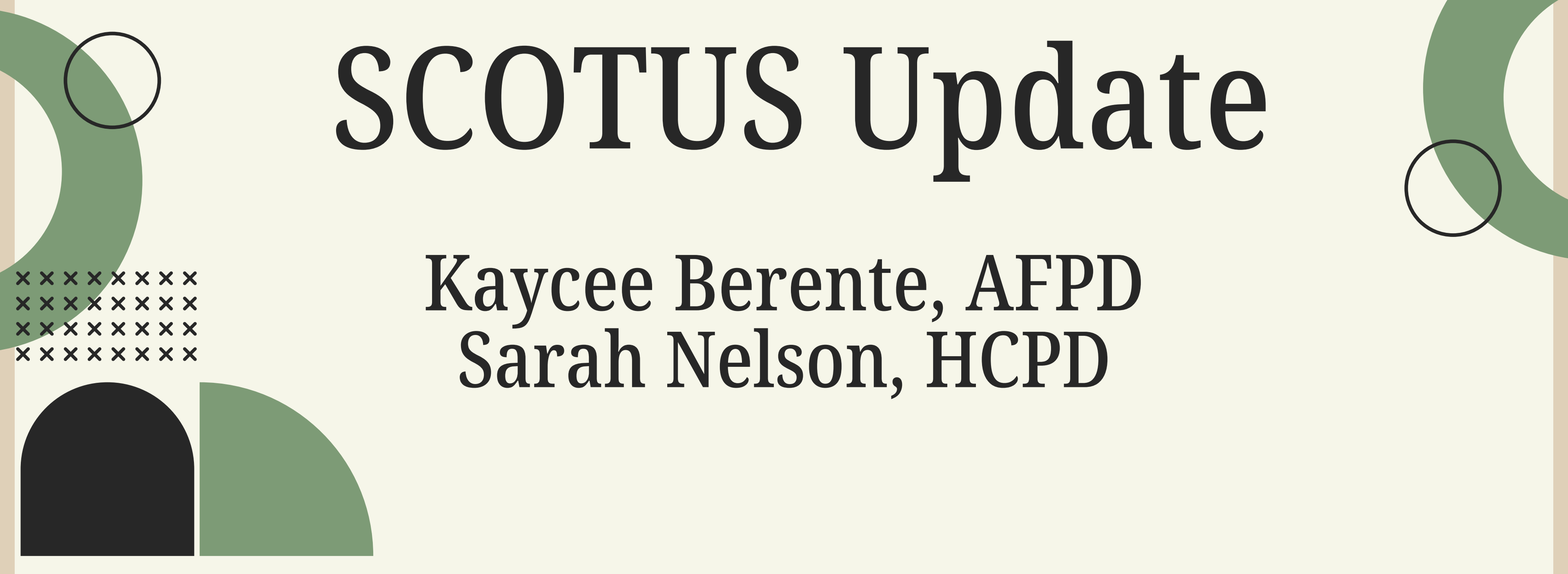


SCOTUS Update

Kaycee Berente, AFPD
Sarah Nelson, HCPD



2024-2025 TERM

Rivers v. Guerrero, 605 U.S. 443 (2025) Second or successive federal habeas petitions

Andrew v. White, 604 U.S. 86 (2025) Post-conviction review & the due process clause

Glossip v. Oklahoma, 604 U.S. 226 (2025) Prosecutor’s obligation to correct false testimony

Bondi v. VanDerStock, 604 U.S. 458 (2025) Expanding definition of firearms to weapon parts kits & unfinished frames/ receivers

Thompson v. U.S., 604 U.S. 408 (2025) 18 USC §1014, misleading vs. false statements

Delligatti v. U.S., 604 U.S. 423 (2025) Expanding “crimes of violence” to include omissions

Kousisis v. U.S., 605 U.S. __ (2025) 18 USC §1343 wire fraud and fraudulent inducement

Esteras v. U.S., 606 U.S. __ (2025) District Courts cannot consider 18 U.S.C. § 3553(a)(2)(A) during revocation hearings

Hewitt v. U.S., 606 U.S. __ (2025) Application of the First Step Act to vacated sentences



2025-2026 TERM

Villarreal v. Texas (OA Oct. 6): Sixth Amendment right to assistance of counsel

Barrett v. United States (OA Oct. 7): Fifth Amendment's double jeopardy clause

Ellingburg v. United States (OA Oct. 14): Restitution under MVRA and ex post facto clause

Case v. Montana (OA Oct. 15): Warrantless home entry and "emergency aid" exception

Rico v. United States (OA Nov. 3): "Fugitive tolling" doctrine & revocation of supervised release

Hamm v. Smith (OA Dec. 10): Eighth Amendment and Capital Punishment

Fernandez v. United States (OA Nov. 12): The First Step Act & judicial discretion

Rutherford v. United States (OA Nov. 12) (consolidated with *Carter v. United States*): The First Step Act & judicial discretion

Bowe v. United States (OA Oct. 14): 28 U.S.C. §§ 2244, 2254, 2255, Jurisdiction, Successive Applications

Wolford v. Lopez (OA TBD): 2nd Amendment and public carry

United States v. Hemani (OA TBD): 2nd Amendment and "drug users"

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RIVERS V. GUERRERO, 605 U.S. 443 (2025)

Second or successive federal habeas petitions

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Rivers filed for federal habeas relief in August 2017 under 28 USC § 2254, alleging prosecutorial misconduct, IAC, and due process and equal protection violations.

The District Court denied the petition in September 2018. The Fifth Circuit granted River's request for a certificate of appealability as to the IAC claim.

While the appeal was pending, Rivers obtained access to his trial file and found an investigator's report that discussed two documents Rivers believed were exculpatory.

Rivers' request to supplement the record on appeal was denied. He asked to stay the appeal or remand the case to present this new evidence to the district court. Those requests were also denied.

The Fifth Circuit affirmed the § 2254 denial on the merits. Certiorari was denied.

Rivers filed another § 2254 petition in the District Court, which included the investigator's report and claims related to the discovery of that evidence.

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RIVERS V. GUERRERO, 605 U.S. 443 (2025)

Second or successive federal habeas petitions

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Question Presented: Did Rivers file a proper § 2254 petition based on the investigative report while the first petition was pending on appeal, or should his filing be classified as a “second or successive” habeas application under § 2244(b).

Circuit Split: When does a habeas application become a second-in-time filing

- **Majority:** when the district court journalizes the entry related to the first application, regardless of any subsequent appeal. (7th, 8th, 9th, 10th).
- **Minority:** If an appeal is pending as to the initial petition when a second petition is filed, the second petition does not fall within AEDPA’s “second or successive” petitions rules (“gatekeeping provision”).

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RIVERS V. GUERRERO, 605 U.S. 443 (2025)

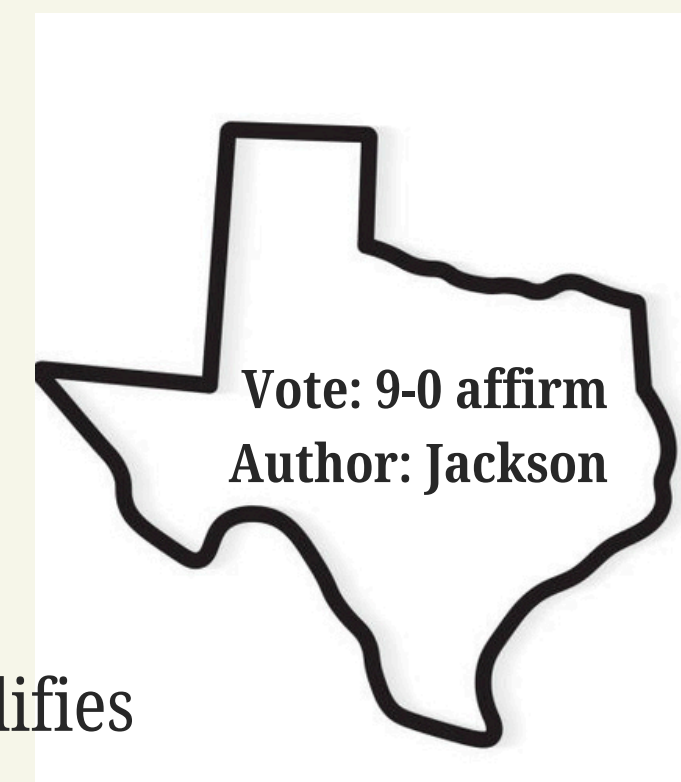
Second or successive federal habeas petitions

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Held: Once a district court enters its judgment with respect to a first-filed habeas petition, a second-in-time filing qualifies as a “second or successive application” and is subject to § 2244(b) requirements.

Reasoning:

- Plain language: “second or successive,” “claim,” “application”
- Prior Precedent: “Our case law establishes . . . that whether a filing qualifies as a second or successive application generally turns on the existence of a final judgment with respect to the first petition, not the status of an appeal.”
- Available alternative for future litigants: Civ.R. 59(e)
- Purpose of AEDPA: conserve judicial resources, reduce piecemeal litigation, and ensure finality



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ANDREW V. WHITE, 604 U.S. 86 (2025)

post-conviction review & due process

- Andrew appeals her conviction and death sentence arguing that the prosecution's introduction of irrelevant evidence deprived her of a fair trial
 - Relies on the Court's statement in *Payne v. Tennessee* (1991) that when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."
- The State concedes most of the challenged evidence was not relevant to any issue in Andrew's case
- The Oklahoma Court of Criminal Appeals denies relief on harmless error grounds
- The 10th Circuit Court of Appeals rejects Andrew's claim, finding no holding of the Supreme Court has established a general rule that the erroneous admission of prejudicial evidence could violate due process

The prosecution "portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals... plucking away any realistic chance that the jury would seriously consider her version of events."

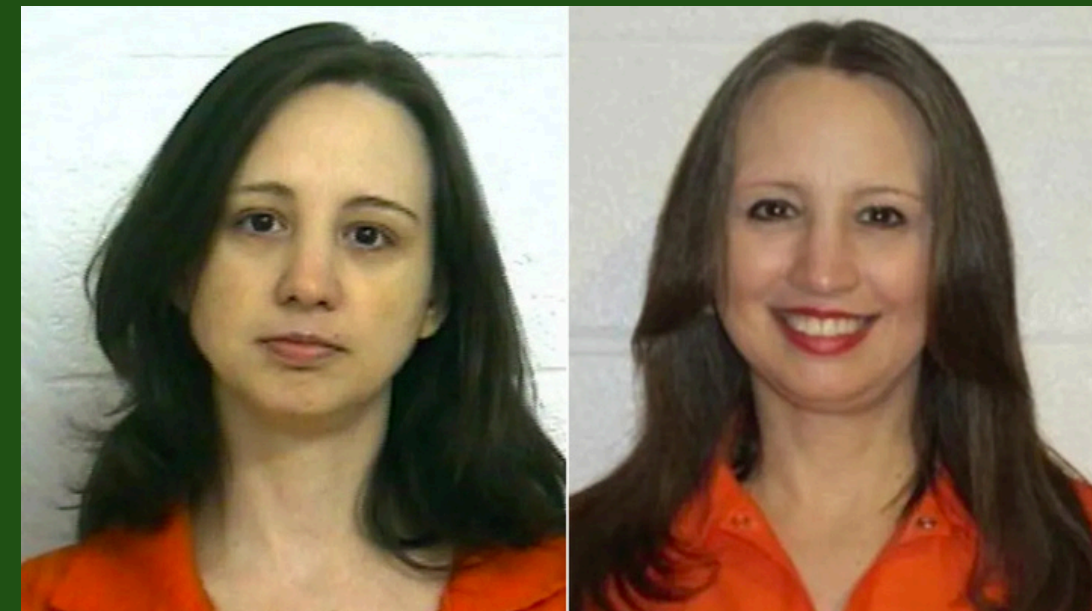
Judge Robert Bacharach, dissenting from the 10th Circuit's denial of relief

ANDREW V. WHITE, 604 U.S. 86 (2025)

post-conviction review & due process

Question presented: “Whether clearly established federal law as determined by this Court forbids the prosecution’s use of a woman’s plainly irrelevant sexual history, gender presentation, and role as a mother and wife to assess guilt and punishment?”

Ms. Andrew has been on death row since 2004, she is currently the only woman in Oklahoma on death row



ANDREW V. WHITE, 604 U.S. 86 (2025)

post-conviction review & due process

Holding: “By the time of Andrew’s trial, this Court had made clear that when ‘evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.’ ” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

Why this matters: *Andrew v. White* establishes that there is a due process limit on the introduction of unfairly prejudicial evidence and suggests that the right can be invoked in situations involving the admission of irrelevant, unfairly prejudicial evidence – creating a constitutional backstop to Federal Rule of Evidence 403!



7-2 Per Curiam Opinion
Justice Alito filed a concurrence
Justice Thomas filed a dissenting opinion, joined by Justice Gorsuch

GLOSSIP V. OKLAHOMA, 604 U.S. 226 (2025)

Prosecutor's obligation to correct false testimony under Napue.

Richard Glossip was accused and convicted of paying Justin Sneed to murder Barry Van Treese and was sentenced to death. Glossip was sentenced to death.

Conviction was reversed on direct appeal. Glossip was convicted following a second jury trial and was again sentenced to death; the conviction was affirmed on appeal.

Glossip was unsuccessful in pursuing state and federal habeas relief.

His post-conviction petitions were noticed by the Oklahoma Legislature, which retained a private firm to conduct an independent investigation.

The firm reported having “grave doubts as to the integrity” of Glossip’s conviction. Following the report, **seven boxes of previously withheld material were turned over.**

A post-conviction motion was filed and denied.

Thereafter, **the State produced an eighth box.** The contents of Box 8 revealed the prosecutor’s knowledge of Sneed’s false testimony which was the basis of the Napue violation.

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GLOSSIP V. OKLAHOMA, 604 U.S. 226 (2025)

Prosecutor's obligation to correct false testimony under Napue.

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Questions Presented:

- (1) Whether the Court has jurisdiction to review Oklahoma's judgment: was the OCCA decision based on independent and adequate state grounds precluding review
- (2) Whether the prosecutor violated its constitutional obligation to correct false testimony.

**Remedy on remand

Prior Precedent: Napue v. Illinois, 360 U.S. 264 (1959)

- Napue held that a conviction knowingly "obtained through use of false evidence" violates the Fourteenth Amendment's Due Process Clause."
- A defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it "to go uncorrected when it appeared."
- A new trial is warranted if the defendant makes that showing, and the testimony "may have had an effect on the outcome of the trial."

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GLOSSIP V. OKLAHOMA, 604 U.S. 226 (2025)

Prosecutor's obligation to correct false testimony under Napue.

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Jurisdiction:

- The OCCA decided that there was no Napue error. This decision was based on the application of federal law, as the OCCA found the attorney general's confession was "**not based in law or fact.**" The attorney general also expressly declined to pursue any procedural default claims under Oklahoma's post-conviction statute.

Napue:

- The factual record clearly demonstrated that the prosecution knew Sneed gave false testimony
- Sneed's testimony was the only direct evidence of Glossip's guilt; his credibility was critical
- Glossip was prejudiced due to the cumulative effect of multiple errors, reinforcing the conclusion that the Napue error was prejudicial and warranted a new trial.

Remedy? New Trial

Vote: 5-3
Author: Sotomayor

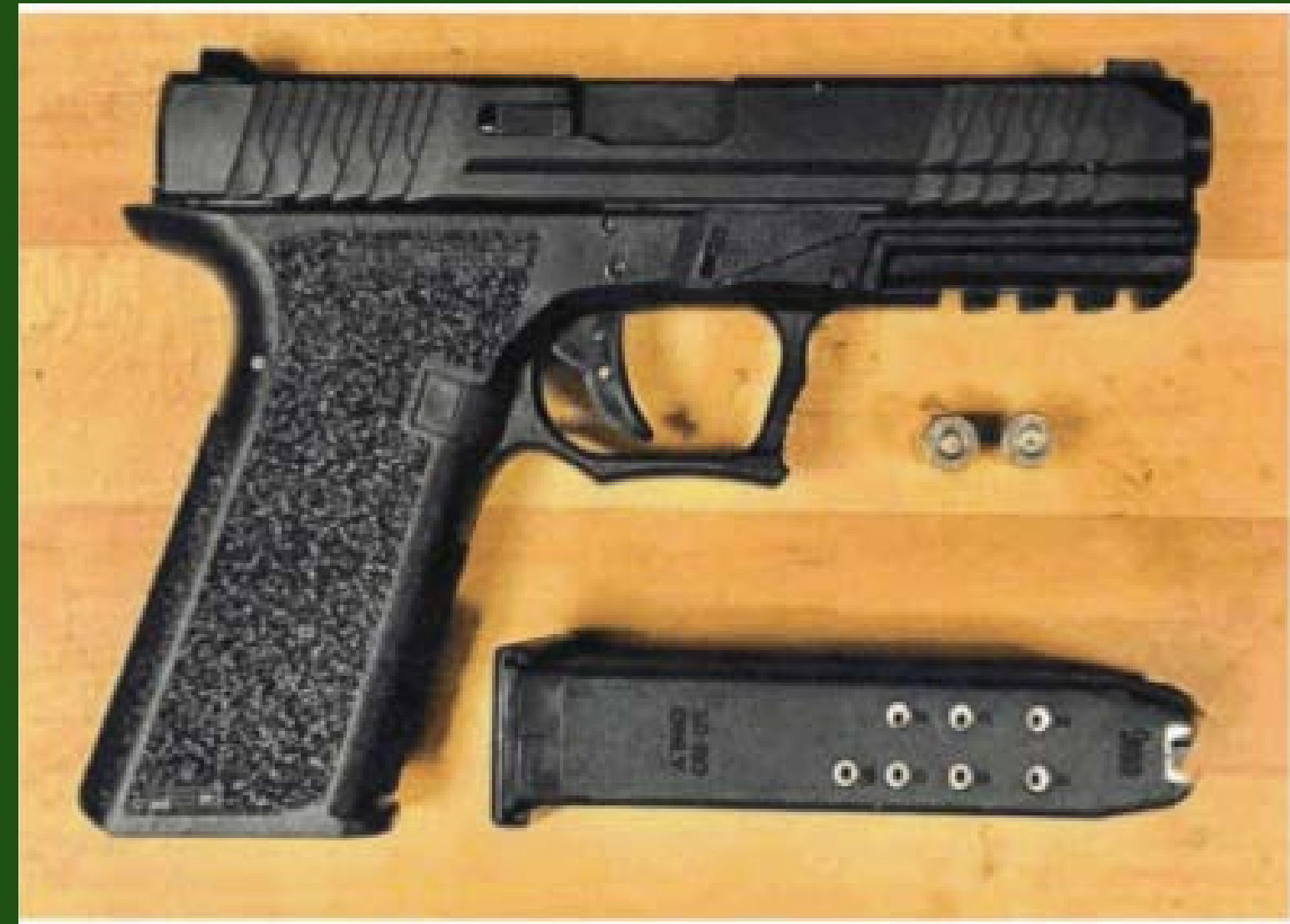


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BONDI V. VANDERSTOCK, 604 U.S. 458 (2025)

expanding definition of firearms to weapon parts

A ghost gun is a do-it-yourself, homemade gun made from easy-to-get building blocks.
Pictured below is Polymer80's "Buy Build Shoot" kit and the gun the kit yeilds:



BONDI V. VANDERSTOCK, 604 U.S. 458 (2025)

expanding definition of firearms to weapon parts

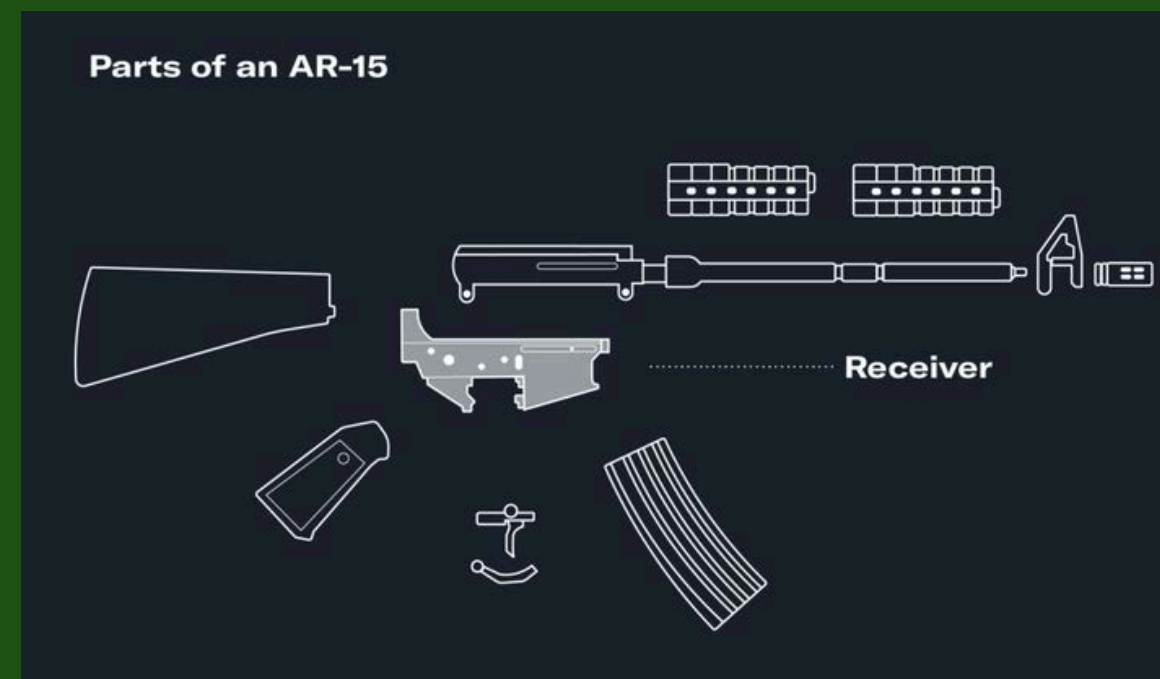
Rules Challenged:

27 C.F.R. § 478.11 Meaning of Terms.

Firearm. Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm. In the case of a licensed collector, the term shall mean only curios and relics. ***The term shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive.*** The term shall not include a weapon, including a weapon parts kit, in which the frame or receiver of such weapon is destroyed as described in the definition “frame or receiver.”

27 C.F.R. § 478.12 Definition of Frame or Receiver.

(c) Partially complete, disassembled, or nonfunctional frame or receiver. ***The terms “frame” and “receiver” shall include a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver...***



BONDI V. VANDERSTOCK, 604 U.S. 458 (2025)

expanding definition of firearms to weapon parts

Question presented: Whether weapon parts kits that are designed to or may be readily completed, assembled, restored or otherwise converted to expel a projectile by the action of an explosive are “firearms” within the scope of the Gun Control Act of 1968?

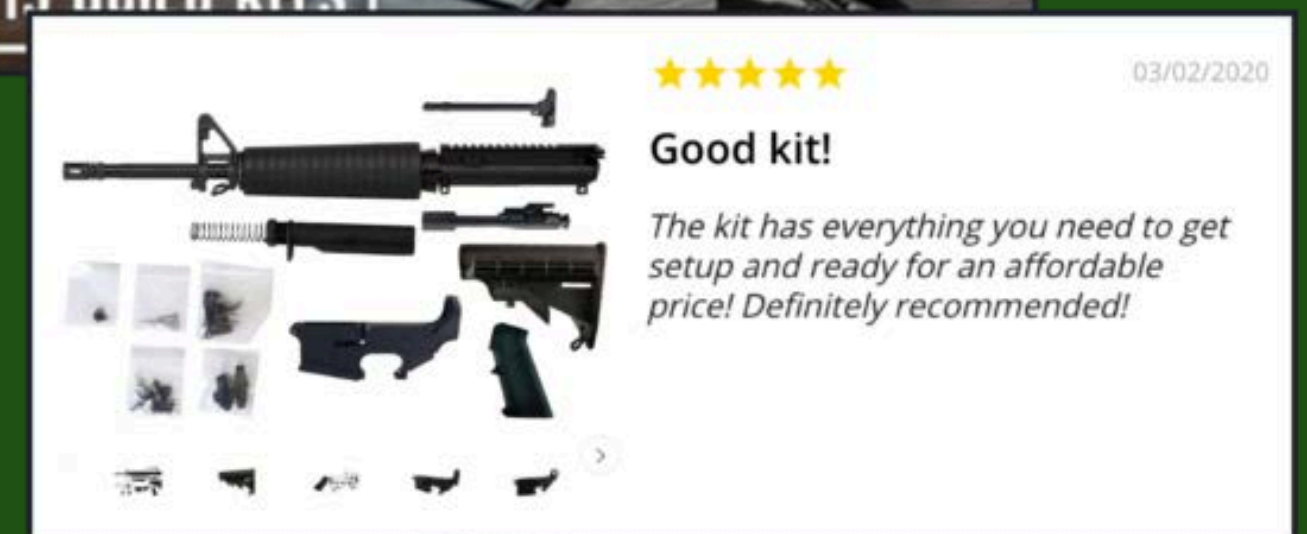
Holding: Yes, some weapon parts kits and unfinished frames or receivers are “firearms.” ATF’s rule is not facially inconsistent with the Gun Control Act.

Why this matters? Since this was a facial challenge, there is room to argue that some parts require too much “time, expertise, or specialized tools to finish” and therefore such parts cannot fairly be described as a “firearm”

18 U.S.C. § 921:

(a) As used in this chapter--

(3) The term “firearm” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.



THOMPSON V. U.S., 604 U.S. 408 (2025)

18 USC §1014: misleading vs. false statements

Patrick Thompson borrowed a total of \$219,000 in three separate loans from the same bank. The first loan was for **\$110,000** and was taken to make an equity contribution to a law firm.

The bank defaulted. The FDIC took over the outstanding loans and sent an invoice to Thompson for \$269,120.68, the total loan with interest.

Thompson promptly called the loan service company in response to the invoice and advised he had no idea where that figure came from; he acknowledged borrowing, but **Thompson believed he borrowed \$110,000 and disputed the invoice.** This call was recorded.

The loan service company called back the next month. Thompson maintained he borrowed **\$110,000 for “home improvement.”** This call was not recorded, but the loan service contractors took notes.

The debt was later settled for the principal amount: \$219,000.

Thompson was charged with two counts of violating **18 USC §1014 for knowingly making false statements** for the purpose of influencing the FDIC in regards to a loan.

THOMPSON V. U.S., 604 U.S. 408 (2025)

18 USC §1014: misleading vs. false statements

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Question Presented: Whether 18 USC §1014 criminalizes statements that are misleading but not false.

Circuit Split:

- **Seventh Circuit:** §1014 criminalizes misleading representations.
- **Sixth Circuit:** “A §1014 conviction cannot rest on material omissions or implied misrepresentations.” U.S. v. Kurlleman, 736 F.3d 439 (6th Cir. 2013)



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THOMPSON V. U.S., 604 U.S. 408 (2025)

18 USC §1014: misleading vs. false statements

Held: Section 1014 does not criminalize statements that are misleading but true. It is not enough that a statement is misleading. **It must be false. “A statement that is true but misleading does not fit the bill.”**

Vote: 9-0
Author: Roberts

Reasoning:

- Plain Language: Statute says **false**. “A misleading statement can be true. . . . And a true statement is obviously not false. . . . So basic logic dictates that at least some misleading statements are not false.” **False** means anything that is **not true**.
- Statutory Context: other statutes in Title 18 use “false or misleading.”
- Prior Precedent:
 - U.S. v. Wells, 519 U.S. 482, §1014 does not incorporate a materiality requirement
 - Williams v. U.S., 458 U.S. 279, “false statement” under §1014 requires (1) a statement and (2) the statement can be characterized as “false” and not “true”



DELLIGATTI V. U.S., 604 U.S. 423 (2025)

expanding “crimes of violence”

18 U.S.C. § 924(c)--

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another

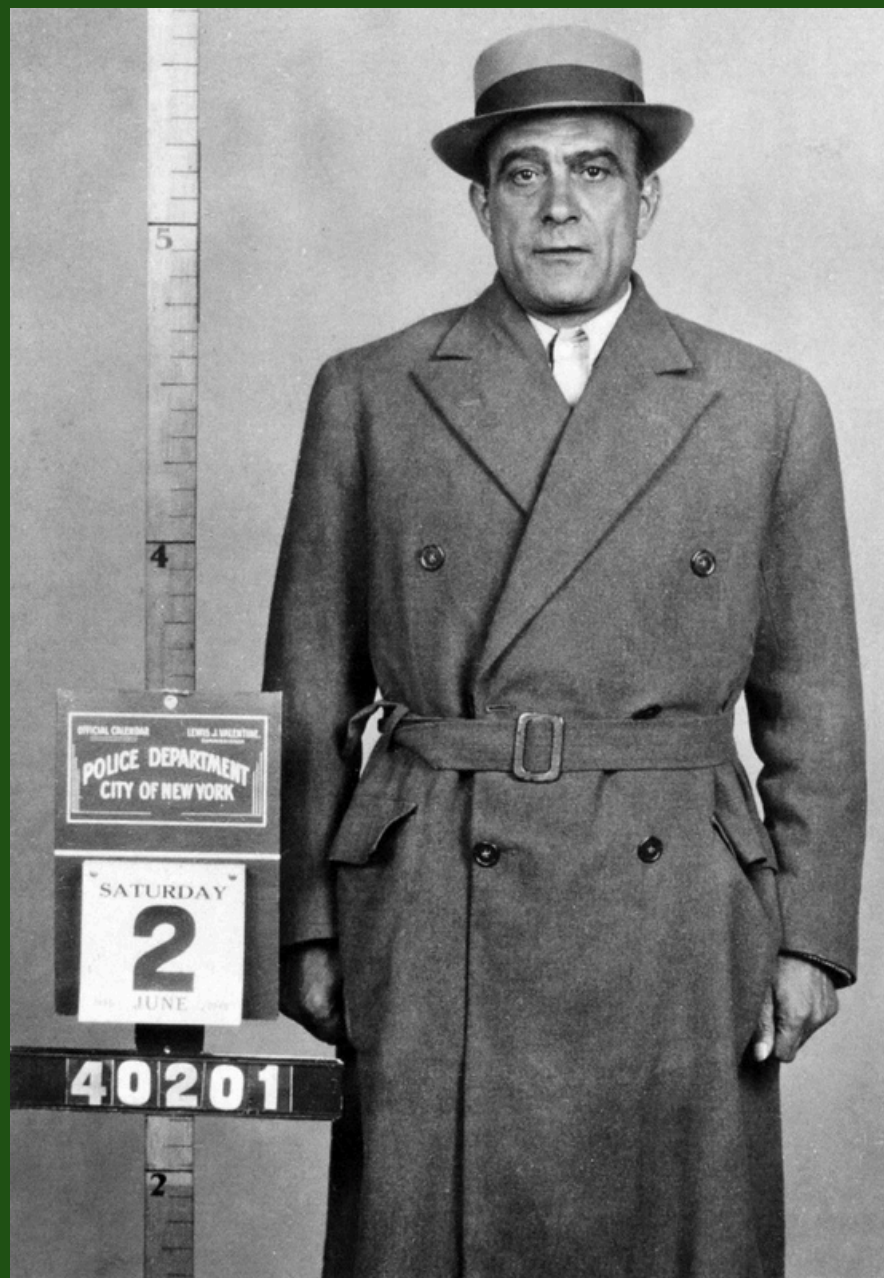
- Salvatore “Fat Sal” Delligatti coordinates attempted murder of Joseph Bonelli
- Attempt is unsuccessful, Fat Sal does not move up in the family but is instead sentenced to 25 years imprisonment
- Fat Sal appeals, pointing out that 2nd degree murder in New York may be committed by omission & an omission cannot serve as a “crime of violence”



DELLIGATTI V. U.S., 604 U.S. 423 (2025)

expanding “crimes of violence”

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Question Presented: Whether an individual who knowingly or intentionally causes bodily injury or death by failing to take action uses physical force within the meaning of the elements clause?

Holding: Yes. The knowing or intentional causation of injury or death, whether by act or omission, necessarily involves the “use” of “physical force” against another person within the meaning of 18 U.S.C. §924(c)(3)(A).

DELLIGATTI V. U.S., 604 U.S. 423 (2025)

expanding “crimes of violence”

Why this matters? The Court has extended the reach of the “crime of violence” definition to include not only affirmative acts of violence, but also purposeful inaction intended to result in harm.

7-2 decision, authored by Justice Thomas

Joined by Justice Jackson, Justice Gorsuch dissented focusing on 18 U.S.C. § 924(c)(3)(A)’s definitional terms, context, & ordinary meaning

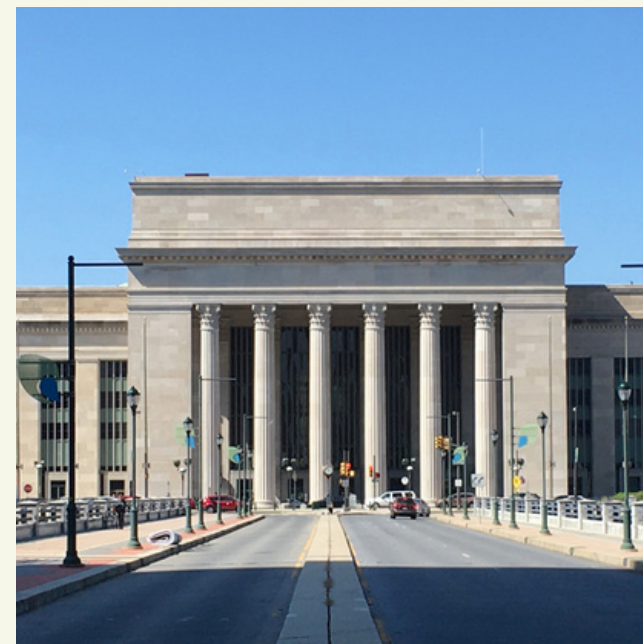


KOUSISIS V. U.S., 605 U.S. __ (2025)

18 USC §1343 wire fraud and fraudulent inducement

Kousisis and Alpha Painting and Construction Company made **material misrepresentations** with respect to contract bids for projects in Philadelphia. They were convicted of wire fraud and conspiracy under 18 U.S.C. §§1343, 1349.

In their motion for acquittal (denied) and on appeal, **defendants argued PennDot received the full economic benefit of the contract** and, despite violating the disadvantaged-business participation requirement, **there was no scheme to defraud PennDot of money or property as the statute requires.**



KOUSISIS V. U.S., 605 U.S. __ (2025)

18 USC §1343 wire fraud and fraudulent inducement

Question Presented: Whether a scheme to induce a transaction in property through deception, but which contemplates no harm to any property interest, constitutes a scheme to defraud under the federal wire fraud statute, 18 USC §1343.

Circuit split: Whether a conviction for federal fraud can stand when the defendant did not seek to cause the victim net pecuniary loss.

- Conviction valid (3rd, 7th, 8th, 10th)
- Conviction invalid (2nd, 6th, 9th, 11th, DC)
 - U.S. v. Sadler, 750 F.3d 585 (6th Cir. 2014)

KOUSISIS V. U.S., 605 U.S. __ (2025)

18 USC §1343 wire fraud and fraudulent inducement

Held: A defendant who induces a victim to enter into a transaction under materially false pretenses may be convicted of federal fraud even if the defendant did not seek to cause the victim economic loss.

Vote: 9-0

Author: Barrett

Reasoning:

- Prior Precedent
 - McNally v. U.S., 483 U.S. 350 (1987)
 - Ciminelli v. U.S., 598 U.S. 306 (2023)
- Statutory Interpretation
 - “The wire fraud statute is agnostic about economic loss.”
- Fraud at common law
 - “Common law courts did not uniformly condition an action sounding in fraud on the plaintiff’s ability to prove economic loss.”
- Materiality requirement
 - “A conviction premised on the fraudulent-inducement theory cannot be sustained without [material misrepresentations].”
- Fraudulent-inducement theory
 - Only applies when “money or property” is the object of the fraud.



ESTERAS V. U.S., 606 U.S. __ (2025)

revocation of supervised release & impermissible factors



The First, Second, Third, and Sixth Circuits held that district courts may consider 18 U.S.C. § 3553(a)(2)(A) when revoking a term of supervised release, while the Fourth, Ninth, and Tenth Circuits held that district courts may not consider § 3553(a)(2)(A).



18 U.S.C. § 3553

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

18 U.S.C. § 3583

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

(3) revoke a term of supervised release...

ESTERAS V. U.S., 606 U.S. __ (2025)

revocation of supervised release & impermissible factors

Question presented: When revoking supervised release and imposing a prison sentence, may a district court consider the sentencing factors in 18 U.S.C. § 3553(a)(2)(A)—namely, “the seriousness of the offense,” “promot[ing] respect for the law,” and “just punishment”—even though these factors are not explicitly referenced in the supervised release statute?



Members from the Federal Public Defender Office in the Northern and Southern Districts of Ohio appeared before the Supreme Court to argue the case!

Pictured from left: Kevin Schad, Lori Riga, Jeff Lazarus, Christian Grostic, and Aleesha Kazi

ESTERAS V. U.S., 606 U.S. __ (2025)

revocation of supervised release & impermissible factors



Holding: In deciding whether to revoke a term of supervised release, a district court may not consider the need for the sentence to reflect the seriousness of the offense, promote respect for the law, or provide just punishment for the offense under § 3553(a)(2)(A)



Appellate Review: During revocation proceedings counsel should object to any reliance on § 3553(a)(2)(A), if the objection is missed, on plain-error review, 6th Circuit will look at whether it is clear or obvious that the district court actually relied on an impermissible factor either because it did so expressly or by unmistakable implication



HEWITT V. U.S., 605 U.S. __ (2025)

Application of the First Step Act's lenient penalty to vacated sentences

Defendants Tony Hewitt, Corey Duffey, Jarvis Ross were convicted of multiple counts of bank robbery and conspiracy to commit bank robbery, in addition to corresponding offenses under §924(c) for using a firearm during a crime of violence.

The initial sentences were imposed in ~2010, before the enactment of the First Step Act, and defendants received sentences exceeding 325 years.

Initial sentences were vacated after a successful appeal and reduced on remand to between 285 and 305 years. Post-conviction motions were denied.

First Step Act enacted in 2018.

In 2019, SCOTUS held that the “crime of violence” definition the Government used to support §924(c) convictions was unconstitutionally vague. U.S. v. Davis, 588 U.S. 445 (2019). This decision impacted the sentences of Hewitt, Duffey, and Ross.

Defendants applied for and were granted applications to file second or successive post-conviction motions to vacate their sentences under Davis,

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HEWITT V. U.S., 605 U.S. __ (2025)

Application of the First Step Act's lenient penalty to vacated sentences

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Question Presented: Whether §403(b) of the First Step Act confers the benefit of the Act's more lenient penalties to defendants facing post-Act resentencing when their pre-Act sentences are vacated.

Prior Decision:

- Parties **agreed** on appeal that the First Step Act applied and **jointly requested to vacate the sentences**
- **Fifth Circuit denied the request for relief** and held that the First Step Act only applied to defendants who had not received a sentence as of the Act's enactment date.
- Because the defendant had been sentenced twice before the enactment date, the Fifth Circuit found the defendant was not eligible for the First Step Act's favorable sentencing relief.

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HEWITT V. U.S., 605 U.S. __ (2025)

Application of the First Step Act's lenient penalty to vacated sentences

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Held: The Act's more lenient penalties apply when an offender's pre-Act sentence has been vacated.

Reasoning:

- Plain language
- Legal effect of a vacated sentence

Vote: 5-4
Author: Jackson

“By authorizing retroactive application of the First Step Act's more lenient penalties on any eligible offender upon whom ‘a sentence . . . has not been imposed,’ **the text of §403(b) indicates that only past sentences with continued validity preclude the application of the Act's new penalties.** A judge would thus correctly conclude at resentencing that, if an offender's past sentence has been vacated, a sentence ‘has not been imposed’ upon that offender for purposes of the First Step Act; hence, the court can impose a new sentence today.”



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2025-2026 TERM

Villarreal v. Texas (OA Oct. 6): Sixth Amendment right to assistance of counsel

Barrett v. United States (OA Oct. 7): Fifth Amendment's double jeopardy clause

Ellingburg v. United States (OA Oct. 14): Restitution under MVRA and ex post facto clause

Case v. Montana (OA Oct. 15): Warrantless home entry and "emergency aid" exception

Rico v. United States (OA Nov. 3): "Fugitive tolling" doctrine & revocation of supervised release

Hamm v. Smith (OA Dec. 10): Eighth Amendment and Capital Punishment

Fernandez v. United States (OA Nov. 12): The First Step Act & judicial discretion

Rutherford v. United States (OA Nov. 12) (consolidated with Carter v. United States): The First Step Act & judicial discretion

Bowe v. United States (OA Oct. 14): 28 U.S.C. §§ 2244, 2254, 2255, Jurisdiction, Successive Applications

Wolford v. Lopez (OA TBD): 2nd Amendment and public carry

United States v. Hemani (OA TBD): 2nd Amendment and "drug users"

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VILLARREAL V. TEXAS

Right to Counsel (OA Oct. 6)

David Asa **Villarreal** testified in his own defense in his murder trial in Texas. He was in the **middle of his direct examination** when the court **adjourned** for the day.

The **trial judge** instructed the attorneys **not to confer with Villarreal regarding his ongoing testimony**. Counsel was permitted to discuss other trial-related matters.

Counsel objected to this limitation under the Sixth Amendment.

VILLARREAL V. TEXAS

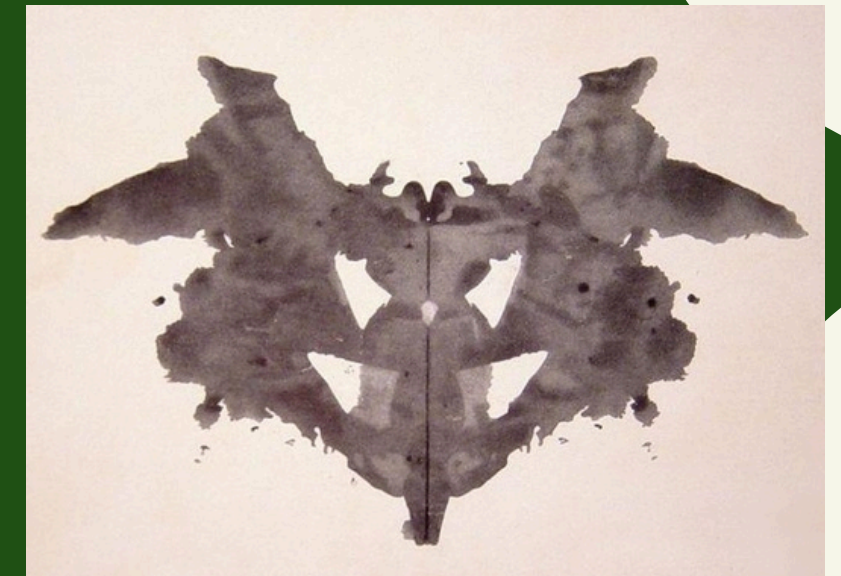
Right to Counsel (OA Oct. 6)

Question Presented: Does a trial court violate a defendant's Sixth Amendment right to counsel by preventing the defendant and his lawyer from discussing the defendant's testimony during an overnight break in the trial?

“[Y]ou can't confer with your attorney but [at] the same time you have a [Sixth] Amendment right to talk to your attorney. . . . I'm going to ask that [counsel] pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time. . . . And you're going to have to decide, if he asks you any questions and such, is this something that is going to be considered to be conferring with him on the witness stand while the jury is there or not.”

VILLARREAL V. TEXAS

Right to Counsel (OA Oct. 6)



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Texas: Trial courts can prohibit overnight discussions between the attorney and the client about the client's testimony so long as they are free to discuss other matters.

Villarreal: A "no direct discussion of testimony" rule is unworkable.

SCOTUS: Where's the "line"?

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BARRETT V. U.S

5A double jeopardy (OA Oct. 7)

Barrett's Sentencing on July 16, 2014

Conspiracy to commit Hobbs Act Robbery	§ 924(c)		20 yrs for conspiracy + 5 yrs for 924(c)
Hobbs Act Robbery	§ 924(c)		+ 15 yrs for robbery + 25 yrs for 924(c)
Hobbs Act Robbery resulting in death of Mr. Dafalla	§ 924(c)	§ 924(j)	(15 yrs for robbery concurrent) + 25 yrs for 924(j) = 90 yrs *Court did not impose a sentence for this 924(c) count, considered it a lesser-included offense of the 924(j) count*

Barrett's Resentencing in 2021:

Conspiracy to commit Hobbs Act Robbery	⚡ § 924(c)		20 yrs for conspiracy +
Hobbs Act Robbery	§ 924(c)		(20 yrs for robbery concurrent) + 5 yrs for 924(c)
Hobbs Act Robbery resulting in death of Mr. Dafalla	§ 924(c)	§ 924(j)	(20 yrs for robbery concurrent) + 25 yrs for 924(j) = 50 yrs *Court did not impose a sentence for this 924(c) count, considered it a lesser-included offense of the 924(j) count*

BARRETT V. U.S

5A double jeopardy (OA Oct. 7)

18 U.S.C. § 924

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, **in addition to the punishment provided for such crime of violence** or drug trafficking crime--

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years....

(D) Notwithstanding any other provision of law--

- (i) a court shall not place on probation any person convicted of a violation of this subsection; and
- (ii) **no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment** imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(j) A person who, **in the course of a violation of subsection (c)**, causes the death of a person through the use of a firearm, shall--
(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.



BARRETT V. U.S

5A double jeopardy (OA Oct. 7)

Question Presented: Does the Fifth Amendment’s double jeopardy clause permit two sentences for the same federal robbery act that violates two criminal provisions, 18 U.S.C. § 924(c) and (j)?

*Pending resolution of case, if presented with a similar scenario, remind the government of their position in *Barrett* and object on double jeopardy grounds*

Following 2nd Circuit’s Decision in 2024:

Conspiracy to commit Hobbs Act Robbery	⚡ § 924(c)		20 yrs for conspiracy +
Hobbs Act Robbery	§ 924(c)		(20 yrs for robbery concurrent) + 5 yrs for 924(c)
Hobbs Act Robbery resulting in death of Mr. Dafalla	§ 924(c)	§ 924(j)	(20 yrs for robbery concurrent) + 25 yrs for 924(j) = 50 yrs *Remanded for resentencing, need to be treated as separate counts warranting cumulative punishment*

2nd Circuit position: Congress intended cumulative punishments, 924(c) and (j) are different crimes, the former focused on the firearm & use of it, while the latter is focused on the death caused by the firearm, and these different crimes are subject to different penalty schemes

ELLINGBURG V. U.S.

Mandatory Victim Restitution Act and Ex Post Facto Clause (OA Oct. 14)

Ellingburg was convicted of robbing a bank. In 1996, he was sentenced to prison and ordered to pay over \$7,500 in restitution under the Victim and Witness Protection Act (VWPA).

Ellingburg had paid one-quarter of the original restitution at the time of his release in 2022. Ellingburg filed a motion arguing that enforcement of his restitution order was unlawful because the applicable payment period under the VWPA had expired.

Ellingburg argued that applying a longer restitution term and mandatory interest provision under the later-enacted Mandatory Victim Restitution Act (MVRA) **violated the Ex Post Facto Clause.**

ELLINGBURG V. U.S.

Mandatory Victim Restitution Act and Ex Post Facto Clause (OA Oct. 14)

Question Presented: Is criminal restitution under the Mandatory Victim Restitution Act (MVRA) penal for purposes of the Ex Post Facto Clause?

Ex post facto clause bars imposing criminal punishments based on statutes not in force when the crime was committed. Two-part analysis:

- (1) Is the punishment civil or criminal in nature?
- (2) If criminal, would retroactive application increase punishment?

ELLINGBURG V. U.S.

Mandatory Victim Restitution Act and Ex Post Facto Clause (OA Oct. 14)

The government agreed that restitution is a criminal punishment.
This agreement should prevail; however, there will likely be additional litigation on remand as to the Ex Post Facto clause.

SCOTUS: Is restitution a criminal punishment or a civil judgment available to help the victim?

Furture Questions:

- (1) If criminal → does an extended payment period “increase” the punishment?**
- (2) If civil → do we have Apprendi or Seventh Amendment concerns re: lack of jury finding as to restitution**

CASE V. MONTANA

Warrantless home entry and “emergency aid” exception (OA Oct. 15)

Trevor Case’s ex-girlfriend J.H. called police to report that Case had threatened suicide. J.H. told Case she was going to call the police, and **Case threatened he would harm any officer** who came to his home.

Officers arrived at Case’s home and attempted to make contact by knocking on doors and calling through an open window, but received no response. Officers observed empty beer cans, an empty handgun holster, and a notepad they believed contained a suicide note. **Forty minutes later, officers entered the home without a warrant** with weapons drawn

An officer encountered Case in an upstairs bedroom closet. The **officer observed what he believed was a dark object at Case’s waist and shot him in the abdomen.** A handgun was subsequently found in a laundry hamper next to where Case fell. Case was arrested for assault on a police officer.

CASE V. MONTANA

Warrantless home entry and “emergency aid” exception (OA Oct. 15)

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Question Presented: May law enforcement enter a home without a search warrant based on less than probable cause that an emergency is occurring?

“A warrantless entry under Montana's community caretaker doctrine is unique from the other exceptions in that the circumstances giving rise to a welfare check on an individual in their home specifically may not implicate a criminal investigation.” State v. Case, 2024 MT 165, ¶ 26.

Brigham City v. Stuart, 547 U.S. 398 (2006): Police may enter a home without a warrant when they have an **objectively reasonable basis** for believing that an occupant is seriously injured or imminently threatened with such injury.

CASE V. MONTANA

Warrantless home entry and “emergency aid” exception (OA Oct. 15)

“The Supreme Court appeared ready to side with the police.”

When has probable cause ever been used outside the criminal context?
(Roberts, Thomas, Kagan)

Case:

- Increase risk of pretextual, mistaken, tragic home entry
- Opens the door to warrantless searches in other contexts that are historically less protected

Would a probable cause requirement hinder police emergency responses?
(Alito, Jackson, Kavanaugh)

Montana:

- Police are often first to respond to emergencies. PC would not exist because no crime when responding to overdoses, strokes, comas, suicide attempts, etc.

RICO V. U.S.

Fugitive tolling and supervised release (OA Nov. 3)

- In 2011 Ms. Rico was sentenced to 84 months imprisonment & 4 years of supervised release for conspiring to distribute methamphetamine and heroin
- Released in 2017, Ms. Rico violates several drug-related conditions of her supervision leading to revocation, 2 months incarceration & a new term of 42 months of supervised release
- December 2017, Ms. Rico is released, her 2nd term of supervised release is set to expire in 2021
- Within a few months, she fails to report for outpatient drug treatment, misses a drug test, loses contact with her PO, & has moved without notifying her PO
- May 2018, PO files a violation petition alleging Ms. Rico had violated supervision by using drugs & changing her residence w/out notice
 - Guideline range of 8-14 months based on Grade C violation
 - Bench warrant issued
- Ms. Rico arrested in January 2023
- PO amends violation petition, dropping drug use allegation, keeps the absconding, and adds new state-law offenses: evading a police officer, driving w/out a license
 - *Grade C violations* (before expiration of term) & **possession of fentanyl for sale**
 - *Grade A violation* (after expiration of term)**



RICO V. U.S.

Fugitive tolling and supervised release (OA Nov. 3)

Question Presented: Does the fugitive-tolling doctrine apply in the context of supervised release?



- Ms Rico objects to Jan 2022 Grade A violation, claiming district court lacked jurisdiction over the violation since her term expired in June 2021
- Government responds that the clock on Ms. Rico's supervision had paused while she absconded
- District court held fugitive-tolling doctrine applied pursuant to 9th Circuit precedent, sentenced her to 16 months imprisonment and an additional 2 years of supervised release

RICO V. U.S.

Fugitive tolling and supervised release (OA Nov. 3)

The Second, Third, Fourth, & Ninth Circuits hold that when a supervisee is in “fugitive status,” their period of supervised release is tolled and violations of their terms of supervision can support revocation even if occurring after the nominal expiration of that period. The First & Eleventh Circuits have declined to apply the doctrine in the context of supervised release.

Object to attempts to apply fugitive tolling in context of supervised release, no 6th Circuit precedent at this time & common law doctrine appears to conflict w/ text of SRA



Some considerations against applying the doctrine in the context of supervised release:

- Pause vs extension of term: automatic & indefinite extension not authorized by text of Sentencing Reform Act which sets maximum terms
- 18 U.S.C. § 3624(e) already contains a tolling provision- term does not run during any other period of incarceration unless less than 30 consecutive days
- 18 U.S.C. § 3583(i) addresses absconding- extending court's jurisdiction beyond expiration of term for the adjudication of violations arising prior to expiration of term
- § 3583(e)(3) allows court to sentence supervisee to prison for entirety of term w/out credit for time previously served on post-release supervision
- Interpretations of absconding from supervision are unclear and unpredictable, leaving duration of terms to the whim of the PO & supervising judge
- Principles of lenity & fair notice

HAMM V. SMITH

Eighth Amendment and Capital Punishment (OA Dec 10)

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Joseph Clifton Smith was convicted of capital murder and sentenced to death in Alabama.

Eleventh Circuit

Years later, Smith filed a federal habeas petition under 28 U.S.C. § 2254 to overturn his death sentence for being intellectually disabled. **Eighth & Fourteenth Amendments.**

Applied a “holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony.”

The central issue in Smith’s case was whether he met the significantly subaverage intellectual functioning prong under Atkins. Alabama law defines intellectual disability as requiring an IQ of 70 or less. Smith scored 75, 74, 72, 78, and 74.

IQ test is imprecise. Clinicians can calculate a range.

Under a “holistic approach,” subaverage disability is not necessarily ruled out based on a number.

How does a reviewing court evaluate multiple IQ scores?

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HAMM V. SMITH

Eighth Amendment and Capital Punishment (OA Dec 10)

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Question Presented: When a capital defendant has taken multiple IQ tests with varying results, how should courts evaluate the cumulative effect of those scores to determine whether the defendant has significantly subaverage intellectual functioning under *Atkins v. Virginia*?

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HAMM V. SMITH

Eighth Amendment and Capital Punishment (OA Dec 10)

Hall v. Florida, 572 U.S. 701 (2014) “When a person has taken multiple tests, each separate score must be assessed” due to the standard error of measurement.

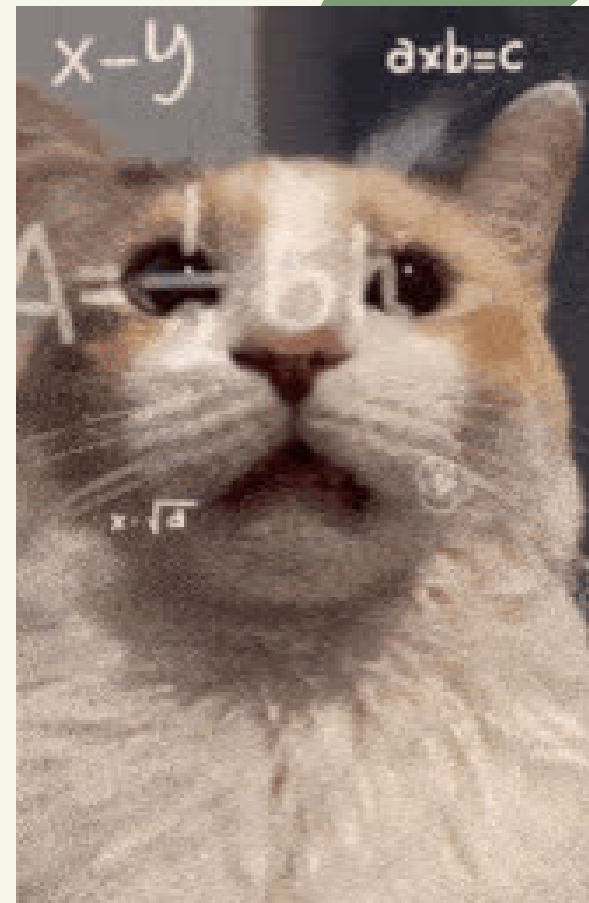
SCOTUS has to decide how to evaluate multiple IQ scores

Alabama (Petitioner)

- States can require a certain IQ score for defendants to establish intellectual disability. Precise math equation.
- **Circuit Split:** Can a defendant be asked to prove an IQ score by a preponderance of the evidence?
 - Preponderance: 5th, 6th, 7th, 10th
 - “Any risk” of low IQ: 8th, 9th, 11th

Smith (Respondent)

- Proper to consider additional evidence of intellectual disability when a person presents IQ scores within the 70-75 range
- Proper under Hall to consider IQ scores alongside evidence regarding adaptive behavior and developmental period.



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FERNANDEZ V. U.S.

First Step Act & Judicial Discretion (OA Nov. 12)

- In 2014, Fernandez convicted by jury of conspiring to commit murder for hire resulting in death, 18 U.S.C. § 1958, & using a firearm in furtherance of a crime of violence resulting in death, 18 U.S.C. § 924(j)
 - The government's key witness, Patrick Darge, was the only one who could place Fernandez at scene & had documented history of lying
- Sentenced to 2 consecutive life terms, cooperating co-defendants receive significantly lighter sentences: ranging from 2yrs-30yrs
- 1st 28 U.S.C. § 2255 motion denied in 2017
- In 2021, 2nd § 2255 motion granted in light of *United States v. Davis*, 558 U.S. 445 (2019) & his § 924(j) conviction is vacated along w/ one of his life sentences
- In 2022, District Court granted Fernandez's motion for a sentence reduction, 18 U.S.C. § 3582(c)(1)(A), reducing his remaining life sentence to time-served (about 11 years)
- "Extraordinary & compelling reasons" =
 - The **sufficiency & reliability of the evidence** of Fernandez's conviction
 - The significant **sentence disparities** btw Fernandez and his co-defendants



FERNANDEZ V. U.S.

First Step Act & Judicial Discretion (OA Nov. 12)

Question Presented: Whether a combination of “extraordinary and compelling reasons” that may warrant a discretionary sentence reduction under 18 U.S.C. § 3582(c)(1)(A) can include reasons that may also be alleged as grounds for vacatur of a sentence under 28 U.S.C. § 2255?

2nd Circuit Decision:

“There is nothing ‘extraordinary’ or ‘compelling’ about a sentence disparity that results from a co-defendant's decision to plead guilty and assist the government.”

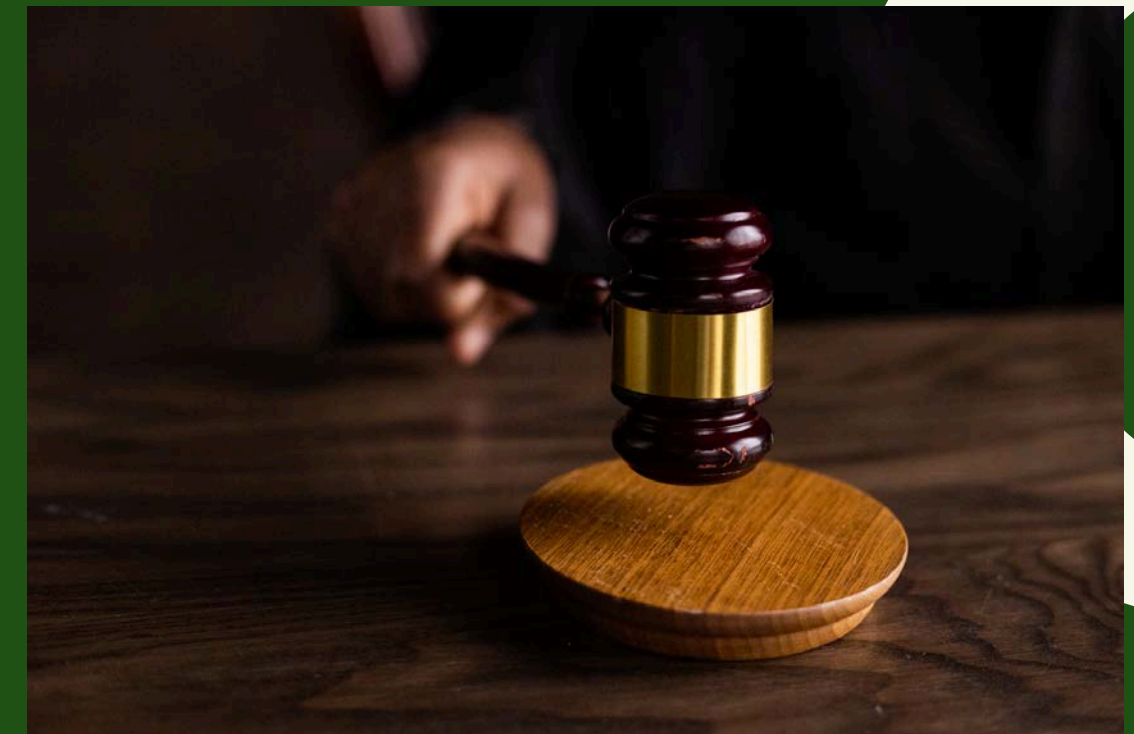
“Since challenges to the validity of a conviction must be made under section 2255, they cannot qualify as ‘extraordinary and compelling reasons’ under section 3582(c)(1)(A). Compassionate release is not a channel to habeas relief or an end run around the limitations of section 2255.”

FERNANDEZ V. U.S.

First Step Act & Judicial Discretion (OA Nov. 12)

Arguments in support of Fernandez:

- *Concepcion v. United States*, 597 U.S. 481(2022) - the only limitations on a court's discretion to consider relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution
- Only limitations on discretion under section 3582(c)(1)(A) = sentence must be consistent w/ Sentencing Commission's applicable policy statements & rehabilitation *alone* cannot be considered an "extraordinary and compelling reason"
- Congress designed section 3582(c) as a "safety valve," vesting courts with the discretion to grant sentence reductions in particularly compelling situations [case-by-case review]
- Sections 3582(c)(1)(A) & 2255 are different vehicles for relief – section 2255 addresses "the legality and validity of a conviction" and section 3582(c)(1)(A) addresses "whether to exercise leniency based on an individualized review of a defendant's circumstances"



Government's arguments:

- Reasons that may also be alleged as grounds for vacatur of a sentence under section 2255 are not "extraordinary & compelling"
- Section 3582(c)(1)(A) is not a mechanism for reducing invalid sentences; otherwise, allowing claims of error would create end-runs around section 2255's procedural & substantive limits

RUTHERFORD V. U.S.

Consolidated with Carter v. U.S.

First Step Act & Judicial Discretion (OA Nov. 12)

- **Petitioners serving sentences under 18 U.S.C. § 924(c)'s former "stacking" provision**
 - Rutherford = 32 years mandatory minimum
 - First § 924(c) [brandishing] conviction = 7 years +
 - Second § 924(c) [brandishing] conviction = 25 years
 - Carter = 57 years mandatory minimum
 - First § 924(c) [brandishing] conviction = 7 years +
 - Second § 924(c) [brandishing] conviction = 25 years +
 - Third § 924(c) [brandishing] conviction = 25 years
- **2023 Amendment to the Policy Statement to define "extraordinary & compelling reasons"**
 - Exception to rule limiting "changes in law" as a consideration =
 - **§ 1B1.13(b)(6)**, non-retroactive change in law "may be considered in determining whether the defendant presents an extraordinary and compelling reason" when:
 - "A defendant **received an unusually long sentence**";
 - "has **served at least 10 years** of the term of imprisonment";
 - an intervening law change has produced a "**gross disparity** between the sentence being served and the sentence likely to be imposed at the time the motion is filed";
 - & the court gives "full consideration of the **defendant's individualized circumstances**."



Should courts be bound by yesterday's excesses, or should they have the flexibility to reflect today's standards of justice?

RUTHERFORD V. U.S.

Consolidated with Carter v. U.S.

First Step Act & Judicial Discretion (OA Nov. 12)

Based on § 1B1.13(b)(6), petitioners brought motions for compassionate release [if sentenced today, Rutherford would have received 14 years, an 18 year difference & Carter 21 years, a 36 year difference]

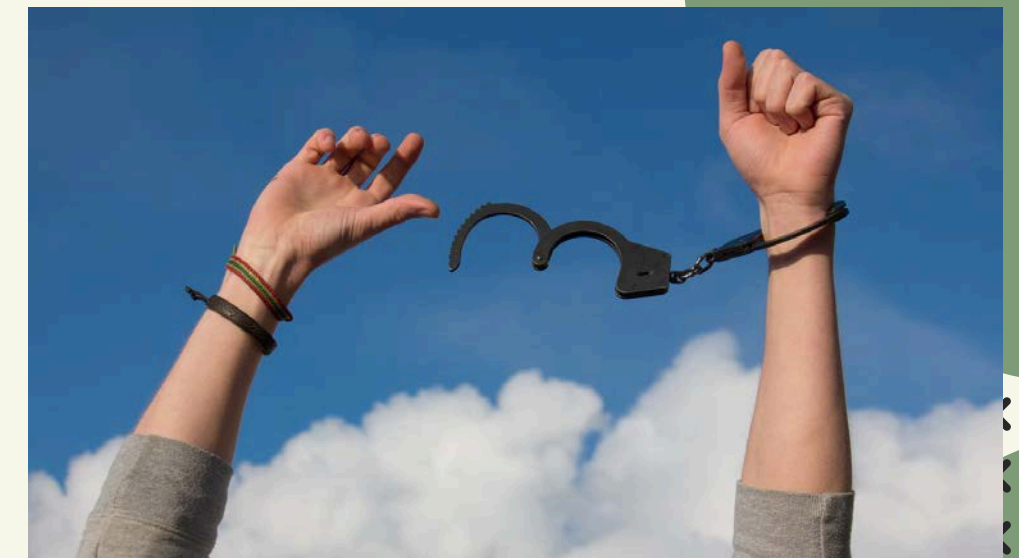
Third circuit affirms denial of Petitioners' motions for compassionate release based on precedent from 2021, *United States v. Andrews*, which prohibits the change to § 924(c) from being a consideration when determining eligibility for compassionate release

Further holds that the amended Policy Statement conflicts w/ *Andrews*... Sentencing Commission may not replace a controlling judicial interpretation of an unambiguous statute with its own construction – Congress explicitly made the First Step Act's change to § 924(c) non-retroactive.

Circuit Split:

The First, Fourth, Ninth, & Tenth Circuits allow sentencing courts to consider non-retroactive changes in law

The Third, Fifth, **Sixth**, Seventh, Eighth, and D.C. Circuits forbid non-retroactive changes in law as a consideration for compassionate release



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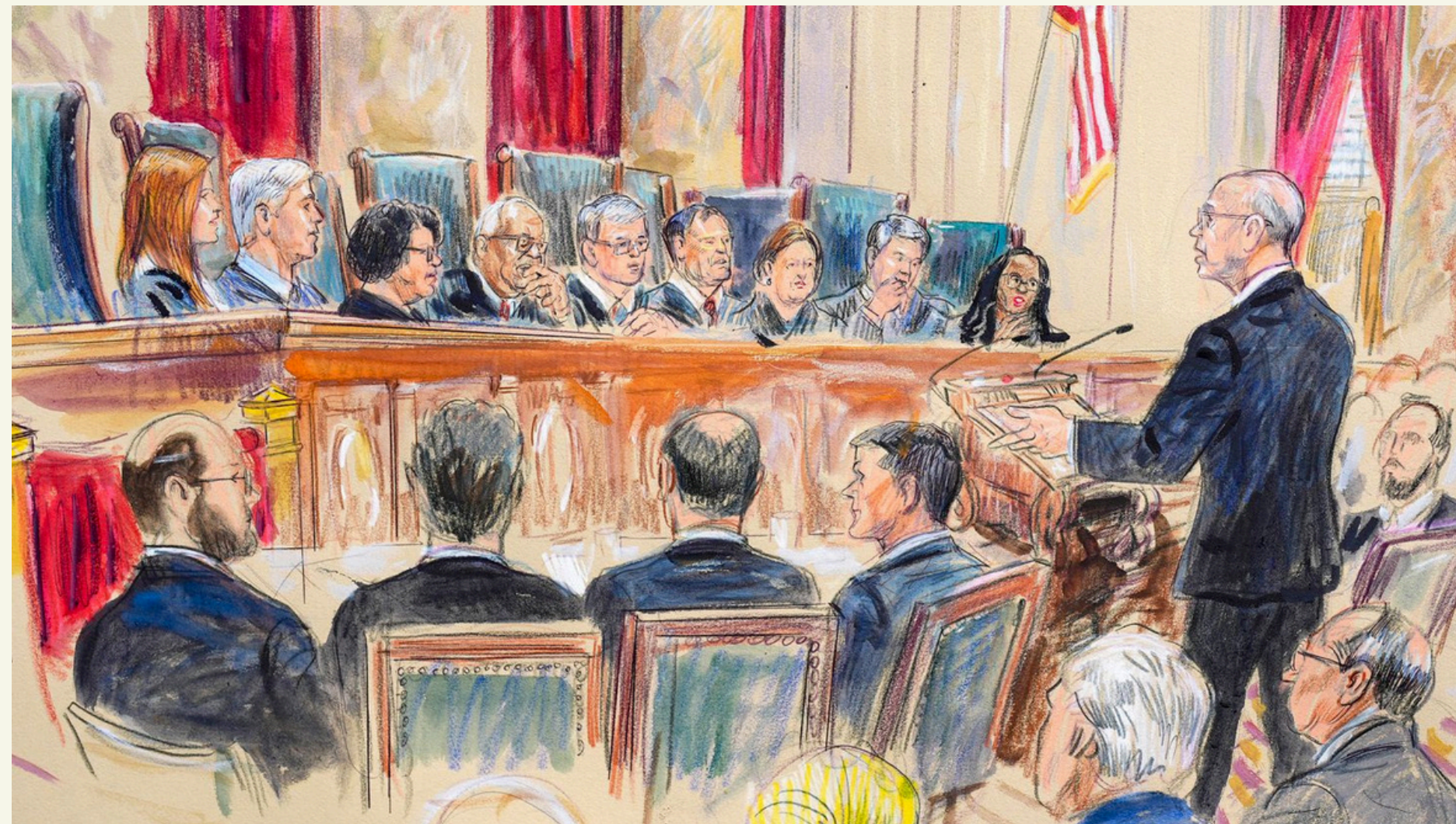


RUTHERFORD V. U.S.

Consolidated with Carter v. U.S.

First Step Act & Judicial Discretion (OA Nov. 12)

Question presented: Whether a district court may consider disparities created by the First Step Act's prospective changes in sentencing law when deciding if "extraordinary and compelling reasons" warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i)?



*These First Step Act cases regarding judicial discretion will be important to watch out for-- the Sixth Circuit currently does not allow consideration of non-retroactive changes in law, no matter how excessive or unjust, & as to *Fernandez*-- if extra-textual limitations are placed on the court's discretion, this may open the door to further manufactured limitations*

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BOWE V. U.S.

28 U.S.C. §§ 2244, 2254, 2255, Jurisdiction & Successive Applications (OA Oct. 14)

- In 2008, Michael Bowe was charged with conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and using a firearm during a crime of violence (18 U.S.C. § 924(c)). In 2016, he started filing habeas petitions challenging his § 924(c) conviction.
- Following SCOTUS decisions in U.S. v. Davis and U.S. v. Taylor, Bowe again challenged his § 924(c) conviction on the basis that his underlying crimes no longer qualified as “crimes of violence.”

The Eleventh Circuit denied Bowe’s petition under **28 U.S.C. § 2244(b)(1)**:

“A claim presented in a second or successive habeas corpus application under **section 2254** that was presented in a prior application shall be dismissed.”

28 U.S.C. § 2254 - State custody; remedies in Federal courts

28 U.S.C. § 2255 - Federal custody; remedies on motion attacking sentence

BOWE V. U.S.

28 U.S.C. §§ 2244, 2254, 2255, Jurisdiction & Successive Applications (OA Oct. 14)

Questions Presented:

(1) Whether 28 USC § 2244(b)(1) applies to a claim presented in a second or successive motion to vacate under 28 USC § 2255.

(2) Whether 28 USC § 2244(b)(3)(E) deprives this Court of certiorari jurisdiction over the grant or denial of an authorization by a court of appeals to file a second or successive motion to vacate under 28 USC § 2255.

BOWE V. U.S.

28 U.S.C. §§ 2244, 2254, 2255, Jurisdiction & Successive Applications (OA Oct. 14)

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Does SCOTUS have jurisdiction?

28 U.S.C. § 2244(b)(3)(E):

“The grant or **denial** of an authorization by a court of appeals to file a second or successive application **shall not be appealable and shall not be the subject** of a petition for rehearing or for a writ of certiorari.”

Does 28 U.S.C. § 2244(b)(1) apply to federal prisoners?

§ 2255(h): “A second or successive motion must be certified as provided in **section 2244**. . .”

§ 2244(b)(1): “A claim presented in a second or successive habeas corpus application under **section 2254** that was presented in a prior application shall be dismissed”

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WOLFORD V. LOPEZ

Public Carry of Firearms (OA TBD)



- The default rule in most states is that gun owners can carry firearms onto private property until they have been told otherwise (e.g., by a sign posted in the doorway declaring no guns allowed)
- New York, New Jersey, Hawaii, and California flipped this default rule, so that gun owners in those states must get permission before they carry onto any private property
- Critics argue flipping the default rule creates a *de facto* ban on public carry because most private property owners do not post signs either allowing or restricting firearms
& no historical tradition of presumptively banning guns on private property

WOLFORD V. LOPEZ

Public Carry of Firearms (OA TBD)

Circuit split over flipping default rule as to private property held open to the public
(e.g., a grocery store, restaurant, gas station):

- The Second & Third Circuits have found such a rule fails *Bruen's* history & tradition test
- The Ninth Circuit found Hawaii's law falls w/in the historical tradition but California's law limiting permission to posted signs failed
 - HI law allows permission by "unambiguous written *or verbal authorization*" or by "posting clear & conspicuous signage"



Question Presented: Whether the Ninth Circuit erred in holding that Hawaii may prohibit the carry of handguns by licensed concealed carry permit holders on private property open to the public unless the property owner affirmatively gives express permission to the handgun carrier?



WOLFORD V. LOPEZ

Public Carry of Firearms (OA TBD)

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Why this matters?

- Upholding 9th Circuit would limit *Bruen*'s impact
- Reversing 9th Circuit would expand *Bruen* to public-facing private spaces
- Could get further clarification on how to apply Court's history & tradition test!
 - 9th Circuit considered 19th-century history alongside founding-era history, primarily focused on two laws
 - will two laws suffice to show a tradition? will certain laws be excluded from consideration based on time or purpose (one of the laws relied on was passed in 1865 as part of Louisiana's Black Codes)?



UNITED STATES V. HEMANI

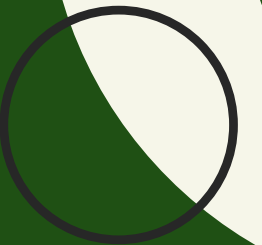
2A and 18 U.S.C. § 922(g)(3) (OA TBD)

18 U.S.C. § 922

(g) It shall be unlawful for any person--

(3) **who is an unlawful user of or addicted to any controlled substance**
(as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.



UNITED STATES V. HEMANI

2A and 18 U.S.C. § 922(g)(3) (OA TBD)



- § 922(g)(3) prosecution based on Hemani's use of marijuana
- Government argues statute targets only "habitual" drug users, that the restriction is temporary & may be lifted if the individual stops using unlawful substances, & statute is historically analogous with laws disarming drunkards
- *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024): § 922(g)(3) cannot constitutionally be applied to individuals based solely on past or habitual drug use, **unless the government proves the person was actually intoxicated or impaired at the time of possessing the firearm**
- Sixth Circuit (*United States v. VanOchten*) not as restrictive as 5th Circuit, takes an individualized dangerousness approach = each drug user must have the "opportunity to make an individualized showing that he himself is not actually dangerous," & court may take into account the individual's criminal record to determine if they "presently pose a clear risk to others if armed"

Question Presented: Whether 18 U.S.C. § 922(g)(3), the federal statute that prohibits the possession of firearms by a person who "is an unlawful user of or addicted to any controlled substance," violates the Second Amendment as applied to respondent?

UNITED STATES V. HEMANI

2A and 18 U.S.C. § 922(g)(3) (OA TBD)

Why this matters?

- Offers opportunity to further elaborate Court's holding in *Rahimi* regarding the historical "principles" that permit disarming particular groups of people
- If statute upheld as to Hemani, government may continue to prosecute firearm possession by those who use controlled substances, including those who lawfully use marijuana under state laws (nearly half of US states permit recreational use of marijuana)
- If 5th circuit upheld, will limit federal firearm regulation
- Address the constitutional relevance, if any, of § 925(c) under the *Bruen* framework



QUESTIONS?

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Thanks for listening!