

2016 Utah Prosecution Council Fall Conference

SUPREME COURT UPDATE¹

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COMMERCE CLAUSE

Robbing drug dealer “obstructs, delays, or affects commerce or the movement of any article or commodity in commerce” and thus violates the Hobbs Act.

Taylor v. United States, 14-6166 (Alito). The Hobbs Act makes it a federal crime to commit a robbery that “in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.” 18 U.S.C. §1951(a). The Court has held that the phrase “affects commerce” in the Act reflects Congress’s intent to exercise “the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.” By a 7-1 vote, the Court held that the government can prove that element merely by “show[ing] that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds.” This conclusion follows from the Court’s holding in *Gonzales v. Raich*, 545 U.S. 1 (2005), “that the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance.” This necessarily means, explained the Court, “that Congress may also regulate intrastate drug theft.”

CRIMINAL LAW

The Hobbs Act is violated when a conspirator conspires to obtain property from another conspirator.

Ocasio v. United States, 14-361 (Alito). By a 5-3 vote, the Court held a defendant may be convicted of conspiring to violate the Hobbs Act where “he entered into a conspiracy that had as its objective the obtaining of property from another conspirator.” The Hobbs Act defines extortion, in relevant part, as “the obtaining of property from another, with his consent, . . . under color of official right.” 18 U.S.C. §1951(b)(2). In this case, a police officer (Ocasio) engaged in a scheme under which he and other officers, when they appeared at the scene of an auto accident, would persuade the owners of the cars to have their vehicles towed to a particular repair shop — whose owners would then pay a kickback to the officers. The Court held that “[u]nder longstanding principles of conspiracy law, a defendant could be convicted of conspiring to violate the Hobbs Act” even though some members of the conspiracy (here, the shop owners) could not personally commit the substantive offense (because they were not obtaining money “from another”; they were paying the money to Ocasio, who obtained it “from another”).

A misdemeanor assault conviction with a *mens rea* of recklessness is a misdemeanor crime of violence for purposes of the federal firearms ban under 18 U.S.C. § 922(g)(9).

Voisine v. United States, 14-10154 (Kagan). Congress bars anyone convicted “in any court of a misdemeanor crime of domestic violence” from possessing firearms. 18 U.S.C. §922(g)(9). The law defines “misdemeanor crime of domestic violence” as an offense that, among other things, involves the “use or attempted use of physical force.” *Id.* §921(a)(33)(A). By a 6-2 vote, the Court reasoned that a misdemeanor assault conviction with the *mens rea* of recklessness triggers the firearms ban. The Court concluded that the statutory language (“use . . . of physical

force”) “naturally read, encompasses acts of force undertaken recklessly”; “[a]nd the state-law backdrop to that provision . . . indicates that Congress meant just what it said.”

A person required by federal law to register as a sex offender need not update his registry when he moves out of the United States.

Nichols v. United States, 15-5238 (Alito). Lester Ray Nichols was a registered sex offender living in the Kansas City area. 42 U.S.C. § 16913(c) required that anytime he changed his name, address, employment, or student status he must “appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.” Involved jurisdictions in subsection (a) included places where the offender resided, worked, or was a student. Without appearing or notifying local Kansas City authorities, Nichols, who was still on parole, moved to the Philippines. A unanimous Court held that Nichols was not required to update his registry in Kansas when he moved to the Philippines. Because he no longer resided, worked, or attended school in Kansas, Kansas was not an “involved” jurisdiction under section 16913(c). And because the Philippines is not under the jurisdiction of the United States for purpose of sex offender registry requirements, federal law did not require Nichols to register anywhere.

Note: Congress recently passed 18 U. S. C. §2250(b), International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders. That law requires sex offenders to notify authorities when they travel abroad and would have covered Nichols conduct.

RICO applies extraterritorially only when the predicate offense apply extraterritorially. But a foreign litigant may only bring a private cause of action under RICO if it proves domestic injury to its business or property.

RJR Nabisco v. The European Community, 15-138 (Alito). This case addressed the extraterritorial reach of the Racketeer Influenced and Corrupt Practices Act (RICO). The Court unanimously held that RICO “applies to foreign racketeering activity — but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially.” Put another way, RICO applies to predicate offenses committed abroad when the specific predicate offenses have overcome “the presumption against extraterritoriality.” Relatedly, the Court held that RICO may apply to “foreign enterprises.” Second, however, the Court held by a 4-3 vote that RICO’s private cause of action (set forth in 18 U.S.C. §1964(c)) requires “[a] private RICO plaintiff [to] allege and prove a domestic injury to its business or property.” The Court found nothing in the language of §1964(c) sufficient to overcome the presumption against extraterritoriality. (Justice Sotomayor did not participate in this case.)

The various structures and vehicles that qualify as locations for a burglary under Iowa law are “means” not “elements.” An Iowa burglary cannot, therefore, be a predicate offense under the Armed Career Criminal Act.

Mathis v. United States, 15-6092 (Kagan). The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory-minimum sentence if a defendant is convicted of being a felon in possession of a firearm following “three previous convictions for a violent felony or a serious drug

offense.” 18 U.S.C. 924(e)(1). As the Court recently explained, “[t]o determine whether a past conviction is for one of those crimes, courts use what has become known as the ‘categorical approach’: They compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime — i.e., the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute’s elements are the same as, or narrower than, those of the generic offense.” But the Court has also “approved a variant of this method — labeled . . . the ‘modified categorical approach’ — when a prior conviction is for violating a so-called ‘divisible statute.’ That kind of statute sets out one or more elements of the offense in the alternative.” Here, the Court held by a 5-3 vote that the categorical approach applies to a past conviction under a state statute that “enumerat[ed] various factual means of committing a single element.”

Arranging meetings, hosting events, and contacting government officials are not “official acts” under federal bribery statute.

McDonnell v. United States, 15-474 (Roberts). The Court unanimously vacated the conviction of former Virginia Governor Robert McDonnell on federal corruption charges. McDonnell was convicted of offenses that make it a felony to agree to take “official action” in exchange for money, campaign contributions, or any other thing of value. The Court held that an “official act,” for these purposes, “must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.” This “may include using [one’s] official position to exert pressure on another official to perform an ‘official act,’ or to advise another official, knowing and intending that such advise will form the basis for an ‘official act’ by another official.” But “[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so — without more — does not fit that definition of ‘official act.’” The Court found that the government’s broader definition of the term “would raise significant constitutional concerns” and “raise[] significant federalism concerns.” The Court concluded that the instructions given by the district court here permitted the jury to convict McDonnell “for conduct that is not unlawful.” The Court therefore vacated and remanded to allow the lower courts to assess McDonnell’s contention that the evidence is insufficient to show he committed or agreed to commit an “official act” as properly defined.

DISCOVERY/BRADY

Death row inmate was entitled to state post-conviction on *Brady* claim where the newly revealed evidence undermined confidence in the conviction.

Wearry v. Cain, No. 14-10008, (Per Curiam). By a 6-2 vote, the Court summarily reversed a Louisiana post-conviction court decision denying a death row inmate’s *Brady* claim. The Court concluded that petitioner Wearry is entitled to a new trial because the prosecution failed to turn over three material types of evidence that undercut the testimony of the state’s two primary witnesses, Scott and Brown: (1) “previously undisclosed police records [which] showed that two of Scott’s fellow inmates had made statements that case doubt on Scott’s credibility”; (2) “contrary to the prosecution’s assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry”; and (3) medical records which

showed that a person whom Scott said “had run into the street to flag down the victim, pulled the victim out of his car, shoved him into cargo space, and crawled into the cargo space himself” “had undergone knee surgery to repair a ruptured patellar tendon” just nine days before the murder. The Court concluded that “[b]eyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry’s conviction.”

DUE PROCESS

Former District Attorney who approved decision to seek death penalty cannot sit as supreme court justice on appeal that case.

Williams v. Pennsylvania, 15-5040 (Kennedy). By a 5-3 vote, the Court held that a capital defendant’s due process rights were violated when one of the state supreme court justices hearing his state habeas appeal had been the district attorney at the time of the initial prosecution and had approved the decision to pursue capital punishment. The Court ruled that “under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” The Court found that test met here because there is not “any doubt that [the justice] had a significant role in” the decision to seek the death penalty. The Court further found that “an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.” (The state high court had unanimously rejected the defendant’s claim.)

A prior uncounseled tribal court conviction that complies with the Indian Civil Rights Act may serve as a predicate offense under 18 U.S.C. § 117.

United States v. Bryant, 15-420 (Ginsberg). It is a federal crime for any person to “commit[] a domestic assault within . . . Indian country” if the person has two prior convictions for domestic violence rendered in “Federal, State, or Indian tribal court proceedings.” 18 U.S.C. §117(a). The Court unanimously held that uncounseled tribal-court convictions that complied with the Indian Civil Rights Act of 1968 (ICRA) can serve as predicate offenses under this provision — even where the convictions would have violated the Sixth Amendment had they been imposed by a state or federal court. (As background, the Sixth Amendment does not apply to tribal-court proceedings; and ICRA requires appointed counsel only when a sentence longer than one-year’s imprisonment is imposed. By contrast, the Sixth Amendment requires counsel when any imprisonment is imposed.)

EIGHTH AMENDMENT

The Eighth Amendment does not require that capital sentencing juries be instructed that mitigating circumstances need not be proven beyond a reasonable doubt.

Kansas v. Carr, 136 S.Ct. 633 (2016) (Scalia). The Court held by an 8-1 vote that the Kansas Supreme Court erred when it overturned the death sentences imposed on three defendants, two of whom were tried jointly. First, the Kansas court erred in holding that the Eighth Amendment requires courts in capital cases “to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt.” In the Court’s view, whether

mitigating circumstances exist is a value judgment not susceptible to a standard of proof; it has never required affirmative instructions of this sort; and the instructions given to the juries here did not create a reasonable likelihood that it would have thought mitigating evidence had to be proven beyond a reasonable doubt. Second, the Kansas court erred in holding that the joint capital proceeding “violated the defendants’ Eighth Amendment right to an ‘individualized sentencing determination.’” The Court found that the defendants’ claim, “at bottom,” was that the joint proceeding led to “the jury consider[ing] evidence that would not have been admitted in a severed proceeding.” But, held the Court, that is more of a due process concern than an Eighth Amendment concern; and given all the evidence of the defendants’ brutal, multiple murders, the defendants failed to show that “the evidence ‘so infected the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process.’”

Possibility of executive clemency in twenty-five years or statutory change by legislature does not obviate the need for a *Simmons* instruction in death penalty sentencing.

Lynch v. Arizona, 15-8366 (Per Curiam). By a 6-2 vote, the Court summarily reversed an Arizona Supreme Court decision for failing to enforce *Simmons v. South Carolina*, 512 U.S. 154 (1994). *Simmons* held that “where a capital defendant’s future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without the possibility of parole,” the Due Process Clause “entitles the defendant to ‘inform the jury of [his] parole ineligibility.’” The Arizona Supreme Court affirmed a death sentence where, although the state put petitioner’s future dangerousness at issue, the sentencing court did not issue a *Simmons* instruction. It reasoned that *Simmons* does not apply because petitioner is eligible for a life sentence, through executive clemency, in 25 years. The U.S. Supreme Court found, however, that “*Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant’s right to inform a jury of his parole ineligibility.” The Court found that *Simmons* likewise expressly rejected the argument made by the state here that the legislature might eventually change the law to allow petitioner to receive parole.

FOURTH AMENDMENT

Under the attenuation doctrine, the discovery of a warrant during an unlawful stop may attenuate any evidence discovered during a search incident to arrest.

Utah v. Strieff, 14-1371 (Thomas). This case involved evidence seized incident to a lawful arrest on an outstanding arrest warrant where the warrant was discovered during an investigatory stop later found to be unlawful (because the officer lacked reasonable suspicion to conduct the stop). By a 5-3 vote, the Court held that the evidence did not need to be suppressed “because the officer’s discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.” In reaching that decision, the Court found “it especially significant” that the officer, in initiating the unlawful stop, “was at most negligent”; “there is no evidence that [the] illegal stop reflected flagrantly unlawful police misconduct.”

A forced warrantless breath test is a valid search incident to a drunk driving arrest. But a forced warrantless blood draw is not.

Birchfield v. North Dakota, 14-1468 (Alito). The Court held that a state may, consistent with the Fourth Amendment, take a warrantless breath test incident to an arrest for drunk driving; but a state may not take a warrantless blood test incident to arrest. The Court explained that, to apply to these tests the search-incident-to-arrest exception to the warrant requirement, it needed to balance the intrusion upon an individual's privacy with the state's asserted need to take the tests. Finding that blood tests are significantly more intrusive than breath tests, the Court concluded that the balance supports the exception applying to the latter but not the former. Based on that conclusion, the Court ruled that motorists arrested for drunk driving may be criminally prosecuted for refusing to submit to a breath test, but may not be criminally prosecuted for refusing to submit to a blood test. (The Court stated, however, that nothing in its decision "should be read to cast doubt on" state implied-consent laws "that impose civil penalties and evidentiary consequences on motorists who refuse to" take blood tests.)

IMMIGRATION

To qualify as an aggravated felony under the Immigration and Naturalization Act, state offense must include every element of listed federal offense except interstate commerce element.

Luna Torres v. Lynch, 14-1096 (Kagan). Under the Immigration and Naturalization Act, an alien is ineligible for cancellation of deportation if he has committed an "aggravated felony." The statutory definition of "aggravated felony" contains a long list of crimes and specifies that it "applies to an offense described in this paragraph whether in violation of Federal or State law." 8 U.S.C. §1101(a)(43). By a 5-3 vote, the Court held that "a state crime counts as an aggravated felony when it corresponds to a specified federal offense in all ways but one — namely, the state crime lacks the interstate commerce element used in the federal statute to establish legislative jurisdiction (i.e., Congress's power to enact the law)."

RETROACTIVITY

Miller v. Alabama's rule that a juvenile committing a homicide may not be automatically sentenced to LWOP applies retroactively to cases on collateral review.

Montgomery v. Louisiana, 136 S.Ct. 718 (2016) (Kennedy). In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court held that the Eighth Amendment's ban against cruel and unusual punishment requires that, before a juvenile may be sentenced to life in prison without the possibility of parole for committing a homicide offense, a judge or jury must give "consideration [to] the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." By a 6-3 vote, the Court held that the rule announced in *Miller* is a substantive rule that applies retroactively to cases on collateral review. The Court reasoned that *Miller* did more than establish new procedural requirements; it "determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender'" and thereby "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status.'"

As a threshold matter, the Court held that it had jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller*. That is because, held the Court, “when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.”

SECOND AMENDMENT

A stun gun is a weapon within the protections of the Second Amendment

Caetano v. Massachusetts, 14-10078 (Per Curiam). In a brief opinion that reversed the Massachusetts Supreme Judicial Court on the petition for certiorari, the Supreme Court held that a stun gun is a weapon within the protections of the Second Amendment. The Court rejected each of the Massachusetts court’s reasons for placing stun guns out of the reach of the Second Amendment—that stun guns were not in use at the time of the Second Amendment’s enactment; that stun guns are unusual and dangerous per se at common law; and that stun guns are not useful in warfare—as violating *District of Columbia v. Heller*, 554 U.S. 570 (2008).

SENTENCING

The rule of last antecedent beats out the series-qualifier canon; the rule of lenity doesn’t apply because the statutory provision wasn’t hopelessly ambiguous.

Lockhart v. United States, 136 S.Ct. 958 (Sotomayor). Under 18 U.S.C. §2252(b)(2), a district court must impose a 10-year mandatory-minimum sentence if a defendant convicted of possessing child pornography “has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct *involving a minor or ward*” (emphasis added). By a 6-2 vote, the Court held that the phrase “involving a minor or ward” modifies only “abusive sexual conduct” — meaning that the provision’s mandatory-minimum sentence is triggered by a prior conviction under New York law for sexual abuse involving an *adult* victim. The Court reasoned that the “rule of the last antecedent” — under which “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows” — applies and is “fortifie[d]” by the statutory context. The Court declined to apply the rule of lenity because the provision was not hopelessly ambiguous.

Under federal sentencing guidelines, the use of an incorrect, higher guideline range is sufficient to show plain error on appeal.

Molina-Martinez v. United States, 14-8913 (Kennedy). A criminal defendant who fails to object to an error at trial can obtain relief on appeal only if he shows plain error, which under Federal Rule of Criminal Procedure 52(b) includes showing that the error affected “substantial rights.” At issue here was how a defendant could make that showing when he failed to object to an error in calculating the U.S. Sentencing Guidelines range, and the sentence imposed on him fell within the correct Guidelines range. By a 6-2 vote, the Court held that the defendant does not have to “make some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings.” Given the “Guidelines’ central role in sentencing,” “[w]hen a defendant is sentenced under an incorrect Guidelines range — whether or not the defendant’s ultimate sentence falls within the correct

range — the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.”

SIXTH AMENDMENT—DOUBLE JEOPARDY

Puerto Rico and the United States government are not separate sovereigns and may not, therefore, prosecute the same person for the same crime.

Puerto Rico v. Sanchez Valle, 15-108 (Kagan). By a 6-2 vote, the Court held that the Commonwealth of Puerto Rico and the Federal Government are not separate sovereigns for purposes of the Double Jeopardy Clause’s dual-sovereignty doctrine. Under that doctrine, “two prosecutions . . . are not for the same offense if brought by different sovereigns — even when those actions target the identical criminal conduct through equivalent criminal laws.” The Court explained that its test for “whether two governments are distinct for double jeopardy purposes” is unique to this context and “overtly disregards common indicia of sovereignty.” Rather, the “test hinges on a single criterion: the ‘ultimate source’ of the powers undergirding the respective prosecutions.” Relying on its precedents holding that United States territories (“including an earlier incarnation of Puerto Rico itself”) derive their powers by authority of the Federal Government, the Court concluded that Puerto Rico is not a separate sovereign under that test. The Court recognized that since the early 1950s Puerto Rico has had “wide-ranging self-rule, exercised under its own Constitution,” such that “Puerto Rico today can avail itself of a wide variety of futures.” “But,” it stated, “for purposes of the Double Jeopardy Clause, the future is not what matters — and there is no getting away from the past.”

SIXTH AMENDMENT—JURY TRIAL RIGHT

Florida’s death penalty unconstitutional where the jury only recommends a sentence and the judge alone must find an aggravating factor necessary for imposing death.

Hurst v. Florida, 136 S.Ct. 616 (2015) (Sotomayor). By an 8-1 vote, the Court held that Florida’s death sentencing scheme violates the Sixth Amendment in light of *Ring v. Arizona*, 536 U.S. 584 (2002). In Florida, if the jury finds by a majority vote that the statutory aggravating factors outweigh the mitigating factors, it recommends to the judge a sentence of death. The judge, giving that recommendation “great weight,” then independently finds and weighs aggravating and mitigating circumstances and enters a sentence of life or death. In *Ring*, however, the Court held that juries (not judges) must find an aggravating factor necessary for imposition of the death penalty. The Court here concluded that the Florida system violates *Ring* because, even though the jury’s death recommendation means a majority of the jury found the existence of an aggravating factor, “the Florida sentencing statute does not make a defendant eligible for death until . . . [t]he trial court *alone* . . . find[s] ‘the facts . . . [t]hat sufficient aggravating circumstances exist.’” (Note: Utah’s current system is not implicated by this decision).

Georgia prosecutors violated *Batson* thirty years ago when they struck two black potential jurors from the venire.

Foster v. Chatma, 14-8349 (Roberts). By a 6-1-1 vote, the Court reversed Georgia state courts’ rejection of a defendant’s *Batson* claim. The Court ruled — for a variety of reasons, including

information in the prosecutions' notes from jury selection, obtained almost 30 years after the trial — that the prosecution struck two black prospective jurors based on their race. The Court found that the prosecution's reasons for striking those two jurors applied equally to non-black panelists who were permitted to serve on the jury; pointed to the prosecutor's "shifting explanations" and "misrepresentations of the record"; and noted "the persistent focus on race in the prosecution's file."

Under AEDPA's deferential review, Sixth Circuit erred in granting habeas relief based on an alleged *Witherspoon* violation.

White v. Wheeler, 136 S.Ct. 456 (2015). Through a *per curiam* opinion, the Court unanimously reversed a Sixth Circuit decision that had granted relief to a habeas petition on the ground that his rights under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985), had been violated. Those decisions establish that states may remove a juror based on her opposition to the death penalty only where such opposition would substantially impair the performance of her duties. Here, the trial court sustained the prosecution's strike of a juror on the ground that she could not impose the death penalty. The Kentucky Supreme Court affirmed, but the Sixth Circuit held that the state court unreasonable applied *Witherspoon* and *Witt*. Reversing, the U.S. Supreme Court held that the Sixth Circuit failed properly to apply AEDPA deference; "[a] fairminded jurist could readily conclude that," based on the juror's statements during voir dire, the trial judge "was fair in the exercise of her 'broad discretion' in determining whether the juror was qualified to serve in a capital case."

SIXTH AMENDMENT—RIGHT TO COUNSEL

The pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.

Luis v. United States, 14-419 (Bryer). The government has long enjoyed the authority to seize assets of a person charged with a crime upon a showing that those assets were obtained as a result of the crime or are traceable to the crime. More recently, the government has enjoyed the power to freeze assets that are unrelated to crime but are of equivalent value to assets obtained by or traceable to criminal activity. *Luis v. United States*, brings the second practice to an end. By a 5-3 vote with Justice Thomas concurring in the judgment, the Court held that the Sixth Amendment's right to counsel prevents the government from freezing innocent assets before a conviction. In so holding, the Court engaged in a balancing test in which it weighed the accused's interest in his own innocent property with the government equitable interest in preserving assets for forfeiture after conviction. The prevailing interest in that balancing is the constitutional right to counsel. And because the root of that right is the right to hire counsel of choice, those accused of crimes must be allowed to use their untainted assets to hire an attorney of their choosing.

Thomas concurred in the judgment and disagreed that any balancing was necessary. At the time the Sixth Amendment was enacted, the law recognized that the government could not seize untainted assets. The text and history of the Sixth Amendment thus prevent pretrial freezing of innocent assets.

Counsel not ineffective in 1995 trial for not finding a report that State’s bullet expert had coauthored in 1991 that “presaged the flaws” in Comparative Bullet Lead Analysis.

Maryland v. Kulbicki, 136 S.Ct. 2 (2015). Through a per curiam opinion, the Court unanimously reversed a Maryland Court of Appeals decision which had held that respondent Kulbicki’s defense counsel was unconstitutionally ineffective at his trial. At the 1995 trial, the state called an expert on Comparative Bullet Lead Analysis (CBLA), Agent Peele, who testified that “the composition of elements in the molten lead of a bullet fragment found in Kulbicki’s trunk matched the composition of lead in a bullet fragment removed from the victim’s brain,” which suggested they were “two pieces of the same bullet.” The Maryland Court of Appeals, in 2006, faulted defense counsel for not finding a report Agent Peele had coauthored in 1991 that “presaged the flaws in CBLA evidence.” Reversing, the U.S. Supreme Court noted that the validity of CBLA evidence was “widely accepted” at the time of the 1995 trial; courts regularly admitted CBLA evidence until 2003; “even the 1991 report itself did not question the validity of CBLA”; and “there is no reason to believe that a diligent search would even have discovered the supposedly critical report.”

SIXTH AMENDMENT—SPEEDY TRIAL

Speedy trial right does not apply between guilty plea or verdict sentence.

Betterman v. Montana, 14-1457(Ginsberg). The Court unanimously held that the Sixth Amendment’s Speedy Trial Clause “does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.” A long delay between conviction and sentencing, therefore, does not state a Speedy Trial Clause claim. The Court explained that the Clause “implements” the presumption of innocence by “prevent[ing] undue and oppressive incarceration prior to trial, . . . minimiz[ing] anxiety and concern accompanying public accusation[,] and . . . limit[ing] the possibilities that long delay will impair the ability of an accused to defend himself.” Those interests “lose[] force upon conviction.” The Court noted that a defendant whose sentencing is unduly delayed may find recourse under the Due Process Clauses.

SUFFICIENCY OF THE EVIDENCE

Under federal law, when a jury instruction adds an element to the charged crime, a sufficiency challenge is assessed against the statutory elements of the crime, not the additional one; and a federal defendant who doesn’t raise a statute of limitations defense at trial is out of luck on appeal.

Musacchio v. United States, 136 S.Ct. 709 (2016). The Court unanimously resolved, against the defendant, two issues of federal criminal law that had divided the lower courts. First, it held “that, when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency [of the evidence] challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction.” Second, the Court held that a defendant who fails to raise a

statute-of-limitations defense at trial may not raise it on appeal because “an unraised limitations defense . . . cannot be plain error” reviewable under Federal Rule of Criminal Procedure 52(b).