Section 5: Criminal Procedure

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V. CRIMINAL LAW

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Carey v. Musladin

(05-785)

Ruling Below: (Musladin v. Lamarque, 427 F.3d 653 (9th Cir. 2005), cert granted 126 S.Ct. 1769, 74 USLW 3579, 74 USLW 3584, 06 Cal. Daily Op. Serv. 3140, 74 USLW 3371 [2006]).

Musladin was convicted of murder in the California state courts. He requested habeas relief in the United States District Court for the Northern District of California, claiming his trial was prejudiced because family members of the deceased wore buttons depicting the deceased at the trial. His petition was denied by the District Court, but approved by the Ninth Circuit Court of Appeals. The Ninth Circuit held that the buttons interfered with the right of the defendant to a fair trial by an impartial jury free from outside influences.

Questions Presented: Whether the Ninth Circuit exceeded its authority by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased.

Mathew MUSLADIN
Petitioner, Appellant,

v.

Anthony LAMARQUE, Warden
Respondent, Appellee

United States Court of Appeals
for the Ninth Circuit

Decided October 21, 2005

[Excerpt: some footnotes and citations omitted]

REINHARDT, Circuit Judge:

At a murder trial in which the central question is whether the defendant acted in self-defense, are a defendant's constitutional rights violated when spectators are permitted to wear buttons depicting the deceased individual? We conclude that under clearly established Supreme Court law such a practice interferes with the right to a fair trial by an impartial jury free from outside influences.

Mathew Musladin appeals the district court's denial of his petition for a writ of habeas corpus. He contends that the buttons worn by the deceased individual's family members at his trial created an unreasonable risk of impermissible factors coming into play, and that the state court was objectively unreasonable in denying this claim both on direct appeal and in the post-conviction proceedings. In light of clearly-established federal law set forth by the Supreme Court, and persuasive authority from this court concerning the proper application of that law, we hold that the last-reasoned decision of the state court constituted an
unreasonable application of Supreme Court law. Accordingly, we reverse the district court's denial of Musladin's petition and remand for issuance of the writ.

I. Factual Background and Procedural History

Musladin was charged in a California state court with first degree murder for the killing of Tom Studer, the fiance of his estranged wife Pamela. On May 13, 1994, Musladin came to the house where Pamela, Studer, and Pamela's brother Michael Albaugh lived in order to pick up his son for a scheduled weekend visit. Pamela testified that she and Musladin had an argument, and that Musladin pushed her to the ground. According to Pamela, when Studer and Albaugh came out of the house to assist her, Musladin reached into his car to grab a gun and fired two shots at Studer, killing him. Musladin contends, however, that after Pamela fell to the ground, Studer and Albaugh appeared, holding a gun and a machete respectively, and threatened him. Musladin asserted that, after seeing the weapons, he shot in the general direction of Studer out of fear for his own life. Accordingly, at trial Musladin argued perfect and imperfect self-defense. There is no dispute that Musladin fired the shot that killed Studer, although experts for both sides agree that the fatal shot was the result of a ricochet rather than a direct hit. Under Musladin's theory of defense, there was no crime and, thus, no victim.

During the 14-day trial, Studer's family sat in the front row of the gallery. On each of those 14 days, at least three members of the family wore buttons on their shirts with the deceased's photograph on them. According to declarations submitted by the defendant, the buttons were several inches in diameter and "very noticeable." Furthermore, the family members were seated in the row directly behind the prosecution and in clear view of the jury. Before opening statements, counsel for Musladin requested that the trial judge instruct the family members to refrain from wearing the buttons in court, out of fear that the button's expressive content would influence the jury and prejudice Musladin's defense. The trial judge denied the request. Musladin was convicted of first degree murder and three other related offenses.

Musladin exhausted the available state procedures both on direct review and on post-conviction relief. The California Court of Appeal on direct appeal held, citing Holbrook v. Flynn, 475 U.S. 560, 570-71, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), that: "While we consider the wearing of photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged, we do not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." Musladin then filed a petition for a writ of habeas corpus in the District Court for the Northern District of California. He alleged, among other things, that the state court unreasonably applied clearly-established federal law in determining that his right to a fair trial was not violated by the family members' wearing of the buttons depicting the deceased. The district court denied the petition and this appeal followed.

II. The AEDPA Standard

Musladin's petition for habeas corpus is governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Therefore, we may not grant habeas relief to the defendant unless the state court decision
was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Because state courts often issue “postcard” denials that offer no rationale for their dispositions, we determine whether the state court unreasonably applied federal law by looking to the “last reasoned decision of the state court as the basis of the state court's judgment.” Franklin v. Johnson, 290 F.3d 1223, 1233 n. 3 (9th Cir. 2002).

In this case, we look to the opinion of the California Court of Appeal on direct appeal. AEDPA limits the source of clearly-established federal law to Supreme Court cases. See 28 U.S.C. § 2254(d)(1). Nevertheless, we recognize that precedent from this court, or any other federal circuit court, has persuasive value in our effort to determine “whether a particular state court decision is an ‘unreasonable application’ of Supreme Court law, and what law is ‘clearly established.’ ” Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000); see also Robinson v. Ignacio, 360 F.3d 1044, 1057 (9th Cir. 2004) (“When faced with a novel situation we may turn to our own precedent, as well as the decisions of other federal courts, in order to determine whether the state decision violates the general principles enunciated by the Supreme Court and is thus contrary to clearly established federal law.”); Williams v. Bowersox, 340 F.3d 667, 671 (8th Cir. 2003) (“[T]he objective reasonableness of a state court's application of Supreme Court precedent may be established by showing other circuits having similarly applied the precedent.”); Ouber v. Guarino, 293 F.3d 19, 26 (1st Cir. 2002) (“[T]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness vel non of the state court's treatment of the contested issue.” (internal quotation marks and citation omitted)); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 890 (3d Cir. 1999) ("[W]e do not believe federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable."). (en banc).

III. Discussion

"Due process requires that the accused receive a fair trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). The Supreme Court has held that when the consequence of a courtroom practice is that an “unacceptable risk is presented of impermissible factors coming into play,” there is “inherent prejudice” to a defendant's constitutional right to a fair trial and reversal is required. Flynn, 475 U.S. 570, 106 S.Ct. 1340. In order to determine whether Musladin is entitled to federal habeas relief, we must therefore assess whether the buttons depicting the deceased individual worn by spectators at the trial posed a risk of impermissible factors coming into play that is similar to those previously found to exist in other circumstances, such as in compelling a criminal defendant to wear prison garb and shackles before the jury, see Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), and in permitting spectators at a rape trial to wear anti-rape buttons, see Norris v. Risley, 918 F.2d 828 (9th Cir. 1990). Because we conclude that no significant difference exists between the circumstances of this case and the “unacceptable risks” found to exist in Williams and Norris, we hold that the state court unreasonably applied established
Supreme Court law in denying Musladin relief.

a. Clearly Established Federal Law

The underlying federal law in this case—that certain practices attendant to the conduct of a trial can create such an “unacceptable risk of impermissible factors coming into play,” as to be “inherently prejudicial” to a criminal defendant—was clearly established by the Supreme Court in *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), and *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

In *Williams*, the Court considered whether compelling a criminal defendant to appear at his jury trial dressed in prison clothing violated his right to a fair trial. See *Williams*, 425 U.S. at 503-06, 96 S.Ct. 1691. The Court found that the compelled wearing of prison clothing constitutes a continuous impermissible reminder to the jury of the defendant's condition: an accused in custody who is unable to post bail. Id. at 505, 96 S.Ct. 1691. The Court held that the influence of prison clothing, and the message it conveys to the jurors, impairs a defendant's presumption of innocence. See id. at 503-06, 96 S.Ct. 1691. Noting these and other concerns, the Court concluded that because “[t]he defendant's clothing is so likely to be a continuing influence throughout the trial an unacceptable risk is presented of impermissible factors coming into play.” Id. at 505, 96 S.Ct. 1691.

In *Flynn*, the court reaffirmed its holding in *Williams* regarding the “inherent prejudice” of courtroom practices that create an “unacceptable risk of impermissible factors coming into play,” but distinguished the case before it on the facts. The defendants in *Flynn* argued that the presence of four uniformed state troopers sitting in the front row directly behind them at trial led the jury to draw adverse inferences about them. *Flynn*, 475 U.S. at 563-64, 106 S.Ct. 1340. The Court explained that there are certain “courtroom practices [that it] might find inherently prejudicial,” but that the use of security officers to the extent involved did not fall into that category. Id. at 569, 106 S.Ct. 1340. As the Court explained, the “inferences that a juror might reasonably draw from the officers' presence” in that case “need not be that [the defendant] is particularly dangerous or culpable.” Id. In distinguishing *Flynn* from *Williams*, the Court pointed out that the jury may not even have noticed that extra guards were being used in the trial, or most likely, drew no impermissible inference from their presence. The court stated, “[guards] are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.” Id. at 569, 106 S.Ct. 1340. The law concerning the “inherently prejudicial” nature of courtroom practices which convey an impermissible message, however, remained unchanged and clear.

This court's decision in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), has persuasive value in an assessment of the meaning of the federal law that was clearly-established by *Williams* and *Flynn* and whether the state court's application of that law in the case before us is objectively unreasonable. Like the present case, *Norris* involved the application of the Supreme Court's “inherent prejudice” rule in assessing whether buttons worn by audience members during a trial created an “unacceptable risk of impermissible factor coming into play.” See *Norris*, 918 F.2d 831-32. In *Norris*, the defendant was facing a criminal charge of rape. During the trial, several women sat in the spectator's gallery wearing buttons that read “Women Against Rape.” Id. at 829. We
noted that at any given time in Norris's trial, approximately three women in the audience would be wearing the anti-rape buttons. Id. at 831. Faced with these facts, we applied Williams and concluded that “[j]ust as the compelled wearing of prison garb during trial can create an impermissible influence on the jury, throughout trial the buttons' message constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence.” Id. at 831. As we explained, because of the button’s obvious communicative purpose, its impermissible message was far more clear and direct than that deemed unlawful in Williams:

Thus, though far more subtle than a direct accusation, the buttons' message was all the more dangerous precisely because it was not a formal accusation. Unlike the state's direct evidence, which could have been refuted by any manner of contrary testimony to be judged ultimately on the basis of each declarant's credibility, the buttons' informal accusation was not susceptible to traditional methods of refutation. Instead, the accusation stood unchallenged, lending credibility and weight to the state's case without being subject to the constitutional protections to which such evidence is ordinarily subjected. Id. at 833.

Our reliance on Norris is appropriate for another reason: the last reasoned state court opinion identified Norris as setting forth the operative law as announced by the Supreme Court, and the state court sought to apply Norris when reaching its determination. Indeed, the state court's unreasonable application of federal law lies in its misapplication of the Williams test, as it was explained in Norris, to the facts of this case. The state court's decision to apply Norris, and ours to afford it persuasive weight when determining the federal law as established by Williams, are particularly significant in light of the striking factual similarities between Norris and the present case. See Richardson v. Bowersox, 188 F.3d 973, 978 (8th Cir. 1999) (“In determining whether a state court's decision involved an unreasonable application of clearly established federal law, it is appropriate to refer to decisions of the inferior federal courts in factually similar cases.”).

b. Unreasonable Application of the Law

Although the state court identified the correct federal law to apply in adjudicating Musladin's claim, citing Williams for the controlling principle, and properly looking to our decision in Norris as a persuasive application of that federal law in a factually similar case, the state court was objectively unreasonable both in its ultimate conclusion and in the rationale it employed in denying Musladin's appeal. The California Court of Appeal justified its rejection of Musladin's claim as follows:

[j]n contrast to the buttons in Norris, the message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member. While we consider the wearing of photographs of victims in a courtroom to be an “impermissible factor coming into play,” the practice of which should be discouraged, we do not believe the buttons in this case branded defendant “with an unmistakable mark of guilt” in the eyes of the jurors. People v. Musladin, No. H015159 at 21-22 (Cal.Ct.App. Dec. 9, 1997) (unpublished decision) (citing Flynn, 475 U.S. at 570-71,
106 S.Ct. 1340).

By disposing of Musladin's claim in the above manner, the state court unreasonably applied federal law by imposing an additional and unduly burdensome requirement—demanding that the challenged practice cause the "brand [ing]" of the defendant with an "unmistakable mark of guilty"—even though the Williams test for finding "inherent prejudice" had already been met. The court specifically found "the wearing of photographs of victims in a courtroom to be an ‘impermissible factor coming into play’” (emphasis added). Under Williams and Flynn, that finding, in itself establishes “inherent prejudice” and requires reversal.

Williams and Flynn cannot be distinguished. In the case before us, the state court found not only that an "unreasonable risk" existed that an impermissible factor would come into play, but that an impermissible factor actually had come into play. Nevertheless, after setting forth this finding, the state court added that, although the practice of wearing such buttons “should be discouraged,” Musladin was not entitled to relief because “the buttons in this case [did not] brand[ ] defendant ‘with an unmistakable mark of guilt’ in the eyes of the jurors.” The state court was unreasonable in imposing this additional requirement after it had concluded that the “inherent prejudice” elements had already been fully established. The Supreme Court announced in Williams and Flynn that following a finding of an unacceptable risk of impermissible factors coming into play, no further showing is necessary because the practice is then deemed “inherently prejudicial.” Here, the state court flouted that rule: it required that the challenged practice not only constitute an unacceptable risk of an impermissible factor coming into play but also that it "brand” the defendant with an "unmistakable mark of guilt.” This additional test imposes too high and too unreasonable a burden on defendants and is contrary to established Supreme Court law. See Benn v. Lambert, 283 F.3d 1040, 1051 n. 5 (9th Cir. 2002).

We note that the “branding” with an “unmistakable mark of guilt” language employed in Flynn constituted only a descriptive comment. See Flynn, 475 U.S. at 571, 106 S.Ct. 1340 (quoting Williams, 425 U.S. at 518, 96 S.Ct. 1691 (Brennan, J., dissenting)). Both Williams and Flynn are clear as to the legal standard, and neither suggested that “branding” was necessary. Indeed, under the state court's interpretation, the holding in Williams would not survive its own test. The Williams Court never found, or even implied, that the compelled donning of prison clothing would “brand[ the] defendant ‘with an unmistakable mark of guilt’ in the eyes of the jurors.” Rather, the court's concern was directed purely at the clothes' role as a “constant reminder of the accused's condition”—a “continuing influence throughout the trial,” principally because the requirement that defendants wear prison clothes “operates usually against only those who cannot post bail prior to trial.” Williams, 425 U.S. at 504-06, 96 S.Ct. 1691. At most, the Williams Court found that the shackling and prison clothes were “unmistakable indications of the need to separate a defendant from the community at large,” not that they would “brand” the defendant with an “unmistakable mark of guilt.” Flynn, 475 U.S. at 569, 571, 106 S.Ct. 1340. Although a practice that brands a defendant as guilty would surely be sufficient to demonstrate “inherent prejudice” and require reversal, branding is not a necessary element of establishing such
prejudice. The state court's imposition of the additional "branding" requirement was contrary to clearly established federal law and constituted an unreasonable application of that law.

Moreover, the finding by the California Court of Appeal goes beyond the finding that was held to require reversal in Norris. The state court attempted to distinguish Norris, but Norris simply cannot reasonably be distinguished. The message conveyed in the present case is even stronger and more prejudicial than the one conveyed in Norris. The state court unreasonably justified its conclusion by stating that, when compared to the buttons worn by spectators in Norris, the "message conveyed by the Studer family wearing buttons is less than clear." This is simply not the case. Just as we held that the message sent by the anti-rape buttons was substantially more direct and clear than the message conveyed by the prison clothing in Williams, see Norris, 918 F.2d at 831, the message conveyed by the buttons depicting Studer in the case before us is substantially more direct and clear than that of the anti-rape buttons in Norris. In Norris, the buttons expressed the wearer's position against rape but did not specify the defendant or the victim. In this case, the buttons actually depicted the individual that the defendant was charged with murdering and represented him as the innocent party, or the victim. Here, the direct link between the buttons, the spectators wearing the buttons, the defendant, and the crime that the defendant allegedly committed was clear and unmistakable. The primary issue at Musladin's trial was whether it was the defendant or the deceased individual who was the aggressor. The buttons essentially "argue" that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and, thus, the perpetrator of a criminal act.

The California court's belief that buttons depicting the deceased individual were "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member" is even more incorrect as a matter of law than the view that interpreting the "Woman against Rape" buttons in Norris served no purpose other than women announcing a general statement against rape or expressing solidarity with, or support for, the rape victim in Norris's case.

We did not excuse the wearing of the buttons on that ground in Norris, and it was objectively unreasonable in light of Norris for the state court to do so here. See Norris, 918 F.2d at 831. In both Norris and the case before us, the law requires the courts to look beyond the general sentiment a button reflects and to determine the specific message that the button conveys in light of the particular facts and issues before the jury. Doing so here, a reasonable jurist would be compelled to conclude that the buttons worn by Studer's family members conveyed the message that the defendant was guilty, just as the buttons worn by spectators in Norris did in that case.

IV. Conclusion

In finding the wearing of buttons depicting the deceased individual to be an "impermissible factor coming into play," the state court reached the point at which the Supreme Court "went no further and concluded that the practice[at issue wa]s unconstitutional." Flynn, 475 U.S. at 568, 106 S.Ct. 1340. Instead of granting relief, however, the state court, disregarding the fact that the central question was one of self-
defense, unreasonably stated that the message conveyed through the wearing of the buttons in this case was not as clear as that conveyed by the anti-rape buttons in Norris. The state court then unreasonably held that “branding” the defendant with “an unmistakable mark of guilt” is necessary to grant relief even though it had already found that “impermissible factors” had come into play before the jury. The state court did not simply engage in an incorrect application of Supreme Court law. Rather, its application of that law was contrary to the Court's established rule of law and was objectively unreasonable. Accordingly, we reverse the district court's denial of Musladin's petition for habeas corpus and remand for issuance of the writ. Musladin shall be released unless the state elects to re-try him within 90 days of the issuance of the mandate. Reversed and Remanded.

THOMPSON, Senior Circuit Judge, dissenting:

I respectfully dissent.

A further statement of the facts seems appropriate. The petitioner, Musladin, and his wife, Pam, were married but separated at the time of the crimes of which Musladin was convicted. Pam was living at her mother's house with her brother Michael Albaugh, her fiancé Tom Studer, and Garrick Musladin, her then three-year-old son by Musladin. On the day of the shooting, Musladin went to the house to pick up Garrick for a scheduled weekend visitation.

The prosecutor presented evidence that an argument ensued between Pam and Musladin in the driveway, during which Musladin pushed Pam to the ground and reached for a gun in his car. Albaugh, standing in the driveway, yelled, “He's got a gun.” Pam and Studer ran up the driveway. Musladin fired the gun at Pam and Studer, hitting Studer in the back of the shoulder. Pam ran into the house and out the back door. Studer fell to the ground and attempted to crawl underneath a truck in the garage. Musladin entered the garage and fired a second shot which ricocheted into Studer's head, killing him.

Musladin presented a different version of these events. He admitted shooting at Studer and killing him, but claimed perfect and imperfect self-defense. He testified that he believed Albaugh was carrying a machete and Studer a gun, and that he fired both shots out of fear for his life. After firing the shots, he got in his car and drove away.

Musladin was tried and convicted of first-degree murder of Studer and attempted murder of Pam.

I disagree with the majority's reliance upon our decision in Norris v. Risley, 918 F.2d 828 (9th Cir. 1990), for the application in this case of the rule of Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In Williams, the Court determined it to have been a violation of the right to a fair trial for the state to have compelled the defendant to wear prison clothing during his trial. Id. at 505, 96 S.Ct. 1691. The Court held the prison clothing impaired the defendant's presumption of innocence. Id. In the present case, the state court permitted relatives of the deceased victim to wear buttons in the courtroom. The buttons disclosed only the deceased victim's picture, nothing else, and had nothing to do with the defendant.

Our Norris case was a case involving three women who wore buttons in the courtroom during the defendant's trial for rape, but that
case is not controlling here. The buttons in Norris were two and one-half inches in diameter and bore the words “Women Against Rape.” Norris, 918 F.2d at 830. “The word ‘rape’ [was] underlined with a broad red stroke.” Id. We stated: “[T]he buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence.” Id. at 831.

Here, the buttons were three to four inches in diameter and, except for the deceased victim's picture, there was nothing else on them. The buttons conveyed no “message.” As the state appellate court stated, “The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member.” Further, it is difficult to distinguish this case from the routine situation of a deceased victim's family members, without buttons, sitting as a group in a courtroom during a trial. Jurors in such a trial surely would recognize the group for what it is. The addition of buttons worn by them showing only the victim's photograph would add little if anything to any possible risk of impermissibly prejudice.

Although the state appellate court in the present case commented that it “consider[ed] the wearing of the photographs of victims in a courtroom to be an ‘impermissible factor coming into play,’ the practice of which should be discouraged,” quoting the “impermissible factor” language from Williams, 425 U.S. at 505, 96 S.Ct. 1691 (which the Supreme Court also quoted in Holbrook v. Flynn, 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986)), the state court's “impermissible factor” comment is most reasonably understood as reflecting that court's view that buttons bearing a victim's photograph should not be worn in a courtroom. The comment did not change the buttons or make them something they were not. Moreover, the state court's additional comment that the buttons did not “brand[ ] defendant 'with an unmistakable mark of guilt' ” is most reasonably understood as an explanation that the buttons were not “so inherently prejudicial as to pose an unacceptable threat to [the] right to a fair trial.” Holbrook, 475 U.S. at 572, 106 S.Ct. 1340.

In sum, I do not believe the decision by the California Court of Appeal was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” See 28 U.S.C. § 2254(d)(1). The state court's decision was not “contrary to” any such federal law, because the state court did not “appl[y] a rule that contradicts the governing law set forth in [Supreme Court] cases,” nor did the state court “confront[ ] a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrive[ ] at a result different from [Supreme Court] precedent.” Lockyer v. Andrade, 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Nor does the state court's decision abridge the “unreasonable application” clause of 28 U.S.C. § 2254(d)(1). “The ‘unreasonable application’ clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable.” Lockyer, 538 U.S. at 75, 123
S.Ct. 1166 (internal citations omitted). Here, even if erroneous (which it was not), the California Court of Appeal's decision was not "objectively unreasonable."

The petitioner also asserts a number of other claims that he argues merit habeas relief. I would reject those claims as well, and thus would affirm the district court.
(Dissenting opinion from the Ninth Circuit’s denial of En Banc Review:)

Musladin v. Lamarque

427 F.3d 647

KLEINFELD, Circuit Judge:

I respectfully dissent from the order denying rehearing en banc. We have effectively erased a statutory provision designed to restrict the power of the lower federal courts to overturn fully reviewed state court criminal convictions. And we have sharpened a serious circuit split.

Musladin was convicted of murder, and his conviction was upheld through direct and collateral review in the California courts. The California Court of Appeal carefully and reasonably applied the relevant precedents of the United States Supreme Court, but arguably deviated from the implications of a Ninth Circuit precedent.

In 1996, Congress adopted the Antiterrorism and Effective Death Penalty Act (AEDPA), amending the standard that federal courts must apply to state criminal convictions in habeas cases. The statute as amended says that we may grant a habeas petition if and only if the last reasoned state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Our decision in this case has the practical effect of erasing the "clearly established” phrase and expanding the “as determined” phrase. The statute in nine states now says, as a practical matter, “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, giving ‘persuasive weight’ to Ninth Circuit decisions that have applied Supreme Court decisions.” We do not have that legislative authority.

The facts of this case and of the controlling precedents show just how clear our mistake is. Musladin, embroiled in a custody dispute with his estranged wife, murdered her new fiancé. At his trial, three members of the fiancé’s family sat in the spectator section of the courtroom wearing buttons with his picture on them. The buttons were two-to-four inch pictures of the victim but had no words. Musladin argued in his state court appeal and petition for review that the buttons denied him due process of law.

The California Court of Appeal concluded that the buttons contained no express message and were unlikely to signify “anything other than the normal grief occasioned by the loss of a family member.” The California Court carefully examined Estelle v. Williams and Holbrook v. Flynn (the relevant Supreme Court decisions) and Ninth Circuit cases. Though the Court of Appeal noted that button wearing should be “discouraged,” it held that the buttons did not amount to a denial of due process
because they did not brand Musladin "with an unmistakable mark of guilt."

The statute is quite clear that our task on review of Musladin's petition for a writ of habeas corpus is not to examine the California Court of Appeal decision as though we were a higher California court. Rather, we exercise a much more limited and deferential review to determine whether the California Court of Appeal acted contrary to "clearly established Supreme Court" precedent or "unreasonabl[y]" applied it. The only question for us is whether there is any Supreme Court authority that holds that silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence. The answer is that there is no such case. That should be the end of our inquiry.

The Supreme Court held in Estelle v. Williams that forcing a defendant to wear prison clothes at trial is "inherently prejudicial" and denies due process. It held in Holbrook v. Flynn that the presence of several armed uniformed officers in the spectators' row directly behind the prisoner is not inherently prejudicial. Neither of these cases holds that a spectator's symbol of affiliation or even opinion denies due process to a defendant.

Dressing the defendant in "prison garb," the Estelle problem, is not analogous to spectators wearing buttons. First, prison garb is an unambiguous statement that the defendant is already a prisoner. Second, it is a communication to the jury of the government's determination—not a non-governmental spectator's—that the defendant belongs in jail. The buttons, by contrast, are ambiguous. They may mean "we really want this defendant punished because we care a lot about his victim," or they may merely mean "we care a lot about the victim," without an implication that the defendant is the proper person to be punished. Even more important, the spectators' buttons do not imply any determination by the government. Even if the buttons did imply that the spectators wanted the defendant punished, that would not be as corrosive of the presumption of innocence as the government saying "this defendant belongs in jail and he is already there because of our determination." Unlike the spectators' buttons in this case, the prison garb in Estelle detracted from the presumption of innocence and from the defendant's dignity in the courtroom.

The presence of the armed officers in the spectator section in Flynn more closely resembles the facts in our case than does the prison garb in Estelle. Both involve what the jury might perceive as communications from the spectators' section. But the Supreme Court held that the presence of the armed officers did not deprive the defendant of due process by corroding the presumption of innocence. And the armed officers were far more likely to do so than spectators not associated with the government because the officers represented the government and might have communicated its judgment that the defendant was dangerous. The Supreme Court held that the armed officers did not deny due process because of the "wider range of inferences that a juror might reasonably draw from the officers' presence." The courtroom cannot be totally free of indications that the state thinks the defendant is guilty, for "jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance." With these two Supreme Court cases as bookends—showing what denies due process and what does not-the
California courts were well within the bounds of reasonable interpretation in determining that this case is more like Flynn. The buttons with a picture of the dead fiancé did not say or obviously imply that the defendant killed him, just that the spectators wearing them cared about him.

So how did the panel majority manage to reach a different result in the face of Supreme Court decisions plainly leaving room for the California courts' conclusion and a statute limiting us to Supreme Court decisions? The panel extended a Ninth Circuit case, not a Supreme Court case, Norris v. Risley. But the statute says we cannot do that, with the express restriction “as determined by the Supreme Court of the United States.” The panel evades that restriction by holding that we give “persuasive weight” to Ninth Circuit cases when determining what is “clearly established Federal law, as determined by the Supreme Court.” The panel’s proposition means that we will grant writs based on precedents other than those of the Supreme Court. Ergo, the statutory restriction on our power is erased.

We held in Norris-before AEDPA—that the writ should be granted where several female spectators wore “Women Against Rape” buttons in the presence of jurors in “elevators, in the courtroom, on their way to and from the courtroom,” and while “the women served refreshments outside the courtroom on behalf of the state.” California could properly decide the case at bar by distinguishing Norris, disagreeing with Norris, or in complete ignorance of Norris. Under AEDPA’s restriction to Supreme Court decisions, we are obligated to deny the writ so long as the California decision was not contrary to or an unreasonable application of Estelle and Flynn. We cannot legitimately require the California courts to follow Ninth Circuit decisions on pain of our letting their prisoners out onto the street.

At least four of our sister circuits have expressly repudiated the error our panel has made. The Sixth Circuit, in Mitzel v. Tate, held that “[w]e may not look to the decisions of our circuit, or other courts of appeals, when ‘deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.’ ” The Tenth Circuit in Welch v. City of Pratt held AEDPA “restricts the source of clearly established law to [the Supreme] Court’s jurisprudence” and federal courts are therefore “no longer permitted to apply our own jurisprudence.” The Seventh Circuit likewise determined that “[f]ederal courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court case-law.”

The Fourth Circuit has also held that habeas relief may be granted only if “the state court decision is contrary to, or an unreasonable application of Supreme Court jurisprudence, and not circuit court precedent,” so “any independent opinions we offer on the merits of the constitutional claims will have no determinative effect in the case before us, nor any precedential effect for state courts in future cases. At best, it constitutes a body of constitutional dicta.” The Fourth Circuit expressly rejects the notion that the lower federal courts need to provide “guidance” to the state courts on how to read the Supreme Court opinions. There is no reason to presume that state courts are in need of our guidance in interpreting and applying the controlling Supreme Court precedents. Our charge under the statute is only to determine whether the state court’s adjudication of the claims before it was a
reasonable one in light of the controlling Supreme Court law.

Arguably our panel did not create the circuit split ex nihilo. The panel notes that the Eighth Circuit in *Williams v. Bowersox* held that the “diversity of opinion” among federal courts on a particular issue suggested that the state court did not unreasonably apply Supreme Court precedent. But saying that the state court decision is not unreasonable because some federal courts have reached similar conclusions is not at all the same as saying that the state court decision is unreasonable because a circuit court has reached a contrary conclusion. The First Circuit in *Ouber v. Guarino* and the Third Circuit in *Matteo v. Superintendent* come much closer to supporting the panel’s decision, but our panel is unique in how boldly it has flown in the face of the statutory restriction to Supreme Court decisions.

Those of us who have actually tried cases to juries have frequently observed how spectators communicate their feelings. This communication is an unavoidable consequence of the Constitutional guarantee of “public trial.” Sometimes there is a wall of brown or blue in the spectators’ section, displaying that state or municipal police care a great deal about the case. Sometimes the courtroom is full of Hells Angels colors, signifying a concern for their brother in the defendant’s chair. The local rape support center volunteers may crowd into the seats behind the prosecutor in a rape trial while the victim sits silently looking at the jurors through the entire trial. Defense lawyers round up family members to show support for the defendant by sitting behind the defense table.

There is nothing wrong with the jury knowing that people care about the case and the parties. Typically, the spectators arrange themselves like wedding guests choosing the bride’s side or the groom’s side, with those who favor a party sitting behind the lawyer for that side. In a public trial, the jury can always see that a lot of people care about one side or the other, or that no one cares except the parties and lawyers. Good lawyers often use this to their advantage, and good judges exercise prudence to avoid situations that might intimidate or prejudice the jury. Perhaps, as the California Court of Appeal implied, the trial judge in this case should have told the family members to remove their buttons. T-shirts with pictures of the victim would be difficult, but buttons are easy. There is no legitimate way for judges to prevent spectators in a public trial from showing that they care about the case and support one side or the other, even if only by where they sit and who they look at with sympathy or hostility. Public concern and public sympathy for one side or the other are part of what it means for a trial to be “public.”

The panel’s error is symptomatic of a deeper problem than its misapplication of Supreme Court precedent to spectators’ photo buttons. Few things incumbent on powerful government officials are more fundamental than their duty to comply with the legal limitations on their power. Our panel has arrogated to our court power that we do not legitimately possess.

State judges take the same oath to uphold the Constitution that we do and perform the same work we do, construing Constitutional provisions and applying them to the facts before them. We do not sit as a state appellate court. One problem they sometimes have is deciding what to do about lower federal court decisions. Obviously
they have to follow United States Supreme Court decisions, and they construe them as routinely as we do. Obviously they do not have to follow federal decisions on questions of state law. Not quite as obviously, but just as true, state courts understand that they are free to act contrary to circuit court holdings on questions of federal law. Lower courts must follow the law laid down by higher courts. But we are not a higher court than the Supreme Court of California or the California Court of Appeal, or for that matter, California traffic courts. We are in a different judicial hierarchy.

Our panel's error creates uncertainty and inconsistency for the nine state court systems and nearly 20% of our nation's population within the Ninth Circuit. Must they follow our decisions when they think our decisions are contrary to or unreasonable applications of Supreme Court precedent? The statute tells them one thing, we tell them another, and the briefs they get will tell them both. Under the plain statutory language, state courts are free to ignore our decisions. But under the panel's decision, they must follow them. We have effectively turned ourselves into the supreme court of the nine states in our circuit. I therefore dissent.

BEA, Circuit Judge:

I join Judge Kleinfeld's dissent from the denial of rehearing en banc. I write separately to underscore that it was not an "unreasonable application of clearly established federal law" for the California Court of Appeal to deny habeas relief notwithstanding its determination that the wearing of victims' photographs in a courtroom constitutes an "impermissible factor coming into play."

The panel opinion suggests that, once the California Court of Appeal "specifically found the wearing of photographs of victims in a courtroom to be an "impermissible factor coming into play," Musladin's conviction could not stand. The rationale offered in support of this conclusion is that, "[u]nder Williams and Flynn," the finding of an impermissible factor coming into play "in itself establishes 'inherent prejudice' and requires reversal."

The panel opinion misconstrues Williams and Flynn. In Williams, the Court established that putting a defendant on trial in prison garb is constitutional error of the variety amenable to harmless-error analysis. When the Court in Flynn "reaffirmed its holding in Williams," it did not, of course, transform "courtroom arrangements challenged as inherently prejudicial" into structural errors. Rather, Flynn suggested that, to obtain a conviction's reversal, a defendant must show "actual prejudice" even after successfully demonstrating that the challenged courtroom arrangement was "inherently prejudicial." Under Flynn, in other words, it is possible to have a situation that is "inherently prejudicial" but not "so inherently prejudicial as to pose an unacceptable threat to [a] defendant's right to a fair trial."

Accordingly, it was a reasonable application of Supreme Court precedent for the California Court of Appeal to determine that, although in its view the wearing of victims' photographs in a courtroom is inherently prejudicial, the button-wearing in this case did not actually deprive Musladin of his right to a fair trial.
The Supreme Court agreed Monday to decide whether a California murderer's right to a fair trial was denied when members of the victim's family wore buttons in court with a photo of the slain man. It is the latest instance of the high court's reconsidering a ruling from the liberal-leaning U.S. 9th Circuit Court of Appeals in a criminal case.

In the murder case, the appeals court, in a 2-1 decision, last year overturned the conviction of Mathew Musladin of San Jose for the 1994 shooting of his ex-wife's fiance, Tom Studer. Judge Stephen Reinhardt of Los Angeles said the buttons with the victim's photo "conveyed the message that the defendant was guilty" and might have prejudiced the jury. Judge Marsha S. Berzon of San Francisco agreed with him.

The trial judge had said he saw no problem with the family members wearing buttons in court. They were probably seen by jurors as a sign of "the normal grief occasioned by the loss of a family member," another state judge said. The California courts and a federal judge upheld Musladin's conviction before his case reached the 9th Circuit.

After their separation in 1992, Musladin had threatened to kill his former wife, Pamela, and the two had repeated confrontations over who would have custody of their son. In 1994, Pamela was engaged to marry Studer. On an afternoon in May of that year, Musladin came to her house in San Jose to pick up their son for a visit. In the driveway, he angrily shoved Pamela to the ground.

When her brother and Studer came to her aid, Musladin shot Studer, first in the shoulder and then in the head. He maintained the shooting was in self-defense.

During the trial, three family members wore buttons with 2- to 4-inch photos of Studer. The jury convicted Musladin of first-degree murder and he was sentenced to 32 years in prison.

Congress in 1996 made it harder for federal judges to overturn state criminal convictions. It said U.S. judges should not free state inmates unless their convictions arose from "an unreasonable application of clearly established federal law," as set by the Supreme Court.

Nonetheless, the 9th Circuit has continued to overturn state convictions with regularity.

Seven judges on the 9th Circuit filed a dissent, saying the full appeals court should reconsider the decision set by Reinhardt and Berzon.

California Atty. Gen. Bill Lockyer appealed to the Supreme Court, urging the justices to reverse the ruling.

On Monday, the court issued an order
granting the appeal and saying it would hear the case in the fall.
Members of a slain San Jose man's family who wore buttons showing his photo at a murder trial may have swayed the jury, a federal appeals court said Friday in overturning the defendant's murder conviction.

Mathew Musladin of Fair Oaks (Sacramento County) was convicted of first-degree murder for shooting his estranged wife's fiance, Tom Studer, 31, outside the couple's San Jose home in May 1994. Musladin, then 34, claimed self-defense, saying Studer had come outside with a gun after Musladin argued with his wife, Pamela, and pushed her to the ground.

In a 2-1 ruling, the Ninth U.S. Circuit Court of Appeals granted Musladin a new trial. The majority of judges said the courtroom display of buttons by Studer's family had violated Musladin's right to "a fair trial by an impartial jury free from outside influences."

At least three of Studer's relatives sat in a front row of the courtroom throughout the trial wearing buttons with large photos of the victim's face. Musladin's attorney objected, but the trial judge refused to order the buttons removed.

The appeals court majority said the case was comparable to two others in which convictions were overturned: a 1976 Supreme Court case in which the defendant was forced to wear prison clothing and shackles in court, and a 1990 Ninth Circuit case in which spectators at a rape trial wore buttons reading "Women Against Rape." In both cases, the court said, a message of guilt was conveyed to the jury.

In this case, where the only issue was the claim of self-defense, "the buttons essentially 'argue' that Studer was the innocent party and that the defendant was necessarily guilty," said Judge Stephen Reinhardt.

In dissent, Judge David Thompson said the buttons sent no message, had nothing to do with Musladin, and were unlikely to have had any more impact than victims' family members who typically sit together during a murder trial.
The Ninth U.S. Circuit Court of Appeals yesterday denied en banc rehearing of a ruling granting a new trial to a convicted murderer who claimed he was denied a fair trial because relatives of the victim appeared in court wearing buttons with the deceased's picture on them.

The denial brought a strong dissent, signed by seven judges, arguing that the panel decision "effectively erased" the statutory provision limiting the power of federal courts to overturn state convictions.

The Northern California defendant, Matthew Musladin, was convicted in the 1994 killing of Tom Studer, who was engaged to marry Musladin's estranged wife.

Pamela Musladin testified that she and her husband, who had come to her home to pick up their son for a weekend visit, got into an argument and that Studer and her brother, with whom she shared the house, came out to assist her after she was pushed to the ground. Musladin, she said, grabbed a gun and fired two shots, killing Studer.

The defendant admitted pushing his wife to the ground. But he contended that Studer and the defendant's brother were armed and that he shot in their direction out of fear for his own life.

Experts agreed that Studer was killed by a ricocheting bullet. Musladin claimed both self-defense and imperfect self-defense.

Members of Studer's family, who sat in the front row of the gallery at trial, wore buttons on their shirts with the decedent's picture on them during each of the 14 days of the trial. The trial judge overruled defense objections to the wearing of the buttons.

Convicted of first degree murder, Musladin lost his state appeals, the Court of Appeal holding that while the wearing of photographs depicting a victim "should be discouraged," it did not brand the defendant as guilty in the context of the particular case.

Musladin sought habeas corpus relief in state and federal courts. He took his appeal to the Ninth Circuit after U.S. Magistrate Judge James Larson of the Northern District of California ruled that the state courts had not acted contrary to clearly established federal law in upholding the conviction.

Writing for the panel, Judge Stephen Reinhardt said the magistrate judge erred in his application of the Antiterrorism and Effective Death Penalty Act of 1996, which limits federal habeas corpus relief from state convictions to cases in which the final state court ruling is contrary to, or an unreasonable application of, clearly established law as determined by the U.S. Supreme Court.

Reinhardt cited a Supreme Court ruling that a defendant was deprived of due process when forced to wear prison garb in court. The judge also noted that the Ninth Circuit had applied that decision in holding that the
wearing of buttons by women at a rape trial, reading "Women Against Rape," may have impermissibly influenced the jury to convict.

But Judge Andrew Kleinfeld, dissenting from yesterday's denial of en banc review, said the panel had, in effect, removed the "clearly established" language from AEDPA and improperly relied on Ninth Circuit, rather than Supreme Court, precedent.

Nothing in Supreme Court precedent, Kleinfeld argued, establishes a blanket rule against the wearing of buttons in court. In this case, he said, the buttons-which bore the victim's photo, but no words-conveyed only that the victim's family mourned his loss, not that they were trying to persuade the jury to convict.

The judge elaborated: "There is nothing wrong with the jury knowing that people care about the case and the parties. Typically, the spectators arrange themselves like wedding guests choosing the bride's side or the groom's side, with those who favor a party sitting behind the lawyer for that side. In a public trial, the jury can always see that a lot of people care about one side or the other, or that no one cares except the parties and lawyers. Good lawyers often use this to their advantage, and good judges exercise prudence to avoid situations that might intimidate or prejudice the jury. Perhaps, as the California Court of Appeal implied, the trial judge in this case should have told the family members to remove their buttons....There is no legitimate way for judges to prevent spectators in a public trial from showing that they care about the case and support one side or the other, even if only by where they sit and who they look at with sympathy or hostility. Public concern and public sympathy for one side or the other are part of what it means for a trial to be public."

The dissent was joined by Judges Alex Kozinski, Richard Tallman, Consuelo Callahan, Diarmuid F. O'Scanlon, Jay Bybee, and Carlos Bea. Bea, in a separate dissent joined by Kleinfeld, Kozinski, and O'Scanlon, argued that under Supreme Court precedent, the trial judge committed, at most, harmless error by allowing the buttons to be worn because there was no showing that the verdict would have been different.

The case is Musladin v. Lamarque, 03-16653.
A San Jose man was gunned down at his Blossom Valley home Friday by his girlfriend's estranged husband, who was arrested minutes after the shooting, police said.

Within 10 minutes after the shooting at 539 Bluefield Drive, an undercover officer stopped a car that fit the description of the prime suspect's vehicle on Highway 101 just south of Blossom Hill Road and arrested Mathew Guy Musladin.

Inside Musladin's car, police found a handgun that investigators believe was used in the killing of Thomas Allen Studer, a 31-year-old plumber who was living with Musladin's estranged wife, Pamela, 23.

Musladin, 34, of Fair Oaks, was taken to police headquarters, questioned, and then booked on suspicion of murder. Musladin works in retail sales, police said.

The 1:50 p.m. shooting unfolded when Musladin went to his former wife's home to pick up their 3-year-old son. The couple had been separated for more than a year and she had been living with Studer for about three months, police said.

An argument between the couple erupted outside the home and Studer tried to intervene. Police say Musladin went to his vehicle, got a gun and shot Studer in front of the home's open garage.

Musladin took his son and drove away. Pamela Musladin ran to a neighbor's home to call police.

"I heard three shots, bam, bam, bam, and a scream," said neighbor Marie Godin. "It was a horrible scream. Then there was complete silence. I heard a car leave, and I thought an animal had been hit."

Randy Zuber, who called police, said Pamela Musladin sought refuge at his house and told him her ex-husband had shot her boyfriend, kidnapped their son and was now trying to kill her.

"She was beating my door down, hysterical," Zuber said. "She was hoping her boyfriend wasn't dead."

Officers who arrived at the scene quickly broadcast the description of Musladin's car, including the license plate and the direction he was heading.

Lt. Tom Wheatley, who was in an unmarked car, heard the description and saw Musladin traveling east on Capitol Expressway at Tuers Road.

Wheatley followed Musladin onto southbound Highway 101 and arrested him without incident. Inside the car was the gun that investigators believe was used in the killing. The child was unharmed.
Ornaski v. Belmontes

(05-493)

Ruling Below: (Belmontes v. Brown, 414 F.3d 1094 (9th Cir. 2005), cert granted 126 S.Ct. 1909, 74 USLW 3260, 74 USLW 3617, 74 USLW 3612 [2006]).

Belmontes was convicted of murder and sentenced to death in the California state courts. He requested habeas relief in the United States District Court for the Eastern District of California because the jury was not instructed to consider his mitigating evidence as to whether he would adapt well to life in prison without parole. His petition was denied by the District Court, but approved by the Ninth Circuit Court of Appeals. The Ninth Circuit held in part that the instruction was insufficient to satisfy the Eighth Amendment requirement that the jury consider and weigh all mitigating evidence presented by the defendant, and that the instructional error was not harmless. Circuit Judge O'Scannlain concurred in part and dissented in part.

Questions Presented: Does Boyde confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner? Also, does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate constitute a "new rule" under Teague v. Lane, 489 U.S. 288 (1989)?

Fernando BELMONTES, Jr.,
Petitioner, Appellant,

v.

Jill L. BROWN, Warden,
Respondent, Appellee

United States Court of Appeals
for the Ninth Circuit

Decided July 15, 2005

[Excerpt: some footnotes and citations omitted]

REINHARDT, Circuit Judge:

I. PREAMBLE

On July 15, 2003, we filed an opinion in this case holding that there is a reasonable probability that as a result of instructional error the jury did not consider constitutionally mitigating evidence at the penalty phase. . . . The warden timely petitioned the Supreme Court for a writ of certiorari. On March 28, 2005, the Supreme Court granted the writ, vacated our judgment, and remanded the case "for further consideration in light of Brown v. Payton.

Upon careful consideration, we conclude
that Payton does not affect our holding in the present case. Notwithstanding the similarity of the factual and legal issues, Payton was a post-AEDPA case and was decided under the highly deferential AEDPA standard, while the case before us is pre-AEDPA and is determined by the application of the ordinary rules of constitutional interpretation.

* * *

II. INTRODUCTION

In this pre-AEDPA death penalty case, Petitioner Fernando Belmontes, Jr., appeals the district court's denial of his petition for writ of habeas corpus. Because the jury was not instructed that it must consider Belmontes' principal mitigation evidence, which tended to show that he would adapt well to prison and would likely become a constructive member of society if incarcerated for life without possibility of parole, and because there is a reasonable probability that the instructional error affected the jury's decision to impose the death penalty on Belmontes, we grant the petition with respect to the penalty phase. We reject, however, those claims that seek relief from the judgment of conviction and the finding of special circumstances. Accordingly, we affirm the district court's decision in part, reverse in part, and remand with instructions to issue a writ vacating the death sentence.

III. FACTUAL AND PROCEDURAL BACKGROUND

* * *

[The court provided in-depth details of the evidence of Belmontes' guilt presented at trial.]

* * *

C. The Penalty Phase

At the penalty phase, the prosecution introduced minimal aggravating evidence. . . .

. . . Ron Cutler, a California Youth Authority ("CYA") counselor, testified that he once observed Belmontes swinging a chair as if he were about to hit another ward, but Cutler was able to intervene before a fight ensued. On cross examination, he admitted that Belmontes was significantly smaller than the other youth.

Barbara Murillo testified about a domestic violence incident that occurred when she asked Belmontes to move out of their shared apartment and to give her his keys so he could not come back. . . .

Finally, the prosecution and defense stipulated that Belmontes entered a plea of no contest in April 1979 to a charge of being an accessory after the fact to voluntary manslaughter. The court refused to allow the prosecutor to introduce evidence that Belmontes had actually murdered the victim, Jerry Howard. Consequently, the jury never heard any details of the murder or Belmontes' alleged role in it.

Belmontes' mitigation presentation was also limited in scope, focusing on two themes: his family and personal history and his capacity for rehabilitation and positive institutional adjustment. It was primarily the latter theme that defense counsel pressed upon the jury.

Belmontes' family history was one of poverty and violence. . . .
The state agrees that Belmontes' counsel, John Schick, presented "substantial evidence" in support of this theme in the form of a series of witnesses who testified to Belmontes' behavior and achievements during his prior CYA incarceration and to the likelihood that he would make positive contributions to the welfare of others if his life was spared. Belmontes himself testified that he was in the custody of the Youth Authority from early 1979 until November 1980, four months prior to the crime. While at the CYA, he was employed on the fire crew at the Pine Grove Camp for one year, during which he worked his way up from last man to number two, a position of leadership and responsibility. Belmontes also testified that during his incarceration he became involved in the M-2 Christian sponsorship program. He admitted that he initially entered the M-2 program as a way to get out of camp, but he explained that he was touched by the decency of his M-2 family, the Haros, and so gradually became curious about Christianity and embraced it.

At the conclusion of the evidentiary stage, the court permitted Belmontes to address the jury personally during closing arguments. Belmontes stated that he did not think that his difficult childhood excused his role in the McConnell murder. However, he explained that he could not handle the pressures of life outside of an institution, and he asked the jury to give him "an opportunity to achieve goals and try to better [him]self." Belmontes' attorney similarly stressed that Belmontes could not "make it on the outside." He argued that Belmontes had had a hard life but still retained his humanity. He characterized Belmontes as someone who thrived in a structured environment-as evidenced by his accomplishments while in the CYA-and asked the jury to spare Belmontes' life on the ground that he would make positive contributions if allowed to live out his natural life in prison.

[The judge instructed the jury to consider Belmontes' age, criminal history, and any other circumstance which mitigates the crime, but without specifically instructing the jury to consider Belmontes' ability to adjust to life in prison]
D. Post-Trial

[The court recounted the post-trial procedural history of the case]

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IV. STANDARD OF REVIEW

Because Belmontes filed his habeas petition prior to AEDPA's effective date, we apply pre-AEDPA standards of review. State court factual findings are presumed correct unless one of eight enumerated exceptions applies. The application of law to historical facts is reviewed de novo.

V. GUILT PHASE ISSUES

[The court considered and rejected the defendant's claims arising from the guilt phase of the trial, including deprivation of due process through failure to disclose the prosecutor's dismissal of several of Bolanos' misdemeanor charges, prosecutor's failure to correct an incorrect statement by Bolanos, conflict of interest for council, admission of an involuntary statement, council's failure to challenge the arrest warrant, cross examination regarding post-arrest silence, restriction of cross examination, evidentiary errors, instructional error, jury which did not compose a fair cross section of the community, and jury misconduct.]

VI. SPECIAL CIRCUMSTANCES ISSUES

[The court considered and rejected the defendant's claims arising from special circumstances, including racial discrimination and arbitrariness in charging]

***

VII. PENALTY PHASE ISSUES

A. Instructional Error

Belmontes contends that the trial judge's instructions to the jury prevented it from considering nonstatutory mitigating circumstances relating to the likelihood that he would live a constructive life in prison and make positive contributions to others if granted life without the possibility of parole. Because we conclude that there is a reasonable probability that as a result of instructional error the jury did not consider constitutionally relevant mitigating evidence, and because we believe that the error was not harmless, we grant the petition with respect to the sentencing phase.

1. Factual Background

At Belmontes' trial, the judge gave the jury the then-standard model jury instructions . . .

The judge also gave the jury half of a supplemental instruction requested by the defense. The part that was given read:

[T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

The other half of the instruction, which the trial judge refused to give, stated: "[Y]ou should not limit your consideration of mitigating circumstances to these specific
factors. You may also consider any other circumstances as reasons for not imposing the death sentence."

After several hours of deliberations, the jury sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The jury was brought back to the courtroom, and the judge reread a portion of the jury instructions, emphasizing that "all 12 jurors must agree, if you can." The jurors asked again what would happen if they could not agree, but the court refused to tell them.

The judge asked the jury: "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" The jurors agreed that they needed more time to deliberate. They then asked the following series of questions:

JUROR HERN: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?

THE COURT: That was the listing, yes, ma'am.

JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?

THE COURT: That is right. It is a balancing process. Mr. Meyer?

JUROR MEYER: A specific question, would this be an either/or situation, not a one, if you cannot the other [sic]?

THE COURT: No. It is not that.

JUROR MEYER: It is an either/or situation?

THE COURT: Exactly. If you can make that either/or decision. If you cannot, I will discharge you.

JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?

THE COURT: That is something you cannot consider in making your decision.

2. Discussion

The California death penalty statute has a unique mechanism for guiding the jury's discretion. Instead of separate sets of aggravating and mitigating circumstances, the statute features an eleven-factor test which focuses the jury's attention on the specifics of the crime and the background and character of the defendant. The first ten factors instruct the jury to evaluate various circumstances of the crime and the defendant's age and prior convictions. The jury itself decides whether these factors are aggravating or mitigating. The eleventh factor-factor (k)-is intended to function as a catch-all that will enable the jury to consider any relevant mitigating circumstance that the defendant proffers as a basis for a sentence less than death. The jury is obligated to weigh and balance the aggravating and mitigating circumstances and must impose the death penalty if it determines that the circumstances in aggravation outweigh those in mitigation.

In this statutory scheme, the importance of factor (k) cannot be overstated. The Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate. This broad mandate includes the duty to consider mitigating evidence that relates to a defendant's probable future behavior, especially the likelihood that he would not pose a future danger if spared but incarcerated. Factor (k) provides the only mechanism for allowing the jury to consider a substantial portion of many defendants' mitigating evidence—indeed, all mitigating evidence that does not relate to the circumstances of the crime or the
defendant's age and criminal record.

To pass constitutional muster, the trial judge's instructions must convey to the jury that factor (k) compels it to consider all relevant mitigating evidence proffered by the defendant as a basis for a sentence less than death. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer." Rather, the trial judge's instructions must convey "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence."

At the time of Belmontes' trial, factor (k) allowed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The Supreme Court had occasion to review this language in Boyde v. California. In Boyde, the defendant had argued that the jury instruction was unconstitutional because there was a reasonable likelihood that the jury would construe the instruction as forbidding it from considering evidence unrelated to the crime - e.g., mitigating evidence relating to the defendant's background and character. However, the Supreme Court held that because of the view "long held by society" that a defendant with a disadvantaged background or emotional or mental problems may be "less culpable than defendants who have no such excuse," the jury was reasonably likely to have understood that the defendant's evidence of "his impoverished and deprived childhood, his inadequacies as a school student, and his strength of character in the face of these obstacles" could have "extenuate[d] the gravity of the crime even though it [wa]s not a legal excuse for the crime." The Court held that, because the trial judge instructed the jury that it "shall consider all of the evidence which has been received during any part of the trial of this case," there was no reasonable likelihood that the jury believed that factor (k) prevented it from considering the background and character evidence introduced by Boyde and its bearing on Boyde's commission of the crime. In other words, the Supreme Court held that the unadorned factor (k), at least when accompanied by an appropriate clarifying instruction, was constitutional as applied to mitigating evidence relating to the defendant's psychological make-up and history, which practically, if not legally, bore upon his commission of the crime and was offered for the purpose of reducing his culpability for the offense.

The same type of evidence, however, can serve an alternative forward-looking purpose, mitigating in a manner wholly unrelated to a petitioner's culpability for the crime he committed. This alternative purpose has nothing to do with persuading the jury that the defendant is less culpable with respect to the crime because of some aspect of his family background, personal history, character, or mental capacity. Rather, as defined by the Supreme Court in Skipper v. South Carolina, the jury must "consider[ ] a defendant's past conduct as indicative of his probable future behavior" and "draw[ ] favorable inferences" about a defendant's "probable future conduct if sentenced to life in prison." . . .

Belmontes contends that his Eighth and Fourteenth Amendment rights were violated because the trial judge's instructions failed to advise the jury to consider the portion of his mitigating evidence that tended to show that he would adapt well to prison and would become a constructive member of society if granted a life sentence. We review
this claim of instructional error under the approach set forth by the Supreme Court in Boyde, which directs us to determine whether there is a reasonable likelihood that the jury understood the instruction in a manner that resulted in its failure to consider constitutionally relevant evidence. Although Belmontes' briefs emphasize the trial judge's mid-deliberation colloquy with Juror Hem, the Court has held that we must examine claims of instructional error in light of the record as a whole. Accordingly, in assessing Belmontes' claim of instructional error, we consider the entire mid-deliberation colloquy as well as the original jury instructions.

We begin with the original instructions. As stated above, Belmontes' jury was instructed to consider and take into account "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Most naturally read, this instruction allows the jury to consider evidence that bears upon the commission of the crime by the defendant and excuses or mitigates his culpability for the offense. We now know that such evidence includes background and character, both of which tend to explain why the defendant committed the crime. By its plain language, however, the instruction does not encompass events or considerations that are unrelated to the defendant's culpability. In particular, the instruction does not apply to those forward-looking considerations encompassed by the Supreme Court's decision in Skipper: evidence that allows the jury to evaluate the defendant's probable future conduct if incarcerated for life without the possibility of parole-specifiedly, evidence that would tend to prove that Belmontes would likely live a constructive life if permanently confined within a structured prison environment. These important sentencing considerations are simply not in any respect "circumstance[s] that extenuate[ ] the gravity of the crime." Moreover, unlike in Boyde, "society" has not had a "long held view" that a defendant's likely future conduct can serve to mitigate or excuse his commission of a serious crime. Rather, the doctrine is a legal concept peculiar to capital punishment cases. Thus, in the absence of a clear instruction on point, jurors are not likely to be aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor.

In the current case, the most important part of Belmontes' mitigation presentation was that the jury should spare his life because he had the potential, if confined within a prison setting, to contribute positively to prison life. Although the record made before the jury included a substantial amount of evidence about his difficult childhood, in his own testimony he repeatedly stated that he did not want to use his rough childhood "as a crutch" or an excuse. Thus, ultimately the more significant evidence related to his conduct during the period of his prior CYA incarceration and to his ability to conform his behavior to societal norms should he be confined within a structured prison environment. Belmontes' counsel argued to the jury that the evidence demonstrated that if granted life without parole, he would adapt well to prison life, would make a positive contribution to the welfare of others, and would not pose a future danger to the guards or the other inmates.

Unlike the background and character evidence in Boyde that tended to mitigate the offense, Belmontes' mitigation evidence was simply not covered by any natural reading of the words of the unadorned factor
(k) instruction. To the contrary, that instruction, read most naturally, suggested to the reasonable juror that Belmontes' evidence tending to show his probable future good conduct should be excluded from consideration, and thus that such evidence was governed by the earlier instruction that the jury "consider all of the evidence except as you may be hereafter instructed." At the least, the unadorned factor (k) instruction is ambiguous with respect to Skipper's requirement that the jury be permitted to consider and give effect to evidence bearing on a defendant's probable future good conduct when it decides whether to impose the death penalty, and thus with respect to the jury's right to consider Belmontes' most important mitigating evidence.

The court's supplemental instructions only exacerbated this problem. Belmontes' counsel had requested instructions that would have expressly instructed the jury that it "should not limit [its] consideration of mitigating circumstances to these specific factors," i.e., the factors listed in the original instruction. However, although the trial judge gave part of the instruction requested by defense counsel, he refused to give the most critical portion. . . . A juror who followed these instructions would likely think that he could not consider nonstatutory mitigating evidence-evidence not going to culpability-such as testimony tending to show that Belmontes would lead a constructive life if confined permanently within a structured environment. Still, the supplementary instructions did not end the matter.

Compounding the problems with the original and supplemental instructions were the trial judge's responses to the jurors' questions during the mid-deliberation colloquy. . . . Juror Hern's questions reveal that she did not understand that her duty as a juror was to consider all of Belmontes' mitigating evidence. . . . Juror Hern wanted confirmation that there was a finite list of factors for the jury to consider and that the list consisted of the statutory factors read to the jury by the judge. This interpretation is reinforced by Juror Hern's next question: "Of those certain factors, we were to decide one or the other [e.g., whether the evidence is aggravating or mitigating] and then balance the sheet?" The structure of this question separates the "certain factors" that appear in "the listing" from other factors that may not be reflected there. It makes it clear that at least one juror believed that the jury should consider, weigh, and balance only "those certain factors" that appeared in "the listing." Of course, such a belief would have been incorrect; the jury was required to consider and evaluate Belmontes' mitigating evidence relating to his potential adjustment to life in prison regardless of the fact that it was not listed in the statute.

In any event, Juror Hern's questions signified that she was not sure how to follow the judge's instructions. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." . . . Instead, however, the judge simply affirmed Juror Hern's incorrect assumptions with a terse, "That is right." In so doing, he not only failed to correct Juror Hern's erroneous view, but he likely left all the jurors with the impression that they could consider mitigation evidence only if it appeared as one of the "certain factors" in "the listing." As we have discussed, Belmontes' principal mitigating evidence does not fall in this category.

We need not rely on affirmative evidence of
jury confusion in order to reach this conclusion, however. "A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any indication of perplexity on their part." To hold otherwise would condition our ability to redress serious constitutional violations on such subjective vagaries of fate as whether the jurors happened to ask a question instead of embarking boldly down the wrong path.

The trial judge also instructed the jury that it could not consider a specific subject relating to Belmontes' ability to adjust to prison life. Less than thirty seconds after Juror Hern's inquiry, Juror Hailstone said: "Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The trial judge responded: "That is something you cannot consider in making your decision." He did not explain why the jury could not consider this issue, and immediately after issuing this response, he sent the jury off to resume its deliberations. The instruction not to consider possible future psychiatric treatment was misleading because of the judge's failure to explain to the jury why it could not consider the prohibited subject; to the extent that the jury believed that it could not consider mitigating evidence relating to how Belmontes might behave in a controlled prison environment, the instruction as given would likely have confirmed its misconception.

Juror Hailstone's question and the trial judge's response are troubling because of the likelihood that the jury understood them in the context of the larger discussion about how to consider, weigh, and balance aggravating and mitigating circumstances. . . . The trial judge's response thus likely reinforced the jury's mistaken notion that Belmontes' mitigation evidence relating to his probable future good conduct if confined in a structured prison environment was irrelevant to the sentencing decision.

The next question is whether the trial judge's various instructions relating to limitations on the evidence that could be considered had an effect on the jury's deliberations. We may not reverse the jury's penalty determination unless the instructions actually created "a reasonable probability that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

We hold that there is a reasonable probability that, as a result of the court's instructions, the jury in Belmontes' case did not consider his principal mitigating evidence.

Having concluded that an error of constitutional magnitude infected the penalty phase of Belmontes' trial, we turn finally to the question whether that error was nonetheless harmless. Belmontes cannot obtain a new trial unless the instructional error had "a substantial and injurious effect" on the jury's verdict. We hold that it did.

Our cases appear to be divided as to whether the petitioner, the state, or neither bears the responsibility for showing harmless error under the Brecht harmless error standard.

In a recent case, we stated that "[t]he Supreme Court has made clear that whether a trial error had a substantial and injurious effect is not to be analyzed in terms of burdens of proof." In that case, we further stated that the reviewing court has "the responsibility to determine this legal question 'without benefit of such aids as
presumptions or allocated burdens of proof that expedite factfinding at the trial.’” However, O’Neal also stated that “it is the State that bears the ‘risk of doubt.’” Also, as we said only recently, we look to the State to instill in us a “fair assurance” that there was no effect on the verdict. . . .

Here we need not consider the issue of burdens of proof any further. Regardless of the applicable rule, we are convinced that the instructional error in this case, which prevented the jury from considering and giving effect to Belmontes’ most important mitigation evidence, had a substantial and injurious effect on the jury’s verdict. . . .

CONCLUSION

. . . [B]ecause the trial judge failed to instruct the jury that it was required to consider Belmontes’ principal mitigation evidence, and because we conclude that this failure had a substantial and injurious effect upon the verdict, we reverse with respect to the sentencing phase. We remand to the district court with instructions to issue an appropriate writ vacating Belmontes’ death sentence.

AFFIRMED in part, REVERSED in part, and REMANDED for issuance of the writ in accordance with this opinion.

O’SCANNLAIN, Circuit Judge, concurring in part and dissenting in part.

The court properly affirms Judge Levi’s determination that there was no constitutional error in Belmontes’s conviction for first-degree murder with special circumstances in state court. I am pleased to concur in its conclusions as to the guilt phase. Regrettably, as to the penalty phase, the majority strains mightily—and unpersuasively—to perceive constitutional error in the comprehensive and perfectly proper jury instructions given by the state trial judge. Because there simply is no such error, and the Supreme Court has expressly told us so on two separate occasions, I must respectfully dissent from the court’s reversal of the district court’s denial of the petition for the writ with respect to the penalty phase.

Over a decade ago, the Supreme Court in Boyde v. California, interpreted the same jury instruction at issue today, “factor (k),” and concluded that it was constitutionally sound. The Court held that there was no “reasonable likelihood that the jury applied [factor (k)] in a way that prevent[ed] the consideration of constitutionally relevant evidence.” Factor (k)’s constitutionality was recently reaffirmed in Brown v. Payton, where the Court again refused to invalidate a death sentence imposed pursuant to instructions that included factor (k). The Court reached that result even though the prosecutor had explicitly argued to the sentencing jury that factor (k) prohibited them from considering the defendant’s mitigating evidence.

The majority nonetheless manages to distinguish Boyde and Payton, and reaches the extraordinary conclusion that there was a reasonable likelihood that the jury refused to consider mitigating evidence that both the prosecution and the defense acknowledged was properly before it. Because the jurors were not constitutionally barred from making a death penalty determination in this case, I would affirm.
I

* * *

A

The majority's holding is based on the false premise that factor (k) limits the jury's consideration only to circumstances that might excuse the crime. But the Supreme Court has already explicitly rejected this proposition. In Boyde, the Court held that factor (k) did not "limit the jury's consideration to 'any other circumstances of the crime which extenuates the gravity of the crime.'" [It directed the jury] to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character." Boyde makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k).

Belmontes's penalty phase presentation was entirely composed of such evidence. The witnesses who testified on his behalf spoke to his religious convictions and his behavior while a ward of the California Youth Authority ("CYA")—all of which goes to his background and character before he murdered Steacy. While the majority attempts to paint such evidence as showing that he would be a model inmate if sentenced to life in prison, the testimony as actually presented deals exclusively with his character prior to the crime. In fact, not one witness who testified during the penalty phase testified to Belmontes's behavior after the murder.

Belmontes's religious conversion and ability to conform to prison are exactly the types of evidence that the Supreme Court held fit within the plain language of factor (k). Accordingly, under Boyde, the jury was able to consider and to give effect to all of Belmontes's mitigating evidence. Nothing more was constitutionally required.

Even so, the Supreme Court has held that inquiry into future dangerousness of a defendant "is not independent of an assessment of personal culpability." In Johnson, the Court held that an instruction that asked jurors to consider the future dangerousness of a defendant provided ample opportunity for the jury to consider the defendant's youth as mitigating evidence. Even though the statutory factor did not explicitly provide that the jury could consider the defendant's youth as a mitigating factor for culpability of the crime, the Court concluded that there was no reasonable likelihood that the jury would have thought it was foreclosed from considering it.

Likewise, because factor (k) allows the jury to consider Belmontes's character and background, there is no reason to think that the jury would have thought it was foreclosed from using such information to consider his future potential if sentenced to life in prison. As the Supreme Court has noted, "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing."

Thus, while the majority scours the cold record decades after the trial to find an ambiguity in the sentencing instruction, it is highly doubtful that the jury itself would have so found. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." I see no reason why the jury would have resisted the inevitable consideration of Belmontes's future potential.
in light of the character evidence presented.

B

The majority also ignores the Supreme Court's advice that "[d]ifferences in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at the trial likely to prevail over technical hairsplitting." That factor (k) permits the consideration of Belmontes's character evidence is amplified when the penalty phase is viewed as a whole, particularly in light of the arguments made by counsel.

In Payton, the prosecutor explicitly argued during the penalty phase that factor (k) did not permit the jury to consider evidence of the defendant's post-crime religious conversion. Notwithstanding the trial judge's failure to correct this misstatement of law, the Supreme Court concluded that habeas relief was not warranted because it was improbable that the sentencing jury would have disregarded the two days of mitigating evidence presented by the defense. In contrast, during the penalty phase of Belmontes's trial, both the prosecutor and the defense attorney urged the jury to consider the mitigating evidence, and the trial court likewise instructed the jury to consider all the evidence unless directed otherwise. The majority nevertheless concludes that the jury likely misunderstood its sentencing task after repeatedly receiving the same unambiguous directions from the prosecutor, the defense attorney, and the court.

The jury heard, without objection, evidence regarding Belmontes's behavior in prison before the murder: how he had found God and how he could serve as an example to other inmates. In its closing argument, the prosecution stated, "I suspect you will be told that the defendant's religious experience is within that catchall [factor (k)] that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime. I'm not really sure it fits in there. I'm not sure it really fits in any of them." Even so, the prosecutor noted, "But I think it [Belmontes's religious experience] appears to be a proper subject of consideration."

Later the prosecutor expounded on why the jury should consider Belmontes's evidence: I suppose you can say it would be appropriate [to consider such evidence] because—in this fashion: The defendant may be of value to the community later. You recall the people talking about how he would have the opportunity to work with other prisoners in prison. And I think that value to the community is something that you have to weigh in. There's something to that.

"[Factor] K" says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact-okay?-some factors at the time of the offense that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.

What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial.
Belmontes's pleas were similar. Belmontes asked for life in prison because in prison "there is an opportunity to achieve goals and try to better yourself." His counsel continued the argument, asking the jury to spare Belmontes's life because he would make a positive contribution if his life were spared: "[W]hat I am suggesting to you and what I hope the evidence suggests to you is Fernando Belmontes cannot make it on the outside. I think it is pretty clear from the development he undertook, the kind of experiences he had with the Haros as compared with his being placed out on his own." He added:

The people who came in here told you about him. They told you not only what they know of him, but they gave you, as best they could, under the very difficult circumstances of somebody looking at the rest of their life in prison, a game plan, something he can do with his life, something he's been able to do. We're just suggesting the tip of the iceberg because who knows in 20, 30, 40, 50 years what sorts of things he can do, as he fits into the system, as he learns to set his goals, to contribute something in whatever way he can.

At no time did the prosecutor object to the defense's characterization, nor did the trial judge indicate that the parties' statements of law were not correct or that the jury could not consider any of the evidence. Nevertheless, the majority concludes that the jury thought that the witnesses wasted their time by testifying, and that the prosecutor, Belmontes, and Belmontes's lawyer were not smart enough to realize they were all mistaken. In its world, the majority envisions a jury playing a game of "gotcha" with the lawyers, whereby the jury ignores everyone and applies its own instructions. Such a conclusion is pure fantasy and cannot justify overturning the jury's choice here.

II

Even assuming, arguendo, that there was a reasonable likelihood that the jury could have interpreted factor (k) to prohibit consideration of Belmontes's character witnesses, the instructions were still constitutionally sufficient. To arrive at its result, the majority downplays the trial court's initial instruction, in which the jury was told, "In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed." Such a jury instruction alone is constitutionally sufficient to convey to the jury its duty to consider all mitigating evidence.

The trial court's duty is simply to convey to the jury that all mitigating evidence must be considered and may be given effect when it deliberates on a defendant's capital sentence. The absence of any specific instruction to the jury to consider the defendant's ability to adjust to an institutional setting is utterly irrelevant.

Even if the jury were confused by the subsequent enumeration of individual factors-perhaps thinking that its consideration of mitigating evidence was limited to such factors-the confusion would have been short lived. After reading the enumerated factors, the court instructed, "[T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." The majority, however, fixates,
not on the clear language of such directive, but on the two sentences that directly follow: "You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case." According to the majority, these sentences somehow obfuscate the clarity of the court's instructions.

We must look at these instructions in their entirety, however.

* * *

The trial court's additional instruction reinforced the constitutional requirement of conveying to the jury that it is "not ... precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Instead of confusing the jury, the trial court's instructions made it clear that all evidence that was presented must be considered. Moreover, the instruction 8362 that the majority concludes was "critical" substantively adds nothing. Rather than speculating that the jury was too dim to understand what it was told by the court, we must presume that the jury understood the instructions taken as a whole.

III

According to the majority, however, it is the series of questions between individual jurors and the judge that proves the jury's confusion. After the jury deliberated for several hours, it sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The judge refused to tell the jury what would happen if they could not agree, but told them that it would discharge them if they could not reach an agreement. He then asked, "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?"

At this time, individual jurors asked the judge some questions.

JUROR HERN: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?
THE COURT: That was the listing, yes, ma'am.
JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?
THE COURT: That is right. It is a balancing process.
JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?
THE COURT: That is something you cannot consider in making your decision.

In the majority's view, Juror Hern's use of the term "listing," and the judge's failure to note that the "listing" was not exclusive as to mitigating circumstances, shows that individual jurors were confused by the instruction. I respectfully disagree. The jury did not submit a formal question to the judge to indicate that it was confused as to its duties or the instructions, and no informal follow-up questions were asked by any jurors. And while the answers the judge gave the juror might have been cryptic, they were not incorrect.

Most importantly, just before the judge answered these informal questions, he asked the jury "to go over the instructions again." Under existing Supreme Court authority, any confusion with regard to its
responsibilities would have been cleared up with another such review. And if, after reviewing the instructions once again, jurors were still confused about the evidence they could consider, they likely would have asked for a formal clarification. While it is possible that after reviewing the instructions again, confusion might have arisen, it was certainly not reasonably likely.

Incredulously, the majority also takes issue with Juror Hailstone's question regarding whether Belmontes could receive psychiatric treatment while in prison. The court properly instructed the jury that it could not consider such potentially mitigating evidence. And for good reason: no such evidence was ever introduced at any stage of the trial. Indeed, the jury was prohibited from such considerations.

There was absolutely nothing wrong with the trial judge's instruction that the jury could not consider evidence that was not presented; indeed, it would have been unconstitutional for him to have said otherwise. Yet, the majority ignores such niceties. If the jury were truly confused by the judge's answer, surely it would have asked a follow-up question of some sort. Nonetheless, without any basis in the record, the majority concludes that the judge's perfectly proper statement was likely to confuse.

IV

The majority concludes that the jurors listened to all the evidence regarding Belmontes's character, listened to the prosecution and the defense tell it to consider such evidence, and listened to the trial court tell it that it must consider all the evidence presented; yet the majority holds that the jury was confused about whether it could consider the evidence presented. Such conclusion, with all due respect, is simply beyond belief; such holding turns the entire proceeding "into a virtual charade."

The jury, in reality, returned a death sentence for Belmontes, not because of a confusing jury instruction, but because he murdered nineteen-year-old Steacy McConnell in cold blood, striking her 15-20 times in the head with an iron dumbbell he had brought with him to her house in case of such an encounter; I sincerely doubt the family and friends of Steacy would share the majority's callous view that her murder was not "especially heinous."

* * *

By concluding that the trial court's jury instructions were unconstitutional, the majority ignores the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." There is nothing in the record which would lead me to believe that there was a reasonable probability that the jury was confused about its sentencing duties; therefore I would affirm the denial of the petition for the writ as to the penalty phase. I must respectfully dissent from the majority's refusal to do so.

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"THE NATION; Voided Death Sentence to Be Reconsidered"

Los Angeles Times
May 2, 2006
David G. Savage

The Supreme Court agreed Monday to hear another appeal by California prosecutors who are challenging a decision by the U.S. 9th Circuit Court of Appeals that voided a death sentence in a 25-year-old murder case.

In 1981, Fernando Belmontes broke into a woman's home in the San Joaquin Valley. He clubbed her, broke her skull and stole her stereo. He described the crime to two accomplices, and then sold the stereo.

Belmontes was convicted of first-degree murder with special circumstances, making him eligible for a death sentence.

In the trial's penalty phase, prosecutors described Belmontes' previous crimes, which included severely beating his pregnant girlfriend a month before the murder. The defense argued that his early life had been troubled, and noted that he had responded well during a commitment in a California Youth Authority facility and had "wholesome relationships" with friends and family members.

After the testimony, the judge gave the jurors standard instructions telling them to consider as mitigating evidence the defendant's age, criminal history and any "other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." He did not give them an instruction the defense had requested: that "you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence."

The jury voted in favor of a death sentence for Belmontes.

The California state courts upheld his conviction and sentence, as did a federal judge. When the case reached the 9th Circuit, Judges Stephen Reinhardt and Richard A. Paez voted to reverse the death sentence.

"There is a reasonable probability," Reinhardt wrote, that the jurors were "not likely to be aware ... that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor." Had they been aware of this, they may have spared Belmontes, he said.

Judge Diarmuid F. O'Scannlain dissented from the three-judge panel's ruling. Seven other judges—short of the needed majority—called on the full 9th Circuit to reverse the ruling.

California Atty. Gen. Bill Lockyer appealed to the Supreme Court, saying "no reasonable juror" would have thought he or she was prohibited from voting to spare Belmontes' life.

Last year, when the state appealed for the first time, the Supreme Court told the 9th Circuit to reconsider the case under a recent ruling that had restored a death sentence in
an Orange County case. But the 9th Circuit simply reaffirmed its ruling.

Lockyer appealed again on behalf of San Quentin State Prison Warden Steven Ornoski. This time, the Supreme Court said it would rule in the case of Ornoski vs. Belmontes.
For the second time, a federal appeals court in San Francisco has overturned the death sentence of a man who has spent more than two decades on death row for beating a woman to death with an iron bar.

In recent years, the U.S. 9th Circuit Court of Appeals has toppled more than a dozen California death sentences, on some occasions drawing rebukes from the Supreme Court.

On Friday, the 9th Circuit overturned the death penalty for Fernando Belmontes, 44.

He was 19 when he and two other young men went to the home of Steacy McConnell in Victor, Calif., just east of Lodi, to steal her stereo in the aftermath of an argument over drugs, according to trial testimony. McConnell's parents later found their daughter lying in a pool of blood.

In mitigation, the defense presented evidence that Belmontes had a family history of poverty and violence.

The 9th Circuit first blocked Belmontes' execution in 2003, ruling that the trial judge had failed to instruct the jury to consider all mitigating evidence before deciding on execution.

On March 28, the Supreme Court vacated the decision and directed the court to reconsider its ruling in light of a decision a week earlier. That case concerned Orange County murderer William Payton, who raped and stabbed to death a Garden Grove woman in 1980. Payton had argued that his trial judge failed to instruct the jury to consider his behind-bars conversion to Christianity.

In Payton's case, the high court noted that Congress in 1996 changed the law to say that federal judges should defer to state courts' reasonable judgments in death penalty cases.

The 9th Circuit, however, ruled Friday that Belmontes' case was different because he filed his challenge before the 1996 law was enacted. Consequently, the state court rulings were due less deference, the court said, and it was appropriate to overturn the death penalty because of the judge's failure to issue the mitigation instruction.

The ruling was written by Judge Stephen Reinhardt, an appointee of President Carter who is one of the court's most consistent skeptics about the validity of death sentences. Judge Richard A. Paez, a Clinton appointee, joined Reinhardt's opinion. Judge Diarmuid F. O'Scannlain, a Reagan appointee who consistently votes to uphold death sentences, issued a strong dissent, just as he did two years ago.

"The majority strains mightily—and unpersuasively—to perceive constitutional error in the comprehensive and perfectly
proper jury instructions given by the state trial judge," O'Scannlain wrote. "Because there simply is no such error, and the Supreme Court has expressly told us so on two separate occasions, I must respectfully dissent."

Mill Valley attorney Eric Multhaup, who has represented Belmontes in appeals for 23 years, called the ruling "really good news."

The California attorney general's office had no immediate comment. The office almost always asks the Supreme Court to review a case when the 9th Circuit overturns a death sentence.
A federal appeals court Tuesday overturned the death sentence of a man who has spent 21 years on death row for beating a woman to death with an iron bar, ruling that the judge at his trial violated his constitutional rights by not fully instructing the jury to consider all possible mitigating evidence before passing sentence.

The ruling was the 12th by the U.S. 9th Circuit Court of Appeals in the last year and a half that either reversed a death sentence or upheld the decision of a federal trial judge who had overturned a death sentence in a California case. Two of those rulings have been overturned by the U.S. Supreme Court. The 9th Circuit has upheld four California death sentences in the same period.

Tuesday's 2-1 decision was written by Judge Stephen Reinhardt, a Jimmy Carter appointee who is one of the court's most consistent skeptics about the validity of death sentences. He was joined by Judge Richard A. Paez, a Clinton appointee. Judge Diarmuid O'Scannlain, a Ronald Reagan appointee who consistently votes to uphold death sentences, issued a strong dissent.

The 42-year-old defendant, Fernando Belmontes Jr., was 19 when he and two other young men went to the home of Steacy McConnell in Victor, just east of Lodi in 1981, intending to steal her stereo in the aftermath of an argument over drugs, according to testimony in his trial.

One of Belmontes' accomplices, who said he was the lookout at the robbery and made a plea bargain with prosecutors, testified that Belmontes entered the home, not expecting to find McConnell. He emerged shortly afterward spattered with blood and saying that he had needed to "take out a witness."

McConnell's parents found their daughter lying in a pool of blood. An autopsy determined that her skull had been shattered by 15 to 20 blows.

After finding Belmontes guilty, jurors heard extensive testimony about Belmontes' background before deliberating six hours and voting in favor of a death sentence.

Belmontes' conviction and his death sentence were upheld by the California Supreme Court and a federal district court judge.

The 9th Circuit upheld the conviction but toppled the death sentence in a lengthy opinion.

The key issue for the court involved the instructions that the judge at Belmontes' trial gave to jurors about how to weigh the evidence on whether they should spare his life.

That evidence included testimony that Belmontes had a record of violence, which included slugging his wife when she was four months pregnant, pleading guilty to being an accessory after the fact to voluntary manslaughter and taking a gun from another man who had offered to sell it to him.
The jurors also heard that Belmontes, who dropped out of school in the ninth grade, had a family history of poverty and violence.

His trial lawyer, who asked the jury to sentence Belmontes to life in prison without parole, rather than death, also presented what the appeals court called substantial evidence that Belmontes could lead a constructive life if he was kept behind bars.

During four months in custody at a California Youth Authority facility the year before the murder, Belmontes worked his way up to a position of leadership in the camp's fire crew. A youth authority chaplain testified that he should not be executed because he was a salvageable person with "a lot of extenuating circumstances in his life."

Several witnesses testified that Belmontes became a Christian while incarcerated by the CYA then failed to maintain his religious commitment after being released.

Belmontes told the jury that he did not think his difficult childhood excused his role in McConnell's murder.

He told jurors that he could not withstand the pressures of life outside prison but asked them to give him "an opportunity to achieve goals and try to better" himself.

When the testimony was over, the trial judge gave the jurors a set of standard instructions telling them to consider as mitigating evidence the defendant's age, criminal history and any "other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

But the judge declined to give the jury what the appeals court declared to be the most important part of another instruction requested by the defense.

That instruction would have told the jurors that "you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence."

The importance of that catchall instruction, which is listed in California's death penalty law, cannot be overstated, Reinhardt wrote.

A reasonable probability exists that the judge's refusal to give the instruction affected the jury's decision, Reinhardt held.

"To pass constitutional muster, the trial judge's instructions must convey to the jury that they are free "to consider all relevant mitigating evidence," he wrote.

In his dissent, O'Scannlain said, "the majority strains mightily—and unpersuasively—to perceive constitutional error in the comprehensive and perfectly proper jury instructions given by the state trial judge."

"There is no reason to think that the jury would have thought it was foreclosed from using" the testimony that it heard, O'Scannlain wrote.

Belmontes' history of "violent, antisocial behavior, not an ambiguous jury instruction," put him on death row, O'Scannlain concluded.

The California attorney general's office had no immediate comment.
Eric Multhaup, an attorney from Mill Valley who has represented Belmontes for 21 years on appeal, said: "I am very happy that he will get a second chance at a life verdict."
WASHINGTON The Supreme Court ruled yesterday that a jury that sentenced a convicted killer to death had properly taken into account his religious conversion, even though a prosecutor incorrectly argued that it was irrelevant.

In a 5-3 ruling, justices reversed a lower court that had ordered a new trial for William Payton. While a California prosecutor was wrong to assert that Payton's conversion was irrelevant, the errors did not make a difference in sentencing, because jurors had heard from other witnesses attesting to Payton's conversion, the justices ruled in Brown v. Payton.

"Testimony about a religious conversion spanning one year and nine months may well have been considered altogether insignificant in light of the brutality of the crimes, the prior offenses, and a proclivity for committing violent acts against women," Justice Anthony M. Kennedy wrote for the majority.

He also noted that justices may overturn a death sentence only if it was unreasonable given all the evidence presented.

"In context, it was not unreasonable for the state court to conclude that the jury believed Payton's evidence was neither credible nor sufficient to outweigh the aggravating factors, not that it was not evidence at all," Kennedy wrote.

In a dissent, Justice David H. Souter argued that Payton deserved a new trial because of the prosecutor's misstatements.

"The trial judge utterly failed to correct these repeated misstatements or in any other way to honor his duty to give the jury an accurate definition of legitimate mitigation," Souter wrote. He was joined by Justices John Paul Stevens and Ruth Bader Ginsburg.

Payton's is one of the longest-running death-penalty cases. He was convicted and sentenced in the 1980 rape and stabbing death of Pamela Montgomery of Garden Grove, Calif.

California has more than 600 inmates on death row, though the state has executed only 10 people since 1992 because of legal challenges and concerns about the system's fairness.

Payton's lawyers have said that about 70 cases involve death-row inmates who contend that mitigating factors after a crime—such as a religious conversion—were not properly considered because of inadequate jury instructions.
Whorton v. Bockting

(05-595)

Ruling Below: (Bockting v. Bayer, 399 F.3d 1010 (9th Cir., 2005), cert granted 126 S. Ct. 2017; 74 U.S.L.W. 3639 [2006]).

Marvin Bockting was convicted for sexual abuse of his six-year old stepdaughter with evidence from an interview the child had with a detective. Bockting claims that the admission of this evidence without cross-examination violated his Sixth Amendment right "to be confronted with the witnesses against him." His claim turns on whether or not the strict standard for admitting such testimony laid down in Crawford v. Washington in a new rule and if it applies retroactively to this case. The Second and Tenth Circuits have held that Crawford should not be applied retroactively. In this panel ruling, all three Circuit Judges wrote separately.

Question Presented: I. Whether, in direct conflict with the published opinions of the Second, Sixth, Seventh, and Tenth circuits, the Ninth Circuit erred in holding that this court's decision in Crawford v. Washington, 541 U.S. 36 (2004) regarding the admissibility of testimonial hearsay evidence under the sixth amendment, applies retroactively to cases on collateral review.
II. Whether the Ninth Circuit's ruling that Crawford applies retroactively to cases on collateral review violates this court's ruling in Teague v. Lane, 489 U.S. 288 (1989).
III. Whether, in direct conflict with the published decisions of the Fourth and Seventh Circuits, the Ninth circuit erred in holding that 28 U.S.C. § 2254 (d) (1) and (2) adopted the Teague exceptions for private conduct which is beyond criminal proscription and watershed rules.

Glen WHORTON, Director, Nevada Department of Corrections, Petitioner
v.
Marvin Howard BOCKTING, Respondent

United States Court of Appeals
for the Ninth Circuit

Decided February 22, 2005

[Excerpt: some footnotes and citations omitted]
McKEOWN, Circuit Judge:

Although this case has been before the Nevada Supreme Court twice and before the United States Supreme Court on one occasion, resolution now rests on interpretation of an intervening Supreme Court case: Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In Crawford, the Court definitively held that "testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." 124 S. Ct. at 1369. Because the little girl's testimony, which was not subject to cross-examination, was central to the
conviction, its admission can hardly be classified as harmless error. Crawford dictates reversal.

The thorny issue is whether Crawford applies retroactively to this state habeas appeal. If, as Judge Noonan argues, Crawford simply reiterates a longstanding rule and does not announce a new rule, then retroactivity falls out of our analysis. If, on the other hand, Crawford is characterized as a "new rule," then we are faced with analyzing the retroactivity of Crawford in the framework of yet another recent Supreme Court case, Schriro v. Summerlin, 159 L. Ed. 2d 442, 542 U.S. 348, 124 S. Ct. 2519 (2004). New rules apply retroactively only where "they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or where the new rule is "implicit in the concept of ordered liberty." Teague v. Lane, 489 U.S. 288, 307, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989). The latter category is "reserved for watershed rules of criminal procedure." Id. at 311.

. . . [A]pplication of the Supreme Court's guidance in Teague leads to the conclusion that Crawford announces a "new rule." Because the Crawford rule is both a "watershed rule" and one "without which the likelihood of an accurate conviction is seriously diminished," Summerlin, 124 S. Ct. at 2523, the rule is retroactive.

I. FACTUAL BACKGROUND

[The Court recounts the background: Bockting's step-daughter Autumn's telling her mother that she was sexually abused by Bockting, her interview with a detective, and her inability to testify in the trial, at which the judge declared her an unavailable witness.]

II. DISCUSSION

In explaining Teague's application, the Supreme Court recently explained that there are three steps to determining whether a rule of criminal procedure applies on collateral review:

First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by precedent then existing, compels the rule. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 159 L. Ed. 2d 494, 124 S. Ct. 2504, 2510 (2004). Because Bockting's conviction became final in 1993, we must evaluate whether any subsequent rule of constitutional law is new against the benchmark of that year.

A. Crawford ANNOUNCED A NEW RULE

The question before us is whether the Confrontation Clause principles stated in Crawford amount to a new rule. In Crawford, the Supreme Court considered whether Washington State's use at trial of a witness's tape-recorded statement to a police officer violated the Confrontation Clause. 124 S. Ct. at 1357. Writing for the Court, Justice Scalia engaged in a lengthy historical
analysis of the Confrontation Clause, noting that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Id. at 1363.

He went on to emphasize "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. at 1365.

Whether the rule in Crawford is new depends on whether it "was dictated by the then-existing precedent." Beard, 124 S. Ct. at 2511. . . . Careful scrutiny of the Crawford opinion suggests otherwise for at least two reasons: (1) Crawford deviates from the test announced in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980); and (2) simply reaching the right "result" does not mean that the result flowed from a constant rule.

As the Court observed, "Roberts conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears particularized guarantees of trustworthiness." Crawford, 124 S. Ct. at 1369 (quoting Roberts, 448 U.S. at 66). Roberts rests on evidentiary principles of reliability and trustworthiness rather than on the constitutional principle of confrontation.

***

Finally, the Court in Crawford pinpointed a situation that was, in fact, "arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial." Id. at 1368 n.8. Citing White v. Illinois, 502 U.S. 346, 112 S. Ct. 736 (1992), the Court described a case remarkably similar to ours, in which "statements of a child victim to an investigating police officer [were] admitted as spontaneous declarations." Id. White rested on the issue of the unavailability requirement under the Confrontation Clause; had Crawford been the rule at the time, the lack of cross-examination would have been fatal to the admission of the evidence.

On balance, an analysis of the historical application of the Confrontation Clause cases leads to the conclusion that Crawford announces a new rule that must be put through the Summerlin strainer.

B. SUMMERLIN CONTROLS THE RETROACTIVITY ANALYSIS

Because Crawford announces a new rule, we must ask whether it falls into one of the two Teague exceptions to the bar on retroactivity. The first Teague exception is for primary conduct that cannot be criminalized. The second is for bedrock rules of criminal procedure. Teague, 489 U.S. at 307. It is the second exception that is at play in this case.

The Crawford rule does not narrow the scope of a criminal statute by interpreting its terms, nor is it a constitutional determination that places particular conduct or persons covered by the statute beyond the State's power to punish. . . . Therefore, Crawford merits retroactive application only if it implicates "the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 495, 110 S. Ct. 1257 (1990), and reworks our understanding of bed-rock criminal procedure, Sawyer v. Smith, 497 U.S. 227, 242, 110 S. Ct. 2822 (1990).
That the *Crawford* requirement is fundamental to our legal regime is beyond dispute. Justice Scalia's eloquent recitation of the history, purpose, and place of the Confrontation Clause and cross-examination answers this question. *Crawford*, 124 S. Ct. at 1359. Hundreds of years of tradition have embedded this notion as a fundamental role. Indeed, "the Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." Id. at 1373.

The question next posed is whether the rule implicates the accuracy of the criminal proceeding. . . .

. . . [T]he evidence that cross-examination seriously decreases the possibility of inaccurate conviction is unequivocal.

The Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy. See, e.g., *Crawford*, 124 S. Ct. at 1370 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth.") (quoting 3 Blackstone, *Commentaries* *373*). . . .

But accuracy and reliability do not exist in a vacuum. Rather, "the central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. "The word 'confront,' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157 (1990). . . .

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Rules that are properly considered retroactive are those that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242, (1990) (internal quotations omitted). . . . Recognizing that bedrock procedural rules are very few in number, it is no leap to conclude that the right of cross-examination as an adjunct to the constitutional right of confrontation joins the very limited company of Gideon.

We join one other circuit that has concluded
that Crawford announces a new rule, although its retroactivity analysis differs from ours. See Brown v. Uphoff, 381 F.3d 1219 (10th Cir. 2004). The Second Circuit did not directly address the new rule issue but concluded that even if Crawford did announce a new rule, it would not be retroactive. Mungo v. Duncan, 393 F.3d 327, 336 (2d Cir. 2004).

[The Court described the Tenth Circuit's reasoning in holding that Crawford was a new rule but not retroactive.]

* * *

The Supreme Court's Confrontation Clause jurisprudence in Crawford cannot be dismissed as a mere tweak on the admissibility of hearsay. See Brown, 281 F.3d at 1226. The Supreme Court surely did not conceive of it as such. Rather, the Court describes the right of confrontation as a "bedrock procedural guarantee," notes that it "dates back to Roman times" and was part of the common law known to the founding generation. Crawford, 124 S. Ct. at 1359. The Court also contrasts "exclusion under the hearsay rules" with "the civil-law abuses the Confrontation Clause targeted." Crawford, 124 S. Ct. at 1364. In a rare mea culpa, the Court faults itself for not enunciating the Crawford rule earlier, stating that "it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." Id. at 1373. There is nothing "mere" about the Crawford rule.

The Tenth Circuit mistakenly concluded that rules of constitutional law subject to harmless error review can never be considered bedrock rules of procedure. The two inquiries hinge on different questions. Whether a rule is a bedrock rule of procedure depends on whether it increases the likelihood of accurate conviction. Summerlin, 124 S. Ct. at 2523. Whether a rule is subject to harmless error analysis depends on whether the impact of the error can be measured. See Arizona v. Fulminante, 499 U.S. 279, 307-08, 111 S. Ct. 1246 (1991). Therefore, a rule of constitutional law could be essential to promote accurate convictions, but still subject to harmless error review if the impact of misapplication of the rule were easily measurable. In short, because accuracy and measurability are different concepts, whether a rule of constitutional law is subject to harmless error review does not answer the question whether it is a bedrock rule of procedure.

After assuming that Crawford announced a new rule, the Second Circuit rejected retroactivity, reasoning that the Crawford rule would not improve overall accuracy because "it is likely to improve accuracy in some circumstances and diminish it in others." Mungo, 393 F.3d at 335. The flaw in this analysis is that the Second Circuit has substituted its judgment of whether the Crawford rule is one without which the accuracy of conviction is seriously diminished, for the Supreme Court's considered judgment. The Court has found repeatedly that the purpose of the Confrontation Clause is to promote accuracy, see, e.g., Tennessee v. Street, 471 U.S. 409, 415, 105 S. Ct. 2078 (1985), and thus Crawford rejected the Roberts framework as reflective of "a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion," Crawford, 124 S. Ct. at 1373. Viewing these holdings together leads to the conclusion that the Crawford rule is one without which the likelihood of accurate conviction is
seriously diminished.

C. BOCKTING MERITS RELIEF UNDER AEDPA

Having determined that Crawford is retroactive, the remaining task is to determine whether, under AEDPA, the Nevada Supreme Court's analysis was either "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1)-(2). [The Court explains why the Nevada Court's analysis misapplied the established federal law.]

The final question is whether admission of Autumn's statement is harmless beyond a reasonable doubt. See Neder v. United States, 527 U.S. 1, 15, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999). The detective's testimony regarding Autumn's interview was a critical piece of evidence, particularly in view of Autumn's inconsistent testimony at the preliminary hearing. Even if her statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant that the error could have materially affected the verdict. Thus, admitting Autumn's statement was not harmless beyond reasonable doubt.

III. CONCLUSION

Because a majority concludes that Crawford must be applied in this pending habeas case, Bockting's petition for a writ of habeas corpus is GRANTED.

NOONAN, Circuit Judge, concurring (In Part):

... Bockting is entitled to a writ of habeas corpus. The misunderstanding of the law governing the case is comprehensible in the light of the history set out in Crawford; nontestimonial hearsay is not subject to an absolute bar. "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 1374.

No opportunity for cross-examination by Bockting ever existed. He was, of course, not present when Autumn spoke to her mother or when she spoke to Detective Zinovitch. Totally untested by the method constitutionally required, the two testimonial tales, retold by Laura and the detective, confronted Bockting at his trial. The Confrontation Clause demanded that he be confronted with the witness against him. U.S. Const. amend. VI.

It is a work of supererogation to praise the wisdom of the Founders and to celebrate the enforcement of a "bedrock procedural guarantee." Crawford, 124 S. Ct. at 1359. Nonetheless, the circumstances of this case demonstrate how wise it is to exclude testimony untested by cross-examination.

***

It is argued that to apply Crawford is to apply it retroactively. To the contrary, the Supreme Court, after reviewing its own decisions, declared:

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.
Crawford, 124 S. Ct. at 1369. Crawford, therefore, does not announce a new rule. Retroactivity is not an issue.

***

Because the action of the Nevada Supreme Court resulted in a decision that was contrary to established federal law as determined by the Supreme Court of the United States, 28 U.S.C. § 2254(d)(1), the writ of habeas corpus should issue to free Bockting from his unconstitutional confinement.

WALLACE, Senior Circuit Judge, concurring and dissenting:

Both Judges McKeown and Noonan conclude that the Supreme Court's recent landmark decision, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), governs our consideration of Bockting's Confrontation Clause claim, although for different reasons. While Judge Noonan would hold that retroactivity is "not an issue" because Crawford did not establish a "new rule" within the meaning of Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), Ante at 2015, I concur with that part of Judge McKeown's opinion holding that Crawford established a new rule that does not apply retroactively to state convictions on habeas review unless it satisfies one of two narrow exceptions. However, I do not agree that Crawford fits within either of those exceptions. Guided by the principles outlined in Schriro v. Summerlin, 159 L. Ed. 2d 442, 542 U.S. 348, 124 S. Ct. 2519 (2004), I would hold that Crawford's new procedural rule does not qualify for retroactive application and would analyze Bockting's Confrontation Clause claim under pre-Crawford jurisprudence. In doing so, I would reject that claim, as well as Bockting's remaining claims, under the deferential standards of review embodied in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and affirm the district court's denial of Bockting's habeas petition.

A.

Several weeks after this case was argued before us and submitted for decision, the Supreme Court issued Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, (2004). Parting ways with the constitutional test formulated in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980), Crawford held that in criminal proceedings, "testimonial statements of witnesses absent from trial [are admissible] only where the defendant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford, 124 S. Ct. at 1369.

Bockting argues that Crawford does not raise retroactivity concerns at all because it does not qualify as a "new rule" under Teague. Although the Supreme Court took great pains to harmonize Crawford's result with previous Sixth Amendment decisions, I agree with Judge McKeown that Crawford's ratio decidendi effected a clear and decisive break from prior precedent. Before Crawford, controlling precedent permitted courts to admit hearsay evidence against a criminal defendant whenever the declarant was "unavailable" and the evidence had "adequate 'indicia of reliability,'" i.e., fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66. Crawford, however, emphatically rejected Roberts's approach to testimonial evidence, arguing that its test demonstrated an "unpardonable . . . capacity to admit core testimonial statements that the Confrontation
Clause plainly meant to exclude." 124 S. Ct. at 1371. . . . Responding to these concerns, the Court limited Roberts's reach to cases "where nontestimonial hearsay is at issue." Id. at 1374. In cases involving "testimonial evidence," the Court replaced Roberts with a new test that has two requirements: "unavailability and a prior opportunity for cross-examination." Id. Thus, since Crawford overruled Roberts's test for the admission of testimonial evidence, the decision also represents a "new rule" for retroactivity purposes.

Crawford's "new" constitutional rule would only apply retroactively to final convictions on collateral review if it falls within certain categories of rules. The Supreme Court recently clarified the nature and scope of these categories in Summerlin:

New substantive rules generally apply retroactively. . . . New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding.


Measured against Summerlin's standards, Crawford is best classified as a procedural rule. Crawford's characterization as a procedural rule is further supported by the Crawford decision itself. By labeling the Confrontation Clause as "a procedural rather than a substantive guarantee . . . " the Court endeavored to reinstitute "the constitutionally prescribed method of assessing reliability." Crawford, 124 S. Ct. at 1370. While, the line between "substance" and "procedure" may not always be crystal-clear, there can be no serious dispute that Crawford's restriction on testimonial evidence is a "procedural" rule.

Bockting contends that Crawford merits retroactive application here because it is a "'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle, 494 U.S. at 495, citing Teague, 489 U.S. at 311. This argument—which Judge McKeown finds persuasive—admittedly has some intuitive appeal; as Bockting observes, the Supreme Court has described "the Sixth Amendment's right of an accused to confront the witnesses against him" as "fundamental," Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065 (1965), and Crawford purports to effectuate the Confrontation Clause's original design and thereby enhance the fairness and accuracy of defendants' criminal proceedings. Crawford, 124 S. Ct. at 1373. However, the fact that Crawford is "'fundamental' in some abstract sense is not enough" to entitle Bockting to habeas relief. Summerlin, 124 S. Ct. at 2523. Under Teague and its progeny, Crawford does not constitute a "watershed rule" suitable for retroactive application unless the Roberts test "so 'seriously diminish[e]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach." Id. at 2525, quoting Teague, 489 U.S. at 312-13.

* * *

Although Summerlin does not directly
control the outcome of this case, the close similarities between the two cases are compelling. As in *Summerlin*, there is no clear consensus over the comparative effects Roberts and *Crawford* might have on the accuracy of jury verdicts, see *Crawford*, 124 S. Ct. at 1377-78 (Rehnquist, C.J., concurring), much less any evidence that Roberts "so 'seriously diminishes' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach," *Summerlin*, 124 S. Ct. at 2525, quoting *Teague*, 489 U.S. at 312-13. Nor am I prepared to assert that all testimonial hearsay evidence admitted without the opportunity for cross-examination necessarily renders a criminal trial "impermissibly inaccurate," id. at 2526, or otherwise "unfair," id. at 2525, quoting *DeStefano*, 392 U.S. at 634. . . . There is simply no solid evidence that Roberts has so seriously undermined the accuracy of criminal proceedings as to discredit the host of final convictions generated pursuant to its authority.

* * *

Yet another flaw in Judge McKeown's analysis is her focus on language in *Crawford* suggesting that the new rule announced in that case is truer to the Framers' design. . . . That the Framers made a particular judgment about the best way to ensure the reliability of testimony does not mean that any rule other than the one they envisioned creates an impermissibly high risk of inaccurate conviction.

The focus of Justice Scalia's analysis in *Crawford* was on Roberts' fidelity to the Framers' intentions, rather than the accuracy of convictions obtained under the Roberts regime. . . . But, even if one assumes that the Framers were correct as an empirical matter that cross-examination is the best way to ensure the reliability of testimony, that does not mean that any other method impermissibly threatens punishing the innocent.

[Wallace summarizes the circuit split on this issue and sides with the Tenth Circuit's reasoning in *Brown v Uphoff*, 381 F.3d 1219 against McKeown.]

For the foregoing reasons, I conclude that *Crawford* does not qualify as a "watershed rule[] of criminal procedure" appropriate for retroactive application to convictions already final on direct review. *Teague*, 489 U.S. at 311. Like the Second Circuit in *Mungo*, see 393 F.3d at 334-35, and unlike Judge McKeown, see ante at 2010-11, I therefore would not reach the question whether AEDPA "nullifies" the Teague exceptions, such that no "new rule"—even one fitting within one of those exceptions—may serve as the basis for habeas relief.

Nonetheless, to determine whether I can concur in the result, I must evaluate Bockting's Confrontation Clause claim according to the standards articulated in Roberts and our own pre-*Crawford* decisions.

B. [Wallace recounts the trial judge's decision to consider Autumn unavailable as a witness and determination to admit the hearsay statements from her mother and a detective.]

* * *

Roberts outlines two preconditions for the introduction of out-of-court statements against a criminal defendant. First, the government must establish the declarant's "unavailability" to testify as a witness at
trial. Bains v. Cambra, 204 F.3d 964, 973 (9th Cir. 2000), citing Roberts, 448 U.S. at 65-66. Second, the government must demonstrate that the hearsay statements bear "adequate indicia of reliability" by showing that they either fall "within a firmly rooted hearsay exception" or contain "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 65-66.

In Bockting's state proceedings, the Nevada Supreme Court determined that the government satisfied these two requirements, see Bockting v. State, 109 Nev. 103, 847 P.2d 1364, 1366-70 (Nev. 1993) (per curiam), and Bockting challenges these determinations on federal habeas review.

* * *

A more difficult question is whether the Nevada Supreme Court's substantive unavailability determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). . . . As a general matter, however, the Court held in Roberts that "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain [her] presence at trial." Roberts, 448 U.S. at 75, quoting Barber v. Page, 390 U.S. 719, 724-25, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968).

Seizing on Roberts's good faith requirement, Bockting makes a plausible argument that child witnesses who refuse to testify in a courtroom setting should not be considered "unavailable" unless the government first makes a good-faith attempt to secure their testimony through closed circuit television or some other medium amenable to cross-examination. I need not consider the merits of Bockting's proposal, however, because my task here is not to decide what might be best; instead, my review is limited to whether the Nevada Supreme Court's application of Roberts was unreasonable. See 28 U.S.C. § 2254(d). On its face, Roberts requires no more than "a good-faith effort to obtain [a witness's] presence at trial," Roberts, 448 U.S. at 75 (emphasis removed), quoting Barber, 390 U.S. at 724-25, and the government arguably satisfied this requirement here by (1) securing Autumn's physical "presence" at trial and (2) making "a good-faith effort" to elicit her testimony in that forum.

. . . I would hold, therefore, that the Nevada Supreme Court's failure to insist upon alternative procedures for procuring Autumn's contemporaneous testimony did not involve an unreasonable application of Roberts, Craig, or Coy.

* * *

The record does not support Bockting's claim that the Nevada Supreme Court's reliance on the trial court's unavailability finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2) . At Bockting's preliminary hearing, Autumn initially responded to the prosecution's inquiries with incomplete or evasive answers, then quickly broke into tears and refused to answer any further questions. Efforts to elicit her testimony at trial were even less fruitful, as she refused so much as to stand or to raise her hand to be sworn in as a witness. The trial transcript does not paint a detailed portrait of Autumn's demeanor on the latter occasion, but there are strong hints that Autumn was distraught and uncommunicative from the start, leading the state trial court to conclude that there
was no use pursuing further questioning before the jury. I therefore am not "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude" that Autumn was emotionally incapable of testifying at trial. Taylor, 366 F.3d at 1000. To the contrary, deference to state courts is particularly appropriate in a case such as this, where findings of fact turn on a trial court's eye-witness evaluation of a child witness's demeanor.

In sum, Bockting has not established that the Nevada Supreme Court's unavailability determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," id. § 2254(d)(2).

***

Bockting argues that the Nevada Supreme Court evaluated the trustworthiness of Autumn's statements based on an unreasonable application of Supreme Court precedent, because it mistakenly interpreted Wright to prohibit consideration of any evidence that did not support trustworthiness.

I need not decide, however, if a categorical refusal to consider evidence challenging the trustworthiness of Autumn's out-of-court statements would constitute an objectively unreasonable application of Wright, for the record does not support Bockting's assertion that the Nevada Supreme Court "explicitly refused to consider evidence" establishing the unreliability of Autumn's accusations in this case. Given the Nevada Supreme Court's assertion that it considered all the "record evidence" in assessing Bockting's claims, it would appear that its "totality of the circumstances" analysis did, in fact, embrace the Bocktings' marital problems and other relevant circumstances surrounding Autumn's out-of-court statements. I would thus reject Bockting's contention that the Nevada Supreme Court unreasonably applied Wright's restrictions on corroborating evidence.

The ultimate determination "whether [Autumn's] hearsay statements were sufficiently reliable to be admitted without violating [Roberts] is a mixed question" of law and fact, Swan, 6 F.3d at 1379, so I review the Nevada Supreme Court's reliability determination to ascertain whether it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see also Davis v. Woodford, 333 F.3d 982, 990 (9th Cir. 2003). [Wallace recounts Bockting's claims which undermine Autumn's testimony and questions their validity.]

***

Although the Nevada Supreme Court did not expressly discuss Autumn's statements at the preliminary hearing when evaluating the consistency of her out-of-court statements, it did not ignore these statements altogether. The court clearly recognized the inconsistencies in Autumn's statements, because the "Facts" section summarized Autumn's relevant testimony at the preliminary hearing. See Bockting, 847 P.2d at 1365 ("At the preliminary hearing, . . . [Autumn] stated that her pants were never removed [during the alleged abuse] and that she could not remember how Bockting
touched her.""). Thus, this testimony was an "aspect of the record evidence" that the state supreme court incorporated into its evaluation of the "totality of the circumstances surrounding the child's out-of-court statements, as defined in Wright." Id. at 1369-70. As such, I would reject Bockting's assertion that the state supreme court "failed to consider and weigh relevant evidence that was properly presented." Taylor, 366 F.3d at 1001.

... Considering the totality of the circumstances surrounding Autumn's hearsay statements, see id. at 820, I am not persuaded that the Nevada Supreme Court applied Roberts and Wright unreasonably by holding that Autumn's testimony at the preliminary hearing does not singlehandedly tip the scale of reliability against the admission of her out-of-court statements.

Since the Nevada Supreme Court's "unavailability" and "adequate indicia of reliability" determinations satisfy AEDPA's stringent standard of review, Bockting's Confrontation Clause claim fails.

II.

[Wallace discusses several other claims that Bockting raised in support of his habeas petition that were not discussed by the other Judges and explains why they are not compelling.]

***

For the foregoing reasons, I would affirm the district court's denial of Bockting's petition for habeas corpus. I therefore respectfully dissent.
The U.S. Supreme Court has agreed to hear a Nevada case that has the potential to force new trials for countless criminal cases—from burglaries to murders—in which hearsay testimony was used.

The high court has agreed to hear the appeal of Marvin Bockting, a Las Vegas man convicted of sexually assaulting a child in 1988. His appeal relies on a 2004 high court decision that blocked the use of taped testimony or other such statements in a Washington case.

At issue is whether that Washington case should apply retroactively. In the Michael Crawford v. Washington case, the court said a person has a constitutional right to question an accuser. If that's not possible, the statements can't be used in court.

Prosecutors say that if Bockting is successful in his appeal, the high court's ruling could have "a devastating effect."

"Since the defendant (Bockting) received a fair trial under the law as it existed at the time of his trial, the 2004 ruling should not apply retroactively," said Chief Deputy District Attorney Dave Clifton of Washoe County.

"To reverse those cases that were fair at the time would be unjust," he said. "It would be like punishing the state for something it didn't do wrong."

But defense lawyers say limiting the use of hearsay was a wise move, and all cases should benefit from that wisdom.

"The Crawford decision represents one of the most significant constitutional decisions of the last decade," said Washoe County Public Defender Jeremy Bosler. "It corrected what had been a gradual erosion of the basic constitutional right that a person must be allowed to confront his or her accuser.

"The ruling brought a return to basic constitutional principles regarding the right to a fair trial."

In the 2004 case, Crawford was accused of stabbing a man he said was trying to rape his wife. During the trial, prosecutors played a tape of his wife, in which she made statements that contradicted Crawford's story. Crawford argued because he could not cross-examine her about the prerecorded statement and because spouses can't be forced to testify against each other, the use of the statement violated Crawford's Sixth Amendment right to confront witnesses against him.

The Supreme Court agreed, and ruled that such hearsay testimony can't be used.

In the Nevada case that the Supreme Court will hear, Bockting was convicted in 1988 of four counts of sexual assault of a minor. At his trial, prosecutors tried to call the 6-year-old victim, but she was unable to testify, so they used statements from the girl's mother and statements the girl made to police.
Bockting was convicted but has appealed, arguing that based on the Crawford ruling he should get a new trial.

Clifton said he disagreed with the old ruling, and hopes it doesn't have further reach.

"The Crawford decision essentially wiped out 20 years of litigation and case law dealing with the admissibility of trustworthy out-of-court statements made to police and others," Clifton said. "As prosecutors, we have been diligently following these laws over the years by presenting certain trustworthy statements of children, murder victims prior to the killing, and other deceased or otherwise unavailable witnesses to jurors in order to gain convictions.

"Retroactivity of this ruling could have a devastating effect," he said. "It would force a review and possible reversal of every one of these criminal cases, including a significant percentage of murder cases, even though the prosecutor and the court followed the law as it stood at the time."

But Bosler said applying Crawford to past cases would right past wrongs.

"Before Crawford, citizens were left with a confusing patchwork of state and federal cases, with decisions analyzing the admission of hearsay statements using a logic that could be best described as torturous," he said. "These decisions established a body of law where a person could be convicted of a crime based upon the admission of an audiotaped statement of an accuser."

Bosler said he understood Clifton's concerns that applying Crawford retroactively could be costly, reduce closure for victims and be a burden on the courts.

"But the focus should not be on those costs," he said. "Instead, we should be asking ourselves how many people have been convicted, and may still be incarcerated, based upon the admission of unchallenged and unconstitutional hearsay testimony."

The high court is scheduled to hear the case in the fall. Nevada Attorney General George Chanos will argue the case for the state, while Bockting's position will be argued by the federal public defender's office.
CARSON CITY – In a case that has national implications, the state attorney general's office will appeal to the U.S. Supreme Court a decision overturning the conviction of a Las Vegas man found guilty of the sexual assault of a 6-year-old relative.

In 2004 the U.S. Supreme Court put more restrictions on hearsay evidence being presented at criminal trials, and then a panel of the 9th Circuit Court, in a 2-1 vote, decided the Supreme Court decision should be retroactive.

The Supreme Court ruled that prior statements of witnesses absent from the criminal trial are admissible only when the witness is unavailable and only when the defendant has had a prior chance to cross-examine the witness.

In the Bockting case, the young victim was not available at trial and her prior statements were admitted into evidence.

Judge Clifford Wallace of the appeals court, who dissented from the original ruling, said it will spark a great number of appeals from inmates now in prison.

The 9th Circuit refused Thursday to have the full court re-hear the case. Wallace objected, saying the Supreme Court ruling should be applied only to future cases. He wanted the full court of 9th Circuit to hear the case.

Wallace said the retroactivity decision "will open the door for a slew of habeas petitions from prisoners whose convictions were based, even partially, on out-of-court testimonial statements."

Schulze said five other federal circuit appeals court have ruled the Supreme Court decision is not retroactive. Because of the conflict between the appeals courts, Schulze said he believed the Supreme Court would accept the case. He suggested that oral arguments could be as early as January next year.

Schulze said he has been getting calls from prosecutors and attorneys general from Oregon to California asking what Nevada is going to do in light of the Bockting ruling and the way it could affect many cases.

If the U.S. Supreme Court upholds the 9th Circuit Court ruling, it could mean that numerous past convictions in these types of cases could be overturned. It would require numerous retrials and young victims would be forced to take the stand at trial and be subject to cross-examination.

Also if the ruling is affirmed by the nation's highest court, that rule would apply
nationwide. At present five other five circuit courts have held that the rule of the Supreme Court on juvenile witnesses applied from the date of the ruling, not to past cases. Attorney General Brian Sandoval said this was "definitely" a case that must be taken to the U.S. Supreme Court.
SAN FRANCISCO—A federal appeals court set aside a Nevada man's 1988 child-molestation conviction yesterday, ruling that statements the 6-year-old girl made to police could not be introduced at trial unless the victim took the stand.

The 2-1 decision by the 9th U.S. Circuit Court of Appeals was the first appellate ruling declaring that a 2004 U.S. Supreme Court decision limiting courtroom hearsay statements applied retroactively to past cases.

Two other circuit courts of appeal, the 2nd and 10th, have ruled otherwise, and said the 2004 decision generally applied to pending or new cases.

The split in circuits likely means that the Supreme Court will decide the issue, and Nevada state prosecutors are planning to appeal.

"We're certainly planning to challenge it one way or the other," said Nevada Deputy Attorney General Rene Hulse.

The retroactive application of Supreme Court decisions has generated legal debate. The justices have recently announced that federal sentencing guidelines were advisory, and demanded that juries, not judges, must decide facts that can increase prison terms.

The San Francisco-based appeals court, the nation's largest, sets precedent for the nine Western states of Alaska, Arizona, Idaho, California, Hawaii, Montana, Nevada, Oregon and Washington.

Many states allow limited "hearsay exceptions," whereby somebody testifies about what someone else said while the defendant cannot cross-examine the person who made the original statement.

The case the San Francisco appeals court decided yesterday concerned Marvin Bockting, convicted of molesting his 6-year-old stepdaughter in a Las Vegas motel where he and his wife lived. The girl told investigators of the abuse and demonstrated to authorities the acts with anatomically correct dolls. A medical doctor concluded that she was sexually abused.

Her statements to the authorities were admitted at trial, after she became upset and testified during a preliminary hearing that she couldn't remember the abuse or her statements to authorities.

Bockting's lawyers were unable to cross-examine the girl, and he was convicted and sentenced to life in prison, largely because of hearsay statements.

Bockting's lawyer, Franny Forsman of Las Vegas, said the decision will affect other cases in which hearsay testimony from police officers is the focal point of a conviction.

"You can't rest your case on a cop's recitation on what the child responded in an interview," Forsman said.
The 9th Circuit said Bockting's inability to cross-examine the girl on the stand violated the Sixth Amendment right to confront witnesses, as spelled out by a Supreme Court decision last year.

Judge M. Margaret McKeown, writing for the majority, was sensitive that "prosecutions for child abuse often rely heavily" on hearsay testimony of the victims, but added, "The detective's description of (the girl's) interview was so significant that the error could have materially affected the verdict."

In March, the U.S. Supreme Court ruled the Constitution guarantees a criminal defendant may confront his accusers. The justices sided with a Washington state man convicted of assaulting an acquaintance he had accused of trying to rape his wife.

The wife did not testify at her husband's Washington state trial because of the law protecting spouses from testifying against one another. Prosecutors used her taped statements to rebut the husband's claim that the stabbing was self-defense.

That the husband's lawyers had no opportunity to cross-examine his wife "is sufficient to make out a violation of the Sixth Amendment," Justice Antonin Scalia wrote.
"Justices Rule Against Statements Made Out of Court"

The Washington Post
March 9, 2004
Charles Lane

The Supreme Court ruled yesterday that prosecutors may not introduce as evidence witness statements made out of court even if a judge has deemed them reliable, overturning a 24-year-old precedent in favor of a new standard likely to be more favorable to criminal defendants.

The court ruled unanimously that the state of Washington violated Michael Crawford's constitutional right to confront and cross-examine witnesses against him at his 1999 trial for attempted murder when it played a tape recording of his wife Sylvia's police interrogation, in which she undermined her husband's claim that he had acted in self-defense. Sylvia Crawford could not testify in person, because Michael Crawford had invoked the spousal privilege to block her appearance.

The state was able to do this because of a 1980 Supreme Court ruling that permitted the introduction of a witness statement made out of court if the trial judge finds specific reasons why it is trustworthy. In this case, the state argued that the reliability of Sylvia Crawford's statement was established because it overlapped with her husband's version of events.

But yesterday, in an opinion written by Justice Antonin Scalia, the court overruled the 1980 case, Ohio v. Roberts, holding that the language and history of the Sixth Amendment to the Constitution clearly require that witness testimony be challenged on cross-examination.

"Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty," Scalia wrote. "This is not what the Sixth Amendment prescribes."

Statements by absent witnesses should be admissible in court only when the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine, Scalia wrote.

Chief Justice William H. Rehnquist, joined by Justice Sandra Day O'Connor, wrote separately to say that he agreed with the result in the case, but that the court could have reached it without overruling Roberts.

The court's decision "casts a mantle of uncertainty over future criminal trials," Rehnquist wrote.

Crawford had been supported in the case by the National Association of Criminal Defense Lawyers and the American Civil Liberties Union, which argued in a friend-of-the-court brief that Roberts was too vague and was being inconsistently applied.

"The Supreme Court's decision will fundamentally alter the way that criminal defendants are tried across the nation," Crawford's lawyer, Jeffrey Fisher, said in a prepared statement. "No more will governments be able to convict people of crimes on the basis of accusations that they are unable to cross-examine."
In its brief, Washington state had maintained that overturning the Roberts rule would undermine the truth-seeking function of trials. "The Roberts framework represents a fair balance between a defendant's right to confrontation and valid considerations of public policy and should not be abandoned," the state argued.

The Bush administration had urged the court to modify the Roberts rule, but not to bar all out-of-court testimony. It proposed instead a rule that would have permitted "inherently reliable" statements.

But the court swept that proposal aside, with a majority made up of the court's two leading adherents to a "textualist" approach to reading the Constitution, Scalia and Justice Clarence Thomas, and its four most liberal members, Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Justice Anthony M. Kennedy also joined Scalia's opinion in full.

The case is Crawford v. Washington, No. 02-9410.
Lopez v. Gonzales

(05-547)

Ruling Below: (Lopez v. Gonzales 417 F.3d 934 (8th Cir. 2005), cert granted 126 S. Ct. 1651, 74 U.S.L.W. 3559 [2006]).

Lopez, a permanent resident on the United States was convicted of aiding and abetting the possession of a controlled substance, a felony under South Dakota law but not under federal law. Lopez claims that since his crime was not considered to be a federal felony by the INA at the time of his pleading, it should not be grounds for his removal as a permanent resident. The Eighth Circuit Court ruled that it was not relevant that the INA did not consider the crime to be an aggravated felony at that time because it was settled law for the circuit court that the crime was a felony. This case had been joined with Toledo-Flores v. United States.

Question Presented: Whether an immigrant who is convicted in state court of a drug crime that is a felony under the state's law but that would only be a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

JOSE ANTONIO LOPEZ,
Petitioner,

v.

ALBERTO GONZALES, Attorney General of the United States,
Respondent

United States Court of Appeals
for the Eighth Circuit

Decided August 9, 2005

[Excerpt: some footnotes and citations omitted]

GRUENDER, Circuit Judge:

Jose Antonio Lopez appeals an order of the Board of Immigration Appeals ("BIA") pretermmitting and denying his application for cancellation of removal. Lopez argues that his state-law conviction for aiding and abetting the possession of a controlled substance is not an aggravated felony for purposes of the Immigration and Naturalization Act ("INA"). For the reasons discussed below, we affirm.

I. BACKGROUND

Petitioner Jose Antonio Lopez entered the United States in 1986 and adjusted his status to legal permanent residency as a Seasonal Agricultural Worker in 1990. In September 1997, Lopez was convicted of aiding and abetting the possession of a controlled substance (cocaine) in South Dakota. The conviction was a felony under South Dakota law.

The Immigration and Naturalization Service ("INS") initiated removal proceedings against Lopez in 1998. The INS argued that
his drug conviction established two separate grounds for removal: it was both a controlled substance violation under INA § 237(a)(2)(B)(i) and an aggravated felony conviction based on drug trafficking under INA § 237(a)(2)(A)(iii). The INS later added charges that Lopez fraudulently obtained his original adjustment of status in 1990. Lopez conceded removability for the controlled substance violation but filed an application for cancellation of removal as a long-time permanent resident pursuant to INA § 240A(a).

In November 2002, the Immigration Judge (IJ) found Lopez removable on both the controlled-substance-violation and aggravated-felony grounds. The IJ also pretermitted and denied Lopez's application for cancellation of removal because INA § 240A(a), 8 U.S.C. § 1229b(a), forbids the Attorney General to cancel removal for an alien convicted of an aggravated felony. The BIA affirmed the IJ's order with a short opinion. Lopez timely appeals the premermission and denial of his application for cancellation of removal, arguing that his South Dakota conviction was not an aggravated felony for purposes of the INA.

II. DISCUSSION

We first address our jurisdiction to hear Lopez’s appeal. Lopez's eligibility for cancellation of removal is governed by INA § 240A. The INA states that "no court shall have jurisdiction to review ... any judgment regarding the granting of relief under section ... 240A." INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B). However, the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, has added an additional jurisdictional provision to INA § 242. The new provision, INA § 242(a)(2)(D), codifies our jurisdiction to review constitutional claims or questions of law raised in petitions for review of decisions made by the Attorney General under INA § 240A and other sections. See Fernandez-Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005). Furthermore, the amendment was intended to be retroactive, applying to direct review of orders issued before, on or after the date of the enactment. REAL ID Act § 106(b); Fernandez-Ruiz, 410 F.3d at 587. In this case, Lopez raises a question of law as to whether his conviction in South Dakota state court meets the INA definition of aggravated felony. As amended, INA § 242 makes clear that we have jurisdiction to review this claim.

"We review the BIA's legal determinations de novo, 'according substantial deference to the [BIA's] interpretation of the statutes and regulations it administers.'" Regalado-Garcia v. INS, 305 F.3d 784, 787 (8th Cir. 2002) (quoting Tang v. INS, 223 F.3d 713, 718-19 (8th Cir. 2000)). We review the BIA's interpretation of federal criminal statutes de novo without according any deference. Omar v. INS, 298 F.3d 710, 714 (8th Cir. 2002), overruled in part on other grounds, Leocal v. Ashcroft, 543 U.S. 1, 160 L. Ed. 2d 271, 125 S. Ct. 377, 380 (2004).

The requirements for eligibility for cancellation of removal for permanent residents are as follows:

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

1. has been an alien lawfully admitted for permanent residence for not less than 5 years,

2. has resided in the United States continuously for 7 years after having been admitted in any status, and
has not been convicted of any aggravated felony.

INA § 240A(a), 8 U.S.C. § 1229b(a).

Lopez argues that his South Dakota conviction for possession of a controlled substance was not an aggravated felony for the purposes of the INA because, although it was a felony under South Dakota law, it would not have qualified as a felony under federal law. However, the plain language of the INA, and of the other statutes it refers to, states that any drug conviction that would qualify as a felony under either state or federal law is an aggravated felony. An aggravated felony is defined as "illicit trafficking in a controlled substance, ... including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). In turn, a drug trafficking crime is "any felony punishable under the Controlled Substances Act (21 U.S.C. §§ 801 et seq.)." 18 U.S.C. 924(c)(2). Finally, "the term 'felony' is defined for the purposes of the Controlled Substances Act (CSA) as 'any Federal or State offense classified by applicable Federal or State Law as a felony.'" United States v. Briones-Mata, 116 F.3d 308, 309 (8th Cir. 1997) (quoting 21 U.S.C. § 802(13)).

In other words, for INA purposes, a drug trafficking crime is an offense which would be punishable under 21 U.S.C. §§ 801 et seq., and which would qualify as a felony under either state or federal law. Briones-Mata, 116 F.3d at 310 ("The definitions of the terms at issue indicate that Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the CSA."); accord United States v. Hernandez-Avalos, 251 F.3d 505, 510 (5th Cir. 2001); but see Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 910-11 (9th Cir. 2004) (relying on "the presumption that immigration laws should be interpreted to be nationally uniform, evidence that Congress intended uniformity, and prudential concerns" in agreeing with the Second and Third Circuits that "state felony drug offenses are not aggravated felonies for immigration purposes unless the offense contains a trafficking element or is punishable as a felony under the federal laws enumerated in 18 U.S.C. § 924(c)(2)").

Lopez's South Dakota conviction for aiding and abetting the possession of a controlled substance was a felony under state law, even though it only would have qualified as a misdemeanor under federal law. Accordingly, following Briones-Mata, we hold that Lopez's state-law drug conviction is an aggravated felony for INA purposes.

Lopez contends that the BIA's reliance on Eighth Circuit precedent in finding that his conviction constituted an aggravated felony was an impermissible retroactive application of a new rule. At the time Lopez was convicted in South Dakota, it was the BIA's position that only crimes which would have qualified as felonies under federal law could support a finding of an aggravated felony. See In re L-G, 21 I. & N. Dec. 89 (BIA 1995). Later, in In re Yanez, the BIA reversed its earlier position, ruling that:

In those circuits that have spoken, the determination whether a state drug conviction constitutes a 'drug trafficking crime' under § 924(c)(2), and therefore an aggravated felony under section 101(a)(43)(B) of the Act, shall be made by reference to applicable circuit law, and not by reference to any legal standard articulated by this Board.
I.

In finding that Lopez's South Dakota conviction was an aggravated felony, the IJ cited the *Yanez* rule and accordingly applied our precedent from *Briones-Mata*. The BIA expressly affirmed the IJ's reasoning.

Lopez cites *INS v. St. Cyr*, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001), for the proposition that the BIA's "retroactive" application of the *Yanez* rule violated his due process rights. In that case, St. Cyr pleaded guilty to an aggravated felony conviction in March 1996. At the time of his plea, an aggravated felony would not have prevented St. Cyr from obtaining a waiver of deportation (analogous to "cancellation of removal") under INA §212(c); by the time of his deportation hearing in April 1997, however, §212(c) had been repealed and replaced with §240A, under which the aggravated felony barred him from cancellation of removal. The Supreme Court, citing traditional presumptions against the retroactive application of amended statutes, held that aliens who had pleaded guilty to an aggravated felony before the replacement of §212(c) with §240A were still eligible to seek cancellation of removal.

In contrast to St. Cyr, Lopez pleaded guilty to an aggravated felony in September 1997, months after §212(c) had been repealed and replaced with §240A. To avoid the consequences of his aggravated felony, Lopez argues detrimental reliance not on a repealed section of the INA that was in effect at the time of his plea, but rather on the BIA's interpretation of a federal criminal statute at the time of his plea—an interpretation that had no legal force in the Eighth Circuit. See *Hernandez-Avalos*, 251 F.3d at 508 n.3 ("If a circuit court's interpretation of 'aggravated felony' is different from the BIA's interpretation, the INS is bound by the decisions of the circuit court in removal proceedings arising in that circuit."); *Yanez*, 23 I. & N. Dec. 390, 394-96. *Briones-Mata* was published several months before Lopez's guilty plea in South Dakota and was settled law for removal proceedings arising in the Eighth Circuit regardless of the BIA's conflicting policy at the time of Lopez's plea. See, e.g., *Amaral v. INS*, 977 F.2d 33, 36 n.3 (1st Cir. 1992) (noting that a state-law felony conviction was an "aggravated felony" for INA purposes, despite the BIA's failure to rely on that ground). Therefore, the BIA did not retroactively apply a rule in concluding that Lopez's conviction was an aggravated felony for the purposes of the INA under Eighth Circuit precedent.

III. CONCLUSION

We affirm the BIA's order pretermittng and denying Lopez's application for cancellation of removal.
Toledo-Flores v. United States
(04-41378)


Toledo-Flores appealed a two year sentence arguing that the court erred by imposing a longer sentence due to his prior felony conviction, because that conviction does not qualify as an aggravated felony under the federal Controlled Substances Act. The court concluded that a state felony counts for this purpose if it is punishable by more than one year of imprisonment. This case had been joined with Lopez v. Gonzales (see previous case).

Question Presented: Has the Fifth Circuit erred in holding—in opposition to the Second, Third, Sixth, and Ninth Circuits—that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c) (2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a) (43) (B), even though the same crime is a misdemeanor under federal law?

UNITED STATES OF AMERICA, Plaintiff-Appellee
v.
REYMUNDO TOLEDO-FLORES, Defendant-Appellant

United States Court of Appeals
for the Fifth Circuit

Decided August 17, 2005

BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:

Reymundo Toledo-Flores (Toledo) appeals the two-year sentence imposed following his guilty-plea conviction for improper entry by an alien. Toledo argues that the district court erred by imposing the eight-level increase in U.S.S.G. § 2L1.2(b)(1)(C) (2003) for having a prior aggravated felony conviction. Toledo contends that his Texas state conviction for possession of cocaine is not a qualifying aggravated felony because it is not a felony under the federal Controlled Substances Act. Although Toledo conceded before the district court that this argument was foreclosed by United States v. Rivera, 265 F.3d 310 (5th Cir. 2001), and United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997), on appeal he asserts that these decisions are not binding because they conflict with Jerome v. United States, 318 U.S. 101, 87 L. Ed. 640, 63 S. Ct. 483 (1943).

Our precedent is clear that Congress has made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." United States v.
Hernandez-Avalos, 251 F.3d 505, 510 (5th Cir. 2001) (internal quotation marks and citation omitted). A prior conviction for a state drug offense will qualify as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) if it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law. See United States v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005). Toledo’s prior offense meets this definition. See 21 U.S.C. § 844(a) (2003); TEX. HEALTH AND SAFETY CODE ANN. §§ 481.102(3)(D) & 481.115 (Vernon 2001); TEX. PENAL CODE ANN. § 12.35(a) (Vernon 2001). Accordingly, the judgment of the district court is AFFIRMED.
The Supreme Court on Monday agreed to decide whether immigrants can avoid deportation over some state drug convictions.

Solicitor General Paul Clement, the Bush administration's Supreme Court lawyer, said appeals courts are split over whether immigrants convicted of state drug felonies can avoid deportation if the same crimes were considered misdemeanors under federal law.

Clement said 77,000 aliens with criminal records received deportation orders in fiscal year 2005. Fewer than 7,000 of them had arrests for drug possession, he said.

In late 2006, Justices will hear appeals brought by two Mexican citizens with drug convictions.

Jose Antonio Lopez pleaded guilty to a felony drug charge in South Dakota. The owner of a grocery store in Sioux Falls, Lopez was arrested in 1997 and pleaded guilty to aiding and abetting the possession of drugs. He served 15 months of a five-year prison sentence.

Reymundo Toledo-Flores was convicted in Texas of possession of cocaine in 2002. In 2004 he pleaded guilty to felony entry into America and was sentenced to two years in prison, based in part on the previous drug conviction.

The cases are Lopez v. Gonzales, 05-547, and Toledo-Flores v. United States, 05-7664.
WASHINGTON, April 3

* * *

In another development on Monday, the court agreed to resolve a dispute among the lower courts with implications for thousands of deportation and criminal sentencing cases. The question is whether a drug offense that is only a misdemeanor under federal law, but that an individual state's criminal code treats as a felony, is deemed an "aggravated felony" for purposes of immigration law or for adding time to a federal sentence.

The issue is particularly important in immigration law because deportable aliens with "aggravated felonies" on their records are ineligible for administrative discretion, making their deportation essentially automatic, no matter the individual circumstances. To resolve the issue, the court accepted two cases, *Lopez v. Gonzales*, No. 05-547, and *Toledo-Flores v. United States*, No. 05-7664.
Most people are aware that helping someone gain, sell or distribute cocaine is a crime. However, for Jose Antonio Lopez and Reymundo Toledo-Flores whether or not their crimes constitute aggravated felonies meant the difference between living in America and being sent back to Mexico.

Approximately 7,000 immigrants were deported for drug-related crimes in 2005. Lopez was deported to Mexico on Jan. 4, 2006, leaving behind two children who are United States citizens and an uncle.

Lopez, who attained legal permanent resident status in the United States in 1990, was arrested in 1997 for aiding and abetting the possession of cocaine in South Dakota, which is a felony under the state’s law.

Prior to his arrest he owned a grocery and craft store in South Dakota. He also ran a taco stand.

In 1998, the Immigration and Naturalization Service began removal proceedings against Lopez. The INS based its grounds for removal on two key parts of the Immigration and Nationality Act (INA).

First, the INA states that any alien admitted to the United States can be removed if convicted of a controlled substance violation involving any drug other than marijuana.

The INA also mandates that any alien convicted of an aggravated felony is deportable.

Although Lopez admitted the controlled substance violation was grounds for removal, he filed an application contesting the INS’ decision to remove him. He argued that the INA allows the Attorney General to cancel the removal of an alien who is deportable if the immigrant has been fully admitted for permanent residence for five or more years or has lived in the United States for seven years.

However, the INA also states that, in order to avoid removal, the deportable alien must have no aggravated felony convictions.

In November 2003, an immigration judge and the Board of Immigration Appeals decided that Lopez had committed an aggravated felony and denied his application for cancellation of removal. The Board of Immigration Appeals is the highest administrative body for interpreting and applying immigration law, and can only be overruled by the Attorney General or a federal court.

Lopez appealed to the 8th Circuit Court of Appeals, arguing that his conviction in the state of South Dakota did not meet the INA’s definition of an aggravated felony because it would not be considered a felony under federal law.

The term aggravated felony used to cover murder, drug trafficking and firearms trafficking cases, but has been expanded to include crimes such as shoplifting, if they come with a year or more of prison time. Sentencing can vary from state to state.
Lawyers for Lopez argue that his is a simple possession case, and that the Board of Immigration Appeals is over-expanding the definition of aggravated felony by defining his crime as drug trafficking.

Attorneys for the government noted in a brief that an earlier 8th Circuit case, U.S. v. Briones-Mata, established in 1997 a precedent that classified Lopez' crime as an aggravated felony regardless of whether or not it so qualified under federal law. In that situation, the INA states that only the Board of Immigration Appeals has jurisdiction to review the case.

Lopez also argued that the Board of Immigration Appeal's decision was invalid because it relied on a rule created after his conviction. The rule in In re Yanez, states that an aggravated felony under state or federal law constitutes grounds for removal.

However, the 8th Circuit precedent, Briones-Mata, was published before Lopez' conviction, and on June 24, 2005, the 8th Circuit panel used it to deny Lopez' application for cancellation of removal.

But an attorney for Lopez, Theodore Metzler of Covington and Burling, said the 8th Circuit precedent would never have been applied if the Board of Immigration Appeals hadn't incorrectly used the rule from In re Yanez.

"Mr. Lopez argued that the Board of Immigration Appeals didn't change its position on that question until after his conviction, Metzler added. "It's true that Briones-Mata had decided that question in the sentencing guidelines context before Mr. Lopez's case arose, and our comment would be that regardless of whether the 8th Circuit followed its own precent, as it was entitled to do, we think that precedent was incorrect."

In a separate 5th Circuit Court of Appeals case, Reymundo Toledo-Flores appealed a two-year sentence he received in Texas for possession of cocaine, arguing that his conviction was not an aggravated felony. He claimed it was not classified as a felony under the Controlled Substances Act.

Yet the 5th Circuit panel affirmed, noting that Congress made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]."

"One case is immigration [and] one case is criminal," noted Timothy Crooks, attorney for Toledo-Flores, in a phone interview. "But both turn on the interpretation of a group of statutes."

Both Lopez and Toledo-Flores petitioned the U.S. Supreme Court for review.

The 2nd, 3rd, 6th and 9th circuit courts have ruled that crimes that are not felonies under federal law cannot constitute aggravated felonies and therefore are not grounds for removal. The Court's decision will likely resolve the difference in precedent between these courts and the 5th and 8th circuits.

"We think the emerging trend among the circuit courts of appeals is that a state law drug possession crime defined as a felony under state law is not a drug trafficking crime under the aggravated felony provisions," Metzler said.

On April 3, 2006, the Supreme Court
accepted review in both cases and consolidated them for consideration.
Jose Lopez lived in South Dakota before he was deported to Mexico in January 2006. He ran a taco stand, and, eventually, owned his own grocery and crafts store. A legal permanent resident, he didn’t seem like the kind of man who would draw the attention of immigration lawyers across the country.

But that was before he was arrested for a drug crime and threatened with deportation. It was also before the U.S. Supreme Court agreed to hear his appeal.

Now some immigration experts are taking notice of the case, saying it demonstrates a growing trend: immigration authorities’ efforts to expand their powers of deportation.

Experts say immigration authorities’ classification of drug offenses, stricter laws on asylum cases and a recent rash of worksite raids have all made it easier to deport immigrants.

"Immigration laws have gotten particularly strict with respect to drug offenses,” said Fred Tsao, Policy Director for the Illinois Coalition of Immigrant and Refugee Rights. “This is a trend we’ve been seeing over the past twenty years, and it’s only getting worse.”

Lopez’ drug offense occurred in 1997, when he was arrested for aiding and abetting the possession of cocaine. The Controlled Substances Act, passed by Congress in 1988, states that drug trafficking crimes are aggravated felonies, but Lopez’ lawyers argue that his is a simple possession case and doesn’t qualify for the aggravated felony label associated with trafficking.

“The aggravated felony question comes up in a substantial number of [immigration] cases,” said Theodore Metzler, an attorney for Covington and Burling, the Washington, D.C.-based law firm that is representing Lopez. “I think that the United States [government’s] strategy in many of the [immigration] cases has been to increase the definition and widen the number of crimes that can be constituted an aggravated felony. . . . The main issue [in the Lopez case] is whether, when Congress said that a drug trafficking crime is an aggravated felony, they meant to include a simple possession charge.”

The distinction matters because under immigration law, Lopez could only apply for cancellation of removal, which would stop his deportation proceedings, if the Board of Immigration Appeals determined that he had not committed an aggravated felony.

Manny Vargas, an immigration lawyer for the New York State Defenders Association’s Immigrant Defense Project, is advising lawyers for Lopez and Toledo-Flores, whose aggravated felony conviction in Texas will be considered before the Supreme Court along with Lopez’ case.

“[Lopez’ case] is an illustration of the federal government overreaching, going beyond what Congress probably intended,” Vargas said. “Hopefully . . . immigrants [can still] go and seek review in the federal courts to put a check on instances where the
government can be overreaching. . . One of the overarching background issues here is that these cases illustrate the importance of people, including non-citizens, being able to have access to the federal courts to challenge overly broad government applications of harsh laws.”

The U.S. Attorney’s Office declined to comment on the case, and Elaine Komis, spokeswoman for the Board of Immigration Appeals, said the Board does not comment on its case decisions.

It is clear, however, that the definition of an aggravated felony under the Controlled Substances Act has been greatly expanded since its first use in 1988. While it first only applied to violent crimes, such as murder and rape, and drug and firearms trafficking, under the Board of Immigration Appeal’s expanded interpretation, it can even apply to crimes such as shoplifting, if they come with a year or more of prison time.

“For those immigrants that are in states that classify minor drug possession crimes as [aggravated] felonies, it has very serious consequences for them and in other states there are no consequences at all,” Metzler said. “That’s the fundamental point of fairness in this case.”

The federal circuit courts have disagreed on whether the Board of Immigration Appeals has misinterpreted Congress’ original intent with the Controlled Substances Act and is too loosely applying the label of aggravated felony to crimes that don’t fully qualify.

The 2nd, 3rd, 6th and 9th circuits have ruled that crimes that are not aggravated felonies under federal law cannot constitute aggravated felonies and therefore are not grounds for removal. However, the 5th and 8th circuits have maintained that, as long as the crimes were considered aggravated felonies under state law, immigrants were not eligible for cancellation of removal.

The Supreme Court’s decision is expected to determine whether or not immigration authorities have been too draconian in interpreting the Controlled Substances Act.

“A favorable decision [for Lopez and Toledo-Flores] will not only benefit non-citizens whose cases specifically raise this issue,” Vargas said, “but also may be a further incentive for the [immigration] agency to be less aggressive in applying these laws generally.”

Vargas added that in Leocal v. Ashcroft, a 2004 Supreme Court decision, the court rejected a broad government interpretation of the term aggravated felony in its application to violent crimes.

“If [the Leocal case] was coupled with a decision here that reversed broad government interpretation on the drug category, it might send a signal to the [immigration] agency that they need to be more careful about how they apply these very harsh provisions in the immigration laws,” Vargas said.

The Board of Immigration Appeal’s interpretation of the Controlled Substances Act isn’t the only legislation that has made remaining in the United States more difficult for immigrants.

New asylum laws also showcase the increasing stringency of the immigration courts.

“About a year ago a new law came down . . . that had implications for asylum seekers,” said Uzoamaka Nzelihe, an immigration attorney at Northwestern University’s
Bluhm Legal Clinic.

She said the Real ID Act, which was passed in May 2005 as part of an emergency spending bill on Iraq and tsunami aid, has made the asylum process much more arduous.

“Some of the immigration judges are denying [asylum] on very technical grounds,” Nzelibe said. “Some [judges] say they are denying [cases] because they don’t believe the applicant. That’s very difficult to refute later on. [Judges] deny based on cooperating evidence. They are denying on bases that are difficult to challenge in the appeals court, so that’s making it very difficult [for asylum seekers].”

A person’s demeanor in the courtroom or a woman’s inability to tell male airport officers her experience being raped by soldiers could be grounds for a judge to deny an asylum case under the Real ID Act, according to the New York-based organization Human Rights First.

However, the latest data the U.S. Citizenship and Immigration Service is able to offer regarding the percentage of asylum cases accepted per year is for 2004, said Sean Saucier, spokesman for the office. The lack of available data means it is impossible to tell statistically whether or not more applicants for asylum are being rejected.

Yet most immigration lawyers agreed that the law has made gaining asylum more difficult. They also say they are haunted by the cases they lose.

“If [asylum] cases fail, there aren’t a whole lot of options and the person has to go back,” said Evelyn Marsh, a Chicago immigration attorney. “It seems like a horrible thing to do to anybody. [Losing an asylum case is] a nightmare that I have.”

Other enforcement actions—such as the recent spate of worksite raids by immigration authorities—are also keeping many undocumented immigrants who are already living and working in the United States awake at night.

While authorities have always had the ability to arrest those who are working illegally, many immigrants perceive the recent raids as a crackdown.

Vargas said the raids are symbolic of “the general more aggressive approach to enforcement of immigration laws that the federal government is engaging in now” that is also seen in the Lopez case.

Large numbers of undocumented workers have been arrested lately. In April 2006, raids on IFCO, a Houston-based crate and pallet manufacturer, resulted in the arrests of seven managers and 1,187 undocumented workers in 26 states.

Antonio, a 21-year-old undocumented immigrant, who asked that his real name not be used, lives in Little Village, a Chicago neighborhood that has a high concentration of Hispanics.

Although he has lived in the United States for seven years, for the past few months he said he has been living in fear. His mother and father, both of whom are undocumented, work in printing and metal factories in the Chicago area.

Recent worksite raids have left Antonio terrified, worried that one or both of his parents may be arrested and deported.

"If immigration goes to the factory where my father works, he's going to be deported,
and then my family will be split," he said.

According to Tsao, Antonio's fears are not unjustified.

The IFCO raids were just the “opening salvo in the [worksite raid] initiative,” said Tsao.

Statements from immigration officials appear to corroborate Tsao's position.

In an April press release, Homeland Security Secretary Michael Chertoff said the status quo for immigration had changed.

"This nationwide enforcement action shows how we will use all our investigative tools to bring these individuals to justice," he said.

But in the midst of strict measures of enforcement by immigration authorities and the Board of Immigration Appeals, the Lopez case, which will likely go before the Supreme Court next fall, could mean a new, less stringent era for immigrants who are arrested for drug crimes. A decision in favor of Lopez would essentially check the Board of Immigration Appeals' power to deport immigrants for simple drug possession charges.

Approximately 7,000 immigrants were deported for drug-related crimes in 2005, but it is unclear how many of them were subject to removal for minor drug possession crimes.

However, for immigrants facing deportation for such crimes in 2006 and 2007, a Supreme Court decision reversing the Board of Immigration's decision in the Lopez case may make all the difference, signaling, perhaps, yet another change in the status quo.
On January 31, Antonia Estrella received a desperate call. After five years in immigration detention centers in Alabama, Georgia, and Louisiana, her son, Franklin Grullon, said he had been told his time was up. Immigration officials had informed Grullon, a legal permanent resident who pleaded guilty 10 years ago to drug and robbery charges, that he would be deported on the next flight to the Dominican Republic.

But at the 11th hour, the government granted a temporary reprieve. Grullon - and probably thousands in similar situations - now has the opportunity for a waiver hearing, one that may allow him to stay in this country legally.

"Now there's a little hope," Ms. Estrella, a Bronx resident, said in Spanish. "Now they're saying, 'Yes, he's going to have his day in court.'"

When Grullon, 39, who immigrated legally at 16 and is the father of two American citizens, was convicted in 1995, other noncitizen criminals in his situation were eligible for relief from deportation. Relief was a chance to present evidence to immigration judges that they should be allowed to stay in America, evidence such as rehabilitation and ties to the community.

When the immigration laws were overhauled in 1996, however, that opportunity was taken away for thousands. A broad category of crimes known as aggravated felonies now triggers automatic deportation.

Those laws were applied retroactively. Thus, when Grullon was released in 2000, he was immediately placed in deportation proceedings.

This fall, however, the Justice Department issued a new rule, and immigrants like Grullon, who have not yet been deported, have been given a second chance. The change was based on a Supreme Court decision four years ago that it was unlawful to apply the change retroactively.

For thousands, it's too late. The Justice Department is not allowing those already deported to apply for the waiver. More than 500,000 noncitizens with criminal convictions, many of whom would have been eligible for the waiver, have been deported since the new laws went into effect in 1996.

Others will not hear about the waiver in time: The opportunity to apply runs out this April 26. In October, the Justice Department posted notices in the Federal Register and sent out a press release, but immigration lawyers said the information is not trickling down to immigrant offenders who need to hear it.

The New York State Defenders Association's Immigrant Defense Project, a nonprofit group, is scrambling to get the word out that some immigrants who, before 1997, pleaded guilty to a crime, can seek a waiver.

"Every other day, our hotline mailbox gets filled because of people calling," a staff
attorney of the Defense Project, Benita Jain, said.

For many of them, however, the rule change came too late.

"Most people who have been calling us have a loved one who was deported wrongfully, and there's not a lot we can say to them," she said. "For people who were deported, the government's position is they can't come back to apply for the waiver, even though they were wrongfully deported."

Another problem disturbs a New York University School of Law professor, Nancy Morawetz, who helped prepare the plaintiff's brief in the Supreme Court case. She said the government is not doing enough to inform immigrants from countries with which America currently has no repatriation agreements, such as Cuba, Vietnam, and Laos. Many have been released from detention because the government will not be able to deport them in the foreseeable future, but they are unaware they should apply for the waiver to prevent future deportation in the event of a shift in bilateral relations. Such a shift recently took place with Cambodia, where America is now able to deport immigrants convicted of crimes.

"What I think is a huge problem is that they tell people there is a time limit, and they simply assume people will know what they are supposed to do. It's a very complicated piece of law," Ms. Morawetz said. "When the government makes a mistake, they have a clear responsibility to fix it, and that's a responsibility they're clearly reneging on in these regulations."

The Justice Department said its response reflects standard policy.

"This is consistent with what the Department of Justice has done in other cases where individuals were given an opportunity to seek relief. But at the same time, the matter is not left open indefinitely," a spokesman for the department, John Nowacki, said.

Advocates of increased restrictions on immigration see the waivers as providing a new loophole to let the worst type of immigrants remain in the country.

But for Franklin Grullon's mother, Ms. Estrella, "212(c)," the name of the waiver and a number she loves to rattle off in Spanish, is the last hope for her son. Ever since his conviction, she said, she has contended he was innocent and was tricked into pleading guilty.

Now, with a stack of court papers almost as tall as she is and more than 170 family members and friends signed on to support his waiver application, she is optimistic that she will keep her son in American and then clear his name.
Burton v. Waddington
(05-9222)

Ruling Below: (Burton v. Waddington, 142 Fed. Appx. 297 (9th Cir., 2005), cert granted 126 S. Ct. 2352; 74 U.S.L.W. 3676 [2006]).

Burton, an inmate, sued for a writ of habeas corpus, objecting to the consecutive sentences for rape, robbery, and burglary that he received from a judge, claiming that Blakely v Washington should apply to reduce his sentence. Blakely held that only a jury may make findings that add to sentences. The court of appeals held that Blakely was a new rule.

Questions Presented: 1. Is the holding in Blakely a new rule or is it dictated by Apprendi? 2. If Blakely is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

BURTON, Petitioner
v.
WADDINGTON, Respondent.

United States Court of Appeals
for the Ninth Circuit

Decided July 28, 2005

TASHIMA, PAEZ, and BEA, Circuit Judges:

Lonnie Lee Burton ("Burton") appeals the district court's denial of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1994, a jury convicted Burton of rape in the first degree, robbery in the first degree, and burglary in the first degree. Burton challenges his consecutive sentence of 304 months for the rape, 153 months for the robbery, and 105 months for the burglary, for a total of 562 months on several constitutional grounds. We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm. We review de novo a district court's denial of a petition for writ of habeas corpus under 28 U.S.C. § 2254. Alvarado v. Hill, 252 F.3d 1066, 1068 (9th Cir. 2001).

The state argues that the district court lacked jurisdiction over Burton's 2002 habeas petition because this court had not granted leave to file a "second or successive" petition pursuant to 28 U.S.C. § 2244(b)(3)(A). We disagree. In 1998, Burton filed his first federal habeas petition challenging his conviction. At that time, the state court judgment as it related to Burton's sentence was not yet final because Burton's challenge to his sentence was still pending before the state court of appeal. Because Burton had not yet exhausted his federal constitutional claims in state court at the time he filed his first federal habeas petition, they were not ripe for federal habeas review. See 28 U.S.C. § 2254(b)(1)(A)(requiring a state prisoner to exhaust his claims in state court before he is allowed to bring an action.

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in federal court for habeas relief). Therefore, Burton was not required to challenge his sentence in his first federal petition because no meaningful relief would have been available at that time. See LaGrand v. Stewart, 170 F.3d 1158, 1159 (9th Cir. 1999)(order). We agree with the district court that Burton's petition is not "second or successive" because he had a "legitimate excuse for failing to raise a claim at the appropriate time." See McCleskey v. Zant, 499 U.S. 467, 490, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991).

II.

Burton claims that his due process rights were violated when the trial court increased his offender score at the sentencing hearing by separately counting his Indiana theft and fraud convictions, rather than aggregating them as it had done in the first and second sentencing hearings. Because Burton has not shown that the Washington Court of Appeals' application of the law of the case doctrine was "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States" 28 U.S.C. § 2254(d)(1), we affirm the district court's denial of relief on this claim.

III.

Burton next argues that his due process rights were violated because the sentencing court was vindictive in imposing an exceptional sentence at his third sentencing hearing. As the Washington Court of Appeals noted, Burton's third sentence is lower than his original sentence, and is therefore not presumptively vindictive under North Carolina v. Pearce, 395 U.S. 711, 725, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989). Because Burton has not shown that the trial court was vindictive in violation of clearly established federal law, Burton's claim is not cognizable under 28 U.S.C. § 2254(d)(1).

IV.

Finally, Burton argues that his exceptional sentence was imposed in violation of his Sixth Amendment rights under Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), and Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). We expanded the Certificate of Appealability and requested supplemental briefing on the impact of Blakely and United States v. Booker, 543 U.S. 220, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005), on this case.

Although Apprendi was decided before Burton's conviction became final and may therefore be applied to this case, the state argues that Blakely—decided after Burton's conviction became final—established a new rule that does not apply retroactively on collateral review. See Teague v. Lane, 489 U.S. 288, 310, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989). We agree. See Schardt v. Payne, 414 F.3d 1025, 2005 U.S. App. LEXIS 13569, 2005 WL 1593468 (9th Cir. July 8, 2005)(holding that Blakely does not apply retroactively to a 28 U.S.C. § 2254 habeas petition).

Apprendi held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. The statutory maximum for each of the offenses to which Burton was found guilty was life imprisonment. See WASH. REV. CODE §§
9A.44.040(2), 9A.52.020(2), 9A.56.200(2) (classifying rape in the first degree, burglary in the first degree, and robbery in the first degree as class A felonies); § 9A.20.021(1)(a)(setting statutory maximum for class A felonies as life imprisonment).

At Burton's third sentencing hearing, the judge imposed consecutive sentences of 304 months for the rape conviction, 153 months for the robbery conviction, and 105 months for the burglary conviction, for a total of 562 months. Because the sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum of life imprisonment, it does not violate Apprendi. See United States v. Shryock, 342 F.3d 948, 989 (9th Cir. 2003) (holding that where statutory maximum for murder in either the first or second degree was life imprisonment, court did not err in sentencing under provision for first degree murder on the basis of judge-found facts); United States v. Sua, 307 F.3d 1150, 1154 (9th Cir. 2002) (holding that Apprendi was not violated where sentence imposed did not exceed the statutory maximum); see also United States v. Buckland, 289 F.3d 558, 570 (9th Cir. 2002) (en banc) (finding no Apprendi violation where none of the individual sentences imposed consecutively exceeded the statutory maximum for that offense).

Accordingly, we AFFIRM.
The U.S. Supreme Court said Monday it will consider whether inmates can reopen challenges to prison sentences based on a court ruling two years ago that limited judges' discretion in sentencing criminal defendants.

Justices will hear arguments this fall from Lonnie Burton, who is serving nearly 47 years in prison in Washington state for a 1991 rape, robbery and burglary in Federal Way.

Burton was convicted in 1994 of forcing his way into a home and raping a 15-year-old boy at gunpoint. He stole $160 from the house before leaving.

Prosecutors asked for a 25-year sentence for Burton—about the maximum outlined under the state's sentencing guidelines—but a King County judge gave him 47 years, saying he deserved the harsher sentence.

Burton's appeal follows a Supreme Court ruling in 2004 that overturned the sentence of another Washington man, Ralph Blakely, who was convicted of kidnapping his estranged wife. A judge, acting alone, had determined that Blakely of Grant County had acted with "deliberate cruelty" and deserved a longer prison term.

The issue in question centers around judges' ability to issue "exceptional sentences," said Helen Anderson, assistant professor of law at the University of Washington.

The Legislature about two decades ago created sentencing guidelines, which laid out sentence ranges for every crime based on factors such as the nature of the crime and the criminal's previous convictions. The Legislature also gave judges the authority to give higher sentences in certain exceptional cases.

"The hope was that these ranges would provide more equality" over the much-larger, less-defined sentencing ranges used before the reforms, Anderson said.

But in a 5-4 decision in the Blakely case, the justices found that exceptional sentences were unconstitutional because they allowed judges to independently consider facts that the jury had not used in reaching a verdict.

Burton had an appeal pending when the court resolved Blakely's case.

Brian Tsuchida, Burton's attorney, said the Supreme Court case is a highly technical one that will determine what remedies, if any, are available for inmates possibly affected by the Blakely case.

"It has to do with whether Blakely v. Washington established a new rule, and if it did, does that new rule apply retroactively. It doesn't address whether the sentencing scheme [in Washington] is legal or illegal."

After Blakely, the Legislature changed the law to say that the state itself, and not judges, must decide before trial whether to seek an exceptional sentence, thereby ensuring that a jury determine the facts that would allow for a longer sentence.
One of the largest issues addressed by the Indiana Supreme Court in 2005 was a byproduct from the nation's highest court the year before.

The state's high court saw a spike in cases heard as a result of the U.S. Supreme Court's decision in *Blakely v. Washington*, which shook the legal world and called into question the nation's sentencing structure.

Since then, state courts are still reeling from the issue and figuring out how the decision impacts thousands of current and past cases dating to the 1970s.

An Examination of the Indiana Supreme Court Docket, Dispositions and Voting in 2005, an annual review of the high court, found a higher caseload resulted from the *Blakely* decision, causing the number of cases to jump about 43 percent.

*Blakely* issues came up in a third of the Indiana court's cases and amounted to 20 percent of the caseload, according to the review. Twenty-two opinions were focused on the issue, and half were abbreviated error-correcting opinions, the review shows.

The *Blakely* decision was a big piece of work for our state courts, said Mark J. Crandley, who helped author the review. That was a huge bomb to drop on lower courts, and it says a lot about our U.S. (Supreme) Court. But Indiana is ahead of the curve and handled it well.

Most of the state's opinions on *Blakely* issues were unanimous, and the opinions were shorter and more concise, he and other legal scholars said.

While important, *Blakely* isn't overly complicated to deal with, said associate professor Joel Schumm at Indiana University School of Law (not equal symbol) Indianapolis.

My take is that while they might represent 20 percent of cases, they don't require the kind of work or discussion that hot-button issues might need, Schumm said. I'm not surprised that so many are related to *Blakely*. It's important but not time consuming.

Crandley said the Indiana Supreme Court issued a ruling in March 2005 that other state courts could model. The ruling in *Smylie v. Indiana* a case arising from Johnson County determined *Blakely*'s applicability to the state's sentencing structure. The court rejected the suggestion of making statutory sentencing structure advisory and instead requires jury determinations of sentence-enhancing facts.

Indiana justices also touched on retroactivity, saying that *Blakely* applies to all cases on direct appeal at the time the *Blakely* decision came down. The retroactivity issue is one that the U.S. Supreme Court expects to tackle this fall in the case of *Burton v. Waddington*, 05-9222.

Justices will hear arguments from Lonnie Burton, who is serving nearly 47 years in prison in Washington State for rape, robbery, and burglary. His attorneys told justices that the local judge increased the sentence by 21 years, declaring that Burton
deserved a harsher sentence than what was provided by the state's sentencing scheme.

At the time of the Blakely ruling, Burton had an appeal pending. Justices have not said how the decision would affect old cases, but attorneys plan to watch the case with interest.
Cunningham v. California
(05-6551)

Ruling Below: (People v. Cunningham, Not Reported in Cal.Rptr.3d, 2005 WL 880983 (Cal.App. 1 Dist.,2005), cert granted 126 S.Ct. 1329, 164 L.Ed.2d 47, 74 USLW 3457, 74 USLW 3471, [2006]).

John Cunningham, appellant, was accused by his son (Doe) of forcibly sodomizing him and forcing him to orally copulate appellant. Despite Doe's history of lying, Appellant was convicted by a jury for sexual abuse of a child under 14. The trial court judge imposed the statutory maximum sentence, 16 years, after weighing the aggravated and mitigating factors. Appellant appealed the admittance of certain hearsay evidence and the imposition of the upper term sentence based on aggravating factors not found by the jury in violation of his right to a jury trial under Blakely v. Washington. The appellate court found no abuse of discretion in allowing the hearsay evidence. Furthermore, two of the judges held that the upper term sentence was part of the range of authorized punishments under California's statutory scheme and thus a permissible scheme under Blakely. One appellate judge, concurring in part and dissenting in part, interpreted Blakely to require any fact that increases the penalty of a crime to be proved beyond a reasonable doubt to the jury and would therefore remand the case for re-sentencing.

Question Presented: Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments?

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John Cunningham (appellant) appeals his conviction by jury trial of continuous sexual abuse of a child under age 14. On appeal he contends the trial court erroneously admitted the victim's hearsay statements, imposed the upper term, and based the upper term on aggravating factors not found by the jury in violation of his right to jury trial under Blakely v. Washington. We reject these contentions and affirm.

Background

Victim's Testimony

The victim, referred to at trial and herein as John Doe, is appellant's son. Doe, born in August 1989, testified that he lived with his
mother, Wanda, for the first 10 years of his life. In December 1999, when Doe was 10 years old, he went to live with appellant, appellant’s girlfriend, Latasha, appellant’s and Latasha’s baby, and Latasha’s young nephew.

Doe admitted that prior to moving in with appellant, Doe falsely accused his stepfather of beating him, resulting in scars on his back, because he wanted to live with appellant and did not like his new stepfather. After appellant took Doe to the hospital Doe admitted he had lied. Doe also admitted that when he was eight years old he called the telephone number for Boys’ Town and falsely reported that there was no food in his mother’s house and she did not provide him with enough attention. The police and child protective services investigated the call and found Doe was healthy and had ample food at his house.

Doe testified that in January 2000, shortly after he moved in with appellant, appellant began forcibly sodomizing him and forcing him to orally copulate appellant. Sometimes while being sodomized by appellant, Doe screamed for help because it hurt “very bad” and appellant put his hand over Doe’s mouth to stop Doe from screaming. The acts occurred in appellant’s bedroom, the living room, the bathroom and the shower. Sometimes appellant molested Doe when he was angry with Doe. Because appellant threatened to kill Doe if he told anyone about the abuse, Doe was afraid of appellant and did not tell anyone while living with him. In December 2000, Doe first told his younger cousin, Brittany, about appellant’s abuse in a note while visiting her when appellant was out of town. Before giving her the note Doe said “I have to tell you,” but did not want to say it aloud. The note said, “my dad is hu[m]ping me.” Thereafter Brittany showed the note to her mother, Karla, who then questioned Doe as to what it meant. Doe told Karla about appellant’s repeated incidents of sodomy and forcing Doe to orally copulate him. After Karla told her husband, Gerrell, about Doe’s allegations, Gerrell talked to Doe, then took him to appellant’s house for a family meeting. While there, as Doe was packing his clothes, appellant confronted him while they were alone and said, “In a week you better say you are lying or else I am going to fuck you up.”

After Doe reported appellant’s abuse to Wanda and his stepfather, Wanda took him to the hospital. The pediatrician who performed a sexual assault examination on Doe testified that the examination revealed no trauma to Doe’s anus, consistent with most postsodomy examinations. However, the doctor said that Doe’s accounts of how he felt physically during and after being sodomized and orally copulating appellant were consistent with how children report such incidents.

On January 4, 2001, Doe was interviewed by San Pablo Police Officer Jeff Palmieri. Doe told Palmieri that appellant sexually abused him numerous times beginning shortly after he moved in with appellant. On January 8, Kerry O’Malley of the Children’s Interview Center (CIC) conducted a videotaped sexual assault interview of Doe. Doe’s statements during the CIC interview were consistent with his earlier statements to Palmieri.

On January 5, 2001, appellant agreed to a videotaped interview by Officer Palmieri and Contra Costa District Attorney’s Office Inspector Ted Todd. At the beginning of the interview appellant adamantly denied any type of sexual touching of Doe. As the questioning ensued, appellant became more forthcoming in his responses. After two or
three hours, appellant admitted that Doe's mouth did make contact with appellant's penis for five seconds while in the shower on one occasion. Appellant also said that Doe was a liar and was manipulative and later said Doe was a homosexual and "can't quit the homosexual behavior."

Defense

Testifying in his own defense, appellant denied ever molesting Doe or any child. He also denied ever threatening to kill Doe or "fuck [him] up." Appellant testified that prior to coming to live with him, Doe had been expelled from school due to behavior problems and was not doing his homework. Other defense witnesses testified that Doe had a history of lying and his allegations against appellant were fabricated because he was unhappy about appellant's requirements regarding chores and homework.

Discussion

I. Doe's Hearsay Statements Were Properly Admitted

Appellant contends the court erred in admitting, pursuant to Evidence Code section 1360 (hereafter section 1360), the portions of the videotaped CIC interview which contained Doe's hearsay statements to Brittany and Karla. He contends the error violated his right to due process. Appellant does not argue that the admission of Doe's hearsay statements violated the Sixth Amendment right of confrontation under the rule recently announced in Crawford v. Washington. Since Doe testified at trial, no Confrontation Clause violation occurred.

Section 1360 creates a limited exception to the hearsay rule in criminal prosecutions regarding a child's statements describing acts of child abuse or neglect, including sexual abuse. In determining whether child hearsay statements possess the requisite indicia of reliability pursuant to section 1360, subdivision (a)(2), the trial court may consider such nonexclusive factors as: "(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected from a child of [similar] age; and (4) lack of motive to fabricate. Although courts have considerable leeway in their consideration of appropriate factors, the "unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.""

Appellant relies on Lilly v. Virginia and People v. Eccleston to argue we are to exercise de novo review over the trial court's reliability determination. This argument rests on a misunderstanding of the cited authorities. At the time section 1360 was enacted (1995), the leading case on the interpretation of the Confrontation Clause was Ohio v. Roberts. Roberts had held that the prosecution could only introduce hearsay against a criminal defendant if the statement was admitted under a firmly rooted hearsay exception or had sufficient indicia of reliability. Since section 1360 is not a firmly rooted hearsay exception, an accused could argue under Roberts that a statement admitted under this section lacked the reliability required by the statute and by the Constitution. While the deferential abuse of discretion standard of review is applied to the statutory finding, the stricter de novo standard of review is applied to the reliability finding under the Confrontation Clause. Since only the statutory finding of reliability is at issue here, we apply the abuse of discretion standard. In doing so we review the trial court's ruling based on the evidence before the court at the time of the ruling.
In this case, prior to trial, appellant filed a written motion in limine seeking to exclude portions of Doe's videotaped CIC interview on the basis that they did not qualify under section 1360. At the initial hearing appellant also objected to admission of Doe's incriminating statements to Brittany and other adult relatives prior to the videotaped interview. The parties stipulated that the court would review the CIC interview video and sections of the police reports submitted by the prosecutor, which describe the subject statements by Doe to determine whether the statements provided sufficient indicia of reliability to be admitted under section 1360. Thereafter the court reviewed the CIC interview videotape, a transcript thereof, a police report, and a supplemental police report, after which it ruled Doe's hearsay statements admissible.

A. The Police Reports

1. Initial Report

Officer Palmieri's initial report states that in his January 4, 2001 interview, Doe said that during the first molestation incident appellant made Doe touch appellant's penis and then "whipped" Doe on the buttocks with his hand for not doing his homework. Throughout the year 2000, appellant made Doe orally copulate him in the living room of the residence and appellant sodomized Doe several times while in the bathroom. Doe referred to appellant's penis as his "dingling" or "dick," and said appellant used Vaseline or oil before sodomizing him. Doe said that in December 2000 he "got in trouble by [appellant]" regarding a book report after which appellant whipped him on his buttock and had him orally copulate appellant. Two weeks before Christmas appellant sodomized him in the shower causing him great pain. Doe described having to use the bathroom after being sodomized and seeing a white film in the toilet water. He said the oral copulation and sodomy happened almost every day that he was alone with appellant. He admitted lying several times to his parents, but was adamant that his accusations regarding appellant were not lies, and he was visibly upset. When Palmieri asked why Doe was crying, he said he did not want to get anyone in trouble, loved appellant and wanted appellant to stop molesting him. Doe told Palmieri that on January 2, 2001, he looked Brittany in the eyes and told her appellant was molesting him. After Brittany told Karla, Karla confronted Doe and he told her about appellant's abuse over the last year. Doe also told Palmieri that when Karla took him back to appellant's house to confront appellant with Doe's allegations, appellant, while alone with Doe told Doe that if he did not say the allegations were a joke, he would "fuck him up." Doe also told Palmieri he did not tell anyone about the abuse for a long time because appellant threatened to kill him if he told anyone.

2. Supplemental Report

Officer Palmieri's supplemental report states that on January 9, 2001, he telephoned Karla and Brittany. Brittany told him that on the afternoon of January 2 while she and Doe were drawing, Doe told her he had something important to tell her but did not want to say it out loud. Doe wrote down that appellant had been "humping" him. When Brittany asked Doe if he was telling the truth, he looked her in the eyes and responded affirmatively. Brittany believed Doe was telling the truth because before he wrote the note he was "happy," and when he told her about appellant he started crying. Karla told Palmieri that after Brittany gave her Doe's note she confronted Doe and told him she wanted him to tell the truth. Doe told Karla that appellant had been "putting
his dingling in [Doe's] butt,” and Doe was also made to put his mouth on appellant's penis. Doe told her the incidents had been occurring for a year, often in the shower, and that appellant put Vaseline or grease “on his butt” before each act of sodomy. Doe told her the last act happened a couple of weeks before because he had not completed a book report.

B. The CIC Videotape

When interviewer O'Malley asked Doe if he knew why he was at CIC, Doe responded “so [he] could talk to [her]” about something that happened to [him].” In response to O'Malley's saying, “Well if you feel comfortable right now, [Doe], could you tell me what happened,” Doe gave a detailed description of the molestation he suffered for a year by a “person” or “him.” Doe described appellant’s use of Vaseline and the pain he experienced while being sodomized. His description of the first incident of molestation was consistent with Palmieri's police report. Subsequently, when O'Malley asked who “him” referred to, Doe identified appellant. Doe said appellant “humped” him, which Doe said meant “molested.” The conduct Doe described as appellant “humping” him constituted sodomy. Doe often referred to appellant's penis as his “private part,” but also referred it as his “ding-a-ling” and his “dick.” He referred to having to go to the bathroom after being sodomized as “when I boo-boo.” He also said after being sodomized something “white with bubbles” would come out in his stool. Doe described the December book report incident as the last incident of molestation. He said appellant first “whooped him” in the bedroom with a belt, then took him to the living room and had Doe orally copulate him, then took Doe into the bathroom and sodomized him. Doe said he told Brittany because he knew she would tell her mother.

When O'Malley asked Doe how he felt about what happened with appellant, Doe said he felt “shock.” Doe said appellant threatened to kill him if he told anyone. Doe said he was afraid to tell anyone because they might not believe him. However, he said he “got tired of him doing it” and “it was disgusting” and told his cousin Brittany to tell her mother. He said he was glad he “brought it out” because he “got sick of it.” He said the molestation happened almost every day.

Doe admitted to O'Malley that in the past he had “said some stuff” about his mother that was not true. When O'Malley asked how she would know if he was telling her the truth, Doe said people know when he is telling the truth. He said Brittany knew he was telling the truth because he looked in her eyes in response to her request to do so and she knew he was telling the truth. He also said he was not laughing when he told Brittany, and that kids laugh when they are not telling the truth. Doe said he cried when talking to Officer Palmieri because he was afraid that Palmieri would not believe him. He was afraid no one would believe him because of his prior lies about his mother and stepfather. He said he previously lied about his mother because he was left alone with no one to talk to and play with. He said he lied about his stepfather because his stepfather would play with his sisters but not with him.

C. Court's Reasoning Regarding Reliability

At the subsequent hearing on the in limine motion the court ruled Doe's out-of-court statements admissible, stating the following reasons for concluding that they bore sufficient indicia of reliability:

“In terms of reliability, the court finds that the spontaneity of the statements by
the minor to his cousin Brittany in the note, knowing his cousin would tell his aunt, and consistent repetition of the manner in which the acts were committed shows the reliability of such statements. The mental state of the minor is demonstrated by the fact that he came forward because he said he was tired of the abuse. The use of the terminology in which he described the acts is unexpected in a child of similar age. And to further explain the court's finding the court has read his description of the sexual acts which showed a knowledge of such matters far beyond the ordinary familiarity of a child of his age. And fourth, the lack of motive to fabricate is demonstrated by the fact that he was very sorry that he had to tell about these acts because they involved his father and he did not want to have to describe them. So, based upon those factors the court finds under Brodit and Eccleston and [section] 1360 that the requirements have been met."

For the following reasons, appellant contends the court erroneously concluded that Doe's hearsay statements were sufficiently reliable to be admissible under section 1360: First, the statements, particularly the note to Brittany, were not spontaneous, but were instead planned. In addition, the statements were not consistent, but were "embellished" and "refined" with each retelling. Second, Doe's mental state at the time of his statements was "unstable" given his prior false accusations against Wanda and Latasha; his animosity toward appellant, Wanda and Latasha; and his behavioral problems at school. Third, Doe's statements did not indicate a level of knowledge that was unexpected for an 11 and one-half year old, and he spent time with older siblings and had access to numerous TV channels with no parental controls. Fourth, Doe had a motive to lie—he wanted to move back to Wanda's house due to his perceived mistreatment by appellant and Latasha. Finally, there was little, if any, evidence corroborating Doe's accusations.

We conclude the court did not abuse its discretion in finding Doe's hearsay statements reliable. Regarding the spontaneity of the statements to both Brittany and O'Malley, Doe's statements were spontaneous in the sense that Doe initiated them. In addition, his statements to O'Malley regarding appellant's abuse were in response to her neutral question, "could you tell me what happened?" We reject appellant's assertion that Doe's hearsay statements were not consistently repeated, but were "embellished" and "refined" with each retelling. Doe's initial and very brief statement to Brittany that appellant had been sodomizing him was not inconsistent with his much longer statements to Karla and O'Malley. Doe's statements to Karla and O'Malley were remarkably consistent as to the "general outline of abuse" and it is understandable that he imparted extra details of the abuse to the interviewer because of the interview format.

Regarding Doe's mental state, the record is mixed. Although he conceded to O'Malley that he had previously fabricated claims against his mother and stepfather, O'Malley conducted a lengthy colloquy with him regarding truth and falsity and questioned him as to how she would know that he was telling the truth. He also stated that in light of his prior lies he was worried that his allegation of appellant's abuse would not be believed. The court could reasonably conclude that this degree of candor enhanced, rather than detracted from Doe's reliability.

We also reject appellant's assertion that
Doe's statements did not indicate a level of knowledge unexpected of an 11 and one-half year old. Doe's extremely detailed descriptions of the unpleasant physical sensations he experienced during and after being sodomized would be unusual even for an adult unless experienced firsthand. Nothing in the record before the court at the in limine hearing suggested that Doe's level of knowledge came from a source other than his personal experience.

Based on the record before the court at the in limine hearing, it could properly determine that Doe lacked a motive to fabricate based on his stated love for appellant, reluctance to report the abuse and the possibility of appellant's resulting incarceration. Appellant had the opportunity to cross-examine Doe at trial about his perceived mistreatment by appellant and appellant's girlfriend as a motive for fabricating the abuse allegations.

Finally, we reject appellant's assertion that the lack of corroborating evidence suggested that Doe's hearsay statements were unreliable. Corroboration is not necessary where the child victim testifies at trial.

After reviewing the police reports and CIC videotape, the court provided a thorough statement of its reasons for finding Doe's hearsay statements reliable. Appellant has failed to demonstrate that the court abused its discretion.

II. The Court Properly Imposed the Upper Term

A. Aggravating Factors

Appellant next contends the court erroneously relied on five of six aggravating factors in sentencing him to the upper term. Prior to sentencing, the court appointed psychologist Richard Lundeen, pursuant to Penal Code section 288.1, to examine appellant and submit to the court a written report and recommendation. Dr. Lundeen opined that appellant would not be a danger to Doe or other children in the community if released. Regarding treatment, Dr. Lundeen stated “either [appellant] did not engage in inappropriate sexual behavior as charged, or else he has repressed those behaviors to a depth where he cannot deal with them at a conscious level at this time. In either case, he would be a poor candidate for rehabilitative therapy if he does not have a condition from which he is trying to rehabilitate.” Appellant retained psychologist John Kincaid to conduct a psychological evaluation. Dr. Kincaid's report stated that if granted probation appellant would be unlikely to pose a risk to Doe, but it would be prudent to restrict him from direct contact with minors without the immediate presence of a responsible adult. Dr. Kincaid also stated that he saw “little likelihood that [appellant]’s incarceration would be a detriment to [Doe], who had lived with him only a relatively brief time.” Dr. Kincaid recommended that appellant obtain treatment which would decrease the likelihood that he would reoffend. He also stated that, if incarcerated, appellant should be referred for a mental health evaluation although “offense-specific treatments are almost nonexistent in custody.”

Although the probation report did not recommend a particular sentence, it noted the following circumstances in aggravation: (1) “The crime involved great sexual violence and callousness toward a 10-year-old child.” In particular, the report noted that the victim was “brutally whipped and sodomized over 100 times in a one year period.” (2) The victim was particularly vulnerable as he relied on his father, as his
custodial parent, for support. (3) Appellant took advantage of his position of parental trust and trust as a police officer to commit the offense. (4) Appellant engaged in violent conduct which indicated a serious danger to children in society. The probation report noted the single mitigating factor that appellant had no prior criminal record.

At sentencing, the court acknowledged that it had considered the probation report, psychological evaluations, sentencing memoranda, letters from the community in mitigation and letters from Doe and his mother. After denying probation, it found the sole mitigating factor was appellant's lack of prior criminal conduct. The court found the following aggravating factors: (1) The crime involved great violence and the threat of great bodily harm disclosing a high degree of viciousness and callousness. (2) The victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker. (3) Appellant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statements about the crime. (4) Appellant took advantage of a position of trust to commit the crime in that he is the victim's father and sole caregiver for a substantial period of time. (5) Appellant engaged in violent conduct which indicates a serious danger to the community. (6) Appellant was a peace officer at the time he committed the criminal acts, violating his duty to serve the community of which the victim was a member. After finding that the aggravating circumstances outweighed the sole mitigating factor, the court imposed the upper 16-year term.

1. The Relationship Between Appellant and the Victim

Appellant contends the court erred in finding the victim was vulnerable due to his age because age was an element of the charged offense. Although the victim's minority cannot be used as an aggravating factor where minority is an element of the offense, victim vulnerability in this case was also based on the victim's dependence on appellant as his primary caretaker. Thus, the court properly based its vulnerable victim finding on a factor other than the victim's age.

Appellant next contends the court erred in using the victim's dependence on appellant, and appellant's taking advantage of a position of trust as the victim's father/sole caregiver as two separate aggravating factors. He relies on Garcia, which held that the victim's relationship to the defendant could not be used both to support a finding of vulnerability and to find that the defendant took advantage of a position of trust or confidence to commit the offense. "It does appear that these factors are two sides of the same coin. The significant circumstance is the relationship between the defendant and the victim. The circumstances that placed the defendant in a position of trust and confidence were identical to the circumstances which placed the victim in a position of vulnerability." We agree with this analysis and conclude that having used the relationship between appellant and the victim in support of the vulnerable victim factor, the court could not use that fact in support of a separate aggravating factor.

2. Danger to Society

Appellant next contends the court's finding that he engaged in violent conduct, which indicated he posed a serious danger to the community, is not supported by the evidence. We disagree. The fact that appellant repeatedly forcibly sodomized Doe and forced Doe to orally copulate him
suggests that the charged offense was a crime of violence. In addition, appellant's retained psychologist, Dr. Kincaid, opined that while a grant of probation would not pose a risk to Doe, it would be prudent to restrict appellant from unsupervised direct contact with minors. In addition, Dr. Kincaid recommended that appellant receive treatment to reduce the likelihood of reoffending. Dr. Kincaid's testimony provides sufficient support for the finding that appellant posed a serious danger to the community.

3. Great Violence and Great Bodily Harm

Appellant argues the court erred in using the fact that he threatened the victim both to find that the crime involved great violence and the threat of great bodily harm and to find that he threatened the victim in an attempt to coerce the victim to recant the victim's statement about the crime. Appellant asserts the record is devoid of any violence separate from that deemed to be inherent in the acts of sodomy and oral copulation.

Even assuming the court's reliance on this factor was misplaced, the court properly found multiple aggravating factors. Sentencing courts have wide discretion in weighing aggravating and mitigating factors, and may balance them qualitatively as well as quantitatively. In addition, one aggravating factor alone may warrant imposition of the upper term and the court need not state reasons for minimizing or disregarding mitigating circumstances.

4. Status As Peace Officer

Finally, appellant contends his status as a police officer was not reasonably related to his sentencing and therefore the court erroneously relied upon it as an aggravating circumstance under rule 4.408(a). In particular, he argues that the abuse he inflicted on the victim was in no way related to his employment as a police officer. Moreover, he argues that his status as a police officer did not make the offense against the victim "distinctively worse than it would ordinarily have been."

Appellant also notes that this case is factually distinguishable from Brown, where the defendant's status as a police officer was relied on as an aggravating factor in imposing the upper term on a firearm enhancement. In that case, the defendant shot a fellow officer with whom she was having an affair, and thereafter destroyed evidence. Brown stated that the trial court could properly have considered the unusual facts relating to the defendant—that the defendant was a police officer who used deadly force to solve a personal problem, caused serious injury, and thereafter destroyed evidence as an aggravating factor because peace officers are seen as having a duty to protect people, not unlawfully shoot an unarmed estranged lover. We agree with appellant that Brown is distinguishable from the instant case.

Again, assuming the court improperly relied on appellant's police officer status as an aggravating factor, the court properly found two aggravating factors and exercised its discretion in balancing them against a single mitigating factor. Appellant has failed to demonstrate that imposition of the upper term was an abuse of the court's discretion. Remand for resentencing is unnecessary since it is not reasonably probable that the court would have imposed a lesser term had it know that some of its reasons were improper.

B. Blakely v. Washington
In a supplemental brief filed pursuant to \textit{Blakely v. Washington}, appellant contends his sentence must be reversed because in imposing the upper term the trial court, and not the jury, made the findings on aggravating factors in violation of his rights to jury trial and due process. The People rejoin, in part, that appellant waived his challenge.

Under the California sentencing scheme the lower, middle and upper terms constitute a range of authorized punishments for a given crime; the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment. A defendant, such as appellant, who is convicted of continuous sexual abuse of a child under age 14, faces a maximum prison term of 16 years in prison that may be imposed “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” (\textit{Blakely v. Washington}.) As \textit{Blakely} explained, “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose based solely on the facts reflected in the jury verdict or admitted by the defendant.”

Disposition

The judgment is affirmed.

We concur. STEVENS, J.

JONES, P.J., Concurring and Dissenting.

I concur with the majority opinion in all respects, except its conclusion that imposition of the 16-year upper term was not unconstitutional. I conclude the case must be remanded for resentencing under compulsion of \textit{Blakely v. Washington}, for the reasons expressed in my dissent in \textit{People v. Picado}.

In short, \textit{Blakely} held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” It explained that the relevant “statutory maximum” is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Under California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term.

In this case, the trial court relied on a number of aggravating factors as the basis...
for imposing the upper term. Even if the vulnerable victim factor was based on evidence other than the victim's age, I believe that Blakely requires a jury finding of this factor. Similarly, the factors that appellant engaged in violent conduct indicating a serious danger to the community, and the crime involved great violence and the threat of bodily harm require a jury finding under Blakely. Finally, even assuming the evidence shows that appellant admitted his status as a police officer, I need not reach the question whether this is unrelated to the offense, as appellant contends, because I would remand the case to the trial court to weigh whether this factor alone is sufficient to support the upper term.

*United States v. Booker,* addressing the applicability of Blakely to the federal sentencing guidelines, does not alter my conclusion. Justice Breyer's majority opinion severed from the Federal Sentencing Act its provision that makes the guidelines mandatory. As a result, the guidelines are now effectively advisory; their use will not implicate the Sixth Amendment, leaving a federal court broad discretion to impose a sentence within the statutory range assigned to a particular offense. By the mandatory language of Penal Code section 1170, subdivision (b), a California court is required to impose the middle term, unless it makes factual findings different from, or in addition to, those inherent in the jury verdict.
The U.S. Supreme Court, aiming to clear up confusion about the rules for criminal sentencing, agreed to consider whether the systems in California and other states violate the constitutional guarantee of a jury trial.

The court today said it will review a California Supreme Court decision upholding that state's sentencing system, under which judges choose from three possible sentences for each crime. Lawyers for convicted child molester John Cunningham say the system lets judges decide issues that should go before a jury.

California is "continuing every day to violate the constitutional rights of countless criminal defendants facing sentencing in its courts," Cunningham argued in an appeal filed in Washington.

The dispute may affect thousands of criminal cases around the country. State courts are split on the meaning of two recent U.S. Supreme Court decisions, a 2005 ruling that invalidated aspects of the federal sentencing guidelines and a 2004 decision involving Washington state's system. At least seven states have since struck down parts of their own sentencing systems, while three have said theirs are constitutional.

The Supreme Court rulings say judges can't increase a maximum possible prison sentence based on their own factual conclusions, rather than the findings of a jury or admissions made by a defendant in a guilty plea.

California requires judges to choose from three possible sentences for each crime. Judges must select the middle term unless they find aggravating or mitigating circumstances. The law lays out a non-exclusive list of factors the judge should consider.

The law also says judges should consider those factors based on a preponderance of the evidence—an easier standard to meet than the beyond-a-reasonable-doubt test that applies in trials on guilt.

California Attorney General Bill Lockyer argued in a court filing that the system is sufficiently flexible to pass constitutional muster because judges aren't limited to the list of sentencing factors set out in the law. He argued that California judges have discretion, much as federal judges now do in the aftermath of the high court's decision last year.

California judges engage in "the same type of judicial fact-finding that traditionally has been part of the sentencing process," Lockyer argued, quoting from a California Supreme Court decision.

Cunningham was sentenced to 16 years, the longest possible term, for continuous sexual abuse of his son. A trial judge pointed to the victim's vulnerability, the especially violent nature of the crime and other so-called aggravating factors.

The case is Cunningham v. California, 05-6551.
Williams v. Overton

(05-7142)

Ruling Below: (Williams v. Overton, 136 Fed.Appx. 859 (6th Cir. 2005), cert granted 126 S.Ct. 1463 (Mem), 164 L.Ed.2d 246, 74 USLW 3499, 74 USLW 3503 [2006]).

Williams sued prison officials for rejecting his requests for surgery and a single-occupancy cell to accommodate his handicap. The United States District Court and the Court of Appeals for the Sixth Circuit dismissed his claims for failure to exhaust administrative remedies, as mandated by the Prisoner Litigation Reform Act, because the defendants named in the suit were not named in the administrative complaint.

Questions Presented: Whether the Prisoner Litigation Reform Act requires a prisoner to name a particular defendant in his or her administrative grievance in order to exhaust his or her administrative remedies as to that defendant and to preserve his or her right to sue them. Also, whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

Timothy WILLIAMS
Plaintiff, Appellant,

v.

William OVERTON, et al.,
Defendants, Appellees

United States Court of Appeals for the Sixth Circuit.

Decided June 22, 2005.

[Excerpt: some footnotes and citations omitted]

GIBBONS, Circuit Judge:

Plaintiff-Appellant Timothy Williams, an inmate in a Michigan Department of Corrections (MDOC) facility, filed a pro se § 1983 action against several employees of the MDOC. The district court dismissed Williams' case without prejudice based on a finding that Williams had failed to exhaust all of his administrative remedies as required by 42 U.S.C. § 1997e(a). Williams appeals that determination.

For the following reasons, we affirm the judgment of the district court.

I.

Williams is an inmate in the custody of the MDOC. Appellant has had "noninvoluting cavernous hemangiomas" in his right arm since birth. This condition creates the growth of tumors and results in disfigurement of his arm.
Denial of Surgery Claim

In March 2001, Williams submitted to surgery performed by Khawaja H. Ikram, D.O., to remove a hemangioma, primarily to relieve the pain accompanying his condition. Williams went to K. Nimr Ikram, D.O. in August 2001 and January 2002 for consultations. At both consultations, further surgery to remove hemangiomas and to straighten his wrist was discussed. On Dr. Ikram's referral, Williams went to see Raymond C. Noellert, M.D. in March 2002. Dr. Noellert concluded that surgery would be "a fairly extensive undertaking" and even in the best case scenario, he "would not expect much in the way of digital flexion over strength, with the hand largely functioning as a passive assist." Dr. Noellert discussed this opinion with Williams, and authorized the treatment because Williams "simply cannot stand the hand the way it is."

The Correctional Medical Services ("CMS") denied authorization of the surgery, stating that "functional return of hand is not a known result. Surgery would be cosmetic and dangerous." On March 26, 2002, this result was appealed on the grounds that the "request is for pain relief not to regain function." The request was again denied, due to the "hazards" of the surgery and the "probable futility of it." The result was again appealed on April 8, 2002 and the CMS decided to present the case at an upcoming medical meeting.

Williams completed a Prisoner/Parolee Grievance Form on June 17, 2002, complaining that he had requested medical follow-up care and had not been treated. Williams failed to specifically name any of the appellees in the Grievance. The Medical Services Advisory Committee upheld the non-approval. Williams appealed this decision through Steps II and III of the grievance process, but both appeals were denied.

Single-Occupancy Cell Accommodation Claim

On August 13, 2002, Williams requested, among other accommodations, placement in a "handicapped accessible single cell" to accommodate his condition. On August 22, 2002, he filed a Prisoner/Parolee Grievance Form against Warden Jamrog requesting the same accommodation. This request was denied. Williams appealed the denial of placement in a single cell through Steps II and III of the grievance process, but his appeals were denied because he was not eligible under prison regulations for placement in a single occupancy cell. Apparently, at some point Williams was placed in a single occupancy cell, but was later removed from the cell because Williams failed to provide medical documentation or other evidence that he qualified for single cell occupancy. After his removal, Williams filed a Grievance Form against Deputy Warden of Housing Klee and Supervisor Peterson. Williams unsuccessfully appealed the denial of these grievances through Steps II and III of the process.

District Court Opinion

Williams filed a pro se § 1983 action against various members of the MDOC—Appellees Jamrog, Klee, Markwell, Pass, Peterson and Overton—claiming that (1) he was denied the surgical procedure to remove the tumors in his hand, and (2) he was improperly denied placement in a single occupancy cell. Williams claimed a violation of the Americans with Disabilities Act, the Rehabilitation Act, and the Eighth and Fourteenth Amendments, seeking injunctive and monetary relief. In lieu of filing an
answer, defendants-appellees Jamrog, Markwell, Pass, Klee, Peterson and Overton filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) and a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(b). United States Magistrate Judge Virginia M. Morgan reviewed the case and issued a Report and Recommendation which recommended that the defendants' motions be granted. The magistrate judge reached the following conclusions: (1) the motion to dismiss should be granted because Williams failed to name any of the defendants specifically in his grievances filed regarding his medical claim, and thus had failed to exhaust his administrative remedies; (2) defendants were entitled to summary judgment due to the fact that Williams failed to present evidence to support his claim with regard to the medical procedure; (3) the defendants were entitled to qualified immunity on Williams' medical claim; (4) defendants should be granted summary judgment on Williams' accommodation claim due to the "total exhaustion" rule based on Williams' failure to exhaust his medical claim; (5) Williams failed to survive the summary judgment standard with respect to his accommodation claim pursuant to the ADA, the Rehabilitation Act, the Eighth or the Fourteenth Amendments; and (6) defendants were entitled to qualified immunity on Williams' accommodation claim.

The district court reviewed the Magistrate Judge's Report and Recommendation and dismissed the complaint for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a). The district court explicitly failed to address the remainder of the Magistrate Judge's analysis. Williams filed a timely appeal from the district court's order.

II. This court reviews de novo a district court's dismissal for failure to exhaust administrative remedies.

The district court held that Williams had failed to exhaust his administrative remedies because although he had filed a grievance and pursued the appropriate appeals with regard to the denial of his request for surgery, he failed to identify any of the defendants personally, and thus had failed to exhaust his claim with respect to those individuals as required by Curry. Applying the total exhaustion rule, the district court dismissed Williams' complaint in its entirety, despite the fact that he appears to have exhausted his administrative remedies with respect to the single-occupancy cell accommodation claim.

The Prison Litigation Reform Act requires prisoners who wish to file a civil rights action regarding the conditions of their confinement to exhaust all available administrative remedies prior to filing suit in federal court. The prisoner bears the burden of showing that all administrative remedies have been exhausted by attaching any decision demonstrating the "administrative disposition of his complaint." The prisoner must demonstrate that he has exhausted the administrative remedies with respect to each individual he intends to sue.

The exact statutory language of 42 U.S.C. § 1997e(a) states:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.
Until fairly recently, there had been a lack of clear consensus on whether the language of 42 U.S.C. § 1997e(a) compels total exhaustion. Recently, however, this court "definitively answer[ed]" the question of whether a prisoner's complaint containing both exhausted and unexhausted claims must be dismissed under the PLRA in the affirmative. Pursuant to this circuit's opinion in Jones Bey, it is now clear that total exhaustion is required in order for a prisoner to bring a civil rights action in this court.

Williams has failed to satisfy the requirement of total exhaustion under the PLRA, and thus, the district court's judgment must be affirmed. Williams did file a grievance based on the denial of medical treatment, and he appealed the grievance through Steps II and III of the grievance process, thus pursuing the claim through all stages of the process. However, the grievance failed to specifically name any of the appellees that Williams has named in his complaint. Because Williams has failed to exhaust his claims with respect to individual appellees, his complaint must be dismissed under the PLRA. See Burton, 321 F.3d at 574 ("[A] prisoner must administratively exhaust his or her claim as to each defendant associated with the claim.").

With respect to Williams' accommodation claim, Williams filed a grievance against specific individuals and appealed the grievance through Steps II and III of the process. Thus, it appears that Williams exhausted his administrative remedies on the accommodation claim, a conclusion not contested by the defendants-appellees. Despite Williams' apparent exhaustion of this issue, however, Jones Bey requires that the entire action be dismissed due to Williams' failure to exhaust his medical claims.

III.
For the foregoing reasons, we affirm the judgment of the district court.
Walton v. Bouchard

(05-7142)

Case Below: (Walton v. Bouchard, 136 Fed.Appx. 846 (6th Cir. 2005), cert granted 126 S.Ct. 1463 (Mem), 164 L.Ed.2d 246, 74 USLW 3499, 74 USLW 3503 [2006])

Walton sued prison officials for disciplining him in a racially discriminatory manner. The United States District Court and the Court of Appeals for the Sixth Circuit dismissed his claims for failure to exhaust administrative remedies, as mandated by the Prisoner Litigation Reform Act, because only one of the defendants named in the suit were named in the initial administrative complaint.

Questions Presented: Whether the Prisoner Litigation Reform Act requires a prisoner to name a particular defendant in his or her administrative grievance in order to exhaust his or her administrative remedies as to that defendant and to preserve his or her right to sue them. Also, whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

John H. WALTON,
Plaintiff, Appellant,
v.
Barbara BOUCHARD, et al.,
Defendants, Appellees

United States Court of Appeals
for the Sixth Circuit

Decided June 17, 2005

[Excerpt: some footnotes and citations omitted]

SUTTON, Circuit Judge:

John Walton, an inmate at the Alger Maximum Correctional Facility in Munising, Michigan, filed this § 1983 action claiming racial discrimination by several prison employees. The district court granted the employees' motions to dismiss on procedural, not substantive, grounds, determining that Walton did not exhaust his administrative remedies as to each defendant named in the suit in accordance with 42 U.S.C. § 1997e(a). On the basis of § 1997e(a) and this court's recent decision in Jones Bey v. Johnson, 407 F.3d 801 (6th Cir. 2005), we affirm.

I.

On July 17, 2001, the prison punished Walton for assaulting a prison officer by giving him a sanction referred to as an "upper slot restriction" for an indefinite period of time. Nearly a year later, in early April 2002, Walton, an African American,
filed a prison grievance charging Assistant Deputy Warden (ADW) Ron Bobo with racial discrimination for giving him the indefinite upper slot restriction. Walton claims that while white prisoners were given definite upper slot restrictions (30 or 60 days at most) for similar assaults, he was given an indefinite restriction. In support of his claim, he identified a white prisoner who had received a definite upper slot restriction for a similar infraction. In Step I of the prison's grievance process, he charged only Bobo with responsibility for the incident. The prison responded to his grievance by stating that ADW Ken Gearin had placed Walton on an indefinite upper slot restriction and that racial discrimination had nothing to do with Gearin's decision. Such restrictions, the prison explained, are imposed individually and one prisoner's restriction does not affect the discipline that another prisoner receives. Walton appealed his claim to Step II of the grievance process, restating his allegations from Step I and claiming racial discrimination on the part of "corrupt administration[ ] heads, warden, etc[ ] al[.]." Prisoner Grievance Appeal Form at Step II (contained in Walton Reply Br. at 14). The prison responded that Walton had failed to present any new evidence at Step II and that its Step I response adequately addressed Walton's allegations.

Walton appealed to Step III of the grievance process, the final level of appeal. In addition to restating his earlier allegations, he identified an additional white prisoner who was given a definite upper slot restriction for misconduct that allegedly paralleled Walton's misconduct. The prison denied the Step III appeal, stating that the responses in Steps I and II adequately addressed Walton's concerns.

Having obtained no relief in the grievance process, Walton filed this action under § 1983 and the Fourteenth Amendment against Warden Barbara Bouchard, ADW Gearin, ADW Bergh, prison employee Cathy Bauman, case manager Denise Gerth and ADW Bobo. In his request for relief, he asked the court to order the defendants to remove the upper slot restriction and to order each of the defendants to pay him up to $750,000 in compensatory and punitive damages.

At the time Walton filed this complaint, several district courts within this circuit had reached different conclusions about whether the Prison Litigation Reform Act (PLRA) required the dismissal of a prisoner's complaint if it contained both exhausted and unexhausted claims. The district court in this case sided with the total-exhaustion school of thought and dismissed Walton's complaint without prejudice for his failure to exhaust administrative remedies against each named defendant. Guided by our recent decision in Jones Bey, we now follow the same path and affirm.

II.
We give fresh review to a district court's dismissal of an action for failure to exhaust administrative remedies. Curry v. Scott, 249 F.3d 493, 503 (6th Cir. 2001). Exhaustion of administrative remedies is mandatory, we have said, "even if proceeding through the administrative system would be futile," and even if the defendant does not raise the defense. The inmate bears the burden of establishing that he has exhausted his administrative remedies.

Under the PLRA, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility
until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). In view of the exhaustion provision's reference to "action" and the PLRA's other reference to "claim," 42 U.S.C. § 1997e(c)(2), another panel of this court recently interpreted § 1997e(a) to "require[ ] a complete dismissal of a prisoner's complaint when that prisoner alleges both exhausted and unexhausted claims."

We also have previously held that a prisoner must "file a grievance against the person he ultimately seeks to sue." Curry, 249 F.3d at 505. Such a requirement is consistent with the aims of the PLRA as it gives the prison administrative system "a chance to deal with claims against prison personnel before those complaints reach federal court." And not only must the prisoner file a grievance with regard to each defendant, he "must administratively exhaust his ... claim as to each defendant associated with the claim." Burton, 321 F.3d at 574. In order to exhaust "a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the [Michigan Department of Corrections] grievance process." ("By negative implication, we understand these [Michigan] policies to preclude administrative exhaustion of a claim against a prison official if the first allegation of mistreatment or misconduct on the part of that official is made at Step II or Step III of the grievance process.").

Walton has not satisfied these requirements. He named only ADW Bobo in Step I of his grievance process, and under our precedent that is the only claim that we may consider exhausted. His claims as to all other defendants remain unexhausted and accordingly the district court properly dismissed the entire complaint under Jones Bey's total-exhaustion requirement.

In his pro se brief on appeal, Walton argues that by mentioning "corrupt administration[ ] heads, warden, et[ ] al[.]"] during the grievance process, he gave any unnamed party notice of the allegations because the prison at that point could have determined which prison employees were involved in the incident. But Walton's reference to "corrupt administration[ ] heads, warden, et[ ] al[.]"] came at Step II of the process, not Step I—the step at which a prisoner generally must name each defendant. And in response to his Step I grievance, the prison gave Walton all of the information that he needed to comply with this requirement. Far from leaving Walton in the dark as to which prison officials were responsible for his alleged mistreatment, the prison told him that ADW Gearin gave him the upper slot restriction. At that point, Walton was armed with all of the information that he needed to file a Step I grievance against ADW Gearin—and a federal complaint against Gearin once the claim had been exhausted—but he simply chose not to follow this route. Even if we took the view, moreover, that the prison's acknowledgment that ADW Gearin was responsible for Walton's upper slot restriction establishes that Walton adequately exhausted his claim against Gearin, it would not establish that Walton exhausted his claims against the other defendants by identifying them by name or position in Step I of the grievance process.

III.

For these reasons, we affirm the district court's dismissal of Walton's complaint without prejudice.
Jones v. Bock

(05-7058)

Case Below: (Jones v. Bock, 135 Fed.Appx. 837 (6th Cir. 2005), cert granted 126 S.Ct. 1462 (Mem), 164 L.Ed.2d 246, 74 USLW 3499, 74 USLW 3503 [2006]).

Jones sued prison officials for ignoring his medical needs. The United States District Court and the Court of Appeals for the Sixth Circuit dismissed all his claims for failure to exhaust administrative remedies, as mandated by the Prisoner Litigation Reform Act, because some of his claims were not exhausted.

Questions Presented: Whether the Total Exhaustion Rule is an affirmative defense, or a bar to suit. Also, whether failure to exhaust one claim, when other claims are exhausted, should result in dismissal.

Lorenzo L. JONES,
Plaintiff, Appellant,
v.
Barbara BOCK, Warden, et al.,
Defendants, Appellees

United States Court of Appeals
for the Sixth Circuit

Decided June 15, 2005

[Excerpt: some footnotes and citations omitted]

PER CURIAM:

Plaintiff-Appellant Lorenzo Jones appeals a district court order dismissing his action brought pursuant to 42 U.S.C. § 1983 for violations of the First, Eighth, and Fourteenth Amendments of the United States Constitution. For the reasons that follow, we AFFIRM the judgment of the district court.

I. BACKGROUND
On November 14, 2000, Plaintiff-Appellant Lorenzo Jones sustained serious injuries from a motor vehicle accident while he was in custody of the Michigan Department of Corrections. Jones alleges that after the accident, various prison officials required him to complete tasks which aggravated his injuries. He argues, inter alia, that this action constituted deliberate indifference to his serious medical needs in violation of the Eighth Amendment of the United States Constitution. The defendants sought dismissal of the complaint based on Jones's failure to exhaust administrative remedies as required by the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), codified at various
sections of 28 and 42 U.S.C. The district court granted the motion. This appeal followed.

II. ANALYSIS
The district court did not err in dismissing the claims against the prison officials based on Jones's failure to exhaust his administrative remedies. The PLRA requires plaintiffs to exhaust all administrative remedies before bringing an action in federal court regarding prison conditions. This Circuit follows the "total exhaustion" rule, meaning that we must dismiss a complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims. See *Bey v. Johnson*, 407 F.3d 801, 806 (6th Cir. 2005) ("We now join the Tenth and Eighth Circuits in holding that total exhaustion is required under the PLRA."). An action is one regarding prison conditions where it arises under federal law and concerns, inter alia, the "effects of actions by government officials on the lives of persons confined in prison."

This Court has held that in order to meet the exhaustion requirement of the PLRA, a prisoner must either attach a copy of his prison grievance forms to the complaint or state the nature of the remedies pursued and the result of each process. Jones stated in his complaint that he had exhausted his administrative remedies. However, he neither attached the grievance forms to his complaint nor described the remedies he pursued and the outcome. The fact that the defendant Later provided evidence that Jones may have exhausted some of his claims is irrelevant under the PLRA and Sixth Circuit precedent. Furthermore, even if Jones had shown he had exhausted some of his claims, the district court properly dismissed the complaint because Jones did not show that he had exhausted all of his claims. Accordingly, Jones's prison-conditions claim was properly dismissed as he did not comply with the exhaustion requirement, as defined by this Court's precedent.

III. CONCLUSION

For the preceding reasons, we AFFIRM the judgment of the district court.
The Supreme Court agreed Monday to clarify when inmates can file civil rights lawsuits contesting prison conditions.

Justices will review the cases of three Michigan inmates whose lawsuits were dismissed because they had failed to complete administrative grievance processes or did not name every prison official they later tried to sue over prison conditions.

Under the Prison Litigation Reform Act of 1995, Congress sought to limit lawsuits filed by inmates over conditions of their confinement, including such issues as the quality of medical care and prison food.

The law requires federal judges to ensure that inmates have completed a prison's internal complaint process before allowing a civil rights lawsuit to go forward.

Civil rights lawsuits filed by the three Michigan inmates Lorenzo Jones, Timothy Williams and John Walton were dismissed because the lower courts found the prisoners had failed in one way or another to follow the grievance procedures to the letter.

Jones, who suffered serious back injuries in a car accident while he was in prison custody, sued because he was assigned a job that required him to do physical labor.

Williams filed suit because he was denied surgery on his right arm and hand to remove disfiguring tumors.

Walton, who is black, alleged he was the victim of racial discrimination because he received more severe discipline for assaulting a corrections officer than white inmates he said had committed similar acts.

The cases will be consolidated for argument during the court's next term, which begins in October.

The cases are Jones v. Bock, 05-7058, and Williams v. Overton and Walton v. Bouchard, 05-7142.
Lawrence v. Florida
(05-8820)

Case Below: (Lawrence v. Florida, 421 F.3d 1221 (11th Cir. 2005), cert granted 126 S.Ct. 1625 (Mem), 164 L.Ed.2d 332, 74 USLW 3539, 74 USLW 3542 [2006]).

Lawrence was sentenced to death in Florida State Court for capital murder. The United States District Court and the Court of Appeals for the Eleventh Circuit denied his petition for a writ of habeas corpus as untimely under the Antiterrorism and Effective Death Penalty Act.

Questions Presented: Where a defendant facing death has pending a U.S. Supreme Court certiorari petition to review the validity of the state's denial of his claims for state post-conviction relief, does the defendant's application toll the 2244(d)(2) statute of limitations? Alternatively, does the confusion around the statute of limitations—as evidenced by the split in the circuits—constitute an "extraordinary circumstance," entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the U.S. Supreme Court on certiorari?

Also, do the special circumstance where counsel advising the defendant as to the statute of limitations was registry counsel—a species of state actor—under the monitoring supervision of Florida Courts, with a statutory duty to file appropriate motions in a timely manner, constitute an "extraordinary circumstance" beyond the defendant's control such that the doctrine of equitable tolling should operate to save his petition?

Gary LAWRENCE,
Petitioner, Appellant,
V.
State of FLORIDA,
Respondent, Appellee

United States Court of Appeals
for the Eleventh Circuit
Aug 26, 2005

[Excerpt: some citations and footnotes omitted]

DUBINA, Circuit Judge:

This is a death penalty case in which the Certificate of Appealability ("COA") presents only one issue for our review: whether the one-year limitations period of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), bars petitioner Gary Lawrence's habeas petition. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we agree with the district court that Lawrence's petition was untimely. Accordingly, we affirm the district court's order.

BACKGROUND
In March 1995, a Florida jury convicted
Lawrence of one count each of premeditated murder in the first degree, conspiracy to commit murder, petit theft, and grand theft of a motor vehicle. The jury recommended a death sentence based on the murder conviction, and the trial court followed the jury's recommendation and imposed a death sentence. The Florida Supreme Court summarized the facts of the murder as follows:

Shortly after Gary and Brenda Lawrence were married, they separated, and another man, Michael Finken, moved in with Brenda and her two daughters, Stephanie and Kimberly Pitts, and Stephanie's friend, Rachel Matin. On the day of the murder, July 28, 1994, Gary and Michael drove Brenda to work and then drank beer at a friend's house. Later, Gary and Michael picked Brenda up and the three returned to the friend's house where they drank more beer. After the three returned to Brenda's apartment, Gary and Michael argued and Gary hit Michael when he learned that Michael had been sleeping with Brenda. Gary and Michael seemed to resolve their differences, and Michael fell asleep on the couch. Gary and Brenda conversed, and Brenda went through the house collecting weapons—including a pipe and a baseball bat. Gary and Brenda told Kimberly and Rachel that they were "going to knock off Mike." Gary told Kimberly to "stay in your bedroom no matter what you hear."

The trial court described what happened after Gary and Brenda spoke to the girls: Thereafter, the two girls heard what they described as a pounding sound. At one point, Rachel Matin stated that she heard the victim say, "stop it, if you stop, I'll leave." She stated that she heard that statement several times. Kimberly Pitts stated she heard the victim say, "please don't hit me, I'm already bleeding." The victim's pleas, however, were met with more pounding. Once the pounding stopped, the girls were required to assist in the clean up and described to the jury what they observed. Kimberly stated that much of the victim's right side of his face was missing and his chin was knocked over to his ear. Rachel Matin stated that there was no skin left on the victim's face and part of his nose was missing. Apparently the victim was still alive. Kimberly observed her mother coming out of the kitchen area with what appeared to be a dagger and then, although not seeing the dagger in her hand at the time, observed her mother make a stabbing motion toward the victim with something in her hand.

It was at that time when Brenda Lawrence requested that the girls obtain the assistance of Chris Wetherbee. Upon his entrance into the home, Chris Wetherbee observed the victim's head being caved in, blood all over, the victim's eyeball protruding approximately three inches and a mop handle shoved into the victim's throat. Wetherbee asked Gary Lawrence, "what's going on?" At which time the Defendant responded by pulling out the mop handle and kicking the victim and making the statement "this is what's going on." Immediately after removing the mop handle from the victim's throat, Wetherbee heard the victim give approximately three or four ragged breaths at which time the victim thereafter stopped breathing and apparently expired. The Defendant, Gary Lawrence, told Wetherbee that he had beat him with a pipe until it bent and then beat him with a baseball bat.

Chris Wetherbee summarized the victim's state: "And [he] looked like something off of one of the real good horror movies." Gary and Brenda then removed a small amount of
money from Michael's pockets, wrapped the body in a shower curtain and placed the body in Michael's car, and Gary drove to a secluded area where he set the body afire. When Gary returned home, he and Brenda danced.

The Florida Supreme Court affirmed Lawrence's conviction and sentence. The United States Supreme Court denied certiorari review on January 20, 1998. Lawrence sought state post-conviction relief, and the trial court denied the petition on October 11, 2000. The Florida Supreme Court affirmed the trial court's denial of state post-conviction relief. The United States Supreme Court denied certiorari review of the Florida Supreme Court's denial of post-conviction relief.

Lawrence then moved to federal court seeking habeas relief pursuant to 28 U.S.C. § 2254. The filing of his March 11, 2003, federal pro se petition sparked an unusual procedural journey. After filing an amended habeas petition, the State responded that the district court should dismiss the petition because Lawrence was time-barred from obtaining federal habeas relief on either the original petition or the amended petition. The State also argued that equitable tolling should not apply in Lawrence's case. Lawrence opposed the dismissal on the basis that there was a disagreement among the courts of appeal on the question whether a petition for certiorari to the U.S. Supreme Court following the denial of state post-conviction relief tolls the limitation period. Lawrence sought to invoke the doctrine of equitable tolling on the grounds that it was appropriate because (1) counsel who advised him of the timing of his petition was selected by and pre-qualified by the State of Florida under its registry statute; (2) his mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim.

On April 12, 2004, the district court entered an order staying the proceedings. The court determined that whether Lawrence's petition was time-barred "depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review." The court noted that there was a circuit split on the issue, although Eleventh Circuit precedent clearly stated that the limitations period was not tolled during the pendency of a petition for certiorari challenging the state court's denial of post-conviction relief. On the question of equitable tolling, the district court found that Lawrence had not met the prerequisites to equitable tolling. However, in light of the pending certiorari petition in Abela v. Martin, which held contrary to this circuit's decision in Coates, the district court entered an order staying the proceedings. The district court noted that if the Supreme Court denied review in Abela, then it would dismiss Lawrence's petition based on Coates.

Subsequently, on May 27, 2004, after the Supreme Court denied review in Caruso v. Abela, the district court noted in an order that Lawrence's petition was time-barred based on Coates. However, the court did not enter an order dismissing the petition because the State had lodged an appeal from the district court's stay order. After this court dismissed the State's appeal from the stay order for lack of jurisdiction, the district court entered the order dismissing the petition. Lawrence filed a motion for a COA, which the district court granted. The
district court set forth the issue in the COA as "whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. § 2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review."

DISCUSSION
The only issue presented in the COA is whether the one-year limitations period under AEDPA bars Lawrence's habeas petition. After needless delay, the district court determined that Lawrence's petition was untimely. "The district court's interpretation and application of a statute of limitations is a question of law that is subject to de novo review." We also review de novo the district court's legal decision on equitable tolling. However, we will reverse the district court's factual determinations only if they are clearly erroneous. The district court's finding whether a party was diligent in ascertaining the federal habeas filing deadline is a finding of fact.

We begin our discussion by setting forth the limited circumstance under which a court may issue a COA. The right to appeal is governed by the COA requirements set forth in 28 U.S.C. § 2253(c):

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Under this limited provision, if a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claims, a COA should issue only if the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." "Both showings must be made before the court of appeals may entertain the appeal." If the procedural bar is obvious and the district court correctly invoked it to dispose of the case, "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." The court may first resolve the issue whose answer is more apparent from the record and the arguments. "The recognition that the court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of, allows and encourages the court to first resolve procedural issues."

Because of the statutory constraint in issuing a COA, we are puzzled by the district court's issuance of a COA in this case. The district court should not have issued a COA on the statute of limitations issue because binding circuit precedent clearly disposed of the issue. "[T]he time during which a petition
for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes." On that basis, jurists of reason would not find the timeliness issue debatable in this circuit. Thus, a COA should not have issued.

However, the district court did issue a COA on the statute of limitations issue. Although the COA does not specifically state that the exceptions to the statute of limitations—State impediment and equitable tolling—are included within the COA, Lawrence contends that these exceptions are subsumed within the COA and properly before this court for consideration. We agree. To decide whether the statute of limitations bars Lawrence's federal habeas petition, we must consider whether a State impediment or equitable tolling excepts the one-year filing deadline. If Lawrence can demonstrate that a State impediment prevented him from timely filing or that equitable tolling applies to his case, then his petition is timely.

Lawrence contends that 28 U.S.C. § 2244(d)(1)(B) applies to his case because the State caused an impediment to his timely filing by providing him with an incompetent attorney through the Florida counsel registry system. It is not clear, however, that Lawrence asserted a § 2244(d)(1)(B) impediment to the district court. We generally do not consider an issue that was not raised in the district court. Assuming Lawrence presented this issue to the district court, we conclude that Lawrence's assertion that the State impedied him from timely filing by providing an incompetent attorney to assist him after setting up a State registry system to monitor attorney performance, is meritless. This is not the type of State impediment envisioned in § 2244(d)(1)(B).

Additionally, Lawrence cannot show that there are extraordinary circumstances present in his case to warrant the application of equitable tolling. "Equitable tolling is an extraordinary remedy which is typically applied sparingly." It is available "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Equitable tolling is limited to rare and exceptional circumstances, such as when the State's conduct prevents the petitioner from timely filing.

Making the most of a novel argument, Lawrence posits that the State's provision to him of an incompetent attorney justifies the imposition of equitable tolling. This is not an extraordinary circumstance that warrants the application of equitable tolling. Moreover, we have stated on numerous occasions that "attorney negligence is not a basis for equitable tolling, especially when the petitioner cannot establish his own diligence in ascertaining the federal habeas filing deadline."

Lawrence also contends that his mental incapacity prevented him from timely filing and justifies the invocation of equitable tolling. However, Lawrence cannot establish a causal connection between his alleged mental incapacity and his ability to file a timely petition. Lawrence admits in his appellate brief that medical reports state that his full scale IQ is 81, and he admits that he did not make the assertion that he was mentally incompetent per se. Instead, Lawrence claims that his initial pleading made it clear that he has suffered from mental impairments his entire life. However, this contention, without more, is insufficient to justify equitable tolling.
CONCLUSION
For the above stated reasons, we affirm the district court's order dismissing Lawrence's habeas petition as untimely.

AFFIRMED.
Congress established the Anti-Terrorism and Effective Death Penalty Act in 1996 after the Oklahoma City bombings, in part to fund anti-terrorism efforts but also with an eye on victims’ rights in limiting the appeals process open to death-row inmates.

The Act significantly hampers death row inmates’ ability to apply for habeas relief, a written petition stating the prisoner has been wrongly imprisoned.

The AEDPA bars federal courts from considering any petition for habeas corpus unless the state court has “unreasonably” interpreted some portion of the constitution in finding the prisoner guilty.

The Act seeks to ensure “justice for victims and an effective death penalty,” according to the text of the bill. It carries a one-year statute of limitations on habeas appeals in federal court.

Eleven years after his murder conviction and on his third try, Gary Lawrence, a Florida man, will have his case heard by the U.S. Supreme Court on the statute of limitations question.

On July 28, 1994, Lawrence bludgeoned Michael Finken to death with a pipe and baseball bat before setting his body ablaze in Santa Rosa County, Florida.

Lawrence was seeking revenge on the sleeping man for having an affair with his estranged wife. Lawrence’s two young daughters witnessed the gruesome murder. A jury convicted Lawrence of first-degree murder in March 1995 and recommended the death penalty. The Florida Supreme Court affirmed the sentence in August 1997.

After unsuccessfully appealing his sentence twice, on March 11, 2003, Lawrence sought habeas relief in federal court, but lawyers for the state argued that his claim should be dismissed because he had already exceeded the time limit on both his original and amended petition based on the AEDPA provision.

Lawrence argued that equitable tolling, or a suspension of the petition’s time limitation, should apply in his case because his state-appointed counsel decided when to file the petition. Lawrence said that even though he exceeded the time limit in the AEDPA, the state itself should be held accountable.

Not only did Lawrence argue that his attorney, John Miller, did not meet his duties as effective counsel but their relationship was also encumbered by the convicted murderer’s mental deficiencies which prevented him from fully communicating with Miller.

On May 27, 2004, the district court noted that Lawrence’s petition for habeas relief was indeed invalidated by exceeded the allotted time but issued him a certificate of appealability. Lawrence appealed to the 11th Circuit Court of Appeals.

On Aug. 26, 2005, the 11th Circuit said it
only grants equitable tolling for “extraordinary circumstances that are both beyond (petitioner’s) control and unavoidable even with diligence.” According to the court, Lawrence did not meet these criteria, despite his assertion that the state granted him an incompetent attorney.

The 11th Circuit stated that Lawrence could demonstrate no causal relationship between his mental shortcomings and his ability to file a timely petition, and thus his claim was invalidated. The appeals court stated further that the district court was wrong to grant him a certificate of appealability, but acknowledged a disparity among the federal circuits in how the time limit is applied.

Lawrence appealed and on March 27, 2006, the U.S. Supreme Court accepted the case for review and allowed Lawrence to have his case heard without cost.

One of the issues to be considered by the Court is from what date, exactly, the one-year statute of limitations for death penalty appeals should derive. The Court is being asked to decide whether it should begin when the court of appeals affirms the District Court's conviction and sentence, or from the deadline for filing a petition with the U.S. Supreme Court.

The Act allows for one year for federal appeals and any additional time the case may be pending on state post conviction review, but Lawrence is asking the Supreme Court to decide whether this means only the time pending in state court or includes the time the convicted murderer asked the Supreme Court to take the case, according to Kent Scheidegger, Legal Director of the California-based Criminal Justice Legal Foundation.

Scheidegger said that before the Act’s introduction in 1996 the appeals process took about 12 years from the time of sentencing to execution and that the process still takes about 12 years today. He said, however, that the appeals process was “steadily increasing” before the Act took effect, so at the least it has stopped the process from becoming ever-lengthier.

The Act states that this “reform will help avoid the waste of state and federal resources that now result when a prisoner presenting a hopeless petition to a federal court is sent back to the state courts to exhaust state remedies.”

“As a whole the act has caused the time to level off and stop increasing but has not decreased as much as proponents would like,” Scheidegger said.
A Florida man has been sentenced to die in the electric chair for torturing and fatally beating his wife's lover, a Council Bluffs man who was planning to return to Iowa the next day.

Circuit Judge Paul Rasmussen cited the "torturous process" used to kill Michael Dean Finken, 37, as an aggravating factor to justify the death sentence Friday of Gary Lawrence, 37, of Milton, Fla.

Finken's father, Francis Finken of Council Bluffs, said he wired $200 to his son the day he was killed. "He was coming back home, supposed to leave the next day," the elder Finken said.

Lawrence beat Finken with an aluminum baseball bat at the Lawrences' home and rammed a mop handle down the victim's throat. His body was burned beyond recognition and left on a nearby country road where it was found last July 29.

Lawrence's wife, Brenda, 34, was sentenced last week to life in prison after she was convicted of being a principal to murder.

The Lawrences made their children get rid of the weapons used to torture and kill Finken, his father said.

Finken's brother Rick, also of Council Bluffs, said his brother had been living with a woman in Billings, Mont., and had a 6-year-old daughter, Maria. He returned last year to Council Bluffs for a few months.

A cousin who was a carpenter visited the family in Council Bluffs. After the visit, Michael Finken gave the cousin a ride to his home in Florida and "just stayed on for a while," Rick Finken said.

Finken was killed when Lawrence discovered he had been sleeping with his wife. "They all went out and got drunk that day," Francis Finken said.

Michael Finken held a variety of jobs, including working for a lawn service and doing carpentry odd jobs and small roofing jobs, his brother said. "He was kind of a jack of all trades." He attended Abraham Lincoln High School and obtained a high school equivalency certificate through the school, Rick Finken said.