Schriro v. Landrigan

Jeffrey Landrigan claims that his attorney rendered constitutionally ineffective assistance by failing to present mitigation evidence at his capital sentencing. He now asks the courts to grant him an evidentiary hearing and an opportunity to develop a factual record in support of this claim. The Arizona state courts denied this request on the grounds that Landrigan had waived his rights by ordering his attorney not to present such evidence, but the Ninth Circuit reversed.


The First Amendment protects nonunion employees from having to fund political activities not germane to the labor union’s general workplace duties. Most unions have procedures by which nonmembers can “opt out” of agreeing to fund such union activity. The state of Washington, however, established an “opt-in” system that required unions to obtain affirmative assent from nonmembers before using their funds for political expression. Now the Supreme Court of Washington has ruled that this law infringes on the First Amendment rights of the union.

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The 2006-2007 volume is Volume # 34, the 1972–1973 term, the first term that the ABA published PREVIEW, being identified retroactively as Volume #1.

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ISSN 0363-0048

A one-year subscription to PREVIEW of U.S. Supreme Court Cases consists of seven issues, mailed September through April, that concisely and clearly analyze all cases given plenary review by the Court during the present Term. A special eighth issue offers a perspective on the newly complete Term.

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In 1994, the Supreme Court struck down as unconstitutional a town’s flow-control law that required all solid waste originating in the town to be disposed at a local transfer station because it violated the Commerce Clause. The Court concluded that the town law discriminated against interstate commerce because it prohibited out-of-state disposal facilities from competing for the waste. Now the Second Circuit has ruled that when the designated disposal facilities are government owned, a town’s flow-control laws must be considered under a more lenient balancing test.

Stephen D. Mossman is a partner in the Lincoln, Nebraska, law firm of Mattson, Ricketts, Davies, Stewart and Calkins and is presently the chair of the American Bar Association’s Waste Management Committee. He has represented parties in reported cases involving the flow control of solid waste as well as reported dormant commerce clause cases in the areas of water and corporate farming restrictions. Mossman practices in the areas of natural resources, agricultural, solid waste, environmental, water and constitutional law. He can be reached at sdm@mattsonricketts.com or (402) 475-8433.

**FACTS**

In 1988, the New York state legislature created the Oneida-Herkimer Solid Waste Management Authority (the Authority), the respondent in this long-running dispute. In the same year, New York passed the Solid Waste Management Act, which created a hierarchy of waste management methods in New York.

The next year, the Authority began entering into contracts to purchase, operate, construct, and develop facilities for solid-waste management. The challenged provisions, which required the delivery of all solid waste generated within the county borders to facilities designated by the Authority, were passed by Oneida County in December 1989 and Herkimer County in February 1990. The Authority required all solid waste generated in the two counties, with the exception of recyclables and waste incinerated at the Authority’s incinerator, to be delivered to the Utica Transfer

**ISSUES**

Is the per se prohibition against hoarding solid waste recognized in *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), applicable when the preferred processing facility is owned by a public entity?

Even if viewed as nondiscriminatory, does the flow-control ordinance at issue in this case violate the Commerce Clause under the test articulated in *Pike v. Bruce Church*, 397 U.S. 137 (1970)?
Station, a facility built under contract with the Authority. The solid waste was then ultimately disposed of in a landfill, also under contract with the Authority.

This suit originally commenced in 1995 when six solid-waste haulers and a trade association, United Haulers, filed suit in federal district court against both counties and the Authority. The suit alleged that the Authority’s flow-control laws violated the dormant Commerce Clause under the Supreme Court’s Carbone decision. The district court agreed, finding for the plaintiffs in their motion for summary judgment that:

These flow control laws are virtually indistinguishable from the laws examined and struck down in both Carbone and SSC Corp. … As the Second Circuit recently summarized those holdings, “the ordinances in Carbone and SSC Corp. were found to be discriminatory because they required all waste within the town to be disposed of at the one favored local facility, to the exclusion of out-of-state competitors.” … Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause…. Consequently, I find based on undisputed facts that the flow control laws are unconstitutional because they discriminate against interstate commerce.

The First Appeal: Second Circuit
On appeal, the Second Circuit reversed the district court’s grant of summary judgment in favor of the haulers. The appellate court found that the “district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility.” United Haulers v. Oneida-Herkimer Solid Waste Management Authority, 261 F.3d 245 (2nd Cir. 2001). The court held, “[A] municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities. As such, the District Court should have analyzed the Counties’ flow control laws under the Pike test to determine whether the laws’ effects on interstate commerce substantially outweigh the local benefits.” The Second Circuit based its conclusion, in part, on its reading of the concurring and dissenting opinions from Carbone and what it described as the Supreme Court’s silence on the public/private distinction. The Second Circuit also analyzed other U.S. Supreme Court local processing cases as well as flow-control cases decided by lower courts. The court concluded that it found precedent for making the public/private distinction in:

(1) the consistent underlying facts of the local processing line of cases, a line in which the majority squarely placed Carbone, and (2) the opinions of four Supreme Court Justices, all of whom characterized the facility in Carbone as publicly owned, and therefore would have analyzed the challenged ordinance under the more lenient Pike test.

The Second Circuit admitted that it was tempted to apply the balancing test from Pike to the facts before it but instead remanded the case to the district court to conduct the analysis. United Haulers’ first writ of certiorari was denied by the U.S. Supreme Court in 2002.

On remand, the parties conducted extensive discovery and filed cross-motions for summary judgment. The district court found that the “challenged laws do not treat similarly situated in-state and out-of-state business interests differently” and did not impose any cognizable burden on interstate commerce. The district court granted the Authority’s motion for summary judgment and found the ordinances constitutional without even applying the Pike balancing test.

The Second Appeal: Second Circuit
On appeal after remand, the Second Circuit first noted a distinction between a state’s actions in regulating commercial activity, which are limited by the dormant Commerce Clause, and its actions as a participant in the marketplace, which are not. United Haulers v. Oneida-Herkimer Solid Waste Management Authority, 438 F.3d 150, 157 (2nd Cir. 2006). With respect to the ordinances being an export barrier because they prohibit articles of commerce generated within the counties from crossing intrastate or interstate lines, the court affirmed its decision in United Haulers I, holding that:

The Counties’ flow control ordinances do not discriminate against interstate commerce because no private entity, whether local or non-local, has been disadvantaged vis-a-vis any other by the creation of the Authority’s monopoly in waste processing.

The Second Circuit then applied the balancing test from Pike. The court reiterated its earlier holding that a municipality may impose a public monopoly on the activities of waste collection, processing, and disposal. When doing so, the Second Circuit found that a local government imposes only a limited burden on interstate commerce. Applying the Pike test, the Second Circuit concluded that “the local benefits of the flow control measures substantially outweigh whatever modest differential burden they may place on interstate commerce.”

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In January 2006, the U.S. Court of Appeals for the Sixth Circuit affirmed a federal district court ruling that a Kentucky county’s flow-control law was unconstitutional under the Commerce Clause, specifically rejecting the public/private distinction recognized by the Second Circuit’s “surprising decision” in United Haulers. In Natl. Solid Wastes Mgmt. Ass’n v. Daviess County, 434 F.3d 898 (6th Cir. 2006), the Sixth Circuit firmly stated it “respectfully disagrees with the Second Circuit on the proposition that Carbone lends support for the public-private distinction drawn by that court.”

To resolve this split between the Second and Sixth Circuits, the U.S. Supreme Court granted United Haulers’ petition for a writ of certiorari on September 26, 2006.

**Case Analysis**

United Haulers and its amici, including the National Solid Waste Management Association, American Trucking Associations, Inc., National Association of Manufacturers, and two Virginia counties, have clearly characterized the Second Circuit’s decision as an attempt to roll back the Court’s opinion in Carbone. In particular, United Haulers argues that simply because public entities hold title to a facility, they should not be able to avoid the holding in Carbone that ordinances discriminatory against interstate commerce are per se invalid. United Haulers argues that there is no distinction between the Authority’s ordinances and those at issue in Carbone, indeed arguing that the Authority has adopted a “virtually identical flow control ordinance.” Further, United Haulers posits that the ordinances at issue have the same protectionist effect: forcing commercial haulers to purchase high-priced processing and disposal services from favored in-state facilities rather than less costly out-of-state facilities.

With respect to the public-private distinction, the petitioners argue that finding such a distinction in Carbone was meaningless in that the facility at issue was publicly owned in all but the most formal sense. In addition, United Haulers believes that state and local laws have been repeatedly found to be protectionist and that local governments should not be allowed to shield their activities in the marketplace from interstate competition.

Finally, United Haulers argues that even if the Court were to find that a public-private distinction makes the ordinances nondiscriminatory, the ordinances still fail the Pike balancing test. Relying in part on Justice O’Connor’s concurrence in Carbone, United Haulers contends that the burden on interstate commerce is clearly excessive in comparison to local interest.

Oneida-Herkimer, backed by a long list of amici, including many regional solid waste authorities, 28 states, groups representing all levels of local government, a few local solid-waste haulers, and an environmental group, argues that its flow-control scheme is a public system in which local government has assumed all responsibility for waste management. Relying on Oregon Waste Systems v. Dep’t of Envtl. Quality, 511 U.S. 93 (1994), the Authority maintains that Commerce Clause discrimination only occurs if there is differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. In this case, Oneida-Herkimer maintains, there is no discrimination because the ordinances treat in-state and out-of-state waste providers the same and do not favor local private business interests. In particular, Oneida-Herkimer draws a distinction from Carbone by arguing that the ordinances at issue in that case designated a private facility. In this case, the Authority posits that no local enterprise is favored because the designated facility is municipally owned.

Even if the Court finds that the ordinances have some incidental effect on interstate commerce, Oneida-Herkimer argues that the ordinances pass the Pike balancing test based on its substantial local benefits. The Authority maintains that three public purposes are served by the ordinances. First, the ordinances place the disposal decisions in public hands, ensuring environmental compliance. Second, the ordinances allow the Authority to reduce waste and maximize recycling. Third, the ordinances allow the Authority to manage waste in an integrated fashion. Citing historical roots to the public management of waste, Oneida-Herkimer draws a distinction between the regulations at issue in this case and those in Carbone, arguing that the ordinances adopted by Clarkstown in the Carbone case had solely a monetary goal.

Finally, the Authority argues that since all waste collectors are treated the same, the flow-control ordinances are not unconstitutional.

**Significance**

In 1995, the same circuit court that decided United Haulers remarked that the federal docket was “clogged with—of all things—garbage.” SSC Corp. v. Town of Smithtown, 66 F.3d 502, 505 (2nd Cir. 1995). Since Carbone, a large number of courts have struck down solid waste flow-control ordinances in reliance on the per se invalidity of such ordinances under the Court’s Commerce Clause analysis. Indeed, the district court in this
case originally noted that courts have considered it almost a foregone conclusion that flow-control laws violate the dormant Commerce Clause. This foregone conclusion no longer rings true, at least in the Second Circuit.

If the Court agrees with the Second Circuit that there is a crucial distinction between public and private ownership of designated facilities, it could be expected that the federal docket will again be clogged with garbage cases. Indeed, United Haulers argues that principles of stare decisis control the case and that the Second Circuit’s decision cannot be affirmed without overruling Carbone.

The per se invalidity tests articulated in Carbone and the Pike test are light years apart. In particular, the burden shifts from the municipality having to show that it has no other means to advance a legitimate local interest under Carbone to the challengers having to show that the burdens on interstate commerce exceed the putative local benefits under Pike. Adoption of the Second Circuit’s reasoning in United Haulers would be a sea change in the burden of proof in flow-control cases.

The distinction between public and private ownership of solid waste facilities is not merely an academic one. The amicus brief authored by Natl. Solid Wastes Mgmt. Ass’n and others states that more than 60 percent of the nation’s waste facilities are owned by public entities. If the public/private distinction is endorsed by the Court, it would be expected that decisions in many of the federal circuit courts that either explicitly [Natl Solid Wastes Mgmt. Ass’n (NSWMA) v. Daviess County, 434 F.3d 898 (6th Cir. 2006)] or implicitly [Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3rd Cir. 1995); Waste Sys. Corp. v. County of Martin, 986 F.2d 1381 (8th Cir. 1993)] rejected the distinction would no longer be good law. An exception to the general post-Carbone belief that flow-control laws are unconstitutional has been drawn by courts upholding the constitutionality of flow-control ordinances that explicitly exempt waste destined for out-of-state disposal. See, On the Green Apartments L.L.C. v. City of Tacoma, 241 F.3d 1235 (9th Cir. 2001); Ben Ohrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997). As this exception is not at issue in United Haulers, these cases should remain viable.

In general, this case highlights the tension between whether solid-waste collection, processing, and disposal are properly viewed as governmental functions or as functions of the marketplace. At its core, Commerce Clause jurisprudence is an attempt to balance these tensions as envisioned by the framers of the Constitution. Proponents of flow control portray all solid-waste activities as purely a governmental function and allege that the public health and environmental benefits of the government controlling the waste stream outweigh any burden on interstate commerce. Critics of flow control point to the use of the term “Balkanization” of the economy in many of the Commerce Clause cases and believe that the Constitution prohibits local governments from interfering with interstate commerce in solid waste. Critics further argue that the national marketplace for solid-waste disposal will be upended if the Second Circuit placed upon the public ownership of the waste facilities. In that event, the Supreme Court will be called upon to balance the local benefits of the flow-control measures against the differential burden they may place on interstate commerce. The Pike balancing test has been performed by many federal district and circuit courts in solid-waste flow-control cases, usually in favor of local governments. How the Supreme Court balances the benefits versus burdens would provide substantial guidance to lower courts as to the proper weight to give each. While this guidance would be important, its significance would pale compared to the importance of a Supreme Court decision adopting the Second Circuit’s public/private distinction in waste facility ownership.

In the alternative, the Court may merely remand this case for that balancing test to be done by a lower court without adopting the weight that the Second Circuit placed upon the public ownership of the waste facilities. In that event, the Supreme Court would be unlikely to grant further review. And, if that comes to pass, the 11-year litigation battle between United Haulers and the Oneida-Herkimer Authority might not materially alter the flow-control landscape.

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For Respondent Oneida-Herkimer Solid Waste Management Authority et al. (Michael J. Cahill (631) 588-8778)

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**Amicus Briefs**

**In Support of Petitioner United Haulers Association, Inc., et al.**
- American Trucking Associations, Inc., and National Solid Waste Management Association (David S. Biderman (202) 364-3743)
- Sussex County, Virginia, and Charles City County, Virginia (Jonathan S. Franklin (202) 662-0460)

**In Support of Respondent Oneida-Herkimer Solid Waste Management Authority et al.**
- Arkansas Association of Regional Solid Waste Management Districts et al. (Scott M. DuBoff (202) 393-1200)
- Economic Development Growth Enterprises Corporation et al. (Gregory Joseph Amoroso (315) 733-0419)
- Environmental Defense (Michael J. Bean (212) 505-2100)
- Madison County, New York (Jeffrey B. Morris (718) 428-3507)
- National Association of Counties et al. (Richard Ruda (202) 434-4850)
- New York State et al. (Caitlin Joan Halligan (212) 416-8016)
- Onondaga County Resource Recovery Agency et al. (Bruce Roger Braun (312) 558-5600)
- Rockland Coalition for Democracy and Freedom et al. and Federation of New York Solid Waste Associations (Michael D. Diederich Jr. (845) 942-0795)
- Rockland County Solid Waste Management Authority (Robert Bergen (212) 513-3200)
Did the Texas Court Fail to Comply with the Supreme Court’s Previous Remand in This Capital Case?

by Kathy Swedlow

Editor’s Note: The respondent’s brief in this case was not available by PREVIEW’s deadline.

This case has been to the Supreme Court before. In Smith v. Texas, 543 U.S. 37 (2004), the Court summarily reversed the Texas Court of Criminal Appeals and found constitutional error under Penry v. Lynaugh, 492 U.S. 302 (1989) (Penry I), and Penry v. Johnson, 532 U.S. 782 (2001) (Penry II).

ISSUES

Is it consistent with this Court’s remand in this case for the Texas Court of Criminal Appeals to deem the error in petitioner’s case harmless based on its view that jurors were in fact able to give adequate consideration and effect to his mitigating evidence notwithstanding this Court’s conclusion to the contrary?

Can the Texas Court of Criminal Appeals, based on a procedural determination that it declined to adopt in its original decision that was summarily reversed by this Court, impose on remand a heightened standard of harm (“egregious harm”) to avoid rectifying the constitutional violation found by this Court?

FACTS

In 1991, LaRoyce Lathair Smith was brought to trial in Texas for the murder of one of his former co-workers at a Dallas County Taco Bell restaurant. At the penalty phase of his trial, Smith presented evidence of “his 78 IQ score, his potentially organic learning disabilities and speech handicaps, and his troubled family background.” In aggravation, the State argued that Smith had “acted deliberately and cruelly” in killing his victim, and “stressed that [he] had previously been convicted of misdemeanor assault and proffered evidence suggesting that he had violated several drug laws,” indicating that he would be dangerous in the future.

At the time of Smith’s trial, the Texas capital sentencing statute required the jury to respond to three “special issues”: whether the... (Continued on Page 186)
defendant had acted “deliberately” in killing his victim, whether there was a probability that the defendant would be dangerous in the future, and whether—if presented by the evidence—the defendant’s actions were an unreasonable response to the victim’s provocation. If the jury answered “yes” to these questions, the defendant would be sentenced to death; if the jury answered “no,” the defendant would receive a life sentence.

In response to the Court’s concerns (expressed in other Texas capital cases) that the special-issues sentencing scheme could prevent the jury from giving effect to a capital defendant’s mitigating evidence, jurors in Smith’s case were also provided with a supplemental nullification instruction. This instruction directed the jury—if they believed that Smith’s mitigating evidence outweighed the prosecution’s evidence in support of the special issues—to answer at least one of the special issues in the negative, even if it found that the prosecutor had proved that special issue beyond a reasonable doubt.

Smith’s jury, after hearing the evidence presented at the penalty phase, sentenced him to death.

In June 1994, the Texas Court of Criminal Appeals affirmed Smith’s conviction and death sentence in an unpublished opinion, and the Supreme Court denied certiorari. Smith then filed a petition for post-conviction relief in the state courts, which was deemed untimely. The Texas Court of Criminal Appeals then authorized Smith to file a second post-conviction relief petition, which was denied by the trial and appellate courts. Ex Parte Smith, 132 S.W.3d 407 (Tex. Crim. App. 2004). In its opinion, the Court of Criminal Appeals held that Smith’s proffered mitigating evidence was not the sort of “constitutionally significant” evidence “which requires a vehicle outside the scope of the statutory special issues,” and that the nullification instruction given in Smith’s case was sufficiently different from a nullification instruction previously rejected by the Supreme Court to survive a constitutional challenge.

Smith then sought certiorari from the Supreme Court, which granted his motion and reversed and remanded the case back to the Court of Criminal Appeals. Smith v. Texas, 543 U.S. 37 (2004) (Smith I). In a terse per curiam opinion, seven members of the Court joined to admonish the Texas state courts for upholding Smith’s sentence by applying the “uniquely severe permanent handicap” and “nexus” tests, noting that the state court had “erroneously relied on a test we never countenanced and now have unequivocally rejected.” Turning to the issue of whether the nullification instruction could have cured the error, the Court held that it could not largely because in order to vote for life, jurors would have to violate their oath in order to do so.

On remand, the Texas Court of Criminal Appeals again affirmed Smith’s sentence, finding that because his mitigating evidence was encompassed by the two special issues, no special instruction was even necessary in his case. Alternatively, the state held that assuming the special issues were insufficient to encompass Smith’s mitigation, because Smith had failed to object to the nullification instruction at trial, he would have to show that the error caused “egregious harm,” which he was unable to do. Ex Parte Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006).

The Supreme Court granted certiorari on October 6, 2006.

**Case Analysis**

Although the Texas special-issues sentencing scheme passed a facial challenge 30 years ago, the Court was concerned even then that, in operation, this scheme might not permit individualized capital sentencing because the special issues might not allow the jury to give effect to the defendant’s mitigating evidence. Jurek v. Texas, 428 U.S. 262, 272 (1976) (plurality) (“Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.”) However, because the Texas Court of Criminal Appeals had “indicated that it [would] interpret this second question [regarding future dangerousness] so as to allow a defendant to bring to the jury’s attention whatever mitigating circumstances he may be able to show,” the plurality was satisfied that the statute was not facially unconstitutional.

Twelve years later, the Court reviewed the case of a capital prisoner whose only mitigating evidence was that he had an unblemished prison record. Franklin v. Lynaugh, 487 U.S. 164, 177-178 (1988). The Court held that under such circumstances, the statute did not operate in an unconstitutional manner because the jury could give effect to Franklin’s mitigation while at the same time answering the “future dangerousness” special issue. The following year, the Court considered a similar challenge, but the mitigating evidence in this case was far different: the petitioner argued that he was mentally retarded and had suffered from childhood abuse. Penry v. Lynaugh, 492 U.S. 302 (1989) (Penry I). This time, the Court found that the jury would be unable to give full effect to the proffered mitigation in answering the special issues, because the special issues
were not broad enough to encompass this mitigating information. Central to this holding was the concern that Penry’s mitigation evidence was a “two-edged sword,” because it could both mitigate and aggravate at the same time. Accordingly, the Court determined that Penry’s jury needed a way to consider his mitigation for what it was—as mitigation.

Rather than reworking the special issues scheme, the Texas courts drafted a supplemental instruction in an effort to cure the problems found in Penry I. Jurors were again given the special issues to answer, but now were also instructed that if they wished to give effect to the defendant’s mitigating evidence and thus give a life sentence, they would have to answer one of the special issues in the negative, even if they found that special issue actually existed. No additional space was provided on the verdict form for a specific finding of mitigating evidence.

In 2001, the Court rejected this practice, explaining that the instructions could only be interpreted in one of two unconstitutional ways. Penry v. Johnson, 532 U.S. 782 (2001) (Penry II). First, the Court reasoned, the jury could have interpreted the instructions as requiring them to take mitigation into account when answering the special issues, which was the very same practice found wanting in Penry I. Second, the Court reasoned, the instructions might be interpreted as a nullification instruction, i.e., one that required the jury to answer “no” to one of the special issues if it found mitigating evidence and wanted to vote for a life sentence, regardless of whether it had found that special issue to be present or not.

At the same time, the Texas courts—state and federal—developed their own tests for assessing Penry I claims. Namely, when determining whether to grant relief, the reviewing court would inquire into the “constitutional relevance” of the proffered mitigation by asking whether the evidence represented a “uniquely severe permanent handicap” that bore a “nexus” to the actual offense. If the petitioner could meet these tests, then the jury would be specially instructed as to how to give effect to the petitioner’s mitigating evidence.

Subsequently, the Supreme Court granted certiorari in two Texas cases: one involving a defendant who had been sentenced prior to Penry I, and another involving a defendant who had been sentenced after Penry I but before Penry II. See (Robert) Smith v. Dretke, No. 02-11309; Tennard v. Dretke, 542 U.S. 274 (2004). While Robert Smith’s case was ultimately dismissed because his sentence was commuted to life, the Court granted relief in Tennard, finding no difference between the instructions given in Tennard’s case and those at issue in Penry I. Writing for the majority, Justice O’Connor likewise rejected the “uniquely severe permanent handicap” and “nexus” tests as having “no foundation in the decisions of [the] Court.”

In his second time before the Court, Smith presents two basic arguments. First, Smith argues that the Court of Criminal Appeals has ignored the mandate set forth in Smith I, by holding that his mitigating evidence fell within the two special issues presented to the jury and by further holding that even if an error had occurred, the supplemental nullification instruction cured the error. (In Smith’s view, the Smith I Court already ruled on these issues.) Second, Smith contends that the Court of Criminal Appeal’s requirement on remand that he show “egregious harm” because he failed to object to the nullification instruction violates federal law and cannot provide an independent basis for denying him relief.

In support of his first argument, Smith points to that part of the state court’s opinion where it contends that the Smith I Court “did not address [its] conclusion that the two special issues provided applicant’s jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence” and its uncertainty whether the Court “concluded that some of applicant’s mitigation evidence was outside the reach of the two special issues, and, if so, exactly what evidence was beyond the ambit of those special issues.” In response to this claim, Smith points back to the opinion in Smith I, and the Court’s seemingly clear and unambiguous statement there that the “findings of deliberateness and future dangerousness … had little, if anything, to do with the mitigation evidence petitioner presented.”

Smith also takes issue with the state court’s holding that the supplemental nullification instruction cured any possible error. After reviewing the voir dire and penalty phase presentations, the Court of Criminal Appeals concluded that Smith had failed to demonstrate that the jury was unable to consider his mitigating evidence. Instead, the state court explained, the theme of Smith’s mitigation was that he had “triumphed over [his] youthful difficulties [and] did not succumb to them.” Ex Parte Smith, 185 S.W.3d at 472. The court went on to distinguish Smith’s mitigation from that presented in Penry I, explaining that in Penry I, the mitigation was a “two-edged sword”: Penry’s mitigation evidence of mental retardation could also be perceived as aggravating evidence. For that reason, the

(Continued on Page 188)
Court of Criminal Appeals felt that Smith’s jury could use the nullification instruction properly—to separate aggravating evidence from mitigating evidence—whereas the jury in Penry I could not make such a separation, even when given a nullification instruction. According to Smith, this argument misses the point of what’s so objectionable about a nullification instruction: that it asks the jurors to ignore their oaths. Indeed, support for this argument can be found in the Court’s opinion in Smith I:

Penry II identified a broad and intractable problem—a problem that the state court ignored here—inherent in any requirement that the jury nullify special issues contained within a verdict form. We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because [the] mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a “true verdict.”

Smith I, 543 U.S. at 47 (quoting Penry II). Smith also notes that the Court of Criminal Appeals supported its opinion by noting the absence of misconduct by the prosecutor, or any urging on his part that the jury ignore Smith’s mitigation evidence in rendering its verdict. Ex Parte Smith, 185 S.W.3d at 471. In Smith’s view, this is yet another instance of the Court of Criminal Appeals ignoring the Supreme Court’s ruling in Smith I. Indeed, the Court in Smith I noted that the prosecutor’s statements that the jury should “follow the law” and answer the special issues affirmatively if they found the state had met its burden of proof enhanced the “ethical dilemma” presented by the nullification instruction, and “may have been more confusing … than the state court assumed.”

In support of his second argument—that Smith failed to show the “egregious harm” he needed to show in order to win relief—Smith contends that the state court impermissibly created new standards on remand that it had never before applied in his case. Smith argues that he adequately objected to the nullification instruction and contends that he has strong support on his side: in Smith I, the Court expressly noted that the state courts had rejected the argument that Smith had failed to adequately object. Smith I, 543 U.S. at 404 n.3.

But Smith points to a larger problem associated with the state court’s application of the “egregious harm” standard: according to Smith, if a state court is permitted to “re resurrect procedural obstacles” after the Court grants relief on the merits, the Court’s opinions could be rendered advisory, in violation of Article III. As Smith warns in his brief: “If state courts were free to revisit procedural determinations after this Court’s review, this Court would regularly be frustrated in its scrupulous efforts to avoid advisory pronouncements.” While this warning may sound dramatic, the odd procedural history of this case does lend it some support.

SIGNIFICANCE

Although the respondent’s brief was not available at the time this article was written, the second opinion of the Court of Criminal Appeals might provide a clue as to the state’s response to Smith’s claims. In that opinion, the state court explained that it was “uncertain as to the Supreme Court’s current Penry II jurisprudence” and stated that the Fifth Circuit shared its uncertainty. Ex Parte Smith, 185 S.W.3d at 466-467 & n.36. The problem appears to be determining which type of mitigation can fall within the special issues and which type falls outside of the special issues. See (Roy Gene) Smith v. Dretke, 422 F.3d 269, 287 n.8 (5th Cir. 2005) (“We note that the Supreme Court has never explicitly stated that Penry claims cannot be extended beyond claims involving evidence of ‘mental impairment.’ In fact at times, it seems the Court has said the exact opposite” (citing Smith I)). It may well be that the Texas state and federal courts could use some clarity on this issue. With that said, there’s no lack of clarity in the Court’s opinion in Smith I, which makes this case such an odd vehicle for this issue.

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AMICUS BRIEFS (AS OF DECEMBER 15, 2006)

In Support of Petitioner LaRoyce Lathair Smith

Former Judges of the United States Courts of Appeal (Erwin Chemerinsky (919) 613-7173)

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Two New Mexico school districts sought judicial review of a decision by the secretary of the U.S. Department of Education certifying that New Mexico had an equalized program of state aid, thereby permitting New Mexico to factor in the receipt of federal Impact Aid funds when making its own distribution of educational aid to local public school districts. The districts claim they receive less revenue than they should have because the secretary used the wrong methodology in determining that New Mexico had equalized funding of public schools.

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an inappropriate proportion of Impact Act funds into consideration when determining state aid, in violation of 20 U.S.C. § 7709(d)(1) and 34 C.F.R. § 222.163(a). The secretary denied the school districts’ objections, and they appealed to the U.S. Court of Appeals for the Tenth Circuit.

Holding that Section 7709(b) was ambiguous, a three-judge panel of the U.S. Court of Appeals for the Tenth Circuit ruled that the secretary’s construction of the statute was permissible and warranted judicial deference. The Tenth Circuit granted rehearing en banc before the full court. On rehearing en banc, the decision of the secretary was affirmed by an equally divided court. Zuni Public School Dist. No. 89 v. U.S. Dept. of Education, 437 F.3d 1289 (10th Cir. 2006). The U.S. Supreme Court granted the petition of Zuni and Gallup-McKinley school districts for review. 127 S.Ct. 36 (2006).

**CASE ANALYSIS**

Impact Aid is compensatory financial assistance paid by the United States to a school district whose ability to raise local revenues is limited either as the result of the real property within its boundaries being tax exempt due to the property’s acquisition by the federal government or because the school district educates children residing on, or whose parents are employed on, federal property, including Indian lands.

Generally, states may not reduce state aid they provide to their school districts if the school districts receive Impact Aid. However, 20 U.S.C. § 7709(b) provides that if a state is certified by the Department of Education as having a program of state aid “that equals expenditures for free publication among local educational agencies in the State,” then the state is permitted to factor in the receipt of Impact Aid funds when making its own distributions of educational aid to the school districts.

The exception in Section 7709(b) first appeared in the Impact Aid laws in 1974. That statute (20 U.S.C. § 240(d)) used general language similar to that appearing in the current statute. However, instead of describing a disparity test, the 1974 statute expressly delegated to the secretary the power to define the term “equalize expenditures.” As authorized by 20 U.S.C. § 240(d), in 1976 the secretary of education established an equalization formula by regulation outlining a disparity test. The regulations directed that a state would be deemed equalized if “the disparity in the amount of current expenditures of revenue per pupil for free public education among local educational agencies having similar grade levels in the state is no more than 25 per centum, as determined according to the procedures set forth in Appendix A to this subpart.” Appendix A detailed the specific method by which to make the disparity determination. First, school districts were ranked by expenditures or revenues per pupil, and then those districts that fell “at the 95th and 5th percentiles of the total numbers of pupils in attendance in the schools of those [districts]” were eliminated. The 25 percent disparity comparison was then made between the remaining highest and lowest ranked school districts.

During the 1976 notice and comment process, the Department of Education responded to a question regarding whether the 95th and 5th percentiles were to be calculated based on the total number of pupils in the state or by school districts. The Department of Education stated:

The referenced percentiles are based on number of pupils. [The regulation] provides that in calculating the disparity standard according to the procedures set forth in Appendix A, the districts in a State will be ranked on the basis of current expenditures or revenue per pupil, and that those districts which fall above the 95th and below the 5th percentile of those agencies will be excluded for purposes of the calculation. The percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of school districts.

In 1994, Section 7709 was passed, repealing and replacing Section 240(d). Section 7709 specifically spells out the 25 percent disparity test and includes language setting out the basic parameters of the required 95th and 5th percentile determinations contained in the earlier regulations and appendix. The new language largely reiterated the disparity test and percentile determinations laid out in the earlier regulations and appendix. However, the percentile language in the 1994 statute differs from that in the earlier regulations. While the former appendix directed that the 95th and 5th percentiles should be calculated by “the total number of pupils in attendance in the schools to determine which LEAs to eliminate,” the 1994 statute dictates that school districts “with per-pupil expenditure or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State” should be disregarded. The legislative history of the 1994 legislation noted that the statute “prohibits a State from taking Impact Aid payments into account in determining the amount of State aid to be paid to LEAs that receive Impact Aid, unless that State has an equalization plan.\n
approved by the secretary and describes the standard which state plans must meet.”

After the passage of 20 U.S.C. § 7709, the department enacted new regulations in 1994 replacing the 1976 regulations. The new disparity calculation language closely mirrors the language of Section 7709. 34 C.F.R. § 222.162(a). However, the regulation goes on to state in fashion similar to the 1976 regulations that “[t]he method of calculating the percentage disparity in a State is in the appendix to this subpart.” The appendix contains the same per-pupil expenditure ranking method that was outlined in earlier appendices, and it details the same specific methodology for calculating the 25 percent disparity test. The appendix directs that the determination of disparity be made by “[i]dentifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs.”

The history accompanying the new regulation notes that the regulation outlines the single statutory standard for determining whether a state is equalized and “specifies the method the Secretary will employ to measure the statutory disparity standard.” In essence, the department has adhered since 1976 to a rule dictating that when disregarding school districts to determine whether a state is equalized, the 95th and 5th percentiles should be calculated by the total number of students in the state rather than by the number of school districts.

In determining whether New Mexico qualified in fiscal year 2000 (July 1, 1999, to June 30, 2000) as an equalized state under Section 7709, the Department of Education followed the methodology provided in the appendix to 34 C.F.R. § 222.162 to decide whether school districts fell within the 95th and 5th percentiles of “the total number of pupils in attendance in the schools of those districts.” Applying this methodology to New Mexico, which has predominantly small school districts among its 89 public school districts, the department eliminated the 18 highest ranking and the seven lowest ranking before ascertaining that the newly top-ranked school district received only 14.43 percent more state funding than the newly bottom-ranked school district. The department concluded that New Mexico’s public school funding was substantially equal.

Zuni and Gallup-McKinley argue that they are entitled to receive federal Impact Aid payments without offset against their state operational funding because the state of New Mexico does not qualify for the Impact Aid exemption. They assert that the secretary’s methodology directly conflicts with the statutory language of 20 U.S.C. § 7709(b). The districts read the section as requiring the department to eliminate school districts on the basis of school district percentiles rather than by student population percentiles.

According to the school districts, the legislative and regulatory history shows how two Impact Aid formulas emerged—one authorized by the secretary and one authorized by Congress. Asserting that Congress changed the system in 1996, the districts say the 1996 changes eliminated the secretary’s authority to establish the equalization formula by creating a new and different equalization formula.

The districts contend that the 1996 legislation requires the secretary to disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile. The school districts argue that as a result of the 1996 legislation, the total number of students is irrelevant in determining percentiles of per-pupil expenditures.

It is the districts’ position that the two Impact Aid formulas are radically different. The districts reason that the statute requires exclusion of school districts whose per-pupil expenditures or revenues are above the 95th percentile and below the 5th percentile of per-pupil expenditures or revenues in the state.

Declaring that there are established standard methods for making a percentile calculation, the districts assert that, when the objective is to calculate where the 95th and 5th percentiles fall along the area of school districts ranked by their per-pupil revenues, no consideration can be given to other factors such as pupil attendance numbers. Thus, the districts say the secretary’s injection of a pupil attendance factor into the calculation is plainly at odds with the statute. The districts suggest that the secretary arguably could have acted by regulation to require use of a particular one of the established standard percentile calculation methods, so long as the regulation did not require or permit the use of any data or factor beyond each school district’s per-pupil revenues in the calculation.

The districts contend that the first step in the secretary’s formula correctly ranks the school districts by per-pupil revenues. However, the districts contend the secretary improperly proceeds to eliminate school districts from the final field by excluding districts whose cumulative pupil attendance numbers are below the 5th percentile or above the 95th percentile of total pupil attendance numbers. By using a formula that eliminates school districts based on percentages of pupils instead of eliminating districts

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whose per-pupil revenues fall above the 95th percentile or below the 5th percentile (based on per-pupil revenues) the districts assert that the secretary excludes many New Mexico school districts whose per-pupil revenues fall between the 95th and the 5th percentiles of those school districts when ranked by per-pupil revenues. The districts conclude that the secretary's formula excluded 13 more school districts from the final list as to which the disparity test was applied, reducing that field to 66 from the 79 school districts as required by the statutory formula.

According to the districts, when Congress decided by statute in 1994 to establish the equalization formula, it rejected the Secretary's 1976 equalization formula. Had Congress wanted to capture the secretary's formula in the new statute, the districts say “the language was there for the taking.” Instead, the districts assert that Congress took a different course. The districts say that the legislative history demonstrates that Congress chose to require the secretary to stop eliminating school districts based on pupil attendance numbers in making the equalization calculation and instead to eliminate school districts based on per-pupil revenues as specified in the statute. The districts claim that the secretary's method is not an interpretation of the statutory method.

Zuni and Gallup-McKinley argue that the secretary has no authority to substitute the secretary's policy choices regarding the proper impact and formula for those of Congress. They say that which method is deemed the most appropriate ultimately reduces to a policy choice about which anomalies and inequities are the most tolerable. The districts assert that Congress could have delegated this call to the secretary, but did not.

It is the districts' position that the secretary's 1995 Impact Aid formula was not promulgated as a regulation intended to have the force of law. They point out that, when the secretary promulgated the proposed regulations, the secretary announced a “Waiver of Proposed Rulemaking” and exempted the process from public notice and comment requirements. The districts note that the secretary said the new regulations “merely reflect statutory changes, remove unnecessary and obsolete regulatory provisions, reorganize and clarify the language of the regulations, and make minor revisions.” Thus, the districts contend that the regulations do not establish or affect substantive policy.

The districts claim that the controlling rules on statutory construction forbid use of the secretary's formula. According to the districts, Congress has directly spoken by requiring use of a different formula. Because Congress’s formula is clear, the districts say this should be the end of the matter. The districts argue that the plain meaning of the 1994 statute requires use of the statutory formula rather than the secretary's formula.

When a court reviews an administrative agency's construction of the statute it administers, the Supreme Court has ruled that if the intent of Congress is clear, that is the end of the matter. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). If a court determines Congress has not directly addressed the precise question at issue and the statute is silent or ambiguous with respect to the specific issue, then the question for the court under Chevron is whether the administrative agency's answer is based on a permissible construction of the statute.

It is the districts’ position that the secretary's formula is not entitled to Chevron deference. The districts explain that administrative implementation of a particular statutory provision qualifies for Chevron when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. The districts stress that deference is not accorded merely because the statute is ambiguous and an administrative official is involved. The districts claim Congress did not give the secretary express authority to adopt a different formula. It also says the secretary has no implied authority to adopt a different formula.

Since the secretary's formula was not issued in exercise of rule-making authority, the districts conclude it is not entitled to Chevron deference. Furthermore, claiming the secretary's formula is inconsistent with the statutory formula, the districts say it cannot be a permissible administrative interpretation of the statute.

According to the respondents, the statute is ambiguous. They assert that when a law entrusted to an agency's administration is ambiguous, or when Congress implicitly or explicitly left a gap in the law to be filled in by the agency through the formulation of policy or rules, the courts must accept the agency’s position so long as it reflects a permissible construction of the language in question. Because the statute mandates that expenditures or revenues be examined on a per-pupil basis, the respondents contend that the department's method of determining the 95th and 5th percentiles based on the total student enrollment in the state is a permissible construction.
SIGNIFICANCE

If Zuni and Gallup-McKinley prevail in this proceeding, they and other similarly situated public school districts that receive Impact Aid may receive more revenue than they would under the secretary's formula. If the respondents prevail, public school districts that receive Impact Aid may receive less revenue. However, such a ruling may result in states having more funds available for distribution to all school districts—including those that do not receive Impact Aid.

Of broader significance is how the Court with its new membership will deal with the question of deference to administrative agency application of statutes. The Supreme Court has devoted considerable attention in the last five years in considering the varying degrees of deference deserved by agency pronouncements. See, e.g., United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576 (2000); General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004); National Cable & Telecommunications Ass’n v. Brand X Internet Services, 545 U.S. 967 (2005); Gonzales v. Oregon, 126 S.Ct. 904 (2006).

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Must a Court Establish Personal Jurisdiction Prior to Dismissing a Case on the Grounds of Forum Non Conveniens?

by Margaret Tarkington


The Third Circuit reversed a district court’s forum non conveniens dismissal because the district court had failed to first determine whether it had personal jurisdiction over petitioner Sinochem. Determination of the personal jurisdiction question would require discovery. This case examines whether a court can dismiss a case on the basis of forum non conveniens in favor of a more convenient foreign forum without having first established its own jurisdiction.

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Forum non conveniens is a doctrine that allows a court to dismiss a case because there is a significantly more convenient and appropriate forum for the adjudication. A court can dismiss for forum non conveniens even though the court has jurisdiction over the case, including jurisdiction over the category of claim that is brought (subject matter jurisdiction) and jurisdiction over the parties (personal jurisdiction), and even though venue is proper. The whole idea of forum non conveniens is that a court should dismiss the case, not because of a lack of jurisdiction, but because the case could be adjudicated much more conveniently and appropriately somewhere else.

Federal courts generally apply forum non conveniens when the alternate forum is in a foreign country. When the preferable forum is another federal court, the federal court can transfer the case to the other forum under 28 U.S.C. §§ 1404 and 1406.

But what happens when a case is filed that is an obvious candidate for forum non conveniens but it is difficult to ascertain jurisdiction? Can the court go ahead and dismiss on the basis of forum non conveniens without determining whether or not the court had jurisdiction?

In Steel Company v. Citizens for a Better Environment, 523 U.S. 83 (1998), the Supreme Court discussed the importance of establishing jurisdiction and disapproved of a common practice among federal courts to assume “hypothetical jurisdiction” in order to decide the merits of a case before determining whether the court had jurisdiction. The Supreme Court declared: “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case.” (Internal citations omitted.) The Court noted the “two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits.” Subsequently, the Supreme Court, in Ruhrgas AG v.
Marathon Oil Company, 526 U.S. 574 (1999), held that although a court was prohibited from “ruling on the merits” without determining jurisdiction, there was no mandatory “sequencing of jurisdictional issues.” Thus a court was permitted to “choose among threshold grounds for denying an audience to a case on the merits” and could dismiss for lack of personal jurisdiction without first establishing its subject matter jurisdiction.

Most recently, in Tenet v. Doe, 544 U.S. 1 (2005), the Supreme Court held that the rule from Totten v. United States, 92 U.S. 105 (1875), which prohibits suits against the government based on covert espionage agreements, could be applied to dismiss a case prior to a determination of jurisdiction. The Court in Tenet explained that “application of the Totten rule of dismissal … represents the sort of ‘threshold question’ we have recognized may be resolved before addressing jurisdiction.”

It is within this framework that the question before the Supreme Court arises.

**ISSUE**

Must a federal court first establish jurisdiction before dismissing a suit on the ground of forum non conveniens?

**FACTS**

Petitioner Sinochem International Co. Ltd. is a Chinese company. In 2003, it contracted with an American company (which is not a party to this suit) for the sale of steel coils. Pursuant to their contract, the seller would obtain payment from a line of credit by producing a valid bill of lading showing that the cargo had been loaded on or before April 30, 2003. The contract provided that any disputes arising out of the contract would be arbitrated under Chinese law. The steel coils were loaded in Philadelphia onto a vessel owned by respondent Malaysia International Shipping Corporation (MISC), a Malaysian company. A bill of lading dated April 30, 2003, was issued and the vessel sailed for China. In June 2003, Sinochem petitioned the Guangzhou Admiralty Court in China for preservation of a maritime claim against MISC and for the arrest of the vessel when it arrived in China. Sinochem claimed that MISC had fraudulently backdated the bill of lading to April 30, 2003. The Chinese Admiralty Court ordered the ship arrested. MISC was required to post security of $9 million for the release of the vessel.

MISC filed the present action in the Eastern District of Pennsylvania on June 23, 2003. MISC alleged that Sinochem made negligent misrepresentations to the Chinese Admiralty Court that had hurt MISC’s reputation and caused damages from the delay of the arrested vessel.

On July 2, 2003, Sinochem filed its own complaint with the Chinese Admiralty Court alleging that it had suffered damage due to MISC’s alleged backdating of the bill of lading (which had triggered payment by Sinochem under the letter of credit). MISC moved to dismiss the Chinese Admiralty Court action on jurisdictional grounds. However, MISC’s motion was denied, and the Guangdong Higher People’s Court affirmed the jurisdiction of the Chinese Admiralty Court.

Meanwhile, in the Eastern District of Pennsylvania, Sinochem filed a motion to dismiss MISC’s complaint on various grounds, including lack of subject matter jurisdiction, lack of personal jurisdiction, and forum non conveniens. The district court determined that it had admiralty subject matter jurisdiction. As to personal jurisdiction, the district court determined that the only valid argument for personal jurisdiction was through Sinochem’s national contacts under Federal Rule of Civil Procedure 4(k)(2). The court determined that limited discovery would be required to identify sufficient national contacts to establish personal jurisdiction. Nevertheless, the court declined to order the discovery and instead dismissed the case on the basis of forum non conveniens, holding that the Chinese Admiralty Court was the appropriate forum for the adjudication of MISC’s claims.

The U.S. Court of Appeals for the Third Circuit reversed. 436 F.3d 349 (2006). The Third Circuit held that forum non conveniens was not a substantive adjudication involving the merits of the case and so did not fall expressly within the prohibition of Steel Co. But the Third Circuit also determined that forum non conveniens was not a jurisdictional issue akin to personal jurisdiction and so was not clearly covered by Ruhrgas either. The court then examined competing case law and determined that in order to dismiss on forum non conveniens grounds, a court must confirm both its personal and subject matter jurisdiction.

**CASE ANALYSIS**

Petitioner Sinochem argues that the Supreme Court’s rule in Steel Co. only prohibits a federal court from deciding the underlying merits of the case without first determining its own jurisdiction to do so. Thus, Sinochem contends, Steel Co. does not forbid the practice of dismissing a case on dispositive non-merits grounds, such as forum non conveniens. Sinochem argues that a federal court that dismisses a case on forum non conveniens grounds does not assume power it does not have but merely declines to exercise its
potential power to adjudicate a case. Thus, it is not necessary for the court to first confirm that it actually has the power to hear the case because even if it did, it would decline to exercise that power.

Respondent MISC contends, quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), that the very nature of forum non conveniens always presupposes at least two forums in which the defendant is “amenable to process”—that is, two forums where a court could exercise personal jurisdiction (and arguably subject matter jurisdiction). MISC emphasizes the Supreme Court’s statement in Gulf Oil that “the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue” in the dismissing court. Although Gulf Oil was decided prior to the Steel Co., Ruhrgas, and Tenet decisions, MISC argues that its rule comports with the holding of Ruhrgas. Specifically, MISC points out that the Ruhrgas Court examined whether subject matter jurisdiction must be determined prior to personal jurisdiction. The Court explained its holding in Ruhrgas by noting that personal jurisdiction, like subject matter jurisdiction “is an essential element of the jurisdiction of a district … court, without which the court is powerless to proceed to an adjudication.” Similarly, the Ruhrgas Court said that Steel Co. did not dictate “sequencing of jurisdictional issues.” (Emphasis added.) MISC contends that forum non conveniens is not a “jurisdictional issue” akin to personal or subject matter jurisdiction, but instead is part of the “adjudication” that a court is “powerless” to perform without first establishing personal and subject matter jurisdiction.

Sinochem focuses on different language from Ruhrgas. Although Ruhrgas only involved personal jurisdiction, the Ruhrgas Court stated that it was “hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.” Sinochem argues that forum non conveniens is a “threshold [ground] for denying audience to a case” and, under Ruhrgas, a federal court can proceed to it before reaching other threshold grounds, such as jurisdiction. Sinochem notes that the Supreme Court in Ruhrgas provided examples of other situations where a court could permissibly choose among “threshold grounds,” including declining jurisdiction of state-law claims on discretionary grounds without first determining whether those claims fall within the court’s supplemental jurisdiction, and examining abstention under Younger v. Harris, 401 U.S. 37 (1971), without deciding whether the parties present a “case or controversy.” Further, since Ruhrgas was decided, the Supreme Court has held in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), that a federal court could determine class certification under Rule 23 prior to determining the case’s justiciability. The Court additionally held in Tenet that application of the Totten rule of dismissal could be decided prior to deciding jurisdiction because it “represents the sort of ‘threshold question’ we have recognized may be resolved before addressing jurisdiction.”

Sinochem additionally relies on In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998), a D.C. Circuit case stating that forum non conveniens can be decided prior to determining subject matter jurisdiction. Indeed, the Supreme Court quoted Papandreou when it held in Ruhrgas that “[a] court that dismisses on … non-merits grounds such as … personal jurisdiction, before finding subject matter jurisdiction, makes no assumption of law-declaring power” in violation of Steel Co. Notably, the full quote from Papandreou that the Ruhrgas Court excerpted says that a court can dismiss on “non-merits grounds such as forum non conveniens and personal jurisdiction” prior to finding subject matter jurisdiction. (Emphasis added.) Although the Supreme Court excluded with ellipses the “forum non conveniens and” language, Sinochem contends that the Supreme Court’s approving quotation of Papandreou indicates its approval of Papandreou’s reasoning regarding both personal jurisdiction and forum non conveniens.

In contrast, MISC emphasizes the diversity of rulings made by the United States Courts of Appeals on this issue. It notes the split in circuit court decisions on whether or not forum non conveniens can be decided prior to matters of jurisdiction and on whether or not forum non conveniens is a non-merits issue or one that implicates the merits.

Further, the Third Circuit highlighted a practice common to forum non conveniens dismissals that involves actual exercise and exertion of power over the parties. Often a court dismissing on the basis of forum non conveniens will order a “conditional dismissal,” making the dismissal conditional on the moving party’s promise not to contest adjudication in the alternative forum. For example, without conditional dismissals, one party could move for and obtain dismissal on the basis of forum non conveniens but then defeat adjudication in the alternate forum by arguing in that forum lack of jurisdiction or that the refiled case is barred by the statute of limitations. A conditional dismissal allows a federal court to prevent such maneuvers by allowing a dismissal “only if the defendant waives jurisdiction and limitations defenses, and only if it turns out that another court ultimately exer-
cises jurisdiction over the case.” *Ford v. Brown*, 319 F.3d 1302, 1310 (11th Cir. 2003). If the conditions are not met, then the federal court “reassert[s] jurisdiction” over the case. Id.

The Third Circuit noted that a conditional dismissal is a deliberate exercise of power over the parties and that therefore a court must establish jurisdiction over the parties in order to grant a conditional *forum non conveniens* dismissal. Indeed, the D.C. Circuit, in *Papandreou*, 139 F.3d at 256 n.6, stated that a *forum non conveniens* dismissal decided before jurisdiction “could not, however, be subject to conditions, e.g., a condition that defendants promise to submit to the jurisdiction of another court, for *exaction of such a condition would appear inescapably to constitute an exercise of jurisdiction.*” (Emphasis added.)

The United States, which filed an amicus brief on behalf of Sinochem, contends that because this case “does not involve a conditional dismissal,” the “Court need not address that issue.” Indeed, in this case, jurisdiction in the alternate forum, the Chinese Admiralty Court, has already been raised, determined, and affirmed on appeal. Thus, there would be no need to condition the dismissal of MISC’s federal action on Sinochem’s submission to jurisdiction in China or on the Chinese Admiralty Court’s actual assertion of jurisdiction because that assertion has already taken place.

The Third Circuit argued that having a single consistent rule regarding whether *forum non conveniens* could be determined prior to jurisdiction was better than having a rule that depended on whether or not a conditional dismissal is warranted in a particular case. Notably, although “efficiency” is one of the main contentions in favor of allowing a *forum non conveniens* dismissal prior to an assertion of jurisdiction, *forum non conveniens* without the aid of conditional dismissals could be miserably inefficient. The Third Circuit contended that if a court “is not able to grant a conditional dismissal,” then a plaintiff could end up with a case dismissed without a guaranteed alternate forum.

Another major argument from Sinochem contends that the Third Circuit’s ruling is “wildly inefficient” in requiring Sinochem to submit to discovery to determine personal jurisdiction even though the district court has determined that it would nevertheless dismiss the case under *forum non conveniens*. MISC counters by explaining that an examination of *forum non conveniens* is not straightforward but requires an “intensive and time consuming analysis” and that “personal jurisdiction is much more easily disposed of in the majority of cases than is the dual balancing of factors required under a *forum non conveniens* analysis.”

The United States similarly emphasizes comity concerns, contending that a federal court should be able to forego jurisdictional discovery and analysis and dismiss for *forum non conveniens* as a courtesy to another nation’s courts. The United States contends that the determination of jurisdiction over foreign matters “can require resolution of issues with sensitive foreign relations ramifications even though such pronouncements could be entirely avoided by a dismissal on *forum non conveniens* grounds.” Additionally, in this case, determination of personal jurisdiction would require Sinochem to submit to discovery. The United States explains that “[i]n cases that would ultimately be dismissed on *forum non conveniens* grounds in any event, intrusive jurisdictional discoverysubjects foreign governments to substantial burdens that are wholly unnecessary” and “as the United States would want to have similar cases filed against it abroad dismissed promptly, foreign governments seek such treatment here.”

Finally, Sinochem argues that determining personal jurisdiction prior to *forum non conveniens* would be inconsistent with the principle of constitutional avoidance. Under that principle, if a court can avoid addressing a constitutional issue or claim by resolving the case through a nonconstitutional means, the court should do so. Although personal jurisdiction does require a due process analysis, it is not clear that the Supreme Court in *Ruhrgas* relied on this principle of constitutional avoidance. In fact in *Ruhrgas*, the Court held that it was permissible to determine personal jurisdiction prior to subject matter jurisdiction in part because the subject matter jurisdiction question at issue “rest[ed] on statutory interpretation, not constitutional command” while the personal jurisdiction issue was based “on the constitutional safeguard of due process.” Thus, the *Ruhrgas* court specifically addressed the constitutional personal jurisdiction issue first and prior to the statutory subject matter jurisdiction issue.

**Significance**

The Supreme Court’s direction is sorely needed in clarifying the rule created by *Steel Co.* and *Ruhrgas*. The rule from those two cases can be read, as Sinochem posits, that only merits determinations are prohibited from being adjudicated prior to a determination of jurisdiction and that any non-merits threshold issue can be decided prior to juris-

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Some commentators advance a broad approach to these cases, relying as do Sinochem and the United States, on the judicial economy created by allowing courts to “dismiss cases on preliminary grounds when such dismissals will save time, energy and cost.” Jack H. Friedenthal, The Crack in the Steel Case, 68 Geo Wash. L. Rev. 258, 269 (2000). However, nearly all of the same arguments in favor of allowing a court to examine forum non conveniens and any threshold issue prior to jurisdiction—including judicial economy, constitutional avoidance, and lack of unfairness to the losing party if the case would be dismissed anyway—just as equally support allowing courts to determine the merits using “hypothetical jurisdiction.” Indeed, it has been argued that the rule of Steel Co. should be revised or overruled to allow determination of the merits prior to subject matter jurisdiction where the merits can be adjudicated more easily. See id.

However, judicial economy, efficiency, and even the avoidance of entanglement into foreign matters (which is a primary focus of the United States’ amicus brief) are not the essential inquiries for determining the jurisdiction of the federal courts. It remains that federal courts are courts of limited jurisdiction—limited in authority by the Constitution and congressional enactments. If federal courts adjudicate matters and bind parties without having established their jurisdiction to do so, they act without authority. The Supreme Court held in Steel Co. that such interests of judicial economy were insufficient to vest the federal courts with power that they either did not have or at least had failed to establish. Notably, the Ruhrgas Court agreed with the Steel Co. statement that “without jurisdiction the court cannot proceed at all in any case.”

Further, another commentator has stated that “Steel Co. and Ruhrgas are at best ambiguous about the number or types of non-merits questions that might qualify for resequencing, and they certainly do not hold that any non-merits question may be decided in any order.” Scott C. Idleman, The Emergence of Jurisdictional Resequencing in the Federal Courts, 87 Cornell L. Rev. 1, 81 (2001). Idleman argues that Ruhrgas only allowed determination of personal jurisdiction before subject matter jurisdiction because personal jurisdiction was (1) essential to the jurisdiction of the court, without which the court could not proceed; and (2) based in part on a constitutional mandate. Certainly forum non conveniens would fail to satisfy such requirements, and so, under Idleman’s reading of Ruhrgas, forum non conveniens could not be decided before subject matter and personal jurisdiction.

The need for the Supreme Court to clarify the holdings and rules arising from Steel Co. and Ruhrgas is revealed by these vastly divergent views of the ultimate rule from these cases. These interpretations run the gamut from stating that all non-merits threshold issues can be decided in any particular order before establishing jurisdiction to asserting that only constitutionally based determinations essential to the jurisdiction of the district court can be decided prior to jurisdiction.

It would be extremely helpful to the lower courts if the Supreme Court devised a defined principle or test to determine what issues can or cannot be determined prior to establishing jurisdiction. Thus far, in Steel Co., Ruhrgas, and Tenet, the Supreme Court has merely listed other instances in which it has allowed various issues to be decided before jurisdiction. However, the Court has never examined these issues and articulated a clear and principled distinction delineating the threshold issues that can or cannot be decided prior to establishing jurisdiction.

For example, Sinochem cites to Tenet as demonstrating that threshold issues like forum non conveniens can be determined prior to jurisdiction. Yet Tenet involves an entirely different kind of non-merits doctrine than forum non conveniens. As the Supreme Court explained in Tenet, the Totten bar is “unique and categorical [in] nature” and is “designed not merely to defeat the asserted claims, but to preclude judicial inquiry.” Because a determination of subject matter or personal jurisdiction usually involves some analysis of the facts of the case, a jurisdictional inquiry of the facts would defeat the purpose of the Totten bar. In contrast, forum non conveniens is not a “categorical” bar at all but is discretionary. Further, unlike Totten, forum non conveniens not only allows a judicial inquiry into the facts, but actually requires significant review of the substantive issues and facts involved in the case. This is merely one example of how the individual instances of allowing a certain “threshold issue” can be significantly different from forum non conveniens or other “threshold issues.” Thus, in addition to examples, the Supreme Court may in this case supply a principled distinction or rule for determining which
threshold issues can be decided prior to personal and subject matter jurisdiction.

The present case could also have a significant impact on the practical application of *forum non conveniens* if it has the effect of discouraging courts from entering conditional dismissals to guarantee the existence of an available alternate forum. Without the ability to use conditional dismissals, a court is left to determine the jurisdiction of a foreign court (since it cannot just order the parties to submit). Such an exercise seems potentially more complex and certainly more uncertain than having the federal court just determine its own jurisdiction so that it can impose conditions on the parties as a prerequisite for dismissal.

Certainly, as the United States points out, the Supreme Court could conclude that it was proper in this case to dismiss on *forum non conveniens* grounds without first determining jurisdiction because there was no need for a conditional dismissal. However, that would leave open the question of whether in the regular case, a court should dismiss *forum non conveniens* without determining its own jurisdiction and thus without the authority to impose a conditional dismissal. The Supreme Court could determine that in a case in which a conditional dismissal would be prudent, the alternate forum is not an adequate or available forum until the federal court has determined its own jurisdiction and can impose a conditional dismissal. That is, when a conditional dismissal should be granted, a federal court should determine jurisdiction before dismissing on the basis of *forum non conveniens* in order to assure that the plaintiff will have an available alternate forum.

Finally, this case raises significant issues of comity and foreign relations because *forum non conveniens* in federal courts involves cases where the competing forum is foreign. Thus, the questions raised by this case include considerations of fairness and comity in imposing United States discovery on foreign parties and investigation of foreign activities where the case will be dismissed to a foreign forum anyway.

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United States (Paul D. Clement, Solicitor General (202) 514-2217)
When Must Federal Courts Defer to a State Court’s Finding That Counsel Rendered Effective Assistance?

by Dan Williams

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Jeffrey Landrigan claims that his attorney rendered constitutionally ineffective assistance by failing to present mitigation evidence at his capital sentencing. He now asks the courts to grant him an evidentiary hearing and an opportunity to develop a factual record in support of this claim. The Arizona state courts denied this request on the grounds that Landrigan had waived his rights by ordering his attorney not to present such evidence, but the Ninth Circuit reversed.

**ISSUE**

Is a capital defendant entitled to an evidentiary hearing to support his Sixth Amendment ineffective-assistance-of-counsel claim even though he objected to, and to some degree interfered with, defense counsel’s attempt to present mitigation evidence on his behalf?

**FACTS**

Jeffrey Landrigan escaped from prison in Oklahoma, where he was serving prison terms for a 1982 murder and a 1986 prison stabbing. Shortly thereafter, on December 13, 1989, in Phoenix, Arizona, Landrigan stabbed and strangled to death a man who “often tried to ‘pick up’ men by showing them money.” Evidence suggested that Landrigan and the victim engaged in sexual activity together before the killing. Physical evidence, including fingerprints and blood evidence, linked Landrigan to the crime, as did some incriminating statements he made to his ex-girlfriend. A jury convicted Landrigan of murder, burglary, and theft.

At sentencing, defense counsel announced their intention to present mitigation evidence to avert a death sentence—in particular, testimony from Landrigan’s mother and ex-wife. Landrigan vociferously objected to having his lawyer present that mitigation evidence. To determine whether Landrigan was indeed waiving his right to present mitigation evidence, the trial court engaged in the following colloquy:

Court: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?

Defendant: Yeah.

Court: Mr. Landrigan, are there mitigating circumstances I should be aware of?

Defendant: Not as far as I’m concerned.
In addition to vetoing the mitigation evidence, Landrigan also repeatedly undermined defense counsel’s efforts to soften his past crimes, including his earlier murder conviction. Whereas defense counsel packaged the prior killing and the prior prison assault as having elements of self-defense, Landrigan interrupted to assert that he, not the victims, was the aggressor. Landrigan also undercut defense counsel’s hope to characterize him as a “loving, caring husband,” interjecting that he committed robberies to support his family.

The trial court sentenced Landrigan to death, finding that he is a man “who has no scruples and no regard for human life and human beings....” The Arizona Supreme Court affirmed the conviction and death sentence. In January 1995, Landrigan sought post-conviction relief, claiming among other things that he did not receive constitutionally adequate assistance of counsel. He claimed in an affidavit that if his attorney had discussed with him the theory of a biological component to violence in his family, he would have allowed that mitigation evidence presentation. Since defense counsel did not alert Landrigan to this and other evidentiary options, he did not receive adequate assistance of counsel, as guaranteed by the Sixth Amendment. The Arizona courts rejected Landrigan’s post-conviction petition, finding that he had expressly waived his right to present mitigation evidence and that he could not transmute that waiver into a claim of ineffective assistance of counsel.

Landrigan pressed his Sixth Amendment claim in federal court. The federal district court, on December 15, 1999, rejected it. That court found that Landrigan “failed to demonstrate he was prejudiced by his trial counsel’s alleged failure to discover and present mitigation evidence”—meaning, a different outcome was not reasonably probable had defense counsel presented the mitigation evidence that Landrigan now asserts he should have presented. A three-judge panel on the Ninth Circuit unanimously upheld the district court’s denial of Landrigan’s habeas petition. That panel broadened the basis for rejecting Landrigan’s Sixth Amendment claim. Because Landrigan actively rebuffed and interfered with defense counsel’s efforts to present mitigation evidence, defense counsel’s performance could not be characterized as deficient, no matter what prejudice might have ensued from the failure to present mitigation evidence.

An en banc panel of the Ninth Circuit reconsidered the panel’s disposition and, over the dissent of two judges, reversed, holding that Landrigan presented a colorable claim for relief and was thus entitled to an evidentiary hearing. The en banc panel was open to the possibility that Landrigan had not waived all mitigation evidence, but only the testimony of two family members, and that this waiver may have been the product of trial counsel’s inadequate investigation and counseling. The Ninth Circuit focused on the fact that Landrigan’s objections to a mitigation presentation occurred in the context of defense counsel’s attempt to put on the witness stand Landrigan’s mother and ex-wife. The Arizona courts, the Ninth Circuit ruled, incorrectly concluded that Landrigan had waived all mitigation by stripping away the context of Landrigan’s mitigation waiver. Because Landrigan was never given the opportunity to develop a factual record supporting his ineffective-assistance-of-counsel claim, the Ninth Circuit ordered the district court to conduct an evidentiary hearing.

The state sought, and the Supreme Court granted, certiorari review.

**Case Analysis**

In all federal habeas cases, particularly those governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) (1995), what motors the legal analysis is the enormous deference that a federal court must accord state court fact-finding. But what structures the analysis in this case is the well-known *Strickland* test. Under the Court’s holding in *Strickland v. Washington*, 466 U.S. 668 (1984), a claim of ineffective assistance of counsel under the Sixth Amendment hinges on the deficiency of defense counsel’s performance and the prejudice that flows from that deficient performance. The Court has never held that defense counsel must present mitigation evidence over a client’s objection. In fact, in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), the Court seemingly endorsed the right of a capital defendant to forgo a mitigation presentation.

Because Landrigan objected to defense counsel’s efforts to present mitigation evidence, he may be unable to argue that the lawyer’s performance was deficient—phrased as “objectively unreasonable” in *Strickland*. Surely, if Landrigan’s actions at his sentencing hearing are understood to be a wholesale veto of any and all mitigation evidence, then *Blystone* poses a huge barrier to his *Strickland* claim. After all, it would be odd to hold that defense counsel’s failure to present mitigation evidence was objectively unreasonable—and hence, his performance deficient—if the withholding of mitigation evidence was the product of Landrigan’s exercise of his right to withhold that evidence. But matters may not be that simple.

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The difficulty in this case stems from two factual questions. First, what if Landrigan did not wish to veto any and all mitigation but only objected to having his mother and ex-wife testify? In that case, the absence of other mitigation evidence may very well be the result of deficient performance by defense counsel. This possibility is one key basis for the Ninth Circuit’s en banc opinion calling for an evidentiary hearing. The Arizona state courts never considered the possibility that defense counsel unreasonably failed to present mitigation evidence because they concluded that defense counsel abided by Landrigan’s wholesale refusal to allow any sort of mitigation presentation at all. On this understanding of the sentencing record, defense counsel did not fail at all, since it was Landrigan’s own considered choice not to mount a mitigation case.

Second, what if defense counsel inadequately counseled Landrigan about his evidentiary options at the sentencing hearing? It is possible that Landrigan believed, wrongly, that a mitigation presentation necessarily entailed testimony from his mother and ex-wife, and that therefore his objection to a mitigation presentation was premised on a misunderstanding. In other words, it is possible that Landrigan would have allowed a mitigation presentation limited to the theory that his violent disposition originates from a biological source, as Landrigan’s lawyers now argue. More broadly, it is possible that trial counsel undertook virtually no effort to develop a mitigation case and thus was in no position to adequately advise Landrigan of his evidentiary options. These factual claims require investigating the quality of defense counsel’s mitigation investigation and his ensuing advice to Landrigan before the sentencing proceeding began. If Landrigan misunderstood his evidentiary options—and in particular, that he could have presented a mitigation case without the testimony of his mother and ex-wife—then that misunderstanding could be placed at the feet of defense counsel, for part of defense counsel’s duties is to educate the client about those options so that he can rationally decide what course of action to pursue.

These are, of course, two possibilities. The Ninth Circuit did not subscribe to either as true or even probable. Landrigan contends that the fact that his mitigation waiver may reasonably be explained by defense counsel’s dereliction, as opposed to some authentic autonomy on Landrigan’s part, warrants an evidentiary hearing, for that dereliction would satisfy Strickland’s demand that a habeas petitioner show deficiency in counsel’s performance. Landrigan notes that without knowing more about what mitigation evidence was withheld from the sentencer—and it appears that the mitigation case was substantial and compelling—it is impossible to assess whether counsel’s deficient performance led to the sort of prejudice that would justify granting habeas relief under Strickland.

Here is where the deferential AEDPA standard of review becomes crucial. While it is possible that Landrigan’s mitigation waiver was the product of defense counsel’s deficient performance, the Arizona courts issued findings of fact that refute that possibility. It is not enough for a federal judge, or a federal appeals panel, to quarrel with those findings. It is not enough that a state court be wrong in its analysis. It must be unreasonably wrong. The state’s position, then, amounts to this: Given Landrigan’s rather clear position that he did not want his lawyers presenting any mitigation evidence on his behalf, the Arizona courts were hardly unreasonable in concluding that Landrigan was exercising a prerogative to waive mitigation that the Supreme Court in Blystone seemed to suggest is the capital defendant’s right. The Ninth Circuit’s parsing of the trial record to arrive at a different understanding of what Landrigan desired constitutes the sort of federal-court meddling into state-court death penalty jurisprudence that the AEDPA was enacted to stop.

Landrigan argues that the deference described above puts the cart before the horse. The Ninth Circuit only ordered an evidentiary hearing; it did not opine that the state courts misapplied the law or engaged in faulty fact-finding. The standard for ordering an evidentiary hearing is much more lax than the standard for granting habeas relief for the simple reason that a litigant ought to have the opportunity to present those facts that would support a legal claim. In this regard Landrigan’s essential point is that the Ninth Circuit is merely giving him the opportunity to present evidence that his supposed mitigation waiver was a product of his trial counsel’s dereliction. Whether that claim is meritorious depends on an assessment of that evidence. Landrigan accuses the state of unfairly transmuting his simple request for such an evidentiary hearing into an issue involving the actual merits of his claim.

At a more conceptual level, the state also argues—as a back-up argument, of sorts—that it is unworkable to saddle defense counsel with the obligation to advise a capital defendant of the manifold possibilities and options available at a capital-sentencing proceeding. Because mitigation evidence is broadly defined, it would be impos-
sible to advise a capital defendant of every conceivable item that could be presented in a capital sentencing proceeding. So long as a capital defendant understands the importance of presenting mitigation evidence and has been advised of his right to present such evidence to counter the prosecution’s quest for a death sentence, the Sixth Amendment has been satisfied. According to the state, Landrigan’s objection to a mitigation presentation was more principled than evidential. He simply did not want his lawyers to mount a mitigation case at all; in fact, he seemed to welcome a death sentence. Because the trial record does not permit the finding that this understanding of Landrigan’s actions is unreasonably wrong, according to the state, the Ninth Circuit’s grant of habeas relief should be overturned.

**Significance**

The Court has never straightforwardly confronted the philosophically deep question of whether a capital defendant ought to have the power to veto wholesale a mitigation presentation at a capital sentencing proceeding. *Blystone* suggests, but does not definitively hold, that capital defendants do have that right. This issue of mitigation waiver presents a collision of two adjudicatory ideals—the individual’s assertion of autonomy (reflected in the capital defendant’s choice to forgo a mitigation presentation) and society’s interest in reliable capital sentencing (reflected in the mandate that the jury consider mitigation evidence). A capital defendant who vetoes a mitigation presentation effectively undercuts the judicial system’s aspiration to give the sentencer all the information it must have to determine, reliably, that the convicted murderer deserves execution.

It is not at all clear that a capital defendant’s autonomy interest ought to trump society’s reliability interest. After all, the Eighth Amendment’s injunction against cruel-and-unusual punishments is a constitutional provision that society has an independent interest in enforcing, which makes it unlike other Bill of Rights protections, where the criminally accused has the key interest in invoking them. When a capital defendant strips the sentencer of the ability to reliably arrive at the moral judgment whether to impose a life sentence or death, he effectively authorizes an execution that would otherwise violate the Eighth Amendment, for the simple reason that the bedrock principle of capital jurisprudence is that no death sentence may be imposed unless and until the jury has considered the available mitigation evidence.

The chances are slight that the Court will adjudicate this conundrum, this collision between autonomy and reliability. In the jurisprudential universe of the AEDPA, the legal inquiry is severely truncated. The difficult substantive questions of a case, such as the one here concerning mitigation waiver, are usually overridden by the AEDPA’s un forgiving demand that the federal courts defer to state court findings and legal conclusions. Less than two weeks ago, the Court held in *Carey v. Musladin* that the Ninth Circuit improperly second-guessed a state court’s determination that a defendant’s due process rights were not violated when spectators at his trial wore badges in honor of the victim, in full view of the jury. The Supreme Court reasoned that there was no need to address the merits of that issue, since the case law was too undeveloped to warrant a conclusion that the state court was unreasonable in arriving at its own judgment on that due process issue. The same is likely to happen here. The Court will not likely untangle and resolve the mitigation-waiver conundrum, but may instead focus on the fact that the Arizona courts had good reason to believe, given *Blystone*, that capital defendants have the right to forgo presentation of mitigation evidence.

But what about the factual issue: did Landrigan truly veto any and all mitigation evidence? That issue demands a close examination of the trial record. The Ninth Circuit examined that record to arrive at a contrary conclusion from that of the Arizona courts. The legal issue, as the state frames it, is whether the Ninth Circuit’s contrary conclusion simply reflects a reasonable disagreement over what the trial record shows or whether it identifies on the part of the Arizona courts an unreasonable reading of that record. Landrigan reframes the issue, arguing that the essential question is whether an evidentiary hearing is needed to ensure a proper disposition of his constitutional claim. In effect, Landrigan flips the state’s argument on its head. The state contends that Landrigan’s waiver of mitigation fatally undercuts his ineffective-assistance claim. Landrigan counters that trial counsel’s ineffective assistance (which can be documented in an evidentiary hearing) fatally undercuts the validity of the mitigation waiver.

In a trilogy of cases—*Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard*—a divided Court has shown a willingness to be aggressive in its review of ineffective-assistance-of-counsel claims arising from capital prosecutions. Landrigan ultimately may be most interesting in revealing how the change in personnel on the Court (notably, Justice Alito’s replacement of Justice O’Connor, who had grown increasingly disenchant ed with capital punishment)

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will affect how the Court responds to ineffective-assistance claims in death penalty appeals.

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In bankruptcy cases, litigants are commonly awarded attorneys' fees if they are entitled to them under whatever contract or provision of state law underlies their claim. However, some courts bar those awards to the extent that the fees were incurred in litigating issues specific to bankruptcy law (e.g., whether the treatment proposed for a creditor's concededly valid claim is permissible under the Bankruptcy Code), as opposed to the merits of the claim itself (such as whether a debt was actually incurred in the amount claimed). Is that bar warranted?

**ISSUE**
May a litigant in bankruptcy court be awarded attorneys’ fees incurred entirely in contesting the treatment accorded its claim under the Bankruptcy Code?

**FACTS**
Petitioner Travelers Casualty & Surety Company of America (Travelers) issued a $100 million surety bond assuring payment of workers’ compensation benefits to injured employees of respondent Pacific Gas and Electric Company (PG&E). In connection with the bond, Travelers and PG&E entered into multiple indemnification agreements. In them, PG&E undertook to pay attorneys’ fees incurred in “recovering or attempting to recover any salvage in connection [with the surety bond] or enforcing by litigation or otherwise any of the [indemnification] agreements.”

Some years later, on April 6, 2001, PG&E filed in the United States Bankruptcy Court for the Northern District of California a petition to reorganize its debts under Chapter 11 of the Bankruptcy Code. On that
date, the court entered an order permitting, but not requiring, PG&E to continue paying its workers’ compensation obligations. The court also fixed a “bar date,” that is, a deadline for those asserting claims against PG&E to file proofs of their claims.

PG&E has never defaulted in paying workers’ compensation. As a result, Travelers has never been required to make payments under the bond. Nevertheless, Travelers filed a proof of claim against PG&E by the bar date. There Travelers asserted a right under the indemnification agreements and the applicable law of suretyship to be indemnified for any payments it might have to make in the event of a future default by PG&E. Travelers also invoked its right of subrogation, under which a surety that pays creditors (that is, the workers’ compensation claimants) succeeds to their rights against the principal debtor (PG&E). Those rights of subrogation and reimbursement are “contingent” in the sense that their enforcement is subject to conditions precedent, namely, default by PG&E and payment under the bond by Travelers.

PG&E objected to Travelers claim on the grounds of 11 U.S.C. §§ 502(e)(1)(B) and 509(A), which respectively bar contingent claims for reimbursement and subrogation. (The Bankruptcy Code comprises title 11 of the United States Code. The text below refers to its provisions simply by section number.) Travelers’ attorneys prepared a brief arguing that its claim was allowable. Before the court ruled on that issue, however, Travelers and PG&E entered into a stipulation acknowledging the invalidity of that claim. On that basis, the court disallowed the claim.

PG&E also filed a disclosure statement describing its proposed plan of reorganization. Travelers objected to the statement on the ground that it did not provide adequate information on how the plan would deal with either workers’ compensation claims or Travelers’ rights as a surety. At the hearing on that objection, the bankruptcy judge asked the proponent of the plan (PG&E’s corporate parent, PG&E Corporation) how it proposed to treat those matters. Its answer was that nothing in the plan would alter the workers’ claims or Traveler’s subrogation rights. In other words, those claims and rights would remain “unimpaired.”

After that hearing, the parties agreed on language to be inserted into the disclosure statement and plan to assure that result. That language provided that workers’ compensation claims would be left unimpaired and that “[n]othing in the Disclosure Statement or Plan shall alter … the subrogation rights of any surety of pre-petition or post-petition Worker’s Compensation Claims.” PG&E also added the following language: “[n]othing herein shall affect the rights of the Debtor to object, pursuant to the Bankruptcy Code, to the existence of any such subrogation rights.”

Travelers incurred $167,000 in attorneys’ fees for work done in connection with its claim, its objection to the disclosure statement and plan, and related negotiations. In its Amended Claim, Travelers sought recovery of those fees under the indemnity agreements. PG&E objected that (1) Travelers’ pursuit of its contingent claim was beyond the scope of the agreements’ provisions for recovering attorneys’ fees, and (2) there is generally no right to recover fees incurred in litigation limited to issues of bankruptcy law.

In an unreported opinion, the bankruptcy court sustained PG&E’s objection, primarily on the second ground above. The district court affirmed on the same ground, also in an unreported opinion. Then the Ninth Circuit affirmed as well. Travelers Casualty & Surety Company of America v. Pacific Gas and Electric Company, 167 Fed. Appx. 593 (9th Cir. 2006) (not published in the Federal Reporter).

The court of appeals relied largely on its previous decision that attorneys’ fees are not awarded in bankruptcy for litigation of issues peculiar to federal bankruptcy law, as opposed to basic contract enforcement issues. Id. at 594 (citing Fobian v. Western Farm Credit Bureau, 951 F.2d 1149 (9th Cir. 1991)). Observing that Travelers had not prevailed on its claim and had not been required to make any payments under the bond, the Court also concluded as follows: “Indeed, if unimpaired, nonprevailing creditors were authorized to obtain an attorney fee award in bankruptcy for inquiring about the status of unimpaired inchoate and contingent claims, the system would likely be overwhelmed by fee applications, with no funds available for disbursement to impaired creditors or debtor reorganization.” 167 Fed. Appx. at 594.


Still other circuits, however, have rejected Fobian, e.g., Official Committee of Unsecured Creditors v. Dow Corning (In re Dow
Travelers maintains that its interventions were necessary to protect its rights as a surety. Its merits brief asserts without much elaboration that it was entitled to attorneys' fees under the indemnity agreement and that Fobian was the only reason offered for denying them. Consistently with that position, Travelers' focuses almost entirely on Fobian.

In granting certiorari, the Court presumably agreed with Travelers that this case squarely presents the soundness of Fobian. The rest of this case analysis, therefore, is limited to that topic.

Travelers argues that in seeking attorneys' fees, it is advancing a claim in the sense of § 101(5), that is, “a right to payment.” Section 502(b) generally directs the bankruptcy court to allow claims, subject to several enumerated exceptions, none of which bar fees incurred in litigating bankruptcy law matters. One exception, § 502(b)(4), mandates disallowance of a claim “for services of an insider or attorney of the debtor” to the extent that the claim “exceeds the reasonable value of such services.” Travelers infers from that provision that Congress would have expressly barred any other attorneys' fees it intended to disallow.

Under § 502(b)(1), claims are also to be disallowed if they are “unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.” Travelers contends that the law applicable to its fees is the state law of contracts, which validates its right to attorney fees under the indemnity agreements. In that regard, Travelers also relies on language in Raleigh v. Ill. Dept' of Revenue, 530 U.S. 15, 20 (2000):

“Creditors’ entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code. The 'basic federal rule' in bankruptcy is that state law governs the substance of claims.”

In the absence of an express statutory bar to its claim, Travelers treats Fobian as an unwarranted intrusion of judge-made federal common law into an area governed by the Code.

PG&E approaches Fobian from a perspective suggested by the following two quotations. “It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees.” Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415 (1978). “When a cause of action is federal ... we ordinarily do not look to state law in considering whether to award attorney's fees.” In re Sheridan, 105 F.3d 1164, 1167 (7th Cir. 1997), citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n. 31 (1975).

In other words, PG&E sees as exceptional the allowance (not the disallowance) of attorneys' fees incurred in bankruptcy court litigation. From that viewpoint, the default rule is to disallow claims like Travelers' unless the Code expressly provides for allowance.

PG&E notes that § 506(b) does mandate allowance of any reasonable “fees, costs, or charges provided for under the agreement or State statute under which [certain claims] arose.” But that provision is limited to over-secured creditors, that is, those whose claims are backed up by collateral of a value greater than the amount owed them when bank-
ruptcy was filed. Traveler’s claim is entirely unsecured. In the absence of any express statutory support for allowing that claim, PG&E infers that it should be disallowed. PG&E characterizes the process of drawing that inference from the Code’s silence in the face of a default rule barring attorneys’ fees as an exercise in conventional statutory construction—not an unwarranted creation of federal common law.

The Court has stated that it “will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.” Pa. Dep’t of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990). Travelers therefore emphasizes a decision under the previous Bankruptcy Act of 1898 awarding attorneys’ fees if the party seeking them was entitled to them under state law. Security Mortgage Co. v. Powers, 278 U.S. 149 (1928). On that authority, some courts have allowed unsecured creditors fees incurred in litigating bankruptcy law issues in bankruptcy court, e.g., United Merchants and Mfrs., Inc. v. Equitable Life Assurance Soc’y (In re United Merchants and Mfrs., Inc.), 674 F.2d 134 (2d Cir. 1982) (decided under the previous Bankruptcy Act).

PG&E distinguishes Security Mortgage on the grounds that the creditor there was oversecured (and hence would be entitled to fees under § 506(b)) and that the fees in issue were incurred in pre-bankruptcy state court litigation of state law issues. But those distinctions do not apply to United Merchants and similar decisions under the Act. At the same time, other courts have expressly disagreed with United Merchants, e.g., Adams v. Zimmerman, 73 F.3d 1164, 1176-77 (1st Cir. 1996).

“[T]he Bankruptcy Code aims, in the main, to secure equal distribution among creditors.” Hocevar Delivery Serv., Inc v. Zurich Am. Ins. Co., 126 S.Ct. 2105, 2109 (2006). Travelers complains that Fobian produces inequality in disallowing certain claims enforceable under state law while such claims are generally being allowed. On the other hand, PG&E maintains that allowing fees incurred in frivolous and wasteful bankruptcy court litigation would itself undermine the bankruptcy distribution by reducing the amounts available for other creditors.

The available briefs of the parties do not focus on arguably significant language in § 502(b): “if [an] objection to a claim is made, the court … shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition” (emphasis added). To similar effect, § 502(b)(2) calls for disallowance of claims “for unmatured interest,” that is, interest which accrues after the bankruptcy filing. There is no comparable express rejection of attorneys fees incurred post-petition, but some courts have disallowed them as analogous to unmatured interest. See, e.g., Adams, 73 F.3d at 1176-77.

On the other hand, allowed claims were fully paid in PG&E’s bankruptcy. In that rare circumstance, the general bar on unmatured interest may be lifted under §§ 726(a)(5) and 1129(a)(7)(A)(ii). If the analogy with post-petition attorneys fees holds, perhaps they too should be allowable when the debtor is solvent. For a recent discussion of how a debtor’s solvency may affect the allowance of attorneys’ fees, see Dow Corning, 456 F.3d at 681-82.

SIGNIFICANCE
Many businesses cannot legally operate without obtaining surety bonds to cover workers’ compensation obligations or other liabilities. Travelers maintains that disallowing sureties’ contractual claims for bankruptcy court litigation of bankruptcy law issues will raise the cost of issuing the bonds, making them more expensive or less available. On the other hand, if those fees were really important to sureties, one would expect that indemnification agreements would ordinarily be drafted clearly to provide for them. That appears not to be so in view of both PG&E’s arguments about the operative language here and the case law.

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AMICUS BRIEFS
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The governor and the attorney general of Guam, independently elected officials, dispute the meaning of the law setting limits on Guam’s indebtedness. The attorney general’s position is contrary to that of the Guam Supreme Court and the legislature. The U.S. Supreme Court also requested briefing on whether the petition for certiorari was time-barred by what the petitioner calls an admittedly idiosyncratic procedural history.

Therefore the case is about a dispute between the governor and the attorney general over the meaning of the act, which reads in relevant part: “[W]hen necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the government of Guam: Provided however, That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of the property in Guam.” (Emphasis in original.)

The Guam legislature is empowered to design the details of its tax system and exempts certain real property from taxation. The assessed or taxable value of the property is set at 35 percent of its appraised value. The property value in Guam may have declined as much as 81 percent from 1990 to 2002.

In 2003, the legislature authorized the governor to borrow money by issuing bonds in an amount not to exceed $418,309,857. The law earmarked $200 million for debt service on bonds issued 10 years.

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ISSUES
Was a petition for writ of certiorari timely when it was filed more than 90 days after the Guam Supreme Court ruled in this case but shortly after the Ninth Circuit Court of Appeals dismissed the appeal for lack of jurisdiction?

Did the Guam Supreme Court err when it interpreted “aggregate tax valuation” to mean the full appraised value of all the taxable property in the territory?

FACTS
The case involves the governance of Guam, an unincorporated territory on an island in the west central Pacific Ocean. Guam was acquired in the Spanish-American War and is now governed by the Organic Act of Guam, 48 U.S.C. § 1421 et seq., which serves as its constitution. The law provides, among other things, that the governor of Guam may not execute contracts on behalf of the territorial government without the approval of the attorney general.

Therefore the case is about a dispute between the governor and the attorney general over the meaning of the act, which reads in relevant part: “[W]hen necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the government of Guam: Provided however, That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of the property in Guam.” (Emphasis in original.)

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earlier and the remainder for general fund expenditures. The grant of authority is found in Public Law 27-19, which also said that the bonds authorized by the act “may not be issued in an amount that would cause a violation of the debt limitations of [the Guam Organic Act].”

The attorney general refused to approve the bonds because the borrowing would raise the territorial government’s indebtedness too high. The attorney general said that “aggregate tax valuation” meant the assessed value of property used for purposes of taxation, which would put the ceiling at about $390 million based on 35 percent of the total appraised value of taxable property. He also said that using the 2002 tax roll used to determine the value was improper because it was out of date and property values had declined. The law required a new appraisal every three years but the last appraisal had been 10 years earlier.

The legislature then enacted Public Law 27-31, which expressed its view that aggregate tax valuation meant 100 percent of the appraised value of the property on Guam. The law was not binding and the attorney general was unmoved.

The governor then filed an original declaratory judgment action in the Supreme Court of Guam, asking the court to determine if the attorney general was correct. The Guam Supreme Court invited the petitioner to intervene, and after allowing seven days for briefing, had oral arguments on the same day the reply briefs were filed. (The Guam Supreme Court is appointed by the governor with the advice and consent of the legislature and can be abolished by an act of those two branches.)

The Guam Supreme Court ruled that “aggregate tax valuation” meant the full appraised value of property rather than the assessed value used for purposes of taxation. It also said the 2002 tax roll could be used to calculate the debt limit. Although the appraisals were outdated, the property rolls’ values had been individually adjusted. The court placed the burden on the petitioner to show that adjustments to the tax roll were arbitrary or capricious.

The Guam Supreme Court said that the total appraised value of taxable property was about $11 billion, the debt limit was $1 billion, the government’s existing debt was about $378 million, and that adding the $418 million sought by the legislature would be within the debt ceiling. The attorney general’s view capping the debt at $390 million would have rendered almost all the bonds illegal.

The attorney general sought review in the U.S. Circuit Court of Appeals for the Ninth Circuit, which at the time had jurisdiction to review the Guam Supreme Court by writ of certiorari. The Ninth Circuit granted the attorney general’s petition and heard oral argument, but before it could act Congress amended the law in 2004 to shift jurisdiction from the Ninth Circuit to the U.S. Supreme Court. The Ninth Circuit did not rule until January 2006 that the amendment applied to pending cases. It dismissed the appeal in this case for lack of jurisdiction in March of 2006. That decision is unreported.

In May 2006 the petitioner was granted an extension of time within which to file a petition for writ of certiorari to the Supreme Court, which was granted. The petition was filed in July and granted in September.

**Case Analysis**

Before the meaning of the statute can be addressed the court must first determine its own jurisdiction, having directed the parties to brief the issue. The question arose because of the length of time that the case sat at the Ninth Circuit. Normally parties must seek certiorari within 90 days of the lower court’s decision. That time ran while the case sat at the circuit court, so the Supreme Court asked the parties to argue the question of whether the time was pending at the Ninth Circuit counted toward the 90-day time limit.

After losing before the Guam Supreme Court, the attorney general did what he was supposed to do and took the case to the Ninth Circuit. The case was briefed and argued there but before the court ruled, Congress changed the law in 2004. The Ninth Circuit concluded it had no jurisdiction and dismissed the appeal—but not until March 6, 2006. An extension of time to file a petition for a writ of certiorari was granted on May 31, 2006, and the petition for the writ was filed on July 19, 2006.

The attorney general argues that the 90-day time limit for filing a petition with the U.S. Supreme Court, 28 U.S.C. § 2101 (e), was tolled by the proceedings in the Ninth Circuit. This is common sense and follows the case law, the attorney general argues.
The Supreme Court has consistently said that actions that suspend the finality of the lower court’s judgment, such as a motion for rehearing, toll the running of the 90-day period set forth in section 2101. It has said the same thing in cases involving review under other statutes. The same principle applies as in a petition for rehearing: the finality of the lower court judgment was challenged and was subject to alteration by the Ninth Circuit, and therefore there was no judgment to be reviewed. The fact that the Ninth Circuit’s review was discretionary does not alter the fact that the judgment was not final. It only became final when the Ninth Circuit dismissed the appeal.

The attorney general compares the case to that of the discretionary review granted by state supreme courts after a decision has been rendered by a state’s intermediate appellate courts. In those instances, the U.S. Supreme Court has made it clear that a judgment is not final until discretionary review is complete, he says.

The case would have been decided at the Ninth Circuit had Congress not acted and the Ninth Circuit properly retained the case to determine its own jurisdiction, argues the attorney general. (In a footnote, the attorney general notes that the decision remained suspended even if the U.S. Supreme Court believes the Ninth Circuit should have acted more quickly.)

There are other considerations that the attorney general says support his position. First, the Court has recognized a presumption that Congress intends territorial courts to be subject to review by at least one Article III court. Second, a contrary decision would deny the attorney general access to any independent court, not just an Article III court. The Guam Supreme Court was not an independent and co-equal branch of the government when it rendered its decision. Third, a contrary decision would penalize the attorney general for following proper procedure. He should not have been required to file a petition for writ of certiorari to the Supreme Court at the same time he was filing before the Ninth Circuit. Such a petition surely would have been dismissed.

But the governor responds that the 90-day time limit is mandatory and jurisdictional. He argues that the Ninth Circuit was divested of jurisdiction when the law was changed and that the attorney general should have filed a cert petition at that time or requested the Ninth Circuit to vacate the judgment and remand the case to the Guam Supreme Court.

Instead, he says, the attorney general “permitted” more than 18 months to pass between the time that the Ninth Circuit was divested of jurisdiction and the time he made his first filing in the U.S. Supreme Court.

The governor argues that it is “undisputed” that the Ninth Circuit ceased to have jurisdiction as of the time the law changed. There was no motion filed with the Guam Supreme Court that kept the case within its jurisdiction until the petition to the U.S. Supreme Court was filed, he points out.

“Thus the crux of the jurisdiction issue may be seen as whether the Ninth Circuit had jurisdiction to decide its own jurisdiction, as the attorney general argues, or whether the law automatically divested the court of power to act in the case.

Once the section 2101 tangle is smoothed out, the parties and the Court can turn to the construction of the Organic Act’s debt-limitation provision.

The petitioner first argues that the Guam Supreme Court’s interpretation of “aggregate tax valuation” as meaning the full appraised value of property conflicts with the plain language of the statute. The statute specifically refers to tax valuation and also ties borrowing to the tax revenues that can be generated to repay the debt by limiting borrowing to “when necessary to anticipate taxes and revenues.” The ruling by the Guam Supreme Court severs the link between borrowing and tax revenues and ignores the word tax in “aggregate tax valuation.” Case law supports this argument by an inverse comparison: It has said that without the word “tax” modifying the word “value,” the reference is to full market value. The Guam Supreme Court said that with the word “tax,” the reference is to full market value.

With more than a hint of frustration, the attorney general then points out that the Guam Supreme Court did not include nontaxed property in the calculation of the debt limit. “[T]he court’s reasoning that ‘it is imprudent to base the debt limit on non-taxed property because such property is not revenue generating’ only underscores the problems with its interpretation of ‘tax valuation’ to mean market value.” He then suggests that the court should not use one valuation system to calculate

(Continued on Page 212)
current taxes and another to calculate the debt limit.

Furthermore, the word “tax” is not in the definition simply to refer to “taxable property,” because if Congress had meant to say that, it would have said “taxable property,” not “tax valuation.”

The petitioner then says that the Guam Supreme Court interpreted “tax valuation” in light of its determination that the Virgin Islands Organic Act refers to “assessed valuation” rather than “tax valuation.” The Virgin Islands’ act was enacted before Guam’s, and Congress would not have said “assessed” in the first and “tax” in the second if it intended both terms to mean “assessed,” said the Guam Supreme Court.

However, says the attorney general, that reasoning ignores the history of the Virgin Islands Organic Act. That law was enacted in light of a federal law that said that real estate taxes in the Virgin Islands were to be based on the actual value of property. That accounts for the difference in the language in the laws concerning the debt ceiling and also shows that Congress has consistently tied operation of territories’ debt-limitation provisions to the property tax system. Two purposes remain constant across the statutes: Congress has sought to ensure that territorial borrowing is not excessive and caps on indebtedness are tied to property taxing systems.

Concluding with a policy argument, the attorney general says that the Guam court’s interpretation undermines the will of Congress expressed in the debt-limitation provisions. The statute “ensures that the Guam legislature cannot engage in levels of borrowing that would threaten the territorial government’s solvency. It prevents the legislature from excessively postponing the enactment of taxes needed to keep the government within its means and thrusting upon future taxpayers oppressive levels of taxation. And, perhaps most fundamentally, the debt limitation proviso thereby ensures that the members of the legislature (and the governor) remain accountable to people who elect them and whom they serve.”

The governor argues that the question really concerns the construction of Public Law 27-19 and that the petitioner is allowing a local law to force the construction of a federal law. The federal law states that “aggregate tax valuation” means the appraised value of the property, as the Guam Supreme Court ruled, says the governor. The Guam Supreme Court correctly based its analysis on the plain language of the law and a comparison to the Virgin Islands and other jurisdictions.

The governor argues that valuation, the term used in the Organic Act, means the process of determining a value, and while the “value” of taxable property is 35 percent of the sale price under local law, the debt ceiling is based on the potential tax valuation of property.

“That there was no reason to believe Congress intended to have local law define any term in the organic Guam Act. Indeed, it is self-evident that the Legislature lacks the authority to adopt Guam law that defines terms in the federal Organic Act like ‘aggregate tax valuation,’” argues the governor.

He continues that the term “tax valuation” makes it clear that the debt limit is to be based on the value of the property being taxed and that the attorney general’s effort to further parse the word “tax” is unwarranted.

The Guam Supreme Court correctly held that the territory’s ability to incur debt should be consistent with the maximum power to tax granted by Congress, says the respondent. Whether the Guam legislature levies taxes based on a lower level than the actual value of the property or declines to tax at a rate necessary to satisfy the obligations are matters of local policy and fiscal management. The legislature has the ability to tax up to the maximum value of all property.

“For the Petitioner to be correct that the debt-ceiling must be tied to the current as opposed to the potential rate of property tax assessment, one would have to completely ignore Congress’ deliberate choice to grant the government of Guam broader taxation powers,” argues the governor.

If Congress had meant to limit the debt ceiling to the assessed value, it would have done so explicitly, as it did in the Virgin Islands, says the governor. He argues that the attorney general’s “speculations” about the reasons for the differences between the laws of the two territories is unsupported. Furthermore, Congress has more control over the Virgin Islands’ property tax system than it does in Guam.

“Congress entrusted Guam’s legislature with the power to engage in public borrowing, and it entrusted Guam’s Supreme Court to sit in judgment of disputes involving issues such as public borrowing,” the governor concludes.

The governor argues that the Guam Supreme Court’s interpretation of the act is entitled to substantial deference, even if the U.S. Supreme Court would construe it differently.

He also raises his own policy arguments, saying that without the abili-
ty to issue bonds Guam will not be able to meet its obligations. “This would be a particularly incongruous result when Guam, which is well on the road to full economic recovery due to increased tourism and a renewed presence of the United States military, needs the ability to reasonably borrow to fuel future economic growth.”

SIGNIFICANCE
Although the United States owns several territories besides Guam, neither party argues that the construction of the Organic Act of Guam has any significance in those territories. While certainly the territorial debt and taxation process, not to mention the political power in the territory that appears to be in the balance, will have a significant effect in Guam, the parties do not claim the case has a broader geographic significance.

They similarly do not argue directly that the procedural issue would necessarily go beyond the case, although the petitioner does list a parade of horribles that could ensue if the Court finds his appeal time-barred. The parade includes uncertainty in the law in other cases in which a judgment is not final, which would lead to redundant certiorari petitions filed for “insurance” purposes and an increased case load.

The governor raises his own specter of horribles: “Indeed, if petitioner’s contrary rule were to apply, there would be no bar to dissatisfied litigants filing in the wrong court to extend proceedings and waiting for that court to declare its lack of jurisdiction before seeking further review from this Court. That would deny prevailing parties the repose that appellate time limits are intended to provide.”

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Can “Reckless Disregard” Satisfy the FCRA’s “Willful” Conduct Requirement?

by Jack E. Karns

In this case, the Supreme Court will resolve a dispute in the Ninth Circuit regarding whether the statutory “willful” conduct requirement of the Fair Credit Reporting Act can be violated absent a showing of actual knowledge or conduct by the defendant. The Ninth Circuit, in contrast to at least five other circuit courts, ruled that conduct rising to the level of “reckless disregard” was sufficient to meet this “willful” conduct standard.

ISSUE
Can a defendant violate the civil, statutory “willful” conduct requirement of FCRA Section 1681n without proof of actual knowledge or conduct but with a lesser showing of “reckless disregard”?

FACTS
In 1970, Congress enacted the Fair Credit Reporting Act (FCRA) “to promote efficiency in the nation’s banking system and to protect consumer privacy.” The act covered both institutions that create consumer credit reports as well as those companies or individuals that use this information in making decisions regarding the provision of consumer credit. At issue in the consolidated cases now before the Court is the act’s requirement that all users of consumer credit-report information notify the consumer in writing whenever they take “adverse action” based on information contained in the report. This adverse action usually takes the form of an insurance company offering a tiered placement within an affiliated company that offers a higher policy premium payment due to the credit risks presented by the consumer-applicant. These variable risk-based pricing options represent a significant departure from the manner in which insurance was offered and sold when FCRA was enacted. At that time there were fewer policy term or rate options, and an applicant was either approved or denied coverage based on the same fixed set of information. However, that system has changed dramatically with the individual’s “credit score” now serving as the key component of today’s risk-based insurance pricing scheme.

The current sophisticated credit-scoring models provide a numerical ranking that uses factors contained in the credit report along with a host of other underwriting factors, many of which are included in the credit application. Credit history and credit exposure are but a couple of factors that are used to calculate this numerical rating, which is

Case at a Glance

In this case, the Supreme Court will resolve a dispute in the Ninth Circuit regarding whether the statutory “willful” conduct requirement of the Fair Credit Reporting Act can be violated absent a showing of actual knowledge or conduct by the defendant. The Ninth Circuit, in contrast to at least five other circuit courts, ruled that conduct rising to the level of “reckless disregard” was sufficient to meet this “willful” conduct standard.
not merely a grading or report of the individual’s credit performance to date but is a model designed to predict the applicant’s future credit risk. An individual’s “credit score” generally ranges from a low of 300 for the highly risky individual to a high of 850 for people who are deemed the best credit risks.

GEICO, Safeco, and most other insurers use one of varying forms of the standard credit score to decide the credit risk presented by credit applicants as well as existing policyholders. These “insurance scores” are calculated using information from the consumer’s credit report along with a mathematical model designed by the Fair Isaac Corporation, a company that is considered the market leader when it comes to providing viable scoring systems for today’s commercial insurance marketplace. While insurance scoring is not the same as credit scoring, it is useful in predicting the risks that an applicant or existing policyholder poses based on his or her individual credit history. Most importantly, insurance scoring allows insurers to make more informed decisions regarding the proper risk classification for an individual and to establish policy-pricing schemes that are not only efficient and reflective of the insured’s likelihood of paying but also allow the companies to meet the consumer protection requirements set forth by the FCRA.

Insurers use more than just insurance scores or credit scores in determining the insurance tier placement of an insured, however. They also are likely to rely on proprietary factors or models, driving history, age, gender, reported claims, policy cancellations due to failure to pay premiums, among other indicia that can reliably predict whether the insurance candidate represents a good customer prospect. Given that both the use of credit reports and scores for determining customer applications and the setting of policy premiums is regulated by state law, most states do not allow an insurance company to rely on this information unless steps are taken to make these mathematical formulas fair for customers who have very little or no credit history. Without this requirement an applicant’s lack of credit history would almost certainly render the individual a “high credit risk” even though he or she may simply be young.

The states, working in concert with the FCRA, therefore assure these individuals that no “adverse” action will result from merely this one “credit score” factor. Most states permit insurers to include in their modeling formulas a factor that will neutralize the adverse impact of this type of negative risk factor. A few states, skeptical as to the overwhelming importance that credit reports and credit scores play in establishing insurance scores and ultimately in determining whether citizens receive insurance, have banned the use of credit reports and scores completely. Rather than rely on the insurers to “neutralize” these inherently unfair factors in their mathematical models, these state legislatures have opted to ban use of the credit report and score at all and thereby achieve automatic neutralization through regulation. In the end, what matters primarily under the FCRA is the manner and extent to which insurers inform applicants or existing customers of any “adverse” impact that the reliance on credit scores had in the insurer’s decision-making process regarding tier placement and the policy terms ultimately offered.

Since credit scores are an inherent part of the credit report, use of the full report is derivatively regulated to some degree, as well. As these consolidated cases factually demonstrate, whether an insured exercised willful conduct resulting in an adverse action relative to an applicant or existing customer is crucial under FCRA § 1681n since it requires that all customers so affected receive a statutory notice of the action taken by the insurer. Typically, this conduct consists of a failure to notify a customer that his or her credit score was the causal factor in a lower insurance rating and tier placement, thereby resulting in a higher premium payment. These consolidated cases purportedly involve “adverse-action” decisions without follow-up statutory notices, but they are not typical in that the respondents in these cases contend insurers can violate the civil provisions governing “willful” conduct under the act by a showing of “reckless disregard” and without consideration of whether the insured knew or had actual knowledge of the adverse action when it occurred. Finally, armed with this understanding of the contemporary commercial insurance market’s decision-making tools, we can analyze the key issues presented in the GEICO and Safeco cases.

GEICO sells automobile insurance through four affiliated companies. GEICO General sells its most preferred insurance to customers who have the lowest risk profiles. The Government Employees’ Company sells preferred auto insurance only to government employees or military personnel, while GEICO Indemnity sells standard insurance for moderate risk customers. Finally, GEICO Casualty sells non-standard policies with higher premiums to consumers who have a greater risk rating.

In 1998 GEICO contracted with Trans Union and the Fair Isaac Corporation in order to gain access (Continued on Page 216)
to information related to an applicant's credit report and rating. The arrangement did not provide that GEICO would have unfettered access to an applicant's complete credit record but rather provided GEICO with the applicant's credit score and no more than four factors that were considered to have most prominently affected the credit score. The following year GEICO began to use these credit scores as one factor, in addition to other pertinent risk factors, in making initial decisions as to the individual's risk category and the type of insurance to be offered, if any. Operation of this risk-analysis system was initiated when a customer called GEICO's toll-free number, and a sales representative gathered basic applicant information with the individual's permission including the authority to obtain a copy of the appropriate credit score.

GEICO's Computer-Assisted Underwriting (CAU) was used to create a weighted factor and then combine additional underwriting factors that determined which GEICO company and tier placement the customer would be offered. At the time at issue in this case GEICO did not have the technical ability to determine whether credit information had "adversely affected" the tier rate recommendation made to a customer, and, therefore, it sent FCRA adverse-action notices to all applicants who received offers with either GEICO Indemnity or Casualty. In short, if the customer did not receive a preferred tier rating and policy offer, GEICO erred on the side of caution by sending a notice so as to ensure there could be no possible violations of Section 1681n. In doing so, GEICO knew full well that it was sending far more statutory notices than was absolutely required by the act, but nevertheless it chose the option that would best minimize any potential legal liability that might arise from this lack of scoring certainty.

A few months later, the Fair Isaac Corporation developed a method incorporating an individual's credit score that allowed insurance companies to isolate the score from all other underwriting decision factors. This permitted the users of the methodology to measure the specific impact that use of the credit score had on the applicant's tier placement and policy premium as compared to the outcome that would have resulted if the score had not been used at all in favor of other more traditional factors. This particular methodology was known in the trade as "neutralizing" an applicant's credit score, and it allowed users of Fair Isaac's information to make more precise decisions as to when an applicant had to be sent an adverse-action notice. This allowed GEICO to eliminate a substantial number of the notices that had previously been sent merely as a caution rather than because they were absolutely required by the FCRA.

In December 2000, Ajene Edo telephoned GEICO for a personal automobile rate quote. Using the newly revised CAU system that relied on Edo's credit score and other underwriting factors, he was determined to be eligible for a policy with GEICO Indemnity, the firm that sells policies to moderate risk individuals. The question was whether or not Edo should receive an adverse-action notice based on the impact his credit score had on his tier placement. The CAU system determined that Edo would have paid the same policy premium whether or not his credit score had been used in GEICO's underwriting determination. So, with or without consideration of his credit score, Edo would have received the same tier placement policy premium quote with GEICO Indemnity, which is the very distinction the improved CAU system was designed to make.

Edo conceded as much when he admitted that he suffered no actual damages since he would have been offered a policy through GEICO Indemnity regardless of any use of his credit score. His position is that the fact that GEICO did not send him an adverse-action notice was a statutory violation because, regardless of the Company's CAU, system it "willfully" violated the act by not informing Edo that he was being denied preferred coverage by GEICO General and instead was being offered a policy through GEICO Indemnity. GEICO's position is that since Edo would have been offered a policy through its Indemnity company regardless of whether it considered his credit score, he suffered no adverse action of the sort contemplated by the FCRA. That is, Edo was not going to qualify for the preferred rates of GEICO General with or without consideration of his credit score, and, therefore, he suffered no adverse action sufficient to require a Section 1681n notice. The district court dismissed Edo's claims against all four GEICO companies and appeal was taken to the Ninth Circuit. Through a series of three chronologically separate opinions, the Ninth Circuit ultimately held that GEICO had "willfully" and through "reckless disregard" committed an "adverse action" with respect to Edo, thereby violating the FCRA Section 1681n statutory notice requirement. The U.S. Supreme Court then granted certiorari to determine the proper meaning of the "willful" conduct provision of the act, whether an adverse action had actually occurred, and whether the statute anticipates the use of a "reckless disregard" standard of conduct for violation of its civil statutory provisions.
In the Safeco case, Lori Spano filed suit against the insurance company for allegedly violating the FCRA's adverse-action notice requirement. Spano's automobile insurance policy had been cancelled four times for failure to pay the premium, but each time upon request of the insured the company's Oregon affiliate (Safeco-Oregon) reinstated the policy without any reference to Spano's credit information. However, when the policy was cancelled for the fifth time and Spano again requested reinstatement, Safeco-Oregon declined to do so at least in part based on information contained in the customer's credit report that was ordered specifically to assist in making the ultimate decision. Spano alleged that this decision not to reinstate was an "adverse action" under FCRA Section 1681n entitling her to statutory notice. Later, two other plaintiffs were named to the case, Massey and Burr. Burr had likewise applied for auto insurance and was issued a policy by another company. Due to his poor driving record, he was placed in the highest risk category requiring the highest policy premiums, and his credit report played a part in the rendering of this decision. Given that he had the most favorable credit score possible, it would not have improved his placement above the highest risk category nor have reduced his policy premium. When this policy lapsed for failure to pay the premium, Burr purchased another policy from Safeco-Oregon. Both that favorable decision to sell him another policy and the initial policy amount were partly due to information contained in his credit report. Because the impact of his credit score on the tier or cost of insurance that he was offered by Safeco had not been altered since his dealings with the previous company, Safeco did not view the credit score as having any adverse impact on their decision. Burr was therefore offered low tier, high premium insurance with no statutory notice of any adverse action.

Massey, on the other hand, applied for renter's insurance from Safeco-Illinois, which used a consumer credit report in deciding that the insured should be placed in the tier that had the highest premium rate. The district court dismissed the complaints of Burr and Massey on the grounds that no adverse action had been taken against either of them as alleged under the act. The court reasoned that an adverse action occurs only when the insurance increases a premium that the company has previously charged that policyholder. Given that both Burr and Massey were not existing policyholders, they were not entitled to any adverse action notice with regard to Safeco's initial rate quotes.

The district court denied Safeco's motion for summary judgment against Spano, reasoning that because she was an existing policyholder and (most importantly) because the decision not to reinstate her policy for a fifth time was based in part on information found in her credit report, an adverse action had occurred. This reliance on the credit report, however small, constituted an adverse action as that term is used within the FCRA and Spano was entitled to statutory notice. Finally, Spano dropped her claim for punitive damages seeking only the statutory remedies in her appeal to the Ninth Circuit offered by Section 1681n. The district court granted Safeco's motion for summary judgment against Massey and Burr based on the ground that the FCRA does not require an adverse action notice when someone is not an existing policyholder but is requesting an initial premium bid. Massey and Burr appealed to the Ninth Circuit. By stipulation of all parties, further proceedings as to Spano were stayed pending the disposition of that appeal. The Ninth Circuit reversed the lower court's grant of summary judgment to Safeco, holding that use of the credit score had resulted in an adverse action to Spano, and further held that the FCRA covered the claims of Massey and Burr despite the fact that they were not existing policyholders. The Supreme Court then granted certiorari to determine the proper meaning of the "willful" conduct provision of the act and whether an adverse action had actually occurred when Safeco failed to send statutory notices as required by the act.

**Case Analysis**

The primary importance of these cases is reflected in the Ninth Circuit's view that "reckless disregard" is sufficient to meet the FCRA requirement of "willful" conduct. The circuit distinguishes itself from nearly a half dozen other appellate courts, all of which require a showing of actual knowledge in order to violate the "adverse action" wording of Section 1681n. This FCRA section states that an "adverse action" means "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

Petitioners contend that this language requires an affirmative act on their part that places respondents in an inferior position, financially or with respect to their tier classification. Respondents counter that such a dramatic change in position is not mandated by the statute. If the insured would have placed higher in

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his or her credit ranking, that would constitute an adverse-action sufficient to trigger the statutory adverse-action notice requirement and accompanying civil statutory penalties even if he or she still would have received the same credit policy offer and attendant premium. In fact, in this situation an insured may well be offered a policy by the same affiliated company, but if his or her credit score was higher than the weighted score used in the mathematical model, then he or she is the victim of an “adverse action” entitled to notice or at least statutory civil penalties as prescribed by the FCRA, which range between $100 and $1,000 per violation.

Petitioners also argue that the Ninth Circuit’s reasoning will compel all insurance companies to send adverse-action notices in situations in which not only did nothing adverse occur, but in which the wording of the notice itself will do nothing but confuse the individual as to exactly what has occurred. This will result in an endless stream of letters, telephone calls, and administrative costs borne by the insurers simply to be absolutely certain that no part of the Ninth Circuit’s rule is violated. At the same time, multinational firms will have to deal with the question of whether to adopt alternate notice methods in the states falling under the other circuits’ jurisdiction or to adopt one standard for all 50 states, a standard dictated by the opinions rendered in the GEICO and Safeco cases by the Ninth Circuit.

Respondents are not persuaded by this argument and contend that the Ninth Circuit’s view that equates “reckless disregard” with “willful” conduct is correct based on a multitude of case law. Actual knowledge is not a primary factor in determining whether an adverse action has taken place. What matters is that the consumer be properly informed of the impact that his or her credit score had in the rendering of a particular insurance decision regardless of whether the individual suffered actual harm or damages.

**SIGNIFICANCE**

The major problem facing respondents with regard to their arguments is the contradictory position taken by other circuit courts and the impact that a favorable ruling by the Supreme Court could have on maintaining a smoothly operating stream of commercial transactions in the insurance industry. The Ninth Circuit’s opinions in these cases present a very significant departure from the interpretation of the FCRA established by other circuits. There is no significant federal case law that explicitly supports the respondents’ views of the FCRA provisions at issue. To rule in favor of the respondents, the Court would have to apply cases that involve different federal statutes. Admittedly, this case law exists but the key question is whether the high Court will choose to alter an interpretational scheme for the act that has well-established judicial roots.

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In Support of Vacatur in No. 06-84 and Reversal in No. 06-100

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The First Amendment protects nonmember employees from having to fund political activities not germane to the labor union's general workplace duties. Most unions have procedures by which nonmembers can opt out of agreeing to fund such union activity. The state of Washington provided even more protection by creating an opt-in system, which required unions to obtain affirmative assent from nonmembers before using their funds for political expression. The Washington Supreme Court ruled that such a law infringes on the First Amendment rights of the union.
A trial court determined that WEA had violated Section 760 and assessed a civil penalty of $25 per nonmember for a total of $200,000. Because the trial court found the violation intentional, it doubled the penalty to $400,000.

In a separate proceeding, four nonunion teachers (the Davenport petitioners) filed a class action lawsuit in March 2001, alleging that the WEA had collected their funds for use partly for political purposes for which they had never given their consent as required by Section 760. The teachers alleged a private right of action under Section 760 and several tort theories, including conversion, fraudulent concealment, and breach of fiduciary duty. The WEA filed a motion to dismiss, which a trial court rejected except as to the breach of fiduciary duty claim. The WEA then sought an interlocutory appeal.

WEA appealed both cases successfully to the Washington Court of Appeals, which ruled Section 760 unconstitutional. In the Washington case, a divided three-judge panel of the Court of Appeals ruled in June 2003 that Section 760 was unconstitutional. This ruling also led the same panel to rule against the Davenport plaintiffs because “plaintiffs, as non-objecting, nonunion employees, lose standing to sue for their un-refunded agency fees.” The net effect of this intermediate appellate court ruling was that both sets of plaintiffs—state (Washington) and private (Davenport)—lost because the appeals court had invalidated Section 760. The appeals court majority determined that the Washington law unduly burdened the First Amendment rights of the union and union members.

The Washington and Davenport plaintiffs then appealed to the Washington Supreme Court, which consolidated the cases. In March 2006, the state high court also ruled 6-3 that Section 760 violated the First Amendment. State ex rel. Public Disclosure Comm. v. Washington Education Association, 156 Wash. 543, 130 P.2d 352 (2006). The majority reasoned that “Section 760 impermissibly shifts to the union the burden of the nonmembers’ rights. This has the practical effect of inhibiting one group’s political speech (the union and supporting nonmembers) for the improper purpose of increasing the speech of another group (the dissenting nonmembers).”

The three-member dissent vigorously disagreed and accused the majority of distorting U.S. Supreme Court precedent: “the majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment.”

The Washington and Davenport plaintiffs both petitioned the U.S. Supreme Court for a writ of certiorari. On September 26, 2006, the Court announced that it would hear the consolidated cases of Washington v. Washington Education Association and Davenport v. Washington Education Association.

**CASE ANALYSIS**

The U.S. Supreme Court has previously decided cases involving disputes between teachers unions and employees who object to their dues being used to fund the union’s political agenda. The Court has said unions may collect fees from nonmember employees, because unions benefit nonmembers as well. The Court has reasoned that such arrangements are “constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.”

For example, the Court ruled in *Abbood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), that an agency shop arrangement was permissible but that the First Amendment “may constitutionally prevent the Union’s spending a part of [objecting employees’] required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.” The *Abbood* principle establishes that employees do possess a First Amendment right not to be forced to fund, or contribute, to a union’s political activities that are not germane to the union’s labor-bargaining duties. The Court also ruled in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), that a teachers’ union’s procedure for making sure nonunion members’ funds were not used to fund political causes was constitutionally deficient. The Court wrote that the procedure in that case was “inadequate because it failed to minimize the risk that nonunion employees’ contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decision maker.”

The *Abbood* and *Hudson* decisions involved opt-out schemes in which the objecting employees had to formally object to having their fees contributed to political purposes if they didn’t want to participate. The key elements of these decisions concerned what steps unions must take in order to protect the First Amendment rights of objecting nonmembers.

The present case is different because it involves a statute that has an opt-
in system for nonmembers. In other words, the statute requires unions to obtain the affirmative assent of nonmembers before they can use their funds for political purposes. The Washington Supreme Court decision focused on the First Amendment rights of the union and its members, whereas Abood and Hudson focused on the First Amendment rights of the nonmembers.

The Davenport petitioners assert that Section 760 is a “reasonable and permissible protection of nonmember rights.” They argue that states are free to adopt an opt-in system and that no U.S. Supreme Court case has ever held that an opt-in system violates the First Amendment. The Campaign Legal Center, in its amicus brief, contends that the Court actually upheld an opt-in requirement when it upheld the vast majority of the Bipartisan Campaign Finance Reform Act in McConnell v. Federal Election Commission, 540 U.S. 93 (2003).

The Washington Supreme Court had emphasized the union’s First Amendment right to freedom of association. But the Davenport petitioners contend that “there is nothing in the union’s right to associate that includes a constitutional right to use for politics the compelled fees of nonmembers who have already demonstrated their objection to associating with the union by declining membership.”

The Davenport plaintiffs urge the Court to apply only a “rational basis” standard of review when evaluating Section 760. According to them, there is no fundamental right on the part of the union to obtain fees from nonmembers, especially for political purposes. To these petitioners, the statute represents a reasonable way for the state to level the playing field and protect the rights of nonmembers. They argue that the opt-in scheme is faithful to the fundamental principles of Abood and Hudson—“preventing compulsory ideological activity by employees who object thereto without restricting the Union’s ability to require every employee to contribute to the cost of collective-bargaining activity.”

The state petitioners also emphasize that the respondent has no First Amendment right to spend fees collected from nonmembers for ideological purposes. They point to language from another compelled speech case, Keller v. State Bar of California, 496 U.S. 1 (1990): “Hudson … outlined a minimum set of procedures by which a union in an agency-shop relationship could meet its constitutional requirement under Abood.” Thus nothing in the Constitution prevents a state from providing even greater protection to union nonmembers. The petitioners and their amici stress that an opt-out system forces nonmembers to speak and potentially suffer retaliation from the union, union members, and even nonmembers who don’t object to the use of their funds. An opt-in system, as amicus Institute for Justice writes, protects the right of nonmembers to refuse to announce their political views.

The respondents ask the Court to employ a much different analysis. They focus on the union’s right to use its money to fund political expression—the type of speech most protected by the First Amendment. Because the Washington law impacts political speech on electoral matters, they contend the law must be subject to strict scrutiny review, not rational basis.

They also claim that the purpose of the law was not to protect nonmembers’ First Amendment rights against compelled speech. The intent of the statute was to regulate campaign spending and protect the public, not individual employees. Furthermore, the respondent contends that “where, as here, the nonmember can avoid supporting the union’s political activities simply by stating an objection, there is no compelled speech.”

**Significance**

This case is important because if the Court upholds the Washington statute, other states may be emboldened to pass similar opt-in schemes protecting union nonmembers. The Court’s compelled speech jurisprudence could use some clarification. The analyses of the petitioners and the respondent are so far apart that it will be quite interesting to see which line of cases the Court applies and how the Court addresses the applicability of the Abood principle.

The Roberts Court could decide this case on federalism grounds, viewing the statute as a legitimate exercise of state authority that does not implicate broader constitutional principles. The American Legislative Exchange Counsel makes this point in its amicus brief when it writes: “This case is about federalism as well as free speech. … The decision below, which struck down such a provision, rests on a distorted view of the First Amendment that undervalues the ability of states to innovate within our federal system.”

Finally, the Court could address the reach—or limits—of its free-association ruling in Boy Scouts of America v. Dale, 530 U.S. 640 (2003), a precedent cited by the Washington high court but not by respondents. The decision thus could provide guidance to the lower courts on how to balance the free-association rights of a group against...
nonmembers’ individual First Amendment rights.

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These two cases involve defendants who were convicted of murder and sentenced to death in Texas prior to 1991—when juries in that state were given instructions in the sentencing phase that required them to answer “yes” or “no” to questions asking whether the defendants had “deliberately” killed and constituted a “continuing threat to society.” The defendants now claim that, under Penry v. Lynaugh, 492 U.S. 302 (1989), they were entitled to special instructions on mitigating factors related to mental impairment and childhood mistreatment and deprivation.

Editor’s note: The respondent’s brief in this case was not available by PREVIEW’s deadline.

ISSUES

Do the former Texas “special issue” capital sentencing jury instructions—which permit jurors to register only a “yes” or “no” answer to two questions, inquiring whether the defendant killed “deliberately” and probably would constitute a “continuing threat to society”—permit constitutionally adequate consideration of a defendant’s mitigating evidence about a defendant’s mental impairment and childhood mistreatment and deprivation, in light of the Supreme Court’s statement in Smith v. Texas, 543 U.S. 37, 48 (2004), that those same two questions “had little, if anything, to do with” Smith’s evidence of mental impairment and childhood mistreatment?

Do the Supreme Court’s opinions in Penry v. Johnson, 532 U.S. 782 (2001) (Penry II), and Smith preclude the Fifth Circuit from adhering to its earlier decisions refusing to find error under Penry v. Lynaugh, 492 U.S. 302 (1989) (Penry or Penry I), whenever the pre-1991 special issues might have afforded some stunted consideration of a defendant’s mitigating evidence?

When the prosecution repeatedly implores jurors to “follow the law” and “do their duty” by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant’s mitigating evidence?

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**Facts**

The petitioners in both cases were convicted of murder in Texas and sentenced to death.

The first petitioner, Brent Ray Brewer, was convicted in the stabbing death of a man who had given Brewer and a female companion a ride in his truck. Brewer and his friend took $140 from the victim's wallet. At the sentencing phase of Brewer's trial, he introduced a variety of mitigating evidence. Among that evidence: a bout with depression three months before the murder; a brief hospitalization for that depression; the fact that his co-defendant was a woman with whom he was apparently obsessed and who dominated and manipulated him; abuse by his father; having witnessed his father abuse his mother; and his own drug abuse.

Brewer submitted numerous proposed instructions designed to give effect to this mitigating evidence, but the trial court denied all of them, instead requiring only that the jury answer two special questions relating to deliberateness and potential for future dangerousness. (1) “Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant … that caused the death of the deceased … was committed deliberately and with the reasonable expectation that the death of the deceased would result?” and (2) “Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant … would commit criminal acts of violence that would constitute a continuing threat to society?” By answering “yes” to both of these questions, the jury was required to sentence Brewer to death.

He then filed a federal habeas corpus petition. A judge conditionally granted the petition, finding that the special questions were a constitutionally inadequate vehicle for the jury to give effect to Brewer's mitigating evidence.

The Fifth Circuit reversed, holding that the judge misapplied the law. “To determine whether a jury has sufficient vehicles for considering mitigating evidence, the habeas court must determine whether ‘there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of the [mitigating evidence],’” the court said. Noting that the district court “seriously considered only the mental illness and drug abuse as potentially warranting habeas relief,” the Fifth Circuit concluded that “the special issues are here capable of giving Brewer's evidence of a troubled childhood constitutionally mitigating effect.”

The second petitioner, Jalil Abdul-Kabir, had changed his name from Ted Calvin Cole. In 1988, Cole had been convicted of strangling a 60-year-old man during a robbery that netted Cole and the others involved $20. At the sentencing phase of his trial, Cole presented mitigating evidence attempting to establish that he had been deprived, neglected, and abandoned as a child. He also presented expert testimony about how that mistreatment had left him with enduring emotional and psychological scars. In addition, the defense presented expert testimony that Cole suffered likely neurological dysfunction that impaired his ability to control his impulses. Cole's requests for additional instructions were denied and jurors answered “yes” to the special questions about whether he acted “deliberately” and posed a “continuing threat to society.”

Cole's conviction and sentence were affirmed on appeal and he was unsuccessful in efforts to obtain post-conviction relief in Texas courts. He then filed a habeas petition in federal court, which a judge denied. The Fifth Circuit upheld the denial of habeas relief.

**Case Analysis**


Brewer compares his case to Penry v. Lynaugh, 492 U.S. 302 (1989) (Penry or Penry I), arguing that:

the deliberateness and dangerousness special issues failed to address the relevant mitigating qualities of Mr. Brewer's abused childhood and mental impairment. Worse, and again as in Penry, the only common-sense inference to be drawn from Mr. Brewer's mitigating evidence was that he would likely be dangerous in the future. And the prosecution exploited the facial narrowness of the special issues by insisting that jurors focus solely on whether Mr. Brewer was dangerous or would pose a dangerous threat in the future, rather than considering what potentially mitigating factors might account for or explain his dangerousness.

Brewer argues that the Texas capital sentencing procedure “failed to provide his jurors an opportunity to consider the relevant mitigating qualities of his abused childhood and mental impairment, in light of the sentencing instructions as they functioned in the context of his tri-
The mitigating evidence presented by Brewer “included both violent abuse as a child and mental impairment resulting from emotional instability as a young adult.” Brewer argues, noting that the Supreme Court “has recognized these very circumstances as ones which could justifiably motivate jurors to impose a life sentence.”

The “deliberateness” special question “afforded no vehicle for meaningful consideration of Mr. Brewer’s mitigating evidence because it required no assessment of his moral culpability,” Brewer asserts, citing *Penry* I. “Since *Penry* this Court has never upheld a Texas death sentence on the theory that the ‘deliberateness’ issue afforded the defendant’s evidence adequate consideration. Nor could it do so here.”

Similarly, Brewer asserts that the “future dangerousness” special issue “afforded no vehicle for the jury to consider and give effect to the relevant mitigating qualities of Mr. Brewer’s abused childhood and mental impairment.” He argues that his evidence “of his abused childhood and mental impairment possessed the same relationship to the second special issue as *Penry*’s evidence of an abused childhood and mental retardation.”

Brewer argues that the district court judge, in conditionally granting habeas relief, appropriately relied on *Tennard v. Dretke*, 542 U.S. 274 (2004), in finding that the state court’s treatment of Brewer’s *Penry* claim was objectively unreasonable and thus subject to habeas review. In *Tennard*, the Court held that the Fifth Circuit had assessed a *Penry* claim under an improper standard by using “constitutional relevance” as a threshold before addressing the merits of the *Penry* claim.

The Fifth Circuit, Brewer contends, “overrode the District Court’s straightforward application of [Tennard, invoking a set of categorical rules of the very sort that Tennard had held unacceptable.” He argues that:

The Fifth Circuit found a “constitutional distinction” between being physically abused as a young child (like *Penry*) and suffering such mistreatment as an adolescent (like Mr. Brewer). … Given this “constitutional distinction,” the Fifth Circuit regarded the abuse Mr. Brewer endured as insufficiently severe to implicate *Penry*. … Respecting Mr. Brewer’s mental impairment, the Fifth Circuit invoked yet another categorical rule: “This circuit has made a distinction between mental retardation and mental illness.” … Evidence of mental illness, it held, requires no additional jury instructions unless “the illness in question is chronic and/or immutable.” … Mr. Brewer’s single episode of non-psychotic major depression” failed the “chronic and/or immutable” test, making *Penry* relief unavailable.

… None of these rationales can be squared with *Tennard* or with *Penry* itself.

The Texas court’s decision rejecting Brewer’s *Penry* claim was “objectively unreasonable,” Brewer contends, “because it rested on a theory of mitigation that was baseless under *Penry* … and that this Court declared untenable in *Tennard*.” In *Tennard*, the Supreme Court “flatly rejected the use of … limitations on the definition of ‘constitutionally relevant mitigating evidence’ as a substitute for conducting a case-specific review of the relationship between a particular defendant’s mitigating evidence and the special issues, with due regard for the full context of the trial,” Brewer asserts. “Just as those criteria were unreasonable when imposed by the Fifth Circuit as threshold bars to *Penry* relief, they were no less unreasonable when articulated and imposed by the [Texas appellate court] to the same end.”

Brewer argues that, “[e]ven putting aside the objectively unreasonable analysis underlying the [Texas appellate court’s] rejection of Mr. Brewer’s *Penry* claim, [the Supreme] Court cannot endorse the conclusion that the jury could give meaningful mitigating effect to Mr. Brewer’s history of childhood abuse and mental impairment in answering the future dangerousness issue. … Simply put, it was objectively unreasonable for the [Texas appellate court] to find *Penry* relief foreclosed for Mr. Brewer when he was, in principle, indistinguishably situated from *Penry* himself.”

The *Penry* case, Brewer contends, held that mitigating evidence of mental retardation and childhood abuse could not be given meaningful mitigating consideration by a jury limited to assessing the defendant’s “deliberateness” and “future dangerousness,” because such evidence lacked a straightforward mitigating relevance to those issues. … Unlike the mitigating evidence presented in [other cases] (relative youth, good work history … aid to his family … [and] the defendant’s clean prison disciplinary record), the circumstances of *Penry’s* background could even have been given aggravating effect under the future dangerousness issue. … And although those factors bore some mitigating relevance to the “deliberateness” question … their primary mitigating relevance in reducing *Penry’s* moral culpability was not reliably captured by their logical relevance to whether he was capable of “deliberate”
conduct as that term is commonly understood. Accordingly, this Court held that some instruction beyond the “deliberateness” and “dangerousness” issues was required.

The Supreme Court’s opinions in \textit{Penry II} and \textit{Smith} v. Texas, 543 U.S. 37, 48 (2004), preclude the Fifth Circuit from adhering to its earlier decisions refusing to find error under \textit{Penry}. Brewer asserts. He reasons that “both \textit{Penry II} and \textit{Smith} rest on the principle that the jury’s sentencing instructions must not exclude from meaningful consideration the ‘relevant mitigating qualities’ of the defendant’s evidence.”

Regardless of the precise terms in which the test is framed, its central requirement is that the jury must have a “reliable means for giving mitigating effect to [the defendant’s] evidence.” … In the context of this case, Mr. Brewer’s jury had no such “reliable means” for expressing the conclusion that a sentence less than death was the appropriate punishment for a defendant with a history of child abuse and mental impairment. Neither the [Texas appellate court] nor the Fifth Circuit articulated any explanation of how those mitigating factors could be linked to “non-dangerousness” in a way that would make the “future dangerousness” question a sensible, direct way to give effect to their relevant mitigating qualities—because no such way exists.

In rejecting Brewer’s arguments, the Texas courts and the Fifth Circuit “have veered far from the course set by \textit{Penry}, because they treat broad swaths of mitigating factors as addressable through the special issues but never undertake the analysis necessary to demonstrate that, in a given case, the jurors actually had a meaningful opportunity to consider and give effect to the relevant mitigating qualities of the condemned defendant’s evidence,” Brewer’s brief argues.

The brief on behalf of Cole, now known as Abdul-Kabir, echoes Brewer’s arguments to the Supreme Court. “\textit{Tennard} and \textit{Penry} itself preclude the Fifth Circuit’s reliance on categorical rules that treat all ‘non-permanent’ mental disorders as outside \textit{Penry’s} scope,” Abdul-Kabir argues. “This Court has made clear that to determine whether the jury could reasonably have given effect to mitigating evidence, a reviewing court must pay close and careful attention to the evidence, the instructions, and the context of the trial proceedings as a whole.”

Abdul-Kabir asserts that:

Neither the Fifth Circuit nor the [Texas appellate court] ever confronted the constitutionally controlling question under \textit{Penry} and \textit{Johnson}: whether jurors could give meaningful consideration and effect to the mitigating qualities of Mr. Cole’s childhood neglect and abandonment, his resulting mental and emotional problems as an adult, and his diminished impulse control owing to both his background experiences and an organic neurological dysfunction. Neither court offered any factual explanation of how these specific mitigating circumstances could have been understood to make Mr. Cole less dangerous, so that they would have been within the jurors’ reach in answering the “future dangerousness” issue. Realistically, as is apparent from the testimony of his own experts, Mr. Cole’s mitigating evidence could have served only to support an inference that he would probably continue to be dangerous in the future. Because the former Texas special issues gave Mr. Cole’s jurors no “meaningful basis” for considering the mitigating qualities of those factors but treated them as exclusively and decisively aggravating, Mr. Cole’s death sentence cannot stand.

In opposing Supreme Court review in Brewer’s case, Texas noted that a Supreme Court plurality, in \textit{Jurek} v. Texas, 428 U.S. 350 (1976), held that the Texas special issues were constitutional because “the enumerated questions allow consideration of particularized mitigating factors,” such as a defendant’s criminal record, the range of severity of such a record, the defendant’s use of drugs, the circumstances of the crime, duress, mental or emotional disturbance, and remorse.

The Court’s decision in \textit{Penry I} “did not negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence could be considered under the plain language of the special issues,” Texas noted in its opposition brief, asserting that the \textit{Penry I} ruling was limited to the facts of that particular case.

Texas rejected what it called Brewer’s assertion that \textit{Smith} and \textit{Penry II} “dramatically changed the meaning” of \textit{Penry I}. “The Smith Court … did not overrule \textit{Jurek} and hold that the former special issues were invariably inadequate for the consideration of mitigating evidence,” Texas wrote in its brief.

“Rather, the Court merely held that Smith’s evidence, as presented, was not all within the effective reach of the jury.” According to Texas, when “\textit{Penry I} and its progeny are viewed as a whole, the following Eighth Amendment inquiry may be derived: (1) whether the mitigating evidence has met the low threshold for relevance in \textit{Tennard} and, if so,
(2) whether the evidence was within the effective reach of the jury in answering the special issues.”

In this case, Texas argued, “Brewer’s mitigating evidence is relevant within the meaning of Tennard” and “there is no reasonable likelihood the jury was precluded from giving constitutionally sufficient mitigating effect to it in answering the Texas future-dangerousness special issue.”

SIGNIFICANCE
The Supreme Court’s ultimate decision in the Brewer and Abdul-Kabir (fka Cole) appeals are limited in one sense because in response to the original Penry decision in 1989, Texas changed its capital sentencing scheme in 1991. In addition to the two special issues presented to the jury in the trials of Brewer and Cole, a jury in a Texas death penalty case is now also asked whether taking into consideration all of the evidence—including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant—there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed. Therefore, only capital defendants tried before the additional special issue was required in 1991 would directly benefit from a ruling in favor of Brewer and Abdul-Kabir.

To the extent that the Court addresses the broader issue of what juries in capital cases must be allowed to consider with respect to a defendant’s mitigating evidence, the Court’s ruling could suggest whether the present court might be retreating from the standards articulated in cases such as Penry I and Tennard (a 6-3 decision written by Justice O’Connor). Already this term, the Court has rejected a capital defendant’s claim that a state sentencing scheme limited his ability to present mitigating evidence. That case, Ayers v. Belmontes, involved a California jury instruction telling jurors to consider “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” The Court, by a 5-4 vote, held that the instruction was consistent with the constitutional right to present mitigating evidence in capital cases. The defendant in Ayers had cited Penry II in support of his contention that the instruction was constitutionally deficient.

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AMICUS BRIEFS (AS OF DECEMBER 15, 2006)
In Support of Petitioners Jalil Abdul-Kabir, fka Ted Calvin Cole, and Brent Ray Brewer
American Academy of the Child and Adolescent Psychiatry et al. (James W. Ellis (505) 277-2146)
Child Welfare League of America et al. (Jeffrey J. Pokorak (617) 305-1645)
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Burdens/standards of proof — As a general matter, the party in a lawsuit asserting a claim or defense has the burden of presenting evidence that establishes the claim or defense. This is known as the burden of proof.

There are three burdens of proof. From the least to the most demanding, they are the preponderance-of-the-evidence burden of proof; the clear-and-convincing burden of proof; and the beyond-a-reasonable-doubt burden of proof. The first two burdens can apply in either criminal or civil cases, while the third applies only in criminal cases and then only to the prosecution.

There are no ready definitions for these burdens. There are, however, working definitions. Under the preponderance standard, the party with the burden of proof is required to come forward with credible evidence establishing that a claim or defense is more likely true than not. Under the clear-and-convincing standard, the party with the burden of proof is expected to present evidence establishing that the claim or defense is quite likely true. Under the beyond-a-reasonable-doubt standard, the prosecution must present such evidence of the defendant’s guilt that a reasonable person would not hesitate to find the defendant guilty. See Victor v. Nebraska, 114 S. Ct. 1239 (1994).

Class action lawsuit — As a general rule, a class action lawsuit is one in which one or several named individuals sue for themselves and others believed to have sustained injuries or losses similar to those sustained by the named plaintiffs, but who, at the time the case is filed, are unknown both as to their identities and their actual numbers. In order for a plaintiff’s lawsuit to be given class action status, the named plaintiff must show that (1) the class is so large as to make it impracticable to specify each and every plaintiff by name, (2) there exist questions of law or fact common to all members of the plaintiff class, (3) the claims of the named plaintiffs are representative of the claims of the unnamed plaintiffs, and (4) the named plaintiffs can fairly and adequately represent the interests of the entire plaintiff class. (Note: Less common is the class action lawsuit in which the class is composed of named and unnamed defendants or in which both the plaintiff’s and the defendant’s side of the case constitute a class.)

Collateral review (see also habeas corpus) — Collateral review is the criminal law’s fail-safe mechanism. It is intended to ensure that a conviction and sentence satisfy the requirements imposed by law, constitutional and statutory. As its name suggests, collateral review looks at a convicted defendant’s trial and in some cases the sentencing proceeding; it is not, however, a second trial. As a general rule, collateral review is limited to issues of law.

To be eligible for collateral review, the petitioning party must be in custody at the time the process begins. Typically but not necessarily, custody means imprisonment. For those convicted of state-law crimes, collateral review is available under state law and federal law, the latter in the form of a petition for a writ of habeas corpus. As a general rule, state-law petitioners must exhaust all avenues of collateral review under state law before filing a federal habeas corpus petition. For federal-law petitioners, federal habeas corpus review is available after certain post-conviction avenues such as a motion to vacate a conviction or sentence have been exhausted.

For both state-law and federal-law petitioners, federal habeas corpus review begins in a trial-level court but, in the collateral-review context, the trial court functions as a reviewing court. However, if the federal habeas corpus petitioner is unsuccessful in habeas court, he or she is permitted, within limiting procedural rules, to seek further review of the habeas court’s decision in the appropriate intermediate federal appeals court and, if unsuccessful there, in the Supreme Court.

Damages — In law, damages means money given to a party whose legal interests have been injured. While there are several types of damages that can be given to an injured party, two of the most prominent types are compensatory damages and punitive damages.

An award of compensatory damages is a sum of money intended to make the injured party whole, insofar as this is possible. An award of punitive damages is intended to punish the wrongdoer in order to deter future wrongdoing. Usually, punitive damages go to the injured party and are over and above any award of compensatory damages. However, in some states, a portion of any punitive damages award goes to the state treasury.

Direct review — In American criminal law, a defendant is tried once, but the trial itself can be reviewed many times by many appellate courts. One channel of review is called direct review because it is initiated by a first appeal as a matter of statutory right. Direct review also is wide-ranging review because the convicted defendant is permitted to raise all procedurally proper issues regarding the trial court’s disposition of his or her case — including issues of law, issues of fact, and issues concerning the trial judge’s use of discretion.

If the first appeal is resolved against the convicted defendant, appellate rules permit the defendant to seek discretionary review by still higher courts, generally by the highest court of the convicting state and then by the United States Supreme Court. (In federal criminal cases, the convicted defendant’s initial appeal as a matter of right is to a circuit court of appeals and then as a matter of discretion to the Supreme Court.) If these courts...
decline to hear the defendant’s case or hear the case but decide against the defendant, or if the defendant defaults on his or her right to seek discretionary review, the direct review process ends and it is said that the defendant’s conviction and sentence are final. At this point, the only avenue of relief from a conviction or sentence — retrial, resentencing, or outright release — is collateral review, defined above.

Discovery — Discovery is a pretrial device in which each party to a lawsuit seeks information from the other party as well as from non-parties believed to have knowledge relevant to the issues in the case. The plaintiff seeks information through discovery to make his or her case; the defendant seeks information to support any defenses that may be available.

Diversity — This term is used whenever a federal court has jurisdiction over a case that does not involve a question of federal law. While there are several types of diversity jurisdiction, the most common type has two requirements: (1) the plaintiff and the defendant are residents of different states; (2) the dollar amount of the dispute between the parties is at least $75,000, exclusive of interest and costs.

En banc — The term literally means “full bench.” Cases in the federal circuit courts of appeals are typically heard and decided by panels of three judges who are drawn from all the judges in that circuit. In rare instances, the court may subsequently agree to have the case reargued, this time in front of more or all of the judges from that circuit.

Habeas corpus — Under the federal habeas corpus statute, 28 U.S.C. §2254 (1994), a person held in state/local custody who believes that his or her custody violates federal law — typically, the Constitution — may challenge that custody by filing a petition for a writ (i.e., an order) of habeas corpus in federal district court. If the petitioner wins, he or she must be released or retried, at the option of the prosecuting authority.

Per curiam opinion — This term literally means “the opinion of the court,” the Supreme Court or any appellate court. Because the opinion is the court’s opinion, there is no indication of which justice/judge wrote it.

Plurality opinion — This term denotes an opinion of the United States Supreme Court in which there is no majority opinion; that is, fewer than a bare majority of five justices were able to agree on the legal basis for the Court’s action in affirming, reversing, or vacating a lower court decision.

In some cases, the Court’s opinion can be a partial plurality opinion. A partial plurality opinion is one in which at least one part of the opinion represents the views of four or fewer Justices. For an example of a partial plurality opinion, see Hubbard v. United States, 115 S. Ct. 1754 (1995) (Parts IV and V, a plurality of three Justices; Parts I, II, III, and VI, a majority of six Justices).

Preemption — Under the Supremacy Clause, U.S. CONST. art. VI, § 2, federal law — whether based on the Constitution, a statute, or a treaty — takes precedence over state or local law on the same matter. In other words, if federal law addresses a matter, either expressly or by implication, it trumps and renders unenforceable any state or local law on the matter.

Qualified immunity — Qualified immunity is a defense that can be raised by a government employee whenever there is uncertainty about the lawfulness or unlawfulness of certain actions taken by the employee, actions claimed by the plaintiff to be unlawful. A government employee can avoid a trial under this defense if the employee can show that, at the time of the complained-of action, he or she could not have known that it violated the law.

Strict scrutiny — Strict scrutiny is a searching level of judicial review applied to governmental actions — federal, state, and local — challenged as unconstitutional. Strict scrutiny requires the governmental actor to show that it had a compelling reason to take the challenged action and that the action taken goes no further than necessary — is narrowly tailored — to advance the cited compelling reason.

Summary judgment — This is the name of a procedural device available to either party to a civil lawsuit that enables one or the other party to win without a trial. A party seeking summary judgment is entitled to a judgment in its favor if there is no genuine dispute about the pertinent facts, and, based on those undisputed facts, the law compels a judgment for the party who has asked for a favorable ruling.