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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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Why is this year's Brief Guide focusing only on cert. petitions? Because you can read up about decided or upcoming SCOTUS cases practically anywhere else and we think this is important stuff too! So here you are—our list of "best" pending cert. petitions (look, they're all interesting—*to me at least*—but we've gathered up some we thought you just *had* to know about for whatever reason), followed by the most disappointing denial of cert. (so far this term)!

"Best" Pending Certiorari Petitions Impacting Criminal Law

Qualified Immunity / Open Wounds Exposed to Feces / Eighth Amendment: *Hamlet v. Hoxie*, No. 23-7, which urges our Highest Court to take the case in order to determine whether it is "clearly established" for purposes of a qualified immunity analysis that the Eighth Amendment bars a prison official from forcing an elderly person with diabetes and open wounds to endure prolonged unnecessary exposure to human feces, which unsurprisingly, led to a life-threatening infection. According to the petition, Officer Hoxie trapped Mr. Hamlet "in a backed-up shower filled with another person's feces, removed from his cell any method by which he could clean the excrement from his wounds, and barred him from showering for a week while human waste festered in his sores." Cruel and unusual punishment? Stay tuned!

SOLITARY CONFINEMENT / MORE EIGHTH AMENDMENT: *Johnson v. Prentice*, No. 22-693, which asks the Court to take up whether depriving someone in solitary confinement of three years' worth of exercise—despite the fact that there was no security justification for it—violates the Eighth Amendment or whether such a deprivation only violates the Constitution if it was imposed in response to an "utterly trivial infraction." Some of us might be guilty of having not exercised much in the last three years, but at least we *could* have.

***BRADY* / PROSECUTORIAL MISCONDUCT / LYING SNITCHES / EXECUTING INNOCENT PEOPLE:** *Glossip v. Oklahoma*, No. 22-7466, which involves the state's suppression of super freaking important information relating to the credibility of THE key prosecution witness, whose credibility was already nonexistent to anyone paying attention. The Court is being asked to weigh in on whether this matters and, if so, how much it matters, or slightly more specifically, whether the state violated due process under *Brady v. Maryland* and *Napue v. Illinois* and, if so, whether it means this capital conviction must be reversed. As the Innocent Project's amicus brief points out: "Prosecutorial misconduct of the sort the State has acknowledged in this case is a distressingly common factor in wrongful convictions. Careful, systematic reviews of post-conviction exonerations reveal that they are overwhelmingly the product of official misconduct. Violations of the *Brady* right in particular have frequently led to the conviction of innocent people. And the misconduct at issue here is particularly significant because it relates to the credibility of highly dubious informant testimony—itself a frequent contributor to wrongful convictions." Yep. We'll see if the Court thinks any of that merits a discussion. Anyone want to bet against my view that they don't bother?

SEARCHES / FOURTH AMENDMENT / NO DUH: *Jackson v. Ohio*, No. 22-978, in which the Court is asked to accept a case in order to determine whether, when one cop opens the door of a car while another cop looks through that open door looking for contraband, it constitutes a "search" of the car. Seriously? How is this even a question?

PUBLIC CORRUPTION / OVERBREADTH: *Snyder v. U.S.*, No. 23-108, in which the Court is being asked to, once again, get involved in solving the mess that infects multiple appellate circuits as they improvise interpret our nation's federal public corruption statutes. This time, the question is whether 18 U.S.C. § 666 is limited to criminalizing quid pro quo bribes or, as some courts have invented decided, whether it also criminalizes payments in recognition of official actions already taken or committed to. The difference between these two approaches means a shocking difference in the number of prosecutions that could be brought.

AND FINALLY, THE FIRST STEP ACT CASES: In *Files v. U.S.*, No. 22-1239, the Court is being asked to answer the question of whether Section 404 of the First Step Act authorizes district courts to impose reduced sentences for both crack-cocaine offenses and related offenses that are part of the same overall sentence package. And in *Ferguson v. U.S.*, No. 22-1216, the Court is being asked whether 28 U.S.C. § 2255 limits a district court's discretion to consider legal errors in prior proceedings as "extraordinary and compelling reasons" warranting a sentence reduction under the First Step Act's revision to 18 U.S.C. § 3582(c)(1)(A).

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Our Designation for MOST DISAPPOINTING DENIAL OF CERTIORARI (So Far)

Our choice for Most Disappointing Denial of Certiorari goes to an acquitted conduct sentencing case, *McClinton v. U.S.*, No. 21-1557 (cert. denied June 30, 2023), 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 have 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*,[1] 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.[2] 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*.

As we have done in many similar cases, we filed an amicus brief arguing that acquitted conduct sentencing is a Sixth Amendment violation. Despite the great vehicle this case presented, and excellent lawyering from the defense, the Court once again refused to take up the matter, breaking our heart for the umpteenth time. Justices Sotomayor, Kavanaugh, Gorsuch, and Barrett did, however, take the time to weigh in regarding various objections to the practice, (you can read their statements here), but they all essentially agreed with the denial of cert. and punted the issue to the U.S. Sentencing Commission, who is currently considering possible revisions to the Guidelines to address the issue. One day, this *will* end. We won't rest until it does—whether it's convincing the Nine do the right thing, getting Congress to pass the bipartisan legislation we drafted, or convincing the Sentencing Commission to end the practice.

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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. While you're at it, you should also check out our sister organization's criminal law blog at https://clause40.org/blog. Also, feel free to reach out if you're interested in writing an amicus brief for either organization on fascinating and profound issues of national importance. Seriously. Call (202-558-6683) or email (shana@idueprocess.org or shana@clause40.org).

[1] 519 U.S. 148.
[2] You can read all about the pathetic *Watts* decision and its even more pathetic progeny at our blog here.