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Due Process Institute's Guide to What Really Matters at the Supreme Court a.k.a. *Sifting Through the Minutiae for Busy Criminal Defense Lawyers & Those Who Otherwise Care About Improving our Criminal Law in Order to Highlight the Most Significant SCOTUS Criminal Law Stuff*

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BEST PENDING CERTIORARI PETITIONS IMPACTING CRIMINAL LAW[3]

ACQUITTED CONDUCT SENTENCING: Every year we do this and we aren't stopping until the Court does the right thing: our choice for Best Currently Pending Certiorari Petition goes to an acquitted conduct sentencing case, *McClinton v. U.S.*, No. 21-1557, in which a jury found Dayonta McClinton guilty of robbing a drug store of about $68 worth of merchandise and brandishing a firearm and acquitted him on charges that he subsequently robbed and murdered an accomplice. On his crimes of conviction, his *Sentencing Guidelines* range would've been 4-6 years but he received a 19 year sentence because the judge felt like she knew better than the jury and decided that Dayonta had, in fact, killed his accomplice (despite serious credibility issues with the accomplices who testified against him).

In its 1997 decision in *U.S. v. Watts*,[4] the Supreme Court relied on its (very slipshod) body of precedent on the use of relevant conduct in sentencing to hold that acquitted conduct sentencing isn't a violation of the Double Jeopardy Clause.[5] As a result, federal courts of appeals have thoughtlessly and reflexively decided that the practice therefore isn't a violation of any due process right. This was the case in the opinion below in *McClinton*; the tenor of the opinion is basically: acquitted conduct sentencing is messed up and increasingly being criticized by the bench, but our hands are tied by *Watts*.

[1] Thank you to Clause 40 Foundation Senior Counsel, Carolyn Iodice, for her extensive help in producing this Guide. Clause 40 Foundation is our sister organization.
[2] A note of thanks to this summer's Clause 40 Foundation interns, Meanna Gray and Betsy Sheppard, for their assistance.
[3] Why do we start our Guide with pending cert. petitions? Because you can read up about decided/upcoming SCOTUS cases elsewhere and we want you to know about this stuff too! But if you want those first, skip to pages 17 and 10 respectively.
[4] 519 U.S. 148.
[5] You can read all about the pathetic *Watts* decision and its even more pathetic progeny at our blog here.

As we have done in many similar cases, we filed an amicus brief arguing that acquitted conduct sentencing is a Sixth Amendment violation[6] and we're just going to keep doing it until The Nine do the right thing. (Or until Congress passes something like the "Prohibiting Punishment of Acquitted Conduct Act," which we've managed to get passed by the House and reported out of the Senate Judiciary Committee.)

Honestly, we find it hard to pick just *one* favorite pending cert. petition because we love all our constitutional procedural protections! So here are some of our other top choices for pending criminal law cert. petitions to bring to your attention:

JUNK SCIENCE / EXECUTING INNOCENT PEOPLE: *Escobar v. Texas*, No. 21-1601, is ludicrous: both the state and the trial court recommended that the defendant's habeas petition be granted, but the appeals court decided to uphold his conviction "on the basis of arguments no party made, reaching a result no party advocated" (as the cert. petition puts it). Areli Escobar was convicted and sentenced to death largely on the basis of DNA evidence that was tested in the Austin PD's lab, whose work was so egregiously shoddy that the state ultimately shut it down. Mr. Escobar filed a habeas petition in state court seeking a new trial, and the court recommended that his petition be granted because the DNA evidence would now be inadmissible or otherwise extremely suspect, and the government's case is weak without the DNA evidence. The state actually supported the granting of Escobar's habeas petition when it was before the Texas Court of Criminal Appeals (TCCA)—but to no avail; the TCCA rejected the court's recommendations and refused to grant the writ because, essentially, it didn't think the tainting of the DNA evidence was material to the outcome of the trial. Escobar now seeks a summary reversal of the TCCA's opinion on due process grounds.

There's a spicy amicus brief by a collection of former prosecutors, and they lay the situation out quite plainly: "Now a defendant whom the State of Texas no longer wishes to prosecute, for a crime the State believes he may not have committed, is set to be executed, under a judgment that the State was unwilling to defend. The Court must stop this runaway train." *Fingers crossed they do*.

BRADY* / *COCAINE MITCH*: *Blankenship v. U.S., No. 21-1428, involves Don Blankenship, who might have come to your attention in 2018 when he ran a disastrous campaign for the republican Senate nomination in West Virginia. Among other *faux pas* that cost him the gig, he accused then-Majority Leader Mitch McConnell of having ties to international cocaine trafficking and started calling him "Cocaine Mitch." *As if that isn't the coolest nickname Mitch McConnell will ever be given*.

[6] Obviously other organizations have filed great amicus briefs as well. One particular highlight: a brief by 17 former federal judges giving a full-throated condemnation of acquitted conduct sentencing.

But I digress. This case is actually about Blankenship's previous life, in which he was the CEO of an energy company who was indicted on several felonies after a deadly explosion in one of his company's mines. Blankenship was ultimately convicted of a misdemeanor for which he served a year in prison. The following year, after an investigation by DOJ's Office of Professional Responsibility, DOJ turned over to Blankenship's lawyers a trove of documents that included witness interview notes that tended to undermine the government's case. He subsequently moved to overturn his conviction on the grounds that the prosecutors had violated his rights under *Brady v. Maryland—you know, the one which ostensibly requires the government to have handed over to the defense exculpatory evidence in its possession*. The district court and the Fourth Circuit refused his request finding that he had access to the witnesses and the information about which they were interviewed (their interactions with him), and that "the *Brady* doctrine is not available where the favorable information is available to the defendant and lies in a source where a reasonable defendant would have looked."[7]

There's actually a circuit split over whether *Brady* material excludes information that the defense would've been able to get if they'd exercised "due diligence" (meaning the defense must show they exercised due diligence when claiming a *Brady* violation), which this case could resolve. As our friends at NACDL put it in their amicus brief, the due diligence rule "defies common sense and ignores the realities of the criminal justice system that underride *Brady* and its progeny." Even though—unlike the vast majority of Americans—Blankenship had the money to hire a legal team with the resources to procure witness interviews to help his defense, when it comes to investigations, the government has massive legal and practical advantages over even the most well-resourced criminal defendant. Plus, of course, the vast majority of criminal defendants aren't the Don Blankenships of the world but people represented by under-resourced appointed counsel whose ability to represent their clients is vastly improved if prosecutors are required to hand over all *Brady* material without the defense's needing to try to re-enact the government's investigatory steps.

Call us biased but we see nothing but good policy arguments for a bright-line, all-*Brady*-material disclosure rule: it makes the prosecution's obligations clear, prevents needless litigation over whether defense counsel's diligence was sufficient, prevents defense counsel from wasting resources reinventing the wheel for no reason, helps balance a hopelessly unbalanced wheel between the government's power and resources versus those of most defense teams, etc. But also, let's just admit that, if the purpose of a criminal trial is to actually decide facts and culpability, then the accuracy of that process—which is therefore crucial to the justness of the outcome—is best served when the defense has meaningful access to all potentially exculpatory evidence. *How could SCOTUS disagree with that?* 🧐

[7] *U.S. v. Blankenship*, 19 F.4th 685, 694 (4th Cir. 2021).

FAIR TRIALS / HARMLESS ERROR / CLOWNERY: *Anthony v. Louisiana*, No. 21993. In its prosecution of Willard Anthony, the state called as a witness the prosecutor who had secured Anthony's grand jury indictment. He was called to rebut an insinuation that a witness had been offered a deal to testify in Anthony's case, but his testimony ended up going far beyond this: as the court of appeals subsequently put it, the prosecutor-witness "vouched for the credibility of the State witnesses and improperly commented on defendant's guilt, while using the prestige and dignity of his office to bolster the State's case," all despite the defense's objections and motions for a mistrial.[8] At one point, the prosecutor-witness said explicitly: "I *know* that Willard Anthony [committed acts alleged by the prosecution.]"[9] On appeal, a Louisiana court of appeals held that this testimony represented a structural error, meaning a defendant gets a new trial without needing to litigate over the likely effect of the error on the outcome of the trial. But the Louisiana Supreme Court reversed and remanded the case back to the court of appeals for a harmless error analysis (*that doctrine of paramount fairness*). Color us surprised that the appeals court changed course and found that the error was harmless. Anthony is now seeking a reversal from SCOTUS.

Obtaining certiorari for error correction is always an uphill battle, but there are perhaps two reasons for Anthony to be hopeful here: the Court has actually requested a response from the state, which court docket watchers always get excited by, and the testimony at issue is pretty egregious. It's frankly mind-boggling that neither the prosecutor, the prosecutor-witness, nor the judge realized that the shenanigans were going to put any resulting verdict on shaky ground. On the other hand . . . un-fun criminal law fact: Louisiana has the highest incarceration rate in the nation (according to the Sentencing Project), so we suppose their track record allows them to think they can get away with pretty much anything down there. Let's see if the Court does.

FOURTH AMENDMENT: *Powers v. Alabama*, No. 21-1486, presents an opportunity for the Court to further ~~erode~~ clarify the Fourth Amendment. *I kid, I kid*. The Supreme Court has said that a visitor's merely being present somewhere that a search warrant is executed doesn't permit the government to search the visitor's person,[10] but it hasn't yet clarified how to determine precisely when that protection extends to a visitor's personal property. Nancy Powers' case illustrates this problem very plainly. She was a visitor at a home when police executed a search warrant for the premises. On a table next to her was a purse she acknowledged was hers. Police searched the purse, found meth, cash, and a digital scale,

[8] *State v. Anthony*, 17-372 (La. App. 5 Cir. 2/20/19), 266 So. 3d 415, 427.
[9] *Id.* at 429.
[10] *Ybarra v. Illinois*, 444 U.S. 85 (1979).

and ultimately charged her with two drug offenses. She says the search counted as a search of her person, for which the police would have needed independent probable cause. The Alabama Supreme Court disagreed and now Powers is seeking review. The cert. petition outlines how courts across the country have come up with a variety of different analytical approaches to the question of when a search of a visitor's effects is lawful without independent probable cause. Because police execute search warrants on premises where there are visitors every single day, the Court might view this question as being a worthwhile use of their time. Keep an eye on this one if you do a lot of Fourth Amendment work.

SPEEDY TRIAL WAIVERS / NONSENSE: ***Gottesfeld v. U.S.***, No. 21-1313, involves the Speedy Trial Act, which requires an information or indictment to be filed within 30 days of arresting or serving a summons on someone, or else the case is dismissed, with or without prejudice.[11] But if a judge finds that the "ends of justice" served by a continuance outweigh the interests of the defendant and the public in having a speedy trial, they may grant a continuance and exclude it from the 30 day limit if they record (orally or in writing) their reason for finding that the ends of justice are served by a continuance.[12] Martin Gottesfeld was indicted 8 months after being arrested. You'll notice that 8 months is more than 30 days—the delay involved six ends-of-justice continuances, none of which were accompanied by an explanation by the judge granting it. Gottesfeld moved to dismiss his indictment on speedy trial grounds but was denied by a (different) district judge who decided that the statute's requirement of an explanation was satisfied by the reasons laid out in the parties' motions for continuance, which he found that the judge had adopted when she granted the continuances without any other explanation. Gottesfeld was ultimately convicted of two counts under the Computer Fraud and Abuse Act and sentenced to ten years. The First Circuit affirmed, saying that a judge granting continuances doesn't need to restate the facts underlying a continuance when they're "obvious and set forth in the motion."[13] Oddly, it also went on to find that any additional record of the reasoning the statute requires was satisfied when the judge hearing the motion to dismiss laid out (what he believed to be) the previous judge's reasons for granting the continuances. You heard me correctly: the First Circuit decided that the Speedy Trial Act doesn't require the judge who grants the waiver to be the same judge who "sets forth in the record the reasons for the ultimate decision to exclude time [from the 30-day clock]."[14] Any judge will do, apparently.

[11] 18 U.S.C. § 3161(b).
[12] 18 U.S.C. § 3161(h)(7)(A).
[13] *U.S. v. Gottesfeld*, 18 F.4th 1, 7 (1st Cir. 2021).
[14] *Id.* at 8.

It's understandable why the government doesn't want Gottesfeld's conviction tossed on these grounds: his counsel had agreed to the continuances that were ostensibly necessary to continue plea negotiations; the reasons for the continuances, which Gottesfeld doesn't dispute, are laid out in the motions, so it's not like the court was pulling reasons to grant waivers out of thin air; and Gottesfeld didn't raise an issue with the judge's failure to record her reasoning for the continuances as they were being granted. (Even now, his cert. petition doesn't argue that the continuances weren't in the interests of justice.) But it strains credulity to read the statute as implying that the findings underlying the continuance needn't be recorded by the judge *whose findings they are*. We doubt the Court will grant cert. in this case, but wow do we hope a cert. denial isn't viewed by the First Circuit as blessing this kind of nonsense. *Because, as the defense bar readily knows . . . bad ideas travel fast.*

QUALIFIED IMMUNITY / PETTY GOVERNMENT DRAMA: *Central Specialties, Inc. v. Large*, No. 21-1552, is a petty municipal government drama involving Jonathan Large, a county engineer in Minnesota, who has beef with Central Specialties, Inc. (CSI), a contractor hired by the state to perform work on state highways that run through Large's county. Essentially, their dispute boils down to the fact that CSI wanted to carry heavy loads on county roads that were not in a condition to handle them. After getting the county to approve a lower weight limit on their roads, Large spotted some CSI trucks that he thought were over the legal limit. Large, being a reasonable human being, responded by complaining through the official channels he had with CSI. *Just kidding*—Large drove his county vehicle onto the road, blocked it, and pulled the trucks over despite having zero legal authority to do so. Over the next few hours, he summoned some actual law enforcement who weighed the trucks, issued a citation (which was dismissed the next day), and let them go. CSI sued under § 1983, arguing Fourth and Fourteenth Amendment violations (the latter because Large did not pull over any of the other overweight trucks that passed by on the county road while this all went down.) The trial court and the Eighth Circuit found for Large on qualified immunity (QI) grounds because there's no precedent involving even vaguely similar facts, since county engineers as a rule don't go around pulling people over. But notice the implications of the inane QI analytical approach if you aren't yet familiar with it: it wouldn't have mattered if Large had enforced the county's weight limit by drone-striking the trucks; county engineers don't forcibly/personally enforce laws—because they have no authority to do so—and so therefore there is no case law to draw from for QI purposes, so . . . a drone-strike would have been protected by the qualified immunity doctrine.[15] 😮

[15] Or, as the dissent put it: "The holding implicitly cloaks such officials with near-absolute immunity for their actions since there are no existing cases circumscribing or defining the scope of this newly discovered, unwritten law enforcement authority." *Cent. Specialties, Inc. v. Large*, 18 F.4th 989, 1000-1 (8th Cir. 2021).

The cert. petition notes that, until 2019, all seven circuits that had addressed similar circumstances had first looked to determine whether the defendant was actually acting within the scope of their official authority when they committed the acts giving rise to the suit. If not, the courts denied QI because the stated rationale for it—spurious though it is—is that QI is necessary to enable government employees to do their jobs, so there's no reason for it when an official is acting outside the scope of their job. The cert. petition says the Tenth Circuit departed from this approach in 2019 and now the Eighth Circuit has joined them, so CSI appeals to SCOTUS to clarify that QI should protect only officials acting within the scope of their employment. Why do we care about this case from our friends at the Institute for Justice? Because we (and you) care deeply about *all* of the Supreme Court's QI jurisprudence, which—so far—has gone out of its way to undermine the intent and letter of § 1983 to bless the most inhumane conduct of government officials against their own citizens and someday we think it might actually come to an end.

BIVENS* / U.S. BORDER ENFORCEMENT: *Elhady v. Bradley, No. 21-1492, is a case mainly about the issue of courts of appeals' using interlocutory appeals of qualified immunity denials to prematurely rule on whether *Bivens v. Six Unknown Named Agents*,[16] which created a federal cause of action for damages for unlawful searches and seizures, applies to the case at hand. It also presents a second question that cuts to the chase given the Court's recent *Bivens* jurisprudence and asks whether a *Bivens* remedy is *ever* available in the context of border enforcement. Anas Elhady, a U.S. citizen, was coming back from visiting friends in Canada when he was, without explanation, detained by border patrol in a freezing or near-freezing room for hours without his shoes or jacket, ultimately causing him to pass out and need a hospital. *You heard us correctly: a U.S. citizen; coming back from Canada.*

Elhady sued under *Bivens*, and the district court actually found that one of the defendants was not entitled to QI! On the interlocutory appeal of that ruling, however, the Sixth Circuit dismissed the claim after holding that *Bivens* never applies in a border context—which is very alarming for anyone who crosses any U.S. border and prefers not to be turned into a human popsicle or otherwise brutalized, invasively searched, arbitrarily detained, etc., in violation of the Constitution. *Hands raised, everyone?*

The Supreme Court hasn't actually held that a *Bivens* remedy is *never* available in border contexts, so the Sixth Circuit may have gotten a little over their skis, but it's reasonable to suspect that the Court could get there given the trajectory of its *Bivens* rulings.[17] *I'm not saying Bivens is on Death's*

[16] 403 U.S. 388 (1971); *see also* our additional *Bivens* discussion on pages 23-24.
[17] *E.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (holding that *Bivens* did not apply to an excessive force claim against a border patrol agent for shooting across the border and killing a teenager); *Egbert v. Boule*, 596 U.S. _ (2022) (holding that *Bivens* did not apply to an excessive force or First Amendment claim against a border patrol agent).

door, but I wouldn't sell it life insurance. Obviously, the petitioner does not want that outcome (nor do we), but if the Court is heading there anyway, it's perhaps preferable for them to come out and say it now so that resources can be directed to other solutions to rights violations by federal officials, like codifying a cause of action against them.[18] 👀

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Our Designations for MOST DISAPPOINTING DENIALS OF CERTIORARI (So Far)

ACQUITTED CONDUCT SENTENCING: ***Allums v. U.S.***, No. 21-996 (cert. denied Feb. 22, 2022), in which Yonell Allums was charged with a drug distribution conspiracy involving 5+ kilograms of cocaine and 280+ grams of crack cocaine, and charged with possessing a weapon in furtherance of a drug conspiracy. A jury acquitted him of the firearm charge and further found him guilty of conspiring to distribute only 500+ grams of cocaine and 28+ grams of crack cocaine (that's dropping a lot of zeros off the Government's accusations). On those convictions, his *Guidelines* range would've been 57 to 71 months' imprisonment (but subject to a 10-year mandatory minimum for a prior conviction); however, the judge in this case decided that the silly jury got it wrong and that Allums had, in fact, trafficked more cocaine and carried a firearm, which therefore justified a 20 year sentence. The cert. petition argued that 20 years is substantively unreasonable on the facts of conviction alone and, therefore, the sentencing violated *Apprendi v. U.S.*, which requires a *jury* to find facts necessary to make a sentence lawful.[19] We signed on to an amicus brief by friend Professor Doug Berman to support the petition, but in our acquitted conduct work we usually go a step further and argue acquitted conduct sentencing is *always* a Sixth Amendment violation, regardless of how much a sentence is increased as a result of the acquitted conduct. The Court refused to take up the matter, breaking our heart for the umpteenth time.

EXCESSIVE FINES: ***Rosales-Gonzalez v. U.S.***, No. 21-5305 (cert. denied Jan. 10, 2022), in which Alejandro Rosales-Gonzalez, an indigent, undocumented immigrant, received a sentence of 36 months and a fine of $4000 after pleading guilty to unlawfully reentering the country. He appealed, arguing that Excessive Fines Clause analysis should take into account whether a defendant has the means to pay the fine, which would be dispositive here because $4000 far exceeded what he could pay.

The Excessive Fines Clause comes from the Magna Carta, which, as the Supreme Court has noted, "required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to

[18] Bivens Act of 2021, H.R.6185, 117th Cong. (2021).
[19] 530 U.S. 466 (2000).

deprive [an offender] of his livelihood.'"[20] We joined an amicus brief to support the petitioner's argument and also to draw out the logical consequences of the Excessive Fines Clause for asset forfeitures (which are fines for Eighth Amendment purposes[21]): if the government forfeits an indigent person's car, phone, home, or even fairly small amounts of cash, it can very easily prevent them from being able to get to work or otherwise maintain their livelihood, and so these forfeitures could be found to violate the Eighth Amendment if the court considers the circumstances of the individual defendant or property owner.

Of course, one would hope that our government wouldn't need to be forced by the Constitution to stop cutting their poorest citizens off at the knees, economically speaking. Saddling people already confined by poverty with criminal justice[22] related debts that they have no hope of paying—or forcing them to forfeit the modest resources they need to maintain their livelihood—makes it even harder for them to meet their own needs. Further, it undermines most of the stated objectives of the criminal legal system—proportionality, fairness, rehabilitation, etc. We're against this sort of thing, but apparently many people aren't, and so we'll continue urging the Court to step in.

I also have a collection of **HONORABLE**, er **DISHONORABLE MENTIONS** in this category, which, for me, all fall under a rubric of "Trying to Create/Maintain Accountability Measures for Actors in the Criminal(ish) System." The Court's failure to do more review in this area is concerning. *Read 'em and weep*:

Santana v. Maryland, No. 21-440 (cert. denied Nov. 1, 2021). Will our criminal legal system permit convictions obtained through the knowing use of false testimony to stand? In our amicus brief, we argued prosecutors should never be permitted to obtain a conviction through the knowing use of false testimony and the responsibility to correct it should not be shifted to the defense. I guess we're wrong.

Campbell v. U.S., No. 20-1790 (cert. denied Jan. 10, 2022). Several courts of appeals, including the Eighth Circuit, authorize district courts to bar cross-examination about the specifics of mandatory minimum sentences. In our amicus brief, we argued this violates a defendant's Sixth Amendment right to cross-examine a witness and that juries should have the opportunity to hear the full extent of a cooperating witness' motive to favor the prosecution. FYI, there has been some interesting public

[20] *Timbs v. Indiana*, 586 U.S. _ (2019) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257, 271 (1989)).
[21] *Austin v. U.S.*, 509 U.S. 602 (1993).
[22] *Using the word "justice" real loosely here, folks.*

opinion work done around this question and it turns out, people agree with us and don't think this kind of thing is fair and that jurors should know about stuff like this when they're making their decisions.

Woodard v. U.S., No. 20-6387 (cert. denied May 17, 2021). In our amicus brief, we argued that SCOTUS should strike down requirements in the Tenth Circuit and other appellate courts that place undue burdens on defendants to demonstrate that their due process rights have been violated by prosecutorial pre-indictment delay, because due process requires the court to focus on prejudice to the defendant rather than the subjective intent of the prosecution. I guess we're wrong.

Romeril v. S.E.C., No. 21-1284 (cert. denied June 21, 2022) In our amicus brief, we challenged the SEC's practice of imposing settlements with a lifetime gag on any speech (from the defendant) challenging their allegations. Nongovernmental litigants face contracts of adhesion, drafted by the agency, containing provisions like a lifetime ban on speech that a court would never impose under Article III. This type of agency-imposed settlement provision violates due process, lacks necessary procedural checks, and is rife with First Amendment concerns.

A PREVIEW OF THE OCTOBER 2022 TERM'S MOST INTERESTING CRIMINAL(ISH) LAW CASES[23]

CAPITAL SENTENCING / HABEAS / DANTE'S 1ST CIRCLE OF HELL: *Cruz v. Arizona*, No. 21-846.

In 1994, the Supreme Court in *Simmons v. South Carolina*[24] held that, when the future dangerousness of a capital defendant is raised, she is entitled under the Due Process Clause to inform the sentencing jury if she would be legally ineligible to ever get parole. The problem with *Simmons* is that, if you're a state that really wants to execute its citizens, letting a defendant point out that the prosecutor's fear mongering re: a person's future dangerousness is baseless might get in the way of that. Accordingly, Arizona proceeded to evade *Simmons* for 22 years by inventing spurious bases on which to distinguish its sentencing laws from those in *Simmons*. This finally ended in 2016 when the Supreme Court said in *Lynch v. Arizona*: "No, Arizona. You really *do* have to comply with the Constitution."[25]

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[23] We sadly didn't hold this program last year so there was no Guide produced for the last term from which we can pull stats, but we note that in the 2019-2020 edition of the Guide, the defense won 2 out of 3 from this category (*Borden v. U.S.* and *Van Buren v. U.S.*). We keep track of this stat because we want to keep encouraging the defense bar to keep trying to call into question those things that ought to be questioned. *Keep trying. It really matters. And sometimes we win.* GO TEAM JUSTICE!

[24] 512 U.S. 154 (1994).

[25] 578 U.S. ___ (2016) (in which the Court issued a per curiam reversal of the Arizona Supreme Court on the question of whether *Simmons* applied in Arizona. 🧐).

One of the people whose due process rights under *Simmons* had been denied by Arizona during that 22-year period of lawlessness was John Montenegro Cruz. He was sentenced to death in 2005, after *Simmons* but prior to *Lynch*. He exhausted his first post-conviction review under state law prior to *Lynch*. Now, he's brought another petition under state law to raise *Lynch* to vindicate his right under *Simmons*, arguing that *Lynch* applies retroactively under a Supreme Court doctrine that says cases that merely applied existing law to a different circumstance—exactly like the per curiam decision in *Lynch*—must be applied retroactively to post-conviction reviews. The problem? Arizona doesn't allow successive petitions if there's only been a small development in the law; it requires a "significant change in the law." It's a catch-22: if *Lynch* didn't merely apply settled law to Arizona, it wouldn't apply retroactively to post-conviction petitions, but precisely because *Lynch* merely applied settled law, Arizona's rule doesn't allow it to serve as the basis for a new petition.

The Arizona Supreme Court dismissed Cruz's petition on the grounds that, in its view, *Lynch* didn't represent a "significant change." Cruz appealed to SCOTUS, arguing that *Lynch* applies retroactively and that it must be applied in his current petition because of the court's precedent in *Yates v. Aiken*[26], which held that state courts, like federal courts, must apply retroactively applicable SCOTUS opinions in its habeas proceedings when considering federal claims. Arizona argues that the applicability of *Lynch* to Cruz's petition is irrelevant because, essentially, there is no petition; it's barred under Arizona's rule on successive petitions, and so Cruz loses regardless of whether *Lynch* applies retroactively. *Tell the truth—have you ever previously pondered the metaphysics of habeas petitions?*

From there, the issues only get more convoluted: Cruz argues that Arizona's rule discriminates against federal claims and violates the Supremacy Clause; Arizona tries to distinguish its habeas process from that in *Yates*; etc., etc.—it's truly a mess, so we're going to skip to the end: the Supreme Court granted cert. on only one question: whether there were adequate and independent state grounds for the decision. Technically, the issue is just about whether SCOTUS has jurisdiction over this dispute, but the question is tied up in all of the issues that the parties have raised, since there cannot be "state grounds" for the decision if those grounds—in this case, the rule dismissing Cruz's petition—are unconstitutional or otherwise invalid. If the Supreme Court decides it has no jurisdiction, then, as our friends at NACDL and ACLU put it, Arizona will have successfully "preserve[d] petitioner's unconstitutionally imposed death sentence and refuse[d] him rights that all now agree are guaranteed to him by the Constitution and this Court's precedent." Unless they find relief through federal habeas proceedings, Cruz—and the six other defendants whose petitions are being stayed pending the outcome of his case—will be put to death even through it's settled that Arizona audaciously and unlawfully ignored their right under

[26] 484 U.S. 211 (1998).

Simmons. More broadly, such a decision would also invite other states to avoid remedying other rights violations in their habeas proceedings. Given this Court's, er, *lack of enthusiasm* for habeas rights of state prisoners, we'll be keeping our expectations low. But our hearts are burning with frustration over the injustice at play.

WIRE FRAUD / HONEST SERVICES FRAUD / CREATIVE PROSECUTION: *U.S. v. Ciminelli*, No. 21-1170 & *U.S. v. Percoco*, No. 21-1158.

Now for the latest installment of: *What Else Can the Government Try to Cram Under the Fraud Statutes?* As you know, according to the Supreme Court, the federal wire fraud statute is defined around theft: it precludes the use of the wires *to take money or property* by deception.[27] But the Second Circuit has too much creative energy to be penned in by such a humble definition; instead, it generously entertains the Government's florid theories of fraud that seemingly cover anything that offends an AUSA's notions of fair dealing. (You recall that in 2020, the Supreme Court slapped down one iteration of this by unanimously reversing a Second Circuit ruling that upheld wire- and federal program fraud convictions for the Bridgegate defendants. The Court reversed because the defendants' unsavory intent in causing gridlock on the G.W. bridge was to exact political revenge, not to obtain money or property.) With this pair of cert. grants, we wonder if the Court will continue reining in the Second Circuit's ever-expanding theories under the fraud laws?

Louis Ciminelli hired a political consultant and lobbyist who'd also been retained by a state employee who held a major role in designing the bidding process for state construction contracts in Buffalo. The state employee conspired with the consultant to give Ciminelli an advantage in the first stage of the bidding process. Ciminelli's company ultimately won the construction contract. A few years later, everybody got convicted of wire fraud. As noted, fraud is about *theft*; the object of the deception must be to ultimately deprive someone of their *property*. This is inconvenient for the government because they had "little evidence" (per the Second Circuit) that the state didn't receive the benefit of its contract with Ciminelli's company or that the state would've gotten a better contract or better product from another company.[28] So the government instead tries to meet their burden by relying on the "right to control" theory of fraud, which says that the right to control one's assets is a property right that can be fraudulently interfered with when someone uses deception to hide from the asset-holder "potentially valuable economic information." Here, the argument is that New York's right to control its $750 million (the value of the contract) was interfered with when part of the bidding process was clandestinely rigged

[27] *Kelly v. U.S.*, 590 US _ (2020) ("The wire fraud statute thus prohibits only deceptive 'schemes to deprive [the victim of] money or property.'") (quoting *McNally v. U.S.*, 483 U. S. 350 (1987)).
[28] *U.S. v. Percoco*, 13 F.4th 158, 172 (2d Cir. 2021).

in favor of Ciminelli's company. The Court granted cert. to decide whether the right to control theory is a valid basis for liability under the wire fraud statute. In our opinion, the emperor has no clothes; the right to control theory is plainly just another attempt to repurpose federal fraud statutes to enable federal prosecutors to go after conduct that's dishonest and icky, but not wire fraud.

The second case in this genre deals with honest services fraud (*my favorite!*) and it involves the same corrupt consultant from *U.S. v. Ciminelli*. Here, he paid Joseph Percoco to contact state agencies to get favorable treatment for his clients. Percoco was convicted of various crimes, one of which was a conspiracy to commit honest services fraud for acts that he largely undertook while he was no longer employed by the governor's office. Of course, paying a private citizen to contact government officials on your behalf is very normal; here in D.C. we call it lobbying, and former government employees do it every single day and are often the people best suited for the job. But the government is arguing that Percoco retained such great influence over the state government that he owed the public a fiduciary duty (which is necessary to commit honest services fraud) even during his period of private employment. The Second Circuit bought this argument; the Supreme Court granted cert. to review it. (We note that, in the Second Circuit's opinion upholding Percoco's conviction, the court leaned heavily on a 1982 case involving an honest services fraud conviction of a local party chairman who hadn't served in government *at all*.[29]) If the line for a fiduciary duty isn't drawn at official government employment, then the point where run-of-the-mill lobbying becomes wire fraud isn't something that anyone is going to be able to understand—a murky legal quagmire that threatens the due process rights of lobbyists (most of whom *are* former government officials or their employees) as well as the First Amendment rights of their clients. *Let's see how much longer SCOTUS can continue to reinterpret the honest services fraud statute before it is willing to admit it should have struck it down as unconstitutionally vague decades ago.*

AEDPA / Habeas / Dante's 8th Circle of Hell: *Jones v. Hendrix*, No. 21-857.

Unfortunately, we can't imagine the defendant prevailing in this appeal, but we'll preview it anyway in case anyone enjoys reading about gross miscarriages of justice.

Federal prisoners seeking to challenge their conviction or sentence generally must do so via a motion under 28 U.S.C. § 2255, not a habeas petition, unless a defendant can prove that a § 2255 motion would be "inadequate or ineffective to test the legality of his detention." Meanwhile, successive § 2255 motions are precluded unless they're based on newly discovered evidence or a new, retroactively

[29] *U.S. v. Percoco*, 13 F.4th 180, 194 (2d Cir. 2021) ("The district court's fiduciary-duty instruction fits comfortably within our decision in *United States v. Margiotta*, where we held that 'a formal employment relationship, that is, public office,' is not a 'rigid prerequisite to a finding of fiduciary duty in the public sector.'"). *Seriously?*

applicable rule of constitutional law. So what happens when a defendant who has already filed a § 2255 motion seeks to challenge their conviction under a new, retroactively applicable rule of *statutory* law (meaning a successive § 2255 petition isn't available)? Does the bar on successive § 2255 motions then count as making a § 2255 motion "inadequate or ineffective to test the legality of his detention"—opening the door to a habeas petition—or did the first § 2255 petition count as an adequate opportunity to test the legality of the detention, even though the applicable circuit's precedent clearly foreclosed the relevant statutory argument at the time the § 2255 petition was filed? For non-nerds, this case is essentially about whether those incarcerated in federal prisons, who didn't challenge their convictions earlier because established applicable law was against them, can challenge the case later after the Supreme Court rules that they are now legally innocent of a crime (because the Court has determined that the law they were convicted under did not actually criminalize the activity they had engaged in).

This is the question faced by Marcus Jones, who was convicted in 2000 of being a felon in possession of a firearm. When he was convicted, the Eighth Circuit did not require the prosecution to prove that the defendant knew he'd been convicted of a felony, but the Supreme Court in 2019 held in *Rehaif v. U.S.* that such a showing *is* required under the statute.[30] But Jones had already filed § 2255 motions, and he didn't raise this argument in those motions (eh, because the Eighth Circuit had already rejected it in other cases, so it would've been pretty much futile for him to try. Now, Jones has brought a habeas petition based on *Rehaif*. He argues that a § 2255 motion would be inadequate to test the legality of his detention because he's unable to file a successive § 2255 motion based on *Rehaif* (because it announced a new *statutory* rule, not a constitutional rule), and so § 2255 allows a habeas petition in this circumstance or, if not, it unconstitutionally suspends the habeas writ. There's a deep circuit split over this issue. Most circuits read § 2255 to allow habeas petitions in these circumstances; the Tenth and Eleventh do not, and the Eighth Circuit decided to join the minority. It ruled that § 2255 does not allow habeas petitions in this circumstance—the original § 2255 petition did allow Jones to *test* the legality of his detention, you see, even though the test would've erroneously determined that his detention was lawful[31]—and it's not a violation of the Suspension Clause. The consequence is that Jones can never get the benefit of *Rehaif*, and so he retains his conviction even though the government never proved him guilty under current law. *Seriously?*

We oppose imprisoning legally innocent people—*we're softies like that*—so it's with profound regret that we note the likelihood that Jones will lose his appeal and the Court will export the minority's reading to the circuits that had rejected it. Now-Justice Gorsuch has already ruled against this same

[30] 588 U.S. __ (2019).

[31] "[T]he question is whether Jones could have raised the argument, not whether he would have succeeded." *Deangelo v. Hendrix*, 8 F.4th 683, 687 (8th Cir. 2021) (😐).

argument in the Tenth Circuit,[32] which surprises me a little since sometimes I feel like I can count on Justice Gorsuch to get criminal law stuff correct, and I'm not holding my breath for the other conservative justices to vindicate habeas rights here. *If only there was a branch of the government that could amend AEDPA . . . .*

INNOCENCE CLAIMS / SECTION 1983: *Reed v. Goertz*, No. 21-442.

Stop us if you've heard this once before: an Innocence Project client is trying to get DNA testing of various pieces of evidence from the scene of the crime for which he was convicted and sentenced to death, and instead of just *testing the freaking evidence* to confirm they're not going to execute an innocent man, the state is pulling out all the stops to keep it under wraps.

Such is the case of Rodney Reed. He was convicted of murder in 1998, and in 2014, he filed an ultimately unsuccessful motion under Texas' statute on post-conviction DNA testing. Now, he's brought a claim under 42 U.S.C. § 1983 to argue that Texas' post-conviction DNA statute violates the Constitution, but the Fifth Circuit says that his claim is untimely. It ruled that Reed's injury accrued for the purposes of the statute of limitations on the § 1983 claim when the trial court first denied his motion under the Texas statute, not when his final appeal of that ruling was denied. The timeline of this case illustrates the wackiness of the Fifth Circuit's ruling. It says that the injury accrued in November 2014, when the trial court orally denied Reed's motion. After that ruling, the case went up to Texas' Court of Criminal Appeals, came back on remand for more fact-finding and legal interpretation, got denied again, went back to the Court of Criminal Appeals, which issued a lengthy opinion reviewing the facts and the law, and then had rehearing denied by the Court of Criminal Appeals and cert. denied by SCOTUS. The relevant statute of limitations is two years, and so according to the Fifth Circuit, Reed could've filed his case as soon as the trial court initially denied his motion—before all of the intervening developments in the factual record and the Texas courts' interpretations of the state statute—and was *required* to have filed it before the Court of Criminal Appeals had ruled on the merits.

Now, state-court appeals can be lengthy and sometimes futile, so some defendants would be better off if federal courts actually wanted to open their doors to post-conviction constitutional challenges before defendants had exhausted their options under state law—but that's not what's going to happen here. The cert. petition notes that the likely result of the Fifth Circuit's rule is "stays and ad hoc abstention" (quoting a 2019 case in which the Supreme Court found that the statute of limitations for § 1983 claims based on a prosecutor's use of fabricated evidence begins running when the relevant criminal proceedings conclude in the claimant's favor not when the claimant first has their liberty

[32] *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011).

infringed as a result of the fabricated evidence).[33] That case gives reason for Reed to be hopeful because the Court's ruling was based in part on the fact that requiring parallel litigation (the § 1983 claim and the state court prosecution on which it's based) would be bananas as a matter of "federalism, comity, consistency, and judicial economy"—all considerations that are equally implicated by the central issue in *Reed*.[34] Call me naïve, but I think this one has a chance of getting fixed.

BANK SECRECY ACT / EXCESSIVE FINES: *U.S. v. Bittner*, No. 21-1195.

This is not a criminal case but potentially of interest to many in the defense bar. The approximately $2.72 million-dollar question at issue is: *what is a "violation"*?

Mr. Bittner is a Romanian-American businessman. For many years, he was living and doing business in Romania and unaware that he was required by virtue of his American citizenship to annually file a form with the IRS reporting his foreign bank accounts. The Bank Secrecy Act empowers the government to "impose a civil money penalty on any person who violates" this rule (capped at $10,000 per "violation") and also establishes criminal penalties for willful violations.[35] Upon Mr. Bittner's return to the U.S. and learning of his overdue reporting obligations, he filed the reporting form for each of the preceding five years. The IRS thanked him kindly (*we presume*) but then slapped him with a $2.72 million fine—$10,000 for each of the accounts that he should have reported in each year that he failed to report them. (Note that the IRS is not alleging any fraud nor did it allege that the failure to file was willful; these penalties are for *non-willful* failures to report for a period of 5 years.) Not surprisingly, Mr. Bittner would prefer to part with less of his money so he's arguing that each "violation" of the rule is the failure to file the annual form—not the reporting failure for each individual account—which would put him on the hook for only $50,000 in penalties.

It's hard to say how this will come out; the statute is as poorly written as most other "white collar" statutes and Mr. Bittner won at the district court but lost on appeal. It's a classic case of the Government arguing for the most expansive reading in order to maximize a fine/disgorgement/loss calculation. Hey, at least he's not being prosecuted, *amiright*? Stay tuned for how much Mr. Bittner will owe as the case's outcome might very well be relevant to *your* future fine/disgorgement/loss calculation battles.

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[33] *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019).

[34] *McDonough* was 5-3, but the dissenters (Justices Thomas, Kagan, and Gorsuch) did not weigh in on the merits (as they felt the case was improvidently granted).

[35] 31 U.S.C. § 5321(a)(5).

The Most Useful, Interesting, and/or Infuriating Criminal(ish) Opinions from the October 2021 Term

ARMED CAREER CRIMINAL ACT / DANTE'S 5TH CIRCLE OF HELL: *Wooden v. U.S.*, No. 20-5279.

One evening in 1997, William Dale Wooden entered a storage facility and broke into 10 different units; he pleaded guilty to 10 counts of burglary. Seventeen years later, he is convicted of being a felon in possession of a firearm, for which the Government sought a 15-year mandatory minimum under the Armed Career Criminal Act (ACCA), which requires that a defendant have three prior convictions for certain crimes (burglary among them) that were "committed on occasions different from one another." The question this case presents is whether Wooden's 10 burglaries of storage units on the same evening 17 years ago occurred on different "occasions" for the purposes of applying ACCA's mandatory minimum sentence to him now. The district court determined that the burglaries occurred on different occasions and so sentenced him to more than 15 years—when his recommended *Guidelines* range had been 21-27 months—and the Sixth Circuit affirmed. Other circuits would have likely come to a different result in this case because they "undertake a more holistic inquiry" in determining what constitutes an "occasion," generally requiring a greater temporal or geographic break between the crimes to suffice as having occurred on different occasions in order to trigger ACCA's harsh mandatory minimum sentence.

The Supreme Court thankfully reversed 9-0 (though with a slew of concurrences; *lovers of the rule of lenity should check out Justice Gorsuch's*) and sided with circuits that take the more holistic approach. The opinion relied on the actual meaning of the word "occasion," which can contain multiple discrete actions—and the intent and legislative history of the ACCA in general and of the "occasions" clause in particular, which were very clearly meant to target "career criminals"—*it's literally in the name of the law!*—not someone who commits multiple acts on one evening.

Not much to analyze in this opinion of the Court except to once again shake our heads at the inanity of how ACCA continuously serves as the basis to unnecessarily ruin lives and fuel overincarceration. But as an aside, I also can't help noting the circumstances in which the gun was found that triggered Wooden's conviction nearly two decades after his storage unit burglaries. From the Court's opinion: "Fast forward now to a cold November morning in 2014, when Wooden responded to a police officer's knock on his door. The officer asked to speak with Wooden's wife. And noting the chill in the air, the officer asked if he could step inside, to stay warm. Wooden agreed. But his good deed did not go unpunished. Once admitted to the house, the officer spotted several guns. Knowing that Wooden was a felon, the officer placed him under arrest. A jury later convicted him for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)." We implore you to remind every man,

woman, and child: *don't let them in without a warrant*. Also, maybe it's time to rethink the value of this "felon in (*mere*) possession of a gun" crime, particularly in a country that seems to love its guns so much?

"CRIME OF VIOLENCE"/ FIREARMS: *U.S. v. Taylor*, No. 20-1459.

Mr. Taylor was charged with multiple counts but ultimately pleaded guilty to conspiring to commit a Hobbs Act robbery[36] and carrying a firearm in violation of 18 U.S.C. § 924(c). Under 18 U.S.C. § 924(c), the use, carrying, possession, etc. of a firearm during a "crime of violence" or drug trafficking crime is punishable by up to 10 years in prison, depending on the circumstances. A "crime of violence" was originally defined in the statute as any felony: (1) that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or (2) "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[37] I'm skipping over some procedural details here, but remember, in 2019, the Supreme Court struck down the latter definition—known as the Residual Clause—for being unconstitutionally vague,[38] so since then courts have to re-analyze whether certain crimes that used to fit comfortably under the Residual Clause can qualify as predicate offenses under what remains of the definition of "crime of violence."

In *Taylor*, the Court granted cert. to resolve this question as it applies to attempted Hobbs Act robbery. In the mid-2000s, Taylor took part in an unsuccessful scheme and pled guilty to conspiracy to commit robbery under the Hobbs Act as well as to a charge under § 924(c) for carrying a firearm during the attempt. We note that his conspiracy did happen to involve the actual use of force (a man was shot and killed), but that's irrelevant because it's a legal question as to whether attempted Hobbs Act robbery has actual, attempted, or threatened use of force as an element of the crime, not whether any specific Hobbs Act violation involved the use of force.

A 7-justice majority found resolving this question very straightforward. The legal elements of the crime of attempted Hobbs Act robbery are: "(1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a "substantial step" toward that end." The step cannot be "mere preparation;" it "must be 'unequivocal' and 'significant,' though it 'need not be violent.'" Since there's no threatened, attempted, or actual use of force required

[36] The Hobbs Act is a federal statute that enables federal prosecution of robberies, which are defined as the "unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." 18 U.S.C. § 1951.
[37] 18 U.S.C. § 924(c)(3).
[38] *U.S. v. Davis*, 588 U.S. __ (2019).

in these elements, attempted Hobbs Act robbery is therefore not deemed a "crime of violence" for the purposes of § 924(c). As our friends at FAMM and NACDL highlighted in their amicus brief, the reading of the statute advocated by the Government would've essentially revived the unconstitutional Residual Clause. Thankfully, the majority saw no reason to do.

FIRST STEP ACT / FAIR SENTENCING ACT / RESENTENCING: *Concepcion v. U.S.*, No. 20-1650.

Congress, in its infinite wisdom (*sarcasm, folks*), assigns much higher penalties for offenses involving crack cocaine than for powder cocaine,[39] despite their just being two forms of the same drug with no real valid scientific or medical reasons for treating them differently (and despite the manifest failure of long prison sentences to materially reduce the availability of illicit drugs . . .). As you might remember, originally, the sentencing disparity was 100-to-1, but in 2010, Congress passed the Fair Sentencing Act (FSA) to reduce the disparity to 18-to-1. Eight years later, the First Step Act made the FSA reduction retroactive, so people sentenced under the 100-to-1 regime could file a motion to reduce their sentence (granted at the discretion of a judge). Specifically, the law provides that the court "may . . . impose a reduced sentence as if [provisions of the FSA] were in effect at the time the covered offense was committed." The question presented in *Concepcion* was whether this provision allows, requires, or forbids the judges hearing these motions to take into account other intervening events, besides the FSA amendments, when deciding whether, and by how much, to reduce a person's sentence.

Carlos Concepcion's situation demonstrates why this question matters. He sought a reduced sentence for his 2009 conviction for crack distribution, for which he received 19 years. His lengthy sentence was based in large part on his being sentenced as a career offender based on prior convictions. But in the intervening years, one of his prior convictions was vacated and, under a 2016 amendment to the *Guidelines*, the others no longer counted for the purposes of the career offender enhancement. If he were sentenced under today's laws—and depending on which Circuit handled his resentencing—his sentencing range could be in the 4-6 year range. We joined an amicus brief with the ACLU, its Massachusetts affiliate, and the Southern Poverty Law Center, arguing that the First Step Act gave all courts discretion to consider intervening factual and legal developments when resentencing defendants under the Fair Sentencing Act, and the majority of the Court ended up agreeing with us. It resolved a 3-way circuit split and held that the law allows courts to take into account intervening developments when resentencing defendants under the FSA, because the First Step Act doesn't disturb the baseline rule that, barring statutory or constitutional limitations, judges may consider relevant information when sentencing a defendant. It further held that courts must at least consider arguments that

[39] 21 U.S.C. § 841(b)(1)(A)(iii); (B)(iii).

intervening events warrant a particular sentencing decision, though need not be persuaded by them—just as they're required to consider any other nonfrivolous arguments in sentencing. So good news for defendants everywhere that the federal sentencing reforms passed in 2010 and 2018 are able to help more people out and in the meantime, you should know that Due Process Institute has spent *much* of this Congress lobbying heavily for a bipartisan supported bill—the EQUAL Act—that would finally eliminate the needless crack-powder disparity altogether. We're so, so, so, so close to finally making this go away. *Let us know if you want to join the fight!*

MENS REA / CONTROLLED SUBSTANCE PRESCRIPTIONS: *Ruan v. U.S.*, No. 20-1410 & *Kahn v. U.S.*, No. 21-5261.

The baseline law at issue in this case is that when someone "knowingly or intentionally" manufactures, distributes, or dispenses a controlled substance "except as authorized," they've committed a federal felony and are liable for serious prison time—up to life—if convicted.[40] One exception to this rule (or, one circumstance in which "authorization" exists) includes doctors who prescribe controlled substances "for a legitimate medical purpose . . . acting in the usual course of his[41] professional practice."[42] Courts usually allow accused doctors to present a "good faith" defense in order to protect them from essentially being criminally prosecuted for mere negligence, but the Eleventh Circuit determined that a physician's good faith belief that he or she dispensed a controlled substance in the usual course of his or her professional practice "irrelevant."

Xiulu Ruan and Shakeel Kahn were doctors in Mobile, Alabama, and depending on who you ask, they either ran a legitimate pain clinic or one of the biggest pill mills in the country. A jury found the latter, and they were each sentenced to more than 20 years in prison. They appealed to the Supreme Court to decide what the applicable *mens rea* is with respect to the requirement that the drugs be distributed without a legitimate medical purpose. In support of their case, we filed an amicus brief highlighting the wisdom of the Court's precedents favoring a subjective intent requirement, because we think a person's mental state should pretty much always matter in the question of whether we should lock a person away.

Six justices found that "knowingly or intentionally" applied to the requirement that the defendant distribute drugs "except as authorized."[43] The majority relies on the Court's background presumption in favor of a scienter requirement, the presence of "knowingly or intentionally" in the

[40] 21 U.S.C. § 841(a).
[41] Apparently, the DEA thinks that only "male" doctors prescribe controlled substances.
[42] 21 C.F.R. § 1306.04.
[43] The other three—Justices Alito, Barrett, and Thomas, who concurred only in the judgment—would simply read the statute as authorizing prescriptions written in good faith.

statute, and the fact that the entire conviction turns on whether the prescription was unauthorized (i.e., whether the prescriptions were issued without a legitimate medical purpose). They essentially treated the "except as authorized" exception as a legal element of the offense. In situations like Ruan's and Kahn's, that means that once a defendant provides evidence that they were a doctor issuing prescriptions, the burden should essentially shift to the government to prove beyond a reasonable doubt that they knowingly or intentionally wrote the prescriptions without a legitimate medical purpose. The good news is this holding should apply broadly to cases beyond physicians writing prescriptions, which will better protect the rights of the accused, and we're fans of that.

MIRANDA / § 1983 / NO RIGHTS FOR YOU: *Vega v. Tekoh*, No. 21-499.

After Terence Tekoh had his un-*Mirandized* confession admitted against him in court (but was nonetheless acquitted), he filed a § 1983 claim against the police officer who had questioned him without giving him a *Miranda* warning for violating his constitutional rights. Quick legal primer for those who need it: Section 1983 provides a cause of action against state actors who "subject[]" people "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws[.]" The Fifth Amendment secures the right against self-incrimination, which precludes the admission of statements against a defendant who made the statement under police compulsion. And *Miranda* generally prohibits the admission of statements against a defendant if the statement was obtained from them through in-custody interrogation unless the police first warned them of their right against self-incrimination. The question at issue here was whether the improper admission of an un-*Mirandized* statement against a defendant can serve as the basis for a § 1983 claim.

In a 6-3 decision, the Court said no: Section 1983 enforces rights "secured by the Constitution," but *Miranda* does not define the contours of a Fifth Amendment violation; it's merely a "prophylactic rule" that helps protect the constitutional right against self-incrimination. (Section 1983 also enforces rights secured by federal "laws," and *Miranda* is federal law, but the Court has previously found that not every federal law creates a cause of action under § 1983.) Since *Miranda* is the Supreme Court's rule, it gets to decide whether it includes a cause of action under § 1983, and the Court decided that it doesn't, as such a cause of action would not pass a cost-benefit analysis.[44] In essence: "*It's our rule and we'll enforce how we want to.* 🎵"

In their dissent, Justices Sotomayor, Breyer, and Kagan noted that the Court has previously characterized *Miranda* as a "constitutional rule." They also noted that, regardless of whether *Miranda*

[44] Curiously, the majority says that enforcing *Miranda* against police via § 1983 "would have little additional deterrent value," yet in other contexts, the Court thinks § 1983 has such a powerful deterrent effect on police behavior that it justifies granting police qualified immunity even for the most unambiguous constitutional violations. *Hmmm* . . . .

protects more than the strict limits of the Fifth Amendment, it is a right "secured by the Constitution" since it comes directly out of the right against self-incrimination. In doing so, they effectively rejected the argument, implied in the majority opinion, that a legal right isn't "secured by the Constitution" for the purposes of § 1983 unless it enforces the narrowest prohibition (on the government's conduct) effected by the particular constitutional clause. But they didn't have the numbers on their side on that view, so . . . 🤷

DOUBLE JEOPARDY / FIRST NATIONS / POTENTIAL MAYHEM: *Denezpi v. U.S.*, No. 20-7622.

Merle Denezpi was convicted and sentenced in two courts for the same criminal act. One was a federal district court, and the other was a Court of Indian Offenses (also called a CFR court), which is a court created by the federal government for jurisdictions of Native American/Indigenous/First Nations folks who don't have their own tribal court. In federal district court, he was convicted under a federal statute; in the CFR court, he pled guilty to offenses that he conceded were under the tribal law of the Ute Mountain Ute Tribe. The crime Denezpi was convicted of under tribal law was assault and battery, which is a lesser included offense of the crime he was convicted of in federal court (aggravated sexual abuse), and so Denezpi argued that his second prosecution violated the Double Jeopardy Clause. The stakes for him were quite stark; he'd received time served in the CFR court but 30 years' imprisonment from the district court.

In 2019, the Supreme Court in *Gamble v. U.S.* affirmed that the Double Jeopardy Clause doesn't preclude different sovereigns—such as a state, a tribal court, and the federal government—from prosecuting someone for the same act, even if their respective laws include all of the same elements.[45] In *Denezpi*, the Court granted cert. to decide whether the Double Jeopardy Clause precludes Denezpi's second conviction, in which arguably the *same sovereign* (the federal government via a CFR court) prosecuted him for the *same act* but under the law of *two different sovereigns* (tribal law and federal law). The Court ultimately demurred on whether CFR courts exercise federal power or tribal power, holding that the identity of the prosecuting authority is irrelevant because the Double Jeopardy Clause doesn't prohibit multiple prosecutions for the same act by the same sovereign; instead, the question is whether the defendant is being prosecuted multiple times for the same "offense." The Double Jeopardy Clause says "[no person shall] be subject for the same offense to be twice put in jeopardy of life or limb[.]"[46] As it did in *Gamble*, the Court read "offense" not as referring to the act committed by the defendant in isolation, but the act as it violated a particular criminal code. Thus, two sovereigns could

[45] 587 U.S. __ (2019).
[46] Not the finest constitutional drafting, if I'm being honest. Interestingly, Madison's original draft was much clearer: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence[.]"

have identical criminal codes, but because the authority for each code flows from a different sovereign's power, a person commits two separate "offense[s]" when they simultaneously act in violation of each of the sovereigns' code.

In his brief, Denezpi pointed out that allowing his second prosecution to stand would permit an alarming scenario in which the states and/or the federal government assume authority to enforce the other's criminal code, allowing them at least two bites at the apple for every person that violates both codes. And the Court says, "*Yes, maybe!*" (Well, they actually said: "[I]f there is a constitutional barrier to such cross-enforcement, it does not derive from the Double Jeopardy Clause.") We find all this deeply unpersuasive. And Justice Gorsuch feels similarly; in his lengthy dissent in *Gamble*, he generously described the Court's interpretation of "offense" as "lawyerly." He dissents again here (joined in parts by Justices Sotomayor and Kagan) to set forth the evidence for construing the CFR courts as enforcing federal law, not tribal law. Specifically, he notes that CFR courts actually enforce the code of federal regulations, which assimilate some tribal law crimes (like assault and battery) if approved by the Department of the Interior. If accurate (the majority demurs on the question), it would mean Denezpi's second prosecution violated the Double Jeopardy Clause even if we accept the majority's illiterate definition of "offense."

BIVENS: *Egbert v. Boule*, No. 21-147.

Robert Boule is a curious character. He operates a crummy inn in Washington state on property that straddles the U.S.-Canada border at a point where there are no fences or other barriers preventing people from illegally crossing over it. And lest you think there's nothing hinky going on, Boule's license plate says "SMUGLER", his "stays" are apparently just rides to people heading toward or coming from the border, and his establishment is literally named Smuggler's Inn. Boule also makes money by informing the feds when he has patrons of interest, allowing federal agents to show up and take them into federal custody. The majority makes sure to point out that he doesn't even offer guests a refund when he does this.

One fine day, ~~the snitch~~ Boule alerts Agent Erik Egbert that a Turkish national had booked a ride with him to Smuggler's Inn. Egbert decided it was unlikely that someone would travel all the way from Turkey to actually stay at the inn, so he went there to check things out. When he sees Boule's SMUGLER SUV pull into the property, he approached. Then things go sideways. Boule says he asked Agent Egbert to get off his property and then Egbert assaulted him. As a result, Boule filed a grievance against Egbert with the Border Patrol (Egbert's employer) and filed a claim against Egbert under the Federal Tort Claims Act (FCTA). Boule says that Egbert then retaliated against him by reporting his license plate to Washington state (for promoting illicit activity) and by getting the IRS to audit him.

After his FTCA claim was denied (and the Border Patrol took no action against Egbert), Boule filed a lawsuit against Egbert under the Fourth Amendment (for the assault) as well as the First Amendment (for the retaliation). Since there's no statute creating a cause of action for damages against federal officials for constitutional violations; the only source of such a remedy is *Bivens v. Six Unknown Named Agents*.[47] The issue in this case was whether *Bivens* provides Boule a cause of action against Agent Egbert for either or both of his alleged constitutional injuries. The answer: *nah*.

For context, only twice more after *Bivens* (in 1979 and 1980) has the Court ever found a cause of action to enforce a constitutional right against alleged violations by federal officials (neither of which remotely resemble Mr. Boule's situation),[48] and after that, the Court stopped discovering causes of actions. It hasn't explicitly said it will *never again* extend *Bivens*, and it does always go through a doctrinal analysis to explain why a particular case at hand is a new context that's different from *Bivens* and why the interests weigh against extending *Bivens* to each new context, but it all reads as a bit of a fig leaf. The Court thinks *Bivens* was a mistake—the *Egbert* majority explicitly states "we have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution"—and so although the Court has not overruled *Bivens*, don't go asking them to extend it an inch further any time soon.

The only point in including this case in our Guide is so I can get on my soapbox, so here goes. In its *Bivens* jurisprudence, the Court emphasizes that Congress, not the judiciary, is the appropriate body to fashion a remedy for constitutional rights violations by federal agents. But to our mind, this erroneously assumes the legitimacy of *refusing to provide a remedy at all*. In the abstract, yes, a legislature has greater flexibility and knowledge to design a remedial scheme that maximizes constitutional enforcement as well as the other interests at stake; but in practice, Congress has lacked the political will to actually do so, which makes that branch's perceived advantages meaningless in protecting the American people. Perhaps we could interpret its failure to act as an informed exercise of its authority—maybe it looked around and decided that the status quo *is* actually the best of all possible worlds—but we tend to think, as the Court originally did in *Bivens*, that such a decision is foreclosed by the Constitution. The function of enumerating individual rights was to set off-limits to democracy the question of whether we *have* certain rights. Inherent in having a right is having a remedy for it. Maybe this is an argument that might get somewhere someday with some other make-up of the Court.

[47] 403 U.S. 388 (1971).
[48] *Davis v. Passman,* 442 U. S. 228 (1979); *Carlson v. Green*, 446 U. S. 14 (1980).

HARMLESS ERROR / HABEAS / AEDPA: *Brown v. Davenport*, No. 20-826.

In *Brecht v. Abrahamson*, the Supreme Court held that state prisoners in federal habeas courts who raise a claim of constitutional trial error must persuade the court that there is "grave doubt" that the error had "a substantial and injurious effect or influence in determining the jury's verdict."[49] Shortly after *Brecht*, Congress passed AEDPA, which created additional hurdles; it forbids federal courts from granting habeas relief on a claim that a state court has already adjudicated on the merits on unless the state's adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[50] In the context of constitutional error analysis, a state court must remedy a constitutional violation unless the state can prove beyond a reasonable doubt that the violation did not affect the outcome of the trial.[51] This means the second AEDPA prong requires a petitioner to show that the state court made an "unreasonable determination" that the constitutional error was harmless beyond a reasonable doubt. The question presented here was whether satisfying *Brecht* suffices to authorize a federal court to grant habeas relief in this circumstance, or whether a petitioner must satisfy the hurdles in both *Brecht* and AEDPA. The Court, in a 6-3 decision, ruled in favor of the most procedural hurdles.

In practice, as the dissent notes, in the circuits which already require both *Brecht* and AEDPA in this circumstance, no one identified a case in which a court held that a petitioner satisfied *Brecht* but not AEDPA. But regardless of how much of an effect the holding of this case will have on habeas outcomes in many circuits, the majority's opinion is concerning because it dedicates several pages to offering an interpretation of the history of habeas that casts it as granting federal courts only a narrow authority to review state court judgments. This changed, the Court says, in 1953 with its ruling in a case called *Brown v. Allen*.[52] We fear this portends further opinions that continue to limit the role of federal courts in securing the rights of state criminal defendants via habeas proceedings, at a time when the incarceration rate in state criminal systems (and, therefore, the oversight capacity needed to prevent widespread constitutional violations) is vastly higher than it was in 1953.[53] But this doesn't surprise any of you, does it.

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[49] 507 U.S. 619 (1993); *O'Neal v. McAninch*, 513 U.S. 432 (1995).
[50] 28 U.S.C. § 2254(d).
[51] *Chapman v. California*, 386 U.S. 18 (1967).
[52] 44 U.S. 443.
[53] Prisoners 1925–81, Bureau of Justice Statistics (1982); Mass Incarceration: The Whole Pie 2022, Prison Policy Project (2022).

CONFRONTATION CLAUSE / SIXTH AMENDMENT: *Hemphill v. New York*, No. 20-637.

In *Crawford v. Washington*,[54] thanks to Jeff Fisher, the Supreme Court held that the Sixth Amendment right to confront one's accusers forbids the use of out-of-court statements against criminal defendants when they do not have the opportunity to cross-examine the person who made the statement. *Crawford* overruled the Court's prior precedent that had allowed such testimony if the statement had "adequate indicia of reliability."[55] New York doesn't care for this. It maintains a rule allowing the use of out-of-court statements against criminal defendants, even without the opportunity to cross-examine the person making the statement, when "reasonably necessary to correct [a] misleading impression" created by the defense's "evidence or argument."

In Darrell Hemphill's case, the court allowed the prosecution to offer parts of a plea allocution made by Nicholas Morris, who was out of the country at the time of Mr. Hemphill's trial. Morris had been charged years earlier for the same crime as Mr. Hemphill: the shooting death of a toddler by a stray 9mm bullet. After the shooting, police found both 9mm and .357-caliber ammunition in Morris's apartment. After Morris's trial for murder began, the prosecution offered to drop the murder charge in exchange for pleading guilty to possession of a .357 caliber gun with time served. The state apparently agreed with Morris's lawyer that there wasn't enough evidence for an indictment on the possession charge, but Morris had been sitting in jail for two years by that point,[56] and so over the advice of counsel, he agreed to the offer and pled out in order to get released. (Note that Morris did not admit to possession of a 9mm handgun.)

In 2013, 7 years after the shooting, Mr. Hemphill was indicted for the child's death. At trial, Hemphill's defense lawyer argued that Morris was in fact the shooter, and they brought up the fact that 9mm ammunition (along with .357-caliber ammunition) had been found at Morris's apartment shortly after the shooting. The court decided that Hemphill had created a misleading impression, and so it allowed Morris's earlier plea allocution (re: possession of a .357 caliber gun but not a 9mm) in as evidence to refute the argument that Morris was the shooter. Hemphill was subsequently convicted and given 25 years-to-life. The Supreme Court reversed, 8-1, holding that Hemphill had not forfeited his confrontation right simply by making Morris's plea allocution relevant to his theory of defense.

This case incidentally demonstrates the wisdom of *Crawford* in removing from judges the task of testing the reliability of out-of-court testimony. The pre-*Crawford* rule vested judges with authority to decide the credibility, and therefore admissibility, of un-crossed, out-of-court statements, but judges cannot acknowledge that plea allocutions like Morris'—likely offered only to secure his release from

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[54] 541 U.S. 36 (2004).
[55] *Id.* at 6.
[56] *People v. Hemphill*, 173 A.D.3d 471, 472 (N.Y. App. Div. 2019).

jail—are totally unreliable (because doing so would raise difficult questions like: *should we be accepting these essentially coerced pleas in 95-95% of criminal cases in the first place?*). Here, *Crawford* prevented this particular plea from infecting yet another criminal proceeding without its reliability being tested by cross-examination. Thanks, Jeff.

HABEAS / AEDPA / INEFFECTIVE ASSISTANCE OF COUNSEL / DANTE'S 8TH CIRCLE OF HELL: ***Shinn v. Ramirez*, No. 20-1009.**

Under the Court's habeas precedents, a state prisoner seeking habeas relief in federal court is generally barred from raising claims that they did not present in state court, even if the failure to raise it stems from their attorney's negligence. To overcome this, a prisoner has to show: (1) cause to waive the default of the claim and (2) actual prejudice caused by the constitutional violation their claim seeks to vindicate. As recently as 2012, in a 7-2 decision, the Court held in *Martinez v. Ryan*[57] that ineffective assistance of counsel is "cause" to forgive procedural default of an ineffective assistance of counsel claim, but only if the state required the claim to be raised for the first time in postconviction proceedings.[58] The *Martinez* decision had been a small open door that provided state prisoners an opportunity to establish that their post-conviction counsel's ineffectual assistance could provide cause and prejudice, which would allow their defaulted claims to be heard. That door is, as a practical matter, closed now.

David Ramirez is on death row in Arizona, and he sought habeas relief on a claim that his trial counsel was ineffective for failing to appropriately find and present mitigating evidence in the sentencing proceedings (to possibly avoid a sentence of death). Unfortunately, his postconviction counsel was also ineffective, failing to raise in state postconviction proceedings the claim that Ramirez's trial counsel was ineffective until after it was procedurally barred under Arizona law. Arizona is one of the states that only allows ineffective assistance claims to be brought in collateral proceedings, and so Ramirez could have cause under *Martinez* for the federal habeas court to waive the procedural default of his claim regarding his trial counsel's ineffective assistance. But wait, folks, there's another hurdle.

AEDPA says that, if a defendant "failed to develop the factual basis of a claim in State court," the federal habeas court cannot hold an evidentiary hearing on the issue (to develop those facts) unless the claim relies on a new, retroactively applicable rule of constitutional law from the Supreme Court or "a factual predicate that could not have been previously discovered through the exercise of due diligence",

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[57] 566 U. S. 1.

[58] The logic being that although an attorney's actions are normally imputed to the defendant in postconviction proceedings (and one's own mistakes cannot give rise to a claim for the equitable relief sought by a habeas petition), if the state requires the claim to be made for the first time in postconviction proceedings, then that's more akin to a direct appeal on that particular issue, and so the Court declined, as a matter of equity, to impute counsel's error to a defendant.

and "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty[.]" Because Ramirez's ineffective postconviction counsel didn't raise the ineffective assistance at trial claim, he or she obviously didn't develop the factual record to support it. Without that record, which AEDPA seems to forbid Ramirez from developing in federal habeas court, Ramirez can't actually make the showings necessary to sustain his claim, which in turn renders *Martinez* pointless. Thus, the question presented was: does *Martinez* allow federal habeas courts to forgo AEDPA's limits on evidentiary hearings when the "state postconviction counsel negligently failed to develop the state-court record" necessary to support a potentially valid habeas claim?

The Court held 6-3 (along ideological lines[59]) that the answer is no. Even if the logic of *Martinez* may suggest that postconviction counsel's error in failing to develop facts to support a claim shouldn't be imputed to the defendant in the context where *Martinez* applies, they hold that AEDPA forecloses such a holding. The dissent succinctly lays out the disturbing upshot of the majority's "perverse" and "illogical" opinion: "The Court's decision will leave many people who were convicted in violation of the Sixth Amendment to face incarceration or even execution without any meaningful chance to vindicate their right to counsel." Mr. Ramirez will likely now be executed in a prosecution in which the legal adequacy of his trial counsel has been untested—counsel whose negligence may be responsible for Mr. Ramirez's death sentence in the first place. Perhaps even more troubling for many people, Ramirez's case is consolidated with the case of Barry Lee Jones, a death row defendant who maintains his actual innocence[60] and had his conviction tossed after the trial court (affirmed by the Ninth Circuit) allowed him to develop the record necessary to show cause and prejudice to waive the default of his ineffective assistance claim. With the Supreme Court's ruling here, he returns to death row. There seems to be a theme arising out of the Court's new majority: *the accused may have constitutional rights, but good luck getting a remedy if they've been violated in state courts*.

[59] Note that in the *Martinez* decision, Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan. Only Justice Scalia, joined by Thomas, dissented. A mere ten years later, Justice Thomas is able to essentially eviscerate the *Martinez* decision by flipping CJ Roberts and Justice Alito and adding the three new justices to his viewpoint.

[60] An amicus brief from the Innocence Network explains how Jones may in fact be innocent:

> "Authorities rushed to judgment, disregarding elementary investigatory standards and presenting deeply flawed and 'scientifically unreliable' forensic evidence about the timeline of injury . . . . These deficiencies intersected with trial counsel's failure to investigate obvious leads or to challenge that forensic evidence through cross-examination and independent expert analyses . . . . Only supplementation of the record following post-trial investigation revealed these defects."

FISA / Fourth Amendment / State Secrets: *FBI v. Fazaga*, No. 20-828.

The Foreign Intelligence Surveillance Act (FISA) sets forth procedural requirements for the government to meet in order to conduct certain kinds of searches and surveillance in the United States. Instead of a typical criminal warrant process, the government generally applies to the Foreign Intelligence Surveillance Court (FISC) to obtain an order that authorizes the surveillance and approves rules on the collection, retention, and dissemination of the evidence gathered under it. The proceedings, the resulting order, and even the Government's underlying application to engage in the surveillance are all classified, which creates difficulty when someone eventually becomes apprised of their FISA surveillance and seeks to challenge the legality of it and needs to review those materials to effectively raise a challenge. (Usually this happens in the context of a criminal prosecution, where the government is obligated to inform the defendant that they're being prosecuted with evidence obtained under FISA and the defendant ostensibly would then the right to test the legality of the government's evidence-gathering.) To address this conflict that classified evidence-gathering creates, FISA includes a provision that allows judges to decide *ex parte* and *in camera* the legality of the government's FISA surveillance. As part of this process, the court *may* grant access to classified FISA materials for the party moving to obtain or suppress FISA-derived evidence, but "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance."

Yassir Fazaga is a plaintiff in a class action who sought to challenge the FBI's unlawful surveillance of Muslim Americans under FISA. The government moved to dismiss on the grounds that their claims would require disclosure of national security information that is protected by the state secrets privilege, which prevents courts from ordering disclosure of certain categories of information in order to ~~let the government get away with wanton rights violations~~ protect national security. The question that reached the Supreme Court was whether FISA's provision governing access to FISA materials in court "displace[s]" the state secrets privilege in this context. A unanimous Court says no: the text of FISA says nothing about the state secrets privilege, and the structure and function of the state secrets privilege and the applicable FISA provision do not countenance a finding that Congress displaced the state secrets privilege in the FISA context.

This is an unfortunate outcome.[61] As noted in the amicus brief that we joined with our friends at the Brennan Center for Justice, Electronic Privacy Information Center, FreedomWorks Foundation, and TechFreedom, other avenues of judicial oversight of FISA have failed to protect Americans' rights (*Feel free to ask us how Congress can fix this and how frequently we encourage them to do so!*) and

[61] Even without an assist from the state secrets privilege, it's not clear to me the plaintiffs would've gotten very far because the FISA provision that the Court interpreted in this case has actually never enabled anyone, including a single criminal defendant anywhere, to obtain access to their FISA materials.

the outcome here "narrow[s] the scope of judicial review under FISA even further." In sum, the Supreme Court's decision in this case is in keeping with the broader trend of inadequate interbranch oversight of the government's FISA surveillance, which has already led to egregious rights violations and internal sloppiness that we surmise cannot be good for national security.

SECTION 1983 / (SOME) PROSECUTORIAL ACCOUNTABILITY: *Thompson v. Clark*, No. 20-659.

The facts here aren't interesting, tragic, or even particularly relevant. We just wanted to let you know that the Supreme Court has decided that a Fourth Amendment claim under § 1983 for malicious prosecution does not require a plaintiff to show that their criminal prosecution "ended with some affirmative indication of innocence," but merely that the prosecution ended without a conviction. (In Thompson's case, the charges against him were dismissed before trial without explanation.) So there's some good news someone can probably use.

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That's it for this edition of *Due Process Institute's Brief Guide to SCOTUS's . . . Criminal Law Stuff*. If you find our work useful to you or are interested in learning more about our work, you can access our amicus briefs, read about our legislative and policy work, and check out our blog at www.idueprocess.org. You should also check out our sister organization's blog at https://clause40.org/blog. Also, feel free to reach out if you're interested in writing an amicus brief for us on these fascinating and profound issues of national importance. Seriously. Call (202-558-6683) or email (shana@idueprocess.org).