

Department of  
**CRIMINAL JUSTICE TRAINING**

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2012



*Leadership is a behavior, not a position*

U.S. SUPREME COURT  
2011 – 2012 TERM



John W. Bizzack, Ph.D.  
*Commissioner*





The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

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Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

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### **NOTE:**

General Information concerning the Department of Criminal Justice Training may be found at <http://docjt.ky.gov>. Agency publications may be found at <http://docjt.ky.gov/publications.asp>.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to [docjt.legal@ky.gov](mailto:docjt.legal@ky.gov). The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

**Bobby (Warden) v. Dixon, 128 S.Ct. 26 (2011)**  
**Decided November 7, 2011**

**FACTS:** Dixon and Hoffner murdered Hammer, in Ohio, “in order to steal his car.” They two men “beat Hammer, tied him up, and buried him alive, pushing the struggling Hammer down into his grave while they shoveled dirt on top of him.” They used his identification to obtain an ID card in Hammer’s name and used that identification to sell the stolen vehicle for cash. During that same time frame, Hammer was reported missing. Dixon became a target of the subsequent investigation. On November 4, 1993, “a police detective spoke with Dixon at a local police station.” It was a chance encounter but the detective gave Dixon Miranda warnings and “then asked to talk to him about Hammer’s disappearance.” Dixon refused to answer without his lawyer. (He was not in custody at the time, but simply visiting the station for another purpose.)

Upon further investigation, it was determined the Dixon had sold the car using forged paperwork. He was arrested for forgery on November 9. He was interrogated, intermittently, over several hours, for a total of about 45 minutes but he was not given Miranda during this time. Dixon admitted to selling the car and signing Hammer’s name but stated that Hammer had given him permission to do so. He claimed not to know Hammer’s whereabouts, stating that he “thought Hammer might have left for Tennessee” The officers told him that Hoffner “was providing them more useful information” and that the first one of the pair to cut a deal would be the only one to get a deal. Dixon continued to deny knowing anything about the disappearance and was booked for forgery.

That same afternoon, Hoffner led the police to Hammer’s grave. He claimed that Dixon “had told him that Hammer was buried there.” Dixon was brought back to the police station and he asked if it was correct that the police had found Hammer’s body and that Hoffner was in custody. They agreed that they had found the body but denied that Hoffner was in custody. Dixon stated that he had spoken to his attorney and that he wanted to talk to them about what had happened. He was given Miranda again and gave a detailed confession, but tried to pin the “lion’s share of the blame on Hoffner.”

Both confessions were excluded at his state trial for murder. The prosecution did not dispute that the initial confession should have been excluded but argued that the second “was admissible because Dixon had received Miranda warnings prior to that confession.” The Ohio Court of Appeals agreed and allowed the second to be admitted, whereupon Dixon was convicted of murder, kidnapping, robbery and forgery. He was sentenced to death. The Ohio Supreme Court affirmed the convictions. Dixon filed for habeas corpus in the U.S. District Court and was denied. However, the Sixth Circuit Court of Appeals reversed that denial, noting, however, that it had authority to do so if the Ohio Courts was either contrary to the law or “involved an unreasonable application no clearly established Federal law.” The Sixth Circuit identified three errors that it believed occurred in the trial. First, the Court said it was clearly established that “police could not speak to Dixon on November 9, because he had invoked his right to counsel on November 4.” Next, the Sixth Circuit held that his rights were violated by the police

urging him to make a deal (and confess) before Hoffner did so. Finally, the Court held that the later confession was technically in violation of Miranda and that under Elstad, was inadmissible because it was “the product of a ‘deliberate question-first, warn-later strategy.’”<sup>1</sup> Ohio appealed and the U.S. Supreme Court granted certiorari.

**ISSUE:** May a subject invoke the right to counsel before being taken into custody?

**HOLDING:** No

**DISCUSSION:** With respect to the first alleged error in the trial, the Supreme Court noted that it was “undisputed that Dixon was not in custody during his chance encounter with police on November 4.” The Court noted that it had never held before that a person can invoke “Miranda rights anticipatorily in a context other than ‘custodial interrogation.’”<sup>2</sup> He was certainly not in custody when he gave that initial confession. With respect to the second alleged error, the Court noted no court had held that “this common police tactic is unconstitutional” or to hold that a “defendant who confesses after being falsely told that his codefendant has turned State’s evidence does so involuntarily.”

With respect to the third alleged error, the Court found that unlike in Seibert, “there is no concern here that police gave Dixon Miranda warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat.” In fact, his later confession actually *contradicted* his prior unwarned statements” in which he claimed no knowledge of what had happened to Hammer. Dixon declared that he wanted to talk to the police before the interrogation session even began. The Court found no nexus between the previous unwarned admission and his “later, warned confession to murder.” In addition, a significant break in time (over four hours) had occurred and he had been taken to another location as well.

The Court ruled that because the Ohio court’s reasoned judgment was in accord with precedent, the judgment of the Sixth Circuit was reversed and the case remanded.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-1540.pdf>.

**Greene v. Fisher, 132 S.Ct. 573 (2011)**  
**Decided November 8, 2011**

**FACTS:** On December, 1993, Greene and four other men robbed a North Philadelphia (PA) grocery store. One of the men shot and killed the store owner. All five were arrested and two confessed, implicating the other three as well. Greene did not confess. At trial, Greene argued for severance of the trials, asserting that “the confessions of his nontestifying codefendants should not be introduced at his trial.”

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<sup>1</sup> Oregon v. Elstad, 470 U.S. 298 (1985); Missouri v. Seibert, 542 U.S. 600 (2004).

<sup>2</sup> McNeil v. Wisconsin, 501 U.S. 171 (1991); Montejo v. Louisiana, 556 U.S. 778 (2009).

The trial court agreed to require that the confessions be redacted to remove names but did not sever the trials.

Greene was convicted of second-degree murder, robbery and conspiracy. He appealed, arguing that Bruton<sup>3</sup> required that his trial be severed. The conviction was upheld, with the Pennsylvania Superior Court holding that the redaction of the names from the confessions cured any error. Greene appealed to the Pennsylvania Supreme Court. During the pendency of that appeal, however, the Court had ruled in Gray v. Maryland,<sup>4</sup> which “considered as a class, redactions that replace a proper name with an obvious blank ... notify the jury that a name has been deleted [and] are similar enough to Bruton’s unredacted confessions as to warrant the same legal results.” The Pennsylvania Supreme Court granted the petition for appeal but later dismissed the action for procedural reasons.

Greene filed for federal habeas corpus, which the U.S. District Court denied. The Third Circuit Court of Appeals affirmed the conviction, holding that when an issue becomes “clearly established” is at the time the state court case is adjudicated on its merits. Greene petitioned for certiorari to the U.S. Supreme Court and was granted review.

**ISSUE:** For purposes of adjudicating a state prisoner’s petition for federal habeas relief, what is the temporal cutoff for whether a decision from this Court qualifies as “clearly established Federal law” under 28 U.S.C. § 2254(d).

**HOLDING:** When the last state-court decision on the merits (the facts) is decided.

**DISCUSSION:** The Court ruled that appeals of this nature fall under 28 U.S.C. §2254(d)(1). In such cases, the federal courts must “focus on what a state court knew and did” and whether they applied precedent as of the time the state court rendered the decision. The Court agreed that its decision does not contradict its ruling in Teague v. Lane, which ruled that under Teague, a state-court decision would merit adjudication when a decision becomes “contrary to, or an unreasonable application of, clearly established Federal law, before the conviction became final.”<sup>5</sup>

The Court agreed that the “last state-court adjudication on the merits of Greene’s Confrontation Clause claim occurred on direct appeal to the Pennsylvania Superior Court.” The decision by that court predated Gray by three months. As such, his writ of habeas corpus was prohibited under the statute. (The Court noted that he was in an unusual predicament “of his own creation.” He did not file an petition in a timely manner that would have allowed him to proceed under Gray or assert it as a petition for state postconviction relief.”)

The Court affirmed Greene’s conviction.

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<sup>3</sup> Bruton v. U.S., 391 U.S. 123 (1968).

<sup>4</sup> 523 U.S. 185 (1998).

<sup>5</sup> 489 U.S. 288 (1989).

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-637.pdf>.

**Smith v. Cain (Warden), 132 S.Ct. 975 (2012)**  
**Decided January 10, 2012**

**FACTS:** Smith was charged with the murder of five people during an armed robbery at a residence. A single witness, Boatner, “linked Smith to the crime.” Boatner was at the scene when Smith and two others entered, demanded money and drugs and started shooting. Boatner identified Smith as the first person through the door, and claimed “he had been face to face with Smith during the initial moments of the robbery.” No other witnesses or evidence implicated Smith. Smith was convicted and appealed. During his appeal efforts, he “obtained files from the police investigation of the case.” The lead investigator’s notes indicated that Boatner had made conflicting statements when he identified Smith as the one of the robbers in that he could not supply any description on the night of the crime other than they were black males. Five days later, Boatner claimed he could not make an ID because he had not seen any faces. The investigator’s formal report stated that Boatner had said he could not identify the perpetrators.

Smith argued for his conviction to be vacated because the failure to disclose the notes violated Brady.<sup>6</sup> The trial court denied his motion and the Louisiana appellate courts agreed. Smith requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** If there is a reasonable probability that undisclosed material would have affected the outcome of a trial, must the conviction be reversed under Brady?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the prosecution agreed that it withheld information that was favorable to Smith. The Court noted the sole question to be “whether Boatner’s statements were material to the determination of Smith’s guilt.” Materiality, under Brady, is “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.”<sup>7</sup> The Court noted that it would only need to be enough to undermine the confidence in the result of the trial.<sup>8</sup> In previous cases, the Court had “observed that evidence impeaching an eyewitness may not be material if the State’s other evidence is strong enough to sustain confidence in the verdict.”<sup>9</sup> In this case, however, “Boatner’s testimony was the *only* evidence linking Smith to the crime.” His “undisclosed statements directly contradict his testimony” and were “plainly material” in the ultimate conviction.

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<sup>6</sup> Brady v. Maryland, 373 U.S. 83 (1963).

<sup>7</sup> Cone v. Bell, 556 U.S. 449 (2009).

<sup>8</sup> See Kyles v. Whitley, 514 U.S. 419 (1995).

<sup>9</sup> U.S. v. Agurs, 427 U.S. 97 (1976).

The Court agreed that a jury might have discounted his undisclosed statements, recognizing his inability to identify a suspect as a fear of retaliation, for example. However, the “police files that Smith obtained” ... “contain other evidence that Smith contends is both favorable to him and material to the verdict.” The Court held that Boatner’s undisclosed statement alone was sufficient to undermine the trial and elected not to review the additional material.

The U.S. Supreme Court overturned the verdict in the Orleans Parish Criminal District Court and remanded the case for further proceedings.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-8145.pdf>.

**Perry v. New Hampshire 132 S.Ct. 716 (2012)**  
**Decided January 11, 2012**

**FACTS:** On August 15, 2008, at about 3 a.m., Ullon called the Nashua (NH) police to report an African-American male trying to break into cars in the apartment parking lot. When Officer Clay arrived, she found Perry near a car with a broken-out back window, holding two amplifiers. A metal bat lay on the ground. He stated he’d found the items on the ground. Ullon’s wife, Blandon, had awakened a neighbor, Clavijo, to tell him she’d just seen someone break into his car. (She’d apparently been watching while her husband called the police.) While another officer was detaining Perry in the parking lot, Officer Clay met with Clavijo and then went to talk to Blandon. She explained she’d watched a man break into the car and when “asked for a more specific description,” pointed out her window to Perry and identified him as the thief. However, a month later, she was unable to pick Perry out of a photo array.

Perry was charged with theft and criminal mischief. He moved for suppression of the initial identification, which was a showup. The trial court denied the motion, finding that she pointed to Perry “spontaneously” and not as the result of an “unnecessarily suggestive procedure” of the officers at the scene. Both Blandon and Clay testified about the identification.

Perry was convicted and appealed, with Perry arguing that the trial court was incorrect in “requiring an initial showing that the police arranged the suggestive identification procedure.” The appellate court affirmed his conviction. Perry requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is a preliminary judicial review necessary in contested eyewitness testimony?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the history of its cases “involved police-arranged identification procedures.” .The Court synthesized the prior cases into Neil v.

Biggers<sup>10</sup> and Manson v. Brathwaite<sup>11</sup> which are “used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement. The Court emphasized that “due process concerns arise only when law enforcement officers use an identification process that is both suggestive and unnecessary.” However, even when that does occur, suppression is not the “inevitable consequence.” As such, on a case-by-case basis, it was necessary to determine “whether improper police conduct created a ‘substantial likelihood of misidentification.’” If the identification is reliable, it will still be admissible.

In this case, the Court agreed that the “police engaged in no improper conduct.” Perry’s proposed rule “would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications.” Certainly, the Court noted, “external suggestion” was not the only factor that “cast[] doubt on the trustworthiness of an eyewitness’ testimony” and further, almost all identifications carry at element of suggestiveness.

The Court concluded that the “fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.” The Court noted that it is the responsibility of the jury, not the judge, traditionally, to make determinations on the reliability of evidence. Further, there are “other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability.” These include the “right to confront the eyewitness” and the right to an attorney “who can expose the flaws in the eyewitness’s testimony during cross-examination and focus the jury’s attention on the fallibility of such testimony.” And, in fact, these safeguards were “at work at Perry’s trial” and the attorney constantly exploited the weaknesses in Blandon’s identification.

The Court held that the “Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.” Perry’s conviction was affirmed.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-8974.pdf>.

**U.S. v. Jones, 132 S.Ct. 945 (2012)**  
**Decided January 23, 2012**

**FACTS:** In 2004, Jones, a nightclub owner, became a suspect in a trafficking case. As part of the information gathered from other sources, the Government got a warrant for the use of an electronic tracking device on his vehicle. The Court issued a warrant and the device was to be installed within 10 days and within the District of Columbia. The device was installed on the 11<sup>th</sup> day, however, and while the vehicle was in a public

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<sup>10</sup> 409 U.S. 188 (1972).

<sup>11</sup> 432 U.S. 98 (1977).

parking lot in Maryland. They tracked him for 28 days, and in fact, had to replace the battery at one point, again, while it was in a public lot. They collected for than 2,000 pages of data over the four weeks.

Jones was indicted on a variety of drug trafficking charges. He moved to suppress the evidence gained through the device, and the court agreed to suppress the data while the vehicle was parked in his own garage. It concluded the remaining data could be admitted, because “a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”<sup>12</sup> The jury hung in his first trial, and he was retried. He was convicted. Jones appealed to the U.S. Court of Appeals for the District of Columbia Circuit, which reversed his conviction because of the admission of the GPS evidence. The Government appealed and the U.S. Supreme Court granted certiorari.

**ISSUE:** Is attaching a tracking device physically to a vehicle a trespass that required a warrant?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the “Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a search.” The Court emphasized that the officers “physically occupied private property for the purpose of obtaining information.” The Court noted that in *Knotts*, the tracking device was on a container before it came into *Knotts*’ possession, and was placed there with the consent of the owner at the time. In the “second ‘beeper’ case,” *U.S. v. Karo*<sup>13</sup> the circumstances were much the same – the device was placed on item before it came into the possession of the suspect.

In this case, however, Jones “possessed the Jeep at the time the Government trespassorily inserted the information-gathering device,” which placed it “on much different footing.” The officers did more than just observe the vehicle, the “encroached on a protected area.”

The Court noted that “situations involving merely the transmission of electronic signals without trespass,” however, would remain subject to the analysis in *Katz*.<sup>14</sup> The Court found it unnecessary to consider whether Jones had a reasonable expectation of privacy, as discussed in *Katz*, because the officers clearly invaded his vehicle for the purpose of attaching the device.

The Court upheld the reversal of Jones’s conviction.

**Full Text of Opinion:** <http://www.supremecourt.gov/opinions/11pdf/10-1259.pdf>.

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<sup>12</sup> *U.S. v. Knotts*, 460 U.S. 276 (1983).

<sup>13</sup> 468 U.S. 705 (1984).

<sup>14</sup> *Katz v. U.S.*, 389 U.S. 347 (1967).

**Ryburn v. Huff, 132 S.Ct. 987 (2012)**  
**Decided January 23, 2012**

**FACTS:** Officers Ryburn and Zepeda (Burbank PD) were called to a local high school because a student, Huff, was “rumored to have written a letter threatening to ‘shoot up’ the school. During their investigation, they learned Huff had been absent for two days and was frequently bullied. One of his classmates “believed that [Huff] was capable of carrying out the alleged threat.” Because they had received training on the subject, the officers recognized “these characteristics are common among perpetrators of school shootings.” They proceeded to his home to question him, but received no answer to their knocks or their call to the home phone. However, when they called Huff’s mother on her cell phone, she answered and said she was actually at home and that Huff was with her.

Mrs. Huff refused to come outside and speak with the officers, and hung up on him. A few minutes later, though, both came out of the house and stood on the steps. “Officer Zepeda advised [Huff] that he and the other officers were there to discuss the threats.” Mrs. Huff refused to allow them into the house to discuss the matter and Sgt. Ryburn, who was also present, found it “‘extremely unusual’ for a parent to decline an officer’s request to interview a juvenile inside” and that she herself never asked why the officers were there.

Sgt. Ryburn asked about guns in the house and Mrs. Huff immediately turned and ran back inside. Sgt. Ryburn, concerned, went in behind her. Huff followed the officer and was, in turn, followed by Officer Zepeda, who did not want Sgt. Ryburn inside alone. The remaining two officers, who had been out of earshot also entered, believing that they had been given consent by Mrs. Huff to enter.

They all remained inside for some 5-10 minutes, until Mr. Huff emerged and challenged their right to be there. The officers “ultimately concluded that the rumor about [Huff] was false. They did not search anyone or any place while inside the house.

The Huffs brought suit under 42 U.S.C. §1983, claiming that their Fourth Amendment rights were violated by the officers’ entry. The District Court found in favor of the officers at a bench trial, concluding that the officers were entitled to qualified immunity “because Mrs. Huff’s odd behavior, combined with the information the officers gathered at the school, could have led” the officers to believe there were weapons inside the house. The Court noted that in such a “rapidly evolving incident,” the “courts should be especially reluctant ‘ to fault the police for not obtaining a warrant.”

The Ninth Circuit, on appeal, upheld qualified immunity for the last two officers who entered, but reversed it as to the remaining officers. The Court of Appeals found no reason to believe the officers (or others inside the home) were in any danger, finding instead Mrs. Huff had “merely asserted her right to end her conversation with the officers and returned to her home.”

The Government appealed and the U.S. Supreme Court granted certiorari.

**ISSUE:** May officer enter a home without a warrant if they reasonable believe that is necessarily to prevent harm to themselves or others?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed with the lone dissenting judge in the Ninth Circuit. That judge noted that “the discrete incident that precipitated the entry in this case was Mrs. Huff’s response to the question regarding whether there were guns in the house.” She “faulted the majority for “recit[ing] a sanitized account of this event,’ that differed markedly from the District Court’s findings of fact.” Instead, she looked to “cases that specifically address the scenario where officer safety concerns prompted the entry” and concluded that the officers “could have reasonably believed that [they were] justified in making a warrantless entry to ensure that no one inside” would post a risk to them.

The Court agreed that “no decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case.” The Court found that “on the contrary, some of our opinions may be read as pointing in the opposition direction.”

The Court looked primarily to Brigham City v. Stuart<sup>15</sup> which found that “officers may enter a residence without a warrant when they have ‘an objectively reasonable basis for believing that an occupant is ... imminently threatened with [serious injury].” The need to preserve and protect life “is justification for what would be otherwise illegal absent an exigency or emergency.”

The Court noted that the Ninth Circuit majority - “far removed from the scene and with the opportunity to dissect the elements of the situation – confidently concluded that the officers really had no reason to fear for their safety or that of anyone else.” They ignored the fact that the Huffs did not respond to the officers knocking on the door and did not answer their home telephone, that Mrs. Huff hung up on the officers and that she ran back into the house when asked about guns. The Court noted that the Ninth Circuit apparently believed “that conduct cannot be regarded as a matter of concern so long as it is lawful.” Their “method of analyzing the string of events ... was entirely unreasonable.” The Court noted that “It is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture.”

The Court agreed that “reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” and that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving.”<sup>16</sup>

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<sup>15</sup> 547 U.S. 398 (2006).

<sup>16</sup> Graham v. Connor, 490 U.S. 386 (1989).

The Court summed up the case, stating “reasonable police officers in [this] position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent” and that the facts as described in this case, could have given the officers that reasonable belief.

The Court reversed the decision with respect to the officers remaining in the case and remanded the case for judgment in their favor.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/11-208.pdf>.

**Reynolds v. U.S., 132 S.Ct. 975 (2012)**  
**Decided January 23, 2012**

**FACTS:** Reynolds was convicted of a sex offense in Missouri in October, 2001. He was released from prison in July, 2005 and registered, as required, as a sex offender in Missouri. In September, 2007, he moved to Pennsylvania, but did not update his Missouri registration and did not register in Pennsylvania. He was indicted under federal law for failing to register as required by the federal Sex Offender Registration and Notification Act (SORNA)<sup>17</sup> which became law in July, 2006.

Reynolds argued that in the fall of 2007, the Act “had not yet become applicable to pre-Act offenders” despite the fact the Attorney General had enacted an interim rule that specified that was the case.

The District Court rejected Reynolds’ claim, as did the Third Circuit Court of Appeals. However, the Third Circuit’s ruling reflected it’s believe that he was obligated to follow the registration requirements even absent any specific rulemaking on the matter.

Because the Circuit Courts of Appeal had reached various conclusions on that issue, the U.S. Supreme Court accept certiorari with respect to Reynolds’ case.

**ISSUE:** Did federal SORNA’s registration requirements immediately apply to pre-SORNA offenders?

**HOLDING:** No

**DISCUSSION:** The Court looked to the “natural reading of the textual language” of the Act. The Act specified that the Attorney General was delegated the authority to “specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment” of the law. The Court noted that Congress likely recognized the practical issues inherent in requiring pre-Act offenders to register, as it would prove expensive and possibly not yet immediately feasible. The Act gave the States three years to “bring their systems into compliance” and even allowed the

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<sup>17</sup> 18 U.S.C. §2250(a).

Attorney General to extend that grace period to five years. The Court noted that the language of the statute contained “potential lacunae<sup>18</sup>” and that it failed to answer important questions about how the Act should be applied against pre-Act offenders, who could “on their own, reach different conclusions about whether, or how, the new registration requirements applied to them.”

The Court agreed that its reading of the Act “involves implementation delay.” The Court agreed that the Act’s registration requirements did “not apply to pre-Act offenders until the Attorney General so specifies.” The Court did not rule, however, on whether the Interim Rule was a valid specification of that fact, because that was not yet argued. The Court reversed the Third Circuit’s decision and remanded the case for further proceedings.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-6549.pdf>.

**Howes (Warden) v. Fields, 132 S.Ct. 1181 (2012)**  
**Decided February 21, 2012**

**FACTS:** While incarcerated for an unrelated crime, Fields was taken to a conference room in the prison to be interrogated for a child sexual offense. He was taken there in the early evening and interrogated for some 5-7 hours. He was told initially, and during the questioning, that he was “free to leave and return to his cell.” During the questioning, Fields was free of any restraints but the two deputies doing the questioning were armed. The door to the room was open during part of the time as well.

About halfway through the questioning, he was “confronted with the allegations of abuse” and “he became agitated and began to yell.” He was told that if he did not want to cooperate he could leave. Eventually, he confessed. He later claimed that he said “several times during the interview that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell prior to the end of the interview.” At that time, he had to wait until a corrections officer returned to escort him, and was returned to his cell far later than his “normal bedtime.” He was never given Miranda warning or otherwise told he did not have to speak to the deputies.

Fields was charged with criminal sexual conduct. He moved for suppression and was denied by the trial court. He was convicted and took appeals through the Michigan appellate system. The Michigan Court of Appeals ruled he was not in custody during the interrogation and the Michigan Supreme Court declined to review the case. Fields took a habeas corpus petition in the U.S. District Court federal court and it was granted. Upon appeal, the Sixth Circuit held that the interview was a “custodial interrogation and that Miranda<sup>19</sup> is required when a prisoner is brought from general population to talk to a law enforcement officer about any criminal conduct.” The Sixth Circuit “reasoned” that the right was clearly established by Mathis v. U.S.<sup>20</sup>

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<sup>18</sup> Gaps.

<sup>19</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>20</sup> 391 U.S. 1 (1968).

Michigan requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is being questioned while incarcerated for an unrelated crime automatically custodial for Miranda purposes?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the meaning of the word “custody” and defined it as “term of art that specifies circumstances that are thought generally to present a serious danger of coercion.” Relevant factors include the “location of the questioning,”<sup>21</sup> “statements made during the interview,”<sup>22</sup> “the presence or absence of physical restraints,”<sup>23</sup> “and the release of the interviewee at the end.”<sup>24</sup> The Court stated that “not all restraints on freedom of movement amount to” Miranda custody. Looking to Maryland v. Shatzer,<sup>25</sup> the Court noted that a “break in custody may occur while a prisoner is serving a term in prison,” and as such, it follows “that imprisonment alone” is not enough to create Miranda custody.

The Court continued:

There are at least three strong grounds for this conclusion. First, questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest.

...

Second, a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for a prompt release.

...

Third, a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence.

The Court concluded:

In short, standard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests that the Court sought to protect when it afforded special safeguards to persons subjected to custodial

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<sup>21</sup> Maryland v. Shatzer, --- U.S. --- (2010).

<sup>22</sup> Berkemer v. McCarty, 468 U.S. 420 (1984).

<sup>23</sup> New York v. Quarles, 467 U.S. 649 (1984).

<sup>24</sup> California v. Beheler, 463 U.S. 1121 (1983).

<sup>25</sup> Shatzer, supra.

interrogation. The Court noted “when a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation,” including “the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted.”

In Fields’ case, although the questioning was lengthy and he did not consent to it, he was told repeatedly he could be returned to his cell if he so desired. He was not restrained and was questioned in comfortable surroundings. Even though he could not leave on his own, that would have been no different had he been taken to the room for other reasons.

The Court concluded that “taking into account all of the circumstances of the questioning – including especially the undisputed fact that [Fields] was told that he was free to end the questioning and return to his cell – we hold that [Fields] was not in custody within the meaning of Miranda.”

The U.S. Supreme Court reversed the decision of the Sixth Circuit.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-680.pdf>.

**Wetzel v. Lambert, 132 S.Ct. 1195 (2012)**  
**Decided February 21, 2012**

**FACTS:** During Lambert’s trial for robbery-murder in Philadelphia in 1984, one of the prosecution witnesses, Jackson, admitted to being involved, and named Reese and Lambert as accomplices. 20 years later, Lambert requested postconviction relief, arguing that the prosecution had “failed to disclose ... a ‘police activity sheet’ in violation of Brady v. Maryland.<sup>26</sup> The document “noted that a photo display containing a picture of an individual named Lawrence Woodlock was shown to two witnesses” in the robbery and that they made an ID. Further, the document noted that Woodlock had been implicated by Jackson as being involved with him in multiple armed robberies, but did not specify the robbery in question in this case. The document “bore the names of the law enforcement officers involved in the investigation of the ... robbery” and the “names of the robbery’s murder victims, as well as the police case numbers for those murders.” There was no indication, however, that Woodlock was every investigated.

Lambert argued that the activity sheet was exculpatory, because it suggested another robber was involved and that he could have used it to impeach Jackson. The Commonwealth, on the other hand, stated that it was “nothing more than an ‘ambiguously worded notation.’” In addition, since Jackson was already “extensively impeached” at the trial, it “would not have discredited Jackson any further.”

The Pennsylvania Supreme Court agreed and rejected the claim, holding the document was not material. Lambert filed for review in the U.S. District Court, which denied the writ of habeas corpus. Lambert appealed and the Third Circuit Court of Appeals

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<sup>26</sup> 373 U.S. 83 (1963).

reversed and granted the writ, ordering that Lambert be released unless retried within 120 days. Pennsylvania requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Must evidence that is not clearly material be revealed under Brady?

**HOLDING:** No

**DISCUSSION:** The Court noted that the Third Circuit “overlooked the [state court’s decision] that the notations were ... ‘not exculpatory or impeaching’ but instead ‘entirely ambiguous.’” The Third Circuit had “focused solely on the alternative ground that any impeachment value that might have been obtained from the notations would have been cumulative.”

The Court agreed that it was incorrect for the Court of Appeals not to consider the trial court’s ruling about the document. The Court agreed that ruling could be reasonable, but did not find it necessary to agree or disagree with it. Instead, the Court noted that “any retrial here would take place *three decades* after the crime, posing the most daunting difficulties for the prosecution.” The Court held that it was not appropriate to reverse the conviction unless the “state court decision is examined and found to be unreasonable” under federal law.<sup>27</sup> The decision of the Third Circuit Court of Appeals was vacated and the case remanded.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/11-38.pdf>.

**Messerschmidt v. Millender, 132 S.Ct. 1235 (2012)**  
**Decided February 22, 2012**

**FACTS:** Kelly decided to break out of her relationship with Bowen. She moved out of her apartment, to which Bowen had a key, because she feared an attack – he had assaulted her before and had been convicted of “multiple violent felonies.” She requested assistance from the LA County Sheriff’s Department to gather her belongings. They arrived, but “were called away to respond to an emergency before the move was complete.” “As soon as the officers left, an enraged Bowen appeared at the bottom of the stairs to the apartment.” He screamed at her for calling them, grabbed her and tried to throw her over the railing. He then tried to drag her inside the apartment by her hair but she got away and ran to her car. He grabbed a sawed off shotgun and ran to the front of her car, threatening to kill her if she tried to leave. She sped away and he fired 5 times, blowing out one of the tires. She was, however, able to escape. She immediately went to law enforcement and told them what happened, identified Bowen as a member of a local gang and provided photos.

Detective Messerschmidt was assigned to the case. Kelly gave him details about Bowen and told him that she believed he was staying at his foster mother’s home. Messerschmidt did a background check and confirmed that he was an active gang

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<sup>27</sup> Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

member with a long criminal background, encompassing 17 pages. He prepared warrants for Bowen's arrest and for a search of the home where he was believed to be living. The warrant sought firearms and evidence of gang membership (in a detailed list). The supporting affidavits (one detailing Messerschmidt's training and experience and the other focused on the crimes against Kelly) requested "night service" for safety's sake.<sup>28</sup> Ultimately, a magistrate approved the warrants, which were served two days later for a team. There, they found Millender, a woman in her 70s, and her daughter and grandson. They went outside initially but were then allowed to wait in the living room. Bowen was not found in the residence, but a shotgun (which belonged to Millender), ammunition and a piece of mail addressed to Bowen were seized. Bowen was found and arrested two weeks later in a motel.

The Millenders filed suit under 42 U.S.C. §1983, against Messerschmidt and others, arguing that the search warrant was invalid. The District Court found the warrant deficient in two respects, holding that the authorization to search for firearms was improperly broad because the crime was committed with a weapon that could be specifically described which negated the need to "search for all firearms." Further, the search for gang-related information was irrelevant as there "was no evidence that the crime at issue was gang-related." The District Court granted summary judgment to the Millenders and rejected the officers' claim for qualified immunity. Messerschmidt and Lawrence (another deputy) appealed and the Ninth Circuit Court of Appeals panel found in their favor, granting them qualified immunity because they were operating under a judicially authorized warrant. The full Ninth Circuit, however, on rehearing, affirmed the denial of qualified immunity, agreeing that the warrant was overbroad by failing to establish probable cause that the broad categories of evidence were contraband or evidence. The deputies had probable cause to search for a single, identifiable weapon only and a reasonable deputy would have realized that the warrant was too broad.

The deputies requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** If a signed warrant is not obviously defective, may an officer rely upon it?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the validity of the actual warrant was not at issue, but whether Messerschmidt and Lawrence were entitled to qualified immunity, "even assuming that the warrant should not have been served." The Court reviewed the precepts of qualified immunity and noted that "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'"<sup>29</sup> However, that fact does not end the "inquiry into objective reasonableness" and that an exception exists when "it is obvious that no reasonably competent officer would have

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<sup>28</sup> These dual affidavits appear to be a California-specific process.

<sup>29</sup> U.S. v. Leon, 468 U.S. 897 (1984).

concluded that a warrant should issue.”<sup>30</sup> The “shield of immunity” is lost when the warrant is “so lacking in indicia of probable cause as to render official believe in its existence entirely unreasonable.”<sup>31</sup> But that “threshold is a high one, and it should be.”

The Court agreed that the specific facts suggested that it was likely that Bowen owned additional firearms and that seizing all of them was “necessary to prevent further assaults on Kelly.” California law specifically permitted a court to order the seizure of items that a person intends to use to commit an offense. Further, the Court agreed it was reasonable for an officer to believe that there was probable cause to search for all firearms and related items. With respect to the authorization to search for gang-related material, the Millenders argued that the case was clearly a domestic assault and not connected to his gang membership. However, the Court noted that the “effort to characterize the case solely as a domestic dispute ... is misleading.” The Court noted that Bowen’s motives in attempting to kill Kelly might be related to “his desire to prevent her from disclosing details of his gang activity to the police.” (And in fact, she had given information already.) As such, the Court agreed an officer might reasonably believe that evidence of his gang affiliation might facilitate his prosecution by proving motivation and could also add related charges under state law. (It would also tie him to the residence that was searched.) In any event, it would not be unreasonable for an officer to believe that searching for such items was proper.

Messerschmidt’s warrant was detailed and “truthfully laid out the pertinent facts.” The only facts that were not included (Bowen’s record) would have only made it stronger. Lawrence, a district attorney and a judge, all approved the warrant without any obvious concerns. Although the Ninth Circuit did not factor this into their decision, the Court noted that such intermediate review of the warrant was very important. The Court concluded that “any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all the items listed in the warrant.” A “simple glance” would not have revealed any error.

The U.S. Supreme Court reversed the decision of the Ninth Circuit and ordered that the denial of qualified immunity be reversed.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-704.pdf>.

**Rehberg v. Paulk, 132 S.Ct. 1497 (2012)**  
**Decided April 2, 2012**

**FACTS:** Rehberg, a CPA, was investigated by Paulk, an investigator for a Georgia district attorney, for his alleged sending of several anonymous faxes, including one to a hospital. The investigation was launched, apparently, “as a favor to the hospital’s leadership.” Paulk testified before the grand jury, and Rehberg was ultimately indicted on several felony charges, including an alleged assault on a hospital physician and the

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<sup>30</sup> Malley v. Briggs, 475 U.S. 335 (1986).

<sup>31</sup> Leon, supra.

burglary of his home. The charges were soon dismissed. A few months later, Paulk returned to the grand jury, and again Rehberg was indicted. But, once again, the indictment was dismissed. While the second indictment was pending, Paulk obtained yet a third indictment, which was also dismissed in due course.

Rehberg filed suit against Paulk under 42 U.S.C. §1983, alleging that Paulk had presented false testimony to the grand jury. Paulk argued he was entitled to absolute immunity for his testimony. The District Court denied Paulk's motion to dismiss the case, but ultimately, the Eleventh Circuit Court of Appeals reversed, finding that Paulk was entitled to absolute immunity.

Rehberg requested review and the U.S. Supreme Court granted certiorari.

**ISSUE:** Is a grand jury witness entitled to absolute immunity for their testimony in that proceeding?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the history of the government "functions that merit the protection of absolute immunity." In Imbler v. Pachtman<sup>32</sup>, the Court agreed that public prosecutors were entitled to broad and absolute immunity for their actions as prosecutors. Further, under common law, "trial witnesses enjoyed a limited form of absolute immunity for statements made in the course of a judicial proceeding. They could not be sued for defamation, even if the statements were maliciously false, although they could, however, certainly be criminally charged for perjury if the statements were materially false and given under oath. This was extended to "any claim" under Briscoe v. LaHue<sup>33</sup> with the Court concluding that without such immunity, the "truth-seeking process at trial would be impaired."

The Court agreed that the reasons to apply absolute immunity to trial testimony applied in equal force to testimony given before the grand jury. In both cases, witnesses (whether lay or law enforcement) would face potential perjury charges, a powerful deterrent.

The Court affirmed the decision of the Eleventh Circuit Court of Appeals.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-788.pdf>.

**Florence v. Board of Chosen Freeholders, 132 S.Ct. 1510 (2012)  
Decided April 2, 2012**

**FACTS:** In 1998, Florence was arrested in Essex County, NJ. He was sentenced to pay a fine in monthly installments. In 2003, after he fell behind in his payments, a bench warrant was issued. He caught up his payments but "for some unexplained

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<sup>32</sup> 424 U. S. 409 (1976).

<sup>33</sup> 460 U. S. 325 (1983).

reason, the warrant remained in a statewide computer database.” When he was stopped for a traffic offense two years later, he was arrested for the (presumably) outstanding warrant and taken to the Burlington County Detention Center.

At the jail, he was subjected to a delousing shower and was examined for “scars, marks gang tattoos, and contraband” pursuant to the jail’s procedures. He also claimed he was instructed to “open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals” although there was some question as to whether the last was actually part of the normal practice. Florence did share a cell with other inmates following his admission. He was transferred to the Essex County Correctional Facility six days later and was further examined by officers there, a process that “applied regardless of the circumstances of the arrest, the suspected offense, or the detainee’s behavior, demeanor, or criminal history.” He was released the next day when the charges against him were dismissed.

Florence sued the jails and related other parties under 42 U.S.C. §1983, claiming violations of his Fourth and Fourteenth Amendment rights. He claimed that “persons arrested for a minor offense could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process.” He argued instead that such searches could only be done “if they had a reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband.” The District Court certified the case as a class-action, with the class being identified as “individuals who were charged with a nonindictable offense under New Jersey law” processed at the facilities named in the lawsuit, and who were “directed to strip naked even though an officer had not articulated any reasonable suspicion they were concealing contraband.”

Ultimately the District Court granted summary judgment in Florence’s favor, finding such searches unreasonable. Upon appeal, however, the Third Circuit Court of Appeals reversed, finding that the jail procedures “struck a reasonable balance between inmate privacy and the security needs of the two jails.” Florence requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** May jails do a thorough search, including requiring inmates to disrobe, during initial intake?

**HOLDING:** Yes

**DISCUSSION:** The Court began by noting that the term “strip search” is imprecise.

It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas,

or to cough in a squatting position. In the instant case, the term does not include any touching of unclothed areas by the inspecting officer. There are no allegations that the detainees here were touched in any way as part of the searches.

The Court continued, stated that “the difficulties of operating a detention center must not be underestimated by the courts.”<sup>34</sup> The Court had maintained the “importance of deference to correctional officers” in such matters. In *Bell v. Wolfish*<sup>35</sup>, the Court had held that searching inmates after “contact visits” was appropriate since that served to deter the smuggling of contraband inside the facility. Subsequent cases had consistently upheld the right of detention facilities, and the Court noted that “these cases establish that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities.” The Court agreed that “some type of strip search of everyone who is to be detained” is common practice in facilities across the country.

With respect to individuals arrested for minor offenses, the Court noted that some of the lower courts “have held that corrections officials may not conduct a strip search of these detainees, even if no touching is involved, absent reasonable suspicion of concealed contraband.” The Court agreed, however, that jails “have a significant interest in conducting a thorough search as a standard part of the intake process.” Such reasons include the need to detect lice or contagious diseases, wounds and injuries. The Court also noted the need to determine gang affiliations because such “rivalries spawn a climate of tension, violence, and coercion.” Finally, “detecting contraband concealed by new detainees ... is a most serious responsibility.” Such contraband, including weapons, drugs and alcohol, as well as more common items, such as cigarettes and lighters, “disrupt the safe operation of a jail.” Scarce and desirable items “have value in a jail’s culture and underground economy.”

Despite Florence’s assertion that it was unreasonable to search individuals arrested for minor offenses, the Court noted that the “record provides evidence that the seriousness of an offense is a poor predictor of who has contraband ....” Further, “it would be difficult in practice to determine whether individual detainees fall within the proposed exemption.” In fact, the Court noted that “people detained for minor offenses can turn out to be the most devious and dangerous criminals,” and provided a list of such incidents over recent years. Further, someone being arrested for a minor offense has reason to hide contraband, fearing a more serious charge should the contraband be found and further could be coerced by other inmates to hide such items upon intake.

Finally, the Court noted the difficulties of classifying inmates by their “current and prior offenses before the intake search.” In addition, “jails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset,” they often do not even have access to the inmate’s criminal history at the beginning and what they do have might be inaccurate. Trying to determine, in a few minutes, whether

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<sup>34</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>35</sup> 441 U. S. 520 (1979).

an inmate should or should not be searched presents practical problems for jail officials, and “to avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary risk for the entire jail population.”

The Court upheld the decision of the Third Circuit Court of Appeals.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-945.pdf>.

**Filarsky v. Delia, 132 S.Ct. 1657 (2012)**  
**Decided April 17, 2012**

**FACTS:** Delia (a Rialto, California, firefighter) was accused of doing construction work at his home while off on an injury leave. Filarsky, a local employment attorney, was hired by the city to investigate the matter. During an interview with Peel and Bekker (fire department officials, along with Filarsky, Delia admitted having purchased building materials, but denied that he’d actually done any work. At a break, Filarsky suggested resolving the matter by having Delia produce the purchased materials (several rolls of insulation) and the Fire Chief, Wells, agreed. When they reconvened, however, Delia refused the request to allow Peel to enter the home to see the materials and also to bring the requested items outside where they could be viewed. Filarsky then ordered him to produce the materials.

Delia argued, through counsel, that to do so would violate the Fourth Amendment. When they failed to sway Filarsky, his attorney “threatened to sue the City and everyone involved, including Filarsky. Filarsky signed the order and Peel and Bekker followed Delia to the house. The rolls of insulation were brought outside and Peel and Bekker thanked him and left.

Delia filed suit against all parties under 42 U.S.C. §1983, claiming the order violated his Fourth and Fourteenth Amendment rights. The District Court granted qualified immunity and summary judgment to all defendants, holding that Delia had not “demonstrated a violation of a clearly established constitutional right.” Delia appealed, and the Ninth Circuit Court of Appeals affirmed that decision, with respect to all defendants but Filarsky. (The Court of Appeals agreed that the order did violate the Fourth Amendment, but agreed that it was not clearly established at the time the order was given.) However, the Court concluded that since Filarsky was a private attorney, not a city employee, he could not claim the protections of qualified immunity. The Court did note, however, this conflicted with the decision in Cullinan v. Abramson<sup>36</sup> but felt it was bound by Circuit precedent.

Filarsky requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is a private individual performing a government function entitled to the protections of qualified immunity?

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<sup>36</sup> 128 F.3d 301 (6<sup>th</sup> Cir. 1997).

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the historical basis behind the defense of qualified immunity, especially with respect to 42 U.S.C. §1983. The logic behind common law immunity was that “government actors were afforded certain protections from liability, based on the reasoning that ‘the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions.’”<sup>37</sup>

The Court went on to explore what existed in 1871, at the time §1983 was enacted. It noted that at that time, government was “smaller in both size and reach” and in fact, there were far fewer employees at all, let alone full-time employees who did nothing but government work. It was common, even expected, that a public servant did not devote all of their efforts to public duties, but would often carry on other regular business. It was common in the 1800s, or even the 1900s, for a private attorney to “conduct criminal prosecutions on behalf of the State,” in fact, Abraham Lincoln served in that role on several occasions.

“Given all this, it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.” Case law had ruled that judicial immunity applied to judges who worked “on a part-time or episodic basis” as well as those employed so full-time.<sup>38</sup> The Court noted that some officials (naming specifically justices of the peace) did not even draw a salary, but collected fees, a concept that would apply in modern day to, for example, Kentucky constables. In addition, “private detectives and privately employed patrol personnel often were publicly appointed as special policemen, and the means and objects of detective work, in particular, made it difficult to distinguish between those on the public payroll and private detectives.”<sup>39</sup> The Court addressed in particular, the law that “Sheriffs executing a warrant were empowered by the common law to enlist the aid of the able-bodied men of the community in doing so.”<sup>40</sup> When so serving, the private individual “had the same authority as the sheriff, and was protected to the same extent.”<sup>41</sup>

The Court concluded that nothing in modern times “counsels against carrying forward the common law rule” because “such immunity ‘protect[s] government’s ability to perform its traditional functions.’”<sup>42</sup> Allowing those who are performing a governmental function to claim the protections of such helps to ensure that the most talented are not deterred from “entering public service.” In fact, “it is often when there is a particular need for specialized knowledge or expertise that the government must look outside its

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<sup>37</sup> Wasson v. Mitchell, 18 Iowa 153 (1864).

<sup>38</sup> Bradley v. Fisher, 80 U.S. 335 (13 Wall. 335) (1872).

<sup>39</sup> Sklansky, The Private Police, 46 UCLA L. Rev. 1165.

<sup>40</sup> In Kentucky, this concept is codified in KRS 70.060, Sheriff may command power of county.

<sup>41</sup> Robinson v. State, 93 Ga. 77, 18 S. E. 1018 (1893).

<sup>42</sup> Wyatt v. Cole, 504 U. S. 158 (1992).

permanent work force to secure the services of private individuals, which is precisely what happened in the case at bar.

The Court continued:

Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity. Under such circumstances, any private individual with a choice might think twice before accepting a government assignment.

In addition, if the lawsuit against the private individual, working in conjunction with government officials, moves forward, the government officials will of necessity still be drawn into the case, which “substantially undermine[s] an important reason immunity is accorded public employees in the first place.” It would also prove difficult, if not impossible, to distinguish between those that would be entitled to such protections, given the myriad ways an individual could be employed by a government agency (as a part-time employee, on a limited project, etc.)

The Court concluded:

New York City has a Department of Investigation staffed by full-time public employees who investigate city personnel, and the resources to pay for it. The City of Rialto has neither, and so must rely on the occasional services of private individuals such as Mr. Filarsky. There is no reason Rialto’s internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York.

The Court reversed the Ninth Circuit holding denying qualified immunity to Filarsky.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-1018.pdf>.

**Blueford v. Arkansas, 132 U.S. 2044 (2012)**  
**Decided May 24, 2012**

**FACTS:** Blueford stood trial in Arkansas for capital murder but the prosecution waived the possibility of the death penalty.<sup>43</sup> The jury was instructed on the possible charges that the jury might consider and specifically instructed that they were to start their deliberations by looking at the charge of capital murder, and only if the jury concluded that charge was inappropriate, were they to move to first-degree murder, manslaughter and then negligent homicide.

A few hours into deliberations, the jury sent a question asking what would happen if they could not agree on a charge at all. The Court brought the jury back into the

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<sup>43</sup> The crime would have been classified as Wanton Murder, KRS 507.020(1)(b) in Kentucky.

courtroom and “issued a so –called ‘Allen instruction,’ emphasizing the importance of reaching a verdict.”<sup>44</sup> The Court deliberated another half hour and reported that it was “hopelessly” deadlocked. The Court inquired into the votes for each of the possible charges and the jury foreman stated that they were unanimous that it was not capital or first-degree murder, but that they disagreed on manslaughter and never reached negligent homicide. They were given another Allen instruction and went back to deliberate, but finally returned that they had not, and could not, reach a verdict. The Court declared a mistrial.

Blueford was retried. He moved to dismiss the capital and first degree murder charges, arguing that since the jurors had unanimously decided he was not guilty of those offenses it was a violation of Double Jeopardy to retry him on those charges. The trial court, and the appellate courts of Arkansas, disagreed, stating that the foreperson’s report to the court was not a “formal announcement of acquittal” when she disclosed the vote.

Blueford requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Does the Double Jeopardy Clause bar a retrial on a greater offense if the jury announces (during an Allen charge) that it has voted against guilt on that greater offense?

**HOLDING:** No

**DISCUSSION:** Blueford continued to argue “that he cannot be retried for capital and first-degree murder because the jury actually acquitted him of those offenses.”<sup>45</sup> The Court, however, agreed that the “foreperson’s report was not a final resolution of anything.” Even though the jury had been instructed to deliberate each charge separately, from the most serious on down, it was possible for the jury to revisit the higher charges, “notwithstanding its earlier votes.” As such, the “foreperson’s report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses, quite apart from any requirement that a formal verdict be returned or judgment entered.”

Blueford further argued that it was improper for the trial court to declare a mistrial and that instead it should have explored other options to allow the jury to give effect to its decision not to convict on the two highest charges. The Court disagreed, noting that it had never before required a trial court “to consider any particular means of breaking the impasse – let alone to consider giving the jury new options for a verdict.”<sup>46</sup>

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<sup>44</sup> Allen v. U.S., 164 U.S. 492 (1896).

<sup>45</sup> Green v. U.S., 355 U.S. 184 (1957).

<sup>46</sup> See Renico v. Lett, 559 U.S. – (2010).

The Court concluded that the “jury in this case did not convict Blueford of any offense, but it did not acquit him of any either.” The Court ruled that “the Double Jeopardy Clause does not stand in the way of a second trial on the same offense” and upheld the judgment by the Arkansas Supreme Court.

**Reichle v. Howards, 132 S.Ct. 2088 (2012)**  
**Decided June 4, 2012**

**FACTS:** On June 16, 2006, Vice President Cheney was visiting Beaver Creek, Colorado. The Secret Service, including Reichle and Doyle, were members of his protective detail. Howards, also at the mall, was overheard by Agent Doyle while speaking on the cell phone, and heard to say “I’m going to ask [Cheney] how many kids he’s killed today.” Agent Doyle shared that with the detail and he and Reichle (and a third agent) began to monitor Howards more closely. Howards entered the line to speak to the president, and when he approached him, he told Cheney that his “policies in Iraq are disgusting.” At some point Howards also touched Cheney’s shoulder.<sup>47</sup> Cheney thanked Howards and moved along.

It was determined that Agent Reichle would question Howards. He had not heard Howards’ initial statement nor observed his interaction with the Vice President, but had been briefed as to both. He approached Howards and asked to speak to him, but Howards refused and attempted to leave. Agent Reichle stepped in front of Howards and asked him if he’d assaulted the Vice President. Howards denied having done so. He then “falsely denied” having touched the president. Reichle confirmed that Agent Doyle had seen the touch, and then arrested Howards.

Howards was handed over to the local sheriff’s office, where he was charged with Harassment under Colorado law. Eventually, that was dismissed.

Howards brought suit against a number of parties under 42 U.S.C. 1983 and under Bivens v. Six Unknown Fed. Narcotics Agents.<sup>48</sup> He alleged that he was arrested and searched in violation of the Fourth Amendment and in retaliation for the criticism, in violation of the First Amendment. (Only Reichle and Doyle remained defendants, however, the others having been given summary judgment at the lower court levels and not successfully appealed.) Both moved for qualified immunity and summary judgment. The District Court in Colorado had denied that claim. The Tenth Circuit Court of Appeals agreed that the two agents were entitled to summary judgment on the Fourth Amendment arrest claim, as he had made a “materially false statement to a federal official.”<sup>49</sup> However, the Court denied qualified immunity on the First Amendment claim, as it ruled that Howards had established a “material factual dispute regarding” their motivation in making the arrest. The Court looked to precedent in finding that Hartman

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<sup>47</sup> There was dispute about whether it was a simple pat or something more, but that distinction was not critical to the Court’s decision.

<sup>48</sup> 403 U.S. 388 (1971).

<sup>49</sup> 18 U.S.C. §1001.

v. Moore did not prevent such a claim when it involved a allegation of a retaliatory arrest, even if the arrest was supported by probable cause.”<sup>50</sup>

The agents requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is an officer protected under qualified immunity for making an arrest (supported by probable cause) that is allegedly in violation of the First Amendment because it is retaliation for a criticism made by the subject?

**HOLDING:** Yes

**DISCUSSION:** The Court initially agreed to review two questions: “whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Howards’ arrest so held.” The Court concluded it would review only the second question, however. The Court noted that for such claims to be successful, “the right allegedly violated must be established, ‘not as a broad general proposition,’ but in a ‘particularized’ sense so that the ‘contours’ of the right are clear to a reasonable official.”<sup>51</sup> The Court stated the issue to be whether “the right in question is not the general right to be free from retaliation for one’s speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause.” The Court further ruled that the existing Tenth Circuit precedent would further not have a “dispositive source of clearly established law in the circumstances of this case.” Hartman involved a retaliatory prosecution, not a retaliatory arrest, but a “reasonable official” could have interpreted Hartman to apply to both, particularly since the prosecutor is, in effect, a third-party to the actual case.

The Court continued:

An officer might bear animus toward the content of a suspect’s speech. But the officer may also decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat.<sup>52</sup>

The Court concluded that “Hartman injected uncertainty into the law governing retaliatory arrests, particularly in light of Hartman’s rationale and the close relationship between retaliatory arrest and prosecution claims.” However, it agreed that “when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation.”

The Court reversed the decision of the Tenth Circuit and remanded the case back for an award of qualified immunity for both agents.

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<sup>50</sup> 547 U.S. 250 (2006).

<sup>51</sup> Brousseau v. Haugen, 543 U.S. 194 (2004); Anderson v. Creighton, 483 U.S. 635 (1987).

<sup>52</sup> Wayte v. U.S., 470 U.S. 598 (1985).

**Parker v. Matthews, --- U.S. --- (2012)**  
**Decided June 11, 2012**

**FACTS:** On June 29, 1981, Matthews burglarized and murdered his estranged wife, Marlene, as well as his mother-in-law, Cruse, at their Louisville home. He was arrested that same morning at his mother's house, where he'd fled to clean up. The murder weapon was found on the property. Matthews denied responsibility for the crimes.

He was indicted. Matthews did not contest that he killed the two women, but argued that he acted under "extreme emotional disturbance" Making a successful claim under that defense would have reduced the murder charge to first-degree manslaughter. At trial, he laid out the troubled history of the marriage, as well as the testimony of a psychiatrist who diagnosed him as having an "adjustment disorder" as a result of stress in his life. Matthews also admitted to drinking and having taken drugs that night. He rendered the opinion that Matthews was acting under EED at the time.

Matthews was convicted, however, of murder and sentenced to death. He appealed through the Kentucky appellate courts, which upheld the conviction. Matthews then took a writ of habeas corpus, arguing that the Kentucky Supreme Court had improperly rejected his claim that "the evidence was insufficient to prove that he had not acted under the influence of" EED. The District Court dismissed the writ, but the Sixth Circuit Court of Appeals reversed that decision. The Warden requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Does the burden of disproving a defense of EED fall to the prosecution, once it has been initially introduced by the defendant?

**HOLDING:** Yes

**DISCUSSION:** The Sixth Circuit ruled that the Kentucky Supreme Court had "impermissibly shifted to Matthews the burden of proving extreme emotional disturbance, and that the Commonwealth had failed to prove the absence of extreme emotional disturbance beyond a reasonable doubt." At the time of the murder, the allocation of proof in such cases was governed by Gall v. Com., "which placed the burden of producing evidence on the defendant, but left the burden of proving the absence of extreme emotional disturbance with the Commonwealth in those cases in which the defendant had introduced evidence sufficient to raise a reasonable doubt on the issue."<sup>53</sup> In Matthews' case, however, the Kentucky courts placed the burden completely on Matthews. Kentucky had also looked to Wellman v. Com., in which it had ruled that "absence of extreme emotional disturbance is not an element of the crime of murder which the Commonwealth must affirmatively prove."<sup>54</sup>

The Court looked to the jury instructions, which required the jury to find that Matthews had not acted under EED at the time of the murder, beyond a reasonable doubt, in

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<sup>53</sup> 607 S.W.2d 97 (1980).

<sup>54</sup> 694 S.W. 2d696 (Ky. 1985).

effect, assigning that burden to the Commonwealth. The Court agreed that was proper for the jury to make that decision, and noted that the EED claim “was belied ‘by the circumstances of the crime.’” The Court emphasized that “expert testimony does not trigger a conclusive presumption of correctness, and it was not unreasonable to conclude that *the jurors* were entitled to consider the tension between [the expert’s] testimony and their own common-sense understanding of emotional disturbance.” In trying to resolve the conflict, the Sixth Circuit overstepped its authority.

The Court resolved, as well, an issue of prosecutorial misconduct in the Commonwealth’s favor, and reinstated Matthew’s conviction and sentence.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/11-845.pdf>.

**Williams v. Illinois, --- U.S. --- (2012)**  
**Decided June 18, 2012**

**FACTS:** On February 10, 2000, a woman (L.J.) was abducted, robbed and raped, and then released. She was taken to the hospital and a blood sample and vaginal swabs were collected. Those samples were sealed and sent to the Illinois State Police lab. At ISP, a forensic scientist confirmed the presence of semen on the vaginal swab and then replaced it in the evidence locker. Evidence indicated those swabs were then sent to Cellmark, in Maryland, for DNA testing. Cellmark returned a report that included the male DNA profile developed from the sample. At the time, Williams was not a suspect in the rape case.

Lambatos, an ISP specialist, used the computer database to compare the profile to others in the system. At some point, she got a match from a sample taken from Williams when he was arrested on unrelated charges in August, 2000. Williams was placed in a lineup in April, 2001 and he was immediately identified by L.J. He was indicted for the rape and elected for a bench trial in 2006.<sup>55</sup> At trial, three different forensic experts testified. Hapack testified that he extracted the sample from the swabs. Abbinanti developed the DNA profile of Williams from the blood sample that was taken when he was incarcerated. Finally, Lambatos testified as to the comparison she did between the profile provided by Cellmark and the profile developed on Williams. She also testified about the general process used to extract DNA, although of course, she did not do the actual extraction on either sample. Lambatos testified concerning the protocol for packaging and shipping samples and identified the shipping manifests in evidence as indicating that the samples were properly sent to Cellmark and returned with a profile.

Williams objected, arguing that it was not proper for Lambatos to testify as to what had been done in the Cellmark lab. However, the prosecutor noted that Lambatos was only

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<sup>55</sup> There was no explanation for the delay, although it might possibly have been because he was in custody for other offenses. Further, it is important to note that this was a bench, rather than jury trial, as the judge is presumed to be able to ignore improperly introduced evidence in coming to a decision without the need for an objection.

being asked about what she had done with the information provided by Cellmark. The trial court allowed the testimony to continue, ultimately Lambatos testified that it was a match. The Cellmark report itself was not entered into evidence and Lambatos did not identify it as the source of any information directly. Upon directly questioning, she testified that she would have been able to tell if the sample was degraded by the report data. Williams objected, based upon the Confrontation Clause, because the expert that did the report (at Cellmark) was not available for cross-examination. The prosecution referred to the Illinois Rules of Evidence regarding expert testimony and argued that any deficiency in the underlying information went to the weight, not the admissibility, of the evidence.

Williams was convicted, and upon appeal, the higher courts upheld the conviction, concluding that Lambato's testimony did not violate the Confrontation Clause because "the Cellmark report was not offered into evidence to prove the truth of the matter it asserted." It agreed that her reference to the report was done for the "limited purpose of explaining the basis for [her expert opinion]," not for proving that the information was truthful.

Williams requested review and the U.S. Supreme Court granted certiorari.

**ISSUE:** May an expert testify, without violating the Confrontation Clause, about an opinion derived from evidence that might otherwise be inadmissible?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed a series of recent decisions, starting with Crawford v. Washington.<sup>56</sup> Two of the reports, Melendez-Diaz v. Massachusetts<sup>57</sup> and Bullcoming v. New Mexico<sup>58</sup>, specifically discussed forensic reports. In the former, the Court agreed that admitting sworn certificates as to the contents through a different analyst was improper, as the certificates were clearly prepared for the purpose of the particular case and as such, were testimonial. In the latter, reports attesting to an analysis of alcohol content were admitted, and the Court agreed such admission violated the Confrontation Clause, because the defendant did not have the opportunity to question the person who did the test. (The reports were admitted through another analyst.)

In this case, the Court agreed that it has long been agreed that an "expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts." Further, "modern rules of evidence continue to permit experts to express opinions based on facts about which

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<sup>56</sup> 541 U.S. 36 (2004).

<sup>57</sup> 557 U.S. 305 (2009).

<sup>58</sup> 131 S.Ct. 62 (2010).

they lack person knowledge, but these rules dispense with the need for hypothetical questions” – as earlier common law had required.<sup>59</sup>

The Court reviewed precisely what Lambatos said on the stand. She specifically “did not testify to the truth of any other matter concerning Cellmark,” other than that the lab was accredited, that ISP used them on occasion and that from the manifests, swabs were sent and a DNA based on those swabs were returned. The closest she got to a problem was when she testified that the DNA profile was based upon the swabs, but even the defense admitted that the same information, in response to a question posed a slightly different way, would have been proper. The Court agreed that the question may have been problematical with a jury, although it agreed that the match was “striking confirmation that the sample that Cellmark tested was the sample taken from the victim’s vaginal swabs.” The Court noted that “conventional chain-of-custody evidence” was properly introduced concerning the swabs and agreed that it could not conceive of how even sloppy lab work could have made the extracted DNA match Williams. The match to which Lambatos testified “was not in any way dependent on the origin of the samples from which the profiles were derived.”

The Court upheld the introduction of evidence that might otherwise be admissible to support an expert’s testimony and to “illuminat[e] the expert’s thought process.”

The Court agreed that William’s Confrontation rights were not violated and upheld his conviction.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-8505.pdf>.

**Miller v. Alabama, --- U.S. --- (2012)**  
**Decided June 25, 2012**

**FACTS:** In November, 1999, Jackson, age 14, and two other juveniles decided to rob a video store. En route, Jackson learned that Shields, one of the boys, was carrying a sawed-off shotgun. Jackson stayed outside while the other two entered. The clerk, Troup, refused their demand for money. Jackson entered at some point. Troup threatened to call the police and Shields fatally shot her. The boys fled.

All three were charged with capital felony murder and aggravated robbery. Despite appeals, Jackson’s case remained in the adult court where he was convicted. Under Alabama law, he was sentenced to life without possibility of parole. He did not appeal his sentence at that time.

Following the Court’s decision in Roper v. Simmons, however, he filed for habeas corpus.<sup>60</sup> Jackson argued that life imprisonment for a 14-year-old offender violates the

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<sup>59</sup> Kentucky’s equivalent of the Rules of Evidence at issue are KRE 702 and 703. Although worded differently, they are essentially the same, although Kentucky does indicate that facts or data relied upon by the expert may be introduced even if not otherwise admissible, if trustworthy and necessary to illuminate testimony. This rule has not yet been tested, however, since Crawford v. Washington.

<sup>60</sup> 543 U.S. 551 (2005). This case invalidated the death penalty for all juvenile offenders.

Eighth Amendment prohibition on cruel and unusual punishment. While on appeal, the Court ruled on Graham v. Florida.<sup>61</sup>

Miller was also 14 when he beat a man badly, and then set his trailer on fire with the man still inside. The victim died from his injuries and smoke inhalation. His case was also tried in adult court in Alabama with “murder in the course of arson.” Miller’s conviction under that crime also carried no possibility of parole. His state court appeals were denied.

Both cases were consolidated upon appeal and the U.S. Supreme Court granted review.

**ISSUE:** May a juvenile homicide offender be sentenced to life without parole?

**HOLDING:** No

**DISCUSSION:** The Court began by noting that these cases “implicate two strands of precedent reflecting [its] concern with proportionate punishment.” The Court concluded that the “confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.” Both Roper and Graham “establish that children are constitutionally different from adults for purposes of sentencing” because they have “diminished culpability and greater prospects for reform.” The Court pointed to a “lack of maturity and an underdeveloped sense of responsibility,” vulnerability to “negative influences and outside pressures,” along with limited ability to control their environment and finally, that their personality traits are less fixed and subject to change.

Although the Court noted that Graham was specific to nonhomicide crimes, the Court noted that nothing in the science of how children develop is “crime-specific.” Fundamentally, Graham “insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” However, the mandatory penalty schemes in both cases “prevent the sentencer from taking account of these central considerations.” Doing so contravenes Graham and Roper, which have as a “foundational principle” the concept that “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.” The Court equated life-without-parole to the death penalty, especially to juveniles, who will naturally spend more years imprisoned under such penalties.

Overall, the Court discussed, it noted that even adult capital cases, such as Woodson v. North Carolina<sup>62</sup>, it had held that “mandating a death sentence ... violated the Eighth Amendment” because it case no consideration to the “character and record of the individual offender or the circumstances” of the crime itself. The Court agreed that “youth is more than a chronological fact,” but is a time when the subject is “most susceptible to influence and the psychological damage.”

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<sup>61</sup> 560 U.S. --- (2010). This case invalidates life without parole on juvenile nonhomicide offenders.

<sup>62</sup> 428 U.S. 280 (1976).

The Court noted that juveniles will, in effect, be given “a *greater* sentence than those adults will serve,” when they look at the number of years they will actually serve. “In imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.” Looking at each case, in Jackson’s situation, he “he did not fire the bullet that killed” the clerk, nor did he intend her death. In addition, both his mother and grandmother “had previously shot other individuals.” With respect to Miller, who was high on drugs and alcohol he had consumed with his adult victim, the Court stated that “if ever a pathological background might have committed to a 14-year-old’s commission of a crime, it is here.” Miller was physically abused, neglected and in and out of foster care his entire young life. He had tried to commit suicide four times, once when he was of kindergarten age. His prior criminal history was, surprisingly, limited. Certainly he deserved a severe punishment, but the Court disagreed that life imprisonment without the possibility of parole was appropriate.

The Court reversed the sentencing in both cases.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-9646.pdf>.

**Arizona v. U.S., --- U.S. --- (2012)**  
**Decided June 25, 2012**

**FACTS:** In 2012, Arizona enacted a statute “called the Support Our Law Enforcement and Safe Neighborhoods Act,” also referred to as S.B. 1070. The United States filed suit, seeking to enjoin the statute, arguing that provisions of the law preempted federal law. Of particular interest to law enforcement, the statute provided “specific arrest authority and investigative duties with respect to certain aliens to state and local law enforcement officers” and also required officers “who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person’s immigration status....”

The U.S. District Court enjoined provisions from taking effect, and the Ninth Circuit Court of Appeals affirmed that decision. Arizona requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** May a state pass a law that requires law enforcement officers to check on the immigration status of subjects lawfully detained for other reasons?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the “federal power to determine immigration policy is well settled.” The States are “precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.”<sup>63</sup> State laws are also “preempted when they conflict with federal law.”

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<sup>63</sup> Gade v. National Solid Wastes Management Assn., 505 U.S. 88 (1992).

Looking at each of the four challenged provisions in turn, the court first invalidated a provision that created a misdemeanor offense of failing to carry an “alien registration document,” thus adding a state penalty for “conduct proscribed by federal law.” The Court agreed the area of alien registration was exclusive to the federal government.

The Court then moved to the next provision, which provide a criminal penalty for an offense for which there is no federal equivalent, making it a state misdemeanor when an unauthorized alien applies or solicits for work in a public place, or performs work as an employee or an independent contractor. The Court agreed that despite earlier decisions, federal law does now generally occupy the field of penalizing employers for hiring unauthorized workers, although it does not put any specific criminal sanctions on the worker. Instead, federal law places civil and other penalties, such as removing eligibility to become a lawful permanent resident, upon the unauthorized alien who takes employment. As such, placing criminal sanctions on such individuals would be contrary to the federal purpose.

The next provision permits local law enforcement to detain an unauthorized alien who they have probable cause to believe has committed a public offense that would make them removable (subject to deportation) from the United States. The Court described the federal process for removable, noting that such warrants are generally served by federal officers who have training in the intricacies of immigration law. The Court agreed that allowing local and state officers to do so “creates an obstacle to the full purposes and objectives of Congress” and invalidated that provision.

Finally, the Court addressed the provision that requires state and local officers to make “reasonable attempt ... to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if ‘reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.’” An arrested subject shall not be released until their status is determined. To determine status, the usual method is to contact ICE. The statute presumes someone with a valid Arizona OL or similar ID is lawfully in the country. Officers are not permitted to consider race, color or national origin improperly and finally, officers are required to act in a manner consistent with state and federal law.

The Court noted that “consultation between federal and state officials is an important feature of the immigration system.” ICE is obligated to respond to request from law enforcement related to a person’s immigration or citizenship status, via the Law Enforcement Support Center. The Court agreed that the federal scheme “leaves room for a policy requiring state officials to contact ICE as a routine matter.” The Court agreed, however, that holding someone in detention solely until their status is verified does cause constitutional concern. The Court noted that depending upon the interpretation of the statute, if it is determined that a state officers must “conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption.” At this point, the court found no need to address “whether reasonable suspicion of illegal entry would be a

legitimate basis for prolonging a detention, or whether this too would be preempted by federal law.” The Court stated that “at this state, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume [the provision] will be construed in a way that creates a conflict with federal law.”

The Court overturned three of the four challenged provisions, but declined to rule upon the fourth “without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.”

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/11-182b5e1.pdf>.

**U.S. v. Alvarez, --- U.S. --- (2012)**  
**Decided June 28, 2012**

**FACTS:** The Court began by noting that “lying was his habit.” Alvarez had lied about several things before he announced that he “held the Congressional Medal of Honor”<sup>64</sup> while attending a meeting as a board member of a California local water district board. The Court noted his “statements were but a pathetic attempt to gain respect that eluded him.” The statements did not appear to have been made to get employment or reap any particular benefits.

Alvarez was charged under the federal Stolen Valor Act, for lying about having received the Medal.<sup>65</sup> (The Act applies to all honors, but with an enhanced penalty with respect to the Medal.) The U.S. District Court denied his claim that the statute violated the First Amendment. He appealed, and the Ninth Circuit Court of Appeals ruled it invalid for that reason. The government requested certiorari. While that request was pending, the Tenth Circuit found the act constitutional.<sup>66</sup> As such, that set up a conflict between the Circuits as to the Act’s validity and the U.S. Supreme Court accepted review.

**ISSUE:** Is the Stolen Valor Act of 2008 a violation of the First Amendment?

**HOLDING:** Yes

**DISCUSSION:** The Court began by acknowledging the extraordinary honor conveyed by the Medal. However, the Court noted that “fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.” The Court noted that “when content-based speech regulation is in question ... exacting scrutiny is required” and agreed that the First Amendment is “sometimes inconvenient.” The Court conceded that there was no question but that Alvarez lied about the Medal. However, the Court noted that content-based restrictions on speech have traditionally been restricted only to those situations that are “intended, and likely, to incite imminent lawless action,”

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<sup>64</sup> The editor recognizes that the phrase is technically incorrect and it should simply be called the Medal of Honor.

<sup>65</sup> Pub.L. 109-437.

<sup>66</sup> U.S. v. Strandlof, 667 F.3d 1146 (2012)

defamation, “fighting words,” child pornography, fraud, true threats and “speech presenting some grave an imminent threat the government has the power to prevent.” Missing from that list is “any general exception to the First Amendment for false statements.” The Court declared this comports with the “common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.” The Court disagreed with the Government’s arguments that false statements fall outside of First Amendment protections, noting that cases cited by the Government for that assertion all involve “defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation.” The Court also declined to equate the issue at bar to those situations where a subject lies to a Government official, commits perjury or speaks as if one is a Government official.

The Court pointed out that a plain reading of the statute indicates it applies “to a false statement made at any time, in any place, to any person.” In this case, the “lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home.” The statute applies “entirely without regard to whether the lie was made for the purpose of material gain.” The Court continued, noting that “our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.”<sup>67</sup> If this statute was upheld, “there could be an endless list of subjects the National Government or the States could single out.”

The Court emphasized, however, that “where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”<sup>68</sup>

Further:

Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

The Court discussed the long history of military honors, and specifically, the meaning of the Medal. The Medal of Honor is “reserved for those who have distinguished themselves ‘conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty,’” and related several instances that resulted in the award of the Medal. It agreed that the Government had a very strong interest in “protecting the integrity of the Medal of Honor.” But that did not end the matter, as the First

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<sup>67</sup> A reference from George Orwell’s book, *Nineteen Eighty-Four*.

<sup>68</sup> Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

Amendment further requires that the speech restriction must be “actually necessary” and that there must be a “direct causal link between the restriction imposed and the injury to be prevented.” That link, in this case, has not been shown, with no evidence presented that a false claim dilutes the general impression of the military honor. Even if actual Medal holders “might experience anger and frustration,” the Government acknowledged, in an amici brief, that “there is nothing that charlatans such as Xavier Alvarez can do to stain [the Medal winners’] honor.”

Further, the Government has not shown “why counterspeech would not suffice to achieve its interest” in protecting the Medal’s integrity. In fact, the facts in this case “indicates that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie.” Even before the FBI became involved, Alvarez’s statements were known to be false and he suffered tremendous public ridicule. The “outrage and contempt” shown for the lies “can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose.”

The Court affirmed:

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; the straight-out lie, the simple truth.”

The Court continued: “The First Amendment itself ensures the right to respond to speech we do not like, and for good reason.” The suppression of speech by the federal government “can make exposure of falsity more difficult, not less so.” Open discussion is “not well served when the government seeks to orchestrate public discussion through content-based mandates.” The Court offered several ways the Government could protect the integrity of the Medal, including simply publicizing a list of those who had received it, and decried the Government’s insistence that it was not feasible to do so.<sup>69</sup> The Court emphasized that “truth needs neither handcuffs nor a badge for its vindication” and agreed that “only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth.”

In holding that the Stolen Valor Act impermissibly infringed upon protected speech, the Court concluded:

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent’s statements anything but contemptible, his right to make those statements is protected by the Constitution’s guarantee of freedom of speech and expression.

The Court affirmed the decision of the Ninth Circuit Court of Appeals.

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<sup>69</sup> In fact, at least one private website purports to do so. As an editorial note, the Opinion indicated that the Medal of Honor has been awarded just 3,476 times since 1861.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf>.

**EDITOR'S NOTE:** *Because this Opinion emphasized that Alvarez did not receive, or even apparently attempt to receive, any material benefit from his claim, this decision does not appear to call into question KRS 434.444, which criminalizes a misrepresentation of military status when it is done with the intent to defraud, obtain employment, or to be elected or appointed to a public office. The Opinion specifically left open that doing so might subject one to criminal penalties.*