Supreme Court Case Summaries: Professor Rory Little's Perspective[1]

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Every Term the Court disposes of a small number of cases by "summary reversal," simply granting *certiorari* and reversing the lower court judgment without briefing of oral argument. Traditionally some Justices object to such summary treatment, and this occurs whichever side of the criminal justice "political" spectrum is perceived to win or lose. This Term was no exception: in six criminal cases the Court summarily reversed, and the dominant theme is the federal courts must be even more cautious in granting writs of habeas corpus in state criminal cases. Indeed, the Term opened (Cavazos) and closed (Cash v. Maxwell) with strong arguments between the "liberal" and "conservative" Justices regarding the appropriate role for the Supreme Court to take in such fact-intensive, and arguably "error correction," cases. (Cash was actually a dissent from denial of *certiorari*, but raised the same set of issues and debate as did Cavazos).

The six criminal summary reversals (and two dissents/concurrences regarding denial of *certiorari*) are summarized below. Once again I will remind the readers that all summaries of the past Term will be presented at a Criminal Justice Section panel at the ABA's Annual Meeting in Chicago on August 3, just 10 days from now. We have a great panel, with Professor Alison Siegler from the university of Chicago, and Manish Shah, Chief of the Criminal Division of the Chicago U.S. Attorney's Office. I hope to see you there!

SUMMARY REVERSALS (Merits Opinions without Briefing or Argument)

Cavasos v. Smith,, No. 10-1115 (Oct. 31, 2011), 6-3 (***per curiam***; Ginsburg dissenting), summarily reversing 437 F.3d 884 (9th Cir. 2006) (after two prior GVR's in the case (grant, vacate and remand) in light of USSCt decisions stressing the high burden for reversal on federal habeas).

Holding: Where testimony is highly conflicting, *Jackson v. Virginia* (1979) requires that the jury's resolution not be overridden unless "irrational," and it must be presumed that the jury believed the prosecution's evidence and not the defendants. When the " "objectively unreasonable" standard for federal habeas is added to the mix, the Ninth Circuit's habeas grant below cannot stand.

Facts: Shirley Ree Smith was sleeping next to her 7-week old grandson Etzel, with other grandchildren and the mother nearby, when Etzel died. The jury heard evidence (disputed) that Smith said she "jostled" Etzel to wake him, and said "Oh my God, did I do it?" when Etzel was dead. Five medical experts testified over seven days as to the cause of death, and they could not agree (even among experts on the same side). The jury convicted Smith of assaulting a child so as to cause death and was sentenced to 15 years to life. The California state courts affirmed, finding that, under *Jackson v. Virginia*, sufficient evidence supported the verdict. On habeas the Magistrate and District Judges

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[1] These summaries are created by Professor Rory K. Little, U.C. Hastings College of the Law, San Francisco (littler@uchastings.edu). They represent his own idiosyncratic and unofficial reading of the Justices' opinions. Remarks in [brackets] are Professor Little's editorial comments. Minor changes in tenses, punctuation, etc., may be made without indication. The original opinions should be consulted for authoritative content.

recognized that "many questions" were present regarding Smith's guilt, but concluded the state courts' resolutions were not "objectively unreasonable" given *Jackson's* high standard. But a Ninth Circuit panel reversed, finding "no evidence" to support "death by violent shaking."

Per Curiam: "The decision below cannot be allowed to stand." (Indeed, we already vacated it twice and remanded for reconsideration in light of habeas decisions; "each time the panel persisted in its course … without seriously confronting the significance of the cases called to its attention." **[Ed. Note:** this would seem to be a matter of opinion, if you read the panel's decisions after remand.] First, the "no evidence" conclusion "was plainly wrong." There was evidence, even if it was disputed, unconvincing in some post hoc view, and subject to scientific critique today. Moreover, "when the deference to state court decisions required by § 2254(d) is applied…, there can be no doubt of the Ninth Circuit's error. "Doubts" about Smith's guilt "are understandable," and other factors might support Executive clemency. **[Ed. Note:** California's Governor in fact did commute Simth's sentence after this decision.] But that "is not for the Judicial Branch to determine."

Ginsburg, dissenting with Breyer and Sotomayor **[Note:** not Kagan**]**: The is "a misuse of discretion." We do not normally grant cert for "error correction" where the lower court has stated the correct legal principles, even if we view them as misapplied (citing Justice Scalia to that effect in *Kyles v. Whitley* (1996)). The science behind "shaken baby syndrome" has changed significantly since this 1997 trial, throwing even more doubt on the prosecution's questionable expert testimony. Meanwhile, this grandmother has served many years in prison, and has been on release since the Ninth Circuit granted its writ, and is plainly no danger to society. "What does the Court achieve" by exercising its discretion to grant cert and summarily reverse, "other than to prolong Smith's suffering" and "teach the Ninth Circuit a lesson." I would deny cert, or at the very least allow the Respondent to brief the merits from the 1500-page record of trial. "Justice is not served" here.

Bobby [Warden] v. Dixon, No. 10-1540 (Nov. 7, 2011), 9-0, Per Curiam, summarily reversing 627 F.3d 553 (6th Cir. 2010).

Facts: In short, Dixon was convicted of a grisly murder, after admission of a confession. He was questioned by the police on three occasions. In the first he was not in custody, and when the police read him *Miranda* warnings anyway, he declined to speak with them. In the second, the police clearly erred when they declined to give Dixon *Miranda* warnings "for fear that Dixon would again refuse to speak with them." The Ohio courts suppressed statements resulting from that interrogation. Four hours, later, "things had changed dramatically;" Dixon had spoken to his lawyer (he said), Dixon learned the police had found the body and were talking to his accomplice, and Dixon volunteered that he wanted to talk with police. After *Miranda* warnings and waiver, he confessed. All courts denied relief until the Sixth Circuit granted habeas, 2-1.

Per Curiam (9-0): On federal habeas, "it is not clear that the Ohio Supreme Court erred at all, much less erred so transparently that no fairminded jurist could agree with that court's decision," which is the standard (quoting *Harrington v. Richter*, 2011). "No precedent of this Court required Ohip to do more" than suppress the statements resulting from the second, unwarned, interrogation. This case is not like *Seibert* (2004), which involved an intentional two-stage denial of Miranda warnings in order to coerce a confession. "The Sixth circuit was without authority to overturn the reasoned judgment of the State's highest court."

Hardy [Warden] v. Cross, No. 11-74 (Dec. 12, 2011), **Per Curiam** (9-0), summarily reversing 632 F.3d ___ (7th Cir. 2010).

Facts: Cross was tried for kidnapping and sexually assaulting victim A.S. At an initial trial, A.S. was fearful of testifying and testified "haltingly," but she did testify and was cross-examined. Cross was acquitted of kidnapping and the jury hung on sexual assault. At retrial, A.S. could not be

located. The state averred that it had made strong efforts to find A.S., and asked to have her prior testimony read into the record. A law clerk did so, allegedly less haltingly than A.S. and with a "slight inflection." Cross was convicted. The state court's affirmed, finding that the State had made a "good-faith, diligent search" for A.S., so admission of her prior cross-examined testimony was not error. On federal habeas, the district court denied relief but the Seventh Circuit reversed.

Per Curiam (9-0): Federal habeas law requires that "state court decisions be given the benefit of the doubt (*Felkner v. Jackson*, 2011). The Seventh Circuit "departed from" this standard. "The state court identified the correct Sixth Amendment standard and applied it in a reasonable manner." Therefore "it cannot be disturbed" on federal habeas.

Ryburn v. Huff, No. 11-208 (January 23, 2012), **Per curiam** (9-0), summarily reversing 632 F. 3d 539 (9th Cir. 2011).

Facts: The Huff family sued Burbank police officers Ryburn and Zepeda alleging a Fourth Amendment violation for entering the family home without consent. The officers had responded to an alleged threat made by student Vincent Huff to "shoot up" his high school. After some investigation suggesting there could be merit to the threat, the officers went to Huff's home to interview Huff. No one answered their knocks, but when the officers called Mrs. Huff's cellphone she said they were inside. Mrs. Huff "hung up" and a few minutes later she and Vincent came onto the front porch. But they declined the officers' request to continue questioning inside, an "extremely unusual" refusal. Then, when Ryburn asked if there were any guns inside the house, Mrs. Huff "immediately turned around and ran into the house."

"Scared," Officer Ryburn ran in after her, Vincent then went in, and a second officer followed, fearing for Officer Ryburn's safety. The officers remained in the living room for 5-10 minutes, had some discussion, and "did not conduct any search." They then left, concluding that the rumored threat was false. The district court, sitting as factfinder, resolved disputes and found the facts above, and then granted judgment for the officers after a two-day trial. The court found that reasonable officers could have believed there was danger and no "clearly established law" prohibited a warrantless entry on such suspicion. Thus qualified immunity was available. The Ninth Circuit reversed 2-1, finding a belief of danger to be "objectively unreasonable." Judge Rawlinson dissented.

Per curiam (9-0): "Judge Rawlinson's analysis of the qualified immunity issue was correct." "No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case." It was an error for the Ninth Circuit panel, "far removed from the scene and with the opportunity to dissect the elements of the situation," to conclude that the officer's fear of imminent harm was unreasonable. The Ninth Circuit opinion is "flawed for numerous reasons." First, it "changed [the District Court's] findings in several key respects." Second, **the panel majority mistakenly believed "that conduct cannot be regarded as a matter of concern so long as it is lawful."** Third, the Ninth Circuit viewed each separate event in isolation rather than in context, which is "entirely unrealistic." Fourth, it **"second-guess[ed] a police officer's assessment, made on the scene, of the danger presented by a particular situation."** In short, a reasonable police officer could have reasonably concluded that the Fourth Amendment permitted warrantless entry into the Huff home "if the officer has a reasonable basis for concluding that there is an imminent threat of violence." , The judgment of the Ninth Circuit is reversed.

Wetzel (Pa. Dept. of Corrections) v. Lambert, No. 11-38 (Feb. 21, 2012), 6-3 (***per curiam***; Breyer dissenting), summarily vacating and remanding 633 F.3d 126 (3rd Cir. 2011).

Facts: Lambert was sentenced to death in 1984 after his conviction for the murder of two patrons of Prince's Lounge in Philadelphia. Twenty years later he filed a state claim for post-conviction relief, alleging that a newly discovered "police activity log" contained undisclosed *Brady*

information -- it allegedly showed that the main co-participant/witness (named Jackson) against Lambert at trial had identified someone else as a participant in the robbery. Lambert claimed that this new evidence was both directly exculpatory and impeaching of Jackson.

The Pennsylvania state courts denied relief, finding the "activity log" to be ambiguous and "speculative at best" and also finding that any impeachment would have been cumulative of already-extensive impeachment and thus not have made a difference at Lambert's trial. Thus it was not "material" under *Bagley*. On federal habeas, the district court also denied relief, finding the Pennsylvania court's resolution "not unreasonable" and the new evidence, again, "ambiguous" and "speculat[ive]." The Third Circuit reversed, ruling simply that the cumulative impeachment ruling was "patently unreasonable." Pennsylvania petitioned for *certiorari*.

***Per Curiam* (6-3): On federal habeas, even if one state court ground for decision is "unreasonable," the writ may not be granted unless all presented grounds are examined and found to be unreasonable.** "Any retrial here would take place three decades after the crime, posing the most daunting difficulties for the prosecution. [**Ed. Note:** Might the author of this *per curiam* be former Third Circuit Judge (and former federal prosecutor) Alito, who might be sympathetic to the Philadelphia authorities' plea?] That burden should not be imposed unless each ground supporting the state court decision is examined and found to be unreasonable under AEDPA." The failure of the Third Circuit to rule on the other, primary, rationale (that the new evidence was ambiguous and speculative "at best") requires *vacatur* and remand.

Breyer dissenting, joined by Ginsburg and Kagan **[Note:** not Sotromayor]: First, I "cannot agree" that the police activity log is ambiguous; and I think the Pennsylvania trial court also found it not ambiguous. Moreover, the suggestion is strong here that Lambert might actually be innocent; only Jackson's testimony identified him as the shooter. The Third Circuit applied the proper legal principles, and "we do not normally consider … fact specific questions about whether a lower court properly applied" legal principles. See *Kyles v. Whitley* (1995) (Scalia dissenting). Thus we should simply deny this writ of *certiorari*.

Coleman v. Johnson, No. 11-1053 (May 29, 2012), ***Per curiam*** (9-0), summarily reversing 446 Fed. Appx. 531 (3rd Cir. 2011).

Facts: This is another federal habeas sufficiency of the evidence case under *Jackson v. Virginia* (1979, see *Cavazos v. Smith, supra*. The evidence showed that Jackson, together with Williams, escorted the victim (Walker) to an alley and stood at the alley entrance while Williams shot the victim. Johnson had been presented earlier in the day when the victim had humiliated Williams by giving him a "public thrashing with a broomstick," and Johnson had heard Williams repeatedly say he would kill Walker. Witnesses testified that they saw Johnson and Williams "force" the victim into the alley. Johnson was convicted as an accomplice to the murder, and the jury necessarily found that he possessed the knowledge and intention that Williams be killed. The state courts all affirmed, rejecting a sufficiency of the evidence claim, as did the district court. But the Third Circuit reversed.

Per Curiam (9-0): **The Third Circuit "failed to afford due respect to the role of the jury and the state courts of Pennsylvania" and "unduly impinged on the jury's role as factfinder."** The standard under Jackson is "bare rationality," and on federal habeas the state court must have been "objectively unreasonable" to find that standard met. Juries may draw reasonable "inferences," and these must be viewed "in the light most favorable to the prosecution [Note: actually, most favorable to the jury's verdict, which necessarily is the prosecution's in a criminal case.] The type of "fine-grained factual parsing in which the Court of Appeals engaged," such as ruling that without physical coercion the jury could not rationally find that Johnson "forced" Williams into the alley, is "not permit[ted]."

"We conclude that the evidence at Johnson's trial was not nearly sparse enough to sustain a due process challenge under *Jackson*."

Dissents from, and concurrences in, Denials of *Certiorari*

Buck v. Thaler, No. 11-6391 (Nov. 7, 2011), denying *certiorari* 7-2 (*Alito* joined by Scalia and Breyer concurring; Sotomayor joined by Kagan dissenting), leaving in place 2011 WL 4067164 (5th Cir. Sept. 14, 2011).

Alito, concurring with Scalia and Breyer: Buck was one of six Texas defendants convicted of murder and sentenced to death, in separate cases in Texas, where an expert testified that race (black) statistically increased the chances of future dangerousness. This was "bizarre and objectionable testimony," and in five of the six cases the State conceded error (the Texas AG at the time saying that "it is inappropriate to allow race to be considered as a factor in our criminal justice system." However, in Buck's case, the testimony was elicited by the defense, and the prosecution did not exploit it (although it did re-mention it on cross). Moreover, the state on various appeals stated conflicting and even erroneous explanations of the reason for asserting a procedural bar in Buck's case. Nevertheless, the district court here was aware of all the circumstances, and denied a Certificate of Appealability for the issue (and the Fifth Circuit affirmed). Because the testimony was elicited by the defense, we concur in the denial of cert. **[Ed. Note:** this hardly seems like Buck's last chance, as this basis for denial seems to scream for an ineffective assistance challenge, although the walls hedging in habeas are remarkably high.]

Sotomayor dissenting with Kagan: It is wrong for us to "den[y] review of a death sentence marred by racial overtones [on] a record compromised by misleading remarks made by the State." "Especially in light of the capital nature" of the case, and the fact that the prosecutor did intend to suggest that race made Buck a better death candidate, we should grant review.

Cash v. Maxwell, No. 10-1548 (January 8, 2012), denying *certiorari* 7 to 2 (*Sotomayor* concurring, Scalia dissenting with Alito), leaving in place 628 F. 3d 486 (9th Cir. 2010).

Facts: In the late 1970s the "Skid Row Stabber" killed at least 10 homeless victims in Los Angeles. Bobby Joe Maxwell was convicted in 1984 by a California jury of two counts of first-degree murder for these crimes and sentenced to life without parole. One witness against Maxwell was Storch, who later was recognized as "one of the most notorious jailhouse informants in the history of Los Angeles County" for repeatedly crafting false stories of confessions by his cellmates from newspaper accounts of the crimes. California state courts repeatedly rejected Maxwell's claims that Storch had testified falsely regarding Maxwell's own confession, ultimately concluding that Maxwell had not established that Storch has lied as his trial and that prosecutors had not violated *Brady* in failing to disclose certain facts about Storch. On federal habeas, the district court denied but the Ninth Circuit reversed, finding the factual findings of the California Supreme Court "unreasonable."

Sotomayor respecting denial of *certiorari*: The Ninth Circuit recognized the extremely high standard for granting federal habeas, and then "meticulously set forth an avalanche of evidence demonstrating that the state court's factual finding was unreasonable." Denial of certiorari is appropriate in such fact-bound circumstances. The record demonstrated that Storch was a "habitual liar who even the State [of California] concedes told . . . material lies at Maxwell's trial," and many law enforcement officials refused to use him as unreliable. The evidence is far more than "circumstantial" as the dissent suggests, and in the end, there is "overwhelming evidence" that Storch "attempt[ed] to manipulate the integrity of the judicial system" in Maxwell's case. "Mere disagreement with [the Ninth Circuit] is, in my opinion, insufficient basis for granting *certiorari*."

Scalia, dissenting from denial of *certiorari*, joined by Alito: **""It is a regrettable reality that some federal judges *like* to second-guess state courts. The only way this Court can assure observance of Congress's" commands about federal habeas "is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no issues of law. … Today we … let[] stand a judgment that once again deprives California courts of that control over the State's administration of criminal justice which federal law assures." I believe the Ninth Circuit unquestionably ignored [the] commands" of this Court's precedent**. [Justice Scalia's detailed review of the record is omitted here.] "We should grant the petition for *certiorari* and summarily reverse the Ninth Circuit."

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