civil-rights action challenging the constitutionality of Oklahoma's midazolam execution protocol following the state's botched execution of another inmate, Clayton Lockett.[58]

Justice Alito . . . determined that Oklahoma's new drug protocol did not amount to an unconstitutional infliction of cruel and unusual punishment.

Justice Alito, writing for a five-justice majority, determined that Oklahoma's new drug protocol did not amount to an unconstitutional infliction of cruel and unusual punishment. Drawing upon the test from the *Baze* plurality opinion, the Court concluded that to obtain a preliminary injunction, prisoners must show "a likelihood that they can establish both that Oklahoma's lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives."[59] Here, their claims failed both requirements—petitioners did not establish that the district court committed clear error in finding midazolam would not inflict severe pain and suffering, nor could they suggest an alternative method of execution.[60]

Justice Sotomayor penned the principal dissent, arguing that Oklahoma's use of midazolam violated the Eighth Amendment's prohibition against cruel and unusual punishment because the drug could not be trusted to render and keep an inmate insensate, leaving him vulnerable to pain at the later stages of the execution.[61] She was particularly critical of the majority's requirement that the inmates identify an alternative method of execution; she would have held that the State should not be allowed to use an objectively intolerable method simply because an alternative cannot be identified.[62]

Justice Breyer authored another dissent, joined by Justice Ginsburg, suggesting that the death penalty was *per se* unconsti-

48. *Clark*, 135 S. Ct. at 2181-83.
49. *Id.* at 2183, 2184 (Scalia, J., concurring).
50. *Id.* at 2185, 2186 (Thomas, J., concurring).
51. *Id.* at 2184 (Scalia, J., concurring).
52. *Id.*
53. *Id.* at 2185. Justice Scalia argues that "[t]his dictum gets the burden precisely backwards . . . . The burden is on the prosecutor who seeks to introduce evidence *over* this [Confrontation Clause] bar to prove a long-established practice of introducing *specific* kinds of evidence . . . ." *Id.*
54. Decisions appear simply to cite *Clark* as the latest *Crawford* case. *See*, *e.g.*, United States v. Clifford, 791 F.3d 884, 888 (8th Cir. 2015) (admission of a young child's spontaneous statements to her mother's boyfriend was not testimonial); People v. Hinton, 2015 Cal. App. Unpub. LEXIS 6097, at *23 (Cal. Ct. App. Aug. 24, 2015) (in-custody defendant's inculpatory statements during a recorded phone call were nontestimonial); and Holloman v. Commonwealth, 775 S.E.2d 434, 446 (Va. Ct. App. 2015) (a gang notebook was not created for the purposes of an investigation or prosecution).
55. 135 S. Ct. 2726 (2015).
56. 553 U.S. 35 (2008) (plurality opinion).
57. *Id.* at 61-62.
58. *Glossip*, 135 S. Ct. at 2734-35.
59. *Id.* at 2737.
60. *Id.* at 2738-39, 2741-42.
61. *Id.* at 2780, 2785-86 (Sotomayor, J., dissenting, joined by Justices Ginsburg, Breyer, and Kagan).
62. *Id.* at 2795.

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tutional and inviting full briefing on the issue.[63] His lengthy dissent points to issues of lack of reliability in assessing whether death is the appropriate punishment, arbitrariness in application of the sanction, and delays in the process. This drew sharp separate opinions from Justices Scalia and Thomas, attacking the suggestion that the death penalty is unconstitutional *per se*.[64]

And in a final twist, after discovering that it was about to use the wrong drug to induce cardiac arrest, the State of Oklahoma halted Richard Glossip's execution two hours before it was scheduled to occur.[65] Since then, the State has reached an agreement with death-row inmates that will effectively prohibit any executions until later in 2016.[66]

DUE PROCESS & EQUAL PROTECTION

Last Term saw the justices give up on efforts to interpret a federal statute, finding the statute vague. The Court also gave us a ruling about harmless error in the context of jury selection.

DUE PROCESS CLAUSE—VAGUENESS

The Court granted certiorari in *Johnson v. United States*[67] to decide whether unlawful possession of a short-barreled shotgun is a "violent felony" under the federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which makes a defendant previously convicted of violent felonies eligible for an increased sentence. *Johnson* was the Court's fifth go since 2007 at the "residual clause" of the act that purports to define certain violent felonies. After oral argument in November 2014, the justices called for supplemental briefing and heard re-argument in April 2015. Then they threw in the towel, finding that this "residual clause" of the ACCA violates the Fifth Amendment's Due Process Clause because it is unconstitutionally vague.

The ACCA defines "violent felony" in several ways. It could be a crime that involves the "use, attempted use, or threatened use of physical force" against another; it could be burglary, arson, extortion, or an offense involving use of explosives; or it could be an offense that "*otherwise involves conduct that presents a serious potential risk of physical injury to another*."[68] The italicized phrase has come to be known as the "residual clause," and the prosecution sought to qualify Johnson's prior conviction under this provision. In four cases decided since 2007, the justices have interpreted the residual clause of the ACCA without striking it down.[69] In those decisions, the Court applied *Taylor v. United States*,[70] which explained that whether a crime is a violent felony under the ACCA requires a categorical approach; that is, assessing "how the law defines the offense" and "not . . . how an individual offender might have committed it on a particular occasion."[71]

The opinion of the Court in *Johnson*, written by Justice Scalia and joined by five other justices, concludes that there is too much uncertainty in categorically determining what kind of conduct "the ordinary case" involves, as well as "how much risk it takes for a crime to qualify as a violent felony."[72] In one prior case, the Court had assessed risk by comparison to the closest analog among the enumerated crimes in the ACCA; two of the prior cases sought to rely upon statistics; and a fourth took an entirely different approach. This "failure of 'persistent efforts . . . to establish a standard'" confirms that the statute is vague.[73] *Stare decisis*, the majority says, "does not matter for its own sake" but only to promote the consistency and predictability of the law.[74] Because application of the residual clause has proved to be unworkable, standing by precedent would "undermine . . . the goals that *stare decisis* is meant to serve."[75] The residual clause "denies fair notice to defendants and invites arbitrary enforcement by judges."[76] Justices Kennedy and Thomas concurred; they would have found that the offense was not a violent felony under the prior court rulings, and they would not have struck down the residual clause.[77] Justice Alito dissented, finding no good reason for

63. *Id.* at 2755, 2756 (Breyer, J., dissenting). The *Glossip* petitioners subsequently petitioned the Court for a rehearing of their case based on Justice Breyer's dissent. The Court denied their petition. Glossip v. Gross, 2015 U.S. LEXIS 4626, 84 U.S.L.W. 3099 (U.S. Aug. 28, 2015).
64. *See id.* at 2746, 2750 (Scalia, J., concurring, joined by Justice Thomas) ("By arrogating to himself the power to overturn [the Framers'] decision, Justice Breyer does not just reject the death penalty, he rejects the Enlightenment."); *id.* at 2750, 2752 (Thomas, J., concurring, joined by Justice Scalia) (attacking Justice Breyer's arguments as "based on cardboard stereotypes or cold mathematical calculations").
65. Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, N.Y. TIMES, Oct. 8, 2015, http://www.nytimes.com/2015/10/09/us/death-penalty-lethal-injection.html.
66. Joint Stipulation for Administrative Closing of Case, Glossip v. Gross (Oct. 16, 2015) (No. CIV-14-665-F), http://www.ok.gov/ oag/documents/Glossip%20-%20Joint%20Stipulation.pdf; *see also* Amanda Sakuma, *Oklahoma Won't Be Executing Death Row Inmates Anytime Soon*, MSNBC, Oct. 16, 2015, http://www.msnbc.com/msnbc/oklahoma-wont-be-executing-death-row-inmates-anytime-soon.
67. 135 S. Ct. 2551 (2015).
68. 18 U.S.C. § 924(e)(2)(B) (emphasis added).
69. *See* James v. United States, 550 U.S. 192 (2007) (clause covers Florida's crime of attempted burglary); Sykes v. United States, 564 U.S. 1 (2011) (clause covers Indiana's crime of vehicular flight from a law-enforcement officer); Begay v. United States, 553 U.S. 137 (2008) (clause does not cover New Mexico's crime of driving under the influence); Chambers v. United States, 555 U.S. 122 (2009) (clause does not cover Illinois's crime of failure to report to a penal institution).
70. 495 U.S. 575 (1990).
71. *Johnson*, 135 S. Ct. at 2557 (quoting *Begay*, 553 U.S. at 141).
72. *Id.* at 2557-58.
73. *Id.* at 2558 (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 91 (1921)).
74. *Id.* at 2563.
75. *Id.*
76. *Id.* at 2557.
77. *Id.* at 2563 (Kennedy, J., concurring); *id.* at 2563 (Thomas, J., concurring). Justice Thomas wrote a lengthy opinion addressing the Due Process Clause and the vagueness doctrine.

overruling precedent "except the Court's weariness with ACCA cases."[78] Justice Alito also would have upheld the residual clause, primarily on the theory that the ACCA does not refer to "the ordinary case" and whether the clause applies or not can be determined by looking at the specific circumstances of each crime.[79]

A few points to note. First, the Court struck down *only* the residual clause, not the other parts of the ACCA (including the provision with enumerated offenses). Thus, the holding need not relate to similar statutes with enumerated offenses. Second, the Court itself emphasized that its holding does not automatically apply to the "dozens of federal and state criminal laws" that include terminology such as "substantial risk," "grave risk," and "unreasonable risk," since almost none of these other laws link the phrase to a confusing list of examples, as opposed to conduct on a particular occasion.[80] The impact of *Johnson* remains to be seen. This decision may open, or at least push slightly ajar, a door to constitutional challenges to state laws that contain at least some language similar to that of the residual clause.

EQUAL PROTECTION CLAUSE—BATSON

The Term also delivered a *Batson*[81] case, *Davis v. Ayala*,[82] though it was presented in a complicated federal habeas corpus framework. In *Davis*, the Court considered whether a federal habeas petitioner with *Batson* claims was entitled to relief when the state court determined that even though there was probably error in his case, it was harmless. A closely divided Court concluded that because the state court was statutorily entitled to deference, and because its findings were reasonable, the federal habeas petition should be denied.[83]

During jury selection in Ayala's case, the prosecution used its peremptory challenges to exclude 18 prospective jurors, including all 7 African-Americans and Hispanics in the venire. The defense raised *Batson* objections three times. While the trial court required the prosecution each time to provide its reasons for the strikes, the judge allowed the prosecution to offer its justifications *ex parte* so as not to be forced to reveal trial strategy. Each time the trial court found that the prosecution had sufficient race-neutral reasons to exclude those jurors. Ayala was subsequently convicted and sentenced to death.[84] On appeal, the California Supreme Court held that excluding defense counsel was error under state and possibly federal law but that the error was harmless beyond a reasonable doubt. Ayala sought federal habeas corpus relief, which the court of appeals determined should be granted.[85] The Supreme Court reversed, 5-4.

In an opinion authored by Justice Alito, the Court first discussed the habeas framework. Under *Brecht v. Abrahamson*,[86] a petitioner must show that a trial error resulted in actual prejudice, and this test subsumes the demanding standards of 28 U.S.C. § 2254(d), the Antiterrorism and Effective Death Penalty Act of 1996, when the state court has found an error to be harmless.[87] Applying this deferential framework, the majority reviewed the prosecution's explanations for its peremptory challenges. There was sufficient information in the record for the trial court to rule on the *Batson* objections without the defense present.[88] "Ayala cannot establish actual prejudice or that no fair-minded jurist could agree with the state court's application" of the test for harmless error.[89]

The Term also delivered a *Batson* case, . . . though it was presented in a complicated federal habeas corpus framework.

The dissent, written by Justice Sotomayor and joined by Justices Ginsburg, Kagan, and Breyer, expressed no disagreement with the standard of review described by the majority but contended that its analysis misidentified the issue: the majority focused on whether the trial court was wrong to reject Ayala's *Batson* objections based on the record rather than on the exclusion of his attorneys from the *Batson* hearings.[90] Ayala's lawyers could have played two critical roles had they been present at the *Batson* hearings. First, they would have been able to question the credibility of the offered race-neutral explanations. Second, they could have made a record and ensured that the trial judge actually considered the defense arguments against the offered reasons. Counsel's presence was all the more important given the length of the jury-selection process (3 months) and the apparent loss of the majority of the jurors' questionnaires.[91] And, with respect to one of the challenged jurors, the dissenters concluded that "had Ayala's lawyers been present at the *Batson* hearing" to point out similarities between that juror and a white juror who was not struck, it is probable that "his strong *Batson* claim would have turned out to be a winning one."[92] There were also two interesting concurrences. Justice Kennedy joined the majority but expressed his grave concern that Ayala has apparently been in solitary confinement for more than 25 years.[93] Justice Thomas retorted that "the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims . . . now rest."[94]

78. *Id.* at 2573, 2575 (Alito, J., dissenting).
79. *Id.* at 2578-80.
80. *Id.* at 2561.
81. Batson v. Kentucky, 476 U.S. 79 (1986).
82. 135 S. Ct. 2187 (2015).
83. *Id.* at 2208.
84. *Id.* at 2193-95.
85. *Id.* at 2195-97.
86. 507 U.S. 619 (1993).
87. *Ayala*, 135 S. Ct. at 2198-99.
88. For example, counsel's presence was not necessary for the trial judge to compare answers of white and African-American jurors (*id.* at 2201), to assess the prosecutor's concern about a juror's limited English proficiency (*id.* at 2204), or to evaluate the sincerity of a prosecutor's concern about a juror's willingness to impose the death penalty (*id.* at 2205).
89. *Id.* at 2203.
90. *Id.* at 2210, 2211-12 (Sotomayor, J., dissenting).
91. *Id.* at 2212-13.
92. *Id.* at 2215-16.
93. *Id.* at 2208 (Kennedy, J., concurring).
94. *Id.* at 2210 (Thomas, J., concurring).

[T]he Court read a scienter requirement into a federal criminal statute but did not specify the particular state of mind required for conviction or reach the lurking constitutional question.

FEDERAL CRIMINAL LAW AND EVIDENCE

The federal criminal-law cases of this Term involved interpreting a wide array of criminal statutes. We will review two decisions in which the Court assessed scienter requirements, two others with ambiguous statutory terms, and an opinion addressing whether a felon whose firearms are seized can transfer those firearms to another. Additionally, we venture perhaps slightly outside of our charter to summarize an important civil decision interpreting Federal Rule of Evidence 606(b) and the use of evidence to impeach a jury's verdict.

FEDERAL CRIMINAL LAW—MENTAL STATE

In *Elonis v. United States*,[95] sometimes called the "Facebook threats" case, the Court read a scienter requirement into a federal criminal statute but did not specify the particular state of mind required for conviction or reach the lurking constitutional question. Anthony Elonis posted violent, graphic, and self-made rap lyrics on Facebook that referenced his estranged wife, co-workers, an unspecified kindergarten class, and an FBI agent. While Elonis often posted the material with disclaimers that his lyrics were fictitious, others viewed them differently. Elonis was charged with violating 18 U.S.C. § 875(c), which prohibits transmitting in interstate commerce "any communication containing any threat . . . to injure the person of another." The district court denied Elonis's request for a jury instruction that the government must prove that he intended to communicate a true threat, and it instead instructed the jury that it was enough if he intentionally made a statement that a reasonable person would view as a threat.[96] Elonis was convicted, and the court of appeals affirmed. The Supreme Court reversed.

As Chief Justice John Roberts wrote for the Court, the text of § 875(c) did not specify any particular mental-state requirement.[97] The majority turned to *Morissette v. United States*[98] and other precedents for the general rule that a defendant must be "blameworthy in mind" and that criminal statutes will be interpreted to include "broadly applicable scienter requirements" even if the statute does not contain them.[99] When the statute is silent on the required mental state, the Court will "read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.'"[100] Because the "crucial element separating legal innocence from wrongful conduct" was the threatening nature of the communication, the lower courts erred in ruling that criminal liability depended on how Elonis's posts were understood by a reasonable person, as opposed to what Elonis thought. Negligence, the Court held, was not enough.[101] However, the justices declined to decide whether recklessness would suffice and remanded to the lower courts to decide the issue.[102]

This refusal to decide the requisite mental state led Justice Alito to write separately. While Justice Alito concurred that scienter was required, he would have found that recklessness in making threatening statements was enough.[103] Because he also would have upheld the conviction on a standard of recklessness, Justice Alito also reached the First Amendment issue, finding that the Free Speech Clause did not protect Elonis's Facebook posts.[104] Justice Thomas was the lone dissenter and, like Justice Alito, castigated the Court for "throw[ing] everyone from appellate judges to everyday Facebook users into a state of uncertainty."[105] He would have upheld a general-intent approach and found no First Amendment violation.[106]

In the other scienter case of the Term, *McFadden v. United States*,[107] the Court unanimously held that the government can establish that a defendant "knowingly" distributed a controlled substance "analogue" in two ways: (1) proving that a defendant knew that he was dealing with a controlled substance or something treated as a controlled substance under the Analogue Act, 21 U.S.C. § 813; or (2) proving that a defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.[108] McFadden sold hallucinogenic bath salts. Because the lower court found that the statute only required that the government prove he meant for the substance to be consumed by humans, the Court vacated and remanded for further proceedings. *McFadden* and *Elonis* together afford some guidance in assessing *mens rea* requirements in statutes that either have no explicit scienter requirement (*Elonis*) or have a requirement that must be distributed to the statute's other elements (*McFadden*).

FEDERAL CRIMINAL LAW—AMBIGUOUS STATUTES

Yates v. United States,[109] one of the decisions construing ambiguous statutes, was not the most important case of the Term, but it is tough to beat for amusement value. The question was whether a fisherman who threw undersized fish from his boat destroyed "tangible object[s]" in violation of 18 U.S.C. § 1519, the "anti-shredding" provision of the Sarbanes-Oxley Act of 2002. Sarbanes-Oxley was passed in the wake of Enron's

95. 135 S. Ct. 2001 (2015).
96. 135 S. Ct. at 2007.
97. *Id.* at 2008.
98. 342 U.S. 246 (1952).
99. 135 S. Ct. at 2009 (quoting *Morisette*, *supra* note 98, and United States v. X–Citement Video, Inc., 513 U.S. 64, 70 (1994)).
100. *Id.* at 2010 (quotations omitted).
101. *Id.* at 2011-12.
102. *Id.* at 2013.
103. *Id.* at 2013, 2014-16 (Alito, J., concurring in part and dissenting in part).
104. *Id.* at 2016-17.
105. *Id.* at 2018 (Thomas, J., dissenting).
106. *Id.* at 2021, 2028.
107. 135 S. Ct. 2298 (2015).
108. *Id.* at 2305.
109. 135 S. Ct. 1074 (2015).

accounting fraud and revelations that Arthur Andersen had destroyed potentially incriminating documents.

The facts of this case seem made to amuse first-year law students.[110] A fish-and-game officer boarded the *Miss Katie*, a commercial fishing vessel captained by defendant John Yates. Federal regulations at the time required immediate release of grouper less than 20 inches long, and the officer found 72 fish that fell short of that mark. He separated the undersized fish from the rest of the catch and ordered Yates to leave them undisturbed until the *Miss Katie* returned to port. But when the officer visited the boat several days later, he discovered that Yates had ordered a crew member to throw the undersized fish over the side and replace them with slightly larger denizens of the deep. Yates was subsequently charged with the federal crime of destroying "any record, document or tangible object with the intent to impede, obstruct, or influence" a federal investigation. He was convicted following a jury trial, and the court of appeals affirmed his conviction. A bare majority of the Supreme Court reversed.

Justice Ginsburg wrote a plurality opinion in which three other justices joined, finding that the lower courts applied too broad a definition of "tangible object." Justice Alito concurred, providing the fifth vote for reversal. The plurality looked to the context of Sarbanes-Oxley, which was enacted specifically to "prohibit . . . corporate document-shredding to hide evidence of financial wrongdoing."[111] While the justices acknowledged that the ordinary meaning of "tangible object" could encompass anything with discrete form, the plurality found that the specific context for the disputed language, the broader context of the statute, and principles of statutory construction (such as avoiding a reading that would render parts of the statute superfluous) counseled a narrower construction. "It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping."[112] Thus, "tangible object" should be read "to cover only objects one can use to record or preserve information, not all objects in the physical world."[113] Concurring, Justice Alito offered a similar but not identical definition of "tangible object," concluding that the term "should refer to something similar to records or documents."[114]

The dissent, penned by Justice Kagan, took issue with how both the Ginsburg plurality and the Alito concurrence interpreted section 1519. While the dissenting justices agreed "that context matters in interpreting statutes," they argued that the plain text of the statute and the context surrounding its enactment both pointed to a broad reading of "tangible object."[115] The dissent suggested that the majority reached its decision because of "overcriminalization and excessive punishments in the U.S. Code."[116] Although Justice Kagan agreed that section 1519 grants "prosecutors too much leverage and sentencers too much discretion" and reflects "a deeper pathology in the federal criminal code," it is not up to the Court to reconstruct laws written by Congress.[117]

The facts of this case seem made to amuse first-year law students.

The other case with ambiguous statutory terms is *Whitfield v. United States*.[118] There a unanimous Court ruled that the statute enhancing penalties for bank robberies that involve forced "accompaniment" does not require movement over a substantial distance; the forced-accompaniment provision of 18 U.S.C. § 2113(e) applies even if the movement occurs entirely within a single building or over a short distance. The Court looked to the dictionary definition of "accompany" and noted that the danger involved in forced accompaniment does not depend on the distance traveled.[119]

FEDERAL CRIMINAL LAW—TRANSFER OF SEIZED FIREARMS

Another interesting federal criminal case is *Henderson v. United States*.[120] There a unanimous Court held that a convicted felon whose firearms are seized by the government before his conviction can transfer those firearms to a seller or other third party unless doing so would allow him to later retake control over those firearms and either use them or direct their use.[121] The decision interprets the federal statute, 18 U.S.C. § 922(g), that bars felons from possessing firearms. While the Court did not decide any constitutional claims, the opinion may be worth a read given the prevalence of felon-in-possession statutes among the states.

The opinion begins by describing "the proverbial sticks from the bundle of property rights" that Henderson retained over his firearms despite his conviction.[122] The Court explained that upon conviction, Henderson had lost the stick of possession, which encompasses both actual and constructive possession, and that he would still constructively possess the firearms if they were transferred to anyone who would return them to Henderson or follow his instructions for their use. But the Court separated that from the right to sell or otherwise dispose of his firearms, which Henderson retained

110. And Supreme Court justices as well. *See id.* at 1091 (Kagan, J., dissenting) (referencing Dr. Seuss, *One Fish Two Fish Red Fish Blue Fish* (1960)); *id.* at 1094 (arguing that the plurality's "fishing expedition comes up empty").
111. *Id.* at 1081 (Ginsburg, J., joined by Chief Justice Roberts and Justices Breyer and Sotomayor).
112. *Id.* at 1087.
113. *Id.* at 1081.
114. *Id.* at 1089 (Alito, J., concurring). He concluded that the combination of "the statute's list of nouns, list of verbs, and its title" suggested that Congress intended the statute to apply to a specific category of items, asking—for example—"[h]ow does one make a false entry in a fish?" *Id.* at 1089-90.
115. *Id.* at 1090, 1092 (Kagan, J., joined by Justices Scalia, Kennedy, and Thomas).
116. *Id.* at 1100.
117. *Id.* at 1101.
118. 135 S. Ct. 785 (2015).
119. *Id.* at 789.
120. 135 S. Ct. 1780 (2015).
121. *Id.* at 1783.
122. *Id.* at 1784.

The Court held that the Federal Rules of Evidence precluded the district court from considering the [juror's] affidavit; the opinion articulates a strong version of the common-law anti-impeachment rule.

despite his conviction.[123] What matters is whether the felon exercises any control over the firearms after the transfer, so "a court . . . may approve the transfer of guns consistently with § 922(g) if, but only if, that disposition prevents the felon from later exercising control over those weapons, so that he could either use them or tell someone else how to do so."[124]

EVIDENCE—IMPEACHING A VERDICT

The Court also decided a civil case about impeaching a jury's verdict. The opinion construes Federal Rule of Evidence 606(b) and may be of particular interest in jurisdictions with evidence codes similar to the Federal Rules.

In *Warger v. Shauers*,[125] the plaintiff moved for a new trial after one juror gave an affidavit about statements made by another juror that suggested she had lied during *voir dire*. The Court held that the Federal Rules of Evidence precluded the district court from considering the affidavit; the opinion articulates a strong version of the common-law anti-impeachment rule.

The decision construes Federal Rule of Evidence 606(b), which provides that a juror may not testify about any statement made in deliberations as part of "an inquiry into the validity of a verdict." A claim about misconduct during *voir dire* plainly entails an inquiry into the validity of a verdict regardless of whether the misconduct had a direct effect on the verdict.[126] The Court acknowledged that some jurisdictions have a weak anti-impeachment rule. For example, under what is sometimes known as the "Iowa" approach, jury testimony is only excluded when it relates to matters that "inhered in the verdict," and that approach has been used to allow juror testimony challenging conduct during *voir dire*.[127] However, as Justice Sotomayor wrote for a unanimous Court, the U.S. Supreme Court rejected the "Iowa" approach early on, and the plain language of Rule 606(b) is consistent with these early cases.[128] The Court also turned aside the plaintiff's contentions that the exceptions in Rule 606(b) applied here and that the narrow interpretation of the rule unconstitutionally infringed the right to an impartial jury.[129]

CIVIL RIGHTS

There were several substantial civil-rights cases in the last Term. One decided the standard to apply in excessive-force lawsuits; others addressed the doctrine of qualified immunity.

In the most significant of the cases, *Kingsley v. Henderson*,[130] the Court held that to prove an excessive-force claim under 42 U.S.C. § 1983, a pretrial detainee only has to show that officers purposefully or knowingly used force that was *objectively* excessive, not that the officers were *subjectively* aware that their use of force was unreasonable.[131] Justice Breyer, writing for the majority, explained that the objective standard was consistent with precedent, primarily *Bell v. Wolfish*,[132] where the Court held that pretrial detainees cannot constitutionally be subjected to excessive force that amounts to punishment. According to the majority, under *Bell*, a pretrial detainee can prevail on an excessive-force claim under 42 U.S.C. § 1983 even when there is no evidence of the officers' intent to punish. He only has to show that the officers' actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that those actions exceed what is necessary for that purpose.[133] Second, the objective standard is "workable"; that is, there are pattern jury instructions in several circuits that incorporate that standard, and many officers are trained "to interact with all detainees as if [their] conduct is subject to an objective reasonableness standard."[134] Finally, the objective standard "adequately protects an officer who acts in good faith," because the reasonableness of force is determined "from the perspective and with the knowledge of the defendant officer."[135] The majority expressly declined to reach the question of whether reckless use of force might be sufficient for liability, though it acknowledged "that recklessness in some cases might suffice as a standard for imposing liability."[136]

Justice Scalia dissented along with Chief Justice Roberts and Justice Thomas, arguing that the majority fundamentally misread *Bell* because that case "makes intent to punish the focus of its due process analysis."[137] Also, according to the dissenters, Kingsley did not need to use the Constitution to bring claims against the officers since state statutory law and common law allowed him to bring a tort claim, and "the majority overlook[ed] this in its tender-hearted desire to tortify the Fourteenth Amendment."[138]

The Court also decided qualified-immunity questions in a handful of Section 1983 civil-rights cases. The justices were poised to decide whether the Americans with Disabilities Act (ADA) required police officers to provide accommodations to an armed, violent, and mentally ill suspect when attempting to bring her into custody. Instead, the Court resolved *City and County of San Francisco v. Sheehan*[139] on more narrow grounds,

123. *Id.* at 1785.
124. *Id.* at 1786.
125. 135 S. Ct. 521.
126. *Id.* at 525, 528.
127. *Id.* at 526 (citations omitted).
128. *Id.* at 526-27.
129. *Id.* at 528-30.
130. 135 S. Ct. 2466 (2015).
131. *Id.* at 2470.
132. 441 U.S. 520 (1979).
133. *Kingsley*, 135 S. Ct. at 2473 (quoting *Bell*, 441 U.S. at 561).
134. *Id.* at 2474.
135. *Id.*
136. *Id.* at 2472.
137. *Id.* at 2477, 2478 (Scalia, J., dissenting).
138. *Id.* at 2479.
139. 135 S. Ct. 1765 (2015).

granting qualified immunity to officers who confronted, shot, and injured a mentally ill woman wielding a knife in her private room.[140] No precedent clearly established that there was not an objective need for the officers to enter Sheehan's room.[141] In two per curiam decisions, *Carroll v. Carman*[142] and *Taylor v. Barkes*,[143] the Court granted certiorari and summarily reversed, finding that officials were entitled to qualified immunity because they did not violate rights that were clearly established by Supreme Court or circuit precedent. *Carroll* holds that officers who approach property owners (for a "knock and talk") at their backyard door instead of their front door do not violate clearly established Fourth Amendment rights. *Taylor* finds that as of 2004, there was no clearly established principle in Supreme Court or Third Circuit precedent assuring an incarcerated person's right to proper implementation of adequate suicide-prevention protocols.

HABEAS CORPUS

Last Term gave us several decisions addressing the standards to be applied in federal habeas proceedings. The most significant of the decisions was in a case brought by a capital defendant with intellectual deficits who claimed that he could not be constitutionally executed under *Atkins v. Virginia*[144] and whose claim was summarily dismissed in state court.

In *Brumfield v. Cain*,[145] the petitioner had based his *Atkins* argument on mitigation evidence from the sentencing phase of his trial, including his IQ score of 75, his fourth-grade reading level, the identification of his learning disability, and his treatment at psychiatric hospitals as a child. The state trial court dismissed the *Atkins* claim without an evidentiary hearing and without providing funds for further investigation, and the Louisiana Supreme Court affirmed.[146] On federal habeas corpus, the district court ruled that Brumfield could overcome the deferential habeas standards established under 28 U.S.C. § 2254(d): the state courts' rejection of the claim did not comport with clearly established federal law and was based on an unreasonable determination of facts. Following a federal evidentiary hearing, the court went on to find that Brumfield was intellectually disabled and therefore could not be executed.[147] The Fifth Circuit reversed on the grounds that Brumfield could not pass through the deferential habeas standards.[148]

The five-justice majority determined that the state court's ruling was based on an "unreasonable determination of the facts" under § 2254(d)(2) without answering the question of whether the state court unreasonably applied "clearly established Federal law" under § 2254(d)(1). The opinion, authored by Justice Sotomayor, focused on two factual determinations made by the state trial court—that Brumfield's IQ indicated he did not have an intellectual disability and that there was no evidence of adaptive impairment.[149] The majority gave substantial deference to the trial court, noting that "[w]e may not characterize these state-court factual determinations as unreasonable 'merely because [we] would have reached a different conclusion . . . .'"[150] Even so, Brumfield's IQ was "squarely in the range of potential intellectual disability," and there was "sufficient evidence to raise a question" as to whether Brumfield met the criteria for adaptive impairment, so the factual findings of the state court were unreasonable.[151] The majority emphasized that the threshold that needed to be overcome by Brumfield for an evidentiary hearing was low; all he needed to do was raise a "reasonable doubt" that he had an intellectual disability.[152] The Court remanded for further proceedings, which presumably would permit the Court of Appeals to review the finding that Brumfield was in fact intellectually disabled.

Last Term gave us several decisions addressing the standards to be applied in federal habeas proceedings.

Justice Thomas dissented. The dissenting and majority opinions provide "a study in contrasts," much like the stories around which the dissent was framed.[153] The dissent accuses the majority of "recasting *legal* determinations as *factual* ones" and would find that the state court's factual determinations were reasonable under § 2254(d)(1) and that the decision was not an unreasonable application of clearly established law relating to funding to develop an *Atkins* claim.[154]

Atkins itself left it to state courts to determine how to implement its constitutional rule. *Brumfield* may offer a bit more guidance, particularly with respect to whether an *Atkins* claim may be summarily denied or may deserve further development. But moving forward, state courts should remain cautious when looking to that guidance because it is specific to the "reasonable doubt" standard for a defendant to get an *Atkins*

140. The Court granted certiorari to decide whether the ADA applies to an officer's on-the-street encounter. However, in its merits brief, San Francisco shifted its legal strategy and instead argued that the ADA applies but that Sheehan was not due an accommodation. As this was not briefed below, the Court dismissed the question as improvidently granted. *Id.* at 1773-74. Justices Scalia and Kagan would have dismissed the entire case to "not reward such bait-and-switch tactics." *Id.* at 1778, 1779 (Scalia, J., concurring in part, dissenting in part).
141. *Id.* at 1777.
142. 135 S. Ct. 348 (2014) (per curiam).
143. 135 S. Ct. 2042 (2015) (per curiam).
144. 536 U.S. 304 (2002).
145. 135 S. Ct. 2269, 2273 (2015).
146. *Id.* at 2275.
147. *Id.* at 2275-76.
148. *Id.* at 2276.
149. *Id.* at 2276-77.
150. *Id.* at 2277 (citation omitted).
151. *Id.* at 2278-79.
152. *Id.* at 2281.
153. *Id.* at 2283, 2283 (Thomas, J., joined by Chief Justice Roberts and Justices Scalia and Alito). In a part of the dissent joined only by Justice Scalia, Justice Thomas compares the horrific facts of Brumfield's crimes with the exemplary life of Warrick Dunn, the son of Brumfield's victim, who overcame the murder of his mother to become a professional football player and philanthropist. *Id.* at 2286-87.
154. *Id.* at 2290, 2296-97.

hearing in Louisiana, and the Court did not discuss differences among the states in standards relating to *Atkins* claims.

As in other recent terms, the justices also summarily reversed several lower federal courts in habeas corpus cases. Most of these decisions were issued to reinforce the highly deferential standards applied under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[155] Thus, in *Lopez v. Smith*,[156] the very first ruling of the Term, the Court emphasized that federal courts of appeals cannot rely on their own precedent to determine whether a constitutional principle is "clearly established" under AEDPA; only Supreme Court precedent may do so.[157] Drawing on *Smith*, *Glebe v. Frost*[158] holds that a trial court's restriction on defense counsel's closing argument was not "clearly established" as structural error; the Washington Supreme Court had found the error to be harmless beyond a reasonable doubt. And in *Woods v. Donald*,[159] the justices determined that the law was not "clearly established" by *United States v. Cronic*[160] that defense counsel's absence from a short portion of trial relating to a co-defendant amounted to ineffective assistance for which prejudice would be presumed.

A LOOK AHEAD

The 2015 Term has just begun, but it already has a significant criminal docket, including a substantial number of capital cases. Three cases argued in October raise questions about how capital juries are instructed with respect to mitigating circumstances and whether conducting joint penalty-phase trials of co-defendants violates the Eighth Amendment by creating a substantial risk that the death penalty will be imposed arbitrarily.[161] October also saw a broad challenge to Florida's death-penalty scheme, based on a claim that Florida's advisory jury fails to require a jury finding on all facts necessary to impose the death penalty.[162] The Court is taking on a *Batson* claim in a capital case.[163] And it will decide another death-penalty case where it is alleged that the presiding chief justice of the state supreme court had personally approved the capital charges during his prior service as district attorney, had—during his election campaign—expressed support for the death penalty in this and other cases, and had then declined to recuse himself from sitting in the petitioner's case.[164] On the non-capital side, the justices are considering whether the ban on mandatory imposition of life-without-parole sentences for juveniles, set out in *Miller v. Alabama*,[165] applies retroactively,[166] and if restraining a defendant's untainted assets needed to retain counsel violates the right to counsel and the Due Process Clause.[167] It is shaping up to be an interesting term.

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155. One outlier: *Christeson v. Roper*, 135 S. Ct. 891 (2015), was a summary reversal to allow an inmate to show that he may be entitled to equitable tolling of AEDPA's statute of limitations.
156. 135 S. Ct. 1 (2014) (per curiam).
157. See 28 U.S.C. § 2254(d)(1) (habeas corpus relief may be granted if a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").
158. 135 S. Ct. 429 (2014) (per curiam).
159. 135 S. Ct. 1372 (2015) (per curiam).
160. 466 U.S. 648 (1984).
161. Kansas v. Carr, No. 14-449 (argued Oct. 7, 2015), Kansas v. Carr, No. 14-452 (argued Oct. 7, 2015), and Kansas v. Gleason, No. 14-452 (argued Oct. 7, 2015).
162. Hurst v. Florida, No. 14-7505 (argued Oct. 13, 2015).
163. Foster v. Chatman, No. 14-8349.
164. Williams v. Pennsylvania, No. 15-5040.
165. 132 S. Ct. 2455 (2012).
166. Montgomery v. Louisiana, No. 14-280 (argued Oct. 13, 2015).
167. Luis v. United States, No. 14-419.