9-2014

Section 6: Criminal

Institute of Bill of Rights Law, William & Mary Law School

VI. Criminal

In This Section:

Heien v. North Carolina

13-604

Ruling Below: State of North Carolina v. Nicholas Brad Heien, 749 S.E.2d 278 (Mem) (N.C. 2013), *cert granted,* 134 S.Ct. 1872 (2014).

Defendant was convicted, on his guilty plea, in the Superior Court, Surry County, of attempted trafficking in cocaine by transporting and by possession. He appealed. The Court of Appeals reversed. State was granted petition for discretionary review. The Supreme Court affirmed.

Question Presented: Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.

STATE of North Carolina
v.
Nicholas Brady HEIEN.

Court of Appeals of North Carolina

Decided on April 2, 2013

[Excerpt; some footnotes and citations omitted.]

McCULLOUGH, Judge.

Nicholas Brady Heien ("defendant") pled guilty to attempted trafficking in cocaine by transportation and possession in Surry County Superior Court in May 2010, preserving his right to seek review of the denial of his motion to suppress. The trial judge found defendant's prior record level to be Level I and sentenced defendant to ten to twelve months on each count with the sentence on the second count to be served consecutively to the first. Defendant appealed to this Court ("*Heien I*"). That appeal resulted in our Court reversing defendant's conviction. In that case, this Court held that the traffic stop which led to defendant's arrest was not based on reasonable suspicion. The State successfully sought discretionary review of our decision. Our Supreme Court reversed and remanded to this Court so that the remaining issues raised by defendant could be addressed. This appeal addresses defendant's other challenges to the search which resulted in his conviction.

The events which led to defendant's arrest and conviction originated with a traffic stop initiated by Sergeant M.M. Darisse, an officer with the Surry County Sheriff's Department. The facts regarding this stop are more fully set forth in our initial opinion concerning defendant's case (*Heien I*) and our Supreme Court's opinion which reversed *Heien I.* The facts will not be repeated in this opinion except to the extent necessary to support this Court's rationale.

In this Court's initial decision concerning defendant's appeal, we reversed defendant's conviction on the basis of the officer's stop, which the lower court found to be valid. There the trial court stated, "[Sergeant] Darisse had a reasonable and articulable suspicion that the ... vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light." In *Heien I,* this Court found, after an extensive statutory analysis, that the statute dealing with brake lights as opposed to taillights, only required a vehicle to have one functioning brake light, and thus the officer's belief that defendant's vehicle must have two functioning brake lights was erroneous. That statute reads:

> (g) No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with a *stop lamp* on the rear of the vehicle. The *stop lamp* shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The *stop lamp* may be incorporated into a unit with one or more other rear lamps.

The State appealed and our Supreme Court ruled that the officer's traffic stop was objectively reasonable. At the Supreme Court, the State accepted this Court's statutory interpretation in *Heien I.* Our Supreme Court stated:

> After considering the totality of the circumstances, we conclude that there was reasonable, articulable suspicion to conduct the traffic stop of the Escort in this case. We are not persuaded that, because Sergeant Darisse was mistaken about the requirements of our motor vehicle laws, the traffic stop was necessarily unconstitutional. After all, reasonable suspicion is a "commonsense, nontechnical conception[ ] ... on which reasonable and prudent men, not legal technicians, act," and the Court of Appeals analyzed our General Statutes at length before reaching its conclusion that the officer's interpretation of the relevant motor vehicle laws was erroneous. After considering the totality of the circumstances, we hold that Sergeant Darisse's mistake of law was objectively reasonable and that he had reasonable suspicion to stop the vehicle in which defendant was a passenger. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for additional proceedings.

The case has now been remanded to this Court to address defendant's remaining challenge to the events leading up to his arrest. In defendant's Motion To Suppress, defendant argues:

> 10. No traffic charges were filed, and only a warning ticket was written. The continuation of the investigation after the motor vehicle stopped, including the questioning of the Defendant, was not based on a reasonable articulable suspicion that criminal activity had been committed or was being committed.
>
> 11. The time that lapsed *after* Officer Darisse learned from the Department of Motor Vehicles computer that as to Mr. [V]asquez, "... everything was valid on the license and registration ..." and wrote the warning ticket, constituted an

unreasonably prolonged traffic stop and Defendant was unlawfully detained and his car unlawfully searched.

12. Under the totality of the circumstances the officers had no just cause to detain the Defendant, question him, or search his vehicle without a warrant.

13. The questioning and other investigation of the Defendant, the prolonged stop, and the search and seizure of Defendant and his property were in violation of the Fourth Amendment of the *United States Constitution* as the same is made applicable to the states, and are in violation of Article I, Sections 19 and 20 of the *Constitution of the State of North Carolina.*

I. SCOPE OF THE VEHICLE SEARCH

14. The alleged controlled substance was found inside a sandwich bag which was inside a paper towel which was inside a white grocery bag which was inside the side compartment of a duffle bag which was inside the vehicle. Neither Officer Darisse nor Officer Ward advised the Defendant that they were going to search his car for narcotics before he gave verbal consent. The Defendant was entitled to know the object of their search prior to giving consent. Had he known, he would have had the opportunity to place explicit limitations on the search. The failure of the officers to explain the object of the search violates Defendant's right to be free from unreasonable searches under the Fourth Amendment to the *[United] States Constitution* and Articles 19 and 20 of the *Constitution of North Carolina,* and evidence of items found inside the duffle bag and elsewhere inside the vehicle should be suppressed.

STANDARD OF REVIEW

In reviewing a trial court's order concerning a motion to suppress, this Court utilizes the following test:

> Generally, an appellate court's review of a trial court's order on a motion to suppress "is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." Where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.

I. Length of Stop

Defendant argues that the traffic stop was unduly prolonged in his motion. Our analysis begins with the pertinent trial court's findings of fact:

> 8) Darisse upon instigating his blue lights, observed a head "pop up" out of the back seat of the subject vehicle and then disappear.
>
> 9) Darisse upon approaching the vehicle observed the defendant lying in the back seat of the vehicle.
>
> 10) Darisse observed the defendant lying in the back seat underneath a blanket. Darisse informed the driver of the vehicle that he was being stopped for a non-functioning brake light and asked the driver to step out to the rear of the vehicle. The driver complied. Darisse engaged in a brief conversation with the driver asking the driver if

anything was wrong with the person in the back seat, from where the driver began travelling and his ultimate destination. The Driver informed Darisse that the defendant was tired and the pair were going to West Virginia. The driver was informed that the officer intended to issue him a warning citation so long as long documentation provided to Darisse was valid. Darisse took the driver's license and registration then returned to his vehicle. Darisse formed the opinion that the driver appeared nervous to him as he made poor eye contact and he was continuously placing his hair in a ponytail and then removing his hair from a ponytail. Defendant continued to lie in the back of the vehicle and did so through the entire stop until he was later approached by Darisse.

11) Officer Ward arrived at the scene of the stop. Ward was informed by Darisse that a subject was lying in the back of the vehicle underneath a blanket. Ward went to the vehicle and asked defendant for his driver's license in order to determine his identity and check for outstanding warrants. The defendant complied and gave his driver's license to Ward without getting up from his position.

12) The driver continued to stand between Darisse's patrol car and the subject car as Ward asked for the defendant's driver's license.

13) The interaction between Ward and the defendant occurred in approximately one to two minutes.

14) The stop of the subject vehicle was initiated at approximately 7:55:40 a.m.

15) Darisse re-approached the driver and returned his driver's license and any other identifying documents he had received and gave the driver a warning citation. Darisse then asked the driver if he would be willing to answer some questions. The driver indicated by nodding his head that he had no objection to answering questions and stated he would answer questions. Darisse's tone and manner with the driver of the vehicle was polite, non-confrontational and conversational.

16) The driver denied any type of contraband in the car.

17) The driver denied guns or large sums of cash in the car.

18) This conversation occurred within a period of a minute to two minutes.

19) Darisse then asked for permission to search the vehicle. The driver did not object to searching the vehicle, but informed Darisse that the vehicle was the defendant's, and Darisse should make the request of the defendant. Darisse approached the defendant who was still lying in the back of the vehicle and asked for permission to search the vehicle. The defendant informed Darisse that he had no objection to the vehicle being searched, although the officers might have a problem because the inside of the vehicle was messy.

20) The tone and manner of Darisse when asking for permission to search the vehicle with the defendant was conversational, non-confrontational and polite.

The Fourth Amendment to the United States Constitution as well as Article I, Section 20 of the North Carolina Constitution guarantee the right of people to be secure in their person and property, and free from

unreasonable searches. A traffic stop is permitted if an officer has a reasonable articulable suspicion that there is criminal activity afoot or when a motorist commits a violation in his or her presence. In this case our Supreme Court has established that the traffic stop was permissible. The temporary detention of a motorist during a valid traffic stop is recognized as a seizure, but a permissible one, as it is considered reasonable. While it is recognized that the motorist is seized for constitutional purposes, roadside questioning during the encounter does not trigger the need for *Miranda* warnings. Once the purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay. Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended. The fact that the documents have been returned does not mean that the officer loses all right to communicate with the motorist. Thus, non-coercive conversation is still permitted. An officer may ask questions or request consent to search so long as the individual freely and voluntarily consents to answer questions or to allow his or her property to be searched. So long as an individual is aware that he is free to leave or free to refuse to answer questions, there is no bright-line rule requiring police to refrain from requesting consent to speak to an individual or request consent to search his or her person or property.

Here, the return of documentation would render the encounter between defendant and the officers consensual so long as a reasonable person would believe he was free to leave or refuse the request. The trial court found the encounter became consensual. The testimony and exhibits at the suppression hearing tend to support the trial court's findings of fact and conclusions of law; thus, we are required to uphold its determination that the defendant freely consented to the search as a reasonable person in his position would not feel coerced under similar circumstances.

Here the encounter was not unduly prolonged. The trial court found that the traffic stop was initiated at 7:55:40 a.m. and that defendant gave his consent to search at 8:08 a.m. During that time the two officers, Ward and Darisse, had discussed the malfunctioning brake light with the driver, had discovered that the two claimed to be going to different destinations (West Virginia or Kentucky), and had observed that defendant engaged in rather bizarre behavior by lying down on the backseat under a blanket, even when approached by Officer Ward who requested his driver's license. After each person's name was checked for warrants, their licenses were returned. Defendant had his license back before the request to search was made. The trial court found that the officer's tone and manner were conversational and non-confrontational. Both defendant and the driver were unrestrained during this encounter, no guns were drawn and neither individual was searched before the request to search the vehicle was made.

Based on this record we believe the trial court was entitled to conclude that defendant was aware that the purpose of the initial stop

had been concluded and that further conversation was consensual. The dissent maintains that there is insufficient evidence in the record to sustain this conclusion, but there is no requirement that a defendant be explicitly informed of his right to refuse a request to search.

The dissent seems to argue that this defendant was merely a passenger and, as such, would not feel free to leave or deny consent since the record does not establish that defendant knew the driver Vasquez had received his license and a warning ticket had been issued. This argument ignores the fact that defendant was not a mere passenger, but was the owner. It is uncontroverted that defendant's driver's license had been returned to him prior to the consent to search request. We believe that the trial court's conclusion that defendant consented to this search is reasonable and should be upheld, as we further believe a reasonable motorist or vehicle owner would understand that with the return of his license or other documents, the purpose of the initial stop had been accomplished and he was free to leave, was free to refuse to discuss matters further, and was free to refuse to allow a search.

II. Scope of Search

In his motion to suppress, defendant also asserts that the officer should have informed defendant that he was searching for narcotics so that defendant could have issued some limiting instructions. We find this argument unpersuasive. Just as there is no requirement for an officer to explicitly inform defendant of his right to refuse a search, there is no requirement that an officer inform defendant of what he is searching for. We believe that any reasonable person would understand the officer was searching for weapons, cash or contraband. The driver, Vasquez, was asked if any of those items were in the car. Additionally, defendant informed Darisse that it might be difficult to search the vehicle as it was messy. We also believe both the driver and defendant were aware that the search would be somewhat detailed as the driver was asked to identify any objects that did not belong to him. Sergeant Darisse evidently began to search the vehicle and immediately found a bag of marijuana under the front seat and marijuana seeds in the ashtray. At this point, the officers had probable cause to search the entire vehicle as well as probable cause to arrest both the driver and defendant. The fact that defendant may have wished to limit the search became irrelevant.

CONCLUSION

In the case at bar, defendant's automobile which was being driven by another individual, was properly stopped by officers of the Surry County Sheriff's Department while on routine traffic patrol. After the officer had issued a warning ticket for a nonfunctioning brake light and both persons had their driver's licenses returned, a request to search the vehicle was made. We conclude that on the record before the trial court there was ample evidence that a reasonable person would understand he was free to leave or refuse to consent to the request. The trial court concluded defendant consented to the search and the trial court's conclusion is supported by the evidence presented at the suppression hearing. Shortly

after the search was initiated, probable cause to conduct a more detailed search and to arrest the occupants was obtained. We thus will uphold the trial court's conclusion that this was a consensual encounter and affirm its denial of defendant's Motion To Suppress.

Affirmed.

Judge ERVIN concurs.

Judge McGEE dissents with a separate opinion.

McGEE, Judge.

I respectfully dissent from the majority's conclusion that Defendant "freely consented" to the search of his vehicle, since that conclusion is contrary to binding precedent of our Court in *State v. Jackson*. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."

A crucial fact, found by the trial court, is that Defendant remained lying on the back seat inside his vehicle while officers questioned the driver, who stood outside Defendant's vehicle between an officer's patrol car and Defendant's vehicle. A crucial fact, not found by the trial court, is that Defendant knew the traffic stop was over when he consented to the search.

"When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment.... [A] passenger is seized as well and so may challenge the constitutionality of the stop." "Once the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual."

First, we determine at what point the original purpose of the stop had been addressed by the officers. In *Jackson*, the officer stopped the vehicle on suspicion the driver was operating the vehicle without a license. This Court concluded the detention was limited to "confirming or dispelling [the officer's] suspicion that [the driver] was operating his vehicle without a license." The officer, however, continued the interrogation.

> Such interrogation was indeed an extension of the detention beyond the scope of the original traffic stop as the interrogation was not necessary to confirm or dispel [the officer's] suspicion that [the driver] was operating without a valid driver's license and it occurred after [the officer's] suspicion that [the driver] was operating without a license had already been dispelled.

In this case, the original purpose of the stop was the brake light. The detention was limited to confirming or dispelling the suspicion that the brake light did not function. However, after the citation, an officer asked Defendant for consent to search. The request for Defendant's consent was not necessary to confirm or dispel suspicions regarding the brake light. The request to search extended the detention beyond the scope of the original traffic stop.

Second, we decide whether the delay was justified by determining if (1) the encounter between Defendant and the officers became consensual or (2) there were grounds for a reasonable and articulable suspicion. The trial court concluded "the encounter between the officers, [D]efendant and the driver, became a consensual encounter at the time the driver voluntarily agreed to answer questions, after the warning citation was delivered to the driver and both driver and [D]efendant had all documents returned."

"The test for determining whether a seizure has occurred is whether under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter." "[T]he return of documentation would render a subsequent encounter consensual only if a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." The person at issue is this case is Defendant, not the driver. The trial court and the majority conflate the perspectives of the driver and Defendant, resulting in the use of an erroneous standard.

"[A] passenger in a car that has been stopped by a law enforcement officer is still seized when the stop is extended." "A passenger would not feel any freer to leave when the stop is lawfully or unlawfully extended, especially ... where the officer was questioning the driver away from the vehicle while the passengers waited in the vehicle."

No findings show or suggest Defendant was aware that an officer had issued a citation or that the officers had completed the investigation of the brake lights. In fact, the trial court found that Defendant remained in the back seat, inside the vehicle. A reasonable person under the same circumstances would not believe he was free to leave because, from Defendant's perspective inside the vehicle, the stop continued while the driver was questioned outside. Without a finding that Defendant was privy to the same information as the driver, this Court does not impute the driver's knowledge to Defendant.

Because Defendant consented during an unlawful seizure of his person, the consent was ineffective to justify the search.

The majority also considers the length of the delay, without holding it to be *de minimis.* To the extent the majority considers the delay's length, I must dissent because the issue is not preserved. Although the State argues on appeal that (1) the delay was *de minimis* and (2) reasonable articulable suspicion existed to justify the delay, the State did not make such arguments at trial, and the trial court made no ruling on either issue.

An appellee may list proposed issues on appeal "based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." These

alternative bases are not preserved for our review.

The majority analyzes a second issue, scope of the search, which Defendant did not argue to this Court. Because this issue regarding the scope of the search is not before us, I dissent from the majority as to its conclusion on that issue as well.

"U.S. Supreme Court Considers Whether the Fourth Amendment Allows Reasonable Mistakes of Substantive Law"

Verdict
Sherry F. Colb
April 30, 2014

Last week, the U.S. Supreme Court granted certiorari in the case of *Heien v. North Carolina*. *Heien* raises the issue of whether a stop is lawful, for Fourth Amendment purposes, when the basis for the stop is the officer's having seen the driver do something lawful that the officer reasonably but mistakenly believes violates state law. Described differently, the question is whether the Fourth Amendment protects against stops by a police officer who acts on the basis of a reasonable but erroneous interpretation of state law. Different courts of appeals have arrived at distinct conclusions on this issue, so the Court will be resolving a circuit split in answering what turns out to be a difficult Fourth Amendment question.

Facts of *Heien*

In *Heien*, a police officer pulled over a vehicle in which the right rear brake light initially failed to illuminate when the driver engaged the brakes. The officer interpreted the existing traffic law to prohibit driving a car with one non-functioning brake light. The state court of appeals later determined, however, that the traffic law actually requires only one working brake light and that the officer who stopped the car therefore had no valid reason for the stop. This interpretation conflicted with what others had reasonably understood to be the meaning of the statute.

Had the driver of Nicholas Brady Heien's car been charged with a traffic violation, the case would have been dismissed, under the court of appeals' interpretation of the statute. One cannot, after all, be guilty of violating a legal requirement that does not exist. After pulling over the driver, however, the officer in the case asked for and received consent from both driver and passenger (Heien) to search the vehicle, and the subsequent search turned up cocaine. Heien was then arrested and charged with trafficking in cocaine, on the basis of the evidence found during the search of the vehicle.

Given the state court of appeals' interpretation of the statute, the defendant argued that the evidence at issue should have been suppressed as the fruit of an unlawful stop. What made the stop unlawful? The fact that it happened without any reasonable suspicion that something unlawful had occurred or was about to occur, the standard for validating a brief stop, under the Supreme Court's decision in *Terry v. Ohio*.

The Meaning of "Reasonable Seizures" Under the Fourth Amendment

The Fourth Amendment protects people's right to be secure against "unreasonable . . . seizures." Among other things, this gives people a right to liberty from detention by the government (i.e., liberty from "seizures of the person") absent a valid basis for their detention. For police to lawfully conduct a brief stop of a suspect, the Supreme Court has held that they must have a "reasonable suspicion" that unlawful activity is in progress or has been committed.

Reasonable suspicion is a less rigorous standard than what is needed for an arrest, which generally requires "probable cause" to believe that a crime has taken place. While more lenient than probable cause, however, "reasonable suspicion" still demands that police have some factual basis for suspecting a violation of the law before detaining an otherwise free person, even for a short time.

Within this legal framework, a police officer might stop a driver who is weaving from side to side in traffic. In this situation, police could reasonably suspect that the driver is intoxicated, and driving while intoxicated is against the law. It could turn out that the driver is not intoxicated but was weaving because she is a relatively new driver.

Still, the stop would be legally valid, and if the police saw narcotics in plain view during the stop, those drugs would accordingly be admissible against the driver in a subsequent drug-related criminal prosecution. Police, in other words, can be mistaken in their suspicions without thereby violating the Fourth Amendment requirement that they act "reasonably."

In Heien's case, the problem is that what the police reasonably suspected (driving with a broken brake light) turned out to be lawful activity, under the state court of appeals' interpretation of the law at issue. To "reasonably suspect" lawful activity does not ordinarily justify a seizure, so the police in this case might have violated the Fourth Amendment. If so, then the evidence that turned up during a consent search on the heels of the stop might represent "fruit of the poisonous tree," inadmissible against Heien in his prosecution for cocaine trafficking.

An Easy Case

Consider what an easy case of police error would look like. Assume that the law permits people to play music while they drive. A police officer is driving on the highway and hears the sounds of radio music (The Grateful Dead) emerging from a car driven by John Doe. The officer now has "reasonable suspicion" to believe that the driver is playing music in his vehicle while driving. Absent some other objectively reasonable basis for pulling over John Doe, however, the police officer in this situation may not stop Mr. Doe without violating the Fourth Amendment. This is true, moreover, even if the officer happens to believe (without a good reason) that it is illegal to play music while driving.

Take a different scenario. Now the officer believes that John Doe is committing an actual offense, such as driving while intoxicated, but the officer lacks any adequate factual grounds for that belief. Perhaps the officer again hears Grateful Dead music coming out of the car. The officer (unreasonably) concludes that

listening to the Grateful Dead provides strong evidence of intoxication. If the officer pulls over Mr. Doe on the basis of this conclusion, then—absent some independently valid basis for the stop—she will be violating the Fourth Amendment.

For a stop to comply with the Fourth Amendment, then, requires both that the facts support a conclusion that the person to be stopped is doing or has done some act (X) and that X be illegal. But what happens when X is legal and the officer reasonably (though incorrectly) believes that X is illegal? That is the question presented by this case.

In an important sense, the two hypothetical scenarios above, in both of which the officer lacks reasonable suspicion of criminal activity, are essentially the same. Having "reasonable suspicion" to believe that a driver is doing something legal is the same thing as having "no reasonable suspicion" to believe that the driver is doing something illegal. In these two scenarios, hearing Grateful Dead music coming from the vehicle plays both roles—it is good evidence that the driver is listening to music while driving (which is legal), and it is inadequate evidence that the driver is driving while intoxicated (which is illegal). Any time police lack reasonable suspicion to justify a stop, it will always be the case that they simultaneously (1) have a factual basis for believing that the driver is doing something lawful (e.g., driving at the speed limit), and (2) lack a factual basis for believing that the driver is doing something unlawful.

Reasonable but Mistaken Factual Beliefs

Fourth Amendment doctrine has always and necessarily tolerated errors by police officers. Police, like other humans, are imperfect and therefore will sometimes carry out valid searches or seizures that turn up nothing, particularly given the relatively permissive standards of "probable cause" and "reasonable suspicion" that authorize searches and seizures.

Police might, for example, have probable cause to believe that Jane Roe robbed a bank and that she is hiding the fruits of that crime in her knapsack. (Say an eyewitness to the robbery identified Jane in error.) In such a case, police will be able to obtain a warrant to arrest Jane in her home and to seize and search Jane's knapsack for the proceeds of the robbery.

The fact that Jane is actually innocent of the robbery does not in any way negate the "reasonableness" of what the police do. The Fourth Amendment does not require that police be factually correct in their suspicions every time they carry out a search or seizure. It requires only that police always behave reasonably when they carry out searches or seizures.

In what contexts are errors acceptable? Generally, "reasonable" police errors have concerned the facts. As in the description above, police may have gathered sufficient evidence (through witnesses or observations) to warrant the conclusion that a particular person committed a crime and/or that evidence of crime may be found in a particular location. If so, and if police obtain a warrant (in those cases in which a warrant is required), then they have complied with the dictates of the Fourth Amendment, even

if it turns out that they were mistaken about the facts and that the suspect at issue is innocent and/or the location in question does not contain the predicted evidence.

Reasonable Legal Errors

On the North Carolina Supreme Court's approach, police who briefly stop a suspect comply with the Fourth Amendment so long as they reasonably—even if mistakenly—believe that what they witnessed evidences the suspect's having violated an actual law. In the U.S. Supreme Court's case law, however, the reasonable errors that the Court finds to have complied with the Fourth Amendment have typically been errors of fact and not of law. In this sense, the officer who "reasonably believes" that driving with music on is illegal is in uncharted territory, as is the officer who erroneously but reasonably believes that driving with only one working brake light is illegal.

One could argue, as the North Carolina Supreme Court maintains, that being reasonably mistaken about the law is really no different from being reasonably mistaken about the facts. When police believe, with good reason, that the law has been violated, then they may act—whether their mistake turns out to be one of law or one of fact. As we saw above, for example, an officer who stops someone playing music in his car because the officer believes that playing music is illegal is making the same sort of mistake as the officer who stops someone playing music in his car because the officer believes that playing (Grateful Dead) music evidences intoxication.

To support this position, the North Carolina Supreme Court cites a U.S. Supreme Court case that approves an arrest for violating an ordinance that was subsequently declared unconstitutional. In *Michigan v. DeFillippo*, police arrested a man for violating an ordinance, and the (otherwise lawful) search incident to arrest that followed turned up evidence of a drug offense, for which the man was charged. On appeal, the Michigan Court of Appeals held that the ordinance that the man had violated was unconstitutionally vague. Nonetheless, the U.S. Supreme Court ruled that the arrest was valid, because it was made on the basis of "good faith" reliance on a presumptively valid statute. This case might seem effectively to dispose of *Heien*, since the officer in *Heien*, like the police in *DeFillippo*, reasonably relied on what turned out to have been an incorrect but reasonable reading of the law.

Good Faith

The problem with this equation of factual and legal errors is that ever since 1984, when police have made reasonable legal errors rather than reasonable factual errors, the U.S. Supreme Court has ruled on the admission of resulting evidence on the basis of the "good faith" exception to the Fourth Amendment exclusionary rule rather than finding actual compliance with the Fourth Amendment. Because *DeFillippo* was decided before the good faith doctrine was born, its applicability to the scenario in *Heien* might be supplanted by the more recent, more properly applicable good faith doctrine. The reasoning in *DeFillippo*, moreover, may be harmonized with that

underlying the good faith doctrine. After all, although the Court in *DeFillippo* relied on the Fourth Amendment itself rather than on a good faith exception to exclusion, it expressly used the phrase "good faith," which could help link that decision with the later-developed good faith doctrine.

The "Good Faith" Exception to Exclusion

In many situations, police "reasonably" act in violation of the Fourth Amendment, which the Court confusingly calls "good faith," though it refers to objectively reasonable reliance rather than to subjectively good intentions (the ordinary meaning of "good faith"). In such situations, the Court has recognized an exception to the Fourth Amendment exclusionary rule and accordingly permits the admission of any resulting evidence at the suspect's subsequent criminal trial, even though there might have been a Fourth Amendment violation.

The Court first announced the "good faith" exception to exclusion in *United States v. Leon*. The Court held that if it is reasonable to rely on what turns out later to have been a defective warrant, then police reliance on that warrant, though in violation of the Fourth Amendment, will nonetheless yield admissible evidence. This can occur if police have assembled factual evidence that they "reasonably" believe satisfies the legal probable cause standard, though the evidence they have assembled actually falls short of that standard, according to a later reviewing court. In this circumstance, the fact that there is a reasonable basis for believing in the validity of the warrant, coupled with police diligence in having sought a warrant and thereby observed the protective safeguard entailed in consulting a neutral magistrate, sufficiently redeems their conduct to permit the introduction of any resulting evidence.

A "good faith" error in this sort of case is best characterized as an error of law: though police have reason to think that what they have observed and gathered is sufficient to satisfy the legal standard of "probable cause," it actually is not. Yet the evidence comes in.

A few years later, in *Illinois v. Krull*, the Court extended the "good faith" exception to cover cases in which police carry out a search or seizure pursuant to the authority of a statute that, a court later determines, violates the Fourth Amendment. *Krull* means that if a police officer "reasonably" searches or seizes on the basis of a statute that turns out to have authorized unconstitutional searches or seizures, the evidence that an officer finds as a result of the constitutional violation is nonetheless admissible in evidence at the suspect's subsequent criminal trial. As in *Leon*, the sort of officer error at issue in *Krull* is best characterized as a legal error, because it stems from an erroneous understanding of what the U.S. Constitution has to say about a statute that authorizes searches or seizures. Yet the evidence comes in, despite a Fourth Amendment violation.

In *Arizona v. Evans* in 1995 and *Herring v. United States* in 2009, the Supreme Court held that if police carry out an arrest based on a warrant in whose existence they reasonably but mistakenly believe, then evidence found as a result of the arrest is

also admissible under the "good faith" exception to the exclusionary rule. These cases involved computer databases that contained erroneous information indicating that there were warrants outstanding for the arrests of the respective suspects. As in the other good faith cases discussed here, the best account of these cases is that they involved errors of law. The police were in error about the existence of legal authorization from a magistrate for a seizure of the person (an arrest), but the evidence was admissible anyway.

Most recently, the Court held, in *Davis v. United States*, that an unconstitutional search of a vehicle incident to arrest, if conducted in objectively reasonable reliance on binding appellate precedent holding that the Fourth Amendment authorizes such searches, does not trigger application of the exclusionary rule. In the case in question, there was binding appellate precedent holding that the Fourth Amendment always permits the search of a vehicle, incident to an arrest of an occupant of the vehicle, even after the arrestee has been secured and cannot reach the vehicle. This turned out to be erroneous, under a U.S. Supreme Court case, *Arizona v. Gant*, which came down after the search took place but before Davis's conviction became final. Nonetheless, it was "reasonable" for police, at the time of the search, to rely on binding appellate precedent going the other way.

In *Heien*, as in *Davis*, a police officer made a decision to carry out a search or seizure on the basis of a reasonable assumption that the law allowed it, but a later, unforeseeable judicial decision ruled that the law in fact rejected it. In *Davis*, the error concerned an interpretation of the Fourth Amendment itself, while in *Heien*, the error concerned an interpretation of the substantive traffic law. Yet in both cases, an officer acted on the basis of an erroneous but reasonable understanding of the governing law. It seems accordingly likely that the Supreme Court will see fit to apply its good faith exception to the exclusionary rule in this case rather than holding that police comply with the Fourth Amendment when they stop someone for violating a law that does not exist (but that the officer reasonably believes does exist).

The Impact of Ruling on the Basis of Good Faith

For purposes of deciding whether evidence resulting from the stop in *Heien* was admissible, it does not matter very much whether the Supreme Court decides that the search was reasonable (based on a reasonable mistake of law) or that even if the search was unreasonable, the error was made in good faith (because one could have reasonably interpreted the statute to prohibit driving with one broken brake light). Either way, the evidence comes in.

Nonetheless, the outcome I predict—that the Court will find a good faith exception for errors of law—will provide an opportunity for the current Court to marginalize the exclusionary rule again, as it has done many times before. The Court will likely repeat its views that (1) the Fourth Amendment does not require exclusion and that (2) exclusion of evidence is a costly measure that should be pursued only as a matter of last resort. When a police officer reasonably but

erroneously interprets the traffic law to prohibit what a driver is doing, then—whether or not the officer violates the Fourth Amendment in doing so—there is no good reason to suppress reliable, probative evidence where the police did nothing deliberate, reckless, or even negligent, in acting as they did.

Deciding the case in this fashion, as I expect the Court will do, will have the benefit of avoiding the possibility of narrowing the scope of the Fourth Amendment itself. Rather than saying expressly that a police officer may lawfully stop someone for committing a nonexistent traffic offense, the Court would be limiting its discussion to the question of remedy and leaving the substantive issue open.

On the other hand, deciding the case in this fashion will also mean one more context in which no deterrent exists for Fourth Amendment violations. Certainly no one will be able to bring a lawsuit against a police officer (or a department) for stopping people who violate what the officer (or department) "reasonably" believes is the law. Thus without the exclusionary rule, where there is any margin for error, there is every incentive for police to "reasonably" interpret the law to prohibit what they want it to prohibit, rather than erring on the side of caution. Ironically, then, the Court's continuing reliance on the "good faith" doctrine to avoid explicitly addressing Fourth Amendment questions might in reality serve to narrow the scope of the Fourth Amendment's protections as effectively as a decision to do so expressly would have done.

"Can a Police Officer Lawfully Pull Over a Car for a Traffic Violation Based on an Erroneous Understanding of the Traffic Laws?"

The Volokh Conspiracy
Orin Kerr
December 21, 2012

Under *Whren v. United States*, the police can pull over a car based on probable cause to believe a traffic violation has occurred. Any civil traffic violation counts: If you're driving at 36mph in a 35 mph zone, you can be lawfully pulled over. But what if the officer pulls over a car based on his belief that a violation has occurred, and it turns out that the officer has the law wrong? That is, what if you're not violating the law, and the officer mistakenly thinks you are? And here's where it gets interesting: What if the officer's mistake about the law is a reasonable one?

Lower courts are deeply divided on the question, and the Supreme Court of North Carolina just entered the fray with *State v. Heien*, ruling by a vote of 4-3 that the Fourth Amendment permits an officer to execute a seizure based on a reasonable mistake of law. The facts of *Heien* are the best possible facts for the government in a case like this. An officer spotted a car with a broken rear right brake light. The officer pulled over the car, and the traffic stop eventually led to the discovery of drugs in the car. The defendant was convicted, and on appeal persuaded the North Carolina Court of Appeals to adopt a rather surprising interpretation of the traffic laws.

According to a long statutory analysis from the North Carolina Court of Appeals, interpreting several archaic sections of the traffic code, it was actually *legal* to have one broken brake light as long as the other brake light functioned properly. The state government saw the opportunity: It accepted this interpretation of the statutes, and it petitioned the North Carolina Supreme Court only on the Fourth Amendment question of whether the stop was constitutionally reasonable even though it turned out that the officer's belief that a broken tail light was unlawful was not correct. That is, did pulling over the car with a broken tail light violate the Fourth Amendment?

A divided North Carolina Supreme Court ruled that the stop was constitutionally reasonable. The officer had a reasonable belief as to what the traffic laws meant, the majority reasoned, and he acted reasonably. Because the Fourth Amendment requires reasonableness, this is all the Fourth Amendment requires and the resulting stop was constitutional. The dissent agrees that the officer acted reasonably in a generic sense, but it argues that we would not want to systemically allow stops of people who are not breaking the law at all based on erroneous officer understandings of what the law is. The dissent also points out that this is like an exclusionary rule case in disguise: The majority's reasoning is akin to saying that there is a good faith exception at the

remedies stage, the kind of thinking that should not infuse the court's reasoning at the initial stage of whether a constitutional violation occurred.

This is a very interesting Fourth Amendment issue — and not an easy one, at least to me. At first blush, my sympathies tend to be with the defense here. That's true for three reasons, which I'll concede may be a bit idiosyncratic. First, I've always thought that the unstated rationale of why the courts allow a traffic stop for a non-criminal violation must be to enforce the traffic laws — it's a sort of regulatory rationale which acts as an exception to the usual rule that cause of *criminality* is required to make a stop. Given that regulatory purpose, it seems sensible that the scope of the police power is based on what that law actually prohibits, not what an officer mistakenly thinks it prohibits. And it doesn't help that the police tend to have tremendous influence on their state traffic laws: As a practical matter, if an officer can't find a traffic violation to stop a car, he isn't trying very hard. And if a court identifies a problem with the traffic laws as the lower court did here, the legislature is likely to fix it in the government's favor pronto. Given that, I'm not sure why we would need a doctrine that makes room for officer errors of law.

Second, as a Criminal Law professor, I can't help but approach the question by reference to the doctrine of mistake of law in criminal law. When a citizen makes a reasonable mistake of law as to what is criminal, the general rule is that ignorance of the law is no excuse. If a citizen reads the law and perfectly reasonably thinks his conduct is lawful, only to have a court take a surprising reading of the criminal law and say he is guilty, the courts say "enjoy your time in prison, Mr. Marrero." And they say that for a good reason. Although it seems harsh in rare cases where the law is construed in a surprising way, we generally want citizens to approach the law with care and have an incentive to learn about it. Looking beyond that one case, it's very hard to administer routine areas of the law if anyone has an out based on their claim to have reasonably misunderstood it. If we apply that rule to citizens facing the awesome power of the state, it seems only fair to apply the same rule to the state facing its citizens.

Third, I agree with the *Heien* dissent that this is basically a remedies question under the guise of substantive Fourth Amendment law. If the exclusionary rule is going to be about officer culpability, then say that there is a Fourth Amendment violation here and no exclusionary remedy. But it doesn't make much sense to harness the same principle to determine what is a Fourth Amendment violation in the first place: If you're going to draw a sharp rights/remedies distinction, then I think the rationale for the rights and remedies should be kept separate.

With that said, if this case goes up to the U.S. Supreme Court, I highly doubt a majority of the Court would share my initial instincts. If the U.S. Supreme Court takes this case, they will probably see this as an easy case for much of the same reason they saw *Davis v. United States* as an easy case: The officer acted reasonably based on the law known at the time, so the government should win. They might look at the legal

question differently in a case with better facts for the defense, but the facts here would seem to make a government win particularly likely.

And finally, there's a cynical case to be made that the ultimate outcome may not make much of a difference in the setting of traffic stops. As long as the *Whren* rule survives that a traffic violation alone justifies a stop, occasional ambiguities in the traffic laws are not likely to interfere much with traffic stops. If the officers can rely on reasonable mistakes of law, then the courts will allow the stops. And if the officers can't rely on them, the police can go to the legislature and the legislature wil clarify the ambiguities in their favor. Either way, the police have the advantage in cases like this over the long haul so long as *Whren* is in place.

Yates v. United States

13-7451

Ruling Below: United States of America v. John L. Yates, 733 F.3d 1059 (11th Cir. 2013), *cert granted*, 134 S.Ct. 1935 (2014).

Defendant was convicted in the United States District Court for the Middle District of Florida of knowingly disposing of undersized fish in order to prevent government from taking lawful custody and control of them, and destroying or concealing "tangible object with the intent to impede, obstruct, or influence" government's investigation into harvesting undersized grouper. Defendant's motion for acquittal was denied. Defendant appealed.

Question Presented: Whether Mr. Yates was deprived of fair notice that destruction of fish would fall within the purview of 18 U.S.C. § 1519, which makes it a crime for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object" with the intent to impede or obstruct an investigation, where the term "tangible object" is ambiguous and undefined in the statute, and unlike the nouns accompanying "tangible object" in section 1519, possesses no record-keeping, documentary, or informational content or purpose.

UNITED STATES of America, Plaintiff-Appellee

v.

John L. YATES, Defendant-Appellant.

United States Court of Appeals, Eleventh Circuit

Decided on August 16, 2013

[Excerpt; some footnotes and citations omitted.]

DUBINA, Circuit Judge.

Appellant John L. Yates ("Yates") appeals his convictions for violating 18 U.S.C. §§ 1519 and 2232(a), which arose out of his harvesting undersized red grouper in federal waters in the Gulf of Mexico. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we affirm Yates's convictions.

I.

On August 17, 2007, Yates and his crew prepared the *Miss Katie*, a fishing vessel, for a fishing trip into federal waters in the Gulf of Mexico. On August 23, 2007, John Jones ("Officer Jones"), a field officer with the Florida Fish and Wildlife Conservation Commission, who was deputized by the National Marine Fisheries Service

("Fisheries Service") to enforce federal fisheries laws, was on an offshore patrol with fellow officers when he encountered the *Miss Katie.* Officer Jones noticed the *Miss Katie* was actively engaged in a commercial harvest using longline fishing gear, so he approached and boarded the *Miss Katie* to inspect for gear, fishery, and boating-safety compliance.

While on board, Officer Jones noticed three red grouper that appeared to be less than 20 inches in length, the minimum size limit for red grouper at that time. As a result, Officer Jones decided to measure Yates's fish to determine whether they were of legal size. Officer Jones separated grouper that appeared to be less than 20 inches so he could measure them. He measured the fish with their mouths closed and their tails pinched. Officer Jones gave Yates the benefit of the doubt on the fish that measured close to 20 inches but separated the fish that were clearly under the legal limit and placed those fish in wooden crates. In total, Officer Jones determined that 72 grouper clearly measured less than 20 inches. Officer Jones then placed the wooden crates in the *Miss Katie's* fish box and issued Yates a citation for the undersized fish. Officer Jones instructed Yates not to disturb the undersized fish and informed Yates that the Fisheries Service would seize the fish upon the *Miss Katie's* return to port.

Contrary to Officer Jones's directions, Yates instructed his crew to throw the undersized fish overboard. Thomas Lemons ("Lemons"), one of the crewmembers, testified that he complied with Yates's directive. At Yates's prompting, the crew then took other red grouper and placed them in the wooden crates that had held the undersized fish. After the switch was completed, Yates instructed Lemons to tell any law enforcement officers who asked that the fish in the wooden crates were the same fish that Officer Jones had determined were undersized.

After the Miss *Katie* returned to port, Fisheries Service special agent James Kejonen ("Agent Kejonen") traveled to Cortez, Florida to meet Yates and investigate the report of undersized grouper. On August 27, 2007, Officer Jones was called in to remeasure the fish, which he did in the same manner as before — mouths closed and tails pinched. Sixty-nine fish measured less than 20 inches. Officer Jones noticed that, although some of Yates's undersized red grouper had previously measured as short as 18 to 19 inches, none of the grouper unloaded at the dock were that short. In fact, at sea, most of Yates's grouper had measured between 19 and 19 1/2 inches, but at the dock, the majority of the grouper measured close to 20 inches. Due to Officer Jones's suspicion that the undersized fish measured on August 27 were not the same fish he had measured on August 23, federal agents interviewed Lemons, who eventually divulged the crew's nefarious conduct.

At trial, Yates disputed whether the red grouper thrown overboard were actually undersized because Officer Jones had only measured the fish with their mouths closed, not open. In other words, Yates argued it was possible that, had the fish been

measured with their mouths open, they would have measured legal size. The day before trial, the district court held a *Daubert* hearing to evaluate the qualifications of the two grouper-measuring experts proffered by the parties. The government offered Dr. Richard Cody ("Dr. Cody"), a research administrator with the Fish and Wildlife Research Institute, as a potential expert witness. Dr. Cody was prepared to testify that, on average, a grouper measured three to four millimeters longer when its mouth was open versus when its mouth was closed. Yates did not object to that contention, but he did object to other portions of Dr. Cody's testimony. The district court took Dr. Cody's testimony under advisement but did not decide whether he could testify as an expert on measuring grouper. The district court also ruled that Yates's expert, William Ward ("Mr. Ward"), research director for the Gulf Fishermen's Association, could offer testimony about a grouper's measurement with an open mouth as opposed to a closed mouth and about fish shrinkage when placed on ice.

Ultimately, the government did not call Dr. Cody as a witness in its case-in-chief. After the government rested, Yates's counsel announced for the first time that he planned to call Dr. Cody as his first witness to testify about the length of grouper with an open mouth versus a closed mouth. The government objected. The district court sustained the government's objection, ruling that Yates was precluded from calling Dr. Cody in his case-in-chief because Yates had failed to properly notify the government of his intention to call Dr. Cody as an expert witness, as required by Federal Rule of Criminal Procedure 16. After the district court had made its ruling, Yates called as his first witness Mr. Ward, who testified that fish can shrink on ice and that grouper measure longer with their mouths open than with their mouths closed. On cross-examination, the government questioned Mr. Ward about his own state and federal fishing violations.

At the conclusion of the government's case-in-chief, and at the close of all the evidence, Yates moved for judgment of acquittal on all counts. The district court denied both motions. After a four-day trial, the jury found Yates guilty of (1) knowingly disposing of undersized fish in order to prevent the government from taking lawful custody and control of them, in violation of 18 U.S.C. § 2232(a) (Count I); and (2) destroying or concealing a "tangible object with the intent to impede, obstruct, or influence" the government's investigation into harvesting undersized grouper, in violation of 18 U.S.C. § 1519 (Count II). The district court sentenced Yates to 30 days' imprisonment, followed by 36 months' supervised release. Yates timely appealed his convictions.

II.

Yates presents three issues on appeal. First, Yates argues the district court erred in denying his motion for judgment of acquittal on Counts I and II, because the government failed to present sufficient evidence to prove the fish thrown overboard were undersized. Second, Yates argues the district court erred as a matter of law in denying his motion for judgment of acquittal on Count II, because

the term "tangible object" as used in 18 U.S.C. § 1519 does not apply to fish. Alternatively, Yates argues the statute is ambiguous and the rule of lenity should apply. Finally, Yates argues the district court abused its discretion by precluding him from calling Dr. Cody during his case-in-chief.

III.

"We review *de novo* a district court's denial of a motion for judgment of acquittal on sufficiency of evidence grounds." "In reviewing the sufficiency of the evidence, we look at the record in the light most favorable to the verdict and draw all reasonable inferences and resolve all questions of credibility in its favor." We review questions of statutory interpretation *de novo.*

IV.

A *Sufficient evidence was presented at trial for the jury to conclude the fish thrown overboard were undersized.*

Yates contends that Officer Jones's failure to measure the fish with their mouths open — as opposed to only measuring them with their mouths closed — creates speculation as to whether the fish would have measured undersized with their mouths open. As such, he argues there was not sufficient evidence for the jury to conclude the fish thrown overboard were undersized. We disagree.

First, the testimonial evidence given by Officer Jones, Agent Kejonen, and Mr. Ward conflicts as to whether measuring a fish with its mouth open, as opposed to closed, makes a difference in the fish's overall length. The jury was free to weigh the conflicting evidence and decide whether opening or closing a fish's mouth made a large difference, a small difference, or no difference at all in the fish's measurement. Further, Officer Jones testified that while he was on board the *Miss Katie*, Yates scolded his crew for keeping undersized fish and stated, "Look at this fish, it's only 19 inches. How could you miss this one?" Similarly, Agent Kejonen testified that, on the dock, Yates admitted to having at least "a few" undersized fish on his boat when Officer Jones measured them days earlier. Moreover, that Yates directed his crew to throw the fish overboard creates an inference that he — as an experienced commercial fisherman — believed the fish to be undersized. In sum, a "rational trier of fact could have found . . . beyond a reasonable doubt" that the fish thrown into the Gulf were shorter than the legal limit. Accordingly, we conclude from the record that sufficient evidence was presented at trial for the jury to convict Yates of Counts I and II.

B. A fish is a "tangible object" within the meaning of 18 U.S.C. § 1519.

Yates contends the district court erred in denying his motion for judgment of acquittal as to Count II because the term "tangible object" as used in 18 U.S.C. § 1519 "only applies to records, documents, or tangible items that relate to recordkeeping" and "does not apply to . . . fish."

"In statutory construction, the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." "When the text of a statute is plain, . . . we

need not concern ourselves with contrary intent or purpose revealed by the legislative history." Further, undefined words in a statute — such as "tangible object" in this instance — are given their ordinary or natural meaning. In keeping with those principles, we conclude "tangible object," as § 1519 uses that term, unambiguously applies to fish. Because the statute is unambiguous, we also conclude the rule of lenity does not apply here.

C. Yates's right to present a defense was not prejudiced by the district court's riding that disallowed Yates from calling Dr. Cody during his case-in-chief.

Because Yates waited until the close of the government's case-in-chief to disclose Dr. Cody as an expert witness, the disclosure was untimely under Federal Rule of Criminal Procedure 16(b)(1)(C). As a sanction for this untimely disclosure, the district court did not allow Dr. Cody to testify during Yates's case-in-chief. Yates does not dispute that he did not give proper notice to the government pursuant to Rule 16(b)(1)(C). Instead, Yates argues that the district court should have used a lesser sanction to address his late disclosure, and that the district court's outright preclusion of Dr. Cody's testimony at trial infringed on Yates's constitutional right to present a defense. According to Yates, Dr. Cody would have reinforced his expert Mr. Ward's testimony that red grouper measure longer with their mouths open than with their mouths closed. Yates also contends Dr. Cody's corroboration of Mr. Ward's testimony would have countered the government's attempt to discredit Mr. Ward.

"Relief for violations of discovery rules lies within the discretion of the trial court[.]"To warrant reversal of the court's discretion on appeal, "a defendant must show prejudice to his substantial rights." While the right of the accused to present a defense is a substantial right, that right is not boundless.

It is unnecessary for us to determine whether the district court properly exercised its discretion in precluding Dr. Cody from testifying at trial, because we conclude Yates has failed to show the preclusion prejudiced his right to present a defense. As Yates conceded in his brief, his expert Mr. Ward offered the same testimony Yates hoped to elicit from Dr. Cody. Indeed, our review of the record shows Dr. Cody's testimony would have been less favorable to Yates than that of Mr. Ward. Moreover, under the circumstances presented here, Yates's inability to offer Dr. Cody's testimony to rehabilitate Dr. Ward's credibility does not amount to prejudice of his substantial rights.

V.

For the above stated reasons, we affirm Yates's convictions.

AFFIRMED.

“Top U.S. Court to Hear White-Collar Case of Fish Thrown Overboard”

Reuters
Lawrence Hurley
April 28, 2014

A fisherman prosecuted under a white-collar crime law for disposing of fish while he was under investigation has persuaded the U.S. Supreme Court to hear his case.

The court said on Monday that it will hear arguments over a jury's 2011 conviction of Florida fisherman John Yates on two of three charges, including one under the "anti-shredding" provision of the 2002 Sarbanes-Oxley law.

The provision penalizes the destruction or concealment of "a tangible object with the intent to impede, obstruct or influence" a government investigation and was intended to prevent fraud of the sort committed by companies such as Enron Corp and WorldCom Inc.

Yates's lawyer John Badalamenti said Yates did not receive fair notice that his actions would be covered by the provision.

Prosecutors in Florida accused Yates of illegally destroying the evidence showing that he had harvested red grouper fish that were smaller than the minimum 20 inches in length required under federal regulations.

Yates, who lives in Holmes Beach, 32 miles south of Tampa, has not been able get work as a fisherman following his trial, Badalamenti said.

"He doesn't want this to happen to anyone else."

Asked if Yates, 62, would be courting media attention like Nevada rancher Cliven Bundy, who last week battled federal agents over the cost of grazing rights on public land, Badalamenti demurred.

"I don't think you are going to see him as a poster-child for any particular political persuasion," the lawyer said.

The National Association of Criminal Defense Lawyers said in a friend-of-the-court brief that the use of the Sarbanes-Oxley law in Yates's case was an example of an increasing "over-criminalization epidemic" in which federal prosecutions punish conduct that could be handled with civil penalties or under state law. The association's brief noted that Yates was not charged with any violation of fishing laws.

Yates has been backed also by Cause of Action, a conservative-leaning group critical of expansive criminal laws.

Even if Yates wins his case before the high court, his conviction for one count of preventing the government from taking custody of the fish will remain intact.

Oral arguments and a decision are expected in the court's next term, which begins in October and ends in June 2015.

Solicitor General Donald Verrilli, the government's lawyer before the Supreme Court, said in court papers that Yates was not disputing that he "directed the destruction or concealment of the fish" and that he had "obstructive intent." He wrote that a fish is a "tangible object" based on the "ordinary and natural meaning" of the phrase.

The case began in August 2007 when federal and state officials measured fish on Yates's boat that they suspected were undersized. At that time, 72 were found to be under 20 inches, with some as short as 18 to 19 inches. After the boat returned to port, agents re-measured the fish. Only 69 were undersized, and they were all closer to the 20-inch mark.

A crew member later testified at trial that Yates had told crew members to throw the undersized fish overboard and replace them with others. In August 2013, the 11th U.S. Circuit Court of Appeals upheld the conviction, finding in part that a fish fit within the definition of a "tangible object."

The U.S. House of Representatives Judiciary Committee has both Republican and Democratic members studying concerns about federal laws being applied too broadly. It has heard testimony about cases including the prosecution of Lawrence Lewis, a janitor at a Washington, D.C., retirement home who was convicted of violating the Clean Water Act following a sewage backup.

The case is *United States v. Yates*, U.S. Supreme Court, No. 13-7451.

“Fishy Application of Sarbanes-Oxley's Ban on Evidence Destruction”

FindLaw
William Peacock
July 11, 2014

One fish, two fish, red fish, short fish?

John L. Yates is a commercial fisherman. In 2007, he was hauling in some red grouper when a fisheries officer boarded his ship to inspect his haul. After measuring the fish and finding that some of them were less than the minimum size of 20 inches, he issued Yates a citation and set aside the short fish for inspection at the docks.

Yates had his crew toss the short fish overboard and replace them with other fish. He was later convicted for violating an evidence destruction provision of the the Sarbanes-Oxley Act banking reform statute, passed in the wake of the Enron scandal. He's appealing that conviction to the U.S. Supreme Court, arguing that the vague statute has no place in the Gulf of Mexico.

Fine Points of Fish Measurement

If you want to learn the fine points of fish measurement, the Eleventh Circuit's opinion is unintentionally hilarious. For example, opening and closing a fish's mouth can change its length by a few millimeters. And putting fish on ice can lead to shrinkage. The parties actually had experts lined up to testify about size and technique of measurement of Yate's red grouper.

The real issue, however, is the application of a banking reform statute to a fisherman.

What Is a 'Tangible Object'?

Section 1519 punishes those who knowingly destroy or conceal "any record, document, or tangible object" in order to impede an investigation. And a fish, when it is evidence in a federal fisheries investigation, would seem to fit under the generic meaning of "tangible object." That's what the Eleventh Circuit held, anyway.

Yates has appealed to the Supreme Court, asking whether the vague statute, which does not define "tangible object," could reasonably apply to an object that has "no record-keeping, documentary, or informational content or purpose." The Court has already granted cert., so this is set for next term's docket.

A number of amicus briefs have been filed in the case in the last week, including an interesting argument from the Cato Institute. The Cato brief argues the context of the statute should aid interpretation, and in this case, "record, document or tangible object" indicates that "tangible object" should be limited to items related to records or documents (hard drives, diskettes, etc.). Otherwise, the overly broad dictionary definition used by the Eleventh Circuit would render "record" and "document" superfluous.

That's certainly a good point: Statutes should be constructed so that no term is

superfluous. (This is the Rule Against Surplusage principle of statutory construction.) The Eleventh Circuit didn't address that argument in its one-paragraph approach to statutory interpretation, nor did it address Yates' argument about the Rule of Lenity, a canon which requires that statutes give notice of what conduct is illegal -- would a reasonable person expect a banking statute to be applied to flinging fish in the sea.

“Fish Not Tangibles Under SOX, Defense Groups Tell Justices”

Law360
Carolina Bolado
July 11, 2014

A criminal defense attorney association and a number of criminal defense law professors have urged the U.S. Supreme Court to toss a Florida commercial fisherman's records destruction conviction for dumping three undersized red grouper, calling the conviction “overcriminalization through an unconstitutional expansion of the Sarbanes-Oxley Act."

The National Association of Criminal Defense Lawyers, the American Fuel & Petrochemical Manufacturers and a group of 18 criminal law professors filed amicus briefs on July 7 supporting John L. Yates, who was found guilty of the so-called anti-shredding provision of the Sarbanes-Oxley Act, which was passed in the wake of the Enron scandal in 2002. The law criminalizes the destruction of records, be they documents or tangible objects — which the Eleventh Circuit said includes fish.

In its brief, the NACDL decried overcriminalization and said that Yates could not have been found guilty under federal law, because the application of the anti-shredding statute to “three rotten fish” is an unconstitutional expansion of the law.

The law professors agreed, saying no one would reasonably expect the Sarbanes-Oxley Act to apply to a fisherman throwing red grouper into the Gulf of Mexico.

“In context, the phrase 'any record, document or tangible object' no more applies to fish than the phrase 'an automobile, automobile truck, automobile wagon, motorcycle or any other self-propelled vehicle' applies to airplanes,” the professors said.

They added that if the term “tangible object” in the statute includes fish, then the law “captures essentially every physical item within the jurisdictional reach of the United States.”

The nation's highest court agreed in April to hear the appeal. The justices will have to consider whether the law can cover anything meeting the dictionary definition of the term “tangible object,” even when there is no connection to corporate records.

Yates argues that any interpretation of the law should take into account the nouns accompanying the pivotal phrase, noting that fish possess no documentary purpose.

The saga dates back to a summer 2007 fishing trip on Yates' boat, the "Miss Katie." A Florida Fish and Wildlife Conservation Commission officer spotted the vessel and inspected the fish that Yates and his crew had hauled in.

The officer determined that 72 grouper met the federal minimum of 20 inches, but found three that were smaller and issued Yates a

citation. Although Yates was told to bring the fish back to port undisturbed for the Fisheries Service to seize, he instead told his crew to toss them overboard and replaced them with legally sized grouper, according to court documents.

A federal jury found Yates guilty of disposing undersized fish and of violating the Sarbanes-Oxley Act's record-destruction provision, sentencing him to 30 days' imprisonment. The Eleventh Circuit upheld the ruling in August, finding that the phrase "tangible object" applies to fish.

The law professors are represented by Steffen N. Johnson, Andrew C. Nichols, Eric M. Goldstein and Eric T. Werlinger of Winston & Strawn LLP.

The NACDL and the American Fuel & Petrochemical Manufacturers are represented by William N. Shepherd of Holland & Knight LLP and NACDL attorney Barbara E. Bergman.

Yates is represented by Assistant Federal Public Defender John L. Badalamenti and Federal Public Defender Donna Lee Elm of the Office of the Federal Public Defender for the Middle District of Florida.

The federal government is represented by U.S. Solicitor General Donald B. Verrilli Jr.; and Acting Assistant Attorney General Mythili Raman and attorney John F. DePue of the U.S. Department of Justice.

The case is *Yates v. U.S.*, case number 13-7451, in the Supreme Court of the United States.

“Commercial Fisherman's Conviction for Disposing of His Catch of Undersized Grouper Upheld”

The Swartz Law Firm
August 24, 2013

In *U.S. v. Yates* the defendant and his crew were on a commercial fishing trip into the Gulf of Mexico when he was stopped by a federally deputized Florida Fish and Wildlife officer on patrol for fishery violations and compliance. After boarding the defendant's boat, he noticed red grouper that appeared to be less than the 20-inch minimum size limit. He measured them with mouths closed and determined there were 72 grouper that clearly measured less than 20 inches. He separated the undersized one into crates, issued a citation, and instructed the defendant not to disturb the crates. He told him that the National Marine Fisheries Service would seize them upon the vessel's return to port. Instead of following the instructions, the captain had his crew throw the undersized fish overboard and replaced them with other larger grouper. When the vessel returned to port in Florida and the officer measured the fish, he suspected they were not the same fish he previously measured. The switch was discovered after a crewmember was interviewed. The captain was charged and convicted of knowingly disposing of undersized fish in order to prevent the government from taking custody and control in violation of 18 U.S.C. §2232(a), and was convicted of destroying a "tangible object with the intent to impede obstruct or influence the government's investigation into harvesting undersized grouper" in violation of 18 U.S.C. §1519. Insufficient evidence argument rejected.

The defendant argued on appeal there was insufficient evidence that the fish thrown overboard were undersized because the officer failed to measure the grouper with mouths open and instead measured them with mouths closed. He argued there is speculation as to whether the fish would have been undersized if measured with mouths opened. The court rejected this argument finding that there was conflicting testimony as to whether this would have made any difference, and the jury was free to weigh and decide the issue. Furthermore, the defendant's directing the crew to throw fish overboard together with his admission that he had at least a few undersized fish on his boat when the officer first measured them, was evidence he believed the fish were undersized.

Fish are tangible objects

The defendant argued that the term "tangible object" as used in 18 U.S.C. §1519 only apple to records, documents or items related to record keeping and does not apply to fish. The court decided that the statutory construction of the term would be given its plain meaning and concluded that tangible objects includes fish.

Exclusion of expert on measuring fish was not prejudicial

Finally, the defendant argued that he was prejudiced by the trial court's ruling

disallowing the defendant from calling an expert in his case-in-chief to testify that grouper measure three to four millimeters longer with mouth open versus when mouth closed. The defense failed to give notice to the government pursuant to Rule 16(b)(1)(C) that it intended to call this expert witness and the trial court's sanction was not allowing the witness to testify. The court of appeals declined to determine if the district court exercise of its discretion was proper because the defendant failed to show any prejudice by the preclusion of this testimony.

NEW TOPIC: DEATH PENALTY PROTOCOLS

"Court Extends Curbs on the Death Penalty in a Florida Ruling"

The New York Times
Adam Liptak
May 27, 2014

The Supreme Court on Tuesday continued a trend to limit capital punishment, ruling that Florida's I.Q. score cutoff was too rigid to decide which mentally disabled individuals must be spared the death penalty.

"Florida seeks to execute a man because he scored a 71 instead of a 70 on an I.Q. test," Justice Anthony M. Kennedy wrote for the majority in a 5-to-4 decision.

Justice Kennedy was joined by the court's four-member liberal wing, a recurring coalition in cases concerning harsh punishments.

When the court barred the execution of people with mental disabilities in 2002 in *Atkins v. Virginia*, it largely let the states determine who qualified. Tuesday's decision, Justice Samuel A. Alito Jr. wrote for the four dissenters, represented a "sea change" in the court's approach.

The ruling will affect not only Florida, which has the nation's second-largest death row after California, but also as many as eight other states by Justice Kennedy's count, including Alabama and Virginia. They will now be required to take a less mechanical approach to mental disability in capital cases, said Eric M. Freedman, a law professor at Hofstra.

"Death row inmates commonly suffer from multidimensional mental problems," Mr. Freedman said. "Today's ruling requires courts to investigate these fully, by looking at the elephant rather than the tail."

In Tuesday's decision, Justice Kennedy said that closer supervision of the states was warranted given the nature of the punishment. "The death penalty is the gravest sentence our society may impose," he wrote. "Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world."

The case, *Hall v. Florida*, arose from the 1978 murder of Karol Hurst, who was 21 and seven months pregnant when Freddie L. Hall and an accomplice forced her into her car in a supermarket parking lot. She was found in a wooded area, where she had been beaten, sexually assaulted and shot.

There was significant evidence in school and court records of Mr. Hall's intellectual disability. Before the Supreme Court's decision in the *Atkins* case, a trial judge found that there was "substantial evidence" that Mr. Hall "has been mentally retarded his entire life."

After the *Atkins* decision, Mr. Hall challenged his death sentence, relying in part on the earlier state court determinations.

The *Atkins* decision gave states only general guidance. It said a finding of intellectual disability required proof of three things: "subaverage intellectual functioning," meaning low I.Q. scores; a lack of fundamental social and practical skills; and the presence of both conditions before age 18. The court said I.Q. scores under "approximately 70" typically indicate disability.

A Florida law enacted not long before the Atkins decision created what Mr. Hall's lawyers called an "inflexible bright-line cutoff" requiring proof of an I.Q. of 70 or below.

In 2012, the Florida Supreme Court ruled that Mr. Hall was eligible to be executed because his I.Q. had been measured at various times as 71, 73, and 80.

That approach, Justice Kennedy wrote, had at least two flaws. One was that it failed to take account of standard errors of measurement.

"An individual's score is best understood as a range of scores on either side of the recorded score," he wrote.

The second problem, he said, was that a rigid cutoff excluders consideration of other evidence. "Intellectual disability is a condition, not a number," he wrote.

Justice Alito protested that this changed the rules announced in Atkins, which required both low scores and more practical proof. He was also sharply critical of the court's reliance on the views of medical experts, saying the majority had overruled part of the Atkins decision "based largely on the positions adopted by private professional organizations."

The Supreme Court assesses whether given practices are barred by the Eighth Amendment's prohibition of cruel and unusual punishment by considering, in the words of a 1958 decision, "the evolving standards of decency that mark the progress of a maturing society."

In doing so, Justice Alito said, it had always "meant the standards of American society as a whole."

"Now, however," he wrote, "the court strikes down a state law based on the evolving standards of professional societies, most notably the American Psychiatric Association."

Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Clarence Thomas joined the dissent.

The majority and dissenting opinions clashed over statistics and over how many states had laws similar to Florida's. By Justice Kennedy's count, Kentucky and Virginia have adopted a fixed cutoff of 70 by statute, and Alabama by court decision.

Five other states (Arizona, Delaware, Kansas, North Carolina and Washington), Justice Kennedy said, have laws open to the same interpretation.

Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan

joined the majority opinion. In earlier decisions limiting the use of the death penalty and other harsh punishments under the Eighth Amendment, Justice Kennedy has often joined the court's liberal wing. He wrote several of those decisions, sometimes using the soaring language that marked his majority opinion on Tuesday.

"The Eighth Amendment's protection of dignity," he wrote, "reflects the nation we have been, the nation we are, and the nation we aspire to be. This is to affirm that the nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force."

Justice Kennedy was also in the majority in cases striking down the death penalty for the mentally disabled, for juvenile offenders and for non-homicide crime and in ones limiting the use of life without parole sentences for juvenile offenders.

The court returned Mr. Hall's case to the lower courts for a fresh assessment of his condition. "Freddie Lee Hall may or may not be intellectually disabled," Justice Kennedy wrote, "but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime."

"Arizona Execution Will Move Forward After Last-Minute Appeals"

Time
Josh Sanburn
July 23, 2014

A rare victory for a death row inmate over the weekend was quashed Tuesday when the Supreme Court lifted a stay of execution for Joseph Wood, who was sentenced to death for the murder of his girlfriend and her father in 1989.

In a three-sentence order, the Supreme Court reversed a judgment by the U.S. Ninth Circuit Court of Appeals that halted Wood's execution based on the secrecy surrounding where the state obtains the drugs to carry out lethal injection. About a half-hour after Wood was scheduled to be executed, Arizona's top court announced that it had temporarily halted the execution on appeals. Wood's lawyers said he did not have proper legal representation. They also claimed that Arizona's "experimental" lethal injection methods, which include drugs like midazolam that have been used in executions that have gone awry in other states, would violate the Eighth Amendment's ban on cruel and unusual punishment. But that stay was lifted Wednesday afternoon after the court heard last-minute appeals from Wood's lawyers, clearing the way for Wood to be executed by lethal injection.

Death row inmates around the U.S. have challenged the constitutionality of their lethal injections, often arguing that the laws and policies shielding drug manufacturers' identities are unconstitutional. Due to drug shortages and boycotts by pharmaceutical companies, many states in the last few years have obtained lethal injection drugs from compounding pharmacies, which are unregulated by the federal government.

Courts around the country have been largely unreceptive to those arguments. Wood's case, however, was an exception.

Wood's lawyers asked the state to halt his execution if it did not provide the origins of the drugs as well as the qualifications of the executioners, relying not on an Eighth Amendment argument regarding the risk of cruel and unusual punishment, but rather a First Amendment defense that Wood had a right to access information about his execution. A U.S. District Court judge in Phoenix initially denied the request, but the Ninth Circuit sided with Wood.

The court denied appeals by the state to lift the stay, sending the case to the Supreme Court, which has been reluctant to step into the ongoing battle over lethal injection.

But while the fate of lethal injection in the U.S. remains uncertain, reverting to an older method of executions got an unexpected endorsement. In a separate opinion by the Ninth Circuit that upheld Wood's stay of execution before the Supreme Court intervened, Judge Alex Kozinski called lethal injection flawed and proposed bringing back the firing squad.

“If some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path and return to more primitive—and foolproof—methods of execution,” Judge Kozinski wrote. “The guillotine is probably best but seems inconsistent with our national ethos. And the electric chair, hanging and the gas chamber are each subject to occasional mishaps. The firing squad strikes me as the most promising. Eight or ten large-caliber bullets fired at close range can inflict massive damage, causing instant death every time. … Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood.”

Legislators in several states have proposed bringing back firing squads. Only Oklahoma and Utah currently allow them, according to the Death Penalty Information Center, but only under very limited circumstances.

"Arizona Killer Takes Two Hours to Die, Fueling Lethal Injection Debate"

LA Times
Matt Pearce, Cindy Carcamo, & Maya Srikrishnan
July 23, 2014

A convicted murderer in Arizona gasped and snorted for more than 90 minutes after a lethal injection Wednesday, his attorneys and witnesses said, dying in a botched execution that prompted the governor to order an investigation and the state Supreme Court to mandate that the materials used in the procedure be preserved.

Joseph Rudolph Wood III's execution almost certainly will reinvigorate the national debate over the death penalty. He received an injection at 1:52 p.m. at the Arizona State Prison Complex in Florence. The execution became so prolonged that reporters witnessing the execution counted several hundred of his wheezes before he was finally declared dead at 3:49 p.m. — nearly two hours after the procedure began.

The incident comes in a year in which lethal injections had already triggered controversy over botched procedures and secrecy.

Wood had fought without success to get more information about the drugs and the expertise of his executioners. His request, which was rejected by the U.S. Supreme Court, prompted one prominent appellate judge to call for the return of the firing squad.

The Arizona Supreme Court ordered officials to preserve the remaining drugs used in his execution and the drug labels.

Gov. Jan Brewer ordered the state Department of Corrections to conduct a full review, saying she was "concerned" about the length of time it took Wood to die.

"One thing is certain, however, inmate Wood died in a lawful manner, and by eyewitness and medical accounts he did not suffer," Brewer said in a statement. "This is in stark comparison to the gruesome, vicious suffering that he inflicted on his two victims — and the lifetime of suffering he has caused their family."

Wood, 55, was sentenced to death in 1991 for the August 1989 shooting deaths of his estranged girlfriend, Debra Dietz, and her father, Eugene Dietz, in Tucson.

Wood's last words were to his victims' family, according to an Associated Press reporter who witnessed the execution: "I take comfort knowing today my pain stops, and I said a prayer that on this or any other day you may find peace in all of your hearts and may God forgive you all."

It took so long for Wood to die after receiving an injection of midazolam combined with hydromorphone that his attorneys filed emergency appeals to save his life.

"At 1:57 p.m [officials] reported that Mr. Wood was sedated, but at 2:02 he began to breathe," said the legal filing in federal court

from public defender Jon M. Sands. “At 2:03 his mouth moved. Mr. Wood has continued to breathe since that time. He has been gasping and snorting for more than an hour. At 3:02 p.m. ... staff rechecked for sedation. He is still alive.”

A Wood attorney also went to the state Supreme Court, which was conducting a hearing by telephone when he was pronounced dead.

The question of whether he suffered divided those who watched the procedure.

Another attorney for Wood, Dale A. Baich, was among them. He said that during the 1 hour and 40 minutes Wood was gasping and snorting, he could not tell whether he was conscious. “There was no sound in the witness room, so we could not hear,” he said.

A spokeswoman for the Arizona attorney general's office who was also a witness disputed that. “There was no gasping of air. There was snoring,” Stephanie Grisham said. “He just laid there. It was quite peaceful.”

Baich responded: “My observation was that he was gasping and struggling to breathe. I couldn't tell if he was snoring. Even if he was snoring, it took two hours for him to die?”

Baich called for an independent investigation.

Wood's prolonged death drew an outcry from capital punishment opponents.

“It's time for Arizona and the other states still using lethal injection to admit that this experiment with unreliable drugs is a failure,” Cassandra Stubbs, director of the American Civil Liberties Union's Capital Punishment Project, said in a statement. “Instead of hiding lethal injection under layers of foolish secrecy, these states need to show us where the drugs are [coming] from. Until they can give assurances that the drugs will work as intended, they must stop future executions.”

Megan McCracken of the Death Penalty Clinic at UC Berkeley School of Law concurred: “We see that when the state is allowed to carry out an execution with an experimental drug combination without scrutiny and oversight, the consequences are absolutely horrific.”

Wood's execution revived memories of those in Ohio and Oklahoma this year.

Ohio used the same drug combination to execute Dennis McGuire in January. Witnesses said that “McGuire started struggling and gasping loudly for air, making snorting and choking sounds which lasted for at least 10 minutes, with his chest heaving and his fist clenched.” Ohio executions are on hold while a federal court reviews the state's execution protocol.

Then, in April, Oklahoma murderer Clayton Lockett died of a heart attack 43 minutes after his execution began — and after the state had called off his execution as he writhed and gasped. Details about the lethal drugs and those who administer them are kept secret in many states. Wood had

launched a 1st Amendment attack on that veil of secrecy, arguing that the public has a right to know more about the state's gravest responsibility.

The U.S. 9th Circuit Court of Appeals agreed, halting his execution with a preliminary injunction Saturday. The U.S. Supreme Court lifted the injunction Tuesday. Arizona's state Supreme Court also allowed the execution to go ahead.

The chief judge of the 9th Circuit, Alex Kozinski, had supported Wood's execution but suggested that lethal drugs should be replaced with something more efficient, such as firing squads.

The latest botched execution could force the U.S. Supreme Court to reconsider the issue. Six years ago, the court rejected a “cruel and unusual punishment” challenge to lethal injections in a Kentucky case but left the door open for future challenges.

Among the witnesses were the victims' family.

“This man conducted a horrific murder, and you guys are going, ‘Let's worry about the drugs,'” Richard Brown, Debra Dietz's brother-in-law, told reporters. “Why didn't they give him a bullet, why didn't we give him Drano?”

"One Execution Botched, Oklahoma Delays the Next"

New York Times
Erik Eckholm
April 29, 2014

What was supposed to be the first of two executions here on Tuesday night was halted when prisoner, Clayton D. Lockett, began to writhe and gasp after he had already been declared unconscious and called out "oh, man," according to witnesses.

The administering doctor intervened and discovered that "the line had blown," said the director of corrections, Robert Patton, meaning that drugs were no longer flowing into Mr. Lockett's vein.

At 7:06 p.m., Mr. Patton said, Mr. Lockett died in the execution chamber, of a heart attack.

Mr. Patton said the governor had agreed to his request for a stay of 14 days in the second execution scheduled for Tuesday night, that of Charles F. Warner.

It was a chaotic and disastrous step in Oklahoma's long effort to execute the two men, overcoming their objections that the state would not disclose the source of the drugs being used in a newly tried combination.

According to Mr. Patton, it was the method of administration, not the drugs themselves, that failed, but it resulted in what witnesses called an agonizing scene.

"This was botched, and it was difficult to watch," said David Autry, one of Mr. Lockett's lawyers.

Dean Sanderford, another lawyer for Mr. Lockett, said, "It looked like torture."

A medical technical inserted the IV needle and then the first drug, a sedative intended to knock the man out and forestall pain, was administered at 6:23 p.m. Ten minutes later, the doctor announced that Mr. Lockett was unconscious, and the team started to administer the next two drugs, a paralytic and one intended to make the heart stop.

At that point, witnesses said, things began to go awry. Mr. Lockett's body twitched, his foot shook and he mumbled, witnesses said.

At 6:37 p.m., he tried to rise and exhaled loudly. At that point, prison officials pulled a curtain in front of the witnesses and the doctor discovered a "vein failure," Mr. Patton said.

Without effective sedation, the second two drugs are known to cause agonizing suffocation and pain.

Mr. Lockett's apparent revival and writhing raised questions about the doctor's initial declaration that he was unconscious and are sure to cast doubt on the effectiveness of the sedative used.

Gov. Mary Fallin said late Tuesday, "I have asked the Department of Corrections to conduct a full review of Oklahoma's execution procedures to determine what

happened and why during this evening's execution of Clayton Derrell Lockett."

Madeline Cohen, a federal public defender and lawyer for Mr. Warner, said that while prison officials asserted that the problem was only with the intravenous line, "unless we have a full and independent investigation, we'll never know."

"No execution should take place in Oklahoma until there has been a full investigation into Clayton Lockett's death, including an independent autopsy and full transparency surrounding the drugs and the process of administering them," she said.

The appeals for disclosure about the drug sources, supported by a state court in March, threw Oklahoma's highest courts and elected officials into weeks of conflict and disarray, with courts arguing over which should consider the request for a politically unpopular stay of execution, the governor defying the State Supreme Court's ruling for a delay, and a legislator seeking impeachment of the justices.

The planned executions of Mr. Lockett, 38, and Mr. Warner, 46, dramatized the growing tension nationally over secrecy in lethal injections as drug companies, saying they are fearful of political and even physical attack, refuse to supply drugs, and many states scramble to find new sources and try untested combinations. Several states have imposed secrecy on the suppliers of lethal injection drugs, leading to court battles over due process and the ban on cruel and usual punishment.

Lawyers for the two convicts said the lack of supplier information made it impossible to know if the drugs were safe and effective, or might possibly violate the ban on cruel and unusual punishment.

Officials swore that the drugs had been obtained legally from licensed pharmacies and had not expired. Ms. Fallin, expressing the view of many here, said earlier Tuesday, "Two men that do not contest their guilt in heinous murders will now face justice."

But that sentiment was overshadowed by Tuesday night's bungled execution, which is certain to generate more challenges to lethal injection, long considered the most human of execution methods.

Mr. Lockett was convicted of shooting a 19-year-old woman in 1999 and burying her alive. Mr. Warner, condemned for the rape and murder of an 11-month-old girl in 1997, was to be executed two hours later.

The two men spent Tuesday in adjacent cells, visited by their lawyers and, in Mr. Warner's case, family members. The hulking white penitentiary in this small town in southeast Oklahoma, amid prairies now green from soaking spring rains, is the prison from which Tom Joad is paroled in the opening pages of John Steinbeck's "The Grapes of Wrath."

In keeping with the untried drug protocol announced by the Corrections Department this month, Mr. Lockett was first injected with midazolam, a benzodiazepine intended to render the prisoner unconscious. This was to be followed by injections of vecuronium bromide, a paralyzing agent that

stops breathing, and then potassium chloride, which stops the heart.

This combination has been used in Florida, but with a much higher dose of midazolam than Oklahoma used.

Faced with shortages, Oklahoma and other states have turned to compounding pharmacies – lightly regulated laboratories that mix up drugs to order. Opponents have raised questions about quality control, especially after the widely reported dying gasps of a convict in Ohio for more than 10 minutes, and an Oklahoma inmate's utterance, "I feel my whole body burning," after being injected with compounded drugs.

Oklahoma later said it had found a federally approved manufacturer to provide the drugs for Tuesday's executions, but refused to identify it.

Oklahoma's attorney general, Scott Pruitt, derided the lawsuits over drug secrecy, calling them delaying tactics. Many legal experts, especially death penalty opponents, say otherwise.

"Information on the drug that is intended to act as the anesthetic is crucial to ensure that the execution will be humane," said Jennifer Moreno, a lawyer with the Berkeley Law School's Death Penalty Clinic.

Elsewhere, Texas has refused to reveal where it obtained a new batch of compounded drugs; a challenge before the State Supreme Court. Georgia passed a law last year making information about lethal drug suppliers a "confidential state secret"; a challenge is also pending in that state's top court.

This month, the United States Supreme Court declined to hear suits attacking drug secrecy in Missouri and Louisiana.

But three of the justices expressed interest, and the issue seems likely to be considered by the Supreme Court at some point, said Eric M. Freedman, a professor of constitutional law at Hofstra University.

In March, it appeared that Mr. Lockett and Mr. Warner had won the right to know more about the drugs when an Oklahoma judge ruled that the secrecy law was unconstitutional. But the judge said she did not have the authority to grant the men stays of execution, sending the inmates into a Kafkaesque legal maze.

The state's Court of Criminal Appeals repeatedly turned back the Supreme Court's order to rule on a stay, while the attorney general insisted that the executions would go ahead.

On April 21, the Supreme Court said that to avoid a miscarriage of justice, it would delay the executions until it had time to resolve the secrecy matter.

The next day, Ms. Fallin, a Republican, said the Supreme Court had overstepped its powers, and she directed officials to carry out both executions on April 29. An outraged legislator, Representative Mike Christian, said he would seek to impeach the justices, who were already under fire from conservative legislators for striking down laws the court deemed unconstitutional.

A constitutional crisis appeared to be brewing. But last Wednesday, the Supreme Court announced a decision on the secrecy

issue – overturning the lower court and declaring that the executions could proceed.

"Gambling With Death: Is the Supreme Court Poised to Abolish the Death Penalty?"

Slate
Evan Mandery
July 24, 2014

Abolitionists have ample reason to believe a Supreme Court decision declaring the death penalty unconstitutional is within their grasp. After another botched execution this week, it must look like the day is coming ever closer.

Over the past dozen years, the court has gradually narrowed the permissible uses of capital punishment, rejecting its use for juveniles, child rapists who did not kill, and the mentally retarded. This past May, in *Hall v. Florida*, the court also announced that mental retardation couldn't be determined by a hard and fast numeric rule, which Florida and other states had used to limit the impact of the court's ban.

Those decisions suggest to court watchers that there may finally be a five-justice majority to reject the death penalty in all cases. The questions folks are asking are who are they and when will it happen. The liberal wing seems dependable. Justices Stephen Breyer and Ruth Bader Ginsburg have both consistently voted against the death penalty. Last year, Justice Sonia Sotomayor dissented from the court's refusal to hear a challenge to Alabama's death penalty law, which allows a judge to override a jury's recommendation of mercy. Based on Justice Elena Kagan's vote in *Hall* and her legal pedigree—which includes a stint clerking for Thurgood Marshall, an outspoken death penalty opponent—there's ample reason to believe she'd be receptive to a constitutional challenge to capital punishment as well.

There's also ample reason to believe that a fifth vote could come from Justice Anthony Kennedy. In fact, one could argue that Kennedy's vote is even more dependable than the others. The juvenile case (*Roper v. Simmons)*, the child rapist case (*Kennedy v. Louisiana)*, and *Hall*, were all 5–4 decisions. In each, Kennedy both cast the decisive vote and wrote the majority opinion. Over the years, his position on capital punishment has become more principled and his rhetoric increasingly robust. In *Hall*, Kennedy wrote that executing an intellectually disabled individual "violates his or her inherent dignity as a human being" and serves "no legitimate penological purpose." He has also repeatedly expressed concern with America's international position as a grim outlier on the death penalty and, as far back as a 2003 speech to the American Bar Association, has said that he is deeply troubled by the American criminal justice system generally.

And suddenly this week, two broad-based challenges to capital punishment have been hand-delivered to death penalty abolitionists. If the court is standing by, it should be on notice that the situation on the

ground is changing. Judge Cormac Carney's decision last week rejecting the California death penalty as unconstitutionally arbitrary is remarkable. It is also a template for a Supreme Court brief seeking to abolish the death penalty nationwide. *Furman v. Georgia*, a 1972 decision striking down the death penalty as then practiced as unconstitutional, and *Gregg v. Georgia*, a 1976 decision upholding revised death penalty laws, require states to create nonarbitrary sentencing systems. Carney's conclusion last week is that this mandate is violated by his state's practice of executing only a random few murderers. California executes a smaller percentage of death-sentenced murderers than any other capital punishment state, but the randomness argument could be made about any other death penalty state. Capital sentencing everywhere is infected by racism and classism.

The second sign that things could be changing is Joseph Wood's botched execution Wednesday night. It, too, lays the foundation for a compelling potential argument for doing away with capital punishment. In 2008, the court rejected by 7–2 a challenge to Kentucky's lethal injection protocol. The plurality opinion, authored by Chief Justice John Roberts and joined by Kennedy, held that "an isolated mishap alone does not violate the Eighth Amendment," but after Wood this week, and Clayton Lockett's botched execution in April, it's difficult to characterize these mishaps as isolated. They are starting to look more like the norm.

Abolitionists have other reasons to believe the lethal injection decision might be reversed or modified. Breyer's vote with the majority in that 2008 case was tepid and based in part of the insufficiency of the evidence of suffering. Also, Kagan has replaced John Paul Stevens, who voted with the majority to uphold Kentucky's lethal injection system.

So is the court poised with five votes to end capital punishment? Of course, Kennedy's vote is hardly a sure thing. Wood's lawyers asked Kennedy to stay the execution midway through the two-hour procedure. Kennedy refused. He also cast a decisive fifth vote in a 2005 case upholding Kansas' death penalty law, which says that when a jury finds the aggravating and mitigating evidence against a defendant to be equal, the tie should go to death. Michael Meltsner, who was the first associate counsel of the NAACP Legal Defense Fund during its litigation campaign in the 1960s and '70s says, "I don't think Kennedy is there yet." One might worry, too, about Kagan, who said she accepted the constitutionality of capital punishment during her confirmation hearings.

It's possible that the prospects for overturning the death penalty might get stronger if a Democrat wins the 2016 election and has the opportunity to replace Kennedy or one or more of the conservative justices with a more reliable vote for abolition. But perhaps a Democrat will not win, and perhaps Kennedy, who is 78, will retire and be replaced by a far more strident conservative in the mold of Justices Samuel Alito or Antonin Scalia. Kennedy's bona

fides as a critic of the death penalty and the American criminal justice system are substantial. For the foreseeable future, this is probably the best opportunity abolitionists have to end the death penalty in America.

If, as some suspect, the five votes are indeed there, the failure to press a case to the court means the death penalty could linger long beyond its natural life. If the votes aren't there, on the other hand, pressing a case to the court could do great harm. It's a massive gamble. The justices might say that the arbitrariness problem has been fixed and give the American public further confidence in capital punishment. If that happened, it's hard to imagine the court returning to the issue anytime soon. One gets a crack at these issues only every 50–100 years.

Carol Steiker, the Henry J. Friendly Professor of Law at Harvard Law School, says this of the abolition gamble:

> It's a tough call. On the one hand, there's been a stunning sea change in the use of the death penalty, including abolitions at the state level, declines in both execution and death sentencing rates, decline in public support, and powerful international pressure against the practice. Add to that the geographical isolation of the death penalty, which is used robustly in only a few states and only a few counties within those states, and it's easy to see capital punishment as a practice that the court might deem to be marginalized and withering. On the other hand, the raw numbers aren't as strong as they were in any of the cases in which the Supreme Court has ruled particular death penalty practices unconstitutional. If you bring a global challenge and lose, it may make it harder to succeed in the future. If you take a shot at the king, you better kill him.

So, it's a roll of the dice, and the stakes could hardly be higher, but notably, no one's stepping up to roll those dice. In the 1960s, Meltsner, Tony Amsterdam, and the NAACP Legal Defense Fund were in clear control of the death penalty abolition campaign. For better or worse, they determined which issues should be brought before the court and in which order. It's impossible to imagine *Furman* having been won without their efforts. But today, there's no organized abolition program and no Amsterdam or Meltsner. The gay marriage movement has Ted Olson and David Boies. The abolition campaign has no such leadership. That's not to say no one is advocating against the death penalty or representing the interests of people on death row. They are. But no one is systematically leading the thinking about how to influence the Supreme Court through a series of challenges and cases. As Meltsner says, "The issues are far from as clear cut as they were in the 1960s," and points to the influence of discrimination as an organizing principle. "It was easy for us in a way," he said. "We began with race. We never left race in a way. No matter how awful the criminals were, randomness was worse because it was based on race."

Whatever brought them and bound them to the cause, one can't help but wish for a new Meltsner or Amsterdam to emerge. There may very well be a historic opportunity at hand. It'd be a shame if it slipped by solely for a lack of leadership.

"Can the Death Penalty Survive Lethal Injection?"

U.S. News & World Report
Tierney Sneed
August 7, 2014

Missouri's execution of Michael Worthington, who was convicted of raping and murdering his neighbor, went as planned early Wednesday morning. Appeals for clemency to Democratic Gov. Jay Nixon and for a stay to the U.S. Supreme Court were denied, despite recent concerns expressed about botched executions.

Worthington's punishment comes after the last U.S. inmate to be executed, Joseph Rudolph Wood III in Arizona, snored and by some accounts gasped loudly throughout the two-hour procedure, which his lawyers had contested over the effectiveness and source of the drugs being used to kill him. After a similarly alarming April execution in Oklahoma, President Barack Obama – who supports capital punishment – instructed the Department of Justice to review death penalty protocols, meaning that despite the relative success of lethal injection in Worthington's execution, questions about its viability – particularly challenges in obtaining and administering the drugs – aren't likely to go away.

Missouri executed Michael Worthington early Wednesday morning for raping and killing a female neighbor in 1995.

While people on both sides of the death penalty issue agree there are problems with lethal injection procedures that need to be addressed – including a pro-death penalty appellate judge on the 9th U.S. Circuit who said ahead of the Arizona execution it was time to go back to the firing squad – exactly what should be done is an open question. Death penalty opponents say lethal injection's problems are just another reason capital punishment should be abolished altogether. Proponents, meanwhile, accuse abolitionists of using issues with the specific method to undermine the entire enterprise, which, according to the Pew Research Center, most Americans still support.

Within this quagmire, death penalty experts fear there is a lack of political will to address the increasingly apparent trouble lethal injection is presenting state executioners.

"It's a mistake to conflate the criticisms with lethal injection with the death penalty itself," says Deborah Denno, a Fordham University law school professor who has been studying lethal injection protocols for more than two decades. "Conflating the two has always been a problem on both sides."

There have been issues with lethal injection since it first came into use in 1982. According to Amherst College's Austin Sarat – author of the book "Gruesome Spectacles: Botched Executions and America's Death Penalty," which surveyed every U.S. execution from 1890 to 2010 – about 3 percent of all executions were botched in that period, while the error rate of lethal injections surveyed was about 7

percent. His study did not include the most recent spate of troublesome procedures, which this year included another Oklahoma execution as well as one in Ohio.

Previously, "botched executions did not play a significant role in the overall question about whether we should retain capital punishment," Sarat says. "The context in which the botched executions are happening [now] is very different and has given them and will give them greater significance in the national debate about capital punishment."

The recent surge in botched executions is believed to be fueled by a shortage of the drugs traditionally used for lethal injection. The last U.S. manufacturer of sodium thiopental stopped making the drug after planning to resume doing so in Italy and facing pressure from government authorities there. The European Union has restricted companies from exporting death penalty drugs to the U.S., and execution labs have been forced to concoct their own mix of drugs in-house or turn to local apothecaries to compound pharmaceuticals. Facing scrutiny over these new protocols, some states have passed secrecy laws, which authorities argue protect the identities of local drugmakers from harassment by anti-death penalty activists.

Attorneys defending death row inmates have used the situation to appeal executions on a variety of constitutional grounds, including freedom of information, due process, and cruel and unusual punishment. So far, such arguments have gained only limited traction in the courts. A three-judge panel's temporary stay of Wood's execution marked the first appellate-level decision to side with the First Amendment argument that the inmate deserved more information from the state about the drugs being used to kill him. The Supreme Court overturned the stay, and the high court overall has appeared to be extremely reluctant to weigh in on the practice, having heard a lethal injection case only once, in 2008, when it ruled Kentucky's three-drug protocol was constitutional.

"It was clear the Supreme Court decision was a failed effort immediately," Denno says, calling the Kentucky ruling – which came with seven separate opinions – "unclear, ambiguous," and one "that doesn't really stand for anything."

Even death penalty proponents recognize the arguments inmates' attorneys are making will only gain more teeth as botched executions continue.

"The more and more ugly cases, it becomes likely that courts are likely to intervene, but what that intervention looks like is a fascinating and uncertain question," says Douglas Berman, an Ohio State University law school professor.

The cost and length of time it takes to litigate death penalty appeals is one of the reasons many states have turned away from capital punishment altogether. While still legal in 32 states, only a handful conduct executions on a relatively regular basis. The delays and randomness of the California system – which has the largest death row in the country but hasn't executed anyone since 2006 – recently led a federal judge to overturn an execution sentence

there, declaring it cruel and unusual punishment. In the last decade, six states have formally abolished the death penalty (bringing the total to 18, plus the District of Columbia), even though in some states – like Connecticut – capital punishment still had public support when lawmakers opted to end it.

The states that continue to execute people – including Texas, Pennsylvania and Tennessee, all of which have executions scheduled in the coming months – appear unwilling to let go of the practice, even as further questions arise.

“Holding on to the death penalty and holding to the regularity of executions, having a source of drugs from your confidential source without asking many questions – or at least not having to answer many questions – that’s what's keeping these experimental, unpredictable, sometimes botched executions going lately,” says Richard Dieter, executive director of the Death Penalty Information Center.

In the aftermath of Wood’s execution, conservative Arizona Gov. Jan Brewer, a Republican, said there would be an internal investigation of the execution’s length, but insisted the procedure was carried out “in a lawful manner” and that Wood “did not suffer." Documents released last week revealed that 15 doses of a drug cocktail were injected before Wood died, according to The New York Times, though authorities continue to deny Wood felt any pain.

“States don’t want to admit their failures, so they keep plodding along,” Dieter says. Meanwhile, a group of news organizations is suing the Missouri Department of Corrections to reveal the sources of its lethal injection drugs.

Bringing more transparency, some say, could help states improve their lethal injection methods. But even some death penalty proponents suggest it might be time to abandon lethal injection altogether.

“There is a way the states could avoid all of these problems with lethal injection – that would be to switch to some other method,” says Michael Rushford, president of the pro-capital punishment Criminal Justice Legal Foundation.

Historically, every time states have switched to a new method of execution – like the movement from electrocution to lethal injection in the 1970s and 1980s – it's been due to political and legal pressures resulting from botched executions carried out by another method.

“The hope [was] that lethal injection was the final frontier, the final solution to the desire of Americans to both having the death penalty and also finding a method of execution that was safe, reliable and humane. The problems with lethal injection go to the heart of this hope,” Sarat says. “There is no new technology over the horizon. It’s not like we can say, ‘Botched executions: OK, we can’t get the drugs, the people aren't well-trained, but we can do something new.’”

Not only did 9th Circuit Chief Judge Alex Kozinski suggest a return to the firing squad or one of the other more consistent – albeit messier – older methods, he argued, “If we,

as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn't be carrying out executions at all."

Kozinski has since denied that he was being hyperbolic, an assumption made by some that highlights how public perception is another obstacle to finding an alternative to lethal injection.

"It's the biggest irony that people's hypocrisy about lethal injection is one of the issues that is making these executions botched," Denno says. "They want to have the so-called medical procedure because they can't face the fact that they're killing people and the punishment that is most humane [firing squad] most resembles something that is real."

Another method also has been put forward: Rushford mentions nitrogen gas or carbon monoxide as "outside the box" options. But doubts remain whether such a change could truly quiet concerns people have about capital punishment.

"At the heart of all of this is the reality that the only faction that is passionate about reform has one particular reform in mind, and that would be abolition," Berman says.

PBS' Gwen Ifill raised just that line of thought in a recent interview with Attorney General Eric Holder, who in turn denied that the Justice Department's review of recent protocols and problems would undercut capital punishment as a whole.

"Even though I am personally opposed to the death penalty, as attorney general, I have to enforce federal law," he said.