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III. Criminal

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Melinda Ghilardi
In March of 2005, plaintiff Albert Florence’s vehicle was stopped by a New Jersey state trooper. The officer discovered a bench warrant for Florence issued for failure to pay a fine. Florence presented the officer with a letter showing this fine had been paid. The officer arrested Florence and took him to a county jail where Florence underwent a strip search and visual inspection. Florence was held at the county jail for six days until he was transferred to a correctional facility in the county in which the warrant was issued. He underwent a similar search at this facility and was placed with the general prison population until he was taken before a magistrate judge the following day. The judge immediately ordered Florence’s release upon discovery the warrant had been dismissed. Shortly after his release, Florence filed suit against the facilities, among other municipal entities. Florence asserted numerous constitutional claims including a Fourth Amendment challenge to the strip search procedure. The District Court concluded that the blanket strip search policies failed the balancing test under Bell v. Wolfish and found for Florence. In 2010 the Third Circuit reversed, holding that the blanket strip search policies were justified in light of the security risks presented at the facilities and that deference was owed to prison officials in such security matters.

Question Presented: Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search whenever an individual is arrested, including for minor offenses.
v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and the many cases that followed it inform our analysis.

In Bell, the Supreme Court rejected a Fourth Amendment challenge to a policy of visual body cavity searches for all detainees—regardless of the reason for their incarceration—after contact visits with outsiders. The Court applied a balancing test and concluded that the visual body cavity searches were reasonable because the prison’s security interest justified the intrusion into the detainees’ privacy.

Since Bell was decided, ten circuit courts of appeals applied its balancing test and uniformly concluded that an arrestee charged with minor offenses may not be strip searched consistent with the Fourth Amendment unless the prison has reasonable suspicion that the arrestee is concealing a weapon or other contraband.

Things changed in 2008, however, when the en banc Court of Appeals for the Eleventh Circuit reversed its prior precedent and held that a jail’s blanket policy of strip searching all arrestees upon entering the facility was reasonable even in the absence of individualized suspicion. A year later, the en banc Court of Appeals for the Ninth Circuit also reversed its prior precedent and upheld a blanket policy of strip searching all arrestees before they enter San Francisco’s general jail population.

Confronted with a clear dichotomy between the en banc decisions of the Ninth and Eleventh Circuits on the one hand and the numerous cases that preceded them on the other, we must determine which line of cases is more faithful to the Supreme Court’s decision in Bell.

I.

A.

We begin with the facts surrounding the arrest and detention of lead Plaintiff Albert Florence. On March 3, 2005, a New Jersey state trooper stopped the car in which Florence was a passenger and arrested him based on an April 25, 2003 bench warrant from Essex County. The warrant charged Florence with a non-indictable variety of civil contempt. Though Florence protested the validity of the warrant by insisting he had already paid the fine on which it was based, he was arrested and taken to the Burlington County Jail (BCJ).

According to Florence, he was subjected to a strip and visual body-cavity search by corrections officers at BCJ. During the jail’s intake process, Florence was directed to remove all of his clothing, then open his mouth and lift his tongue, hold out his arms and turn around, and lift his genitals. The officer conducting the search sat approximately arms-length in front of him, and directed Florence to shower once the search was complete. Florence was held at BCJ for six days.

During Florence’s sixth day at BCJ, the Essex County Sheriff’s Department took custody of him and transported him to the Essex County Correctional Facility (ECCF). Florence alleges that he was subjected to another strip and visual body-cavity search upon his arrival at ECCF. As described by Florence, he and four other detainees were instructed to enter separate shower stalls, strip naked and shower under the watchful eyes of two corrections officers. After showering, Florence was directed to open his mouth and lift his genitals. Next, he was ordered to turn around so he faced away from the officers and to squat and cough. After donning ECCF-issued clothing and visiting a nurse, Florence joined the general jail population until the following day, when the charges against him were dismissed.
After his release, Florence sued BCJ, ECCF, and various individuals and municipal entities (collectively, the Jails) under 42 U.S.C. § 1983. While Florence asserted numerous constitutional claims, the only claim germane to this appeal is his Fourth Amendment challenge to the strip search procedures at BCJ and ECCF.

B.

On March 20, 2008, the District Court granted Florence’s motion for class certification, defining the plaintiff class as:

All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants’ officers to strip naked before those officers, no matter if the officers term that procedure a “visual observation” or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons.


Following discovery, the parties filed cross motions for summary judgment. In reviewing the motions, the District Court first considered whether the intake procedures at each facility rose to the level of a “strip search.” Florence v. Bd. of Chosen Freeholders of the County of Burlington, 595 F.Supp.2d 492, 502 (D.N.J.2009). To resolve this question, the District Court reviewed the Jails’ written search policies as well as the deposition testimony of correctional officers and the wardens at each facility. Ultimately, the District Court concluded that, while there were facts in dispute—such as whether non-indictable male arrestees at BCJ were required to lift their genitals during the search—these disputes were immaterial because even the undisputed procedures of instructing arrestees to remove all of their clothing and subject their naked bodies to visual inspection “rose to the level of a strip search” under the Fourth Amendment. Id. at 502-03 (“Whatever the case may be, a discrepancy of this sort does not necessarily provide a genuine issue of material fact. . . . ‘It’s just common sense. Take off all your clothes. You’re strip[ ] searched.’” (quoting Plaintiffs’ counsel)).

The District Court found that BCJ’s “blanket” strip search policy “entails a complete disrobing, followed by an examination of the nude inmate for bruises, marks, wounds or other distinguishing features by the supervising officer, which is then followed by a supervised shower with a delousing agent.” The Court found that ECCF utilized similar strip-search and supervised-shower procedures; however, the ECCF procedures were slightly more intrusive because “Essex officers carefully observed the entire naked body of the inmate, including body openings and inner thighs.” Having thus defined the Jails’ respective search policies, the District Court concluded that the procedures failed the Bell balancing test and observed that “blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband, [are] unconstitutional.” Based on this holding, the District Court granted the Plaintiffs’ motion for summary judgment on the unlawful search claim, but denied the Plaintiffs’ request for a preliminary injunction. The
Court denied Defendants’ cross-motion which sought qualified and Eleventh Amendment immunity.

Following the decision, the Jails moved the District Court to certify its summary judgment as an appealable order pursuant to 28 U.S.C. § 1292(b). The District Court agreed that the order “involve[d] a controlling question of law as to which there is substantial ground for difference of opinion,” and we granted permission to appeal. The District Court certified the following question for our review: “whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment.” “In reviewing an interlocutory appeal under 28 U.S.C. § 1292(b), this court exercises plenary review over the question certified.”

II.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures.” To enforce this guarantee, government officials are limited to only those searches which are reasonable. Reasonableness under the Fourth Amendment is a flexible standard, “not capable of precise definition or mechanical application,” Bell, 441 U.S. at 559, 99 S.Ct. 1861. “In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”

Detention in a correctional facility “carries with it the circumscription or loss of many significant rights.” “The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of institutional needs and objectives of prison facilities, chief among which is internal security.” Because privacy is greatly curtailed by the nature of the prison environment, a detainee’s Fourth Amendment rights are likewise diminished.

While the Supreme Court has “repeatedly held that prisons are not beyond the reach of the Constitution[,]” it has also emphasized that the judiciary has a “very limited role” in the administration of detention facilities. Indeed, detention facilities have been described as “unique place[s] fraught with serious security dangers,” the management of which “courts are ill equipped to deal with[.]” Therefore, authorities are entitled to considerable latitude in designing and implementing prison management policies. As the Supreme Court cautioned in Bell: “[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” In addition to prison administrators’ “professional expertise,” separation of powers and federalism concerns support “wide-ranging deference” to the decisions of prison authorities.

A.

Having explained the general standards that govern our inquiry, we turn to the Supreme Court’s pathmarking decision in Bell v. Wolfish. Although there are factual differences between Bell and the instant case, they are sufficiently similar to warrant a detailed review of Bell.

In Bell, pretrial detainees and convicted prisoners confined at the Metropolitan Correctional Center (MCC)—a federally operated short-term custodial facility—filed suit challenging numerous prison practices
and conditions of confinement. Although the primary purpose of MCC was to house pretrial detainees awaiting trial on federal criminal charges, the facility also housed: witnesses in protective custody, contemnors, inmates awaiting sentencing or transportation to federal prison, inmates serving relatively short sentences, and inmates lodged under writs of habeas corpus issued to ensure their presence at trial. The population at MCC was quite transient, with 50% of its inmates spending fewer than 30 days at the facility and 73% of the population spending fewer than 60 days at MCC.

Among the conditions of confinement challenged by the inmates at MCC was the policy of strip and visual body-cavity searches after contact visits with outsiders. Under that policy, all persons housed at MCC—regardless of the reason for their detention—were “required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.” For males, this required “lift[ing] [the] genitals and bend[ing] over to spread [the] buttocks for visual inspection.” “The vaginal and anal cavities of female inmates also [were] visually inspected.” Inmates were not touched by officers during the searches.

The district court in Bell upheld the strip searches but held the visual body cavity searches unreasonable under the Fourth Amendment. The Court of Appeals for the Second Circuit affirmed, finding that the “gross violation of personal privacy inherent in such a search cannot be outweighed by the government’s security interest in maintaining a practice of so little actual utility.”

The Supreme Court reversed, holding that the visual body-cavity searches were reasonable under the Fourth Amendment. As a preliminary matter, the Court assumed without deciding that both convicted prisoners and pretrial detainees retain some Fourth Amendment rights upon commitment to a correctional facility. It then explained that, in each case, the test of Fourth Amendment reasonableness requires “a balancing of the need for the particular search against the invasion of personal rights that the search entails,” and instructed courts to consider four factors in assessing reasonableness: “the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”

In applying the balancing test to the search policy, the Supreme Court cited MCC’s dual objectives of detecting and deterring smuggling of weapons and other contraband, recognizing that “[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence.” The Court upheld the policy despite the absence of any evidence of smuggling problems at MCC as the record contained only one instance where an inmate was caught with contraband in a body cavity. Nevertheless, the Court found the lack of evidence supported the prison’s interest in the policy because it was “more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of inmates to secrete and import such items when the opportunity arises.”

Significantly, Bell included just one sentence discussing the scope of the privacy intrusion, in which the Court stated that it “did not underestimate the degree to which these searches may invade the personal privacy of inmates.” And though it acknowledged that correctional officers may sometimes conduct the searches in an impermissibly abusive fashion, the Supreme Court did not address that issue; rather, it
limited its review to the policy as a whole, “deal[ing]... with the question whether visual body-cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause grounds.” The Court answered that question in the affirmative. Moreover, the Court rejected the district court’s consideration of alternative, less-intrusive means of detecting contraband. Even assuming the availability of such alternatives, the Court deferred to MCC’s choice of security procedure because it had not been shown to be “irrational or unreasonable.”

B.

In the years following Bell, ten circuit courts of appeals applied the Supreme Court’s balancing test to strip searches of individuals arrested for minor offenses and found the searches unconstitutional where not supported by reasonable suspicion that the arrestee was hiding a weapon or contraband. In general, these courts concluded that the extreme invasion of privacy caused by a strip and/or visual body-cavity search outweighed the prison’s minimal interest in searching an individual charged with a minor crime shortly after arrest. The critical factor in balancing the competing interests was the belief that individuals arrested for minor offenses presented a relatively slight security risk because they usually are arrested unexpectedly whereas the contact visits in Bell may have been arranged specifically for the purpose of smuggling weapons or drugs.

Recently, the Eleventh and Ninth Circuits, sitting en banc, reversed their prior precedents and held that Bell authorizes a policy of blanket strip searches for all arrestees entering the general population of a jail.

In Powell [v. Barrett], the Eleventh Circuit reviewed a policy of strip searching all arrestees at the time of intake implemented by the Fulton County Jail in Georgia. The policy required that all persons entering the jail’s general population be strip searched regardless of the crime charged and without any individualized suspicion. Powell, 541 F.3d at 1301. The booking process required groups of 30 to 40 arrestees to enter a large shower room, simultaneously remove all of their clothing, place it in boxes and then shower. “After the group shower each arrestee either singly, or standing in a line with others, is visually inspected front and back by deputies. Then each man takes his clothes to a counter and exchanges his own clothes for a jail jumpsuit.” The Eleventh Circuit discussed in great detail the facts and circumstances surrounding the searches at issue in Bell, which demonstrated the high level of intrusiveness that the Supreme Court countenanced as reasonable. The Eleventh Circuit also noted the paltry record of body-cavity smuggling at MCC as evidence of the significant deference provided to prison administrators by the Court in Bell. In light of these points, the Eleventh Circuit determined that most courts (and its own prior precedent) misinterpreted Bell to require reasonable suspicion for strip searches of minor offenders. It opined that the decisions requiring reasonable suspicion failed to give appropriate deference to the judgments of prison administrators and ignored the fact that in upholding visual body-cavity searches, the Supreme Court in Bell neither required individualized suspicion of smuggling nor differentiated the degree of suspicion required based on the type of offender.

The Powell court also disagreed with the majority view that security interests at the time of intake are less important than those
arising after an inmate’s contact visit with an outsider, describing “an inmate’s initial entry into a detention facility” as “coming after one big and prolonged contact visit with the outside world.” The court asserted that the “need for strip searches at all detention facilities, including county jails, is not exaggerated.” Citing other cases, the court noted the problem of gang violence in prisons and observed that gang members might “coerce, cajole, or intimidate lesser violators into smuggling contraband into the facility.” In light of these security concerns, the Eleventh Circuit held that “a policy or practice of strip searching all arrestees as part of the process of booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible” at least where the search is no more intrusive than the search in Bell.

Like the Eleventh Circuit in Powell, the Ninth Circuit in Bull v. City and County of San Francisco reversed prior precedent and upheld the San Francisco Sheriff’s policy authorizing strip searches of all arrestees before they are placed in the general population of a county jail. Bull, 595 F.3d at 966. In rejecting its prior requirement of reasonable suspicion for arrestee strip searches, the Bull court relied on much of the same reasoning as the Eleventh Circuit in Powell, including its view that decisions interpreting Bell v. Wolfish to require reasonable suspicion to strip search minor offenders were analytically flawed. The Ninth Circuit concluded that “the scope, manner, and justification for San Francisco’s strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in Bell.” Based on the record presented, the justification for searching arrestees at the time of intake was even higher than the justification for the post-contact visit searches in Bell because San Francisco had amassed a record demonstrating “a pervasive and serious problem with contraband inside San Francisco’s jails” as well as instances of contraband smuggled within body cavities.

C.

Mindful of the newly-minted circuit split we have described, we proceed to apply Bell’s balancing test to the question certified for interlocutory appeal in this case. The Jails rely heavily on Powell in support of their argument that strip searches satisfy the reasonableness standard of Bell. They argue that the searches serve the valid prison interests of “eliminating weapons and drugs from the jail environment, serving to mitigate gang violence and preventing disease,” and that these concerns apply to indictable and non-indictable arrestees alike. On behalf of the Plaintiff class, Florence counters that the District Court properly applied Bell, and that we should adopt the reasonable suspicion requirement applied by the majority of our sister circuits. Florence also challenges the legitimacy of the gang, health, and contraband concerns as justifications for the strip search of non-indictable arrestees as unsupported by the record and argues that there are less intrusive alternatives to satisfy the Jails’ security interests.

Like the Supreme Court in Bell, we assume detainees maintain some Fourth Amendment rights against searches of their person upon entry to a detention facility. To determine whether the strip search procedures at BCJ and ECCF violate the Fourth Amendment, we first consider the scope of the searches at issue.

We have previously recognized that a strip search constitutes a “significant intrusion on an individual’s privacy.” Here, the strip
search policies require the arrestees to undress completely and submit to a visual observation of their naked bodies before taking a supervised shower. We do not minimize the extreme intrusion on privacy associated with a strip search by law enforcement officers; however, the searches at issue here are less intrusive than the visual body-cavity searches considered by the Supreme Court in *Bell*. In fact, they are closer to the strip searches upheld by the lower court in *Bell*.

The searches were also conducted in a similar manner and place as those in *Bell*—by correctional officers at a detention facility. The policies governing strip searches at BCJ require that they be conducted “in private . . . under sanitary conditions . . . [and] in a professional and dignified manner.” Moreover, the searches are relatively brief, such that between the search and supervised shower, an arrestee is not required to remain naked for more than several minutes. Because the scope, manner, and place of the searches are similar to or less intrusive than those in *Bell*, the only factor on which Plaintiffs could distinguish this case is the Jails’ justification for the searches.

Detention facilities are “unique place[s] fraught with serious security dangers.” We have recognized that New Jersey jails, like most correctional facilities, face serious problems caused by the presence of gangs. The Jails cite three specific security interests to justify strip searches: (1) the detection and deterrence of smuggling weapons, drugs or other contraband into the facility, (2) the identification of gang members by observing their tattoos, and (3) the prevention of disease, specifically Methicillin-resistant Staphylococcus aureus (MRSA). Of these three, the potential for smuggling of weapons, drugs, and other contraband poses the greatest security threat.

It is self-evident that preventing the introduction of weapons and drugs into the prison environment is a legitimate interest of concern for prison administrators. Prevention of the entry of illegal weapons and drugs is vital to the protection of inmates and prison personnel alike.

Like the Ninth and Eleventh Circuit Courts of Appeals, we conclude that the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*. We reject Plaintiffs’ argument that blanket searches are unreasonable because jails have little interest in strip searching arrestees charged with non-indictable offenses. This argument cannot be squared with the facts and law of *Bell*. First, the *Bell* court explicitly rejected any distinction in security risk based on the reason for detention. Instead, the security risk was defined by the fact of detention in a correctional facility.

Second, *Bell* did not require individualized suspicion for each inmate searched; it assessed the facial constitutionality of the policy as a whole, as applied to all inmates at MCC. MCC housed pretrial detainees, convicted inmates, and even non-offenders held as material witnesses, all of whom were included in the plaintiff class.

We also disagree with Plaintiffs’ contention that the risk that non-indictable offenders will smuggle contraband is low because arrest for this category of offenses is often unanticipated. Even assuming that most such arrests are unanticipated, this is not always the case. It is plausible that incarcerated persons will induce or recruit others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility. This would be especially true if we were to hold that those incarcerated on non-indictable
offenses are, as a class, not subject to search. For that reason, we agree with the concern expressed by the Eleventh Circuit in Powell that gang members would be likely to exploit an exception from security procedures for minor offenders.

A similar risk was recognized by the Supreme Court in Block v. Rutherford, where the Court upheld a prison policy denying contact visits to pretrial detainees regardless of the crime charged. 468 U.S. 576, 589, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984). In Block, the district court permitted the denial of contact visits for high risk detainees, but required the jail to provide visits for pretrial detainees “concerning whom there is no indication of drug or escape propensities.” The Supreme Court rejected the lower court’s characterization of a blanket ban on contact visits as disproportionate to the risks posed by low level detainees. In doing so, the Court reasoned that inmates would likely take advantage of any gap in security: “[i]t is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits.”

It is also important to note that the opportunity for smuggling during the contact visits in Bell was low. As described by the district court in that case, “inmates and their visitors are in full view during the visits and fully clad. The secreting of objects in rectal or genital areas becomes in this situation an imposing challenge to nerves and agility.” Despite these obstacles to an inmate obtaining contraband from a visitor and hiding it in a body cavity, the Supreme Court still found that MCC’s interest in detecting and deterring this low risk of smuggling outweighed the privacy intrusion. If it is reasonable to assume that a prisoner will try to arrange for a visitor to deliver contraband during a contact visit, it is equally reasonable to assume that a detainee will arrange for an accomplice on the outside to subject himself to arrest for a non-indictable offense to smuggle contraband into the facility. Thus, the Jails’ interest in preventing smuggling at the time of intake is just as high as MCC’s interest after the contact visits in Bell.

The Plaintiff class argues that the Jails cannot rely on an interest in preventing smuggling because they have not presented any evidence of a past smuggling problem or any instance of a non-indictable arrestee attempting to secrete contraband. It is true that the Jails’ justifications for strip searches would be stronger if supported by evidence regarding discovery of contraband on indictable and non-indictable offenders during intake, and the incidence with which gang members are arrested for non-indictable offenses. Nonetheless, our interpretation of the Supreme Court’s decision in Bell leads us to conclude that the Jails are not required to produce such a record.

In Bell, the single instance of attempted smuggling did not undermine MCC’s justification for the search. Quite to the contrary, the Court considered the absence of a record to be evidence of the policy’s successful deterrent effect. Likewise here, strip searches at the time of intake also have significant deterrent value. If non-indictable offenders were not subject to automatic search it would create a security gap which offenders could exploit with relative ease.

The Bell court did not require a record of smuggling to justify MCC’s interest in preventing it (in fact, there was no time for a long history of smuggling to have developed as the Bell plaintiffs filed their case only four months after MCC opened). The Supreme Court declared that “[s]muggling
of money, drugs, weapons, and other contraband is all too common an occurrence" at detention facilities. In addition to the sole instance of smuggling in the record, Bell relied upon cases concerning other detention facilities for the proposition that inmates attempt to secrete items in their body cavities.

Finally, we also find significant that the Supreme Court repeatedly has emphasized that courts must defer to the policy judgments of prison administrators. Moreover, we have stated that “deference is especially appropriate when a regulation implicates prison security.” This emphasis on deference further supports the proposition that the absence of evidence of smuggling at a particular correctional institution does not demonstrate the unreasonableness of a policy implemented to prevent smuggling. A detention facility need not suffer a pattern of security breaches before it takes steps to prevent them where those steps are neither “irrational [nor] unreasonable.”

Plaintiffs assert that the Jails’ interest in preventing smuggling could be achieved through means less intrusive than strip searches. Specifically, Plaintiffs point to the Body Orifice Scanning System (BOSS Chair), “[a] non-intrusive scanning system designed to detect small weapons or contraband metal objects concealed in oral, anal, or vaginal cavities,” a security method already used by ECCF. In Bell, the Supreme Court rejected the district court’s reliance on the less-intrusive means of metal detection in evaluating searches at MCC. The Court found metal detection to be less effective than the visual search procedure and deferred to the prison administrator’s decision to use the visual search method. Florence’s argument regarding the BOSS Chair fails for the same reasons. Aside from the fact that there is no evidence regarding the efficacy of the BOSS Chair in detecting metallic objects, it would not detect drugs and other non-metallic contraband. Accordingly, the decision not to rely exclusively on the BOSS Chair is not unreasonable.

As asserted by the Jails, a blanket policy will help to avoid potential equal protection concerns in the strip search process as it removes officer discretion in selecting which arrestees to search. The potential for abuse in a “reasonable suspicion” scheme is high, particularly where reasonable suspicion may be based on such subjective characteristics as the arrestee’s appearance and conduct at the time of arrest. Subjecting all arrestees to the same policy promotes equal treatment.

In sum, balancing the Jails’ security interests at the time of intake before arrestees enter the general population against the privacy interests of the inmates, we hold that the strip search procedures described by the District Court at BCJ and ECCF are reasonable. Accordingly, we will reverse the District Court’s grant of summary judgment on Plaintiffs’ Fourth Amendment strip search claim and remand for further proceedings consistent with this opinion.9

POLLAK, District Judge, dissenting.

I.

I respectfully disagree with the court’s opinion. I think Judge Rodriguez’s decision should be affirmed, and I would expressly predicate the order of affirmance on his comprehensive, finely crafted, and characteristically thoughtful opinion.

II.

In upholding as constitutional strip searches of persons detained on non-indictable offenses and with respect to whom there is
no individualized ground for suspicion that they may be bringing contraband into a detention facility, the court finds the en banc opinions of the Eleventh Circuit, "Powell v. Barrett," 541 F.3d 1298 (11th Cir. 2008), and of the Ninth Circuit, "Bull v. City and County of San Francisco," 595 F.3d 964 (9th Cir. 2010), persuasive. For my part, I find greater wisdom in Judge Barkett’s dissent in Powell and Judge Thomas’s dissent in Bull. Judge Thomas’s Bull dissent frames the issues this way:

The majority sweeps away twenty-five years of jurisprudence, giving jailors the unfettered right to conduct mandatory, routine, suspicionless body cavity searches on any citizen who may be arrested for minor offenses, such as violating a leash law or a traffic code, and who pose no credible risk for smuggling contraband into the jail. Under its reconfigured regime, the majority discards Bell’s requirement to balance the need for a search against individual privacy and instead blesses a uniform policy of performing body cavity searches on everyone arrested and designated for the general jail population, regardless of the triviality of the charge or the likelihood that the arrested is hiding contraband.

The rationale for this abrupt precedential departure is founded on quicksand. Indeed, the government’s entire argument is based on the logical fallacy cum hoc ergo propter hoc—happenstance implies causation. The government argues that contraband has been found in the San Francisco jails. Thus, the government reasons, individuals who are arrested must be smuggling contraband into the jail. Therefore the government concludes it must body cavity search everyone who is arrested, even those who pose no risk of concealing contraband, much less of trying to smuggle contraband into the jail.

This reasoning finds no support from the record in this case. Although there is evidence of some arrestees attempting to conceal contraband during their arrest, there is not a single documented example of anyone doing so with the intent of smuggling contraband into the jail. More importantly, for our purposes, there is not a single example of anyone from the class defined by the district court who was found to possess contraband upon being strip search. Not one.

Bull, 595 F.3d at 990.

In his District Court opinion, Judge Rodriguez makes a point which gives special cogency to Judge Thomas’s “Not one”:

... [I]t is worth noting that neither county submits supporting affidavits that detail evidence of a smuggling problem specific to their respective facilities.


Judge Barkett’s Powell dissent sums up the issues with special force:

Like the majority, I recognize and appreciate the deference due to jail administrators as they fulfill their charge of ensuring security in jails,
not only for the jail officials but also for the inmates. At the same time, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." This principle applies with at least as much force to individuals detained prior to their trial on petty misdemeanor charges such as failing to pay child support, driving without a license, or trespassing. These protections, such as the right to be free from degrading, humiliating, and dehumanizing treatment and the right to bodily integrity, include protection against forced nakedness during strip searches in front of others.

*Powell, 541 F.3d at 1315.*
A New Jersey man who says he was subjected to two humiliating strip searches over unpaid traffic fines will have his appeal heard by the Supreme Court, an important test of police detention powers in the post 9/11 security-conscious environment.

The justices Monday accepted Albert Florence's petition, and will hold oral arguments in the fall.

At issue is a challenge to a county's rules allowing routine, suspicionless strip searches of everyone arrested for even minor offenses, regardless of the circumstances.

Florence was a passenger in his family's sport utility vehicle when it was stopped by a New Jersey state trooper in March 2005. His then-pregnant wife was driving and their 4-year-old daughter was in the back seat as they headed to dinner with Florence's mother-in-law.

Since Albert Florence was the registered owner, the officer ran his identification and discovered a bench warrant for failure to pay a fine. He had already paid the money, and carried a letter attesting to that fact, since he claimed he had been stopped on several previous occasions.

Nevertheless, Florence this time was handcuffed and arrested, and then taken to the jail in Burlington County, in the southern part of the state.

Court records show Florence was subjected to an invasive strip and visual body-cavity search. He was then held for six days in the county lockup before being transferred to a Newark correctional facility, where he was subjected to another identical search before being placed in the general prison population.

The next day a judge freed Florence, confirming what he had insisted all along, that the fine had been paid.

He then sued, but a federal appeals court in Philadelphia last year ruled the search policy proper.

In the appeal to the Supreme Court, Florence's lawyers wrote, "Strip searches deprive an individual of the most tangible protection of his intimate personal privacy—his clothing... It is unreasonable under the Fourth Amendment for jail officials to engage in the deep intrusion into personal dignity of a strip search of every single individual admitted into the facility, no matter what the circumstances."

They also pointed out that Florence's alleged offense, failure to pay a fine, is not considered a criminal offense in the state and would not normally result in incarceration. His family said their efforts to free Florence were thwarted by repeated bureaucratic run-arounds.

State officials in their reply drew a distinction between a strip search policy for those initially arrested and for those later entering the general prison population. Such "intake" searches are justified, said the state, when applied consistently to every inmate and for proper reasons, including "both
health threats and the increasing need to identify gang members upon their entry into the institution.”

Federal courts before the September 11, 2001, attacks had been at odds over the constitutionality of strip searches. The Constitution’s Fourth Amendment protects against “unreasonable searches and seizures.”

The Supreme Court in 1979, in what is called the Bell precedent, upheld the kind of search Florence had undergone for those prisoners who had contact visits with outsiders. Using a balancing test, the justices said the prison’s security interest justified intrusion into the inmates’ privacy.

But subsequent appeals courts have found those arrested for minor offenses may not be strip searched unless authorities have a “reasonable suspicion” that the person may be concealing a weapon or contraband such as drugs.

In 2008, however, appeals courts in Atlanta and San Francisco found searches of every inmate coming into the prison population are justified, even without specific suspicions. Those opinions were the first of their kind since the 9/11 attacks and, along with Florence’s case, now give the high court the chance to clarify an issue that a number of civil and human rights proponents have tried to highlight.

Local jails in New Jersey at the time of Florence’s arrest were subject to federal monitors after allegations that minority motorists and their passengers were being unfairly targeted for police stops and arrests. Stops of that nature are not at issue in the current appeal. Florence, who is African-American, is not alleging any racial discrimination by the state or individual officers.

The case is Florence v. Board of Chosen Freeholders of the County of Burlington, New Jersey (10-945).
[A] strip-search and, to a lesser extent, the strange and somewhat confounding circumstances that surrounded [Albert] Florence's six-day detention in 2005 have led to a potential landmark civil rights case to be argued this fall before the U.S. Supreme Court.

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The case of Albert W. Florence against Essex and Burlington counties stands on a precipice: ... Legally, the Supreme Court's ruling is expected to set clear national law . . . on an issue that has split the country's federal appeals courts: Whether detention facilities can strip-search a noncriminal offender without having a “reasonable suspicion” that the person might be concealing something.

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On one hand, Essex and Burlington counties will argue that the Supreme Court should continue with its recent trend of giving more deference to detention facility officials to run their houses as they see fit. Essex and Burlington will contend that safety is paramount and that anyone who enters the four walls of their jails and prisons must be strip-searched, no matter the circumstances, in order to pinpoint gang members through spotting their tattoos, identify and prevent the spread of staph infections, and, most notably, prevent the smuggling in of weapons, drugs or other contraband.

On the other hand, attorneys for Florence will argue the Fourth Amendment of the U.S. Constitution, which protects citizens against unwarranted searches and seizures, calls for a different balancing of the rights of the government against the intrusion into one's privacy. As Susan Chana Lask, the civil rights attorney who has handled Florence's case for six years, said recently, "How reasonable does everyone think it is to get hauled off to jail for a traffic ticket and get strip-searched?"

Lask argues vehemently that what happened to Florence could "happen to anyone" and that those accused of being noncriminal offenders should be treated differently than murder suspects and other alleged serious criminals. A proper balancing under the Fourth Amendment, Lask says, calls for detention facilities to make a "reasonable suspicion" determination before strip-searching a low-level offender. Plus, Lask says, "there's a practical fix, which is to physically separate the noncriminal offenders (in the facilities) from the murderers and the rapists."

Meanwhile, the stakes for Essex and Burlington counties are particularly high. While Florence at first brought his case individually, his lawsuit was later certified as a class action by the federal trial court, which ruled in Florence's favor, finding his strip-searches to be unconstitutional. That means if Florence wins at the Supreme Court, the class of previously strip-searched...
noncriminal offenders at the Essex and Burlington jails—a group that has been estimated to be 10,000 people—can ask for damages, usually in the range of $1,000 to $2,000 a person, lawyers say.

The Traffic Stop

On March 3, 2005, a state police officer in Burlington County pulled over Florence’s wife, April, for driving 82 mph in a 65-mph zone. The police officer ran the vehicle’s registration and arrested Albert Florence, the passenger, after learning that there was an Essex County warrant for his arrest, according to court records and state police spokesman Stephen Jones.

Suddenly, Florence was on his way to the Burlington County Correctional Facility, even though he quickly gave officials a piece of paper that bore “a raised seal from the State of New Jersey” and showed “that all judgments against plaintiff were satisfied and no warrant existed against him,” according to his lawsuit.

Indeed, the warrant for Florence had been dismissed in 2003, court filings show and the lawyers in the case say.

* * *

Once incarcerated, Florence . . . spent five to six days in the Burlington County jail as a “holdover” inmate, waiting to be transferred to Essex County. At a sparsely attended news conference organized earlier this month by Lask, Florence described the first strip-search he endured—the one done in Burlington—as a “horrible moment.” He was ordered to “while nude, open his mouth, lift his tongue, hold his arms out, turn fully around, and lift his genitals,” said his lawsuit complaint.

. . . To top it off, [Florence] said, he was eventually transferred to the Essex County Correctional Facility, where he said he suffered an even worse strip-search than the one in Burlington.

* * *

Florence only stayed a day in Essex County before he saw a magistrate judge who quickly released him based on the warrant having been dismissed.

At the trial level, one issue hotly contested before U.S. District Court Judge Joseph H. Rodriguez was whether Florence was, in fact, strip-searched—or instead was only subjected to “clothing exchanges” linked to mandatory inmate showers. Several jail officers testified that they didn’t consider Florence’s treatment to be a strip-search, said J. Brooks DiDonato, a veteran lawyer who is defending Burlington County. But Judge Rodriguez disagreed.

* * *

In The Beginning

* * *

According to court and police records, and a Burlington County filing in his lawsuit, Florence had a serious confrontation with the law in 1997. Documents obtained by The Star-Ledger from the Maplewood Police Department, and interviews with a Maplewood official, reveal that on Dec. 18, 1997, Florence was arrested and accused of speeding off from a traffic stop in a 1994 Honda Accord “that was used as a weapon to attempt to injure” a Maplewood police officer.

Court filings and police reports show that Florence was charged with criminal offenses including aggravated assault, obstruction of the administration of law, eluding/failure to stop, and possession of a weapon (the Honda Accord) for unlawful purpose.
A Burlington County court filing also says that, on or about May 4, 1998, Florence in turn pleaded guilty to the lesser indictable offenses of hindering prosecution and obstruction of the administration of law. He served probation after the plea, according to the court filing, and he may have been ordered to pay fines.

The Burlington legal brief says that on April 25, 2003, an arrest warrant was issued on the hindering-prosecution charge, but four days later, Florence satisfied the requirement of his probation and the warrant was dismissed.

**Reasonable Suspicion**

The Supreme Court issue arising from Florence’s lawsuit is one that appeared settled for many years under a 1979 decision called *Bell v. Wolfish*. Then-Associate Justice William Rehnquist wrote in *Bell* that a visual body-cavity search of a detained person was warranted after the inmate had contact with an outside visitor, regardless of why the person was incarcerated.

After *Bell* was decided, 10 U.S. appeals courts interpreted *Bell* to mean that a detention facility could not strip-search a person brought in on minor offenses, unless the facility had a “reasonable suspicion” that the person was concealing something.

Since 2008, though, at least three U.S. appeals courts have now disagreed with that view of *Bell*, including the 3rd Circuit Court of Appeals in Philadelphia, which last year heard Florence’s case and decided that a jail had a powerful interest in keeping its premises free of weapons and drugs. The court ruled that all people introduced to the general population of a facility can be strip-searched.

Writing for the majority, Judge Thomas M. Hardiman said that a blanket strip-search policy had an important “deterrent effect.” He added, “It is plausible that incarcerated persons will induce or recruit others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility.”

Jonathan Turley, a well-known George Washington University constitutional law professor, said the court’s argument about people getting arrested for low-level offenses and smuggling in contraband for others struck him as particularly “fanciful.” He also said the “small percentage” of inmates who “actually introduce contraband” by hiding it in their bodies means that “claims of imminent threats aren’t supported by the data.”

But the Burlington lawyer, DiDonato, said people smuggling contraband in their bodies into jails is “a far more commonplace incident than most people could imagine.” He sees safety in jails and prisons as paramount, he said. “If I were admitted to the general population of a facility for an offense like an unpaid fine,” DiDonato said, “I would want to be sure that the people I was sharing a cell with had been strip-searched—whether I was rightfully or wrongfully incarcerated.”

Phillips, the Supreme Court litigator for Essex County, who has argued more cases before the high court than any other private practitioner alive, contends that physically separating the noncriminal offenders in facilities from those accused of serious crimes “would be an administrative nightmare for most places” and could mean “doubling the costs.”
Albert W. Florence believes that black men who drive nice cars in New Jersey run a risk of being questioned by the police. For that reason, he kept handy a 2003 document showing he had paid a court-imposed fine stemming from a traffic offense, just in case.

It did not seem to help.

In March 2005, Mr. Florence was in the passenger seat of his BMW when a state trooper pulled it over for speeding. His wife, April, was driving. His 4-year-old son, Shamar, was in the back.

The trooper ran a records search, and he found an outstanding warrant based on the supposedly unpaid fine. Mr. Florence showed the trooper the document, but he was arrested anyway.

A failure to pay a fine is not a crime. It is, rather, what New Jersey law calls a nonindictable offense. Mr. Florence was nonetheless held for eight days in two counties on a charge of civil contempt before matters were sorted out.

In the process, he was strip-searched twice.

"Turn around," he remembered being told while he stood naked before several guards and prisoners. "Squat and cough. Spread your cheeks."

The treatment stung. "I consider myself a man's man," said Mr. Florence, a finance executive for a car dealership. "Six-three. Big guy. It was humiliating. It made me feel less than a man. It made me feel not better than an animal."

The Supreme Court is likely to decide this month whether to hear Mr. Florence's case against officials in New Jersey over the searches, and there is reason to think it will.

The federal courts of appeal are divided over whether blanket policies requiring jailhouse strip-searches of people arrested for minor offenses violate the Fourth Amendment. Eight courts have ruled that such searches are proper only if there is a reasonable suspicion that the arrested person has weapons or contraband.

The more recent trend, from appeals courts in Atlanta, San Francisco and Philadelphia, is to allow searches no matter how minor the charge. Some potential examples cited by dissenting judges in those cases: violating a leash law, driving without a license, failing to pay child support.

Although the judges in the majority in Mr. Florence's case, the one heard in Philadelphia, said they had been presented with no evidence that the searches were needed, they nonetheless ruled that they would not second-guess corrections officials who said they feared that people like Mr. Florence would smuggle contraband into their jails.

The most pertinent Supreme Court decision, Bell v. Wolfish, was decided by a 5-to-4 vote in 1979. It allowed strip-searches of people held at the Metropolitan Correctional Center in New York after "contact visits" with outsiders.

On the one hand, such visits are planned and may provide opportunities for smuggling
contraband in a way that unanticipated arrests do not. On the other, as Judge Marvin E. Frankel of Federal District Court in Manhattan wrote in the case in 1977, contact visits take place in front of guards. "The secreting of objects in rectal or genital areas becomes in this situation an imposing challenge to nerves and agility," Judge Frankel wrote.

The recent decisions allowing strip-searches of all arrestees have said they were authorized by the Supreme Court's Bell decision. In the Atlanta case, Judge Ed Carnes said that new inmates enter facilities there after "one big and prolonged contact visit with the outside world."

In Mr. Florence's case, the majority used interesting reasoning to justify routine strip-searches.

"It is plausible," Judge Thomas M. Hardiman wrote, "that incarcerated persons will induce or recruit others to subject themselves to arrest on nonindictable offenses to smuggle weapons or other contraband into the facility."

Mr. Florence's lawyer, Susan Chana Lask, said that would make sense if her client were "Houdini in reverse"—a master of becoming incarcerated though blameless, in the hope of passing along contraband to confederates waiting for him inside.

In his dissent in Mr. Florence's case, Judge Louis H. Pollak, a former dean of Yale Law School, was also skeptical of the majority's theory. "One might doubt," he wrote, "that individuals would deliberately commit minor offenses such as civil contempt—the offense for which Florence was arrested—and then secrete contraband on their persons, all in the hope that they will, at some future moment, be arrested and taken to jail to make their illicit deliveries."

In urging the Supreme Court not to hear Mr. Florence's case, officials from Burlington County, N.J., allowed that "perhaps petitioner's frustration is understandable."

But jails are dangerous places, the brief said. "It might even be argued that those arrested on nonindictable or other 'minor' offenses would be particularly anxious," the brief reasoned, to make sure that everyone around them was thoroughly searched.

Mr. Florence's son has drawn a lesson from what he saw from the back seat in 2005. "If he sees a cop and we're together," Mr. Florence testified in 2006, "he still asks, 'Daddy, are you going to jail?'"
Juan Smith, Petitioner,  
v.  
Burl CAIN, Warden, Louisiana State Penitentiary, Respondent.  

No. 10-8145  
October Term, 2010  
December 20, 2010  

On Petition for a Writ of Certiorari to the Louisiana Supreme Court  

Petition for a Writ of Certiorari.

[Excerpt; some footnotes and citations omitted.]

* * *

STATEMENT OF THE CASE

A. Procedural History

* * *

B. Statement of Facts

Events Leading Up to Trial

On February 4, 1995, sometime in the evening after 8:00 pm, Tangie Thompson, her boyfriend, Andre White and her three-year-old child were killed in their residence on Morrison Road in New Orleans, Louisiana.

Another seemingly unrelated murder occurred on March 1, 1995. On that evening, sometime after 8:30 p.m., three armed gunmen entered the home of Reba Espadron on North Roman Street in New Orleans. Six people were ordered by three armed black men to lie on the floor. Five people were shot multiple times and died as a result. Four victims were found inside the home and another was found outside, toward the back of the house. One of the victims, Shelita Russell, was severely injured but conscious.

Juan Smith was convicted of five murders and sentenced to life in prison in 1995. The results of that trial were used in a second trial where Smith was convicted for additional, separate murders and sentenced to death. Smith is now arguing that the prosecution in the first trial failed to turn over potentially exculpatory evidence to the defense in violation of Brady v. Maryland. The Louisiana Supreme Court denied Smith post-conviction relief without issuing an opinion.

Questions Presented: (1) Is there a reasonable probability that, given the cumulative effect of the Brady and Napue/Giglio violations in Smith’s case, the outcome of the trial would have been different? (2) Did the Louisiana state courts ignore fundamental principles of due process in rejecting Smith’s Brady and Napue/Giglio claims?
after the attack. She was interviewed by police, and this interview was never turned over to the defense. Ms. Russell died several days after the offense as a result of her wounds.

Reba Espadron and Reginald Harbor, who were in a back bedroom of the house during the incident, were not injured. Larry Boatner also survived—he was not shot, but suffered a laceration to his head when one of the gunmen struck him on the head when he did not comply with the gunman’s demands. All survivors were interviewed by the New Orleans Police Department and provided statements detailing the incident.

Larry Boatner told police that he opened the door to the Espadron residence and saw three armed black men get out of a white four-door car with a loud muffler and enter the Espadron residence. The men demanded money, and one man hit Boatner on the head. The gunmen made the occupants of Espadron's home lie down on the floor and then started shooting. In an interview with the police, Boatner described the guns used by the perpetrators as an AK assault rifle, a Tech-Nine handgun, and a silver handgun, but could not supply any other information on the guns or the perpetrators. In fact, Boatner told police he was “too scared to look at anybody,” and thus could not provide a more detailed description of the assailants.

Phillip Young also survived the shootings, but was identified as one of the perpetrators of the shootings because he was unknown to Reba Espadron and Larry Boatner. Young was shot in the incident and was initially unable to give police any information about what had occurred due to his severe injuries. Police recovered a beeper from Young, and learned the message “187” had been sent to Young’s beeper from Kintaid Phillips’ address shortly before the murders. 187 is the police code used for murder in California, and is a commonly used slang term for murder.

Police interviewed Michelle Branch, Phillip Young’s girlfriend, about her knowledge of the Roman Street murders. The Michelle Branch interviews were never disclosed to defense counsel. Ms. Branch told police that Phillip Young used her car on March 1, 1995, the day of the Roman Street murders, and that Young never returned with her car. Ms. Branch described her car as a “light yellow” LeBaron which at night “would look white.” Michelle’s car “didn’t have a muffler.” Michelle also told police that she had received phone calls telling her that Kintaid Phillips was driving her car in the Calliope Housing Projects after the Roman Street shootings. Ms. Branch also told police she heard rumors that Kintaid Phillips was responsible for the Roman Street murders.

Pursuant to this information, police conducted an extensive police investigation into the Roman Street murders, wherein they focused their attention on Kintaid Phillips and his known associates, including Donielle Bannister. However, neither Reba Espadron nor Larry Boatner could identify anyone from thirteen photographic line-ups that included all known associates of Phillips and Bannister. Notably, Juan Smith’s photograph was never included in the photographic line-ups as an associate of Phillips and Bannister. Both the Morrison Road and Roman Street cases stalled as police could not gather enough evidence to arrest the main suspects in either of the cases.

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While incarcerated for [an] attempted murder charge, Robert Trackling shared a cell with Eric Rogers at the Orleans Parish Prison. On May 19, 1995, Eric Rogers gave
a police statement in which he stated that Robert Trackling had confessed to Rogers about his involvement in the Morrison Road and North Roman Street murders. The State never disclosed Trackling's involvement to the defense. Trackling was never charged with the Roman Street murders despite his own admission that he committed these crimes. Instead, he entered into an agreement with Assistant District Attorney Rodger Jordan which provided Trackling with a very favorable deal in exchange for his testimony against Juan Smith in the Morrison Road trial.

Even as the State concealed Tracking's involvement in the Roman Street murders, New Orleans Police Department Detective John Ronquillo developed a photographic lineup that included Juan Smith based upon Tracking's statement. Detective Ronquillo presented the lineup to Reba Espadron, who was unable to identify Juan Smith as one of the perpetrators. A few days later, on June 7, 1995, an article appeared in the Times Picayune that included a photograph of Mr. Smith and Kintaid Phillips, stating they were wanted for the Morrison Road murders.

Police approached Larry Boatner with a photographic line-up containing Juan Smith's picture. Boatner ultimately identified Mr. Smith from the photo line-up, but the State failed to disclose the true circumstances that led to Juan Smith's identification.

When Detective Ronquillo approached Mr. Boatner with the photographic line-up, Mr. Boatner was housed in a psychiatric ward at Charity Hospital, where he was being treated for alcohol abuse. When Boatner viewed the line-up he knew that the suspected perpetrator's photograph was included. Boatner told staff at Charity Hospital that he heard from friends that police had identified the suspected killers in the Roman Street murders, but that they were not yet in custody. At the time Boatner made the statement, only the New Orleans Police Department knew Trackling had implicated Juan Smith and Kintaid Phillips for the crime. Boatner could only have learned this information from Espadron, who had been previously pressured by Detective Ronquillo to identify Juan Smith as one of the perpetrators. Boatner was thus pressured to identify someone he knew the police believed was responsible.

The day he made the identification, Boatner told medical staff that he felt confused, overwhelmed and afraid. He also complained that he was being harassed by Detective Ronquillo to make an identification of the Roman Street perpetrator.

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REASONS FOR GRANTING THE WRIT

I. There is a Reasonable Probability that the Cumulative Effect of the Brady, Napue and Giglio Violations in this Case Would Have Changed the Outcome of the Proceedings

A. The History of Brady Violations in Orleans Parish

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In the instant case, much like the Corey Miller and Shareef Cousin cases, prosecutor Roger Jordan concealed important eyewitness statements that were clearly exculpatory. In Mr. Smith's case, the State failed to disclose information that the testimony of its only eyewitness, Larry Boatner, was false and riddled with inconsistencies. The State also concealed police interviews of several other eyewitnesses stating that all of the gunmen wore masks, evidence that was inconsistent.
with Larry Boatner's eyewitness identification and subsequent trial testimony. In addition, the prosecution allowed several other witnesses to testify falsely.

B. The Trial

* * *

At trial, Reba Espadron testified that she had never seen Juan Smith before and that throughout the shooting the only man she had seen had his face covered, wore a hat to cover his hair, and only revealed his eyes. She stated that this gunman was holding a "big handgun."

Detective John Ronquillo testified that on June 28, 1995, at around 2:55 p.m., he showed Larry Boatner a photographic lineup at Charity Hospital. According to Ronquillo, he met with Boatner for about fifteen minutes. Ronquillo stated he did not force or coerce Boatner to make the identification. Ronquillo testified that he showed Boatner the photographs and Boatner reportedly immediately picked out Juan Smith's photograph.

On cross-examination, Detective Ronquillo agreed that Boatner was the only eyewitness to have identified Juan Smith. Ronquillo stated that Boatner was supposed to meet with him at Reba Espadron's home on June 3, 1995 to view the line-up, but that Boatner didn't show up. Ronquillo denied that Boatner ever told him that friends had given him information about who might have committed the shootings. Ronquillo testified that Boatner told him on June 28, 1995, that he had seen Juan Smith's photograph in the newspaper. Ronquillo believed it was the June 4th Times Picayune.

Boatner said he checked himself into Charity Hospital to stop drinking on June 26, 1995. While at Charity Hospital, Boatner met with Detective John Ronquillo and one of the nursing staff members. Boatner claimed that Detective Ronquillo showed him a line-up and that he immediately picked Juan Smith, claiming "I'll never forget Juan's face, never." In the courtroom, Boatner then identified Juan Smith as the man who put a .9mm to his head, stating, "like I say, I'll never forget him." Boatner also stated that the armed gunman had a mouth full of gold.

On cross-examination, Boatner stated that he had told the police on March 1st "how his hair was and I told him about the golds in his mouth." He also recalled that the gunman was heavy set. Boatner admitted that in the photographic line-up he could not see any gold in Mr. Smith's teeth.

* * *

C. Post-Conviction Evidentiary Hearings

* * *

[During evidentiary hearings on Petitioner's Brady, Napue, and Giglio claims] Frank
Larre, Mr. Smith’s trial lawyer, was shown Petitioner’s Exhibit 1 (in globo documents obtained from the District Attorney’s file in Mr. Smith’s case) as well as Petitioner’s Exhibit 2 (in globo documents obtained from the New Orleans Police Department). Mr. Larre testified that he was not provided these documents prior to or at any time during the trial.

a. Eyewitnesses Dale Mims and Shelita Russell

Mr. Larre testified he was never given a police interview of eyewitness Dale Mims in which Mims stated that on the night of the offense he heard multiple shotgun blasts and then saw four black males wearing masks and carrying rifles drive away in a white four-door Buick Oldsmobile car. Mr. Larre stated that he could have used this interview to impeach Larry Boatner’s testimony that the men were not wearing masks and that he was hit with a handgun.

On January 13, 2009, the State called Dale Mims as a witness. Mr. Mims testified that immediately after hearing gunfire he saw two men run out of Reba Espadron’s home and get into a four-door white car. The car then passed in front of Mr. Mims’ house and he saw three men inside it. He further testified that at least two or maybe all three men were wearing masks when they exited the home.

On cross examination Mr. Mims gave further details of what he recalled—that he saw two men outside and when they passed his house there were three men:

Q. There were three?

A. Yes. Like I said, the AKA’S stopped shooting. I saw the two guys, one on either side with the

guns get in the car. Then I heard the twelve gauge going off in the background.

The defense called Detective Ronquillo to testify regarding his interview with Dale Mims shortly after the shooting. According to Ronquillo, Mims told him all of the men were wearing ski masks and carrying rifles. He couldn’t see any of the men’s faces.

Defense counsel also testified he was never given a police interview of another eyewitnesses, Shelita Russell, who died later at the hospital. Ms. Russell told the police at the crime scene that she was in the kitchen and that the first gunmen who entered the house had a black cloth across his face. Mr. Larre testified that he could have used Ms. Russell’s statement to impeach Larry Boatner’s testimony that Juan Smith was not wearing a mask after identifying him as the first person through the door.

b. Larry Boatner’s Prior Inconsistent Statements to Police

Mr. Frank Larre testified that the State never provided him with multiple statements Larry Boatner made to police, many of which contradict his testimony at trial. Specifically, the State never disclosed a statement made the night of the murders that he could not “supply a description of the perpetrators other than they were black males”; his next statement that he was “too scared to look at anybody”; and his pretrial statement that he could not identify any of the weapons other than to state they were an “AK type assault rifle, one Tech nine type handgun, and a silver colored handgun.”

Mr. Larre also testified as to how he would have used these undisclosed police interviews to support Mr. Smith’s defense during his trial:
Well, it would have totally contradicted what Mr. Boatner was testifying to under my cross examination. It certainly was a previous statement that is inconsistent to what he was saying in court. It would have been very, very exculpatory.

c. Circumstances Surrounding Boatner’s Identification of Petitioner

On January 13, 2009, Frank Larre testified that he was unaware that Larry Boatner was being harassed by an NOPD Detective into making identification in the Roman Street case, as indicated by notes in Boatner’s Charity Hospital records.

When Mr. Larre was questioned about how this information might have changed his actions at trial, he stated that he would have attempted to locate witnesses mentioned in the records, and, if unsuccessful, would have attempted to introduce the Charity Hospital records as “defense evidence showing that there were claims of police harassment to identify the witness.”

Petitioner called Janie Mills as a witness on January 14, 2009. At the time Larry Boatner identified Mr. Smith, Ms. Mills was a Psychiatric Technician at Charity Hospital on the floor which housed Mr. Boatner. Ms. Mills reviewed Mr. Boatner’s medical records and was able to identify the handwriting and signature of the individual who stated that Mr. Boatner was “being harassed by an NOPD Detective Steve Ruffilo to identify a suspected perpetrator or perpetrators that were allegedly involved in shooting incident last March.” Ms. Mills identified the individual as social worker Anna Blossom. She further testified that Ms. Blossom is now deceased.

d. Additional Evidence that Larry Boatner Testified Falsely at Petitioner’s Trial

At trial, Larry Boatner testified that he saw Juan Smith’s photograph on June 7, 1995, on the front page of the Times-Picayune and recognized him as one of the assailants. That testimony bolstered his later identification of Mr. Smith from a photographic lineup.

Detective Ronquillo’s notes and testimony showed that Mr. Boatner claimed to have seen Mr. Smith’s photograph on June 4, 1995. Ronquillo also confirmed that Reba Espadron told him on June 10, 1995, that when she last spoke to Mr. Boatner on June 4, 1995, he told her the same thing. In fact Mr. Smith’s photograph did not appear in the newspaper until June 7, 1995, three days after Mr. Boatner claimed he saw it.

In the hearing, Mr. Boatner testified that he gave police a height and weight description of the man he alleged was Mr. Smith. During the trial, however, Detective Ronquillo testified at the trial that he never gave a height or weight description he was focused on the gun. Moreover, Detective Archie Kaufman agreed that Boatner never gave any description of height or weight.

Amazingly, Mr. Boatner testified at the hearing that there may have been only two men in the house. “I don’t know how many people was in there. But, I know at that time it was two, for sure, like I said. It was Juan and someone else.” In all of his police interviews and at trial he testified to and described three men.

e. The Confession of Robert Trackling

On January 13, 2009, Petitioner called Eric Rogers, a cellmate of Robert Trackling, to whom Trackling confessed about his participation in Roman Street. Rogers
testified that after Trackling confessed to him, Rogers made a statement to Detective Byron Adams of the NOPD. Rogers stated that before he gave his official, tape-recorded statement, he was informally interviewed by Detective Adams. In this informal, unrecorded statement, Rogers testified that he told police “Trackling told me that him, Banister [sic], and McGee [sic] had committed the crime.” In fact, Rogers stated that Trackling never mentioned Juan Smith in his confession, nor did Trackling tell Rogers that Short Dog was Juan Smith.

According to Rogers, after he gave police this initial statement, Detective Adams indicated that Juan Smith was involved in the Roman Street incident and asked Rogers to implicate Mr. Smith...

Rogers further testified that the first time he had heard the name Juan Smith or Short Dog was from Detective Adams, and that he did not know either Juan Smith or Short Dog. Nevertheless, because Detective Adams offered Eric Rogers a reduced sentence in his own offense, Rogers gave police a statement that implicated Short Dog in the Roman Street murders. Rogers testified that he was never interviewed by Juan Smith’s lawyer about his knowledge of the Roman Street incident.

Frank Larre was called by Petitioner on January 13, 2009, and testified that the State had not informed him that Robert Trackling had confessed to Eric Rogers about his participation in Roman Street. Mr. Larre further testified as to how he would have used Trackling’s confession to further his defense of Mr. Smith:

Well, I could use it to show that some people said there were four people, that there was a chaos going on and nobody really knew what happened, especially since we have witnesses that said that they had masks on their faces. And, obviously, since this guy has confessed, I would suggest that he would know who was in the car and who did the shooting, and he denies that it was Short Dog.

Moreover, Mr. Larre “would have used it for impeachment in cross examination.”

f. Phillip Young’s Improved Medical Condition

On January 13, 2009, Petitioner called Barbara Riley, the head nurse at the Rehab Institute of New Orleans at the time when Phillip Young was receiving treatment at that facility after the Roman Street incident. Mrs. Riley remembered Phillip Young, and testified that Young “did not speak” but was able to communicate by shaking his head yes or no when asked questions. When questioned by the State about whether Young suffered from amnesia, Ms. Riley responded, “No, I recollect aphasia, a lack of speech.”

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On January 22, 2009, Petitioner called Detective John Ronquillo, who verified that he interviewed Phillip Young at the Rehab Institute of New Orleans. Petitioner presented handwritten notes to Detective Ronquillo, which Ronquillo confirmed he had written during the course of the interview.

Mr. Larre testified that he was never provided with Detective Ronquillo’s notes regarding his interview with Phillip Young during which Young indicated that Short Dog was not responsible and did not go to the house on the night of the offense. Mr. Larre then described that he would have used this information as indicating that an
admitted participant in the offense “[d]enies that Short Dog, who was alleged to have been my client, participated in the robbery and murder and did not shoot him.”

In the instant case, the sum of the Brady and Napue/Giglio violations completely changes the lens through which the State’s case against Mr. Smith can be viewed. In light of the Brady evidence, Larry Boatner’s testimony, which provided the only evidence linking Mr. Smith to the murders, is untrustworthy and unreliable. Not only is Boatner’s testimony refuted by his own undisclosed previous statements to police, but it is also impeached by other undisclosed eyewitness statements. Further, the suppressed evidence establishes that Phillip Young, an alleged perpetrator in the offense, asserted that Petitioner was not involved in the offense. In withholding this information from defense counsel, the State prevented the defense from subjecting its case against Mr. Smith to any meaningful adversarial treatment. Because the suppressed evidence was material and prevented the jury from fully evaluating the integrity of the state’s case, Mr. Smith’s conviction is unreliable and should be reversed.

II. The Louisiana State Courts Ignored Fundamental Principles of Due Process in Rejecting Smith’s Brady and Napue/Giglio Claims

In the thirty years after Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam), this Court identified an important class of due process rights now commonly referred to as the Brady doctrine. This series of cases has uniformly condemned the prosecution’s presentation of evidence that is false, that is known to create a false impression, as well as the suppression of evidence that is favorable or exculpatory to the defense.

* * *

The Louisiana state courts have abdicated their responsibility in failing to address the due process violations present in Petitioner’s case. After Petitioner’s state post-conviction petition was filed, four days of evidentiary hearings were held at the order of the trial court judge. During the evidentiary hearings, Petitioner was able to present for the first time certain favorable evidence that the prosecution never disclosed either before or during trial. Despite this, the trial court orally issued its ruling denying relief at the close of the fourth day:

BY THE COURT: I am ready to rule in the case. I don’t have to take any time for this. I have been listening to this for quite a while. I am denying post-conviction relief.

The Fourth Circuit Court of Appeal and the Louisiana Supreme Court both declined to review Petitioner’s claims. All three state courts denied Petitioner relief without making any factual findings or providing any reasons for their ruling. As a result, the suppressed evidence that Petitioner presented has never received meaningful consideration by the Louisiana state courts.

CONCLUSION

Wherefore, for the foregoing reasons, Mr. Smith respectfully moves the Court to grant review of this matter and reverse Mr. Smith’s conviction.
STATEMENT

The Petitioner seeks to overturn convictions of five counts of first degree murder based on allegations that the state courts disregarded this Court’s decisions in Brady v. Maryland, 373 U.S. 83 (1963), Napue v. Illinois, 360 U.S. 264 (1959), and Giglio v. United States, 405 U.S. 150 (1972), when they denied his application for state post conviction relief. He points to particular incidences of purported evidence suppression as the factual basis for his claims, the aggregation of which he suggests warrants the vacating of his convictions. He bolsters this suggestion with a proposition that any conviction out of the Orleans Parish District Attorney’s Office mandates reversal, particularly if a specific assistant district attorney formerly employed with the office tried the case. However, the Petitioner’s suggestions are unsubstantiated, and the mere aggregation of individually meritless suggestions cannot prove, as the Petitioner claims, a cognizable violation of Brady, Napue, or Giglio.

The Petitioner argues that this Court should grant his Petition for a Writ of Certiorari because the state courts summarily denied his applications for relief. However, the state district judge, who presided over the Petitioner’s trial, heard from ten witnesses over a four day post-conviction hearing and found, as a matter of law, that the Petitioner failed to meet his burden of proving that his convictions were obtained in violation of the Constitution of the United States. Further, although the Petitioner claims that the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court “declined to review [his] claims,” in fact, those courts did review, and summarily denied, his applications for supervisory review, which were appended with copies of the relevant transcripts and exhibits. Considering the unmeritorious nature of the Petitioner’s claims, the decisions of the state courts are reasonable applications of decisions of this Court and consistent with the usual course of judicial proceedings. As such, the instant petition should be denied.

I. FACTUAL BACKGROUND

[The Court recounted the entry of the gunmen, the orders to lie on the floor, and the shooting.]

... [When officers arrived,] Phillip Young, one of the assailants, who was conscious but unable to move, was lying face down in the living room with Robert Simon lying partially on top of him. When emergency medical personnel arrived, they rolled Robert Simon’s body off of Phillip Young, who was clutching a .25 caliber pistol in his left hand. The EMS personnel pried the
loaded and cocked weapon from Young's grip. As the officers secured the premises, they found Larry Boatner in the bathroom. He had not been shot but was suffering from a severe head laceration. Officers Narcisse and Lavasseur discovered the body of Ian Jackson in the alley.

. . . Detective Ronquillo presented a photographic lineup to Larry Boatner from which Boatner identified Juan Smith as one of the assailants.

* * *

REASONS FOR DENYING THE PETITION

The Petitioner claims that this Court should grant his Petition for a Writ of Certiorari because (1) the state courts summarily denied his applications for relief, which, petitioner appears to contend, is inconsistent with the usual course of judicial proceedings; (2) the State withheld material information in violation of this Court's holding in Brady v. Maryland; and (3) prosecutors knowingly permitted Larry Boatner to testify falsely at trial, in violation of his due process rights.

I. The state courts' determinations were a result of accepted and usual course of judicial proceedings.

Petitioner is aggrieved because the state district judge "orally denied relief . . . without issuing a written opinion, making any factual findings, or providing any reasons for [his] ruling." However, the state district judge, who presided over the Petitioner's trial, heard from ten witnesses over a four-day post-conviction hearing and found, as a matter of law, that the Petitioner failed to meet his burden of proving that his convictions were obtained in violation of the Constitution of the United States. Further, although the Petitioner claims that the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court "declined to review [his] claims" in fact, those courts did review, and summarily denied, his applications for supervisory review, which were appended with copies of the relevant transcripts and exhibits.

The rules of the Supreme Court of Louisiana and the Louisiana Courts of Appeal provide that a grant or denial of an application for writs at the higher state courts rests within the judicial discretion of the courts, which may act peremptorily on an application. This Court has recently noted, in the context of federal habeas petitioners, that every federal Court of Appeals has recognized that "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." Accordingly, the summary denial of the Petitioner's state court applications cannot be said to be inconsistent with the usual course of judicial proceedings.

II. The Petitioner's state post conviction application was properly denied because the Petitioner failed to meet his burden of proving that his conviction was obtained in violation of Brady v. Maryland and its progeny.

The Petitioner's claims that the State withheld evidence seem to fall into three categories: (1) the withholding of evidence regarding eyewitness identification; (2) the withholding of evidence of Phillip Young's improved medical condition; and (3) the withholding of evidence regarding Robert Trackling's involvement in the murders. Initially, the Petitioner fails to demonstrate "a reasonable probability that, had the
evidence been disclosed to the defense, the result of the proceeding would have been different. Further, viewing the undisclosed evidence collectively, the Petitioner cannot prove a *Brady* violation by the mere aggregation of individually meritless claims.

To prevail on a *Brady* claim, a petitioner must show that (1) the prosecution suppressed or withheld evidence that was (2) favorable to the accused and (3) material to either guilt or punishment; and although the *Brady* doctrine mandates disclosure of certain evidence, it does not require the prosecution to open its files to the defense. However, the mere possibility that undisclosed information might have helped the defense or affected the outcome does not establish the materiality of that information. Rather, undisclosed information is material only where the nondisclosure deprives the defendant of a fair trial. As this Court has stated, “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.

A. Withholding of Evidence Regarding Eyewitness Identifications

i. Evidence Allegedly Undermining the Credibility of Larry Boatner

The Petitioner claims that prosecutors withheld favorable evidence that, if disclosed before trial, could have been used to undermine the credibility and reliability of Larry Boatner’s photographic and in court identifications of the petitioner as the shooter. . . .

Aside from merely recording . . . contentions and highlighting his trial counsel’s post-conviction testimony that he was not provided with any of the information in question, the Petitioner makes no attempt to argue the materiality of the complained-of discrepancies or to articulate specifically how the State’s disclosure of the withheld documents would have created a reasonable probability of a different verdict. Instead, the petitioner merely notes that Boatner was the only eyewitness to the crime and conclusorily presumes that Boatner’s trial testimony would somehow have been “impeached” and “refuted” had the jury been presented with such discrepancies, leaving entirely to the imagination the form that such impeachment and refutation would take. Nevertheless, a review of the petitioner’s contentions, when measured against the facts of the case, exposes the fatal flaws present in argument that would might tend to support them.

a. Boatner’s statement to Detective Ronquillo on the night of the incident that he could not supply a description of the shooters

First, the Petitioner contends that Larry Boatner provided a statement to Detective Archie Kauffman that indicated that Boatner could not describe any of the perpetrators. Subsequently, however, Boatner gave a statement . . . that Boatner “could not describe any of the subjects, other than the subject who put the gun in his face,” who had “golds in his mouth,” and whom he in fact later identified as the Petitioner.

The non-disclosure of this first statement, petitioner alleges, rises to the level of a *Brady* violation. However while testifying during the post-conviction hearing, Detective Ronquillo stated that, while Boatner had initially told him that he could
not describe any of the perpetrators except that they were black males, Boatner later gave a formal recorded statement in which he told Detective Kaufman: “I can tell you about one [of the subjects], the one who put the pistol in my face.” Although Boatner emphasized that he could only describe that one subject, he noted that the subject had gold teeth. Boatner’s description very closely matched that of the Petitioner. Ronquillo attributed Boatner’s initial reluctance to provide a description to his being “shook up” after the incident, . . . Ronquillo noted, however, the accurate description of the Petitioner Boatner had earlier provided. Accordingly, the State’s disclosure of Detective Ronquillo’s supplemental report would not have served to impeach the credibility of Larry Boatner’s identification in that regard.

b. Boatner’s statement to Detective Ronquillo that he had been too scared to look at anyone during the incident

Second, the Petitioner represents to this Court that Boatner initially told Detective Kaufman that he had been too scared to look at anybody during the incident. Contrary to the petitioner’s mistaken reading of Boatner’s statement to Kaufman, Boatner clearly indicated that he was too scared to look at anybody after he and the other victims had been ordered to the floor, which does not conflict with his statement and testimony that he was able to see and describe the petitioner prior to that moment. Moreover, Boatner indicated that he was too scared to look at any of the perpetrators other than the petitioner, whom he encountered unexpectedly after opening the front door and whose face he therefore could not help seeing. These statements are entirely consistent with Boatner’s post-conviction testimony, in which he explained that he closed his eyes after being ordered to the floor by the petitioner, and that he did not open them “until the gunshots.” Therefore, because Boatner’s statements and testimony were consistent, non-disclosure of the statements did not violate Brady.

c. Boatner’s pre-trial statement that he could not identify any of the weapons used

Third, the Petitioner’s argument regarding Boatner’s description of the weapons used during the crime also bears no fruit. Boatner consistently described the petitioner as carrying a handgun. In fact, at trial Boatner testified, consistent with his police statement, that the .9 mm gun the petitioner carried was “a silver gun.” When asked whether it was a handgun, Boatner replied affirmatively. He confirmed that fact on cross-examination at the post-conviction hearing, stating that the gun in the petitioner’s hand was “a nine millimeter chrome.”

d. Charity Hospital records documenting Boatner’s complaint that he was being harassed by a detective

Fourth, the Petitioner alleges that Boatner’s undisclosed Charity Hospital records show that his photographic identification of the Petitioner as a perpetrator was the product of “harassment” by Detective Ronquillo earlier that morning, and thus was unduly suggestive and/or unreliable. However, he provides no factual or legal support for his unwarranted inferential leap that any possible harassment by Detective Ronquillo in some way rendered Boatner’s identification of the petitioner unduly suggestive or otherwise affected its reliability. He does not so much as specify the nature of the supposed harassment as it pertained to Boatner’s eventual identification.
At the pre-trial hearing on a motion to suppress Boatner's identification, Boatner himself testified that Detective Ronquillo neither forced nor coerced him to make an identification, nor promised him anything in exchange for his identification, nor suggested that he select the petitioner. Hearing that testimony, the trial judge denied the motion to suppress. Subsequently, at the post-conviction hearing, Boatner reiterated that testimony and reaffirmed that he was not visited by detectives prior to the date on which he made his identification. Janie Mills, the psychiatric aid who tended to Boatner during his stay at Charity, also testified at the pre-trial motion hearing, as a defense witness, that Detective Ronquillo did not suggest to Boatner whom he should select from the photographic arrays. She further testified at the post-conviction hearing that Boatner did not appear to be distressed while talking to detectives during his identification. Detective Ronquillo testified at the post-conviction hearing that he had no recollection of visiting Boatner in the hospital prior to the date and time he made his identification of the petitioner.

e. Unidentified records allegedly demonstrating that Boatner knew that police had already identified the petitioner as a perpetrator of the North Roman Street murders

Fifth, the Petitioner alleges that, contrary to his testimony at trial, Boatner made statements to both Espadron and Detective Ronquillo that he observed a picture of the petitioner in The Times-Picayune on June 4, 1995, when in fact that picture did not appear in the paper until June 7, 1995. It is true that the picture did not appear until June 7, 1995. It is also true that Mr. Boatner testified accurately and truthfully at trial that he observed the picture in the paper on June 7, 1995. The significance, if any, of this discrepancy is unclear, and the petitioner makes no effort to illuminate it. To the extent it might have served to call into question the credibility of Boatner as a factual witness, it is to be remembered that, to a man who narrowly escaped a brutal assault that left five of his friends dead, a date would likely be an inconsequential detail in the face of once again being confronted with the image of the man who very nearly took his life. Nevertheless, it was for a jury to judge Boatner's total credibility, and nothing about his minor discrepancy as to dates would have undermined confidence in the outcome of the proceedings. Thus, the unidentified records allegedly memorializing this discrepancy were not subject to Brady.

f. Shelita Russell's pre-death statement that the first gunman who entered the house (identified by Boatner as the petitioner) wore a mask

Sixth, the Petitioner argues that information in a "daily" entry in Detective Ronquillo's supplemental police report noting Shelita Russell's purported pre-death statement that the first subject who entered the North Roman Street residence had a black cloth across his face, would contradict Larry Boatner's trial and post-conviction testimony that the petitioner—who he maintains was the first perpetrator to enter—did not have his face covered. The notation in question reads, "Said—in kitchen saw people barge in—one—black color across face—first one through door—[No further statement]." The petitioner's trial counsel testified at the post-conviction hearing that had he been provided with Russell's statement he would have used it to reinforce the fact that Mr. Boatner could not have identified anyone," thus undermining his identification of the
petitioner. However, even if favorable, the petitioner fails to demonstrate the materiality of Russell’s statement. Had the trial court admitted Russell’s statement, the petitioner must still show a reasonable probability that its admission would have served to discredit Boatner’s testimony regarding the petitioner’s appearance to such an extent that confidence in the outcome would be undermined.

The jury could easily have taken into account that Boatner was in immediate proximity to the petitioner—unlike Russell, who was cowering in a room at the back of the house—when he entered the residence and that the face of co-perpetrator Phillip Young, who was left severely injured inside the house, was not covered. Thus, the petitioner cannot demonstrate a reasonable probability that the admission of Shelita Russell’s undisclosed statement would have resulted in the jury’s discrediting Boatner’s testimony.

g. Statements by Reba Espadron and neighbor Dale Minis to investigators

Seventh, the petitioner alleges that undisclosed police and newspaper reports show that Reba Espadron and neighbor Dale Mims gave statements to police that they observed four masked gunmen enter the North Roman Street residence, which contradicts Larry Boatner’s testimony that three unmasked men perpetrated the crime.

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... [Mims] told Detective Ronquillo that he heard shots and looked out his front door, whereupon he saw three black males armed with AK-47s exit 2230 North Roman (where the murders occurred), get into a white 4-door Buick and drive off. He then heard a shotgun blast and saw a fourth subject get into another vehicle and also leave the scene. Mims stated that all four men were wearing ski masks covering their faces. At the post-conviction evidentiary hearing, Mims testified similarly, but acknowledged that one of the three men he saw exiting the house did not have a mask. He also admitted that he did not see the men in question arrive at or enter 2230 North Roman, nor did he see them inside the residence. He also recalled that the men wearing masks removed them after they entered the Buick.

Detective Ronquillo’s notes indicate that Reba Espadron told Detective James Stewart that she observed only one of the perpetrators, whom she described as being 5’ 6” tall and slim with a “thing around his face.” At the petitioner’s trial she testified accordingly and further described him as carrying a “big gun” that he held with two hands. Ronquillo testified at the post-conviction hearing that the physical description provided by Espadron did not match the petitioner. Moreover, the gun carried by the perpetrator who confronted Espadron (most likely the AK-47) was clearly not a handgun, as was carried by the petitioner.

Mims’ and Espadron’s undisclosed statements would not have served to impeach the trial testimony of Larry Boatner or his identification of the petitioner. Mims confirmed that he did not see the subjects he described at any time before or during their entrance into 2230 North Roman, and thus would not have been able to testify as to whether their faces were covered when Boatner first encountered them. He further stated that one of the men may not have been masked at all. Espadron described a subject that was clearly not the petitioner, who Boatner testified was the only perpetrator whose face he observed. Her statement thus does not undermine his
identification. Therefore, the petitioner cannot show that the undisclosed statements of Dale Mims or Reba Espadron would have aided him at trial.

B. Evidence of Phillip Young’s Improved Medical Condition

The petitioner claims that prosecutors withheld material evidence from the defense—namely Detective Ronquillo’s supplemental report and “daily” notes indicating that he interviewed Phillip Young in Charity Hospital following the shooting—that would have demonstrated the petitioner’s innocence and therefore cast the State’s trial evidence in a different light. He further notes that the evidence regarding Young’s improved medical condition and the statements made by him contradict Ronquillo’s testimony and the prosecution’s statement to the jury that Young was in a vegetative state and unable to communicate. These allegations are spurious.

First, the petitioner was well aware of Young’s medical condition throughout the proceedings. Young was in fact a co-perpetrator of the North Roman Street murders and was charged in the same indictment as the petitioner. In fact, on October 19, 1995—barely a month after the petitioner was arraigned—the court ruled Young irrestorably incompetent, finding that he “will never be able to assist his counsel in trial due to permanent [sic] brain damage.”

Second, Ronquillo’s notes regarding Young’s condition do not conflict with his trial testimony. In fact, in response to the prosecutor’s very first question on the issue, Ronquillo confirmed that he had indeed spoken to Young at Charity Hospital. The prosecutor even admonished Ronquillo in his questioning, in light of the hearsay rule, not to “say what [Young] said if he said anything to you.” This open court colloquy hardly evidences a prosecutorial conspiracy to conceal from the jury the fact that Young could in fact communicate. Moreover, Ronquillo’s testimony that Young could not speak much and could only use his left hand did not conflict with his undisclosed notes; rather, his notes corroborate that testimony almost word-for-word. Furthermore, Ronquillo’s statement at trial that he couldn’t understand anything that Young was saying did not refer to Young’s inability to communicate at all, merely—when presented in the context of the colloquy as a whole—to his ability to communicate verbally, which inability is acknowledged even by the petitioner. The statement also reflects Ronquillo’s own subjective impression of Young’s communicative ability and, as such, is not an allegation of objective fact that could be empirically contradicted by the undisclosed report.

In any event, even if Young’s “statements” had been disclosed and admissible at trial—despite their constituting hearsay—they would not have served to undermine confidence in the jury’s verdict. Detective Ronquillo testified at the post-conviction hearing that he disavowed Young’s statements because he was uncertain as to whether they even had any substance. As noted above, the jury would have been free to consider the fact, as prosecutors would no doubt have emphasized, that Young was a known associate and co-defendant of the petitioner, as well as the inherent bias that accompanied that relationship. This was corroborated by Ronquillo’s post-conviction testimony that “the whole nature of [Young’s] behavior and how he answered questions changed” when he found out Ronquillo was a homicide detective. Young could also reasonably fear that the petitioner—who had just murdered five people in cold blood—would not hesitate to
do the same to him if he “snitched.” Accordingly, Young had every incentive in
the world to deny the petitioner’s involvement in the killings or in his
wounding, even if he could not deny his own presence on the scene. Therefore, the
petitioner cannot show that there was a reasonable probability that confidence in the
outcome would have been undermined.

Relatedly, Young had a corresponding incentive to blame his injuries on one of the
occupants of the house. However, the jury
would also have been free to consider that the .25 calibre handgun that the petitioner
ascribes to Robert Simons was found by police clutched in Young’s hand and would
have been reasonable in finding it unlikely that Young had somehow managed to grab
the gun from Simons after having essentially been rendered paralyzed and unconscious by
the shot to his head. Even if established, however, the fact that Simons may have shot
Young would not have served to exonerate the petitioner. Finally, the statements by
Young that do not exculpate the petitioner—“drove
in car”, “girlfriend’s car”—are of no
real evidentiary value.

Finally, while the petitioner argues that the
undisclosed evidence, even if not admissible itself, constitutes Brady material because it
could have led to the discovery of admissible evidence favorable to the
defense, he fails even to speculate what additional evidence could have been
discovered to exculpate him based on the
disclosure thereof. Detective Ronquillo was
examined at length during the post-
conviction hearing about numerous other
leads and suspects in the North Roman Street murders and testified that through
investigation he was able to eliminate everyone but the petitioner as a confirmed
perpetrator. Confronted with that testimony
at trial, the jury would have been reasonable
in discrediting any “alternative suspect”
theory that the disclosure of Young’s
hospital statements may have engendered.

The only evidence of how the defense would have used Young’s statements was offered
by the petitioner’s trial counsel, who
testified at the post-conviction hearing that
he would have attempted to locate Young or,
in the alternative, to introduce Ronquillo’s
notes as evidence of police harassment of
Young to make an identification. However,
Young’s whereabouts throughout the
proceedings—especially after his remand to
the state forensic facility—were hardly a
secret and counsel could easily have visited
and attempted to interview him with
minimal diligence. Finally, as Young never
identified any of the alleged actual
perpetrators, any evidence as to police
“harassment” to that end would have been
entirely irrelevant.

The petitioner has utterly failed to
demonstrate the materiality of the
undisclosed notes regarding Phillip Young’s
improved medical condition and his
“statements” to Detective Ronquillo.

C. Evidence Regarding Robert Trackling’s
Involvement in the Murders

The petitioner alleges that prosecutors
withheld material evidence of Robert
Trackling’s confession to having
participated in the North Roman Street
murders and his implication of Donielle
Bannister therein. . . . The petitioner cites
[Eric Rogers’ post-conviction testimony
regarding Trackling’s prison cell confession]
as material evidence that directly exculpates
him from the North Roman Street murders.
The second piece of undisclosed information
involves a June 1, 1995, interview between
Detective Adams and Trackling relating to
his involvement in the Morrison Road
murders, during which Trackling identified the petitioner from a photographic lineup as “Short Dog” and implicated him in the Morrison Road murders. The petitioner notes with suspicion the timing of Adams’ interview with Trackling . . . and the fact that Trackling was not asked about his role in the North Roman Street murders, despite the information learned from Rogers. He further points to a notation entry in Detective Ronquillo’s supplemental report stating that Adams had interviewed Trackling and that Trackling had denied being involved in the North Roman Street murders, which he contrasts with the fact that Adams did not, as far as is known, ask Trackling about North Roman Street. The petitioner surmises that this proves the existence of an as-of-yet undisclosed interview, even as the District Attorney’s file contains no such second interview.

Finally, the petitioner directs this Court to a notation in Ronquillo’s supplemental report referring to his interview with Trackling in July of 1995, during which Trackling denied his involvement in the North Roman Street murders and offered the alibi that he was at work when the crimes were committed. The report goes on to note that Ronquillo checked Trackling’s time card and discovered that he did not clock out of work until 7:45 pm. The petitioner cites this as proof of Trackling’s possible involvement in the North Roman Street murders, which did not occur until 8:30 pm. Police knowledge of Trackling’s involvement, according to the petitioner, was evidenced by his being placed in photographic lineups shown to Reba Espadron and Larry Boatner, neither of whom identified him as a perpetrator. Upon that, the petitioner argues that police concealed Trackling’s confession to his prejudice.

The petitioner’s unwieldy allegation as to evidence of Trackling’s supposed involvement in the North Roman Street murders fails to satisfy his burden under Brady. As an initial matter, Eric Rogers’ testimony at trial—to the extent it tracked his police statement and post-conviction testimony—would have been inadmissible hearsay through Trackling and Detective Adams. Moreover, his undisclosed statement that Trackling admitted to committing the North Roman Street murders with Donielle Bannister and Robert Home is contradicted by his own post-conviction testimony that Trackling told him he committed the murders with Bannister and Romalice McGee. It is also contradicted by the other undisclosed evidence of which the petitioner complains—Trackling’s own statements to Adams and Ronquillo denying his involvement in the North Roman Street murders. His statement regarding Romalice McGee’s involvement was rebutted by Detective Ronquillo’s post-conviction testimony that Larry Boatner was shown a lineup containing McGee’s picture and was unable to identify him as one of the perpetrators.

Rogers’ statement that “Short Dog” was Robert Home is contradicted by Trackling’s identification of the petitioner as “Short Dog” as well as by the testimony of the petitioner’s own sister, Trenieze Smith, at his related trial in the Morrison Road case, in which she acknowledged that she thought her brother went by the nickname “Short Dog.” At the post-conviction hearing, she similarly testified that the petitioner was known as “Shorty.” Furthermore, Rogers’ post-conviction testimony that he in fact never received the sentence reduction that Adams allegedly offered him in return for implicating the petitioner contradicts his unsupported allegation that Adams had coaxed him to do so. Finally, under Louisiana evidence rules, Rogers’ testimony
would have been subject to impeachment through his conviction for second-degree murder, further damaging his credibility. Accordingly, Rogers’ inconsistent and controverted statements . . . would carry little evidentiary weight and the petitioner cannot therefore show that the trial jury would have been unreasonable in discrediting his testimony in light of the countervailing evidence.

As to Detective Adams’ interview with Trackling, the petitioner fails to demonstrate that its substance is favorable to his defense. Indeed, disclosure of that statement would have only provided additional evidence implicating the petitioner in the North Roman Street murders by introducing another photographic identification and corroboration that his nickname was “Short Dog.” Coupled with Eric Rogers’ statement that “Short Dog” was involved in the North Roman Street murders, the effect would be highly prejudicial at trial. That Trackling was not questioned by Detective Adams about the North Roman Street murders during his June 1, 1995, interview means nothing; as the interview was explicitly concerned with his role in the Morrison Road case, it is not surprising that Adams did not delve into ancillary investigations. Even if the petitioner’s allegation of an undisclosed second interview between Adams and Trackling, in which Trackling denied his involvement in the North Roman Street murders, were substantiated, that information would be merely cumulative of Trackling’s interview with Detective Ronquillo, during which he denied the same.

The petitioner further fails to show how Trackling’s undisclosed interview with Detective Ronquillo, in which he denied his involvement in the North Roman Street murders, would have exculpated him in the same crime. The only evidence that the petitioner advances in support of his argument is the fact that Trackling’s time card showed that he was not at work, as he had told Ronquillo he was, at the time of the murders. However, Ronquillo testified that he found Trackling’s denial credible because he had already confessed to being involved in the Morrison Road murder and Ronquillo “[didn’t] see why he would confess to one murder and not the other.” Moreover, the effect of disclosing Trackling’s possible involvement to the jury would have been soundly rebutted by Ronquillo’s testimony that Larry Boatner was shown photographic lineups including Trackling’s picture and was unable to identify him as a perpetrator. The petitioner acknowledges that much, but still claims that police concealed the evidence of his supposed confession. However, as noted, the only evidence of Trackling’s supposed involvement comes from the mouth of a convicted murderer who’s credibility is undermined by the very evidence the petitioner complains was not disclosed to him. That evidence also reflects Trackling’s implication of the petitioner in the murders by his nickname. Therefore, the petitioner’s own argument defeats itself.

In any event, even assuming, arguendo, that the undisclosed evidence was somehow sufficient to convince the jury of Trackling’s involvement in the North Roman Street murders, this would still not constitute material or even favorable evidence entitling the petitioner to habeas relief. As is by now well documented, both surviving eyewitnesses—Reba Espadron and Larry Boatner—testified that three to four subjects participated in the home invasion and killings, including the petitioner and likely Phillip Young. As noted, Shelita Russell also indicated that more than one subject entered the house, and Dale Mims likewise testified that he observed four men flee the scene after the shootings. Trackling’s own
alleged confession indicates that he committed the murders with two other people—Donielle Bannister and "Short Dog," i.e. the petitioner. Thus, the evidence establishing Trackling's involvement in the crime would do nothing to negate the petitioner's own involvement; it would merely add another name to the indictment. The petitioner therefore cannot demonstrate that the jury would have been unreasonable in finding the evidence of his guilt sufficient nonetheless.

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.
Just weeks after the Supreme Court divided deeply over the tactics of prosecutors in New Orleans, the Justices on Monday decided to take another look, adding a new case claiming repeated violations of those prosecutors' duty to share information that would help defense lawyers. Public defender lawyers, in the new case, aimed strong complaints at the District Attorney's office in Orleans Parish, contending that it has "a well-documented history of hiding...from defense counsel" evidence of potential aid to the defense. That office, they contended, has not taken seriously prior orders from the Supreme Court to change its ways.

It may not be a coincidence that the new case, Smith v. Louisiana (docket 10-8145), has been developing at the Court even as the Justices were working on the case of Connick v. Thompson (09-571), the case decided on a 5-4 split on March 29, absolving the New Orleans DA of complaints for failing to train prosecutors about their obligations under the Court's 1963 precedent in Brady v. Maryland. In Brady, the Court decided that it was unconstitutional for prosecutors to suppress an accomplice's confession. It established the basic obligation of prosecutors to share with defense counsel any "exculpatory" (that is, favorable) evidence, if that evidence bore on guilt or innocence.

Brady violations were also directly at issue in the Connick v. Thompson case. Last year, as the Court initially pondered that case, it sought a closer look, asking for the record of lower court proceedings. Not long after that file reached the Court in February of last year, the Justices granted review, on the sole question of whether a "single Brady violation" would justify a finding that the DA's office had improperly failed to train its line prosecutors. Ultimately, the Court said no, but the dissenting Justices protested that there was far more than a single violation in the prosecution of John Thompson.

The Connick case was argued last October, and internal discussions began. In December, the case of Smith v. Louisiana, involving Juan Smith was filed at the Court. After the state urged the Court not to hear that case, the Justices then called for a response by the state. That request was issued in February of this year, while draft opinions were still circulating in Connick v. Thompson; that case was then decided near the end of March, and nine days later the Justices sought the lower court record in Smith—an indication that they were then examining it as a potential sequel to Connick. Nothing further was done with the case until Monday, with the grant.

In a lengthy footnote in the petition in the Smith case, his lawyers ticked off a list of cases which, they asserted, showed that "the history of the Orleans Parish District Attorney's Brady violations began before and continued after Mr. Smith's trial." One of the cases cited in that footnote was the case of John Thompson. That footnote also noted that, in the 1995 case of Kyles v. Whitley, the Supreme Court had overturned a conviction "because of the extent of the Brady violations by the Orleans Parish District Attorney's Office."
Smith’s petition also noted that, since 1981, there have been seven cases in which Louisiana death-row inmates have been exonerated, and four of the seven had been prosecuted in Orleans Parish “and all four of these cases . . . involved serious Brady violations.”

The Thompson and Kyles cases were among the four. “Rather than heeding this Court’s directive in Kyles, the Orleans Parish DA’s office continued its pattern of deceit by concealing material, exculpatory evidence from the defense in the instant case,” the petition added.

Urging the Court to deny review, lawyers for the DA’s office said the complaints of Juan Smith’s lawyers “are unsubstantiated,” adding that “the mere aggregation of individually meritless suggestions cannot prove...a cognizable violation” of Brady, or of two other precedents cited by Smith’s counsel: Napue v. Illinois in 1959 and Giglio v. U.S. in 1972 (two other cases involving misconduct by prosecutors—withstanding knowledge of false testimony in Napue, failing to disclose a promise of non-prosecution of a co-conspirator in return for his trial testimony in Giglio).

Smith’s lawyers, the prosecutors contended, were trying to bolster their case by proposing “that any conviction out of the Orleans Parish District Attorney’s Office mandates reversal.” None of the claimed violations of prosecutors’ legal duties, the brief in opposition argued, involved “material” evidence and none of it would have changed the outcome of the case: Smith’s convictions on multiple murder charges.

Smith’s conviction of five murders in New Orleans in 1995 led to a sentence of life in prison without a chance for parole. That is the conviction directly at issue in the new petition. The results of that trial were used as a factor in a second trial, for four other murders in New Orleans, also in 1995, and Smith was sentenced to death after conviction in that proceeding. In the earlier proceeding, the petition argued, prosecutors repeatedly withheld evidence from the defense—including a jailhouse confession by another man.

Smith’s petition for review in the Supreme Court raised two issues: whether the “cumulative effect” of the alleged violations by prosecutors would have changed the verdict against him, and whether state courts in Louisiana have violated Smith’s due process rights in rejecting his prosecutorial misconduct claims. The case will be heard and argued in the Court’s next Term, starting Oct. 3.

***
The U.S. Supreme Court will take a look at yet another case in which Orleans Parish prosecutors are accused of withholding key evidence to win a murder conviction.

The high court this week agreed to hear the case of Juan Smith, who was convicted by District Attorney Harry Connick’s office on five counts of first-degree murder in a 1995 rampage inside a home on North Roman Street.

Evidence from the allegedly tainted trial also helped prosecutors convict Smith in a separate trio of murders a month earlier, including the killing of former Saints football player Bennie Thompson’s ex-wife and child. That case landed Smith on death row.

Gary Clements, director of the Capital Post-Conviction Project of Louisiana, which will represent Smith at oral arguments expected this fall, said the court this session has accepted only one in 1,100 similar appeals by indigent criminal defendants.

It’s the second recent case the Supreme Court has taken up in which Orleans Parish prosecutors were accused of violating a requirement under *Brady v. Maryland* to give the defense all exculpatory evidence.

In an ideologically divided, 5-4 opinion in March, the court sided with the city, rejecting a $14 million judgment for former death row inmate John Thompson. The issue in the that case was not whether the DA’s office could be held liable for a few prosecutors admittedly hiding blood evidence favorable to Thompson in an armed robbery case before his 1984 trial for the murder of hotel executive Ray Liuzza.

The Supreme Court majority found that Thompson needed to show a pattern of prosecutors ignoring or thumbing their noses at *Brady* requirements, but failed to do so. The dissent was caustic, with Justice Ruth Bader Ginsburg calling the failures by prosecutors in the Thompson case “neither isolated nor atypical” of the office at the time of Thompson’s trial.

“Something’s going on there,” said Clements of the Supreme Court’s renewed interest with the Smith case. “What makes it stand out is they are looking at the allegations that we have made that the Orleans Parish District Attorney’s Office has once again failed to turn over important evidence that supports the defendant.”

In its appeal, the capital defense group counts seven death penalty convictions overturned in Louisiana for *Brady* violations since 1981—four of them in Orleans Parish. Clements said all four took place during the tenure of Connick, who retired in 2003.

Clements said attorneys for Smith found the exculpatory evidence in investigative updates that they received a few years ago.

According to the petition, several witnesses in the quintuple murder told police the killers wore masks that made their identities indiscernible, and one Orleans Parish inmate
told police another man had confessed he was at the murder scene and that Smith was not there.

The same year of Smith’s arrest, the Supreme Court scolded Connick’s office for threatening to drag the justice system to “a gladiatorial level” by suppressing evidence.

“This is another example of our office being called on to defend prosecutions that occurred decades ago,” said Christopher Bowman, an assistant district attorney and spokesman for DA Leon Cannizzaro. “However, every court that has reviewed (Smith’s) claims has summarily denied them. We don’t believe (he) is making any new claims. We believe we will be able to effectively defend the conduct of Mr. Connick’s office in due course.”

Smith was arrested five months after three gunmen entered the home on the 2200 block of North Roman Street, ordered six people to lie on the floor and shot five dead in the bloodiest crime in New Orleans that year.

A month earlier, Bennie Thompson’s 3-year-old child, his ex-wife Tangie Thompson and her boyfriend, Andre White, were killed in their residence on Morrison Road. Smith’s appeal on that conviction is on hold pending resolution of the North Roman Street case.
In 1999, Cory Maples was convicted of capital murder and sentenced to death. Maples appealed to both the Alabama Court of Criminal Appeals and the Alabama Supreme Court and both courts affirmed his conviction. Subsequently, Maples filed for post-conviction relief alleging numerous instances of ineffective assistance on the part of his trial counsel. The trial court ordered Maples's petition dismissed and sent notice to Maples's new counsel, two attorneys with the New York City law firm of Sullivan & Cromwell along with Maples's local counsel in Alabama. Maples's local counsel took no action. The attorneys from Sullivan & Cromwell had left the firm by the time the dismissal order was issued. The firm's mail room returned the notice to the Alabama circuit court clerk unopened. The deadline for appealing the dismissal of the petition for post-conviction relief passed and the Alabama Court of Criminal Appeals denied Maples an out-of-time appeal. Maples then filed a federal habeas petition that was denied in the district court. The district court held that Maples's ineffective-assistance claims were procedurally defaulted because he failed to file a timely appeal to the dismissal of his motion for post-conviction relief and even if such a default were the result of ineffective assistance, such ineffectiveness could not establish a cause for default as there is no constitutional right to post-conviction counsel. The Eleventh Circuit affirmed.

Question Presented: Whether the Eleventh Circuit properly held that there was no "cause" to excuse any procedural default where petitioner was blameless for the default, the state's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.
and oral argument, we affirm.

I. BACKGROUND

Maples was convicted of capital murder and sentenced to death for killing two companions, Stacy Alan Terry and Barry Dewayne Robinson II, after an evening of drinking, playing pool, and riding around in Terry's car. When the men arrived at Maples's house, Maples went inside and got a .22 caliber rifle. Maples then shot each man twice in the head in an execution-style killing. See Maples v. State, 758 So.2d 1, 14-15 (Ala.Crim.App.1999). Maples fled in Terry's car.

Maples signed a confession, stating that he: (1) shot both victims around midnight; (2) had drunk six or seven beers by about 8 p.m., but "didn't feel very drunk"; and (3) did not know why he decided to kill the two men. Faced with this confession, Maples's trial attorneys argued that Maples was guilty of murder, but not capital murder. Under Alabama law, capital murder involves, inter alia, (1) murder during a robbery, or (2) the murder of two persons by one act or pursuant to one scheme or course of conduct. The trial judge instructed the jury on capital murder, robbery, and the lesser included charges of murder (a non-capital crime) and first-degree theft of property. Both the capital murder and the lesser included murder charges required that the jury find that Maples had the intention to cause the death of a person. The jury convicted Maples of capital murder.

On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Maples's conviction and death sentence. Ex parte Maples, 758 So.2d 81 (Ala.1999); Maples v. State, 758 So.2d 1 (Ala.Crim.App.1999). On direct appeal, Maples argued that the jury instructions violated due process because the trial court failed to include, sua sponte, an instruction on the lesser included, non-capital offense of manslaughter due to voluntary intoxication. This claim forms part of the basis of the current appeal.

Maples subsequently filed a petition for post-conviction relief pursuant to Alabama Rule of Criminal Procedure 32, claiming, inter alia, that trial counsel was ineffective for failing to investigate or present evidence of: (1) Maples's mental health history; (2) his intoxication at the time of the crime; and (3) his alcohol and drug history. Maples's Rule 32 petition claimed the jury instructions violated due process by not including the lesser offense of manslaughter due to voluntary intoxication. The State of Alabama moved the state trial court (what Alabama calls the circuit court) to dismiss Maples's Rule 32 petition, and that motion was denied. Seventeen months later, the trial court issued an order (the "Rule 32 Order") dismissing Maples's Rule 32 petition. The trial court dismissed some claims for failure to state a claim, and found other claims procedurally barred because they could have been raised at trial or on direct appeal but were not.

The Alabama trial court clerk sent copies of the Rule 32 Order, filed on May 22, 2003, to: (1) Maples's two attorneys (Jaasi Munanka and Clara Ingen-Housz) with the law firm of Sullivan & Cromwell in New York, who were attorneys of record and had performed all of the substantive work on Maples's Rule 32 case; and (2) Maples's local counsel (John G. Butler, Jr.) in Alabama. No one disputes that both Butler and Sullivan & Cromwell received copies of the Rule 32 Order dismissing Maples's petition.

Neither Maples nor any of his three
attorneys filed a notice of appeal from the
dismissal of Maples's Rule 32 petition
within the 42 days required by Alabama
Rule of Appellate Procedure 4(b)(1). Butler
took no action whatsoever after receiving
the Rule 32 Order. Sullivan & Cromwell
received the Rule 32 Order but instead of
opening the envelope that contained it, the
firm returned it to the Alabama circuit court
clerk.

By the time the trial court dismissed
Maples's Rule 32 petition, attorneys
Munanka and Ingen-Housz had left Sullivan
& Cromwell. As Maples's Sullivan &
Cromwell attorney acknowledged at oral
argument, arrangements had been made
within the firm for other attorneys at
Sullivan & Cromwell to take over
representation of Maples. However, none of
Maples's attorneys filed anything with the
Alabama trial court reflecting this change.

The State's attorney (Jon Hayden) wrote
Maples a letter, dated August 13, 2003,
informing him that although his deadline for
appealing the dismissal of his Rule 32
petition had passed, Maples still had four
weeks to file a federal habeas petition.
Hayden gave Maples the address to file a
federal habeas petition and informed him
how to seek new counsel if he wished.

Thereafter, Maples's mother contacted
Sullivan & Cromwell. On Maples's behalf,
new attorneys from the Sullivan &
Cromwell firm requested that the Alabama
trial court re-issue its Rule 32 Order so that
he might file a timely appeal. The trial court
refused, stating in an order that it was
"unwilling to enter into subterfuge in order
to gloss over mistakes made by counsel for
[Maples]." *Ex parte Maples*, 885 So.2d 845,
court order).

Maples, through counsel Sullivan &
Cromwell, then petitioned the Alabama
Court of Criminal Appeals for a writ of
mandamus directing that he be granted an
out-of-time appeal. That court denied his
petition, finding that the circuit court clerk
had properly served Maples's attorneys of
record at their listed addresses with the Rule
32 Order and the attorneys had failed to act.
Thus, an out-of-time appeal was not
warranted. The Alabama Supreme Court
also denied Maples's petition for a writ of
mandamus requesting an out-of-time appeal
of the Rule 32 dismissal. The United States
Supreme Court denied Maples's subsequent
certiorari petition.

In the meantime, Maples, again through
counsel Sullivan & Cromwell, had filed the
federal habeas petition at issue here alleging,
*inter alia*, the same ineffective-assistance
claims asserted in his Rule 32 petition and
the same jury-instruction claim asserted in
his direct appeal. The district court stayed
the § 2254 petition while Maples's state
court petition seeking an out-of-time appeal
of the Rule 32 Order was pending.

After the state appellate courts denied
Maples's requests for an out-of-time appeal
in his Rule 32 case, the district court denied
Maples's § 2254 petition. The district court
concluded that: (1) Maples's ineffective-
assistance claims were procedurally
defaulted because Maples did not timely file
an appeal of the dismissal of his Rule 32
petition; (2) even if Maples's default were
the result of his three post-conviction
counsel's failing to file a Rule 32 appeal,
such ineffectiveness could not establish
cause for the default because there is no
constitutional right to post-conviction
counsel; and (3) the Alabama appellate
courts' decisions that Maples was not
entitled to a *sua sponte* jury instruction on
manslaughter due to voluntary intoxication was not contrary to, or an unreasonable application of, clearly established federal law. This appeal followed.

II. STANDARD OF REVIEW

"When examining a district court's denial of a § 2254 petition, we review the district court's factual findings for clear error and its legal determinations de novo." We review de novo the district court's determination that a claim has been procedurally defaulted. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), governs Maples's § 2254 petition and appeal. AEDPA "greatly circumscribes federal court review of state court decisions" and "establishes a general framework of substantial deference for reviewing every issue that the state courts have decided." According to § 2254, as amended by AEDPA, a federal court shall not grant a writ of habeas corpus on behalf of a state prisoner with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.


III. DISCUSSION

A. Procedural Bar

The first issue is whether Maples's ineffective-assistance-of-trial-counsel claims are procedurally barred from federal habeas review.

Before bringing a § 2254 habeas action in federal court, a petitioner must exhaust all state court remedies that are available for challenging his state conviction. To exhaust state remedies, the petitioner must "fairly present[]" every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review. Thus, to properly exhaust a claim, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."

Maples's ineffective-assistance claims were first presented to the state trial court in Maples's Rule 32 petition. It is undisputed that Maples never appealed that court's dismissal of his Rule 32 claims. Thus, Maples did not properly exhaust those claims in state court. And because any further attempts by Maples to exhaust those claims in state court would be futile, Maples's unexhausted claims are procedurally defaulted.

We know that Maples's further attempts at exhaustion would be futile because the Alabama courts already have denied Maples's requests for an out-of-time Rule 32 appeal. So Maples has procedurally defaulted his ineffective-assistance claims for this reason.

Maples urges this Court to overlook his
procedural default, claiming the Alabama courts have not regularly enforced Alabama's time limits for appeals, although they obviously did so in Maples's case. For a state procedural ruling to preclude federal habeas review of Maples's ineffective-assistance claims, the state court's ruling must rest upon an "independent" and "adequate" state-law ground.

Here, it is undisputed that (1) the last state court's judgment was based on a procedural bar to state review and not the merits of the claim, and (2) that state law ground was independent of the federal question. More specifically, under Alabama law, Maples had 42 days to file a notice of appeal of the Rule 32 Order but did not do so. And the Alabama appellate court denied Maples's request for an out-of-time appeal under state law and undisputedly did not consider the merits of his Rule 32 claims. Thus, the only question in this case is whether Alabama's procedural bar provides an "adequate" state ground for denying relief.

"[T]he adequacy of state procedural bars" is not a matter of state law, but "is itself a federal question." To constitute an adequate state ground, the state procedural rule "must not be applied in an arbitrary or unprecedented fashion," but must be "sufficiently firmly established and regularly followed" to warrant a procedural default. In determining whether a state procedural rule is firmly established and regularly followed, courts consider whether the state has put litigants on notice of the rule and whether the state has a legitimate state interest in the rule's enforcement. Further, while "regularly followed" means "closely hewn to," it does not mean complete unanimity or absolute consistency of state decisions applying the rule.

Here, the district court properly concluded that Alabama's 42-day and out-of-time appeal rules were firmly established and regularly followed by the Alabama courts and were not applied in an unprecedented or arbitrary fashion in Maples's case. Maples was on notice of the rules and the state has an undoubted legitimate state interest in its time deadlines for appeals for finality purposes. Further, Alabama courts routinely have enforced the 42-day rule and denied out-of-time appeals.

Alabama has granted out-of-time appeals in only three limited circumstances: (1) prisoners proceeding pro se who were not served with copies of the relevant orders within the 42-day period; (2) direct criminal appeals where the defendant requested counsel to appeal but no appeal was filed, given that a defendant has a constitutional right to counsel; and (3) the trial court, acting through its clerk, assumed a duty to personally serve or notify a party who was represented by counsel in Rule 32 proceedings, but then negligently failed to do so, resulting in an out-of-time appeal. None of these three exceptions apply here. First, Maples never filed any pleadings pro se or otherwise appeared pro se but had three counsel who were served with the Rule 32 Order. Second, Maples's case was not a direct criminal appeal; but an appeal from a collateral Rule 32 dismissal, where Maples has no constitutional right to counsel. Indeed, Maples does not rely on these two exceptions.

Rather, Maples relies on the third exception, arguing primarily that his case is like Marshall, where the Alabama courts granted an out-of-time appeal. However, Maples's case is wholly different from Marshall. The petitioner Marshall filed a notice of appeal that was dismissed as untimely. Marshall I, 884 So.2d at 898. Marshall filed a second Rule 32 petition seeking an out-of-time
appeal for his first Rule 32 petition. The Alabama appellate courts in Marshall appeared to find that the state circuit court clerk assumed a duty to serve Marshall personally in prison, even though he had counsel at some point, because Marshall had filed “numerous pro se motions and pleadings throughout this matter” in the circuit court and had “request[ed] information on the status of his first Rule 32 petition.” The out-of-time appeal in Marshall was granted only because the “court assumed a duty of notification it did not otherwise owe the petitioner and then failed to perform that duty.”

The Alabama Supreme Court concluded that the remedy for breach of the clerk’s duty to notify was issuance of a writ of mandamus to the clerk directing reinstatement of Marshall’s untimely appeal to the docket, and not the grant of Marshall’s second Rule 32 petition. The Alabama Supreme Court’s decision that Marshall was entitled to an out-of-time appeal expressly relied on Johnson’s and Weeks’s assumption-of-duty rule.

In contrast to Marshall, Maples never filed any pleadings pro se but had three attorneys to whom the clerk sent notice. Maples relied exclusively on his counsel and made no attempt to deal directly with the state trial court or its clerk, or to keep himself apprised directly of the developments in his case. Maples never requested the clerk to give him personal notice in addition to his counsel. There is no basis here upon which to infer that the trial court clerk was negligent or that the clerk even knew Maples wanted to be personally informed of the court’s orders, much less that it assumed a duty to notify Maples personally in prison. Indeed, in Maples’s case, the Alabama appellate court itself expressly distinguished Marshall when it denied Maples’s request for an out-of-time appeal. Maples, 885 So.2d at 848-50. Simply put, Marshall does not convince us that Alabama appellate courts ignore the state’s procedural rules for appeals or fail to apply them regularly. Maples can point to no Alabama case where an out-of-time appeal has been granted in circumstances such as his case.

For all of these reasons, we conclude that it was neither arbitrary nor inconsistent for the Alabama courts to enforce its 42 day rule for appeals and deny Maples’s request for an out-of-time appeal, and that Alabama’s appeal rules are adequate, independent state law procedural rules barring Maples’s ineffective-assistance claims from federal habeas review.

B. Cause and Prejudice to Excuse Procedural Default

Notwithstanding that a claim has been procedurally defaulted, a federal court may still consider the claim if a state habeas petitioner can show either (1) cause for and actual prejudice from the default; or (2) a fundamental miscarriage of justice. Maples argues that, even if they are procedurally defaulted, his ineffective-assistance claims should be heard by the federal court because he has demonstrated cause for and prejudice from the default. Cause is established if “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” “Such external impediments include evidence that could not reasonably have been discovered

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9 In Marshall, the petitioner’s counseled Rule 32 petition was denied in June 2000. Marshall’s November 2000 notice of appeal was dismissed as untimely. Marshall filed a second Rule 32 petition, claiming he personally never received notice of the denial of his first Rule 32 petition and was due an out-of-time appeal because the trial court did not send him personally a copy of the denial order in the first Rule 32 case.
in time to comply with the rule; interference by state officials that made compliance impossible; and ineffective assistance of counsel at a stage where the petitioner had a right to counsel.”

Here, the factor that resulted in Maples’s default—namely, counsel’s failure to file a timely notice of appeal of the Rule 32 Order—cannot establish cause for his default because there is no right to post-conviction counsel.

C. Waiver of the Exhaustion Requirement and Estoppel as to the Procedural Bar

Maples’s remaining arguments are based on a footnote in the State’s brief to the Alabama Supreme Court opposing Maples’s request for an out-of-time appeal of the Rule 32 Order. In the Alabama Supreme Court, Maples’s brief asserted that “Maples may very well be executed despite valid post-conviction claims merely because he was denied the opportunity to timely appeal the dismissal of his Rule 32 Petition.” A footnote in the State’s response brief said that “Maples has filed a petition for [a] writ of habeas corpus in federal court . . . [and] may still present his postconviction claims to that court.” Maples argues that this statement in the State’s footnote (1) is a waiver of the exhaustion requirement or (2) judicially estops the State from arguing that his ineffective-assistance claims are procedurally barred.

Maples’s arguments fail. Section 2254(b)(3) provides that “[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.” Thus, we cannot find either waiver of exhaustion or estoppel as to the procedural bar unless the State’s footnote can be considered an express waiver.

This Court has found express waivers under § 2254(b)(3) only where the State has provided an explicit statement during federal habeas proceedings that it is waiving a petitioner’s procedural default.

Here, the State’s footnote statement to the Alabama Supreme Court is not an “express waiver.” Merely observing to a state court that a petitioner may present his claims in federal habeas proceedings does not imply that the federal court would reach the merits of these claims. And observing that a petitioner may present his claims in federal court, without explicitly stating that the State was waiving the exhaustion requirement, cannot satisfy § 2254(b)(3)’s mandate that the State “expressly waive[ ] the requirement.” Because the State did not expressly waive the exhaustion requirement or the procedural bar, it cannot be deemed to have waived those defenses nor can it be estopped from asserting them now.

D. Jury-Instruction Claims

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IV. CONCLUSION

We affirm the district court’s denial of Maples’s § 2254 petition.

AFFIRMED.

BARKETT, Circuit Judge, dissenting:

I cannot agree that Maples’s ineffective assistance of counsel claims are procedurally barred. As such, the claims should be reviewed on the merits. As the majority opinion explains in detail, a
petitioner’s habeas claims are procedurally defaulted—and therefore rendered unavailable for review by this court—when, *inter alia*, the state rule on which the default is based is “adequate and independent.” However, Alabama’s law on out-of-time appeals, which forms the basis of Maples’s claim in this case, is not “adequate” pursuant to the Supreme Court’s definition of that term. Maples therefore has not procedurally defaulted. Accordingly, there is no procedural bar to the consideration of the ineffective assistance of counsel claims that Maples attempts to bring before this court.

The Supreme Court defines an “adequate and independent” state court decision as one “[which] rests on a state law ground that is independent of the federal question and adequate to support the judgment.” To be considered “adequate” by a federal court, the state procedural rule must be both “firmly established and regularly followed.” In other words, the rule must be “clear [and] closely hewn to” by the state for a federal court to find it to be adequate. The “adequacy” requirement thus means that the procedural rule “must not be applied in an arbitrary or unprecedented fashion.” If the rule is not firmly established, or if it is applied in an arbitrary or unprecedented fashion, then it is not adequate to preclude federal review. In this case, the rule used to procedurally bar review in the state court was not firmly established or, if interpreted as firmly established, was applied to Maples in an unprecedented and arbitrary fashion.

As demonstrated by *Marshall v. State*, 884 So.2d 898, 899 (Ala.Crim.App.2002), *overruled on other grounds*, 884 So.2d 900 ( Ala.2003), the rule which the majority applies is not firmly established and has been arbitrarily applied to Maples. As in this case, the defendant in *Marshall* did not receive notice when his first Rule 32 petition for post-conviction relief was denied. His time to appeal the denial thus lapsed before he was even aware an order had been entered. When Marshall was finally notified, he filed a second Rule 32 petition which asked the court to permit him to file his appeal out of time. The Alabama Court of Criminal Appeals *granted* that petition.

The majority finds that *Marshall* permits an out-of-time appeal based on failure to notify the defendant personally only when the court has assumed a duty to notify the defendant personally of an order in his case. Only then would the court’s failure to notify the defendant violate his rights. Applying that rule to the issues in *Marshall*, this majority concludes that the *Marshall* court allowed Marshall an out-of-time appeal because the court had assumed a duty to notify Marshall of its decision after he wrote to the clerk of courts inquiring about the status of his case. The court then allegedly violated that duty—thereby permitting an out-of-time appeal—when its clerk failed to respond.

That may be the rule that *Marshall* suggested; but it is not the rule that *Marshall* applied. Like Maples, Marshall did not begin filing his requests with the clerk until *after* the order denying his Rule 32 petition had been decided. As Marshall himself explained, he made the requests “because he had no idea that his first petition had been dismissed.” Again, like Maples, Marshall was represented by counsel in his Rule 32 proceeding; neither Maples nor Marshall

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1 The Alabama Supreme Court held that Marshall should have petitioned for a writ of mandamus rather than seeking relief as he did. This procedural change did not affect Marshall’s underlying claims. In any event, Alabama subsequently amended its rules of civil procedure to permit Marshall’s method of challenging the denial of his out-of-time appeal of his Rule 32 petition. This dissent therefore uses the procedural terminology interchangeably.
were proceeding pro se. Counsel for both Marshall and Maples received a copy of the order denying the their clients' Rule 32 petitions, and both sets of counsel failed to timely act on that order. Despite these indistinguishable facts, the Marshall court granted an out-of-time appeal, and the Maples court did not. The Marshall opinion thus provides no clear basis for distinguishing the facts of Marshall's out-of-time appeal from the facts of Maples's out-of-time appeal. This inconsistency in the application of Alabama's law on granting out-of-time appeals renders the rule an inadequate ground on which to bar federal review of Maples's claims.

Marshall aside, the interests of justice also require that Maples be permitted review of his claims when the alleged default of those claims occurred through no fault of his own. Rather, any such default is entirely the fault of his post-conviction counsel, and this court is allowing him to be put to death because of that negligence. “[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.” Due to this “unique nature of the death penalty,” the Eighth Amendment demands “heightened reliability . . . in the determination whether the death penalty is appropriate in a particular case.” As a result, the Supreme Court has recognized that “in capital cases, it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence.” If the facts alleged by Maples to support his claims of ineffective assistance of counsel are true, then the jury in this case was left without sufficient information of Maples's character and individual circumstances when it returned a verdict for the death penalty.

Notwithstanding the supposed procedural bar in this case, the imposition of the death penalty and the heightened reliability that it requires, necessitate federal review of Maples's ineffective assistance claims. Ultimately, “[h]abeas corpus is governed by equitable principles.” Barrirling federal review of claims defaulted under state law serves the dual principles of comity and federalism. Nevertheless, in certain cases, like the present case, those equitable principles “must yield to the imperative of correcting a fundamentally unjust [sentence].” Without review of Maples's claims, we cannot ascertain the reliability of Maples's death sentence.

Maples was entitled to an out-of-time appeal under Alabama precedent established in Marshall v. State, 884 So.2d 898, 899 (Ala.Crim.App.2002). Because he was denied that opportunity, the merits of his claims must be examined by the district court to determine whether or not his sentence is reliable. If AEDPA bars review in such circumstances, then its constitutionality would appear questionable in this regard.

I respectfully dissent.
Death row case

The court agreed to hear the case of an Alabama death row inmate whose appeal has been turned down by lower courts because of a paperwork mix-up.

Cory R. Maples was convicted in 1997 of killing two men after a night of heavy drinking and drug use. He filed appeals alleging that his inexperienced court-appointed attorneys—who during the trial warned the jury that it might appear they were "stumbling around in the dark"—were negligent.

At one point in the years of appeals that followed, Maples was represented by two lawyers from a New York firm, Sullivan & Cromwell. But the two left the firm without telling Maples or the court. And when the court sent notice of an unfavorable ruling, someone in the law firm’s mailroom stamped the letters "Return to sender."

The letters went back to the county clerk, who did nothing with them. It was only after the 42-day deadline for appeal had passed that Maples received notice. The law firm tried to intervene, but the court said it was too late.

Maples also found no relief from the U.S. Court of Appeals for the 11th Circuit in Atlanta. Gregory G. Garre, who was solicitor general under President George W. Bush and is now representing Maples, brought the issue to the Supreme Court.

The case, he wrote, "raises the shocking prospect that a man may be executed without any federal court review of serious constitutional claims due to a series of events for which all agree he was blameless and notwithstanding the state’s own failings in the purported default."

Garre noted in his petition that in 2006, the court held in Jones v. Flowers that, when the loss of a home was at stake, state officials had to take action when an important notice was returned unopened.

"It follows that the state may not ‘shrug [its] shoulders . . . and say ‘I tried’ when a man’s life is at stake,” Garre wrote.

The case is Maples v. Thomas and will be argued in the court term that begins in October.
Above the Law
November 2, 2009
Kashmir Hill

More than a decade ago, Cory Maples of Alabama murdered two people. After an evening of heavy drinking, playing pool, and riding around in a friend's car, Maples killed two friends, shooting them execution-style.

According to court documents, he signed a confession, "stating that he: (1) shot both victims around midnight; (2) had drunk six or seven beers by about 8 p.m., but 'didn't feel very drunk'; and (3) did not know why he decided to kill the two men. Faced with this confession, Maples's trial attorneys argued that Maples was guilty of murder, but not capital murder."

A jury found Maples guilty and sentenced him to death.

Maples appealed his capital murder conviction with the help of attorneys at Sullivan & Cromwell:

Maples subsequently filed a petition for post-conviction relief pursuant to Alabama Rule of Criminal Procedure 32, claiming, inter alia, that trial counsel was ineffective for failing to investigate or present evidence of: (1) Maples's mental health history; (2) his intoxication at the time of the crime; and (3) his alcohol and drug history.

The trial court dismissed Maples' Rule 32 petition, and sent notice of the decision to the attorneys at Sullivan & Cromwell and to local Alabama counsel. There was a 42-day period for filing a notice of appeal, but all the lawyers involved dropped the ball on the case, PepsiCo-style.

So what's the explanation for S&C's missing the deadline for filing an appeal?

From our tipster:

Basically, Sullivan & Cromwell forgot to file a notice of appeal for a death row inmate, causing him to procedurally default all his ineffective-assistance claims. Oops!

Here's the explanation, from the Eleventh Circuit:

The Alabama trial court clerk sent copies of the Rule 32 Order, filed on May 22, 2003, to: (1) Maples's two attorneys (Jaasi Munanka and Clara Ingen-Housz) with the law firm of Sullivan & Cromwell in New York, who were attorneys of record and had performed all of the substantive work on Maples's Rule 32 case; and (2) Maples's local counsel (John G. Butler, Jr.) in Alabama. No one disputes that both Butler and Sullivan & Cromwell received copies of the Rule 32 Order dismissing Maples's petition.

Neither Maples nor any of his three attorneys filed a notice of appeal from the dismissal of Maples's Rule 32 petition within the 42 days required by Alabama Rule of Appellate Procedure 4(b)(1). Butler took no action whatsoever after receiving the Rule 32 Order. Sullivan & Cromwell received the Rule 32
Order but instead of opening the envelope that contained it, the firm returned it to the Alabama circuit court clerk.

Apparently attorneys Munanka and Ingen-Housz had left Sullivan & Cromwell. Although arrangements had been made for new attorneys to take over the pro bono matter, they had not filed notice of the change of counsel with the Alabama trial court.

The state's attorney wrote Maples a letter letting him know he had missed the deadline to appeal the Petition's dismissal, but that he could still file a federal habeas petition.

Thereafter, Maples's mother contacted Sullivan & Cromwell. On Maples's behalf, new attorneys from the Sullivan & Cromwell firm requested that the Alabama trial court re-issue its Rule 32 Order so that he might file a timely appeal. The trial court refused, stating in an order that it was "unwilling to enter into subterfuge in order to gloss over mistakes made by counsel for [Maples]."

New Sullivan & Cromwell attorneys helped Maples file his federal habeas petition, but that petition was denied:

The district court concluded that:

(1) Maples's ineffective-assistance claims were procedurally defaulted because Maples did not timely file an appeal of the dismissal of his Rule 32 petition; (2) even if Maples's default were the result of his three post-conviction counsel's failing to file a Rule 32 appeal, such ineffectiveness could not establish cause for the default because there is no constitutional right to post-conviction counsel; and (3) the Alabama appellate courts' decisions that Maples was not entitled to a sua sponte jury instruction on manslaughter due to voluntary intoxication was not contrary to, or an unreasonable application of, clearly established federal law.

The decision was affirmed by the Eleventh Circuit in a per curiam opinion. Cory Maples remains on death row.
A death row prisoner in Alabama has had a final plea against execution turned down by the federal appeals court on the grounds that his lawyers failed to meet a 42-day deadline to file legal paperwork.

Cory Maples, 35, may go to his death as a result of a procedural mistake by his lawyers of which he had no knowledge or he had no control.

The case has highlighted inconsistencies in the application of the death penalty across America: critics say the system is so skewed that issues of justice and fairness are frequently lost in a myopic focus on bureaucratic rule-keeping.

"We have created an incredibly complex procedural maze, with the result that we are risking executing people who should not have been given a death sentence in the first place," said Bryan Stevenson, director of the Alabama-based Equal Justice Initiative, EJI.

The case of Maples began on 7 July 1995 when two friends, Stacy Terry and Barry Robinson, went round to his house. Later, as the men were leaving in their car, Maples shot them both twice in the head with his father's gun. He confessed to the murders, telling police he had drunk about eight pints of beer.

At his trial, Maples was found guilty by 10 votes to two and the jury recommended death. Just one fewer vote against him would have spared him under Alabama law.

After Maples was sent to death row in 2000 he took on another team of lawyers for post-conviction appeals. They found that his original lawyer had made basic and serious mistakes.

He had failed to present the jury with evidence that Maples had been drunk, or that he had a history of mental illness, suicide attempts and drug addiction, to such an extent that he was mentally incapable of carrying out a premeditated murder and was thus unfit to face the death penalty.

His new lawyers, at a large international firm called Sullivan & Cromwell, went before the Alabama courts to argue that Maples’s trial lawyer had mishandled his defence, but in 2003 a judge rejected the petition. They then had 42 days to file a further appeal.

Paperwork was mailed from Alabama to their New York offices, addressed to two lawyers who had left the company. The letter was returned unopened to the Alabama courts and the deadline missed.

Sullivan & Cromwell said it could not comment as the case, which it continues to work on, is still active. After prolonged legal wrangling, the federal appeals court has ruled that because the deadline was missed, Maples has lost the right to a final appeal against being put to death. "Any and all fault here lies with Maples for not filing a timely notice of appeal," the ruling says.
One judge, Rosemary Barkett, dissented from the ruling, saying “the interests of justice require that Maples be permitted review of his claims. This court is allowing him to be put to death because of the negligence” of his lawyers.

Death row campaigners say the Maples case highlights the brutal, legalistic approach to execution adopted in Alabama and a handful of other states. Alabama has 200 death row prisoners, and holds the record in the country for the number of people sentenced to death each year in recent times.

Yet it is the only state in America that has no public defender programme, which means that people charged with offences that could lead to the death penalty have no right to choose a lawyer for themselves. Instead, they are handed a lawyer by Alabama state, some of whom, according to EJI, have fallen asleep or been drunk during trials.

At the time Maples went on trial there was a limit on out-of-court preparation costs for the state-appointed lawyer, who was given just $1,000 (£625) to prepare for the case. “When you pay someone this kind of money you have every reason to think the lawyer is not going to do effective work,” Stevenson said.

The result, he added, was that the burden of responsibility was placed on death row prisoners themselves—many of whom are poorly educated or mentally ill—to negotiate the legal maze.

“The crazy situation is that we execute someone according to whether documents were filed on a Thursday or Friday, or if the Ts were cross and the Is dotted,” he said.
The Supreme Court has granted review in *Maples v. Allen*, a habeas case. Cory Maples was convicted of murder and sentenced to death in Alabama. The conviction and sentence were affirmed on appeal. Maples thereafter filed a state petition for post-conviction relief arguing that his trial lawyer was constitutionally defective. The state court hearing that petition denied it. Maples did not file a timely notice of appeal from that denial and only found out about the decision after the time to appeal had passed. According to the record in the case, the court clerk had mailed a copy of the order denying the petition to Maples’s attorneys at the law firm where, according to the docket information, they were employed. Those lawyers, however, had since left the firm (without updating their contact information with the court) and so the mail room receiving the court’s mailing sent it back to the court. The court clerk made no additional effort to locate Maples’s attorneys. The clock ticked. Maples’s time to appeal ran out. After Maples eventually became aware of the denial of his original petition, he unsuccessfully petitioned the state appellate court to allow an untimely appeal. He thereafter filed a federal habeas petition, asserting his ineffective assistance of trial counsel claim. The federal district court denied the habeas petition on the ground that the claim was procedurally defaulted and there was no good cause that would excuse the default. The 11th Circuit affirmed the district court.

The case has attracted significant attention because the lawyers representing Maples in the post-conviction proceeding, Clara Ingen-Housz and Jaasi Munanka, were from the New York office of Sullivan & Cromwell (S&C); it was the S&C mail room that returned the trial court’s order to the court after Ingen-Housz and Munanka had left S&C. Numerous commentators have asked how it is that S&C dropped the ball, with the result that Maples now faces execution without any federal review of his ineffective assistance of counsel claim.

I see some different issues.

First things first: the case isn’t important for the legal questions it raises and it isn’t going to generate any new law. Maples is represented at the Supreme Court by former Solicitor General Gregory Garre. Maples asks the Supreme Court for a ruling that the state timing rule is not consistently applied and therefore is not adequate to procedurally bar his habeas petition. In light of the Court’s recent decision in *Beard v. Kindler*, it is very unlikely that the Court will grant Maples relief on that basis. Instead, I predict a “sympathy” per curiam, in which the Court will squeeze Maples’s plight into *Holland v. Florida* and hold that equitable tolling is appropriate in his case. Maples will end up with federal review of his ineffective assistance of counsel claim (which, like most such claims, will likely fail on the merits).

The more interesting aspect of the case is what it tells us about pro bono work at big law firms.
Although Ingen-Housz and Munanka were attorneys at S&C at the time they took on Maples's case, Maples was apparently not represented by S&C itself. Among the materials in the record (petition for cert., p. 257a) is an affidavit from an S&C partner, Marc De Leeuw, who explains:

Lawyers at S&C handle pro bono cases on an individual basis. Accordingly, the lawyers who first appeared in this case, and all lawyers who have participated thereafter, have done so on an individual basis, and have attempted not to use the firm name on correspondence or court papers.

In the state court filings, therefore, Maples's attorneys of record were Ingen-Housz and Munanka (not Ingen-Housz and Munanka of S&C).

It isn't hard to think of reasons a big law firm would, as a legal matter, have pro bono clients represented by individual attorneys rather than the firm at large. Individual representation limits the firm's exposure to liability; the firm need not hold onto the case if (as here) the lawyers leave the firm; the firm need not commit its vast resources to the case; and if the case comes out badly the firm can deny responsibility. Indeed, if Ingen-Housz and Munaka were Maples's attorneys in an individual capacity, it becomes hard to fault the S&C mailroom or S&C itself. After all, nobody at S&C would have a responsibility (or perhaps even authority) to open and hand over to another attorney within the firm a court document sent to an individual attorney in care of S&C concerning a client S&C never represented.

In practice, however, the wall between individual attorneys and the firm where they are ordinarily employed is obviously far less solid. As is true of most pro bono work in big firms, it is very likely that Ingen-Housz and Munanka worked on Maples's case in the office and not at home. They likely used firm resources (the Westlaw account, secretarial support and so on). And they were likely able to count the hours they worked on the case towards whatever hourly expectations the firm has of its attorneys.

Moreover, S&C (like other big firms) certainly gives a public impression that the firm itself is handling the pro bono cases. S&C's website says, for example:

S&C consistently ranks among the leaders of large firms in participation in pro bono and other public service activities. . . . We are proud of our tradition of public service and of the quality and quantity of S&C's diverse pro bono practice.

Our lawyers . . . represent pro bono clients around the country in various habeas corpus matters, in post-conviction death row proceedings and in federal narcotics prosecutions. Sullivan & Cromwell's public service activities are coordinated by Marcia Levy, Special Counsel for Pro Bono Initiatives, along with the Firm's five-partner Public Service Committee. S&C recently created the position of Special Counsel for Pro Bono Initiatives to enhance the Firm's deep commitment to pro bono work and broaden the opportunities and types of pro bono matters available. In addition, the Firm has designated a day-to-day coordinator of pro bono activities.

The coordinators seek out challenging and rewarding public service opportunities. The Firm
creates numerous opportunities for all lawyers, summer associates and legal assistants to participate in public service activities.

Public service matters are generally undertaken in one of two ways: as a result of a referral from a community organization or at the initiative of the Firm or individual lawyers. S&C encourages lawyers to learn about and sign up for pro bono matters through Pro Bono Net (www.probono.net). In whichever way a matter is initiated, a proposed new matter goes through the Firm’s standard new matter opening procedures. These procedures include conflict clearance as well as approval by the Managing Partners Committee.

All of this suggests to me that pro bono clients are S&C clients.

More significantly, Maples might well have believed—and might still believe—he was represented by S&C. His petition for certiorari indicates that after Maples learned of the missed deadline, his mother called S&C, which arranged for new lawyers from the firm to take over the case. The Eleventh Circuit’s opinion refers repeatedly to S&C as representing Maples. And the Wall Street Journal says that S&C hired Gregory Garre to handle the case at the Supreme Court.

This case raises in my mind three basic questions about big law representation of pro bono clients. One is whether the clients know they are represented only by individual attorneys (and therefore cannot count on the firm as a whole for resources and support). A second question is whether big firms should receive the public credit they do for pro bono work conducted by attorneys acting in an individual capacity.

The third question might be the most important. If lawyers at big firms are handling pro bono case in an individual (and not firm) capacity, we might well ask about the quality of lawyering the pro bono clients, especially in death penalty cases, are given.

Clara Ingen-Housz and Jaasi Munanka began representing Cory Maples in September 2000. Ingen-Housz was trained as a lawyer in France and she received an L.L.M from Harvard in 1999. Munanka graduated from the University of Michigan Law School, also in 1999. Neither of the two did a clerkship before starting at S&C. In other words, Maples’s life was in the hands of two lawyers, one educated in France, both just entering their second year as S&C associates in New York City. And those two sophomore lawyers were responsible for navigating the complexities of Alabama law and the minefield of federal law governing habeas review of state court judgments.

There is no question that a firm like S&C can handle the complexities and risks of death penalty litigation. But leaving the task to two beginners, if that’s what big firms are doing, is surely a bigger sin than any a mail room employee might commit.
In 2001, Petitioner Randall Fields was serving a 45-day sentence for disorderly conduct in the Lenawee county jail when he was taken out of his cell and questioned for several hours about his relationship with a minor. Fields was informed he was free to leave at any time during this session but was not otherwise read his Miranda rights. Statements made by Fields during this session were used at a subsequent trial, over objection by defense counsel, where Fields was convicted of two counts of third-degree criminal sexual conduct. The Michigan Court of Appeals affirmed Fields’ conviction, holding that Fields was unquestionably in custody but because he had been informed he was free to leave and never asked to do so, Miranda warnings were not required. The Michigan Supreme Court denied Fields permission to appeal that decision and Fields then filed for habeas relief in federal court. The district court conditionally granted Fields’ habeas petition holding the state court unreasonably applied Mathias v. United States resulting in non-harmless error.

Question Presented: Whether this Court’s clearly established precedent under 28 U.S.C. § 2254 holds that a prisoner is always “in custody” for purposes of Miranda any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison regardless of the surrounding circumstances.


United States Court of Appeals for the Sixth Circuit

Decided and Filed: August 20, 2010

[Excerpt; some footnotes and citations omitted.]
jumpsuit, but was not handcuffed or otherwise chained.

In the conference room, Fields was questioned by Deputy David Batterson and Deputy Dale Sharp about his relationship with Travis Bice, whom Fields had met when Bice was a minor. The questioning commenced between 7:00 p.m. and 9:00 p.m. and lasted for approximately seven hours. Fields was not read his Miranda rights but was told that if he did not want to cooperate he was free to leave the conference room at any time. Leaving the locked conference room would have taken nearly twenty minutes, as a corrections officer would have had to be summoned to return Fields to his cell.

Fields did not ask for an attorney or to go back to his cell. However, he told the officers more than once that he did not want to speak with them anymore. At one point in the interview, Fields became angry and started yelling. Deputy Batterson testified that he told Fields he was not going to tolerate being talked to like that and that Fields was welcome to return to his cell. Additionally, Deputy Sharp testified that Deputy Batterson told Fields that if he continued to yell the interview would be terminated. Fields testified that he was told "sit my fucking ass down" and that "if I didn't want to cooperate, I could leave."

During the interview, Deputy Batterson told Fields that there had been allegations of a sexual nature involving Bice. Fields initially did not acknowledge any sexual relationship with Bice, but he eventually admitted to masturbating Bice and engaging in oral sex with him on at least two occasions. Prior to trial in the Lenawee County Circuit Court, the trial judge denied Fields' motion to suppress these statements. At trial, over the renewed objection of defense counsel, Deputy Batterson testified to Fields' jailhouse admissions. Fields was ultimately convicted of two counts of third-degree criminal sexual conduct and was sentenced on December 5, 2002, to a prison term of ten to fifteen years.

Fields filed an appeal of right in the Michigan Court of Appeals on three grounds. The ground relevant to the instant appeal asserted that "[t]he trial court violated Mr. Fields' due process rights by admitting his alleged custodial statement where Mr. Fields was in custody in the county jail and the Lenawee County sheriff interrogated him for as much as 7 hours without providing Miranda warnings." The Michigan Court of Appeals affirmed the trial court, holding that because Fields "was unquestionably in custody, but on a matter unrelated to the interrogation" and "was told that he was free to leave the conference room and return to his cell . . . [but] never asked to leave . . . Miranda warnings were not required . . ." People v. Fields, No. 246041, 2004 WL 979732, at *2 (Mich.App. May 6, 2004). The Michigan Supreme Court denied Fields leave to appeal the Michigan Court of Appeals' decision. People v. Fields, 471 Mich. 933, 689 N.W.2d 233 (Mich.2004) (table).

Fields then filed a pro se petition, pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus on the same grounds as his direct appeal to the Michigan Court of Appeals. The district court conditionally granted Fields' habeas petition, holding that the state court unreasonably applied Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968) and that the state court's error was not harmless. Appellant Carol Howes, Warden of the Lakeland Correctional Facility in Coldwater, Michigan, has appealed the district court's decision.
II. STANDARD OF REVIEW

The district court's grant of a writ of habeas corpus is reviewed de novo. Findings of fact are reviewed for clear error unless the district court's decision is based on the transcripts from the petitioner's state court trial, in which case the findings of fact are reviewed de novo. Questions of law and mixed questions of law and fact are also reviewed de novo.

III. ANALYSIS

Appellant argues that the district court misinterpreted and erroneously applied 28 U.S.C. § 2254(d) by determining that the state court adjudication was objectively unreasonable.

28 U.S.C. § 2254(d)(1), which is part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.


The district court made no findings of fact because the parties agreed there were no factual disputes. Thus, we are left to examine, de novo, whether the Michigan Court of Appeals' decision was contrary to, or an unreasonable application of, clearly established federal law.

A state court decision is contrary to clearly established federal law as determined by the Supreme Court if: (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) the state court confronts a set of facts that are materially indistinguishable from a Supreme Court decision and nevertheless arrives at a result different from Supreme Court precedent. A state court unreasonably applies clearly established federal law if the state court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the state prisoner's case. A state court's application of federal law must be "objectively unreasonable" to be an unreasonable application of federal law under § 2254(d)(1). Critically, "an unreasonable application of federal law is different from an incorrect application of federal law." Nevertheless, if the Supreme Court has not "broken sufficient legal ground to establish [a] . . . constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar" under either the contrary to or unreasonable application standard.

The Fifth Amendment provides that no person "... shall be compelled in any criminal case to be a witness against himself..." In Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court held that this privilege against self-incrimination applies to a criminal suspect subjected to custodial interrogation. Specifically, statements taken during a custodial interrogation cannot be admitted to establish the guilt of the accused unless the accused was provided a full and effective warning of his rights at the outset.
of the interrogation process and knowingly, voluntarily and intelligently waived his rights. Custodial interrogation is “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”

Miranda only applies if the suspect was (1) interrogated while (2) in custody. Interrogation under Miranda is “express questioning or its functional equivalent” that law enforcement officers “should know [is] reasonably likely to elicit an incriminating response.” Appellant does not dispute that the two law enforcement officials’ seven hour questioning of Fields constituted an interrogation. Therefore, we must only determine whether Fields was in custody for purposes of Miranda.

“Miranda warnings are required only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’” “Although the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving of Miranda protection, the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”

In Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), the Supreme Court held that “nothing in the Miranda opinion ... calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.” While the petitioner in Mathis was serving time in a state prison for an unrelated conviction, an IRS agent questioned him about tax refunds he had claimed on his individual income tax returns. The agent did not read the petitioner his Miranda rights prior to obtaining documents and oral statements subsequently used to convict the petitioner of two counts of knowingly filing a false claim. At trial, the district court denied the petitioner’s attempts to suppress the evidence elicited by the revenue agent. On appeal, the circuit court affirmed the district court.

The Supreme Court reversed the lower courts, finding that the petitioner was entitled to receive a Miranda warning prior to questioning by the government agent. Specifically, the Supreme Court rejected the respondent’s contentions that Miranda did not apply because: (1) the questions asked were part of a routine civil, rather than criminal, tax investigation; and (2) the petitioner was in jail for a separate offense than that for which he was being questioned. The respondent’s first contention was rejected because, as occurred with the defendant in Mathis, civil tax investigations frequently lead to criminal prosecutions. In rejecting the second distinction, the Supreme Court found that requiring Miranda warnings only where questioning occurs in connection with the case for which a suspect is being held in custody “goes against the whole purpose of the Miranda decision which was designed to give meaningful protection to Fifth Amendment rights.”

The central holding of Mathis is that a Miranda warning is required whenever an incarcerated individual is isolated from the general prison population and interrogated, i.e. questioned in a manner likely to lead to self-incrimination, about conduct occurring outside of the prison. In the instant case, the district court determined that the Michigan Court of Appeals unreasonably applied Mathis by concluding that the investigators need not have provided Miranda warnings to Fields because the interrogation was unrelated to the crime for which he was being held in custody. Though we agree with the district court's decision, we believe that the Michigan Court of Appeals’
decision was contrary to, as opposed to an unreasonable application of, Mathis. In its opinion, the Michigan Court of Appeals explicitly stated that Fields "was unquestionably in custody, but on a matter unrelated to the interrogation," yet still concluded that Miranda warnings were not required. People v. Fields, No. 246041, 2004 WL 979732 at *2 (Mich.App. May 6, 2004) (emphasis added). The Michigan Court of Appeals did not cite Mathis nor any case relying upon Mathis in its decision. However, the material facts in this case are indistinguishable from Mathis. In both cases, the imprisoned suspect was interrogated about a matter unrelated to his offense of incarceration. Yet, while the Supreme Court in Mathis held that the suspect was entitled to a Miranda warning prior to interrogation, the Michigan Court of Appeals ruled that a Miranda warning was not required. The Michigan Court of Appeals therefore arrived at a conclusion contrary to clearly established federal law.

Appellant contends that federal law does not necessarily require Miranda warnings any time an incarcerated individual is questioned about a subject unrelated to the offense of incarceration. As there was no Sixth Circuit decision on point at the time of briefing, Appellant cites numerous cases from other Circuits to support its position.

However, these cases are readily distinguishable from Mathis and do not provide persuasive authority to this case, which may explain why none of them were cited by the Michigan Court of Appeals. Four cases involved on-the-scene questioning by prison officers concerning an offense committed in the jail itself. See Miranda, 384 U.S. at 477, 86 S.Ct. 1602 ("General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding").

Five cases involved voluntary confessions made by individuals who were not interrogated in isolation.

Because Fields was removed from the general prison population for interrogation about an offense unrelated to the one for which he was incarcerated, Mathis is the applicable law. None of the cited appellate cases, all of which were decided subsequent to Mathis, erode its essential holding: Miranda warnings must be administered when law enforcement officers remove an inmate from the general prison population and interrogate him regarding criminal conduct that took place outside the jail or prison.

The Michigan Court of Appeals correctly determined that Fields was "unquestionably" in custody and was subject to interrogation. Fields was taken from his prison cell to a conference room without explanation. The conference room was locked. Though told that he could leave at any time, exiting the conference room was a lengthy process that required a corrections officer to be summoned. Thus, Fields faced the type of "restraint on freedom of movement" necessary to be deemed in custody. Furthermore, Fields was questioned for approximately seven hours. The subject of the questioning was his sexual relationship with a minor, which was not related to his offense of incarceration. This was assuredly an interrogation as it was express questioning that was reasonably likely to elicit an incriminating response.

Despite properly determining that Defendant was in custody and subject to interrogation, the Michigan Court of Appeals erroneously concluded that "there must be some nexus between [the elements of custody and interrogation] in order for Miranda to apply." Fields, 2004 WL 979732, at *2. The Michigan Court of Appeals relied upon
People v. Honeyman, 215 Mich.App. 687, 546 N.W.2d 719, 723 (1996), which created the “nexus” test without citation to federal authority. Fields, 2004 WL 979732, at *2 n. 3. However, Miranda and its progeny only require a finding of custodial interrogation; there is no nexus requirement. Thus, the Michigan Court of Appeals erred first by searching for a nexus between custody and interrogation and then by finding that, because Defendant was in custody “on a matter unrelated to the interrogation,” Defendant wasn’t “in custody for the purpose of determining whether Miranda warnings were required.” Fields, 2004 WL 979732, at *2.

Any doubt that Fields was in Miranda custody is erased by both this Court’s recent decision in Simpson v. Jackson, 615 F.3d 421, No. 08-3224, 2010 WL 2771861 (6th Cir. July 13, 2010), and the Supreme Court’s opinion in Maryland v. Shatzer, — U.S. — , 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010). As an initial matter, it should be noted that although Simpson was argued after our case and both opinions were written concurrently, the Simpson decision was issued prior to this opinion. We are therefore bound by its ruling. Because Simpson only briefly discussed the Miranda custodial interrogation issue, we are including a detailed explanation of our ruling.

In Simpson, the incarcerated appellant, on separate occasions, made incriminating statements to police officers questioning him about a crime unrelated to his offense of incarceration. The appellant was not read his Miranda rights on either occasion. The statements were then used as evidence to support criminal charges against the appellant. The appellant moved to suppress these statements at trial, but the state trial judge denied the motion and admitted his statements. The appellant was subsequently convicted. On direct appeal, the Court of Appeals of Ohio upheld the appellant’s conviction. The appellant then petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, which was dismissed by the district court. The appellant appealed the dismissal to our court. The panel reversed the district court’s dismissal and granted the appellant’s petition, holding that the state court’s decision was contrary to factually indistinguishable Supreme Court precedent. Specifically, the panel found “no relevant factual distinction between Mathis and the circumstances of [the appellant's statements].”

In both our case and Simpson, “as in Mathis, state agents unaffiliated with the prison isolated an inmate and questioned him about an unrelated incident without first giving Miranda warnings.” Moreover, the state court judges in both cases, without even citing Mathis, ruled that statements obtained from such questioning was admissible. And in both cases, the failure to heed Mathis and forego the issuance of Miranda warnings was “improper” and “any resulting statements [should have been] suppressed” by the trial court.

In Maryland v. Shatzer, the Supreme Court found an incarcerated prisoner subjected to questioning on an unrelated crime to be in custody for Miranda purposes. The Shatzer defendant, who was serving a sentence for an unrelated child-sexual-abuse offense, was questioned at the correctional institution by a detective on August 7, 2003, regarding allegations he had sexually abused his son. Before any questions were asked, the defendant was read his Miranda rights. Mistaking the detective for an attorney, the defendant waived his rights. However, once the detective explained he was there to question the defendant about the allegations that he abused his son, the defendant declined to speak to the detective without an
attorney present and was released back into the general prison population. Approximately two-and-a-half years later, on March 2, 2006, a new detective visited the defendant, who had been transferred to a different facility, to question him about the same allegations of abusing his son. The defendant was read his Miranda rights, and a written waiver of these rights was obtained. The defendant was questioned for approximately thirty minutes in a maintenance closet. He never requested an attorney be present or referred to his prior refusal to answer questions.

Five days later, the detective returned to the correctional facility with another detective to administer a polygraph examination to the defendant. The defendant was read his Miranda rights, and a written waiver was again obtained. When the detectives began questioning the defendant, he became upset and incriminated himself by saying “I didn’t force him.” He then requested an attorney, ending the interrogation.

At trial, the defendant moved to suppress the incriminating statements made in 2006 based on his invocation of his Miranda rights in 2003. The trial court denied his motion to suppress, reasoning that there was a break in custody between 2003 and 2006, and therefore, the 2006 waiver of his Miranda rights superseded the defendant’s request for an attorney in 2003. The defendant was subsequently found guilty of sexual child abuse of his son. The Court of Appeals of Maryland reversed and remanded, and the Supreme Court of the United States granted a writ of certiorari.

Holding that a break in custody of more than two weeks terminates an invocation of Miranda protections, the Supreme Court reversed the judgment of the Court of Appeals of Maryland and remanded the matter. The Court’s opinion discussed whether incarceration necessarily constitutes custody, which it had “never decided ... and [had] indeed explicitly declined to address ...” Concluding that “all forms of incarceration” satisfy the restraint on freedom of movement analysis of custody, the Court nevertheless held that “lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in Miranda “and therefore Miranda rights are not triggered simply because an individual is incarcerated. That is, Miranda custody requires both a restraint on movement, which is always satisfied by incarceration, and coercive pressure.

Critically for the pending appeal, the Court noted that “[n]o one questions that Shatzer was in custody for Miranda purposes during the interviews with Detective Blankenship in 2003 and Detective Hoover in 2006.” A prisoner is in custody when he is removed from his “normal life” by being taken from his cell to an isolated area, such as a closet or conference room, for the purpose of interrogation. Once the prisoner is then released back into the general prison population, away from his interrogators, he is no longer in custody.

Thus, faced with a factual scenario of an inmate being removed from his cell and being interrogated about an unrelated crime, the Supreme Court expressed no doubt that a Miranda warning was required. The question facing the Court was whether the inmate’s 2003 invocation of his Miranda rights precluded law enforcement from soliciting a Miranda warning in 2006 and interrogating the inmate again. The Supreme Court’s unambiguous conclusion that the Shatzer defendant was in Miranda custody on both occasions serves to bolster our determination regarding Fields.

Moreover, in finding that the defendant in Shatzer was in custody, the Supreme Court
did not address the physical circumstances of the interrogation, such as whether the interrogation room was windowless, whether the defendant was handcuffed, whether the defendant was told he could stop the interrogation or the length of the interrogation. The Court’s approach, combined with the holding in Simpson, provides us the necessary guidance to formalize a bright line test for determining whether Miranda rights are triggered for an incarcerated individual. A Miranda warning must be given when an inmate is isolated from the general prison population and interrogated about conduct occurring outside of the prison.

The critical issue in this inquiry becomes whether the prisoner is isolated from the general prison population for questioning. “Miranda . . . was designed to guard against . . . the ‘danger of coercion [that] results from the interaction of custody and official interrogation.’” While locking doors or handcuffing the inmate enhances the potential for coercion, isolation is perhaps the most coercive aspect of custodial interrogation. Assuming the inmate is indeed undergoing interrogation, being placed in a room, apart from others within the prison population, sequesters the prisoner with his accusers in the type of scenario for which Miranda seeks to provide protection. Moreover, “[w]hen a prisoner is removed from the general prison population and taken to a separate location for questioning, the duration of that separation is assuredly dependent upon his interrogators.” The sense of control exercised by interrogators over the prisoner in determining the length of the prisoner’s removal from his normal life further reinforces the element of coercion. A prisoner may feel he has no choice but to cooperate and provide the exact answers his interrogators seek to elicit, regardless of the potential for incrimination. We believe a reasonable person in an inmate’s position would view such interrogation conducted in isolation as coercive, thus necessitating a Miranda warning.

This bright line approach will obviate fact-specific inquiries by lower courts into the precise circumstances of prison interrogations conducted in isolation, away from the general prison population. Furthermore, law-enforcement officials will have clearer guidance for when they must administer Miranda warnings prior to a prison interrogation.

The Michigan Court of Appeals’ conclusion that, although Fields was in custody, interrogation without a Miranda warning was permissible because the questioning concerned an unrelated matter contradicts clearly established federal law as determined by the Supreme Court in Mathis. In order for habeas relief to be warranted, however, we must also determine if the admission of Fields’ involuntary confession was harmless error. An error that “‘had substantial and injurious effect or influence in determining the jury’s verdict,’” is not harmless. Even if there is only “grave doubt about whether a trial error of federal law has substantial and injurious effect or influence in determining the jury’s verdict, that error is not harmless.” Moreover, “the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.”

There is no question that the failure to suppress Fields’ confession was not harmless error. In fact, Appellant has not even challenged this portion of the district court’s ruling. Fields was convicted of two counts of third-degree criminal sexual conduct. As noted by the district court, the
critical evidence against Fields was his confession and the victim’s testimony. The victim, however, recanted his testimony on several occasions, including telling two law enforcement officers and at least three other individuals that the sexual conduct with Petitioner never occurred. Accordingly, Fields’ confession must have heavily influenced the jury’s decision. The district court therefore correctly concluded that the trial court’s error was not harmless and that, consequently, habeas relief was merited because the Michigan Court of Appeals’ decision contradicted federal law as established by the Supreme Court.

IV. CONCLUSION

For the reasons discussed supra, the district court’s conditional grant of the petition of writ of habeas corpus pursuant to 28 U.S.C. § 2254 is hereby AFFIRMED.

McKEAGUE, Circuit Judge, concurring.

I agree that the outcome of this case is controlled by this court’s prior decision in Simpson v. Jackson, No. 08-3224, 615 F.3d 421, 2010 WL 2771861 (6th Cir. July 13, 2010). However, I write separately because I disagree with both Simpson’s and the majority’s interpretation of two Supreme Court cases: Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968) and Maryland v. Shatzer, — U.S. —, 130 S.Ct. 1213, 175L.Ed.2d 1045 (2010). In particular, in contrast to the majority and Simpson, I do not believe that Mathis obviates the need for the context-specific custody analysis clearly established by Miranda and its progeny. Moreover, I do not agree with the majority that Mathis established a bright line test to the effect that, “[a] Miranda warning must be given when an inmate is isolated from the general prison population and interrogated about conduct occurring outside of the prison.” Instead, applying the context-specific Miranda custody analysis under the deferential review mandated by AEDPA, I believe that the proper course of action in this case would be to reverse the district court and uphold the state court’s determination.

I read Mathis as standing for a narrower proposition than does the majority. The Court in Mathis addressed the government’s argument that it should: “narrow the scope of the Miranda holding by making it applicable only to questioning one who is ‘in custody’ in connection with the very case under investigation.” The Court found that there was “nothing in the Miranda opinion which call[ed] for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.” Therefore, Mathis holds that Miranda applies to a person interrogated while in prison on charges unrelated to the investigation for which he is interrogated, but it does not establish that such a person is automatically in custody entitled to Miranda warnings anytime he is interrogated away from the general prison population. Instead, this determination depends on the context—specific analysis of whether the inmate is deemed to be “in custody”; i.e., whether he was subject to the sort of isolation and coercive influence that trigger the need for Miranda warnings. Therefore, I would not read the “essential holding” of Mathis to be that “Miranda warnings must be administered when law enforcement officers remove an inmate from the general prison population and interrogate him regarding criminal conduct that took place outside the jail or prison.”

Furthermore, I also do not read Shatzer as broadly as does the majority here.
Admittedly, Shatzer does state that: “[n]o one questions that Shatzer was in custody for Miranda purposes during the interviews with Detective Blankenship in 2003 and Detective Hoover in 2006.” However, the fact that no one questioned whether Shatzer was in custody, does not mean (or clearly establish) that anytime an inmate is removed from the general prison population and interrogated he is “in custody” for Miranda purposes. Instead, it only means that the parties, unlike the government in this case, did not make an issue of the “in custody” requirement in relation to those specific interrogations.

Consequently, instead of adopting a bright line rule governing the interrogation of those already in prison and mandating that we find that Fields was in custody, I believe that the normal, context-specific analysis articulated in Miranda and its progeny applies here and that this analysis should determine whether Fields was in custody for Miranda purposes. In speaking of “custody,” the language of the Miranda opinion indicates that “when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized.” However, as the Court’s cases “make clear . . . the freedom-of-movement test identifies only a necessary and not a sufficient condition for Miranda custody” and “Miranda is to be enforced ‘only in those types of situations in which the concerns that powered the decision are implicated.’” The Court noted in Berkemer that:

The purposes of the safeguards prescribed by Miranda are to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the inherently compelling pressures generated by the custodial setting itself, which work to undermine the individual’s will to resist, and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.

Id. at 433, 104 S.Ct. 3138 (internal citations and quotations omitted).

Indeed, under the Miranda custody test: “[t]wo discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” Consequently, the Miranda custody analysis in this case is shaped by the circumstances surrounding Fields’ interrogation, including the fact that Fields was already incarcerated on separate charges and, therefore, that he lived in prison.

Turning to the particulars of this case, the Michigan Court of Appeals was the last state court to issue a reasoned opinion considering this issue. That court noted that the fact that “a defendant is in prison for an unrelated offense when being questioned does not, without more, mean that he was in custody for the purpose of determining whether Miranda warnings were required.” People v. Fields, 2004 WL 979732, *2 (Mich.Ct.App. May 6, 2004) (citation omitted). The court also noted that:

[D]efendant was unquestionably in custody, but on a matter unrelated to the interrogation. Although defendant was not read his Miranda rights, he was told that he was free to leave the conference room and return
to his cell. Defendant never asked to leave. Because Miranda warnings were not required, the trial court did not err in denying defendant’s motion to suppress his statement.

Id.

Obviously or “unquestionably,” Fields was in custody in the sense that he was incarcerated on a matter unrelated to the interrogation. However, this does not mean that he was “in custody” for purposes of the Miranda and, indeed, the Michigan Court of Appeals went on to describe the fact that Fields would have felt free to terminate the interview and leave, which is critical to the Miranda custody determination. In particular, even though Fields was interrogated in a separate conference room, he was told that he was free to leave the conference room and return to his cell; consequently, the Michigan Court of Appeals concluded that Fields was not subject to the sort of coercion necessary to trigger Miranda warnings because he was not in custody for purposes of Miranda.

We view this determination under AEDPA which, to grant relief, requires that we find the state court’s decision to be “contrary to, or involve[ ] an unreasonable application of, clearly established Federal law” as established “by the Supreme Court.” 28 U.S.C. § 2254(d)(1). A state-court decision is “contrary to” clearly established federal law if: (1) the state court applies a rule that contradicts the governing law set forth by the Supreme Court in its cases, or (2) the state court confronts a set of facts that are materially indistinguishable from a Supreme Court decision. Furthermore, while a close call, I cannot say that the Michigan Court of Appeals' decision applying the context-specific Miranda custody test is objectively unreasonable. The Michigan Court of Appeals provided the specific factual context surrounding the investigation:

At trial, Deputy Batterson testified that he removed defendant from his cell, where he was jailed on domestic assault, and led him to a conference room. He told defendant that he wanted to speak with him in regard to the victim whom defendant indicated he knew. The interview began around 7:00 or 9:00 p.m. and ended around midnight. Defendant was not read his Miranda rights, but Deputy Batterson told him he was free to leave the conference room and return to his jail cell.

Fields, 2004 WL 979732 at * 1.
As noted above, the Michigan Court of Appeals found the fact that Fields was told that he was free to leave to be critical.

It is true that Fields had to leave his cell, and was escorted through a separate door into a conference room in a separate building, and that he was questioned at length. However, Fields was a prisoner. So, the fact that he had to be escorted to the conference room, and could leave and return to his cell at any time, but only with an escort, were normal, routine features of his life as an inmate. While he did have to pass through the J-door, and the conference room was in a separate part of the building, the state court rightly noted that the fact that Fields was told he could leave at any time is of critical significance. This, along with the fact that Fields was already accustomed to incarceration and its accompanying restraints, demonstrate that there were objective circumstances creating an interrogation environment in which a reasonable person, already imprisoned on separate charges, “would have felt free to terminate the interview and leave.”

In short, while the majority’s bright line rule frees the courts from the task of scrutinizing individual cases to try to determine whether the suspect already incarcerated on separate charges was in custody for Miranda purposes, I do not believe that it is appropriate for this court to fashion such a rule under the constraints imposed by the AEDPA. Instead, we should apply the context-specific analysis articulated in Miranda and its progeny to determine whether Fields was “in custody.” Under these circumstances, because “fair-minded jurists could disagree over whether [Fields] was in custody,” the state court’s decision that Fields was not in custody was not objectively unreasonable. However, since we are bound by Simpson, I concur.
The Supreme Court agreed on Monday to clarify when prison or jail officials must give an inmate warnings about his rights under *Miranda v. Arizona*, when they take the prisoner out of a cell for questioning about another crime. The issue arises in a Michigan child sex abuse case, *Howes v. Fields* (10-680). The Court’s ruling on the case—expected in its next Term—will clarify the scope of the Court's ruling in 1968 in *Mathis v. U.S.* That was one of two cases granted review before the Justices began a four-week recess.

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The new *Miranda* case the Court put on its decision docket grows out of an investigation by sheriff’s deputies in Lenawee County, Mich., into a possible sexual abuse of a minor. Randall Fields was in the county jail serving a 45-day sentence for disorderly conduct. He was taken out of his cell, and questioned for perhaps seven hours in a conference room. During the questioning, he was told he could leave, but state courts concluded that he was “in custody” during that interrogation.

However, state courts ruled that, because Fields was questioned about a potential crime other than the one for which he was in jail, and thus there was no connection between the two, the deputies were not required to give him *Miranda* warnings. That ruling was overturned when Fields took the case on to federal court. The Sixth Circuit Court interpreted the 1968 Mathis decision to mean that “a *Miranda* warning is required whenever an incarcerated individual is isolated from the general prison population and interrogated, i.e., questioned in a manner likely to lead to self-incrimination, about conduct occurring outside of the prison.”

State officials urged the Supreme Court to rule that such a “bright-line rule” goes beyond what the Court had previously required.

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Guam Attorney General Leonardo Rapadas and attorneys general from three dozen states filed a “friend of the court” brief with the U.S. Supreme Court, challenging a recent federal court decision that limits the ability of law enforcement to question prisoners.

At issue before the high court is how to apply Miranda—informing someone of their right to remain silent and their right to legal counsel—when they are already locked up.

The Sixth Circuit U.S. Court of Appeals in August 2010 ruled that inmates who are pulled aside for questioning while locked up need to be read their Miranda rights.

But the attorneys general in their May 31 brief argue it is only necessary to read inmates their Miranda rights if they are exposed to restraints or “coercive pressures” other than those typical of being in prison.

Several other federal courts have adopted that position, they noted.

The case is based on statements made by Randall Fields, who was arrested and locked up for disorderly conduct at the Lenawee County, Michigan, Sheriff’s Department in December 2001. Deputies moved Fields to a locked conference room at the sheriff’s department and questioned him. His statements to deputies were used against him in court, and he was convicted of two counts of criminal sexual conduct.

He appealed to the federal district court, which ruled that Fields’ confession was improperly admitted into evidence. Carol Howes, warden of the Lakeland Correctional Facility, appealed to the Sixth Circuit, which agreed with the lower court.

According to the U.S. Supreme Court brief filed by Rapadas and others, the states oppose any expansion of the Miranda doctrine, especially in prison, because it gives prisoners greater rights than other citizens.

“Periodic removal from the general population is a fact of life for most inmates and, therefore, does not itself generate the same type of coercive pressures at issue in Miranda,” they stated.
Detective Curt Messerschmidt applied for a warrant to search the premises of Augusta Millender and seize property in connection with an assault with a deadly weapon. Millender was the foster mother of suspect Jerry Ray Bowen. Bowen’s girlfriend at the time, Shelly Kelly alleged that Bowen fired multiple shots at her vehicle from “a black sawed off shotgun with a pistol grip.” Kelly provided Messerschmidt with a photograph of Bowen with this weapon. Messerschmidt drafted a warrant application that sought to seize all firearms, firearm parts, ammunition, or firearm-related paperwork at the residence and any articles of evidence that tended to show Bowen’s affiliation with a street gang.

The warrant was approved investigators conducted an early morning search of the residence, failing to find Bowen or the “black sawed off shotgun with pistol grip.” The officers did however find and confiscate Millender’s personal shotgun and ammunition.

The Millenders filed suit, alleging Fourth and Fourteenth Amendment violations. The district court concluded the warrant was facially valid but unconstitutionally overbroad as to the search for firearms, firearm-related materials, and gang-related materials. The district court rejected the officers’ claims of qualified immunity which was the subject of the Ninth Circuit appeal. The Ninth Circuit held the warrant was not supported by probable cause and the officers were not entitled to qualified immunity.

Questions Presented: (1) Whether police officers are entitled to qualified immunity when they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her. (2) Whether United States v. Leon, 468 U.S. 897 (1984), and Malley v. Briggs, 475 U.S. 335 (1986), should be reconsidered or clarified.

Augusta MILLENDER; Brenda Millender; and William Johnson, Plaintiffs-Appellees, v.
COUNTY OF LOS ANGELES; Robert J. Lawrence (292848); Curt Messerschmidt (283271), Defendants-Appellants,
and
Los Angeles County Sheriff’s Department; Leroy D. Baca; Scott Walker (188188); Rick Rector (280600); Donald Nichiporuk (213625); Richard Schlegel (280735), e/s/a M. Schlegel; Brice Stella (402018), e/s/a D. Stella; Jack Demello (223333), e/s/a J. Dernell; David O’Sullivan (293952); Jack Ritenour (164927); and Ian Stade (279464), Defendants.

United States Court of Appeals for the Ninth Circuit

Filed August 24, 2010
IKUTA, Circuit Judge:

Plaintiffs Augusta Millender, Brenda Millender, and William Johnson (collectively, "the Millenders") filed this suit under 42 U.S.C. § 1983 against the County of Los Angeles, the Los Angeles County Sheriff's Department, and several individual members of the Sheriff's Department, alleging violations of their civil rights. Their complaint arose from a search pursuant to a warrant obtained by Detective Curt Messerschmidt of the Los Angeles County Sheriff's Department and executed under the supervision of Sergeant Robert Lawrence. Messerschmidt and Lawrence (collectively, "the deputies") appeal from the district court's determination that they were not entitled to qualified immunity with respect to the alleged overbreadth of the search warrant. Because the challenged sections of the warrant were "so lacking in indicia of probable cause as to render official belief in its existence unreasonable," Malley v. Briggs, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), we affirm.

I

On November 4, 2003, Messerschmidt applied for an arrest warrant for Jerry Ray Bowen at 2234 E. 120th St., Los Angeles, and for a warrant to search that address and seize specified property in connection with "a spousal assault and an assault with a deadly weapon." Messerschmidt prepared an affidavit, entitled "Statement of Probable Cause." The affidavit contained the following facts:

...  

According to Kelly, as soon as the officers [assigned to protect her as she moved out of a residence shared with Bowen] left, Bowen appeared and screamed, "I told you to never call the cops on me bitch!" Bowen physically assaulted Kelly and [Kelly eventually escaped]. Bowen followed seconds later, now holding "a black sawed off shotgun with a pistol grip." Standing in front of Kelly's car, Bowen pointed the shotgun at Kelly and shouted, "If you try to leave, I'll kill you bitch." Kelly was able to escape by leaning over in her seat and flooring the gas. Bowen jumped out of the way and fired one shot at her, blowing out the front left tire of Kelly's car. Chasing the car on foot, Bowen fired four more times in Kelly's direction, missing her each time.

... Kelly reported the shooting, described Bowen's firearm as a "black sawed off shotgun with a pistol grip," and gave the officers four photos of Bowen to aid their investigation.

Based on this information, Messerschmidt put a photo of Bowen into a "six pack" line-up. When Messerschmidt showed the photo line-up to Kelly, she immediately identified Bowen and circled his picture. Messerschmidt's affidavit states that "[t]he person [Kelly] identified is Jerry Ray Bowen ... , a known Mona Park Crip gang member." Kelly told Messerschmidt that Bowen's current address was 2234 E. 120th St., Los Angeles.

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Messerschmidt's affidavit also requested night service of the search warrant, giving two reasons. First, "the investigation has shown that the primary suspect in this case has gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang data base." Second, Messerschmidt believed that "the nature of the crime (Assault with a deadly weapon)
goes to show that night service would provide an added element of safety to the community" as well as to those personnel serving the warrant. The affidavit concluded by stating that Messerschmidt "believes that the items sought will be in the possession of Jerry Ray Bowen and the recovery of the weapon could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of further crimes being committed."

In addition to preparing the affidavit, Messerschmidt completed a "Search Warrant and Affidavit" form to authorize the search of the residence identified in "Attachment 1" and the seizure of property identified in "Attachment 2." Attachment 1 identifies the "location to be searched" as 2234 E. 120th St. in Los Angeles. Attachment 2 sets out two categories of items to search and seize. The first paragraph lists:

- All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

The second paragraph lists:

- Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of person [sic] in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

** Messerschmidt was aware of other relevant facts not included in the affidavit. First, Kelly explained to Messerschmidt that the address she gave him, 2234 E. 120th St., was the home of Bowen's foster mother, Augusta Millender. Second, Messerschmidt knew that Bowen had a previous criminal record and was on summary probation for spousal battery and driving without a license. Bowen also had several previous felony convictions and misdemeanor arrests, and was a "third strike candidate" under California law. Third, in addition to identifying the gun Bowen used as a black sawed-off shotgun with a pistol grip, Kelly gave Messerschmidt a picture of Bowen posing with the gun. Fourth, there was no evidence that Bowen's assault on Kelly was in any way gang-related. In subsequent testimony, Messerschmidt answered "No" to
the question, "So you didn’t have any reason to believe that the assault on Kelly was any sort of a gang crime, did you?"

Before Messerschmidt submitted the warrants and affidavit to the magistrate, they were reviewed by his supervisors in the Sheriff’s station, Sergeant Lawrence and Lieutenant Ornales. In addition, Deputy District Attorney Janet Wilson signed the search warrant, indicating that she had reviewed it for probable cause and approved it. Messerschmidt presented the Search Warrant and Affidavit and the Probable Cause Arrest Warrant, along with their attachments (including the affidavit), to a magistrate. The magistrate approved both warrants and authorized night service.

At 5:00 a.m. on the morning of November 6, 2003, the Sheriff’s Department’s SWAT team served the search and arrest warrants at the 120th St. address. The SWAT team forced open the front security door, broke a front window, and proceeded to enter, search, and clear the house. The ten occupants of the house, including the Millenders, were ordered to exit, which they did. Once the SWAT team had secured the residence, investigators searched the area. While Messerschmidt and Lawrence did not participate in the search, they were both present. The investigators conducting the search failed to find Bowen or a black sawed-off shotgun with a pistol grip. However, they did find and take Augusta Millender’s personal shotgun (a black 12-gauge “Mossberg” with a wooden stock), a box of .45 caliber “American Eagle” ammunition, and a letter from Social Services addressed to Bowen. Some two weeks later, Messerschmidt, without SWAT assistance, arrested Bowen in the middle of the day after discovering Bowen hiding under a bed in a motel room.

The Millenders filed suit under 42 U.S.C. § 1983 against the County of Los Angeles, the Los Angeles County Sheriff’s Department, Sheriff Leroy Baca, and 27 Los Angeles County deputies, including Messerschmidt and Lawrence. As relevant here, the Millenders alleged violations of their Fourth and Fourteenth Amendment rights. The parties filed cross motions for summary adjudication on the validity of the arrest and search warrants. The district court concluded that the arrest warrant was facially valid, and granted the defendants’ motion for summary adjudication on this issue. The Millenders have not appealed this ruling.

The district court also held that the warrant’s authorization to search for and seize all firearms, firearm-related materials, and gang-related items was unconstitutionally overbroad, but that its authorization to search for evidence tending to establish control of the premises was constitutional. Accordingly, the court granted the Millenders’ motion for summary adjudication as to firearm- and gang-related evidence, but granted the defendants’ motion as to identification evidence. The district court then rejected the deputies’ claim of qualified immunity on the ground that the deputies’ actions were not objectively reasonable.

Messerschmidt and Lawrence timely appealed the district court’s determination that they were not entitled to qualified immunity.

II

[Jurisdiction and Standard of Review]

III

“The doctrine of qualified immunity
protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." A police officer is not entitled to qualified immunity if: (1) the facts show that the officer's conduct violated a plaintiff's constitutional rights; and (2) those rights were clearly established at the time of the alleged violation. Although we have discretion to address these prongs in any order, we begin in this case by considering whether the deputies' conduct violated the Millenders' constitutional rights.

A

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

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We read the Fourth Amendment as requiring "specificity," which has two aspects, "particularity and breadth." "Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." In determining whether a warrant's description is sufficiently specific to meet these Fourth Amendment requirements, we consider the following questions:

(1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

Spilotro, 800 F.2d at 963 (citations omitted). The first consideration encapsulates the overarching Fourth Amendment principle that police must have probable cause to search for and seize "all the items of a particular type described in the warrant." The second and third factors are relevant to determining whether the warrant satisfies this general rule.

When considering challenges to warrants under this framework, we must be mindful that a "magistrate's determination of probable cause should be paid great deference by reviewing courts." The Supreme Court has directed us to take a practical approach in determining whether there is sufficient probable cause, and to avoid "interpreting affidavits in a hypertechnical, rather than a common-sense, manner." "Deference to the magistrate, however, is not boundless." We are not to "defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the
existence of probable cause."

B

We begin by analyzing whether the warrant’s authorization to search for firearms and firearm-related materials satisfies the three-factor specificity framework. We first consider whether the deputies had probable cause to search for and seize “all the items of a particular type described in the warrant.” “The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity.” For example, probable cause to search for documents pertaining to “certain aspects of [an] operation” cannot justify the seizure of all documents in an office.

As noted above, the warrant in this case authorizes a search for essentially any device that could fire ammunition, any ammunition, and any firearm-related materials. There is no dispute that the deputies had probable cause to search for and seize the “black sawed off shotgun with a pistol grip” used in the crime. But the affidavit does not set forth any evidence indicating that Bowen owned or used other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millenders’ residence. Nothing in the warrant or the affidavit provides any basis for concluding there was probable cause to search for or seize the generic class of firearms and firearm-related materials listed in the search warrant. As such, we conclude that “probable cause did not exist to seize all items of those particular types.”

More specific standards may be contained in an affidavit, rather than the warrant itself, only if: “(1) the warrant expressly incorporate[s] the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search.” ... In this case, the deputies argue that the affidavit narrowed the scope of the search warrant by including specific information about the crime at issue, the weapon used, and Bowen’s gang membership, and that this information cured any constitutional deficiency. The affidavit does satisfy the first prong of the Kow test: the district court found that the warrant expressly incorporated the affidavit by reference. But there is no evidence in the record, nor do the deputies argue, that the affidavit was physically attached to the warrant or accompanied the warrant on the search. Therefore, we cannot consider its effect.

Even if we could consider the affidavit, it still would not cure the warrant’s deficiencies. ... As in Kow, where we held that an incorporated affidavit did not cure a facially invalid warrant, “there is absolutely no evidence in this case that the officers who executed the warrant, although instructed to read the affidavit, actually relied on the information in the affidavit to limit the warrant’s overbreadth.” Accordingly, we cannot uphold the warrant based on objective standards in the affidavit.

Finally, as suggested by the framework’s third consideration, warrants may sometimes authorize a search for classes of generic items if the government was not “able to describe the items more particularly in light of the information available to it at the time the warrant was issued.” ... But where the police do have information more specifically describing the evidence or contraband, a
In short, the deputies had probable cause to search for a single, identified weapon, whether assembled or disassembled. They had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant. Although we have upheld warrants describing broad classes of items in certain cases, the rationales adopted in those cases are inapplicable here given the information the deputies possessed.

The deputies raise several additional arguments to justify the breadth of the warrant. These arguments, however, are unrelated to the constitutional requirement that a search warrant not issue except upon probable cause for every item described in the warrant.

First, the deputies argue that it was reasonable for the warrant to authorize a broad search for firearms and firearm-related materials because Bowen is a violent and dangerous person. . . . The dissent makes similar arguments, see Dissent at 12742-44, n.1 & n.6, and also contends that probable cause existed because firearms are inherently dangerous, Dissent at 12743-44. There is no doubt that deputies have a valid interest in protecting themselves and the public from potentially violent and dangerous suspects. Indeed, the Supreme Court has recognized that courts must give "some latitude" to "officers in the dangerous and difficult process of making arrests and executing search warrants." In this vein, the

4 We refer to Judge Callahan's dissent as "the dissent" or "Dissent." We refer to Judge Silverman's dissent by name.
Court’s “search incident to arrest” doctrine allows a police officer to take into account the inherent hazards raised by an arrestee’s potential access to firearms. But there is no “dangerousness” exception to the Fourth Amendment’s probable cause requirement, regardless of whether a search involves violent suspects or deadly weapons. A police officer’s valid safety concerns do not create a “fair probability” that a broad class of weapons may be found in a suspect’s residence or that such items are contraband or evidence of a crime. The deputies cite no case, and we have found none, holding that a warrant’s overbreadth could be cured simply because of potential danger to police officers at some point in the future. Indeed, such a rule would permit officers to transform every warrant into a “general, exploratory search[ ]” allowing “indiscriminate rummaging through a person’s belongings.” Nor is there a per se rule that police have probable cause to search the residences of ex-felons for firearms and firearm-related items.

Here the record is devoid of evidence that Bowen possessed guns other than the sawed-off shotgun identified by Kelly or that the broad range of firearms covered by the warrant would be present in the Millenders’ residence. Therefore, regardless of Bowen’s history or the inherent dangerousness of firearms, the police lacked probable cause to apply for a search warrant for a broad range of firearms.

In any event, because Messerschmidt did not inform the magistrate of Bowen’s prior felonies, his criminal history is not relevant to our analysis here. It is well established that, in reviewing a search warrant, we are “limited to the information and circumstances contained within the four corners of the underlying affidavit.” Probable cause is a determination made by the issuing magistrate based on the facts presented to him, not a determination made by an officer based on information known only to himself. Therefore, the dissent errs in suggesting that Messerschmidt’s personal knowledge that Bowen was a felon is sufficient to create probable cause. Dissent at 1036 & n.1.

Second, the deputies argue they were justified in seeking all firearms and firearm-related materials because such materials could aid in the prosecution of Bowen. Again, this argument is unrelated to the constitutional requirement that there be probable cause for each item described in the warrant. Although the deputies likely had probable cause to search for a limited range of firearm-related material that would have provided circumstantial evidence of ownership of the sawed-off shotgun at issue, such as receipts or compatible ammunition, the warrant extended beyond such evidence to “[a]ny firearm capable of firing or chambered to fire any caliber ammunition.” Put simply, the Fourth Amendment does not authorize the issuance of warrants to conduct fishing expeditions to find evidence that could assist officers in prosecuting suspects.

The deputies further argue that any caliber of shotgun or receipts would show the possession and purchase of guns. But we fail to see how this gives the deputies probable cause, because the possession and purchase of guns by itself does not constitute contraband or evidence of a crime. As discussed above, the warrant did not include the information about Bowen’s criminal record that could make his possession and purchase of guns a criminal offense, and thus such information cannot be considered in our analysis. Moreover, while the district court concluded that the deputies had probable cause to search for “[a]rticles of
personal property tending to establish the identity of the person or persons in control of the premise or premises,” a ruling the Millenders do not challenge on appeal, the deputies do not argue that such probable cause justified their search for the broad range of firearms listed in the warrant. Nor could they. While we have upheld warrants authorizing searches for “[i]ndicia tending to establish the identity of persons in control of the premises,” the probable cause to search for such “indicia of control” usually refers to such items as “utility company receipts, rent receipts, cancelled mail envelopes, and keys,” not to the full range of firearm and firearm-related materials sought here.

Although we are deferential to a magistrate’s determination of probable cause and consider the language of a warrant and affidavit in a common sense and practical manner, here we are unable to identify any basis, let alone a “substantial basis,” for probable cause to search and seize the broad category of firearm and firearm-related materials set forth in the warrant. Accordingly, we find ourselves in that rare situation where we must conclude that the magistrate lacked a substantial basis for issuing the warrant for this broad range of items.

C

We next consider the search warrant’s authorization to search for all gang-related items. . . . Neither of [the] assertions [provided in the affidavit] provides probable cause for a magistrate to conclude that “contraband or evidence of a crime,” would be found at Mrs. Millender’s residence. Merely being a gang member or having gang ties is not a crime in California. The relevant California law “imposes increased criminal penalties” for gang membership only when the underlying criminal act is “for the benefit of, at the direction of, or in association with” a group that meets the specific statutory conditions of a “criminal street gang,” and when the act is done with the “specific intent to promote, further, or assist in any criminal conduct by gang members.” Here, Messerschmidt himself stated he had no reason to believe that Bowen’s assault on Kelly was related to gangs, and there is no evidence in the affidavit (or the record) to suggest otherwise. Because the deputies failed to establish any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence is likewise invalid.

IV

Our conclusion that there was no probable cause for the broad categories of firearm- and gang-related items listed in the search warrant, and that the search warrant violated the Millenders’ constitutional rights, is only the first step in our analysis of whether the deputies are entitled to qualified immunity. We must next consider whether the Millenders’ constitutional rights were “clearly established” at the time of the deputies’ alleged misconduct.

A

The Supreme Court has refined the application of the qualified immunity test in the Fourth Amendment context. See Malley, 475 U.S. at 344-46, 106 S.Ct. 1092; Groh, 540 U.S. at 563-65, 124 S.Ct. 1284. In private actions against officers who have executed constitutionally inadequate warrants, the Supreme Court has held that an officer loses qualified immunity only when “a reasonably well-trained officer in [the defendant officer’s] position would have known that his affidavit failed to establish probable cause and that he should not have
applied for the warrant.” This standard “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”

Despite this protection, the Supreme Court has preserved the right of individuals to seek relief in certain narrowly defined circumstances. Malley and Groh, the two leading Supreme Court cases in this context, deal with facts and arguments similar to the case before us. In Malley, plaintiffs sued a state trooper under § 1983 for applying for an arrest warrant that failed to establish probable cause. Rather than granting the officer absolute immunity, Malley held that officers should receive only qualified immunity because “it would be incongruous to test police behavior by the ‘objective reasonableness’ standard in a suppression hearing, while exempting police conduct in applying for an arrest or search warrant from any scrutiny whatsoever in a § 1983 damages action.” Accordingly, Malley held that officers would be entitled to qualified immunity in § 1983 actions only under the same facts that would allow the government to claim a good faith exception to the exclusionary rule in a suppression hearing. Said otherwise, officers lose immunity only “where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.”

Malley rejected the argument that the trooper was “shielded from damages liability because the act of applying for a warrant is per se objectively reasonable” and that he was “entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant.” According to Malley, that view of objective reasonableness was “at odds” with cases such as Leon and Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Rather, the pertinent question must be “whether a reasonably well-trained officer in [the defendant officer’s] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.” If a reasonable officer would have known that the affidavit was fatally deficient, then the defendant’s “application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest [or search].” Malley declined to hold that an officer could rely on the determination of the magistrate, stating that “it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should” and, accordingly, it was “reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.”

Groh offers an example of one of the rare cases described in Malley when a warrant is “so lacking in indicia of probable cause as to render official belief in its existence unreasonable,” 475 U.S. at 345, 106 S.Ct. 1092, notwithstanding the approval of a magistrate. In Groh, the plaintiff claimed his Fourth Amendment rights had been violated because the warrant authorizing the search and seizure of his property was invalid. 540 U.S. at 554-55, 124 S.Ct. 1284. Although the defendant officer had prepared a detailed application for the warrant, the warrant itself included only a description of the plaintiff’s residence, and it did not incorporate the application by reference. Groh held that the warrant “was plainly invalid” because it totally failed to describe the things to be seized, let alone with particularity. Accordingly, the Court concluded that the search conducted pursuant to the warrant was unconstitutional. Rejecting the officer’s assertion of qualified immunity, Groh reasoned that “just a simple glance [ ]would have revealed a glaring deficiency that any
reasonable police officer would have known was constitutionally fatal." Further, the
Court held that the officer "may not argue that he reasonably relied on the Magistrate's
assurance that the warrant contained an adequate description of the things to be
seized and was therefore valid" because the officer himself prepared the invalid warrant.

Accordingly, as Malley and Groh make clear, a plaintiff can proceed with a § 1983
action stemming from an officer's application for an invalid warrant in those
limited situations when "a reasonably well-trained officer" in the defendant's situation
would have known that the warrant did not establish probable cause. When the warrant
is so lacking in indicia of probable cause, officers cannot claim that they acted
reasonably by seeking a warrant merely because a neutral magistrate approved the
application; rather, officers must exercise their own "reasonable professional
judgment."

In interpreting these precedents, we have emphasized the "distinction between
warrants with disputable probable cause and warrants so lacking in probable cause that
no reasonable officer would view them as valid." Where the "lack of probable cause
was so obvious that any reasonable officer reading the warrant would conclude that the
warrant was facially invalid," we have held that "[a]pproval by an attorney and a
magistrate did not justify reasonable reliance."

B

While the deputies claim that "a reasonably well-trained officer" in their position would
not have known that the search warrant failed to establish probable cause, they add
little to their prior arguments. The deputies argue that they could have reasonably but
mistakenly concluded that they had probable cause to seize the weapon found at the
Millender residence because "they would not know if the suspect would be coming
back and the officers would not want the suspect to gain access to more weapons and
hurt other people, including the victim in this case." To the extent this argument
differs from their "dangerousness" argument, see supra at pp. 12729-30, it also
fails. Although officers may make a warrantless entry into a residence under
certain exigent circumstances, such as when "they have an objectively reasonable basis
for believing that an occupant is seriously injured or imminently threatened with such
injury," the exigent circumstances doctrine is an exception to the warrant requirement,
not an authorization for the deputies to apply for a warrant that is not supported by
probable cause. The deputies also assert they could have been reasonably mistaken as to
whether the underlying crime was gang-related. This argument borders on the
frivolous, given Messerschmidt's statement that he had no reason to hold such a belief,
and the absence of any evidence that the crime at issue was gang-related.

The deputies' arguments cannot change the reality that the warrant in this case suffered a
"glaring deficiency." Neither it nor the affidavit established probable cause that the
broad categories of firearms, firearm-related material, and gang-related material
described in the warrant were contraband or evidence of a crime. Moreover, a reasonable
officer in the deputies' position would have been well aware of this deficiency. The
affidavit indicated exactly what item was evidence of a crime . . . and reasonable
officers would know they could not undertake a general, exploratory search for
unrelated items unless they had additional probable cause for those items. Under these
circumstances, we cannot say that an officer
could reasonably but mistakenly believe that the search warrant established "a colorable argument for probable cause." Rather, the warrant here was "plainly invalid."

Citing the dissenting opinions in Malley and Groh, see Dissent at 1039 n.8, 1038-40 & n.10, 1045-46, the dissent would hold that the officers acted in an objectively reasonable manner as a matter of law because they "reasonably relied" on the review and approval of "their superiors, the district attorney, and the magistrate to correct the alleged overbreadth in the search warrant," Dissent at 1044. Judge Silverman likewise suggests that the deputies are entitled to qualified immunity because they obtained a warrant, consulted with their superiors, and acted in good faith. Silverman Dissent at 1049-50. We cannot accept these propositions, however, because they conflict with the majority opinions in Malley and Groh, which imposed on police officers the independent responsibility to ensure there is at least a colorable argument for probable cause, and rejected the factors suggested by the dissenting justices for giving police officers even further protection from liability. Nor can we agree that the officers were objectively reasonable in obtaining a search warrant for a broad range of firearms and gang indicia because the suspect was an ex-felon, the firearms were inherently dangerous, and the firearms were specifically described. Dissent at 12759-60. As explained above, under basic Fourth Amendment principles, a search warrant is not supported by probable cause unless the affidavit establishes that the items in the search warrant are contraband or evidence of a crime; neither information known only to the officer, the criminal status of the suspect, nor the dangerousness of the items listed in the warrant establishes probable cause. The dissent's desire to transform these long-standing rules into a more "workable guideline," Dissent at 1041, does not excuse the police officers from compliance with the existing rules mandated by the Supreme Court.

The deputies here had a responsibility to exercise their reasonable professional judgment. As Malley recognized, "ours is not an ideal system," and as such in circumstances such as these a neutral magistrate's approval (and, a fortiori, a non-neutral prosecutor's) cannot absolve an officer of liability. Accordingly, the deputies are not entitled to qualified immunity with respect to the Millenders' claim that their role in obtaining and executing the warrants violated their constitutional rights.

V

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AFFIRMED.

CALLAHAN, Circuit Judge, with whom TALLMAN, Circuit Judge joins, dissenting: Although the majority's opinion nicely lays out the law applicable to a determination of qualified immunity, my review of the law and the facts in this case require that I dissent. I address four matters. First, I take issue with the majority's determination that the warrant constitutionally could not provide for the search and seizure of firearms other than the sawed-off shotgun. Second, in reviewing the applicable case law, the majority fails to appreciate the factors courts have used to transform an abstract standard—did the officer reasonably rely on review by counsel and a magistrate—into a workable guide for a line officer. Third, I would find that the totality of the circumstances in this case compels a finding that the line officer reasonably relied on his supervisors, the district attorney, and the magistrate to determine the
constitutional limits of the search warrant. Finally, I am concerned that the majority's parsing of the search warrant is likely to encourage uncertainty and needless litigation. I would grant the officer qualified immunity.

I

Our differing views on the warrant's provision for the search and seizure of firearms are revealed by our respective applications of United States v. Spilotro, 800 F.2d 959 (9th Cir.1986), which sets forth the framework for determining a warrant's sufficiency. There we held that "[i]n determining whether a description is sufficiently precise," we should concentrate on one or more of the following:

(1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

Id. at 963 (citations omitted).

The majority admits that there was probable cause to search for and seize the "black sawed-off shotgun with a pistol grip," but objects that "the affidavit does not set forth any evidence indicating that Bowen owned or used any other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millenders' residence." Op. at 1025. This approach overlooks the fact that the search warrant was accompanied by an arrest warrant for Bowen, the real object of the search, who the officer believed resided at the residence. Bowen was reasonably considered to be dangerous.

Given this context, the officers had probable cause to search for and seize any firearms in the home in which Bowen, a gang member and felon, was thought to reside. In Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the Supreme Court held that probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Firearms by their very nature are dangerous and numerous laws render their possession by convicted felons criminal. Thus, in light of the facts known to the officer, i.e., that Bowen had recently fired a shotgun at his girl friend, was a gang member, was a felon, and presumably was armed, there was at least a "fair probability" not only that there might be firearms in the house in which Bowen was believed to be residing, but that such firearms would be "contraband or evidence of a crime." Moreover, the safety of all involved, both the officers and the inhabitants of the home, requires that officers seeking the nighttime arrest of a dangerous felon be allowed to seize any firearm that they come across in their search for that individual or for evidence that is otherwise properly covered by the search warrant. Indeed, securing any weapons found during the search is justified to protect the officers executing the warrant from harm while doing so.

Once it is understood that there was a fair probability that any firearms found in the house in which Bowen was thought to reside would be contraband or evidence of a crime, the warrant meets the second and third provisions of the Spilotro framework. The warrant sets out firearms and firearms-related items in objective language that
allowed the officers to differentiate what items they might seize. Furthermore, as any firearm was likely to be contraband or evidence of a crime, a more particular description was neither required nor desirable. Accordingly, I dissent from the majority's determination that the warrant's provision for the search and seizure of firearms was unconstitutional.

II

A. Supreme Court Authority

The majority and I agree that the standard for determining qualified immunity has been set forth by the Supreme Court in Malley v. Briggs, 475 U.S. 335, 345-46, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) and Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). Moreover, there is little difference in our reading of these opinions in the abstract. Rather, we differ on the application of the qualified immunity test to a front line police officer's request for an arrest warrant and accompanying search warrant. The majority's position is difficult to reconcile with the Fourth Amendment's preference for searches authorized by neutral and detached magistrates.

[Summary of Malley, Groh, and Leon.]

In sum, I agree with the majority that pursuant to Malley and Groh, the question is whether a reasonably well-trained officer in the defendant's situation would have known that the warrant did not establish probable cause. Op. at 12734-35. But an appreciation of the specific language in the Supreme Court's opinions should lead us to focus on those factors that transform an abstract standard into a workable guideline for a line officer.

B. Ninth Circuit Authority

A review of our own precedent reveals and reinforces the factors that should be considered in determining whether an officer who sought a warrant reasonably relied on review by counsel and a magistrate.

[Summary of Ninth Circuit precedent.]

C. Analysis

Our review of Supreme Court and Ninth Circuit cases addressing reasonable reliance reveals certain considerations that transform what might otherwise be an abstract question into a working guide for police officers. Among these considerations are: (1) whether it was reasonable for the officer to apply for the warrant; (2) whether there was sufficient probable cause to issue a warrant; (3) whether the warrant was facially invalid; (4) whether the warrant properly identified the limited matters to be searched; (5) whether the officer fairly sought review by his or her superiors, counsel and a magistrate; and (6) whether the officer's misunderstanding was reasonable even where there was no probable cause.

All of these factors should be applied in a manner consistent with the Supreme Court's perspective that qualified immunity should "amply" protect "all but the plainly incompetent or those who knowingly violate the law."

III

The application of these factors to the present case compels a determination that
the officers reasonably relied on their superiors, the district attorney, and the magistrate to correct the alleged overbreadth in the search warrant.

First, as this case comes to us, we accept that it was reasonable for the officers to apply for the warrant and that there was sufficient probable cause for the warrant to issue. In the district court, plaintiffs challenged whether the affidavit established probable cause to believe that Bowen could be found at the residence, but the district court denied that claim. On this interlocutory appeal from the district court’s denial of qualified immunity, we accept the district court’s determination that there was sufficient probable cause to allow the officer to apply for the nighttime search warrant and for the magistrate to issue the warrant.

Second, the warrants were facially valid. They adequately identified the location to be searched, the person to be arrested, and the items to be seized. Regardless of whether there was probable cause to search for firearms and indicia of gang membership, these limited items were properly identified on the face of the warrant.

Third, Officer Messerschmidt scrupulously followed the proper procedures in seeking the arrest and search warrants. The warrant affidavit was reviewed by his sergeant and Messerschmidt consulted a lieutenant. Moreover, the warrants were reviewed by a deputy district attorney before they were presented to, reviewed by, and signed by a magistrate. Messerschmidt followed the Supreme Court directions in *Leon* to seek the "detached scrutiny of a neutral magistrate."

Despite accepting that there were reasonable grounds for seeking the warrants, that there was sufficient probable cause to issue the search warrant, that the warrant was facially valid, and that the proper procedures were followed to have the warrants reviewed and approved by a neutral magistrate, the majority nonetheless concludes that the absence of probable cause for two sections of the warrant was so obvious that the officer is not entitled to qualified immunity. Despite our observation, and the Supreme Court’s observation, that “reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause,” the majority, in essence, considers the officer to have been incompetent or dishonest. Initially, it should be noted that the majority does not suggest that the officer was dishonest. Although the plaintiffs in the district court argued that the officer had failed to present the magistrate with all the relevant facts, the district court rejected those contentions, and there is nothing in the majority’s opinion that resurrects that contention. Rather, the majority’s opinion basically holds that the lack of relationship between the charged crime by Bowen and certain items described in the search warrant was so obvious that the officer may be held personally liable for having entertained a contrary thought. Of course, in light of my perspective on whether the search might include firearms other than the sawed-off shotgun, I think that the officer’s inclusion of other firearms in the warrant, if not proper, was certainly objectively reasonable.

How could the officer have thought that he could search for indicia of gang membership? We must ask this question based on what the officer knew when he prepared his affidavit. Here, we agree that the officer knew that Bowen had fired a sawed-off shotgun at a person in public, that he was a felon, and that he had ties with a street gang. We also accept that the officer reasonably believed that Bowen was “hiding
out” at the house on 120th Street. Why are these “facts” not sufficient to allow the officer initially to include a search for indicia of gang membership in his warrant application? Indeed, the affidavit in support of the warrant offered precisely this line of reasoning.

It appears that ultimately there was no evidence of a link between Bowen’s assault on Kelly with a deadly weapon and his membership in a street gang, but the officer did not know this when he applied for the warrant. Given that Bowen was a felon, a gang member, and had used a sawed-off shotgun, the possession of which might well be illegal, the officer may reasonably have conceived of possible ties between the crime, the weapon and the gang. I do not disagree with the district court’s and the majority’s determination that nevertheless there was insufficient probable cause to support a warrant for indicia of gang membership. Rather, my point is only that it was reasonable for the officer to think that there might be sufficient probable cause, at least to include the request in the initial application that would then be reviewed by his superiors, a deputy district attorney and a magistrate.

The officer may well have made factual and legal mistakes. He may have thought that the facts that Bowen was a felon, a gang member, and had committed an assault with a deadly weapon created probable cause to search for indicia for gang membership. He was wrong, but objectively viewed, his mistake was not objectively unreasonable.

One way of ascertaining whether a mistaken belief was reasonable is to compare it to other cases where we have found that an officer was not entitled to qualified immunity. I can find no clear precedent that supports the majority’s conclusion. In Kow, 58 F.3d 423, “the lack of probable cause was so obvious that any reasonable officer would conclude that the warrant was facially invalid.” Similarly, the warrant in Stubbs, 873 F.2d 210, was facially invalid. Perhaps the most analogous case is KRL II. There, we denied qualified immunity to Officer Hall because we found that “no reasonable officer could conclude that the discovery of a 1990 ledger and several checks showed that KRL had been primarily engaged in fraudulent activity since 1990.” However, our denial of qualified immunity was based on: (1) Hall’s “leadership role in the overall investigation;” (2) our factual determination that “the discovery of a ledger and several checks predating the allegedly fraudulent activity by five years did not provide sufficient probable cause to search for documents dating back to 1990;” and (3) our conclusion that the warrant was obviously facially invalid. Although Officer Messerschmidt may have been in charge of the investigation of Bowen, he did not have a leadership position similar to that held by Hall in KRL II. Furthermore, his incorrect factual conclusion was not as far-fetched as that in issue in KRL II, and the warrant was not obviously facially invalid.

It might also be noted that in 2003, when Messerschmidt sought the warrant, neither of our opinions in KRL had issued. However, we had decided Ortiz, 887 F.2d 1366. In that case, the officer sought a warrant to search a home for weapons and explosives based on only four telephone calls by the same anonymous person. Nonetheless, while finding that there was no probable cause to support the warrant, we granted the police officer qualified immunity, commenting that an “error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not police officers who made the critical mistake.” I
would hold that here, as in Ortiz, the officer’s “conduct was ‘sufficient to establish objectively reasonable behavior.’”

Moreover, the majority’s opinion appears to extend unnecessarily the guiding Supreme Court opinions. In Malley, the Court stated that the question was “whether a reasonably well-trained officer in petitioner’s position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.” In Groh, the Court denied qualified immunity because the warrant “did not describe the items to be seized at all” and “was so obviously deficient that we must regard the search as ‘warrantless’ within the meaning of our case law.” Here, there is really no question that there was probable cause to issue the warrant and that it was not facially invalid.

I recognize that each provision of a search warrant should be supported by probable cause. Nonetheless, we have held in appeals from suppression orders that evidence from valid portions of a warrant may be severed from invalid portions. Similarly, we should recognize that the lack of probable cause for one clause in an otherwise valid warrant does not mean that the officer’s decision to seek the warrant, or even to include that clause in the warrant, was necessarily unreasonable. Instead, at least where the warrant is supported by probable cause and is facially valid, but there is some question as to the sufficiency of evidence to support a section of the warrant, then absent some showing of bad faith on the part of the officer or of a failure to present all the relevant known facts to the magistrate, the officer should be allowed to rely on his superiors, the district attorney and the magistrate to correct any over-breadth. Certainly, that should be the case here, as the officer’s affidavit clearly sets forth the basis on which the officer mistakenly thought he could seek a warrant to search for indicia of gang membership.

Moreover, the two provisions of the warrant at issue—those authorizing searches for firearms and for indicia of gang membership—do not appear to have been very important either when the warrant was initially sought or later. First, as noted, the primary purpose of the search was to arrest Bowen. Second, because the district court upheld the warrant’s provision allowing the search for, and seizure of, indicia of home ownership, and because the majority concedes that the officers were entitled to search for disassembled parts of the sawed-off shotgun, the questioned provisions did not expand the actual scope of the search. Third, as the search only resulted in the seizure of Mrs. Millender’s shotgun and a box of ammunition (and no indicia of gang membership), it does not appear that plaintiffs were really harmed by the search authorized by the questioned provisions of the warrant (as contrasted to the entry into the home and the general search). As Justice Kennedy noted in his dissent in Groh, the Supreme Court has stressed that “the purpose of encouraging recourse to the warrant procedure’ can be served best by rejecting overly technical standards when courts review warrants.” Here, even accepting that there was no probable cause to support the questioned provisions of the warrant, because this defect did not expand the scope of the search nor cause any real harm to the plaintiffs, it should not defeat an otherwise appropriate grant of qualified immunity.

This conclusion is reinforced by the purpose of qualified immunity: to “amply” protect officers other than “the plainly incompetent or those who knowingly violate the law.” Here, as noted, there is no suggestion that
the officer "knowingly violated the law." While the majority concludes that the officer should have known that the search warrant was too broad, the length it has to go to make that point suggests that an officer's failure to so reason cannot be considered plain incompetence. Indeed, the very fact that judges on this en banc panel disagree on this point, in itself, weighs in favor of granting qualified immunity.

IV

Last, but not least, I am concerned that the majority's parsing of the search warrant will lead to uncertainty and needless litigation. Denying qualified immunity where, as here, the defect in the warrant (a lack of probable cause for two sections of a warrant) did not expand the scope beyond what was constitutional and did not cause any real harm, creates considerable incentive to challenge all but the narrowest of warrants. Even if the overbreadth of a warrant does not produce any evidence and does not result in any real harm, a disgruntled person can overcome a claim of qualified immunity by showing that the officer did not have probable cause to support some part of the warrant. This seems contrary to the purpose of qualified immunity.

Moreover, the approach may well interfere with a police officer's ability to properly protect the public and investigate crimes. Instead of investigating a possible relationship between an assault with a deadly weapon by a convicted gang member and the felon's street gang, the majority would hold the officer personally liable for not grasping that these facts did not support the issuance of a warrant for anything other than the felon and the particular weapon. This appears to be the type of "high level of generality" that Justice Thomas warned against in his dissent in Groh, 540 U.S. at 578, 124 S.Ct. 1284. Furthermore, this approach may well discourage officers from following up on leads that they would otherwise bring to the attention of their superiors for fear of personal liability if they unwittingly err in their judgment.

To recap, although I think that the officer could reasonably have sought to search for firearms other than the shotgun, I agree with the majority that there was not a sufficient showing of a relationship between the assault and gang membership to provide probable cause for the inclusion of indicia of gang membership in the search warrant. But, applying the factors stressed by the Supreme Court and our court, I cannot conclude that the officer's inclusion of the provision in the warrant was so objectively unreasonable as to preclude reliance on the approval of his supervisors, the district attorney and the magistrate. It was reasonable for the officer to apply for the warrant, there was probable cause to issue the warrant, the warrant was not facially invalid, the warrant properly identified the limited matters to be seized, and the officer followed the proper procedures for seeking review by his superiors, a district attorney and a magistrate. Moreover, at least as to the questioned provisions, it does not appear that the officer hid any relevant information from his superiors or the magistrate and his affidavit plainly presented the grounds on which he sought indicia of gang membership. Furthermore, I have found no precedent that suggests that an officer may not rely on his superiors and the magistrate when he makes an honest mistake in thinking that there is probable cause to support a provision in an otherwise valid warrant. The majority's contrary conclusion is of little real benefit to the plaintiffs, and unfairly punishes a line officer for what, at most, was a failure on the part of his superiors, the deputy district attorney and
the magistrate, to properly limit the warrant. Here, as in Ortiz, an "error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers who made the critical mistake." I would hold that the officer's application for a search warrant which included searching for other firearms and indicia of gang membership was not objectively unreasonable and that the officer is entitled to qualified immunity.

SILVERMAN, Circuit Judge, with whom TALLMAN, Circuit Judge, joins, dissenting:

I join Parts II through IV of Judge Callahan's dissent, but write separately to emphasize several points.

The doctrine of qualified immunity "protects government officials from liability for good faith misjudgments and mistakes," and that is precisely the situation here. The judge issued a defective warrant and the deputies mistakenly relied on it, but their mistake was entirely in good faith. The deputies did not act until they obtained the warrant and they did only what the warrant authorized them to do. They did not engage in any form of misconduct. They did not rough-up the residents. They did not put false information in the affidavit, conceal exculpatory information, or seize property not mentioned in the four-corners of the warrant. This is not a case where police officers sought to evade the warrant requirement; to the contrary, they sought to comply with it. The record is totally devoid of any evidence that the deputies acted other than in good faith.

Qualified immunity protects from liability "all but the plainly incompetent and those who knowingly violate the law." Does the deputies' mistake rise to the level of plain incompetence or intentional violation of the law? I cannot imagine a clearer case of reasonable error than this one. In determining whether the deputies reasonably relied on the warrant, "all of the circumstances . . . may be considered." It is undisputed that the deputies knew Bowen to be a convicted felon with a very violent history, including convictions for assault with a deadly weapon and being a felon in possession of a firearm. They also knew that he reportedly had just shot at the victim several times with a short-barrel shotgun. As a convicted felon, Bowen was prohibited from possessing firearms. Under such circumstances, how can it be "entirely unreasonable"—not just a mistake but entirely unreasonable—for the deputies to have relied on a judge-signed warrant authorizing the seizure of all of Bowen’s guns?

I also do not see how the deputies can be deemed to be plainly incompetent, or to have knowingly violated the law, for relying on the warrant’s authorization to seize Mona Park Crip gang paraphernalia. The deputies had probable cause to believe both that Bowen was tied to the Mona Park Crip gang and that he was residing at the Millender residence. Had Mona Park Crip paraphernalia been found in close proximity to guns during the search of the Millender house—say, a gun concealed in Mona Park Crip clothing—such a discovery would have tended to prove that the guns were Bowen’s and not the Millenders’. It is commonplace for search warrants to authorize the seizure of items that can help identify persons in control of the premises or contraband. The deputies’ belief in the validity of this portion of the warrant was entirely reasonable.

Qualified immunity insulates police officers from the threat of personal liability so that they can "execute[their] office with the decisiveness and the judgment required by
the public good." The tradeoff for this perceived societal benefit is that some wrongs will go uncompensated. That is the nature of immunity, and it is a tradeoff adopted by the Supreme Court itself.
The Supreme Court recently granted certiorari in \textit{Millender v. Los Angeles}. Here are the background facts: Bowen shoots at his ex-girlfriend with a sawed-off shotgun. The police obtain a search warrant for the home of Bowen’s 73-year-old former foster mother. The warrant application does not disclose that Bowen last lived with his foster mother 15 years ago. (The girlfriend suggested to the police that Bowen might be hiding there.) The warrant authorizes the seizure of all firearms on the premises, not merely the particular gun which had been used in the crime against the girlfriend.

The police executed a 5 a.m. dynamic entry, and in the course of their search, seize a firearm which is lawfully owned by the 73-year-old woman, Augusta Millender. She sues, and the 9th Circuit en banc rules that the warrant was objectively unconstitutional. The officer who procured the warrant (and Los Angeles, by respondeat superior) are not entitled to qualified immunity, because the warrant to seize all firearms was so clearly unconstitutional, based on settled law.

In the certiorari grant, the Questions Presented are:

This Court has held that police officers who procure and execute warrants later determined invalid are entitled to qualified immunity, and evidence obtained should not be suppressed, so long as the warrant is not “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” \textit{United States v. Leon}, 468 U.S. 897, 920, 923 (1984); \textit{Malley v. Briggs}, 475 U.S. 335,341,344-45 (1986). The Questions Presented are: 1. Under these standards, are officers entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a district attorney approved the application, no factually on point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search? 2. Should the \textit{Malley}/\textit{Leon} standards be reconsidered or clarified in light of lower courts’ inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good faith conduct and improper exclusion of evidence in criminal cases?

The phrasing of the Questions Presented further suggest that attorneys for Respondents have an uphill battle. The Supreme Court docket page is here; the full history of the case in the district court and the Ninth Circuit, with full text of many of the relevant documents, is available at the website of California attorney Chuck Michel. Michel is, in my opinion, one of the top two firearms law lawyers in California, the other being Don Kilmer.

In conjunction with Stephen Halbrook, Michel filed an amicus brief in \textit{Millender}, on behalf of the National Rifle Association.
and the California Rifle and Pistol Association Foundation. The brief explains how the Fourth Amendment’s prohibition on general warrants is closely entwined with the right to arms; for example, the 1662 gun ban of the wicked Stuart king Charles II was enforced by general warrants.

The Questions Presented seem to presume the unconstitutionality of the general warrant, with the only issue before the Court being qualified immunity. The Halbrook/Michel argument on qualified immunity points out that Detective Messerschmidt knew that the only firearm involved in the crime was a black, pistol-gripped, short-barreled shotgun. He nonetheless drafted a general warrant authorizing search and seizure of all firearms and firearm parts from the home of an elderly woman, her daughter, and her grandson, knowing that the suspect (Bowen) did not even live in that home. Messerschmidt cannot now rely on the defense that he persuaded others up the chain to approve his general warrant.

...

It bears repeating that the affidavit failed to disclose that the residence was that of an elderly lady and her relatives, not that of the suspect.

Although Los Angeles argues that the unconstitutionality of the warrant was not clearly established at the time the warrant was executed, Halbrook and Michel point to:

*Groh v. Ramirez*, 540 U.S. 551 (2004), aff'g Ramirez v. Butte-Silver Bow County, 298 F.3d 1022 (9th Cir. 2002), involved a general warrant obtained to search for unregistered firearms, but the warrant contained no list of firearms to seize. *Id.* at 554. A list of firearms was included in the affidavit, but not attached to the warrant. *Id.* Only lawful firearms were found. *Id.* at 555. The homeowners later filed a civil rights action for damages. *Id.* The Supreme Court upheld the Ninth Circuit’s conclusion in Groh that the search was unlawful and that the agent who secured the warrant and led the search could not rely on the defense of qualified immunity. *Id.* at 563-566.

Moreover,

In *Groh*, the law was clearly established in the very text of the Fourth Amendment. Case law condemning general warrants in England dates back to at least 1765 in Entick, and in the United States, to 1886 in Boyd. The general warrant here—to search for all firearms and related items, when only a black, pistol-gripped, short-barreled shotgun was at issue, and it had little or no connection to the house to be searched—clearly violated the Fourth Amendment, would be known to do so by any competent officer, and was not sanctified by being rubber stamped by higher ups.

Michel has announced that NRA and CRPAF will file an amicus brief in the Supreme Court, in part to explain to the Court the problem of law enforcement officers seizing large numbers of lawfully-possessed firearms in order to boost gun seizure statistics.
The Ninth Circuit has just agreed to rehear *Millender v. County of Los Angeles* en banc; here’s what I blogged about the case when the panel opinion came out in May:

Bowen was a felon and likely a gang member who had apparently committed a serious gun crime (shooting at the car of his girlfriend, who was leaving him, with a sawed-off shotgun). The police heard that Bowen “might be staying at his foster mother’s home.” They therefore got a warrant to search the foster mother’s (Augusta Millender’s) home for, among other things, “all firearms and firearm-related items.”

When they searched the house, they didn’t find Bowen or the gun with which he had committed the crime, but they did find and seize “Mrs. Millender’s personal shotgun . . . and a box of 45-caliber ammunition.” Mrs. Millender and the family members with whom she was living (her daughter and her grandson) sued, claiming the search violated the Fourth Amendment. The case eventually ended up before the Ninth Circuit, as *Millender v. County of Los Angeles*, decided last Wednesday.

Judge Callahan, writing for herself and for Judge Fernandez, held that the defendant police officers were shielded by qualified immunity because the search was authorized by the warrant, and that this would be so even if the warrant was unconstitutionally overbroad. Judge Callahan did not express a view on whether the warrant was indeed overbroad.

Judge Fernandez concurred in the majority opinion, agreeing that the officers were shielded by qualified immunity because of the warrant, but concluded that the search was indeed unconstitutional. In this case, he concluded, there was “extremely little support for the search of a third person’s home for all firearms and ammunition” (even though the officers thought Bowen was staying at the house, and therefore it was “Bowen’s home also”).

Judge Ikuta dissented, concluding that “no officer of reasonable competence could have thought [the] affidavit established probable cause to search for the items listed in the warrant,” and that therefore the officers couldn’t claim qualified immunity. Judge Ikuta also briefly cited *D.C. v. Heller*, though only in passing, and following a clause that said, “Mere possession of firearms is not, generally speaking, a crime.”

A very interesting case, and much worth reading if you’re interested in searches and seizures as they affect innocent third parties, if you’re interested in gun rights, or if you’re interested in both.
Defendant Sandy Williams allegedly sexually assaulted, kidnapped, and robbed L.J. on February 10, 2000. A vaginal examination of L.J. was conducted after the incident and swabs were sent to the Illinois State Police Crime Lab (ISP) for analysis which confirmed the presence of semen. The samples were then sent to Cellmark Diagnostic Laboratory where a DNA profile was generated. Six months later, Williams was arrested for an unrelated offense and a blood sample was drawn pursuant to court order. ISP generated a DNA profile of the defendant's blood sample.

At trial, ISP forensic biologist Sandra Lambatos testified the two DNA profiles were a match. The Cellmark lab report was not admitted into evidence and defense counsel objected, claiming a violation of the Confrontation Clause. The trial court disagreed and Williams was convicted. On appeal, the Supreme Court of Illinois affirmed in part, holding that Lambatos appealed to the Cellmark report for the purpose of explaining the basis of her opinion rather than as proof the truth of her assertions and thus the prohibitions against hearsay evidence were inapposite.

Questions Presented: Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts violates the Confrontation Clause, when the defendant has no opportunity to confront the actual analysts.
clause right. The State cross-appeals, maintaining the appellate court improperly reversed the trial court's imposition of a consecutive sentence. For the following reasons, we affirm in part and reverse in part.

BACKGROUND

The State charged the defendant in a 17-count indictment with aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery. The cause proceeded to a bench trial. The counts that the State ultimately submitted to the judge were counts IV and VI (aggravated criminal sexual assault under 720 ILCS 5/12-14(a)(3) (West 2000)), count XV (aggravated kidnapping under 720 ILCS 5/10-2(a)(3) (West 2000)) and count XVII (aggravated robbery under 720 ILCS 5/18-5 (West 2000)). The State entered a *nolle prosequi* on the remaining counts. The following facts were adduced at trial.

On February 10, 2000, 22-year-old L.J. worked until 8 p.m. as a cashier at a clothing store in Chicago. On her way home to the south side of the city, she purchased items at the store for her mother and went toward her home. As she passed an alley, the defendant came up behind her and forced her to sit in the backseat of a beige station wagon, where he told her to take her clothes off. The defendant then vaginally penetrated L.J. The defendant also contacted L.J.'s anus with his penis, but did not penetrate. He then pushed L.J. out of the car while keeping L.J.'s coat, money, and other items. After L.J. ran home, her mother opened the door and saw her in tears, partially clothed with only one pant leg on. After L.J. went into the bathroom, her mother called the police.

Shortly after 9 p.m., Chicago police officers arrived at the home and found L.J. in the bathtub. She had not yet washed her vaginal area. After L.J. told the officers what had transpired, the officers issued a “flash” message for a black male, 5 foot, 8 inches tall, wearing a black skull cap, a black jacket and driving a beige station wagon. An ambulance transported L.J. and her mother to the emergency room. Dr. Nancy Schubert conducted a vaginal exam of L.J. and took vaginal swabs, which were then sealed and placed into a criminal sexual assault evidence collection kit along with L.J.'s blood sample. The kit was sent to the Illinois State Police (ISP) Crime Lab for testing and analysis.

On February 15, 2000, forensic biologist Brian Hapack with the ISP Crime Lab received L.J.'s sexual assault evidence collection kit and performed tests that confirmed the presence of semen. Hapack placed the swabs in a coin envelope, sealed the envelope, and placed the evidence in a secure freezer. Hapack guaranteed the accuracy of his results by working in a clean environment free from contamination and by ensuring that the tests functioned properly.

On August 3, 2000, police arrested the defendant for an unrelated offense and, pursuant to a court order, drew a blood sample from the defendant. On August 24, 2000, forensic scientist Karen Kooi performed an analysis on the sample that consisted of four quarter-sized bloodstains on a filter card. Kooi extracted a deoxyribonucleic acid (DNA) profile and entered it into the database at the ISP Crime Lab. Meanwhile, the samples from L.J.'s sexual assault kit were sent to Cellmark Diagnostic Laboratory in Germantown, Maryland, for DNA analysis on November 29, 2000. Cellmark returned L.J.'s vaginal swabs and blood standard to the ISP Crime Lab on April 3, 2001. Cellmark derived a DNA profile for the person whose semen
was recovered from L.J. According to ISP forensic biologist Sandra Lambatos, whose testimony will be set forth more fully below, the DNA profile received from Cellmark matched the defendant's DNA profile from the blood sample in the ISP database. L.J. identified the defendant in a line up on April 17, 2001. The defendant was then arrested for the instant offenses.

At the bench trial, Lambatos was accepted as an expert in forensic biology and forensic DNA analysis by the trial court. Lambatos began her testimony with a brief explanation of polymerase chain reaction (PCR) testing. PCR testing, according to Lambatos, is one of the most modern types of DNA analysis available and is generally accepted in the scientific community. Lambatos explained how PCR analysis can be used to identify a male profile from a semen sample. First, an analyst conducts a procedure that isolates and extracts DNA from a sample that may include a mixture from a particular defendant and the victim. The DNA is not large enough to test at this point, and requires amplification to form a more workable sample. After amplification, an analyst can measure the length of an individual specific strand through a process called electrophoresis. A computer translates this measurement onto a graph called an electropherogram. The electropherogram is a representation of the individual's specified DNA data into a line with peaks representing the lengths of the DNA strands of the 13 STR regions. Reports generally also provide a "table of alleles" showing the DNA profile of each sample. She also stated that the statistical probability of a match can also be determined by entering the alleles into a frequency database to learn how common they are in the general population.

Lambatos further testified that it is a commonly accepted practice in the scientific community for one DNA expert to rely on the records of another DNA analyst to complete her work. As mentioned, she used the DNA profile from Cellmark to match the DNA profile from the defendant's blood sample, which was contained in the ISP database. She stated that, because Cellmark was an accredited laboratory, it was required to meet "certain guidelines to perform DNA analysis for the Illinois State Police and so all those calibrations and internal proficiencies and controls [of the equipment used] would have had to have been in place for them to perform the DNA analysis." Cellmark's testing and analysis methods were generally accepted in the scientific community according to Lambatos. Lambatos, however, admitted that Cellmark had different procedures and standards for results than the ISP Crime Lab. Nevertheless, Lambatos testified that she personally developed proficiency tests for Cellmark technicians to perform. She further testified that she routinely relied on results from Cellmark and she did not observe any chain of custody or contamination problems.

The prosecutor then asked her expert opinion regarding the DNA match. Defense counsel objected and asserted that Lambatos could not rely upon the testing performed by another lab. The trial court replied, "We will see. If she says that she didn't do her own testing and she relied on a test of another lab and she's testifying to that. We'll see what she's going to say."

Lambatos then testified that a match was generated of the male DNA profile found in the semen from L.J.'s vaginal swabs to the defendant's male DNA profile from the defendant's blood standard. In response to defense questioning, Lambatos restated her interpretation of the alleles at each of the 13 locations. She testified about several locations where she visually filtered out
spurious alleles and "background noise" and distinguished the defendant's profile. Lambatos concluded that in her expert opinion, the semen from L.J.'s vaginal swab was a match to the defendant. Lambatos testified that the probability of this profile occurring in the general population was one in 8.7 quadrillion black, one in 390 quadrillion white, and one in 109 quadrillion Hispanic unrelated individuals. She did not observe any degradation or irregularities in the sample from L.J.'s vaginal swab.

She stated that, in general, if "there was a question of a match, then we would investigate that further by looking at the electropherograms from all the cases involved and do some more comparisons on that." She explained that in looking at Cellmark's report, she interpreted it and "I did review their data, and I did make my own interpretations so I looked at what * * * they sent to me and did make my own determination, my own opinion." While Lambatos testified to her conclusion informed by Cellmark's report, Cellmark's report itself was not introduced into evidence. Also, while Lambatos referenced documents she reviewed in forming her own opinion, she did not read the contents of the Cellmark report into evidence.

At the conclusion of Lambatos' testimony, the defendant moved to strike the evidence of testing completed by Cellmark based upon a violation of his sixth amendment right to confront witnesses against him. The defendant also objected on the grounds of foundation, citing People v. Raney, 324 Ill.App.3d 703, 258 Ill.Dec. 356, 756 N.E.2d 338 (2001), and argued insufficient evidence was presented regarding the calibration of the Cellmark equipment. The trial court denied the defendant's motion to strike. The trial court stated, "I don’t think this is a Crawford scenario, and I agree with the State that the evidence is—the issue is, you know, what weight do you give the test, not do you exclude it and accordingly your motion to exclude or strike the testimony of the last witness or opinions based on her own independent testing of the data received from Cellmark will be denied."

Following this and other testimony concerning the incident, the State rested. The trial court denied the defendant's motion for a directed finding. The defendant did not present any evidence in his defense. Thereafter, the trial court found the defendant guilty of two counts of aggravated criminal sexual assault, and one count each of aggravated kidnapping and aggravated robbery. The court denied the defendant's motion for a new trial.

[The Court discussed sentencing.]

On appeal, the appellate court rejected the defendant's contentions that the State failed to establish a sufficient foundation for Lambatos' opinion; that the State failed to establish that Cellmark's equipment was adequately calibrated and properly functioning; and that the State failed to establish a sufficient chain of custody based upon Cellmark's handling of the evidence. The appellate court next rejected the defendant's argument that the results of Cellmark's testing and analysis were testimonial in nature and therefore Lambatos' expert testimony thereto violated the defendant's constitutional right to confrontation. 385 Ill.App.3d at 370, 324 Ill.Dec. 246, 895 N.E.2d 961. The court noted that the confrontation clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. The appellate court found that "Cellmark's report was not offered for the truth of the matter asserted; rather, it was offered to provide a basis for
Lambatos' opinion." 385 Ill.App.3d at 369, 324 Ill.Dec. 246, 895 N.E.2d 961. The court stated, "Overall, defendant essentially requests that we require each and every individual involved in the testing and analysis of DNA to testify at trial. For obvious reasons in the abstract and for those provided in the case at bar, we decline to issue such a ruling." 385 Ill.App.3d at 370, 324 Ill.Dec. 246, 895 N.E.2d 961.

This court granted the defendant's petition for leave to appeal. 210 Ill.2d R. 315. The State has requested cross-relief concerning the appellate court's modification of the sentence.

ANALYSIS

Foundational Challenge

The defendant argues generally before this court that the trial court committed reversible error when it permitted Lambatos to testify that the defendant's DNA profile matched the male DNA profile of the semen in L.J.’s vaginal swabs. The defendant specifically argues that the trial court erred in admitting Lambatos' testimony regarding the match because a sufficient foundation was not established. The defendant additionally argues that Lambatos' testimony violated his sixth amendment confrontation right under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We begin with the foundational argument. We apply the abuse of discretion standard to the defendant’s foundational challenge to the trial court’s admission of Lambatos’ expert testimony.

The defendant contends that the trial court should not have permitted the State’s forensic analyst to testify because of a lack of sufficient testimony that the Cellmark report was reliable. According to the defendant, when expert testimony relies upon data obtained from electronic or mechanical equipment, the proponent of the testimony must offer foundational proof that the equipment was calibrated and functioning properly at the time the data was presented in order to establish that the expert’s testimony is reliable. The State responds that Lambatos’ testimony that Cellmark’s testing was done according to valid scientific theory and reliable methodology provided a sound basis upon which Lambatos could formulate her opinion. Therefore, the State asserts that it was not obliged to present additional testimony regarding the calibration and functioning of Cellmark’s equipment to admit Lambatos’ expert opinion pursuant to Wilson v. Clark, 84 Ill.2d 186, 49 Ill.Dec. 308, 417 N.E.2d 1322 (1981). We agree with the State.

In Wilson v. Clark, this court adopted Rules 703 and 705 of the Federal Rules of Evidence concerning an expert’s testimony at trial. Former Rule 703 states in part:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.”


The court in Wilson noted that, in a trial context, "[b]oth Federal and State courts have interpreted Federal Rule 703 to allow opinions based on facts not in evidence."
Wilson, 84 Ill.2d at 193, 49 Ill.Dec. 308, 417 N.E.2d 1322. Rule 705 states:

“The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”

Fed.R.Evid. 705.

Following Rule 705, we held in Wilson that, at trial, “an expert may give an opinion without disclosing the facts underlying that opinion.” “Under Rule 705 the burden is placed upon the adverse party during cross-examination to elicit the facts underlying the expert opinion.” Thus, an expert testifying at trial may offer an opinion based on facts not in evidence, and the expert is not required on direct examination to disclose the facts underlying the expert’s opinion.

This court applied Wilson v. Clark to DNA evidence in People v. Sutherland, 223 Ill.2d 187, 307 Ill.Dec. 524, 860 N.E.2d 178 (2006). There, the defendant filed a motion during trial to bar testimony from Terry Melton, the president of Mitotyping Technologies, concerning human mitochondrial DNA (mtDNA). Melton did not complete the actual laboratory “bench work” on the evidence. The defendant argued that, without the lab technician’s testimony, Melton’s testimony regarding the mtDNA results was improper. We rejected that argument, holding that it was enough that Melton relied upon data reasonably relied upon by other experts in her field.

Here, the trial court correctly denied defense counsel’s objection to the foundation for Lambatos’ expert opinion. It is undisputed that Lambatos was qualified as an expert in forensic biology and DNA analysis; Lambatos testified that it is the commonly accepted practice in the scientific community for a forensic DNA analyst to rely on the work of other analysts to complete her own work; and Lambatos based her opinion on information reasonably relied upon by experts in her field.

As in Sutherland, Lambatos testified that Cellmark’s work on the vaginal swabs in this case and the results of the PCR analysis conducted by Kooi are the types of data reasonably relied upon by experts in her field. Lambatos testified that, because Cellmark was an accredited laboratory, calibrations, internal proficiencies, and controls had to be in place for the DNA analysis to be completed in this case. These internal controls were, according to Lambatos’ testimony, ones that she personally developed. Lambatos herself reviewed Cellmark’s data, including the electropherogram, and did not have any question about the match. Rather, she used her own expertise to compare the two profiles before her. She also did not observe any problems in the chain of custody or any signs of contamination or degradation of the evidence. Lambatos ultimately agreed with Cellmark’s results regarding the male DNA profile, and then made her own visual and interpretive comparisons of the peaks on the electropherogram and the table of alleles to conclude there was a match to the defendant’s genetic profile.

We also reject the defendant’s specific complaint that there was no testimony that the instruments used by Cellmark were calibrated and functioning properly. The defendant principally relies on People v. Raney, 324 Ill.App.3d 703, 258 Ill.Dec. 356, 756 N.E.2d 338 (2001). Raney held that
where the expert testimony is based upon an electronic or mechanical device, the expert must provide some foundational proof that the device was functioning properly at the time it was used. The defendant there argued that the State failed to establish a proper foundation for the admission of scientific results from the gas chromatography mass spectrometer (GCMS) machine. The court agreed, finding that the record contained no evidence regarding whether the GCMS machine was functioning properly at the time it was used to analyze the substance. Further, the Raney court stated an expert should be able to explain how the GCMS machine was calibrated or why she knew the results were accurate. Finding a lack of such an explanation, the court concluded that the State failed to prove the defendant guilty beyond a reasonable doubt because of the lack of foundation. The Raney court acknowledged, however, that “[i]t may not be feasible for each expert to personally test the instrument relied upon for purposes of determining what is a suspected controlled substance.”

We find that the testing of narcotics using a GCMS machine is not comparable to the scientific process at issue in this case. At the defendant’s bench trial, Lambatos did not merely regurgitate results generated by a machine, as the witness in Raney did. Lambatos conducted an independent evaluation of data related to samples of genetic material, including items processed at both Cellmark and the ISP Crime Lab. Lambatos used her expertise and professional judgment to compare the DNA profiles. Her examination of the different alleles from the blood sample and from the semen sample indicated a match with the defendant. She also determined the statistical probability of the match by examining the alleles and entering them into a frequency database to determine how common they are in the general population. Further, this case is distinguishable from Raney because Lambatos maintained that Cellmark necessarily met the threshold of proper DNA analysis because Cellmark was an accredited laboratory and followed guidelines that she had personally developed. We therefore do not accept the defendant’s invitation to broadly interpret Raney to find an insufficient foundation where an analyst merely relies upon data obtained from electronic or mechanical equipment.

Finally, under Wilson, the burden is placed upon the adverse party during cross-examination to elicit facts underlying the expert opinion. The record reveals substantial cross-examination of Lambatos’ comparison of the DNA profile from the database to the DNA profile from the sexual assault kit. The record also reveals that the trial court, sitting as a fact finder, appropriately weighed the testimony. It stated:

“The DNA expert that testified, the last witness, was in my view the best DNA witness I have ever heard. Under detail [sic ], lengthy complex cross-examination by the defense on every single part of her report she explains, she told what was the basis of her opinion, she was an outstanding witness in every respect. There is the issue of she didn’t do the actual test. The testing is farmed out to other labs. Some did the testing, some are an accredited lab. That was part of the playback you might say of the Illinois state police forensic division at that time, and I agree with the State that there is no misidentification here. This is a match, this is 1 in 8.7 quadrillion, 50
times the population for the last 2000 years. It’s an absolute match.”

Accordingly, the issue of Lambatos’ reliance on Cellmark’s report went to the weight of her opinion and not its admissibility. The trial court assessed the weight of Lambatos’ testimony and found it convincing.

We therefore find that the trial court did not abuse its discretion in finding a sufficient foundation for Lambatos’ testimony and therefore turn to the defendant’s Crawford argument.

Sixth Amendment

The trial court rejected the defense objection that his sixth amendment right was violated by Lambatos’ testimony concerning Cellmark’s report. The appellate court affirmed this decision, finding that the complained-of statements regarding Cellmark’s report by Lambatos were not used for the truth of the matter asserted and therefore the sixth amendment was not implicated. The defendant’s claim that his sixth amendment confrontation right was violated involves a question of law, which we review de novo.

The sixth amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.” This part of the sixth amendment is called the confrontation clause and applies to the states through the fourteenth amendment. In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the sixth amendment’s “primary object” is with “testimonial hearsay.” Accordingly, “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” The Supreme Court added an explicit logical corollary to this statement by pointing out, in a footnote, that the confrontation clause does not bar the admission of testimonial statements that are admitted for purposes other than proving the truth of the matter asserted. Stated another way, we need only consider whether a statement was testimonial if the statements at issue were, in fact, hearsay statements offered to prove the truth of the matter asserted.

The hearsay rule generally prohibits the introduction of an out-of-court statement offered to prove the truth of the matter asserted therein. Underlying facts and data, however, may be disclosed by an expert, not for the truth of the matter asserted, but for the purpose of explaining the basis for his opinion. Moreover, it is well established that an expert may testify about the findings and conclusions of a nontestifying expert that he used in forming his opinions.

The defendant argues that the State introduced the Cellmark report to establish the truth of the matter asserted and it is therefore hearsay. Without Cellmark’s report, according to the defendant, Lambatos could not have given her testimony that the defendant’s DNA matched the profile deduced by Cellmark. The State counters that Lambatos testified about the Cellmark tests only to explain how she formed her own opinion. Therefore, the only statement that the prosecution offered for the truth of the matter asserted was Lambatos’ own opinion. According to the State, presentation of the person who prepared the DNA profile at Cellmark was not necessary for confrontation purposes. We agree with the State.
This court has long held that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of his opinion. In Lovejoy, a medical examiner testified that another toxicologist detected six different types of drugs in the victim's body after conducting blood tests, indicating that poisoning caused the victim's death. Lovejoy, 235 Ill.2d at 141, 335 Ill.Dec. 818, 919 N.E.2d 843. The medical examiner testified that he was trained in toxicology interpretation and that the toxicology report showed lethal amounts of several medications in the victim's blood. He explained how the toxicology report added to his own physical observations during the autopsy and that it aided him in determining the cause of death. Following Wilson v. Clark and its progeny, we noted that experts may not only consider the reports commonly relied upon by experts in their particular field, but also to testify to the contents of the underlying records. Quoting People v. Pasch, we explained:

"While the contents of reports relied upon by experts would clearly be inadmissible as hearsay if offered for the truth of the matter asserted, an expert may disclose the underlying facts and conclusions for the limited purpose of explaining the basis for his opinion. [Citation.] By allowing an expert to reveal the information for this purpose alone, it will undoubtedly aid the jury in assessing the value of his opinion."


Accordingly, we held that the medical examiner's testimony repeating the nontestifying analyst's conclusions was not admitted for the truth of the matter asserted, but rather was introduced "to show the jury the steps [the examiner] took prior to rendering an expert opinion in this case." Consequently, there was no confrontation clause violation.

Our appellate court addressed a similar factual situation in People v. Johnson, 394 Ill.App.3d 1027, 333 Ill.Dec. 774, 915 N.E.2d 845 (2009). In Johnson, the defendant challenged an expert's testimony regarding DNA test results, arguing that he had no opportunity to cross-examine the analysts who conducted the testing. The court observed that experts are permitted to disclose underlying facts and data to the jury in order to explain the basis for their opinions. It concluded that the State offered the DNA report at issue as part of the basis for the expert opinion and no confrontation violation occurred.

Like Lovejoy and Johnson, Lambatos' testimony about Cellmark's report was not admitted for the truth of the matter asserted. The State introduced this testimony, rather, to show the underlying facts and data Lambatos used before rendering an expert opinion in this case. The evidence against the defendant was Lambatos' opinion, not Cellmark's report, and the testimony was introduced live on the witness stand. Indeed, the report was not admitted into evidence at all. Rather, Lambatos testified to her conclusion based upon her own subjective judgment about the comparison of the Cellmark report with the existing ISP profile.

For instance, at trial, the defense attorney questioned her if she confused the defendant's DNA with L.J.'s DNA. He asked Lambatos if the alleles were not more consistent with the victim than the defendant
at several loci. When asked about a specific locus called "T-POX," Lambatos responded:

"In my opinion with this profile, it is a mixture so when we have a mixture you are looking at the profile as a whole * * * and it's important to note that the alleles at each locus on a DNA molecule that we look at are very common. It is not uncommon for you and I to have the same alleles at a locus or you and I to have the same alleles. The power of this DNA comes with looking at all 13 areas of the DNA because it's that uniqueness looking at all 13 that's going to give us numbers. And here like a T-POX and in the other two that you mentioned, there are only two alleles and like I say in my opinion there are only two people in this profile and it just may so happen that they share an 8 or that they share an 11 or it may so happen that she is an 8 and 11 and he is just an 11, 11, or he is an 8, 11 and she is an 8, 8. There's only certain possibilities that can be attributed at each locus."

After defense counsel stated that Lambatos' interpretation could have erred because of a degraded sample, she stated:

"Yes, it's possible to have a degraded sample but if the sample was degraded, that would be known by our earlier examination of the evidence [by Hapack]. We determine the quantity and the DNA that we have and the quality of the DNA and also after we look at the electropherograms, you can see the degradation, their specific patterns, and the data looks a certain way when it is degraded. The peaks aren't as defined. They slope off missing here and there. Different things happen with degradation, and I didn't see any evidence of degradation in this particular fraction."

The defendant's suggestion that Lambatos was merely a "conduit" for Cellmark's report and that the report was entirely dispositive of Lambatos' opinion, and thus hearsay, is not compelling. Her testimony consisted of her expert comparison of the DNA profile in the ISP database with the DNA profile from the kit prepared by Cellmark. She used her own expertise to compare the two profiles before her: the blood sample prepared by Kooi and the semen sample prepared by Cellmark. She also did not observe any problems in the chain of custody or any signs of contamination or degradation of the evidence. Lambatos ultimately agreed with Cellmark's results regarding the male DNA profile. But Lambatos additionally made her own visual and interpretive comparisons of the peaks on the electropherogram and the table of alleles to make a conclusion on the critical issue: that there was a match to the defendant's genetic profile. Accordingly, Cellmark's report was not used for the truth of the matter asserted and was not hearsay.

The defendant further asserts that the instant matter is "directly analogous" to the United States Supreme Court's recent holding of Melendez-Diaz v. Massachusetts, 557 U.S. —, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). In Melendez-Diaz, the Court considered whether a certification by a forensic lab analyst as to the nature and weight of a controlled substance was a testimonial statement, and thus its admission in lieu of live testimony by the analyst violated the sixth amendment right to confrontation. The defendant in that case, Luis Melendez-Diaz, was charged with
cocaine trafficking in an amount between 14 and 28 grams. At trial, the prosecution placed into evidence white plastic bags containing a substance that resembled cocaine. It also submitted three “certificates of analysis” showing the results of forensic analysis performed on the seized substances. The certificates reported the weight of the substances and stated that the bags “[have] been examined with the following results: The substance was found to contain: Cocaine.” The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health as required by Massachusetts law. Massachusetts law permitted the use of such affidavits to provide prima facie evidence of the analyzed substance’s composition, quality and net weight.

In a 5-4 decision, the Court held that, following Crawford, the analyst’s certificates “were testimonial statements and the analysts were ‘witnesses’ for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ‘be confronted with’ the analysts at trial. “The Court found the ‘case involves little more than the application of our holding in Crawford.”

The Court based its holding on two rationales derived from Crawford. First, the forensic analyst’s certificates were within the “core class of testimonial statements” in Crawford. Because the critical issue was whether the substance was cocaine, the Supreme Court found that “[t]he ‘certificates’ are functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.” Second, the Court stated, “not only were the affidavits ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ [citation] but under Massachusetts law the sole purpose of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.”

The majority explicitly rejected the suggestion that the prosecutors were required to call each person involved in the chain of custody to the witness stand. Responding to the dissent in a footnote, the majority stated:

“[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. * * * ‘[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.’ It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.”

(Emphasis omitted.)

Melendez-Díaz, 557 U.S. at —— n. 1, 129 S.Ct. at 2532 n. 1, 174 L.Ed.2d at 322 n. 1. Accordingly, the Court in Melendez-Díaz held that the defendant’s confrontation clause right had been violated.

We find that Melendez-Díaz does not change our determination. In Melendez-Díaz, the
disputed evidence was a “bare-bones statement” that the substance was cocaine, and the defendant “did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.” Here, Lambatos testified about her own expertise, judgment, and skill at interpretation of the specific alleles at the 13 loci, and confirmed her general knowledge of the protocols and procedures of Cellmark. Lambatos also conducted her own statistical analysis of the DNA match. She did not simply read to the judge, sitting as a fact finder, from Cellmark’s report. This is in contrast to Cellmark’s report, which did not include any comparative analysis of the electropherograms or DNA profiles and was not introduced into evidence. Cellmark’s electropherogram, rather, was part of the process used by Lambatos in rendering her opinion concluding that the profiles matched. Thus, Lambatos’ opinion is categorically different from the certificate in Melendez-Diaz.

In sum, the State did not offer Lambatos’ testimony regarding the Cellmark report for the truth of the matter asserted and this testimony did not constitute “hearsay.” Thus, the trial court and appellate court properly concluded that Crawford considerations did not apply here. Lambatos disclosed the underlying facts from Cellmark’s report for the limited purpose of explaining the basis for her opinion on the critical issue concerning whether there was a DNA match between the defendant’s blood sample and the semen sample recovered from L.J. By allowing the expert to reveal the information for this purpose alone, it undoubtedly aided the judge, sitting as the factfinder, in assessing the value of Lambatos’ opinion. Finally, the record demonstrates that the gaps in the chain of custody went to the “‘weight of the evidence rather than its admissibility’” and our review of the record shows that Lambatos’ conclusion was tested “in the crucible of cross-examination.”

Sentencing

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CONCLUSION

For the foregoing reasons, the judgment of the appellate court is affirmed in part and reversed in part.

Appellate court judgment affirmed in part and reversed in part.

Justices THOMAS, KILBRIDE, GARMAN, and KARMEIER concurred in the judgment and opinion.

Justice FREEMAN specially concurred, with opinion.

Justice BURKE concurred in part and dissented in part, with opinion.

Justice FREEMAN, specially concurring:

I agree that defendant’s convictions and sentences must be affirmed. With respect to defendant’s appeal in which he raises several evidentiary challenges, I concur in the court’s judgment for reasons other than those expressed in its opinion. With respect to the State’s cross-appeal, I join in that portion of the opinion reversing the appellate court’s modification of defendant’s sentence.

My concerns in this case are based on the lack of foundation for Sandra Lambatos’ testimony....
The court dismisses defendant’s contentions based on Lambatos’ testimony that “because Cellmark was an accredited laboratory, calibrations, internal proficiencies, and controls had to be in place for the DNA analysis to be completed in this case.” The court concludes that because witnesses like Lambatos are permitted in Illinois to give an opinion without disclosing the facts or data upon which the expert bases her opinion, such testimony is sufficient. In other words, Lambatos’ foundational testimony was based upon data reasonably relied upon by other experts in her field, and defendant’s appellate concerns relate to the weight of the evidence, not its admissibility.

An expert may certainly base her opinion on information reasonably relied upon by other experts in the field. But that was not what occurred here. Strikingly absent from Lambatos’ testimony is any information about Cellmark’s extraction and amplification processes in generating the profile that was used to produce the data upon which she relied in her making comparisons. Lambatos’ “testing” in this case consisted of her own reading to match up the numbers generated on the computer charts, which was derived from Cellmark’s underlying scientific processes. What Lambatos failed to testify to during her examination was what occurred at Cellmark beginning from when Cellmark received the package containing the victim’s vaginal swabs and blood sample to when Cellmark analysts performed the extraction and amplification procedures. Instead, she speculated that because Cellmark was accredited, “they would have to meet certain guidelines to perform DNA analysis for the Illinois State Police so all those calibrations and internal proficiencies and controls would have had to have been in place for them to perform the DNA analysis.” Lambatos’ testimony on this point is insufficient. First, with respect to the fact of accreditation, Lambatos did not identify when or by whom Cellmark received its accreditation. Whether a laboratory is accredited is a fact that can be established without the need of an expert witness. Here, Lambatos’ testimony does not establish that Cellmark was accredited; rather, it was her opinion that the laboratory was accredited at the time it ran the tests. Further, Lambatos did not base her assumption that “certain guidelines * * * would have had to have been in place” on sources such as the report of another expert, i.e., the written report of the technicians who generated the profile or even the lab’s logbook at the time the profile was generated. Lambatos’ opinion regarding whether Cellmark followed proper guidelines at the time the DNA material was extracted and amplified was not based on anything other than her rank speculation that it “had to have been done” solely because Cellmark was an accredited lab.

While I do not believe that Lambatos is required to personally verify the protocols used by Cellmark to generate the DNA profile from the swab, she, at the very least, should be able to point to something concrete in order to give her opinion as to what protocols were used at the time the profile was generated. She did not. There was no testimony on which protocols were used. In fact, Lambatos admitted that Cellmark used procedures and standards that were different from those used by her own employer, the Illinois State Police Crime Laboratory. Although Lambatos stated that she personally “helped develop line proficiency tests to be administered to analysts at Cellmark,” nothing in her testimony revealed that the analysts who performed the DNA extraction and amplification in this case had taken, let
alone passed, the tests she had developed or that, when the tests were run, they were run according to the standards preferred by the Illinois State Police Lab.

The lack of any information regarding Cellmark’s generation of the male DNA profile from the victim’s vaginal swabs contrasts sharply with the testimony the State produced with respect to the DNA profile generated from defendant’s blood sample by Karen Kooi, upon which Lambatos also relied to read and match up the numbers on her chart. Kooi, an employee of the Illinois State Police Crime Lab at the time, testified as to the protocols she used to generate the DNA profile taken from defendant’s blood. Kooi further stated that she utilized “clean lab” techniques when she generated the profile.

This case, therefore, differs from People v. Sutherland, 223 Ill.2d 187, 307 Ill.Dec. 524, 860 N.E.2d 178 (2006), upon which the court primarily relies in reaching its conclusion today. There, the witness in question was an employee of the laboratory which did the DNA analysis, who not only testified at trial, but who had also testified at the Frye hearing. Moreover, the defendant had received from the State, pursuant to Rule 417(b), extensive information including records reflecting compliance with quality control guidelines. In fact, even the defendant’s own DNA expert was able to testify from the records produced that the lab’s results were “clean.” These facts render Sutherland distinguishable.

Two cases from our appellate court support my point regarding foundation. In People v. Johnson, a panel of the First Division of the First District held that a sufficient foundation was established where the DNA expert, an actual employee of Cellmark, testified that although she did not personally perform any of the testing used to generate the male DNA profile from the sexual assault kit, she based her opinion on records used in the ordinary course of business. People v. Johnson, 389 Ill.App.3d 618, 329 Ill.Dec. 225, 906 N.E.2d 70 (2009). In particular, the witness relied on a written Cellmark report, which indicated that 10 Cellmark analysts had been involved in the lab work in the case and that all the methods used, conclusions and results reached were to a reasonable degree of scientific certainty. Another witness, who like Lambatos was employed by Illinois State Police, testified that he compared the Cellmark-generated male DNA profile to the DNA panel he had generated from saliva obtained from the defendant and concluded that they were a match. Like Lambatos, he testified as to the statistical probabilities of the match. In holding that an adequate foundation for Cellmark’s work had been established for the Cellmark witness, the court found it significant that the witness actually worked for Cellmark, which was the lab that generated the DNA profile from the victim’s samples. She also performed an independent review of the work to make sure all of the procedures done at the lab were followed correctly, which the court held was sufficient foundation upon which to partially base her assessment and conclusion. I note that the court stressed, in reaching its conclusion, that the foundational testimony was stronger than that in this case, specifically citing the Third Division’s opinion in this case.

Similarly, in People v. Johnson, 394 Ill.App.3d 1027, 333 Ill.Dec. 774, 915 N.E.2d 845 (2009), a panel from the Sixth Division of the First District held that a sufficient foundation was established where the DNA expert, again an actual employee of Cellmark, testified not only about the proper procedures that were expected to be
utilized at her lab, but that the case file indicated that those procedures had been followed with respect to the DNA profile in question. To reach this conclusion, the witness relied on the records of other Cellmark employees, which indicated that the proper procedures had been followed. Therefore, although the witness did not perform any of the testing, her testimony showed a sufficient foundation of Cellmark’s procedures and specifications upon which to partially base her assessment and conclusion. The court stressed that the foundation in the case was stronger than that found sufficient by the appellate court in this case.

Lambatos’ testimony is demonstrably different from the testimony in either of the Johnson opinions. Lambatos’ direct testimony was based on two documents offered into evidence by the State, which consisted of two shipping manifests from FedEx. One manifest showed that the victim’s vaginal swabs and blood standards were sent to Cellmark from the Illinois State Police Crime Laboratory on November 28, 2000, and were received by Cellmark on November 29, 2000. The second manifest showed that the victim’s samples were “sent back from Celtmark [sic]” on April 3, 2001, along with samples from “other cases” that had nothing to do with the present case. Lambatos testified that she relied on these two pieces of evidence when she did the work in this case. I submit that these shipping manifests are not the kind of “facts or data” contemplated by this court in Wilson. Unlike the witnesses in the Johnson cases, Lambatos was not a Cellmark employee. She did not rely on the detailed type of reports that those witnesses relied upon. She did not know who performed the tests at Cellmark nor could she testify as to what protocols, if any, they followed. The shipping manifests, which are not enough to even establish a proper chain of custody once the samples reached their destination at Cellmark, certainly cannot establish whether a laboratory was “clean” or whether Lambatos’ protocols were actually followed.

By accepting Lambatos’ assumption that because Cellmark was accredited, the protocols she had personally developed for the lab to use were, in fact, used to generate the DNA profile, the court errs in finding that an adequate foundation was laid. The court relies on the fact that Lambatos used her expertise and professional judgment to compare the DNA profiles in this case. But the problem with this is that there was no foundation established for the DNA profile generated by Cellmark. Lambatos’ opinion that the DNA profile generated there matched defendant’s DNA profile does not change that fact. It is certainly the law that alleged infirmities in the performance of a test usually go to the weight of the evidence, not to its admissibility. Courts should not automatically exclude scientific evidence whenever a forensic analyst deviates from a correct test protocol in minor respects; instead, the deviation would have to materially affect the outcome in order to warrant exclusion. Here, however, Lambatos could not offer any testimony to establish any protocol. Contrary to what the court rests its analysis upon, there is simply no foundational evidence to “weigh.”

Last, and of equal importance, the court today implies that the scientific process involved in DNA analysis is “not comparable” to narcotics Gas Chromatography Mass Spectrometer (GCMS) testing because Lambatos did not “regurgitate” the results from Cellmark as experts do with respect to GCMS test results. Lambatos took on faith the DNA profile generated by Cellmark from the victim’s samples, assuming that because the
lab was accredited all quality controls were in place when the profile was created. This seems no different from how expert witnesses in drug cases view the results from the GCMS machine. Unfortunately, it has been well-documented in DNA cases that “[q]uality control and quality assurances procedures that are followed religiously in some labs are ignored or followed intermittently in others.” The failure to employ quality control and quality assurance procedures can result in DNA matches in criminal cases that are wrong because of sample contamination or misconduct on the part of the technician. This explains why an adequate foundation is as essential in DNA cases as it is in drug cases. Given the impact a DNA match has on the trier of fact, courts must be vigilant in ensuring that DNA evidence is admitted with proper foundation. This is particularly so in jury cases where lay people might not be able to appreciate arguments which go to weight once they hear of a match that is one in a billion.

Based on the foregoing, I would hold that the foundation for Lambatos’ testimony was insufficient, and the circuit court abused its discretion in admitting it. Based on my resolution of defendant’s foundational challenge, I need not reach defendant’s sixth amendment confrontation clause argument. Although I believe the circuit court abused its discretion by admitting Lambatos’ testimony without proper foundation, the error does not require a new trial. The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict a defendant. In this case, the trial judge specifically found defendant guilty on the basis of the victim’s testimony, which he characterized as “highly credible.” The trial judge also commented specifically on the strength of the victim’s lineup identification and her in-court identification. The judge found the victim to be “an outstanding witness” and believed her testimony “a hundred percent.” These findings indicate to me that the error in admitting Lambatos’ testimony was harmless. On that basis, I would affirm the convictions.

Justice BURKE, concurring in part and dissenting in part:

I join the part of Justice Freeman’s special concurrence that concludes that the circuit court abused its discretion in admitting Lambatos’ testimony. I write separately because I disagree with the majority’s resolution of the consecutive-sentencing issue....

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The Supreme Court, in its final orders on Tuesday, showed its continued interest in the Sixth Amendment's Confrontation Clause, taking on a new case on whether an expert witness can be called as a stand-in for a lab analyst who actually did a test on criminal evidence, but did not appear at the trial. That question was close to one that had been raised last week by Justice Sonia Sotomayor as the Court ruled in the case of Bullcoming v. New Mexico (09-10876). . . .

* * *

The new Confrontation Clause case is Williams v. Illinois (10-8505). In that case, the Illinois Supreme Court ruled that prosecutors could introduce the substance of a forensic analyst's report on a DNA test of evidence by putting an expert witness on the stand and having her analyze the results, which showed a DNA match in a rape and kidnapping case. The lab analyst was called to testify, and the actual lab report itself was not admitted. The expert witness had had no part in making the analysis, and no personal knowledge of how the test was done. The state Supreme Court nevertheless concluded that there was no violation of the suspect's confrontation right, because the findings of the lab report were being admitted not for their truth, but only to explain the expert's opinion about the results.

That was similar to a scenario mentioned by Justice Sotomayor on June 23, in her concurrence in the Bullcoming case. In that case, the Court had ruled that a lab supervisor could not be a surrogate witness in place of a lab technician who prepared a report but did not appear, so the lab test was not admissible. Sotomayor sought to show that the decision was a narrow one, and she listed several factual scenarios that she said were not covered. One of them was a situation in which "an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence."

In the Sotomayor suggestion, the lab report would not have been admitted, but she intimated that the expert might be allowed to take the stand anyway and give an independent opinion about it. That appeared to be what had occurred in the Williams case. The Court apparently granted the case to determine whether this scenario would satisfy the line of cases beginning with Crawford v. Washington (2004).

* * *
"Independence Day, Take 3: Why I Think That The Supreme Court Will Find No Confrontation Clause Violation in Williams v. Illinois"

EvidenceProf Blog
June 29, 2011
Colin Miller

Yesterday, I noted that the Supreme Court granted cert in Williams v. Illinois (10-8505) to address a question left unanswered by Bullcoming v. New Mexico: Is the Confrontation Clause violated when an expert witness for the prosecution relies upon a testimonial report prepared by an analyst who does not testify at trial, but the report itself is not admitted into evidence to prove the truth of the matter asserted? This was different from the question resolved by Bullcoming, in which the Court held that the Confrontation Clause is violated when such a testimonial report is actually admitted into evidence. Indeed, Justice Sotomayor made this distinction clear in her concurring opinion in Bullcoming, which I wrote about yesterday. In that post about Sotomayor's concurring opinion, I mused about whether the Bullcoming dissent would be able to create a 5-4 majority finding no Confrontation Clause violation in a case where a testimonial report is relied upon but not actually admitted into evidence to prove the truth of the matter asserted. And, based upon the facts of Williams v. Illinois, 939 N.E.2d 268 (Ill. 2010), I think the dissent will achieve this result.

Williams v. Illinois

In Williams, L.J. was allegedly sexually assaulted, kidnapped, and robbed by the defendant Sandy Williams on February 10, 2000. Thereafter,

Dr. Nancy Schubert conducted a vaginal exam of L.J. and took vaginal swabs, which were then sealed and placed into a criminal sexual assault evidence collection kit along with L.J.'s blood sample. The kit was sent to the Illinois State Police (ISP) Crime Lab for testing and analysis.

On February 15, 2000, forensic biologist Brian Hapack with the ISP Crime Lab received L.J.'s sexual assault evidence collection kit and performed tests that confirmed the presence of semen. Hapack placed the swabs in a coin envelope, sealed the envelope, and placed the evidence in a secure freezer. . . .

On August 3, 2000, police arrested the defendant for an unrelated offense and, pursuant to a court order, drew a blood sample from the defendant. On August 24, 2000, forensic scientist Karen Kooi performed an analysis on the sample that consisted of four quarter-sized bloodstains on a filter card. Kooi extracted a deoxyribonucleic acid (DNA) profile and entered it into the database at the ISP Crime Lab. Meanwhile, the samples from L.J.'s sexual assault kit were sent to Cellmark Diagnostic Laboratory in Germantown, Maryland, for DNA analysis on November 29, 2000. Cellmark returned L.J.'s vaginal swabs and blood standard to the ISP Crime Lab on April 3, 2001.
Cellmark derived a DNA profile for the person whose semen was recovered from L.J. According to ISP forensic biologist Sandra Lambatos, the DNA profile received from Cellmark matched the defendant’s DNA profile from the blood sample in the ISP database.

At trial,

Lambatos began her testimony with a brief explanation of polymerase chain reaction (PCR) testing. PCR testing, according to Lambatos, is one of the most modern types of DNA analysis available and is generally accepted in the scientific community. Lambatos explained how PCR analysis can be used to identify a male profile from a semen sample. First, an analyst conducts a procedure that isolates and extracts DNA from a sample that may include a mixture from a particular defendant and the victim. The DNA is not large enough to test at this point, and requires amplification to form a more workable sample. After amplification, an analyst can measure the length of an individual specific strand through a process called electrophoresis. A computer translates this measurement onto a graph called an electropherogram. The electropherogram is a representation of the individual’s specified DNA data into a line with peaks representing the lengths of the DNA strands of the 13 STR regions. Reports generally also provide a “table of alleles” showing the DNA profile of each sample. She also stated that the statistical probability of a match can also be determined by entering the alleles into a frequency database to learn how common they are in the general population.

Lambatos further testified that it is a commonly accepted practice in the scientific community for one DNA expert to rely on the records of another DNA analyst to complete her work. As mentioned, she used the DNA profile from Cellmark to match the DNA profile from the defendant’s blood sample, which was contained in the ISP database...Cellmark's testing and analysis methods were generally accepted in the scientific community according to Lambatos.

When the prosecutor then asked Lambatos for her expert opinion regarding the DNA match, “[d]efense counsel objected and asserted that Lambatos could not rely upon the testing performed by another lab.” The trial judge deferred his ruling on the issue, and

Lambatos then testified that a match was generated of the male DNA profile found in the semen from L.J.’s vaginal swabs to the defendant’s male DNA profile from the defendant’s blood standard. In response to defense questioning, Lambatos restated her interpretation of the alleles at each of the 13 locations. She testified about several locations where she visually filtered out spurious alleles and “background noise” and distinguished the defendant’s profile. Lambatos concluded that in her expert opinion, the semen from L.J.’s vaginal swab was a match to the defendant. Lambatos testified that the probability of this profile occurring in the general population was one in
8.7 quadrillion black, one in 390 quadrillion white, and one in 109 quadrillion Hispanic unrelated individuals. She did not observe any degradation or irregularities in the sample from L.J.'s vaginal swab.

She stated that, in general, if "there was a question of a match, then we would investigate that further by looking at the electropherograms from all the cases involved and do some more comparisons on that." She explained that in looking at Cellmark's report, she interpreted it and "I did review their data, and I did make my own interpretations so I looked at what * * * they sent to me and did make my own determination, my own opinion." While Lambatos testified to her conclusion informed by Cellmark's report, Cellmark's report itself was not introduced into evidence. Also, while Lambatos referenced documents she reviewed in forming her own opinion, she did not read the contents of the Cellmark report into evidence.

Defense counsel then repeated his objection, claiming, inter alia, that Lambatos' use of Cellmark's report violated the Confrontation Clause. The trial court disagreed, stating,

"I don't think this is a Crawford scenario, and I agree with the State that the evidence is—the issue is, you know, what weight do you give the test, not do you exclude it and accordingly your motion to exclude or strike the testimony of the last witness or opinions based on her own independent testing of the data received from Cellmark will be denied."

After he was convicted, Williams appealed, claiming, inter alia, "that his sixth amendment right was violated by Lambatos' testimony concerning Cellmark's report," and his appeal eventually reached the Supreme Court of Illinois. The Illinois Supremes initially noted that it "has long held that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of his opinion." The court then rejected Williams' "suggestion that Lambatos was merely a 'conduit' for Cellmark's report and that the report was entirely dispositive of Lambatos' opinion," instead finding that

Her testimony consisted of her expert comparison of the DNA profile in the ISP database with the DNA profile from the kit prepared by Cellmark. She used her own expertise to compare the two profiles before her: the blood sample prepared by Kooi and the semen sample prepared by Cellmark. She also did not observe any problems in the chain of custody or any signs of contamination or degradation of the evidence. Lambatos ultimately agreed with Cellmark's results regarding the male DNA profile. But Lambatos additionally made her own visual and interpretive comparisons of the peaks on the electropherogram and the table of alleles to make a conclusion on the critical issue: that there was a match to the defendant's genetic profile. Accordingly, Cellmark's report was not used for the truth of the matter asserted and was not hearsay (emphasis added).

The court also rejected Williams' contention
that his case was "directly analogous" to the United States Supreme Court's recent holding of Melendez-Diaz v. Massachusetts," concluding that

Lambatos testified about her own expertise, judgment, and skill at interpretation of the specific alleles at the 13 loci, and confirmed her general knowledge of the protocols and procedures of Cellmark. Lambatos also conducted her own statistical analysis of the DNA match. She did not simply read to the judge, sitting as a fact finder, from Cellmark's report. This is in contrast to Cellmark's report, which did not include any comparative analysis of the electropherograms or DNA profiles and was not introduced into evidence. Cellmark's electropherogram, rather, was part of the process used by Lambatos in rendering her opinion concluding that the profiles matched. Thus, Lambatos' opinion is categorically different from the certificate in Melendez-Diaz (emphasis added).

Justice Sotomayor

As I noted in my post yesterday, Justice Sotomayor held in her Bullcoming concurrence that the Court was not presented with four factual circumstances in Bullcoming, including the circumstance "in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." I then concluded that based upon the language used by Justice Sotomator, it was likely that she would find no Confrontation Clause problem with an expert witness offering opinion testimony pursuant to Rule 703 based upon a testimonial report prepared by an analyst who does not testify at trial.

My main question involved the issue of the circumstances under which Justice Sotomayor would find that a testifying expert's opinion was truly an "independent opinion" rather than an opinion dependent upon a testimonial report. For instance, I cited to the opinion of the Court of Appeals of North Carolina in State v. Hough, 2010 WL 702458 (N.C.App. 2010), in which a chemist weighed drugs and prepared a report but did not testify, and a second chemist used the report as the basis for expert testimony on the weight of the drugs without herself testing the drugs. I argued that under this circumstance, Justice Sotomayor should (but might not) find that the testifying chemist's opinion was not truly independent, meaning that there was a Confrontation Clause violation.

In Williams, however, Lambatos' opinion seemingly was truly "independent." Indeed, the trial court noted that Lambatos conducted "independent testing." Moreover, as the Supreme Court of Illinois noted, Lambatos "made her own visual and interpretive comparisons" and "conducted her own statistical analysis of the DNA match." Given these findings, I think it is clear that Justice Sotomayor will find that Lambatos' opinion was truly "independent" and will thus join the four Bullcoming dissenters to form a five Justice majority concluding that there was no Confrontation Clause violation in Williams.

Now, will this be the correct ruling, and what will it tell us about cases like Hough in which there is not independent testing by the testifying expert? I'm not sure yet, but I will have more thoughts over the course of the summer.
In *Williams v. Illinois*, the state presented the testimony of a DNA expert that in her opinion, based on a Cellmark report on DNA found in a crime scene sample and on a report by the Illinois State Police on DNA found in a swab taken from the accused, that the accused was the source of the DNA found in the crime scene sample. No one from Cellmark testified at trial.

1. The Cellmark report was testimonial. As I understand it, this was a report on a crime scene sample referred to Cellmark by the Illinois State Police. I don’t think that there is much doubt that the primary purpose of the report, however one might analyze it, was to create evidence for use in prosecution. (That is more rigorous than the test I think ought to be applied, but that’s another issue.)

I think it’s important to bear in mind that the other issues raised by *Williams* come into play only if the underlying statement is testimonial. That may be obvious, but it is worth emphasizing for a couple of reasons. First, this fact should relieve much of the concern about costs, financial and in terms of lost evidence. No confrontation problem arises unless the report is made in anticipation of evidentiary use. For example, if a lab tech does a blood test without the anticipation of evidentiary use, it will not be testimonial, and there is no confrontation issue. Second, if the statement is testimonial, then that means that the statement was made in anticipation of evidentiary use—and in fact under current law it would mean that it was made with the primary purpose of creating evidence for use in prosecution. That, I believe, should raise alarm bells for a court considering creation of a doctrine that would allow use of the statement without the live testimony of a competent witness.

2. The statement was not formally admitted, but a crucial part of the substance was made known to the jury. The prosecutor asked Sandra Lambatos, the in-court witness, “Was there a computer match generated of the male DNA profile [reported by Cellmark] found in semen from the vaginal swabs of [the victim] to a male DNA profile [reported by another analyst in the state police lab] that had been identified as having originated from Sandy Williams?” She answered in the affirmative. The prosecutor then asked whether she had compared the two profiles. She said she had. He asked what the frequency of such a match would be if someone other than Williams were the source, and she answered with very low numbers. Finally, the prosecutor asked, “In your expert opinion, can you call this a match to Sandy Williams?” and she responded simply, “Yes.”

Formal admission of an out-of-court statement is not necessary to invoke the Confrontation Clause. When a statement is a writing, it is of course often admitted as an exhibit. When it is unrecorded, then no tangible exhibit of it can be offered. We necessarily rely on another witness’s account of the statement—but the Clause may be brought into play without that account being purportedly verbatim. It should be enough if the prosecution is effectively asking the jury to infer that the in-court witness is communicating some or all of the substance of an out-of-court testimonial statement, and that this
substance is true. See my recent post, "When is a statement presented for purposes of the Confrontation Clause?"

In considering application of this principle to this case, note first that the existence of the statement was made clear to the jury. In other words, this is not a case in which an expert assembles information from one or more sources and then draws an inference based on that information without disclosing what it is or what its sources are. (I don't believe that if that were so it would per se render the Confrontation Clause inapplicable; it still might that the jury would likely infer that the expert's opinion was based on a statement to a certain effect, and even if not there would be a concern that the expert's opinion is being used to repackage the information contained in an undisclosed testimonial statement. But, whatever the ramifications may be of that situation, the Court need not address them in the Williams case.) The testimony explicitly referred to the Cellmark report. Furthermore, it was clear what the substance of the statement was: It indicated that the vaginal swab taken from the crime scene reflected the same DNA profile as the swab taken from Williams. It is as if an in-court witness reports, "Somebody at the scene described the person she saw commit the crime, and the description closely matched Williams." So far as the Confrontation Clause is concerned, the report was presented to the jury.

3. The argument that the statement was in any event presented to the jury not for the truth of a matter that it asserted but rather in support of the expert's opinion seems willfully wrong-headed to me in this context. In prior posts on this blog, including one discussing the fine opinion in People v. Goldstein, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100 (by a former boss of mine, Judge Robert Smith), I have emphasized the simple point that if a statement supports the expert's opinion only if it is true then it is a sham to say that it is being presented to support the opinion but not for its truth; see also The Not-for-the-Truth End Run. And in Williams, the application of this principle is perfectly clear: If the profile revealed by the vaginal swab was not what the Cellmark report said it was, then that report provided no support whatsoever for the expert's opinion.

4. This analysis should not be affected by concluding that the expert's opinion conveyed additional information not contained in the original report—an argument not available to the prosecution in Bullcoming, where the in-court witness did nothing more than transmit the information reported by the absent analyst. The question is not whether the in-court witness's testimony had added value, but whether the out-of-court report was presented for its truth. This is simply an ordinary instance of a prosecution case depending on multiple links in a chain—and each link must comply with the Confrontation Clause. We wouldn't, for example, tolerate a witness testifying that a given sample contained cocaine without the prosecution also presenting proper evidence tying the sample to the case. This is no different. If the expert's opinion does indeed convey additional information, that is something more that the prosecution has to prove; it does not ease the burden on the prosecution.

Indeed, the "expert value added" theory would be an invitation to manipulation by the prosecution and its witnesses. That is, the prosecution would have an incentive to manufacture needs for its in-court witnesses to add value over the other information.
presented to the jury.

For example, suppose a lab analyst reports results from which a qualified chemist could easily infer the presence of cocaine—but that the report does not include this bottom line. If the “expert value added” theory governed, a chemist could, so far as the Confrontation Clause is concerned, testify at trial against an accused, “In my opinion, cocaine was present in that sample.” (As discussed below, evidence law in most jurisdictions would require the expert to satisfy the court that the information on which she based her opinion was “of a type reasonably relied upon by experts” in her field, but that is a standard easily met.) The lab analyst, who by hypothesis knew that her report was intended for prosecutorial use, would not have to come to court, and the report would not even have to be introduced or otherwise presented to the jury.

A few points. This Rule does not purport to state a constitutional principle. Nor does it state an evidentiary principle of long standing; it was developed and adopted in the third quarter of the 20th century. There is no constitutional problem with the Rule so long as the information provided to the expert is not a testimonial statement. But if the expert does base an opinion on a testimonial statement, then I think there are potential constitutional problems.

First, if the statement is presented to the jury for the truth of what it asserts—and I have argued above that in Williams these conditions were met for purposes of the Confrontation Clause—then there is a violation of the Clause, assuming the author of the statement (or someone else who can endorse its substance from first-hand knowledge) does not testify at trial. The last sentence of Fed. R. Evid. 703, if it were applicable, would relieve the statement of objection to admissibility under ordinary evidentiary rules, but of course it cannot provide relief from a constitutional objection—and note that it is based on a set of considerations, a weighing of probative value and prejudice, having nothing to do with the Clause. This sentence as adopted, as I recall, because courts were in conflict about how to handle the situation in which an expert was allowed to offer an opinion based in part on a statement otherwise inadmissible and the proponent sought to use the opinion as a lever to gain admissibility of the statement. Some courts, I believe, without quite recognizing the nature of the Confrontation Clause problem—this was before Crawford—nevertheless had a sense that in at least some cases there was something fishy about letting an otherwise inadmissible statement in on the basis that it supported the expert’s opinion. But the rulemakers couldn’t articulate the circumstances in which this

5. Fed. R. Evid. 703, copied by most of the states (now including Illinois), provides:

If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [on which a testifying expert bases an opinion] need not be admissible in evidence in order for the opinion or inference to be admitted.

A 2000 amendment to the Federal Rule adds:

Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.
created a problem—the answer, I think, is that it's a problem when the statement is testimonial—and so they responded with a rather clumsy compromise, simply putting some extra weight on the prejudice side of the scale prescribed by Fed. R. Evid. 403.

Now, what if the out of court statement is testimonial but it is not presented to the jury? Is there a Confrontation Clause problem with allowing the expert to give an opinion based in part on the undisclosed statement, as Fed. R. Evid. 703 purports to allow? That, as I have said, is a question not presented in Williams, and there is no need for the Supreme Court to resolve it in deciding Williams. But a couple of comments. First, even if the statement is not explicitly disclosed to the jury, it may be that enough is disclosed that the jury will likely infer the substance of the statement. Second, even apart from that, I think there may be a substantial Confrontation Clause problem. Recall, that by hypothesis, the statement made to the expert is testimonial. The expert therefore may essentially be repackaging information provided by an out-of-court witness who does not come to court. Again, an example would be a chemist who offers an "opinion" in court that a substance was cocaine, based on a lab report giving information that strongly implies that conclusion to chemists.

In short, I worry that if the Supreme Court holds for the state in Williams, it will invite subterfuges and manipulations that will substantially impair the confrontation right.
Defendant Eric Greene was convicted of second degree murder, robbery, and conspiracy. Before trial, an agreement was reached whereby statements from some of Greene’s non-testifying codefendants would be redacted, replacing individual names with generic pronouns such as “we” or “someone.” Greene filed a direct appeal with the Pennsylvania Superior Court which affirmed the trial court and addressed Greene’s claim under *Bruton v. United States* on the merits on December 16, 1997. Greene then filed for allowance of appeal with the Pennsylvania Supreme Court. While that petition was pending, the Supreme Court decided *Gray v. Maryland* holding that redactions similar to the ones at issue in Greene’s case were similar enough to those at issue in *Bruton* to warrant the same legal results. The Pennsylvania first granted a limited version of Greene’s petition then dismissed his appeal as improvidently granted. Greene’s conviction became final on July 28, 1999.

Greene was denied post-conviction relief at all state court levels and he proceeded to seek federal *habeas* relief. The Magistrate Judge determined the controlling date for determining “clearly established federal law” was the date of Greene’s last state-court decision and thus *Gray* did not apply to Greene’s case. Accordingly, the Magistrate Judge applied *Bruton* and *Richardson v. Marsh* and recommended the District Court deny Greene’s petition for *habeas* relief. The District Court adopted this recommendation and the Third Circuit affirmed.

**Question Presented:** For purposes of adjudicating a state prisoner’s petition for federal *habeas* relief, what is the temporal cutoff for whether a decision from this Court qualifies as “clearly established Federal law” under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996?
“clearly established Federal law” for purposes of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) standard of review, set forth in 28 U.S.C. § 2254(d)(1). Based on the statute’s text and Supreme Court precedent, we now hold that “clearly established Federal law” should be determined as of the date of the relevant state-court decision. Because the Supreme Court decision that Greene wishes to rely upon in his habeas petition, Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), had not yet been decided at the time of the relevant state-court decision, he cannot show that his state-court proceedings resulted in an unreasonable application of “clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Thus, we will affirm the judgment of the District Court denying Greene’s habeas petition.

I.

The Crime

In early December of 1993, three or four men robbed a small family owned grocery store in North Philadelphia, and its owner, Francisco Azcena, died after being shot at point-blank range.

The Investigation

[Investigators collected conflicting statements from Greene’s codefendants that identified Greene and the other codefendants as taking part in the crime.]

The Trial

Greene filed a pretrial motion seeking severance on several grounds. In that motion, he argued, inter alia, that a joint trial with his codefendants would be prejudicial because of the incriminating statements they had made to authorities during a pretrial hearing, Greene urged the trial court, the Court of Common Pleas of Philadelphia, to sever the trials because the statements of some of his non-testifying codefendants implicated him and identified him as the person who carried the cash register out of the grocery store. The trial court, recognize[ed] that the statements might be inadmissible at a joint trial, but also not[ed] that redaction might resolve any problem of prejudice[.]

... The Court [determined] that “it seems to me that the fair way to redact these [statements] is to refer to three different people.” Greene’s counsel responded: “As long as I would be allowed to argue in my closing speech that you heard what you heard and you heard that there were different people, then I would have no problem with [it].” The prosecutor offered to redact the statements so that “not one specific person carries out the cash register.” Greene’s counsel agreed that, under Bruton, such a redaction would remove any prejudice from the statements.

* * *

The Commonwealth also called Detectives Gross and Walsh to testify about the statements they obtained from Finney and Womack. Neither Greene nor his codefendants objected to the reading of those statements in redacted form. Detective Gross read Finney’s redacted statement, which substituted the nicknames or proper names of Finney’s codefendants with the phrases “this guy,” “other guys,” and “two guys.” The redacted statement also used the neutral pronouns “we” or “someone” in certain instances.
... During Detective Gross’s reading of the redacted statement, the trial court instructed the jury that Finney’s statement could only be considered as evidence against him and not as evidence against any other defendant.

Detective Walsh, during his testimony, read a redacted version of Womack’s statement.

Although the redacted statement utilized neutral references such as “guy,” “another guy,” “someone,” “someone else,” “one,” and “others,” it replaced the names of some of the codefendants with the word “blank” on three occasions. The trial court did not give a limiting instruction following the reading of Womack’s redacted statement, and neither Greene nor any of his codefendants requested such an instruction.

After closing arguments, the trial court issued a limiting instruction directing the jurors not to consider either redacted statement as evidence against any defendant other than the declarant. The jury found Greene guilty of second degree murder, three counts of robbery, and one count of conspiracy. The trial court sentenced him to life imprisonment.

Subsequent Procedural History

Greene filed a direct appeal with the Pennsylvania Superior Court. Citing Bruton, Greene argued that his trial should have been severed from that of his codefendants because the statements implicating him “were not suitable for redaction.” On December 16, 1997, the Pennsylvania Superior Court affirmed the judgment against Greene, addressing his Bruton claim on the merits. The Court observed that the statements that were admitted into evidence “were redacted to remove any reference to the other defendants in the case” and “[t]he trial court instructed the jury on more than one occasion that such statements could only be considered as evidence against the defendants who made them.” In light of these observations, the Pennsylvania Superior Court concluded that Bruton was not violated and that Greene was not deprived of his right to confrontation.

Greene filed a timely petition for allowance of appeal with the Pennsylvania Supreme Court. His petition argued, inter alia, that he had been deprived of his rights under the Confrontation Clause by the introduction of Womack’s and Finney’s statements. As support for his position, Greene again cited Bruton. While Greene’s petition for allowance of appeal was pending with the Pennsylvania Supreme Court, the United States Supreme Court issued its decision in Gray. In Gray, the Supreme Court stated that “considered as a class, redactions that replace a proper name with an obvious blank, the word ‘delete,’ a symbol, or similarly notify the jury that a name has been deleted are similar enough to Bruton’s unredacted confessions as to warrant the same legal results.” 523 U.S. at 195, 118 S.Ct. 1151. Thereafter, the Pennsylvania Supreme Court granted Greene’s petition for allocatur “limited to the issue of whether the common pleas court erred by denying the motion for severance thereby resulting in the violation of [Greene]’s Sixth Amendment right of confrontation upon the admission of statements given by his nontestifying codefendants.” Commonwealth v. Trice, 552 Pa. 201, 713 A.2d 1144 (1998). After granting the petition for allocatur, however, the Pennsylvania Supreme Court dismissed Greene’s appeal as improvidently granted. Commonwealth v. Trice, 556 Pa. 265, 727 A.2d 1113 (1999). Greene’s conviction became final ninety days later, on July 28,
1999, when the time period for filing a petition for certiorari to the United States Supreme Court expired.

In early August of 1999, Greene sought relief from his conviction based on Pennsylvania’s Post Conviction Relief Act ("PCRA"). In his PCRA petition, Greene argued that the trial court abused its discretion in denying the severance motion, and cited, *inter alia*, the prosecutor’s summation, which allegedly improperly informed the jury that Finney’s statement corroborated that the others on trial were implicated in the commission of the crime. The PCRA petition did not assert a Confrontation Clause claim as it failed to reference the redacted statements or to cite the Supreme Court’s decisions in *Bruton*, *Marsh*, or *Gray*. The trial court dismissed Greene’s PCRA petition as frivolous.

Greene, acting pro se, appealed the denial of his PCRA petition to the Pennsylvania Superior Court, asserting that the trial court erred by refusing to grant a severance. His argument cited only Pennsylvania authority regarding motions to sever multiple criminal charges. He did not refer to the Confrontation Clause, *Bruton*, *Marsh* or *Gray*. On December 31, 2003, the Pennsylvania Superior Court affirmed Greene’s convictions on direct appeal, asserting that the trial court erred by refusing to grant a severance. His argument cited only Pennsylvania authority regarding motions to sever multiple criminal charges. He did not refer to the Confrontation Clause, *Bruton*, *Marsh* or *Gray*. On December 31, 2003, the Pennsylvania Superior Court affirmed Greene’s convictions on direct appeal, asserting that the trial court erred by refusing to grant a severance.

The timely § 2254 petition followed. In his petition, Greene asserted, *inter alia*, that his trial should have been severed “due to antagonistic defenses, due to the fact a codefendant was subjected to the death penalty even though petitioner was not, and particularly due to the fact that effective redaction of the codefendant’s [sic] statements, though attempted, was polluted by gross prosecutorial misconduct.” In a comprehensive report, the Magistrate Judge to whom the petition had been referred recommended that Greene’s petition be dismissed, but that a certificate of appealability be granted on the Confrontation Clause claim arising out of the introduction of Womack’s and Finney’s redacted statements at trial.

The Magistrate Judge struggled with whether to determine the “clearly established Federal law” under § 2254(d)(1) as of the date of the relevant state-court decision, as instructed by Justice O’Connor in her portion of the majority decision in *Williams v. Taylor*, 529 U.S. 362, 403-412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), or by the date Greene’s conviction became final, as instructed by Justice Stevens in his portion of the majority decision in *Williams*, *id.* at 390, 120 S.Ct. 1495. This issue was significant because it determined whether “clearly established Federal law” for purposes of Greene’s § 2254 petition included the Supreme Court’s decision in *Gray*. If the cutoff date was the date of the relevant state-court decision, *i.e.*, the Pennsylvania Superior Court’s December 16, 1997 decision affirming Greene’s convictions on direct appeal, that date preceded the Supreme Court’s decision in *Gray*, and *Gray would not* be part of the “clearly established Federal law” applicable to this habeas petition. But if the date Greene’s convictions became final, July 28, 1999, was the pertinent cutoff date, *Gray*, which was issued more than a year earlier on March 9, 1998, *would be* “clearly established Federal law.”

The Magistrate Judge ultimately determined that the controlling date for ascertaining the “clearly established Federal law” for Greene’s habeas petition was the date of the
relevant state-court decision. Accordingly, the Magistrate Judge applied the Supreme Court law existing at the time of the Pennsylvania Superior Court’s December 16, 1997 decision, *Bruton* and *Marsh*, to determine whether Greene’s § 2254 petition merited relief. He concluded that the Pennsylvania Superior Court did not unreasonably apply *Bruton* and *Marsh* in concluding that the redacted statements did not violate the Confrontation Clause and recommended that the District Court deny the § 2254 petition.

The Commonwealth objected to the Magistrate Judge’s report, arguing that Greene had not procedurally exhausted his Confrontation Clause claim. The District Court overruled the Commonwealth’s objections, noting that Greene presented a general claim regarding the redacted confessions and relied upon relevant Supreme Court authority, *Bruton* and *Marsh*. The District Court adopted the Magistrate Judge’s report and recommendation. The Court denied the petition, but also granted a certificate of appealability limited to Greene’s Confrontation Clause claim.

II.

[Fair presentation of Confrontation Clause claim.]

III.

Having determined that Greene fairly presented his Confrontation Clause claim in the Pennsylvania state courts, we turn to a vexing issue that has, for the most part, evaded analytical discussion by the Supreme Court and the Courts of Appeals. That is, whether “clearly established Federal law” under 28 U.S.C. § 2254(d)(1) is determined based on the “time of the relevant state-court decision,” *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 (O’Connor, J., for the Court), the “time [the] state-court conviction became final,” *id.* at 390, 120 S.Ct. 1495 (Stevens, J., for the Court), or some combination thereof, e.g., *Horn v. Banks*, 536 U.S. 266, 272, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002) (per curiam) (holding that “in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989),] analysis when the issue is properly raised by the state”). The Supreme Court, until recently, appeared to have settled on the date of the relevant state-court decision. But the use of the date the petitioner’s conviction became final has refused to quietly exit the stage. In recent months, the Supreme Court has noted the “uncertainty” surrounding the meaning of “clearly established Federal law” for the purposes of § 2254(d)(1).

After careful consideration of the divergent approaches to determining what constitutes “clearly established Federal law” under § 2254(d)(1), we now hold that the date of the relevant state-court decision is the controlling date. After surveying the questions that arise from the Supreme Court’s *Williams* decision, and considering the statutory text and post-*Williams* Supreme Court precedent, our view is that using the date of the relevant state-court decision to determine “clearly established Federal law” is the most logical approach to applying § 2254(d)(1).

A.

It is understandable that confusion surrounds what constitutes “clearly established Federal law.” In discussing the meaning of the AEDPA amendments, the Supreme Court has held that the “statutory phrase [‘clearly
established Federal law’] refer[red] to the holdings, as opposed to the dicta, of [its] decisions as of the time of the relevant state-court decision.” It has also held that all Supreme Court jurisprudence that would “qualify as an old rule under [its] Teague jurisprudence w[ould] constitute ‘clearly established Federal law . . . ’ under § 2254(d)(1).”

These statements from Justice O’Connor present the first area of confusion in Williams. The most logical meaning for the term “old rule,” a term that lacks any meaningful discussion post-Williams, is any rule which is not “new” under Teague. If that is the case, then an “old rule” is any rule that was “dictated by the governing precedent existing at the time when [the petitioner’s] conviction became final[.]” In that event, the inclusion of old rules under Teague as “clearly established Federal law” would include Supreme Court decisions issued after the relevant state-court decision but before the petitioner’s conviction became final. Such an outcome, in our view, contradicts Justice O’Connor’s initial declaration that “clearly established Federal law” should be determined based on the date of the relevant state-court decision.

To further complicate Williams, the Supreme Court also held that the “threshold question under AEDPA is whether [a petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final.” Williams, 529 U.S. at 390, 120 S.Ct. 1495 (Stevens, J., for the Court) (emphasis added). Thus, the majority opinions of the Court, on their faces, offered differing interpretations of the “clearly established Federal law” language.

Supreme Court precedent after Williams has also raised questions. At least some post-Williams authority suggests that the Teague test and § 2254(d)(1) are distinct inquiries. The instances where both tests must be met, however, are unclear. More importantly, it is also unclear whether the distinct nature of the two inquiries has any impact on how we approach the meaning of “clearly established Federal law” for the purposes of § 2254(d)(1).

In sum, we have (1) Justice O’Connor’s majority opinion in Williams, which seems to contradict itself by stating that the date of the relevant state-court decision is the operative date for determining “clearly established Federal law” while simultaneously stating that Supreme Court jurisprudence that would qualify as “old rules” under Teague (which relies on the date the petitioner’s conviction became final) is also “clearly established Federal law,” (2) Justice Stevens’s majority opinion in Williams, which contradicts Justice O’Connor’s directive that we should look to the date of the relevant state-court decision, and (3) post-Williams Supreme Court authority suggesting that Teague and § 2254(d)(1) are distinct inquiries subject to independent analysis under certain circumstances.

While many courts have managed to avoid confronting these issues, this case presents us with the inescapable obligation to decide the cutoff date for determining “clearly established Federal law.” Greene’s petition turns on whether he may invoke Gray; without that decision he cannot obtain relief. See infra Section IV. Gray was decided on March 9, 1998. Thus, using the date of the relevant state-court decision, the Pennsylvania Superior Court’s December 16, 1997 decision, Gray would not be “clearly established Federal law.” But using the date Greene’s conviction became final, July 28, 1999, Gray would be “clearly established Federal law.” Indeed, Greene’s
case is the perfect storm of facts for resolving the issue of which date—the date of the relevant state-court decision or the date the state-court conviction became final—should be used for determining “clearly established Federal law” for the purposes of § 2254(d)(1).

B.

The text of § 2254(d)(1) supports using the date of the relevant state-court decision for determining “clearly established Federal law.” Section 2254(d)(1) is concerned with “decision[s]” that were “contrary to” or “unreasonable application[s]” of “clearly established Federal law”:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

Id.

The statute indicates that a “decision” results from a state court’s adjudication “on the merits” of a claim. In other words, the decision occurs when the state court has acted on the substance of a petitioner’s claim. Thus, it is the state court’s resolution of the petitioner’s claim that must be “contrary to” or an “unreasonable application” of existing Federal law to justify granting habeas relief.

Given that AEDPA is concerned with the review of the state court’s decision on the merits of the petitioner’s claim, the statute, read in the most straightforward fashion, requires that the relevant Federal law be “clearly established” at the time of that state-court decision. Reading the language plainly, “clearly established” contemplates that the law or precedent existed at the time of the state court’s substantive resolution of the petitioner’s claim. A state court cannot unreasonably apply a Supreme Court decision that did not exist at the time of its decision. The same is true for the “contrary to” prong of the statute.

C.

Supreme Court decisions after Williams further bolster our conclusion. In Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003), the Supreme Court stated unequivocally that “‘clearly established Federal Law’ under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.” . . .

The date the conviction became final, on the other hand, has not gained much traction in the Supreme Court. Aside from stating that Teague and § 2254(d)(1) are distinct inquiries, and that in certain circumstances both Teague and § 2254(d)(1) must be satisfied, the Supreme Court has not suggested that the date the conviction became final has any import in determining “clearly established Federal law” for the purposes of § 2254(d)(1). In fact, it appears that Justice Stevens’s majority opinion language from Williams stating that the “threshold question” is whether the petitioner seeks to apply a rule that was clearly established at the time his state-court conviction became final, has been supplanted by Lockyer, where the Supreme
Court agreed that the "threshold matter" was to decide what constituted "clearly established Federal law," but then used the relevant state-court decision date to determine that law. The most telling observation regarding the use of the date the conviction became final is that the strongest authorities we have found for that approach are the recent Supreme Court opinions expressing uncertainty on which date is appropriate. Mere uncertainty cannot counterbalance the numerous Supreme Court decisions that have unequivocally, albeit without analysis, taken the other approach. As an inferior federal court, we are not free to ignore the numerosity of these pronouncements.

Moreover, it appears that Justice Stevens's primary concern with Justice O'Connor's formulation of the "clearly established Federal law" inquiry is her view that the phrase "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions[.]") In Carey, Justice Stevens explained that he took issue with Justice O'Connor's formulation because it discouraged state courts from seeking guidance from the Supreme Court's decision on the grounds that such guidance was dicta:

Virtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases. It is quite wrong to invite state court judges to discount the importance of such guidance on the ground that it may not have been strictly necessary as an explanation of the Court's specific holding in the case. The text of [AEDPA] itself provides sufficient obstacles to obtaining habeas relief without placing a judicial thumb on the warden's side of the scales.

Carey, 549 U.S. at 79, 127 S.Ct. 649 (Stevens, J., concurring) (citations omitted).

This concern exists independent of the date upon which "clearly established Federal law" is determined and is not implicated in the issue we decide today. The decisions preceding Gray-Bruton and Marsh-explicitly refused to provide guidance on whether the teachings of Bruton applied to redactions like the ones made in this case. See infra Section IV.

In conclusion, we hold that the cutoff date for determining "clearly established Federal law" for purposes of § 2254(d)(1) is the date of the relevant state-court decision. Both the natural reading of the statutory text and post-Williams Supreme Court precedent support this conclusion. As such, Gray was not "clearly established Federal law" for the purposes of Greene's habeas petition.

D.

Before applying our holding to the facts in this case, a brief segue is needed to address our dissenting colleague's spirited defense of the use of the date the petitioner's conviction became final to determine "clearly established Federal law." While we recognize that the issue confronted today is one over which reasonable jurists may disagree, there are some notable deficiencies in the dissent's proposed adjudication of this case. The dissent (1) would sub silentio codify Teague, including its retroactivity exceptions, as part of § 2254 without any reasoned justification for doing so, (2) erroneously asserts that Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), applies to cases on collateral review, and (3) incorrectly asserts that our
approach to § 2254(d)(1) creates a “twilight zone,” preventing a petitioner from relying on Supreme Court decisions issued after the date of his last relevant state-court decision, but before his conviction becomes final.

1.

As already explained in Section III(A), there is direct Supreme Court precedent supporting the view that “whatever would qualify as an old rule under [the Supreme Court’s] Teague jurisprudence will constitute ‘clearly established Federal law, . . . ’ under § 2254(d)(1).” But the dissent appears to go one step further. It alludes, at times, to the retroactive application of new rules that fall within the Teague exceptions for retroactivity as “clearly established Federal law” for purposes of § 2254.

As a preliminary observation, this case does not raise a Teague new rules retroactivity issue. Under Teague, Gray would be an old rule since it was issued before Greene’s conviction became final. Thus, comments on the supposed benefits of Teague’s new rule retroactivity exceptions would be dicta even if we were to take the dissent’s approach. That being said, we caution that the use of Teague’s new rule retroactivity exceptions for purposes of § 2254, while not implausible, has yet to gain support from the Supreme Court. In fact, in Horn, the Supreme Court explained that the “AEDPA and Teague inquiries are distinct.” As distinct inquiries, it is unclear whether Teague’s new rule retroactivity exceptions should be incorporated into § 2254 even if we were to adopt the use of the date the petitioner’s conviction became final for determining “clearly established Federal law.”

Indeed, the Horn decision recognized that satisfaction of § 2254(d) is the minimum required for a petitioner to receive habeas relief:

While it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. § 2254(d) (“an application ... shall not be granted ... unless “ the AEDPA standard of review is satisfied (emphasis added)), none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard, or that AEDPA relieves courts from the responsibility of addressing properly raised Teague arguments.

Id.

Thus, under Horn, if Teague is in play at all, it is as an additional concern on top of AEDPA’s requirements codified in § 2254(d). As such, it seems a leap to assume that new rules that are deemed retroactive under Teague would be automatically deemed “clearly established Federal law” for purposes of § 2254(d)(1).

2.

The dissent’s assertion that Griffith applies on collateral review cannot be reconciled with that decision’s holding. In Griffith, the Supreme Court considered whether a certain decision “applie[d] retroactively to a federal conviction then pending on direct review.” It held that a newly declared rule “for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]” The principles animating Griffith were the ideas that “failure to apply a newly declared constitutional rule to criminal cases
pending on direct review violates basic norms of constitutional adjudication,” and that courts should treat like cases alike,

The dissent, citing Whorton, seeks to take Griffith, a decision animated by constitutional principles pertaining to treating like cases alike on direct review, and apply it to collateral review. It sees Whorton as “explicitly” recognizing that Griffith applies to collateral review. Neither Whorton nor subsequent Supreme Court precedent support this view.

The language from Whorton upon which the dissent relies is far from explicit. The sole citation of Griffith was for the proposition that under the “Teague framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review.” Before assuming that the Supreme Court sought, without any additional discussion, to extend Griffith to collateral review, as the dissent suggests, a less novel understanding of the Whorton Court’s reliance on Griffith should be considered. Namely, that Griffith was probably cited as general support for the propositions that “an old rule applies . . . on direct . . . review [and that] a new rule is generally applicable only to cases that are still on direct review.” The sentence following the Griffith citation in the Whorton decision further confirms this understanding by explaining how new rules apply in collateral proceedings through citation to Teague, not Griffith.

Subsequent Supreme Court precedent also belies the dissent’s view that Griffith applies on collateral review. Approximately a year after Whorton, the Supreme Court, in Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008), stated that Griffith “defined the scope of constitutional violations that would be remedied on direct appeal.” It did so in the context of determining whether “Teague constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion.” Rather than holding that Teague applied to the state courts, like Griffith, 479 U.S. at 328, 107 S.Ct. 708, the Supreme Court reached the opposite conclusion. It held that the Teague decision did not control a state court’s decisions on retroactivity. According to the Danforth Court, the Teague decision “limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under Teague.” The Supreme Court emphasized that Teague, unlike Griffith, was based on the Court’s “power to interpret the federal habeas statute.” Because “Teague is based on statutory authority that extends only to federal courts applying a federal statute; it cannot be read as imposing a binding obligation on state courts.” While Griffith is concerned with affording individuals on direct review their right to adjudication in accord with the Constitution, Teague is derived from language in the habeas statute permitting disposal of habeas petitions “as law and justice require[.]” Because their sources of authority are different-Griuffth, the Constitution, and Teague, 28 U.S.C. § 2243-and their motivations are different, Griffith cannot be imported wholesale into Teague without discussion. In short, we do not dispute that Griffith may somehow inform the Supreme Court’s approach in applying Teague. We also do not dispute that a § 2254 petition may invoke Griffith where a petitioner was denied the application of relevant Supreme Court precedent on direct review. But Griffith,
independently, does not control retroactivity for cases on collateral review.

3.

The dissent also asserts that our approach creates a twilight zone for any petitioner who seeks to invoke Supreme Court decisions that fall between the date of the last relevant state-court decision and the date the petitioner’s conviction became final. This assertion is incorrect. Our holding does not create a categorical bar to a petitioner’s reliance on Supreme Court decisions issued during any twilight zone period. Instead, we set forth a simple rule: the universe of “clearly established Federal law” that may be applied to a particular petitioner’s § 2254 appeal is tied to the date of his last relevant state-court decision.

In this case, it was Greene’s decision not to raise the Confrontation Clause claim in his PCRA petition that established December 16, 1997, as the date of the last relevant state-court decision on the merits. This, in turn, shrunk the universe of “clearly established Federal law” available to him for his § 2254 petition, relative to what that universe would have been had he pursued the Confrontation Clause claim at the PCRA stage and obtained a later, post-Gray state-court decision on the merits. It is unfortunate for Greene that the body of “clearly established Federal law” as of December 16, 1997, did not include the Gray decision. Yet this is an outcome he could easily have avoided by raising the Confrontation Clause claim in his PCRA petition. Doing so would have pushed the date of the last relevant state-court decision on the merits forward, thereby expanding the universe of “clearly established Federal law” to include Gray.

Using the date of the last relevant state-court decision to determine “clearly established Federal law” gives defendants incentive to pursue all colorable claims based on “Federal law” as far as possible in the state courts because doing so will give them the best chance of success in federal habeas proceedings, not to mention the underlying state proceedings. This is a salutary effect that serves Congress’s goals in passing AEDPA.

IV.

[The Court discussed and applied Bruton and Marsh holding they were reasonably applied by the state courts.]

V.

This case presents a vexing conundrum that cannot, no matter how one views the facts or law, be avoided. While we cannot predict with absolute certainty what date the Supreme Court would use to determine “clearly established Federal law” for purposes of § 2254(d)(1), our decision today represents a careful consideration of the pertinent, conflicting authorities, and we believe that we have reached the best conclusion given the guidance we have to date. Ultimately, only the Supreme Court can resolve such uncertainty as exists. For now, we hold that “clearly established Federal law” for purposes of § 2254(d)(1) should be determined as of the date of the relevant state-court decision. In this case, because the Pennsylvania Superior Court’s December 16, 1997 decision did not unreasonably apply the “clearly established Federal law” that existed at that time, Bruton and Marsh, we will affirm the judgment of the District Court.

AMBRO, Circuit Judge, concurring in part and dissenting in part.
Although I agree with my colleagues that Greene’s claim is not procedurally defaulted and join Part II of the majority opinion in full, I respectfully disagree with their determination of the controlling date for “clearly established Federal law” under 28 U.S.C. § 2254(d)(1). As my colleagues recognize, the authority on this question is conflicting and, save for a First Circuit Court opinion, unreasoned. But choosing the date of the relevant state-court decision, as our Court does today, leaves a twilight zone between the cutoff set by the majority here and the retroactivity analysis of the Supreme Court’s decisions in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality). The consequence of the majority’s opinion today is that a criminal defendant who is denied the right under *Griffith* to apply a new constitutional rule to his or her case on direct appeal is left without later recourse to federal habeas review to correct that error.

I. Background

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II. Analysis

This is not a situation where Greene is seeking to take belated advantage of a rule to which he is not entitled. He is asking us to apply a case that should have been applied on direct review. Under the Supreme Court’s *Griffith* jurisprudence, he was entitled to the benefit of *Gray*. It is only because the Pennsylvania state courts failed to apply it to his case that we are evaluating it in the first instance on habeas review.

My analysis differs from that of the majority. In a nutshell, subsection 2254(d)(1) does not choose any cutoff date.

Thus, we are left with the retroactivity jurisprudence of *Griffith* and *Teague*. Because *Gray* was decided prior to the date Greene’s conviction became final, I believe *Griffith* requires its application to this case. I would therefore reverse the judgment of the District Court and remand for consideration of *Gray*.

A. As noted, the question of whether § 2254(d)(1) sets a cutoff date is unresolved. I agree with the majority that “clearly established Federal law” did not have any special meaning prior to AEDPA and the text of 28 U.S.C. § 2254(d)(1). See Maj. Op. at 98 n. 10. Nor does the text of 28 U.S.C. § 2254(d)(1) have an express time cutoff for “clearly established Federal law.” My colleagues read the statute implicitly to require that any Supreme Court decision handed down after the relevant state-court decision on the merits is to be ignored for purposes of habeas relief. I disagree that “[r]ead[ing] the language plainly,” or in a “straightforward” way, as my colleagues suggest, requires that the Supreme Court decision exist at the time of the state court’s substantive resolution. If § 2254(d)(1) were so plain or straightforward, why does the Supreme Court say it is uncertain? And why are my colleagues of the view that “there is no clear answer to the issue we face”? Maj. Op. at 96 n. 7. In the face of such uncertainty, I find it difficult to conclude that there is a “natural reading” of § 2254(d)(1) dictating a cutoff date.

A primary reason for the Supreme Court’s uncertainty as to whether the text of § 2254(d)(1) provides a clear cutoff date is its own decision in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Inadvertently (no doubt), the Court had two different majorities identifying two different cutoffs. Justice Stevens, writing for six members of the Court in Part III of his
opinion, stated that the applicable date for purposes of determining whether federal law is established is “the time [the habeas petitioner's] state-court conviction became final.” Justice O'Connor, writing for five members of the Court in Part II of her opinion, stated that “clearly established Federal law... refers to the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.” Neither Justice Stevens nor Justice O'Connor appears to have chosen a cutoff based on the text of the statute, and they did not acknowledge the discrepancy in their respective opinions. Indeed, in Williams the choice of cutoff would not have mattered because the case focused on Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a case decided prior to both the 1985 crime and the 1986 conviction in Williams, making the discussion of cutoff dicta because under both cutoffs Strickland was undoubtedly “clearly established Federal law.”

Our task is to reconcile the conflicting majorities in Williams regarding the cutoff for “clearly established Federal law” under AEDPA while maintaining consistency with the Court’s controlling decisions in Griffith and Teague. Recently, the Supreme Court recognized the “uncertainty” in temporal cutoff for “clearly established Federal law,” and declined to resolve it at that time.

Recognizing the Court's statement in Spisak as the “most telling observation regarding the use of the date the conviction became final,” my colleagues dismiss it in a single sentence as “mere uncertainty [that] cannot counterbalance” the cases that select the date of the relevant state-court decision. Maj. Op. at 99. Moreover, they do so even though we agree that Supreme Court has never conducted a thorough analysis of the “clearly established” cutoff for AEDPA. Id. at 96-97. Though the Supreme Court has used the relevant state-court decision as the temporal cutoff in cases after Williams, I do not find this dispositive. Like our own checkered jurisprudence, it is not clear from the Supreme Court's cases whether it recognized these divergent approaches inasmuch as it was not required in those cases to resolve whether the cutoff date was the relevant state-court decision date or the date the conviction became final.

If, as the majority suggests, the clear answer is the date of the relevant state-court decision, the Spisak Court would not have noted the uncertainty, nor would it have assumed the date of finality. The Court is not in the business of offering advisory opinions, and if it were clear that its prior cases had selected the date of the relevant state-court decision, it would not have issued the opinion in Spisak. It would have held instead that, because Mills was decided after the final state-court decision on the merits, AEDPA did not permit consideration of the case. It would have stopped its analysis there instead of going on at great length to evaluate the Mills claim on the merits. Thus, post-Williams Supreme Court precedent offers little to clarify the temporal cutoff for “clearly established Federal law” under AEDPA.

B. The Supreme Court has not abandoned its retroactivity jurisprudence post-AEDPA.

AEDPA’s concern over whether a state court ruling in a criminal case was contrary to, or an unreasonable application of, “clearly established Federal law” stems from the desire to avoid disturbing final criminal judgments through collateral review. In particular, the use of the past tense (“established”) means that AEDPA is concerned with the law that should have
been applied at the time of the state court proceedings. Where I diverge from my colleagues is how we determine what that body of law is.

Even though at first it seems conceptually difficult to say that a court unreasonably applied Supreme Court precedent that did not yet exist, retroactivity analysis becomes the tool for deciding. When a Supreme Court holding is retroactively applied to a prior proceeding, it is as if it existed at the time of that prior proceeding. The majority's view ignores controlling Supreme Court precedent that allows, in certain circumstances, for the retroactive application of constitutional rules to criminal cases even though they are announced after a state court ruling on the merits.

Paramount to understanding the Supreme Court's retroactivity jurisprudence is discerning its decisions in *Griffith* and *Teague*. They provide a distinction between "old rules" and "new rules," terms that have a clear meaning only when used in relation to a given criminal conviction. Unhelpfully, the Supreme Court has used "new rule" to mean different things in the *Griffith* and *Teague* context.

A "new rule" for *Griffith* is one that is announced after a state court ruling on the merits. A "new rule" for *Teague* is one that is announced after a conviction becomes final. This means that in the application of *Gray* to Greene's conviction, *Gray* is a "new rule" for *Griffith* purposes but is an "old rule" for *Teague* purposes. We are principally concerned with the *Teague* distinction between "old rules" and "new rules."...

C. The Supreme Court has a developed jurisprudence governing the application to cases on collateral review of its cases decided pre-finality and those decided post-finality.

The retroactive application of newly announced constitutional rules in criminal cases has long troubled the Supreme Court. As noted, retroactivity takes that rule and transports it back in time to a proceeding that pre-dated the announcement of the rule, treating the rule as if it existed at the time of the prior proceeding. Because this fiction has the potential to upset settled proceedings, especially in the criminal context, over the years the Court came to adopt a bright line that splits the application of these rules into two domains of review.

Whether a new rule applies retroactively depends on whether a criminal conviction is on direct review or collateral review at the time of the Supreme Court decision announcing the new rule. If the conviction is on direct review when the new rule is announced, *Griffith* allows the retroactive application of the new rule to all criminal cases pending on direct review as a "basic norm [ ] of constitutional adjudication." If the conviction is on collateral review when the new rule is announced (i.e., convictions that became final before the new rule is announced), *Teague* restricts the application of that new rule to narrow exceptions discussed below. This bright-line distinction was made due to the differing considerations between the two domains of review.

1. *Griffith*

The *Griffith* Court held that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional
adjudication.” It was the very “integrity of judicial review” that required application of a new constitutional rule “to all similar cases pending on direct review.” Two principles guided this decision. First, the Court recognized that

[a]s a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from “[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.”

Id. (citation omitted).

Second, the Court recognized that selective application of new rules violates the principle of treating similarly situated defendants the same. As we pointed out in United States v. Johnson, [457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)] the problem with not applying new rules to cases pending on direct review is “the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary” of a new rule. Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: “The time for toleration has come to an end.”

Id. (citations omitted) (emphasis in original).

The Court therefore held “that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” I note that “pending on direct review” is slightly different from “not yet final.” A case that has already exhausted the direct appeal as of right resulting in a state-court decision on the merits, but is not yet final, is still within the purview of Griffith. Finality is the key date.

The Griffith Court “instruct[ed] the lower courts,” state and federal, “to apply the new rule retroactively to cases not yet final.” It did not merely advise those courts to consider applying the rule subject to their discretion, but mandated application of the new rule. It was only through this mandate that “actual inequity “ between “many similarly situated defendants” would be avoided.

2. Teague

In Teague, the Supreme Court dealt with the other side of the retroactivity question. Collateral attacks such as habeas corpus are not meant to be a substitute for direct review, and the Court has recognized an interest in leaving concluded litigation in a state of repose. Quoting the second Justice Harlan, the Court noted that it was “‘sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas ] cases on the basis of intervening changes in constitutional interpretation.’” The Court identified only two exceptions to the general prohibition against the retroactive application of new post-finality rules to
cases on collateral review: (1) new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; and (2) new "watershed rules of criminal procedure ... [that] "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction[]."

In deciding Griffith and Teague, the Supreme Court has carefully set out the different concerns in the pre-finality (direct appeal) and post-finality (collateral attack) application of new rules. In the context of retroactivity for federal habeas review, the Teague Court focused on the distinction between intermediate judgments subject to appeal and final judgments subject only to collateral attack:

Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none."

Id. at 309, 109 S.Ct. 1060 (emphases in original) (citation omitted).

With this view of finality, the Court held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," using finality, not the date of the relevant state-court decision, as the inflection point between Griffith and Teague.

D. Section 2254(d)(1) does not discard Griffith and Teague.

In a unanimous post-AEDPA and post-Williams decision, Whorton v. Bockting, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007), the Supreme Court held that Griffith and Teague laid out the framework to be used in determining whether a rule announced in one of [the Court's] opinions should be applied retroactively to judgments in criminal cases that are already final on direct review. Under the Teague framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. See Griffith, 479 U.S. 314 [107 S.Ct. 708]. A new rule applies retroactively in a collateral proceeding only if [the Teague requirements are met].

549 U.S. at 416, 127 S.Ct. 1173.

Though Whorton dealt with an application of Teague, it explicitly recognized that Griffith requires that "old rules" be applied both on direct and collateral review. To me this means that the Whorton Court unanimously endorsed Griffith and the idea that a Supreme Court decision handed down after the last state court ruling on the merits, but before finality, is an old rule that is applicable even under AEDPA and even if it is not a "watershed" ruling or does not place conduct beyond the power of the state to proscribe.
Given the Court's retroactivity concerns, I believe the better reading of § 2254(d)(1) is that it does not set a definitive cutoff date for "clearly established Federal law." It is the Supreme Court's retroactivity jurisprudence of Griffith or Teague that determines applicability on collateral review, not AEDPA.

My colleagues' reading of § 2254(d)(1) conflicts with Whorton. They refuse to include all "old rules" as "clearly established Federal law." This reading contradicts the unanimous holding in Williams that all "old rules" for Teague purposes are "clearly established Federal law." My colleagues recognize this contradiction, but they choose to ignore Griffith and Teague and adopt Justice O'Connor's initial unreasoned declaration (that chose the date of the relevant state-court decision and cited no case) and not her later reasoned one (that referred to "old rules" under Teague and cited Supreme Court precedent). It is unclear to me why we would choose her statement of the law (a dictum, no less) in conflict with the Supreme Court's decisions in Griffith and Teague instead of her statement of the law in harmony with those Supreme Court holdings and Whorton (and that actually invokes the controlling Supreme Court precedent of Teague).

E. The majority's cutoff creates a twilight zone

If the relevant cutoff date is the date of the last state-court decision on the merits, we would create a twilight zone for criminal defendants. Consider the possible times relative to a state court conviction when a decision by the Supreme Court is announced: (1) prior to the last state-court decision on the merits; (2) between the last state-court decision on the merits and finality; and (3) after the conviction is final. If it were decided in the first period (prior to the last state-court decision on the merits), a state court would have to apply it to be consistent with Griffith. If it were decided in the third period (after finality), habeas relief would be available as a "new rule" under Teague if the decision announced a "watershed" rule or placed certain conduct beyond the power of the state to proscribe. However, if it were decided in the second period (the twilight zone between the last state-court decision on the merits and before finality), the majority's time cutoff would nonetheless consider it not to be "clearly established Federal law" and would bar habeas relief because the rule did not exist at the time of the last state-court decision on the merits. The majority reaches this conclusion even though, as discussed above, a rule announced pre-finality is an "old rule" for Teague purposes and Griffith requires its application on direct and collateral review.

So inflexible is the "plain reading" the majority adopts that even "new rules" that pass the Teague test for retroactive application would not entitle a petitioner to habeas relief. "New rules" for Teague purposes are always decided after the date of the relevant state-court decision, as they come into being after finality. Yet the majority would not consider the "new rule" to be "clearly established Federal law" because the "new rule" did not yet exist, and no relief could be granted. Such a Catch-22 reading of § 2254(d)(1) effectively disregards Griffith and Teague even as the Supreme Court has maintained that both decisions remain viable.

As discussed above, even though at first it seems conceptually difficult to say that a state court unreasonably applied Supreme Court precedent that did not yet exist, the Supreme Court's retroactivity analysis treats the precedent as if it existed at the time of
that prior state court proceeding. Under *Griffith*, Supreme Court decisions are retroactively applied to those convictions not yet final at the time of the decision. Furthermore, if the state court neglects to apply the rule retroactively to convictions not yet final, this can be still corrected after finality on collateral review. Under *Teague*, Supreme Court decisions are retroactively applicable even to convictions that were already final at the time of the decision if it announces a “watershed” rule or places certain conduct beyond the power of the state to proscribe. We know from *Whorton* that § 2254(d)(1) does not overrule *Griffith* and *Teague*, but by deeming irrelevant any case that post-dates the relevant state-court decision, the majority implicitly disregards both *Griffith* and *Teague*.

While another Circuit Court has rejected the majority’s cutoff on fears of the potential for “state court . . . subver[sion] . . . by the simple expedient of summarily affirming a lower court’s decision,” its reasoning does not depend on a distrust of the judicial integrity of state courts. A well-meaning state court system could innocently neglect to apply *Griffith* after its final decision on the merits, but before the conviction becomes final. If a state court were to ignore the mandate to apply the new rule to all cases still pending on direct appeal or not yet final, it would similarly undermine the integrity of judicial review. That would leave collateral review by *habeas corpus* as the only remedy to correct the mistake. Surely a criminal defendant is entitled to recourse if the state courts simply forget to check for new, relevant Supreme Court precedent prior to finality. This helps to avoid the situation where similarly situated defendants receive disparate treatment based on the happenstance of state court attention (or inattention).

Yet, under the majority’s selection of temporal cutoff, even that remedy would be foreclosed whenever the state courts declined to apply the rule without explanation. This would leave affected *habeas* petitioners as unfairly treated relative to other similarly situated individuals who were lucky enough to have the state courts apply the new rule.

It is not our place to second-guess the Supreme Court when it has held that: (1) Supreme Court decisions handed down prior to finality must be applied on both direct and collateral review under *Griffith*; (2) *Teague* and *Griffith* have continuing vitality after AEDPA; (3) all nine Justices in *Williams* agreed that an “old rule” under *Teague* qualifies as “clearly established Federal law”; and (4) its decisions since *Williams* have not definitively set a temporal cutoff. In the absence of an express statement to the contrary by the Supreme Court (and there is none), we are bound to apply the clearly expressed (and still controlling) jurisprudence of *Griffith* and *Teague*. The Court may wish, in the AEDPA context, to cut back on *Griffith* and *Teague*, but it, not us, possesses the power to overrule its precedent.

I would hold that the cutoff date for “clearly established Federal law” is not prescribed by 28 U.S.C. § 2254(d)(1). The retroactive application of constitutional rules to criminal cases is governed by *Griffith* and *Teague*, and I would look first to whether *Gray* was decided before or after finality to determine which rule applies. As here *Gray* was decided prior to finality, the Pennsylvania Supreme Court should have considered it in the course of fulfilling its responsibilities under *Griffith*. When it did not do so, the District Court on *habeas* review needed to correct this failure to
consider Gray. Accordingly, I would vacate its judgment and remand for application of Gray to Greene's Confrontation Clause claim. For these reasons, I respectfully dissent from all but Part II of the majority opinion.
On April 4, 2011, the Supreme Court granted only two certiorari petitions, and both are from the Supreme Court Litigation Clinic’s docket.

In . . . Greene v. Fisher, the clinic represents a state prisoner arguing that he may obtain federal habeas corpus relief based on a violation of a United States Supreme Court decision announced after the last state-court decision on the merits of his direct appeal but before that appeal became final. In other words, petitioner argues that the retroactivity regime that the Supreme Court announced in 1989 in Teague v. Lane remains good law after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Clinic law students Thomas Scott (’11), Andrew Zahn (’11), and Kathryn McCann (’12) prepared the petition under the supervision of the clinic’s co-director, Jeffrey Fisher.

The clinic will now proceed to brief both cases on the merits and to present oral argument next fall.
The Supreme Court agreed Monday to review the appeal of a man sentenced to life in prison for second-degree murder and other charges.

Its decision of the case is expected to shed light on a disputed element of habeas procedure: whether judges can consider Supreme Court decisions as "clearly established Federal law" under the Antiterrorism and Effective Death Penalty Act of 1996 if the decision was published before a state prisoner's conviction becomes final but after his last state-court decision on the merits.

In March 1998, the Supreme Court decided in Kevin D. Gray v. Maryland that prosecutors cannot use redactions to skirt a law that forbids them from using one defendant’s confession as evidence if it implicates a co-conspirator.

This case was decided while Eric Greene (aka Jarmalne Q. Trice) was appealing his conviction of second-degree murder, robbery and conspiracy. Greene had been tried alongside four co-conspirators, one of whom was facing first-degree murder charges. At trial, prosecutors read the confessions of the co-conspirators who spoke with police when they were arrested but would not be testifying in the trial.

The jury was instructed not to consider the confessions as evidence against any of the other defendants.

When Gray was decided, Greene argued that his trial had been prejudiced by the admission of his alleged co-conspirators' redacted statements. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), federal courts may grant habeas relief if a state court's consideration of a federal constitutional claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."

Greene’s conviction became final in 1999, but the last state-court decision on the merits of his case predated Gray. A magistrate judge and federal judge decided that Gray was not "clearly established Federal law" for Greene and dismissed his appeals. A divided 3rd Circuit panel affirmed in May 2010.

"As the Third Circuit itself strongly suggested in this very case, this Court should resolve this conflict of authority," Greene’s attorneys in their brief to the Supreme Court. "This basic procedural issue has already confronted numerous federal courts, and it will continue to arise in the context of an array of substantive constitutional claims. The question is outcome determinative in this case. Finally, the Third Circuit’s holding that AEDPA changed longstanding retroactivity law is incorrect."

Greene is represented by Jeffrey Fisher of the Stanford Law School Supreme Court Litigation Clinic, Isabel McGinty of Hightstown, N.J., and Goldstein, Howe & Russell of Bethesda, Md.
A split panel of the Third Circuit held that for purposes of the standard of review for a federal habeas claim set forth in AEDPA, 28 U.S.C. §2254(d)(1), "clearly established Federal law" should be determined as of the date of the relevant state-court decision subject to habeas review. Greene was convicted of second degree murder, robbery and conspiracy and sentenced to life imprisonment. On appeal to the Pennsylvania Superior Court, Green argued, inter alia, that the admission at trial of redacted statements of his co-defendants violated the Confrontation Clause. The Superior Court rejected that claim in a decision dated December 16, 1997. That decision became the final state court decision for purposes of habeas review. Greene’s conviction became final on July 28, 1999. In the meantime, however, the Supreme Court decided Gray v. Maryland, 523 U.S. 185 (1998), on March 9, 1998, which supported Greene’s claim. The issue before the Third Circuit was whether the Gray case was to be considered “clearly established Federal law.” The court held that it was not because the relevant state court decision was issued before Gray. One judge dissented opining that the relevant time frame should be the time that the conviction became final.