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SUPREME COURT UPDATE[1]

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1 Thanks to Dan Schweitzer, Supreme Court Counsel, National Association of Attorneys General, for his synopses of U.S. Supreme Court decisions.

CIVIL RIGHTS

Failure of plaintiff to specifically invoke §1983 in the complaint does not warrant dismissal of complaint against city.

Johnson v. City of Shelby, MS, 13-1318. Through a unanimous *per curiam* opinion, the Court summarily reversed the Fifth Circuit for dismissing a damages action against a city for failing specifically to invoke §1983 in the complaint. The Court explained that "[f]ederal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,'" and therefore "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* "concern the *factual* allegations a complaint must contain," which were sufficiently set out here.

Prison policy that prohibited a Muslim inmate from growing a ½-inch beard in accordance with his religious belief violated the Religious Land Use and Institutionalized Persons Act.

Holt v. Hobbs, 13-6827. The Court unanimously held that an Arkansas Department of Corrections policy prohibiting prisoners from growing beards violates the Religious Land Use and Institutionalized Persons Act as applied to a Muslim inmate who wishes to grow a ½-inch beard in accordance with his religious beliefs. The Court found that the state failed to meet its burden under the statute of showing that its policy is the least restrictive means of furthering its asserted interests in preventing prisoners from hiding contraband and preventing prisoners from disguising their identities.

Pre-trial detainee asserting excessive force claim need only show that force was objectively unreasonable, not that officers were subjectively aware that force was unreasonable.

Kingsley v. Hendrickson, 14-6368. By a 5-3-1 vote, the Court held that a pretrial detainee seeking to prove an excessive force claim need not show that the jail officers "were *subjectively* aware that their use of force was unreasonable"; he need only show "that the officers' use of that force was *objectively* unreasonable." The Court concluded that its precedents establish that "'the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment'" — which he can show through "objective evidence." The Court declined to apply the Eighth Amendment standard applicable to convicted prisoners because "pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"

No clearly established law requires knock and talk to begin at the front door.

Carroll v. Carman, 14-212. Through a unanimous *per curiam* opinion, the Court summarily reversed the Third Circuit and held that a police officer was entitled to qualified immunity from a §1983 lawsuit alleging he violated the Fourth Amendment. The Third Circuit had held that the officer violated the Fourth Amendment by conducting a "knock and talk" interview at the back door of a residence. In the Third Circuit's view, knock and talk encounters "must begin at the

front door." Reversing, the Supreme Court held that no precedent clearly established that rule, thus entitling the officer to qualified immunity. The Court found that the one precedent relied on by the Third Circuit, if "it says anything about this case, . . . arguably supports [the officer's] view."

Police officers entitled to qualified immunity after shooting mentally ill person.

City and County of San Francisco, Cal. v. Sheehan, 13-1412. The Court held that two police officers are entitled to qualified immunity from a §1983 action filed by a mentally ill person who claimed that the officers violated the Fourth Amendment when they entered her room (for a second time) and shot her after she threatened them with a knife. The Ninth Circuit had held that the officers violated the Fourth Amendment by reopening respondent's door rather than attempting to accommodate her disability. Reversing, the Court held that no precedent from the Ninth Circuit or it clearly established that there was not "an objective need for immediate entry" here, given the possibility that respondent—who had threatened to kill her social worker—would escape or gather more weapons. (The Court dismissed as improvidently granted the first question presented, which had asked whether Title II of the Americans with Disabilities Act applies to a police officer's attempt to arrest a person with a mental disability.

EIGHTH AMENDMENT

State court violated clearly established law by refusing to allow death-penalty defendant with IQ of 75 to present claim of intellectual disability in court.

Brumfield v. Cain, 13-1433. By a 5-4 vote, the Court held that a state court unreasonably determined the facts within the meaning of 28 U.S.C. §2254(d)(2) when it rejected petitioner's request for a hearing to assess whether he is intellectually disabled and therefore ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court therefore held that petitioner was "entitled to have his *Atkins* claim considered on the merits in federal court." In particular, the Court ruled that the state court erred in holding that an IQ score of 75 showed that petitioner did not have sub-average intelligence; in finding that the trial record failed to raise questions about his "adaptive skills"; and in relying on a doctor's description of petitioner as having "an antisocial personality."

Three-drug cocktail used by Oklahoma to administer the death penalty does not violate the Eighth Amendment.

Glossip v. Gross, 14-7955. By a 5-4 vote, the Court held that Oklahoma's lethal-injection protocol does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. After Oklahoma could no longer obtain sodium thiopental, it began using midazolam as the first drug in its three-drug protocol. Midazolam induces a state of unconsciousness, and is followed by a paralytic agent and then potassium chloride to induce cardiac arrest. Several death row inmates filed suit alleging that midazolam "cannot maintain a deep, comalike unconsciousness" needed to ensure the inmate does not feel pain when the second and third drugs are administered. The Court rejected their claim on the grounds that (1) they "failed to identify a known and available alternative method of execution that entails a lesser risk of pain," and (2) "the District Court did not commit clear error when it found that the

prisoners failed to establish that Oklahoma's use of midazolam in its execution protocol entails a substantial risk of severe pain."

EVIDENCE

Rule 606(b) prevents a party from using juror's statements during deliberations to prove that juror was dishonest during voir dire.

Warger v. Shauers, 13-517. Federal Rule of Evidence 606(b) provides that "[d]uring an inquiry into the validity of a verdict," evidence "about any statement made or incident that occurred during the jury's deliberations" is inadmissible. The Court unanimously held that "Rule 606(b) precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during *voire dire*."

FIRST AMENDMENT

Florida rule prohibiting judges from personally soliciting campaign funds does not violate First Amendment.

Williams-Yulee v. Florida Bar, 13-1499. By a 5-4 vote, the Court held that a Florida rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds does not violate the First Amendment. The Court found that this is "one of the rare cases in which a speech restriction withstands strict scrutiny." It does so, held the Court, because "[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity." The Court rejected the plaintiff's claim that the Florida rule is underinclusive because it allows a judge's campaign committee to solicit funds and allows judicial candidates to write thank you notes to donors. The Court explained that the "solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary" and that the state's "accommodations reflect Florida's efforts to respect First Amendment interests of candidates and their contributors."

Specialty license plates are government speech and government's decision whether to approve a plate may be content- and viewpoint-based.

Walker v. Texas Division, Sons of Confederate Veterans, Inc., 14-144. By a 5-4 vote, the Court held that Texas did not violate the First Amendment when its Department of Motor Vehicles Board denied a proposed specialty-plate design that featured the Sons of Confederate Veterans' logo. The Court concluded that Texas specialty license plates constitute government speech and therefore may be content- and viewpoint-based. In determining that the plate design is government speech, the Court (applying the factors it set out in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)) noted that license plates have historically "communicated messages from the States"; license plate designs "'are often closely identified in the public mind with the [State],'" for they "are, essentially, government IDs"; and Texas has final approval authority over the designs.

Sign regulations that require religious signs to be smaller and displayed for a shorter period than political or ideological signs violates First Amendmet.

Reed v. Town of Gilbert, AZ, 13-502. The Town of Gilbert has a Sign Code that limits the size of temporary signs displayed outdoors and how long the signs may be displayed. Under the ordinance, a sign displayed by petitioners – a church and its pastor – promoting church services must be smaller (6 square feet) and displayed for a shorter period of time (12 hours before, and one hour after, the event) than signs posted for political or ideological purposes or by homeowners' associations. The Court unanimously held that the Sign Code is a content-based regulation of speech that violates the First Amendment. A six-Justice majority held that the Code, because it is content-based, is subject to strict scrutiny and that it cannot survive that scrutiny because it is both underinclusive and overinclusive.

FOURTEENTH AMENDMENT—DUE PROCESS

No clearly established law prevents the prosecution from changing theories of the case mid-trial.

Lopez v. Smith, 13-946. Through a *per curiam* opinion, the Court unanimously reversed a Ninth Circuit decision that had granted habeas relief to respondent on the ground that his Sixth Amendment and due process right to notice had been violated. The Ninth Circuit faulted the prosecution for trying the case on the theory that respondent himself delivered the fatal blow to the victim, but then requesting an aiding-and-abetting instruction. In reversing, the Court noted that (as even the Ninth Circuit acknowledged) the information charging respondent with first-degree murder put him on notice that he could be convicted as either a principal or an aider-and-abettor. And none of the Court's decisions "clearly establish that a defendant, once adequately apprised of such a possibility, can nevertheless be deprived of adequate notice by a prosecutorial decision to focus on another theory of liability at trial." Habeas relief was therefore barred by 28 U.S.C. §2254(d)(1).

No clearly established law holds that limiting defense counsel's closing argument amounts to a denial of counsel.

Glebe v. Frost, 14-95. Through a *per curiam* opinion, the Court unanimously reversed a Ninth Circuit decision that had granted habeas relief to respondent. The Washington Supreme Court held that the trial court violated the Due Process and Assistance of Counsel Clauses by preventing respondent Frost's counsel from arguing in the alternative at closing that (1) the state failed to prove Frost was an accomplice and (2) Frost acted under duress. (Counsel chose to argue only the latter.) The Washington Supreme Court affirmed his conviction, however, because it found the error harmless. (Frost confessed to participating in the crimes several times on tape and admitted guilt on the witness stand.) The Ninth Circuit granted habeas relief, holding that the Washington Supreme Court's decision contradicted *Herring v. New York*, 422 U.S. 853 (1975), which held that the complete denial of summation violates the Assistance of Counsel Clause and (in the Ninth Circuit's view) further held that this denial was structural error not subject to harmless-error review. Reversing, the Court held that "even assuming that *Herring* established that *complete denial* of summation amounts to structural error, it did not clearly establish that the *restriction* of summation also amounts to structural error. A court

could reasonably conclude, after all, that prohibiting all argument differs from prohibiting argument in the alternative." AEDPA therefore barred habeas relief on that ground.

No clearly established law holds that defense counsel's absence from courtroom for ten minutes during testimony of co-defendant amounts to ineffective assistance of counsel

Woods v. Donald, 14-618. Through a *per curiam* opinion, the Court unanimously reversed a Sixth Circuit decision that had granted habeas relief to respondent on the ground that his attorney provided per se ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). Counsel was absent for about 10 minutes while a codefendant was testifying about a matter that was irrelevant under respondent's theory of the case. The Court stated that none of its precedents clearly established that *Cronic* applies in that context — and therefore held that habeas relief under that theory is barred by 28 U.S.C. §2254(d)(1).

States must issue marriage licenses to same-sex couples.

Obergefell v. Hodges, 14-556. By a 5-4 vote, the Court held (in an opinion by Justice Kennedy) that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex. The Court relied on both the Due Process Clause and the Equal Protection Clause. As to the former, the Court stated that the "fundamental liberties protected by th[at] Clause . . . extend to certain personal choices central to individual dignity and autonomy," including "the right to marry." The Court concluded that the four core "reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." Specifically, "all persons, whatever their sexual orientation," are entitled to exercise "individual autonomy" by entering the "enduring bond" of marriage; marriage "supports a two-person union unlike any other in its importance to committed individuals," including homosexuals; marriage plays a critical role in providing "loving, supportive families" for children, who would suffer a stigma if marriage were denied to their same-sex parents; and marriage plays a bedrock role in our social order, as reflected by the "expanding list of governmental rights, benefits, and responsibilities" tied to marriage. But "by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage," which "demean gays and lesbians."

The Court then ruled that "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." Stated the Court, "it must be further acknowledged that [the challenged laws] abridge central precepts of equality" by denying same-sex couples "all the benefits afforded to opposite-sex couples," which thereby "serves to disrespect and subordinate them." In response to the contention that it should wait to let the democratic process play out, the Court stated that "[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right." In the Court's view, just as homosexual men and women were harmed between the time the Court issued *Bowers v. Hardwick*, 478 U.S. 186 (1986), and overruled it in *Lawrence v. Texas*, 539 U.S. 558 (2003), so too would they be harmed by delaying protecting their right to marriage. The Court added, in response to the respondent states' arguments, that "it is unrealistic to conclude

that an opposite-sex couple would choose not to marry simply because same-sex couples may do so," and that the states "have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe."

FOURTH AMENDMENT

Reasonable mistake of law can still support a reasonable suspicion to justify a traffic stop.

Heien v. North Carolina, 13-604. By an 8-1 vote, the Court held that a police officer's reasonable "mistake of law can give rise to the reasonable suspicion necessary to" justify a traffic stop. In this case, an officer stopped petitioner's car for having one brake light that did not work and then found drugs in the car — but the North Carolina courts then interpreted state law as requiring only one working brake light (meaning petitioner had not broken the law). The Court explained that reasonableness is the touchstone of the Fourth Amendment and that, just as searches and seizures may be based on reasonable mistakes of fact, so too can they be based on reasonable mistakes of law.

Attaching a GPS tracking device to a person is a search under the Fourth Amendment.

Grady v. North Carolina, 14-593. A state trial court ordered that petitioner, a convicted sex offender, be subjected to a satellite-based monitoring (SBM) program for the rest of his life. The North Carolina Supreme Court rejected his Fourth Amendment challenge to the program on the ground that the state's program is civil in nature. Through a *per curiam* opinion, the Court unanimously reversed based on its decision in *United States v. Jones*, 565 U.S. ___ (2012), which held that the police had engaged in a "search" with the meaning of the Fourth Amendment when they installed and monitored a GPS tracking device on a suspect's car. The Court found no basis to distinguish SBM monitoring. The Court expressly left open for remand the question whether the SBM monitoring is an *unreasonable* search that violates the Fourth Amendment.

Detaining a motorist for seven minutes to wait for a dog without reasonable suspicion of criminal activity violates the Fourth Amendment.

Rodriguez v. United States, 13-9972. The Court held by a 6-3 vote that "a dog sniff conducted after completion of a traffic stop" violates the Fourth Amendment. More generally, the Court "h[e]ld that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." The Court therefore reversed an Eighth Circuit decision which had held that a seven- or eight-minute extension of a traffic stop to allow a drug-detection dog to walk around the stopped car was a "*de minimis* intrusion on [petitioner's] personal liberty."

City ordinance requiring hotels to allow police to inspect their guest registries violates the Fourth Amendment.

City of Los Angeles, CA v. Patel, 13-1175. By a 5-4 vote, the Court affirmed a Ninth Circuit decision holding that a Los Angeles ordinance that requires hotels to make their guest registries subject to police inspection is facially invalid under the Fourth Amendment. The Court first held

that facial challenges to laws are permitted under the Fourth Amendment. The Court then upheld this facial challenge because "in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker" — a procedure not afforded by the Los Angeles ordinance. The Court declined to apply the exception to that rule for "closely regulated industries," holding that the exception is a narrow and inapplicable here.

IIMIGRATION

Kansas controlled substance conviction for concealing unspecified pills in his sock did not trigger removal of non-citizen.

Mellouli v. Lynch, 13-1034. Under 8 U.S.C. §1227(a)(2)(B)(i), a non-citizen may be removed if he has been convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21) . . . ." By a 7-2 vote, the Court held that petitioner's conviction under Kansas law for concealing unspecified pills in his sock did not trigger removal under that provision. The Court ruled that the categorical approach applies, under which "[t]he state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law." The Court found that petitioner's conviction does not trigger removal under that approach because, although the Kansas statute related to a controlled substance, "it was immaterial under that law whether the substance was defined in 21 U.S.C. §802. Nor did the State charge, or seek to prove, that [petitioner] possessed a substance on the §802 schedules."

SIXTH AMENDMENT—CONFRONTATION

Statement of a three-year-old to his teacher about who caused bruises on his face was not testimonial.

Ohio v. Clark, 13-1352. Without dissent, the Court held that a three-year-old child's statement to his teacher stating who caused the bruises on his face was not testimonial, which means the introduction of that statement did not violate the Confrontation Clause. The Court declined to adopt a categorical rule that statements made to persons who are not law enforcement officers are *never* testimonial; but it agreed that "such statements are less likely to be testimonial." The Court went on to conclude that the statement here was not testimonial because its primary purpose was not to create evidence for trial, which is "a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." It failed the "primary purpose" test, held the Court, because the teachers were concerned about possible child abuse; the exchange "was informal and spontaneous"; "it is extremely unlikely that a 3-year-old child . . . would intend his statements to be a substitute for trial testimony"; and history does not support exclusion of the statements.

CERT GRANTS TO WATCH

Foster v. Humphrey, 14-8349. The Court will review Georgia state courts' rejection of a defendant's *Batson* claim where the prosecution's notes from jury selection (disclosed during

state habeas proceedings) showed that "the prosecution (1) marked the name of each black prospective juror in green highlighter on four different copies of the jury list; (2) circled the word 'BLACK' next to the 'Race' question on the juror questionnaires of five black prospective jurors; (3) identified three black prospective jurors as 'B#1,' 'B#2,' and 'B#3'; [and] (4) ranked the black prospective jurors against each other in case 'it comes down to having to pick one of the black jurors.'" The state habeas court concluded that the state offered sufficient race-neutral reasons for striking each juror to rebut the defendant's claim; and the Georgia Supreme Court denied the defendant's application for a certificate of probable cause to appeal.

Musacchio v. United States, 14-1095. This federal criminal case raises two questions. The first arises when the government fails to object to jury instructions that erroneously included additional or more stringent elements for a crime than the statute and the indictment. The circuits are divided as to whether, under the law-of-the-case doctrine, the government must prove those additional or heightened elements. The second issue arises when the defendant fails to raise a statute of limitations defense at trial but wishes to raise it on appeal. The circuits are divided as to whether that defense may be reviewed for plain error or otherwise, or is waived and unreviewable.

Torres v. Lynch, 14-1096. 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." *Id*. §1101(a)(43). The question presented is "[w]hether a state offense constitutes an aggravated felony under 8 U.S.C. §1101(a)(43) on the ground that the state offense is 'described in' a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks."