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## Section 6: Criminal Law

Institute of Bill of Rights Law at The College of William & Mary School of Law

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## VI. Criminal Law

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*Bond v. United States*

12-158

**Ruling Below:** *United States v. Bond*, 681 F.3d 149 (3d Cir. 2012), *cert granted*, 133 S.Ct. 978 (U.S. 2013).

Defendant was convicted by guilty plea in the United States District Court for the Eastern District of Pennsylvania of possessing and using a chemical weapon and mail theft, and she appealed. The Court of Appeals affirmed, and certiorari was granted. The Supreme Court reversed and remanded the holding that defendant lacked standing to challenge the conviction. On remand, upon considering the constitutional merits, the Third Circuit Court of Appeals held that Chemical Weapons Convention Implementation Act did not exceed Congress' power under Necessary and Proper Clause and the conviction was upheld.

**Question Presented:** (1) Whether the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state prerogatives, and is concededly unnecessary to satisfy the government's treaty obligations; and (2) whether the provisions of the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229, can be interpreted not to reach ordinary poisoning cases, which have been adequately handled by state and local authorities since the Framing, in order to avoid the difficult constitutional questions involving the scope of and continuing vitality of this Court's decision in *Missouri v. Holland*.

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**UNITED STATES of America**

v.

**Carol Anne BOND, Appellant.**

United States Court of Appeals, Third Circuit

Decided on May 3, 2012

[Excerpt; some footnotes and citations omitted.]

**JORDAN, Circuit Judge**

This case is before us on remand from the Supreme Court, which vacated our earlier judgment that Appellant Carol Anne Bond lacked standing to challenge, on Tenth

Amendment grounds, her conviction under the penal provision of the Chemical Weapons Convention Implementation Act of 1998, (the "Act"), which implements the

1993 Chemical Weapons Convention (the “Convention”). The Supreme Court determined that Bond does have standing to advance that challenge, and returned the case to us to consider her constitutional argument.

In her merits argument, Bond urges us to set aside as inapplicable the landmark decision *Missouri v. Holland*, which is sometimes cited for the proposition that the Tenth Amendment has no bearing on Congress's ability to legislate in furtherance of the Treaty Power in Article II, § 2 of the Constitution. Cognizant of the widening scope of issues taken up in international agreements, as well as the renewed vigor with which principles of federalism have been employed by the Supreme Court in scrutinizing assertions of federal authority, we agree with Bond that treaty-implementing legislation ought not, by virtue of that status alone, stand immune from scrutiny under principles of federalism. However, because the Convention is an international agreement with a subject matter that lies at the core of the Treaty Power and because *Holland* instructs that “there can be no dispute about the validity of [a] statute” that implements a valid treaty, we will affirm Bond's conviction.

## **I. Factual Background and Procedural History**

### **A. Facts**

Bond's criminal acts are detailed in our prior opinion, and in the Supreme Court's opinion, *Bond v. United States* (“*Bond II*”), so we provide only a brief recitation here. Suffice it to say that, while Bond was employed by

the chemical manufacturer Rohm and Haas, she learned that her friend Myrlinda Haynes was pregnant and that Bond's own husband was the baby's father. Bond became intent on revenge. To that end, she set about acquiring highly toxic chemicals, stealing 10-chlorophenoxarsine from her employer and purchasing potassium dichromate over the Internet. She then applied those chemicals to Haynes's mailbox, car door handles, and house doorknob. Bond's poisonous activities were eventually discovered and she was indicted on two counts of acquiring, transferring, receiving, retaining, or possessing a chemical weapon, in violation of the Act. She was, in addition, charged with two counts of theft of mail matter, in violation of 18 U.S.C. § 1708.

### **B. Procedural History**

Bond filed a motion to dismiss the counts that alleged violations of the Act. She argued that the Act was unconstitutional, both facially and as applied to her. More particularly, she said that the Act violated constitutional “fair notice” requirements, that it was inconsistent with the Convention it was meant to implement, and that it represented a breach of the Tenth Amendment's protection of state sovereignty. Emphasizing that last point, Bond contended that neither the Commerce Clause, nor the Necessary and Proper Clause in connection with the Treaty Power, could support the expansive wording of the statute, let alone her prosecution. The government's response has shifted over time, but it has been consistent in maintaining that the Act is a constitutional exercise of Congress's authority to enact treaty-implementing

legislation under the Necessary and Proper Clause. The District Court accepted that argument and denied Bond's motion to dismiss.

We affirmed on appeal, concluding that Bond lacked standing to pursue her Tenth Amendment challenge and that the Act was neither unconstitutionally vague nor unconstitutionally overbroad. The Supreme Court granted certiorari to address the question of “[w]hether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.” Ultimately, the Court concluded that Bond “does have standing to challenge the federal statute.” The case was remanded to us to address the “issue of the statute's validity” which, as the Court instructed, “turns in part on whether the law can be deemed ‘necessary and proper for carrying into Execution’ the President's Article II, § 2 Treaty Power.”

## II. Discussion

In *Missouri v. Holland*, the Supreme Court declared that, if a treaty is valid, “there can be no dispute about the validity of the statute [implementing it] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.” Implicit in that statement is the premise that principles of federalism will ordinarily impose no limitation on Congress's ability to write laws supporting treaties, because the only relevant question is whether the underlying treaty is valid. Reasoning that a reading of

*Holland* that categorically rejects federalism as a check on Congress's treaty-implementing authority is of questionable constitutional validity, Bond asks us to invalidate her conviction because the Act is unconstitutional as applied to her. She says that to hold otherwise would offend the Constitution's balance of power between state and federal authority by “intrud [ing] ... on the traditional state prerogative to punish assaults.”

### A. Constitutional Avoidance

Bond first argues, however, that we should avoid reaching the constitutional question by construing the Act not to apply to her conduct at all.

Her avoidance argument begins with the text of the Act itself, which provides, in pertinent part, that “it shall be unlawful for any person knowingly ... to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.” The term “chemical weapon” is defined broadly to include any “toxic chemical and its precursors,” and “[t]he term ‘toxic chemical’ means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.” Congress did put some limit on the sweep of the Act by excluding from the definition of “chemical weapon” any chemicals and precursors “intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.” The phrase “purpose not prohibited under this chapter,” is then

defined, in part, as “[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.” It is that “peaceful purpose” language that Bond urges us to take as our interpretive lodestar.

Specifically, Bond argues that, by looking to the “peaceful purpose” exception, we can employ a “common sense interpretation of § 229” that avoids “mak[ing] every malicious use of a household chemical”—including her own—a federal offense. All we need do is “interpret the statute ... to reach [only the kind of acts] that would violate the Convention if undertaken by a signatory state.” In other words, as Bond sees it, the modifier “peaceful” should be understood in contradistinction to “warlike” and, when so understood, the statute will not reach “conduct that no signatory state could possibly engage in—such as using chemicals in an effort to poison a romantic rival,” as Bond did. That interpretation is tempting, in light of the challenges inherent in the Act’s remarkably broad language, but, as we held the first time we had this case, Bond’s behavior “clearly constituted unlawful possession and use of a chemical weapon under § 229.”

That holding is in better keeping with the Act’s use of the term “peaceful purpose” than the construction Bond would have us give it. The ordinary meaning of “peaceful” is “untroubled by conflict, agitation, or commotion,” “of or relating to a state or time of peace,” or “devoid of violence or force,” and Bond’s “deploy [ment of] highly toxic chemicals with the intent of harming Haynes,” can hardly be characterized as

“peaceful” under that word’s commonly understood meaning. The term “peaceful,” moreover, does not appear in isolation: the Act only excludes from its ambit “peaceful purpose[s] ... related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.” Bond’s attacks on Haynes—even if non-warlike—were certainly not “related to an industrial, agricultural, research, medical, or pharmaceutical activity.” Nor can her use of chemicals be said to be a “peaceful purpose[ ] ... related to an ... other activity,” because regarding her assaultive behavior as such would improperly expand § 229F(7)(A)’s scope.

Thus, while one may well question whether Congress envisioned the Act being applied in a case like this, the language itself does cover Bond’s criminal conduct. And, given the clarity of the statute, we cannot avoid the constitutional question presented. It is not our prerogative to rewrite a statute, and we see no sound basis on which we can accept Bond’s construction of the Act without usurping Congress’s legislative role. Though we agree it would be better, if possible, to apply a limiting construction to the Act rather than consider Bond’s argument that it is unconstitutional, the statute speaks with sufficient certainty that we feel compelled to consider the hard question presented in this appeal.

## **B. Constitutionality of the Act as Applied**

Understanding whether application of the Act to Bond violates the structural limits of federalism begins with the Tenth Amendment, which Bond cites and which

provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” That text, as the Supreme Court has observed, “confirms that the power of the Federal Government is subject to limits that may ... reserve power to the States.” Thus, it encapsulates the principles of federalism upon which our nation was founded.

Endeavoring to discover what impact the Tenth Amendment may have on treaty-implementing legislation immediately leads, as we have indicated, to the Supreme Court's decision in *Missouri v. Holland*. The statute at issue in that case, the Migratory Bird Treaty Act, implemented a treaty between the United States and Great Britain that banned the hunting of migratory birds during certain seasons. The State of Missouri brought suit against a U.S. game warden, arguing that the statute unconstitutionally interfered with the rights reserved to Missouri by the Tenth Amendment because Missouri was free to do what it wished with the birds while they were within its borders. The Supreme Court, speaking through Justice Holmes, rejected that argument, reasoning that “it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly.”

As noted earlier, the Court made it clear that Congress may, under the Necessary and Proper Clause, legislate to implement a valid treaty, regardless of whether Congress would otherwise have the power to act or

whether the legislation causes an intrusion into what would otherwise be within the state's traditional province. While the Court did allow that there may be “qualifications to the treaty-making power,” it also said, somewhat obscurely, that they had to be found “in a different way” than one might find limitations on other grants of power to the federal government. After implying that Congress's powers are particularly sweeping when dealing with “matters requiring national action,” the Court suggested one limitation on the Treaty Power: if the implementation of a treaty “contravene[s] any prohibitory words to be found in the Constitution,” then it may be unconstitutional. Since the treaty in question did not do that, the only remaining question was “whether it [was] forbidden by some invisible radiation from the general terms of the Tenth Amendment.” The Court concluded that it was not. Finally, the Court assumed without further discussion that, because the treaty was valid, so was the implementing statute.

In sum, *Holland* teaches that, when there is a valid treaty, Congress has authority to enact implementing legislation under the Necessary and Proper Clause, even if it might otherwise lack the ability to legislate in the domain in question. The legislation must, of course, meet the Necessary and Proper Clause's general requirement that legislation implemented under that Clause be “rationally related to the implementation of a constitutionally enumerated power.” In the treaty context, that requirement has been understood to mean that a treaty and its implementing legislation must be rationally related to one another. Thus, as long as “the



effectuating legislation bear[s] a rational relationship to” a valid treaty, the arguable consequence of *Holland* is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states' rights the President and Congress may choose to venture.

Bond vigorously disputes the implications of that conclusion. Specifically, she argues that legal trends since the Supreme Court's 1920 decision in *Holland* make it clear that the Tenth Amendment should not be treated as irrelevant when examining the validity of treaty-implementing legislation. Concluding otherwise, she asserts, would make “nothing ... off-limits” in a world where, more and more, “international treaties govern[ ] a virtually unlimited range of subjects and intrud[e] deeply on internal concerns.” That latter point is not without merit. Juxtaposed against increasingly broad conceptions of the Treaty Power's scope, reading *Holland* to confer on Congress an unfettered ability to effectuate what would now be considered by some to be valid exercises of the Treaty Power runs a significant risk of disrupting the delicate balance between state and federal authority.

Those concerns notwithstanding, Bond does not argue that the Convention itself is constitutionally infirm. On the contrary, she admits “that a treaty restricting chemical weapons is a ‘proper subject[ ] of negotiations between our government and other nations.’ ” Accordingly, we need not tackle, head on, whether an arguably invalid treaty has led to legislation encroaching on matters traditionally left to the police powers

of the states. Nevertheless, resolving the argument Bond does lodge against her prosecution requires at least some consideration of whether the Convention is, in fact, valid. We therefore turn briefly to whether the Convention falls within the Treaty Power's appropriate scope, bearing in mind that Bond seems to accept that it does.

### **1. The Convention's Validity**

The Constitution does not have within it any explicit subject matter limitation on the power granted in Article II, § 2. That section states simply that the President has the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” Throughout much of American history, however, including when *Holland* was handed down, it was understood that the Treaty Power was impliedly limited to certain subject matters.

Contemporaneous records such as the Virginia Ratifying Convention show that the Founders generally accepted that the purpose of treaties was, as James Madison put it, to regulate “intercourse with foreign nations,” and that the “exercise” of the Treaty Power was expected to be “consistent with” those “external” ends. As Madison later explained, if there was

no limitation on the Treaty-making power ..., it might admit of a doubt whether the United States might not be enabled to do those things by Treaty which are forbidden to be done by Congress ...; but no such consequence can follow, for it is a sound rule of construction, that what is forbidden

to be done by all the branches of Government conjointly, cannot be done by one or more of them separately.

Early cases followed that reasoning and indicated that the Treaty Power is confined to matters traditionally understood to be of international concern.

That is not to say, however, that any treaty encroaching on matters ordinarily left to the states was considered to be beyond the Treaty Power's permissible ambit. On the contrary, so long as the subject matter limitation was satisfied—which it undoubtedly was in cases involving “subjects [such as] peace, alliance, commerce, neutrality, and others of a similar nature,” or, as Jay put it, “war, peace, and commerce,”—it was accepted that treaties could affect domestic issues. Many early decisions of the Supreme Court upheld treaties of that nature, including treaties regarding the ownership and transfer of property. Still, it was widely accepted that the Treaty Power was inherently limited in the subject matter it could properly be used to address, and that the purpose of limiting the Treaty Power to matters which “in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty” was to ensure that treaties were “consistent with ... the distribution of powers between the general and state governments.”

Despite the long history of that view of the Treaty Power, the tide of opinion, at least in some quarters, has shifted decisively in the last half-century. Many influential voices now urge that there is no limitation on the

Treaty Power, at least not in the way understood from the founding through to the middle of the Twentieth Century. That change is reflected in the Restatement (Third) of Foreign Relations Law of the United States (1987) (the “Third Restatement”), which declares flatly that, “[c]ontrary to what was once suggested, the Constitution does not require that an international agreement deal only with ‘matters of international concern.’ ”

Whatever the Treaty Power's proper bounds may be, however, we are confident that the Convention we are dealing with here falls comfortably within them. The Convention, after all, regulates the proliferation and use of chemical weapons. One need not be a student of modern warfare to have some appreciation for the devastation chemical weapons can cause and the corresponding impetus for international collaboration to take steps against their use. Given its quintessentially international character, we conclude that the Convention is valid under any reasonable conception of the Treaty Power's scope. In fact, as we discuss at greater length herein, because the Convention relates to war, peace, and perhaps commerce, it fits at the core of the Treaty Power.

## **2. Interpreting *Holland***

Because *Holland* clearly instructs that “there can be no dispute about the validity of [a] statute” that implements a valid treaty, the constitutionality of Bond's prosecution would seem to turn on whether the Act goes beyond what is necessary and proper to carry the Convention into effect, or, in other

words, whether the Act fails to “bear a rational relationship to” the Convention. According to Bond, however, only a simplistic reading of *Holland* could lead one to think that the Supreme Court was saying that “Congress's power to implement treaties is subject to no limit other than affirmative restrictions on government power like the First Amendment.”

The problem with Bond's attack is that, with practically no qualifying language in *Holland* to turn to, we are bound to take at face value the Supreme Court's statement that “[i]f the treaty is valid there can be no dispute about the validity of the statute ... as a necessary and proper means to execute the powers of the Government.” A plurality of the Supreme Court itself apparently gave that passage the simplistic reading Bond denounces when it said, in *Reid v. Covert*, that:

The Court [in *Holland* ] was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

It is true that Justice Holmes spoke later in *Holland* in language that implies a balancing of the national interest against the interest claimed by the State, but that was in the context of assessing the validity of the Migratory Bird Treaty itself, not the implementing statute. That the latter was constitutional in light of the validity of the

former seemed to the Supreme Court to require no further comment at all.

That does not mean, of course, that the *Holland* court would have spoken in the same unqualified terms had it foreseen the late Twentieth Century's changing claims about the limits of the Treaty Power, or had it been faced with a treaty that transgressed the traditional subject matter limitation. It may well have chosen to say more about how to assess the validity of a treaty, and hence of coextensive treaty-implementing legislation. Perhaps *Holland's* vague comment about “invisible radiation[s] from the general terms of the Tenth Amendment” would have been given some further explication. As we have previously described, when *Holland* was decided, and, more importantly, when the Founders created the Treaty Power, it was generally understood that treaties should concern only matters that were clearly “international” in character, matters which, in *Holland's* words, invoke a national interest that “can be protected only by national action in concert with that of another [sovereign nation].” All the authors of The Federalist Papers, along with others from that era, considered the Treaty Power to be a necessary attribute of the central government for the important but limited purpose of permitting our “intercourse with foreign nations,” and thereby allowing for compacts “especially as [they] relate[ ] to war, peace, and commerce.” It was not a general and unlimited grant of power to the federal government.

Because an implied subject matter limitation on the Treaty Power was a given at the time

*Holland* was written, it was enough to answer the states' rights question in that case by pointing out that the Tenth Amendment only reserves those powers that are not delegated and that "the power to make treaties is delegated expressly." Thus, *Holland's* statement that "there can be no dispute about the validity" of a statute implementing a valid treaty, sensible in context and, in any event, binds us. We do not discount the significance of the Supreme Court's emphasis on the important role that federalism plays in preserving individual rights, and it may be that there is more to say about the uncompromising language used in *Holland* than we are able to say, but that very direct language demands from us a direct acknowledgement of its meaning, even if the result may be viewed as simplistic. If there is nuance there that has escaped us, it is for the Supreme Court to elucidate.

### **3. The Necessary and Proper Clause**

Thus, because the Convention falls comfortably within the Treaty Power's traditional subject matter limitation, the Act is within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power, unless it somehow goes beyond the Convention. Bond argues that it does.

She says that the Act covers a range of activity not actually banned by the Convention and thus cannot be sustained by the Necessary and Proper Clause. Whether that argument amounts to a facial or an as-applied attack on the Act, it fails. We stated in *Bond I* that "Section 229 ... closely

adheres to the language of the ... Convention," and so it does. True, as Bond notes, the Convention bans persons from using, developing, acquiring, stockpiling, or retaining chemical weapons, while the Act makes it unlawful to "receive, stockpile, retain, own, possess, use, or threaten to use" a chemical weapon, but those differences in wording do not prove that the Act has materially expanded on the Convention. The meaning of the list in the former seems rather to fairly encompass the latter (with the possible exception of the "threaten to use" provision of the Act) and, if the Act goes beyond the Convention at all, does not do so in the "use" aspect at issue here.

So while Bond's prosecution seems a questionable exercise of prosecutorial discretion, and indeed appears to justify her assertion that this case "trivializes the concept of chemical weapons" the treaty that gave rise to it was implemented by sufficiently related legislation.

In short, because the Convention pertains to the proliferation and use of chemical weapons, which are matters plainly relating to war and peace, we think it clear that the Convention falls within the Treaty Power's core. Consequently, we cannot say that the Act disrupts the balance of power between the federal government and the states, regardless of how it has been applied here.

### **III. Conclusion**

For the foregoing reasons, we will affirm the judgment of conviction.

**RENDELL, Circuit Judge, concurring.**

I fully agree with the Majority's reasoning and result. I write separately to cast the issue before us in a somewhat different light, by expanding upon two aspects of the Majority's reasoning which, I believe, decide this case. As it crystallized before us at oral argument, Ms. Bond's challenge has little to do with the validity of the Convention. Her problem lies with the Act. She contends that the structure of federal-state relations is such that the Act should not apply to her actions, namely, conduct involving a domestic dispute that could be prosecuted under state law. But, as the Majority rightly concludes, the Act is a valid exercise of Congress's Necessary and Proper Power. Moreover, no jurisprudential principle, grounded in federalism or elsewhere, saves her from the Act's reach.

I consider two questions raised by her argument: What is legally wrong with the Act, which reaches Ms. Bond's conduct?; and, What is wrong with the Act's application to Ms. Bond, given the structure of federal-state relations? The answer to both is: Nothing.

As to the first question, nothing “wrong” occurred at the moment Congress passed the Act. As the Majority has thoroughly discussed, the Convention itself is valid—indeed, Ms. Bond unequivocally concedes that point. In turn, the Act, which implements the Convention, is valid as an exercise of Congress's Necessary and Proper Power. That is because the Necessary and Proper Clause affords Congress “ ‘ample means’ ” to implement the Convention, and gives Congress the authority “to enact laws that are ‘convenient, or useful’ or

‘conducive’ ... to the ‘beneficial exercise’ ” of the federal government's Treaty Power. There is no question that the Act is rationally related to the Convention; it faithfully tracks the language of the Convention. Enacting a statute that essentially mirrors the terms of an underlying treaty is plainly a means which is “reasonably adapted to the attainment of a legitimate end”—ensuring that the United States complies with our international obligations under a valid treaty.

In examining the constitutionality of Congress's exercise of its Necessary and Proper Power, we need not consider whether the prosecution of Ms. Bond is necessary and proper to complying with the Convention, as she would have us do. In other words, she argues that no nation-state would submit that the United States has failed to comply with its obligations under the Convention if the federal government did not prosecute Ms. Bond under the Act. But that is not the appropriate test. Examining the scope of Congress's Necessary and Proper Power by definition requires us to examine the Act, not its enforcement. To determine if the Act is necessary and proper, we ask whether it bears a rational relationship to the Convention. Ms. Bond's actions fall plainly within the terms of the Act, and the Act bears a rational relationship to the Convention. So ends the Necessary and Proper inquiry.

The foregoing conclusion is enough to affirm Ms. Bond's conviction. As the Majority correctly reasons, *Missouri v. Holland* forecloses challenging a valid

statute implementing a valid treaty on Necessary and Proper grounds or federalism grounds.

But even if Ms. Bond were able to assert a federalism challenge to her conviction, she proposes no principle of federalism that would limit the federal government's authority to prosecute her under the Act. Thus, as to the second question, Ms. Bond argues that if the statute is applied to her, and, is thus read to “criminalize every malicious use of poisoning,” then principles of federalism are violated by disturbing the division of power between the federal government and the states. As appealing as the argument sounds—that a federal statute should not reach an essentially local offense like this—there is in fact no principled reason to limit the Act's reach when her conduct is squarely prohibited by it. The fact that an otherwise constitutional federal statute might criminalize conduct considered to be local does not render that particular criminalization unconstitutional. As the Supreme Court explained in *Gonzales v. Raich*, when “the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.” The fact that the Act, which properly implements a valid treaty, reaches non-terrorist uses of chemical weapons leaves us powerless to excise such an individual instance. True, *Raich* involved Congress's Commerce Clause Power. But the Majority is correct to apply its principle to this case, particularly in light of the Supreme Court's rejection, in *Holland*, of federalism as a basis to challenge a statute implementing an otherwise valid treaty.

Ms. Bond continues to urge otherwise, asking us to consider the “world where the Supreme Court recognizes that the Tenth Amendment is primarily about protecting individual liberty,” in which the Supreme Court recognized that some acts of Congress, even if they are otherwise valid under an enumerated power, can run afoul of the Tenth Amendment. But this case is not like *New York* or *Printz*, in which Congress wrongfully commandeered states' legislative processes and public officials. Nothing in those cases suggests a principle of federalism that would apply to this case.

Moreover, it is not enough to urge, as Ms. Bond does, that Pennsylvania law and authorities are equally able to handle, and punish, this conduct so that, from a federalism standpoint, we should leave the matter to Pennsylvania. That view simply misstates the law. We have a system of dual sovereignty. Instances of overlapping federal and state criminalization of similar conduct abound. But Ms. Bond argues that here, unlike the case with other federal crimes, no federal interest is being served by prosecuting every malicious use of a chemical. That argument fails for two reasons. First, there exists nowhere in the law a rule requiring that a statute implementing a treaty contain an element explicitly tying the statute to a federal interest so as to ensure that a particular application of the statute is constitutional. Second, even if we were to require that there be a clear federal interest, Ms. Bond incorrectly characterizes the federal interest that is represented by her prosecution as one in prosecuting every malicious use of a chemical. Rather, the federal interest served

is twofold: combating the use and proliferation of chemical weapons, and complying with the United States' obligations under a valid treaty. Additionally, whether there is a distinction, and where that distinction lies, between combating the use and proliferation of chemical weapons and prosecuting the malicious use of a chemical, is exceedingly difficult to discern.

In sum, Congress passed the Act, which is constitutionally sound legislation, to implement the Convention, a constitutionally sound treaty. Ms. Bond's appeal generally to federalism, rather than to a workable principle that would limit the federal government's authority to apply the Act to her, is to no avail.

The real culprits here are three. First, the fact pattern. No one would question a prosecution under the Act if the defendant were a deranged person who scattered potassium dichromate and 10-chloro-10H-phenoxarsine, the chemicals which Ms. Bond used, on the seats of the New York subway cars. While that defendant could be punished under state law, applying the Act there would not offend our sensibilities. The application, however, to this "domestic dispute," somehow does.

Second, the "use" of chemical weapons as prescribed in the Act has an admittedly broad sweep. Because the Act tracks the Convention, however, Congress had the power to criminalize all such uses. Perhaps, in carrying out the United States' treaty obligations, Congress could have created a

more expansive exception for "peaceful purposes," but it did not.

Lastly, the decision to prosecute is troubling. The judgment call to prosecute Ms. Bond under a chemical weapons statute rather than allowing state authorities to process the case is one that we question. But we see that every day in drug cases. Perhaps lured by the perception of easier convictions and tougher sentences, prosecutors opt to proceed federally. There is no law against this, or principle that we can call upon, to limit or regulate it.

While the Majority opinion explores arguments regarding the limits of the Treaty Power, I find Ms. Bond's argument to be much more limited in scope, although equally unsupportable. I agree that we should affirm the judgment of the District Court.

**AMBRO, Circuit Judge, concurring.**

I concur in the result reached by Judge Jordan's thoughtful opinion. I write separately to urge the Supreme Court to provide a clarifying explanation of its statement in *Missouri v. Holland* that "[i]f [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."

Absent that undertaking, a blank check exists for the Federal Government to enact any laws that are rationally related to a valid treaty and that do not transgress affirmative constitutional restrictions, like the First Amendment. This acquirable police power,

however, can run counter to the fundamental principle that the Constitution delegates powers to the Federal Government that are “few and defined” while the States retain powers that are “numerous and indefinite.”

Since *Holland*, Congress has largely resisted testing the outer bounds of its treaty-implementing authority. But if ever there were a statute that did test those limits, it would be Section 229. With its shockingly broad definitions, Section 229 federalizes purely local, run-of-the-mill criminal conduct. The statute is a troublesome example of the Federal Government's appetite for criminal lawmaking. Sweeping

statutes like Section 229 are in deep tension with an important structural feature of our Government: “ ‘The States possess primary authority for defining and enforcing the criminal law.’ ”

I hope that the Supreme Court will soon flesh out “[t]he most important sentence in the most important case about the constitutional law of foreign affairs,” and, doing so, clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it.



## “Chemical Weapon or Just Poison? Supreme Court Takes Case”

*Reuters*

Jonathan Stempel & Terry Baynes

January 18, 2013

The Supreme Court on Friday agreed to hear a new appeal by a woman convicted under a federal law intended to combat chemical weapons in a case where she admitted trying to poison a former friend who had an affair with her husband.

At the center of the case is a 1998 U.S. law banning the use of chemical weapons other than for a "peaceful purpose."

That law grew out of the 1993 Chemical Weapons Convention, an international agreement designed to keep rogue countries and terrorists from obtaining weapons of mass destruction.

Carol Anne Bond, a trained microbiologist who once worked at the chemical company Rohm and Haas Co, admitted to trying to poison her former best friend Myrlinda Haynes after learning that Haynes, a single mother, became pregnant by Bond's husband.

The toxic chemicals were taken from Rohm & Haas, and lethal compounds were sprinkled on Haynes' mailbox, car door handles and house doorknob on several occasions between November 2006 and June 2007.

Such cases are normally handled by local prosecutors under traditional criminal laws, but Bond was prosecuted under the federal chemical weapons law.

The case could give the court a chance to revisit a 1920 precedent written by Justice Oliver Wendell Holmes that gave Congress broad authority to adopt laws implementing treaties.

It also presents an unusual clash between the desire to enforce international treaty norms, including provisions designed to thwart terrorism, and the 10th Amendment to the U.S. Constitution, which limits federal power.

Bond, a Pennsylvania resident, was sentenced to six years in prison after entering a guilty plea that gave her a right to appeal the use of that law in her case. Bond said its use invaded the powers reserved to U.S. states under the 10th Amendment.

In 2011, the Supreme Court said Bond had standing to fight her conviction, without deciding the merits, and sent the case to the 3rd U.S. Circuit Court of Appeals in Philadelphia.

### **CACHE IN EACH CUPBOARD**

In May, the 3rd Circuit upheld the conviction, despite finding that the law "turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache."

The 3rd Circuit said the 1920 Supreme Court precedent, *Missouri v. Holland*,

limited its review to whether the federal law was rationally related to a valid treaty.

"The arguable consequence of *Holland* is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states' rights the president and Congress may choose to venture," it found.

In her latest Supreme Court appeal, Bond, represented by former Solicitor General Paul Clement, claimed that the federal government overreached in trying to criminalize "purely local conduct" by implementing the chemical weapons treaty.

The U.S. government opposed the appeal, saying Congress had authority under the Constitution's Commerce Clause and Necessary and Proper Clause to enact the 1998 law.

It also said Bond could not escape the law "because her actions were anything but peaceful."

The court could hear the appeal in April, and if it does would likely issue a decision by the end of June.

## “Jilted Suburbanite To Fight Terrorism Conviction In The Supreme Court”

*Business Insider*

Erin Fuchs

January 22, 2013

The U.S. Supreme Court agreed Friday to hear an unusually dramatic dispute: the case of a Pennsylvania suburbanite who allegedly tried to poison her husband's pregnant mistress.

The nation's highest court will reexamine the conviction of Carol Anne Bond for allegedly spreading poison around the home of her husband's mistress, who was also her best friend.

In 2011, the Supreme Court ruled Bond could challenge her conviction under a federal anti-terrorism law, and an appeals court ultimately upheld her six-year prison term.

Now the Supreme Court will hear the case a second time, this time reviewing the merits of the prosecution including whether prosecutors had a right to charge Bond under the Chemical Weapons Implementation Act.

The justices will consider Bond's argument that U.S. prosecutors had no business jumping into a "domestic dispute," especially using a law designed to police chemical weapons of mass destruction.

Bond is represented by legal superstar Paul Clement, who's best known for opposing Obamacare and spearheading the legal battle to preserve the anti-gay Defense of Marriage Act.

Clement's Supreme Court petition in the case paints a sad and intimate story of the alleged betrayal that led to a 42-year-old suburbanite's conviction under a federal anti-terror law.

The drama began to unfold in 2006, when Bond's best friend Myrlinda Haynes announced her pregnancy. Bond, who couldn't have biological children of her own, was initially happy for her best friend.

But then she learned her own husband was the father, the petition claims.

"This double betrayal brought back painful memories of her father's infidelities, and petitioner suffered an emotional breakdown," the petition states. Her hair fell out. She had panic attacks.

During the emotional breakdown, she bought potassium dichromate from Amazon.com and spread it around Haynes' house with the intention of giving her former best friend a rash, Bond's lawyers say.

Ultimately, Haynes suffered only a tiny chemical burn on her thumb, according to Bond.

Federal prosecutors then overstepped their authority by prosecuting Bond under an international arms-control treaty meant to stop the proliferation of weapons of mass destruction, her lawyers argue.

"Domestic disputes resulting from marital infidelities and culminating in a thumb burn are appropriately handled by local law enforcement authorities," the petition stated.

The government argues Bond's conduct fell squarely within the anti-terrorism law. Haynes suffered 24 "chemical attacks" during a three-month period, forcing her to

constantly have to check the area around her house for chemicals, the government says in its brief.

The government goes on to say that Bond "vowed revenge and promised she would make Haynes' life a living hell."

## “Once More Unto the Treaty-Power Breach”

*Cato Institute*

Ilya Shapiro & Trevor Burrus

May 16, 2013

The Carol Anne Bond saga continues. Now in her second trip to the Supreme Court—and with Cato’s support for the fourth time—Bond is still hoping to avoid federal punishment stemming from her attempts to get back at her erstwhile best friend for having an affair with her husband.

Bond, a microbiologist, spread toxic chemicals on her friend’s car and mailbox. Postal inspectors discovered this plot after they caught Bond on film stealing from the woman’s mailbox. Rather than leave this caper to local law enforcement, however, a federal prosecutor reached into his bag of tricks and charged Bond with violating a statute that implements U.S. treaty obligations under the 1993 Chemical Weapons Convention.

Yes, rather than being charged with attempted murder and the like, Bond is essentially accused of chemical warfare.

Bond challenged the federal government’s power to charge her with a crime, arguing that Congress lacks constitutional authority to pass general criminal statutes and cannot somehow acquire that authority through a treaty. Before a court could reach this issue, however, there was a question whether Bond could even *make that argument* under the Tenth Amendment, which reaffirms that any powers not delegated to Congress are reserved to the states or to the people. On

Bond’s first trip to the Supreme Court, the Court unanimously accepted the argument, offered in an amicus brief by Cato and the Center for Constitutional Jurisprudence, that there’s no reason in constitutional structure or history that someone can’t use the Tenth Amendment to challenge the constitutionality of the statute under which she was convicted.

On remand to the Philadelphia-based U.S. Court of Appeals for the Third Circuit, and now with standing to challenge that law, Bond raised the argument that Congress’s limited and enumerated powers cannot be increased by treaties. We again filed in that case in support of Bond. The Third Circuit disagreed, however—if reluctantly—based on one sentence written by Justice Oliver Wendell Holmes in the 1920 case of *Missouri v. Holland*, which has been interpreted to mean that treaties can indeed expand Congress’s powers. With Cato supporting her bid to return to the Supreme Court on that treaty power question, Bond’s case reached the high court.

Now, in a brief authored by professor Nicholas Quinn Rosenkranz and joined by the Center for Constitutional Jurisprudence, the Atlantic Legal Foundation, and former attorney general Edwin Meese III—in what we hope will be our final filing in the case—we argue that a treaty cannot give Congress the constitutional authority to charge Bond.

Allowing Congress to broaden its powers via treaties is an astounding manner in which to interpret a document that creates a federal government of limited powers.

Not only would this mean that the president has the ability to expand federal power by signing a treaty, but it would mean that *foreign governments* could change federal power by abrogating previously valid treaties—thus removing the constitutional authority from certain laws. This perverse result makes *Missouri v. Holland* a doctrinal anomaly that the Court must either overrule or clarify. We also point out how the most influential argument

supporting *Holland* is based on a clear misreading of constitutional history that has been repeated without question.

Although *Holland* is nearly 100 years old, there is thus no reason to adhere to a precedent that is not only blatantly incorrect, but could severely threaten our system of government. We're in a constitutional quagmire with respect to the treaty power, one that can only be escaped by limiting or overturning *Missouri v. Holland*.

The Supreme Court will hear oral arguments in *Bond v. United States* in October.

**UNITED STATES of America, Appellee,**  
**v.**  
**Brima WURIE, Defendant, Appellant.**

United States Court of Appeals, First Circuit

Decided on May 17, 2013

[Excerpt; some footnotes and citations omitted]

**STAHL, Circuit Judge**

This case requires us to decide whether the police, after seizing a cell phone from an individual's person as part of his lawful arrest, can search the phone's data without a warrant. We conclude that such a search exceeds the boundaries of the Fourth Amendment search-incident-to-arrest exception. Because the government has not argued that the search here was justified by exigent circumstances or any other exception to the warrant requirement, we reverse the denial of defendant-appellant Brima Wurie's motion to suppress, vacate his conviction, and remand his case to the district court.

**I. Facts & Background**

On the evening of September 5, 2007, Sergeant Detective Paul Murphy of the Boston Police Department (BPD) was performing routine surveillance in South Boston. He observed Brima Wurie, who was driving a Nissan Altima, stop in [a] parking lot ... pick up a man later identified as Fred Wade, and engage in what Murphy believed was a drug sale in the car. Murphy and another BPD officer subsequently stopped Wade and found two plastic bags in his pocket, each containing 3.5 grams of crack

cocaine. Wade admitted that he had bought the drugs from "B," the man driving the Altima [and] that "B" lived in South Boston and sold crack cocaine.

Murphy notified a third BPD officer, who was following the Altima. After Wurie parked the car, that officer arrested Wurie for distributing crack cocaine, read him Miranda warnings, and took him to the police station. When Wurie arrived at the station, two cell phones, a set of keys, and \$1,275 in cash were taken from him.

Five to ten minutes after Wurie arrived at the station, but before he was booked, two other BPD officers noticed that one of Wurie's cell phones, a gray Verizon LG phone, was repeatedly receiving calls from a number identified as "my house" on the external caller ID screen on the front of the phone. The officers were able to see the caller ID screen, and the "my house" label, in plain view. After about five more minutes, the officers opened the phone to look at Wurie's call log. Immediately upon opening the phone, the officers saw a photograph of a young black woman holding a baby, which was set as the phone's "wallpaper." The officers then [determined]

the phone number associated with the “my house” caller ID reference.

One of the officers typed that phone number into an online white pages directory, which revealed that the address associated with the number was on Silver Street... The name associated with the address was Manny Cristal.

Sergeant Detective Murphy then gave Wurie a new set of Miranda warnings and asked him a series of questions. Wurie said, among other things, that he lived at an address on Speedwell Street in Dorchester and that he had only been “cruising around” in South Boston. He denied having stopped at the... store, having given anyone a ride, and having sold crack cocaine.

Suspecting that Wurie was a drug dealer, that he was lying about his address, and that he might have drugs hidden at his house, Murphy took Wurie's keys and, with other officers, went to the Silver Street address associated with the “my house” number. One of the mailboxes at that address listed the names Wurie and Cristal. Through the first-floor apartment window, the officers saw a black woman who looked like the woman whose picture appeared on Wurie's cell phone wallpaper. The officers entered the apartment to “freeze” it while they obtained a search warrant. Inside the apartment, they found a sleeping child who looked like the child in the picture on Wurie's phone. After obtaining the warrant, the officers seized from the apartment, among other things, 215 grams of crack cocaine, a firearm, ammunition, four bags of

marijuana, drug paraphernalia, and \$250 in cash.

Wurie was charged with possessing with intent to distribute and distributing cocaine base and with being a felon in possession of a firearm and ammunition. He filed a motion to suppress the evidence obtained as a result of the warrantless search of his cell phone; the parties agreed that the relevant facts were not in dispute and that an evidentiary hearing was unnecessary. The district court denied Wurie's motion to suppress, and, after a four-day trial, the jury found Wurie guilty on all three counts. He was sentenced to 262 months in prison. This appeal followed.

## **II. Analysis**

In considering the denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions de novo.

...Today, a warrantless search is per se unreasonable under the Fourth Amendment, unless one of “a few specifically established and well-delineated exceptions” applies. One of those exceptions allows the police, when they make a lawful arrest, to search “the arrestee's person and the area within his immediate control.” In recent years, courts have grappled with the question of whether the search-incident-to-arrest exception extends to data within an arrestee's cell phone.

### **A. The legal landscape**

The modern search-incident-to-arrest doctrine emerged from *Chimel v. California*,



in which the Supreme Court held that a warrantless search of the defendant's entire house was not justified by the fact that it occurred as part of his valid arrest. The Court found that the search-incident-to-arrest exception permits an arresting officer "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction" and to search "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." The justifications underlying the exception, as articulated in *Chimel*, were protecting officer safety and ensuring the preservation of evidence.

Four years later, in *United States v. Robinson*, the Supreme Court examined how the search-incident-to-arrest exception applies to searches of the person. Robinson was arrested for driving with a revoked license, and in conducting a pat down, the arresting officer felt an object that he could not identify in Robinson's coat pocket. He removed the object, which turned out to be a cigarette package, and then felt the package and determined that it contained something other than cigarettes. Upon opening the package, the officer found fourteen capsules of heroin. The Court held that the warrantless search of the cigarette package was valid, explaining that the police have the authority to conduct "a full search of the person" incident to a lawful arrest.

*Robinson* reiterated the principle, discussed in *Chimel*, that "[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to

preserve evidence on his person for later use at trial." However, the Court also said the following:

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

The following year, the Court decided *United States v. Edwards*. Edwards was arrested on suspicion of burglary and detained at a local jail. After his arrest, police realized that Edwards's clothing, which he was still wearing, might contain paint chips tying him to the burglary. The police seized the articles of clothing and examined them for paint fragments. The Court upheld the search, concluding that once it became apparent that the items of clothing might contain destructible evidence of a crime, "the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered."

The Court again addressed the search-incident-to-arrest exception in *United States v. Chadwick*, abrogated on other grounds by *California v. Acevedo*, this time emphasizing that not all warrantless searches undertaken in the context of a

custodial arrest are constitutionally reasonable. In *Chadwick*, the defendants were arrested immediately after having loaded a footlocker into the trunk of a car. The footlocker remained under the exclusive control of federal narcotics agents until they opened it, without a warrant and about an hour and a half after the defendants were arrested, and found marijuana in it. The Court invalidated the search, concluding that the justifications for the search-incident-to-arrest exception—the need for the arresting officer “[t]o safeguard himself and others, and to prevent the loss of evidence”—were absent. The search “was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody” and therefore could not “be viewed as incidental to the arrest or as justified by any other exigency.”

Finally, there is the Supreme Court's recent decision in *Arizona v. Gant*. *Gant* involved the search of an arrestee's vehicle... Once again, the Court reiterated the twin rationales underlying the exception, first articulated in *Chimel*... Relying on [] safety and evidentiary justifications, the Court found that a search of a vehicle incident to arrest is lawful “when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”

Courts have struggled to apply the Supreme Court's search-incident-to-arrest jurisprudence to the search of data on a cell phone seized from the person. The searches at issue in the cases that have arisen thus far have involved everything from simply

obtaining a cell phone's number, to looking through an arrestee's call records, text messages, or photographs.

Though a majority of these courts have ultimately upheld warrantless cell phone data searches, they have used a variety of approaches. Some have concluded that, under *Robinson* and *Edwards*, a cell phone can be freely searched incident to a defendant's lawful arrest, with no justification beyond the fact of the arrest itself. Others have, to varying degrees, relied on the need to preserve evidence on a cell phone. The Seventh Circuit discussed the *Chimel* rationales more explicitly in *Flores-Lopez*, assuming that warrantless cell phone searches must be justified by a need to protect arresting officers or preserve destructible evidence, and finding that evidence preservation concerns outweighed the invasion of privacy at issue in that case, because the search was minimally invasive.

A smaller number of courts have rejected warrantless cell phone searches, with similarly disparate reasoning. In *United States v. Park*, for example, the court concluded that a cell phone should be viewed not as an item immediately associated with the person under *Robinson* and *Edwards* but as a possession within an arrestee's immediate control under *Chadwick*, which cannot be searched once the phone comes into the exclusive control of the police, absent exigent circumstances...

## **B. Our vantage point**

We begin from the premise that, in the Fourth Amendment context, “[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”... Thus, we find it necessary to craft a bright-line rule that applies to all warrantless cell phone searches, rather than resolving this case based solely on the particular circumstances of the search at issue.

The government seems to agree, urging us to find that a cell phone, like any other item carried on the person, can be thoroughly searched incident to a lawful arrest. The government's reasoning goes roughly as follows: (1) Wurie's cell phone was an item immediately associated with his person...; (2) such items can be freely searched without any justification beyond the fact of the lawful arrest; (3) the search can occur even after the defendant has been taken into custody and transported to the station house; and (4) there is no limit on the scope of the search, other than the Fourth Amendment's core reasonableness requirement.

This “literal reading of the *Robinson* decision” fails to account for the fact that the Supreme Court has determined that there are categories of searches undertaken following an arrest that are inherently unreasonable because they are never justified by one of the *Chimel* rationales: protecting arresting officers or preserving destructible evidence. As we explain below, this case therefore turns on whether the government can demonstrate that warrantless cell phone

searches, as a category, fall within the boundaries laid out in *Chimel*.

The government admitted at oral argument that its interpretation of the search-incident-to-arrest exception would give law enforcement broad latitude to search any electronic device seized from a person during his lawful arrest... The search could encompass things like text messages, emails, or photographs, though the officers here only searched Wurie's call log. *Robinson* and *Edwards*, the government claims, compel such a finding.

We suspect that the eighty-five percent of Americans who own cell phones and “use the devices to do much more than make phone calls,” would have some difficulty with the government's view that “Wurie's cell phone was indistinguishable from other kinds of personal possessions, like a cigarette package, wallet, pager, or address book, that fall within the search incident to arrest exception to the Fourth Amendment's warrant requirement.” In reality, “a modern cell phone is a computer,” and “a computer ... is not just another purse or address book.”...

That information is, by and large, of a highly personal nature: photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records. It is the kind of information one would previously have stored in one's home and that would have been off-limits to officers performing a search incident to arrest...

In short, individuals today store much more personal information on their cell phones than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers that the government has invoked... [T]he government's proposed rule would give law enforcement automatic access to "a virtual warehouse" of an individual's "most intimate communications and photographs without probable cause" if the individual is subject to a custodial arrest, even for something as minor as a traffic violation...

It is true that *Robinson* speaks broadly, and that the Supreme Court has never found the constitutionality of a search of the person incident to arrest to turn on the kind of item seized or its capacity to store private information. In our view, however, what distinguishes a warrantless search of the data within a modern cell phone from the inspection of an arrestee's cigarette pack or the examination of his clothing is not just the nature of the item searched, but the nature and scope of the search itself.

In *Gant*, the Court emphasized the need for "the scope of a search incident to arrest" to be "commensurate with its purposes," which include "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." Inspecting the contents of a cigarette pack can (and, in *Robinson*, did) preserve destructible evidence (heroin capsules). It is also at least theoretically necessary to protect the arresting officer, who does not know what he will find inside the cigarette pack. Examining the clothing an arrestee is wearing can (and, in *Edwards*,

did) preserve destructible evidence (paint chips). Thus, the searches at issue in *Robinson* and *Edwards* were the kinds of reasonable, self-limiting searches that do not offend the Fourth Amendment, even when conducted without a warrant. The same can be said of searches of wallets, address books, purses, and briefcases, which are all potential repositories for destructible evidence and, in some cases, weapons.

When faced, however, with categories of searches that cannot ever be justified under *Chimel*, the Supreme Court has taken a different approach. In *Chadwick*, the Court struck down warrantless searches of "luggage or other personal property not immediately associated with the person of the arrestee" that the police have "reduced ... to their exclusive control," because such searches are not necessary to preserve destructible evidence or protect officer safety. The searches at issue in *Chadwick* [was] general, evidence-gathering search, not easily subject to any limiting principle, and the Fourth Amendment permits such searches only pursuant to a lawful warrant.

We therefore find it necessary to ask whether the warrantless search of data within a cell phone can ever be justified under *Chimel*. The government has provided little guidance on that question. [T]he government has included just one, notably tentative footnote in its brief attempting to place warrantless cell phone data searches within the *Chimel* boundaries. We find ourselves unconvinced.

The government does not argue that cell phone data searches are justified by a need

to protect arresting officers. Wurie concedes that arresting officers can inspect a cell phone to ensure that it is not actually a weapon, but we have no reason to believe that officer safety would require a further intrusion into the phone's contents...

The government has, however, suggested that the search here was “arguably” necessary to prevent the destruction of evidence. Specifically, the government points to the possibility that the calls on Wurie's call log could have been overwritten or the contents of his phone remotely wiped if the officers had waited to obtain a warrant. The problem with the government's argument is that it does not seem to be particularly difficult to prevent overwriting of calls or remote wiping of information on a cell phone today. Arresting officers have at least three options. First, in some instances, they can simply turn the phone off or remove its battery. Second, they can put the phone in a Faraday enclosure, a relatively inexpensive device...Third, they may be able “to ‘mirror’ (copy) the entire cell phone contents, to preserve them should the phone be remotely wiped, without looking at the copy unless the original disappears.”

Indeed, if there is a genuine threat of remote wiping or overwriting, we find it difficult to understand why the police do not routinely use these evidence preservation methods, rather than risking the loss of the evidence during the time it takes them to search through the phone... While the measures described above may be less convenient for arresting officers than conducting a full search of a cell phone's data incident to arrest, the government has not suggested

that they are unworkable, and it bears the burden of justifying its failure to obtain a warrant.

Instead of truly attempting to fit this case within the *Chimel* framework, the government insists that we should disregard the *Chimel* rationales entirely, for two reasons.

First, the government emphasizes that *Robinson* rejected the idea that “there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.” That holding was predicated on an assumption, clarified in *Chadwick*, that “[t]he potential dangers lurking in all custodial arrests” are what “make warrantless searches of items within the ‘immediate control’ area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved.”... [H]owever, we are not suggesting a rule that would require arresting officers or reviewing courts to decide, on a case-by-case basis, whether a particular cell phone data search is justified under *Chimel*. Rather, we believe that warrantless cell phone data searches are categorically unlawful under the search-incident-to-arrest exception, given the government's failure to demonstrate that they are ever necessary to promote officer safety or prevent the destruction of evidence. We read *Robinson* as compatible with such a finding.

Second, the government places great weight on a footnote at the end of *Chadwick* stating

that searches of the person, unlike “searches of possessions within an arrestee’s immediate control,” are “justified by ... reduced expectations of privacy caused by the arrest.” ...

Yet the Court clearly stated in *Robinson* that “[t]he authority to search the person incident to a lawful custodial arrest” is “based upon the need to disarm and to discover evidence,” and *Chadwick* did not alter that rule. When the Court decided *Robinson* in 1973 and *Chadwick* in 1977, any search of the person would almost certainly have been the type of self-limiting search that could be justified under *Chimel*. The Court, more than thirty-five years ago, could not have envisioned a world in which the vast majority of arrestees would be carrying on their person an item containing not physical evidence but a vast store of intangible data—data that is not immediately destructible and poses no threat to the arresting officers.

In the end, we therefore part ways with the Seventh Circuit, which also applied the *Chimel* rationales in *Flores–Lopez*. Though the court described the risk of evidence destruction as arguably “so slight as to be outweighed by the invasion of privacy from the search,” it found that risk to be sufficient, given the minimal nature of the intrusion at issue (the officers had only searched the cell phone for its number). That conclusion was based, at least in part, on Seventh Circuit precedent allowing a “minimally invasive” warrantless search.

We are faced with different precedent and different facts, but we also see little room

for a case-specific holding, given the Supreme Court’s insistence on bright-line rules in the Fourth Amendment context.... [W]hile the search of Wurie’s call log was less invasive than a search of text messages, emails, or photographs, it is necessary for all warrantless cell phone data searches to be governed by the same rule...

We therefore hold that the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee’s person, because the government has not convinced us that such a search is ever necessary to protect arresting officers or preserve destructible evidence. Instead, warrantless cell phone data searches strike us as a convenient way for the police to obtain information related to a defendant’s crime of arrest—or other, as yet undiscovered crimes—without having to secure a warrant. We find nothing in the Supreme Court’s search-incident-to-arrest jurisprudence that sanctions such a “general evidence-gathering search.”

There are, however, other exceptions to the warrant requirement that the government has not invoked here but that might justify a warrantless search of cell phone data under the right conditions. Most importantly, we assume that the exigent circumstances exception would allow the police to conduct an immediate, warrantless search of a cell phone’s data where they have probable cause to believe that the phone contains evidence of a crime, as well as a compelling need to act quickly that makes it impracticable for them to obtain a warrant—for example, where the phone is believed to contain evidence

necessary to locate a kidnapped child or to investigate a bombing plot or incident.

### **C. The good-faith exception**

That leaves only the government's belated argument, made for the first time in a footnote in its brief on appeal, that suppression is inappropriate here under the good-faith exception to the exclusionary rule. The government bears the “heavy burden” of proving that the good-faith exception applies, and it did not invoke the exception before the district court.

... In this case, [] we do not believe that ground should be one with respect to which the government bore the burden of proof and entirely failed to carry that burden below, despite the fact that the issue was ripe for the district court's review.

### **III. Conclusion**

... Today, many Americans store their most personal “papers” and “effects,” in electronic format on a cell phone, carried on the person. Allowing the police to search that data without a warrant any time they conduct a lawful arrest would, in our view, create “a serious and recurring threat to the privacy of countless individuals.”

We therefore reverse the denial of Wurie's motion to suppress, vacate his conviction, and remand for further proceedings consistent with this opinion.

### **HOWARD, Circuit Judge, dissenting.**

Undoubtedly, most of us would prefer that the information stored in our cell phones be

kept from prying eyes, should a phone be lost or taken from our hands by the police during an arrest. One could, individually, take protective steps to enhance the phone's security settings with respect to that information, or for that matter legislation might be enacted to make such unprotected information off-limits to finders or to the police unless they first obtain a warrant to search the phone. But the question here is whether the Fourth Amendment requires this court to abandon long-standing precedent and place such unprotected information contained in cell phones beyond the reach of the police when making a custodial arrest. I think that we are neither required nor authorized to rule as the majority has.

Instead, this case requires us to apply a familiar legal standard to a new form of technology.... In this exercise, consistency is a virtue... Having scrutinized the relevant Supreme Court decisions, as well as our own precedent, I find no support for Wurie's claim that he had a constitutional right protecting the information obtained during the warrantless search. Nor do I believe that we possess the authority to create such a right. Therefore, I respectfully dissent...

We have long acknowledged that police officers can extract this type of information from containers immediately associated with a person at the time of arrest. In *United States v. Sheehan*, police arrested a suspected bank robber and then searched his wallet, which included a piece of paper bearing several names and telephone numbers. The police officers copied this piece of paper, which action Sheehan challenged as an unconstitutional seizure.

The claim is made that *Sheehan* is inapposite to the present case because it concerned a challenge to the seizure, not the search. We, however, did not address the warrantless search in *Sheehan* because its legality was beyond dispute...

The police officers' limited search of one telephone number in Wurie's call log was even less intrusive than the searches in these cases. The police observed, in plain view, multiple calls from "my house"... to Wurie's cell phone. Only then did they initiate their search and only for the limited purpose of retrieving the actual phone number associated with "my house." The police did not rummage through Wurie's cell phone, unsure of what they could find... The additional step of identifying the actual telephone number hardly constituted a further intrusion on Wurie's privacy interests, especially since that information is immediately known to the third-party telephone company. This case fits easily within existing precedent.

Nor are there any other persuasive grounds for distinguishing this case from our previous decisions. That the container the police searched was a cell phone is not, by itself, dispositive, for "a constitutional distinction between 'worthy' and 'unworthy' containers would be improper." We made a similar observation in *United States v. Eatherton*, where we upheld the warrantless search of a briefcase incident to an arrest...

Even assuming that cell phones possess unique attributes that we must consider as part of our analysis, none of those attributes are present in this case. Though we do not

know the storage capacity of Wurie's cell phone, we know that the police did not browse through voluminous data in search of general evidence. Nor did they search the "cloud," or other applications containing particularly sensitive information. Instead, they conducted a focused and limited search of Wurie's electronic call log. If the information that they sought had been written on a piece of paper, as opposed to stored electronically, there would be no question that the police acted constitutionally, so I see no reason to hold otherwise in this case. The constitutionality of a search cannot turn solely on whether the information is written in ink or displayed electronically.

The issue of warrantless cell phone searches has come before a number of circuits. None of them have adopted the majority's categorical bar on warrantless cell phone searches. Instead, they unanimously have concluded that the cell phone searches before them did not violate the Fourth Amendment.

I reach the same conclusion here....

In my view, there is another rationale, apparent from the record, for upholding this search: the risk that others might have destroyed evidence after Wurie did not answer his phone. Wurie received repeated calls from "my house" in the span of a few minutes after his arrest. His failure to answer these phone calls could have alerted Wurie's confederates to his arrest, prompting them to destroy further evidence of his crimes. The majority asserts that this scenario would be present "in almost every instance of a



custodial arrest,” giving police an ever-ready justification to search cell phones. On the contrary, the justification is based on the specific facts of this case. The fact that “my house” repeatedly called Wurie’s cell phone provided an objective basis for enhanced concern that evidence might be destroyed and thus gave the police a valid reason to inspect the phone...

Wurie himself suffered no constitutional violation during the search. If we are to fashion a rule, it cannot elide the facts before us. “The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case.” Yet the competing analysis focuses on hypothetical searches that have not emerged in any case or controversy before this court...

The majority gets around this problem by requiring the government to “demonstrate that warrantless cell phone searches, as a category, fall within the boundaries laid out in *Chimel*.” ... The Supreme Court [has held] on two occasions, neither of which involved the search of items held by the arrestee, that certain types of searches require a warrant because they lack any *Chimel* justification. But the Supreme Court has not extrapolated from those cases a general rule that the government justify each category of searches under *Chimel*, nor a requirement that the appellate courts conduct this sort of analysis.

Indeed, if the Supreme Court wishes us to look at searches incident to arrest on a categorical basis, it is curious that the Court

has offered absolutely no framework for defining what constitutes a distinct category. ... Yet no relevant criteria are articulated for establishing these categories...

Thus, either we are drastically altering the holding in *United States v. Robinson* by forcing the government to provide a *Chimel* rationale for practically every search, or we are putting ourselves in the position of deciding, without any conceptual basis, which searches are part of a distinct “category” and which are not. This runs the risk of spreading confusion in the law enforcement community and multiplying, rather than limiting, litigation pertaining to these searches...

As the government points out, the Supreme Court cases treat searches of the arrestee and the items on the arrestee—as is the case here—as either not subject to the *Chimel* analysis, or at a least subject to a lower level of *Chimel* scrutiny. These cases, unlike *Chimel* and *Gant*, are on point with Wurie’s case, and we are not free to disregard them in favor of the principles enunciated in *Gant*...

In *Robinson*, the Supreme Court drew a sharp distinction between two types of searches pursuant to an arrest: searches of the arrestee and searches of the area within his control. “The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged.... Throughout the series of cases in which the Court has addressed the second [type of search,] no doubt has been expressed as to the unqualified authority of the arresting

authority to search the person of the arrestee.” The Supreme Court did state that the basis of this authority is “the need to disarm and to discover evidence,” but in the next sentence clarified that “[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification,”

Indeed, the Court could not rely on a *Chimel* justification in *Robinson*, as the arresting officer conceded that he “did not in fact believe that the object in [Robinson]’s coat pocket was a weapon” and that he gave no thought to the destruction of evidence either. *Robinson* may not have rejected *Chimel* in the context of searches of an arrestee and items on the arrestee, but it did establish that these searches differ from other types of searches incident to arrest...

Even in *Chadwick*, where the Supreme Court did require the police to obtain a warrant for a category of searches, it continued to treat the search of an arrestee and items immediately associated with him as independently justified by “reduced expectations of privacy caused by the arrest.”... These cases, taken together, establish that items immediately associated with the arrestee—as a category—may be searched without any *Chimel* justification. The majority seeks a bright-line rule to govern cell phone searches, but denies the fact that such a rule—covering all items on the arrestee’s person—already exists.

But even if searches of items on an arrestee required *Chimel* justifications, I cannot see

why cell phones fail to meet this standard if wallets, cigarette packages, address books, briefcases, and purses do...

One argument is that these other items, unlike cell phones, all theoretically could contain “destructible” evidence, which justifies examining them. But the evidence in a cell phone is just as destructible as the evidence in a wallet: with the press of a few buttons, accomplished even remotely, cell phones can wipe themselves clean of data. Any claim that the information is not destructible strikes me as simply wrong...

Another argument is that because cell phone searches are not “self-limiting,” they always require a warrant. The majority does not precisely define the term “self-limiting,” but I gather that it refers to the danger that cell phones, because of their vast storage capabilities, are susceptible to “general, evidence-gathering searches.” As an initial matter, this has never been the focus of Supreme Court cases discussing the search incident to arrest exception for items immediately associated with the arrestee. Thus, I am reluctant to give it much weight in assessing Wurie’s constitutional claim.

Nonetheless, if we are concerned that police officers will exceed the limits of constitutional behavior while searching cell phones, then we should define those limits so that police can perform their job both effectively and constitutionally. Instead, the majority has lumped all cell phone searches together, even while perhaps acknowledging that its broad rule may prohibit some otherwise constitutional searches...

Still, I share many of the majority's concerns about the privacy interests at stake in cell phone searches. While the warrantless search of Wurie's phone fits within one of our "specifically established and well-delineated exceptions," due to the rapid technological development of cell phones and their increasing prevalence in society, cell phone searches do pose a risk of depriving arrestees of their protection against unlawful searches and seizures. There must be an outer limit to their legality.

In *Flores-Lopez*, Judge Posner suggested that courts should balance the need to search a cell phone against the privacy interests at stake.

[E]ven when the risk either to the police officers or to the existence of the evidence is negligible, the search is allowed, provided it's no more invasive than, say, a frisk, or the search of a conventional container, such as Robinson's cigarette pack, in which heroin was found. If instead of a frisk it's a strip search, the risk to the officers' safety or to the preservation of evidence of crime must be greater to justify the search.

I believe that cell phone searches should follow this formula. That is not to say that the police must prove a risk to officer safety or destruction of evidence in every case. There is, inherent in every custodial arrest,

some minimal risk to officer safety and destruction of evidence. Moreover, *Chadwick* states that the arrest itself diminishes the arrestee's privacy rights over items "immediately associated" with the arrestee. But the invasion of the arrestee's privacy should be proportional to the justification for the warrantless search...

[W]hile *Robinson's* principles generally authorize cell phone searches, and certainly encompass the search in this case, there are reasonable limits to *Robinson* that we should not hesitate to enforce, especially in light of a cell phone's unique technological capabilities, for "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."...

But ultimately the question of what constitutes an unreasonable cell phone search should be left for another day. The majority has outlined some of the more troubling privacy invasions that could occur during a warrantless search. So long as they remain in the hypothetical realm, I think it premature to draw the line. Suffice it to say that, for the reasons I have stated, the search in this case fell on the constitutional side of that line.

I respectfully dissent.

## “U.S. Appeals on Cellphone Privacy”

*SCOTUS Blog*  
Lyle Denniston  
August 16, 2013

The Obama administration, taking the advice of two judges to rush the issue to the Supreme Court, has moved quickly to ask the Justices to rule that police are free to look through the contents of a private cellphone they take from an individual they arrest, and to do so without a judge’s approval.

About two weeks after the First Circuit Court voted to leave intact a ruling that such searches are unconstitutional if police do not have a search warrant, the government on Thursday asked the Supreme Court to overturn that decision. The government could have taken three months to begin an appeal. The case is *United States v. Wurie* (docket 13-212). An earlier post on the constitutional controversy can be read [here](#).

The key to the government’s argument is that police have long had the authority, without a warrant, to search items that are found on a person whom they arrest. That has been “a bright-line rule,” the petition said, that as long as the arrest was valid, items that person was carrying should be open to search by officers.

Creating exceptions to that rule, on an “item-by-item” basis, would undercut that rule and complicate police enforcement activity. “No sound rule justifies excluding cellphones, the contents of which are far more susceptible to destruction than most other evidence,” the petition argued. There

are no exceptions for wallets, calendars, address books, pagers, and pocket diaries, and none should be created for hand-held telephones, the government contended.

The issue, however, has divided lower courts, the petition noted. In fact, the First Circuit Court ruling requiring a warrant for officers to search an arrestee’s cellphone conflicts directly with an opposite ruling by the highest court of Massachusetts. Massachusetts, of course, is in the geographic area of the First Circuit, so the petition said that the conflict between the two courts in that area leaves police with “the task of making sense” of their legal duty.

The petition added: “Particularly given the ubiquity of cellphone use by drug traffickers and other serious offenders, and the important law-enforcement consequences of unsettling search-incident-to-arrest doctrine, the question presented now ‘requires an authoritative answer from the Supreme Court,’” the petition said, quoting a judge on the First Circuit Court.

The same issue raised in the case is already on file at the Court, in *Riley v. California* (docket 12-132). With the widening conflict among lower courts, review of the issue by the Justices is highly likely, during the new Term that opens in October. The new government petition mentions the *Riley* case in a final footnote, but implied that the

*Wurie* case would present a better test of the constitutional issues. (A reader has suggested that the government may have rushed to file its own appeal in order to give

it an added chance to be considered in competition with the *Riley* case.)

## “What Seized Cellphones and Leftovers Have in Common”

*Wall Street Journal*

Jacob Gershman

August 26, 2013

We think of Reynolds Wrap as the stuff used to cover last night’s roast chicken.

In a new paper, law professor Adam Gershowitz of William & Mary Law School explains how aluminium foil can be used to literally foil criminal suspects.

The paper concerns one of the most hotly debated legal questions of the day – whether the U.S. Constitution permits police to search a suspect’s cellphone at the time of arrest.

Mr. Gershowitz thinks that police should be allowed to seize a phone. But, absent a specific exigency, he thinks police should have to get a warrant before searching its contents.

A problem for authorities is that smartphones come with remote-erase features that allow a suspect to wipe evidence from a seized phone.

In a forthcoming article in the William & Mary Bill of Rights Journal, Mr. Gershowitz lays out how police can minimize that risk without stepping over constitutional lines.

One option, he says, is using a data extraction device to copy the phone’s

contents. Those devices cost tens of thousands of dollars, making it unrealistic for police to carry a bunch of them around on patrol.

Here’s where his paper starts to read like those old “Bet You Can” science books for kids.

Mr. Gershowitz suggests that police shield store the device in a signal-blocking Faraday bag, which you can buy on Amazon.com for \$58.

An even cheaper option can be found in any kitchen cabinet — aluminum foil.

“When the police seize a phone, they simply have to wrap the phone in a few layers of aluminum foil and the chance of remote wiping of the phone will be almost completely eliminated,” writes Mr. Gershowitz.

The bag and foil tricks aren’t foolproof. They won’t save data that has been pre-programmed to delete.

But he says the measures could go a long way toward protecting evidence without giving police “carte blanche” to conduct warrantless searches.

## “Can Police Search a Seized Cell Phone Without a Warrant?”

*FindLaw*  
Kelly Cheung  
May 23, 2013

Seized cell phones are safe from a warrantless search by police, the First Circuit recently held. The court ruled that a police cell phone search for data is not constitutional when a person is arrested unless officers get a warrant first.

For Brima Wurie, his cell phone was the one important item that was searched by police officers the evening he was arrested for possessing crack cocaine. Because police looked through his seized cell phone without a warrant, they knew to search Wurie's house, where they found 215 grams of cocaine -- a huge difference from the 3.5 grams found in his possession.

The Fourth Amendment, which Wurie claims was violated in his case, protects people's right to feel secure in their persons, homes, papers, and effects, against unreasonable search and seizures. The First Circuit had to decide if the search-incident-to-arrest exception to a warrantless search includes a police search of an arrestee's seized cell phone.

The court considered various case precedents that involved items like clothing, footlockers, cigarette packages, and cell phones. It ultimately focused on both the nature and scope of the search conducted on the confiscated cell phone.

According to the court, what is distinguishable about a seized cell phone is

that it does not hold any evidence that can be destroyed before police get a warrant. An arrestee is away from it at that point. The seized phone itself also does not pose any immediate safety threat to the arresting officers to justify a warrantless search of it either.

The government attempted to create an argument that the phone data could get overwritten remotely. But the court stated that there were simple methods for police to address that concern. For example, police can simply turn the phone off, take the battery out, or copy the data before it gets wiped clean.

In Wurie's case, police could have just waited to get a warrant to search Wurie's seized cell phone, the court held. There was no need to go through the confiscated cell phone before obtaining a warrant. With the suspect under arrest, the evidence in this case would have still been there safely at his house.

As technology advances, our arrest and warrant rules may need to be modified as technology changes our lives. There's a huge privacy concern when it comes to cell phones, and this court recognized that.

The privacy concerns far outweigh the need for police to search a seized cell phone without a warrant. Cell phones are more like our papers and effects protected under the

Fourth Amendment. They carry a lot of personal information that most of us wouldn't even want our family members looking at, let alone a police officer. Hence, the utility of a password protection feature that would have prevented police from snooping so soon in Wurie's case.

Police search of seized cell phones is an important issue that affects most people. The Florida Supreme Court found that

warrantless cell phone searches are unconstitutional just a few weeks ago. However, four other federal circuit courts have ruled in favor of searching a person's cell phone after arrest, as the Associated Press reported. It will be interesting to see if and how the U.S. Supreme Court will weigh in on this very private issue.



*Paroline v. U.S.*

12-8561

**Ruling Below:** *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012), *cert granted*, 2013 WL 497856 (U.S. 2013).

Following defendant's conviction for possession of material involving sexual exploitation of children, child depicted in images requested restitution. The United States District Court for the Eastern District of Texas denied the request. Child petitioned for writ of mandamus. A divided panel initially refused petition, but on rehearing, the Court of Appeals granted the petition. In a separate case, the United States District Court for the Eastern District of Louisiana awarded restitution against defendant convicted of possession of child pornography. Defendant appealed. The Court of Appeals vacated. Rehearing en banc was granted for both cases. The Fifth Circuit held that: victim was limited to mandamus review; restitution statute was not subject to general proximate cause requirement; and victim's petition for writ of mandamus would be granted.

**Question Presented:** What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

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**IN RE AMY UNKNOWN, Petitioner.**  
**United States of America, Plaintiff-Appellee, Doyle Randall Paroline, Defendant-Appellee,**  
v.  
**Amy Unknown, Movant-Appellant.**  
**United States of America, Plaintiff-Appellee,**  
v.  
**Michael Wright, Defendant-Appellant.**

United States Court of Appeals, Fifth Circuit

Decided on November 19, 2012

[Excerpt; some footnotes and citations omitted.]

**GARZA, Circuit Judge**

The original opinion in this matter was issued by the en banc court on October 1, 2012. A petition for rehearing en banc is currently pending before the en banc court. The petition for rehearing en banc is granted

in part. Accordingly, we WITHDRAW our previous opinion and replace it with the following opinion.

The issue presented to the en banc court is whether 18 U.S.C. § 2259 requires a district

court to find that a defendant's criminal acts proximately caused a crime victim's losses before the district court may order restitution, even though that statute only contains a “proximate result” requirement in § 2259(b)(3)(F). All our sister circuits that have addressed this question have expanded the meaning of § 2259(b)(3)(F) to apply to all losses under § 2259(b)(3), thereby restricting the district court's award of restitution to a victim's losses that were proximately caused by a defendant's criminal acts. A panel of this court rejected that reading, and instead focused on § 2259's plain language to hold that § 2259 does not limit a victim's total recoverable losses to those proximately resulting from a defendant's conduct. A subsequent panel applied that holding to another appeal, yet simultaneously questioned it in a special concurrence that mirrored the reasoning of our sister circuits. To address the discrepancy between the holdings of this and other circuits, and to respond to the concerns of our court's special concurrence, we granted rehearing en banc and vacated the panel opinions.

This en banc court holds that § 2259 only imposes a proximate result requirement in § 2259(b)(3)(F); it does not require the Government to show proximate cause to trigger a defendant's restitution obligations for the categories of losses in § 2259(b)(3)(A)-(E). Instead, with respect to those categories, the plain language of the statute dictates that a district court must award restitution for the full amount of those losses. We VACATE the district court's judgment in *United States v. Paroline*, and REMAND for further proceedings

consistent with this opinion. We AFFIRM the district court's judgment in *United States v. Wright*.

## I

We review a set of appeals arising from two separate criminal judgments issued by different district courts within this circuit. Both appeals involve restitution requests by Amy, a young adult whose uncle sexually abused her as a child, captured his acts on film, and then distributed them for others to see. The National Center for Missing and Exploited Children, which reports that it has found at least 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998, describes the content of these images as “extremely graphic.” The Government reports that restitution has been ordered for Amy in at least 174 child pornography cases across the United States in amounts ranging from \$100 to \$3,543,471.

## A

In the consolidated cases *In re Amy* and *In re Amy Unknown* a panel of this court reviewed Amy's mandamus petition and appeal, both of which challenged the district court's order denying Amy restitution in connection with a criminal defendant's sentence.

In the case underlying Amy's mandamus petition and appeal, Doyle Paroline (“Paroline”) pled guilty to 18 U.S.C. § 2252 for possessing 150 to 300 images of minors engaged in sexually explicit conduct. At least two images were of Amy. Pursuant to Amy's right to restitution under the Crime

Victims' Rights Act the Government and Amy moved the district court to order restitution under § 2259. Amy supported this request with her psychiatrist's report, which itemized her future damages for specific categories of treatment and estimated total damages nearing \$3.4 million.

The district court denied Amy restitution. The district court held that § 2259 required the Government to prove that by possessing images depicting Amy's sexual abuse, Paroline proximately caused the injuries for which she sought restitution.... Amy petitioned for mandamus, asking this court to direct the district court to order Paroline to pay her the full amount of the restitution she had requested.

Over one dissent, that panel denied her relief because it was not clear or indisputable that § 2259 mandates restitution irrespective of proximate cause. Amy sought rehearing and filed a separate notice of appeal from the district court's restitution order; her mandamus petition and appeal were consolidated. The panel assigned to hear Amy's appeal granted her rehearing request. That panel then granted mandamus and rejected a requirement of proof of proximate cause in § 2259 because “[i]ncorporating a proximate causation requirement where none exists is a clear and indisputable error,” but declined to reach the question of whether crime victims such as Amy have a right to an appeal. The panel remanded for the district court's entry of a restitution order.

## **B**

In *United States v. Wright*, a separate panel of this court heard the appeal of Michael Wright (“Wright”). Like Paroline, Wright pled guilty to 18 U.S.C. § 2252 for possession of over 30,000 images of child pornography, which included images of Amy's abuse. The Government sought restitution for Amy under § 2259, supporting its request with the same psychiatric report Amy provided in Paroline's case. The district court awarded Amy \$529,661 in restitution, explaining that “[t]his amount was reached by adding the estimated costs of the victim's future treatment and counseling at \$512,681.00 and the costs of the victim's expert witness fees at \$16,980.00.” The district court did not explain why it awarded no restitution for the other amounts that Amy had requested and made no reference to a proximate cause requirement. Observing that Amy had been awarded restitution in another district court, the district court further explained that “[t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim.” Wright appealed to contest the restitution order.

The *Wright* panel first found that the appeal waiver in Wright's plea agreement did not foreclose his right to appeal the restitution order. Then, applying Amy's holding, the *Wright* panel concluded that Amy was entitled to restitution but that the district court had given inadequate reasons for the award it assessed. The panel remanded for further findings regarding the amount of the award. The three members on the *Wright* panel, however, joined a special concurrence that questioned Amy's holding and

suggested that the court rehear both cases en banc, in part because this court was the first circuit to hold that a proximate cause requirement does not attach to the “full amount of ... losses” under § 2259(b)(3).

This court held the mandates in both *Amy* and *Wright*. A majority of this court's members voted to rehear these opinions en banc to resolve the question of how to award restitution under § 2259 and to address other related questions raised by these appeals.

## II

In rehearing *Amy* and *Wright* en banc, we address the following issues: (1) whether the Crime Victims' Rights Act (“CVRA”) grants crime victims a right to an appeal or, if not, whether this court should review *Amy*'s mandamus petition under the standard this court has applied to supervisory writs; (2) whether 18 U.S.C. § 2259 requires the Government to show a defendant's criminal acts proximately caused a victim's injuries before a district court may award restitution; and (3) whether, in light of our holding with respect to § 2259, the district courts in *Amy* and *Wright* erred.

### A

*Amy* petitioned for mandamus and, after this court initially denied her relief, appealed from the district court's restitution order. In the panel opinion in *Amy*, this court granted her mandamus on rehearing under our traditional mandamus inquiry, which this court held in *In re Dean* applies to appeals under the CVRA. In *Amy*, the panel declined to decide whether the CVRA entitled her to bring a direct appeal, even though *Dean*

seemingly foreclosed that argument. *Amy* asks the en banc court to construe the CVRA to guarantee crime victims the right of appeal and alternatively asks the court to hear her mandamus petition under our supervisory mandamus power, which would hold her mandamus petition to a less onerous standard of review than *Dean* requires.

### 1

The CVRA grants crime victims, including *Amy*, “[t]he right to full and timely restitution as provided in law,” and makes explicit that crime victims, their representatives, and the Government may move the district court to enforce that right. The CVRA further commands that “[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded [this right].” Where a district court denies a victim relief, the CVRA provides that

[T]he movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.

The CVRA further grants the Government, “[i]n any appeal in a criminal case,” the authority to “assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates,” and makes clear that “[n]othing in this chapter shall be construed to impair the

prosecutorial discretion of the Attorney General or any officer under his direction.” Amy’s argument effectively requires us to address two questions: first, whether the CVRA entitles crime victims to an appeal; and second, whether the CVRA entitles crime victims’ mandamus petitions through the review standards governing an appeal. First, we observe that the plain text of the CVRA expressly grants crime victims only a right to mandamus relief and makes no mention of any right of crime victims to an appeal. In contrast, the CVRA grants the Government the right to mandamus while also retaining the Government’s right to a direct appeal. In interpreting the statute, absent contrary indication, we presume that Congress “legislated against the background of our traditional legal concepts,” including that crime victims have no right to appeal.

Amy fails to show any language in the statute that reflects Congress’ intent to depart from this principle.... The cases Amy cites are unconvincing. They allowed non-parties to appeal discrete pre-trial issues with constitutional implications, which were unrelated to the merits of the criminal cases from which they arose.... Because nothing in the CVRA suggests that Congress intended to grant crime victims the right to an appeal or otherwise vary the historical rule that crime victims do not have the right of appeal, we conclude that the CVRA grants crime victims only mandamus review.

Next, we consider whether the CVRA nonetheless requires appellate courts to apply the standard of review governing a direct criminal appeal to mandamus petitions, and conclude it does not. When

assessing the meaning of the term “mandamus” in the CVRA, we presume that this “statutory term ... ha[s] its common-law meaning,” absent contrary indication. The Supreme Court has explained that “[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” ...

Certain aspects of the CVRA convince us that Congress intended mandamus in its traditional sense when it selected the word “mandamus.” Reading the statute’s provisions together, the CVRA seems to intentionally limit victims’ right to review as an extraordinary remedy because it authorizes review only where a district court fails to fulfill a statutory duty; the statute does not extend victims’ right to review to situations where a district court acts on a discretionary matter. To explain, the CVRA lists eight rights that it ensures crime victims, including the right to restitution. The restrictive statement, “A crime victim has the following rights,” precedes the list of those rights and supports the conclusion that the CVRA’s grant of rights is exclusive.... Under this reading, only the Government would retain a right to appeal even seemingly discretionary actions, and could elect to appeal the district court’s order to the extent it exercises its own prosecutorial discretion to do so. If we were to instead read the CVRA as extending a right of appeal to victims, we would expand the rights granted to crime victims and simultaneously erode the CVRA’s attempt to preserve the Government’s discretion....

The very short timeline in which appellate courts must act, and the fact that a single circuit judge may rule on a petition, confirm

the conclusion that Congress intended to limit crime victims' appellate relief under the CVRA to traditional mandamus review. These requirements reflect that appellate courts must grant relief quickly, but rarely, as "a drastic remedy generally reserved for really 'extraordinary' cases."

Amy has failed to show that Congress intended to grant crime victims anything other than traditional mandamus relief under the CVRA. While, as Amy insists, it may be more difficult for a crime victim to enforce rights through mandamus than appeal, this limitation reflects the express language of the statute and honors the common law tradition in place when the CVRA was drafted.

## 2

...

Because we hold that the CVRA entitles Amy to only mandamus relief, we dismiss her appeal. Under our traditional mandamus inquiry, we will grant Amy's requested mandamus only if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate.

## B

Wright appeals from the district court's restitution order. This court reviews the legality of the restitution order *de novo*. If the restitution order is legally permitted, we then review the amount of the order for an abuse of discretion.

## III

To resolve Amy's mandamus petition and Wright's appeal, we must first ascertain the level of proof required to award restitution to Amy and crime victims like her under 18 U.S.C. § 2259. The parties' dispute turns on the interpretation and effect of the words "proximate result" in § 2259(b)(3)(F).

## A

Our analysis again begins with the text of the statute. If § 2259's language is plain, our "sole function" is to "enforce it according to its terms" so long as "the disposition required by the text is not absurd." The Supreme Court has explained that "[s]tatutory construction 'is a holistic endeavor.'" ...

Only after we apply principles of statutory construction, including the canons of construction, and conclude that the statute is ambiguous, may we consult legislative history. For statutory language to be ambiguous, however, it must be susceptible to more than one reasonable interpretation or more than one accepted meaning. ...

The language of 18 U.S.C. § 2259 reflects a broad restitutionary purpose. Section 2259(a) mandates that district courts "shall order restitution for any offense under this chapter," including the offense to which Paroline and Wright pled guilty. Section 2259(b)(1) specifies that a restitution order "shall direct the defendant to pay the victim ... the full amount of the victim's losses."

Section 2259(b)(3) defines the term “the full amount of the victim's losses,” contained in § 2259(b)(1), as

[A]ny costs incurred by the victim for—

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys' fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.

Section 2259(b)(4) reinforces that “[t]he issuance of a restitution order under this section is mandatory,” and instructs that “[a] court may not decline to issue an order under this section because of—(i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.” ...

## B

The district court in *Paroline* rejected Amy's argument that § 2259 requires an award of “the full amount of [her] losses.” Instead, resorting to the Supreme Court's decision in *Porto Rico Railway, Light & Power Co. v. Mor*, which explained that “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all,” the district court

extended the “proximate result” language contained in § 2259(b)(3)(F) to apply to the losses described in subsections (A) through (E). In construing the statute, the district court expressed its concern that “a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment,” and that an alternative “interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied.” In reversing the district court's holding, the *Amy* panel rejected a generalized proximate cause requirement and stressed that the causation requirement in the definition of “victim,” together with § 3664's mechanism for joint and several liability, surmounts any Eighth Amendment concerns.

Unlike the district court in *Paroline*, the *Wright* district court seemed to accept Amy's argument to a limited degree, as it awarded all of the restitution she requested for her future treatment and counseling, and the costs of her expert witness fees. Although the *Wright* panel accepted Amy's holding as binding precedent in reviewing the district court's restitution award, *Wright's* special concurrence, tracing the reasoning of the district court in *Amy* and challenging the panel's decision not to limit § 2259 to damages proximately caused by a defendant's criminal actions, presaged this en banc rehearing.

In this en banc rehearing, Amy maintains that § 2259 is a mandatory statute requiring district courts to award full restitution to victims of child pornography. In her view,

the plain language of the statute dictates that the proximate result language in § 2259(b)(3)(F) is limited to that category of losses and does not apply to the categories of losses described in § 2259(b)(3)(A)-(E).

The Government contends that § 2259(b)(3) conditions all of a victim's recoverable losses on a showing that those losses proximately resulted from the offense. Drawing on *Porto Rico Railway*, the Government asserts that the statutory text reflects Congress' intent to condition all recoverable losses on a showing of proximate cause. Without citing to precedent, the Government urges us “to presume that Congress adhered to the usual balance in the law of remedies: to hold defendants fully accountable for the losses associated with their conduct but in a manner that respects the deeply-rooted principle of proximate causation.”...

Paroline similarly construes the “proximate result” language in the statute and relies on the construction of other restitution statutes to support his position. Both Paroline and Wright draw on legislative materials to assert that in drafting § 2259, Congress intended to incorporate a proximate cause requirement.

## C 1

Our plain reading of § 2259 leads us to the following conclusion: Once a district court determines that a person is a victim, that is, an “individual harmed as a result of a commission of a crime” under the chapter that relates to the sexual exploitation and

abuse of children, § 2259 requires the district court to order restitution for that victim. The restitution order that follows must encompass “the full amount of the victim's losses.” Those losses include five categories of specific losses—medical services related to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and childcare expenses; lost income; and attorney's fees and costs—and one category of “other losses suffered by the victim as a proximate result of the offense.” The rule of the last antecedent, recently applied by the Supreme Court in *Barnhart v. Thomas*, instructs that “a limiting clause or phrase,” such as the “proximate result” phrase in § 2259(b)(3)(F), “should ordinarily be read as modifying only the noun or phrase that it immediately follows.” ...

## a

First, the Government, Paroline, Wright, and Judge Davis's dissenting opinion press the importance of *Porto Rico Railway* and other caselaw relied on by the district court. As did the Amy panel, however, we doubt *Porto Rico Railway's* applicability here. *Porto Rico Railway* concerned the following statute: “Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico ....” ... The Supreme Court explained, “When several words are followed by a clause which is applicable as much to the first and other words as to the



last, the natural construction of the language demands that the clause be read as applicable to all.”

Deprived of its context, *Porto Rico Railway's* rule can be contorted to support the statutory interpretation urged by the Government and apply the “proximate result” language in § 2259(b)(3)(F) to the five categories of loss that precede it. But applying that rule here to require generalized proximate cause would disregard that the list in *Porto Rico Railway's* statute is significantly different than the one central to this appeal. ... The Supreme Court expressed its concern that a different construction would have left the reader with a fragmented phrase, which would be overly broad in application, and which, in turn, would have failed to satisfy the statute's overarching purpose to curtail federal courts' jurisdiction.

Section 2259, in contrast, begins with an introductory phrase composed of a noun and verb (“ ‘full amount of the victim's losses' includes any costs incurred by the victim for—”) that feeds into a list of six items, each of which are independent objects that complete the phrase. ... Of course, we do not sit “as a panel of grammarians,” but we cannot ignore that “the meaning of a statute will typically heed the commands of its punctuation.” The structural and grammatical differences between § 2259 and the statute in *Porto Rico Railway* forcefully counsel against applying *Porto Rico Railway* to the current statute to reach the Paroline district court's reading.

*Seatrain*, the other case relied on by the district court, is similarly inapplicable. ...

At least three circuits agree that under rules of statutory construction, we cannot read the “proximate result” language in § 2259(b)(3)(F) as applying to the categories of losses in § 2259(b)(3)(A)-(E). But we do not ignore that other circuits have used tools of statutory construction to conclude that the proximate result language in § 2259(b)(3)(F) applies to the five categories of loss that preceded it. These circuits, however, reached this conclusion for reasons we do not find compelling. ...

## **b**

Next, we consider the Government's assertion that principles of tort liability limit the award of restitution under § 2259 to losses proximately caused by a defendant's criminal actions. At least three of our sister circuits have accepted this view and derived a proximate cause requirement not from “the catch-all provision of § 2259(b)(3)(F), but rather [from] traditional principles of tort and criminal law and [from] § 2259(c)'s definition of ‘victim’ as an individual harmed ‘as a result’ of the defendant's offense.”

In *United States v. Monzel*, a case that has served as a springboard for other circuits evaluating § 2259, the D.C. Circuit explained that “[i]t is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused,” and “a restitution statute [presumably] incorporates the traditional requirement of proximate cause unless there is good reason

to think Congress intended the requirement not to apply.” The D.C. court posited that “[a]lthough § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party,” and found nothing in the text of § 2259 indicating Congress' intent to eliminate “the ordinary requirement of proximate cause.” Rather, “[b]y defining ‘victim’ as a person harmed ‘as a result of’ the defendant's offense,” the court inferred that “the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused.” The D.C. Circuit worried that without such a limitation, “liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how ‘remote’ or tenuous the causal connection.”

... The D.C. Circuit criticized this court's decision in *Amy* because “a ‘general’ causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all”; “[s]o long as the victim's injury would not have occurred but for the defendant's offense, the defendant would be liable for the injury.” ... We do not accept this reasoning, however, and refuse to inject the statute with a proximate cause requirement based on traditional principles of liability.

The Supreme Court has explained that we “ordinarily” should “resist reading words or elements into a statute that do not appear on its face.” But the Supreme Court has also explained that the absence of certain language in a statute does not necessarily mean that Congress intended courts to

disregard traditional background principles. ...

In interpreting the omission of intent in a different statute, the Supreme Court cautioned that “far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with” a mens rea requirement.

... In assessing whether Congress intended a broad proximate cause limitation, we cannot ignore that § 2259 expresses causal requirements, yet isolates them to two discrete points: the definition of victim as an “individual harmed as a result of a commission of a crime,” and the limitation of “any other losses” to those that are the “proximate result of the offense.” Had Congress omitted all causal language and not required award of the full amount of losses, or positioned the proximate result language so that it would apply to all categories of losses, we could consider the possibility that Congress intended to bind all categories of losses with a proximate cause requirement. Instead, Congress resisted using the phrase “proximate cause” anywhere in § 2259, including § 2259(b)(3)(F) and further required the court to order the “full amount of the victim's losses.” ...

This interpretation does not render the statute unworkable. The problem seeming to animate the cases in other circuits interpreting § 2259 to require proximate cause is how to allocate responsibility for a victim's harm to any single defendant. These courts ignore, however, that deciding that a

defendant “must pay restitution for the losses he caused (whether proximately or not),” does not resolve how the court “determines how those losses should be allocated in cases where more than one offender caused them”—injecting the statute with traditional proximate causation limitations takes courts no closer to determining what each defendant must pay or to supplying crime victims with the “full amount of [their] losses.” By focusing on the question of proximate cause, our sister circuits have not made § 2259 any easier to apply and seemingly have ignored that § 2259 has armed courts with tools to award restitution because it instructs courts to refer to the standards under § 3664.

....

Any fears that Amy and victims like her might be overcompensated through the use of joint and several liability, as expressed under § 3664(h), are unwarranted. The use of joint and several liability does not mean that Amy may “recover more than her total loss: [rather,] once she collects the full amount of her losses from one defendant, she can no longer recover from any other.”

Section 3664 provides “reasonable means” to defend against any theoretical overcompensation that could result. First, if Amy recovers the full amount of her losses from defendants, the Government and defendant may use this information to ensure that Amy does not seek further awards of restitution. Second, § 3664(k) suggests a means for ending defendants' existing joint and several restitution obligations once Amy receives the full

amount of her losses; it allows for a district court, “on its own motion, or the motion of any party, including the victim, [to] adjust the payment schedule, or require immediate payment in full, as the interests of justice require.” ...

c

Next, the Government asserts that not restricting the recovery of losses by proximate cause produces an absurd result—constitutional implications that could be avoided if we were to read § 2259 as requiring proximate causation with respect to all categories of losses. Specifically, the Government is concerned that without a proximate cause limitation, § 2259 could be challenged on the ground that it subjects a defendant to excessive punishment under the Eighth Amendment.

...The Government posits that by giving effect to the statute's plain text, this court could cause Eighth Amendment problems similar to that expressed by a recent Supreme Court case involving criminal forfeiture: Where criminal forfeiture “would be grossly disproportional to the gravity of [an] offense,” the Supreme Court held that it would violate the Excessive Fines Clause of the Eighth Amendment.

First, we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive. Even so, restricting the “proximate result” language to the catchall category in which it appears does not open the door to grossly disproportionate restitution in a way that

would violate the Eighth Amendment.... Fears over excessive punishment are misplaced.

Any concern that individual defendants may bear a greater restitutionary burden than others convicted of possessing the same victim's images, moreover, does not implicate the Eighth Amendment or threaten to create an absurd result. Restitution is not tied to the defendant's gain; rather "so long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional." ...

The court, moreover, can ameliorate the impact of joint and several liability on an individual defendant by establishing a payment schedule that corresponds to the defendant's ability to pay.

Ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography. In light of restitution's remedial nature, § 2259's built-in causal requirements, and the mechanisms described under § 3664, we do not see any Eighth Amendment concerns here or any other absurd results that our plain reading produces.

## 2

Accordingly, we hold that § 2259 requires a district court to engage in a two-step inquiry to award restitution where it determines that § 2259 applies. First, the district court must determine whether a person seeking restitution is a crime victim under § 2259—that is, "the individual harmed as a result of

a commission of a crime under this chapter." The Supreme Court has acknowledged that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," and this court has elaborated that "children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." This logic applies with equal force to defendants who possess child pornography: By possessing, receiving, and distributing child pornography, defendants collectively create the demand that fuels the creation of the abusive images. Thus, where a defendant is convicted of possessing, receiving, or distributing child pornography, a person is a victim under this definition if the images the defendant possesses, receives, or distributes include those of that individual.

Second, the district court must ascertain the full amount of the victim's losses as defined under § 2259(b)(3)(A)-(F), limiting only § 2259(b)(3)(F) by the proximate result language contained in that subsection, and craft an order guided by the mechanisms described in § 3664, with a particular focus on its mechanism for joint and several liability.

## IV

Having resolved this important issue of statutory interpretation, we apply our holding to Amy's mandamus and Wright's appeal.

## A

Under our traditional mandamus inquiry, we will grant Amy's petition for mandamus if

(1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate in these circumstances. As the Supreme Court has noted, the “hurdles” limiting use of mandamus, “however demanding, are not insuperable.”

We easily conclude that the first prong is met. Because we have held that the CVRA limits crime victims' relief to the mandamus remedy, Amy has no other means for obtaining review of the district court's decision not to order restitution. We are also satisfied that a writ is appropriate in these circumstances: The CVRA expressly authorizes mandamus, and awarding restitution would satisfy § 2259's broad restitutionary purpose. Next, we conclude that Amy has a “clear and indisputable” right to restitution in light of our holding today. First, Amy is a “victim” under § 2259(c). Paroline possessed at least two of her images, and his possession of those images partly formed the basis of his conviction. Amy, as an “individual harmed as a result of [Paroline's] commission of a crime” falling within § 2259's scope, is thus a victim under § 2259. Because Amy is a victim, § 2259 required the district court to award her restitution for the “full amount of [her] losses” as defined under § 2259(b)(3). Because the district court awarded Amy nothing, it therefore clearly and indisputably erred. No matter what discretion the district court possessed and no matter how confounding the district court found § 2259, it was not free to leave Amy with nothing.

On remand, the district court must enter a restitution order reflecting the “full amount of [Amy's] losses” in light of our holdings today.

## **B**

Turning to Wright's appeal, Amy is eligible for restitution as a “victim” of Wright's crime of possessing images of her abuse for the same reasons she is eligible as a victim of Paroline's crime. It was therefore legal for the district court to order restitution to Amy. As such, Wright's appeal necessarily focuses on the amount of the district court's restitution award, which we review for an abuse of discretion. The district court awarded Amy \$529,661 by adding Amy's estimated future counseling costs to the value of her expert witness fees. The district court did not explain why Wright should not be required to pay for any of the other losses Amy requested, and the record does not otherwise disclose why the district court reduced the Government's full request on Amy's behalf. While the district court erred in failing to award Amy the full amount of her losses, because the Government did not appeal Wright's sentence and Amy did not seek mandamus review, under *Greenlaw v. United States*, we must affirm Wright's sentence.

## **V**

For the reasons above, we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her

abuse. We AFFIRM the district court in *United States v. Wright*. We VACATE the district court's judgment in *United States v. Paroline*, and REMAND for proceedings consistent with this opinion.

**DENNIS, Circuit Judge, concurring in part in the judgment:**

I respectfully concur in the majority opinion's decision that the CVRA does not grant crime victims a right to a direct appeal from a district court's rejection of her claim for restitution under 18 U.S.C. § 2259; that the CVRA grants crime victims only a right to seek traditional mandamus review; and that the CVRA grants the government the right to seek mandamus and to retain its right to a direct appeal.

I further agree with the majority that neither the Government nor the victim is required to prove that the victim's losses defined by 18 U.S.C. § 2259(b)(3)(A)-(E) were a proximate result of the defendant's crime; it is only “any other loss suffered by the victim” that must be proved to be “a proximate result of the offense.” Section 2259(c) defines “victim” as an “individual harmed as a result of a commission of a crime under this chapter,” but it does not require a showing that the victim's losses included in § 2259(b)(3)(A)-(E) be a “proximate result of the offense.” From this, I infer that the statute places only a slight burden on the victim or the government to show that the victim's losses or harms enumerated in those subsections plausibly resulted from the offense. Once that showing has been made, in my view, a presumption arises that those enumerated

losses were the proximate result of the offense, which the defendant may rebut with sufficient relevant and admissible evidence.

Finally, I agree with the majority's conclusion that where a defendant is convicted of possessing child pornography, a person is a victim under the statute if the images include those of that individual. In these cases, I agree that the government and the victim have made a sufficient showing, unrebutted by the defendant, that the victim is entitled to restitution of losses falling under 18 U.S.C. § 2259(b)(3)(A)-(E). Therefore, I concur in that part of the majority's judgment that vacates the district courts' judgments and remands the cases to them for further proceedings.

In remanding, however, I would simply direct the district courts to proceed to issue and enforce the restitution orders in accordance with 18 U.S.C. § 3664 and 3663A, as required by § 2259(b)(2)....

**W. EUGENE DAVIS, Circuit Judge, concurring in part and dissenting in part, joined by KING, JERRY E. SMITH and GRAVES, Circuit Judges:**

I agree with my colleagues in the majority that we should grant mandamus in *In re Amy* and remand for entry of a restitution award. I also agree that we should vacate the award entered in *Wright* and remand for further consideration on the amount of the award. The devil is in the details, however, and I disagree with most of the majority's analysis.

I disagree with my colleagues in the majority in two major respects:

1. Although I conclude that the proximate cause proof required by the restitution statutes can be satisfied in these cases, I disagree with the majority that the statute authorizes restitution without any proof that the violation proximately caused the victim's losses.

2. I agree with the majority that the district court must enter a restitution award against every offender convicted of possession of the victim's pornographic image; but I disagree with the majority that in cases such as these two, where the offenses of multiple violators contribute to the victim's damages, the district court must enter an award against each offender for the full amount of the victim's losses. No other circuit that has addressed this issue has adopted such a one size fits all rule for the restitution feature of the sentence of an offender. Other circuits have given the district courts discretion to assess the amount of the restitution the offender is ordered to pay.

## **I. THE STATUTES**

At bottom, this is a statutory interpretation case, and I begin with a consideration of the structure and language of the statutes at issue that facially belie the majority's position that victims may be awarded restitution for losses not proximately caused by offense conduct. Section 2259 specifically governs mandatory restitution awards for crimes related to the sexual exploitation and abuse of children. A number of provisions in the statute make it clear that proof of a causal connection is

required between the offenses and the victim's losses.

Section 2259(b)(2) expressly incorporates the general restitution procedures of 18 U.S.C. § 3664 and states that “[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.” Section 3664(e) states that “[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.”

This language requiring proof of causation from § 3664(e) is consistent with the language defining “victim” found in § 2259(c), who is defined as “the individual harmed as a result of a commission of crime under this chapter....”

Section 2259(a) states that the court “shall order restitution for any offense under this chapter.” Section 2259(b)(3) states that the victim's losses are defined as those suffered by the victim “as a proximate result of the offense.” ...

In interpreting [§ 2259(b)(3)] we should follow the fundamental canon of statutory construction established by the Supreme Court in *Porto Rico Railway, Light & Power Co. v. Mor*. In that case, the Court held that “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” Applying this cardinal rule of statutory interpretation, I conclude

that subsection (F)'s "as a proximate result of the offense" language applies equally to the previous five subcategories of losses, (A) through (E). ...

In contrast, the majority concludes that once the district court determines that a person is a victim (an individual harmed as a result of an offense under § 2259) the district court must order restitution without further proof of causation.

The majority's reading of § 2259(b)(3) is patently inconsistent with the rule of statutory interpretation announced in *Porto Rico Railway*, which makes it clear that the clause should be read to apply to all categories of loss. My conclusion that *Porto Rico Railway's* rule of interpretation applies in this case is made even clearer when we consider the multiple references in the statutes discussed above expressly reflecting Congressional intent to require proof of causation....

Other circuits have used different analyses but all circuits to confront this issue have interpreted the statute as using a proximate causation standard connecting the offense to the losses. This circuit is the only circuit that has interpreted § 2259 and concluded that proximate cause is not required by the statute.

For the above reasons, I conclude that the statutes at issue require proof that the defendant's offense conduct proximately caused the victim's losses before a restitution award can be entered as part of the defendant's sentence.

## II.

## CAUSATION

In cases such as the two cases before this court where the conduct of multiple offenders collectively causes the victim's damages, I would follow the position advocated by the Government and adopted by the First Circuit and the Fourth Circuit to establish the proximate cause element required by § 2259. Under this "collective causation" theory, it is not necessary to measure the precise damages each of the over 100 offenders caused. As the First Circuit in *Kearney* stated: "Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort." The court relied on the following statement of the rule from Prosser and Keeton:

When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event.

The court explained further:

Proximate cause therefore exists on the aggregate level, and there is no reason to find it lacking on the individual level. The Restatement (Third) of Torts has recognized this: causation exists even where "none of the alternative causes is sufficient by itself, but together they are sufficient" to cause the harm.

I agree with the Government and the First and Fourth Circuits that this definition of



proximate cause is appropriate in this context and under this standard the causation requirement in both cases before us is satisfied.

### **III. AMOUNT OF THE AWARD**

The most difficult issue in these cases—where multiple violators combine to cause horrendous damage to a young victim—is establishing some standards to guide the district court in setting an appropriate restitution award for the single offender before the court.

I agree that Amy is a victim in both cases before us. Defendant Paroline (in *In re Amy*) and defendant Wright possessed Amy's pornographic images and the statute requires the court to enter an award against them.

I agree that Amy is entitled to a restitution award from all of her offenders in a sum that is equal to the amount of her total losses. But in cases such as these where multiple violators have contributed to the victim's losses and only one of those violators is before the court, I disagree that the court must always enter an award against that single violator for the full amount of the victim's losses. I agree that § 3664(h) gives the court the option in the appropriate case of entering an award against a single defendant for the full amount of the victim's losses even though other offenders contributed to these losses. I also agree that in that circumstance the defendant can seek contribution from other offenders jointly liable for the losses. We have allowed such

contribution claims in analogous non-sex offender cases.

In concluding that an award for the full amount of the victim's losses is required the majority relies on § 3664(h) which provides:

If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

The majority simply ignores the second clause in § 3664(h) emphasized above. That subsection plainly gives the court the option of either (1) assessing a restitution award against the single defendant in an amount that is equal to the victim's total losses or (2) apportioning liability among the defendants to reflect each defendant's level of contribution to the victim's loss taking into consideration a number of factors including the economic circumstances of each defendant. It would be surprising if Congress had not given courts this option. After all, restitution is part of the defendant's criminal sentence and § 3664(h), consistent with sentencing principles generally, gives the sentencing judge discretion to fix the sentence based on the facts and circumstances surrounding the defendant's circumstances, background, and nature of his conduct. ...

I agree with the majority that the defendants in both cases before us having been convicted of violating 18 U.S.C. § 2252

must be ordered to pay restitution to Amy. We should leave the calculation of the appropriate award against each defendant to the district court in the first instance. I would give the district court the following general guidelines:

The court must recognize that Amy's losses are an aggregation of the acts of the person who abused and filmed her assault, those who distributed and redistributed her images, and those who possessed those images. The culpability and liability for restitution of any one defendant regarding Amy's loss is dependent at least in part on the role that defendant played with respect to her exploitation.

The court should first compute the victim's probable future losses based on evidence of the damages she will likely incur from the date of the defendant's offense conduct into the foreseeable future. The court should consider all items of damage listed in § 2259(b)(3) as well as any other losses suffered by the defendant related to the conduct of the violators of this chapter....

The district court is not required to justify any award with absolute precision, but the amount of the award must have a factual predicate. In determining whether it should cast the single defendant before it for the total amount of the victim's losses or in fixing the amount of a smaller award the court should consider all relevant facts including without limitation the following:

1. The egregiousness of the defendant's conduct including whether he was involved in the physical abuse of this victim or other

victims, and whether he attempted to make personal contact with victims whose images he viewed or possessed.

2. For defendants who possessed images of the victim, consider the number of images he possessed and viewed, and whether the defendant circulated or re-circulated those images to others.

3. The financial means of the defendant and his ability to satisfy an award.

4. The court may consider using the \$150,000 liquidated civil damage award authorized by 18 U.S.C. § 2255 or a percentage thereof as a guide in fixing the amount of the award.

5. The court may also consider as a guide awards made in similar cases in this circuit and other circuits.

6. Any other facts relevant to the defendant's level of contribution to the victim's loss and economic circumstances of the defendant.

#### IV.

#### CONCLUSION

In summary, I would grant mandamus and vacate the judgment in *In re Amy* and remand that case to the district court to enter an award consistent with the principles outlined above. I would also vacate the judgment in *Wright* and remand for entry of judgment consistent with the above guidelines.

**LESLIE H. SOUTHWICK, Circuit Judge, dissenting:**

We are confronted with a statute that does not provide clear answers. I join others in suggesting it would be useful for Congress “to reconsider whether § 2259 is the best system for compensating the victims of child pornography offenses.” The goal is clear: providing meaningful restitution to victims of these crimes. How to order restitution in individual cases in light of that goal is a difficult question.

Our task today is to effectuate the scheme according to the congressional design as best as we can discern it. Both of the other opinions have ably undertaken this difficult task. I agree with Judge Davis that this circuit should not chart a solitary course that rejects a causation requirement. The reasons why I believe the statute requires causation are different than he expresses, though. I agree with the majority, relying on the last-antecedent rule, that the phrase “as a proximate result of the offense” that is in Section 2259(b)(3)(F) only modifies the category of loss described in (F).

Though I agree with the majority in that respect, I find persuasive the reasoning of the Second, Fourth, and D.C. Circuits that causation “is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259.” ...

True, the positioning of the phrase “proximate result” solely within subsection (F) could be a sign that Congress meant to eliminate causation for damages falling under subsections (A)-(E). Any such implication is thoroughly defeated, though, by other provisions of the statute. First, as the D.C. Circuit has recognized, Section

2259 calls for restitution to go to a “victim” of these crimes, a term defined as “the individual harmed as a result of a commission of a crime under this chapter.” Second, the statute directs that an order of restitution should be issued and enforced “in the same manner as an order under section 3663A.” ...

I understand the contours of this proximate-cause requirement in much the same manner as does Judge Davis, including his analysis of “collective causation.” I also agree that the option of “apportion[ing] liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant” belies the majority's notion that each case calls for an award equal to the total loss incurred by a victim. Yet by making restitution “mandatory” for all these crimes of exploitation, including possession and distribution of child pornography, Congress made its “goal of ensuring that victims receive full compensation” plain.

Awards must therefore reflect the need to make whole the victims of these offenses. As Amy's suffering illustrates, the “distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children.” They constitute an indelible “record of the children's participation and the harm to the child is exacerbated by their circulation.”

In light of the unique nature of prosecutions for child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of

restitution should be resolved in favor of the child. This concern is largely a matter of a difference of emphasis from the views expressed by Judge Davis. I am concerned that his emphasis on the discretion of a district court, though clearly that discretion exists and can be exercised under the terms of Section 3664, tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be assigned a particular defendant. That puts too much weight on the interests of the defendants. Over-compensation is an unlikely eventuality. Were it to occur, then at that

point district courts might be able to shift to evening up contributions among past and future defendants.

In summary, proximate cause must be shown and the principle of aggregate causation is the method for proving its existence. By statute, district courts can award all damages to each defendant but also have discretion to make lesser awards if properly explained. This means that I agree with requiring additional proceedings as to both defendants, but disagree that each district court is required to impose a restitution award of the full amount of damages.

## “Supreme Court Takes Up Case on Child Porn Victim Restitution”

*Huffington Post*

Mark Sherman

June 27, 2013

The Supreme Court said Thursday it will take up a case about when victims of child pornography can recover money from people convicted of viewing their abuse.

The justices agreed to review a question that has divided lower courts: Must there be a link between the crime of viewing child pornography and the victims' injuries before victims are entitled to restitution?

A woman identified as Amy is seeking financial payments from Texas resident Doyle Randall Paroline, who pleaded guilty to possessing between 150 and 300 images of child pornography on his computer. Amy was among the girls depicted.

Amy is seeking more than \$3.3 million from Paroline to cover the cost of her lost income, attorneys' fees and psychological care.

Last year, the full 5th U.S. Circuit Court of Appeals in New Orleans said in a 10-5 decision that victims do not have to show a link between the crime and their injuries.

Amy, now her early 20s and living in Pennsylvania, was a child when her uncle

sexually abused her and widely circulated images of the abuse, according to court records. The National Center for Missing and Exploited Children said it has found at least 35,000 images of Amy's abuse in more than 3,200 child pornography cases since 1998.

In at least 174 cases, Amy has been awarded restitution in amounts ranging from \$100 to more than \$3.5 million. She has collected more than \$1.5 million, one of her attorneys has said.

In another case involving Amy and a second woman, the 9th U.S. Circuit Court of Appeals in San Francisco threw out a restitution order because it found there was not a sufficient link between a man convicted of possessing child pornography and the women.

That is why Amy's lawyers also urged the Supreme Court to hear Paroline's appeal, in an effort to resolve the split among federal judges.

## **“High Court to Decide Who Owes Restitution to Child Porn Victims - Woman Filing Against Men who Viewed Images Years Later”**

*The Blade*  
Paula Reed Ward  
July 7, 2013

It is self-evident that a child is harmed during the creation of child pornography.

But it is less clear if that person is harmed years later when someone views those images on the Internet.

The decision on how harm is calculated could be the difference between a victim being compensated or receiving nothing at all.

The issue has been raised in the Western District of Pennsylvania and in federal courts across the country for five years, but now the U.S. Supreme Court will weigh in. The high court agreed late last month to hear the case involving “Amy,” who was sexually abused by her uncle at the ages of 8 and 9. He photographed that abuse and distributed the images online starting in 1998.

The Block News Alliance does not identify victims of sexual abuse; Amy is the name used in court documents for the victim.

According to the National Center for Missing and Exploited Children, more than 35,000 pornographic images of Amy have been found in 3,200 criminal cases since.

Amy began filing requests for restitution in September, 2008, against defendants convicted of possessing images of her. She

has made similar filings in every U.S. district court in the country.

But the rulings have been split. In some districts, restitution of the full amount she is seeking — \$3.4 million — has been granted. But in others, Amy has been awarded nothing.

The legal question turns on a single phrase.

The Mandatory Restitution for Sexual Exploitation of Children Act of 1994 declares that a person harmed as a result of child pornography shall be paid by the defendant “the full amount of the victim’s losses,” which include:

- Medical services relating to physical, psychiatric, or psychological care.
- Physical and occupational therapy or rehabilitation.
- Necessary transportation, temporary housing, and child-care expenses.
- Lost income.
- Attorneys’ fees, as well as other costs incurred.
- Any other losses suffered by the victim as “a proximate result of the offense.”

The issue turns on the phrase “as a proximate result of the offense.” It means a

direct causal link between the offense and the loss.

Defense attorneys for Doyle Paroline, a defendant from the Eastern District of Texas whose case will go to the Supreme Court, argue that victims of child pornography must be able to prove the losses they suffered were the “proximate result” of their individual clients’ viewing online images of them taken when they were young children.

But the attorney for Amy says that the phrase “proximate result” should only apply to the last subsection for “any other losses,” because the phrase does not appear in any other part of the list of losses in the statute.

The question of restitution has been brewing since Amy filed her first request against a man convicted of possession in Connecticut.

That defendant, a British foreign national who was the vice president of global patents for Pfizer and a millionaire, was the first test case.

The judge in the district court there awarded \$200,000, although the case later ended with a settlement among the parties.

In the case in the Western District of Pennsylvania, a defendant named Kelly Hardy was also ordered by U.S. District Judge Nora Barry Fischer to pay restitution. Ultimately, the parties reached an agreement for Hardy to pay \$1,000.

As of May, restitution for Amy has been ordered in 174 cases, ranging from \$100 to \$3.5 million, although some cases have been

rejected on appeal or are pending. She has collected \$1.6 million.

But in the case involving Paroline, the district court judge in Tyler, Texas, said he did not have to pay restitution because the government failed to show the specific harm caused to Amy by the man viewing her images.

“Certainly, Amy was harmed by Paroline’s possession of Amy’s two pornographic images, but this does little to show how much of her harm, or what amount of her losses, was proximately caused by Paroline’s offense,” wrote U.S. District Judge Leonard Davis. “There is no doubt that everyone involved with child pornography — from the abusers and producers to the end-users and possessors — contribute to Amy’s ongoing harm.”

While the judge said he was sympathetic to what Amy has experienced — and will throughout her lifetime — that is not enough to dispense with the “proximate cause” requirement.

However, the 5th U.S. Circuit Court of Appeals overturned Judge Davis, writing that the proximate cause requirement applies only to the last category to the last subsection, “any other losses suffered by the victim.”

The 5th Circuit, though, is the only circuit in the country to have found that way.

Ten other circuits have ruled against restitution.

“The Supreme Court is going to have its work cut out for it,” said Stanley Schneider, who will represent Paroline at the Supreme Court. “You have all these underlying issues that need to be discussed.”

One of the most obvious to him as to whether his client should be liable for any payment, Mr. Schneider said, is the timing of his arrest. Amy had already created her restitution model — and submitted requests in a number of jurisdictions — before Paroline was arrested in January 2009.

“It’s an interesting anomaly,” Mr. Schneider said. “How can someone be liable for [harm that occurred] before you committed your criminal act?”

Additionally, Mr. Schneider argues that Amy suffers harm from the viewing of her images only because she requests notification when defendants are arrested for possessing them.

But, he continued, it is her perception that causes any ill effects, not that a defendant viewed it.

Attorneys for Amy have argued that she is not seeking to collect more than she has asserted. Once she has collected \$3.4 million, Amy would stop filing, they have said.



## “D.C. Circuit Weighs Child Pornography Restitution Case”

*Blog of Legal Times*

May 13, 2013

The thorny question of how to calculate restitution to victims of child pornography came back before the U.S. Court of Appeals for the D.C. Circuit last week, with the U.S. Department of Justice defending a proposed formula.

Friday's arguments marked the second time the court considered the case of Michael Monzel. Monzel pleaded guilty to one count each of distribution and possession of child pornography. A trial judge ordered Monzel to pay \$5,000 to a victim known by the pseudonym "Amy," but on remand from the D.C. Circuit reduced the award to zero, finding the government didn't produce evidence on how much of Amy's losses he caused.

The government appealed, arguing U.S. District Judge Gladys Kessler was wrong to reduce the award and that its proposed formula – dividing a victim's total losses by the number of individuals found criminally responsible and then adjusting based on certain factors – represented a fair solution. Monzel's lawyer, Federal Public Defender A.J. Kramer, said the formula was arbitrary and that Kessler was right to reduce the award after the government presented no evidence linking his client to specific losses.

Courts across the country have struggled to find a consistent way to calculate damages in child pornography cases. As lawyers on both sides noted, there are often an unpredictable number of defendants,

especially if the images are distributed online, and it can be difficult to know the extent an individual defendant who viewed or possessed an image was responsible for harming the victim.

Judge Brett Kavanaugh told Patty Stemler, chief of the appellate section of the Justice Department's criminal division, that he was interested in reaching a decision that would apply to similar cases in the future. However, the court expressed concern that under the government's formula, individuals convicted earlier would bear more of a burden. Stemler said the amount owed by each defendant would be lowered as needed until a certain threshold.

Kavanaugh asked if the Justice Department had recommended legislation to Congress addressing the restitution issue. Stemler said they were working on it, but had yet to submit something.

Specific to Monzel's case, Judge Judith Rogers asked Stemler why the government didn't provide more information to Kessler on remand estimating Amy's losses that could be attributed to Monzel. Kessler had called the estimates stale, Rogers said. Stemler said the government was never asked for more information and followed the D.C. Circuit's first decision saying Kessler could request more evidence or a formula.

The court heard from a lawyer representing Amy's interests, Paul Cassell of the appellate

clinic at the University of Utah S.J. Quinney College of Law. Cassell said Kessler was wrong to not follow a federal statute known as Masha's Law, which gave victims of child pornography the right to file a civil lawsuit and set minimum damages at \$150,000 for each violation of federal child pornography laws.

Cassell said his team was preparing to take the case to the U.S. Supreme Court to ask that defendants pay at least \$150,000 in accordance with Masha's Law.

When asked how the court should calculate losses attributable to Monzel, Kramer said several courts found there was no answer and that the statute surrounding criminal

restitution was "unworkable." Absent evidence from the government, Kramer said, Kessler was justified in finding Monzel couldn't be responsible for paying specific losses.

Rogers compared the situation to the administration of payments to victims of the terrorist attacks on September 11, 2001, saying the court was tasked with finding a reasonable approach, as opposed to a perfect solution for allotting payments. Kramer said the government's formula was arbitrary and ran afoul of a requirement that restitution be tied to the defendant's role in contributing to the victim's losses.

## **“Should Child Porn 'Consumers' Pay Victim Millions? Supreme Court to Decide.”**

*Christian Science Monitor*

Warren Richey

June 27, 2013

The US Supreme Court on Thursday agreed to examine whether anyone convicted of possessing images of child pornography can be required to pay a multimillion dollar restitution award to the abused child depicted in the illicit images – even if the individual had no direct contact with the child-victim.

Under the Mandatory Restitution for Sexual Exploitation of Children Statute, Congress said that a judge “shall order restitution” for the victim in a child pornography case in “the full amount of the victim’s losses.”

The law applies to those who personally engage in physical abuse of a child while producing pornographic images of the abuse. But the question in the appeal is whether the same law requires anyone who views or possesses the resulting child pornography to also pay the total amount of restitution.

The issue has arisen in hundreds of cases across the country involving possession of child pornography. The vast majority of courts have declined to require child pornography consumers (as opposed to producers) to pay the full amount of restitution. Only one federal appeals court, the New Orleans-based Fifth US Circuit Court of Appeals, has ordered full restitution under such circumstances.

On Thursday, the Supreme Court agreed to examine a case from the Fifth Circuit and decide whether the government or the victim must be able to prove there is a causal relationship between the defendant’s conduct and harm to the victim and the victim’s claimed damages.

The issue arises in the case of an East Texas man, Doyle Paroline, who faced a restitution demand of \$3.4 million after pleading guilty to possessing child pornography. Investigators found 280 images on his computer. He was sentenced to two years in prison and 10 years of supervised release.

After his conviction, experts at the National Center for Missing and Exploited Children determined the identity of one of the children whose images were on Paroline’s computer. They identify her in court papers by the pseudonym “Amy.”

They found at least two images of Amy. Lawyers working on her behalf filed the request for full restitution.

Amy had been sexually abused as a child by her uncle. The uncle recorded the abuse on film and distributed the images on the Internet. The National Center for Missing and Exploited Children has found at least 35,000 copies of images of Amy’s abuse among the evidence in 3,200 child pornography cases since 1998.

The images are said to be “extremely graphic.”

According to federal prosecutors, restitution has been ordered for Amy in more than 170 child pornography cases. The amounts range from \$100 to \$3.5 million. The vast majority of defendants in child pornography cases are said to be of limited means and therefore unable to pay make significant restitution payments.

The images of Amy’s abuse were traded on the Internet and are said to have gone “viral” among consumers of child pornography worldwide.

Amy has said in court filings that because images of her abuse continue to be sought out, traded, and viewed, she feels as if she is being abused “over and over again.”

She noted: “It feels like I am being raped by each and every [person who is looking at my pictures],” according to a brief filed on her behalf at the high court.

The central issue in the case is whether the law simply requires full payment of restitution in child pornography cases, or whether prosecutors or the victim must be able to prove a causal relationship showing the specific actions of a defendant caused specific harms to the victim.

In some cases, judges have taken the total amount of damages claimed by a child-victim and divided it by the number of other defendants ordered to pay restitution to that child-victim.

In contrast, the Fifth Circuit ruled that the statute requires judges to order defendants to pay the full amount.

The appeals court explained that the law would not allow “Amy” to collect the full amount of her losses several times over. Instead, her claims would end once she’d received the full amount of her claimed losses from one or more defendants.

In urging the high court to take up a similar case, lawyers for Amy and another child-victim said that unlike the Fifth Circuit, 10 other federal courts of appeal have ruled that child pornography victims must be able to show that a defendant’s actions were the proximate cause of the harms for which they seek restitution.

“The practical effect of this clearly-acknowledged circuit split is that child pornography victims in the Fifth Circuit are now receiving restitution for the full amount of their losses, as commanded by Congress,” wrote University of Utah Law Professor Paul Cassell in his brief to the court in a similar child pornography restitution case.

He noted that while the defendant in the Fifth Circuit case was ordered to pay Amy \$3 million, the ordered restitution to Amy in a Ninth Circuit case was \$0.

In identical cases involving the same victim and the same crime, the restitution award showed a \$3 million variance, Cassell said.

“Allowing such disparate results contradicts the commitment to fair and equal treatment

of criminal defendants – and crime victims,”  
he wrote.

*Kansas v. Cheever*

12-609

**Ruling Below:** *State v. Cheever*, 284 P.3d 1007 (Kan. 2012), *cert granted*, 133 S.Ct. 1460 (U.S. 2013).

Defendant was convicted in the Greenwood District Court, of capital murder, four counts of attempted capital murder of law enforcement officers, criminal possession of a firearm based on a previous felony conviction for aggravated robbery, and manufacture of methamphetamine. Cheever subsequently appealed. The Supreme Court of Kansas held that allowing State's expert to testify in rebuttal to defendant's voluntary intoxication defense violated defendant's Fifth Amendment rights. Additionally, the trial court's error in admitting testimony of State's psychiatric expert in violation of defendant's Fifth Amendment rights was not harmless error, and prosecutor's comment (which was made during the penalty-stage closing argument, stating that jury could consider mitigating circumstances, but did not have to) was not improper.

**Question Presented:** Whether, when a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant's methamphetamine use, the state violates the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defendant's mental state defense with evidence from a court-ordered mental evaluation of the defendant.

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**STATE of Kansas, Appellee,**  
**v.**  
**Scott D. CHEEVER, Appellant.**

Supreme Court of Kansas

Decided on August 24, 2012

[Excerpt; some footnotes and citations omitted.]

**PER CURIAM**

A jury convicted Scott D. Cheever of capital murder for the killing of Greenwood County Sheriff Matthew Samuels, four counts of attempted capital murder of law enforcement officers Robert Keener, Travis Stoppel, Mike Mullins, and Tom Harm, criminal possession of a firearm based on a

previous felony conviction for aggravated robbery, and manufacture of methamphetamine. Cheever was sentenced to death on the capital offense. In addition, he was given a controlling sentence of 737 months for the attempted capital murder convictions, which included concurrent sentences of 146 months for the

manufacturing conviction and 8 months for the firearm conviction. Cheever filed a timely appeal of his convictions and sentences. We have jurisdiction under K.S.A. 21-4627(a).

We conclude that allowing the State's psychiatric expert, Dr. Michael Welner, to testify based on his court-ordered mental examination of Cheever, when Cheever had not waived his privilege under the Fifth Amendment to the United States Constitution in that examination by presenting a mental disease or defect defense at trial, violated Cheever's privilege against compulsory self-incrimination secured by the Fifth and Fourteenth Amendments to the United States Constitution. Because we are unable to conclude beyond a reasonable doubt that Welner's testimony did not contribute to the capital murder and attempted capital murder verdicts obtained in this case, this constitutional error cannot be declared harmless. Consequently, Cheever's convictions for capital murder and attempted capital murder must be reversed and remanded for a new trial.

Cheever did not challenge his convictions and sentences for manufacture of methamphetamine and criminal possession of a firearm. We affirm those convictions and sentences.

## **FACTS AND PROCEDURAL BACKGROUND**

On January 19, 2005, Scott D. Cheever shot and killed Greenwood County Sheriff Matthew Samuels at Darrell and Belinda

Coopers' residence near Hilltop, Kansas. Samuels, acting on a tip, had gone to the Coopers' residence, along with Deputy Michael Mullins and Detective Tom Harm, to attempt to serve an outstanding warrant for Cheever's arrest. Cheever, along with the Coopers, Matt Denney, and Billy Gene Nowell, had been cooking and ingesting methamphetamine in the early morning hours prior to Samuels' arrival. In the ensuing attempts to remove the wounded Samuels from the residence and arrest Cheever, Cheever also shot at Mullins, Harm, and two state highway patrol troopers, Robert Keener and Travis Stoppel.

...There was little discrepancy in the pictures painted by the various accounts [at trial].

Shortly before Samuels, Mullins, and Harm arrived at the Coopers, Belinda had received a telephone call informing her that the police were on their way to the house to look for Cheever. Belinda told Cheever the police were coming and asked him to get his stuff together and leave, but Cheever's car had a flat tire.

When Samuels arrived at the Cooper's house, Cheever and Denney were hiding in an upstairs bedroom. Cheever had two guns with him—a .44 caliber Ruger revolver and a .22 caliber semi-automatic pistol. As he hid upstairs, Cheever heard the officers pull up to the house and heard Darrell yell that the cops were there and that he was going to tell them Cheever was not there. Cheever also heard Darrell answer the door and tell Samuels Cheever was not there. Cheever

heard Darrell agree to allow Samuels inside to look around.

Cheever heard Samuels calling out his name as he looked for Cheever on the first floor. The doorway to the upstairs had a piece of carpet covering it and Samuels asked Belinda where the doorway led. Belinda said it went upstairs. Samuels pulled the carpet back and yelled for Cheever. Cheever looked over at Denney and told him, "Don't move, don't make a sound, just stay right where you are." Samuels then went through the doorway to go upstairs.

Cheever heard Samuels' steps on the stairs. Cheever had the loaded and cocked .44 in his hand when he stepped out of the bedroom and looked down the stairway. Cheever saw Samuels coming up the stairs. Cheever pointed his gun and shot Samuels. Cheever then stepped back into the bedroom and told Denney not to go out of the window because they would shoot him. Cheever returned to the stair railing, looked down the stairs, saw Samuels, and shot him again. Cheever stepped back into the bedroom and saw that Denney had left through the window. Cheever then shot at Mullins and Harm as they tried to get the wounded Samuels out of the stairwell. Later, he shot at Keener and Stoppel, who were part of the SWAT team that entered the house to arrest Cheever.

Cheever asserted a voluntary intoxication defense, based on the theory that methamphetamine use had rendered him incapable of forming the necessary premeditation to support the murder and attempted murder charges. Cheever's

evidence in support of his defense consisted of his own testimony and the testimony of his expert witness, Dr. Roswell Lee Evans, Jr., a doctor of pharmacy with a specialty in psychiatric pharmacy.

The jury found Cheever guilty on all counts as charged. At the penalty phase, the jury unanimously found beyond a reasonable doubt that the three alleged aggravating circumstances had been proven to exist and that they were not outweighed by any mitigating circumstances found to exist and therefore sentenced Cheever to death. The trial court subsequently accepted the jury's verdict and imposed a sentence of death.

While the facts of the case are relatively straightforward, the procedural history of the case is less so. The case was originally filed in Greenwood County District Court shortly after the crime. At about the same time, this court found the Kansas death penalty scheme unconstitutional in *State v. Marsh*. The state proceeding was dismissed after federal authorities initiated prosecution in the United States District Court under the Federal Death Penalty Act.

The federal case went to jury trial in September 2006, but 7 days into jury selection, the case was suspended when Cheever's defense counsel became unable to proceed. The federal case was subsequently dismissed without prejudice and the state case was refiled, went to trial, and resulted in the convictions and sentences before us in this appeal. Additional facts will be included in the discussion where relevant to the issues.



## **I. COURT-ORDERED MENTAL EXAMINATION**

During the course of the federal proceedings, Judge Monte Belot ordered Cheever to undergo a psychiatric examination with Dr. Michael Welner, a forensic psychiatrist hired by the government. While the precise circumstances leading to Judge Belot's order are not in the record before us, the record is sufficient to show that the mental examination was ordered because Cheever had raised the possibility that he would assert a defense based on mental condition. ... Welner's interview of Cheever lasted 5 and 1/2 hours, was videotaped, and resulted in a 230–page transcript.

Welner's examination first became an issue at trial during the State's cross-examination of Cheever. The State sought to use the transcript of Cheever's interview with Welner to impeach Cheever's testimony that he did not hear Samuels ask if he could go upstairs. Defense counsel objected, arguing that because the defense had not filed a notice of intent to rely on a mental disease or defect defense, the State was not entitled to use Welner's examination of Cheever. The trial court allowed the impeachment as “a prior inconsistent statement given to a witness who will testify” after the State confirmed Welner would be called as a rebuttal witness to Cheever's voluntary intoxication defense.

Cheever's expert witness in support of his voluntary intoxication defense was Dr. Roswell Lee Evans, Jr., a doctor of pharmacy, who specialized in psychiatric

pharmacy, the pharmacological effects of drugs, including illegal drugs such as methamphetamine. Evans testified that methamphetamine is a very intense stimulant drug that has three pharmacological phases: the initial rush, the long-term intoxication, and the neurotoxic phase. Evans explained that the initial rush is a virtually instantaneous very extreme high that lasts approximately 30 minutes. Following the initial rush is the long-term intoxication period. He testified that the intoxication lasts about 13 to 14 hours...

Evans testified that while methamphetamine is not pharmacologically addictive, the intense pleasure of the initial rush makes the drug psychologically addictive. ... However, methamphetamine users develop a tolerance to the initial rush, leading them to increase the frequency of use or the dosage, which then extends the long-term intoxication stage.

The neurotoxic phase, Evans testified, develops in chronic, long-term users. He said that the neurotoxic effect of long-term use can change the structure of the brain, resulting in the loss of gray matter and consequential loss of brain function, including loss of cognitive functions that deal with planning, assessing consequences, abstract reasoning, and judgment. Evans testified that long-term use can cause paranoid psychosis which, due to impairment of the brain functions responsible for judgment and impulse control, can result in violence. According to Evans, chronic users in a state of paranoid psychosis begin to react...to all sorts of stimuli based on their paranoid ideations...

[Evans'] testimony primarily indicated that these changes persist only as the result of continued drug use and would abate after a period of nonuse ranging from 4 to 6 months.

Testifying about Cheever specifically, Evans said that at the time of the crimes, Cheever's drug use had progressed to the point that he had developed neurotoxicity and was showing symptoms of psychosis, evidenced by doing "really stupid judgment kind of stuff." ...

Ultimately, Evans testified it was his opinion that at the time Cheever committed these crimes, Cheever was both under the influence of recent methamphetamine use and impaired by neurotoxicity due to long-term methamphetamine use, which affected his ability to plan, form intent, and premeditate the crime. With respect to shooting Samuels, Evans testified that there "was no judgment. There was no judgment at all. This man just did it."

On cross-examination, the State made clear that Evans was not a medical doctor, not a psychiatrist, not a neurologist, and not a psychologist. The State characterized Evans as a "pharmacist."

At the conclusion of Evans' testimony, the defense rested. The State then sought to present Welner as a rebuttal witness. Defense counsel objected, arguing that because Cheever had not asserted a mental disease or defect defense in this case, the State could not use Welner's examination. The State contended that Welner's testimony was proper rebuttal to Cheever's voluntary

intoxication defense. ... The trial court ruled that Welner's testimony was admissible as rebuttal to the voluntary intoxication defense.

Welner's testimony began with a long discourse on his qualifications, his substantial fee, and the extensive methodology he applies to cases under his review. Welner also described in detail the materials he reviewed prior to interviewing Cheever, the 5 and 1/2 hour interview process, and the psychological testing that was conducted on Cheever.

Welner testified that based on his examination, it was his opinion that on January 19, 2005, Cheever's perceptions and decision-making ability were not impaired by methamphetamine use. Welner told the jury that Cheever had the ability to control his actions, he had the ability to think the matter over before he shot Samuels, and he had the ability to form the intent to kill.

Addressing the relationship between Cheever's level of suspicion on the day of the crimes and his use of methamphetamine, Welner testified that while Cheever was suspicious that morning, his suspicions were reality based... Welner also concluded that there was no change in Cheever's level of suspicion after he used methamphetamine.

Addressing the relationship between Cheever's level of suspicion and violence, Welner testified that Cheever's conduct demonstrated that his suspicions were not a trigger for violence. He considered it significant that, although Cheever had suspicions about the others taking his

manufacturing supplies or swindling him in some way, Cheever did not react with violence. Instead, Cheever attempted to gain control over the situation and defuse the perceived threats by giving Denney a walkie-talkie to monitor the area and personally engaging with Nowell, whom he did not trust. ...

Welner also addressed whether Cheever had suffered any “longstanding-effects” or “brain damage” as a result of methamphetamine use. He noted that neuropsychological testing conducted by another doctor showed Cheever had high-average executive functioning and response inhibition....

Focusing specifically on the shooting of Samuels, Welner described Cheever's decision-making process:

“The decision-making ability, as I've—as I've assessed it in this case, began with his—his decision-making once it became clear that the police were there. He made a decision not to try to flee, not to try to run. ... And he made a decision to shoot when he did.

“And then he engaged Matthew Denney and then went back and made a decision to shoot again. And then when he stopped shooting he made a decision to stop shooting.”

Welner testified he considered and ultimately discounted other factors that could possibly explain Cheever's crimes, such as psychiatric conditions or disorders. He also considered and ultimately discounted environmental phenomena that

could influence Cheever's efforts to avoid being taken into custody. ...

Cheever argues that his Fifth Amendment privilege against compulsory self-incrimination was violated when the trial court allowed the State to use the court-ordered mental examination by Welner when Cheever had not waived his privilege in that examination by asserting a mental disease or defect defense at trial.

#### **A. Preservation/Standard of Review**

The State argues that Cheever's constitutional challenge to the admission of evidence from the court-ordered examination was not properly preserved for review because he did not object on Fifth Amendment grounds at trial.

Although Cheever disputes the State's contention that his objection was insufficient to preserve his constitutional claim, he argues alternatively that preservation is not fatal to his claim. In support, Cheever relies on the following language of K.S.A. 21–4627(b):

“[in a death penalty case] [t]he supreme court of Kansas shall consider the question of sentence as well as any errors asserted in the review and appeal and *shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.*”

Cheever asserts that because Welner's testimony played a large role in the guilt and penalty phases, it serves the ends of justice to determine whether the use of that

evidence violated his constitutional privilege against compelled self-incrimination.

We hold that lack of preservation is not an obstacle to our review, but not because of our authority to notice *unassigned* errors under K.S.A. 21-4627(b), as Cheever argues. K.S.A. 21-4627(b) provides two distinct exceptions in death penalty cases to general rules concerning appellate review: It requires the court to consider all errors asserted on appeal, and it authorizes the court to notice unassigned errors appearing in the record if doing so serves the ends of justice.

The first exception applies to errors raised by the parties. ... Thus, the statute imposes a mandatory exception in death penalty appeals to the various statutes and rules barring consideration of unpreserved issues.

The second exception applies to unassigned errors. An unassigned error is one *not* raised by the parties but noticed by the court on its own during its review of the record. In contrast to our duty to consider all asserted errors, our review of unassigned errors is permissive and conditional.

On this issue and throughout his brief, Cheever misses the distinction between these two provisions. Because Cheever raises the Fifth Amendment issue in his brief, it is not an unassigned error; it is an asserted error. Accordingly, we must review Cheever's constitutional claim, notwithstanding the State's contention that Cheever's failure to raise that specific ground at trial precludes appellate review.

Having determined that this issue is reviewable, we next address the standard of review. Because Cheever challenges the legal basis for the admission of this evidence, our standard of review is *de novo*.

## **B. Analysis**

Cheever relies primarily on *Estelle v. Smith*, *Buchanan v. Kentucky*, and several related cases to argue that because he had not waived the privilege by presenting evidence of a mental disease or defect at trial, the State was precluded by the Fifth Amendment from using statements he made during Welner's examination, conducted as part of the federal case, against him. The State responds that its use of Welner's examination was proper rebuttal and impeachment.

In *Smith*, the United States Supreme Court held that a court-ordered pretrial psychiatric examination implicated the defendant's rights under the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, when the defendant neither initiated the exam nor put his mental capacity into issue at trial.

In *Smith*, the trial court ordered a competency examination of the defendant. Defense counsel had not raised an issue of competency or sanity and was unaware that the examination was ordered. The psychiatrist interviewed the defendant and provided a report to the trial court in which he concluded the defendant was competent to stand trial. During the penalty phase of the defendant's capital trial, the State called

the psychiatrist to testify as to the defendant's future dangerousness—one of three factors the State was required to establish to obtain the death penalty under Texas law. The psychiatrist's testimony included his conclusions that the defendant was a “severe sociopath” with no regard for property or human life, that he would continue his criminal behavior if given the opportunity, and that he had no remorse for his actions.

The Court determined that under the “distinct circumstances” of the case, the Fifth Amendment privilege applied to the examination. The Court emphasized that the Fifth Amendment is not implicated by an order requiring a criminal defendant to submit to a competency examination “for the limited, neutral purpose of determining ... competency to stand trial.” Further, as long as the examination is conducted consistent with that limited purpose and used for that neutral purpose, there is no Fifth Amendment issue.

The Court noted that although the scope of the examination went beyond the question of competency, it was not the conduct of the examination that triggered the Fifth Amendment, but its use against the defendant at trial to establish an element necessary to obtain a verdict of death. The Court observed that there would have been no Fifth Amendment issue if the psychiatrist's findings had been used solely for the purpose of determining competency. But because “the State used [Smith's] own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death

penalty[,]” the Fifth Amendment privilege applied.

The Court made clear that its ruling applied only to situations in which the defendant “neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence” at trial. The Court explained that where a defendant has placed his or her mental state in issue, a court-ordered psychiatric examination may be the only way the State can rebut the defense...

In *Buchanan*, the Court addressed the situation it had distinguished in *Smith*. In *Buchanan*, the defense joined with the prosecution in requesting a court-ordered mental examination of the defendant and presented evidence supporting a mental-state-based defense at trial. The Court held that under those circumstances, allowing the State to use the results of the mental examination for the limited purpose of rebutting that defense did not violate the defendant's Fifth Amendment privilege.

In addition to the *Smith/Buchanan* line of precedent, Cheever also relies on *Battie v. Estelle* and *Gibbs v. Frank*. In *Battie*, the Fifth Circuit Court of Appeals rejected the argument that a defendant waives his or her Fifth Amendment privilege by requesting or submitting to a psychiatric examination to determine sanity at the time of the crime. The court explained that waiver occurs when the defense introduces psychiatric testimony, in the same manner as would the defendant's election to testify at trial.

We explore *Gibbs* in some depth, because the Third Circuit Court of Appeals examined

and applied the *Smith* and *Buchanan* line of precedent to a situation with similarities to Cheever's case.

The defendant in *Gibbs* was tried twice for the 1984 murder of a security guard in Pennsylvania. In the first trial, the defense requested that an expert be appointed for the purpose of determining whether to raise a mental infirmity defense. After the examination, the defense notified the State of its intent to raise such a defense and, consequently, the State secured an order for its own psychiatric examination. The State's psychiatrist gave the defendant *Miranda* warnings, and the defendant made several inculpatory statements. At trial, Gibbs offered expert testimony to establish a diminished capacity defense, and the State called its own expert witness to rebut the testimony. The defendant was found guilty and sentenced to death, but his conviction was ultimately reversed.

At his second trial, the defendant presented an identity defense, not a mental-state-based defense. Nevertheless, the State was permitted to call its expert psychiatric witness to testify about the inculpatory statements the defendant had made during his examination. The defendant was convicted, and the conviction was affirmed on direct appeal. On federal habeas review, the Third Circuit addressed the defendant's claim that his Fifth Amendment privilege was violated when the State was permitted to introduce its psychiatrist's testimony despite the fact that the defendant did not raise the diminished capacity defense at his second trial.

The Third Circuit examined and synthesized the Supreme Court's precedent to determine the applicable rules for resolving the issue:

“...A compelled psychiatric interview implicates Fifth and Sixth Amendment rights. Before submitting to that examination, the defendant must receive *Miranda* warnings and...counsel must be notified. ...The Fifth and Sixth Amendments do not necessarily attach, however, when the defendant himself initiates the psychiatric examination. Similarly, the Fifth—but not Sixth—Amendment right can be waived when the defendant initiates a trial defense of mental incapacity or disturbance, even though the defendant had not been given *Miranda* warnings. But that waiver is not limitless; it only allows the prosecution to use the interview to provide rebuttal to the psychiatric defense. Finally, the state has no obligation to warn about possible uses of the interview that cannot be foreseen because of future events, such as uncommitted crimes.”

Applying this synthesis, the Third Circuit held that while the psychiatrist's testimony was admissible in the first trial at which the defendant had presented a mental capacity defense, it was not admissible at the subsequent trial....

Kansas statutes and caselaw are consistent with *Smith*, *Buchanan*, *Battie*, and *Gibbs*. Under K.S.A. 22–3219(1), in order to present a mental disease or defect defense at trial, a criminal defendant must file a pretrial notice of the intent to do so. Filing such a notice is deemed to be consent to a court-ordered mental examination.

...The court-ordered examination remains privileged unless and until the defendant presents evidence supporting a mental disease or defect defense at trial.

In *Williams*, the defendant filed a notice of intent to raise an insanity defense and then scheduled and paid for a psychiatric examination of the defendant. The State filed a motion to compel discovery of the report, arguing that K.S.A. 22–3219 required its release. The district court ordered the defendant to produce the report. The defendant then withdrew the notice of intent to use the insanity defense and asked the district court to vacate its order. The district court refused, stating the report had to be produced, regardless of whether it was going to be used. Defense counsel refused to comply, arguing that because the notice was withdrawn, the defendant retained his Fifth Amendment privilege in the report. Defense counsel was held in contempt and they appealed.

A panel of the Court of Appeals reversed the contempt order and held that the trial court's *initial order* to produce the report was consistent with K.S.A. 22–3219(2), because the defendant had filed a notice of intent to assert an insanity defense. After the defendant withdrew his intent to assert an insanity defense, however, the district court's refusal to reconsider its order to produce was erroneous...

In summary, we hold that K.S.A. 22–3219 and our caselaw are in harmony with the scope of the Fifth Amendment privilege as construed in the *Smith* and *Buchanan* line

of precedent. Read together, the following rules apply.

Where a defendant files a notice of intent to assert a mental disease or defect defense under K.S.A. 22–3219, the Fifth Amendment does not prevent the court from ordering the defendant to submit to a mental examination. The filing of such a notice constitutes consent to a court-ordered mental examination by an expert for the State, making *Miranda* warnings unnecessary. Consent to the examination, however, does not waive the defendant's Fifth Amendment privilege so as to entitle the State to use the examination against the defendant at trial. Waiver does not occur unless or until the defendant presents evidence at trial that he or she lacked the requisite criminal intent due to a mental disease or defect. If the defendant withdraws the notice to assert a mental disease or defect defense or does not present evidence supporting that defense at trial, the Fifth Amendment privilege remains intact and the State may not use the mental examination as evidence against the defendant. If, however, the defendant presents evidence supporting a mental disease or defect defense, the State may use the court-ordered examination for the limited purpose of rebutting the defendant's mental disease or defect defense.

Applying these rules to Cheever's case, Cheever retained a Fifth Amendment privilege in the Welner examination. Cheever could waive his privilege and allow use of the report under the proper circumstances. Absent such a waiver,

however, the report was privileged under the Fifth Amendment.

***1. Did Cheever waive the privilege, thus entitling the State to use the examination for rebuttal?***

The State contends that Cheever presented expert testimony at trial regarding his mental state, and therefore it was entitled to use the examination to rebut that defense. Cheever contends that he did not present evidence of a mental disease or defect defense. Cheever argues his evidence was limited to showing voluntary intoxication, which is not a mental disease or defect under Kansas law and, therefore, the State was not entitled to use the examination for rebuttal.

The only mental capacity defense recognized in Kansas is the mental disease or defect defense, as defined by K.S.A. 22–3220:

“It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense.”

It is well established that voluntary-intoxication-induced temporary mental incapacity at the time of the crime is not evidence of a mental disease or defect. Evidence of permanent mental incapacity due to long-term use of intoxicants, however, may support a mental disease or defect defense.

In *Kleypas*, the defendant attempted to introduce expert witness testimony that he

had experienced a blackout at the time of the offenses due to voluntary intoxication and chronic cocaine use. The State objected that the defendant was attempting an end run around the procedural and substantive consequences of asserting a mental defect defense after having withdrawn his previously filed notice of intent to assert such a defense. The trial court agreed. On appeal, we held that the defendant's expert testimony did not relate to a mental disease or defect but solely to voluntary intoxication, and thus the trial court erred in refusing to allow the defendant to present that evidence. ...

Cheever's voluntary intoxication defense was based on evidence that his mental state at the time of the crime was a product of a combination of immediate voluntary ingestion of methamphetamine and long-term use of the drug. Cheever did not present evidence, however, that his use of methamphetamine had caused permanent mental impairment. Evans testified that while neurotoxic changes could potentially be permanent, in most cases, those changes abate after a 4– to 6–month period of nonuse. Evans did not testify that Cheever had sustained permanent damage. In fact, he testified that psychological testing done on Cheever some 6 months after his arrest was unlikely to be useful for determining his mental state at the time of the crime because he would no longer have been suffering the effects of the drug.

Accordingly, we find that Cheever's evidence showed only that he suffered from a temporary mental incapacity due to voluntary intoxication; it was not evidence



of a mental disease or defect within the meaning of K.S.A. 22-3220. ... Therefore, we conclude that allowing Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

## **2. Impeachment**

Cheever also argues that allowing the State to use statements he made to Welner to impeach his testimony at trial violated his Fifth Amendment privilege. The State contends that because there is no evidence Cheever's statements to Welner were unlawfully coerced and Cheever does not make such a claim, there was no reason to exclude that evidence. In its brief, the State argues:

“Whether viewed as a constitutional claim or otherwise, there is no basis for exclusion of Dr. Welner's testimony. The exclusion of relevant evidence obtained by the State in a criminal prosecution is a judicially created remedy designed to safeguard the rights of defendants through its deterrent effect. The ‘primary purpose of the exclusionary rule “is to deter future unlawful police conduct.” ’ ...Because there was no allegation of government misconduct here, the exclusion of Dr. Welner's testimony by the trial court was not warranted.”...

We hold the exclusionary rule argument has no relevance here. Cheever's statements to Welner are not excluded as a sanction for governmental misconduct; they are inadmissible because they are protected by

the Fifth Amendment privilege against compelled self-incrimination.

Although not argued by the parties, we note there is conflicting federal caselaw on the question of whether a defendant's statements made during a court-ordered mental examination, while not admissible to rebut a mental-state defense, may nevertheless be used to impeach the defendant's trial testimony. ...

We conclude that under the circumstances, resolution of this issue must await another day. ... In addition, as discussed below, the erroneous admission of Welner's testimony requires reversal and remand of the capital murder and attempted capital murder convictions. Thus, even if we were also to determine that Cheever's statements were properly admitted for impeachment, that determination would not change the outcome in this case.

Last, we address an additional point about the admissibility of Welner's testimony. The trial court suggested that Welner's testimony was admissible for rebuttal because Evans relied on Welner's report in reaching his conclusions. During the arguments over Cheever's objection to the State calling Welner to testify in rebuttal to Evans, the State interjected that Evans had testified he relied on Welner's report. Defense counsel confirmed the State's representation. The trial court then stated “that fact standing alone probably allows the State to call him to give his own point of view.”

Although defense counsel confirmed the State's representation, the record does not.

Evans never stated that he relied upon Welner's report. Evans specifically testified that he did not watch the video of Welner's interview or read the transcript of the interview. ...

...In any event, we need not speculate about the legal basis for the trial court's suggestion that Evans' reliance upon Welner's report provided an alternate ground for allowing Welner to testify, because the record plainly fails to establish that Evans actually did rely upon Welner's report to arrive at his own opinions.

### ***C. Harmless Error Analysis***

Because the admission of Welner's testimony violated Cheever's Fifth Amendment privilege against compelled self-incrimination, we apply the federal constitutional harmless error test of *Chapman v. California*. Under *Chapman*, an error that violates a criminal defendant's constitutional rights requires reversal unless the party who benefitted from the error—here, the State—“proves beyond a reasonable doubt that the error complained of ... did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict.”

In *Satterwhite v. Texas*, the United States Supreme Court considered whether the erroneous admission of the defendant's court-ordered psychiatric examination was harmless error under *Chapman*. Because of parallels with Cheever's case, we set out in

detail the Court's discussion of the evidence at issue and its effect on the outcome:

“Dr. Grigson [who conducted the examination of the defendant] was the State's final witness.... He stated unequivocally [*sic*] that, in his expert opinion, Satterwhite ‘will present a continuing threat to society by continuing acts of violence.’ He explained that Satterwhite has ‘a lack of conscience’ and is ‘as severe a sociopath as you can be.’ ...Dr. Grigson concluded his testimony on direct examination with perhaps his most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation.

“The District Attorney highlighted Dr. Grigson's credentials and conclusions in his closing argument:

‘Doctor James Grigson, Dallas psychiatrist and medical doctor. And he tells you: ... Severe sociopath. Extremely dangerous. A continuing threat to our society. Can it be cured? Well, it's not a disease. It's not an illness. That's his personality. That's John T. Satterwhite.’

“The finding of future dangerousness was critical to the death sentence.... Having reviewed the evidence in this case, we find it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury.”

*Satterwhite* involved the admission of evidence in the penalty phase of a capital murder proceeding, while here, Welner's testimony was admitted in the guilt stage. As the Court recognized in *Satterwhite*, assessing the prejudicial effect of error in the sentencing phase can be

more difficult because of the discretion the jury has in determining whether death is the appropriate punishment. That difference notwithstanding, we find the Court's analysis of the prejudicial effect of the error in admitting psychiatric evidence instructive for the ways in which it parallels Cheever's case. ...

Arguably, it is possible the jury might have convicted Cheever even without Welner's testimony; however, that is not the standard we must apply under *Chapman*. "The question ... is not whether the legally admitted evidence was sufficient to support" the verdict, "but, rather, whether the State has proved 'beyond a reasonable doubt that the error complained of *did not* contribute to the verdict obtained.' "

Because this error violated Cheever's federal constitutional rights, we must reverse unless we can say with "the highest level of certainty that the error did not affect the outcome." After reviewing the entire record, we do not have that level of certainty; we cannot conclude beyond a reasonable doubt that Welner's testimony did not contribute to the verdict in this case. Consequently, the error is not harmless, and Cheever's convictions for capital murder and attempted capital murder must be reversed and remanded for a new trial.

Our decision reversing Cheever's convictions for capital murder and attempted capital murder make it unnecessary to resolve the other issues Cheever has raised. Nevertheless, because we are remanding the case for a new trial, we will address those

issues that are likely to arise on remand in order to provide guidance to the trial court.

## **II. FELONY MURDER AS A LESSER INCLUDED OFFENSE OF CAPITAL MURDER**

The trial court instructed the jury on first-degree premeditated murder as a lesser included offense of capital murder. On appeal, Cheever argues that the first-degree murder instruction should have included the alternative theory of felony murder as a lesser included offense of capital murder. Cheever acknowledges he did not request such an instruction or object to its absence in the district court; thus the trial judge did not have an opportunity to address this issue....

With capital murder as the highest degree of homicide, first-degree murder is a lesser degree of capital murder under K.S.A. 21-3107(2)(a) and is therefore a lesser included crime of capital murder. The crime of first-degree murder may be committed in two ways: premeditated murder and felony murder. Accordingly, felony murder is a lesser included crime of capital murder and, where facts support it, should be included in instructions on lesser included crimes in capital murder cases....

## **III. VOIR DIRE COMMENTS MENTIONING APPELLATE REVIEW**

The trial court divided the prospective jurors into seven panels for voir dire. The trial court's introductory remarks to each panel were substantially similar and began by introducing the parties, their counsel, and court personnel, including the court reporter. In explaining the role of the court reporter,

the trial court told the prospective jurors that the court reporter's written record of the proceedings served two purposes: for reference during the trial and for appellate review should the case be appealed.

The following remarks made to the seventh panel are representative of those made to all of the panels:

“Almost everything is on the record that we do in here.

“We refer back to that record from time to time during the trial to see what someone said, whether a question's already been asked, things of that nature, and if this case should go up on appeal to the appellate courts in Kansas in Topeka, a transcript is made of everything we do and that transcript is sent to the appellate court, along with the exhibits, and the appellate court decides all issues on appeal based on that record that we've made here in the trial court.”

Cheever argues that the trial court's remarks violated the Eighth Amendment to the United States Constitution as applied in *Caldwell v. Mississippi*. Cheever contends the trial judge's remarks in this case created the risk that the jurors would believe that the ultimate responsibility for Cheever's sentence rested with the appellate courts, thereby undermining the heightened reliability the Eighth Amendment demands of a jury's determination that death is the appropriate punishment.

In *Caldwell*, the prosecutor argued to the jury that a decision to impose the death sentence would not be final because it was subject to review by the appellate court. The

Supreme Court held the remarks rendered the death sentence unconstitutional. ...

*State v. Nguyen* provided this court with an opportunity to consider whether a trial judge commits judicial misconduct by mentioning to a jury the possibility that the case before it could be appealed. In explaining the process for the jury to submit questions or request readbacks during deliberations, the judge said:

“ ‘I explained to you that if I get a question, and that will be through my bailiff, Ms. Mies, the foreman will write it down and date it. And I would request also that he write the time—he or she write the time on there. That question will be preserved, ‘cause defense, regardless, would have a right to appeal. As I told you, that a judge is under a microscope and that [to] be sure that any defendant receives the correct legal decisions. I can be challenged. And I welcome the challenges.’ ”

...Although we found the comments were not prejudicial, we unequivocally stressed that “[a] trial court should not mention a defendant's right to appeal.”

*Nguyen* was not a death penalty case; however, the reasoning is consistent with *Caldwell*. Accordingly, we take this opportunity to reiterate our general directive: It is improper for a trial court to make comments to the jury regarding appellate review. Moreover, we emphasize that the life-or-death stakes in a capital murder proceeding require extra vigilance on the part of the trial court to abide by this directive. We note the remarks in this case are not analogous to those that required

reversal in *Caldwell*. Nevertheless, under *Nguyen*, it is error for the trial judge to tell jurors, even prospective jurors, that the exhibits and transcripts of the proceedings will be reviewed by an appellate court. ...

#### **IV. CHEEVER'S AGE AT THE TIME OF THE OFFENSE**

Cheever argues that his death sentence was imposed in violation of his right to jury trial under the Sixth and Fourteenth Amendments to the United States Constitution because the jury did not find beyond a reasonable doubt that he was at least 18 years old at the time of the crime, a fact that he contends is necessary to render him eligible for the enhanced sentence of death. Cheever does not dispute that he was at least 18 years old at the time of the capital offense....

Resolution of this issue hinges on whether the fact Cheever was at least 18 years of age at the time of the crime is a fact necessary for imposition of the death penalty. Cheever argues that it is, relying primarily on *Roper v. Simmons*. Cheever points out that *Roper* held that being 18 years or older at the time of the offense is an *eligibility requirement* for the death penalty. ...

The State responds that the defendant's age is not within the scope of *Apprendi* because it is not a fact that increases the statutory maximum sentence. According to the State, death is the maximum authorized sentence under our capital sentencing statutes, with the defendant's age merely a fact that mitigates that sentence to life in prison. ...

We deem the State's arguments unpersuasive. First, we disagree that death is the maximum authorized sentence. ...

Second, the Supreme Court in *Roper* explicitly rejected the idea that the Eighth Amendment could be satisfied by treating the defendant's youth as a mitigating circumstance. Instead, the Court drew a bright line, holding that the age of 18 or older is a requirement for death eligibility.

Third, under our statutory scheme, the fact the defendant was at least 18 is a prerequisite to imposition of the death penalty. ...

Accordingly, we conclude that the fact the defendant was at least 18 years old at the time of the crime is a fact necessary to subject the defendant to the death penalty and therefore within the scope of Sixth Amendment protection....

#### **V. PENALTY-PHASE INSTRUCTIONS ON MITIGATING CIRCUMSTANCES**

...We note that the [penalty-phase] instruction at issue followed PIK Crim.3d 56.00–D. That pattern instruction did not conform to our directive in *Kleypas*. In 2008, PIK Crim.3d 56.00–D was amended to inform the jury that mitigating circumstances do not need to be proved beyond a reasonable doubt. In any retrial of this case, the most current version of the PIK Crim.3d instructions on mitigating evidence should be used.

#### **VI. MERCY INSTRUCTION**

Cheever challenges the mitigating circumstances instruction on another ground, specifically, the following part:

“Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.

“The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.”

Cheever argues that by characterizing mercy as a mitigating circumstance and placing it in the context of the weighing equation, the instruction prevents the jurors from being able to give full effect to mercy as a basis for a sentence less than death, in violation of the Eighth Amendment. Cheever argues that the jurors must be allowed the opportunity to extend mercy and impose a life sentence *after* determining that the mitigators do not outweigh the aggravators and death is the appropriate sentence by law. ...

Cheever's argument is the same argument we considered and rejected in *Kleypas* ... Cheever offers nothing new to support revisiting [previous] decisions....

## **VII. PROSECUTORIAL MISCONDUCT DURING PENALTY STAGE**

Cheever contends that certain comments concerning consideration of mitigating circumstances made by the prosecutor

during the penalty-stage closing argument constitute prosecutorial misconduct.

The first comment at issue was made during the State's closing argument rebuttal:

“Ladies and gentlemen, let's start off by looking at these mitigating circumstances offered to you by the defendant, which Judge Ward has contained in the instructions. First of all, it's important to remember that these are contentions only. The judge, by instructing you about these, is not suggesting to you that they are true. What he's telling you is that the defendant has put these before you, *you can consider them if you choose, but you don't have to*. Or you can give them as little weight as you choose to give them.” Cheever contends the highlighted remark told the jury that it did not have to consider mitigating circumstances. Cheever argues that because the Eighth Amendment is violated when a capital sentencing jury is precluded from considering relevant mitigating evidence that might serve as a basis for a life sentence, the remark was improper.

The prosecutor's comment in this case was part of an argument that the mitigating circumstances identified in the instructions were only contentions and, as such, the jury did not have to accept them as established simply because they were listed in the instructions. That comment was not an effort to “cut off in an absolute manner” the jury's consideration of Cheever's mitigating evidence. The larger argument, moreover, was consistent with the law and the instructions. It was not improper....

The second comment concerned Cheever's mitigating circumstance that he "was addicted to methamphetamine and he was under its influence at the time of the crime." The prosecutor argued:

"The defendant tells us he was addicted to methamphetamine, and that's the reason, that's a mitigator. Well, tell that to Robert Sanders 'cause he wasn't on methamphetamine that night. Now, you've already decided methamphetamine did not play a role in the capital murder of Matt Samuels. And you should reject it now, too."

...The point of the prosecutor's comment was simply that because the evidence showed Cheever committed a violent criminal act when he was not under the influence of methamphetamine, the jury should give little weight to Cheever's mitigating circumstance that he was under the influence of methamphetamine at the time of the crime. As such, it was not improper.

The last comment at issue concerned the jury's rejection of Cheever's voluntary intoxication defense in the guilt stage: "[Y]ou've already decided methamphetamine did not play a role in the capital murder of Matt Samuels. And you should reject it now." According to Cheever, this remark suggested to the jury that because it rejected the voluntary intoxication defense at the guilt stage, it could reject Cheever's mitigating circumstance that he was under the influence of methamphetamine at the time of the crime. Although the prosecutor said "you *should* reject it," the remark crossed

the line between comment on the weight of the evidence as it relates to specific mitigating circumstances and argument to the jury that it *could not* consider a mitigating circumstance *as a matter of law*. Not only is such an argument an incorrect statement of the law, it could lead a juror to refuse to consider legally relevant mitigating evidence, in violation of the Eighth Amendment. We strongly suggest the State avoid this argument on remand.

The convictions and sentences for manufacture of methamphetamine and criminal possession of a firearm are affirmed. The convictions for capital murder and attempted capital murder are reversed, and the case is remanded for a new trial.

**ROSEN, J., concurring:**

I concur with the majority but write separately only to comment on Cheever's argument that jurors be allowed the opportunity to consider mercy after finding a determination of death is warranted.

As a result of our decision in *State v. Stallings*, capital defendants are denied the statutory right of allocution to the sentencing jury. Thus, a capital defendant is deprived of any meaningful opportunity to make a plea for mercy, indeed for his or her very life, before the sentencing jury makes a decision whether the defendant is to be put to death. I dissented from the decision in *Stallings* and write here to make clear my opinion that Cheever, like all criminal defendants, should be afforded an opportunity to offer a direct allocutory statement in mitigation to his sentencer.

## “U.S. Justices Agree to Weigh Defendant's Self-Incrimination Claim”

*Reuters*

Lawrence Hurley  
February 25, 2013

The U.S. Supreme Court agreed on Monday to consider whether a criminal defendant's right against self-incrimination is violated when a psychiatrist who examined him testifies about his mental state.

Scott Cheever was sentenced to death for killing Greenwood County, Kansas, Sheriff Matthew Samuels while officers sought to enforce a warrant for his arrest in January 2005.

Cheever's defense was that he was intoxicated after using methamphetamine and therefore incapable of the premeditation necessary for him to be convicted of murder and attempted murder.

The legal question is whether Cheever's Fifth Amendment right against self-

incrimination was violated when the state called a psychiatrist who had examined Cheever to testify in order to rebut the claim that the defendant was incapable of rational thought.

The psychiatrist's testimony was based in part on what Cheever had said to him during the evaluation. The Kansas Supreme Court ruled in Cheever's favor.

Oral argument and a decision are expected in the U.S. Supreme Court's next term, which begins in October and runs until June 2014.

The case is *Kansas v. Cheever*, U.S. Supreme Court, No. 12-609.



## **“Kansas Supreme Court Overturns Conviction of Death-Row Inmate in Sheriff’s Killing”**

*The Wichita Eagle*

Hurst Laviana

August 24, 2012

The Kansas Supreme Court on Friday overturned the capital murder conviction of a death-row inmate who shot and killed Greenwood County Sheriff Matt Samuels.

The court said in its ruling that prosecutors violated Scott Cheever’s right against self-incrimination when they allowed an expert witness to discuss the results of a mental exam that Cheever was required by a federal judge to take.

The Kansas Supreme Court has yet to uphold a death sentence imposed under the state’s 1994 capital murder law.

Attorney General Derek Schmidt said his office was reviewing Friday’s ruling but didn’t indicate whether the state would retry the case.

“We will be consulting with appropriate parties over the next few days to determine the best course of action to ensure justice is served,” Schmidt said.

Cheever, now 31, is a special management inmate at the Lansing Correctional Facility.

Cheever was convicted of shooting Samuels on Jan. 19, 2005, near the Greenwood County town of Virgil. Acting on a tip, witnesses at Cheever’s trial testified, Samuels went to the home to serve an arrest warrant on Cheever. Cheever and other

residents of the home had been cooking and using meth before Samuels and a deputy arrived. Cheever, who was hiding in an upstairs bedroom, shot Samuels as he climbed the stairs. Cheever never denied shooting Samuels.

Although Cheever was originally charged with capital murder in Greenwood County District Court, the case was moved to federal court because the constitutionality of the state’s death penalty was being challenged at the time. In the summer of 2006, the U.S. Supreme Court upheld the constitutionality of the law, and Cheever’s case was moved back to state court.

During Cheever’s time in the federal court system, U.S. District Judge Monte Belot ordered him to undergo a psychiatric examination by Michael Welner, a forensic psychiatrist hired by the government. It was Welner’s testimony at the state court trial that would eventually result in Cheever’s conviction being overturned.

During his jury trial, Cheever’s lawyers relied on a voluntary intoxication defense, arguing that Cheever’s heavy use of meth prevented him from forming the intent or premeditation to commit murder.

Lee Evans, dean of the school of pharmacy at Auburn University, was called as an expert witness by the defense to testify that

Cheever's use of meth kept him from making sound decisions.

With respect to shooting Samuels, Evans testified, there "was no judgment. There was no judgment at all. This man just did it."

Welner, who was called by prosecutors as a rebuttal witness, disagreed.

"He made a decision to shoot when he did," he told the jury. "And when he stopped shooting, he made a decision to stop shooting."

The Greenwood County jury convicted Cheever of capital murder on Oct. 30, 2007, then sentenced him to death two days later.

In a 53-page opinion that overturned the conviction, the Kansas Supreme Court said the Fifth Amendment does not prevent a judge from ordering a defendant to submit to a mental exam. But the court said it does prevent the state from using the exam against the defendant at trial.

"Welner was the last witness the jury heard during the guilt phase of the trial, and his

testimony was extensive and devastating," the ruling said. "He employed a method of testifying that virtually put words into Cheever's mouth. He focused on the events surrounding the shootings, giving a moment-by-moment recounting of Cheever's observations and actual thoughts to rebut the sole defense theory that he did not premeditate the crimes."

In addition to capital murder, Cheever was convicted on four counts of attempted capital murder for firing at two state troopers and two sheriff's deputies. The court also overturned those convictions. Cheever's convictions for manufacturing methamphetamine and criminal possession of a firearm were upheld.

Samuels' death prompted changes in the Kansas criminal code to make it more difficult to purchase the ingredients used in making meth. Changes in the law restricting the purchase of certain allergy medications and increased penalties were known as the Matt Samuels Act.

*Fernandez v. California*

12-7822

**Ruling Below:** *California v. Fernandez*, 208 Cal.App.4th 100 (App. 2d Dist. 2012), *cert granted*, 133 S.Ct. 2388 (U.S. 2013).

Defendant was convicted of second degree robbery and willful infliction of corporal injury on a spouse, cohabitant, or child's parent. Defendant appealed, and the Court of Appeals, held that warrantless search of apartment over defendant's objection was lawful, where defendant was arrested and no longer present when co-tenant consented to search.

**Question Presented:** Whether, under *Georgia v. Randolph*, a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search or whether a defendant's previously stated objection, while physically present, to a warrantless search is a continuing assertion of Fourth Amendment rights which cannot be overridden by a co-tenant.

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**The PEOPLE, Plaintiff and Respondent,**

**v.**

**Walter FERNANDEZ, Defendant and Appellant.**

Court of Appeal, Second District, Division 4, California

Decided on August 1, 2012

[Excerpt; some footnotes and citations omitted.]

**SUZUKAWA, J.**

A jury convicted defendant Walter Fernandez of second degree robbery and willful infliction of corporal injury on a spouse, cohabitant, or child's parent; as to count 1, the jury further found that (1) in the commission of the offense, the defendant personally used a dangerous and deadly weapon, to wit, a knife, within the meaning of section 12022, subdivision (b) (1), and (2) the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of section 186.22, subdivision (b)(1).

Defendant pled nolo contendere to possession of a firearm by a felon, short barreled shotgun or rifle activity. The trial court imposed a sentence of 14 years.

In this appeal from the judgment, defendant contends: (1) the trial court erred in denying his motion to suppress evidence seized during a warrantless search of his apartment; (2) the trial court abused its discretion by admitting evidence that a suspect was arrested for attempted murder in defendant's apartment; (3) there was insufficient evidence to support the true finding on the

gang allegation; and (4) the trial court erred in denying defendant's Pitchess motion.

In the published portion of the opinion, we conclude the trial court properly denied defendant's suppression motion. In the unpublished portion, we reject defendant's remaining claims, with the exception of his contention of Pitchess error. We conditionally reverse the section 273.5, subdivision (a) conviction for the trial court to conduct an in camera review of one officer's personnel file; in all other respects, we affirm the judgment.

## **STATEMENT OF FACTS**

### **I. Prosecution Case**

#### **A. Percipient Testimony**

##### **1. Abel Lopez**

On October 12, 2009, at about 11:00 a.m., Abel Lopez was approached after cashing a check near the corner of 14th Street and Magnolia in Los Angeles by a man with light skin, a grey sweater, and a tattoo on his bald head. The man, whom Lopez later identified as defendant, asked what neighborhood Lopez was from. Lopez said, "I'm from Mexico." Defendant laughed and said Lopez was in his territory and should give him his money. He then said, "The D.F.S. rules here. They rule here." Defendant took a knife out of his pocket and pointed it towards Lopez's chest. Lopez put up his hands to protect himself and defendant cut Lopez's wrist.

Lopez tried to run away and, while running, took out his cell phone and called 911. He told the 911 operator he needed help because someone wanted to kill him.

Defendant then whistled loudly and three or four men ran out of a building on 14th Street and Magnolia. They hit Lopez in the face and all over his body, knocking him to the ground, where they continued to hit and kick him. When he got up, Lopez did not have his cell phone or wallet. He saw the men running back to the building from which they had come. As a result of the attack, Lopez suffered a deep cut on his left wrist and bruising and swelling over his body.

Several minutes after the attack, the police and paramedics arrived. Lopez participated in a field showup, where he identified defendant.

##### **2. Detective Clark and Officer Cirrito**

Detective Kelly Clark and Officer Joseph Cirrito responded to a police radio dispatch on October 12, 2009. Because the police dispatcher indicated possible involvement by members of the Drifters gang in an assault with a deadly weapon, Clark and Cirrito drove to an alley near Magnolia and 14th Street where they knew Drifters gathered. As they stood in the alley, two men walked by and one said, "[T]he guy is in the apartment." The speaker appeared very scared and walked away quickly. When he returned, he again said, "He's in there. He's in the apartment." Immediately thereafter, the detectives saw a tall, light-skinned, Hispanic or white male wearing a light blue t-shirt and khaki pants run through the alley and into the house where the witness was pointing. The house had been restructured into multiple apartments and was a known gang location. A minute or so later, the officers heard sounds of screaming

and fighting from the apartment building into which the suspect had run.

Clark and Cirrito called for backup and, once additional officers arrived, knocked on the door of the unit from which they had heard screaming. The door was opened by Roxanne Rojas, who was holding a baby and appeared to be crying. Her face was red and she had a big bump on her nose that looked fresh. She had blood on her shirt and hand that appeared to come from a fresh injury. Cirrito asked what happened and she said she had been in a fight. Cirrito then asked if anyone else was inside the apartment, and she said only her son. When Cirrito asked her to step outside so he could conduct a sweep of the apartment, defendant stepped forward. He was dressed only in boxer shorts and seemed very agitated. He said, "You don't have any right to come in here. I know my rights." Cirrito removed him from the residence and took him into custody.

While Cirrito and Clark arrested defendant at the rear of the house, two men ran out of the front of the house. Officers detained them for questioning.

After defendant was removed from the scene, officers secured the apartment. Clark then went back to Rojas, told her that defendant had been identified as a robbery suspect, and asked for Rojas's consent to search the apartment. Rojas gave consent, orally and in writing. During the ensuing search, officers found Drifters gang paraphernalia, a butterfly knife, boxing gloves, and clothing, including black pants and a light blue shirt. None of the items stolen from the victim was ever found.

The officers interviewed Rojas about her injuries. She said that when defendant entered the apartment, she confronted him about his relationship with a woman named Vanessa. They argued, and defendant struck Rojas in the face. The officers also spoke to Rojas's four-year-old son, Christian, who told them defendant had a gun. Officers recovered a sawed-off shotgun from a heating unit where Christian told them it was hidden. ...

## **B. Expert Testimony**

### **1. Defendant's Active Gang Membership**

Cirrito testified for the prosecution as a gang expert, opining that defendant was an active member of the Drifters, a Latino street gang. He said that the Drifters began as a "car club," but moved into criminal activities in the 1980's. By the 1990's, they began to engage in more violent crimes, such as assaults, carjackings, attempted murders, and narcotics sales. As of October 2009, there were about 140 active Drifters members. In 2009, defendant told officers he had been a member of the Drifters (12th Street Bagos clique) for nine years.

The Drifters' territory includes a "stronghold" in the area between 14th Street and 15th Street, and between Hoover and Menlo. The stronghold is an area where gang members can retreat if there is danger, and from which members can escape through secret passageways. ...

Cirrito testified that a "moniker" is a nickname typically given to a gang member. Defendant's moniker is "Blocks." The moniker "Blocks" appeared in a Drifters

“roll call” (list of active gang members) on a water heater near defendant's apartment. “Blocks” also appeared in tagging on a garage door a few days after defendant's arrest, which read “D.F.S. [Drifters], Bagos, Block [s].” “Bagos” is the Drifters clique in the area in which defendant lives.

Cirrito testified that an art book recovered from defendant's bedroom on October 12, 2009, also evidences defendant's gang membership. Specifically, he noted that the book contains a roll call with monikers and references to “D.F.S. 13,” “D.F.S. 12th Street, Bagos,” “Blocks,” “Rox,” “Roxy, 12th Street,” “Drifters,” and “Drifters 13.” Cirrito said that “13” indicates an affiliation with the Mexican mafia, the “M.A.”...

In summary, Cirrito opined that defendant was an active member of the Drifters because he had tattoos that reference the Drifters gang; he goes by the moniker “Blocks”; he admitted to officers that he has been a member of the Drifters; he had gang paraphernalia in his home; he lived in a Drifters stronghold; and during the incident for which he was arrested, he said, “Where are you from? D.F.S. rules here.”

## **2. Cirrito's Opinion That the Robbery Was Gang-related**

Cirrito testified that gang members care deeply about their gang's reputation in the community because “reputation means everything to them.” He said that gangs want respect from rival gangs, but they also want to terrorize the neighborhoods in which they operate so people will be afraid to come forward and talk about the gang's criminal

activities. A gang makes itself known in the community in several ways, primarily by committing crimes and tagging.

The Drifters establish their territory “[b]y committing crimes in—just open daylight. There's fear and intimidation.... [S]ome of these younger people ... want to be gang members. Some of them, it's almost peer pressure. Some of them are actually forced because they live in that neighborhood. They get beat up. They're getting—I'll say attacked or pocket checked, and, eventually, they give in to just be part of this gang.”

Cirrito opined that Drifters members individually and collectively engage in a pattern of criminal gang activity. Their primary activities are robbery, grand theft auto, assault with a deadly weapon, narcotics, and attempted murder. ...

## **II. Defense Case**

Roxanne Rojas testified that on October 12, 2009, she and defendant were living together in the apartment where defendant was arrested. At about 11:00 a.m., defendant left the apartment to buy tacos and cigarettes; Rojas remained home with their two-month-old daughter and four-year-old son. While defendant was gone, a woman named Vanessa came to the apartment, and she and Rojas fought. Rojas and Vanessa were both injured during the fight. When defendant returned to the apartment through the back door, Vanessa left out the front door. Defendant saw that Rojas was injured and began to yell at her. Moments later, an officer arrived. The officer asked Rojas to let him in, and Rojas “didn't say yes. I didn't

say no. I said let me get my children.” Rojas agreed that defendant has a Drifters tattoo, but said he was no longer active in the gang.

Defendant testified that he had been involved with the Drifters earlier in his life. He was “forcibly jumped in” when he was 18 or 19 years old and he “had to basically like go with the flow.” He was never heavily involved with the Drifters; “[i]t always was just about like simply like me living there ... like I’m out there doing stuff in the neighborhood ... hanging out with people I grew up with.” He admitted that he had been convicted of receiving stolen property and served time in prison. He said he was released in 2007 and turned his life around. He began working and got an apartment in Marina del Rey for himself, Rojas, and her son. When Rojas got pregnant with her second child, the family moved to a two-bedroom apartment on 15th Street and Magnolia, but he had nothing to do with the Drifters.

Defendant testified that on the morning of October 12, 2009, he woke up late, played with his son, and then went out to get tacos for the family. On 14th Street, he was approached by a Hispanic man who appeared to be drunk. The man said, “Crazy Riders,” which is rival gang from the area. Defendant ignored him and kept walking. The man continued to talk to him and then “got into the point where he’s coming at me.” Defendant pushed him away, and the two men got into a fist fight. When it was over, defendant continued to the liquor store to buy cigarettes and then went home. Defendant never saw the man again. When he returned home, Rojas told him a girl had

come to the house looking for him, and she and the girl had gotten into a fight. Defendant was upset that Rojas had let the girl in, and he and Rojas began yelling at one another. He did not hit Rojas during the argument. The police arrived a few minutes later and arrested him.

On cross-examination, defendant conceded that he has four prior felony convictions for theft-related crimes. He said “Blocks” or “Blockhead” is his nickname, but it is not a gang moniker.

### **III. Sentencing and Appeal**

On October 8, 2010, defendant pled nolo contendere to counts 3, 4, and 5 (firearms and ammunition possession). In connection with defendant's plea, the parties agreed that defendant's son would not be called as a witness in the jury trial and the prosecution would not reference a gun seized at defendant's home after his arrest. On October 25, 2010, the jury convicted defendant of counts 1 and 2 (second degree robbery and corporal injury on a spouse, cohabitant, or child's parent); as to count 1, the jury further found that (1) in the commission of the offense, defendant had personally used a dangerous and deadly weapon, and (2) the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang.

As to count 1, the court sentenced defendant to 14 years (midterm of three years, plus an additional consecutive term of 10 years pursuant to § 186.22, subd. (b)(1)(A), plus an additional term of one year pursuant to § 12022, subd. (b)(1)). As to count 2, the court

sentenced defendant to the midterm of three years, to run concurrent with the principal term. As to counts 3, 4, and 5, the court sentenced defendant to the midterm of two years, to run concurrent with the principal term.

Defendant timely appealed.

## DISCUSSION

Defendant contends: (1) the trial court erred by denying his motion to suppress evidence seized in his apartment during a warrantless search; (2) the trial court abused its discretion by admitting evidence that a suspect was arrested for attempted murder in defendant's apartment; (3) there was insufficient evidence to support the true finding on the gang allegation; and (4) the trial court erred by denying defendant's Pitchess motion. We consider these issues below.

### I. The Trial Court Did Not Err by Denying Defendant's Motion to Suppress

Prior to trial, defendant filed a motion pursuant to section 1538.5 to suppress evidence seized during a warrantless search of his apartment following his arrest. Specifically, defendant sought to exclude (1) a Mossberg New Haven 20-gauge shotgun, (2) Remington 20-gauge shotgun ammunition, (3) a knife with a four and a half-inch stainless steel blade, (4) any currency seized during the search, and (5) any other evidence seized, including clothing, notebooks, and boxing gloves. The trial court denied the motion to suppress. We review the order de novo to determine whether, on the facts found by the trial court

on the basis of substantial evidence, the search or seizure was reasonable under the Fourth Amendment.

Defendant contends that the trial court erred by denying the motion to suppress, noting that the officers did not obtain a search warrant and he objected to their entry into his apartment. Citing *Georgia v. Randolph*, he urges that Rojas's subsequent consent to a search of their apartment was invalid and any evidence obtained was inadmissible. The Attorney General disagrees, contending that Rojas's consent provided a constitutionally permissible basis for the search once defendant was lawfully removed from the apartment.

We begin by discussing *Randolph*, in which the United States Supreme Court held that police officers may not constitutionally conduct a warrantless search of a home over the express refusal of consent by a physically present resident, even if another resident consents to a search. We then discuss the split of authority among the federal circuit courts as to *Randolph*'s application to a case like the present one, where consent to search is given by a defendant's cotenant after the defendant is arrested and removed from the residence. We conclude that under the circumstances of the present case, the search was lawful.

#### A. *Georgia v. Randolph*

In *Randolph*, defendant's wife, Janet Randolph, called police to the family home and complained that her husband was a cocaine user. An officer asked defendant's permission to search the house; he refused.



The officer then sought Mrs. Randolph's consent to search, which she gave. In defendant's bedroom, the officer discovered cocaine and drug paraphernalia.

Defendant moved to suppress the evidence as products of a warrantless search. The Supreme Court granted certiorari "to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search."

The court noted that to the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable per se, "one 'jealously and carefully drawn' exception, recognizes the validity of searches with the voluntary consent of an individual possessing authority. That person might be the householder against whom evidence is sought, or a fellow occupant who shares common authority over property, when the suspect is absent. The exception recognized in those cases " "does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' "

The "constant element" in assessing Fourth Amendment reasonableness in the consent cases, the Supreme Court explained, is "the

great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules. *Matlock* accordingly not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests." Such an understanding includes an assumption tenants "usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. As *Matlock* put it, shared tenancy is understood to include an 'assumption of risk,' on which police officers are entitled to rely[.]"

The situation differs, however, when a cohabitant is present and denying entrance: "[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions.... The visitor's reticence without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority." "In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail

over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.”

Applying these principles, the court concluded that “[s]ince the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all.” It held that “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.”

The court then reaffirmed the continuing vitality of *Matlock* and *Rodriguez*, explaining as follows: “Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today’s holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

“This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant’s permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant’s contrary indication when he expresses it. For the very reason that *Rodriguez* held it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, we think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. There is no ready reason to believe that efforts to invite a refusal would make a difference in many cases, whereas every co-tenant consent case would turn into a test about the adequacy of the police’s efforts to consult with a potential objector. Better to accept the formalism of distinguishing *Matlock* from this case than to impose a requirement, time consuming in the field and in the courtroom, with no apparent systemic justification. The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent, albeit imprudently, a fact that undercuts any argument that the

police should try to locate a suspected inhabitant because his denial of consent would be a foregone conclusion.”

The case before it, the court concluded, “invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained.”

### **B. *United States v. Murphy***

In *Murphy*, the Ninth Circuit extended *Randolph* to hold that if a defendant expressly withholds consents to search, a warrantless search conducted after the defendant has left or been removed from the residence is invalid even if a cotenant subsequently consents. In *Murphy*, the defendant was living in a storage unit rented by Dennis Roper. Officers arrested the defendant, who refused to consent to a

search of the storage unit; later, they arrested Roper, who consented to a search. During the search, officers seized a methamphetamine lab.

The defendant challenged the validity of Roper's consent to the search. The Ninth Circuit held that the search violated the Fourth Amendment, rejecting the government's contention that the present case was distinguishable from *Randolph* because the defendant was not present when Roper consented to the search. It explained: “The ... distinction that the government attempts to make between this case and *Randolph* is that in the former, unlike in the latter, the objecting co-tenant was not physically present when the other tenant gave consent to the search. Here, *Murphy* refused consent and was subsequently arrested and removed from the scene. Two hours later, officers located Roper and obtained consent from him to search the units. Roper did not know that Murphy had previously refused consent and Murphy was not present to object once again to the second search. We see no reason, however, why Murphy's arrest should vitiate the objection he had already registered to the search. We hold that when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant.

“We find support for our holding in the *Randolph* Court's treatment of the related issue of police removal of a tenant from the scene for the purpose of preventing him from objecting to a search. The Court held

that third party consent to a search is valid only '[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.' If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. ... Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects. The rule that *Randolph* establishes is that when one co-tenant objects and the other consents, a valid search may occur only with respect to the consenting tenant. It is true that the consent of either co-tenant may be sufficient in the absence of an objection by the other, either because he simply fails to object or because he is not present to do so. Nevertheless, when an objection has been made by either tenant prior to the officers' entry, the search is not valid as to him and no evidence seized may be used against him. Rather, as in this case, in the absence of exigent circumstances, the police must obtain a warrant before conducting the search."

### **C. Subsequent Case Law**

Four federal circuit courts and at least two state Supreme Courts have rejected the Ninth Circuit's analysis in *Murphy*; they hold that even if a defendant expressly refuses to allow officers to search his residence, a cohabitant's consent given after a defendant leaves or is lawfully removed will support a warrantless search. *United States v. Hudspeth* is one such case. There,

officers executed a search warrant at the defendant's workplace and discovered child pornography on the defendant's computer. The defendant was arrested for possession of child pornography. The arresting officer asked the defendant for permission to search his home computer; he refused. Law enforcement officers then went to the defendant's home, where his wife gave permission to seize the home computer. On that computer, investigators found additional child pornography. The defendant was indicted for possession of child pornography and pled guilty after unsuccessfully moving to suppress the evidence seized during the searches of his work and home computers.

As relevant here, the Eighth Circuit held that the warrantless search of the defendant's home computer did not violate the Fourth Amendment. It explained as follows: "The legal issue of whether an officer's knowledge of the prior express refusal by one co-tenant negates the later obtained consent of another authorized co-tenant is a matter of first impression in this court. We will answer this compound legal question by answering the separate legal questions involved.

"First, we know Mrs. Hudspeth was a co-tenant authorized to give the officers consent to search....

"Second, unlike *Randolph*, the officers in the present case were not confronted with a 'social custom' dilemma, where two physically present co-tenants have contemporaneous competing interests and one consents to a search, while the other objects. ... Thus, this rationale for the

narrow holding of *Randolph*, which repeatedly referenced the defendant's physical presence and immediate objection, is inapplicable here. ...

“The *Randolph* opinion repeatedly referred to an ‘express refusal of consent by a physically present resident.’ ... *Hudspeth* was not at the door and objecting and does not fall within *Randolph*'s ‘fine line.’ ...

“The Fourth Amendment does not prohibit warrantless searches and seizures, nor does the Fourth Amendment always prohibit warrantless searches and seizures when the defendant previously objected to the search and seizure. ‘What [*Hudspeth*] is assured by the Fourth Amendment itself, however, is ... no such search will occur that is “unreasonable.” ’ As the Supreme Court explains, ‘it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his [or her] own right.’ And the absent, expressly objecting co-inhabitant has ‘assumed the risk’ that another co-inhabitant ‘might permit the common area to be searched.’ The authorized co-tenant may give consent for several reasons including an unawareness of contraband on the premises, or a desire to protect oneself or others....

The Seventh Circuit followed *Hudspeth* (and declined to follow *Murphy*) in *United States v. Henderson*. There, police were called to the home of the defendant and his wife, Patricia, to investigate a report of domestic abuse. Patricia admitted police into the home, where in “unequivocal terms” the defendant ordered them out. The officers arrested the defendant for domestic battery

and took him to jail. After his arrest and removal from the scene, Patricia signed a consent-to-search form and led the police on a search that uncovered firearms, crack cocaine, and items indicative of drug dealing. The defendant was indicted on federal weapon and drug charges. ...

“Here, it is undisputed that Henderson objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and Patricia was free to authorize a search of the home. This she readily did. Patricia's consent rendered the warrantless search reasonable under the Fourth Amendment, and the evidence need not have been suppressed.”

At least two other federal circuit courts and two state Supreme Courts have followed *Hudspeth* and *Henderson* and declined to follow *Murphy*.

#### **D. Analysis**

We conclude that *Randolph* does not require exclusion of the evidence obtained in the warrantless search of defendant's home. We begin by noting that, like the federal appellate cases discussed above, the facts here differ in a critical way from those of *Randolph*. While the defendant in *Randolph* was present and continued to object to a search of his home, in the present case defendant had been arrested and removed from the apartment before Rojas consented to a search. Thus, unlike in *Randolph*, there was in this case no co-tenant “who is present and states a refusal to permit the search.”

Defendant's absence from the home when Rojas consented to a search of the apartment is, we believe, determinative. ... [T]he *Randolph* court distinguished between cases in which a defendant was present and objected to a search, on the one hand, and cases in which a defendant was not present and therefore could not object to a search, on the other. The court recognized that it was “drawing a fine line,” but believed its formalism was justified so long as there was no evidence that police had removed a potentially objecting tenant from the scene for the sake of avoiding a possible objection.

We believe that the line we draw is consistent with that drawn by the Supreme Court in *Randolph*. As in *Randolph*, the line we draw is a clear one, distinguishing between cases in which a defendant is present and objecting to a search, and those in which a defendant has been lawfully arrested and thus is no longer present when a cotenant consents to a search of a shared residence. It thus preserves the “simple clarity of complementary rules” established by *Randolph*.

Further, our rule preserves the law enforcement prerogatives recognized by *Randolph*. As we have said, *Randolph* expressly reaffirmed the holdings of *Matlock* and *Rodriguez*, noting that “it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received.” We believe that requiring officers who have

already secured the consent of a defendant's cotenant to also secure the consent of an absent defendant would similarly and needlessly limit the capacity of law enforcement to respond to “ostensibly legitimate opportunities in the field.”

We note, as the Seventh Circuit did in *Henderson*, that the rule advocated by defendant and adopted by the Ninth Circuit in *Murphy* permits “a one-time objection” by one cotenant to “permanently disable the other [co-tenant] from ever validly consenting to a search of their shared premises.” Like *Henderson*, we think such a rule “extends *Randolph* too far.”

Finally, like the Fourth, Fifth, Seventh, and Eighth Circuits, we believe that the defendant's presence was indispensable to the decision in *Randolph*. We again quote *Henderson*, which well articulated the analysis: “[T]he fact of a conflict between present co-occupants plays a vital role in the *Randolph* majority's ‘social expectations’ premise; a third party, attuned to societal customs regarding shared premises, would not, ‘[w]ithout some very good reason,’ enter when faced with a disputed invitation between cotenants. The calculus shifts, however, when the tenant seeking to deny entry is no longer present. His objection loses its force because he is not there to enforce it[.]”

For all of these reasons, we conclude that Rojas's consent to a search of the apartment she shared with defendant was valid, and thus the trial court did not err in denying defendant's motion to exclude.

## **DISPOSITION**

The conviction on count 2, willful infliction of corporal injury on a spouse, cohabitant, or child's parent, is conditionally reversed, with directions to the trial court to review relevant portions of Officer Cirrito's personnel records in chambers. If the trial court determines that the records contain no relevant information, it shall reinstate the judgment as to count 2. If it determines that the records contain some relevant

information, it shall give defendant a reasonable opportunity to investigate the disclosed material and order a new trial if he demonstrates a reasonable probability of a different outcome had the evidence been disclosed; otherwise, the court shall reinstate the judgment as to count 2. In all other respects, the judgment is affirmed.

**We concur: EPSTEIN, P.J., and WILLHITE, J.**

## “SCOTUS to Hear Fernandez, a Calif. 'Warrantless Search' Case”

*FindLaw*  
William Peacock  
May 22, 2013

In 2009, the search for a robbery suspect led police to the doorstep of convicted-felon Walter Fernandez. Police were investigating nearby when they heard the screams of his girlfriend and cohabitant, Roxanne Rojas. Once backup arrived, they knocked on the door and Rojas, with a bruised nose and bloody hand, answered.

Fernandez came to the door and refused to allow the police to enter, stating, “You don’t have any right to come in here. I know my rights.” He was taken into custody, and later identified as the suspect in the nearby robbery.

A short time later, the officers returned, notified Rojas that Fernandez was a suspect in a robbery, and asked for consent to search. She gave both written and verbal consent. The search turned up a shotgun, ammunition, a butterfly knife, and gang paraphernalia.

Fernandez argued that, under the Supreme Court's holding in *Georgia v. Randolph* (2006) and the Ninth Circuit's holding in *United States v. Murphy* (2008), the evidence found in the search should have been suppressed. The California Court of Appeal upheld the trial court's admission of the evidence and explicitly rejected *Murphy*.

Earlier this week, the U.S. Supreme Court agreed to hear the case, and to resolve

the split in lower courts' interpretations of *Randolph*.

### ***Randolph's Fine Line***

The *Randolph* decision was simple, yet limited. After noting that they had upheld warrantless searches stemming from a cohabitant's consent, including one case where a defendant was not present to object (he was in a squad car nearby) and in another case, where the defendant was asleep inside the apartment, the court stated:

If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search ... So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules ...

A fine line indeed, but what about situations like these, where the defendant objects, is taken into custody, and later, his cohabitant consents?

### **The *Murphy* Rule**

In *Murphy*, a man living in a storage unit (with a meth lab) refused to allow a search.



The man who leased the unit was also arrested, and this time, he consented to a search, not knowing of Murphy's prior refusal. The Ninth Circuit held the search impermissible, noting that:

If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. Nor, more generally, do we see any reason to limit the *Randolph* rule to an objecting tenant's removal by police. Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective

manifestation that he has changed his position and no longer objects.

### **A Finer Fine Line**

The California court rejected the Ninth Circuit's approach, and instead followed the reasoning of at least four other federal circuit courts and two state supreme courts. These courts rely upon the *physical presence* requirement, limiting *Randolph's* protections to physically present objecting defendants. Their holdings draw an even more fine line: if the defendant refuses to allow a search and is then arrested, a cohabitant's consent is sufficient.

## “Search Allowed by Roommate to High Court”

*San Francisco Chronicle*

Bob Egelko

May 21, 2013

The U.S. Supreme Court took up a California case Monday to decide whether police can enter and search a home, over the objections of a suspect who lives there, by arresting the suspect and getting a roommate's consent for the entry.

The justices ruled in 2006 that the Fourth Amendment's prohibition on unreasonable searches bars police, in nonemergencies, from entering a home without a warrant if a resident objects, even if another resident consents. But lower courts have been divided on whether the refusal prohibits officers from entering the home in the future, if the objector is not present.

To resolve that question, the court granted review Monday of an appeal by a Los Angeles man convicted of a gang-related robbery after police searched his apartment without a warrant. The case will be heard in the term that starts in October, with a ruling due by June 2014.

According to court records, police investigating a robbery and assault in a gang neighborhood in October 2009 went to Walter Fernandez's apartment after hearing sounds of screaming and fighting. A woman came to the door, showing signs of injuries, but when officers started to enter, Fernandez stepped forward and objected, saying, "You don't have any right to come in here."

Officers arrested Fernandez, then secured the apartment and told the woman Fernandez was a robbery suspect. They entered, with her consent, and found gang paraphernalia, a knife and a gun, a state appeals court said in an August 2012 ruling.

Fernandez, identified by the robbery victim as the man who had stabbed him and called on accomplices to beat him, was convicted of robbery and domestic violence in 2010, and sentenced to 14 years in prison. Ten years of his sentence stemmed from the jury's finding that the robbery was gang-related, based in part on evidence found in the apartment.

In upholding the search, the state's Second District Court of Appeal said a resident's authority to prohibit a warrantless police entry applies only when that resident is present. Once Fernandez had been taken away, the court said, he no longer had the power to prevent his cohabitant from admitting police to the apartment she shared.

Fernandez's Supreme Court appeal argued that police should have gone to a judge to get a warrant, which they could have done quickly after securing the apartment. Otherwise, defense lawyer Gerald Peters said Monday, "all you would do in every case is, if the person objects, you arrest him and remove him. Then what good is the Fourth Amendment?"

The case is *Fernandez vs. California*, 12- 7822.

## **“Can Police Search the Home of a Defendant by Getting Consent to Enter from his Co-Tenant?”**

*California Crime Blog*

Aaron J. Sussman

August 2, 2012

If a defendant objects to police entry into his home and is subsequently arrested, can police enter his home without a warrant premised on the consent to enter from the defendant’s co-tenant? In a remarkable recent published decision, *The People v. Walter Fernandez*, the California Court of Appeals answered this question, creating a rare split between the law that governs California’s state prosecutions and California’s federal prosecutions. Read below for more details.

Walter Fernandez was wanted for a gang-related assault with a knife. Police saw the defendant running into an apartment building and followed him to an apartment from which screaming was heard; they knocked on the door. A woman, Roxanne Rojas, answered the door; she was bleeding from a fresh injury, so officers performed a protective sweep of the apartment, discovering Fernandez and two others. Fernandez said “You don’t have any right to come in here. I know my rights.” Fernandez was arrested and removed from the scene. Then, officers returned to the apartment, knocked on the door, and asked Rojas if she would consent to a search of the apartment; she consented, and officers found gang paraphernalia and a butterfly knife. Fernandez was charged with second degree robbery with the use of a deadly weapon (the knife) and association with a criminal street gang. He was found guilty, but he

appealed his conviction, arguing that he had expressed his refusal to consent to the search of the apartment, that the search of the apartment was therefore unconstitutional, and thus that the evidence found in the apartment should not have been admitted at trial.

The Fourth Amendment prohibits unreasonable searches and seizures. As the home is considered inviolate, searches of the home without a warrant are presumptively invalid. (*Payton v. New York* (1980) 445 U.S. 573, 586.) However, a search is not unreasonable if police have a person with actual authority, apparent authority, or common authority over the premises has consented to the search. (*Illinois v. Rodriguez* (1990) 497 U.S. 177.) But, in a 2006 decision, *Georgia v. Randolph*, the Supreme Court held that “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.” (*Georgia v. Randolph* (2006) 547 U.S. 103, 120 (emphasis added).)

The question here, though, was what police can do when the physically absent defendant objects to the police entry while the present co-tenant consents. Courts have split on this decision. Most notably, the Ninth Circuit – the federal court of appeals that hears

appeals from federal trials in many states, including California – held that “when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant, the search is invalid as to the objecting co-tenant.” (*United States v. Murphy*, (2008) 516 F.3d 1117, 1124.) But most courts have disagreed, holding that a non-present defendant’s objection does not nullify the consent of a present co-tenant.

The California Court of Appeals decided to go with the majority of courts that have addressed the question, therefore disagreeing with the Ninth Circuit and holding that a tenant’s consent to police entry is valid despite the fact that a co-tenant, who was not present, would not have consented. The California Court of Appeals held that the line to be drawn “is a clear one, distinguishing between cases in which a defendant is present and objecting to a search, and those in which a defendant has been lawfully arrested and thus is no longer present when a co-tenant consents to a search of a shared residence.” The court

relied upon the narrow language of *Randolph*, which seemed to limit its holding to circumstances when the co-tenant was physically present, and which received a decisive fifth vote from Justice Breyer, whose concurring opinion noted plainly that “The Court’s opinion does not apply where the objector is not present ‘and object[ing].’”

This decision creates a rare split in the courts’ interpretation of the Fourth Amendment; while federal trial courts in California are required to follow the Ninth circuit’s decision in *Murphy* (holding that non-consent from a non-present co-tenant vitiates consent by a present co-tenant), state trial courts in California must not follow the California Court of Appeals’ decision in *Fernandez* (holding that non-consent by a non-present co-tenant does not vitiate consent by a present co-tenant). It’s an interesting split, perhaps one that the California Supreme Court or the United States Supreme Court would want to examine.

## **“California Robbery Case Leads Supreme Court to Reconsider Police Search Laws”**

*McClatchy*  
Michael Doyle  
May 20, 2013

A tattooed inmate in one of California’s most remote prisons will now get his moment in the Supreme Court sun, along with a shot at clarifying the rules governing certain law enforcement searches.

Beating the legal odds, Los Angeles gang veteran Walter Fernandez succeeded Monday in convincing the court to hear his challenge to an apartment search. Fernandez had objected to the search, but his girlfriend eventually assented after Fernandez was taken into custody. This prompted a constitutional question that has divided lower courts.

“There’s this long-lasting issue, as to what extent a cohabitant can give consent to a search,” Thousand Oaks, Calif.-based defense attorney Gerald P. Peters said in a telephone interview Monday. “This is not a totally unique problem; it’s actually a foreseeable problem.”

In a 2006 case arising from a Georgia drug bust, the Supreme Court ruled invalid a warrantless search of a shared dwelling over the express refusal of consent by an individual who was present. That ruling was based on the Fourth Amendment, which protects individuals against “unreasonable searches and seizures.”

Lower appellate courts have disagreed, though, about how far this rule extends.

The 9th U.S. Circuit Court of Appeals, which covers Western states, ruled in a 2008 case involving an alleged Oregon methamphetamine lab that a co-tenant’s refusal to offer consent remains in effect even after the individual is absent. But in a Missouri child pornography case, the 8th U.S. Circuit Court of Appeals came to the opposite conclusion, reasoning that a wife’s consent sufficed once the resisting husband was gone.

Resolving such circuit splits often motivates the Supreme Court to take up a case, though the odds are always long. The court receives about 8,000 petitions annually and hears only about 75. The odds are stacked even more against petitions like Fernandez’s, designated as in forma pauperis, which are often impoverished prisoners’ cases for which filing fees don’t have to be paid.

During the court’s 2011 term, only seven such cases were heard out of more than 6,000 on the docket.

“I think it’s a good thing,” Peters said of the court’s decision to hear the Fernandez case. “The Supreme Court has been strangely good for criminal defendants in a number of cases, and maybe that will carry forward.”

But another possibility, Peters acknowledged, is that the high court could use the Fernandez case to strike down the

9th Circuit's defendant-friendly rule, which can impede some police searches.

"The conflict in the state and federal courts is heavily lopsided against (the Fernandez) petition," California Deputy Attorney General Louis W. Karlin noted in the state's legal filing.

Peters represents Fernandez, now serving a 14-year sentence on firearms, robbery and domestic abuse charges at California's High Desert State Prison. The maximum security facility in Lassen County, in the arid northeast corner of the state, is about 550 miles from the neighborhood where Fernandez once joined a street gang called the Drifters.

Though the gang's identity was tattooed on his back, among other places, Fernandez says he was trying to turn his life around and had moved away from gang involvement following release from prison on earlier, theft-related charges.

"It always was just about . . . me living there, hanging out with people I grew up

with," Fernandez explained at the 2010 trial that led to his most recent convictions.

Fernandez was living with Roxanne Rojas in October 2009 when police investigating a street robbery responded to sounds of fighting from their apartment. At the front door, an agitated Fernandez told police that "you don't have any right to come in here," according to subsequent trial testimony. Police recognized one of his scalp tattoos from a description given by the robbery victim, and Fernandez was arrested and taken away.

About an hour later, amid circumstances that remain in dispute, police returned and secured permission from Rojas to search the apartment, in which they found a .20-gauge shotgun, ammunition, a butterfly knife and assorted Drifters gang paraphernalia.